

★ RIGHTS AT RISK IN WARTIME ★

A Lesson by Linda Weber

SUMMARY

The surprise terrorist attacks on September 11, 2001, stunned the nation. As commander-in-chief, President George W. Bush responded quickly, but soon all three branches of government would be embroiled in the struggle to balance national security with the protection of individual liberties amid a war on terror.

On the authority of President Bush and with the support of Congress, suspected terrorists from around the world were rounded up, labeled as enemy combatants and imprisoned on the U.S. naval base in Guantanamo Bay, Cuba. There they would be held indefinitely and their rights restricted – no habeas corpus and no access to the judiciary.

Legal questions arose about the actions of the president and the legislation passed by Congress during this period. Only the Supreme Court could determine if the Constitution had been violated. The battle for protecting individual rights moved to the Court.

The principles of the Constitution apply in wartime, just as they apply in peacetime. Even in an unconventional war, the rights of those under the jurisdiction of the Constitution must be protected. The president and Congress have the power to deal with a real crisis, but how they handle it must be within the constraints of the Constitution.

This lesson is based on a video about the four Supreme Court cases known as the Guantanamo cases. These cases are examples of how the Court, the president and even Congress fought to balance national security and civil liberties during the war on terror, a war that continues to this day. At the heart of each case was the constitutional right of *habeas corpus*, the right to have one's detention or imprisonment reviewed in court.

Notes and Considerations

- This lesson presumes that students have some experience reviewing Supreme Court cases.
- This is a self-contained lesson with a variety of resources and activities that can be adapted to different lengths of classes and levels of students.

Snapshot of Lesson

Grades: Middle School; High School (Focus)

Subject Focus: Civics/Government

Estimated Time: 2, 50-minute classes

Alignment: National Standards for Civics and Government Grades 5-8, Grades 9-12; Common Core Standards: Literacy in History/Social Studies, Science and Technical Subjects, Grades 6-8, 9-10, 11-12

Materials/Equipment Needed:

- Annenberg video: *Habeas Corpus: The Guantanamo Cases*
- Computer lab

Materials Included:

Readings and Resources

- Video transcript formatted for study
- Chapter 14: The Right to Habeas Corpus, *Our Rights* – David J. Bodenhamer
- Terms from *Understanding Democracy*: Rule of Law, Separation of Powers
- Supreme Court opinion for each of the four Guantanamo cases
- U.S. Constitution: Amendments V, VI; Article 1, Section 9, Clauses 1-4
- Remarks of Chief Justice William Rehnquist in 2000 to the Norfolk and Portsmouth Bar Association, Norfolk, Va.

Student Materials

- Class-Prep Assignment
- Student's Video Guide
- Activity: Civil Liberties in Three Wars
- Activity: The Guantanamo Cases in Brief

Teacher Materials

- Teacher's Video Guide & Key
- Keys for student work
- A Continuum of Points of View: Instructions (whole class activity)

Standards-Level Detail

National Standards for Civics and Government
Common Core State Standards

TOPICS

- checks and balances
- civil liberties in wartime
- constitutional rights
- democratic principles and values
- due process of law
- equal protection
- emergency powers
- executive powers
- Guantanamo cases
- habeas corpus
- national security v. individual liberties
- role of the Supreme Court
- rule of law
- separation of powers
- tyranny
- war powers

NATIONAL STANDARDS

Document: *National Standards for Civics and Government* (1994) Center for Civic Education
<http://new.civiced.org/national-standards-download>

Grades 5-8 Organizing Questions

The following outline lists the high-level organizing questions supported by this lesson.

- I. What are civic life, politics, and government?
 - A. What is civic life? What is politics? What is government? Why are government and politics necessary? What purposes should government serve?
 - B. What are the essential characteristics of limited and unlimited government?
 - C. What are the nature and purposes of constitutions?
 - D. What are alternative ways of organizing constitutional governments?
- II. What are the foundations of the American political system?
 - A. What is the American idea of constitutional government?
 - C. What is American political culture?
 - D. What values and principles are basic to American constitutional democracy?
- III. How does the government established by the Constitution embody the purposes, values, and principles of American democracy?
 - A. How are power and responsibility distributed, shared, and limited in the government established by the United States Constitution?
 - E. What is the place of law in the American constitutional system?
- IV. What is the relationship of the United States to other nations and to world affairs?
 - A. How is the world organized politically?
- V. What are the roles of the citizen in American democracy?
 - A. What is citizenship?
 - B. What are the rights of citizens?
 - C. What are the responsibilities of citizens?

Grades 9-12 Organizing Questions

The following outline lists the high-level organizing questions supported by this lesson.

- I. What are civic life, politics, and government?
 - A. What is civic life? What is politics? What is government? Why are government and politics necessary? What purposes should government serve?
 - B. What are the essential characteristics of limited and unlimited government?
 - C. What are the nature and purposes of constitutions?
 - D. What are alternative ways of organizing constitutional governments?

- II. What are the foundations of the American political system?
 - A. What is the American idea of constitutional government?
 - C. What is American political culture?
 - D. What values and principles are basic to American constitutional democracy?

- III. How does the government established by the Constitution embody the purposes, values, and principles of American democracy?
 - A. How are power and responsibility distributed, shared, and limited in the government established by the United States Constitution?
 - B. How is the national government organized and what does it do?
 - D. What is the place of law in the American constitutional system?

- IV. What is the relationship of the United States to other nations and to world affairs?
 - A. How is the world organized politically?
 - B. How do the domestic politics and constitutional principles of the United States affect its relations with the world?

- V. What are the roles of the citizen in American democracy?
 - A. What is citizenship?
 - B. What are the rights of citizens?
 - C. What are the responsibilities of citizens?

Note: A more detailed standards-level alignment related to these questions can be found in the “Standards” section at the end of this lesson plan.

COMMON CORE STANDARDS

Document: *English Language Arts & Literacy in History/Social Studies, Science and Technical Subjects*

Standards: Grades 6-12 Literacy in History/Social Studies, Science and Technical Subjects
<http://www.corestandards.org/ELA-Literacy>

Note: The activities in this lesson support learning related to the following standards. For more specifics, please refer to the Standards section of this lesson.

Reading in History/Social Studies 6-8

Key Ideas and Details

CCSS.ELA-Literacy.RH.6-8.1

CCSS.ELA-Literacy.RH.6-8.2

Craft and Structure

CCSS.ELA-Literacy.RH.6-8.4

CCSS.ELA-Literacy.RH.6-8.6

Integration of Knowledge and Ideas

CCSS.ELA-Literacy.RH.6-8.7

CCSS.ELA-Literacy.RH.6-8.8

CCSS.ELA-Literacy.RH.6-8.9

Range of Reading and Level of Text Complexity

CCSS.ELA-Literacy.RH.6-8.10

Writing 6-8

Text Types and Purposes

CCSS.ELA-Literacy.WHST.6-8.2

Production and Distribution of Writing

CCSS.ELA-Literacy.WHST.6-8.4

Research to Build and Present Knowledge

CCSS.ELA-Literacy.WHST.6-8.8

CCSS.ELA-Literacy.WHST.6-8.9

Range of Writing

CCSS.ELA-Literacy.WHST.6-8.10

Reading in History/Social Studies 9-10

Key Ideas and Details

CCSS.ELA-Literacy.RH.9-10.1

CCSS.ELA-Literacy.RH.9-10.2

CCSS.ELA-Literacy.RH.9-10.3

Craft and Structure

CCSS.ELA-Literacy.RH.9-10.4

CCSS.ELA-Literacy.RH.9-10.5

CCSS.ELA-Literacy.RH.9-10.6

Integration of Knowledge and Ideas

CCSS.ELA-Literacy.RH.9-10.9

Range of Reading and Level of Text Complexity

CCSS.ELA-Literacy.RH.9-10.10

Writing 9-10

Text Types and Purposes

CCSS.ELA-Literacy.WHST.9-10.2

Production and Distribution of Writing

CCSS.ELA-Literacy.WHST.9-10.4

Research to Build and Present Knowledge

CCSS.ELA-Literacy.WHST.9-10.8

CCSS.ELA-Literacy.WHST.9-10.9

Range of Writing

CCSS.ELA-Literacy.WHST.9-10.10

Reading in History/Social Studies 11-12

Key Ideas and Details

CCSS.ELA-Literacy.RH.11-12.1

CCSS.ELA-Literacy.RH.11-12.2

CCSS.ELA-Literacy.RH.11-12.3

Craft and Structure

CCSS.ELA-Literacy.RH.11-12.4

CCSS.ELA-Literacy.RH.11-12.6

Integration of Knowledge and Ideas

CCSS.ELA-Literacy.RH.11-12.7

CCSS.ELA-Literacy.RH.11-12.9

Range of Reading and Level of Text Complexity

CCSS.ELA-Literacy.RH.11-12.10

Writing 11-12

Text Types and Purposes

CCSS.ELA-Literacy.WHST.11-12.2

Production and Distribution of Writing

CCSS.ELA-Literacy.WHST.11-12.4

Research to Build and Present Knowledge

CCSS.ELA-Literacy.WHST.11-12.8

CCSS.ELA-Literacy.WHST.11-12.9

Range of Writing

CCSS.ELA-Literacy.WHST.11-12.10

STUDENT OUTCOMES

Knowledge, skills, and dispositions

Students will . . .

- Identify the responsibilities of government in a national state of emergency.
- Appreciate how the checks and balance system works to protect individual liberties.
- Discover how the government responded to the events of 9/11.
- Understand the history and importance of habeas corpus.
- Analyze how executive orders affected individual liberties in three wars.
- Consider the importance of adhering to the rule of law.
- Grapple with timely issues that affect national security and individual liberties.

Integrated Skills

1. Information literacy skills

Students will . . .

- Extract, organize and analyze information from different sources.
- Use skimming and research skills.
- Organize information into usable forms.
- Build background knowledge to support new learning.
- Use technology to facilitate learning.

2. Media literacy skills

Students will . . .

- Gather and interpret information from different media.
- Use online sources to support learning.

3. Communication skills

Students will . . .

- Write and speak clearly to contribute ideas, information, and express own point of view.
- Write in response to questions.
- Understand diverse opinions and points of view.
- Gather and interpret visual information.
- Develop listening skills.

4. Study skills

- Manage time and materials.
- Complete graphic organizers

5. Thinking skills

Students will . . .

- Describe and recall information.
- Make real-world connections.
- Explain ideas or concepts.
- Draw conclusions.
- Analyze and evaluate issues.
- Use sound reasoning and logic.
- Evaluate information and decisions.

6. Problem-solving skills

Students will . . .

- Discuss issues and facts.
- Analyze cause and effect relationships.
- Examine reasoning used in making decisions.
- Evaluate proposed solutions.
- Grapple with difficult issues and hard choices.

7. Participation skills

Students will . . .

- Contribute to small and large group discussion.
- Work responsibly both individually and with diverse people.
- Express own beliefs, feelings, and convictions.
- Show initiative and self-direction.
- Interact with others to deepen understanding.

ASSESSMENT

Evidence of understanding may be gathered from student performance related to the following:

- Class-Prep Assignment
- Responses to each part in the video guide
- Class discussion and daily assignments

VOCABULARY

Vocabulary for historical context

- | | | |
|--|-------------------------------|---|
| 1. Abraham Lincoln | 14. Ex parte Endo | 29. national security |
| 2. appeal | 15. executive branch | 30. Pearl Harbor |
| 3. Article I, Section 9 of the U.S Constitution | 16. federal courts | 31. Pentagon |
| 4. balance between national security and civil liberties | 17. founders | 32. president's duty |
| 5. Bill of Rights | 18. Franklin Delano Roosevelt | 33. rights and protections guaranteed by the Constitution |
| 6. branches of government | 19. Hirabayashi v. U.S. | 34. rule of law |
| 7. civil liberties | 20. homeland | 35. separation of powers |
| 8. Civil War | 21. individual liberty | 36. September 11, 2001 |
| 9. Commander-in-Chief | 22. internment cases | 37. suspension clause |
| 10. Congress | 23. Japanese internment | 38. terrorist attack |
| 11. constitutional values | 24. judicial branch | |
| 12. democracy | 25. Judiciary Act of 1789 | |
| 13. emergency powers | 26. Korematsu v. U.S. | |
| | 27. legislative branch | |
| | 28. Magna Carta | |

Vocabulary for the Guantanamo cases

- | | | |
|--|--|--|
| 1. Afghanistan | 19. judiciary | 35. resolution authorizing the use of military force statute |
| 2. alien | 20. jurisdiction | 36. separation of powers |
| 3. appeal | 21. justice | 37. sovereign territory |
| 4. Boumediene v. Bush | 22. majority opinion | 38. statute |
| 5. checks and balances | 23. military commission | 39. Supreme Court opinion |
| 6. civil rights guaranteed by the Constitution | 24. Military Commissions Act of 2006 | 40. terrorist |
| 7. civilian courts | 25. military force | 41. The Military Commissions Act of 2006 |
| 8. Congress | 26. military justice | 42. U.S citizen |
| 9. conventional war | 27. military tribunal | 43. U.S. naval base |
| 10. detainee | 28. national security interests | 44. unconventional war |
| 11. due process rights | 29. Osama bin Laden | 45. Uniform Code of Military Justice |
| 12. enemy combatant | 30. precedent | 46. violations of the law of war |
| 13. executive branch | 31. President George W. Bush | 47. war on terror |
| 14. Guantanamo Bay, Cuba | 32. prosecute | 48. wartime |
| 15. habeas corpus petition | 33. Rasul v. Bush | 49. writ of habeas corpus |
| 16. Hamdan v. Rumsfeld | 34. resolution authorizing the use of military force | |
| 17. Hamdi v. Rumsfeld | | |
| 18. internment cases | | |

Resources for Definitions

- **Findlaw—Law Dictionary**
<http://dictionary.lp.findlaw.com/>
- **Legal Information Institute, Cornell University Law School**
Wex: All
<https://www.law.cornell.edu/wex/all>
- **National Standards for Civics and Government: Glossary**
http://new.civiced.org/standards?page=stds_glossary
- **Merriam-Webster Online**
<http://www.merriam-webster.com/>
- **Annenberg Classroom – Glossary**
<http://www.annenbergclassroom.org/terms>
- **Glossary of Legal Terms: SCOTUSblog**
<http://www.scotusblog.com/reference/educational-resources/glossary-of-legal-terms/>
- **Glossary: United States Courts**
<http://www.uscourts.gov/Common/Glossary.aspx>

“We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”

—Justice Sandra Day O’Connor, *Hamdi v. Rumsfeld* (2004)

LESSON OVERVIEW

This lesson is organized to support study and learning related to the 25-minute video *Habeas Corpus: The Guantanamo Cases* by providing a plan that can be adapted for different length classes and levels of students. Due to the range of prerequisite knowledge required, this lesson divides the video into logical parts (shown below) to facilitate thoughtful reflection of the content. The parts and their titles do not appear in the video. The transcript, however, has been formatted to support the activities in the lesson.

Day 1 Showing	{	Part 1: September 11, 2001 (Start – 03:08) Part 2: The Right of Habeas Corpus (03:08 – 07:21) Part 3: Civil Liberties in Wartime (07:21 – 09:49)
Day 2 Showing	{	Part 4: The Guantanamo Cases (09:49 – 22:41) Part 5: Conclusion (22:41 – 24:58)

Goals:

Students will . . .

- Identify the responsibilities of government in a national state of emergency.
- Appreciate how the check and balance system works to protect individual liberties.
- Discover how the government responded to the events of 9/11.
- Understand the history and importance of habeas corpus.
- Analyze how executive orders affected individual liberties in three wars.
- Consider the importance of adhering to the rule of law.
- Grapple with timely issues that affect national security and individual liberties.

Class-Prep Assignment

Students complete an independent assignment to build background knowledge and understanding for the historical context covered in the Day 1 showing.

DAY 1: Civil Liberties in Wartime

Students watch the first 3 parts of the video and begin to analyze how government actions to protect national security affected civil liberties in three wars: Civil War, World War II, and the war on terror

DAY 2: The Guantanamo Cases

Students learn about Supreme Court decisions that gave Guantanamo detainees under the jurisdiction of the Constitution the right to appear before a judge.

Note: Teachers are encouraged to keep a running list of issues and questions that arise during this lesson. The war on terror has not ended, and students are likely to have strong opinions, feelings and beliefs. Keep track of the controversial questions and use some in the Continuum of Points of View activity at the end of the lesson.

TEACHING ACTIVITIES: Day by Day

Class-Prep Assignment

This assignment provides important background knowledge and context for the first 10 minutes of the video *Habeas Corpus: The Guantanamo Cases*. The following 5 tasks are covered in the assignment:

- Task 1: Reflect on the separation of powers in a constitutional democracy.
- Task 2: Learn how a national emergency can impact civil liberties and government power.
- Task 3: Discover how the government responded to the events of 9/11.
- Task 4: Understand the history and importance of habeas corpus.
- Task 5: Learn how executive orders affected civil liberties in two wars.

Materials/Technology Needed:

- Class-Prep Assignment Sheet
- Internet access
- All resources included with the lesson

Instructions:

1. Review the Class-Prep Assignment, then assign one or more tasks based on the background knowledge of the students.

* Make available all resources included with this lesson for the duration of the activities.*

Remind students to bring their work to class.

DAY 1: Civil Liberties in Wartime

Day 1 Showing	{	Part 1: September 11, 2001 (Start – 03:08)
		Part 2: The Right of Habeas Corpus (03:08 – 07:21)
		Part 3: Civil Liberties in Wartime (07:21 – 09:49)

Overview: Students gain historical understanding and perspective related to the development of habeas corpus and its controversial use in wartime.

Goal: Students learn about the impact of war on civil liberties.

Materials/Equipment:

- Computers with Internet access
- Video: *Habeas Corpus: The Guantanamo Cases* (25 minutes)
Available from Annenberg Classroom at <http://www.annenbergclassroom.org/page/all-videos>
- Video transcript: *Habeas Corpus: The Guantanamo Cases* (Lesson Resource)
- Supreme Court opinions in the four Guantanamo cases (Lesson Resources)

Student Materials:

- Class-Prep Assignment – Completed before class
- Student's Video Guide
- Activity: Civil Liberties in Three Wars
- Activity: The Guantanamo Cases in Brief

Teacher Materials:

- Teacher's Video Guide & Key
- Teacher Key for each activity

Procedure:

1. Briefly discuss each task covered in the Class-Prep Assignment .
2. Distribute and review the Student's Video Guide.
3. Show the first three parts of the video. Stop after each part or as needed to reflect and discuss as a class or assign questions in the video guide.
4. Distribute activity: Civil Liberties in Wartime and allow students time to add information gained from the video (Parts 1-3) and their Class-Prep Assignment.

Homework:

Activity: The Guantanamo Cases in Brief

Purpose: Familiarize students with each of the four cases that will be discussed in the video on Day 2.

1. Distribute the activity and review the instructions.
2. Students consult primary and secondary sources to work on a Case in Brief chart for each case.
3. **Remind students to bring the assignment to class.**

DAY 2: The Guantanamo Cases

Day 2 Showing { Part 4: The Guantanamo Cases (09:49 – 22:41)
Part 5: Conclusion (22:41 – 24:58)

Overview: Students watch the remainder of the video in which the four Guantanamo cases are discussed, then reflect on the use of habeas corpus in wartime.

Goal: Students learn about Supreme Court decisions that gave Guantanamo detainees under the jurisdiction of the Constitution the right to appear before a judge.

Materials Needed:

- Computer with Internet connection
- Video: *Habeas Corpus: The Guantanamo Cases*
Available from Annenberg Classroom at <http://www.annenbergclassroom.org/page/all-videos>

Student Materials:

- Student’s Video Guide (Used on Day 1)
- Activity: The Guantanamo Cases in Brief (Homework)
- Supreme Court opinion for each case(Lesson Resources)

Teacher Materials:

1. Teacher’s Video Guide & Key (Used on Day 1)
2. Activity: The Guantanamo Cases in Brief (Teacher Key)
3. A Continuum of Points of View: Instructions

Procedure:

1. Briefly review each of the four cases before watching the last 15 minutes of the video.
2. Refer to the video to complete each **Case in Brief** chart in the Guantanamo Cases activity.
3. Conclude with a whole class activity: A Continuum of Points of View

A Continuum of Points of View is an effective activity for getting students to discuss their opinions, beliefs, and values about controversial issues. It helps them recognize that a wide range of perspectives may be found on different issues, allows them to learn what others think, and gives them an opportunity to reflect on or change their own position.

Use controversial questions gathered during the course of the lesson or adapt one of these:

- In the war on terror, should foreigners (noncitizens) with allegiances to other countries be given the right to go into a U.S. federal court to challenge their imprisonment? Should it make a difference if they are captured abroad or captured in the U.S.?
- “Can strong war powers, which the national government may need to defeat a fearsome foreign enemy, be reconciled with the immutable constitutional rights of individuals? Or must the liberty of some persons be sacrificed temporarily to the exigencies of national survival?” (*The Pursuit of Justice*, pg.93)

EXTENSION ACTIVITIES

Have more time to teach?

1. Research to learn what happened to the Guantanamo detainees in the four cases. There were multiple petitioners in some cases. Were any of them released? If so, when and under what circumstances? Where did they go and where are they now?
Note: Some of this information can be found in the Supreme Court opinions. Be sure to check the footnotes.
2. Read and respond to a related Speak Out! issue on Annenberg Classroom.
 - How does national security affect you at the local level?
<http://www.annenbergclassroom.org/speakout/how-does-national-security-affect-you-at-the-local-level>
 - Should the president use executive orders to bypass Congress?
<http://www.annenbergclassroom.org/speakout/should-the-president-use-executive-orders-to-bypass-congress>
3. Is America still “the land of the free”? Research to analyze how life has changed since 9/11.
4. Identify and discuss the challenges faced by a constitutional democracy in the midst of an unconventional war.

Discuss/debate timely topics:

1. Is the president overreaching his authority when he takes unilateral action by using executive orders?
2. Should terrorists who are arrested abroad be afforded the protections of our Constitution?
3. To what extent should individual rights be denied for national security? How much freedom are you willing to lose or allow others to lose? How much control of your life do you want the government to have?
4. When a government threatens the rights of the people, how can the problem be fixed?
5. If you were the responsible person in charge and had to choose between a necessary war measure and obeying the Constitution, which would you choose?
6. Explain how the events of 9/11 affected the civil liberties of Americans. Identify restrictions that affect your life.
7. If the president chooses to ignore decisions made by the Supreme Court, what option is left to check the power of the executive?
8. Should enemies of the U.S with allegiances to foreign nations be given the same constitutional rights that you have as a citizen living in the U.S.?

RELATED RESOURCES

Online Books from Annenberg

- *Understanding Democracy, A Hip Pocket Guide* – John J. Patrick
<http://www.annenbergclassroom.org/page/understanding-democracy-a-hip-pocket-guide>
- *Our Constitution* – Donald Ritchie and Justicelearning.org
<http://www.annenbergclassroom.org/page/our-constitution>
- *Our Rights* – David J. Bodenhamer
<http://www.annenbergclassroom.org/page/our-rights>
- *The Pursuit of Justice* – Kermit L. Hall and John J. Patrick
<http://www.annenbergclassroom.org/page/the-pursuit-of-justice>

September 11, 2001 (Nine-Eleven)

- Statement of George W. Bush in His Address to the Nation, September 11, 2001
<http://www.911memorial.org/sites/all/files/Statement%20by%20President%20Bush%20in%20His%20Address%20to%20the%20Nation.pdf>
- Statement of Senator Russ Feingold on War Powers, September 14, 2001
http://avalon.law.yale.edu/sept11/feingold_001.asp
- Proclamation 7463 of September 14, 2001
Declaration of National Emergency by Reason of Certain Terrorist Attacks
by the President of the United States of America
<http://fas.org/irp/news/2001/09/fr091801.html>
- Authorization for Use of Military Force: September 18, 2001
115 STAT. 224 PUBLIC LAW 107-40—SEPT. 18, 2001
<http://www.gpo.gov/fdsys/pkg/STATUTE-115/pdf/STATUTE-115-Pg224.pdf>
- September 11, 2001: Attack on America
Address to a Joint Session of Congress and the American People; September 20, 2001
http://avalon.law.yale.edu/sept11/address_001.asp
- 9/11 Memorial: FAQ about 9/11
<http://www.911memorial.org/faq-about-911>
- 9/11 Primary Sources (in chronological order), 9/11 Memorial
<http://www.911memorial.org/911-primary-sources>

The Right of Habeas Corpus

- Chapter 14: The Right to Habeas Corpus, *Our Rights*
http://www.annenbergclassroom.org/Files/Documents/Books/Our%20Rights/Chapter_14_Our_Rights.pdf
- National Archives: Search “habeas corpus”
<http://www.archives.gov/>
- Habeas corpus, Cornell University Law School
http://www.law.cornell.edu/wex/habeas_corpus

- Magna Carta 1215, National Archives & Records Administration
http://www.archives.gov/exhibits/featured_documents/magna_carta/
- Magna Carta: Muse and Mentor, Library of Congress
Writ of Habeas Corpus
<http://loc.gov/exhibits/magna-carta-muse-and-mentor/writ-of-habeas-corpus.html>

War Powers

- War Powers, Library of Congress
<http://www.loc.gov/law/help/war-powers.php>
- Exploring Constitutional Conflicts: Separation of Powers
<http://law2.umkc.edu/faculty/projects/ftrials/conlaw/separationofpowers.htm>
- Exploring Constitutional Conflicts: Presidential Powers: An Introduction
<http://law2.umkc.edu/faculty/projects/ftrials/conlaw/prespowers.html>
- War Powers and Emergency Powers, Cornell University Law School
https://www.law.cornell.edu/wex/war_powers
https://www.law.cornell.edu/wex/emergency_powers
- Exploring Constitutional Conflicts: War and Treaty Powers
<http://law2.umkc.edu/faculty/projects/ftrials/conlaw/warandtreaty.htm>
- War Powers Resolution, Joint Resolution Concerning the War Powers of Congress and the President (1971), Yale Law School
http://avalon.law.yale.edu/20th_century/warpower.asp
- War Powers Resolution (1973)
<http://www.gpo.gov/fdsys/pkg/STATUTE-87/pdf/STATUTE-87-Pg555.pdf>
- Law of War
http://lawofwar.org/geneva_prisoner_war_convention.htm
- Uniform Code of Military Justice, Cornell University Law School
<http://www.law.cornell.edu/uscode/text/10/subtitle-A/part-II/chapter-47>

Civil War

- Remarks of Chief Justice William H. Rehnquist
100th Anniversary Celebration Of the Norfolk and Portsmouth Bar Association
Norfolk, Virginia, May 3, 2000
http://www.supremecourt.gov/publicinfo/speeches/viewsspeech/sp_05-03-00
- A proclamation on the suspension of habeas corpus, 1862 (a primary source)
<http://www.gilderlehrman.org/history-by-era/american-civil-war/resources/proclamation-suspension-habeas-corpus-1862>
- Chapter 13: Civil Liberties in the Civil War (From *The Pursuit of Justice* by Kermit L. Hall and John J. Patrick available on annenbergclassroom.org)
http://www.annenbergclassroom.org/Files/Documents/Books/The%20Pursuit%20of%20Justice/45_52_Ch_5.pdf

World War II

- Chapter 11: Internment of Japanese Americans during World War II (From *The Pursuit of Justice* by Kermit L. Hall and John J. Patrick available on annenbergclassroom.org)
http://www.annenbergclassroom.org/Files/Documents/Books/The%20Pursuit%20of%20Justice/93_100_Ch_11.pdf
- Executive Order 9066 (primary source)
Resulting in the Relocation of Japanese (1942)
<http://www.ourdocuments.gov/doc.php?flash=true&doc=74>
- Japanese American Incarceration Facts, Japanese American National Museum
<http://www.janm.org/nrc/resources/internfs/>
- Remarks of Chief Justice William H. Rehnquist
100th Anniversary Celebration Of the Norfolk and Portsmouth Bar Association
Norfolk, Virginia May 3, 2000
http://www.supremecourt.gov/publicinfo/speeches/viewsspeech/sp_05-03-00
- War Relocation Centers of World War II, National Park Service
<http://www.nps.gov/nr/twhp/wwwlps/lessons/89manzanar/89manzanar.htm>
- Japanese Relocation, National Archives
<http://www.archives.gov/education/lessons/japanese-relocation/>

Four Guantanamo Cases

- **Supreme Court Resources**
Information about Opinions
http://www.supremecourt.gov/opinions/info_opinions.aspx
Where to Obtain Supreme Court Opinions
<http://www.supremecourt.gov/opinions/obtainopinions.aspx>
Rules of the Court
<http://www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf>
Bound Volumes
<http://www.supremecourt.gov/opinions/boundvolumes.aspx>
- **Hamdi v. Rumsfeld (2004)**
Cornell University Law School: Legal Information Institute
<http://www.law.cornell.edu/supct/html/03-6696.ZS.html>
Oyez
http://www.oyez.org/cases/2000-2009/2003/2003_03_6696/
JUSTIA US Supreme Court
<https://supreme.justia.com/cases/federal/us/542/507/>
- **Rasul v. Bush (2004)**
Cornell University Law School: Legal Information Institute
<http://www.law.cornell.edu/supct/html/03-334.ZS.html>
Oyez
http://www.oyez.org/cases/2000-2009/2003/2003_03_334
JUSTIA US Supreme Court
<https://supreme.justia.com/cases/federal/us/542/466/>

- **Hamdan v. Rumsfeld (2006)**
Cornell University Law School: Legal Information Institute
<https://www.law.cornell.edu/supct/pdf/05-184P.ZS>
Oyez
http://www.oyez.org/cases/2000-2009/2005/2005_05_184
JUSTIA US Supreme Court
<https://supreme.justia.com/cases/federal/us/548/557/>
- **Boumediene v. Bush (2008)**
Cornell University Law School: Legal Information Institute
<https://www.law.cornell.edu/supct/html/06-1195.ZO.html>
Oyez
http://www.oyez.org/cases/2000-2009/2007/2007_06_1195
JUSTIA US Supreme Court
<https://supreme.justia.com/cases/federal/us/553/723/>

George W. Bush and Military Tribunals

- American Bar Association Task Force on Terrorism and the Law
Report and Recommendations on Military Commissions, January 4, 2002
<http://www.americanbar.org/content/dam/aba/migrated/leadership/military.authcheckdam.pdf>
- President Issues Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, November 13, 2001
<http://georgewbush-whitehouse.archives.gov/news/releases/2001/11/print/20011113-27.html>
- Public Law 107-40, 115 Stat. 224, Authorization for Use of Military Force, September 18 2001
<http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf>
- American Constitution Society or Law and Policy
“Enemy Combatants,” The Constitution and the Administration’s “War on Terror”
By Kate Martin and Joe Onek
August 2004
<http://www.acslaw.org/pdf/enemycombatants.pdf>

Tonight, we are a country awakened to danger and called to defend freedom. Our grief has turned to anger, and anger to resolution. Whether we bring our enemies to justice, or bring justice to our enemies, justice will be done.

--President George W. Bush, Address to a Joint Session of Congress and the American People; September 20, 2001

Student Materials

- Class-Prep Assignment
- Student's Video Guide
- Activity: Civil Liberties in Wartime
- Activity: The Guantanamo Cases in Brief

Class-Prep Assignment

The following assignment provides important background knowledge and context for the first 10 minutes of the video *Habeas Corpus: The Guantanamo Cases*, which will be shown and discussed in class. The remainder of the video (15 minutes) focuses on four Guantanamo cases and will be shown the following day.

INSTRUCTIONS

1. Review the following vocabulary and become familiar with all the terms.

- Abraham Lincoln
- appeal (court-related)
- Article I, Section 9 of the U.S Constitution
- balance between national security and civil liberties
- Bill of Rights
- branches of government
- civil liberties
- Civil War
- Commander-in-Chief
- Congress
- constitutional values
- democracy
- emergency powers
- Ex parte Endo
- executive branch
- federal courts
- founders
- Franklin Delano Roosevelt
- Hirabayashi v. U.S.
- homeland
- individual liberty
- internment cases
- Japanese internment
- judicial branch
- Judiciary Act of 1789
- Korematsu v. U.S.
- legislative branch
- Magna Carta
- national security
- Pearl Harbor
- Pentagon
- president's duty
- rights and protections guaranteed by the Constitution
- rule of law
- separation of powers
- September 11, 2001
- suspension clause
- terrorist attack

2. There are five tasks with related readings and questions or activities to complete in this assignment.

Task 1: Reflect on the separation of powers in a constitutional democracy.

Task 2: Learn how a national emergency can impact civil liberties and government power.

Task 3: Discover how the government responded to the events of 9/11.

Task 4: Understand the history and importance of habeas corpus.

Task 5: Analyze how executive orders affected civil liberties in two wars.

Bring this assignment sheet and all completed work with you to class.

Class-Prep Assignment Sheet

Task 1: Reflect on the separation of powers in a constitutional democracy.

Resources:

- Preamble to the Constitution
<http://www.annenbergclassroom.org/page/preamble>

- *Understanding Democracy: A Hip Pocket Guide*
<http://www.annenbergclassroom.org/page/understanding-democracy-a-hip-pocket-guide>
Review these terms:
 - Separation of Powers (Lesson Resource)
 - Constitutionalism
 - Rule of Law (Lesson Resource)

Questions:

1. Identify the primary purposes of government listed in the Preamble to the Constitution.

2. Explain why the Founders designed a limited government with the separation and sharing of powers among three branches.

3. Why is it important for all people in a democratic society (including the leaders) to follow the rule of law?

4. Complete this chart.

	Branch	Responsibilities
Congress		
President		
Supreme Court		

Class-Prep Assignment Sheet

Task 2: Learn how a national emergency can impact civil liberties and government power.

Resources:

- U.S. Constitution
 - Articles I & II: War Powers ClausesAnnenberg's Guide to the Constitution
<http://www.annenbergclassroom.org/page/a-guide-to-the-united-states-constitution>

- War Powers, Emergency Powers, Executive Power
https://www.law.cornell.edu/wex/war_powers
https://www.law.cornell.edu/wex/emergency_powers
https://www.law.cornell.edu/wex/executive_power

- War Powers
Annenberg Classroom
<http://www.annenbergclassroom.org/term/war-powers>

- State of Emergency
Cornell University Law School, Legal Information Institute
https://www.law.cornell.edu/wex/state_of_emergency

Questions:

1. Identify the war powers for each branch of government represented below:
Congress:
President:
Supreme Court:

2. What constitutes a state of national emergency?

3. Which branch can declare a national state of emergency?
Which branch can declare a war?

4. Discuss the impact that a national emergency can have on government power and civil liberties.

Class-Prep Assignment Sheet

Task 3: Learn how the government responded to the events of 9/11.

Resources:

- Proclamation 7463 of Executive Order 13223
<http://fas.org/irp/news/2001/09/fr091801.html>
- Authorization for Use of Military Force:
<http://www.gpo.gov/fdsys/pkg/STATUTE-115/pdf/STATUTE-115-Pg224.pdf>
- September 11, 2001: Attack on America
Address to a Joint Session of Congress and the American People
http://avalon.law.yale.edu/sept11/address_001.asp
- President Issues Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism
<http://georgewbush-whitehouse.archives.gov/news/releases/2001/11/print/20011113-27.html>
- Military Commissions Act
<http://www.gpo.gov/fdsys/pkg/BILLS-109s3930enr/pdf/BILLS-109s3930enr.pdf>
- Statement by the President in His Address to the Nation
<http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010911-16.html>

Activity:

Each of the above resources describes a specific government action related to 9/11. Identify and organize the actions chronologically in the following chart.

Date	Government Actions	Branch	Purpose

Class-Prep Assignment Sheet

Task 4: Learn about the history and importance of habeas corpus.

Resources:

- Chapter 14: The Right of Habeas Corpus in *Our Constitution* (Lesson Resource)
Source: <http://www.annenbergclassroom.org/page/our-constitution>
- Article I, Section 9, Clauses 1-4 (Lesson Resource)
Source: <http://www.annenbergclassroom.org/page/our-constitution>
- Findlaw: Writ of Habeas Corpus
<http://criminal.findlaw.com/criminal-procedure/writ-of-habeas-corpus.html>
- National Archives: Search “habeas corpus”
<http://www.archives.gov/>
- Glossary of Legal Terms
<http://www.scotusblog.com/reference/educational-resources/glossary-of-legal-terms/>

Questions:

1. Identify the origin and meaning of “*habeas corpus*.”
 - Language:
 - Literal meaning:
 - Source of the right:
 - Earliest appearance (document):
2. Why was the right to habeas corpus so important to the Founders?
3. Does the Constitution grant the right of habeas corpus or guarantee its protection? Explain.
4. What does a habeas corpus petition do?
5. Explain the difference between the right to habeas corpus and a right in the Bill of Rights.
6. Cite the constitutional reference for habeas corpus.
Quote the full clause.
7. Habeas corpus is found in the section of the Constitution that explains the limits and powers of which branch of government?
8. Cite the conditions under which the Constitution allows for the suspension of *habeas corpus*.
Identify the special name given to the phrase.
9. Which branch of government has the constitutional authority to suspend *habeas corpus*?
Explain.

Class-Prep Assignment Sheet

Task 5: Learn how executive orders affected civil liberties in two wars.

Resources:

- Remarks of Chief Justice William H. Rehnquist (Lesson Resource)
100th Anniversary Celebration of the Norfolk and Portsmouth Bar Association
Norfolk, Virginia, May 3, 2000
http://www.supremecourt.gov/publicinfo/speeches/viewsspeech/sp_05-03-00

- A proclamation on the suspension of habeas corpus, 1862
<http://www.gilderlehrman.org/history-by-era/american-civil-war/resources/proclamation-suspension-habeas-corpus-1862>

- Chapter 14: The Right of Habeas Corpus in *Our Constitution* (Lesson Resource)
Source: <http://www.annenbergclassroom.org/page/our-constitution>

- Executive Order 9066
Resulting in the Relocation of Japanese (1942)
<http://www.ourdocuments.gov/doc.php?flash=true&doc=74>

- A quote from the Epilogue written by former Supreme Justice Tom C. Clark for the book *Executive Order 9066: The Internment of 110,000 Japanese Americans*, 1992. Justice Clark represented the Department of Justice in the “relocation.”

“The truth is – as this deplorable experience proves – that constitutions and laws are not sufficient of themselves; they must be given life through implementation and strict enforcement. Despite the unequivocal language of the Constitution of the United States that the writ of habeas corpus shall not be suspended, and despite the Fifth Amendment’s command that no person shall be deprived of life, liberty, or property without due process of law, both of these constitutional safeguards were denied by military action under Executive Order 9066.”

Questions:

1. Which two wars did Chief Justice Rehnquist discuss during his address to the bar association?

2. In each of the two wars, the president issued executive orders that denied civil liberties. Provide key information for each war by completing the following chart.

Name the war		
Identify the president. (full name)		
Describe the severity of the threat.		
Identify the precipitating event.		
Describe the president’s order that denied civil liberties		
Which rights were sacrificed for the sake of national security?		
Which branch made the decision to sacrifice the rights of some to save the nation?		

Class-Prep Assignment Sheet

Think About It

According to Chief Justice Rehnquist, “The courts, for their part, have largely reserved the decisions favoring civil liberties in wartime to be handed down after the war was over.”

He also makes this observation:

“While we would not want to subscribe to the full sweep of the Latin maxim – *Inter Arma Silent Leges* – in time of war the laws are silent, perhaps we can accept the proposition that though the laws are not silent in wartime, they speak with a muted voice.”

Chief Justice Rehnquist delivered his remarks to the bar association in 2000. The war on terror was announced in 2001 and continues to this day.

When it comes to civil liberty matters, how do you think the courts should respond during the war on terror?

Student's Video Guide
Habeas Corpus: The Guantanamo Cases

(Time: 25 minutes)

Overview

The surprise terrorist attacks on September 11, 2001, stunned the nation. As Commander-in-Chief, President Bush responded quickly, but soon all three branches of government would be embroiled in the struggle to balance national security with the protection of individual liberties in the midst of the war on terror.

On the authority of President George W. Bush and with the support of Congress, suspected terrorists from around the world were rounded up, labeled as enemy combatants and imprisoned on the U.S. naval base in Guantanamo Bay, Cuba. There they would be held indefinitely and their rights restricted – no habeas corpus and no access to the judiciary.

Legal questions arose about the actions of the president and the legislation passed by Congress during this period. Only the Supreme Court could determine if the Constitution had been violated. The battle for protecting individual rights moved to the Court.

Four Supreme Court cases known as the Guantanamo cases are indicative of how the Court, the president and even Congress fought to balance national security and civil liberties during the war on terror, a war that continues to this day. At the heart of each case was the constitutional right of *habeas corpus*, the right to have one's detention or imprisonment reviewed in court. Each of these cases is discussed in the video.

Speakers

- David Cruz: University of Southern California Gould School of Law
- Kermit Roosevelt: University of Pennsylvania Law School
- David Rudovsky: University of Pennsylvania Law School
- Madeline Morris: Duke University School of Law
- Anthony Kennedy: Associate Justice of the U.S. Supreme Court
- Stephen G. Breyer: Associate Justice of the U.S. Supreme Court
- Neal Katyal: Georgetown Law School
- Geoffrey Stone: University of Chicago Law School

Background Knowledge

In order to understand the discussion and content, viewers should have advance knowledge and understanding about the following topics:

- three branches of government and the powers of each
- separation of powers
- checks and balances
- right of *habeas corpus*
- September 11, 2001
- Civil War and Lincoln
- Japanese internment and Roosevelt
- national security v. individual liberties
- rule of law
- executive power in wartime
- rights under the Constitution
- war on terror
- due process
- reading Supreme Court opinions

Student's Video Guide
Habeas Corpus: The Guantanamo Cases
(Time: 25 minutes)

Preparation for Viewing and Study

1. Complete the Class-Prep Assignment before watching the video. It covers the content understandings needed for the first 10 minutes of the video.
2. Review the words and phrases for each day's showing.
3. Obtain a copy of the video transcript. It is formatted in parts to facilitate the study and thoughtful reflection of the content in each part. The divisions and their titles do not appear in the video.

Schedule

1. Plan to watch the video over 2 days. The following stopping points are recommended in the video transcript at points where the main subject changes.

Part 1: September 11, 2001 (Start – 03:08)
Part 2: The Right of Habeas Corpus (03:08 – 07:21)
Part 3: Civil Liberties in Wartime (07:21 – 09:49) } Day 1 showing

Part 4: The Guantanamo Cases (09:49 – 22:41)
Part 5: Conclusion (22:41 – 24:58) } Day 2 showing

2. Be prepared to discuss related assignments before each showing.

Day 1 Showing: Start - 09:49

Words and Phrases

- Abraham Lincoln
- appeal
- Article I, Section 9 of the U.S Constitution
- Bill of Rights
- branches of government
- civil liberties
- Civil War
- Commander-in-Chief
- Congress
- constitutional values
- democracy
- emergency powers
- Ex parte Endo
- executive branch
- federal courts
- founders
- Franklin Delano Roosevelt
- Hirabayashi v. U.S.
- homeland
- individual liberty
- internment cases
- Japanese internment
- judicial branch
- Judiciary Act of 1789
- Korematsu v. U.S.
- legislative branch
- Magna Carta
- national security
- Pearl Harbor
- Pentagon
- president's duty
- rights and protections guaranteed by the Constitution
- rule of law
- separation of powers
- September 11, 2001
- suspension clause
- terrorist attack
- George W. Bush

Student's Video Guide & Key
Habeas Corpus: The Guantanamo Cases

(Time: 25 minutes)

Part 1 Questions: Nine-Eleven

(Time: Start – 3:07)

1. Explain this quote: “...history shows that when the nation is at war and feeling as though its security is at risk – when people are afraid – the balance between national security and rights guaranteed by the Constitution can falter.”
2. Describe the events on September 11, 2001.
Cover the Facts: (who, what, where, when, why, how)

Impact on the Nation:
3. Identify these speakers:
 - Stephen Breyer:
 - Anthony Kennedy:
4. Reflect on this quote by Anthony Kennedy:
“The Constitution is at its most vulnerable when we’re in a crisis.”
How did the events of 9/11 make the Constitution vulnerable?
5. Are all Americans vulnerable if the Constitution is vulnerable? Explain.
6. Name the constitutional values that are worth fighting for.
How are they described in the video?
7. Identify the two primary responsibilities of a constitutional government that are particularly difficult to balance in a time of war.
8. Describe the political fight that ensued after 9/11.
9. Which branch of government is ultimately responsible for protecting the constitutional rights of the individual?
10. How and why did the Supreme Court get involved in the political fight?

Part 2 Questions: The Right of Habeas Corpus

(Time: 3:07-7:20)

1. Explain the significance of including the right to *habeas corpus* in the original Constitution and not making it a part of the Bill of Rights.
 - a. Purpose of the Bill of Rights:
 - b. Purpose of the original Constitution:
 - c. Significance of the location of the habeas right.

Student's Video Guide & Key
Habeas Corpus: The Guantanamo Cases

(Time: 25 minutes)

2. Reference the location for *habeas corpus* in the Constitution. Identify and quote the relevant clause:
When can *habeas corpus* be suspended? Quote the phrase.
What is the special name given this phrase?
3. Explain the significance of the following:
 - Judiciary Act of 1789
 - Magna Carta 1215
4. Before the Constitution, how did *habeas corpus* serve as a check on executive power?
5. Who is the final arbiter of the Constitution?
6. Explain the metaphor of the three light switches.
7. Which branch of the government was especially distrusted by the founders?
Explain:
8. What protection does the Constitution guarantee those who fear too much executive power?
9. The Constitution protects the right to habeas corpus, but which branch is ultimately responsible for protecting the right?

Part 3: Civil Liberties in Wartime
(Time: 07:21 – 09:49)

Activity: Civil Liberties in Three Wars

Use information from the video and your work on the Class-Prep Assignment to complete the activity.

Homework:

Activity: The Guantanamo Cases in Brief

1. Become familiar with the vocabulary and each of the four cases that will be discussed in the video on Day 2.
2. At minimum, complete rows 1-3 in each **Case in Brief** chart before the Day 2 showing. Internet resources are identified to assist with the task. After watching the video, you will have a chance to complete the charts.

Student's Video Guide & Key
Habeas Corpus: The Guantanamo Cases
(Time: 25 minutes)

Day 2 Showing: 09:49 – 24:52

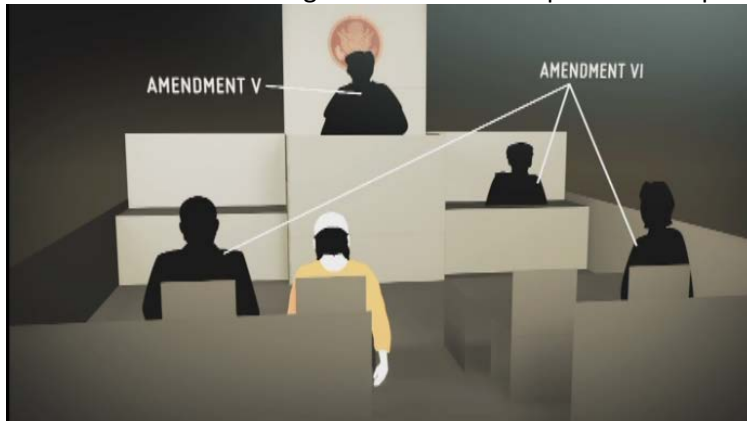
Words and Phrases (Day 2)

- Afghanistan
- alien
- appeal
- Boumediene v. Bush
- checks and balances
- civil rights guaranteed by the Constitution
- civilian courts
- Congress
- conventional war
- detainee
- due process rights
- enemy combatant
- executive branch
- George W. Bush
- Guantanamo Bay, Cuba
- habeas corpus petition
- Hamdan v. Rumsfeld
- Hamdi v. Rumsfeld
- internment cases
- judiciary
- jurisdiction
- justice
- majority opinion
- military commission
- Military Commissions Act of 2006
- military force
- military justice
- national security interests
- Osama bin Laden
- prosecute
- Rasul v. Bush
- resolution authorizing the use of military force
- separation of powers
- sovereign territory
- statute
- terrorist
- The Military Commissions Act of 2006
- tribunals
- U.S citizen
- U.S. naval base
- unconventional war
- Uniform Code of Military Justice
- violations of the law of war
- war on terror
- wartime
- writ of habeas corpus

Part 4: The Guantanamo Cases
(Time: 09:49 – 22:41)

Part 5: Conclusion
(Time: 09:49 – 24:52)

1. Describe the following screen shot and explain what it portrays.



3. When the detainees are given the right of habeas corpus, they enter the U.S. legal system. Once in the system, the Constitution guarantees them other legal rights. What are those rights? (be specific)

Student's Video Guide & Key
Habeas Corpus: The Guantanamo Cases

(Time: 25 minutes)

4. Which case is recognized by scholars and news outlets as “one of the most important wartime decisions of the last 50 years.”
Explain the significance of this case.

2. Refer to the video to complete each Case in Brief chart in the Guantanamo Cases activity.

Think About It:

In the war on terror, should foreigners (noncitizens) with allegiances to other countries be given the right to go into a U.S. federal court to challenge their imprisonment? Should it make a difference if they are captured abroad or captured in the U.S.?

Activity: Civil Liberties in Three Wars

(For use with the video *Habeas Corpus: The Guantanamo Cases*)

Instructions:

1. Complete the following chart with information about the three wars covered in the video.
2. Glean as much information as you can from the video and the transcript before consulting additional online resources.
3. Include a list of any additional online resources used and provide a link to each source.

“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” (U.S. Constitution, Article 1, Section 9, Clause 2)

Ponder this question as you complete the chart:

“Can strong war powers, which the national government may need to defeat a fearsome foreign enemy, be reconciled with the immutable constitutional rights of individuals? Or must the liberty of some persons be sacrificed temporarily to the exigencies of national survival?” (*The Pursuit of Justice*, pg. 93)

Overview for Three Wars			
The Wars	Civil War	World War II	War on Terror
Dates (Start-End)		Also identify start of U.S. involvement:	
Event that started the war			
Identify the sides			
Conventional or unconventional war			
Describe the crisis			
Explain the significance of the threat.			
What was/is at stake?			
President			
President (full name)			
How did the president use his emergency powers?			
What were the consequences of the president’s orders?			
How was the action justified?			
Who challenged the		Refer to the cases in the video	Refer to the cases in the video

Activity: Civil Liberties in Three Wars
 (For use with the video *Habeas Corpus: The Guantanamo Cases*)

Overview for Three Wars			
presidential actions?			Case name: Petitioner(s): Case name: Petitioner(s): Case name: Petitioner(s): Case name: Petitioner(s):
Where did this challenge take place?			
Congress			
Actions by the Congress			
Supreme Court			
Did the Supreme Court uphold the president's decision during the war?			
Cases heard by the Supreme Court		Internment Cases	Name the Guantanamo Cases

Additional Resources Used:

- 1.
- 2.

Activity: The Guantanamo Cases in Brief

(For use with the video *Habeas Corpus: The Guantanamo Cases*)

Instructions:

1. Research to learn about each of the following Guantanamo cases before watching the remaining 15 minutes of the video.

Case 1: Hamdi v. Rumsfeld

Case 2: Rasul v. Bush

Case 3: Hamdan v. Rumsfeld

Case 4: Boumediene v. Bush

Research reminders: Always compare secondary source summaries to the primary source to ensure that the facts are accurately represented. Remember to read footnotes.

2. Familiarize yourself with the following vocabulary.

- Afghanistan
- alien
- appeal
- Boumediene v. Bush
- checks and balances
- civil rights guaranteed by the Constitution
- civilian courts
- Congress
- conventional war
- detainee
- due process rights
- enemy combatant
- executive branch
- Guantanamo Bay, Cuba
- habeas corpus petition
- Hamdan v. Rumsfeld
- Hamdi v. Rumsfeld
- held
- internment cases
- judiciary
- jurisdiction
- justice
- military commission
- Military Commissions Act of 2006
- military force
- military justice
- military tribunal
- national security interests
- opinion
- Osama bin Laden
- parties
- petitioner
- precedent
- President George W. Bush
- prosecute
- Rasul v. Bush
- remanded
- resolution authorizing the use of military force
- respondent
- military force statute
- reversed
- separation of powers
- sovereign territory
- statute
- terrorist
- The Military Commissions Act of 2006
- U.S citizen
- U.S. naval base
- unconventional war
- Uniform Code of Military Justice
- vacated
- violations of the law of war
- war on terror
- wartime
- writ of habeas corpus

3. At minimum, complete rows 1-3 in each **Case in Brief** chart before class. Internet resources are identified to assist with the task. After watching the video you will have a chance to complete all charts and use information from the video and transcript.

Activity: The Guantanamo Cases in Brief

(For use with the video *Habeas Corpus: The Guantanamo Cases*)

Case 1 in Brief: Hamdi v. Rumsfeld

References:

- Hamdi v. Rumsfeld Opinion of the Court (Lesson Resource)
- Oyez: http://www.oyez.org/cases/2000-2009/2003/2003_03_6696/
- Cornell University Law School: Legal Information Institute: <http://www.law.cornell.edu/supct/html/03-6696.ZS.html>
- JUSTIA US Supreme Court: <https://supreme.justia.com/cases/federal/us/542/507/>

1.	Reference Citation for the Case	Legal Provision	Vote	Majority Opinion by...
2.	Identify the Parties: Petitioner(s): _____ Respondent: _____			
3.	Facts of the Case:			
4.	Question Before the Court:			
5.	Decision of the Court:			
6.	Order of the Court (refer to the Opinion):			
7.	Key Point(s) in the Majority Opinion:			
8.	Key Point(s) in Dissenting Opinion by . . . (Name the Justice):			
9.	Outcome for the Petitioner(s) per the video:			
10.	Respond to a significant point or quote made by one of the speakers in the video:			

Activity: The Guantanamo Cases in Brief

(For use with the video *Habeas Corpus: The Guantanamo Cases*)

Case 2 in Brief: Rasul v. Bush

References:

- Supreme Court Opinion: Rasul v. Bush (Lesson Resource)
- Oyez: http://www.oyez.org/cases/2000-2009/2003/2003_03_334
- Cornell University Law School: Legal Information Institute: <http://www.law.cornell.edu/supct/html/03-334.ZS.html>
- JUSTIA US Supreme Court: <https://supreme.justia.com/cases/federal/us/542/466/>

1.	Reference Citation for the Case	Legal Provision	Vote	Majority Opinion by...
2.	Identify the Parties: Petitioner(s): _____ Respondent: _____			
3.	Facts of the Case:			
4.	Question Before the Court:			
5.	Decision of the Court:			
6.	Order of the Court (refer to the Opinion):			
7.	Key Point(s) in the Majority Opinion:			
8.	Key Point(s) in Dissenting Opinion by . . . (Name the Justice):			
9.	Outcome for the Petitioner(s) per the video:			
10.	Respond to a significant point or quote made by one of the speakers in the video:			

Activity: The Guantanamo Cases in Brief

(For use with the video *Habeas Corpus: The Guantanamo Cases*)

Case 3 in Brief: Hamdan v. Rumsfeld

References:

- Supreme Court Opinion: Hamdan v. Rumsfeld (Lesson Resource)
- Oyez: http://www.oyez.org/cases/2000-2009/2005/2005_05_184
- Cornell University Law School: Legal Information Institute: <https://www.law.cornell.edu/supct/pdf/05-184P.ZS>
- JUSTIA US Supreme Court: <https://supreme.justia.com/cases/federal/us/548/557/>

1.	Reference Citation for the Case	Legal Provision	Vote	Majority Opinion by...
2.	Identify the Parties: Petitioner(s): _____ Respondent: _____			
3.	Facts of the Case:			
4.	Question Before the Court:			
5.	Decision of the Court:			
6.	Order of the Court (refer to the Opinion):			
7.	Key Point(s) in the Majority Opinion:			
8.	Key Point(s) in Dissenting Opinion by . . . (Name the Justice):			
9.	Outcome for the Petitioner(s) per the video:			
10.	Respond to a significant point or quote made by one of the speakers in the video:			

Activity: The Guantanamo Cases in Brief

(For use with the video *Habeas Corpus: The Guantanamo Cases*)

Case 4 in Brief: Boumediene v. Bush

References:

- Supreme Court Opinion: Boumediene et al v. Bush (Lesson Resource)
- Oyez: http://www.oyez.org/cases/2000-2009/2007/2007_06_1195
- Cornell University Law School: Legal Information Institute: <https://www.law.cornell.edu/supct/html/06-1195.ZO.html>
- JUSTIA US Supreme Court: <https://supreme.justia.com/cases/federal/us/553/723/>

1.	Reference Citation for the Case	Legal Provision	Vote	Majority Opinion by...
2.	Identify the Parties: Petitioner(s): _____ Respondent: _____			
3.	Facts of the Case:			
4.	Question Before the Court:			
5.	Decision of the Court:			
6.	Order of the Court (refer to the Opinion):			
7.	Key Point(s) in the Majority Opinion:			
8.	Key Point(s) in Dissenting Opinion by . . . (Name the Justice):			
9.	Outcome for the Petitioner(s) per the video:			
10.	Respond to a significant point or quote made by one of the speakers in the video:			

Teacher Materials

- Class-Prep Assignment (Key)
- Teacher's Video Guide and Key
- Activity: Civil Liberties in Wartime (Key)
- Activity: The Guantanamo Cases in Brief (Key)
- A Continuum of Points of View: Instructions

Teacher Key

Class-Prep Assignment

The following assignment provides important background knowledge and context for the first 10 minutes of the video *Habeas Corpus: The Guantanamo Cases*, which will be shown and discussed in class. The remainder of the video (15 minutes) focuses on four Guantanamo cases and will be shown the following day.

INSTRUCTIONS

1. Review the following vocabulary and become familiar with all the terms.

- Abraham Lincoln
- appeal (court-related)
- Article I, Section 9 of the U.S Constitution
- Bill of Rights
- branches of government
- civil liberties
- Civil War
- Commander-in-Chief
- Congress
- constitutional values
- democracy
- emergency powers
- executive branch
- federal courts
- founders
- Franklin Delano Roosevelt
- George W. Bush
- homeland
- individual liberty
- internment cases
- Japanese internment
- judicial branch
- legislative branch
- Magna Carta
- national security
- Pearl Harbor
- Pentagon
- president's duty
- rights and protections guaranteed by the Constitution
- rule of law
- separation of powers
- September 11, 2001
- suspension clause
- terrorist attack

2. There are five tasks with related readings and questions or activities to complete in this assignment.

Task 1: Reflect on the separation of powers in a constitutional democracy.

Task 2: Learn how a national emergency can impact civil liberties and government power.

Task 3: Discover how the government responded to the events of 9/11.

Task 4: Understand the history and importance of habeas corpus.

Task 5: Analyze how executive orders affected civil liberties in two wars.

Bring this assignment sheet and all completed work with you to class.

Class-Prep Assignment

Task 1: Reflect on the separation of powers in a constitutional democracy.

Resources:

- Preamble to the Constitution
<http://www.annenbergclassroom.org/page/preamble>
- *Understanding Democracy: A Hip Pocket Guide*
<http://www.annenbergclassroom.org/page/understanding-democracy-a-hip-pocket-guide>
Review these terms:
 - Separation of Powers (Lesson Resource)
 - Constitutionalism
 - Rule of Law (Lesson Resource)

Questions:

1. Identify the primary purposes of government listed in the Preamble to the Constitution.
establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty
2. Explain why the Founders designed a limited government with the separation and sharing of powers among three branches.
They feared a government with too much power and wanted to make sure that no one branch could assume too much power.
3. Why is it important for all people in a democratic society (including the leaders) to follow the rule of law?
answers will vary
4. Complete this chart.

	Branch	Responsibilities
Congress	Legislative	Make the laws
President	Executive	Execute the laws
Supreme Court	Judicial	Interpret the laws; determine if a law is unconstitutional

Class-Prep Assignment

Task 2: Learn how a national emergency can impact civil liberties and government power.

Resources:

- U.S. Constitution
 - Articles I & II: War Powers Clauses
Annenberg's Guide to the Constitution
<http://www.annenbergclassroom.org/page/a-guide-to-the-united-states-constitution>
- War Powers, Emergency Powers, Executive Power
https://www.law.cornell.edu/wex/war_powers
https://www.law.cornell.edu/wex/emergency_powers
https://www.law.cornell.edu/wex/executive_power
- War Powers
Annenberg Classroom
<http://www.annenbergclassroom.org/term/war-powers>
- State of Emergency
Cornell University Law School, Legal Information Institute
https://www.law.cornell.edu/wex/state_of_emergency

Questions:

1. Identify the war powers for each branch of government represented below:
Congress: **Declare war; appropriate funds to fight a war**
President: **Commander-in-Chief; send military into battle; issue executive orders**
Supreme Court: **Determine if actions by either branch are unconstitutional**
2. What constitutes a state of national emergency?
an event such as a war that jeopardizes the survival of the nation
3. Which branch can declare a national state of emergency? **executive branch, the president**
Which branch can declare a war? **Congress**
4. Discuss the impact that a national emergency can have on government power and civil liberties.
President may issue executive orders that alter government operations, order specific action by individuals, and suspend regular civil rights; the president as commander in chief of the military has considerable latitude in sending American troops into combat.

Teacher Key
Class-Prep Assignment

Task 3: Learn how the government responded to the events of 9/11.

Resources:

- Proclamation 7463 of **September 14, 2001**
Executive Order 13223 of **September 14, 2001**
<http://fas.org/irp/news/2001/09/fr091801.html>
- Authorization for Use of Military Force: **September 18, 2001**
<http://www.gpo.gov/fdsys/pkg/STATUTE-115/pdf/STATUTE-115-Pg224.pdf>
- September 11, 2001: Attack on America
Address to a Joint Session of Congress and the American People **September 20, 2001**
http://avalon.law.yale.edu/sept11/address_001.asp
- President Issues Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism **November 13, 2001**
<http://georgewbush-whitehouse.archives.gov/news/releases/2001/11/print/20011113-27.html>
- Military Commissions Act, **January 3, 2006**
<http://www.gpo.gov/fdsys/pkg/BILLS-109s3930enr/pdf/BILLS-109s3930enr.pdf>
- Statement by the President in His Address to the Nation, **September 11, 2001**
<http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010911-16.html>

Activity:

Each of the above resources describes a specific government action related to 9/11. Identify and organize the actions chronologically in the following chart.

Date	Government Actions	Branch	Purpose
September 11, 2001	Statement by the President in His Address to the Nation	President	Describe the severity of the situation; Inform the nation of plans for protection; announce the search for those responsible and promise they will be brought to justice
September 18, 2001	Public Law 107-40	Congress	To authorize the use of United States armed forces against those responsible for the recent attacks launched against the United States
September 14, 2001	Proclamation 7463	President	“Declaration of National Emergency by Reason of Certain Terrorist Attacks”
September 14, 2001	Executive Order 13223	President	“Ordering the Ready Reserve of the Armed Forces To Active Duty and Delegating Certain Authorities to the Secretary of Defense and the

Teacher Key
Class-Prep Assignment

Date	Government Actions	Branch	Purpose
			Secretary of Transportation”
November 13, 2001	Military Order	President	“Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism”
January 3, 2006	Military Commissions Act	Congress	“To authorize trial by military commission for violations of the law of war, and for other purposes.”

Task 4: Learn about the history and importance of habeas corpus.

Resources:

- Chapter 14: The Right of Habeas Corpus in *Our Constitution* (Lesson Resource)
Source: <http://www.annenbergclassroom.org/page/our-constitution>
- Article I, Section 9, Clauses 1-4 (Lesson Resource)
Source: <http://www.annenbergclassroom.org/page/our-constitution>
- Findlaw: Writ of Habeas Corpus
<http://criminal.findlaw.com/criminal-procedure/writ-of-habeas-corpus.html>
- National Archives: Search “habeas corpus”
<http://www.archives.gov/>
- Glossary of Legal Terms
<http://www.scotusblog.com/reference/educational-resources/glossary-of-legal-terms/>

Questions:

1. Identify the origin and meaning of “*habeas corpus*.”
 - Language: **Latin**
 - Literal meaning: **“you should have the body”**
 - Source of the right: **English common law**
 - Earliest appearance (document): **Magna Carta 1215**
2. Why was the right to habeas corpus so important to the Founders?
Their history with England had taught them to fear the unchecked power of the executive.
3. Does the Constitution grant the right of habeas corpus or guarantee its protection? Explain.
It guarantees its protection by ensuring that it can only be suspended “when in Cases of Rebellion or Invasion the public Safety may require it.”
4. What does a habeas corpus petition do?

Teacher Key
Class-Prep Assignment

It commands the government to show cause (provide a legal reason) for holding an individual in detention.

5. Explain the difference between the right to habeas corpus and a right in the Bill of Rights. Habeas corpus is not an amendment. The Bill of Rights contains 10 amendments. The habeas right is found in the main part of the Constitution. It is a right that the Founders wanted Congress to be responsible for protecting.
6. Cite the Constitutional reference for habeas corpus.
Article I, Section 9, Clause 2
Quote the full clause.
“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.”
7. Habeas corpus is found in the section of the Constitution that explains the limits and powers of which branch of government?
It is mentioned in the section of the Constitution that identifies the powers and limits of Congress
8. Cite the conditions under which the Constitution allows for the suspension of *habeas corpus*.
“when in Cases of Rebellion or Invasion the public Safety may require it.”
Identify the special name given to the phrase. suspension clause
9. Which branch of government has the Constitutional authority to suspend *habeas corpus*?
Explain. Congress, Article 1, Section 9 identifies the limits and powers of Congress.

Task 5: Learn how executive orders affected civil liberties in two wars.

Resources:

- Remarks of Chief Justice William H. Rehnquist (Lesson Resource)
100th Anniversary Celebration Of the Norfolk and Portsmouth Bar Association
Norfolk, Virginia, May 3, 2000
http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_05-03-00
- A proclamation on the suspension of habeas corpus, 1862
<http://www.gilderlehrman.org/history-by-era/american-civil-war/resources/proclamation-suspension-habeas-corpus-1862>
- Chapter 14: The Right of Habeas Corpus in *Our Constitution* (Lesson Resource)
Source: <http://www.annenbergclassroom.org/page/our-constitution>
- Executive Order 9066
Resulting in the Relocation of Japanese (1942)
<http://www.ourdocuments.gov/doc.php?flash=true&doc=74>

Teacher Key

Class-Prep Assignment

- A quote from the Epilogue written by former Supreme Justice Tom C. Clark for the book *Executive Order 9066: The Internment of 110,000 Japanese Americans*, 1992. Justice Clark represented the Department of Justice in the “relocation.”

“The truth is – as this deplorable experience proves – that constitutions and laws are not sufficient of themselves; they must be given life through implementation and strict enforcement. Despite the unequivocal language of the Constitution of the United States that the writ of habeas corpus shall not be suspended, and despite the Fifth Amendment’s command that no person shall be deprived of life, liberty, or property without due process of law, both of these constitutional safeguards were denied by military action under Executive Order 9066.”

Questions:

1. Which two wars did Chief Justice Rehnquist discuss during his address to the bar association?
Civil War, World War II
2. In each of the two wars, the president issued executive orders that denied civil liberties. Provide key information for each war by completing the following chart.

Name the war	Civil War	World War II
Identify the president. (full name)	Abraham Lincoln	Franklin Delano Roosevelt
Describe the severity of the threat.	survival of the nation	survival of the nation
Identify the precipitating event.	Washington, D.C., was surrounded by Confederate sympathizers before Union troops were in position to protect the capital city.	Surprise attack on Pearl Harbor by the Japanese
Describe the president’s order that denied civil liberties	suspension of habeas corpus	resulted in the relocation and detention of Japanese, many American citizens
Which rights were sacrificed for the sake of national security?	right to habeas corpus	habeas corpus, due process
Which branch made the decision to sacrifice the rights of some to save the nation?	executive branch	executive branch

Think About It

According to Chief Justice Rehnquist, “The courts, for their part, have largely reserved the decisions favoring civil liberties in wartime to be handed down after the war was over.”

He also makes this observation:

“While we would not want to subscribe to the full sweep of the Latin maxim – *Inter Arma Silent Leges* – in time of war the laws are silent, perhaps we can accept the proposition that though the laws are not silent in wartime, they speak with a muted voice.”

Teacher Key

Class-Prep Assignment

Chief Justice Rehnquist delivered his remarks to the bar association in 2000. The war on terror was announced in 2001 and continues to this day.

When it comes to civil liberty matters, how do you think the courts should respond during the war on terror?

Teacher's Video Guide & Key
Habeas Corpus: The Guantanamo Cases

(Time: 25 minutes)

Overview

The surprise terrorist attacks on September 11, 2001, stunned the nation. As commander-in-chief, President George W. Bush responded quickly, but soon all three branches of government would be embroiled in the struggle to balance national security with the protection of individual liberties in the midst of the war on terror.

On the authority of President Bush and with the support of Congress, suspected terrorists from around the world were rounded up, labeled as enemy combatants and imprisoned on the U.S. naval base in Guantanamo Bay, Cuba. There they would be held indefinitely and their rights restricted – no habeas corpus and no access to the judiciary.

Legal questions arose about the actions of the president and the legislation passed by Congress during this period. Only the Supreme Court could determine if the Constitution had been violated. The battle for protecting individual rights moved to the Court.

Four Supreme Court cases known as the Guantanamo cases are indicative of how the Court, the president and even Congress fought to balance national security and civil liberties during the war on terror, a war that continues to this day. At the heart of each case was the constitutional right of habeas corpus, the right to have one's detention or imprisonment reviewed in court. Each of these cases is discussed in the video.

Speakers

- David Cruz: University of Southern California Gould School of Law
- Kermit Roosevelt: University of Pennsylvania Law School
- David Rudovsky: University of Pennsylvania Law School
- Madeline Morris: Duke University School of Law
- Anthony Kennedy: Associate Justice of the U.S. Supreme Court
- Stephen G. Breyer: Associate Justice of the U.S. Supreme Court
- Neal Katyal: Georgetown Law School
- Geoffrey Stone: University of Chicago Law School

Background Knowledge

In order to understand the discussion and content, viewers should have advance knowledge and understanding about the following topics:

- three branches of government and the powers of each
- separation of powers
- checks and balances
- right of habeas corpus
- September 11, 2001
- Civil War and Lincoln
- Japanese internment and Roosevelt
- national security v. individual liberties
- rule of law
- executive power in wartime
- rights under the Constitution
- war on terror
- due process
- reading Supreme Court opinions

Teacher’s Video Guide & Key
Habeas Corpus: The Guantanamo Cases

(Time: 25 minutes)

Preparation for Viewing and Study

1. Students complete the Class-Prep Assignment before watching the video. It covers the content understandings needed for the first 10 minutes of the video.
2. Provide each student with a video transcript. The transcript is formatted in parts to facilitate the study and thoughtful reflection of the content in each part. The divisions and their titles do not appear in the video.
3. Students review the words and phrases listed before each day’s showing.

Schedule

1. Plan to show the video in two sessions. The following stopping points are recommended in the video transcript at points where the main subject changes.

Part 1: September 11, 2001 (Start – 03:08)
Part 2: The Right of Habeas Corpus (03:08 – 07:21)
Part 3: Civil Liberties in (07:21 – 09:49) } Session 1 showing

Part 4: The Guantanamo Cases (09:49 – 22:41)
Part 5: Conclusion (22:41 – 24:58) } Session 2 showing

2. Begin each session with review and discussion that prepare students for the next showing.

Day 1 Showing: Start - 09:49

Words and Phrases

- Abraham Lincoln
- appeal
- Article I, Section 9 of the U.S Constitution
- Bill of Rights
- branches of government
- civil liberties
- Civil War
- Commander-in-Chief
- Congress
- constitutional values
- democracy
- emergency powers
- Ex parte Endo
- executive branch
- federal courts
- founders
- Franklin Delano Roosevelt
- Hirabayashi v. U.S.
- homeland
- individual liberty
- internment cases
- Japanese internment
- judicial branch
- Judiciary Act of 1789
- Korematsu v. U.S.
- legislative branch
- Magna Carta
- national security
- Pearl Harbor
- Pentagon
- president’s duty
- rights and protections guaranteed by the Constitution
- rule of law
- separation of powers
- September 11, 2001
- suspension clause
- terrorist attack
- George W. Bush

Teacher's Video Guide & Key
Habeas Corpus: The Guantanamo Cases

(Time: 25 minutes)

Part 1 Questions: Nine-Eleven

(Time: Start – 3:07)

1. Explain this quote: “...history shows that when the nation is at war and feeling as though its security is at risk – when people are afraid – the balance between national security and rights guaranteed by the Constitution can falter.”

2. Describe the events on September 11, 2001.

answers will vary

Facts: (who, what, where, when, why, how)

Impact on the Nation: created fear about what would happen next

3. Identify these speakers:

- Stephen Breyer: Associate Justice of the U.S. Supreme Court
- Anthony Kennedy: Associate Justice of the U.S. Supreme Court

4. Reflect on this quote by Anthony Kennedy:

“The Constitution is at its most vulnerable when we’re in a crisis.”

How did the events of 9/11 make the Constitution vulnerable?

answers will vary

5. Are all Americans vulnerable if the Constitution is vulnerable? Explain.

answers will vary

6. Which constitutional values are worth fighting for?

How are they described in the video?

“They include the fundamental rights and protections guaranteed by the Constitution”

7. Identify the two primary responsibilities of a constitutional government that are particularly difficult to balance in a time of war.

protect our national security; protect our civil rights

8. Describe the political fight that ensued after 9/11.

three branches of the federal government – the executive, the legislative and the judiciary – fought over the balance between national security and civil liberties

9. Which branch of government is ultimately responsible for protecting the constitutional rights of the individual? judicial branch, Supreme Court

10. How and why did the Supreme Court get involved in the political fight?

Four cases having to do with the constitutional protection of the fundamental right of habeas corpus were heard by the Court. The Court tried to balance the president’s duty to protect the nation with constitutional protections of fundamental rights. When the political branches don’t necessarily protect people’s rights at time of war, the duty falls to the courts.

Teacher's Video Guide & Key
Habeas Corpus: The Guantanamo Cases

(Time: 25 minutes)

Part 2 Questions: The Right of Habeas Corpus

(Time: 3:07-7:20)

1. Explain the significance of including the right to *habeas corpus* in the original Constitution and not making it a part of the Bill of Rights.
 - a. Purpose of the Bill of Rights: **Amendments were added later to ensure the protection of specific individual rights**
 - b. Purpose of the original Constitution: **Define the structure of government.**
 - c. Significance of the location of the habeas right.
"it's really more about the structure of government so the point of habeas is to reinforce the separation of powers by making sure that all three branches cooperate in order to deny an individual liberty."

2. Reference the location for habeas corpus in the Constitution.
Article 1, Section 9
Identify and quote the relevant clause: **Clause 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."
When can habeas corpus be suspended? Quote the phrase.
when national security is at risk; "in Cases of Rebellion or Invasion the public Safety may require it."
What is the special name given this phrase?
the suspension clause

3. Explain the significance of the following:
 - **Judiciary Act of 1789**
It was "the very first law passed by the very first Congress gave the courts the power to hear habeas petitions." It made the judiciary responsible protecting the right of habeas corpus.
 - **Magna Carta 1215**
The right to habeas corpus has a long history that goes back to the Magna Carta.

4. Before the Constitution, how did habeas corpus serve as a check on executive power?
It prevented a king from rounding up enemies without any accountability and locking them away forever. No hearing or trial.

5. Who is the final arbiter of the Constitution?
The Supreme Court

6. Explain the metaphor of the three light switches.
The American founders said we need to check the abuse of power by dividing power among the three branches. And the simplest way to think about it, as almost like a series of three light switches, and in order to deprive someone of their rights, our founders said all three branches have to agree.

7. Which branch of the government was especially distrusted by the founders?
Executive branch

Teacher's Video Guide & Key
Habeas Corpus: The Guantanamo Cases

(Time: 25 minutes)

Explain: From their past experience with a King, the founders knew that an executive with too much power could simply round up its enemies without any accountability and lock them away forever

8. What protection does the Constitution guarantee those who fear too much executive power?
The writ of habeas corpus.
9. The Constitution protects the right to habeas corpus, but which branch is ultimately responsible for protecting the right?
the judicial branch; Even after the Constitution was ratified, the framers wanted to spell out, in writing, that the habeas right should be protected by the judiciary. So the very first law passed by the very first Congress gave the courts the power to hear habeas petitions.

Part 3: Civil Liberties in Wartime
(Time: 07:21 – 09:49)

Activity: Civil Liberties in Three Wars

Students may use information from the video and work on the Class-Prep Assignment to complete the activity.

(See the related Teacher Key for assistance with answers.)

Homework Assignment:

Activity: The Guantanamo Cases in Brief

1. Students review the vocabulary for Day 2 and become familiar with each of the four cases that will be discussed in the video on Day 2.
2. At minimum, students complete rows 1-3 in each **Case in Brief** chart before the Day 2 showing. Internet resources are identified to assist with the task. After watching the video, you will have a chance to complete the charts.

Teacher's Video Guide & Key
Habeas Corpus: The Guantanamo Cases
(Time: 25 minutes)

Session 2 Showing: 09:49 – 24:52

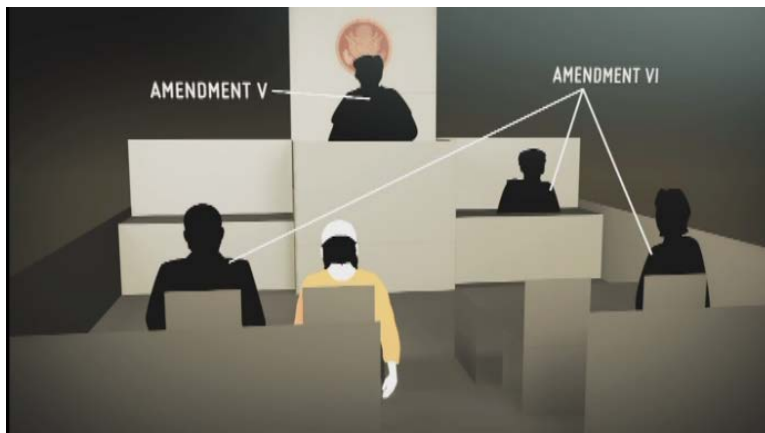
Words and Phrases

- Afghanistan
- alien
- appeal
- Boumediene v. Bush
- checks and balances
- civil rights guaranteed by the Constitution
- civilian courts
- Congress
- conventional war
- detainee
- due process rights
- enemy combatant
- executive branch
- George W. Bush
- Guantanamo Bay, Cuba
- habeas corpus petition
- Hamdan v. Rumsfeld
- Hamdi v. Rumsfeld
- internment cases
- judiciary
- jurisdiction
- justice
- majority opinion
- military commission
- Military Commissions Act of 2006
- military force
- military justice
- national security interests
- Osama bin Laden
- prosecute
- Rasul v. Bush
- resolution authorizing the use of military force
- separation of powers
- sovereign territory
- statute
- terrorist
- The Military Commissions Act of 2006
- tribunals
- U.S citizen
- U.S. naval base
- unconventional war
- Uniform Code of Military Justice
- violations of the law of war
- war on terror
- wartime
- writ of habeas corpus

Part 4: The Guantanamo Cases
(Time: 09:49 – 22:41)

Part 5: Conclusion
(Time: 09:49 – 24:52)

1. Describe the following screen shot and explain what it portrays.



The screen shot portrays a detainee sitting in front of a judge in a courtroom. He has a lawyer on his side. On the opposite side sits the lawyer for the government. The Amendments V and VI guarantee due process rights

Teacher's Video Guide & Key
Habeas Corpus: The Guantanamo Cases

(Time: 25 minutes)

When the detainees are given the right of habeas corpus, they enter the U.S legal system. Once in the system, the Constitution guarantees them other legal rights. What are those rights? (be specific)
They are due process rights that include right to an impartial judge; right to a fair trial; right to a lawyer; right to respond to witnesses; right to hear the charges against you; right to rebut the charges against you

2. Which case is recognized by scholars and news outlets as “one of the most important wartime decisions of the last 50 years.” *Boumediene v. Bush*
Explain the significance of this case.

The Court had to decide whether Congress and the president can write a new law denying detainees their habeas corpus rights, or is habeas corpus a constitutional guarantee even for enemy combatants who are not U.S. citizens held at Guantanamo Bay and the Court says yes. Yes, there is a constitutional right. The procedures that the executive branch and Congress have set up are not adequate, so these people must be given the right to petition for habeas corpus. Non-U.S. citizens held in Guantanamo Bay have habeas corpus rights.

3. Students refer to the video to complete each Case in Brief chart in the Guantanamo Cases activity.

Think About It:

Consider using this question for A Continuum of Points of View:

In the war on terror, should foreigners (noncitizens) with allegiances to other countries be given the right to go into a U.S. federal court to challenge their imprisonment? Should it make a difference if they are captured abroad or captured in the U.S.?

Teacher Key

Activity: Civil Liberties in Three Wars

(For use with the video *Habeas Corpus: The Guantanamo Cases*)

Instructions:

1. Complete the following chart with information about the three wars covered in the video.
2. Glean as much information as you can from the video and the transcript before consulting additional online resources.
3. Include a list of any additional online resources used and provide a link to each source.

“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” (U.S. Constitution, Article 1, Section 9, Clause 2)

Ponder this question as you complete the chart:

“Can strong war powers, which the national government may need to defeat a fearsome foreign enemy, be reconciled with the immutable constitutional rights of individuals? Or must the liberty of some persons be sacrificed temporarily to the exigencies of national survival?” (*The Pursuit of Justice*, pg. 93)

Overview for Three Wars			
The War	Civil War	World War II	War on Terror
Dates (Start-End)	1861-1865	1939-1945 Also identify start of U.S. involvement: 1941-1945	2001-present
Event that started the war	Confederates attacked Union soldiers at Fort Sumter, South Carolina	September 1939 when Britain and France declared war on Germany following Germany's invasion of Poland.	September 11, 2001 - present
Identify the sides	Northern states v. Southern states Union	nations v. nations Axis nations v. the Allied nations	Answers will vary
Conventional or Unconventional war	conventional	conventional	unconventional; terrorists
Describe the crisis	Washington, D.C., was surrounded by Confederate sympathizers before Union troops were in position to protect the capital city.	Surprise attack on Pearl Harbor by the Japanese	Answers will vary
Explain the significance of the threat.	The nation's capital needed to be saved. If the capital fell, the nation would come to an end	The attack brought the U.S. into World War II.	Answers will vary
What was/is at stake?	survival of the nation	survival of the U.S.; freedom	the nation; freedom; our way of life

Teacher Key

Activity: Civil Liberties in Three Wars

(For use with the video *Habeas Corpus: The Guantanamo Cases*)

Overview for Three Wars			
President			
President (full name)	Abraham Lincoln	Franklin Delano Roosevelt	President George W. Bush
How did the president use his emergency powers?	The president suspended habeas corpus because Congress was not in session	Roosevelt issued executive order 9066 on February 19, 1942.	<ol style="list-style-type: none"> 1. Bush a Proclamation 7463 on 9/14 that declared a state of emergency and applied it retroactively to 9/11. 2. Issued Executive Order 13223 on September 14 immediately after the proclamation re: "Ordering the Ready Reserve of the Armed Forces To Active Duty and Delegating Certain Authorities to the Secretary of Defense and the Secretary of Transportation" 3. Issued a Military Order on November 13, 2001 re: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism
What were the consequences of the president's orders?	The nation's capital was saved and the nation saved.	The executive order resulted in the military rounding up 120,000 people of Japanese descent, most of them American citizens, and putting in internment camps. There were no hearings. No chance to appeal being locked up because of their race.	<p>Executive Order: Preparations for "the continuing and immediate threat of further attacks on the United States" began immediately</p> <p>Military Order: suspected terrorists around the world were rounded up, sent to Guantanamo Bay prison. The president wanted suspected terrorists labeled "enemy combatants and given limited rights--no habeas corpus, no access to the judiciary.</p>
How was the action justified?	It was a rebellion and Congress was not in session so Lincoln needed to save the nation.	There was fear of a Japanese attack on the West Coast; fear the Japanese	"I have determined that an extraordinary emergency exists for

Teacher Key

Activity: Civil Liberties in Three Wars

(For use with the video *Habeas Corpus: The Guantanamo Cases*)

Overview for Three Wars			
		might be disloyal.	national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.”-- President’s Military Order
Who challenged the presidential actions?	James B. Merryman, a Confederate recruiter in Maryland, was imprisoned without trial as a threat to national security	Refer to the cases in the video Korematsu was an American citizen of Japanese descent Hirabayashi was an American citizen of Japanese Ex parte Endo (1944): Mitsuye Endo was an American citizen of Japanese descent	Refer to the cases in the video Case name: Hamdi v. Rumsfeld (2004) Petitioner(s): Yaser Hamdi, a U.S. citizen arrested in Afghanistan Case name: Rasul v. Bush (2004) Petitioner(s): Four British and Australian citizens Case name: Hamdan v. Rumsfeld (2006) Petitioner(s): Salim Ahmed Hamdan is a Yemeni national and Osama bin Laden’s “body guard and personal driver” Case name: Boumediene et al v. Bush (2008) Petitioner(s): Boumediene et al a group of aliens detained at Guantanamo after being captured in Afghanistan
Where did this challenge take place?	in the Supreme Court	in the Supreme Court	in the Supreme Court
Congress			
Actions by the Congress	At the time, Congress was not involved because it was not in session In 1863, Congress retroactively authorized the suspension of habeas corpus.	Congress declared war on December 8, 1941, the day after the attack. Congress supported the President	Authorization for use of military force was passed Congress supported the actions of President Bush
Supreme Court			
Did the Supreme Court uphold	Chief Justice Roger B. Taney issued a writ of	yes	the war is not over

Teacher Key

Activity: Civil Liberties in Three Wars

(For use with the video *Habeas Corpus: The Guantanamo Cases*)

Overview for Three Wars			
the President's decision during the war?	habeas corpus for Merryman, but Lincoln ignored it. Taney then wrote an opinion calling Lincoln's action unconstitutional. Lincoln ignored it. The Court cannot enforce the law.		
Cases heard by the Supreme Court	"All during the Civil War the courts were unable or unwilling to ride herd on the Lincoln administration's policies which seriously interfered with civil liberty. Only after the end of the war was a decision handed down which upheld that liberty." (remarks by Chief Justice Rehnquist)	Internment Cases Korematsu v. US (1944) Hirabayashi v. US (1943) Ex parte Endo (1944)	Guantanamo Cases Case 1: Hamdi v. Rumsfeld (2004) Case 2: Rashul v. Bush (2004) Case 3: Hamdan v. Rumsfeld (2006) Case 4: Boumediene et al v. Bush (2008)

Additional Resources Used:

- 1.
- 2.

Activity: The Guantanamo Cases in Brief

(For use with the video *Habeas Corpus: The Guantanamo Cases*)

Instructions:

1. Research to familiarize yourself with each of the following Guantanamo cases before watching the remaining 15 minutes of the video.

Case 1: Hamdi v. Rumsfeld

Case 2: Rasul v. Bush

Case 3: Hamdan v. Rumsfeld

Case 4: Boumediene v. Bush

Research reminders: Always compare secondary source summaries to the primary source to ensure that the facts are accurately represented. Remember to read footnotes.

2. Students should become familiar with the following vocabulary.

- Afghanistan
- alien
- appeal
- Boumediene v. Bush
- checks and balances
- civil rights guaranteed by the Constitution
- civilian courts
- Congress
- conventional war
- detainee
- due process rights
- enemy combatant
- executive branch
- Guantanamo Bay, Cuba
- habeas corpus petition
- Hamdan v. Rumsfeld
- Hamdi v. Rumsfeld
- held
- internment cases
- judiciary
- jurisdiction
- justice
- military commission
- Military Commissions Act of 2006
- military force
- military justice
- military tribunal
- national security interests
- Opinion
- Osama bin Laden
- parties
- petitioner
- precedent
- President George W. Bush
- prosecute
- Rasul v. Bush
- remanded
- resolution authorizing the use of military force
- respondent
- military force statute
- reversed
- separation of powers
- sovereign territory
- statute
- terrorist
- The Military Commissions Act of 2006
- U.S citizen
- U.S. naval base
- unconventional war
- Uniform Code of Military Justice
- vacated
- violations of the law of war
- war on terror
- wartime
- writ of habeas corpus

Teacher Key

Activity: The Guantanamo Cases in Brief

(For use with the video *Habeas Corpus: The Guantanamo Cases*)

3. At minimum, students complete rows 1-3 in each of the following **Case in Brief** charts before class. Internet resources are identified to assist with the task. After the video they will complete all charts and use information from the video and transcript.

Activity: The Guantanamo Cases in Brief
 (For use with the video *Habeas Corpus: The Guantanamo Cases*)

Case 1 in Brief: Hamdi v. Rumsfeld

References:

- Hamdi v. Rumsfeld Opinion of the Court (Lesson Resource)
- Oyez: http://www.oyez.org/cases/2000-2009/2003/2003_03_6696/
- Cornell University Law School: Legal Information Institute: <http://www.law.cornell.edu/supct/html/03-6696.ZS.html>
- JUSTIA US Supreme Court: <https://supreme.justia.com/cases/federal/us/542/507/>

1.	Reference Citation for the Case Hamdi v. Rumsfeld 542 U.S. 507 (2004)	Legal Provision due process	Vote 6:3 for Hamdi	Majority Opinion by... Justice Sandra Day O'Connor
2.	Identify the Parties: Petitioner(s): Yaser Esam Hamdi is an American citizen Respondent: Rumsfeld is Donald Rumsfeld, the Secretary of Defense			
3.	Facts of the Case: <p>"In the fall of 2001, Yaser Hamdi, an American citizen, was arrested by the United States military in Afghanistan. He was accused of fighting for the Taliban against the U.S., declared an "enemy combatant," and transferred to a military prison in Virginia. Frank Dunham, Jr., a defense attorney in Virginia, filed a habeas corpus petition in federal district court there, first on his own and then for Hamdi's father, in an attempt to have Hamdi's detention declared unconstitutional. He argued that the government had violated Hamdi's Fifth Amendment right to Due Process by holding him indefinitely and not giving him access to an attorney or a trial. The government countered that the Executive Branch had the right, during wartime, to declare people who fight against the United States "enemy combatants" and thus restrict their access to the court system." (Oyez)</p> <p>"The Government contends that Hamdi is an enemy combatant,. and that this status justifies holding him in the United States indefinitely. without formal charges or proceedings.unless and until it makes the determination that access to counsel or further process is warranted." (Opinion)</p> <p>The district court ruled for Hamdi, telling the government to release him. On appeal, a Fourth Circuit Court of Appeals panel reversed, finding that the separation of powers required federal courts to practice restraint during wartime because "the executive and legislative branches are organized to supervise the conduct of overseas conflict in a way that the judiciary simply is not." The panel therefore found that it should defer to the Executive Branch's "enemy combatant" determination." (Oyez)</p>			
4.	Question Before the Court: Is labeling a U.S. citizen an enemy combatant enough to hold him and limit his due process rights during wartime?			
5.	Decision of the Court: No, U.S. citizens cannot be deprived of their rights to due process.			
6.	Order of the Court: The judgment is vacated, and the case is remanded. (from Opinion)			
7.	Key Point(s) in the Majority Opinion: "We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker." - Justice Sandra Day O'Connor			

Teacher Key

Activity: The Guantanamo Cases in Brief

(For use with the video *Habeas Corpus: The Guantanamo Cases*)

8.	Key Point(s) in Dissenting Opinion by . . . (Name the Justice): Antonin Scalia, Clarence Thomas, Concurrence and Dissent in Part--David H. Souter
9.	Outcome for the Petitioner(s) per the video: charges dropped
10.	Respond to a significant point or quote made by one of the speakers in the video:

Case 2 in Brief: Rasul v. Bush

References:

- Supreme Court Opinion: Rasul v. Bush (Lesson Resource)
- Oyez: http://www.oyez.org/cases/2000-2009/2003/2003_03_334
- Cornell University Law School: Legal Information Institute: <http://www.law.cornell.edu/supct/html/03-334.ZS.html>
- JUSTIA US Supreme Court: <https://supreme.justia.com/cases/federal/us/542/466/>

1.	Reference Citation for the Case Rasul v. Bush 542 U.S. 466 (2004)	Legal Provision habeas corpus	Vote 6:3 for Rasul	Majority Opinion by... Justice John Paul Stevens
2.	Identify the Parties: Petitioner(s): "Petitioners in these cases are 2 Australian citizens and 12 Kuwaiti citizens who were captured abroad during hostilities between the United States and the Taliban. ¹ " (Opinion) (Footnote 1 in Opinion) "When we granted certiorari, the petitioners also included two British citizens, Shafiq Rasul and Asif Iqbal. These petitioners have since been released from custody. ¹ " --- Respondent: Bush is the George W. Bush, President of the United States			
3.	Facts of the Case: (Oyez) Four British and Australian citizens were captured by the American military in Pakistan or Afghanistan during the United States' War on Terror. The four men were transported to the American military base in Guantanamo Bay, Cuba. When their families learned of the arrests, they filed suit in federal district court seeking a writ of habeas corpus that would declare the detention unconstitutional. They claimed that the government's decision to deny the men access to attorneys and to hold them indefinitely without access to a court violated the Fifth Amendment's Due Process clause. The government countered that the federal courts had no jurisdiction to hear the case because the prisoners were not American citizens and were being held in territory over which the United States did not have sovereignty (the Guantanamo Bay base was leased from Cuba indefinitely in 1903, and Cuba retains "ultimate sovereignty"). The district court agreed with the government, dismissing the case because it found that it did not have jurisdiction. The U.S. Court of Appeals for the District of Columbia affirmed the district court's decision.			
4.	Question Before the Court: Does the habeas law apply to non-U.S. citizens at Guantanamo Bay?			
5.	Decision of the Court: Yes, the habeas law applies to non-U.S. citizens.			
6.	Order of the Court (refer to the Opinion):			
7.	Key Point(s) in the Majority Opinion: (from Oyez) ". . . Court found that the degree of control exercised by the United States over the Guantanamo Bay base was sufficient to trigger the application of habeas corpus rights. . . . using a list of precedents stretching back to mid-17th Century English Common Law cases, found that the			

Teacher Key

Activity: The Guantanamo Cases in Brief

(For use with the video *Habeas Corpus: The Guantanamo Cases*)

	right to habeas corpus can be exercised in "all ... dominions under the sovereign's control." "the right to habeas corpus is not dependent on citizenship status"
8.	Key Point(s) in Dissenting Opinion by . . . (Name the Justice): Antonin Scalia
9.	Outcome for the Petitioner(s) per the video: charges dropped
10.	Respond to a significant point or quote made by one of the speakers in the video:

Case 3 in Brief: Hamdan v. Rumsfeld

References:

- Supreme Court Opinion: Hamdan v. Rumsfeld (Lesson Resource)
- Oyez: http://www.oyez.org/cases/2000-2009/2005/2005_05_184
- Cornell University Law School: Legal Information Institute: <https://www.law.cornell.edu/supct/pdf/05-184P.ZS>
- JUSTIA US Supreme Court: <https://supreme.justia.com/cases/federal/us/548/557/>

1.	Reference Citation for the Case	Legal Provision	Vote	Majority Opinion by...
	Hamdan v. Rumsfeld 548 U.S. 557 (2006)	Uniform Code of Military Justice	5:3 for Hamdan	Justice John Paul Stevens
2.	Identify the Parties: Petitioner(s): Hamdan is Osama bin Laden’s former chauffeur. Respondent: Rumsfeld is Donald Rumsfeld, the Secretary of Defense			
3.	Facts of the Case: (from Oyez) “Salim Ahmed Hamdan, Osama bin Laden's former chauffeur, was captured by Afghani forces and imprisoned by the U.S. military in Guantanamo Bay. He filed a petition for a writ of habeas corpus in federal district court to challenge his detention. Before the district court ruled on the petition, he received a hearing from a military tribunal, which designated him an enemy combatant. A few months later, the district court granted Hamdan's habeas petition, ruling that he must first be given a hearing to determine whether he was a prisoner of war under the Geneva Convention before he could be tried by a military commission. The Circuit Court of Appeals for the District of Columbia reversed the decision, however, finding that the Geneva Convention could not be enforced in federal court and that the establishment of military tribunals had been authorized by Congress and was therefore not unconstitutional.”			
4.	Question Before the Court: Do the military commissions violate the law?			
5.	Decision of the Court: Yes, military commissions violate the law.			
6.	Order of the Court: The judgment is reversed, and the case is remanded. (from Bench Opinion)			
7.	Key Point(s) in the Majority Opinion: (from Oyez) “. . .neither an act of Congress nor the inherent powers of the Executive laid out in the Constitution expressly authorized the sort of military commission at issue in this case. Absent that express authorization, the commission had to comply with the ordinary laws of the United States and the laws of war. The Geneva Convention, as a part of the ordinary laws of war, could therefore be enforced by the Supreme Court, along with the statutory Uniform Code of Military Justice.”			

Teacher Key

Activity: The Guantanamo Cases in Brief

(For use with the video *Habeas Corpus: The Guantanamo Cases*)

8.	Key Point(s) in Dissenting Opinion by . . . (Name the Justice): Samuel A. Alito, Jr., Clarence Thomas, Antonin Scalia
9.	Outcome for the Petitioner(s) per the video: conviction overturned
10.	Respond to a significant point or quote made by one of the speakers in the video:

Case 4 in Brief: Boumediene v. Bush

References:

- Supreme Court Opinion: Boumediene et al v. Bush (Lesson Resource)
- Oyez: http://www.oyez.org/cases/2000-2009/2007/2007_06_1195
- Cornell University Law School: Legal Information Institute: <https://www.law.cornell.edu/supct/html/06-1195.ZO.html>
- JUSTIA US Supreme Court: <https://supreme.justia.com/cases/federal/us/553/723/>

1.	Reference Citation for the Case Boumediene v. Bush 553 U.S. 723 (2008)	Legal Provision Suspension of the Writ of Habeas Corpus	Vote 5: 4 for Boumediene	Majority Opinion by... Justice Anthony M. Kennedy
2.	Identify the Parties: Petitioner(s): Boumediene is an Algerian native; Respondent: Bush is George W. Bush, the President			
3.	<p>Facts of the Case: (from Oyez)</p> <p>"In 2002 Lakhdar Boumediene and five other Algerian natives were seized by Bosnian police when U.S. intelligence officers suspected their involvement in a plot to attack the U.S. embassy there. The U.S. government classified the men as enemy combatants in the war on terror and detained them at the Guantanamo Bay Naval Base, which is located on land that the U.S. leases from Cuba. Boumediene filed a petition for a writ of habeas corpus, alleging violations of the Constitution's Due Process Clause, various statutes and treaties, the common law, and international law. The District Court judge granted the government's motion to have all of the claims dismissed on the ground that Boumediene, as an alien detained at an overseas military base, had no right to a habeas petition. The U.S. Court of Appeals for the D.C. Circuit affirmed the dismissal but the Supreme Court reversed in <i>Rasul v. Bush</i>, which held that the habeas statute extends to non-citizen detainees at Guantanamo.</p> <p>In 2006, Congress passed the Military Commissions Act of 2006 (MCA). The Act eliminates federal courts' jurisdiction to hear habeas applications from detainees who have been designated (according to procedures established in the Detainee Treatment Act of 2005) as enemy combatants. When the case was appealed to the D.C. Circuit for the second time, the detainees argued that the MCA did not apply to their petitions, and that if it did, it was unconstitutional under the Suspension Clause. The Suspension Clause reads: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."</p> <p>The D.C. Circuit ruled in favor of the government on both points. It cited language in the MCA applying the law to "all cases, without exception" that pertain to aspects of detention. One of the purposes of the MCA, according to the Circuit Court, was to overrule the Supreme Court's opinion in <i>Hamdan v. Rumsfeld</i>, which had allowed petitions like Boumediene's to go forward. The D.C. Circuit held that the Suspension Clause only protects the writ of habeas corpus as it existed in 1789, and that the writ would not have been understood in 1789 to apply to an overseas military base leased from a foreign government. Constitutional rights do not apply to aliens outside of the United States, the court held, and the leased military base in Cuba does not qualify as inside the geographic borders of the U.S. In a rare reversal, the Supreme Court granted certiorari</p>			

Teacher Key

Activity: The Guantanamo Cases in Brief

(For use with the video *Habeas Corpus: The Guantanamo Cases*)

	after initially denying review three months earlier.”
4.	Question Before the Court: Is habeas a constitutional right for detainees?
5.	Decision of the Court: Yes, habeas is a constitutional right for detainees.
6.	Order of the Court (refer to the Opinion) : reversed and remanded
7.	Key Point(s) in the Majority Opinion: (from Oyez) “ . . . if the MCA is considered valid its legislative history requires that the detainees' cases be dismissed. However, the Court went on to state that because the procedures laid out in the Detainee Treatment Act are not adequate substitutes for the habeas writ, the MCA operates as an unconstitutional suspension of that writ. The detainees were not barred from seeking habeas or invoking the Suspension Clause merely because they had been designated as enemy combatants or held at Guantanamo Bay.”
8.	Key Point(s) in Dissenting Opinion by . . . (Name the Justice): Antonin Scalia, John G. Roberts, Jr.
9.	Outcome for the Petitioner(s) per the video: charges dropped
10.	Respond to a significant point or quote made by one of the speakers in the video:

A CONTINUUM OF POINTS OF VIEW

Instructions

Purpose: A Continuum of Points of View is an effective activity for getting students to discuss their opinions, beliefs, and values about controversial issues. It helps them recognize that a wide range of perspectives may be found on different issues, allows them to learn what others think, and gives them an opportunity to reflect on or change their own position.

Description: The continuum activity involves the physical movement of students as they organize themselves at different points along a continuum that ranges from “strongly disagree” to “strongly agree.” Students select a physical position on the continuum that represents their position on the issue.

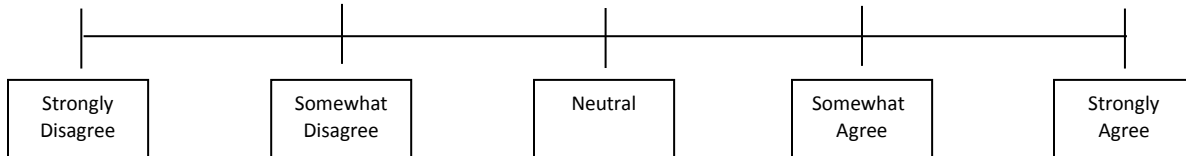
Procedure:

1. Identify a pool of controversial questions or statements related to an area of study. Questions or issues raised during a lesson could be revisited in this way.

Examples of controversial statements/questions:

1. The president is overreaching his authority when he takes unilateral action and issues executive orders.
2. Terrorists who are arrested abroad by the U.S. should be afforded the protections of the Constitution.
3. More people ignore the law than follow the law.
4. Should national security always trump individual rights?

2. Set up a continuum across the room and post signs at various points by using tape, string, or a single line of desks.



3. Give students 2-3 minutes to reflect on the issue and the reasons for their opinions. At your signal, ask students to position themselves on the continuum where they feel most comfortable.
4. Opinion Exchange: Ask students to move toward a person who is far away on the continuum and partner up to exchange ideas. The purpose of this exchange is not to change somebody’s mind, but to understand another’s point of view and have an opportunity to explain one’s own position.

Rules for the exchange: (Teacher as timer and moderator.)

- Use alphabetical order to determine who goes first.
- First speaker explains and supports his/her point of view without interruption (1-2 min). Listener restates the speaker’s position. (30 sec)
- Second speaker explains and supports his/her position without interruption (1-2 min). Listener restates the speaker’s position. (30 sec)
- After the exchange, if students change their minds, they can physically move on the continuum to reflect that change.

A CONTINUUM OF POINTS OF VIEW

Instructions

5. Debrief on the experience through a general discussion. Ask students what they learned about sharing one's own opinion and listening to the opinion of another. Did the speaker clearly communicate his/her viewpoint? Did the listener accurately summarize the viewpoint of the speaker? Was the reasoning presented logical and based on facts, not feelings? What prompted students to change or not change their minds?
6. Repeat the process with other controversial questions or statements as time allows.

Variations:

1. Partner exchanges may be with those nearby.
2. Exchanges may take the form of a debate.
3. Instead of having the students partner up after they are distributed along the continuum, hold a discussion while the students are in place.

Ask students to express their opinions orally, using follow-up questions to help them clarify, elaborate on, or support their positions. Ask other students to respond. Do they agree or disagree? As students change their minds, they may move to a new location on the continuum.

4. Ask students to identify what they believe are the strongest arguments/reasons they heard from the OPPOSING side.
5. Reword the questions or statements in ways that prompt students to move on the continuum.
6. Introduce factual information that may sway positions on the issues and prompt students to move on the continuum. Ask them to move after each fact is presented.
7. Use this activity at the beginning of a lesson to gain insight into student opinions and knowledge about the topic.

Readings & Resources

- Video Transcript: *Habeas Corpus: The Guantanamo Cases* (Formatted for study)
- Chapter 14: “The Right to Habeas Corpus” from *Our Rights* by David J. Bodenhamer
- U.S. Constitution: Amendment V
- U.S. Constitution: Amendment VI
- U.S. Constitution: Article 1, Section 9, Clauses 1-4
- Supreme Court Opinions
 - Hamdi v. Rumsfeld
 - Rasul v. Bush
 - Hamdan v. Rumsfeld
 - Boumediene v. Bush
- Remarks of Chief Justice William H. Rehnquist (Speech in 2000 to the Norfolk and Portsmouth Bar Association, Norfolk, Virginia.)
- Terms from *Understanding Democracy, a Hip-Pocket Guide*
 - Rule of Law
 - Separation of Powers

— Video Transcript —
Habeas Corpus: The Guantanamo Cases

The organization of this transcript is formatted to facilitate study and thoughtful reflection of the content presented in each part. The divisions and their titles do not appear in the video. Questions and activities related to each part are found in the Video Guide that accompanies this lesson.

Part 1: September 11, 2001

Time: Start – 03.08

- 00:23 **David Cruz:** The attacks on the U.S. on September 11th shocked the nation.
- 00:29 **Aaron Brown:** An extraordinarily well-planned terrorist attack on both Washington and New York has taken place this morning. The trade centers here in New York, the two World Trade Center towers, have collapsed.
- 00:40 **Kermit Roosevelt:** It was not the sort of thing that we thought could happen to us. The American homeland seemed very secure. So it was psychologically quite devastating to have this kind of harm inflicted.
- 00:54 **David Rudovsky:** It was a terrible attack on us; 3,000 people killed.
- 00:58 **Madeline Morris:** When the plane was flown into the Pentagon, it was the heart of the United States military that had been attacked, physically, right there in Washington. And if that could happen, then what was next?
- 01:17 **Narrator:** After September 11th, 2001, the nation was afraid of another attack. And history shows that when the nation is at war and feeling as though its security is at risk – when people are afraid – the balance between national security and rights guaranteed by the Constitution can falter.
- 01:36 **Anthony Kennedy:** The Constitution is at its most vulnerable when we're in a crisis.
- 01:42 **Narrator:** Associate Justice of the United States Supreme Court Anthony Kennedy
- 01:46 **Anthony Kennedy:** We have to remember that the law and the Constitution are for our hard times as well as good times. Our liberties are most in danger in times of crisis.

— Video Transcript —
Habeas Corpus: The Guantanamo Cases

02:00 **Stephen Breyer:** The Constitution applies in wartime as in peacetime.

02:03 **Narrator:** Associate Justice of the United States Supreme Court Stephen Breyer

02:08 **Stephen Breyer:** And after all, that's what we're fighting for – for the constitutional values that the Constitution embodies.

02:15 **Narrator:** Those values include fundamental rights and protections guaranteed by the Constitution. But who guarantees them, especially during a time of war? After the attacks of 9/11, as America fought two wars abroad, all three branches of the federal government – the executive, the legislative and the judiciary – fought over the balance between national security and civil liberties. The fight escalated over four Supreme Court cases as the Court tried to balance the president's duty to protect the nation with constitutional protections of fundamental rights.

02:52 **David Cruz:** When the political branches don't necessarily protect people's rights at time of war, the duty falls to the courts. And if they don't do it, no one will.

03:02 **Narrator:** And at the heart of it all was the right of habeas corpus.

03:08 STOP to reflect and respond — See Part 4 in the Video Guide
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Habeas Corpus: The Guantanamo Cases

Part 2: The Right of Habeas Corpus

Time: 03:08 – 07:21

03:08 **Narrator:** Habeas corpus isn't a magic spell.

03:11 **David Cruz:** It almost sounds like a Harry Potter incantation.

03:14 **Narrator:** But if you're locked up, these are words you want to hear. If you're in prison, you have the right to go to court and force the government to explain why it's holding you. That right is called habeas corpus, which is Latin for...

03:28 **Madeline Morris:** Have the body or produce the body.

03:30 **David Rudovsky:** It's from English legal history. And it literally means "a judge's order to bring the body to the court." It is a very fundamental protection against executive punishment without due process.

03:44 **Narrator:** Check this out. The Bill of Rights – freedom of speech and religion, right to an attorney, freedom from cruel and unusual punishment – these are all amendments. Remember? They came after the Constitution was originally written – but look at habeas corpus.

04:00 **Kermit Roosevelt:** The habeas right is spelled out in Article I, Section 9, which is part of the original Constitution. The other thing you might say about placing the habeas right in the initial Constitution rather than the Bill of Rights is that it's really more about the structure of government so the point of habeas is to reinforce the separation of powers by making sure that all three branches cooperate in order to deny an individual liberty.

04:28 **Narrator:** This is how important habeas corpus is. Even after the Constitution was ratified, the framers wanted to spell out, in writing, that the habeas right should be protected by the judiciary. So the very first law passed by the very first Congress gave the courts the power to hear habeas petitions.

Habeas Corpus: The Guantanamo Cases

- 04:49 **Kermit Roosevelt:** If we didn't have the right of habeas corpus, this country would be like a country in which you could have secret detentions, in which people would disappear. You wouldn't necessarily know why, you wouldn't know where they'd gone. Maybe you would never see them again.
- 05:06 **Narrator:** There are other countries in the world today where people can spend weeks or years in custody without ever getting the chance to challenge their imprisonment. There's no habeas corpus, so there's no law that lets them check the power of the king or president who put them there.
- 05:21 **Kermit Roosevelt:** There are countries like that, but we don't consider them democracies committed to the rule of law.
- 05:27 **Neal Katyal:** The American founders said we need to check the abuse of power by dividing power among the three branches. And the simplest way to think about it, as almost like a series of three light switches, and in order to deprive someone of their rights, our founders said all three branches have to agree.
- 05:45 **Geoffrey Stone:** The right of habeas corpus basically says we don't trust any single branch of the government and especially not the executive. So the writ of habeas corpus is a fundamental protection against abuse of executive power. Because without it, the executive could simply go around and round up its enemies without any accountability, lock them away forever, and no one would even know.
- 06:10 **Narrator:** Especially when that executive was a king. Habeas corpus goes back to at least the Magna Carta. And while the king's power was limited on British soil, colonists in America were routinely locked up by the king's military with no hearing or trial.
- 06:27 **Geoffrey Stone:** It was an enormous danger. And so to them, it was not just an individual liberty, it was an essential part of limiting the power of the executive branch in a way that would prevent it from engaging in certain types of abuses.

Habeas Corpus: The Guantanamo Cases

06:39 **Kermit Roosevelt:** “President, you can’t just imprison me on your say-so. You’ve got to come into court and explain why you’re doing it.”

06:46 **Narrator:** So the executive can lock you up, but you have the right of habeas corpus, so you can challenge the executive in court. And Congress has the power to suspend habeas corpus right here in Article I, Section 9, but only in cases of rebellion or invasion. That’s called the suspension clause. And it’s hard to use, because habeas corpus is such an important right.

07:11 **Narrator:** Because habeas corpus can only be suspended during times of rebellion or invasion, it has been at the center of more than one wartime crisis.

07:21 STOP to reflect and respond — See Part 2 in the Video Guide
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Habeas Corpus: The Guantanamo Cases

Part 3: Civil Liberties in Wartime

Time: 07:21–09:49

Civil War

07:21 **Narrator:** At the start of the Civil War, Washington, D.C., was surrounded by Confederate sympathizers before Union troops were in position to protect the capital city. Congress was out of session at the time, so President Lincoln suspended habeas corpus and arrested many of the Southern sympathizers, he said, to save the nation's capital.

07:41 **Geoffrey Stone:** This was the Civil War, and it was a rebellion.

07:43 **Narrator:** Supreme Court Chief Justice Roger Taney ruled that the president violated the Constitution. He argued that the suspension clause is in Article I, which spells out the powers of Congress, so habeas can only be suspended by an act of Congress and not the president. Taney said the president had to let the prisoners appear in court. President Lincoln ignored the chief justice. If the capital fell, he argued, the nation would come to an end.

08:12 **Madeline Morris:** And he said: What would you have me do? Would you have me let the entire union dissolve? All of the laws that we love, gone? Just to respect this one law?

08:21 **Kermit Roosevelt:** Lincoln saved the nation and he did so, maybe in part, by violating the Constitution and suspending habeas corpus.

Attack on Pearl Harbor, World War II

08:35 **Narrator:** After the attack at Pearl Harbor drew the United States into World War II, another president sought to suspend habeas corpus, afraid of a Japanese attack on the West Coast. President Franklin Delano Roosevelt ordered 120,000 people of Japanese descent, most of them American citizens, rounded up and put in internment camps for fear they might be disloyal. There were no hearings. No chance to appeal being locked up because of their race.

Habeas Corpus: The Guantanamo Cases

- 09:04 **Neal Katyal:** A few brave individuals challenged that scheme, and their cases went to the Supreme Court.
- 09:10 **David Cruz:** The U.S. Supreme Court said that this was something that the federal government was entitled to do. That this wasn't a violation of the command in the Constitution that people be treated equally.
- 09:23 **Narrator:** Because it was wartime, the Court said it was OK.
- 09:27 **Neal Katyal:** It was a sad day for the Court.
- 09:29 **David Rudovsky:** It's probably, you know, the greatest stain on our constitutional fabric.
- 09:32 **Anthony Kennedy:** We have thousands of people, and yet they don't get protection. Was it because of war? Yes. Does that make the decision right? No. But war is difficult because it blurs the vision.

09:49 **STOP to reflect and respond — See Part 3 in the Video Guide**

— Video Transcript —
Habeas Corpus: The Guantanamo Cases

Part 4: The Guantanamo Cases

Time: 09:49 - 22:41

09:49 **Narrator:** Justices have given the president and the generals the benefit of the doubt during times of war because the president gets briefings about national security – updates on battles and locations of the enemy – the justices don't. The Court has never said that the United States shouldn't defend itself. But since the internment cases, times have changed. The Court has learned that the executive branch misled it during the war. And the Court has pushed the president to protect civil liberties while also protecting the nation.

10:20 **Stephen Breyer:** Well, what I think has happened over time is that the Court has become open to the possibility of more sophisticated solutions. Legal solutions that give the president authority to do quite a lot, but do not allow the president as Commander-in-Chief to run roughshod over civil rights that are guaranteed by the Constitution.

10:44 **Narrator:** And that's what happened after 9/11. Four cases over four years that came to be known as the Guantanamo cases. The Court and the president – and even Congress – fought over the balance between national security and civil liberties during the war on terror.

11:02 **George W. Bush:** Tonight, we are a country awakened to danger and called to defend freedom. Our grief has turned to anger, and anger to resolution. Whether we bring our enemies to justice, or bring justice to our enemies, justice will be done.

11:23 **Narrator:** After the terrorist attacks of September 11, 2001, President George W. Bush announced a general war on terror. This was not a conventional war with soldiers representing nations on a battlefield. The president was going to go after suspected terrorists all over the world, and Congress supported him.

11:42 **Neal Katyal:** Congress passed a resolution authorizing the use of military force to basically attack, hunt down, kill or capture those responsible.

11:52 **Narrator:** But there was a problem.

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- 11:54 **Kermit Roosevelt:** It's not always clear whether the person that you're dealing with is a terrorist or not.
- 11:58 **Madeline Morris:** How would you know whether you had the right person or the wrong person? This is not somebody wearing a uniform who's in the army of an enemy country.
- 12:06 **Kermit Roosevelt:** In most cases in our judicial system, it's not enough to say we think this person is dangerous and might do something bad in the future. You have to have actual proof that they have broken the law before you can detain them.
- 12:18 **Narrator:** The executive branch announced it was going to label war on terror prisoners "enemy combatants" and limit their rights. No habeas corpus, no judiciary. The president wanted to hold enemy combatants as long as he thought it was necessary, and didn't want them to be able to challenge his authority in court.
- 12:36 **George W. Bush:** If I determine that it is in the national security interests of our great land to try by military commission those who make war on America, then we will do so.
- 12:53 **Neal Katyal:** The Bush administration took the position that they could label someone an enemy combatant and by doing so deprive them of the most foundational rights, including the writ of habeas corpus.

Case 1: Hamdi v. Rumsfeld

- 13:06 **Narrator:** The first two Guantanamo cases were decided on the same day. In *Hamdi v. Rumsfeld*, Yaser Hamdi was a U.S. citizen arrested in Afghanistan and held without charges in the United States. He wasn't allowed to have a lawyer. His dad filed a habeas corpus petition to get him into court, where the Constitution gives him due process rights.
- 13:30 **Kermit Roosevelt:** In order for an individual to have a meaningful opportunity to try to demonstrate innocence, you'd need a bunch of things. You would need someone who's not committed to either side, like a federal judge. You'd need the government to tell them,

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“Here’s why we think you’re a terrorist.” You would need to give them some opportunity to rebut those charges. They might need to call witnesses. And a lawyer would be helpful.

13:53 **Narrator:** The government argued that labeling Hamdi an enemy combatant was enough to hold him and limit his due process rights during wartime.

14:01 **Madeline Morris:** Here, the government is saying the process that is due is very minimal.

14:05 **Narrator:** The Supreme Court ruled in favor of Yaser Hamdi. A U.S. citizen, even one labeled an enemy combatant, is entitled to due process guaranteed by the Constitution. The president had to let him have his day in court. Justice Sandra Day O’Connor wrote that...

14:21 **Neal Katyal:** “A state of war is not a blank check for the executive.” The president can’t just use a military necessity to justify whatever measure he sees fit. That there has to be a system of checks and balances over those assertions by the president.

Case 2: Rasul v. Bush

14:38 **Narrator:** In case No. 2, *Rasul v. Bush*, Shafiq Rasul was not a U.S. citizen, and he was not being held on U.S. soil, but here, in Guantanamo Bay prison, Cuba.

14:51 **Kermit Roosevelt:** Well, Guantanamo is technically part of the sovereign territory of Cuba. It’s a U.S. naval base. It’s on the island of Cuba.

14:58 **Geoffrey Stone:** What we know from the people who were inside the administration is the reason they chose Guantanamo was to precisely prevent the federal courts from having habeas corpus jurisdiction on the theory that habeas corpus jurisdiction for the federal courts only reaches as far as American territory.

15:16 **Narrator:** One military lawyer said Guantanamo Bay was the legal equivalent of outer space. The president authorized the military to hold enemy combatants in Guantanamo indefinitely, beyond the reach of civilian courts.

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- 15:31 **Neal Katyal:** The government said we can suspend the right of habeas corpus at Guantanamo Bay because Guantanamo is not American soil.
- 15:39 **Madeline Morris:** The question was: You have this non-American citizen who's being held not in the United States. What right would that person have to habeas review?
- 15:49 **Narrator:** Rasul argued that the U.S. controlled everything about Guantanamo, so it had to follow the habeas laws of the United States.
- 15:58 **Kermit Roosevelt:** It's under complete American control. It's got a McDonald's. It's got a very nice gift shop. In all practical terms, Guantanamo is effectively part of the United States.
- 16:00 **Narrator:** The Supreme Court agreed and ruled that Guantanamo is within the jurisdiction of the United States, so the president can't issue an order that breaks the law. Remember, the habeas laws go all the way back to 1789. And they don't say habeas is limited to territory inside the U.S. So Rasul gets to have his day in court.
- 16:30 **Kermit Roosevelt:** The Court says the habeas statute has no territorial limit. The habeas statute, by its terms, gives this right to anyone who says that they have been detained in violation of the laws, Constitution or treaty of the United States.
- 16:43 **Narrator:** But the political branches didn't back down.
- 16:46 **Narrator:** After Rasul, Congress joined the president and passed a new law saying enemy combatants could not be tried in federal courts, even the Supreme Court, even the case it was already scheduled to hear.

Case 3: Hamdan v. Rumsfeld

- 16:58 **Narrator:** Case No.3, *Hamdan v. Rumsfeld*.

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- 17:02 **Kermit Roosevelt:** Hamdan is Osama bin Laden's driver. And the reason his case is important, the question in his case, is not really so much about who he is or what he's done. The question is who can try him.
- 17:15 **Narrator:** To protect national security, the president insisted he had the power to create military commissions that could try enemy combatants in secret with fewer rights.
- 17:25 **Neal Katyal:** What President Bush said is, I get to set up the process. I get to enforce it. And I get to rule on whether or not it's constitutional. And the federal court should have no business reviewing what I'm doing.
- 17:37 **Narrator:** Neal Katyal was the lawyer who took Salim Hamdan's case to the Supreme Court.
- 17:43 **Neal Katyal:** So the case was about that simple idea that one man's say-so, no matter how wise he is, is not enough in the American system to change the ground rules and deprive people of their most basic rights.
- 17:57 **Narrator:** This time the Court didn't back down. It said it could hear the case. Then it said that the president's military commissions were a violation of the separation of powers because they were doing things beyond what Congress said they could. Worst of all for the president, the Court ruled that his military commissions did not meet the standards of the Uniform Code of Military Justice, and even violated international law.
- 18:22 **Narrator:** It was a major setback for a president during wartime.
- 18:26 **Neal Katyal:** The U.S. Supreme Court said that the military trial system that President Bush set up at Guantanamo Bay violated the Constitution's guarantee of separation of powers.
- 18:37 **Narrator:** The majority opinion was written by Justice John Paul Stevens. Justice Stevens wrote that the prisoners had the right to see the evidence against them, they had to be allowed to attend their own trials, and appeals had to be heard outside of the executive branch. The Court reminded the president that the president has to obey the law.

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18:57 **David Cruz:** They struck down the first set of military commissions that President Bush set up to prosecute these people for violations of the law of war and said you've got to go back to the drawing board and come up with procedures and tribunals that will protect the rights that our law guarantees.

19:15 **Narrator:** For the president and his supporters in Congress, this was the last straw.

19:20 **George W. Bush:** To win the war on terror we must be able to detain, question, and, when appropriate, prosecute terrorists captured here in America, and on the battlefields around the world.

19:30 **Madeline Morris:** Congress said OK, under the statute that we had in place, the Court has determined both the citizen and the non-citizen in Guantanamo get habeas review. But Congress decided we don't want that to be the case. So we'll change the statute.

19:45 **Narrator:** Congress went back to the drawing board and passed the Military Commissions Act of 2006 as a direct response to the Court's Hamdan decision. This time, Congress wrote a law that denied enemy combatants habeas rights in any federal court in "all cases, without exception."

Case 4: Boumediene v. Bush

20:04 **Narrator:** Scholars and news outlets call the case of *Boumediene v. Bush* one of the most important wartime decisions of the last 50 years.

20:13 **David Cruz:** This was a case brought by another group of detainees at Guantanamo Bay, including Lakhdar Boumediene, arguing that they were being held unlawfully.

20:23 **Madeline Morris:** His claim was the new statute that said that people at Guantanamo don't get habeas is unconstitutional.

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- 20:29 **Narrator:** These cases have all led to this moment. In each one, the Court has saved the separation of powers and determined that prisoners will have their day in court. First, the Court ruled that the president has to give a U.S. citizen his constitutional due process rights. Then it ruled that the president has to give a non-U.S. citizen held in Guantanamo Bay his habeas corpus rights.
- 20:53 **Narrator:** In Hamdan, the Court ruled in favor of habeas corpus and that the president's military commissions violated military justice and international law.
- 21:02 **Kermit Roosevelt:** And the question now is do they have a constitutional right to habeas corpus.
- 21:08 **Narrator:** And finally, in Boumediene, the Court has to decide whether Congress and the president can write a new law denying detainees their habeas corpus rights. Or is habeas corpus a constitutional guarantee even for enemy combatants who are not U.S. citizens held at Guantanamo Bay?
- 21:27 **Kermit Roosevelt:** And there the Court says yes. Yes, there is a constitutional right. The procedures that the executive branch and Congress have set up are not adequate, so these people must be given the right to petition for habeas corpus.
- 21:41 **Neal Katyal:** If you are even a non-U.S. citizen being detained at Guantanamo Bay, you do have the right of habeas corpus. The right to at least come in and say, "I didn't do it."
- 21:52 **Narrator:** This time, the Court put its foot down. Writing for a 5-4 majority, Justice Anthony Kennedy told the president and Congress that they can't use poor substitutes for this fundamental right. Justice Kennedy wrote that, "The laws and Constitution are designed to survive, and remain in force, in extraordinary times," even the war on terror. Over half a century after the Japanese internment, this time, the Court demanded a balance between national security and civil liberties.

— Video Transcript —

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22:26 **Narrator:** But the balance for each of these men came slowly. Each man spent years in prison, only to see his charges dropped by the government or overturned by a judge. A judge that heard their cases because of the right of habeas corpus.

22:41 **STOP to reflect and respond — See Part 4 in the Video Guide**

— Video Transcript —
Habeas Corpus: The Guantanamo Cases

Part 5: Conclusion

Time: 22:41 – 24:58

22:41 **Stephen Breyer:** In the Guantanamo cases, the Court has more or less approached this step by step, and said the people in Guantanamo do have a right to go into court. It's trying throughout to say the president does have authority to deal with a real crisis. But he has to be careful how he exercises it.

22:58 **Anthony Kennedy:** The law must insist the law must always be obeyed. The consequence of fear is that you may tend to forget your responsibility to protect your constitutional heritage. We have a compact over time. We have a compact with the founders, those who have made this nation. And we have a contract with future generations to keep our freedom and to remember the principles on which the law is based and to be faithful to them.

24:52 **The End**

Reflect and Respond — See Part 5 in the Video Guide
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CHAPTER 14

The Right to Habeas Corpus



Most individual rights of Americans are based on the Bill of Rights or another amendment to the Constitution. Habeas corpus is an exception. This ancient legal procedure commands government to show cause—to provide a legal reason—for holding an individual in detention. The literal meaning of habeas corpus, from Latin, is “you should have the body.” This term comes from the opening words of the document, or writ, used during the medieval period in England to require the jailor to bring a suspect to court. This Great Writ, as it became known, is the undeniable right of every American citizen. It receives mention in Article I, Section 9, of the Constitution as one of the limits on the power of Congress: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” The framers judged it so essential to liberty that they ensured it could not be abridged except in the gravest circumstances.

The origin of habeas corpus is unclear, but it dates at least to 1215, when King John, under pressure from noblemen, issued the Magna Carta, the Great Charter of English liberty; it was part of the law of the land the king was bound to obey. The original use of habeas corpus was to bring a prisoner into court for trial, but gradually it became a right available to protect individuals against arbitrary detention by the state. During the religious and political turmoil of the seventeenth century, concern grew in England about abuse of power, especially in ecclesiastical or church courts and in royal tribunals such as the Star Chamber, the secret agency used to punish enemies of the state. When abuses continued even after the Star Chamber’s demise in 1641, the Habeas Corpus Act, passed in 1679, reinforced the power of courts to issue the writ and made officials personally liable for disobeying the law.

The colonists brought habeas corpus with them as part of their rights and privileges under English common law. The refusal to grant habeas corpus was a grievance during the decades before independence, so the revolutionary generation wrote guarantees of the right into both state and federal constitutions. The first statute ever passed by Congress, the Judiciary Act of 1789, empowered all federal courts “to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment.” State legislatures also passed similar laws. Significantly, anyone—not simply the person under detention—could petition a court to issue a writ. Antislavery advocates took advantage of this feature to bring cases before judges sympathetic to their cause, hoping to secure freedom for slaves who were journeying through free states. Such was the result with Med Maria, a six-year-old slave girl traveling with her mother in Massachusetts in 1836. Abolitionists used a writ of habeas corpus to gain a court ruling that she was being detained illegally by her master because Massachusetts had no law allowing slavery to exist. A more famous use of the writ for the same purpose,

“[The writ of habeas corpus] is the great remedy of the citizen or subject against arbitrary or illegal imprisonment; it is the mode by which the judicial power speedily and effectually protects the personal liberty of every individual, and repels the injustice of unconstitutional laws and despotic governments.”

—William Rawle, *A View of the Constitution of the United States* (1829)

but with a different outcome, occurred in the Dred Scott case, with the U.S. Supreme Court ultimately deciding that Scott was not a person under the meaning of the Constitution and therefore had no rights.

The Civil War was an important test of the writ of habeas corpus because it raised questions about how far individual rights extend in a national emergency. Soon after Confederate troops fired on Fort Sumter, off the coast of Charleston, South Carolina, in April 1861, pro-secession mobs in northern cities tried to prevent the passage of Union troops, and in border states, southern sympathizers recruited and trained armed volunteers. The law of treason was too muddied to permit confident prosecution of such activity, and state criminal statutes were irrelevant. In response to the crisis, President Abraham Lincoln, claiming extraordinary emergency powers, suspended the writ of habeas corpus and ordered the arrest and detention of persons “dangerous to the public safety.” Military authorities, federal marshals, and Secret Service agents detained hundreds of suspected subversives, often without sufficient evidence to make a definite charge. Civilian judges frequently sought the release of such prisoners, but military officers disregarded their orders.

In 1862, federal officials arrested James B. Merryman, a Confederate recruiter in Maryland, and imprisoned him without trial as a threat to national security. Chief Justice Roger B. Taney, a fellow Marylander and a slaveholder, issued a writ of habeas corpus, and when the President rejected it, he wrote an opinion declaring Lincoln’s suspension of habeas corpus to be unconstitutional, arguing that Congress alone had this power. Lincoln ignored Taney’s protests and continued to suspend the writ in areas where resistance to the war threatened Union victory, including places far removed from the battlefield.

In 1863, Congress retroactively authorized the suspension of habeas corpus but ordered that prisoners be released if grand juries failed to indict them. But what if the military authorities, worried that local courts might release dangerous men, ignored this law? What was the extent of government’s power during wartime? Could it bypass constitutional guarantees of civil liberty, such as the writ of habeas corpus, to protect the nation’s security?

Late in 1864, an arrest and conviction by a military court of an accused traitor from Indiana tested these fundamental questions. The outcome was a decision that still ranks as one of the most important statements of our rights ever issued by the Supreme Court.

Lambdin P. Milligan was an Ohio native who moved to Indiana in the 1830s and turned to law because he could not make a living as a farmer. A respected member of the state bar, he became involved in the antiwar faction of the Indiana Democratic party. Known as Copperheads, after the treacherous snake,

these southern sympathizers in the North were Jeffersonian Democrats who believed in states' rights and in an agricultural society as the best means to preserve liberty. They especially distrusted New Englanders, whom they associated with industrialization, and they had no sympathy with abolition. Milligan, like other Peace Democrats, believed New England capitalists were using the war to enhance their own economic interests, while placing the military burden on common men from the western states.

In the elections of 1862, Indiana Democrats gained strength as public opinion became unsettled about the war, which was not going well for the Union. This sentiment emboldened Milligan, who became convinced that the Emancipation Proclamation was proof that Lincoln had fallen under the influence of abolitionist New Englanders. Believing that the South and West had economic interests in common, he began to campaign for an armistice (truce) and urged Democrats to defend their rights "at all costs." His movement, however, had reached its high point. Union victories in 1863 convinced voters that the tide had turned against the Confederacy, and the Peace Democrats began to lose public support. As a result, Milligan failed to capture his party's nomination for governor in 1864.

Embittered, Milligan joined with sympathizers to form secret societies, clubs designed to further the antiwar cause. One of these societies, the Sons of Liberty, named Milligan an officer, perhaps without his knowledge. The activities of the society did not remain secret for long, and the Republican governor and the commander of the Indiana district of the Union Army employed spies to learn more about its inner workings. The information the agents collected was exaggerated—much of it was based on hearsay—but the reports led to Milligan's arrest for treason. The key evidence was an 1864 speech in which Milligan opposed Lincoln's conduct of the war. Milligan and five others were accused of conspiring to seize arms and ammunition at federal arsenals and to liberate Confederate prisoners held in several northern camps.

The men were tried before a military tribunal, even though civil courts were open and operating in Indiana. Four of the men were found guilty of treason; the military court sentenced three of them to hang. Milligan was one of the three condemned men. After Lincoln's assassination, the new President, Andrew Johnson, commuted Milligan's sentence to life imprisonment, but Milligan refused to compromise. He petitioned a federal circuit court to grant a writ of habeas corpus, arguing that the military had no authority to try him. When the two judges disagreed on the decision, Milligan appealed to the Supreme Court.

The Court agreed unanimously with Milligan. The military court lacked jurisdiction, the justices concluded; the Constitution was not suspended in times of war, and a military trial of civilians while domestic courts were open denied the accused of their rights to a grand jury indictment and trial by jury. Justice David Davis wrote in the Court's opinion: "The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies [crises] of government."

A state of war did not suspend the Constitution or its guarantee of individual rights. The framers knew the nation likely would be involved in wars, but they still chose to restrict what the President could do alone because "unlimited pow-

er, wherever lodged at such a time, was especially hazardous to free men.”

Released from prison in April 1866, Milligan sought damages for the time he spent behind bars. He successfully sued the governor, members of the military commission, and others he believed were responsible for his imprisonment, but a recently passed state law limited his award to five dollars. The jury’s verdict mattered most to Milligan, who saw it as vindication of his antiwar belief and actions. He returned home a hero, convinced that his case had established a vital principle of American liberty: government must honor the rights of individuals, even during national emergencies.

Although *Ex Parte Milligan* (“in the matter of Milligan”) was a landmark decision, a federal law passed a year after the Court’s decision gave the writ of habeas corpus much of its modern importance. Congress worried, with good reason, that southern state courts would not protect the rights of newly freed slaves, so it passed the Habeas Corpus Act of 1867. This measure allowed individuals imprisoned or detained under state authority to seek a writ of habeas corpus from a federal court if they believed the state had violated their constitutional rights. The act changed the nature of the writ itself. Previously, it had applied only to questions about the legality of detention before trial; now habeas corpus could be invoked by federal judges to review detention after conviction in both federal and state courts. It marked a significant expansion of federal power and was the most important means of protecting federal constitutional rights until the Supreme Court began to interpret these safeguards as part of the Fourteenth Amendment’s due process clause.

The twentieth century witnessed increased use of habeas corpus in all areas of law, largely because of the expansion of constitutionally protected rights under the Fourteenth Amendment. Its use by prisoners is an especially controversial modern use of the habeas petition. Death row inmates often seek postconviction relief, which is a review after a final judgment to determine whether the trial was fair. The review conducted under a habeas petition is not the same as an appeal. It involves such questions as: Was the defendant informed of his rights? Did he have access to counsel? Was she tried by an impartial jury? These questions address the lawfulness of procedures used in the pretrial, trial, sentencing, or appeal; the petition for a review cannot claim simply that the defendant is innocent. This use of habeas corpus in this manner raises popular concern about delays in the finality of justice. The petitions clog federal court dockets, prompting questions about how far the federal judiciary should be involved in criminal justice, historically a responsibility of the states. In response, both Congress and the Supreme Court in recent years have restricted habeas petitions in capital cases. For all the controversy surrounding their use, however, the vast majority of petitions fail to prove a legal or factual error.

Habeas corpus is an old remedy for testing the lawfulness of all detentions, but its primary importance in American history has been to challenge the power of the executive. When drafting the Constitution, the framers were mindful of their heritage as Englishmen. The history of the mother country had taught them to fear the unchecked power of the executive, so they wrote a document that separated government’s power among three branches—legislative, executive, and judicial. They also provided means to challenge the authorized use of power, especially by the branch directly responsible for administering the law. The writ of habeas corpus was one of those means. It could not be suspended, they agreed, except when necessary to preserve the nation itself.

This principle, of course, is the central meaning of *Ex Parte Milligan*. The Court repeatedly has upheld its declaration that the President cannot suspend the Constitution without the express approval of Congress. Even though it has not applied the decision consistently, as the internment of Japanese Americans during World War II reveals, the justices have never repudiated *Milligan*. Its principles remain central to our democracy, as a 2004 case from the Iraq- Afghanistan conflict demonstrated.

Under the congressional resolution authorizing the use of force, the U.S. military captured an American citizen in Afghanistan, classified him as an enemy combatant, and denied him access to a lawyer or courts. The suspect's father used a writ of habeas corpus to challenge this detention. The justices, in a 6-to-3 vote, rejected the executive's authority to deny access to courts without a congressional suspension of the writ. *Hamdi v. Rumsfeld* recognized the importance of giving the President wide latitude to defend the nation's security but concluded, "it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." American citizens have a fundamental right, the Court declared, "to be free from involuntary confinement by [their] own government without due process of law."

Today, we struggle to reconcile liberty and security, but the constitutional balance point is clear: we value liberty above all else, so we expect any use of governmental power to meet strict tests. One standard is that government must act according to the law. The writ of habeas corpus assures us that we have a means of enforcing this requirement. Its protection of the freedom of the person, Thomas Jefferson noted, is an "essential principle of our government" because it "secures every man here, alien or citizen, against everything which is not law." Arbitrary, unlawful confinement of any citizen is an assault on our individual and collective liberty, and its price is too steep for a free society to pay for its safety. Benjamin Franklin, like other founders, knew this. "They who would give up an essential liberty for temporary security," he wrote, "deserve neither liberty or security." The constitutional privilege of habeas corpus assures us that, in acting lawfully, we have the greatest protection of our security and our freedom.

"We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."

—Justice Sandra Day O'Connor, *Hamdi v. Rumsfeld* (2004)

“This Is a Great Bulwark”

In 1788, ratifying conventions were held in each state to consider whether to approve the new constitution proposed by the convention in Philadelphia the previous year. Voters elected delegates who debated each provision of the document before agreeing to give or withhold consent. The right of habeas corpus, especially the power of Congress to suspend it during times of emergency, drew the attention of these conventions. In this transcript of the Massachusetts debate, delegates voiced their concerns about this power of suspension.

Judge Sumner said, that this was a restriction on Congress, that the writ of habeas corpus should not be suspended, except in cases of rebellion or invasion. The learned judge then explained the nature of this writ. When a person, said he, is imprisoned, he applies to a judge of the Supreme Court; the judge issues his writ to the jailer, calling upon him to have the body of the person imprisoned before him, with the crime on which he was committed. If it then appears that the person was legally committed, and that he was notailable, he is remanded to prison; if il-

legally confined, he is enlarged. This privilege, he said, is essential to freedom, and therefore the power to suspend it is restricted. On the other hand, the state, he said, might be involved in danger; the worst enemy may lay plans to destroy us, and so artfully as to prevent any evidence against him, and might ruin the country, without the power to suspend the writ was thus given. Congress have only the power to suspend the privilege to persons committed by their authority. A person committed under the authority of the states will still have a right to this writ.

Later during the Massachusetts convention, a delegate named Samuel Nasson argued that citizens should not give up the right of habeas corpus too easily.

Samuel Nasson: The paragraph that gives Congress power to suspend the writ of habeas corpus, claims a little attention—This is a great bulwark—a great privilege indeed—we ought not, therefore, to give it up, on any slightest pretence. Let us see—how long

it is to be suspended? As long as rebellion or invasion shall continue. This is exceeding loose. Why is not the time limited [sic] as in our Constitution? But, sir, its design would then be defeated—It was the intent, and by it we shall give up one of our greatest privileges.

“The Most Celebrated Writ”

In 1963, the Supreme Court extended the right of habeas corpus, which had been applicable only to federal courts, to individuals who had been convicted in state courts with its decision in Fay v. Noia. Previously, a respect for federalism, especially the states' primary responsibility for criminal justice, meant that a defendant convicted in state court could be brought before a federal court under a writ of habeas corpus only if he had exhausted all avenues for appeal under state procedures. Under the new rule, the federal judiciary assumed a greater role for protecting the rights of prisoners. In the majority opinion, Justice William Brennan discussed the role of the writ of habeas corpus in protecting individual liberty.

We do well to bear in mind the extraordinary prestige of the Great Writ, habeas corpus ad subjiciendum, in Anglo-American jurisprudence: “the most celebrated writ in the English law.” . . . It is “a writ antecedent to statute, and throwing its root deep into the genius of our common law. . . . It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I.” . . . Received into our own law in the colonial period, given explicit recognition in the Federal Constitution, Art. I, . . . habeas corpus was early confirmed by Chief Justice John Marshall to be a “great constitutional privilege.” . . .

These are not extravagant expressions. Behind them may be discerned the unceasing contest be-

tween personal liberty and government oppression. It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and of liberty clash most acutely, not only in England in the seventeenth century, but also in America from our very beginnings, and today. Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.

Fifth Amendment

—♦—♦—♦—

(1791)

WHAT IT SAYS

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

WHAT IT MEANS

Rooted in English common law, the Fifth Amendment seeks to provide fair methods for trying people accused of committing a crime. To avoid giving government unchecked powers, grand jurors are selected from the general population, and their work, conducted in secret, is not hampered by rigid rules about the type of evidence that can be heard. Grand jury charges can be issued against anyone except members of the military, who are subject to courts-martial in the military justice system. In the U.S. federal courts and some state courts, grand juries are panels of twelve to twenty-three citizens who serve for a month or more. If the jurors find there is sufficient evidence against individuals accused of crimes, the grand jury will indict them, that is, charge them with a crime.

GRAPPLING WITH THE RIGHT AGAINST SELF-INCRIMINATION

In the midst of the Cold War, the U.S. House of Representatives had a Committee on Un-American Activities (HUAC) that investigated individuals and organizations who were associated with the U.S. Communist Party. In 1949, the committee called Julius Emspak, an official of the Electrical, Radio, and Machine Workers of America Union, to testify. The committee asked him 239 questions about the union and its relationship with the Communist Party. He declined to answer sixty-eight of these questions, citing “primarily the first amendment, supplemented by the fifth.” A district court later held that Emspak’s statement about his rights was insufficient; he needed specifically to invoke his right against self-incrimination under the Fifth Amendment. He was found guilty of refusing to testify before a committee of Congress. Emspak appealed that decision to the Supreme Court, which closely analyzed the conditions that needed to be met in order for people to claim their right against self-incrimination and refuse to answer certain questions. The justices decided that witnesses need only state their wish to be protected under the Fifth Amendment in a way that the court could “reasonably be expected to understand.” Next the Court addressed the government’s claim that Emspak had waived his rights when he answered “no” to a question about whether he thought admitting his knowledge of certain people would lead him to a criminal prosecution and found that the release of constitutional rights cannot be inferred, and that Emspak’s “no” was not a definite release of his right against self-incrimination. The Court decided that Emspak could choose not to answer the questions that the committee asked him, reasoning that if he were to reveal his knowledge of the individuals about whom he was asked he might have uncovered evidence that could have helped prosecute him for federal crimes. Finally, the Court found fault with the House committee for not overruling Emspak’s refusal to answer certain questions and instructing him to answer during the hearing. This would have given him a choice between answering or being sentenced for refusal to testify. Accused persons must refuse to answer knowing that they are required to answer. In *Emspak v. United States* (1955), the Supreme Court therefore set aside his fine and prison sentence.

Once indicted, defendants stand trial before a petit (from the French word for “small”) jury of six to twelve citizens who hear the evidence and testimony to determine whether the accused are guilty or innocent.

The Fifth Amendment protects people from being put in “double jeopardy,” meaning they cannot be punished more than once for the same criminal act and that once found innocent of a crime they cannot be prosecuted again for the same crime. The double jeopardy clause reflects the idea that government should not have unlimited power to prosecute and punish criminal suspects, instead getting only one chance to make its case.

The Fifth Amendment’s right against self-incrimination protects people from being forced to reveal to the police, a judge, or any other government agents any information that might subject them to criminal prosecution. Even if a person is guilty of a crime, the Fifth Amendment demands that the prosecutors find other evidence to prove their case. If police violate the Fifth Amendment by forcing a suspect to confess, a court may prohibit the confession from being used as evidence at trial. Popularly known as the “right to remain silent,” this provision prevents evidence taken by coercive interrogation from being used in court and also means that defendants need not take the witness stand at all during their trials. Nor can the prosecution point to such silence as evidence of guilt. This right is limited to speaking, nodding, or writing. Other personal information that might be incriminating, such as blood or hair samples, DNA samples, or fingerprints, may be used as evidence, with or without the accused’s permission.

The right to due process of law protects those accused of crimes from being imprisoned without fair procedures. The due process clause applies to the federal government’s conduct. The Fourteenth Amendment, ratified in 1868, contains a due process clause that applies to the actions of state governments as well. Court decisions interpreting the Fourteenth Amendment’s due process rights generally apply to the Fifth Amendment and vice versa. Due process applies to all judicial proceedings, whether criminal or civil, that might deprive someone of “life, liberty, or property.”

The “taking clause” of the Fifth Amendment strikes a balance between private property rights and the government’s right to take property that benefits the public at large. The superior power the government can exert over private property is sometimes referred to as “eminent domain.” Government may use eminent domain, for instance, to acquire land to build a park or highway through a highly populated area, so long as it pays “just compensation” to the property owners for the loss.

✦ — ✦

“The Fifth Amendment was designed to protect the accused against infamy as well as against prosecution.”

—Justice William O. Douglas,
dissenting opinion, *Ullmann v. United States* (1956)

✦ — ✦

Fifth Amendment TIMELINE

Seizure of property without full hearing does not violate due process

→ 1856

The federal government seizes property from a man who owes it money. He argues that the lack of a hearing violates his Fifth Amendment right to “due process.” The Supreme Court rules in *Murray’s Lessee v. Hoboken Land and Improvement Co.* that different processes may be legitimate in different circumstances. To determine the constitutionality of a procedure the Court looks at whether it violates specific safeguards in the Constitution and whether similar types of proceedings had been used historically, particularly in England. In this case, because a summary method for the recovery of debts had been used in England, the procedure is constitutional in the United States.

Slaves cannot be taken from their owners by federal law

→ 1857

In *Dred Scott v. Sandford*, the Supreme Court decides that Dred Scott, who had moved with his owners to the free state of Illinois, returned to slavery when his owners moved back to Missouri, a slave state. The Court rules that slaves are property and that therefore the Missouri Compromise, which forbids slave owners from taking their property into free states violated the owners’ Fifth Amendment rights not to have private property taken from them without just compensation. The Court further declares that slaves are not citizens of the United States entitled to the protection of the Fifth Amendment.

The government can take private property

→ 1876

In *Kohl v. United States*, the U.S. Supreme Court upholds the federal government’s right to take land in Cincinnati, Ohio, to build a post office. The government’s ability to exercise the power of eminent domain contained in the Fifth Amendment is ruled essential to the government’s ability to fulfill its duties to the public. This important goal outweighs any inconvenience to individuals living on the land.

Curfew regulations do not violate due process rights

→ 1943

In the wake of Japan’s attack on Pearl Harbor, Congress passes a law requiring Japanese Americans to live in restricted areas and obey curfews. In the case of *Hirabayashi v. United States*, the U.S. Supreme Court rules that this is not a violation of the Japanese Americans’ Fifth Amendment right to due process, as they may have divided loyalties during wartime and their segregation is necessary to protect national security.

Organizations do not have the right against self-incrimination

→ 1944

In *United States v. White*, the U.S. Supreme Court rules that a labor union under criminal investigation cannot refuse to turn over its records on the grounds of self-incrimination, explaining that the Bill of Rights was enacted to protect individuals, not organizations, from government control.

A suspect has the right to remain silent

→ 1966

In *Miranda v. Arizona*, the U.S. Supreme Court rules that the right against self-incrimination is not limited to in-court testimony, but also applies when a suspect is taken into police custody for questioning. Before any questioning can begin, police must explain that the suspect has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The court refuses to accept as evidence any statements made after the right to remain silent has been invoked. These mandatory statements by police are known as Miranda rights and the process of informing is known as Mirandizing.

Conviction in both federal and state court is not double jeopardy

→ 1922 →

A defendant who had been convicted in state court objects to having to stand trial in federal court for the same crime. In *United States v. Lanza*, the U.S. Supreme Court rules that the double jeopardy clause was not violated because the state and federal legal systems are different government “units,” and that each can determine what shall be an offense against its peace and dignity.

Due process requires a hearing before someone is deported

→ 1922 →

In *Ng Fung Ho v. White*, the U.S. Supreme Court rules that the Fifth Amendment due process clause requires the government to hold a hearing before deporting a U.S. resident who claims to be a citizen, arguing that otherwise the person is deprived of liberty, and possibly in danger of losing property and life.

The right against self-incrimination applies in some civil cases

→ 1924 →

The U.S. Supreme Court considers the question of whether a debtor who testifies at his own bankruptcy hearing is allowed to refuse to answer questions that might incriminate him. In *McCarthy v. Arndstein*, the Supreme Court holds that the Fifth Amendment privilege against self-incrimination applies to defendants in civil cases, not just criminal cases, if criminal prosecution might result from the disclosure.

Double jeopardy applies to state trials

→ 1969 →

At first the Bill of Rights was seen as a limitation on the federal government’s powers, not on the state government. In *Benton v. Maryland*, the U.S. Supreme Court rules that the double jeopardy clause represents a fundamental ideal of “our constitutional heritage,” and extends double jeopardy protection to defendants in state court trials. The justices also cite the Fourteenth Amendment’s prohibition on state governments limiting liberty without due process. Double jeopardy, they rule, violates the due process rights of the accused.

Prior notice and a hearing are required

→ 1993 →

Four years after police found drugs and drug paraphernalia in a man’s home and he pleaded guilty to drug offenses under Hawaiian law, the federal government files a request to take his house and land because it had been used to commit a federal drug offense. Following an ex parte proceeding (in which only the prosecution participates), a judge authorizes the property’s seizure without prior notice to the individual. The Supreme Court, in *United States v. James Daniel Good Real Property*, rules that the property owner was entitled to advance notice and a full hearing before the government could take his home and land.

A death sentence imposed after retrial is not double jeopardy

→ 2003 →

A defendant is convicted of first-degree murder, but the jury cannot reach a unanimous decision whether to sentence the defendant to death or to life in prison. By default, a life sentence is imposed. The defendant appeals his conviction and wins a retrial, but at the second trial the jury unanimously hands down a death sentence. In *Sattazahn v. Pennsylvania*, the U.S. Supreme Court rules that this second verdict does not violate the double jeopardy clause because the first jury’s inability to reach a unanimous verdict means that there was no official finding of the facts regarding what kind of penalty the defendant deserved. As these questions remain open at the time of the second trial, the second jury can look at the facts again.

Sixth Amendment

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(1791)

WHAT IT SAYS

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

THE JURY AS A CROSS SECTION OF THE COMMUNITY

In the early 1980s, Daniel Holland went on trial in Illinois for a variety of charges that stemmed from the 1980 kidnapping, rape, and robbery of a stranded motorist. On the appointed day for jury selection, the prosecution and Holland’s counsel were faced with a jury pool made up of twenty-eight whites and just two African Americans. After questioning the potential jurors, the attorneys were permitted to remove, or “strike,” a certain number of jurors. Some were to be struck “for cause,” meaning that they had expressed some bias or other sentiment that cast doubt on their ability to be fair. The attorneys were permitted to strike a smaller number for no stated reason at all, the so-called peremptory challenge. The prosecution used its peremptory challenges to strike both African American jurors. Holland’s counsel objected on the grounds that Holland, who was white, had the Sixth Amendment right to “be tried by a representative cross section of the community”—words the U.S. Supreme Court had used in its ruling in *Taylor v. Louisiana* (1975). Holland’s attorney argued that an all-white jury violated that right. The trial judge rejected the argument, an all-white jury was sworn in, and Holland was convicted of virtually all the charges. He was sentenced to sixty years in prison. Holland appealed the convictions. When the case of *Holland v. Illinois* (1990) reached the U.S. Supreme Court, the justices found no Sixth Amendment violation. The Court explained that the guarantee of a jury drawn from a “representative cross section of the community” referred only to the pool from which the jurors are picked, not the composition of the final jury itself. The guarantee was intended to ensure an impartial jury, not a diverse one.

WHAT IT MEANS

The Sixth Amendment further specifies the protections offered to people accused of committing crimes. It allows the accused to have their cases heard by an impartial jury made up of people from the surrounding community who have no connection to the case. In some instances when there has been a significant amount of news coverage of the crime, jury members may be picked from outside the place where the crime took place.

Without the Sixth Amendment’s right to a speedy trial, criminal defendants could be held indefinitely, under a cloud of unproven accusations. A speedy trial is also critical to a fair trial, because if a trial takes too long to occur witnesses may die or leave the area, their memories may fade, and physical evidence may be lost. The public trial guarantee protects defendants from secret proceedings that might encourage abuse of the judicial system. Criminal defendants can voluntarily give up their right to a public proceeding—such a renunciation is called a waiver—and judges may limit public access to trials in certain circumstances, such as to protect witnesses’ privacy or to keep order in the court.

A speedy, public trial heard by an impartial jury would be meaningless if a defendant did not know what crime he or she was being charged with and why. Criminal defendants further have the right to face their accusers, which requires that prosecutors put their witnesses on the stand to testify under oath. The defendant’s counsel may then cross-examine the witnesses, which may reveal their testimony as unreliable.

The Sixth Amendment guarantees a criminal defendant the right to have an attorney. That right does not depend on the defendant’s ability to pay an attorney. If a defendant cannot afford one, the government must provide one. The right to an effective defense does not guarantee a successful defense. A defendant can receive effective legal assistance and still be convicted.

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“The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances.”

—Justice Joseph McKenna,
majority opinion, *Beavers v. Haubert*
(1905)

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Sixth Amendment TIMELINE

Defendants can give up the right to a jury trial

1930

In *Patton v. United States*, the U.S. Supreme Court decides that defendants can give up their right to a jury trial, and choose to have the judge alone decide their guilt or innocence. This choice must be made with the understanding of what they are giving up (that is, it must be an “intelligent” or “knowing” choice). In the federal courts and in some state courts, the prosecution and the judge also must agree not to have a jury.

The Supreme Court reverses the conviction of the “Scottsboro Boys”

1932

In Scottsboro, Alabama, nine African Americans known as the “Scottsboro Boys” have been convicted of rape and sentenced to death. The U.S. Supreme Court overturns their convictions in *Powell v. Alabama* because their attorney had been appointed on the morning of the trial and had no opportunity to investigate the case or put on a meaningful defense. In a second trial, the nine men again are convicted, despite testimony by one of the alleged victims there has been no rape. Once again the Supreme Court reverses their convictions because of the exclusion of African Americans from the jury. At a third trial, four of the men are again convicted, while a fifth pleads guilty. Charges against the other four are dropped.

The Supreme Court rejects secret trials

1948

A Michigan law allows judges to hold secret grand jury proceedings. Grand jury proceedings historically have been conducted in private, but a grand jury only has the power to indict someone to stand trial. However, in this case, the grand jury goes further, deciding the defendant’s guilt, and sending him to jail. The U.S. Supreme Court in *In re Oliver*, overturns the conviction of a Michigan man who has been convicted and sentenced after such a secret hearing.

The exclusion of jurors based on race is unconstitutional

1965

In *Swain v. Alabama*, the U.S. Supreme Court holds that prosecutors cannot use peremptory challenges to exclude jurors of a particular race (as it had ruled earlier about ethnic groups). The Court sets rules for proving that jurors have been stricken because of their race. Having few or no minority jurors is not proof enough. It is necessary to show that minority jurors in a certain community have been excluded over a series of trials or over a period of years before a constitutional violation can be found. The Court’s ruling in *J.E.B. v. Alabama* (1994) extends this provision to gender as well as race.

Reservations about the death penalty should not bar one from a jury

1968

A person who expresses reservations about the death penalty is not necessarily unfit to serve on a jury, the Supreme Court rules in *Witherspoon v. Illinois*. The Court holds that a prosecutor can “strike” a person from the jury “for cause” (that is, because of indications that the person cannot be fair) only if the potential juror cannot make an impartial decision about imposing the death penalty.

The Supreme Court relaxes the requirement of a twelve-member jury

1970

Although it is not specified in the Constitution, the Supreme Court in *Thompson v. Utah* (1898) rules that, just as in England, a jury must have twelve people when trying someone charged with a serious crime. However in *Williams v. Florida* (1970), the Supreme Court calls a twelve-member jury a “historical accident” and decides that what matters is if the jury’s size will allow it to reach a fair decision. The Court finds that it makes sense to determine the jury’s size by the seriousness of the crime.

Exclusion of ethnic groups from a jury is unconstitutional

→ 1954 →

In *Hernandez v. Texas*, the U.S. Supreme Court rules that the exclusion of Mexican Americans from a jury, through the prosecutor's use of peremptory challenges (objections to certain potential jurors serving on a jury without any specific reason), violates the Fourteenth Amendment's requirement that all people be treated equally.

Pretrial publicity can jeopardize the right to an impartial jury

→ 1961 →

If there has been an excessive amount of press coverage or other publicity before a defendant goes to trial, it may not be possible to find people to serve on a jury who have not prejudged the case. In *Irwin v. Dowd*, the U.S. Supreme Court rules that a criminal defendant is entitled to have a trial relocated to another community to make sure that the jury will be impartial.

The right to counsel is not dependent on the ability to pay

→ 1963 →

Since 1938 the Supreme Court has ruled that the government has to provide counsel for defendants in federal court trials who cannot afford to pay for one. But the court does not extend this right to state trials until the landmark case of *Gideon v. Wainwright*. In *Argersinger v. Hamlin* (1972) the Court extends its Gideon ruling by specifying that a defendant found guilty, whether of a misdemeanor or a felony, cannot be sentenced to jail time unless offered an attorney at trial.

Jury trials are not required for juvenile offenders

→ 1971 →

Although previous U.S. Supreme Court decisions afforded juvenile defendants many of the same constitutional protections as adults, in *McKeiver v. Pennsylvania*, the Court rules that juveniles do not have a Sixth Amendment right to a jury if tried in juvenile court.

Information in public court documents may be published

→ 1975 →

In *Cox Broadcasting Corp. v. Cohn*, the U.S. Supreme Court rules that a state cannot prevent the news media from publishing or broadcasting the name of a rape victim in a criminal case, when the name has already been included in a court document available to the public.

Presidential order permits military trials of suspected terrorists

→ 2001 →

Following the terrorist attacks on September 11, 2001, President George W. Bush signs a military order authorizing the government to detain noncitizens suspected of terrorism, and to try them before military tribunals. Civil liberties groups criticize the order, fearing that the accused might be held indefinitely without receiving a trial, and that trials could be held in secret, without the usual rules about the kind of evidence that is admissible.

Article I

Section 9



Clauses 1-4

WHAT IT SAYS

[1] [The Migration or Importation of Such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.]*

[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.

[3] No Bill of Attainder or ex post facto Law shall be passed.

[4] [No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.]**

* This provision became obsolete after 1808, when the Constitution prohibited further importation of slaves.

** Revised by the Sixteenth Amendment.

HOLDING PRISONERS INDEFINITELY AT THE GUANTANAMO NAVAL BASE

After the radical Islamic group al Qaeda committed vicious acts of terrorism against the World Trade Center in New York City and the Pentagon in Washington, D.C., on September 11, 2001, Congress authorized President George W. Bush to use military force against the “nations, organizations, or persons” who planned the attacks. The United States quickly sent armed forces to Afghanistan, where the country’s rulers, the Taliban, had allowed al Qaeda terrorists to set up bases. U.S. forces captured many prisoners who were suspected of having aided the Taliban and the terrorists. President Bush signed a military order that permitted U.S. Defense Department officials to hold such prisoners indefinitely without trial, because they posed a threat to national security. The President’s order allowed those arrested to be held without charges and without the right to counsel. The President further directed the Pentagon to create military tribunals, but set no deadline for them, so the detainees were held for years without trial at the U.S. naval base in Guantanamo Bay, Cuba. On behalf of the 595 detainees, the Center for Constitutional Rights, a civil liberties organization, filed a habeas corpus suit against the government. The Supreme Court ruled in *Rasul v. Bush* (2004) that the due process clause requires that even in time of war the foreign prisoners who claimed they were being unlawfully imprisoned could take their cases to U.S. civilian courts. Because the base was outside the United States, the Bush administration argued that anyone held there was outside the jurisdiction of the U.S. civilian courts.

WHAT IT MEANS

Article I, section 9, details areas in which Congress cannot legislate. In the first clause, the Constitution banned Congress from ending the slave trade before the year 1808.

In the second and third clauses, the Constitution specifically guarantees rights to those accused of crimes. It provides that a writ of habeas corpus (a Latin phrase meaning “produce the body”), which allows prisoners the right to challenge their detention, cannot be suspended except under extreme circumstances, such as rebellion or invasion, when there is a public danger. Habeas corpus has been suspended only on rare occasions in American history. For example, President Abraham Lincoln suspended the writ during the Civil War. In 1871, the federal government also suspended habeas corpus in South Carolina to combat the Ku Klux Klan.

The Constitution similarly prohibits bills of attainder, which are laws directed against specific individuals or groups, declaring them guilty of a serious crime—such as treason—by legislation rather than by a jury trial. This ban was intended to ensure that the legislative branch did not bypass the courts and deny people the protections designed for criminal defendants and guaranteed elsewhere in the Constitution. In addition, there can be no “ex post facto” (Latin for “after the fact”) laws—or laws passed to make an action illegal after it has already happened. This protection guarantees that individuals are warned ahead of time that their actions are illegal.

The fourth clause, which prevented the imposition of direct taxes, caused the Supreme Court to strike down a national income tax in 1895. To expand federal revenues, Congress proposed and the states ratified the Sixteenth Amendment (1913), permitting the federal government to levy an income tax.

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“If I be wrong on this question of Constitutional power [suspension of habeas corpus], my error lies in believing that certain proceedings are constitutional, when, in cases of rebellion or invasion, the public safety requires them.”

— Abraham Lincoln, letter to Erastus Corning, June 12, 1863

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Cite as: 542 U. S. ____ (2004)

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Opinion of O'CONNOR, J.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 03–6696

YASER ESAM HAMDI AND ESAM FOUAD HAMDI, AS
NEXT FRIEND OF YASER ESAM HAMDI, PETITION-
ERS *v.* DONALD H. RUMSFELD, SECRETARY
OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

[June 28, 2004]

JUSTICE O'CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE BREYER join.

At this difficult time in our Nation's history, we are called upon to consider the legality of the Government's detention of a United States citizen on United States soil as an "enemy combatant" and to address the process that is constitutionally owed to one who seeks to challenge his classification as such. The United States Court of Appeals for the Fourth Circuit held that petitioner's detention was legally authorized and that he was entitled to no further opportunity to challenge his enemy-combatant label. We now vacate and remand. We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.

I

On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks. One week later, in response to these “acts of treacherous violence,” Congress passed a resolution authorizing the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” or “harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” Authorization for Use of Military Force (“the AUMF”), 115 Stat. 224. Soon thereafter, the President ordered United States Armed Forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it.

This case arises out of the detention of a man whom the Government alleges took up arms with the Taliban during this conflict. His name is Yaser Esam Hamdi. Born an American citizen in Louisiana in 1980, Hamdi moved with his family to Saudi Arabia as a child. By 2001, the parties agree, he resided in Afghanistan. At some point that year, he was seized by members of the Northern Alliance, a coalition of military groups opposed to the Taliban government, and eventually was turned over to the United States military. The Government asserts that it initially detained and interrogated Hamdi in Afghanistan before transferring him to the United States Naval Base in Guantanamo Bay in January 2002. In April 2002, upon learning that Hamdi is an American citizen, authorities transferred him to a naval brig in Norfolk, Virginia, where he remained until a recent transfer to a brig in Charleston, South Carolina. The Government contends that Hamdi is an “enemy combatant,” and that this status

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justifies holding him in the United States indefinitely—without formal charges or proceedings—unless and until it makes the determination that access to counsel or further process is warranted.

In June 2002, Hamdi's father, Esam Fouad Hamdi, filed the present petition for a writ of habeas corpus under 28 U. S. C. §2241 in the Eastern District of Virginia, naming as petitioners his son and himself as next friend. The elder Hamdi alleges in the petition that he has had no contact with his son since the Government took custody of him in 2001, and that the Government has held his son "without access to legal counsel or notice of any charges pending against him." App. 103, 104. The petition contends that Hamdi's detention was not legally authorized. *Id.*, at 105. It argues that, "[a]s an American citizen, . . . Hamdi enjoys the full protections of the Constitution," and that Hamdi's detention in the United States without charges, access to an impartial tribunal, or assistance of counsel "violated and continue[s] to violate the Fifth and Fourteenth Amendments to the United States Constitution." *Id.*, at 107. The habeas petition asks that the court, among other things, (1) appoint counsel for Hamdi; (2) order respondents to cease interrogating him; (3) declare that he is being held in violation of the Fifth and Fourteenth Amendments; (4) "[t]o the extent Respondents contest any material factual allegations in this Petition, schedule an evidentiary hearing, at which Petitioners may adduce proof in support of their allegations"; and (5) order that Hamdi be released from his "unlawful custody." *Id.*, at 108–109. Although his habeas petition provides no details with regard to the factual circumstances surrounding his son's capture and detention, Hamdi's father has asserted in documents found elsewhere in the record that his son went to Afghanistan to do "relief work," and that he had been in that country less than two months before September 11, 2001, and could not have received

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military training. *Id.*, at 188–189. The 20-year-old was traveling on his own for the first time, his father says, and “[b]ecause of his lack of experience, he was trapped in Afghanistan once that military campaign began.” *Id.*, at 188–189.

The District Court found that Hamdi’s father was a proper next friend, appointed the federal public defender as counsel for the petitioners, and ordered that counsel be given access to Hamdi. *Id.*, at 113–116. The United States Court of Appeals for the Fourth Circuit reversed that order, holding that the District Court had failed to extend appropriate deference to the Government’s security and intelligence interests. 296 F. 3d 278, 279, 283 (2002). It directed the District Court to consider “the most cautious procedures first,” *id.*, at 284, and to conduct a deferential inquiry into Hamdi’s status, *id.*, at 283. It opined that “if Hamdi is indeed an ‘enemy combatant’ who was captured during hostilities in Afghanistan, the government’s present detention of him is a lawful one.” *Ibid.*

On remand, the Government filed a response and a motion to dismiss the petition. It attached to its response a declaration from one Michael Mobbs (hereinafter “Mobbs Declaration”), who identified himself as Special Advisor to the Under Secretary of Defense for Policy. Mobbs indicated that in this position, he has been “substantially involved with matters related to the detention of enemy combatants in the current war against the al Qaeda terrorists and those who support and harbor them (including the Taliban).” App. 148. He expressed his “familiar[ity]” with Department of Defense and United States military policies and procedures applicable to the detention, control, and transfer of al Qaeda and Taliban personnel, and declared that “[b]ased upon my review of relevant records and reports, I am also familiar with the facts and circumstances related to the capture of . . . Hamdi and his detention by U. S. military forces.” *Ibid.*

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Mobbs then set forth what remains the sole evidentiary support that the Government has provided to the courts for Hamdi's detention. The declaration states that Hamdi "traveled to Afghanistan" in July or August 2001, and that he thereafter "affiliated with a Taliban military unit and received weapons training." *Ibid.* It asserts that Hamdi "remained with his Taliban unit following the attacks of September 11" and that, during the time when Northern Alliance forces were "engaged in battle with the Taliban," "Hamdi's Taliban unit surrendered" to those forces, after which he "surrender[ed] his Kalishnikov assault rifle" to them. *Id.*, at 148–149. The Mobbs Declaration also states that, because al Qaeda and the Taliban "were and are hostile forces engaged in armed conflict with the armed forces of the United States," "individuals associated with" those groups "were and continue to be enemy combatants." *Id.*, at 149. Mobbs states that Hamdi was labeled an enemy combatant "[b]ased upon his interviews and in light of his association with the Taliban." *Ibid.* According to the declaration, a series of "U. S. military screening team[s]" determined that Hamdi met "the criteria for enemy combatants," and "a subsequent interview of Hamdi has confirmed that he surrendered and gave his firearm to Northern Alliance forces, which supports his classification as an enemy combatant." *Id.*, at 149–150.

After the Government submitted this declaration, the Fourth Circuit directed the District Court to proceed in accordance with its earlier ruling and, specifically, to "consider the sufficiency of the Mobbs Declaration as an independent matter before proceeding further." 316 F. 3d at 450, 462 (2003). The District Court found that the Mobbs Declaration fell "far short" of supporting Hamdi's detention. App. 292. It criticized the generic and hearsay nature of the affidavit, calling it "little more than the government's 'say-so.'" *Id.*, at 298. It ordered the Government to turn over numerous materials for *in camera*

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review, including copies of all of Hamdi's statements and the notes taken from interviews with him that related to his reasons for going to Afghanistan and his activities therein; a list of all interrogators who had questioned Hamdi and their names and addresses; statements by members of the Northern Alliance regarding Hamdi's surrender and capture; a list of the dates and locations of his capture and subsequent detentions; and the names and titles of the United States Government officials who made the determinations that Hamdi was an enemy combatant and that he should be moved to a naval brig. *Id.*, at 185–186. The court indicated that all of these materials were necessary for “meaningful judicial review” of whether Hamdi's detention was legally authorized and whether Hamdi had received sufficient process to satisfy the Due Process Clause of the Constitution and relevant treaties or military regulations. *Id.*, at 291–292.

The Government sought to appeal the production order, and the District Court certified the question of whether the Mobbs Declaration, “standing alone, is sufficient as a matter of law to allow meaningful judicial review of [Hamdi's] classification as an enemy combatant.” 316 F. 3d, at 462. The Fourth Circuit reversed, but did not squarely answer the certified question. It instead stressed that, because it was “undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict,” no factual inquiry or evidentiary hearing allowing Hamdi to be heard or to rebut the Government's assertions was necessary or proper. *Id.*, at 459. Concluding that the factual averments in the Mobbs Declaration, “if accurate,” provided a sufficient basis upon which to conclude that the President had constitutionally detained Hamdi pursuant to the President's war powers, it ordered the habeas petition dismissed. *Id.*, at 473. The Fourth Circuit emphasized that the “vital purposes” of the detention of uncharged enemy combatants—preventing those combatants

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from rejoining the enemy while relieving the military of the burden of litigating the circumstances of wartime captures halfway around the globe—were interests “directly derived from the war powers of Articles I and II.” *Id.*, at 465–466. In that court’s view, because “Article III contains nothing analogous to the specific powers of war so carefully enumerated in Articles I and II,” *id.*, at 463, separation of powers principles prohibited a federal court from “delv[ing] further into Hamdi’s status and capture,” *id.*, at 473. Accordingly, the District Court’s more vigorous inquiry “went far beyond the acceptable scope of review.” *Ibid.*

On the more global question of whether legal authorization exists for the detention of citizen enemy combatants at all, the Fourth Circuit rejected Hamdi’s arguments that 18 U. S. C. §4001(a) and Article 5 of the Geneva Convention rendered any such detentions unlawful. The court expressed doubt as to Hamdi’s argument that §4001(a), which provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress,” required express congressional authorization of detentions of this sort. But it held that, in any event, such authorization was found in the post-September 11 Authorization for Use of Military Force. 316 F. 3d, at 467. Because “capturing and detaining enemy combatants is an inherent part of warfare,” the court held, “the ‘necessary and appropriate force’ referenced in the congressional resolution necessarily includes the capture and detention of any and all hostile forces arrayed against our troops.” *Ibid.*; see also *id.*, at 467–468 (noting that Congress, in 10 U. S. C. §956(5), had specifically authorized the expenditure of funds for keeping prisoners of war and persons whose status was determined “to be similar to prisoners of war,” and concluding that this appropriation measure also demonstrated that Congress had “authorized [these individuals] detention in

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the first instance”). The court likewise rejected Hamdi’s Geneva Convention claim, concluding that the convention is not self-executing and that, even if it were, it would not preclude the Executive from detaining Hamdi until the cessation of hostilities. 316 F. 3d, at 468–469.

Finally, the Fourth Circuit rejected Hamdi’s contention that its legal analyses with regard to the authorization for the detention scheme and the process to which he was constitutionally entitled should be altered by the fact that he is an American citizen detained on American soil. Relying on *Ex parte Quirin*, 317 U. S. 1 (1942), the court emphasized that “[o]ne who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such.” 316 F.3d, at 475. “The privilege of citizenship,” the court held, “entitles Hamdi to a limited judicial inquiry into his detention, but only to determine its legality under the war powers of the political branches. At least where it is undisputed that he was present in a zone of active combat operations, we are satisfied that the Constitution does not entitle him to a searching review of the factual determinations underlying his seizure there.” *Ibid.*

The Fourth Circuit denied rehearing en banc, 337 F. 3d 335 (2003), and we granted certiorari. 540 U. S. __ (2004). We now vacate the judgment below and remand.

II

The threshold question before us is whether the Executive has the authority to detain citizens who qualify as “enemy combatants.” There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such. It has made clear, however, that, for purposes of this case, the “enemy combatant” that it is seeking to detain is an individual who, it

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alleges, was “part of or supporting forces hostile to the United States or coalition partners” in Afghanistan and who “engaged in an armed conflict against the United States” there. Brief for Respondents 3. We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.

The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not reach the question whether Article II provides such authority, however, because we agree with the Government’s alternative position, that Congress has in fact authorized Hamdi’s detention, through the AUMF.

Our analysis on that point, set forth below, substantially overlaps with our analysis of Hamdi’s principal argument for the illegality of his detention. He posits that his detention is forbidden by 18 U. S. C. §4001(a). Section 4001(a) states that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” Congress passed §4001(a) in 1971 as part of a bill to repeal the Emergency Detention Act of 1950, 50 U. S. C. §811 *et seq.*, which provided procedures for executive detention, during times of emergency, of individuals deemed likely to engage in espionage or sabotage. Congress was particularly concerned about the possibility that the Act could be used to reprise the Japanese internment camps of World War II. H. R. Rep. No. 92–116 (1971); *id.*, at 4 (“The concentration camp implications of the legislation render it abhorrent”). The Government again presses two alternative positions. First, it argues that §4001(a), in light of its legislative history and its location in Title 18, applies only to “the control of civilian prisons and related detentions,” not to military detentions. Brief for Respondents 21. Second, it maintains that §4001(a) is satisfied,

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because Hamdi is being detained “pursuant to an Act of Congress”—the AUMF. *Id.*, at 21–22. Again, because we conclude that the Government’s second assertion is correct, we do not address the first. In other words, for the reasons that follow, we conclude that the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe (assuming, without deciding, that such authorization is required), and that the AUMF satisfied §4001(a)’s requirement that a detention be “pursuant to an Act of Congress” (assuming, without deciding, that §4001(a) applies to military detentions).

The AUMF authorizes the President to use “all necessary and appropriate force” against “nations, organizations, or persons” associated with the September 11, 2001, terrorist attacks. 115 Stat. 224. There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the “necessary and appropriate force” Congress has authorized the President to use.

The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by “universal agreement and practice,” are “important incident[s] of war.” *Ex parte Quirin*, 317 U. S., at 28. The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again. Naqvi, *Doubtful Prisoner-of-War Status*, 84 *Int’l Rev. Red Cross* 571, 572 (2002) (“[C]aptivity in war is ‘neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the pris-

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oners of war from further participation in the war” (quoting decision of Nuremberg Military Tribunal, reprinted in 41 Am. J. Int'l L. 172, 229 (1947)); W. Winthrop, *Military Law and Precedents* 788 (rev. 2d ed. 1920) (“The time has long passed when ‘no quarter’ was the rule on the battlefield It is now recognized that ‘Captivity is neither a punishment nor an act of vengeance,’ but ‘merely a temporary detention which is devoid of all penal character.’ . . . ‘A prisoner of war is no convict; his imprisonment is a simple war measure.’” (citations omitted); cf. *In re Territo*, 156 F. 2d 142, 145 (CA9 1946) (“The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on must be removed as completely as practicable from the front, treated humanely, and in time exchanged, repatriated, or otherwise released” (footnotes omitted)).

There is no bar to this Nation’s holding one of its own citizens as an enemy combatant. In *Quirin*, one of the detainees, Haupt, alleged that he was a naturalized United States citizen. 317 U. S., at 20. We held that “[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war.” *Id.*, at 37–38. While Haupt was tried for violations of the law of war, nothing in *Quirin* suggests that his citizenship would have precluded his mere detention for the duration of the relevant hostilities. See *id.*, at 30–31. See also Lieber Code, ¶153, *Instructions for the Government of Armies of the United States in the Field*, Gen. Order No. 100 (1863), reprinted in 2 Lieber, *Miscellaneous Writings*, p. 273 (contemplating, in code binding the Union Army during the Civil War, that “captured rebels” would be treated “as prisoners of war”). Nor can we see any reason for drawing such a line here. A citizen, no less than an alien, can be “part of or supporting forces hostile

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to the United States or coalition partners” and “engaged in an armed conflict against the United States,” Brief for Respondents 3; such a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict.

In light of these principles, it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, in permitting the use of “necessary and appropriate force,” Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.

Hamdi objects, nevertheless, that Congress has not authorized the *indefinite* detention to which he is now subject. The Government responds that “the detention of enemy combatants during World War II was just as ‘indefinite’ while that war was being fought.” *Id.*, at 16. We take Hamdi’s objection to be not to the lack of certainty regarding the date on which the conflict will end, but to the substantial prospect of perpetual detention. We recognize that the national security underpinnings of the “war on terror,” although crucially important, are broad and malleable. As the Government concedes, “given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement.” *Ibid.* The prospect Hamdi raises is therefore not far-fetched. If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that Hamdi’s detention could last for the rest of his life.

It is a clearly established principle of the law of war that detention may last no longer than active hostilities. See Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6

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U. S. T. 3316, 3406, T. I. A. S. No. 3364 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities”). See also Article 20 of the Hague Convention (II) on Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1817 (as soon as possible after “conclusion of peace”); Hague Convention (IV), *supra*, Oct. 18, 1907, 36 Stat. 2301 (“conclusion of peace” (Art. 20)); Geneva Convention, *supra*, July 27, 1929, 47 Stat. 2055 (repatriation should be accomplished with the least possible delay after conclusion of peace (Art. 75)); Praust, Judicial Power to Determine the Status and Rights of Persons Detained without Trial, 44 Harv. Int’l L. J. 503, 510–511 (2003) (prisoners of war “can be detained during an armed conflict, but the detaining country must release and repatriate them ‘without delay after the cessation of active hostilities,’ unless they are being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences” (citing Arts. 118, 85, 99, 119, 129, Geneva Convention (III), 6 T. I. A. S., at 3384, 3392, 3406, 3418)).

Hamdi contends that the AUMF does not authorize indefinite or perpetual detention. Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress’ grant of authority for the use of “necessary and appropriate force” to include the authority to detain for the duration of the relevant conflict, and our understanding is based on long-standing law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. See, e.g., Constable, U. S. Launches New Operation in Afghanistan, Washington Post, Mar. 14, 2004, p. A22 (reporting that 13,500 United States troops

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remain in Afghanistan, including several thousand new arrivals); J. Abizaid, Dept. of Defense, Gen. Abizaid Central Command Operations Update Briefing, Apr. 30, 2004, <http://www.defenselink.mil/transcripts/2004/tr20040430-1402.html> (as visited June 8, 2004, and available in the Clerk of Court's case file) (media briefing describing ongoing operations in Afghanistan involving 20,000 United States troops). The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who "engaged in an armed conflict against the United States." If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of "necessary and appropriate force," and therefore are authorized by the AUMF.

Ex parte Milligan, 4 Wall. 2, 125 (1866), does not undermine our holding about the Government's authority to seize enemy combatants, as we define that term today. In that case, the Court made repeated reference to the fact that its inquiry into whether the military tribunal had jurisdiction to try and punish Milligan turned in large part on the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there. *Id.*, at 118, 131. That fact was central to its conclusion. Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different. The Court's repeated explanations that Milligan was not a prisoner of war suggest that had these different circumstances been present he could have been detained under military authority for the duration of the conflict, whether or not he was a citizen.¹

¹Here the basis asserted for detention by the military is that Hamdi was carrying a weapon against American troops on a foreign battlefield;

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Moreover, as JUSTICE SCALIA acknowledges, the Court in *Ex parte Quirin*, 317 U. S. 1 (1942), dismissed the language of *Milligan* that the petitioners had suggested prevented them from being subject to military process. *Post*, at 17–18 (dissenting opinion). Clear in this rejection was a disavowal of the New York State cases cited in *Milligan*, 4 Wall., at 128–129, on which JUSTICE SCALIA relies. *See id.*, at 128–129. Both *Smith v. Shaw*, 12 Johns. *257 (N. Y. 1815), and *M'Connell v. Hampton*, 12 Johns. *234 (N. Y. 1815), were civil suits for false imprisonment. Even accepting that these cases once could have been viewed as standing for the sweeping proposition for which JUSTICE SCALIA cites them—that the military does not have authority to try an American citizen accused of spying against his country during wartime—*Quirin* makes undeniably clear that this is not the law today. Haupt, like the citizens in *Smith* and *M'Connell*, was accused of being a spy. The Court in *Quirin* found him “subject to trial and punishment by [a] military tribunal[]” for those acts, and held that his citizenship did not change this result. 317 U. S., at 31, 37–38.

Quirin was a unanimous opinion. It both postdates and clarifies *Milligan*, providing us with the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances. Brushing aside such precedent—particularly when doing so gives rise to a host of new questions never dealt with by this Court—is unjustified and unwise.

To the extent that JUSTICE SCALIA accepts the precedential value of *Quirin*, he argues that it cannot guide our inquiry here because “[i]n *Quirin* it was uncontested that

that is, that he was an enemy combatant. The legal category of enemy combatant has not been elaborated upon in great detail. The permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them.

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the petitioners were members of enemy forces,” while Hamdi challenges his classification as an enemy combatant. *Post*, at 19. But it is unclear why, in the paradigm outlined by JUSTICE SCALIA, such a concession should have any relevance. JUSTICE SCALIA envisions a system in which the only options are congressional suspension of the writ of habeas corpus or prosecution for treason or some other crime. *Post*, at 1. He does not explain how his historical analysis supports the addition of a third option—detention under some other process after concession of enemy-combatant status—or why a concession should carry any different effect than proof of enemy-combatant status in a proceeding that comports with due process. To be clear, our opinion only finds legislative authority to detain under the AUMF once it is sufficiently clear that the individual is, in fact, an enemy combatant; whether that is established by concession or by some other process that verifies this fact with sufficient certainty seems beside the point.

Further, JUSTICE SCALIA largely ignores the context of this case: a United States citizen captured in a *foreign* combat zone. JUSTICE SCALIA refers to only one case involving this factual scenario—a case in which a United States citizen-POW (a member of the Italian army) from World War II was seized on the battlefield in Sicily and then held in the United States. The court in that case held that the military detention of that United States citizen was lawful. See *In re Territo*, 156 F. 2d, at 148.

JUSTICE SCALIA's treatment of that case—in a footnote—suffers from the same defect as does his treatment of *Quirin*: Because JUSTICE SCALIA finds the fact of battlefield capture irrelevant, his distinction based on the fact that the petitioner “conceded” enemy combatant status is beside the point. See *supra*, at 15–16. JUSTICE SCALIA can point to no case or other authority for the proposition that those captured on a foreign battlefield (whether

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detained there or in U. S. territory) cannot be detained outside the criminal process.

Moreover, JUSTICE SCALIA presumably would come to a different result if Hamdi had been kept in Afghanistan or even Guantanamo Bay. See *post*, at 25 (SCALIA, J., dissenting). This creates a perverse incentive. Military authorities faced with the stark choice of submitting to the full-blown criminal process or releasing a suspected enemy combatant captured on the battlefield will simply keep citizen-detainees abroad. Indeed, the Government transferred Hamdi from Guantanamo Bay to the United States naval brig only after it learned that he might be an American citizen. It is not at all clear why that should make a determinative constitutional difference.

III

Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status. Hamdi argues that he is owed a meaningful and timely hearing and that “extra-judicial detention [that] begins and ends with the submission of an affidavit based on third-hand hearsay” does not comport with the Fifth and Fourteenth Amendments. Brief for Petitioners 16. The Government counters that any more process than was provided below would be both unworkable and “constitutionally intolerable.” Brief for Respondents 46. Our resolution of this dispute requires a careful examination both of the writ of habeas corpus, which Hamdi now seeks to employ as a mechanism of judicial review, and of the Due Process Clause, which informs the procedural contours of that mechanism in this instance.

A

Though they reach radically different conclusions on the process that ought to attend the present proceeding, the parties begin on common ground. All agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States. U. S. Const., Art. I, §9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it”). Only in the rarest of circumstances has Congress seen fit to suspend the writ. See, *e.g.*, Act of Mar. 3, 1863, ch. 81, §1, 12 Stat. 755; Act of April 20, 1871, ch. 22, §4, 17 Stat. 14. At all other times, it has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law. See *INS v. St. Cyr*, 533 U. S. 289, 301 (2001). All agree suspension of the writ has not occurred here. Thus, it is undisputed that Hamdi was properly before an Article III court to challenge his detention under 28 U. S. C. §2241. Brief for Respondents 12. Further, all agree that §2241 and its companion provisions provide at least a skeletal outline of the procedures to be afforded a petitioner in federal habeas review. Most notably, §2243 provides that “the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts,” and §2246 allows the taking of evidence in habeas proceedings by deposition, affidavit, or interrogatories.

The simple outline of §2241 makes clear both that Congress envisioned that habeas petitioners would have some opportunity to present and rebut facts and that courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process. The Government recognizes the basic procedural protections required by the habeas statute, *Id.*, at 37–38, but asks us to hold that, given both the flexibility of the habeas mechanism and the circumstances presented in this case, the

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presentation of the Mobbs Declaration to the habeas court completed the required factual development. It suggests two separate reasons for its position that no further process is due.

B

First, the Government urges the adoption of the Fourth Circuit's holding below—that because it is “undisputed” that Hamdi's seizure took place in a combat zone, the habeas determination can be made purely as a matter of law, with no further hearing or factfinding necessary. This argument is easily rejected. As the dissenters from the denial of rehearing en banc noted, the circumstances surrounding Hamdi's seizure cannot in any way be characterized as “undisputed,” as “those circumstances are neither conceded in fact, nor susceptible to concession in law, because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances.” 337 F. 3d 335, 357 (CA4 2003) (Luttig, J., dissenting from denial of rehearing en banc); see also *id.*, at 371–372 (Motz, J., dissenting from denial of rehearing en banc). Further, the “facts” that constitute the alleged concession are insufficient to support Hamdi's detention. Under the definition of enemy combatant that we accept today as falling within the scope of Congress' authorization, Hamdi would need to be “part of or supporting forces hostile to the United States or coalition partners” and “engaged in an armed conflict against the United States” to justify his detention in the United States for the duration of the relevant conflict. Brief for Respondents 3. The habeas petition states only that “[w]hen seized by the United States Government, Mr. Hamdi resided in Afghanistan.” App. 104. An assertion that one *resided* in a country in which combat operations are taking place is not a concession that one was “*captured* in a zone of active combat operations in a foreign theater of war,” 316 F. 3d, at 459

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(emphasis added), and certainly is not a concession that one was “part of or supporting forces hostile to the United States or coalition partners” and “engaged in an armed conflict against the United States.” Accordingly, we reject any argument that Hamdi has made concessions that eliminate any right to further process.

C

The Government’s second argument requires closer consideration. This is the argument that further factual exploration is unwarranted and inappropriate in light of the extraordinary constitutional interests at stake. Under the Government’s most extreme rendition of this argument, “[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict” ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme. Brief for Respondents 26. At most, the Government argues, courts should review its determination that a citizen is an enemy combatant under a very deferential “some evidence” standard. *Id.*, at 34 (“Under the some evidence standard, the focus is exclusively on the factual basis supplied by the Executive to support its own determination” (citing *Superintendent, Mass. Correctional Institution at Walpole v. Hill*, 472 U. S. 445, 455–457 (1985) (explaining that the some evidence standard “does not require” a “weighing of the evidence,” but rather calls for assessing “whether there is any evidence in the record that could support the conclusion”))). Under this review, a court would assume the accuracy of the Government’s articulated basis for Hamdi’s detention, as set forth in the Mobbs Declaration, and assess only whether that articulated basis was a legitimate one. Brief for Respondents 36; see also 316 F. 3d, at 473–474 (declining to address

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whether the “some evidence” standard should govern the adjudication of such claims, but noting that “[t]he factual averments in the [Mobbs] affidavit, if accurate, are sufficient to confirm” the legality of Hamdi’s detention).

In response, Hamdi emphasizes that this Court consistently has recognized that an individual challenging his detention may not be held at the will of the Executive without recourse to some proceeding before a neutral tribunal to determine whether the Executive’s asserted justifications for that detention have basis in fact and warrant in law. See, e.g., *Zadvydas v. Davis*, 533 U. S. 678, 690 (2001); *Addington v. Texas*, 441 U. S. 418, 425–427 (1979). He argues that the Fourth Circuit inappropriately “ceded power to the Executive during wartime to define the conduct for which a citizen may be detained, judge whether that citizen has engaged in the proscribed conduct, and imprison that citizen indefinitely,” Brief for Petitioners 21, and that due process demands that he receive a hearing in which he may challenge the Mobbs Declaration and adduce his own counter evidence. The District Court, agreeing with Hamdi, apparently believed that the appropriate process would approach the process that accompanies a criminal trial. It therefore disapproved of the hearsay nature of the Mobbs Declaration and anticipated quite extensive discovery of various military affairs. Anything less, it concluded, would not be “meaningful judicial review.” App. 291.

Both of these positions highlight legitimate concerns. And both emphasize the tension that often exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right. The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not “deprived of life, liberty, or property,

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without due process of law,” U. S. Const., Amdt. 5, is the test that we articulated in *Mathews v. Eldridge*, 424 U. S. 319 (1976). See, e.g., *Heller v. Doe*, 509 U. S. 312, 330–331 (1993); *Zinermon v. Burch*, 494 U. S. 113, 127–128 (1990); *United States v. Salerno*, 481 U. S. 739, 746 (1987); *Schall v. Martin*, 467 U. S. 253, 274–275 (1984); *Addington v. Texas*, *supra*, at 425. *Mathews* dictates that the process due in any given instance is determined by weighing “the private interest that will be affected by the official action” against the Government’s asserted interest, “including the function involved” and the burdens the Government would face in providing greater process. 424 U. S., at 335. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of “the risk of an erroneous deprivation” of the private interest if the process were reduced and the “probable value, if any, of additional or substitute safeguards.” *Ibid.* We take each of these steps in turn.

1

It is beyond question that substantial interests lie on both sides of the scale in this case. Hamdi’s “private interest . . . affected by the official action,” *ibid.*, is the most elemental of liberty interests—the interest in being free from physical detention by one’s own government. *Foucha v. Louisiana*, 504 U. S. 71, 80 (1992) (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action”); see also *Parham v. J. R.*, 442 U. S. 584, 600 (1979) (noting the “substantial liberty interest in not being confined unnecessarily”). “In our society liberty is the norm,” and detention without trial “is the carefully limited exception.” *Salerno*, *supra*, at 755. “We have always been careful not to ‘minimize the importance and fundamental nature’ of the individual’s right to liberty,” *Foucha*, *supra*, at 80 (quoting *Salerno*, *supra*, at 750), and

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we will not do so today.

Nor is the weight on this side of the *Mathews* scale offset by the circumstances of war or the accusation of treasonous behavior, for “[i]t is clear that commitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection,” *Jones v. United States*, 463 U. S. 354, 361 (1983) (emphasis added; internal quotation marks omitted), and at this stage in the *Mathews* calculus, we consider the interest of the *erroneously* detained individual. *Carey v. Piphus*, 435 U. S. 247, 259 (1978) (“Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property”); see also *id.*, at 266 (noting “the importance to organized society that procedural due process be observed,” and emphasizing that “the right to procedural due process is ‘absolute’ in the sense that it does not depend upon the merits of a claimant’s substantive assertions”). Indeed, as *amicus* briefs from media and relief organizations emphasize, the risk of erroneous deprivation of a citizen’s liberty in the absence of sufficient process here is very real. See Brief for AmeriCares et al. as *Amici Curiae* 13–22 (noting ways in which “[t]he nature of humanitarian relief work and journalism present a significant risk of mistaken military detentions”). Moreover, as critical as the Government’s interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat. See *Ex parte Milligan*, 4 Wall., at 125 (“[The Founders] knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that

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unlimited power, wherever lodged at such a time, was especially hazardous to freemen"). Because we live in a society in which "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty," *O'Connor v. Donaldson*, 422 U. S. 563, 575 (1975), our starting point for the *Mathews v. Eldridge* analysis is unaltered by the allegations surrounding the particular detainee or the organizations with which he is alleged to have associated. We reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails.

2

On the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States. As discussed above, *supra*, at 10, the law of war and the realities of combat may render such detentions both necessary and appropriate, and our due process analysis need not blink at those realities. Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them. *Department of Navy v. Egan*, 484 U. S. 518, 530 (1988) (noting the reluctance of the courts "to intrude upon the authority of the Executive in military and national security affairs"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 587 (1952) (acknowledging "broad powers in military commanders engaged in day-to-day fighting in a theater of war").

The Government also argues at some length that its interests in reducing the process available to alleged enemy combatants are heightened by the practical diffi-

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culties that would accompany a system of trial-like process. In its view, military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away, and discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war. Brief for Respondents 46–49. To the extent that these burdens are triggered by heightened procedures, they are properly taken into account in our due process analysis.

3

Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad. See *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 164–165 (1963) (“The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with guarantees which, it is feared, will inhibit government action”); see also *United States v. Robel*, 389 U. S. 258, 264 (1967) (“It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile”).

With due recognition of these competing concerns, we believe that neither the process proposed by the Government nor the process apparently envisioned by the District Court below strikes the proper constitutional balance

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when a United States citizen is detained in the United States as an enemy combatant. That is, “the risk of erroneous deprivation” of a detainee’s liberty interest is unacceptably high under the Government’s proposed rule, while some of the “additional or substitute procedural safeguards” suggested by the District Court are unwarranted in light of their limited “probable value” and the burdens they may impose on the military in such cases. *Mathews*, 424 U. S., at 335.

We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker. See *Cleveland Bd. of Ed. v. Loudermill*, 470 U. S. 532, 542 (1985) (“An essential principle of due process is that a deprivation of life, liberty, or property ‘be preceded by notice and opportunity for hearing appropriate to the nature of the case’” (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950))); *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U. S. 602, 617 (1993) (“due process requires a ‘neutral and detached judge in the first instance’” (quoting *Ward v. Monroeville*, 409 U. S. 57, 61–62 (1972))). “For more than a century the central meaning of procedural due process has been clear: ‘Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.’ It is equally fundamental that the right to notice and an opportunity to be heard ‘must be granted at a meaningful time and in a meaningful manner.’” *Fuentes v. Shevin*, 407 U. S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 1 Wall. 223, 233 (1864); *Armstrong v. Manzo*, 380 U. S. 545, 552 (1965) (other citations omitted)). These essential constitutional promises may not be eroded.

At the same time, the exigencies of the circumstances

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may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant. In the words of *Mathews*, process of this sort would sufficiently address the "risk of erroneous deprivation" of a detainee's liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government. 424 U. S., at 335.²

We think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts. The parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have

² Because we hold that Hamdi is constitutionally entitled to the process described above, we need not address at this time whether any treaty guarantees him similar access to a tribunal for a determination of his status.

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been seized. The Government has made clear in its briefing that documentation regarding battlefield detainees already is kept in the ordinary course of military affairs. Brief for Respondents 3–4. Any factfinding imposition created by requiring a knowledgeable affiant to summarize these records to an independent tribunal is a minimal one. Likewise, arguments that military officers ought not have to wage war under the threat of litigation lose much of their steam when factual disputes at enemy-combatant hearings are limited to the alleged combatant's acts. This focus meddles little, if at all, in the strategy or conduct of war, inquiring only into the appropriateness of continuing to detain an individual claimed to have taken up arms against the United States. While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here. Cf. *Korematsu v. United States*, 323 U. S. 214, 233–234 (1944) (Murphy, J., dissenting) (“[L]ike other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled”); *Sterling v. Constantin*, 287 U. S. 378, 401 (1932) (“What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions”).

In sum, while the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a

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citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator.

D

In so holding, we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. *Youngstown Sheet & Tube*, 343 U. S., at 587. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. *Mistretta v. United States*, 488 U. S. 361, 380 (1989) (it was "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty"); *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398, 426 (1934) (The war power "is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties"). Likewise, we have made clear that, unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serv-

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ing as an important judicial check on the Executive's discretion in the realm of detentions. See *St. Cyr*, 533 U. S., at 301 (“At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest”). Thus, while we do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge. Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process.

Because we conclude that due process demands some system for a citizen detainee to refute his classification, the proposed “some evidence” standard is inadequate. Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short. As the Government itself has recognized, we have utilized the “some evidence” standard in the past as a standard of review, not as a standard of proof. Brief for Respondents 35. That is, it primarily has been employed by courts in examining an administrative record developed after an adversarial proceeding—one with process at least of the sort that we today hold is constitutionally mandated in the citizen enemy-combatant setting. See, *e.g.*, *St. Cyr, supra; Hill*, 472 U. S., at 455–457. This standard therefore is ill suited to the situation in which a habeas petitioner has received no prior proceedings before any tribunal and had no prior opportunity to rebut the Executive's factual assertions before a neutral decisionmaker.

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Today we are faced only with such a case. Aside from unspecified “screening” processes, Brief for Respondents 3–4, and military interrogations in which the Government suggests Hamdi could have contested his classification, Tr. of Oral Arg. 40, 42, Hamdi has received no process. An interrogation by one’s captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker. Compare Brief for Respondents 42–43 (discussing the “secure interrogation environment,” and noting that military interrogations require a controlled “interrogation dynamic” and “a relationship of trust and dependency” and are “a critical source” of “timely and effective intelligence”) with *Concrete Pipe*, 508 U. S., at 617–618 (“one is entitled as a matter of due process of law to an adjudicator who is not in a situation which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true” (internal quotation marks omitted)). That even purportedly fair adjudicators “are disqualified by their interest in the controversy to be decided is, of course, the general rule.” *Tumey v. Ohio*, 273 U. S. 510, 522 (1927). Plainly, the “process” Hamdi has received is not that to which he is entitled under the Due Process Clause.

There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention. See *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, Army Regulation 190–8, §1–6 (1997). In the absence of such process, however, a court that receives a petition for a writ of habeas corpus from an alleged enemy

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combatant must itself ensure that the minimum requirements of due process are achieved. Both courts below recognized as much, focusing their energies on the question of whether Hamdi was due an opportunity to rebut the Government's case against him. The Government, too, proceeded on this assumption, presenting its affidavit and then seeking that it be evaluated under a deferential standard of review based on burdens that it alleged would accompany any greater process. As we have discussed, a habeas court in a case such as this may accept affidavit evidence like that contained in the Mobbs Declaration, so long as it also permits the alleged combatant to present his own factual case to rebut the Government's return. We anticipate that a District Court would proceed with the caution that we have indicated is necessary in this setting, engaging in a factfinding process that is both prudent and incremental. We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.

IV

Hamdi asks us to hold that the Fourth Circuit also erred by denying him immediate access to counsel upon his detention and by disposing of the case without permitting him to meet with an attorney. Brief for Petitioners 19. Since our grant of certiorari in this case, Hamdi has been appointed counsel, with whom he has met for consultation purposes on several occasions, and with whom he is now being granted unmonitored meetings. He unquestionably has the right to access to counsel in connection with the proceedings on remand. No further consideration of this issue is necessary at this stage of the case.

* * *

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The judgment of the United States Court of Appeals for the Fourth Circuit is vacated, and the case is remanded for further proceedings.

It is so ordered.

Cite as: 542 U. S. ____ (2004)

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 03–334 and 03–343

03–334 SHAFIQ RASUL, ET AL., PETITIONERS
v.
GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, ET AL.

03–343 FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
PETITIONERS
v.
UNITED STATES ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 28, 2004]

JUSTICE STEVENS delivered the opinion of the Court.

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

I

On September 11, 2001, agents of the al Qaeda terrorist network hijacked four commercial airliners and used them as missiles to attack American targets. While one of the four attacks was foiled by the heroism of the plane's passengers, the other three killed approximately 3,000 inno-

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cent civilians, destroyed hundreds of millions of dollars of property, and severely damaged the U. S. economy. In response to the attacks, Congress passed a joint resolution authorizing the President to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons.” Authorization for Use of Military Force, Pub. L. 107–40, §§1–2, 115 Stat. 224. Acting pursuant to that authorization, the President sent U. S. Armed Forces into Afghanistan to wage a military campaign against al Qaeda and the Taliban regime that had supported it.

Petitioners in these cases are 2 Australian citizens and 12 Kuwaiti citizens who were captured abroad during hostilities between the United States and the Taliban.¹ Since early 2002, the U. S. military has held them—along with, according to the Government’s estimate, approximately 640 other non-Americans captured abroad—at the Naval Base at Guantanamo Bay. Brief for United States 6. The United States occupies the Base, which comprises 45 square miles of land and water along the southeast coast of Cuba, pursuant to a 1903 Lease Agreement executed with the newly independent Republic of Cuba in the aftermath of the Spanish-American War. Under the Agreement, “the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas],” while “the Republic of Cuba consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas.”² In 1934,

¹When we granted certiorari, the petitioners also included two British citizens, Shafiq Rasul and Asif Iqbal. These petitioners have since been released from custody.

²Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418 (hereinafter 1903 Lease Agreement). A

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the parties entered into a treaty providing that, absent an agreement to modify or abrogate the lease, the lease would remain in effect “[s]o long as the United States of America shall not abandon the . . . naval station of Guantanamo.”³

In 2002, petitioners, through relatives acting as their next friends, filed various actions in the U. S. District Court for the District of Columbia challenging the legality of their detention at the Base. All alleged that none of the petitioners has ever been a combatant against the United States or has ever engaged in any terrorist acts.⁴ They also alleged that none has been charged with any wrongdoing, permitted to consult with counsel, or provided access to the courts or any other tribunal. App. 29, 77, 108.⁵

The two Australians, Mamdouh Habib and David Hicks, each filed a petition for writ of habeas corpus, seeking release from custody, access to counsel, freedom from interrogations, and other relief. *Id.*, at 98–99, 124–126.

supplemental lease agreement, executed in July 1903, obligates the United States to pay an annual rent in the amount of “two thousand dollars, in gold coin of the United States” and to maintain “permanent fences” around the base. Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U. S.-Cuba, Arts. I–II, T. S. No. 426.

³Treaty Defining Relations with Cuba, May 29, 1934, U. S.-Cuba, Art. III, 48 Stat. 1683, T. S. No. 866 (hereinafter 1934 Treaty).

⁴Relatives of the Kuwaiti detainees allege that the detainees were taken captive “by local villagers seeking promised bounties or other financial rewards” while they were providing humanitarian aid in Afghanistan and Pakistan, and were subsequently turned over to U. S. custody. App. 24–25. The Australian David Hicks was allegedly captured in Afghanistan by the Northern Alliance, a coalition of Afghan groups opposed to the Taliban, before he was turned over to the United States. *Id.*, at 84. The Australian Mamdouh Habib was allegedly arrested in Pakistan by Pakistani authorities and turned over to Egyptian authorities, who in turn transferred him to U. S. custody. *Id.*, at 110–111.

⁵David Hicks has since been permitted to meet with counsel. Brief for United States 9.

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Fawzi Khalid Abdullah Fahad Al Odah and the 11 other Kuwaiti detainees filed a complaint seeking to be informed of the charges against them, to be allowed to meet with their families and with counsel, and to have access to the courts or some other impartial tribunal. *Id.*, at 34. They claimed that denial of these rights violates the Constitution, international law, and treaties of the United States. Invoking the court’s jurisdiction under 28 U. S. C. §§1331 and 1350, among other statutory bases, they asserted causes of action under the Administrative Procedure Act, 5 U. S. C. §§555, 702, 706; the Alien Tort Statute, 28 U. S. C. §1350; and the general federal habeas corpus statute, §§2241–2243. App. 19.

Construing all three actions as petitions for writs of habeas corpus, the District Court dismissed them for want of jurisdiction. The court held, in reliance on our opinion in *Johnson v. Eisentrager*, 339 U. S. 763 (1950), that “aliens detained outside the sovereign territory of the United States [may not] invok[e] a petition for a writ of habeas corpus.” 215 F. Supp. 2d 55, 68 (DC 2002). The Court of Appeals affirmed. Reading *Eisentrager* to hold that “‘the privilege of litigation’ does not extend to aliens in military custody who have no presence in ‘any territory over which the United States is sovereign,’” 321 F. 3d 1134, 1144 (CADDC 2003) (quoting *Eisentrager*, 339 U. S., at 777–778), it held that the District Court lacked jurisdiction over petitioners’ habeas actions, as well as their remaining federal statutory claims that do not sound in habeas. We granted certiorari, 540 U. S. 1003 (2003), and now reverse.

II

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

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The statute traces its ancestry to the first grant of federal court jurisdiction: Section 14 of the Judiciary Act of 1789 authorized federal courts to issue the writ of habeas corpus to prisoners “in custody, under or by colour of the authority of the United States, or committed for trial before some court of the same.” Act of Sept. 24, 1789, ch. 20, §14, 1 Stat. 82. In 1867, Congress extended the protections of the writ to “all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.” Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. See *Felker v. Turpin*, 518 U. S. 651, 659–660 (1996).

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

As it has evolved over the past two centuries, the habeas statute clearly has expanded habeas corpus “beyond the limits that obtained during the 17th and 18th centuries.” *Swain v. Pressley*, 430 U. S. 372, 380, n. 13 (1977). But “[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.” *INS v. St. Cyr*, 533 U. S. 289, 301 (2001). See also *Brown v. Allen*, 344 U. S. 443, 533 (1953) (Jackson, J., concurring in result) (“The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial”). As Justice Jackson

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wrote in an opinion respecting the availability of habeas corpus to aliens held in U. S. custody:

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

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

The question now before us is whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not “ultimate sovereignty.”⁶

III

Respondents’ primary submission is that the answer to the jurisdictional question is controlled by our decision in *Eisentrager*. In that case, we held that a Federal District

⁶1903 Lease Agreement, Art. III.

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Court lacked authority to issue a writ of habeas corpus to 21 German citizens who had been captured by U. S. forces in China, tried and convicted of war crimes by an American military commission headquartered in Nanking, and incarcerated in the Landsberg Prison in occupied Germany. The Court of Appeals in *Eisenrager* had found jurisdiction, reasoning that “any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ.” *Eisenrager v. Forrestal*, 174 F. 2d 961, 963 (CADC 1949). In reversing that determination, this Court summarized the six critical facts in the case:

“We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.” 339 U. S., at 777.

On this set of facts, the Court concluded, “no right to the writ of *habeas corpus* appears.” *Id.*, at 781.

Petitioners in these cases differ from the *Eisenrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression

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against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Not only are petitioners differently situated from the *Eisentrager* detainees, but the Court in *Eisentrager* made quite clear that all six of the facts critical to its disposition were relevant only to the question of the prisoners' *constitutional* entitlement to habeas corpus. *Id.*, at 777. The Court had far less to say on the question of the petitioners' *statutory* entitlement to habeas review. Its only statement on the subject was a passing reference to the absence of statutory authorization: "Nothing in the text of the Constitution extends such a right, nor does anything in our statutes." *Id.*, at 768.

Reference to the historical context in which *Eisentrager* was decided explains why the opinion devoted so little attention to question of statutory jurisdiction. In 1948, just two months after the *Eisentrager* petitioners filed their petition for habeas corpus in the U. S. District Court for the District of Columbia, this Court issued its decision in *Ahrens v. Clark*, 335 U.S. 188, a case concerning the application of the habeas statute to the petitions of 120 Germans who were then being detained at Ellis Island, New York, for deportation to Germany. The *Ahrens* detainees had also filed their petitions in the U. S. District Court for the District of Columbia, naming the Attorney General as the respondent. Reading the phrase "within their respective jurisdictions" as used in the habeas statute to require the petitioners' presence within the district court's territorial jurisdiction, the Court held that the District of Columbia court lacked jurisdiction to entertain the detainees' claims. *Id.*, at 192. *Ahrens* expressly reserved the question "of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert

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federal rights.” *Id.*, 192, n. 4. But as the dissent noted, if the presence of the petitioner in the territorial jurisdiction of a federal district court were truly a jurisdictional requirement, there could be only one response to that question. *Id.*, at 209 (opinion of Rutledge, J.).⁷

When the District Court for the District of Columbia reviewed the German prisoners’ habeas application in *Eisentrager*, it thus dismissed their action on the authority of *Ahrens*. See *Eisentrager*, 339 U. S., at 767, 790. Although the Court of Appeals reversed the District Court, it implicitly conceded that the District Court lacked jurisdiction under the habeas statute as it had been interpreted in *Ahrens*. The Court of Appeals instead held that petitioners had a constitutional right to habeas corpus secured by the Suspension Clause, U. S. Const., Art. I, §9, cl. 2, reasoning that “if a person has a right to a writ of habeas corpus, he cannot be deprived of the privilege by an omission in a federal jurisdictional statute.” *Eisentrager v. Forrestal*, 174 F. 2d, at 965. In essence, the Court of Appeals concluded that the habeas statute, as construed in *Ahrens*, had created an unconstitutional gap that had to be filled by reference to “fundamentals.” 174 F. 2d, at 963. In its review of that decision, this Court, like the Court of Appeals, proceeded from the premise that “nothing in our statutes” conferred federal-court jurisdiction, and accordingly evaluated the Court of Appeals’ resort to “fundamentals” on its own terms. 339 U. S., at 768.⁸

⁷Justice Rutledge wrote:

“[I]f absence of the body detained from the territorial jurisdiction of the court having jurisdiction of the jailer creates a total and irremediable void in the court’s capacity to act, . . . then it is hard to see how that gap can be filled by such extraneous considerations as whether there is no other court in the place of detention from which remedy might be had” 335 U. S., at 209.

⁸Although JUSTICE SCALIA disputes the basis for the Court of Appeals’ holding, *post*, at 4, what is most pertinent for present purposes is that

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Because subsequent decisions of this Court have filled the statutory gap that had occasioned *Eisentrager*'s resort to "fundamentals," persons detained outside the territorial jurisdiction of any federal district court no longer need rely on the Constitution as the source of their right to federal habeas review. In *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U. S. 484, 495 (1973), this Court held, contrary to *Ahrens*, that the prisoner's presence within the territorial jurisdiction of the district court is not "an invariable prerequisite" to the exercise of district court jurisdiction under the federal habeas statute. Rather, because "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody," a district court acts "within [its] respective jurisdiction" within the meaning of §2241 as long as "the custodian can be reached by service of process." 410 U. S., at 494–495. *Braden* reasoned that its departure from the rule of *Ahrens* was warranted in light of developments that "had a profound impact on the continuing vitality of that decision." 410 U. S., at 497. These developments included, notably, decisions of this Court in cases involving habeas petitioners "confined overseas (and thus outside the territory of any district court)," in which the Court "held, if only implicitly, that the petitioners' absence from the district does not present a jurisdictional obstacle to the consideration of the claim." *Id.*, at 498 (citing *Burns v. Wilson*, 346 U. S.

this Court clearly understood the Court of Appeals' decision to rest on constitutional and not statutory grounds. *Eisentrager*, 339 U. S., at 767 ("[The Court of Appeals] concluded that any person, including an enemy alien, deprived of his liberty anywhere under any purported authority of the United States is entitled to the writ if he can show that extension to his case of any constitutional rights or limitations would show his imprisonment illegal; [and] that, *although no statutory jurisdiction of such cases is given*, courts must be held to possess it as part of the judicial power of the United States . . ." (emphasis added)).

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137 (1953), rehearing denied, 346 U. S. 844, 851–852 (opinion of Frankfurter, J.); *United States ex rel. Toth v. Quarles*, 350 U. S. 11 (1955); *Hirota v. MacArthur*, 338 U. S. 197, 199 (1948) (Douglas, J., concurring)). *Braden* thus established that *Ahrens* can no longer be viewed as establishing “an inflexible jurisdictional rule,” and is strictly relevant only to the question of the appropriate forum, not to whether the claim can be heard at all. 410 U. S., at 499–500.

Because *Braden* overruled the statutory predicate to *Eisentrager*’s holding, *Eisentrager* plainly does not preclude the exercise of §2241 jurisdiction over petitioners’ claims.⁹

⁹The dissent argues that *Braden* did not overrule *Ahrens*’ jurisdictional holding, but simply distinguished it. *Post*, at 7. Of course, *Braden* itself indicated otherwise, 410 U. S., at 495–500, and a long line of judicial and scholarly interpretations, beginning with then-JUSTICE REHNQUIST’s dissenting opinion, have so understood the decision. See, e.g., *id.*, at 502 (“Today the Court overrules *Ahrens*”); *Moore v. Olson*, 368 F. 3d 757, 758 (CA7 2004) (“[A]fter *Braden* . . . , which overruled *Ahrens*, the location of a collateral attack is best understood as a matter of venue”); *Armentero v. INS*, 340 F. 3d 1058, 1063 (CA9 2003) (“[T]he Court in [*Braden*] declared that *Ahrens* was overruled” (citations omitted)); *Henderson v. INS*, 157 F. 3d 106, 126, n. 20 (CA2 1998) (“On the issue of territorial jurisdiction, *Ahrens* was subsequently overruled by *Braden*”); *Chatman-Bey v. Thornburgh*, 864 F. 2d 804, 811 (CAD9 1988) (en banc) (“[I]n *Braden*, the Court cut back substantially on *Ahrens* (and indeed overruled its territorially-based jurisdictional holding)”). See also, e.g., *Patterson v. McLean Credit Union*, 485 U. S. 617, 618 (1988) (*per curiam*); Eskridge, *Overruling Statutory Precedents*, 76 *Geo. L. J.* 1361, App. A (1988).

The dissent also disingenuously contends that the continuing vitality of *Ahrens*’ jurisdictional holding is irrelevant to the question presented in these cases, “inasmuch as *Ahrens* did not pass upon any of the statutory issues decided by *Eisentrager*.” *Post*, at 7. But what JUSTICE SCALIA describes as *Eisentrager*’s statutory holding—“that, unaided by the canon of constitutional avoidance, the statute did not confer jurisdiction over an alien detained outside the territorial jurisdiction of the courts of the United States,” *post*, at 6—is little more than the rule of

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IV

Putting *Eisentrager* and *Ahrens* to one side, respondents contend that we can discern a limit on §2241 through application of the “longstanding principle of American law” that congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested. *EEOC v. Arabian American Oil Co.*, 499 U. S. 244, 248 (1991). Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within “the territorial jurisdiction” of the United States. *Foley Bros., Inc. v. Filardo*, 336 U. S. 281, 285 (1949). By the express terms of its agreements with Cuba, the United States exercises “complete jurisdiction and control” over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses. 1903 Lease Agreement, Art. III; 1934 Treaty, Art. III. Respondents themselves concede that the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base. Tr. of Oral Arg. 27. Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee’s citizenship.¹⁰ Aliens held at the

Ahrens cloaked in the garb of *Eisentrager*’s facts. To contend plausibly that this holding survived *Braden*, JUSTICE SCALIA at a minimum must find a textual basis for the rule other than the phrase “within their respective jurisdictions”—a phrase which, after *Braden*, can no longer be read to require the habeas petitioner’s physical presence within the territorial jurisdiction of a federal district court. Two references to the district of confinement in provisions relating to recordkeeping and pleading requirements in proceedings before circuit judges hardly suffice in that regard. See *post*, at 2 (citing 28 U. S. C. §§2241(a), 2242).

¹⁰JUSTICE SCALIA appears to agree that neither the plain text of the statute nor his interpretation of that text provides a basis for treating

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base, no less than American citizens, are entitled to invoke the federal courts' authority under §2241.

Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm,¹¹ as well as the claims of persons detained in the so-called "exempt jurisdictions," where ordinary writs did not run,¹² and all other domin-

American citizens differently from aliens. *Post*, at 10. But resisting the practical consequences of his position, he suggests that he might nevertheless recognize an "atextual exception" to his statutory rule for citizens held beyond the territorial jurisdiction of the federal district courts. *Ibid*.

¹¹See, e.g., *King v. Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K. B. 1759) (reviewing the habeas petition of a neutral alien deemed a prisoner of war because he was captured aboard an enemy French privateer during a war between England and France); *Sommerset v. Stewart*, 20 How. St. Tr. 1, 79–82 (K. B. 1772) (releasing on habeas an African slave purchased in Virginia and detained on a ship docked in England and bound for Jamaica); *Case of the Hottentot Venus*, 13 East 195, 104 Eng. Rep. 344 (K. B. 1810) (reviewing the habeas petition of a "native of *South Africa*" allegedly held in private custody).

American courts followed a similar practice in the early years of the Republic. See, e.g., *United States v. Villato*, 2 Dall. 370 (CC Pa. 1797) (granting habeas relief to Spanish-born prisoner charged with treason on the ground that he had never become a citizen of the United States); *Ex parte D'Olivera*, 7 F. Cas. 853 (No. 3,967) (CC Mass. 1813) (Story, J., on circuit) (ordering the release of Portuguese sailors arrested for deserting their ship); *Wilson v. Izard*, 30 F. Cas. 131 (No. 17,810) (CC NY 1815) (Livingston, J., on circuit) (reviewing the habeas petition of enlistees who claimed that they were entitled to discharge because of their status as enemy aliens).

¹²See, e.g., *Bourn's Case*, Cro. Jac. 543, 79 Eng. Rep. 465 (K. B. 1619) (writ issued to the Cinque-Ports town of Dover); *Alder v. Paisy*, 1 Freeman 12, 89 Eng. Rep. 10 (K. B. 1671) (same); *Jobson's Case*, Latch 160, 82 Eng. Rep. 325 (K. B. 1626) (entertaining the habeas petition of a prisoner held in the County Palatine of Durham). See also 3 W. Blackstone, Commentaries on the Laws of England 79 (1769) (hereinafter Blackstone) ("[A]ll prerogative writs (as those of *habeas corpus*,

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ions under the sovereign's control.¹³ As Lord Mansfield wrote in 1759, even if a territory was "no part of the realm," there was "no doubt" as to the court's power to issue writs of habeas corpus if the territory was "under the subjection of the Crown." *King v. Cowle*, 2 Burr. 834, 854–855, 97 Eng. Rep. 587, 598–599 (K. B.). Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of "the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown." *Ex parte Mwenya*, [1960] 1 Q. B. 241, 303 (C. A.) (Lord Evershed, M. R.).¹⁴

prohibition, *certiorari*, and *mandamus*) may issue . . . to all these exempt jurisdictions; because the privilege, that the king's writ runs not, must be intended between party and party, for there can be no such privilege against the king" (footnotes omitted); R. Sharpe, *Law of Habeas Corpus* 188–189 (2d ed. 1989) (describing the "extraordinary territorial ambit" of the writ at common law).

¹³See, e.g., *King v. Overton*, 1 Sid. 387, 82 Eng. Rep. 1173 (K. B. 1668) (writ issued to Isle of Jersey); *King v. Salmon*, 2 Keble 450, 84 Eng. Rep. 282 (K. B. 1669) (same). See also 3 Blackstone 131 (habeas corpus "run[s] into all parts of the king's dominions: for the king is at all times [e]ntitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted" (footnotes omitted)); M. Hale, *History of the Common Law* 120–121 (C. Gray ed. 1971) (writ of habeas corpus runs to the Channel Islands, even though "they are not Parcel of the Realm of England").

¹⁴*Ex parte Mwenya* held that the writ ran to a territory described as a "foreign country within which [the Crown] ha[d] power and jurisdiction by treaty, grant, usage, sufferance, and other lawful means." *Ex parte Mwenya*, 1 Q. B., at 265 (internal quotation marks omitted). See also *King v. The Earl of Crewe ex parte Sekgome*, [1910] 2 K. B. 576, 606 (C. A.) (Williams, L. J.) (concluding that the writ would run to such a territory); *id.*, at 618 (Farwell, L. J.) (same). As Lord Justice Sellers explained:

"Lord Mansfield gave the writ the greatest breadth of application which in the then circumstances could well be conceived. . . . 'Subjection' is fully appropriate to the powers exercised or exercisable by this country irrespective of territorial sovereignty or dominion, and it

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In the end, the answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States.¹⁵ No party questions the District Court's jurisdiction over petitioners' custodians. Cf. *Braden*, 410 U. S., at 495. Section 2241, by its terms, requires nothing more. We therefore hold that §2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay

embraces in outlook the power of the Crown in the place concerned." 1 Q. B., at 310.

JUSTICE SCALIA cites *In re Ning Yi-Ching*, 56 T. L. R. 3 (Vacation Ct. 1939), for the broad proposition that habeas corpus has been categorically unavailable to aliens held outside sovereign territory. *Post*, at 18. *Ex parte Mwenya*, however, casts considerable doubt on this narrow view of the territorial reach of the writ. See *Ex parte Mwenya*, 1 Q. B., at 295 (Lord Evershed, M. R.) (noting that *In re Ning Yi-Ching* relied on Lord Justice Kennedy's opinion in *Ex parte Sekgome* concerning the territorial reach of the writ, despite the opinions of two members of the court who "took a different view upon this matter"). And *In re Ning Yi-Ching* itself made quite clear that "the remedy of *habeas corpus* was not confined to British subjects," but would extend to "any person . . . detained" within reach of the writ. 56 T. L. R., at 5 (citing *Ex parte Sekgome*, 2 K. B., at 620 (Kennedy, L. J.)). Moreover, the result in that case can be explained by the peculiar nature of British control over the area where the petitioners, four Chinese nationals accused of various criminal offenses, were being held pending transfer to the local district court. Although the treaties governing the British Concession at Tientsin did confer on Britain "certain rights of administration and control," "the right to administer justice" to Chinese nationals was not among them. 56 T. L. R., at 4–6.

¹⁵Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. §2241(c)(3). Cf. *United States v. Verdugo-Urquidez*, 494 U. S. 259, 277–278 (1990) (KENNEDY, J., concurring), and cases cited therein.

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Naval Base.

V

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

As explained above, *Eisentrager* itself erects no bar to the exercise of federal court jurisdiction over the petitioners’ habeas corpus claims. It therefore certainly does not bar the exercise of federal-court jurisdiction over claims that merely implicate the “same category of laws listed in the habeas corpus statute.” But in any event, nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the “privilege of litigation” in U. S. courts. 321 F. 3d, at 1139. The courts of the United States have traditionally been open to nonresident aliens. Cf. *Disconto Gesellschaft v. Umbreit*, 208 U. S. 570, 578 (1908) (“Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights”). And indeed, 28 U. S. C. §1350 explicitly

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confers the privilege of suing for an actionable “tort . . . committed in violation of the law of nations or a treaty of the United States” on aliens alone. The fact that petitioners in these cases are being held in military custody is immaterial to the question of the District Court’s jurisdiction over their nonhabeas statutory claims.

VI

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

It is so ordered.

Cite as: 548 U. S. ____ (2006)

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Opinion of STEVENS, J.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 05–184

SALIM AHMED HAMDAN, PETITIONER *v.* DONALD
H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 29, 2006]

JUSTICE STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I through IV, Parts VI through VI–D–iii, Part VI–D–v, and Part VII, and an opinion with respect to Parts V and VI–D–iv, in which JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join.

Petitioner Salim Ahmed Hamdan, a Yemeni national, is in custody at an American prison in Guantanamo Bay, Cuba. In November 2001, during hostilities between the United States and the Taliban (which then governed Afghanistan), Hamdan was captured by militia forces and turned over to the U. S. military. In June 2002, he was transported to Guantanamo Bay. Over a year later, the President deemed him eligible for trial by military commission for then-unspecified crimes. After another year had passed, Hamdan was charged with one count of conspiracy “to commit . . . offenses triable by military commission.” App. to Pet. for Cert. 65a.

Hamdan filed petitions for writs of habeas corpus and mandamus to challenge the Executive Branch’s intended means of prosecuting this charge. He concedes that a

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court-martial constituted in accordance with the Uniform Code of Military Justice (UCMJ), 10 U. S. C. §801 *et seq.* (2000 ed. and Supp. III), would have authority to try him. His objection is that the military commission the President has convened lacks such authority, for two principal reasons: First, neither congressional Act nor the common law of war supports trial by this commission for the crime of conspiracy—an offense that, Hamdan says, is not a violation of the law of war. Second, Hamdan contends, the procedures that the President has adopted to try him violate the most basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him.

The District Court granted Hamdan’s request for a writ of habeas corpus. 344 F. Supp. 2d 152 (DC 2004). The Court of Appeals for the District of Columbia Circuit reversed. 415 F. 3d 33 (2005). Recognizing, as we did over a half-century ago, that trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure, *Ex parte Quirin*, 317 U. S. 1, 19 (1942), we granted certiorari. 546 U. S. ___ (2005).

For the reasons that follow, we conclude that the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions. Four of us also conclude, see Part V, *infra*, that the offense with which Hamdan has been charged is not an “offens[e] that by . . . the law of war may be tried by military commissions.” 10 U. S. C. §821.

I

On September 11, 2001, agents of the al Qaeda terrorist organization hijacked commercial airplanes and attacked the World Trade Center in New York City and the national headquarters of the Department of Defense in

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Arlington, Virginia. Americans will never forget the devastation wrought by these acts. Nearly 3,000 civilians were killed.

Congress responded by adopting a Joint Resolution authorizing the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” Authorization for Use of Military Force (AUMF), 115 Stat. 224, note following 50 U. S. C. §1541 (2000 ed., Supp. III). Acting pursuant to the AUMF, and having determined that the Taliban regime had supported al Qaeda, the President ordered the Armed Forces of the United States to invade Afghanistan. In the ensuing hostilities, hundreds of individuals, Hamdan among them, were captured and eventually detained at Guantanamo Bay.

On November 13, 2001, while the United States was still engaged in active combat with the Taliban, the President issued a comprehensive military order intended to govern the “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” 66 Fed. Reg. 57833 (hereinafter November 13 Order or Order). Those subject to the November 13 Order include any noncitizen for whom the President determines “there is reason to believe” that he or she (1) “is or was” a member of al Qaeda or (2) has engaged or participated in terrorist activities aimed at or harmful to the United States. *Id.*, at 57834. Any such individual “shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including imprisonment or death.” *Ibid.* The November 13 Order vested in the Secretary of Defense the power to appoint

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military commissions to try individuals subject to the Order, but that power has since been delegated to John D. Altenberg, Jr., a retired Army major general and longtime military lawyer who has been designated “Appointing Authority for Military Commissions.”

On July 3, 2003, the President announced his determination that Hamdan and five other detainees at Guantanamo Bay were subject to the November 13 Order and thus triable by military commission. In December 2003, military counsel was appointed to represent Hamdan. Two months later, counsel filed demands for charges and for a speedy trial pursuant to Article 10 of the UCMJ, 10 U. S. C. §810. On February 23, 2004, the legal adviser to the Appointing Authority denied the applications, ruling that Hamdan was not entitled to any of the protections of the UCMJ. Not until July 13, 2004, after Hamdan had commenced this action in the United States District Court for the Western District of Washington, did the Government finally charge him with the offense for which, a year earlier, he had been deemed eligible for trial by military commission.

The charging document, which is unsigned, contains 13 numbered paragraphs. The first two paragraphs recite the asserted bases for the military commission’s jurisdiction—namely, the November 13 Order and the President’s July 3, 2003, declaration that Hamdan is eligible for trial by military commission. The next nine paragraphs, collectively entitled “General Allegations,” describe al Qaeda’s activities from its inception in 1989 through 2001 and identify Osama bin Laden as the group’s leader. Hamdan is not mentioned in these paragraphs.

Only the final two paragraphs, entitled “Charge: Conspiracy,” contain allegations against Hamdan. Paragraph 12 charges that “from on or about February 1996 to on or about November 24, 2001,” Hamdan “willfully and knowingly joined an enterprise of persons who shared a com-

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mon criminal purpose and conspired and agreed with [named members of al Qaeda] to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism.” App. to Pet. for Cert. 65a. There is no allegation that Hamdan had any command responsibilities, played a leadership role, or participated in the planning of any activity.

Paragraph 13 lists four “overt acts” that Hamdan is alleged to have committed sometime between 1996 and November 2001 in furtherance of the “enterprise and conspiracy”: (1) he acted as Osama bin Laden’s “bodyguard and personal driver,” “believ[ing]” all the while that bin Laden “and his associates were involved in” terrorist acts prior to and including the attacks of September 11, 2001; (2) he arranged for transportation of, and actually transported, weapons used by al Qaeda members and by bin Laden’s bodyguards (Hamdan among them); (3) he “drove or accompanied [O]sama bin Laden to various al Qaida-sponsored training camps, press conferences, or lectures,” at which bin Laden encouraged attacks against Americans; and (4) he received weapons training at al Qaeda-sponsored camps. *Id.*, at 65a–67a.

After this formal charge was filed, the United States District Court for the Western District of Washington transferred Hamdan’s habeas and mandamus petitions to the United States District Court for the District of Columbia. Meanwhile, a Combatant Status Review Tribunal (CSRT) convened pursuant to a military order issued on July 7, 2004, decided that Hamdan’s continued detention at Guantanamo Bay was warranted because he was an “enemy combatant.”¹ Separately, proceedings before the

¹An “enemy combatant” is defined by the military order as “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United

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military commission commenced.

On November 8, 2004, however, the District Court granted Hamdan's petition for habeas corpus and stayed the commission's proceedings. It concluded that the President's authority to establish military commissions extends only to "offenders or offenses triable by military [commission] under the law of war," 344 F. Supp. 2d, at 158; that the law of war includes the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3316, T. I. A. S. No. 3364 (Third Geneva Convention); that Hamdan is entitled to the full protections of the Third Geneva Convention until adjudged, in compliance with that treaty, not to be a prisoner of war; and that, whether or not Hamdan is properly classified as a prisoner of war, the military commission convened to try him was established in violation of both the UCMJ and Common Article 3 of the Third Geneva Convention because it had the power to convict based on evidence the accused would never see or hear. 344 F. Supp. 2d, at 158–172.

The Court of Appeals for the District of Columbia Circuit reversed. Like the District Court, the Court of Appeals declined the Government's invitation to abstain from considering Hamdan's challenge. Cf. *Schlesinger v. Councilman*, 420 U. S. 738 (1975). On the merits, the panel rejected the District Court's further conclusion that Hamdan was entitled to relief under the Third Geneva Convention. All three judges agreed that the Geneva Conventions were not "judicially enforceable," 415 F. 3d, at 38, and two thought that the Conventions did not in any event apply to Hamdan, *id.*, at 40–42; but see *id.*, at 44 (Williams, J.,

States or its coalition partners." Memorandum from Deputy Secretary of Defense Paul Wolfowitz re: Order Establishing Combatant Status Review Tribunal §a (Jul. 7, 2004), available at <http://www.defense.gov/news/Jul2004/d20040707review.pdf> (all Internet materials as visited June 26, 2006, and available in Clerk of Court's case file).

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concurring). In other portions of its opinion, the court concluded that our decision in *Quirin* foreclosed any separation-of-powers objection to the military commission's jurisdiction, and held that Hamdan's trial before the contemplated commission would violate neither the UCMJ nor U. S. Armed Forces regulations intended to implement the Geneva Conventions. 415 F. 3d, at 38, 42–43.

On November 7, 2005, we granted certiorari to decide whether the military commission convened to try Hamdan has authority to do so, and whether Hamdan may rely on the Geneva Conventions in these proceedings.

II

On February 13, 2006, the Government filed a motion to dismiss the writ of certiorari. The ground cited for dismissal was the recently enacted Detainee Treatment Act of 2005 (DTA), Pub. L. 109–148, 119 Stat. 2739. We postponed our ruling on that motion pending argument on the merits, 546 U. S. ____ (2006), and now deny it.

The DTA, which was signed into law on December 30, 2005, addresses a broad swath of subjects related to detainees. It places restrictions on the treatment and interrogation of detainees in U. S. custody, and it furnishes procedural protections for U. S. personnel accused of engaging in improper interrogation. DTA §§1002–1004, 119 Stat. 2739–2740. It also sets forth certain “PROCEDURES FOR STATUS REVIEW OF DETAINEES OUTSIDE THE UNITED STATES.” §1005, *id.*, at 2740. Subsections (a) through (d) of §1005 direct the Secretary of Defense to report to Congress the procedures being used by CSRTs to determine the proper classification of detainees held in Guantanamo Bay, Iraq, and Afghanistan, and to adopt certain safeguards as part of those procedures.

Subsection (e) of §1005, which is entitled “JUDICIAL REVIEW OF DETENTION OF ENEMY COMBATANTS,” supplies the basis for the Government's jurisdictional argument.

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The subsection contains three numbered paragraphs. The first paragraph amends the judicial code as follows:

“(1) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by adding at the end the following:

“(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—

“(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

“(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

“(A) is currently in military custody; or

“(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.” §1005(e), *id.*, at 2741–2742.

Paragraph (2) of subsection (e) vests in the Court of Appeals for the District of Columbia Circuit the “exclusive jurisdiction to determine the validity of any final decision of a [CSRT] that an alien is properly designated as an enemy combatant.” Paragraph (2) also delimits the scope of that review. See §§1005(e)(2)(C)(i)–(ii), *id.*, at 2742.

Paragraph (3) mirrors paragraph (2) in structure, but governs judicial review of final decisions of military commissions, not CSRTs. It vests in the Court of Appeals for the District of Columbia Circuit “exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1,

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dated August 31, 2005 (or any successor military order).” §1005(e)(3)(A), *id.*, at 2743.² Review is as of right for any alien sentenced to death or a term of imprisonment of 10 years or more, but is at the Court of Appeals’ discretion in all other cases. The scope of review is limited to the following inquiries:

“(i) whether the final decision [of the military commission] was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and

“(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.” §1005(e)(3)(D), *ibid.*

Finally, §1005 contains an “effective date” provision, which reads as follows:

“(1) IN GENERAL.—This section shall take effect on the date of the enactment of this Act.

“(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS.—Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.” §1005(h), *id.*, at 2743–2744.³

The Act is silent about whether paragraph (1) of subsection (e) “shall apply” to claims pending on the date of

²The military order referenced in this section is discussed further in Parts III and VI, *infra*.

³The penultimate subsections of §1005 emphasize that the provision does not “confer any constitutional right on an alien detained as an enemy combatant outside the United States” and that the “United States” does not, for purposes of §1005, include Guantanamo Bay. §§1005(f)–(g).

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enactment.

The Government argues that §§1005(e)(1) and 1005(h) had the immediate effect, upon enactment, of repealing federal jurisdiction not just over detainee habeas actions yet to be filed but also over any such actions then pending in any federal court—including this Court. Accordingly, it argues, we lack jurisdiction to review the Court of Appeals’ decision below.

Hamdan objects to this theory on both constitutional and statutory grounds. Principal among his constitutional arguments is that the Government’s preferred reading raises grave questions about Congress’ authority to impinge upon this Court’s appellate jurisdiction, particularly in habeas cases. Support for this argument is drawn from *Ex parte Yerger*, 8 Wall. 85 (1869), in which, having explained that “the denial to this court of appellate jurisdiction” to consider an original writ of habeas corpus would “greatly weaken the efficacy of the writ,” *id.*, at 102–103, we held that Congress would not be presumed to have effected such denial absent an unmistakably clear statement to the contrary. See *id.*, at 104–105; see also *Felker v. Turpin*, 518 U. S. 651 (1996); *Durousseau v. United States*, 6 Cranch 307, 314 (1810) (opinion for the Court by Marshall, C. J.) (The “appellate powers of this court” are not created by statute but are “given by the constitution”); *United States v. Klein*, 13 Wall. 128 (1872). Cf. *Ex parte McCordle*, 7 Wall. 506, 514 (1869) (holding that Congress had validly foreclosed one avenue of appellate review where its repeal of habeas jurisdiction, reproduced in the margin,⁴ could not have been “a plainer instance of posi-

⁴“*And be it further enacted*, That so much of the act approved February 5, 1867, entitled “An act to amend an act to establish the judicial courts of the United States, approved September 24, 1789,” as authorized an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court, on appeals which have been, or may hereafter be

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tive exception”). Hamdan also suggests that, if the Government’s reading is correct, Congress has unconstitutionally suspended the writ of habeas corpus.

We find it unnecessary to reach either of these arguments. Ordinary principles of statutory construction suffice to rebut the Government’s theory—at least insofar as this case, which was pending at the time the DTA was enacted, is concerned.

The Government acknowledges that only paragraphs (2) and (3) of subsection (e) are expressly made applicable to pending cases, see §1005(h)(2), 119 Stat. 2743–2744, but argues that the omission of paragraph (1) from the scope of that express statement is of no moment. This is so, we are told, because Congress’ failure to expressly reserve federal courts’ jurisdiction over pending cases erects a presumption against jurisdiction, and that presumption is rebutted by neither the text nor the legislative history of the DTA.

The first part of this argument is not entirely without support in our precedents. We have in the past “applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed.” *Landgraf v. USI Film Products*, 511 U. S. 244, 274 (1994) (citing *Bruner v. United States*, 343 U. S. 112 (1952); *Hallowell v. Commons*, 239 U. S. 506 (1916)); see *Republic of Austria v. Altmann*, 541 U. S. 677, 693 (2004). But the “presumption” that these cases have applied is more accurately viewed as the nonapplication of another presumption—viz., the presumption against retroactivity—in certain limited circumstances.⁵ If a statutory provision “would

taken, be, and the same is hereby repealed.” 7 Wall., at 508.

⁵See *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U. S. 939, 951 (1997) (“The fact that courts often apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain limited circumstances failing to meet the conditions for our generally

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operate retroactively” as applied to cases pending at the time the provision was enacted, then “our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.” *Landgraf*, 511 U. S., at 280. We have explained, however, that, unlike other intervening changes in the law, a jurisdiction-conferring or jurisdiction-stripping statute usually “takes away no substantive right but simply changes the tribunal that is to hear the case.” *Hallowell*, 239 U. S., at 508. If that is truly all the statute does, no retroactivity problem arises because the change in the law does not “impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” *Landgraf*, 511 U. S., at 280.⁶ And if a new rule has no retroactive effect, the presumption against retroactivity will not prevent its application to a case that was already pending when the new rule was enacted.

That does not mean, however, that all jurisdiction-stripping provisions—or even all such provisions that truly lack retroactive effect—must apply to cases pending at the time of their enactment.⁷ “[N]ormal rules of con-

applicable presumption against retroactivity . . .”).

⁶Cf. *Hughes Aircraft*, 520 U. S., at 951 (“Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties” (emphasis in original)).

⁷In his insistence to the contrary, JUSTICE SCALIA reads too much into *Bruner v. United States*, 343 U. S. 112 (1952), *Hallowell v. Commons*, 239 U. S. 506 (1916), and *Insurance Co. v. Ritchie*, 5 Wall. 541 (1867). See *post*, at 2–4 (dissenting opinion). None of those cases says that the absence of an express provision reserving jurisdiction over pending cases trumps or renders irrelevant any other indications of congressional intent. Indeed, *Bruner* itself relied on such other indications—including a negative inference drawn from the statutory text, *cf. infra*, at 13—to support its conclusion that jurisdiction was not available. The Court observed that (1) Congress had been put on notice by prior lower

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struction,” including a contextual reading of the statutory language, may dictate otherwise. *Lindh v. Murphy*, 521 U. S. 320, 326 (1997).⁸ A familiar principle of statutory construction, relevant both in *Lindh* and here, is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute. See *id.*, at 330; see also, *e.g.*, *Russello v. United States*, 464 U. S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”). The Court in *Lindh* relied on this reasoning to conclude that certain limitations on the availability of habeas relief imposed by AEDPA applied only to cases filed after that statute’s effective date. Congress’ failure to identify the temporal reach of those limitations, which governed noncapital cases, stood in contrast to its express command in the same legislation that new rules governing habeas petitions in capital cases “apply to cases pending on or after the date of enactment.” §107(c), 110 Stat. 1226; see *Lindh*, 521 U. S., at 329–330. That contrast, combined with the fact that the amendments at issue “affect[ed] substantive entitlement to relief,” *id.*, at 327, warranted

court cases addressing the Tucker Act that it ought to specifically reserve jurisdiction over pending cases, see 343 U. S., at 115, and (2) in contrast to the congressional silence concerning reservation of jurisdiction, reservation *had* been made of “any rights or liabilities’ existing at the effective date of the Act” repealed by another provision of the Act, *ibid.*, n. 7.

⁸The question in *Lindh* was whether new limitations on the availability of habeas relief imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, applied to habeas actions pending on the date of AEDPA’s enactment. We held that they did not. At the outset, we rejected the State’s argument that, in the absence of a clear congressional statement to the contrary, a “procedural” rule must apply to pending cases. 521 U. S., at 326.

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drawing a negative inference.

A like inference follows *a fortiori* from *Lindh* in this case. “If . . . Congress was reasonably concerned to ensure that [§§1005(e)(2) and (3)] be applied to pending cases, it should have been just as concerned about [§1005(e)(1)], unless it had the different intent that the latter [section] not be applied to the general run of pending cases.” *Id.*, at 329. If anything, the evidence of deliberate omission is stronger here than it was in *Lindh*. In *Lindh*, the provisions to be contrasted had been drafted separately but were later “joined together and . . . considered simultaneously when the language raising the implication was inserted.” *Id.*, at 330. We observed that Congress’ tandem review and approval of the two sets of provisions strengthened the presumption that the relevant omission was deliberate. *Id.*, at 331; see also *Field v. Mans*, 516 U. S. 59, 75 (1995) (“The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects”). Here, Congress not only considered the respective temporal reaches of paragraphs (1), (2), and (3) of subsection (e) together at every stage, but omitted paragraph (1) from its directive that paragraphs (2) and (3) apply to pending cases only after having *rejected* earlier proposed versions of the statute that would have included what is now paragraph (1) within the scope of that directive. Compare DTA §1005(h)(2), 119 Stat. 2743–2744, with 151 Cong. Rec. S12655 (Nov. 10, 2005) (S. Amdt. 2515); see *id.*, at S14257–S14258 (Dec. 21, 2005) (discussing similar language proposed in both the House and the Senate).⁹ Congress’ rejection of the very language

⁹That paragraph (1), along with paragraphs (2) and (3), is to “take effect on the date of enactment,” DTA §1005(h)(1), 119 Stat. 2743, is not dispositive; “a ‘statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.’” *INS v. St. Cyr*, 533 U. S.

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that would have achieved the result the Government urges here weighs heavily against the Government's interpretation. See *Doe v. Chao*, 540 U. S. 614, 621–623 (2004).¹⁰

289, 317 (2001) (quoting *Landgraf v. USI Film Products*, 511 U. S. 244, 257 (1994)). Certainly, the “effective date” provision cannot bear the weight JUSTICE SCALIA would place on it. See *post*, at 5, and n. 1. Congress deemed that provision insufficient, standing alone, to render subsections (e)(2) and (e)(3) applicable to pending cases; hence its adoption of subsection (h)(2). JUSTICE SCALIA seeks to avoid reducing subsection (h)(2) to a mere redundancy—a consequence he seems to acknowledge must otherwise follow from his interpretation—by speculating that Congress had special reasons, not also relevant to subsection (e)(1), to worry that subsections (e)(2) and (e)(3) would be ruled inapplicable to pending cases. As we explain *infra*, at 17, and n. 12, that attempt fails.

¹⁰We note that statements made by Senators preceding passage of the Act lend further support to what the text of the DTA and its drafting history already make plain. Senator Levin, one of the sponsors of the final bill, objected to earlier versions of the Act's “effective date” provision that would have made subsection (e)(1) applicable to pending cases. See, e.g., 151 Cong. Rec. S12667 (Nov. 10, 2005) (amendment proposed by Sen. Graham that would have rendered what is now subsection (e)(1) applicable to “any application or other action that is pending on or after the date of the enactment of this Act”). Senator Levin urged adoption of an alternative amendment that “would apply only to new habeas cases filed after the date of enactment.” *Id.*, at S12802 (Nov. 15, 2005). That alternative amendment became the text of subsection (h)(2). (In light of the extensive discussion of the DTA's effect on pending cases prior to passage of the Act, see, e.g., *id.*, at S12664 (Nov. 10, 2005); *id.*, at S12755 (Nov. 14, 2005); *id.*, at S12799–S12802 (Nov. 15, 2005); *id.*, at S14245, S14252–S14253, S14257–S14258, S14274–S14275 (Dec. 21, 2005), it cannot be said that the changes to subsection (h)(2) were inconsequential. Cf. *post*, at 14 (SCALIA, J., dissenting).)

While statements attributed to the final bill's two other sponsors, Senators Graham and Kyl, arguably contradict Senator Levin's contention that the final version of the Act preserved jurisdiction over pending habeas cases, see 151 Cong. Rec. S14263–S14264 (Dec. 21, 2005), those statements appear to have been inserted into the Congressional Record *after* the Senate debate. See Reply Brief for Petitioner 5, n. 6; see also 151 Cong. Rec. S14260 (statement of Sen. Kyl) (“I would like to say a few words about the *now-completed* National Defense Authorization Act

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The Government nonetheless offers two reasons why, in its view, no negative inference may be drawn in favor of jurisdiction. First, it asserts that *Lindh* is inapposite because “Section 1005(e)(1) and (h)(1) remove jurisdiction, while Section 1005(e)(2), (3) and (h)(2) create an exclusive review mechanism and define the nature of that review.” Reply Brief in Support of Respondents’ Motion to Dismiss 4. Because the provisions being contrasted “address wholly distinct subject matters,” *Martin v. Hadix*, 527 U. S. 343, 356 (1999), the Government argues, Congress’ different treatment of them is of no significance.

This argument must fail because it rests on a false distinction between the “jurisdictional” nature of subsection (e)(1) and the “procedural” character of subsections (e)(2) and (e)(3). In truth, all three provisions govern jurisdiction over detainees’ claims; subsection (e)(1) addresses jurisdiction in habeas cases and other actions “relating to any aspect of the detention,” while subsections (e)(2) and (3) vest exclusive,¹¹ but limited, *jurisdiction* in the Court of

for fiscal year 2006” (emphasis added)). All statements made during the debate itself support Senator Levin’s understanding that the final text of the DTA would not render subsection (e)(1) applicable to pending cases. See, *e.g.*, *id.*, at S14245, S14252–S14253, S14274–S14275 (Dec. 21, 2005). The statements that JUSTICE SCALIA cites as evidence to the contrary construe *subsection (e)(3)* to strip this Court of jurisdiction, see *post*, at 12, n. 4 (dissenting opinion) (quoting 151 Cong. Rec. S12796 (Nov. 15, 2005) (statement of Sen. Specter))—a construction that the Government has expressly disavowed in this litigation, see n. 11, *infra*. The inapposite November 14, 2005, statement of Senator Graham, which JUSTICE SCALIA cites as evidence of that Senator’s “assumption that pending cases are covered,” *post*, at 12, and n. 3 (citing 151 Cong. Rec. S12756 (Nov. 14, 2005)), follows directly after the uncontradicted statement of his co-sponsor, Senator Levin, assuring members of the Senate that “the amendment will not strip the courts of jurisdiction over [pending] cases.” *Id.*, at S12755.

¹¹The District of Columbia Circuit’s jurisdiction, while “exclusive” in one sense, would not bar this Court’s review on appeal from a decision under the DTA. See Reply Brief in Support of Respondents’ Motion to

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Appeals for the District of Columbia Circuit to review “final decision[s]” of CSRTs and military commissions.

That subsection (e)(1) strips jurisdiction while subsections (e)(2) and (e)(3) restore it in limited form is hardly a distinction upon which a negative inference must founder. JUSTICE SCALIA, in arguing to the contrary, maintains that Congress had “ample reason” to provide explicitly for application of subsections (e)(2) and (e)(3) to pending cases because “jurisdiction-stripping” provisions like subsection (e)(1) have been treated differently under our retroactivity jurisprudence than “jurisdiction-conferring” ones like subsections (e)(2) and (e)(3). *Post*, at 8 (dissenting opinion); see also Reply Brief in Support of Respondents’ Motion to Dismiss 5–6. That theory is insupportable. Assuming *arguendo* that subsections (e)(2) and (e)(3) “confer *new* jurisdiction (in the D. C. Circuit) where there was none before,” *post*, at 8 (emphasis in original); but see *Rasul v. Bush*, 542 U. S. 466 (2004), and that our precedents can be read to “strongly indicat[e]” that jurisdiction-creating statutes raise special retroactivity concerns not also raised by jurisdiction-stripping statutes, *post*, at 8,¹² subsections (e)(2) and (e)(3) “confer” jurisdiction in a man-

Dismiss 16–17, n. 12 (“While the DTA does not expressly call for Supreme Court review of the District of Columbia Circuit’s decisions, Section 1005(e)(2) and (3) . . . do not remove this Court’s jurisdiction over such decisions under 28 U. S. C. §1254(1)”).

¹²This assertion is itself highly questionable. The cases that JUSTICE SCALIA cites to support his distinction are *Republic of Austria v. Altmann*, 541 U. S. 677 (2004), and *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U. S. 939 (1997). See *post*, at 8. While the Court in both of those cases recognized that statutes “creating” jurisdiction may have retroactive effect if they affect “substantive” rights, see *Altmann*, 541 U. S., at 695, and n. 15; *Hughes Aircraft*, 520 U. S., at 951, we have applied the same analysis to statutes that have jurisdiction-stripping effect, see *Lindh v. Murphy*, 521 U. S. 320, 327–328 (1997); *id.*, at 342–343 (Rehnquist, C. J., dissenting) (construing AEDPA’s amendments as “ousting jurisdiction”).

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ner that cannot conceivably give rise to retroactivity questions under our precedents. The provisions impose no additional liability or obligation on any private party or even on the United States, unless one counts the burden of litigating an appeal—a burden not a single one of our cases suggests triggers retroactivity concerns.¹³ Moreover, it strains credulity to suggest that the desire to reinforce the application of subsections (e)(2) and (e)(3) to pending cases drove Congress to *exclude* subsection (e)(1) from §1005(h)(2).

The Government’s second objection is that applying subsections (e)(2) and (e)(3) but not (e)(1) to pending cases “produces an absurd result” because it grants (albeit only temporarily) dual jurisdiction over detainees’ cases in circumstances where the statute plainly envisions that the District of Columbia Circuit will have “*exclusive*” and immediate jurisdiction over such cases. Reply Brief in Support of Respondents’ Motion to Dismiss 7. But the premise here is faulty; subsections (e)(2) and (e)(3) grant jurisdiction only over actions to “determine the validity of any final decision” of a CSRT or commission. Because Hamdan, at least, is not contesting any “final decision” of a CSRT or military commission, his action does not fall within the scope of subsection (e)(2) or (e)(3). There is, then, no absurdity.¹⁴

¹³See *Landgraf*, 511 U. S., at 271, n. 25 (observing that “the great majority of our decisions relying upon the antiretroactivity presumption have involved intervening statutes burdening private parties,” though “we have applied the presumption in cases involving *new monetary obligations* that fell only on the government” (emphasis added)); see also *Altmann*, 541 U. S., at 728–729 (KENNEDY, J., dissenting) (explaining that if retroactivity concerns do not arise when a new monetary obligation is imposed on the United States it is because “Congress, by virtue of authoring the legislation, is itself fully capable of protecting the Federal Government from having its rights degraded by retroactive laws”).

¹⁴There may be habeas cases that were pending in the lower courts at

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The Government’s more general suggestion that Congress can have had no good reason for preserving habeas jurisdiction over cases that had been brought by detainees prior to enactment of the DTA not only is belied by the legislative history, see n. 10, *supra*, but is otherwise without merit. There is nothing absurd about a scheme under which pending habeas actions—particularly those, like this one, that challenge the very legitimacy of the tribunals whose judgments Congress would like to have reviewed—are preserved, and more routine challenges to final decisions rendered by those tribunals are carefully channeled to a particular court and through a particular lens of review.

Finally, we cannot leave unaddressed JUSTICE SCALIA’s contentions that the “meaning of §1005(e)(1) is entirely clear,” *post*, at 6, and that “the *plain import* of a statute repealing jurisdiction is to eliminate the power to consider and render judgment—in an already pending case no less than in a case yet to be filed,” *post*, at 3 (emphasis in original). Only by treating the *Bruner* rule as an inflexible trump (a thing it has never been, see n. 7, *supra*) and ignoring both the rest of §1005’s text and its drafting history can one conclude as much. Congress here expressly provided that subsections (e)(2) and (e)(3) applied to pending cases. It chose not to so provide—after having been presented with the option—for subsection (e)(1). The omission is an integral part of the statutory scheme that muddies whatever “plain meaning” may be discerned from blinkered study of subsection (e)(1) alone. The dissent’s speculation about what Congress might have intended by the omission not only is counterfactual, cf. n. 10, *supra*

the time the DTA was enacted that do qualify as challenges to “final decision[s]” within the meaning of subsection (e)(2) or (e)(3). We express no view about whether the DTA would require transfer of such an action to the District of Columbia Circuit.

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(recounting legislative history), but rests on both a misconstruction of the DTA and an erroneous view our precedents, see *supra*, at 17, and n. 12.

For these reasons, we deny the Government’s motion to dismiss.¹⁵

III

Relying on our decision in *Councilman*, 420 U. S. 738, the Government argues that, even if we have statutory jurisdiction, we should apply the “judge-made rule that civilian courts should await the final outcome of on-going military proceedings before entertaining an attack on those proceedings.” Brief for Respondents 12. Like the District Court and the Court of Appeals before us, we reject this argument.

In *Councilman*, an army officer on active duty was referred to a court-martial for trial on charges that he violated the UCMJ by selling, transferring, and possessing marijuana. 420 U. S., at 739–740. Objecting that the alleged offenses were not “service connected,” *id.*, at 740, the officer filed suit in Federal District Court to enjoin the proceedings. He neither questioned the lawfulness of courts-martial or their procedures nor disputed that, as a serviceman, he was subject to court-martial jurisdiction. His sole argument was that the subject matter of his case did not fall within the scope of court-martial authority. See *id.*, at 741, 759. The District Court granted his request for injunctive relief, and the Court of Appeals

¹⁵Because we conclude that §1005(e)(1) does not strip federal courts’ jurisdiction over cases pending on the date of the DTA’s enactment, we do not decide whether, if it were otherwise, this Court would nonetheless retain jurisdiction to hear Hamdan’s appeal. Cf. *supra*, at 10. Nor do we decide the manner in which the canon of constitutional avoidance should affect subsequent interpretation of the DTA. See, e.g., *St. Cyr*, 533 U. S., at 300 (a construction of a statute “that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions”).

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affirmed.

We granted certiorari and reversed. *Id.*, at 761. We did not reach the merits of whether the marijuana charges were sufficiently “service connected” to place them within the subject-matter jurisdiction of a court-martial. Instead, we concluded that, as a matter of comity, federal courts should normally abstain from intervening in pending court-martial proceedings against members of the Armed Forces,¹⁶ and further that there was nothing in the particular circumstances of the officer’s case to displace that general rule. See *id.*, at 740, 758.

Councilman identifies two considerations of comity that together favor abstention pending completion of ongoing court-martial proceedings against service personnel. See *New v. Cohen*, 129 F. 3d 639, 643 (CA DC 1997); see also 415 F. 3d, at 36–37 (discussing *Councilman* and *New*). First, military discipline and, therefore, the efficient operation of the Armed Forces are best served if the military justice system acts without regular interference from civilian courts. See *Councilman*, 420 U. S., at 752. Second, federal courts should respect the balance that Congress struck between military preparedness and fairness to individual service members when it created “an integrated system of military courts and review procedures, a

¹⁶ *Councilman* distinguished service personnel from civilians, whose challenges to ongoing military proceedings are cognizable in federal court. See, e.g., *United States ex rel. Toth v. Quarles*, 350 U. S. 11 (1955). As we explained in *Councilman*, abstention is not appropriate in cases in which individuals raise “substantial arguments denying the right of the military to try them at all,” and in which the legal challenge “turn[s] on the status of the persons as to whom the military asserted its power.” 420 U. S., at 759 (quoting *Noyd v. Bond*, 395 U. S. 683, 696, n. 8 (1969)). In other words, we do not apply *Councilman* abstention when there is a substantial question whether a military tribunal has personal jurisdiction over the defendant. Because we conclude that abstention is inappropriate for a more basic reason, we need not consider whether the jurisdictional exception recognized in *Councilman* applies here.

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critical element of which is the Court of Military Appeals, consisting of civilian judges ‘completely removed from all military influence or persuasion’” *Id.*, at 758 (quoting H. R. Rep. No. 491, 81st Cong., 1st Sess., p. 7 (1949)). Just as abstention in the face of ongoing state criminal proceedings is justified by our expectation that state courts will enforce federal rights, so abstention in the face of ongoing court-martial proceedings is justified by our expectation that the military court system established by Congress—with its substantial procedural protections and provision for appellate review by independent civilian judges—“will vindicate servicemen’s constitutional rights,” 420 U. S., at 758. See *id.*, at 755–758.¹⁷

The same cannot be said here; indeed, neither of the comity considerations identified in *Councilman* weighs in favor of abstention in this case. First, Hamdan is not a member of our Nation’s Armed Forces, so concerns about military discipline do not apply. Second, the tribunal convened to try Hamdan is not part of the integrated system of military courts, complete with independent review panels, that Congress has established. Unlike the officer in *Councilman*, Hamdan has no right to appeal any conviction to the civilian judges of the Court of Military Appeals (now called the United States Court of Appeals for the Armed Forces, see Pub. L. 103–337, 108 Stat. 2831). Instead, under Dept. of Defense Military Commis-

¹⁷See also *Noyd*, 395 U. S., at 694–696 (noting that the Court of Military Appeals consisted of “disinterested civilian judges,” and concluding that there was no reason for the Court to address an Air Force Captain’s argument that he was entitled to remain free from confinement pending appeal of his conviction by court-martial “when the highest military court stands ready to consider petitioner’s arguments”). Cf. *Parisi v. Davidson*, 405 U. S. 34, 41–43 (1972) (“Under accepted principles of comity, the court should stay its hand only if the relief the petitioner seeks . . . would also be available to him with reasonable promptness and certainty through the machinery of the military judicial system in its processing of the court-martial charge”).

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sion Order No. 1 (Commission Order No. 1), which was issued by the President on March 21, 2002, and amended most recently on August 31, 2005, and which governs the procedures for Hamdan's commission, any conviction would be reviewed by a panel consisting of three military officers designated by the Secretary of Defense. Commission Order No. 1 §6(H)(4). Commission Order No. 1 provides that appeal of a review panel's decision may be had only to the Secretary of Defense himself, §6(H)(5), and then, finally, to the President, §6(H)(6).¹⁸

We have no doubt that the various individuals assigned review power under Commission Order No. 1 would strive to act impartially and ensure that Hamdan receive all protections to which he is entitled. Nonetheless, these review bodies clearly lack the structural insulation from military influence that characterizes the Court of Appeals for the Armed Forces, and thus bear insufficient conceptual similarity to state courts to warrant invocation of abstention principles.¹⁹

In sum, neither of the two comity considerations underlying our decision to abstain in *Councilman* applies to the circumstances of this case. Instead, this Court's decision in *Quirin* is the most relevant precedent. In *Quirin*, seven German saboteurs were captured upon arrival by submarine in New York and Florida. 317 U. S., at 21. The President convened a military commission to try the saboteurs, who then filed habeas corpus petitions in the United

¹⁸If he chooses, the President may delegate this ultimate decision-making authority to the Secretary of Defense. See §6(H)(6).

¹⁹JUSTICE SCALIA chides us for failing to include the District of Columbia Circuit's review powers under the DTA in our description of the review mechanism erected by Commission Order No. 1. See *post*, at 22. Whether or not the limited review permitted under the DTA may be treated as akin to the plenary review exercised by the Court of Appeals for the Armed Forces, petitioner here is not afforded a right to such review. See *infra*, at 52; §1005(e)(3), 119 Stat. 2743.

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States District Court for the District of Columbia challenging their trial by commission. We granted the saboteurs' petition for certiorari to the Court of Appeals before judgment. See *id.*, at 19. Far from abstaining pending the conclusion of military proceedings, which were ongoing, we convened a special Term to hear the case and expedited our review. That course of action was warranted, we explained, “[i]n view of the public importance of the questions raised by [the cases] and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay.” *Ibid.*

As the Court of Appeals here recognized, *Quirin* “provides a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions.” 415 F. 3d, at 36.²⁰ The circumstances of this case, like those in *Quirin*,

²⁰Having correctly declined to abstain from addressing Hamdan’s challenge to the lawfulness of the military commission convened to try him, the Court of Appeals suggested that *Councilman* abstention nonetheless applied to bar its consideration of one of Hamdan’s arguments—namely, that his commission violated Article 3 of the Third Geneva Convention, 6 U. S. T. 3316, 3318. See Part VI, *infra*. Although the Court of Appeals rejected the Article 3 argument on the merits, it also stated that, because the challenge was not “jurisdictional,” it did not fall within the exception that *Schlesinger v. Councilman*, 420 U. S. 738 (1975), recognized for defendants who raise substantial arguments that a military tribunal lacks personal jurisdiction over them. See 415 F. 3d, at 42.

In reaching this conclusion, the Court of Appeals conflated two distinct inquiries: (1) whether Hamdan has raised a substantial argument that the military commission lacks authority to try him; and, more fundamentally, (2) whether the comity considerations underlying *Councilman* apply to trigger the abstention principle in the first place. As the Court of Appeals acknowledged at the beginning of its opinion, the first question warrants consideration only if the answer to the

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simply do not implicate the “obligations of comity” that, under appropriate circumstances, justify abstention. *Quackenbush v. Allstate Ins. Co.*, 517 U. S. 706, 733 (1996) (KENNEDY, J., concurring).

Finally, the Government has identified no other “important countervailing interest” that would permit federal courts to depart from their general “duty to exercise the jurisdiction that is conferred upon them by Congress.” *Id.*, at 716 (majority opinion). To the contrary, Hamdan and the Government both have a compelling interest in knowing in advance whether Hamdan may be tried by a military commission that arguably is without any basis in law and operates free from many of the procedural rules prescribed by Congress for courts-martial—rules intended to safeguard the accused and ensure the reliability of any conviction. While we certainly do not foreclose the possibility that abstention may be appropriate in some cases seeking review of ongoing military commission proceedings (such as military commissions convened on the battlefield), the foregoing discussion makes clear that, under our precedent, abstention is not justified here. We therefore proceed to consider the merits of Hamdan’s challenge.

IV

The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity. See W. Winthrop, *Military Law and Precedents* 831 (rev. 2d ed. 1920) (hereinafter Winthrop).

second is yes. See 415 F. 3d, at 36–37. Since, as the Court of Appeals properly concluded, the answer to the second question is in fact no, there is no need to consider any exception.

At any rate, it appears that the exception would apply here. As discussed in Part VI, *infra*, Hamdan raises a substantial argument that, because the military commission that has been convened to try him is not a “regularly constituted court” under the Geneva Conventions, it is *ultra vires* and thus lacks jurisdiction over him. Brief for Petitioner 5.

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Though foreshadowed in some respects by earlier tribunals like the Board of General Officers that General Washington convened to try British Major John André for spying during the Revolutionary War, the commission “as such” was inaugurated in 1847. *Id.*, at 832; G. Davis, *A Treatise on the Military Law of the United States* 308 (2d ed. 1909) (hereinafter Davis). As commander of occupied Mexican territory, and having available to him no other tribunal, General Winfield Scott that year ordered the establishment of both “*military commissions*” to try ordinary crimes committed in the occupied territory and a “*council of war*” to try offenses against the law of war. Winthrop 832 (emphases in original).

When the exigencies of war next gave rise to a need for use of military commissions, during the Civil War, the dual system favored by General Scott was not adopted. Instead, a single tribunal often took jurisdiction over ordinary crimes, war crimes, and breaches of military orders alike. As further discussed below, each aspect of that seemingly broad jurisdiction was in fact supported by a separate military exigency. Generally, though, the need for military commissions during this period—as during the Mexican War—was driven largely by the then very limited jurisdiction of courts-martial: “The *occasion* for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offences defined in a written code.” *Id.*, at 831 (emphasis in original).

Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, §8 and Article III, §1 of the Constitution unless some other part of that document authorizes a response to the felt need. See *Ex parte Milligan*, 4 Wall. 2, 121 (1866) (“Certainly no part of the judicial power of the country was conferred on [military commissions]”); *Ex parte Val-*

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landigham, 1 Wall. 243, 251 (1864); see also *Quirin*, 317 U. S., at 25 (“Congress and the President, like the courts, possess no power not derived from the Constitution”). And that authority, if it exists, can derive only from the powers granted jointly to the President and Congress in time of war. See *id.*, at 26–29; *In re Yamashita*, 327 U. S. 1, 11 (1946).

The Constitution makes the President the “Commander in Chief” of the Armed Forces, Art. II, §2, cl. 1, but vests in Congress the powers to “declare War . . . and make Rules concerning Captures on Land and Water,” Art. I, §8, cl. 11, to “raise and support Armies,” *id.*, cl. 12, to “define and punish . . . Offences against the Law of Nations,” *id.*, cl. 10, and “To make Rules for the Government and Regulation of the land and naval Forces,” *id.*, cl. 14. The interplay between these powers was described by Chief Justice Chase in the seminal case of *Ex parte Milligan*:

“The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. . . . Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.” 4 Wall., at 139–140.²¹

²¹See also Winthrop 831 (“[I]n general, it is those provisions of the Constitution which empower Congress to ‘declare war’ and ‘raise

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Whether Chief Justice Chase was correct in suggesting that the President may constitutionally convene military commissions “without the sanction of Congress” in cases of “controlling necessity” is a question this Court has not answered definitively, and need not answer today. For we held in *Quirin* that Congress had, through Article of War 15, sanctioned the use of military commissions in such circumstances. 317 U. S., at 28 (“By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases”). Article 21 of the UCMJ, the language of which is substantially identical to the old Article 15 and was preserved by Congress after World War II,²² reads as follows:

“Jurisdiction of courts-martial not exclusive.

“The provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals.” 64 Stat. 115.

We have no occasion to revisit *Quirin*’s controversial characterization of Article of War 15 as congressional authorization for military commissions. Cf. Brief for Legal

armies,’ and which, in authorizing the initiation of *war*, authorize the employment of all necessary and proper agencies for its due prosecution, from which this tribunal derives its original sanction” (emphasis in original)).

²²Article 15 was first adopted as part of the Articles of War in 1916. See Act of Aug. 29, 1916, ch. 418, §3, Art. 15, 39 Stat. 652. When the Articles of War were codified and re-enacted as the UCMJ in 1950, Congress determined to retain Article 15 because it had been “construed by the Supreme Court (*Ex Parte Quirin*, 317 U. S. 1 (1942)).” S. Rep. No. 486, 81st Cong., 1st Sess., 13 (1949).

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Scholars and Historians as *Amici Curiae* 12–15. Contrary to the Government’s assertion, however, even *Quirin* did not view the authorization as a sweeping mandate for the President to “invoke military commissions when he deems them necessary.” Brief for Respondents 17. Rather, the *Quirin* Court recognized that Congress had simply preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions—with the express condition that the President and those under his command comply with the law of war. See 317 U. S., at 28–29.²³ That much is evidenced by the Court’s inquiry, *following* its conclusion that Congress had authorized military commissions, into whether the law of war had indeed been complied with in that case. See *ibid.*

The Government would have us dispense with the inquiry that the *Quirin* Court undertook and find in either the AUMF or the DTA specific, overriding authorization for the very commission that has been convened to try Hamdan. Neither of these congressional Acts, however, expands the President’s authority to convene military commissions. First, while we assume that the AUMF activated the President’s war powers, see *Hamdi v. Rumsfeld*, 542 U. S. 507 (2004) (plurality opinion), and that those powers include the authority to convene military commissions in appropriate circumstances, see *id.*, at 518; *Quirin*, 317 U. S., at 28–29; see also *Yamashita*, 327 U. S., at 11, there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the

²³ Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 637 (1952) (Jackson, J., concurring). The Government does not argue otherwise.

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UCMJ. Cf. *Yerger*, 8 Wall., at 105 (“Repeals by implication are not favored”).²⁴

Likewise, the DTA cannot be read to authorize this commission. Although the DTA, unlike either Article 21 or the AUMF, was enacted after the President had convened Hamdan’s commission, it contains no language authorizing that tribunal or any other at Guantanamo Bay. The DTA obviously “recognize[s]” the existence of the Guantanamo Bay commissions in the weakest sense, Brief for Respondents 15, because it references some of the military orders governing them and creates limited judicial review of their “final decision[s],” DTA §1005(e)(3), 119 Stat. 2743. But the statute also pointedly reserves judgment on whether “the Constitution and laws of the United States are applicable” in reviewing such decisions and whether, if they are, the “standards and procedures” used to try Hamdan and other detainees actually violate the “Constitution and laws.” *Ibid.*

Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the “Constitution and laws,” including the law of war. Absent a more specific congressional authorization, the task of this Court is, as it was in *Quirin*, to decide whether Hamdan’s military commission is so justified. It is to that inquiry we now turn.

²⁴On this point, it is noteworthy that the Court in *Ex parte Quirin*, 317 U. S. 1 (1942), looked beyond Congress’ declaration of war and accompanying authorization for use of force during World War II, and relied instead on Article of War 15 to find that Congress had authorized the use of military commissions in some circumstances. See *id.*, at 26–29. JUSTICE THOMAS’ assertion that we commit “error” in reading Article 21 of the UCMJ to place limitations upon the President’s use of military commissions, see *post*, at 5 (dissenting opinion), ignores the reasoning in *Quirin*.

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V

The common law governing military commissions may be gleaned from past practice and what sparse legal precedent exists. Commissions historically have been used in three situations. See Bradley & Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2048, 2132–2133 (2005); Winthrop 831–846; Hearings on H. R. 2498 before the Subcommittee of the House Committee on Armed Services, 81st Cong., 1st Sess., 975 (1949). First, they have substituted for civilian courts at times and in places where martial law has been declared. Their use in these circumstances has raised constitutional questions, see *Duncan v. Kahanamoku*, 327 U. S. 304 (1946); *Milligan*, 4 Wall., at 121–122, but is well recognized.²⁵ See Winthrop 822, 836–839. Second, commissions have been established to try civilians “as part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function.” *Duncan*, 327 U. S., at 314; see *Milligan*, 4 Wall., at 141–142 (Chase, C. J., concurring in judgment) (distinguishing “MARTIAL LAW PROPER” from “MILITARY GOVERNMENT” in occupied territory). Illustrative of this second kind of commission is

²⁵The justification for, and limitations on, these commissions were summarized in *Milligan*:

“If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.” 4 Wall., at 127 (emphases in original).

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the one that was established, with jurisdiction to apply the German Criminal Code, in occupied Germany following the end of World War II. See *Madsen v. Kinsella*, 343 U. S. 341, 356 (1952).²⁶

The third type of commission, convened as an “incident to the conduct of war” when there is a need “to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war,” *Quirin*, 317 U. S., at 28–29, has been described as “utterly different” from the other two. Bickers, *Military Commissions are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 *Tex. Tech. L. Rev.* 899, 902 (2002–2003).²⁷ Not only is its jurisdiction limited to offenses cognizable during time of war, but its role is primarily a factfinding one—to determine, typically on the battlefield itself, whether the defendant has violated the law of war. The last time the U. S. Armed Forces

²⁶The limitations on these occupied territory or military government commissions are tailored to the tribunals’ purpose and the exigencies that necessitate their use. They may be employed “pending the establishment of civil government,” *Madsen*, 343 U. S., at 354–355, which may in some cases extend beyond the “cessation of hostilities,” *id.*, at 348.

²⁷So much may not be evident on cold review of the Civil War trials often cited as precedent for this kind of tribunal because the commissions established during that conflict operated as both martial law or military government tribunals and law-of-war commissions. Hence, “military commanders began the practice [during the Civil War] of using the same name, the same rules, and often the same tribunals” to try both ordinary crimes and war crimes. Bickers, 34 *Tex. Tech. L. Rev.*, at 908. “For the first time, accused horse thieves and alleged saboteurs found themselves subject to trial by the same military commission.” *Id.*, at 909. The Civil War precedents must therefore be considered with caution; as we recognized in *Quirin*, 317 U. S., at 29, and as further discussed below, commissions convened during time of war but under neither martial law nor military government may try only offenses against the law of war.

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used the law-of-war military commission was during World War II. In *Quirin*, this Court sanctioned President Roosevelt's use of such a tribunal to try Nazi saboteurs captured on American soil during the War. 317 U. S. 1. And in *Yamashita*, we held that a military commission had jurisdiction to try a Japanese commander for failing to prevent troops under his command from committing atrocities in the Philippines. 327 U. S. 1.

Quirin is the model the Government invokes most frequently to defend the commission convened to try Hamdan. That is both appropriate and unsurprising. Since Guantanamo Bay is neither enemy-occupied territory nor under martial law, the law-of-war commission is the only model available. At the same time, no more robust model of executive power exists; *Quirin* represents the high-water mark of military power to try enemy combatants for war crimes.

The classic treatise penned by Colonel William Winthrop, whom we have called “the ‘Blackstone of Military Law,’” *Reid v. Covert*, 354 U. S. 1, 19, n. 38 (1957) (plurality opinion), describes at least four preconditions for exercise of jurisdiction by a tribunal of the type convened to try Hamdan. First, “[a] military commission, (except where otherwise authorized by statute), can legally assume jurisdiction only of offenses committed within the field of the command of the convening commander.” Winthrop 836. The “field of command” in these circumstances means the “theatre of war.” *Ibid.* Second, the offense charged “must have been committed within the period of the war.”²⁸ *Id.*, at 837. No jurisdiction exists to try offenses “committed either before or after the war.” *Ibid.* Third, a military commission not established pursuant to martial

²⁸If the commission is established pursuant to martial law or military government, its jurisdiction extends to offenses committed within “the exercise of military government or martial law.” Winthrop 837.

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law or an occupation may try only “[i]ndividuals of the enemy’s army who have been guilty of illegitimate warfare or other offences in violation of the laws of war” and members of one’s own army “who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war.” *Id.*, at 838. Finally, a law-of-war commission has jurisdiction to try only two kinds of offense: “Violations of the laws and usages of war cognizable by military tribunals only,” and “[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war.” *Id.*, at 839.²⁹

All parties agree that Colonel Winthrop’s treatise accurately describes the common law governing military commissions, and that the jurisdictional limitations he identifies were incorporated in Article of War 15 and, later, Article 21 of the UCMJ. It also is undisputed that Hamdan’s commission lacks jurisdiction to try him unless the charge “properly set[s] forth, not only the details of the act charged, but the circumstances conferring *jurisdiction*.” *Id.*, at 842 (emphasis in original). The question is whether the preconditions designed to ensure that a military necessity exists to justify the use of this extraordinary tribunal have been satisfied here.

The charge against Hamdan, described in detail in Part I, *supra*, alleges a conspiracy extending over a number of years, from 1996 to November 2001.³⁰ All but two months

²⁹Winthrop adds as a fifth, albeit not-always-complied-with, criterion that “the *trial* must be had within the theatre of war . . . ; that, if held elsewhere, and where the civil courts are open and available, the proceedings and sentence will be *coram non iudice*.” *Id.*, at 836. The Government does not assert that Guantanamo Bay is a theater of war, but instead suggests that neither Washington, D. C., in 1942 nor the Philippines in 1945 qualified as a “war zone” either. Brief for Respondents 27; cf. *Quirin*, 317 U. S. 1; *In re Yamashita*, 327 U. S. 1 (1946).

³⁰The elements of this conspiracy charge have been defined not by Congress but by the President. See Military Commission Instruction

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of that more than 5-year-long period preceded the attacks of September 11, 2001, and the enactment of the AUMF—the Act of Congress on which the Government relies for exercise of its war powers and thus for its authority to convene military commissions.³¹ Neither the purported

No. 2, 32 CFR §11.6 (2005).

³¹JUSTICE THOMAS would treat Osama bin Laden’s 1996 declaration of jihad against Americans as the inception of the war. See *post*, at 7–10 (dissenting opinion). But even the Government does not go so far; although the United States had for some time prior to the attacks of September 11, 2001, been aggressively pursuing al Qaeda, neither in the charging document nor in submissions before this Court has the Government asserted that the President’s *war powers* were activated prior to September 11, 2001. Cf. Brief for Respondents 25 (describing the events of September 11, 2001, as “an act of war” that “triggered a right to deploy military forces abroad to defend the United States by combating al Qaeda”). JUSTICE THOMAS’ further argument that the AUMF is “backward looking” and therefore authorizes *trial by military commission* of crimes that occurred prior to the inception of war is insupportable. See *post*, at 8, n. 3. If nothing else, Article 21 of the UCMJ requires that the President comply with the law of war in his use of military commissions. As explained in the text, the law of war permits trial only of offenses “committed within the period of the war.” Winthrop 837; see also *Quirin*, 317 U. S., at 28–29 (observing that law-of-war military commissions may be used to try “those enemies *who in their attempt to thwart or impede our military effort* have violated the law of war” (emphasis added)). The sources that JUSTICE THOMAS relies on to suggest otherwise simply do not support his position. Colonel Green’s short exegesis on military commissions cites Howland for the proposition that “[o]ffenses committed before a *formal declaration of war* or *before the declaration of martial law* may be tried by military commission.” *The Military Commission*, 42 Am. J. Int’l L. 832, 848 (1948) (emphases added) (cited *post*, at 9–10). Assuming that to be true, nothing in our analysis turns on the admitted absence of either a formal declaration of war or a declaration of martial law. Our focus instead is on the September 11, 2001 attacks that the Government characterizes as the relevant “act[s] of war,” and on the measure that authorized the President’s deployment of military force—the AUMF. Because we do not question the Government’s position that the war commenced with the events of September 11, 2001, the *Prize Cases*, 2 Black 635 (1863) (cited *post*, at 2, 7, 8, and 10 (THOMAS, J., dissenting)),

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agreement with Osama bin Laden and others to commit war crimes, nor a single overt act, is alleged to have occurred in a theater of war or on any specified date after September 11, 2001. None of the overt acts that Hamdan is alleged to have committed violates the law of war.

These facts alone cast doubt on the legality of the charge and, hence, the commission; as Winthrop makes plain, the offense alleged must have been committed both in a theater of war and *during*, not before, the relevant conflict. But the deficiencies in the time and place allegations also underscore—indeed are symptomatic of—the most serious defect of this charge: The offense it alleges is not triable by law-of-war military commission. See *Yamashita*, 327 U. S., at 13 (“Neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge proffered against him

are not germane to the analysis.

Finally, JUSTICE THOMAS’ assertion that Julius Otto Kuehn’s trial by military commission “for conspiring with Japanese officials to betray the United States fleet to the Imperial Japanese Government prior to its attack on Pearl Harbor” stands as authoritative precedent for Hamdan’s trial by commission, *post*, at 9, misses the mark in three critical respects. First, Kuehn was tried for the *federal espionage crimes* under what were then 50 U. S. C. §§31, 32, and 34, *not* with common-law violations of the law of war. See Hearings before the Joint Committee on the Investigation of the Pearl Harbor Attack, 79th Cong., 1st Sess., pt. 30, pp. 3067–3069 (1946). Second, he was tried by *martial law* commission (a kind of commission JUSTICE THOMAS acknowledges is not relevant to the analysis here, and whose jurisdiction extends to offenses committed within “the exercise of . . . martial law,” Winthrop 837, see *supra*, n. 28), *not* a commission established exclusively to try violations of the law of war. See *ibid.* Third, the martial law commissions established to try crimes in Hawaii were ultimately declared illegal by this Court. See *Duncan v. Kahanamoku*, 327 U. S. 304, 324 (1946) (“The phrase ‘martial law’ as employed in [the Hawaiian Organic Act], while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals”).

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is of a violation of the law of war”).³²

³²JUSTICE THOMAS adopts the remarkable view, not advocated by the Government, that the charging document in this case actually includes more than one charge: Conspiracy *and* several other ill-defined crimes, like “joining an organization” that has a criminal purpose, “[b]eing a guerilla,” and aiding the enemy. See *post*, at 16–21, and n. 9. There are innumerable problems with this approach.

First, the crimes JUSTICE THOMAS identifies were not actually charged. It is one thing to observe that charges before a military commission “need not be stated with the precision of a common law indictment,” *post*, at 15, n. 7 (citation omitted); it is quite another to say that a crime *not charged* may nonetheless be read into an indictment. Second, the Government plainly had available to it the tools and the time it needed to charge petitioner with the various crimes JUSTICE THOMAS refers to, if it believed they were supported by the allegations. As JUSTICE THOMAS himself observes, see *post*, at 21, the crime of aiding the enemy may, in circumstances where the accused owes allegiance to the party whose enemy he is alleged to have aided, be triable by military commission pursuant to Article 104 of the UCMJ, 10 U. S. C. §904. Indeed, the Government has charged detainees under this provision when it has seen fit to do so. See Brief for David Hicks as *Amicus Curiae* 7.

Third, the cases JUSTICE THOMAS relies on to show that Hamdan may be guilty of violations of the law of war not actually charged do not support his argument. JUSTICE THOMAS begins by blurring the distinction between those categories of “offender” who may be tried by military commission (*e.g.*, jayhawkers and the like) with the “offenses” that may be so tried. Even when it comes to “being a guerilla,” *cf. post*, at 18, n. 9 (citation omitted), a label alone does not render a person susceptible to execution or other criminal punishment; the charge of “being a guerilla” invariably is accompanied by the allegation that the defendant “took up arms” as such. This is because, as explained by Judge Advocate General Holt in a decision upholding the charge of “being a guerilla” as one recognized by “the universal usage of the times,” the charge is simply shorthand (akin to “being a spy”) for “the perpetration of a succession of similar acts” of violence. Record Books of the Judge Advocate General Office, R. 3, 590. The sources cited by JUSTICE THOMAS confirm as much. See cases cited *post*, at 18, n. 9.

Likewise, the suggestion that the Nuremberg precedents support Hamdan’s conviction for the (uncharged) crime of joining a criminal organization must fail. *Cf. post*, at 19–21. The convictions of certain high-level Nazi officials for “membership in a criminal organization”

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There is no suggestion that Congress has, in exercise of its constitutional authority to “define and punish . . . Offences against the Law of Nations,” U. S. Const., Art. I, §8, cl. 10, positively identified “conspiracy” as a war crime.³³ As we explained in *Quirin*, that is not necessarily fatal to the Government’s claim of authority to try the alleged offense by military commission; Congress, through Article 21 of the UCMJ, has “incorporated by reference” the common law of war, which may render triable by military commission certain offenses not defined by statute. 317 U. S., at 30. When, however, neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous. To demand any less would be to risk concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution. Cf. *Loving v. United States*, 517 U. S. 748, 771 (1996) (acknowledging that Congress “may not delegate the power to make laws”); *Reid*, 354 U. S., at 23–24 (“The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds”); The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison) (“The accumulation of all powers legislative, executive and judici-

were secured pursuant to specific provisions of the Charter of the International Military Tribunal that permitted indictment of individual organization members following convictions of the organizations themselves. See Arts. 9 and 10, in 1 Trial of the Major War Criminals Before the International Military Tribunal 12 (1947). The initial plan to use organizations’ convictions as predicates for mass individual trials ultimately was abandoned. See T. Taylor, *Anatomy of the Nuremberg Trials: A Personal Memoir* 584–585, 638 (1992).

³³Cf. 10 U. S. C. §904 (making triable by military commission the crime of aiding the enemy); §906 (same for spying); War Crimes Act of 1996, 18 U. S. C. §2441 (2000 ed. and Supp. III) (listing war crimes); Foreign Operations, Export Financing, and Related Appropriations Act, 1998, §583, 111 Stat. 2436 (same).

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ary in the same hands . . . may justly be pronounced the very definition of tyranny”).³⁴

This high standard was met in *Quirin*; the violation there alleged was, by “universal agreement and practice” both in this country and internationally, recognized as an offense against the law of war. 317 U. S., at 30; see *id.*, at 35–36 (“This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War” (footnote omitted)). Although the picture arguably was less clear in *Yamashita*, compare 327 U. S., at 16 (stating that the provisions of the Fourth Hague Convention of 1907, 36 Stat. 2306, “plainly” required the defendant to control the troops under his command), with 327 U. S., at 35 (Murphy, J., dissenting), the disagreement between the majority and the dissenters in that case concerned whether the historic and textual evidence constituted clear precedent—not whether clear precedent was required to justify trial by law-of-war military commission.

At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a

³⁴ While the common law necessarily is “evolutionary in nature,” *post*, at 13 (THOMAS, J., dissenting), even in jurisdictions where common law crimes are still part of the penal framework, an act does not become a crime without its foundations having been firmly established in precedent. See, e.g., *R. v. Rimmington*, [2006] 2 All E. R. 257, 275–279 (House of Lords); *id.*, at 279 (while “some degree of vagueness is inevitable and development of the law is a recognised feature of common law courts, . . . the law-making function of the courts must remain within reasonable limits”); see also *Rogers v. Tennessee*, 532 U. S. 451, 472–478 (2001) (SCALIA, J., dissenting). The caution that must be exercised in the incremental development of common-law crimes by the judiciary is, for the reasons explained in the text, all the more critical when reviewing developments that stem from military action.

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defendant by military commission is acknowledged to be an offense against the law of war. That burden is far from satisfied here. The crime of “conspiracy” has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction,³⁵ and does not appear in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war.³⁶ Winthrop explains that under the common law governing military commissions, it is not enough to intend to violate the law of war and commit overt acts in furtherance of that intention unless the overt acts either are themselves offenses against the law of war or constitute steps sufficiently substantial to qualify as an attempt. See Winthrop 841 (“[T]he jurisdiction of the military commission should be restricted to cases of offence consisting in *overt acts*, *i.e.*, in unlawful commissions or actual attempts to commit, and not in intentions

³⁵The 19th-century trial of the “Lincoln conspirators,” even if properly classified as a trial by law-of-war commission, cf. W. Rehnquist, *All the Laws But One: Civil Liberties in Wartime 165–167* (1998) (analyzing the conspiracy charges in light of ordinary criminal law principles at the time), is at best an equivocal exception. Although the charge against the defendants in that case accused them of “combining, confederating, and conspiring together” to murder the President, they were also charged (as we read the indictment, cf. *post*, at 23, n. 14 (THOMAS, J., dissenting)) with “maliciously, unlawfully, and traitorously murdering the said Abraham Lincoln.” H. R. Doc. No. 314, 55th Cong., 1st Sess., 696 (1899). Moreover, the Attorney General who wrote the opinion defending the trial by military commission treated the charge as if it alleged the substantive offense of assassination. See 11 Op. Atty. Gen. 297 (1865) (analyzing the propriety of trying by military commission “the offence of having assassinated the President”); see also *Mudd v. Caldera*, 134 F. Supp. 2d 138, 140 (DC 2001).

³⁶By contrast, the Geneva Conventions do extend liability for substantive war crimes to those who “orde[r]” their commission, see Third Geneva Convention, Art. 129, 6 U. S. T., at 3418, and this Court has read the Fourth Hague Convention of 1907 to impose “command responsibility” on military commanders for acts of their subordinates, see *Yamshita*, 327 U. S., at 15–16.

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merely” (emphasis in original)).

The Government cites three sources that it says show otherwise. First, it points out that the Nazi saboteurs in *Quirin* were charged with conspiracy. See Brief for Respondents 27. Second, it observes that Winthrop at one point in his treatise identifies conspiracy as an offense “prosecuted by military commissions.” *Ibid.* (citing Winthrop 839, and n. 5). Finally, it notes that another military historian, Charles Roscoe Howland, lists conspiracy “to violate the laws of war by destroying life or property in aid of the enemy” as an offense that was tried as a violation of the law of war during the Civil War. Brief for Respondents 27–28 (citing C. Howland, *Digest of Opinions of the Judge Advocates General of the Army* 1071 (1912) (hereinafter *Howland*)). On close analysis, however, these sources at best lend little support to the Government’s position and at worst undermine it. By any measure, they fail to satisfy the high standard of clarity required to justify the use of a military commission.

That the defendants in *Quirin* were charged with conspiracy is not persuasive, since the Court declined to address whether the offense actually qualified as a violation of the law of war—let alone one triable by military commission. The *Quirin* defendants were charged with the following offenses:

“[I.] Violation of the law of war.

“[II.] Violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy.

“[III.] Violation of Article 82, defining the offense of spying.

“[IV.] Conspiracy to commit the offenses alleged in charges [I, II, and III].” 317 U. S., at 23.

The Government, defending its charge, argued that the

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conspiracy alleged “constitute[d] an additional violation of the law of war.” *Id.*, at 15. The saboteurs disagreed; they maintained that “[t]he charge of conspiracy can not stand if the other charges fall.” *Id.*, at 8. The Court, however, declined to resolve the dispute. It concluded, first, that the specification supporting Charge I adequately alleged a “violation of the law of war” that was not “merely colorable or without foundation.” *Id.*, at 36. The facts the Court deemed sufficient for this purpose were that the defendants, admitted enemy combatants, entered upon U. S. territory in time of war without uniform “for the purpose of destroying property used or useful in prosecuting the war.” That act was “a hostile and warlike” one. *Id.*, at 36, 37. The Court was careful in its decision to identify an overt, “complete” act. Responding to the argument that the saboteurs had “not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations” and therefore had not violated the law of war, the Court responded that they had actually “passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose.” *Id.*, at 38. “The offense was complete when with that purpose they entered—or, having so entered, they remained upon—our territory in time of war without uniform or other appropriate means of identification.” *Ibid.*

Turning to the other charges alleged, the Court explained that “[s]ince the first specification of Charge I sets forth a violation of the law of war, we have no occasion to pass on the adequacy of the second specification of Charge I, or to construe the 81st and 82nd Articles of War for the purpose of ascertaining whether the specifications under Charges II and III allege violations of those Articles or whether if so construed they are constitutional.” *Id.*, at 46. No mention was made at all of Charge IV—the conspiracy charge.

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If anything, *Quirin* supports Hamdan's argument that conspiracy is not a violation of the law of war. Not only did the Court pointedly omit any discussion of the conspiracy charge, but its analysis of Charge I placed special emphasis on the *completion* of an offense; it took seriously the saboteurs' argument that there can be no violation of a law of war—at least not one triable by military commission—without the actual commission of or attempt to commit a “hostile and warlike act.” *Id.*, at 37–38.

That limitation makes eminent sense when one considers the necessity from whence this kind of military commission grew: The need to dispense swift justice, often in the form of execution, to illegal belligerents captured on the battlefield. See S. Rep. No. 130, 64th Cong., 1st Sess., p. 40 (1916) (testimony of Brig. Gen. Enoch H. Crowder) (observing that Article of War 15 preserves the power of “the military commander *in the field in time of war*” to use military commissions (emphasis added)). The same urgency would not have been felt vis-à-vis enemies who had done little more than agree to violate the laws of war. Cf. 31 Op. Atty. Gen. 356, 357, 361 (1918) (opining that a German spy could not be tried by military commission because, having been apprehended before entering “any camp, fortification or other military premises of the United States,” he had “committed [his offenses] outside of the field of military operations”). The *Quirin* Court acknowledged as much when it described the President's authority to use law-of-war military commissions as the power to “seize and subject to disciplinary measures those enemies *who in their attempt to thwart or impede our military effort* have violated the law of war.” 317 U. S., at 28–29 (emphasis added).

Winthrop and Howland are only superficially more helpful to the Government. Howland, granted, lists “conspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy” as one of over

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20 “offenses against the laws and usages of war” “passed upon and punished by military commissions.” Howland 1071. But while the records of cases that Howland cites following his list of offenses against the law of war support inclusion of the other offenses mentioned, they provide no support for the inclusion of conspiracy as a violation of the law of war. See *ibid.* (citing Record Books of the Judge Advocate General Office, R. 2, 144; R. 3, 401, 589, 649; R. 4, 320; R. 5, 36, 590; R. 6, 20; R. 7, 413; R. 8, 529; R. 9, 149, 202, 225, 481, 524, 535; R. 10, 567; R. 11, 473, 513; R. 13, 125, 675; R. 16, 446; R. 21, 101, 280). Winthrop, apparently recognizing as much, excludes conspiracy of any kind from his own list of offenses against the law of war. See Winthrop 839–840.

Winthrop does, unsurprisingly, include “criminal conspiracies” in his list of “[c]rimes and statutory offenses cognizable by State or U. S. courts” and triable by martial law or military government commission. See *id.*, at 839. And, in a footnote, he cites several Civil War examples of “conspiracies of this class, *or of the first and second classes combined.*” *Id.*, at 839, n. 5 (emphasis added). The Government relies on this footnote for its contention that conspiracy was triable both as an ordinary crime (a crime of the “first class”) and, independently, as a war crime (a crime of the “second class”). But the footnote will not support the weight the Government places on it.

As we have seen, the military commissions convened during the Civil War functioned at once as martial law or military government tribunals and as law-of-war commissions. See n. 27, *supra*. Accordingly, they regularly tried war crimes and ordinary crimes together. Indeed, as Howland observes, “[n]ot infrequently the crime, as charged and found, was a combination of the two species of offenses.” Howland 1071; see also Davis 310, n. 2; Winthrop 842. The example he gives is “‘murder in violation of the laws of war.’” Howland 1071–1072. Winthrop’s

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conspiracy “of the first and second classes combined” is, like Howland’s example, best understood as a species of compound offense of the type tried by the hybrid military commissions of the Civil War. It is not a stand-alone offense against the law of war. Winthrop confirms this understanding later in his discussion, when he emphasizes that “*overt acts*” constituting war crimes are the only proper subject at least of those military tribunals not convened to stand in for local courts. Winthrop 841, and nn. 22, 23 (emphasis in original) (citing W. Finlason, *Martial Law* 130 (1867)).

JUSTICE THOMAS cites as evidence that conspiracy is a recognized violation of the law of war the Civil War indictment against Henry Wirz, which charged the defendant with “[m]aliciously, willfully, and traitorously . . . combining, confederating, and conspiring [with others] to injure the health and destroy the lives of soldiers in the military service of the United States . . . to the end that the armies of the United States might be weakened and impaired, in violation of the laws and customs of war.” *Post*, at 24–25 (dissenting opinion) (quoting H. R. Doc. No. 314, 55th Cong., 3d Sess., 785 (1865); emphasis deleted). As shown by the specification supporting that charge, however, Wirz was alleged to have *personally committed* a number of atrocities against his victims, including torture, injection of prisoners with poison, and use of “ferocious and bloodthirsty dogs” to “seize, tear, mangle, and maim the bodies and limbs” of prisoners, many of whom died as a result. *Id.*, at 789–790. Crucially, Judge Advocate General Holt determined that one of Wirz’s alleged co-conspirators, R. B. Winder, should *not* be tried by military commission because there was as yet insufficient evidence of his own personal involvement in the atrocities: “[I]n the case of R. B. Winder, *while the evidence at the trial of Wirz was deemed by the court to implicate him in the conspiracy against the lives of all Federal prisoners in rebel hands, no*

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such specific overt acts of violation of the laws of war are as yet fixed upon him as to make it expedient to prefer formal charges and bring him to trial.” *Id.*, at 783 (emphases added).³⁷

Finally, international sources confirm that the crime charged here is not a recognized violation of the law of war.³⁸ As observed above, see *supra*, at 40, none of the major treaties governing the law of war identifies conspiracy as a violation thereof. And the only “conspiracy” crimes that have been recognized by international war crimes tribunals (whose jurisdiction often extends beyond war crimes proper to crimes against humanity and crimes against the peace) are conspiracy to commit genocide and common plan to wage aggressive war, which is a crime against the peace and requires for its commission actual participation in a “concrete plan to wage war.” 1 Trial of

³⁷The other examples JUSTICE THOMAS offers are no more availing. The Civil War indictment against Robert Loudon, cited *post*, at 25, alleged a conspiracy, but not one in violation of the law of war. See War Dept., General Court Martial Order No. 41, p. 20 (1864). A separate charge of “[t]ransgression of the laws and customs of war” made no mention of conspiracy. *Id.*, at 17. The charge against Lenger Grenfel and others for conspiring to release rebel prisoners held in Chicago only supports the observation, made in the text, that the Civil War tribunals often charged hybrid crimes mixing elements of crimes ordinarily triable in civilian courts (like treason) and violations of the law of war. Judge Advocate General Holt, in recommending that Grenfel’s death sentence be upheld (it was in fact commuted by Presidential decree, see H. R. Doc. No. 314, at 725), explained that the accused “united himself with traitors and malefactors for the overthrow of our Republic in the interest of slavery.” *Id.*, at 689.

³⁸The Court in *Quirin* “assume[d] that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury.” 317 U. S., at 29. We need not test the validity of that assumption here because the international sources only corroborate the domestic ones.

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the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945–1 October 1946, p. 225 (1947). The International Military Tribunal at Nuremberg, over the prosecution’s objections, pointedly refused to recognize as a violation of the law of war conspiracy to commit war crimes, see, *e.g.*, 22 *id.*, at 469,³⁹ and convicted only Hitler’s most senior associates of conspiracy to wage aggressive war, see S. Pomorski, Conspiracy and Criminal Organization, in the Nuremberg Trial and International Law 213, 233–235 (G. Ginsburgs & V. Kudriavtsev eds. 1990). As one prominent figure from the Nuremberg trials has explained, members of the Tribunal objected to recognition of conspiracy as a violation of the law of war on the ground that “[t]he Anglo-American concept of conspiracy was not part of European legal systems and arguably not an element of the internationally recognized laws of war.” T. Taylor, *Anatomy of the Nuremberg Trials: A Personal Memoir* 36 (1992); see also *id.*, at 550 (observing that Francis Biddle, who as Attorney General prosecuted the defendants in *Quirin*, thought the French judge had made a “‘persuasive argument that conspiracy in the truest sense is not known to international law’”).⁴⁰

³⁹Accordingly, the Tribunal determined to “disregard the charges . . . that the defendants conspired to commit War Crimes and Crimes against Humanity.” 22 Trial of the Major War Criminals Before the International Military Tribunal 469 (1947); see also *ibid.* (“[T]he Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war”).

⁴⁰See also 15 United Nations War Crimes Commissions, Law Reports of Trials of War Criminals 90–91 (1949) (observing that, although a few individuals were charged with conspiracy under European domestic criminal codes following World War II, “the United States Military Tribunals” established at that time did not “recognis[e] as a separate offence conspiracy to commit war crimes or crimes against humanity”). The International Criminal Tribunal for the former Yugoslavia (ICTY), drawing on the Nuremberg precedents, has adopted a “joint criminal

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In sum, the sources that the Government and JUSTICE THOMAS rely upon to show that conspiracy to violate the law of war is itself a violation of the law of war in fact demonstrate quite the opposite. Far from making the requisite substantial showing, the Government has failed even to offer a “merely colorable” case for inclusion of conspiracy among those offenses cognizable by law-of-war military commission. Cf. *Quirin*, 317 U. S., at 36. Because the charge does not support the commission’s jurisdiction, the commission lacks authority to try Hamdan.

The charge’s shortcomings are not merely formal, but are indicative of a broader inability on the Executive’s part here to satisfy the most basic precondition—at least in the absence of specific congressional authorization—for establishment of military commissions: military necessity. Hamdan’s tribunal was appointed not by a military commander in the field of battle, but by a retired major general stationed away from any active hostilities. Cf. *Rasul v. Bush*, 542 U. S., at 487 (KENNEDY, J., concurring in judgment) (observing that “Guantanamo Bay is . . . far removed from any hostilities”). Hamdan is charged not with an overt act for which he was caught redhanded in a theater of war and which military efficiency demands be tried expeditiously, but with an *agreement* the inception of which long predated the attacks of September 11, 2001 and the AUMF. That may well be a crime,⁴¹ but it is not

enterprise” theory of liability, but that is a species of liability for the substantive offense (akin to aiding and abetting), not a crime on its own. See *Prosecutor v. Tadić*, Judgment, Case No. IT-94-1-A (ICTY App. Chamber, July 15, 1999); see also *Prosecutor v. Milutinović*, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction—Joint Criminal Enterprise, Case No. IT-99-37-AR72, ¶26 (ICTY App. Chamber, May 21, 2003) (stating that “[c]riminal liability pursuant to a joint criminal enterprise is not a liability for . . . conspiring to commit crimes”).

⁴¹JUSTICE THOMAS’ suggestion that our conclusion precludes the Government from bringing to justice those who conspire to commit acts of

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an offense that “by the law of war may be tried by military commissio[n].” 10 U. S. C. §821. None of the overt acts alleged to have been committed in furtherance of the agreement is itself a war crime, or even necessarily occurred during time of, or in a theater of, war. Any urgent need for imposition or execution of judgment is utterly belied by the record; Hamdan was arrested in November 2001 and he was not charged until mid-2004. These simply are not the circumstances in which, by any stretch of the historical evidence or this Court’s precedents, a military commission established by Executive Order under the authority of Article 21 of the UCMJ may lawfully try a person and subject him to punishment.

VI

Whether or not the Government has charged Hamdan with an offense against the law of war cognizable by military commission, the commission lacks power to proceed. The UCMJ conditions the President’s use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the “rules and precepts of the law of nations,” *Quirin*, 317 U. S., at 28—including, *inter alia*, the four Geneva Conventions signed in 1949. See *Yamashita*, 327 U. S., at 20–21, 23–24. The procedures that the Government has decreed will govern Hamdan’s trial by commission violate these laws.

A

The commission’s procedures are set forth in Commission Order No. 1, which was amended most recently on

terrorism is therefore wide of the mark. See *post*, at 8, n. 3; 28–30. That conspiracy is not a violation of the law of war triable by military commission does not mean the Government may not, for example, prosecute by court-martial or in federal court those caught “plotting terrorist atrocities like the bombing of the Khobar Towers.” *Post*, at 29.

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August 31, 2005—after Hamdan’s trial had already begun. Every commission established pursuant to Commission Order No. 1 must have a presiding officer and at least three other members, all of whom must be commissioned officers. §4(A)(1). The presiding officer’s job is to rule on questions of law and other evidentiary and interlocutory issues; the other members make findings and, if applicable, sentencing decisions. §4(A)(5). The accused is entitled to appointed military counsel and may hire civilian counsel at his own expense so long as such counsel is a U. S. citizen with security clearance “at the level SECRET or higher.” §§4(C)(2)–(3).

The accused also is entitled to a copy of the charge(s) against him, both in English and his own language (if different), to a presumption of innocence, and to certain other rights typically afforded criminal defendants in civilian courts and courts-martial. See §§5(A)–(P). These rights are subject, however, to one glaring condition: The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to “close.” Grounds for such closure “include the protection of information classified or classifiable . . . ; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests.” §6(B)(3).⁴² Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer’s discretion, be forbidden to reveal to his or her client what took place therein. *Ibid.*

⁴²The accused also may be excluded from the proceedings if he “engages in disruptive conduct.” §5(K).

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Another striking feature of the rules governing Hamdan's commission is that they permit the admission of *any* evidence that, in the opinion of the presiding officer, "would have probative value to a reasonable person." §6(D)(1). Under this test, not only is testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses' written statements need be sworn. See §§6(D)(2)(b), (3). Moreover, the accused and his civilian counsel may be denied access to evidence in the form of "protected information" (which includes classified information as well as "information protected by law or rule from unauthorized disclosure" and "information concerning other national security interests," §§6(B)(3), 6(D)(5)(a)(v)), so long as the presiding officer concludes that the evidence is "probative" under §6(D)(1) and that its admission without the accused's knowledge would not "result in the denial of a full and fair trial." §6(D)(5)(b).⁴³ Finally, a presiding officer's determination that evidence "would not have probative value to a reasonable person" may be overridden by a majority of the other commission members. §6(D)(1).

Once all the evidence is in, the commission members (not including the presiding officer) must vote on the accused's guilt. A two-thirds vote will suffice for both a verdict of guilty and for imposition of any sentence not including death (the imposition of which requires a unanimous vote). §6(F). Any appeal is taken to a three-member review panel composed of military officers and designated by the Secretary of Defense, only one member of which need have

⁴³As the District Court observed, this section apparently permits reception of testimony from a confidential informant in circumstances where "Hamdan will not be permitted to hear the testimony, see the witness's face, or learn his name. If the government has information developed by interrogation of witnesses in Afghanistan or elsewhere, it can offer such evidence in transcript form, or even as summaries of transcripts." 344 F. Supp. 2d 152, 168 (DC 2004).

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experience as a judge. §6(H)(4). The review panel is directed to “disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission.” *Ibid.* Once the panel makes its recommendation to the Secretary of Defense, the Secretary can either remand for further proceedings or forward the record to the President with his recommendation as to final disposition. §6(H)(5). The President then, unless he has delegated the task to the Secretary, makes the “final decision.” §6(H)(6). He may change the commission’s findings or sentence only in a manner favorable to the accused. *Ibid.*

B

Hamdan raises both general and particular objections to the procedures set forth in Commission Order No. 1. His general objection is that the procedures’ admitted deviation from those governing courts-martial itself renders the commission illegal. Chief among his particular objections are that he may, under the Commission Order, be convicted based on evidence he has not seen or heard, and that any evidence admitted against him need not comply with the admissibility or relevance rules typically applicable in criminal trials and court-martial proceedings.

The Government objects to our consideration of any procedural challenge at this stage on the grounds that (1) the abstention doctrine espoused in *Councilman*, 420 U. S. 738, precludes pre-enforcement review of procedural rules, (2) Hamdan will be able to raise any such challenge following a “final decision” under the DTA, and (3) “there is . . . no basis to presume, before the trial has even commenced, that the trial will not be conducted in good faith and according to law.” Brief for Respondents 45–46, nn. 20–21. The first of these contentions was disposed of in Part III, *supra*, and neither of the latter two is sound.

First, because Hamdan apparently is not subject to the

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death penalty (at least as matters now stand) and may receive a sentence shorter than 10 years' imprisonment, he has no automatic right to review of the commission's "final decision"⁴⁴ before a federal court under the DTA. See §1005(e)(3), 119 Stat. 2743. Second, contrary to the Government's assertion, there *is* a "basis to presume" that the procedures employed during Hamdan's trial will violate the law: The procedures are described with particularity in Commission Order No. 1, and implementation of some of them has already occurred. One of Hamdan's complaints is that he will be, and *indeed already has been*, excluded from his own trial. See Reply Brief for Petitioner 12; App. to Pet. for Cert. 45a. Under these circumstances, review of the procedures in advance of a "final decision"—the timing of which is left entirely to the discretion of the President under the DTA—is appropriate. We turn, then, to consider the merits of Hamdan's procedural challenge.

C

In part because the difference between military commissions and courts-martial originally was a difference of jurisdiction alone, and in part to protect against abuse and ensure evenhandedness under the pressures of war, the procedures governing trials by military commission historically have been the same as those governing courts-martial. See, e.g., 1 *The War of the Rebellion* 248 (2d series 1894) (General Order 1 issued during the Civil War required military commissions to "be constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise"). Accounts of commentators from Winthrop through General Crowder—who drafted Article of War 15 and whose

⁴⁴Any decision of the commission is not "final" until the President renders it so. See Commission Order No. 1 §6(H)(6).

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views have been deemed “authoritative” by this Court, *Madsen*, 343 U. S., at 353—confirm as much.⁴⁵ As recently as the Korean and Vietnam wars, during which use of military commissions was contemplated but never made, the principle of procedural parity was espoused as a background assumption. See Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 *Mich. J. Int’l L.* 1, 3–5 (2001–2002).

There is a glaring historical exception to this general rule. The procedures and evidentiary rules used to try General Yamashita near the end of World War II deviated in significant respects from those then governing courts-martial. See 327 U. S. 1. The force of that precedent, however, has been seriously undermined by post-World War II developments.

Yamashita, from late 1944 until September 1945, was Commanding General of the Fourteenth Army Group of the Imperial Japanese Army, which had exercised control over the Philippine Islands. On September 3, 1945, after American forces regained control of the Philippines, Yamashita surrendered. Three weeks later, he was charged with violations of the law of war. A few weeks after that, he was arraigned before a military commission convened in the Philippines. He pleaded not guilty, and his trial lasted for two months. On December 7, 1945, Yamashita was convicted and sentenced to hang. See *id.*, at 5; *id.*, at 31–34 (Murphy, J., dissenting). This Court upheld the

⁴⁵See Winthrop 835, and n. 81 (“military commissions are constituted and composed, and their proceedings are conducted, similarly to general courts-martial”); *id.*, at 841–842; S. Rep. No. 130, 64th Cong., 1st Sess., 40 (1916) (testimony of Gen. Crowder) (“Both classes of courts have the same procedure”); see also, *e.g.*, H. Coppée, *Field Manual of Courts-Martial*, p. 104 (1863) (“[Military] commissions are appointed by the same authorities as those which may order courts-martial. They are constituted in a manner similar to such courts, and their proceedings are conducted in exactly the same way, as to form, examination of witnesses, etc.”).

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denial of his petition for a writ of habeas corpus.

The procedures and rules of evidence employed during Yamashita's trial departed so far from those used in courts-martial that they generated an unusually long and vociferous critique from two Members of this Court. See *id.*, at 41–81 (Rutledge, J., joined by Murphy, J., dissenting).⁴⁶ Among the dissenters' primary concerns was that the commission had free rein to consider all evidence "which in the commission's opinion 'would be of assistance in proving or disproving the charge,' without any of the usual modes of authentication." *Id.*, at 49 (Rutledge, J.).

The majority, however, did not pass on the merits of Yamashita's procedural challenges because it concluded that his status disentitled him to any protection under the Articles of War (specifically, those set forth in Article 38, which would become Article 36 of the UCMJ) or the Geneva Convention of 1929, 47 Stat. 2021 (1929 Geneva Convention). The Court explained that Yamashita was neither a "person made subject to the Articles of War by Article 2" thereof, 327 U. S., at 20, nor a protected prisoner of war being tried for crimes committed during his detention, *id.*, at 21.

At least partially in response to subsequent criticism of General Yamashita's trial, the UCMJ's codification of the Articles of War after World War II expanded the category of persons subject thereto to include defendants in Yama-

⁴⁶The dissenters' views are summarized in the following passage:

"It is outside our basic scheme to condemn men without giving reasonable opportunity for preparing defense; in capital or other serious crimes to convict on 'official documents . . .; affidavits; . . . documents or translations thereof; diaries . . ., photographs, motion picture films, and . . . newspapers' or on hearsay, once, twice or thrice removed, more particularly when the documentary evidence or some of it is prepared *ex parte* by the prosecuting authority and includes not only opinion but conclusions of guilt. Nor in such cases do we deny the rights of confrontation of witnesses and cross-examination." *Yamashita*, 327 U. S., at 44 (footnotes omitted).

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shita's (and Hamdan's) position,⁴⁷ and the Third Geneva Convention of 1949 extended prisoner-of-war protections to individuals tried for crimes committed before their capture. See 3 Int'l Comm. of Red Cross,⁴⁸ Commentary: Geneva Convention Relative to the Treatment of Prisoners of War 413 (1960) (hereinafter GCIII Commentary) (explaining that Article 85, which extends the Convention's protections to "[p]risoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture," was adopted in response to judicial interpretations of the 1929 Convention, including this Court's decision in *Yamashita*). The most notorious exception to the principle of uniformity, then, has been stripped of its precedential value.

The uniformity principle is not an inflexible one; it does not preclude all departures from the procedures dictated for use by courts-martial. But any departure must be tailored to the exigency that necessitates it. See *Winthrop* 835, n. 81. That understanding is reflected in Article 36 of the UCMJ, which provides:

⁴⁷Article 2 of the UCMJ now reads:

"(a) The following persons are subject to [the UCMJ]:

"(9) Prisoners of war in custody of the armed forces.

"(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands." 10 U. S. C. §802(a).

Guantanamo Bay is such a leased area. See *Rasul v. Bush*, 542 U. S. 466, 471 (2004).

⁴⁸The International Committee of the Red Cross is referred to by name in several provisions of the 1949 Geneva Conventions and is the body that drafted and published the official commentary to the Conventions. Though not binding law, the commentary is, as the parties recognize, relevant in interpreting the Conventions' provisions.

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“(a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

“(b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.” 70A Stat. 50.

Article 36 places two restrictions on the President’s power to promulgate rules of procedure for courts-martial and military commissions alike. First, no procedural rule he adopts may be “contrary to or inconsistent with” the UCMJ—however practical it may seem. Second, the rules adopted must be “uniform insofar as practicable.” That is, the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable.

Hamdan argues that Commission Order No. 1 violates both of these restrictions; he maintains that the procedures described in the Commission Order are inconsistent with the UCMJ and that the Government has offered no explanation for their deviation from the procedures governing courts-martial, which are set forth in the Manual for Courts-Martial, United States (2005 ed.) (Manual for Courts-Martial). Among the inconsistencies Hamdan identifies is that between §6 of the Commission Order, which permits exclusion of the accused from proceedings and denial of his access to evidence in certain circumstances, and the UCMJ’s requirement that “[a]ll . . . proceedings” other than votes and deliberations by courts-martial “shall be made a part of the record and shall be in

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the presence of the accused.” 10 U. S. C. A. §839(c) (Supp. 2006). Hamdan also observes that the Commission Order dispenses with virtually all evidentiary rules applicable in courts-martial.

The Government has three responses. First, it argues, only 9 of the UCMJ’s 158 Articles—the ones that expressly mention “military commissions”⁴⁹—actually apply to commissions, and Commission Order No. 1 sets forth no procedure that is “contrary to or inconsistent with” those 9 provisions. Second, the Government contends, military commissions would be of no use if the President were hamstrung by those provisions of the UCMJ that govern courts-martial. Finally, the President’s determination that “the danger to the safety of the United States and the nature of international terrorism” renders it impracticable “to apply in military commissions . . . the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts,” November 13 Order §1(f), is, in the Government’s view, explanation enough for any deviation from court-martial procedures. See Brief for Respondents 43–47, and n. 22.

⁴⁹Aside from Articles 21 and 36, discussed at length in the text, the other seven Articles that expressly reference military commissions are: (1) 28 (requiring appointment of reporters and interpreters); (2) 47 (making it a crime to refuse to appear or testify “before a court-martial, military commission, court of inquiry, or any other military court or board”); (3) 48 (allowing a “court-martial, provost court, or military commission” to punish a person for contempt); (4) 49(d) (permitting admission into evidence of a “duly authenticated deposition taken upon reasonable notice to the other parties” *only* if “admissible under the rules of evidence” and *only* if the witness is otherwise unavailable); (5) 50 (permitting admission into evidence of records of courts of inquiry “if otherwise admissible under the rules of evidence,” and if certain other requirements are met); (6) 104 (providing that a person accused of aiding the enemy may be sentenced to death or other punishment by military commission or court-martial); and (7) 106 (mandating the death penalty for spies convicted before military commission or court-martial).

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Hamdan has the better of this argument. Without reaching the question whether any provision of Commission Order No. 1 is strictly “contrary to or inconsistent with” other provisions of the UCMJ, we conclude that the “practicability” determination the President has made is insufficient to justify variances from the procedures governing courts-martial. Subsection (b) of Article 36 was added after World War II, and requires a different showing of impracticability from the one required by subsection (a). Subsection (a) requires that the rules the President promulgates for courts-martial, provost courts, and military commissions alike conform to those that govern procedures in *Article III courts*, “so far as *he considers practicable*.” 10 U. S. C. §836(a) (emphasis added). Subsection (b), by contrast, demands that the rules applied in courts-martial, provost courts, and military commissions—whether or not they conform with the Federal Rules of Evidence—be “uniform *insofar as practicable*.” §836(b) (emphasis added). Under the latter provision, then, the rules set forth in the Manual for Courts-Martial must apply to military commissions unless impracticable.⁵⁰

The President here has determined, pursuant to subsection (a), that it is impracticable to apply the rules and principles of law that govern “the trial of criminal cases in

⁵⁰JUSTICE THOMAS relies on the legislative history of the UCMJ to argue that Congress’ adoption of Article 36(b) in the wake of World War II was “motivated” solely by a desire for “uniformity across the separate branches of the armed services.” *Post*, at 35. But even if Congress was concerned with ensuring uniformity across service branches, that does not mean it did not also intend to codify the longstanding practice of procedural parity between courts-martial and other military tribunals. Indeed, the suggestion that Congress did *not* intend uniformity across tribunal types is belied by the textual proximity of subsection (a) (which requires that the rules governing criminal trials in federal district courts apply, absent the President’s determination of impracticability, to courts-martial, provost courts, and *military commissions* alike) and subsection (b) (which imposes the uniformity requirement).

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the United States district courts,” §836(a), to Hamdan’s commission. We assume that complete deference is owed that determination. The President has not, however, made a similar official determination that it is impracticable to apply the rules for courts-martial.⁵¹ And even if subsection (b)’s requirements may be satisfied without such an official determination, the requirements of that subsection are not satisfied here.

Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case. There is no suggestion, for example, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility. Assuming *arguendo* that the reasons articulated in the President’s Article 36(a) determination ought to be considered in evaluating the impracticability of applying court-martial rules, the only reason offered in support of that determination is the danger posed by international terrorism.⁵² Without for one moment underestimating that danger, it is not evident to us why it

⁵¹We may assume that such a determination would be entitled to a measure of deference. For the reasons given by JUSTICE KENNEDY, see *post*, at 5 (opinion concurring in part), however, the level of deference accorded to a determination made under subsection (b) presumably would not be as high as that accorded to a determination under subsection (a).

⁵²JUSTICE THOMAS looks not to the President’s official Article 36(a) determination, but instead to press statements made by the Secretary of Defense and the Under Secretary of Defense for Policy. See *post*, at 36–38 (dissenting opinion). We have not heretofore, in evaluating the legality of Executive action, deferred to comments made by such officials to the media. Moreover, the only additional reason the comments provide—aside from the general danger posed by international terrorism—for departures from court-martial procedures is the need to protect classified information. As we explain in the text, and as JUSTICE KENNEDY elaborates in his separate opinion, the structural and procedural defects of Hamdan’s commission extend far beyond rules preventing access to classified information.

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should require, in the case of Hamdan’s trial, any variance from the rules that govern courts-martial.

The absence of any showing of impracticability is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself: the right to be present. See 10 U. S. C. A. §839(c) (Supp. 2006). Whether or not that departure technically is “contrary to or inconsistent with” the terms of the UCMJ, 10 U. S. C. §836(a), the jettisoning of so basic a right cannot lightly be excused as “practicable.”

Under the circumstances, then, the rules applicable in courts-martial must apply. Since it is undisputed that Commission Order No. 1 deviates in many significant respects from those rules, it necessarily violates Article 36(b).

The Government’s objection that requiring compliance with the court-martial rules imposes an undue burden both ignores the plain meaning of Article 36(b) and misunderstands the purpose and the history of military commissions. The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter. See Winthrop 831. Exigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections. That history explains why the military commission’s procedures typically have been the ones used by courts-martial. That the jurisdiction of the two tribunals today may sometimes overlap, see *Madsen*, 343 U. S., at 354, does not detract from the force of this history;⁵³ Article 21 did not trans-

⁵³JUSTICE THOMAS relies extensively on *Madsen* for the proposition

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form the military commission from a tribunal of true exigency into a more convenient adjudicatory tool. Article 36, confirming as much, strikes a careful balance between uniform procedure and the need to accommodate exigencies that may sometimes arise in a theater of war. That Article not having been complied with here, the rules specified for Hamdan's trial are illegal.⁵⁴

D

The procedures adopted to try Hamdan also violate the Geneva Conventions. The Court of Appeals dismissed Hamdan's Geneva Convention challenge on three independent grounds: (1) the Geneva Conventions are not judicially enforceable; (2) Hamdan in any event is not entitled to their protections; and (3) even if he is entitled to their protections, *Councilman* abstention is appropriate. Judge Williams, concurring, rejected the second ground but agreed with the majority respecting the first and the last. As we explained in Part III, *supra*, the abstention rule applied in *Councilman*, 420 U. S. 738, is not applicable here.⁵⁵ And for the reasons that follow, we hold that

that the President has free rein to set the procedures that govern military commissions. See *post*, at 30, 31, 33, n. 16, 34, and 45. That reliance is misplaced. Not only did *Madsen* not involve a law-of-war military commission, but (1) the petitioner there did not challenge the procedures used to try her, (2) the UCMJ, with its new Article 36(b), did not become effective until May 31, 1951, *after* the petitioner's trial, see 343 U. S., at 345, n. 6, and (3) the procedures used to try the petitioner actually afforded *more* protection than those used in courts-martial, see *id.*, at 358–360; see also *id.*, at 358 (“[T]he Military Government Courts for Germany . . . have had a less military character than that of courts-martial”).

⁵⁴Prior to the enactment of Article 36(b), it may well have been the case that a deviation from the rules governing courts-martial would not have rendered the military commission “*illegal*.” *Post*, at 30–31, n. 16 (THOMAS, J., dissenting) (quoting Winthrop 841). Article 36(b), however, imposes a statutory command that must be heeded.

⁵⁵JUSTICE THOMAS makes the different argument that Hamdan's

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neither of the other grounds the Court of Appeals gave for its decision is persuasive.

i

The Court of Appeals relied on *Johnson v. Eisentrager*, 339 U. S. 763 (1950), to hold that Hamdan could not invoke the Geneva Conventions to challenge the Government’s plan to prosecute him in accordance with Commission Order No. 1. *Eisentrager* involved a challenge by 21 German nationals to their 1945 convictions for war crimes by a military tribunal convened in Nanking, China, and to their subsequent imprisonment in occupied Germany. The petitioners argued, *inter alia*, that the 1929 Geneva Convention rendered illegal some of the procedures employed during their trials, which they said deviated impermissibly from the procedures used by courts-martial to try American soldiers. See *id.*, at 789. We rejected that claim on the merits because the petitioners (unlike Hamdan here) had failed to identify any prejudicial disparity “between the Commission that tried [them] and those that would try an offending soldier of the American forces of like rank,” and in any event could claim no protection, under the 1929 Convention, during trials for crimes that occurred before their confinement as prisoners of war. *Id.*, at 790.⁵⁶

Buried in a footnote of the opinion, however, is this curious statement suggesting that the Court lacked power even to consider the merits of the Geneva Convention argument:

Geneva Convention challenge is not yet “ripe” because he has yet to be sentenced. See *post*, at 43–45. This is really just a species of the abstention argument we have already rejected. See Part III, *supra*. The text of the Geneva Conventions does not direct an accused to wait until sentence is imposed to challenge the legality of the tribunal that is to try him.

⁵⁶As explained in Part VI–C, *supra*, that is no longer true under the 1949 Conventions.

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“We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, 47 Stat. 2021, concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.” *Id.*, at 789, n. 14.

The Court of Appeals, on the strength of this footnote, held that “the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court.” 415 F. 3d, at 40.

Whatever else might be said about the *Eisentrager* footnote, it does not control this case. We may assume that “the obvious scheme” of the 1949 Conventions is identical in all relevant respects to that of the 1929 Convention,⁵⁷ and even that that scheme would, absent some other provision of law, preclude Hamdan’s invocation of the Convention’s provisions as an independent source of law binding the Government’s actions and furnishing petitioner with any enforceable right.⁵⁸ For, regardless of

⁵⁷But see, *e.g.*, 4 Int’l Comm. of Red Cross, Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War 21 (1958) (hereinafter GCIV Commentary) (the 1949 Geneva Conventions were written “first and foremost to protect individuals, and not to serve State interests”); GCIII Commentary 91 (“It was not . . . until the Conventions of 1949 . . . that the existence of ‘rights’ conferred in prisoners of war was affirmed”).

⁵⁸But see generally Brief for Louis Henkin et al. as *Amici Curiae*; 1

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the nature of the rights conferred on Hamdan, cf. *United States v. Rauscher*, 119 U. S. 407 (1886), they are, as the Government does not dispute, part of the law of war. See *Hamdi*, 542 U. S., at 520–521 (plurality opinion). And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted.

ii

For the Court of Appeals, acknowledgment of that condition was no bar to Hamdan’s trial by commission. As an alternative to its holding that Hamdan could not invoke the Geneva Conventions at all, the Court of Appeals concluded that the Conventions did not in any event apply to the armed conflict during which Hamdan was captured. The court accepted the Executive’s assertions that Hamdan was captured in connection with the United States’ war with al Qaeda and that that war is distinct from the war with the Taliban in Afghanistan. It further reasoned that the war with al Qaeda evades the reach of the Geneva Conventions. See 415 F. 3d, at 41–42. We, like Judge Williams, disagree with the latter conclusion.

The conflict with al Qaeda is not, according to the Government, a conflict to which the full protections afforded detainees under the 1949 Geneva Conventions apply because Article 2 of those Conventions (which appears in all four Conventions) renders the full protections applicable only to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.” 6 U. S. T., at 3318.⁵⁹ Since Hamdan

Int’l Comm. for the Red Cross, Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 84 (1952) (“It should be possible in States which are parties to the Convention . . . for the rules of the Convention to be evoked before an appropriate national court by the protected person who has suffered a violation”); GCII Commentary 92; GCIV Commentary 79.

⁵⁹For convenience’s sake, we use citations to the Third Geneva Convention only.

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was captured and detained incident to the conflict with al Qaeda and not the conflict with the Taliban, and since al Qaeda, unlike Afghanistan, is not a “High Contracting Party”—*i.e.*, a signatory of the Conventions, the protections of those Conventions are not, it is argued, applicable to Hamdan.⁶⁰

We need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories.⁶¹ Article 3, often referred to as Common Article 3 because, like Article 2, it appears in all four Geneva Conventions, provides that in a “conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party⁶² to the conflict shall be bound to apply, as a minimum,” certain provisions protecting “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid

⁶⁰The President has stated that the conflict with the Taliban is a conflict to which the Geneva Conventions apply. See White House Memorandum, *Humane Treatment of Taliban and al Qaeda Detainees 2* (Feb. 7, 2002), available at http://www.justicescholars.org/pegc/archive/White_House/bush_memo_20020207_ed.pdf (hereinafter *White House Memorandum*).

⁶¹Hamdan observes that Article 5 of the Third Geneva Convention requires that if there be “any doubt” whether he is entitled to prisoner-of-war protections, he must be afforded those protections until his status is determined by a “competent tribunal.” 6 U. S. T., at 3324. See also Headquarters Depts. of Army, Navy, Air Force, and Marine Corps, *Army Regulation 190–8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (1997), App. 116. Because we hold that Hamdan may not, in any event, be tried by the military commission the President has convened pursuant to the November 13 Order and Commission Order No. 1, the question whether his potential status as a prisoner of war independently renders illegal his trial by military commission may be reserved.

⁶²The term “Party” here has the broadest possible meaning; a Party need neither be a signatory of the Convention nor “even represent a legal entity capable of undertaking international obligations.” GCIII Commentary 37.

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down their arms and those placed *hors de combat* by . . . detention.” *Id.*, at 3318. One such provision prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” *Ibid.*

The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being “‘international in scope,’” does not qualify as a “‘conflict not of an international character.’” 415 F.3d, at 41. That reasoning is erroneous. The term “conflict not of an international character” is used here in contradistinction to a conflict between nations. So much is demonstrated by the “fundamental logic [of] the Convention’s provisions on its application.” *Id.*, at 44 (Williams, J., concurring). Common Article 2 provides that “the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.” 6 U. S. T., at 3318 (Art. 2, ¶1). High Contracting Parties (signatories) also must abide by all terms of the Conventions vis-à-vis one another even if one party to the conflict is a nonsignatory “Power,” and must so abide vis-à-vis the nonsignatory if “the latter accepts and applies” those terms. *Ibid.* (Art. 2, ¶3). Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory “Power” who are involved in a conflict “in the territory of” a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase “not of an international character” bears its literal meaning. See, e.g., J. Bentham, Introduction to

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the Principles of Morals and Legislation 6, 296 (J. Burns & H. Hart eds. 1970) (using the term “international law” as a “new though not inexpressive appellation” meaning “betwixt nation and nation”; defining “international” to include “mutual transactions between sovereigns as such”); Commentary on the Additional Protocols to the Geneva Conventions of 12 August 1949, p. 1351 (1987) (“[A] non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other”).

Although the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of “conflict not of an international character,” *i.e.*, a civil war, see GCIII Commentary 36–37, the commentaries also make clear “that the scope of the Article must be as wide as possible,” *id.*, at 36.⁶³ In fact, limiting language that would have rendered Common Article 3 applicable “especially [to] cases of civil war, colonial conflicts, or wars of religion,” was omitted from the final version of the Article, which coupled broader scope of application with a narrower range of rights than did earlier proposed iterations. See GCIII Commentary 42–43.

⁶³See also GCIII Commentary 35 (Common Article 3 “has the merit of being simple and clear. . . . Its observance does not depend upon preliminary discussions on the nature of the conflict”); GCIV Commentary 51 (“[N]obody in enemy hands can be outside the law”); U. S. Army Judge Advocate General’s Legal Center and School, Dept. of the Army, Law of War Handbook 144 (2004) (Common Article 3 “serves as a ‘minimum yardstick of protection in all conflicts, not just internal armed conflicts’” (quoting *Nicaragua v. United States*, 1986 I. C. J. 14, ¶218, 25 I. L. M. 1023)); *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶102 (ICTY App. Chamber, Oct. 2, 1995) (stating that “the character of the conflict is irrelevant” in deciding whether Common Article 3 applies).

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iii

Common Article 3, then, is applicable here and, as indicated above, requires that Hamdan be tried by a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” 6 U. S. T., at 3320 (Art. 3, ¶1(d)). While the term “regularly constituted court” is not specifically defined in either Common Article 3 or its accompanying commentary, other sources disclose its core meaning. The commentary accompanying a provision of the Fourth Geneva Convention, for example, defines “regularly constituted” tribunals to include “ordinary military courts” and “definitely exclud[e] all special tribunals.” GCIV Commentary 340 (defining the term “properly constituted” in Article 66, which the commentary treats as identical to “regularly constituted”);⁶⁴ see also *Yamashita*, 327 U. S., at 44 (Rutledge, J., dissenting) (describing military commission as a court “specially constituted for a particular trial”). And one of the Red Cross’ own treatises defines “regularly constituted court” as used in Common Article 3 to mean “established and organized in accordance with the laws and procedures already in force in a country.” Int’l Comm. of Red Cross, 1 Customary International Humanitarian Law 355 (2005); see also GCIV Commentary 340 (observing that “ordinary military courts” will “be set up in accordance with the recognized principles governing the administration of justice”).

The Government offers only a cursory defense of Hamdan’s military commission in light of Common Article 3. See Brief for Respondents 49–50. As JUSTICE KENNEDY explains, that defense fails because “[t]he regular military courts in our system are the courts-martial established by

⁶⁴The commentary’s assumption that the terms “properly constituted” and “regularly constituted” are interchangeable is beyond reproach; the French version of Article 66, which is equally authoritative, uses the term “régulièrement constitués” in place of “properly constituted.”

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congressional statutes.” *Post*, at 8 (opinion concurring in part). At a minimum, a military commission “can be ‘regularly constituted’ by the standards of our military justice system only if some practical need explains deviations from court-martial practice.” *Post*, at 10. As we have explained, see Part VI–C, *supra*, no such need has been demonstrated here.⁶⁵

iv

Inextricably intertwined with the question of regular constitution is the evaluation of the procedures governing the tribunal and whether they afford “all the judicial guarantees which are recognized as indispensable by civilized peoples.” 6 U. S. T., at 3320 (Art. 3, ¶1(d)). Like the phrase “regularly constituted court,” this phrase is not defined in the text of the Geneva Conventions. But it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I). Although the United States declined to ratify Protocol I, its objections were not to Article 75 thereof. Indeed, it appears that the Government “regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.” Taft, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 *Yale J. Int’l L.* 319, 322 (2003). Among the rights set forth in Article 75 is the “right to be tried in [one’s] presence.” Protocol I, Art. 75(4)(e).⁶⁶

⁶⁵Further evidence of this tribunal’s irregular constitution is the fact that its rules and procedures are subject to change midtrial, at the whim of the Executive. See Commission Order No. 1, §11 (providing that the Secretary of Defense may change the governing rules “from time to time”).

⁶⁶Other international instruments to which the United States is a

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We agree with JUSTICE KENNEDY that the procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by any “evident practical need,” *post*, at 11, and for that reason, at least, fail to afford the requisite guarantees. See *post*, at 8, 11–17. We add only that, as noted in Part VI–A, *supra*, various provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 and indisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him. See §§6(B)(3), (D).⁶⁷ That the Government has a compelling interest in

signatory include the same basic protections set forth in Article 75. See, e.g., International Covenant on Civil and Political Rights, Art. 14, ¶3(d), Mar. 23, 1976, 999 U. N. T. S. 171 (setting forth the right of an accused “[t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing”). Following World War II, several defendants were tried and convicted by military commission for violations of the law of war in their failure to afford captives fair trials before imposition and execution of sentence. In two such trials, the prosecutors argued that the defendants’ failure to apprise accused individuals of all evidence against them constituted violations of the law of war. See 5 U. N. War Crimes Commission 30 (trial of Sergeant-Major Shigeru Ohashi), 75 (trial of General Tanaka Hisakasu).

⁶⁷The Government offers no defense of these procedures other than to observe that the defendant may not be barred from access to evidence if such action would deprive him of a “full and fair trial.” Commission Order No. 1, §6(D)(5)(b). But the Government suggests no circumstances in which it would be “fair” to convict the accused based on evidence he has not seen or heard. Cf. *Crawford v. Washington*, 541 U. S. 36, 49 (2004) (“It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine” (quoting *State v. Webb*, 2 N. C. 103, 104 (Super. L. & Eq. 1794) (*per curiam*)); *Diaz v. United States*, 223 U. S. 442, 455 (1912) (describing the right to be present as “scarcely less important to the accused than the right of trial itself”); *Lewis v. United States*, 146 U. S. 370, 372 (1892) (exclusion of defendant from part of proceedings is “contrary to the dictates of humanity” (internal quotation marks omitted)); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U. S. 123, 170, n. 17, 171 (1951) (Frankfurter, J., concurring) (“[t]he

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denying Hamdan access to certain sensitive information is not doubted. Cf. *post*, at 47–48 (THOMAS, J., dissenting). But, at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him.

v

Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But *requirements* they are nonetheless. The commission that the President has convened to try Hamdan does not meet those requirements.

VII

We have assumed, as we must, that the allegations made in the Government’s charge against Hamdan are true. We have assumed, moreover, the truth of the message implicit in that charge—viz., that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government’s power to detain him for the duration of active hostilities in order to prevent such harm. But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.

The judgment of the Court of Appeals is reversed, and

plea that evidence of guilt must be secret is abhorrent to free men” (internal quotation marks omitted)). More fundamentally, the legality of a tribunal under Common Article 3 cannot be established by bare assurances that, whatever the character of the court or the procedures it follows, individual adjudicators will act fairly.

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the case is remanded for further proceedings.

It is so ordered.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

Cite as: 553 U. S. ____ (2008)

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 06–1195 and 06–1196

LAKHDAR BOUMEDIENE, ET AL., PETITIONERS
06–1195 *v.*
GEORGE W. BUSH, PRESIDENT OF THE UNITED
STATES, ET AL.

KHALED A. F. AL ODAH, NEXT FRIEND OF FAWZI
KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
PETITIONERS
06–1196 *v.*
UNITED STATES ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 12, 2008]

JUSTICE KENNEDY delivered the opinion of the Court.

Petitioners are aliens designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay, Cuba. There are others detained there, also aliens, who are not parties to this suit.

Petitioners present a question not resolved by our earlier cases relating to the detention of aliens at Guantanamo: whether they have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, §9, cl. 2. We hold these petitioners do have the habeas corpus privilege. Congress has enacted a statute, the Detainee Treatment Act of 2005 (DTA), 119 Stat. 2739, that pro-

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vides certain procedures for review of the detainees' status. We hold that those procedures are not an adequate and effective substitute for habeas corpus. Therefore §7 of the Military Commissions Act of 2006 (MCA), 28 U. S. C. A. §2241(e) (Supp. 2007), operates as an unconstitutional suspension of the writ. We do not address whether the President has authority to detain these petitioners nor do we hold that the writ must issue. These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court.

I

Under the Authorization for Use of Military Force (AUMF), §2(a), 115 Stat. 224, note following 50 U. S. C. §1541 (2000 ed., Supp. V), the President is authorized “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

In *Hamdi v. Rumsfeld*, 542 U. S. 507 (2004), five Members of the Court recognized that detention of individuals who fought against the United States in Afghanistan “for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.” *Id.*, at 518 (plurality opinion of O’Connor, J.), *id.*, at 588–589 (THOMAS, J., dissenting). After *Hamdi*, the Deputy Secretary of Defense established Combatant Status Review Tribunals (CSRTs) to determine whether individuals detained at Guantanamo were “enemy combatants,” as the Department defines that term. See App. to Pet. for Cert.

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in No. 06–1195, p. 81a. A later memorandum established procedures to implement the CSRTs. See App. to Pet. for Cert. in No. 06–1196, p. 147. The Government maintains these procedures were designed to comply with the due process requirements identified by the plurality in *Hamdi*. See Brief for Respondents 10.

Interpreting the AUMF, the Department of Defense ordered the detention of these petitioners, and they were transferred to Guantanamo. Some of these individuals were apprehended on the battlefield in Afghanistan, others in places as far away from there as Bosnia and Gambia. All are foreign nationals, but none is a citizen of a nation now at war with the United States. Each denies he is a member of the al Qaeda terrorist network that carried out the September 11 attacks or of the Taliban regime that provided sanctuary for al Qaeda. Each petitioner appeared before a separate CSRT; was determined to be an enemy combatant; and has sought a writ of habeas corpus in the United States District Court for the District of Columbia.

The first actions commenced in February 2002. The District Court ordered the cases dismissed for lack of jurisdiction because the naval station is outside the sovereign territory of the United States. See *Rasul v. Bush*, 215 F. Supp. 2d 55 (2002). The Court of Appeals for the District of Columbia Circuit affirmed. See *Al Odah v. United States*, 321 F. 3d 1134, 1145 (2003). We granted certiorari and reversed, holding that 28 U. S. C. §2241 extended statutory habeas corpus jurisdiction to Guantanamo. See *Rasul v. Bush*, 542 U. S. 466, 473 (2004). The constitutional issue presented in the instant cases was not reached in *Rasul*. *Id.*, at 476.

After *Rasul*, petitioners' cases were consolidated and entertained in two separate proceedings. In the first set of cases, Judge Richard J. Leon granted the Government's motion to dismiss, holding that the detainees had no

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rights that could be vindicated in a habeas corpus action. In the second set of cases Judge Joyce Hens Green reached the opposite conclusion, holding the detainees had rights under the Due Process Clause of the Fifth Amendment. See *Khalid v. Bush*, 355 F. Supp. 2d 311, 314 (DC 2005); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 464 (DC 2005).

While appeals were pending from the District Court decisions, Congress passed the DTA. Subsection (e) of §1005 of the DTA amended 28 U. S. C. §2241 to provide that “no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba.” 119 Stat. 2742. Section 1005 further provides that the Court of Appeals for the District of Columbia Circuit shall have “exclusive” jurisdiction to review decisions of the CSRTs. *Ibid.*

In *Hamdan v. Rumsfeld*, 548 U. S. 557, 576–577 (2006), the Court held this provision did not apply to cases (like petitioners’) pending when the DTA was enacted. Congress responded by passing the MCA, 10 U. S. C. A. §948a *et seq.* (Supp. 2007), which again amended §2241. The text of the statutory amendment is discussed below. See Part II, *infra*. (Four Members of the *Hamdan* majority noted that “[n]othing prevent[ed] the President from returning to Congress to seek the authority he believes necessary.” 548 U. S., at 636 (BREYER, J., concurring). The authority to which the concurring opinion referred was the authority to “create military commissions of the kind at issue” in the case. *Ibid.* Nothing in that opinion can be construed as an invitation for Congress to suspend the writ.)

Petitioners’ cases were consolidated on appeal, and the parties filed supplemental briefs in light of our decision in *Hamdan*. The Court of Appeals’ ruling, 476 F. 3d 981

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(CADC 2007), is the subject of our present review and today's decision.

The Court of Appeals concluded that MCA §7 must be read to strip from it, and all federal courts, jurisdiction to consider petitioners' habeas corpus applications, *id.*, at 987; that petitioners are not entitled to the privilege of the writ or the protections of the Suspension Clause, *id.*, at 990–991; and, as a result, that it was unnecessary to consider whether Congress provided an adequate and effective substitute for habeas corpus in the DTA.

We granted certiorari. 551 U. S. ____ (2007).

II

As a threshold matter, we must decide whether MCA §7 denies the federal courts jurisdiction to hear habeas corpus actions pending at the time of its enactment. We hold the statute does deny that jurisdiction, so that, if the statute is valid, petitioners' cases must be dismissed.

As amended by the terms of the MCA, 28 U. S. C. A. §2241(e) (Supp. 2007) now provides:

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

“(2) Except as provided in [§§1005(e)(2) and (e)(3) of the DTA] no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting

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such determination.”

Section 7(b) of the MCA provides the effective date for the amendment of §2241(e). It states:

“The amendment made by [MCA §7(a)] shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.” 120 Stat. 2636.

There is little doubt that the effective date provision applies to habeas corpus actions. Those actions, by definition, are cases “which relate to . . . detention.” See Black’s Law Dictionary 728 (8th ed. 2004) (defining habeas corpus as “[a] writ employed to bring a person before a court, most frequently to ensure that the party’s imprisonment or detention is not illegal”). Petitioners argue, nevertheless, that MCA §7(b) is not a sufficiently clear statement of congressional intent to strip the federal courts of jurisdiction in pending cases. See *Ex parte Yerger*, 8 Wall. 85, 102–103 (1869). We disagree.

Their argument is as follows: Section 2241(e)(1) refers to “a writ of habeas corpus.” The next paragraph, §2241(e)(2), refers to “any other action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who . . . [has] been properly detained as an enemy combatant or is awaiting such determination.” There are two separate paragraphs, the argument continues, so there must be two distinct classes of cases. And the effective date subsection, MCA §7(b), it is said, refers only to the second class of cases, for it largely repeats the language of §2241(e)(2) by referring to “cases . . . which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an

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alien detained by the United States.”

Petitioners’ textual argument would have more force were it not for the phrase “other action” in §2241(e)(2). The phrase cannot be understood without referring back to the paragraph that precedes it, §2241(e)(1), which explicitly mentions the term “writ of habeas corpus.” The structure of the two paragraphs implies that habeas actions are a type of action “relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained . . . as an enemy combatant.” Pending habeas actions, then, are in the category of cases subject to the statute’s jurisdictional bar.

We acknowledge, moreover, the litigation history that prompted Congress to enact the MCA. In *Hamdan* the Court found it unnecessary to address the petitioner’s Suspension Clause arguments but noted the relevance of the clear statement rule in deciding whether Congress intended to reach pending habeas corpus cases. See 548 U. S., at 575 (Congress should “not be presumed to have effected such denial [of habeas relief] absent an unmistakably clear statement to the contrary”). This interpretive rule facilitates a dialogue between Congress and the Court. Cf. *Hilton v. South Carolina Public Railways Comm’n*, 502 U. S. 197, 206 (1991); H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1209–1210 (W. Eskridge & P. Frickey eds. 1994). If the Court invokes a clear statement rule to advise that certain statutory interpretations are favored in order to avoid constitutional difficulties, Congress can make an informed legislative choice either to amend the statute or to retain its existing text. If Congress amends, its intent must be respected even if a difficult constitutional question is presented. The usual presumption is that Members of Congress, in accord with their oath of office, considered the constitutional issue and determined

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the amended statute to be a lawful one; and the Judiciary, in light of that determination, proceeds to its own independent judgment on the constitutional question when required to do so in a proper case.

If this ongoing dialogue between and among the branches of Government is to be respected, we cannot ignore that the MCA was a direct response to *Hamdan's* holding that the DTA's jurisdiction-stripping provision had no application to pending cases. The Court of Appeals was correct to take note of the legislative history when construing the statute, see 476 F. 3d, at 986, n. 2 (citing relevant floor statements); and we agree with its conclusion that the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us.

III

In deciding the constitutional questions now presented we must determine whether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status, *i.e.*, petitioners' designation by the Executive Branch as enemy combatants, or their physical location, *i.e.*, their presence at Guantanamo Bay. The Government contends that non-citizens designated as enemy combatants and detained in territory located outside our Nation's borders have no constitutional rights and no privilege of habeas corpus. Petitioners contend they do have cognizable constitutional rights and that Congress, in seeking to eliminate recourse to habeas corpus as a means to assert those rights, acted in violation of the Suspension Clause.

We begin with a brief account of the history and origins of the writ. Our account proceeds from two propositions. First, protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights. In the system conceived by the Framers the writ had a centrality that

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must inform proper interpretation of the Suspension Clause. Second, to the extent there were settled precedents or legal commentaries in 1789 regarding the extra-territorial scope of the writ or its application to enemy aliens, those authorities can be instructive for the present cases.

A

The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom. Experience taught, however, that the common-law writ all too often had been insufficient to guard against the abuse of monarchical power. That history counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system.

Magna Carta decreed that no man would be imprisoned contrary to the law of the land. Art. 39, in *Sources of Our Liberties* 17 (R. Perry & J. Cooper eds. 1959) (“No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land”). Important as the principle was, the Barons at Runnymede prescribed no specific legal process to enforce it. Holdsworth tells us, however, that gradually the writ of habeas corpus became the means by which the promise of Magna Carta was fulfilled. 9 W. Holdsworth, *A History of English Law* 112 (1926) (hereinafter Holdsworth).

The development was painstaking, even by the centuries-long measures of English constitutional history. The writ was known and used in some form at least as early as the reign of Edward I. *Id.*, at 108–125. Yet at the outset it was used to protect not the rights of citizens but those of the King and his courts. The early courts were considered

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agents of the Crown, designed to assist the King in the exercise of his power. See J. Baker, *An Introduction to English Legal History* 38–39 (4th ed. 2002). Thus the writ, while it would become part of the foundation of liberty for the King’s subjects, was in its earliest use a mechanism for securing compliance with the King’s laws. See Halliday & White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 *Va. L. Rev.* (forthcoming 2008) (hereinafter Halliday & White) (manuscript, at 11, online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008252 (all Internet materials as visited June 9, 2008, and available in Clerk of Court’s case file) (noting that “conceptually the writ arose from a theory of power rather than a theory of liberty”). Over time it became clear that by issuing the writ of habeas corpus common-law courts sought to enforce the King’s prerogative to inquire into the authority of a jailer to hold a prisoner. See M. Hale, *Prerogatives of the King* 229 (D. Yale ed. 1976); 2 J. Story, *Commentaries on the Constitution of the United States* §1341, p. 237 (3d ed. 1858) (noting that the writ ran “into all parts of the king’s dominions; for it is said, that the king is entitled, at all times, to have an account, why the liberty of any of his subjects is restrained”).

Even so, from an early date it was understood that the King, too, was subject to the law. As the writers said of *Magna Carta*, “it means this, that the king is and shall be below the law.” 1 F. Pollock & F. Maitland, *History of English Law* 173 (2d ed. 1909); see also 2 Bracton *On the Laws and Customs of England* 33 (S. Thorne transl. 1968) (“The king must not be under man but under God and under the law, because law makes the king”). And, by the 1600’s, the writ was deemed less an instrument of the King’s power and more a restraint upon it. See Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace*, 40 *Calif. L. Rev.* 335, 336 (1952) (noting

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that by this point the writ was “the appropriate process for checking illegal imprisonment by public officials”).

Still, the writ proved to be an imperfect check. Even when the importance of the writ was well understood in England, habeas relief often was denied by the courts or suspended by Parliament. Denial or suspension occurred in times of political unrest, to the anguish of the imprisoned and the outrage of those in sympathy with them.

A notable example from this period was *Darnel’s Case*, 3 How. St. Tr. 1 (K. B. 1627). The events giving rise to the case began when, in a display of the Stuart penchant for authoritarian excess, Charles I demanded that Darnel and at least four others lend him money. Upon their refusal, they were imprisoned. The prisoners sought a writ of habeas corpus; and the King filed a return in the form of a warrant signed by the Attorney General. *Ibid.* The court held this was a sufficient answer and justified the subjects’ continued imprisonment. *Id.*, at 59.

There was an immediate outcry of protest. The House of Commons promptly passed the Petition of Right, 3 Car. 1, ch. 1 (1627), 5 Statutes of the Realm 23, 24 (reprint 1963), which condemned executive “imprison[ment] without any cause” shown, and declared that “no freeman in any such manner as is before mentioned [shall] be imprisoned or detained.” Yet a full legislative response was long delayed. The King soon began to abuse his authority again, and Parliament was dissolved. See W. Hall & R. Albion, *A History of England and the British Empire* 328 (3d ed. 1953) (hereinafter Hall & Albion). When Parliament reconvened in 1640, it sought to secure access to the writ by statute. The Act of 1640, 16 Car. 1, ch. 10, 5 Statutes of the Realm, at 110, expressly authorized use of the writ to test the legality of commitment by command or warrant of the King or the Privy Council. Civil strife and the Interregnum soon followed, and not until 1679 did Parliament try once more to secure the writ, this time through the

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Habeas Corpus Act of 1679, 31 Car. 2, ch. 2, *id.*, at 935. The Act, which later would be described by Blackstone as the “stable bulwark of our liberties,” 1 W. Blackstone, Commentaries *137 (hereinafter Blackstone), established procedures for issuing the writ; and it was the model upon which the habeas statutes of the 13 American Colonies were based, see Collings, *supra*, at 338–339.

This history was known to the Framers. It no doubt confirmed their view that pendular swings to and away from individual liberty were endemic to undivided, uncontrolled power. The Framers’ inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty. See *Loving v. United States*, 517 U. S. 748, 756 (1996) (noting that “[e]ven before the birth of this country, separation of powers was known to be a defense against tyranny”); cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring) (“[T]he Constitution diffuses power the better to secure liberty”); *Clinton v. City of New York*, 524 U. S. 417, 450 (1998) (KENNEDY, J., concurring) (“Liberty is always at stake when one or more of the branches seek to transgress the separation of powers”). Because the Constitution’s separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, see *Yick Wo v. Hopkins*, 118 U. S. 356, 374 (1886), protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles, see, e.g., *INS v. Chadha*, 462 U. S. 919, 958–959 (1983).

That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension: “The Privilege of the Writ of Habeas Corpus shall not

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be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Art. I, §9, cl. 2; see Amar, *Of Sovereignty and Federalism*, 96 *Yale L. J.* 1425, 1509, n. 329 (1987) (“[T]he non-suspension clause is the original Constitution’s most explicit reference to remedies”). The word “privilege” was used, perhaps, to avoid mentioning some rights to the exclusion of others. (Indeed, the only mention of the term “right” in the Constitution, as ratified, is in its clause giving Congress the power to protect the rights of authors and inventors. See Art. I, §8, cl. 8.)

Surviving accounts of the ratification debates provide additional evidence that the Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme. In a critical exchange with Patrick Henry at the Virginia ratifying convention Edmund Randolph referred to the Suspension Clause as an “exception” to the “power given to Congress to regulate courts.” See 3 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 460–464 (J. Elliot 2d ed. 1876) (hereinafter *Elliot’s Debates*). A resolution passed by the New York ratifying convention made clear its understanding that the Clause not only protects against arbitrary suspensions of the writ but also guarantees an affirmative right to judicial inquiry into the causes of detention. See *Resolution of the New York Ratifying Convention* (July 26, 1788), in 1 *Elliot’s Debates* 328 (noting the convention’s understanding “[t]hat every person restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint, and to a removal thereof if unlawful; and that such inquiry or removal ought not to be denied or delayed, except when, on account of public danger, the Congress shall suspend the privilege of the writ of *habeas corpus*”). Alexander Hamilton likewise explained that by providing the detainee a judicial forum to challenge detention, the writ preserves limited government. As he explained in

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The Federalist No. 84:

“[T]he practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone . . . are well worthy of recital: ‘To bereave a man of life . . . or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government.’ And as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the *habeas corpus* act, which in one place he calls ‘the BULWARK of the British Constitution.’” C. Rossiter ed., p. 512 (1961) (quoting 1 Blackstone *136, 4 *id.*, at *438).

Post-1789 habeas developments in England, though not bearing upon the Framers’ intent, do verify their foresight. Those later events would underscore the need for structural barriers against arbitrary suspensions of the writ. Just as the writ had been vulnerable to executive and parliamentary encroachment on both sides of the Atlantic before the American Revolution, despite the Habeas Corpus Act of 1679, the writ was suspended with frequency in England during times of political unrest after 1789. Parliament suspended the writ for much of the period from 1792 to 1801, resulting in rampant arbitrary imprisonment. See Hall & Albion 550. Even as late as World War I, at least one prominent English jurist complained that the Defence of the Realm Act, 1914, 4 & 5 Geo. 5, ch. 29(1)(a), effectively had suspended the privilege of habeas corpus for any person suspected of “communicating with the enemy.” See *King v. Halliday*, [1917] A. C. 260, 299

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(Lord Shaw, dissenting); see generally A. Simpson, *In the Highest Degree Odious: Detention Without Trial in War-time Britain* 6–7, 24–25 (1992).

In our own system the Suspension Clause is designed to protect against these cyclical abuses. The Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the “delicate balance of governance” that is itself the surest safeguard of liberty. See *Hamdi*, 542 U. S., at 536 (plurality opinion). The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account. See *Preiser v. Rodriguez*, 411 U. S. 475, 484 (1973) (“[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody”); cf. *In re Jackson*, 15 Mich. 417, 439–440 (1867) (Cooley, J., concurring) (“The important fact to be observed in regard to the mode of procedure upon this [habeas] writ is, that it is directed to, and served upon, not the person confined, but his jailer”). The separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause.

B

The broad historical narrative of the writ and its function is central to our analysis, but we seek guidance as well from founding-era authorities addressing the specific question before us: whether foreign nationals, apprehended and detained in distant countries during a time of serious threats to our Nation’s security, may assert the privilege of the writ and seek its protection. The Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope

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of the writ. See *INS v. St. Cyr*, 533 U. S. 289, 300–301 (2001). But the analysis may begin with precedents as of 1789, for the Court has said that “at the absolute minimum” the Clause protects the writ as it existed when the Constitution was drafted and ratified. *Id.*, at 301.

To support their arguments, the parties in these cases have examined historical sources to construct a view of the common-law writ as it existed in 1789—as have *amici* whose expertise in legal history the Court has relied upon in the past. See Brief for Legal Historians as *Amici Curiae*; see also *St. Cyr*, *supra*, at 302, n. 16. The Government argues the common-law writ ran only to those territories over which the Crown was sovereign. See Brief for Respondents 27. Petitioners argue that jurisdiction followed the King’s officers. See Brief for Petitioner Boumediene et al. 11. Diligent search by all parties reveals no certain conclusions. In none of the cases cited do we find that a common-law court would or would not have granted, or refused to hear for lack of jurisdiction, a petition for a writ of habeas corpus brought by a prisoner deemed an enemy combatant, under a standard like the one the Department of Defense has used in these cases, and when held in a territory, like Guantanamo, over which the Government has total military and civil control.

We know that at common law a petitioner’s status as an alien was not a categorical bar to habeas corpus relief. See, e.g., *Sommersett’s Case*, 20 How. St. Tr. 1, 80–82 (1772) (ordering an African slave freed upon finding the custodian’s return insufficient); see generally *Khera v. Secretary of State for the Home Dept.*, [1984] A. C. 74, 111 (“Habeas corpus protection is often expressed as limited to ‘British subjects.’ Is it really limited to British nationals? Suffice it to say that the case law has given an emphatic ‘no’ to the question”). We know as well that common-law courts entertained habeas petitions brought by enemy aliens detained in England—“entertained” at least in the

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sense that the courts held hearings to determine the threshold question of entitlement to the writ. See *Case of Three Spanish Sailors*, 2 Black. W. 1324, 96 Eng. Rep. 775 (C. P. 1779); *King v. Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K. B. 1759); *Du Castro's Case*, Fort. 195, 92 Eng. Rep. 816 (K. B. 1697).

In *Schiever* and the *Spanish Sailors'* case, the courts denied relief to the petitioners. Whether the holdings in these cases were jurisdictional or based upon the courts' ruling that the petitioners were detained lawfully as prisoners of war is unclear. See *Spanish Sailors, supra*, at 1324, 96 Eng. Rep., at 776; *Schiever, supra*, at 766, 97 Eng. Rep., at 552. In *Du Castro's Case*, the court granted relief, but that case is not analogous to petitioners' because the prisoner there appears to have been detained in England. See Halliday & White 27, n. 72. To the extent these authorities suggest the common-law courts abstained altogether from matters involving prisoners of war, there was greater justification for doing so in the context of declared wars with other nation states. Judicial intervention might have complicated the military's ability to negotiate exchange of prisoners with the enemy, a wartime practice well known to the Framers. See Resolution of Mar. 30, 1778, 10 Journals of the Continental Congress 1774–1789, p. 295 (W. Ford ed. 1908) (directing General Washington not to exchange prisoners with the British unless the enemy agreed to exempt citizens from capture).

We find the evidence as to the geographic scope of the writ at common law informative, but, again, not dispositive. Petitioners argue the site of their detention is analogous to two territories outside of England to which the writ did run: the so-called “exempt jurisdictions,” like the Channel Islands; and (in former times) India. There are critical differences between these places and Guantanamo, however.

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As the Court noted in *Rasul*, 542 U. S., at 481–482, and nn. 11–12, common-law courts granted habeas corpus relief to prisoners detained in the exempt jurisdictions. But these areas, while not in theory part of the realm of England, were nonetheless under the Crown’s control. See 2 H. Hallam, *Constitutional History of England: From the Accession of Henry VII to the Death of George II*, pp. 232–233 (reprint 1989). And there is some indication that these jurisdictions were considered sovereign territory. *King v. Cowle*, 2 Burr. 834, 854, 855, 97 Eng. Rep. 587, 599 (K. B. 1759) (describing one of the exempt jurisdictions, Berwick-upon-Tweed, as under the “sovereign jurisdiction” and “subjection of the Crown of England”). Because the United States does not maintain formal sovereignty over Guantanamo Bay, see Part IV, *infra*, the naval station there and the exempt jurisdictions discussed in the English authorities are not similarly situated.

Petitioners and their *amici* further rely on cases in which British courts in India granted writs of habeas corpus to noncitizens detained in territory over which the Moghul Emperor retained formal sovereignty and control. See *supra*, at 12–13; Brief for Legal Historians as *Amici Curiae* 12–13. The analogy to the present cases breaks down, however, because of the geographic location of the courts in the Indian example. The Supreme Court of Judicature (the British Court) sat in Calcutta; but no federal court sits at Guantanamo. The Supreme Court of Judicature was, moreover, a special court set up by Parliament to monitor certain conduct during the British Raj. See Regulating Act of 1773, 13 Geo. 3, §§13–14. That it had the power to issue the writ in nonsovereign territory does not prove that common-law courts sitting in England had the same power. If petitioners were to have the better of the argument on this point, we would need some demonstration of a consistent practice of common-law courts sitting in England and entertaining petitions brought by

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alien prisoners detained abroad. We find little support for this conclusion.

The Government argues, in turn, that Guantanamo is more closely analogous to Scotland and Hanover, territories that were not part of England but nonetheless controlled by the English monarch (in his separate capacities as King of Scotland and Elector of Hanover). See *Cowle*, 2 Burr., at 856, 97 Eng. Rep., at 600. Lord Mansfield can be cited for the proposition that, at the time of the founding, English courts lacked the “power” to issue the writ to Scotland and Hanover, territories Lord Mansfield referred to as “foreign.” *Ibid.* But what matters for our purposes is why common-law courts lacked this power. Given the English Crown’s delicate and complicated relationships with Scotland and Hanover in the 1700’s, we cannot disregard the possibility that the common-law courts’ refusal to issue the writ to these places was motivated not by formal legal constructs but by what we would think of as prudential concerns. This appears to have been the case with regard to other British territories where the writ did not run. See 2 R. Chambers, *A Course of Lectures on English Law 1767–1773*, p. 8 (T. Curley ed. 1986) (quoting the view of Lord Mansfield in *Cowle* that “[n]otwithstanding the *power* which the judges have, yet where they cannot judge of the cause, or give relief upon it, they would not think *proper* to interpose; and therefore in the case of imprisonments in *Guernsey*, *Jersey*, *Minorca*, or the *plantations*, the most usual way is to complain to the *king in Council*” (internal quotation marks omitted)). And after the Act of Union in 1707, through which the kingdoms of England and Scotland were merged politically, Queen Anne and her successors, in their new capacity as sovereign of Great Britain, ruled the entire island as one kingdom. Accordingly, by the time Lord Mansfield penned his opinion in *Cowle* in 1759, Scotland was no longer a “foreign” country vis-à-vis England—at least not in the sense

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in which Cuba is a foreign country vis-à-vis the United States.

Scotland remained “foreign” in Lord Mansfield’s day in at least one important respect, however. Even after the Act of Union, Scotland (like Hanover) continued to maintain its own laws and court system. See 1 Blackstone *98, *109. Under these circumstances prudential considerations would have weighed heavily when courts sitting in England received habeas petitions from Scotland or the Electorate. Common-law decisions withholding the writ from prisoners detained in these places easily could be explained as efforts to avoid either or both of two embarrassments: conflict with the judgments of another court of competent jurisdiction; or the practical inability, by reason of distance, of the English courts to enforce their judgments outside their territorial jurisdiction. Cf. *Munaf v. Geren, ante*, at 15 (opinion of the Court) (recognizing that “prudential concerns’ . . . such as comity and the orderly administration of criminal justice” affect the appropriate exercise of habeas jurisdiction).

By the mid-19th century, British courts could issue the writ to Canada, notwithstanding the fact that Canadian courts also had the power to do so. See 9 Holdsworth 124 (citing *Ex parte Anderson*, 3 El. and El. 487 (1861)). This might be seen as evidence that the existence of a separate court system was no barrier to the running of the common-law writ. The Canada of the 1800’s, however, was in many respects more analogous to the exempt jurisdictions or to Ireland, where the writ ran, than to Scotland or Hanover in the 1700’s, where it did not. Unlike Scotland and Hanover, Canada followed English law. See B. Laskin, *The British Tradition in Canadian Law* 50–51 (1969).

In the end a categorical or formal conception of sovereignty does not provide a comprehensive or altogether satisfactory explanation for the general understanding

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that prevailed when Lord Mansfield considered issuance of the writ outside England. In 1759 the writ did not run to Scotland but did run to Ireland, even though, at that point, Scotland and England had merged under the rule of a single sovereign, whereas the Crowns of Great Britain and Ireland remained separate (at least in theory). See *Cowle, supra*, at 856–857, 97 Eng. Rep., 600; 1 Blackstone *100–101. But there was at least one major difference between Scotland’s and Ireland’s relationship with England during this period that might explain why the writ ran to Ireland but not to Scotland. English law did not generally apply in Scotland (even after the Act of Union) but it did apply in Ireland. Blackstone put it as follows: “[A]s Scotland and England are now one and the same kingdom, and yet differ in their municipal laws; so England and Ireland are, on the other hand, distinct kingdoms, and yet in general agree in their laws.” *Id.*, at *100. This distinction, and not formal notions of sovereignty, may well explain why the writ did not run to Scotland (and Hanover) but would run to Ireland.

The prudential barriers that may have prevented the English courts from issuing the writ to Scotland and Hanover are not relevant here. We have no reason to believe an order from a federal court would be disobeyed at Guantanamo. No Cuban court has jurisdiction to hear these petitioners’ claims, and no law other than the laws of the United States applies at the naval station. The modern-day relations between the United States and Guantanamo thus differ in important respects from the 18th-century relations between England and the kingdoms of Scotland and Hanover. This is reason enough for us to discount the relevance of the Government’s analogy.

Each side in the present matter argues that the very lack of a precedent on point supports its position. The Government points out there is no evidence that a court sitting in England granted habeas relief to an enemy alien

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detained abroad; petitioners respond there is no evidence that a court refused to do so for lack of jurisdiction.

Both arguments are premised, however, upon the assumption that the historical record is complete and that the common law, if properly understood, yields a definite answer to the questions before us. There are reasons to doubt both assumptions. Recent scholarship points to the inherent shortcomings in the historical record. See Halliday & White 14–15 (noting that most reports of 18th-century habeas proceedings were not printed). And given the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, the common-law courts simply may not have confronted cases with close parallels to this one. We decline, therefore, to infer too much, one way or the other, from the lack of historical evidence on point. Cf. *Brown v. Board of Education*, 347 U. S. 483, 489 (1954) (noting evidence concerning the circumstances surrounding the adoption of the Fourteenth Amendment, discussed in the parties’ briefs and uncovered through the Court’s own investigation, “convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive”); *Reid v. Covert*, 354 U. S. 1, 64 (1957) (Frankfurter, J., concurring in result) (arguing constitutional adjudication should not be based upon evidence that is “too episodic, too meager, to form a solid basis in history, preceding and contemporaneous with the framing of the Constitution”).

IV

Drawing from its position that at common law the writ ran only to territories over which the Crown was sovereign, the Government says the Suspension Clause affords petitioners no rights because the United States does not claim sovereignty over the place of detention.

Guantanamo Bay is not formally part of the United

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States. See DTA §1005(g), 119 Stat. 2743. And under the terms of the lease between the United States and Cuba, Cuba retains “ultimate sovereignty” over the territory while the United States exercises “complete jurisdiction and control.” See Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418 (hereinafter 1903 Lease Agreement); *Rasul*, 542 U. S., at 471. Under the terms of the 1934 Treaty, however, Cuba effectively has no rights as a sovereign until the parties agree to modification of the 1903 Lease Agreement or the United States abandons the base. See Treaty Defining Relations with Cuba, May 29, 1934, U. S.-Cuba, Art. III, 48 Stat. 1683, T. S. No. 866.

The United States contends, nevertheless, that Guantanamo is not within its sovereign control. This was the Government’s position well before the events of September 11, 2001. See, e.g., Brief for Petitioners in *Sale v. Haitian Centers Council, Inc.*, O. T. 1992, No. 92–344, p. 31 (arguing that Guantanamo is territory “outside the United States”). And in other contexts the Court has held that questions of sovereignty are for the political branches to decide. See *Vermilya-Brown Co. v. Connell*, 335 U. S. 377, 380 (1948) (“[D]etermination of sovereignty over an area is for the legislative and executive departments”); see also *Jones v. United States*, 137 U. S. 202 (1890); *Williams v. Suffolk Ins. Co.*, 13 Pet. 415, 420 (1839). Even if this were a treaty interpretation case that did not involve a political question, the President’s construction of the lease agreement would be entitled to great respect. See *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U. S. 176, 184–185 (1982).

We therefore do not question the Government’s position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay. But this does not end the analysis. Our cases do not hold it is improper for us to inquire into the

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objective degree of control the Nation asserts over foreign territory. As commentators have noted, “[s]overeignty’ is a term used in many senses and is much abused.” See 1 Restatement (Third) of Foreign Relations Law of the United States §206, Comment *b*, p. 94 (1986). When we have stated that sovereignty is a political question, we have referred not to sovereignty in the general, colloquial sense, meaning the exercise of dominion or power, see Webster’s New International Dictionary 2406 (2d ed. 1934) (“sovereignty,” definition 3), but sovereignty in the narrow, legal sense of the term, meaning a claim of right, see 1 Restatement (Third) of Foreign Relations, *supra*, §206, Comment *b*, at 94 (noting that sovereignty “implies a state’s lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there”). Indeed, it is not altogether uncommon for a territory to be under the *de jure* sovereignty of one nation, while under the plenary control, or practical sovereignty, of another. This condition can occur when the territory is seized during war, as Guantanamo was during the Spanish-American War. See, e.g., *Fleming v. Page*, 9 How. 603, 614 (1850) (noting that the port of Tampico, conquered by the United States during the war with Mexico, was “undoubtedly . . . subject to the sovereignty and dominion of the United States,” but that it “does not follow that it was a part of the United States, or that it ceased to be a foreign country”); *King v. Earl of Crewe ex parte Sekgome*, [1910] 2 K. B. 576, 603–604 (C. A.) (opinion of Williams, L. J.) (arguing that the Bechuanaland Protectorate in South Africa was “under His Majesty’s dominion in the sense of power and jurisdiction, but is not under his dominion in the sense of territorial dominion”). Accordingly, for purposes of our analysis, we accept the Government’s position that Cuba, and not the United States, retains *de jure* sovereignty over Guantanamo Bay. As we did in *Rasul*, however, we take notice

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of the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory. See 542 U. S., at 480; *id.*, at 487 (KENNEDY, J., concurring in judgment).

Were we to hold that the present cases turn on the political question doctrine, we would be required first to accept the Government's premise that *de jure* sovereignty is the touchstone of habeas corpus jurisdiction. This premise, however, is unfounded. For the reasons indicated above, the history of common-law habeas corpus provides scant support for this proposition; and, for the reasons indicated below, that position would be inconsistent with our precedents and contrary to fundamental separation-of-powers principles.

A

The Court has discussed the issue of the Constitution's extraterritorial application on many occasions. These decisions undermine the Government's argument that, at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends.

The Framers foresaw that the United States would expand and acquire new territories. See *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 542 (1828). Article IV, §3, cl. 1, grants Congress the power to admit new States. Clause 2 of the same section grants Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Save for a few notable (and notorious) exceptions, *e.g.*, *Dred Scott v. Sandford*, 19 How. 393 (1857), throughout most of our history there was little need to explore the outer boundaries of the Constitution's geographic reach. When Congress exercised its power to create new territories, it guaranteed constitutional protections to the inhabitants by statute. See, *e.g.*, An Act: to

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establish a Territorial Government for Utah, 9 Stat. 458 (“[T]he Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah”); Rev. Stat. §1891 (“The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States”); see generally Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. Chi. L. Rev. 797, 825–827 (2005). In particular, there was no need to test the limits of the Suspension Clause because, as early as 1789, Congress extended the writ to the Territories. See Act of Aug. 7, 1789, 1 Stat. 52 (reaffirming Art. II of Northwest Ordinance of 1787, which provided that “[t]he inhabitants of the said territory, shall always be entitled to the benefits of the writ of habeas corpus”).

Fundamental questions regarding the Constitution’s geographic scope first arose at the dawn of the 20th century when the Nation acquired noncontiguous Territories: Puerto Rico, Guam, and the Philippines—ceded to the United States by Spain at the conclusion of the Spanish-American War—and Hawaii—annexed by the United States in 1898. At this point Congress chose to discontinue its previous practice of extending constitutional rights to the territories by statute. See, e.g., An Act Temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes, 32 Stat. 692 (noting that Rev. Stat. §1891 did not apply to the Philippines).

In a series of opinions later known as the Insular Cases, the Court addressed whether the Constitution, by its own force, applies in any territory that is not a State. See *De Lima v. Bidwell*, 182 U. S. 1 (1901); *Dooley v. United States*, 182 U. S. 222 (1901); *Armstrong v. United States*, 182 U. S. 243 (1901); *Downes v. Bidwell*, 182 U. S. 244

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(1901); *Hawaii v. Mankichi*, 190 U. S. 197 (1903); *Dorr v. United States*, 195 U. S. 138 (1904). The Court held that the Constitution has independent force in these territories, a force not contingent upon acts of legislative grace. Yet it took note of the difficulties inherent in that position.

Prior to their cession to the United States, the former Spanish colonies operated under a civil-law system, without experience in the various aspects of the Anglo-American legal tradition, for instance the use of grand and petit juries. At least with regard to the Philippines, a complete transformation of the prevailing legal culture would have been not only disruptive but also unnecessary, as the United States intended to grant independence to that Territory. See An Act To declare the purpose of the people of the United States as to the future political status of the people of the Philippine Islands, and to provide a more autonomous government for those islands (Jones Act), 39 Stat. 545 (noting that “it was never the intention of the people of the United States in the incipency of the War with Spain to make it a war of conquest or for territorial aggrandizement” and that “it is, as it has always been, the purpose of the people of the United States to withdraw their sovereignty over the Philippine Islands and to recognize their independence as soon as a stable government can be established therein”). The Court thus was reluctant to risk the uncertainty and instability that could result from a rule that displaced altogether the existing legal systems in these newly acquired Territories. See *Downes, supra*, at 282 (“It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate and production . . .”).

These considerations resulted in the doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for state-

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hood but only in part in unincorporated Territories. See *Dorr, supra*, at 143 (“Until Congress shall see fit to incorporate territory ceded by treaty into the United States, . . . the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation”); *Downes, supra*, at 293 (White, J., concurring) (“[T]he determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States”). As the Court later made clear, “the real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements.” *Balzac v. Porto Rico*, 258 U. S. 298, 312 (1922). It may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance. Cf. *Torres v. Puerto Rico*, 442 U. S. 465, 475–476 (1979) (Brennan, J., concurring in judgment) (“Whatever the validity of the [Insular Cases] in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970’s”). But, as early as *Balzac* in 1922, the Court took for granted that even in unincorporated Territories the Government of the United States was bound to provide to noncitizen inhabitants “guaranties of certain fundamental personal rights declared in the Constitution.” 258 U. S., at 312; see also *Late Corp. of Church of Jesus Christ of Latter-day Saints v. United States*, 136 U. S. 1, 44 (1890) (“Doubtless Congress, in legislating for the Territories would be subject to

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those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments”). Yet noting the inherent practical difficulties of enforcing all constitutional provisions “always and everywhere,” *Balzac, supra*, at 312, the Court devised in the Insular Cases a doctrine that allowed it to use its power sparingly and where it would be most needed. This century-old doctrine informs our analysis in the present matter.

Practical considerations likewise influenced the Court’s analysis a half-century later in *Reid*, 354 U. S. 1. The petitioners there, spouses of American servicemen, lived on American military bases in England and Japan. They were charged with crimes committed in those countries and tried before military courts, consistent with executive agreements the United States had entered into with the British and Japanese governments. *Id.*, at 15–16, and nn. 29–30 (plurality opinion). Because the petitioners were not themselves military personnel, they argued they were entitled to trial by jury.

Justice Black, writing for the plurality, contrasted the cases before him with the Insular Cases, which involved territories “with wholly dissimilar traditions and institutions” that Congress intended to govern only “temporarily.” *Id.*, at 14. Justice Frankfurter argued that the “specific circumstances of each particular case” are relevant in determining the geographic scope of the Constitution. *Id.*, at 54 (opinion concurring in result). And Justice Harlan, who had joined an opinion reaching the opposite result in the case in the previous Term, *Reid v. Covert*, 351 U. S. 487 (1956), was most explicit in rejecting a “rigid and abstract rule” for determining where constitutional guarantees extend. *Reid*, 354 U. S., at 74 (opinion concurring in result). He read the Insular Cases to teach that whether a constitutional provision has extraterritorial effect depends upon the “particular circumstances, the

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practical necessities, and the possible alternatives which Congress had before it” and, in particular, whether judicial enforcement of the provision would be “impracticable and anomalous.” *Id.*, at 74–75; see also *United States v. Verdugo-Urquidez*, 494 U. S. 259, 277–278 (1990) (KENNEDY, J., concurring) (applying the “impracticable and anomalous” extraterritoriality test in the Fourth Amendment context).

That the petitioners in *Reid* were American citizens was a key factor in the case and was central to the plurality’s conclusion that the Fifth and Sixth Amendments apply to American civilians tried outside the United States. But practical considerations, related not to the petitioners’ citizenship but to the place of their confinement and trial, were relevant to each Member of the *Reid* majority. And to Justices Harlan and Frankfurter (whose votes were necessary to the Court’s disposition) these considerations were the decisive factors in the case.

Indeed the majority splintered on this very point. The key disagreement between the plurality and the concurring Justices in *Reid* was over the continued precedential value of the Court’s previous opinion in *In re Ross*, 140 U. S. 453 (1891), which the *Reid* Court understood as holding that under some circumstances Americans abroad have no right to indictment and trial by jury. The petitioner in *Ross* was a sailor serving on an American merchant vessel in Japanese waters who was tried before an American consular tribunal for the murder of a fellow crewman. 140 U. S., at 459, 479. The *Ross* Court held that the petitioner, who was a British subject, had no rights under the Fifth and Sixth Amendments. *Id.*, at 464. The petitioner’s citizenship played no role in the disposition of the case, however. The Court assumed (consistent with the maritime custom of the time) that *Ross* had all the rights of a similarly situated American citizen. *Id.*, at 479 (noting that *Ross* was “under the protection and sub-

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ject to the laws of the United States equally with the seaman who was native born”). The Justices in *Reid* therefore properly understood *Ross* as standing for the proposition that, at least in some circumstances, the jury provisions of the Fifth and Sixth Amendments have no application to American citizens tried by American authorities abroad. See 354 U. S., at 11–12 (plurality opinion) (describing *Ross* as holding that “constitutional protections applied ‘only to citizens and others within the United States . . . and not to residents or temporary sojourners abroad’” (quoting *Ross, supra*, at 464)); 354 U. S., at 64 (Frankfurter, J., concurring in result) (noting that the consular tribunals upheld in *Ross* “w[ere] based on long-established custom and they were justified as the best possible means for securing justice for the few Americans present in [foreign] countries”); 354 U. S., at 75 (Harlan, J., concurring in result) (“what *Ross* and the *Insular Cases* hold is that the particular local setting, the practical necessities, and the possible alternatives are relevant to a question of judgment, namely, whether jury trial *should* be deemed a necessary condition of the exercise of Congress’ power to provide for the trial of Americans overseas”).

The *Reid* plurality doubted that *Ross* was rightly decided, precisely because it believed the opinion was insufficiently protective of the rights of American citizens. See 354 U. S., at 10–12; see also *id.*, at 78 (Clark, J., dissenting) (noting that “four of my brothers would specifically overrule and two would impair the long-recognized vitality of an old and respected precedent in our law, the case of *In re Ross*, 140 U. S. 453 (1891)”). But Justices Harlan and Frankfurter, while willing to hold that the American citizen petitioners in the cases before them were entitled to the protections of Fifth and Sixth Amendments, were unwilling to overturn *Ross*. 354 U. S., at 64 (Frankfurter, J., concurring in result); *id.*, at 75 (Harlan, J., concurring

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in result). Instead, the two concurring Justices distinguished *Ross* from the cases before them, not on the basis of the citizenship of the petitioners, but on practical considerations that made jury trial a more feasible option for them than it was for the petitioner in *Ross*. If citizenship had been the only relevant factor in the case, it would have been necessary for the Court to overturn *Ross*, something Justices Harlan and Frankfurter were unwilling to do. See *Verdugo-Urquidez, supra*, at 277 (KENNEDY, J., concurring) (noting that *Ross* had not been overruled).

Practical considerations weighed heavily as well in *Johnson v. Eisentrager*, 339 U. S. 763 (1950), where the Court addressed whether habeas corpus jurisdiction extended to enemy aliens who had been convicted of violating the laws of war. The prisoners were detained at Landsberg Prison in Germany during the Allied Powers' postwar occupation. The Court stressed the difficulties of ordering the Government to produce the prisoners in a habeas corpus proceeding. It "would require allocation of shipping space, guarding personnel, billeting and rations" and would damage the prestige of military commanders at a sensitive time. *Id.*, at 779. In considering these factors the Court sought to balance the constraints of military occupation with constitutional necessities. *Id.*, at 769–779; see *Rasul*, 542 U. S., at 475–476 (discussing the factors relevant to *Eisentrager's* constitutional holding); 542 U. S., at 486 (KENNEDY, J., concurring in judgment) (same).

True, the Court in *Eisentrager* denied access to the writ, and it noted the prisoners "at no relevant time were within any territory over which the United States is sovereign, and [that] the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." 339 U. S., at 778. The Government seizes upon this language as proof positive that the *Eisentrager* Court adopted

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a formalistic, sovereignty-based test for determining the reach of the Suspension Clause. See Brief for Respondents 18–20. We reject this reading for three reasons.

First, we do not accept the idea that the above-quoted passage from *Eisentrager* is the only authoritative language in the opinion and that all the rest is dicta. The Court’s further determinations, based on practical considerations, were integral to Part II of its opinion and came before the decision announced its holding. See 339 U. S., at 781.

Second, because the United States lacked both *de jure* sovereignty and plenary control over Landsberg Prison, see *infra*, at 34–35, it is far from clear that the *Eisentrager* Court used the term sovereignty only in the narrow technical sense and not to connote the degree of control the military asserted over the facility. See *supra*, at 21. The Justices who decided *Eisentrager* would have understood sovereignty as a multifaceted concept. See Black’s Law Dictionary 1568 (4th ed. 1951) (defining “sovereignty” as “[t]he supreme, absolute, and uncontrollable power by which any independent state is governed”; “the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation”; and “[t]he power to do everything in a state without accountability”); Ballentine’s Law Dictionary with Pronunciations 1216 (2d ed. 1948) (defining “sovereignty” as “[t]hat public authority which commands in civil society, and orders and directs what each citizen is to perform to obtain the end of its institution”). In its principal brief in *Eisentrager*, the Government advocated a bright-line test for determining the scope of the writ, similar to the one it advocates in these cases. See Brief for Petitioners in *Johnson v. Eisentrager*, O. T. 1949, No. 306, pp. 74–75. Yet the Court mentioned the concept of territorial sovereignty only twice in its opinion. See *Eisentrager*, *supra*, at 778, 780. That the Court devoted a significant portion of

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Part II to a discussion of practical barriers to the running of the writ suggests that the Court was not concerned exclusively with the formal legal status of Landsberg Prison but also with the objective degree of control the United States asserted over it. Even if we assume the *Eisentrager* Court considered the United States' lack of formal legal sovereignty over Landsberg Prison as the decisive factor in that case, its holding is not inconsistent with a functional approach to questions of extraterritoriality. The formal legal status of a given territory affects, at least to some extent, the political branches' control over that territory. *De jure* sovereignty is a factor that bears upon which constitutional guarantees apply there.

Third, if the Government's reading of *Eisentrager* were correct, the opinion would have marked not only a change in, but a complete repudiation of, the Insular Cases' (and later *Reid*'s) functional approach to questions of extraterritoriality. We cannot accept the Government's view. Nothing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus. Were that the case, there would be considerable tension between *Eisentrager*, on the one hand, and the Insular Cases and *Reid*, on the other. Our cases need not be read to conflict in this manner. A constricted reading of *Eisentrager* overlooks what we see as a common thread uniting the Insular Cases, *Eisentrager*, and *Reid*: the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism.

B

The Government's formal sovereignty-based test raises troubling separation-of-powers concerns as well. The political history of Guantanamo illustrates the deficiencies of this approach. The United States has maintained complete and uninterrupted control of the bay for over 100

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years. At the close of the Spanish-American War, Spain ceded control over the entire island of Cuba to the United States and specifically “relinquish[ed] all claim[s] of sovereignty . . . and title.” See Treaty of Paris, Dec. 10, 1898, U. S.-Spain, Art. I, 30 Stat. 1755, T. S. No. 343. From the date the treaty with Spain was signed until the Cuban Republic was established on May 20, 1902, the United States governed the territory “in trust” for the benefit of the Cuban people. *Neely v. Henkel*, 180 U. S. 109, 120 (1901); H. Thomas, *Cuba or The Pursuit of Freedom* 436, 460 (1998). And although it recognized, by entering into the 1903 Lease Agreement, that Cuba retained “ultimate sovereignty” over Guantanamo, the United States continued to maintain the same plenary control it had enjoyed since 1898. Yet the Government’s view is that the Constitution had no effect there, at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.

Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not “absolute and unlimited” but are subject “to such restrictions as are expressed in the Constitution.” *Murphy v. Ramsey*, 114 U. S. 15, 44 (1885). Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court’s recogni-

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tion that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say “what the law is.” *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

These concerns have particular bearing upon the Suspension Clause question in the cases now before us, for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.

C

As we recognized in *Rasul*, 542 U. S., at 476; *id.*, at 487 (KENNEDY, J., concurring in judgment), the outlines of a framework for determining the reach of the Suspension Clause are suggested by the factors the Court relied upon in *Eisentrager*. In addition to the practical concerns discussed above, the *Eisentrager* Court found relevant that each petitioner:

“(a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.” 339 U. S., at 777.

Based on this language from *Eisentrager*, and the reasoning in our other extraterritoriality opinions, we conclude that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process

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through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.

Applying this framework, we note at the onset that the status of these detainees is a matter of dispute. The petitioners, like those in *Eisentrager*, are not American citizens. But the petitioners in *Eisentrager* did not contest, it seems, the Court's assertion that they were "enemy alien[s]." *Ibid.* In the instant cases, by contrast, the detainees deny they are enemy combatants. They have been afforded some process in CSRT proceedings to determine their status; but, unlike in *Eisentrager, supra*, at 766, there has been no trial by military commission for violations of the laws of war. The difference is not trivial. The records from the *Eisentrager* trials suggest that, well before the petitioners brought their case to this Court, there had been a rigorous adversarial process to test the legality of their detention. The *Eisentrager* petitioners were charged by a bill of particulars that made detailed factual allegations against them. See 14 United Nations War Crimes Commission, Law Reports of Trials of War Criminals 8–10 (1949) (reprint 1997). To rebut the accusations, they were entitled to representation by counsel, allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution's witnesses. See Memorandum by Command of Lt. Gen. Wedemeyer, Jan. 21, 1946 (establishing "Regulations Governing the Trial of War Criminals" in the China Theater), in Tr. of Record in *Johnson v. Eisentrager*, O. T. 1949, No. 306, pp. 34–40.

In comparison the procedural protections afforded to the detainees in the CSRT hearings are far more limited, and, we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review. Although the detainee is assigned a

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“Personal Representative” to assist him during CSRT proceedings, the Secretary of the Navy’s memorandum makes clear that person is not the detainee’s lawyer or even his “advocate.” See App. to Pet. for Cert. in No. 06–1196, at 155, 172. The Government’s evidence is accorded a presumption of validity. *Id.*, at 159. The detainee is allowed to present “reasonably available” evidence, *id.*, at 155, but his ability to rebut the Government’s evidence against him is limited by the circumstances of his confinement and his lack of counsel at this stage. And although the detainee can seek review of his status determination in the Court of Appeals, that review process cannot cure all defects in the earlier proceedings. See Part V, *infra*.

As to the second factor relevant to this analysis, the detainees here are similarly situated to the *Eisentrager* petitioners in that the sites of their apprehension and detention are technically outside the sovereign territory of the United States. As noted earlier, this is a factor that weighs against finding they have rights under the Suspension Clause. But there are critical differences between Landsberg Prison, circa 1950, and the United States Naval Station at Guantanamo Bay in 2008. Unlike its present control over the naval station, the United States’ control over the prison in Germany was neither absolute nor indefinite. Like all parts of occupied Germany, the prison was under the jurisdiction of the combined Allied Forces. See Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany, June 5, 1945, U. S.-U. S. S. R.-U. K.-Fr., 60 Stat. 1649, T. I. A. S. No. 1520. The United States was therefore answerable to its Allies for all activities occurring there. Cf. *Hirota v. MacArthur*, 338 U. S. 197, 198 (1948) (*per curiam*) (military tribunal set up by Gen. Douglas MacArthur, acting as “the agent of the Allied Powers,” was not a “tribunal of the United States”). The

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Allies had not planned a long-term occupation of Germany, nor did they intend to displace all German institutions even during the period of occupation. See Agreements Respecting Basic Principles for Merger of the Three Western German Zones of Occupation, and Other Matters, Apr. 8, 1949, U. S.-U. K.-Fr., Art. 1, 63 Stat. 2819, T. I. A. S. No. 2066 (establishing a governing framework “[d]uring the period in which it is necessary that the occupation continue” and expressing the desire “that the German people shall enjoy self-government to the maximum possible degree consistent with such occupation”). The Court’s holding in *Eisenrager* was thus consistent with the Insular Cases, where it had held there was no need to extend full constitutional protections to territories the United States did not intend to govern indefinitely. Guantanamo Bay, on the other hand, is no transient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States. See *Rasul*, 542 U. S., at 480; *id.*, at 487 (KENNEDY, J., concurring in judgment).

As to the third factor, we recognize, as the Court did in *Eisenrager*, that there are costs to holding the Suspension Clause applicable in a case of military detention abroad. Habeas corpus proceedings may require expenditure of funds by the Government and may divert the attention of military personnel from other pressing tasks. While we are sensitive to these concerns, we do not find them dispositive. Compliance with any judicial process requires some incremental expenditure of resources. Yet civilian courts and the Armed Forces have functioned along side each other at various points in our history. See, e.g., *Duncan v. Kahanamoku*, 327 U. S. 304 (1946); *Ex parte Milligan*, 4 Wall. 2 (1866). The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees’ claims. And in light of

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the plenary control the United States asserts over the base, none are apparent to us.

The situation in *Eisentrager* was far different, given the historical context and nature of the military's mission in post-War Germany. When hostilities in the European Theater came to an end, the United States became responsible for an occupation zone encompassing over 57,000 square miles with a population of 18 million. See Letter from President Truman to Secretary of State Byrnes, (Nov. 28, 1945), in 8 Documents on American Foreign Relations 257 (R. Dennett & R. Turner eds. 1948); Pollock, A Territorial Pattern for the Military Occupation of Germany, 38 Am. Pol. Sci. Rev. 970, 975 (1944). In addition to supervising massive reconstruction and aid efforts the American forces stationed in Germany faced potential security threats from a defeated enemy. In retrospect the post-War occupation may seem uneventful. But at the time *Eisentrager* was decided, the Court was right to be concerned about judicial interference with the military's efforts to contain "enemy elements, guerilla fighters, and 'were-wolves.'" 339 U. S., at 784.

Similar threats are not apparent here; nor does the Government argue that they are. The United States Naval Station at Guantanamo Bay consists of 45 square miles of land and water. The base has been used, at various points, to house migrants and refugees temporarily. At present, however, other than the detainees themselves, the only long-term residents are American military personnel, their families, and a small number of workers. See History of Guantanamo Bay online at <https://www.cnic.navy.mil/Guantanamo/AboutGTMO/gtmohistorygeneral/gtmohistgeneral>. The detainees have been deemed enemies of the United States. At present, dangerous as they may be if released, they are contained in a secure prison facility located on an isolated and heavily fortified military base.

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There is no indication, furthermore, that adjudicating a habeas corpus petition would cause friction with the host government. No Cuban court has jurisdiction over American military personnel at Guantanamo or the enemy combatants detained there. While obligated to abide by the terms of the lease, the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base. Were that not the case, or if the detention facility were located in an active theater of war, arguments that issuing the writ would be “impracticable or anomalous” would have more weight. See *Reid*, 354 U. S., at 74 (Harlan, J., concurring in result). Under the facts presented here, however, there are few practical barriers to the running of the writ. To the extent barriers arise, habeas corpus procedures likely can be modified to address them. See Part VI–B, *infra*.

It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest wars in American history. See *Oxford Companion to American Military History* 849 (1999). The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government. Under these circumstances the lack of a precedent on point is no barrier to our holding.

We hold that Art. I, §9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause. Cf. *Hamdi*, 542 U. S., at 564 (SCALIA, J., dissenting) (“[I]ndefinite imprisonment on

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reasonable suspicion is not an available option of treatment for those accused of aiding the enemy, absent a suspension of the writ”). This Court may not impose a *de facto* suspension by abstaining from these controversies. See *Hamdan*, 548 U. S., at 585, n. 16 (“[A]bstention is not appropriate in cases . . . in which the legal challenge ‘turn[s] on the status of the persons as to whom the military asserted its power’” (quoting *Schlesinger v. Councilman*, 420 U. S. 738, 759 (1975))). The MCA does not purport to be a formal suspension of the writ; and the Government, in its submissions to us, has not argued that it is. Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention.

V

In light of this holding the question becomes whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus. The Government submits there has been compliance with the Suspension Clause because the DTA review process in the Court of Appeals, see DTA §1005(e), provides an adequate substitute. Congress has granted that court jurisdiction to consider

“(i) whether the status determination of the [CSRT] . . . was consistent with the standards and procedures specified by the Secretary of Defense . . . and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.” §1005(e)(2)(C), 119 Stat. 2742.

The Court of Appeals, having decided that the writ does not run to the detainees in any event, found it unnecessary to consider whether an adequate substitute has been

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provided. In the ordinary course we would remand to the Court of Appeals to consider this question in the first instance. See *Youakim v. Miller*, 425 U. S. 231, 234 (1976) (*per curiam*). It is well settled, however, that the Court's practice of declining to address issues left unresolved in earlier proceedings is not an inflexible rule. *Ibid.* Departure from the rule is appropriate in "exceptional" circumstances. See *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U. S. 157, 169 (2004); *Duignan v. United States*, 274 U. S. 195, 200 (1927).

The gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional. The parties before us have addressed the adequacy issue. While we would have found it informative to consider the reasoning of the Court of Appeals on this point, we must weigh that against the harms petitioners may endure from additional delay. And, given there are few precedents addressing what features an adequate substitute for habeas corpus must contain, in all likelihood a remand simply would delay ultimate resolution of the issue by this Court.

We do have the benefit of the Court of Appeals' construction of key provisions of the DTA. When we granted certiorari in these cases, we noted "it would be of material assistance to consult any decision" in the parallel DTA review proceedings pending in the Court of Appeals, specifically any rulings in the matter of *Bismullah v. Gates*. 551 U. S. ____ (2007). Although the Court of Appeals has yet to complete a DTA review proceeding, the three-judge panel in *Bismullah* has issued an interim order giving guidance as to what evidence can be made part of the record on review and what access the detainees can have to counsel and to classified information. See 501 F. 3d 178 (CA DC) (*Bismullah I*), reh'g denied, 503 F. 3d 137 (CA DC 2007) (*Bismullah II*). In that matter the full court denied

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the Government's motion for rehearing en banc, see *Bismullah v. Gates*, 514 F. 3d 1291 (CADDC 2008) (*Bismullah III*). The order denying rehearing was accompanied by five separate statements from members of the court, which offer differing views as to scope of the judicial review Congress intended these detainees to have. *Ibid*.

Under the circumstances we believe the costs of further delay substantially outweigh any benefits of remanding to the Court of Appeals to consider the issue it did not address in these cases.

A

Our case law does not contain extensive discussion of standards defining suspension of the writ or of circumstances under which suspension has occurred. This simply confirms the care Congress has taken throughout our Nation's history to preserve the writ and its function. Indeed, most of the major legislative enactments pertaining to habeas corpus have acted not to contract the writ's protection but to expand it or to hasten resolution of prisoners' claims. See, e.g., Habeas Corpus Act of 1867, ch. 28, §1, 14 Stat. 385 (current version codified at 28 U. S. C. §2241 (2000 ed. and Supp. V) (extending the federal writ to state prisoners)); Cf. *Harris v. Nelson*, 394 U. S. 286, 299–300 (1969) (interpreting the All Writs Act, 28 U. S. C. §1651, to allow discovery in habeas corpus proceedings); *Peyton v. Rowe*, 391 U. S. 54, 64–65 (1968) (interpreting the then-existing version of §2241 to allow petitioner to proceed with his habeas corpus action, even though he had not yet begun to serve his sentence).

There are exceptions, of course. Title I of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), §106, 110 Stat. 1220, contains certain gatekeeping provisions that restrict a prisoner's ability to bring new and repetitive claims in "second or successive" habeas corpus actions. We upheld these provisions against a Suspension

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Clause challenge in *Felker v. Turpin*, 518 U. S. 651, 662–664 (1996). The provisions at issue in *Felker*, however, did not constitute a substantial departure from common-law habeas procedures. The provisions, for the most part, codified the longstanding abuse-of-the-writ doctrine. *Id.*, at 664; see also *McCleskey v. Zant*, 499 U. S. 467, 489 (1991). AEDPA applies, moreover, to federal, postconviction review after criminal proceedings in state court have taken place. As of this point, cases discussing the implementation of that statute give little helpful instruction (save perhaps by contrast) for the instant cases, where no trial has been held.

The two leading cases addressing habeas substitutes, *Swain v. Pressley*, 430 U. S. 372 (1977), and *United States v. Hayman*, 342 U. S. 205 (1952), likewise provide little guidance here. The statutes at issue were attempts to streamline habeas corpus relief, not to cut it back.

The statute discussed in *Hayman* was 28 U. S. C. §2255. It replaced traditional habeas corpus for federal prisoners (at least in the first instance) with a process that allowed the prisoner to file a motion with the sentencing court on the ground that his sentence was, *inter alia*, “imposed in violation of the Constitution or laws of the United States.” 342 U. S., at 207, n. 1. The purpose and effect of the statute was not to restrict access to the writ but to make postconviction proceedings more efficient. It directed claims not to the court that had territorial jurisdiction over the place of the petitioner’s confinement but to the sentencing court, a court already familiar with the facts of the case. As the *Hayman* Court explained

“Section 2255 . . . was passed at the instance of the Judicial Conference to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts. Nowhere in the history of Section 2255 do we find any purpose to impinge

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upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum." *Id.*, at 219.

See also *Hill v. United States*, 368 U. S. 424, 427, 428, and n. 5 (1962) (noting that §2255 provides a remedy in the sentencing court that is "exactly commensurate" with the pre-existing federal habeas corpus remedy).

The statute in *Swain*, D. C. Code Ann. §23-110(g) (1973), applied to prisoners in custody under sentence of the Superior Court of the District of Columbia. Before enactment of the District of Columbia Court Reform and Criminal Procedure Act of 1970 (D. C. Court Reform Act), 84 Stat. 473, those prisoners could file habeas petitions in the United States District Court for the District of Columbia. The Act, which was patterned on §2255, substituted a new collateral process in the Superior Court for the pre-existing habeas corpus procedure in the District Court. See *Swain*, 430 U. S., at 374-378. But, again, the purpose and effect of the statute was to expedite consideration of the prisoner's claims, not to delay or frustrate it. See *id.*, at 375, n. 4 (noting that the purpose of the D. C. Court Reform Act was to "alleviate" administrative burdens on the District Court).

That the statutes in *Hayman* and *Swain* were designed to strengthen, rather than dilute, the writ's protections was evident, furthermore, from this significant fact: Neither statute eliminated traditional habeas corpus relief. In both cases the statute at issue had a saving clause, providing that a writ of habeas corpus would be available if the alternative process proved inadequate or ineffective. *Swain, supra*, at 381; *Hayman, supra*, at 223. The Court placed explicit reliance upon these provisions in upholding the statutes against constitutional challenges. See *Swain*,

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supra, at 381 (noting that the provision “avoid[ed] any serious question about the constitutionality of the statute”); *Hayman, supra*, at 223 (noting that, because habeas remained available as a last resort, it was unnecessary to “reach constitutional questions”).

Unlike in *Hayman* and *Swain*, here we confront statutes, the DTA and the MCA, that were intended to circumscribe habeas review. Congress’ purpose is evident not only from the unequivocal nature of MCA §7’s jurisdiction-stripping language, 28 U. S. C. A. §2241(e)(1) (Supp. 2007) (“No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus . . .”), but also from a comparison of the DTA to the statutes at issue in *Hayman* and *Swain*. When interpreting a statute, we examine related provisions in other parts of the U. S. Code. See, e.g., *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U. S. 83, 88–97 (1991); *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 717–718 (1995) (SCALIA, J., dissenting); see generally W. Eskridge, P. Frickey, & E. Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 1039 (3d ed. 2001). When Congress has intended to replace traditional habeas corpus with habeas-like substitutes, as was the case in *Hayman* and *Swain*, it has granted to the courts broad remedial powers to secure the historic office of the writ. In the §2255 context, for example, Congress has granted to the reviewing court power to “determine the issues and make findings of fact and conclusions of law” with respect to whether “the judgment [of conviction] was rendered without jurisdiction, or . . . the sentence imposed was not authorized by law or otherwise open to collateral attack.” 28 U. S. C. A. §2255(b) (Supp. 2008). The D. C. Court Reform Act, the statute upheld in *Swain*, contained a similar provision. §23–110(g), 84 Stat. 609.

In contrast the DTA’s jurisdictional grant is quite lim-

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ited. The Court of Appeals has jurisdiction not to inquire into the legality of the detention generally but only to assess whether the CSRT complied with the “standards and procedures specified by the Secretary of Defense” and whether those standards and procedures are lawful. DTA §1005(e)(2)(C), 119 Stat. 2742. If Congress had envisioned DTA review as coextensive with traditional habeas corpus, it would not have drafted the statute in this manner. Instead, it would have used language similar to what it used in the statutes at issue in *Hayman* and *Swain*. Cf. *Russello v. United States*, 464 U. S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion” (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (CA5 1972))). Unlike in *Hayman* and *Swain*, moreover, there has been no effort to preserve habeas corpus review as an avenue of last resort. No saving clause exists in either the MCA or the DTA. And MCA §7 eliminates habeas review for these petitioners.

The differences between the DTA and the habeas statute that would govern in MCA §7’s absence, 28 U. S. C. §2241 (2000 ed. and Supp. V), are likewise telling. In §2241 (2000 ed.) Congress confirmed the authority of “any justice” or “circuit judge” to issue the writ. Cf. *Felker*, 518 U. S., at 660–661 (interpreting Title I of AEDPA to not strip from this Court the power to entertain original habeas corpus petitions). That statute accommodates the necessity for factfinding that will arise in some cases by allowing the appellate judge or Justice to transfer the case to a district court of competent jurisdiction, whose institutional capacity for factfinding is superior to his or her own. See 28 U. S. C. §2241(b). By granting the Court of Appeals “exclusive” jurisdiction over petitioners’ cases, see DTA §1005(e)(2)(A), 119 Stat. 2742, Congress has fore-

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closed that option. This choice indicates Congress intended the Court of Appeals to have a more limited role in enemy combatant status determinations than a district court has in habeas corpus proceedings. The DTA should be interpreted to accord some latitude to the Court of Appeals to fashion procedures necessary to make its review function a meaningful one, but, if congressional intent is to be respected, the procedures adopted cannot be as extensive or as protective of the rights of the detainees as they would be in a §2241 proceeding. Otherwise there would have been no, or very little, purpose for enacting the DTA.

To the extent any doubt remains about Congress' intent, the legislative history confirms what the plain text strongly suggests: In passing the DTA Congress did not intend to create a process that differs from traditional habeas corpus process in name only. It intended to create a more limited procedure. See, *e.g.*, 151 Cong. Rec. S14263 (Dec. 21, 2005) (statement of Sen. Graham) (noting that the DTA “extinguish[es] these habeas and other actions in order to effect a transfer of jurisdiction over these cases to the DC Circuit Court” and agreeing that the bill “create[s] in their place a very limited judicial review of certain military administrative decisions”); *id.*, at S14268 (statement of Sen. Kyl) (“It is important to note that the limited judicial review authorized by paragraphs 2 and 3 of subsection (e) [of DTA §1005] are not habeas-corpus review. It is a limited judicial review of its own nature”).

It is against this background that we must interpret the DTA and assess its adequacy as a substitute for habeas corpus. The present cases thus test the limits of the Suspension Clause in ways that *Hayman* and *Swain* did not.

B

We do not endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas

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corpus. We do consider it uncontroversial, however, that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to “the erroneous application or interpretation” of relevant law. *St. Cyr*, 533 U. S., at 302. And the habeas court must have the power to order the conditional release of an individual unlawfully detained—though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted. See *Ex parte Bollman*, 4 Cranch 75, 136 (1807) (where imprisonment is unlawful, the court “can only direct [the prisoner] to be discharged”); R. Hurd, *Treatise on the Right of Personal Liberty, and On the Writ of Habeas Corpus and the Practice Connected with It: With a View of the Law of Extradition of Fugitives* 222 (2d ed. 1876) (“It cannot be denied where ‘a probable ground is shown that the party is imprisoned without just cause, and therefore, hath a right to be delivered,’ for the writ then becomes a ‘writ of right, which may not be denied but ought to be granted to every man that is committed or detained in prison or otherwise restrained of his liberty’”). But see *Chessman v. Teets*, 354 U. S. 156, 165–166 (1957) (remanding in a habeas case for retrial within a “reasonable time”). These are the easily identified attributes of any constitutionally adequate habeas corpus proceeding. But, depending on the circumstances, more may be required.

Indeed, common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances. See 3 Blackstone *131 (describing habeas as “the great and efficacious writ, in all manner of illegal confinement”); see also *Schlup v. Delo*, 513 U. S. 298, 319 (1995) (Habeas “is, at its core, an equitable remedy”); *Jones v. Cunningham*, 371 U. S. 236, 243 (1963) (Habeas is not “a static, narrow, formalistic remedy; its scope has grown to achieve its

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grand purpose”). It appears the common-law habeas court’s role was most extensive in cases of pretrial and noncriminal detention, where there had been little or no previous judicial review of the cause for detention. Notably, the black-letter rule that prisoners could not controvert facts in the jailer’s return was not followed (or at least not with consistency) in such cases. Hurd, *supra*, at 271 (noting that the general rule was “subject to exceptions” including cases of bail and impressment); Oakes, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 457 (1966) (“[W]hen a prisoner applied for habeas corpus before indictment or trial, some courts examined the written depositions on which he had been arrested or committed, and others even heard oral testimony to determine whether the evidence was sufficient to justify holding him for trial” (footnotes omitted)); Fallon & Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2102 (2007) (“[T]he early practice was not consistent: courts occasionally permitted factual inquiries when no other opportunity for judicial review existed”).

There is evidence from 19th-century American sources indicating that, even in States that accorded strong res judicata effect to prior adjudications, habeas courts in this country routinely allowed prisoners to introduce exculpatory evidence that was either unknown or previously unavailable to the prisoner. See, e.g., *Ex parte Pattison*, 56 Miss. 161, 164 (1878) (noting that “[w]hile the former adjudication must be considered as conclusive on the testimony then adduced” “newly developed exculpatory evidence . . . may authorize the admission to bail”); *Ex parte Foster*, 5 Tex. Ct. App. 625, 644 (1879) (construing the State’s habeas statute to allow for the introduction of new evidence “where important testimony has been obtained, which, though not newly discovered, or which, though known to [the petitioner], it was not in his power

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to produce at the former hearing; [and] where the evidence was newly discovered”); *People v. Martin*, 7 N. Y. Leg. Obs. 49, 56 (1848) (“If in custody on criminal process before indictment, the prisoner has an absolute right to demand that the original depositions be looked into to see whether any crime is in fact imputed to him, and the inquiry will by no means be confined to the return. Facts out of the return may be gone into to ascertain whether the committing magistrate may not have arrived at an illogical conclusion upon the evidence given before him . . .”); see generally W. Church, *Treatise on the Writ of Habeas Corpus* §182, p. 235 (1886) (hereinafter Church) (noting that habeas courts would “hear evidence anew if justice require it”). Justice McLean, on Circuit in 1855, expressed his view that a habeas court should consider a prior judgment conclusive “where there was clearly jurisdiction and a full and fair hearing; but that it might not be so considered when any of these requisites were wanting.” *Ex parte Robinson*, 20 F. Cas. 969, 971, (No. 11,935) (CC Ohio 1855). To illustrate the circumstances in which the prior adjudication did not bind the habeas court, he gave the example of a case in which “[s]everal unimpeached witnesses” provided new evidence to exculpate the prisoner. *Ibid.*

The idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context. See *Mathews v. Eldridge*, 424 U. S. 319, 335 (1976) (noting that the Due Process Clause requires an assessment of, *inter alia*, “the risk of an erroneous deprivation of [a liberty interest;] and the probable value, if any, of additional or substitute procedural safeguards”). This principle has an established foundation in habeas corpus jurisprudence as well, as Chief Justice Marshall’s opinion in *Ex parte Watkins*, 3 Pet. 193 (1830), demonstrates. Like the petitioner in *Swain*, Watkins sought a

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writ of habeas corpus after being imprisoned pursuant to a judgment of a District of Columbia court. In holding that the judgment stood on “high ground,” 3 Pet., at 209, the Chief Justice emphasized the character of the court that rendered the original judgment, noting it was a “court of record, having general jurisdiction over criminal cases.” *Id.*, at 203. In contrast to “inferior” tribunals of limited jurisdiction, *ibid.*, courts of record had broad remedial powers, which gave the habeas court greater confidence in the judgment’s validity. See generally Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 982–983 (1998).

Accordingly, where relief is sought from a sentence that resulted from the judgment of a court of record, as was the case in *Watkins* and indeed in most federal habeas cases, considerable deference is owed to the court that ordered confinement. See *Brown v. Allen*, 344 U. S. 443, 506 (1953) (opinion of Frankfurter, J.) (noting that a federal habeas court should accept a state court’s factual findings unless “a vital flaw be found in the process of ascertaining such facts in the State court”). Likewise in those cases the prisoner should exhaust adequate alternative remedies before filing for the writ in federal court. See *Ex parte Royall*, 117 U. S. 241, 251–252 (1886) (requiring exhaustion of state collateral processes). Both aspects of federal habeas corpus review are justified because it can be assumed that, in the usual course, a court of record provides defendants with a fair, adversary proceeding. In cases involving state convictions this framework also respects federalism; and in federal cases it has added justification because the prisoner already has had a chance to seek review of his conviction in a federal forum through a direct appeal. The present cases fall outside these categories, however; for here the detention is by executive order.

Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the

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need for collateral review is most pressing. A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures. In this context the need for habeas corpus is more urgent. The intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry. Habeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order. But the writ must be effective. The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain.

To determine the necessary scope of habeas corpus review, therefore, we must assess the CSRT process, the mechanism through which petitioners' designation as enemy combatants became final. Whether one characterizes the CSRT process as direct review of the Executive's battlefield determination that the detainee is an enemy combatant—as the parties have and as we do—or as the first step in the collateral review of a battlefield determination makes no difference in a proper analysis of whether the procedures Congress put in place are an adequate substitute for habeas corpus. What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral.

Petitioners identify what they see as myriad deficiencies in the CSRTs. The most relevant for our purposes are the constraints upon the detainee's ability to rebut the factual basis for the Government's assertion that he is an enemy combatant. As already noted, see Part IV–C, *supra*, at the CSRT stage the detainee has limited means to find or present evidence to challenge the Government's case against him. He does not have the assistance of counsel and may not be aware of the most critical allegations that

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the Government relied upon to order his detention. See App. to Pet. for Cert. in No. 06–1196, at 156, ¶F(8) (noting that the detainee can access only the “unclassified portion of the Government Information”). The detainee can confront witnesses that testify during the CSRT proceedings. *Id.*, at 144, ¶g(8). But given that there are in effect no limits on the admission of hearsay evidence—the only requirement is that the tribunal deem the evidence “relevant and helpful,” *ibid.*, ¶g(9)—the detainee’s opportunity to question witnesses is likely to be more theoretical than real.

The Government defends the CSRT process, arguing that it was designed to conform to the procedures suggested by the plurality in *Hamdi*. See 542 U. S., at 538. Setting aside the fact that the relevant language in *Hamdi* did not garner a majority of the Court, it does not control the matter at hand. None of the parties in *Hamdi* argued there had been a suspension of the writ. Nor could they. The §2241 habeas corpus process remained in place, *id.*, at 525. Accordingly, the plurality concentrated on whether the Executive had the authority to detain and, if so, what rights the detainee had under the Due Process Clause. True, there are places in the *Hamdi* plurality opinion where it is difficult to tell where its extrapolation of §2241 ends and its analysis of the petitioner’s Due Process rights begins. But the Court had no occasion to define the necessary scope of habeas review, for Suspension Clause purposes, in the context of enemy combatant detentions. The closest the plurality came to doing so was in discussing whether, in light of separation-of-powers concerns, §2241 should be construed to forbid the District Court from inquiring beyond the affidavit Hamdi’s custodian provided in answer to the detainee’s habeas petition. The plurality answered this question with an emphatic “no.” *Id.*, at 527 (labeling this argument as “extreme”); *id.*, at 535–536.

Even if we were to assume that the CSRTs satisfy due

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process standards, it would not end our inquiry. Habeas corpus is a collateral process that exists, in Justice Holmes' words, to "cu[t] through all forms and g[o] to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell." *Frank v. Mangum*, 237 U. S. 309, 346 (1915) (dissenting opinion). Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant. See 2 Chambers, *Course of Lectures on English Law 1767–1773*, at 6 ("Liberty may be violated either by arbitrary *imprisonment* without law or the appearance of law, or by a lawful magistrate for an unlawful reason"). This is so, as *Hayman* and *Swain* make clear, even where the prisoner is detained after a criminal trial conducted in full accordance with the protections of the Bill of Rights. Were this not the case, there would have been no reason for the Court to inquire into the adequacy of substitute habeas procedures in *Hayman* and *Swain*. That the prisoners were detained pursuant to the most rigorous proceedings imaginable, a full criminal trial, would have been enough to render any habeas substitute acceptable *per se*.

Although we make no judgment as to whether the CSRTs, as currently constituted, satisfy due process standards, we agree with petitioners that, even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact. This is a risk inherent in any process that, in the words of the former Chief Judge of the Court of Appeals, is "closed and accusatorial." See *Bismullah III*, 514 F. 3d, at 1296 (Ginsburg, C. J., concurring in denial of rehearing en banc). And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this

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is a risk too significant to ignore.

For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings. This includes some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. Federal habeas petitioners long have had the means to supplement the record on review, even in the postconviction habeas setting. See *Townsend v. Sain*, 372 U. S. 293, 313 (1963), overruled in part by *Keeney v. Tamayo-Reyes*, 504 U. S. 1, 5 (1992). Here that opportunity is constitutionally required.

Consistent with the historic function and province of the writ, habeas corpus review may be more circumscribed if the underlying detention proceedings are more thorough than they were here. In two habeas cases involving enemy aliens tried for war crimes, *In re Yamashita*, 327 U. S. 1 (1946), and *Ex parte Quirin*, 317 U. S. 1 (1942), for example, this Court limited its review to determining whether the Executive had legal authority to try the petitioners by military commission. See *Yamashita, supra*, at 8 (“[O]n application for habeas corpus we are not concerned with the guilt or innocence of the petitioners. We consider here only the lawful power of the commission to try the petitioner for the offense charged”); *Quirin, supra*, at 25 (“We are not here concerned with any question of the guilt or innocence of petitioners”). Military courts are not courts of record. See *Watkins*, 3 Pet., at 209; Church 513. And the procedures used to try General Yamashita have been sharply criticized by Members of this Court. See *Hamdan*, 548 U. S., at 617; *Yamashita, supra*, at 41–81 (Rutledge, J., dissenting). We need not revisit these cases, however.

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For on their own terms, the proceedings in *Yamashita* and *Quirin*, like those in *Eisentrager*, had an adversarial structure that is lacking here. See *Yamashita, supra*, at 5 (noting that General Yamashita was represented by six military lawyers and that “[t]hroughout the proceedings . . . defense counsel . . . demonstrated their professional skill and resourcefulness and their proper zeal for the defense with which they were charged”); *Quirin, supra*, at 23–24; Exec. Order No. 9185, 7 Fed. Reg. 5103 (1942) (appointing counsel to represent the German saboteurs).

The extent of the showing required of the Government in these cases is a matter to be determined. We need not explore it further at this stage. We do hold that when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner’s release.

C

We now consider whether the DTA allows the Court of Appeals to conduct a proceeding meeting these standards. “[W]e are obligated to construe the statute to avoid [constitutional] problems” if it is “fairly possible” to do so. *St. Cyr*, 533 U. S., at 299–300 (quoting *Crowell v. Benson*, 285 U. S. 22, 62 (1932)). There are limits to this principle, however. The canon of constitutional avoidance does not supplant traditional modes of statutory interpretation. See *Clark v. Martinez*, 543 U. S. 371, 385 (2005) (“The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means of choosing between them*”). We cannot ignore the text and purpose of a statute in order to save it.

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The DTA does not explicitly empower the Court of Appeals to order the applicant in a DTA review proceeding released should the court find that the standards and procedures used at his CSRT hearing were insufficient to justify detention. This is troubling. Yet, for present purposes, we can assume congressional silence permits a constitutionally required remedy. In that case it would be possible to hold that a remedy of release is impliedly provided for. The DTA might be read, furthermore, to allow the petitioners to assert most, if not all, of the legal claims they seek to advance, including their most basic claim: that the President has no authority under the AUMF to detain them indefinitely. (Whether the President has such authority turns on whether the AUMF authorizes—and the Constitution permits—the indefinite detention of “enemy combatants” as the Department of Defense defines that term. Thus a challenge to the President’s authority to detain is, in essence, a challenge to the Department’s definition of enemy combatant, a “standard” used by the CSRTs in petitioners’ cases.) At oral argument, the Solicitor General urged us to adopt both these constructions, if doing so would allow MCA §7 to remain intact. See Tr. of Oral Arg. 37, 53.

The absence of a release remedy and specific language allowing AUMF challenges are not the only constitutional infirmities from which the statute potentially suffers, however. The more difficult question is whether the DTA permits the Court of Appeals to make requisite findings of fact. The DTA enables petitioners to request “review” of their CSRT determination in the Court of Appeals, DTA §1005(e)(2)(B)(i), 119 Stat. 2742; but the “Scope of Review” provision confines the Court of Appeals’ role to reviewing whether the CSRT followed the “standards and procedures” issued by the Department of Defense and assessing whether those “standards and procedures” are lawful. §1005(e)(C), *ibid.* Among these standards is “the require-

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ment that the conclusion of the Tribunal be supported by a preponderance of the evidence . . . allowing a rebuttable presumption in favor of the Government's evidence." §1005(e)(C)(i), *ibid.*

Assuming the DTA can be construed to allow the Court of Appeals to review or correct the CSRT's factual determinations, as opposed to merely certifying that the tribunal applied the correct standard of proof, we see no way to construe the statute to allow what is also constitutionally required in this context: an opportunity for the detainee to present relevant exculpatory evidence that was not made part of the record in the earlier proceedings.

On its face the statute allows the Court of Appeals to consider no evidence outside the CSRT record. In the parallel litigation, however, the Court of Appeals determined that the DTA allows it to order the production of all "reasonably available information in the possession of the U. S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant," regardless of whether this evidence was put before the CSRT. See *Bismullah I*, 501 F. 3d, at 180. The Government, see Pet. for Cert. pending in *Gates v. Bismullah*, No. 07–1054 (hereinafter *Bismullah Pet.*), with support from five members of the Court of Appeals, see *Bismullah III*, 514 F. 3d, at 1299 (Henderson, J., dissenting from denial of rehearing en banc); *id.*, at 1302 (opinion of Randolph, J.) (same); *id.*, at 1306 (opinion of Brown, J.) (same), disagrees with this interpretation. For present purposes, however, we can assume that the Court of Appeals was correct that the DTA allows introduction and consideration of relevant exculpatory evidence that was "reasonably available" to the Government at the time of the CSRT but not made part of the record. Even so, the DTA review proceeding falls short of being a constitutionally adequate substitute, for the detainee still would have no opportunity to present evidence discovered after the

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CSRT proceedings concluded.

Under the DTA the Court of Appeals has the power to review CSRT determinations by assessing the legality of standards and procedures. This implies the power to inquire into what happened at the CSRT hearing and, perhaps, to remedy certain deficiencies in that proceeding. But should the Court of Appeals determine that the CSRT followed appropriate and lawful standards and procedures, it will have reached the limits of its jurisdiction. There is no language in the DTA that can be construed to allow the Court of Appeals to admit and consider newly discovered evidence that could not have been made part of the CSRT record because it was unavailable to either the Government or the detainee when the CSRT made its findings. This evidence, however, may be critical to the detainee's argument that he is not an enemy combatant and there is no cause to detain him.

This is not a remote hypothetical. One of the petitioners, Mohamed Nechla, requested at his CSRT hearing that the Government contact his employer. The petitioner claimed the employer would corroborate Nechla's contention he had no affiliation with al Qaeda. Although the CSRT determined this testimony would be relevant, it also found the witness was not reasonably available to testify at the time of the hearing. Petitioner's counsel, however, now represents the witness is available to be heard. See Brief for Boumediene Petitioners 5. If a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court. Even under the Court of Appeals' generous construction of the DTA, however, the evidence identified by Nechla would be inadmissible in a DTA review proceeding. The role of an Article III court in the exercise of its habeas corpus function cannot be circumscribed in this manner.

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By foreclosing consideration of evidence not presented or reasonably available to the detainee at the CSRT proceedings, the DTA disadvantages the detainee by limiting the scope of collateral review to a record that may not be accurate or complete. In other contexts, *e.g.*, in post-trial habeas cases where the prisoner already has had a full and fair opportunity to develop the factual predicate of his claims, similar limitations on the scope of habeas review may be appropriate. See *Williams v. Taylor*, 529 U. S. 420, 436–437 (2000) (noting that §2254 “does not equate prisoners who exercise diligence in pursuing their claims with those who do not”). In this context, however, where the underlying detention proceedings lack the necessary adversarial character, the detainee cannot be held responsible for all deficiencies in the record.

The Government does not make the alternative argument that the DTA allows for the introduction of previously unavailable exculpatory evidence on appeal. It does point out, however, that if a detainee obtains such evidence, he can request that the Deputy Secretary of Defense convene a new CSRT. See Supp. Brief for Respondents 4. Whatever the merits of this procedure, it is an insufficient replacement for the factual review these detainees are entitled to receive through habeas corpus. The Deputy Secretary’s determination whether to initiate new proceedings is wholly a discretionary one. See Dept. of Defense, Office for the Administrative Review of the Detention of Enemy Combatants, Instruction 5421.1, Procedure for Review of “New Evidence” Relating to Enemy Combatant (EC) Status ¶5(d) (May 7, 2007) (Instruction 5421.1) (“The decision to convene a CSRT to reconsider the basis of the detainee’s [enemy combatant] status in light of ‘new evidence’ is a matter vested in the unreviewable discretion of the [Deputy Secretary of Defense]”). And we see no way to construe the DTA to allow a detainee to challenge the Deputy Secretary’s decision not to open a

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new CSRT pursuant to Instruction 5421.1. Congress directed the Secretary of Defense to devise procedures for considering new evidence, see DTA §1005(a)(3), but the detainee has no mechanism for ensuring that those procedures are followed. DTA §1005(e)(2)(C), 119 Stat. 2742, makes clear that the Court of Appeals' jurisdiction is "limited to consideration of . . . whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense . . . and . . . whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." DTA §1005(e)(2)(A), *ibid.*, further narrows the Court of Appeals' jurisdiction to reviewing "any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." The Deputy Secretary's determination whether to convene a new CSRT is not a "status determination of the Combatant Status Review Tribunal," much less a "final decision" of that body.

We do not imply DTA review would be a constitutionally sufficient replacement for habeas corpus but for these limitations on the detainee's ability to present exculpatory evidence. For even if it were possible, as a textual matter, to read into the statute each of the necessary procedures we have identified, we could not overlook the cumulative effect of our doing so. To hold that the detainees at Guantanamo may, under the DTA, challenge the President's legal authority to detain them, contest the CSRT's findings of fact, supplement the record on review with exculpatory evidence, and request an order of release would come close to reinstating the §2241 habeas corpus process Congress sought to deny them. The language of the statute, read in light of Congress' reasons for enacting it, cannot bear this interpretation. Petitioners have met their burden of establishing that the DTA review process

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is, on its face, an inadequate substitute for habeas corpus.

Although we do not hold that an adequate substitute must duplicate §2241 in all respects, it suffices that the Government has not established that the detainees' access to the statutory review provisions at issue is an adequate substitute for the writ of habeas corpus. MCA §7 thus effects an unconstitutional suspension of the writ. In view of our holding we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.

VI

A

In light of our conclusion that there is no jurisdictional bar to the District Court's entertaining petitioners' claims the question remains whether there are prudential barriers to habeas corpus review under these circumstances.

The Government argues petitioners must seek review of their CSRT determinations in the Court of Appeals before they can proceed with their habeas corpus actions in the District Court. As noted earlier, in other contexts and for prudential reasons this Court has required exhaustion of alternative remedies before a prisoner can seek federal habeas relief. Most of these cases were brought by prisoners in state custody, *e.g.*, *Ex parte Royall*, 117 U. S. 241, and thus involved federalism concerns that are not relevant here. But we have extended this rule to require defendants in courts-martial to exhaust their military appeals before proceeding with a federal habeas corpus action. See *Schlesinger*, 420 U. S., at 758.

The real risks, the real threats, of terrorist attacks are constant and not likely soon to abate. The ways to disrupt our life and laws are so many and unforeseen that the Court should not attempt even some general catalogue of crises that might occur. Certain principles are apparent, however. Practical considerations and exigent circum-

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stances inform the definition and reach of the law's writs, including habeas corpus. The cases and our tradition reflect this precept.

In cases involving foreign citizens detained abroad by the Executive, it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody. If and when habeas corpus jurisdiction applies, as it does in these cases, then proper deference can be accorded to reasonable procedures for screening and initial detention under lawful and proper conditions of confinement and treatment for a reasonable period of time. Domestic exigencies, furthermore, might also impose such onerous burdens on the Government that here, too, the Judicial Branch would be required to devise sensible rules for staying habeas corpus proceedings until the Government can comply with its requirements in a responsible way. Cf. *Ex parte Milligan*, 4 Wall., at 127 ("If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course"). Here, as is true with detainees apprehended abroad, a relevant consideration in determining the courts' role is whether there are suitable alternative processes in place to protect against the arbitrary exercise of governmental power.

The cases before us, however, do not involve detainees who have been held for a short period of time while awaiting their CSRT determinations. Were that the case, or were it probable that the Court of Appeals could complete a prompt review of their applications, the case for requir-

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ing temporary abstention or exhaustion of alternative remedies would be much stronger. These qualifications no longer pertain here. In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands. And there has been no showing that the Executive faces such onerous burdens that it cannot respond to habeas corpus actions. To require these detainees to complete DTA review before proceeding with their habeas corpus actions would be to require additional months, if not years, of delay. The first DTA review applications were filed over a year ago, but no decisions on the merits have been issued. While some delay in fashioning new procedures is unavoidable, the costs of delay can no longer be borne by those who are held in custody. The detainees in these cases are entitled to a prompt habeas corpus hearing.

Our decision today holds only that the petitioners before us are entitled to seek the writ; that the DTA review procedures are an inadequate substitute for habeas corpus; and that the petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court. The only law we identify as unconstitutional is MCA §7, 28 U. S. C. A. §2241(e) (Supp. 2007). Accordingly, both the DTA and the CSRT process remain intact. Our holding with regard to exhaustion should not be read to imply that a habeas court should intervene the moment an enemy combatant steps foot in a territory where the writ runs. The Executive is entitled to a reasonable period of time to determine a detainee's status before a court entertains that detainee's habeas corpus petition. The CSRT process is the mechanism Congress and the President set up to deal with these issues. Except in cases of undue delay, federal courts should refrain from entertaining an enemy combatant's habeas corpus petition at least until after the Department, acting via the CSRT, has had a chance to

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review his status.

B

Although we hold that the DTA is not an adequate and effective substitute for habeas corpus, it does not follow that a habeas corpus court may disregard the dangers the detention in these cases was intended to prevent. *Felker*, *Swain*, and *Hayman* stand for the proposition that the Suspension Clause does not resist innovation in the field of habeas corpus. Certain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ.

In the DTA Congress sought to consolidate review of petitioners' claims in the Court of Appeals. Channeling future cases to one district court would no doubt reduce administrative burdens on the Government. This is a legitimate objective that might be advanced even without an amendment to §2241. If, in a future case, a detainee files a habeas petition in another judicial district in which a proper respondent can be served, see *Rumsfeld v. Padilla*, 542 U. S. 426, 435–436 (2004), the Government can move for change of venue to the court that will hear these petitioners' cases, the United States District Court for the District of Columbia. See 28 U. S. C. §1404(a); *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U. S. 484, 499, n. 15 (1973).

Another of Congress' reasons for vesting exclusive jurisdiction in the Court of Appeals, perhaps, was to avoid the widespread dissemination of classified information. The Government has raised similar concerns here and elsewhere. See Brief for Respondents 55–56; *Bismullah* Pet. 30. We make no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees' habeas corpus proceedings. We recognize, however, that the Government has a legiti-

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mate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible. Cf. *United States v. Reynolds*, 345 U. S. 1, 10 (1953) (recognizing an evidentiary privilege in a civil damages case where “there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged”).

These and the other remaining questions are within the expertise and competence of the District Court to address in the first instance.

* * *

In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches. See *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 320 (1936). Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.

Officials charged with daily operational responsibility for our security may consider a judicial discourse on the history of the Habeas Corpus Act of 1679 and like matters to be far removed from the Nation’s present, urgent concerns. Established legal doctrine, however, must be consulted for its teaching. Remote in time it may be; irrelevant to the present it is not. Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom’s first principles. Chief among these are free-

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dom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.

Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.

Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. This result is not inevitable, however. The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism. Cf. *Hamdan*, 548 U. S., at 636 (BREYER, J., concurring) (“[J]udicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so”).

It bears repeating that our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined. We hold that peti-

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tioners may invoke the fundamental procedural protections of habeas corpus. The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.

The determination by the Court of Appeals that the Suspension Clause and its protections are inapplicable to petitioners was in error. The judgment of the Court of Appeals is reversed. The cases are remanded to the Court of Appeals with instructions that it remand the cases to the District Court for proceedings consistent with this opinion.

It is so ordered.

Speech

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**Remarks of Chief Justice William H. Rehnquist
100th Anniversary Celebration
Of the Norfolk and Portsmouth Bar Association
Norfolk, Virginia
May 3, 2000**

Thank you, Judge Doumar, for your kind introduction. I am very pleased to be here today to help celebrate the 100th anniversary of the founding of the Norfolk and Portsmouth Bar Association.

I am going to speak this afternoon about civil liberty in time of war, focusing first on the Civil War and then on World War II. I have chosen this subject in part because of the importance of the Civil War in this historic area.

Even those of you who did not major in history probably know that Abraham Lincoln was elected President in November of 1860, and was inaugurated as President on March 4, 1861. Between the time of his election and his inauguration, the seven states of the deep south -- South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas -- had seceded from the Union and elected Jefferson Davis as their President. For the first six weeks of Lincoln's administration, the cabinet debated what to do about the Union garrison at Fort Sumter, on an island in the harbor of Charleston, South Carolina. In mid-April, the Confederate shore batteries opened up on the fort, and the garrison surrendered the next day. Lincoln called for 75,000 volunteers to put down the rebellion, and the four states of the upper south -- Virginia, North Carolina, Tennessee, and Arkansas -- seceded and joined the original seven states of the Confederacy. The Civil War had begun.

As most of you already know, some of the more well-known Civil War events occurred in this area. Indeed, the Norfolk Navy Shipyard played an interesting role during the Civil War. The U. S. government had established the Norfolk Navy Shipyard in 1801. Its predecessor on the same site was a private shipyard built in 1767 by a wealthy Scottish merchant named Andrew Sprowle.

On April 20, 1861, Federal troops evacuated the Norfolk Navy Yard, and the Confederacy fell heir to the enormous amount of guns, and equipment that had been stored there. Before they evacuated the Navy Yard, however, Federal troops had deliberately sunk the USS "Merrimack" in hopes of preventing the Confederate troops from making use of it. The "Merrimack" had been a brand new steam frigate with the capacity to carry 40 guns and worth over one million two hundred thousand dollars (in 1861 dollars) fully equipped. Under the control of the Confederacy, the Norfolk Navy Yard salvaged and rebuilt the Confederate ironclad "Virginia" from the hull of the scuttled USS "Merrimack".

Accounts from the time state that the refurbished "Virginia", also still referred to by many as the "Merrimack", bore some resemblance to a huge terrapin, with a large round chimney about the middle of its back. The ship had a maximum speed of around five knots or five miles per hour, and it was not suitable to sail in either high winds or heavy seas. It also took over 30 minutes to turn the vessel. Thus the sole purpose of the ironclad "Virginia" was to guard the Norfolk harbor. The reconstruction of the "Virginia" by Confederate workers was completed on March 5, 1862.

The Confederacy generally intended to use the ironclad "Virginia" to guard the water route to Richmond from the coast via the James River. The vessel's first voyage away from the Norfolk Navy Yard occurred on March 8, 1862. On that day, the "Virginia" sank the federal ship "Cumberland" and burned the Union ship "Congress" off

Hampton Roads (which today is considered part of the Norfolk/Portsmouth/Hampton Roads metropolitan area). On March 9, 1862, the "Virginia" sailed out to complete the destruction of the federal ship "Minnesota", which had run aground after the previous day's encounter with the "Virginia". On this voyage, the "Virginia" met the USS "Monitor", also an experimental ironclad with a revolving turret amidship. The ensuing five-hour battle was the first naval engagement in history between ironclad vessels. Although the engagement resulted in a draw, the "Virginia" was nonetheless driven back to Norfolk for repairs. The James River remained closed, however, keeping the federal fleet in Hampton Roads and away from Richmond. In early May of 1862, Confederate soldiers burned the "Virginia" in order to keep her from falling back into the hands of Federal troops. The City of Norfolk and the Navy Yard were then recaptured by Federal troops on May 10 of 1862.

Let us now shift our focus to a city located on the northern border of the Commonwealth of Virginia. When the Civil War broke out, Washington, D.C. went from being an interior capital to a capital on the very frontier of the Union, exposed to possible raids and even investment and capture by the Confederate forces. President Lincoln, fully aware of this danger, was most anxious that the 75,000 volunteers for whom he had called would arrive in Washington and defend the city against a possible Confederate attack. Many would come from the northeast -- Boston, New York, and Philadelphia. But all of the rail connections from the northeast into Washington ran through the city of Baltimore, 40 miles to the northeast. Herein lay a problem; there were numerous Confederate sympathizers in Baltimore and the city itself, at that time, had a reputation for unruliness -- it was known as "Mob City." To complicate matters further, it was necessary for passengers enroute from the northeast to Washington to change stations in Baltimore.

Shortly after troops from the northeast began arriving in Baltimore on their way to Washington, a riot broke out while soldiers were in transit from one station to another. Some of the troops were riding in railroad cars drawn by horses through the downtown streets of the city, while others were marching in military formation through those same streets. A hostile crowd pelted the troops with stones. The troops in turn fired shots into the crowd. Several soldiers and several bystanders were killed.

That night, the chief of police of Baltimore, who was an avowed Confederate sympathizer, and the Mayor of Baltimore, who was a less open one, spearheaded a group of Confederate sympathizers who took matters into their own hands. They blew up the railroad bridges leading into Baltimore from the north. As a result troops bound for Washington to be sent on a circuitous journey by ship from a point on the Chesapeake Bay above Baltimore to Annapolis, from which they traveled to Washington by land.

In response to the situation in Baltimore, Lincoln, at the behest of his Secretary of State, William H. Seward, took the first step to curtail civil liberty -- he authorized General Winfield Scott, commander-in-chief of the Army, to suspend the writ of habeas corpus at any point he deemed necessary along the rail line from Philadelphia to Washington. Scott took full advantage of this authority, and several weeks later, federal troops arrested a man named Merryman, whom authorities suspected of being a major actor in the dynamiting of the railroad bridges. He was he confined in Fort McHenry, and immediately sued out a writ of habeas corpus.

The writ of habeas corpus is something that comes to us from English common law, and was the means by which one who was arrested or confined by governmental authority could ask a court to require the person holding him in custody to show cause why he was being held. The court would then decide whether there was sufficient reason to hold the person, and if there was not would order him set free. It has been rightly regarded as a safeguard against executive tyranny, and an essential safeguard to individual liberty. The United States Constitution provides that the writ of habeas corpus shall not be suspended, except when in time of war or rebellion the public safety shall require it.

The day after Merryman sought the writ, Chief Justice Roger Taney, who was sitting as a circuit judge in Baltimore, ordered the government to show cause why Merryman should not be released. A representative of

the commandant of Fort McHenry appeared in court for the government to advise Taney that the writ of habeas corpus had been suspended, and asked for time to consult with the government in Washington. Taney refused, and issued an arrest warrant for the commandant. The next day, the marshal reported that in his effort to serve the writ he had been denied admission to the fort. Taney then issued an opinion in the case declaring that the President alone did not have the authority to suspend the writ of habeas corpus -- only Congress could do that -- and holding that Merryman's confinement was illegal. The Chief Justice, knowing that he could not enforce his order, sent a copy of it to Lincoln.

Lincoln ignored the order, but in his address to the special session of Congress which he had called to meet on July 4, 1861, he adverted to it in these words:

"Must [the laws] be allowed to finally fail of execution even had it been perfectly clear that by the use of the means necessary to their execution some single law, made in such extreme tenderness of the citizen's liberty that practically it relieves more of the guilty than of the innocent, should to a very limited extent be violated? To state the question more directly, are all the laws but one to go unexecuted, and the government itself go to pieces less that one be violated?"

Lincoln, with his usual incisiveness, put his finger on the debate that inevitably surrounds issues of civil liberties in wartime. If the country itself is in mortal danger, must we enforce every provision safeguarding individual liberties even though to do so will endanger the very government which is created by the Constitution? The question of whether only Congress may suspend it has never been authoritatively answered to this day, but the Lincoln administration proceeded to arrest and detain persons suspected of disloyal activities, including the mayor of Baltimore and the chief of police.

Newspaper publishers did not escape the government's watchful eye during the Civil War either -- particularly the New York press, which had a disproportionate impact on the rest of the country. Newspapers in smaller cities frequently simply reprinted stories which had run earlier in the metropolitan press. In August 1861, a grand jury sitting in New York was outraged by an article in the New York Journal of Commerce -- a paper which opposed the war -- that listed over one hundred Northern newspapers opposed to "the present unholy war." Without hearing any evidence or receiving any legal instructions from the judge, the grand jury made a "presentment" as to five anti-war New York newspapers -- a written notice taken by a grand jury of what it believes to be an indictable offense.

On this thin reed, the administration proceeded to act. Postmaster General Montgomery Blair directed the Postmaster in New York to exclude from the mails the five newspapers named by the grand jury. Gerald Hallock, the part owner and editor of the Journal of Commerce, was obliged to negotiate with the Post Office Department to see what the paper would have to do to regain its right to use of the mails. The Post Office Department told him that he must sell his ownership in the newspaper. Hallock reluctantly agreed, and retired, thereby depriving the paper of its principal editorialist opposing the war.

The New York News, owned by Benjamin Wood, brother of New York Mayor Fernando Wood, decided to fight the ban against his paper. He sought to send its edition south and west by private express, and hired newsboys to deliver the paper locally. The government ordered U.S. Marshals to seize all copies of the paper. In fact one newsboy in Connecticut was arrested for having hawked it. Eventually, Wood, too, gave up. The other New York newspapers did not rally to the cause of the anti-war newspapers, shouting "First Amendment," as they surely would today. Quite the contrary, they gloated. James Gordon Bennett's Herald was "gratified" to report the death of the News, and the Times observed that Ben Wood should be thankful he could "walk in the streets."

Even clergy were subject to detention for perceived disloyalty. Perhaps the most egregious example was that of

the Reverend J. R. Stewart, the Episcopal rector at St. Paul's Church in Alexandria, Virginia, who was undoubtedly a southern sympathizer. For two Sundays in a row, he had omitted the customary Episcopal prayer for the President of the United States in the course of the service. On the second of these occasions, he was arrested in the pulpit of the church, and briefly detained until cooler heads prevailed.

As the Civil War drew to a close in 1864, there was considerable disaffection and war-weariness in what were called the states of the old northwest -- Ohio, Indiana, and Illinois. There was evidence of a conspiracy on the part of members of secret societies, such as the Knights of the Golden Circle and the Sons of Liberty, to assassinate the Governor of Indiana, free Confederate prisoners held near Chicago, and seize the federal arsenal at Rock Island, Illinois. These plans were thwarted when, in the summer of 1864, a cache of arms and incriminating correspondence was found in the Indianapolis home of the state commander of the "Sons of Liberty." Edwin Stanton, Lincoln's Secretary of War, decided that the suspects in this conspiracy should be tried, not in a regular civil court by a jury, but by a military commission, composed of senior army officers.

In so doing, he went a good deal further than simply suspending the writ of habeas corpus. Trial before such a commission would raise serious questions, for example, about denial of the right to jury trial guaranteed by the Bill of Rights. The suspects were duly tried before such a commission in Indianapolis, and several were sentenced to be hanged. They appealed to the Supreme Court, which in a case called Ex Parte Milligan decided in 1866 -- more than a year after the Civil War was over, by a vote of 5 to 4 that civilians not in the military -- and that is who these defendants were -- could not be tried by a military commission so long as the civil courts were open for business.

Here we have an illustration of an old maxim of Roman law -- *Inter Arma Silent Leges* -- which loosely translated means that in time of war the laws are silent. All during the Civil War the courts were unable or unwilling to ride herd on the Lincoln administration's policies which seriously interfered with civil liberty. Only after the end of the war was a decision handed down which upheld that liberty.

Let us now move forward to World War II. I am one of the few in this room old enough to remember back to the Japanese attack on Pearl Harbor on December 7, 1941. Since it began for the United States by Japan's attack on Pearl Harbor, and Hitler's declaration of war, there was strong support for the war effort across the political spectrum in this country. It was "the good war," as Studs Terkel calls it in his book. Fourteen million people were in the armed services; on the home front there were sacrifices, and slogans such as "Buy Bonds" and "A Slip of the Lip May Sink a Ship." Even restaurants got into the act, with the slogan "Food Will Win the War." On this sign at one restaurant, a customer scrawled "Yes, but how can we get the enemy to eat here"?

In June of 1942, six months after Pearl Harbor, Richard Quirin and seven other members of the German armed forces were secretly landed in the United States. They had been trained in the use of explosives and secret writing at a sabotage school near Berlin. Four of them were transported by German submarine to Amagansett Beach on Long Island, New York. They landed under cover of darkness in June 1942, carrying a supply of explosive and incendiary devices. At the moment of the landing they wore German uniforms, but immediately afterwards they buried their uniforms on the beach and went in civilian dress to New York city. The remaining four who had been trained at the sabotage school were taken by another German submarine to Ponte Vedra Beach, Florida. They went through the same procedures as those who landed on Long Island, and proceeded to Jacksonville in civilian dress. All were ultimately arrested by the FBI in New York or Chicago; all had been instructed to destroy war industries in the United States.

President Franklin Roosevelt appointed a military commission to try Quirin and his cohorts for offenses against the laws of war and the Articles of War enacted by Congress, and he directed that the defendants have no access to civil courts. While they were being tried by the military commission, which sentenced all of them to death, they petitioned the Supreme Court of the United States for review of the procedures under which they were

being tried. The Supreme court convened in a special term on July 29, 1942, to hear arguments in their case.

One of the principal arguments made by able counsel for the petitioners was that the civil courts throughout the United States were open at the time, there had been no invasion of any part of the country, and therefore under the Milligan case there could be no resort to trial by a military commission. Counsel noted that one of the petitioners, Herbert Haupt, had been born in the United States and was a United States citizen. At the conclusion of the arguments in the case, and after deliberation, the Court on July 31st announced its disposition of the case upholding the government's position, but its full opinion did not come down until October 1942. In that opinion the Court sharply cut back on the *dicta* in the *Milligan* case, saying that even though the civil courts were open, and even though it was assumed that one of the German soldiers was a United States citizen, these defendants could nonetheless properly be tried and sentenced to death by a court martial.

It is worth noting that this decision was made in the dark days of the summer of 1942, when the fortunes of war of the United States were just beginning to recover from their lowest ebb. The United States Navy had suffered serious damage to its fleet at Pearl Harbor, and Japanese troops invading the Philippines had pushed the United States troops back onto the Bataan Peninsula, resulting in the grisly Bataan death march. In North Africa, German forces had recaptured Tobruk and were within striking distance of Cairo, threatening the entire Mid East. Civil liberties were not high on anyone's agenda, including that of judges.

Hawaii was placed under martial law within days after the attack on Pearl Harbor, and remained under that regime until it was lifted in the Autumn of 1944. Such a regime would seem to have been quite justified in the period immediately after the bombing of Pearl Harbor, when actual invasion of the islands by Japanese forces was feared. But after the battle of Midway in June 1942, that possibility was all but eliminated. Yet martial law remained in effect until the Autumn of 1944, when it was lifted by presidential proclamation.

One of the principal incidents of this martial law was that the civil courts in Hawaii were closed the day after Pearl Harbor, and only gradually permitted to resume some of their previous functions. They were closed not because of any external necessity, but because the military governor of Hawaii ordered them closed. Provost courts, composed of officers appointed by the military governor, tried criminal cases. Lloyd Duncan, a civilian shipfitter, was charged with assaulting two military guards at the Pearl Harbor Navy yard, where he worked. He was tried by a provost court and sentenced to six months in jail. Harry White, a stockbroker, was charged with having embezzled funds from a client -- surely an offense as far removed from considerations of public order or security as one can imagine. He was tried by a provost court and sentenced to four years in prison. Both of the defendants challenged their convictions by habeas corpus in the federal courts. When their cases finally reached the Supreme Court, a majority of the Court in the case of *Duncan v. Kahanamoku* held that extension of martial law so long after the threat of invasion had ceased was illegal. Chief Justice Stone commented in a concurring opinion that if the bars and restaurants could be reopened within two months after Pearl Harbor, it was hard to see why the courts should not have been able to reopen a full year later.

The good news for civil liberty in the *Duncan* decision was that the martial law regime was held to be illegal; the bad news was that the Supreme Court handed down its ruling in February 1946, six months after Japan surrendered, and a year and a half after martial law had been lifted by the President.

One of the most controversial actions of the government during World War II was the forced relocation of both Japanese aliens and American citizens of Japanese ancestry away from the west coast. The Supreme Court reluctantly upheld this program during the war, but the judgment of history has been that a serious injustice was done these people, because there was no effort to separate the loyal from the disloyal. As often happens, the latter-day judgments, in my view, swing the pendulum too far the other way. With respect to the forced relocation of Japanese-American who were born in the United States of Japanese nationals -- and were therefore United States citizens -- even given the exigencies of wartime it is difficult to defend their mass forced

relocation under present constitutional doctrine. But the relocation of the Japanese nationals residing in the United States -- typically the parents of those born in this country -- stands on quite a different footing. The authority of the government to deal with enemy aliens in time of war, according to established case law from our Court, is virtually plenary.

There were considerable differences between the way the Lincoln administration infringed on civil liberty and the way FDR's infringed on it. Lincoln often acted without any authority from Congress, and some of his measures unabashedly suppressed dissent. There was no such suppression of dissent in World War II, and most of the administration's acts hostile to civil liberty were based on laws passed by Congress. So the general trend from the 1860s to the 1940s was in the direction of greater sympathy to claims of civil liberty. But neither Lincoln nor FDR -- nor Woodrow Wilson during World War I -- could be described by any stretch of the imagination as a supporter of civil liberty.

Surely Abraham Lincoln is the greatest of American Presidents, and Franklin Roosevelt ranks high among the runners up. Lincoln did not himself approve in advance of most of the arrests, detentions, and trials before military commissions which took place during the Civil War. His cabinet secretaries and other advisors did that, but Lincoln acquiesced in almost all of their decisions. The same may be said for Franklin Roosevelt during the Second World War; he did not originate the plan for the relocation of the Japanese from the west coast, but he unhesitatingly acquiesced in it when he was told that it was a necessary war measure.

Lincoln felt that the great task of his administration was to preserve the Union. If he could do it by following the Constitution, he would; but if he had to choose between preserving the Union or obeying the Constitution, he would quite willingly choose the former course. Franklin Roosevelt felt the great task of his wartime administration was to win World War II, and, like Lincoln, if forced to choose between a necessary war measure and obeying the Constitution, he would opt for the former.

This is not necessarily a condemnation. Both Lincoln and FDR fit into this mold. The courts, for their part, have largely reserved the decisions favoring civil liberties in wartime to be handed down after the war was over. Again, we see the truth in the maxim *Inter Arma Silent Leges* -- in time of war the laws are silent.

To lawyers and judges, this may seem a thoroughly undesirable state of affairs, but in the greater scheme of things it may be best for all concerned. The fact that judges are loath to strike down wartime measures while the war is going on is demonstrated both by our experience in the Civil War and in World War II. This fact represents something more than some sort of patriotic hysteria that holds the judiciary in its grip; it has been felt and even embraced by members of the Supreme Court who have championed civil liberty in peacetime. Witness Justice Hugo Black: he wrote the opinion for the Court upholding the forced relocation of Japanese Americans in 1944, but he also wrote the Court's opinion striking down martial law in Hawaii two years later. While we would not want to subscribe to the full sweep of the Latin maxim -- *Inter Arma Silent Leges* -- in time of war the laws are silent, perhaps we can accept the proposition that though the laws are not silent in wartime, they speak with a muted voice.

Thank you for inviting me to be with you today, and may your Bar Association have an equally successful second century.

Rule of Law

In a limited government administered according to the rule of law, the rulers use power following established principles and procedures based on a constitution. By contrast, when the rulers wield power capriciously, there is rule by the unbridled will of individuals without regard for established law. The rule of law is an essential characteristic of every constitutional democracy that guarantees rights to liberty. It prevails in the government, civil society, and market economy of every state with a functional constitution.

The rule of law exists when a state's constitution functions as the supreme law of the land, when the statutes enacted and enforced by the government invariably conform to the constitution. For example, the second clause of Article 6 of the U.S. Constitution says,

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

The third clause of Article 6 says, "The Senators and Representatives before mentioned and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution." These statements about constitutional supremacy have been functional throughout the history of the United States, which is the reason that the rule of law has prevailed from the country's founding era until the present.

The rule of law, however, is not merely rule by law; rather, it demands equal justice for each person under the authority of a constitutional government. So, the rule of law exists in a democracy or any other kind of political system only when the following standards are met:

- laws are enforced equally and impartially
- no one is above the law, and everyone under the authority of the constitution is obligated equally to obey the law
- laws are made and enforced according to established procedures, not the rulers' arbitrary will
- there is a common understanding among the people about the requirements of the law and the consequences of violating the law
- laws are not enacted or enforced retroactively
- laws are reasonable and enforceable

There is a traditional saying about the rule of law in government: "It is a government of laws and not of men and women." When the rule of law prevails in a democracy, there is equal justice and ordered liberty in the lives of the people. In this case, there is an authentic constitutional democracy. When rule of law does not prevail, there is some form of despotism in which power is wielded arbitrarily by a single person or party.

SEE ALSO Constitutionalism; Government, Constitutional and Limited

The Constitution grants power to the president to make treaties with foreign governments, but the Senate has power to confirm or reject them. Additional examples of the separation and sharing of powers among the executive and legislative branches, involving checks and balances, are found in Articles 1 and 2 of the Constitution.

The judicial branch of government uses its power to interpret the Constitution and the laws made under it in order to check the other two branches of government and to maintain the separation of powers among the three branches. For example, the Supreme Court uses judicial review to prevent either the legislative or executive branch from violating the Constitution. The Court can declare null and void actions of the Congress or the President that exceed or contradict their powers as expressed in the Constitution.

The principle of judicial independence, established in Article 3 of the Constitution, prevents the other two branches from intimidating the judicial branch and impeding it from properly checking them if they overstep their constitutional boundaries. The Constitution provides for lifetime terms of office and prohibits Congress from punishing judges by reducing the level of payment for their services in order to buttress the judicial branch's independence.

Separation and sharing of powers among the three branches, through checks and balances, is the basic constitutional means for achieving limited government and thereby protecting the people from governmental abuses. Each branch of a constitutional government has some influence over the actions of the others, but no branch can exercise its powers without cooperation from the others. The constitution of a presidential democracy prevents any one branch from encroaching upon the domains of the other branches.

Under the system of checks and balances, no branch of the government can accumulate too much power. But each branch, and the government generally, is supposed to have enough power to do what the people expect of it. So, the government is both limited and empowered; neither too strong for survival of the

people's liberty nor too limited to be effective in maintaining order, stability, and security for the people.

During the founding era of the United States, James Madison expressed the importance of separated powers in a constitutional government. In the 47th paper of *The Federalist*, Madison wrote, "The accumulation of all powers, legislative, executive and judiciary, in the hands of one, a few, or many, and whether hereditary, self-appointed, or elected, may justly be pronounced the very definition of tyranny." In the next *Federalist* paper, Madison cautioned that unless the separate branches of government "be so far connected and blended [balanced] as to give each a constitutional control [check] over the others the degree of separation . . . essential to a free government can never in practice be duly maintained."

The parliamentary system of constitutional democracy also includes a distribution of powers in government among the legislative, executive, and judicial functions. The parliament enacts the laws, and the executive officers of the government, the prime minister in tandem with the various ministers of executive departments, execute the laws. However, the prime minister and other executive ministers derive their authority from the parliament and are answerable to it. In most parliamentary systems, there is an independent judiciary department that can declare null and void acts of the parliament or the executive ministers that violate the constitution. However, the parliamentary form of constitutional democracy is not based on a strict system of separated and shared powers.

Advocates of parliamentary democracy claim that it is more efficient than the presidential system, and that it is more responsive to the will of the people. They assert that the complex system of checks and balances among three separate and independent branches of government slows down decision making and sometimes thwarts the will of the majority of citizens, instead of directly and readily expressing it.

Defenders of separated and shared powers emphasize the importance of deliberate decision making in support of their system of constitutional democracy. They believe that the compromises

necessary to achieve agreement among different groups empowered with checks on the actions of the other groups result in a government that cannot act recklessly.

Justice Louis D. Brandeis of the U.S. Supreme Court nicely summed up the justification for separated and shared powers in the Constitution. In his dissenting opinion in the 1926 case *Myers v. United States*, Justice Brandeis wrote,

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

SEE ALSO Constitutionalism; Government, Constitutional and Limited; Judicial Independence; Judicial Review; Parliamentary System; Presidential System

Standards

National Civics and Government Standards

National Standards for Civics and Government (1994) Center for Civic Education

Source: <http://www.civiced.org/standards>

- Grades 5-8
- Grades 9-12

Common Core State Standards

English Language Arts & Literacy in History/Social Studies, Science and Technical Subjects

Source: http://www.corestandards.org/assets/CCSSI_ELA%20Standards.pdf

Grades 6-12 Literacy in History/Social Studies, Science and Technical Subjects
(Reading for Literacy in History/Social Studies and Writing)

- Grades 6-8
- Grades 10-11
- Grades 11-12

National Standards for Civics and Government

Lesson: Rights at Risk in Wartime

Source: *National Standards for Civics and Government* (1994) Center for Civic Education
<http://www.civiced.org/index.php?page=stnds>

Grades 5-8 Content Standards Alignment

The following chart shows a more granular alignment at the standards level.

National Standards for Civics and Government (Grades 5-8)	Lesson: Rights at Risk in Wartime
Specific Content Standards	Understandings Reinforced by the Lesson
I.A.2. Necessity and purposes of government. Students should be able to evaluate, take, and defend positions on why government is necessary and the purposes government should serve.	The judiciary is responsible for interpreting the law, evaluating the constitutionality of federal laws.
I.B.2. The rule of law. Students should be able to explain the importance of the rule of law for the protection of individual rights and the common good.	No one is above the law, including government leaders. Everyone under the authority of the Constitution is obligated to obey the law. Supreme Court decisions help ensure that the law is interpreted consistently and applied fairly for the protection of individual rights and the common good.
I.C.2. Purposes and uses of constitutions. Students should be able to explain the various purposes constitutions serve.	As the supreme law of the land, the U.S. Constitution places limits on government power in order to protect individual rights and promote the common good.
1.C.3. Conditions under which constitutional government flourishes. Students should be able to explain those conditions that are essential for the flourishing of constitutional government.	Participation in the judicial process helps reinforce, refine, and define constitutional principles that are essential for the survival of a constitutional democracy.
I.D.1. Shared powers and parliamentary systems. Students should be able to describe the major characteristics of systems of shared powers and of parliamentary systems.	The U.S. has a shared powers system in which powers are separated among 3 branches of government with each branch having primary responsibility for certain functions. The Congress and the president share war powers.
II.A.1. The American idea of constitutional government. Students should be able to explain the essential ideas of American constitutional government.	The Constitution defines the limited and shared powers of the government. Habeas corpus limits the power of government in order to protect the rights of individuals.
II.C.1. American identity. Students should be able to explain the importance of shared political values and principles to American society.	The U.S. Constitution identifies basic values and principles that are American distinctives. These include respect for the law, protection of individual rights, and justice under the law.
II.C.2. The character of American political conflict. Students should be able to describe the character of American political conflict and explain factors that usually prevent violence or that lower its intensity.	Wartimes generate much political conflict when issues of national security and individual liberty are at stake.

National Standards for Civics and Government

Lesson: Rights at Risk in Wartime

National Standards for Civics and Government (Grades 5-8)	Lesson: Rights at Risk in Wartime
Specific Content Standards	Understandings Reinforced by the Lesson
<p>II.D.1. Fundamental values and principles. Students should be able to explain the meaning and importance of the fundamental values and principles of American constitutional democracy.</p>	<p>The following values and principles are important for maintaining a constitutional democracy:</p> <ul style="list-style-type: none"> • individual rights (majority and minority rights) • the common or public good • justice • truth <p>Principles fundamental to American constitutional democracy include:</p> <ul style="list-style-type: none"> • Separated and shared powers • Checks and balances • Individual rights • Rule of law
<p>II.D.2. Conflicts among values and principles in American political and social life. Students should be able to evaluate, take, and defend positions on issues in which fundamental values and principles are in conflict.</p>	<p>When a nation is threatened, disputes and conflicts often arise over how to protect individual rights and ensure national security.</p>
<p>II.D.3. Disparities between ideals and reality in American political and social life. Students should be able to evaluate, take, and defend positions on issues concerning ways and means to reduce disparities between American ideals and realities.</p>	<p>Important American ideals include an informed citizenry, equal justice for all, concern for the common good, and respect for the rights of others.</p> <p>During times of war American ideals tend to get blurred.</p>
<p>III.A.1. Distributing, sharing, and limiting powers of the national government. Students should be able to explain how the powers of the national government are distributed, shared, and limited.</p>	<p>There is a balance and check of war powers within the three-branch system of government.</p>
<p>III.E.1. The place of law in American society. Students should be able to explain the importance of law in the American constitutional system.</p>	<p>The courts make decisions based on the rule of law in order to protect the rights of citizens. The Supreme Court hears cases related to the Constitution and federal laws.</p>
<p>III.E.3. Judicial protection of the rights of individuals. Students should be able to evaluate, take, and defend positions on current issues regarding judicial protection of individual rights.</p>	<p>The right of habeas corpus gives prisoners the right to appear before a judge.</p> <p>The right to due process helps ensure that one gets a fair trial.</p>
<p>IV.A. 2. Interaction among nation-states. Students should be able to explain how nation-states interact with each other.</p>	<p>World War II was a conflict of nation-states. The war on terror is an unconventional war in which the enemy is seeking to become a nation-state and expand its control.</p>
<p>IV.A. 3. United States' relations with other nation-states. Students should be able to explain how United States foreign policy is made and the means by which it is carried out.</p>	<p>The Constitution gives Congress and the president certain war powers. The Supreme Court can hear cases that challenge the constitutionality of any actions made by the president or Congress.</p>

National Standards for Civics and Government

Lesson: Rights at Risk in Wartime

National Standards for Civics and Government (Grades 5-8)	Lesson: Rights at Risk in Wartime
Specific Content Standards	Understandings Reinforced by the Lesson
V.A.1. The meaning of citizenship. Students should be able to explain the meaning of American citizenship.	All citizens have equal rights under the law that give them access to the judicial process to resolve legal disputes. Guantanamo Bay detainees who are American citizens cannot be denied their right to habeas corpus.
V.B.1. Personal rights. Students should be able to evaluate, take, and defend positions on issues involving personal rights.	The right of habeas corpus was at the heart of these Guantanamo cases: Hamdi v. Rumsfeld Rasul v. Bush Hamdan v. Rumsfeld Boumediene v. Bush
V.B.4. Scope and limits of rights. Students should be able to evaluate, take, and defend positions on issues regarding the proper scope and limits of rights.	“National security” is a criterion often used to limit rights.
V.C.2. Civic responsibilities. Students should be able to evaluate, take, and defend positions on the importance of civic responsibilities to the individual and society.	There are civic responsibilities associated with being an American citizen. These include: <ul style="list-style-type: none"> • obeying the law • respecting the rights of others • being informed and attentive to public issues • monitoring political leaders and governmental agencies and taking appropriate action if their adherence to constitutional principles is lacking

National Standards for Civics and Government

Lesson: Rights at Risk in Wartime

Source: *National Standards for Civics and Government* (1994) Center for Civic Education
<http://www.civiced.org/index.php?page=stds>

Grades 9-12 Content Standards Alignment

The following chart shows a more granular alignment at the standards level.

National Standards for Civics and Government (Grades 9-12)	Lesson: Rights at Risk in Wartime
Specific Content Standards	Understandings Reinforced by the Lesson
<p>I.A.3. The purposes of politics and government. Students should be able to evaluate, take, and defend positions on competing ideas regarding the purposes of politics and government and their implications for the individual and society.</p>	<p>Conflicts that arise between individual rights and the common good escalate in wartime.</p>
<p>I.B.1. Limited and unlimited governments. Students should be able to explain the essential characteristics of limited and unlimited governments.</p>	<p>Limited governments have established and respected restraints on their power</p>
<p>I.B.2. The rule of law. Students should be able to evaluate, take, and defend positions on the importance of the rule of law and on the sources, purposes, and functions of law.</p>	<p>No one is above the law, including government leaders. Everyone under the authority of the Constitution is obligated to obey the law. Supreme Court decisions help ensure that the law is interpreted consistently and applied fairly for the protection of individual rights and the common good.</p>
<p>I.C.2. Purposes and uses of constitutions. Students should be able to explain the various purposes served by constitutions.</p>	<p>As the supreme law of the land, the U.S. Constitution places limits on government power in order to protect individual rights and promote the common good.</p>
<p>I.D.1. Shared powers and parliamentary systems. Students should be able to describe the major characteristics of systems of shared powers and of parliamentary systems.</p>	<p>The U.S. has a shared powers system in which powers are separated among 3 branches of government with each branch having primary responsibility for certain functions.</p> <p>The Congress and the president share war powers.</p>
<p>II.A.1. The American idea of constitutional government. Students should be able to explain the central ideas of American constitutional government and their history.</p>	<p>The right of habeas corpus comes from English common law and goes back to the Magna Carta (1215). It limits the power of government in order to protect the rights of individuals.</p> <p>The system of checks and balances helps ensure that one branch does not assume too much power.</p>
<p>II.A.2. How American constitutional government has shaped the character of American society. Students should be able to explain the extent to which Americans have internalized the values and principles of the Constitution and attempted to make its ideals realities.</p>	<p>Landmark Supreme Court decisions help make the values and principles of the Constitution a reality for all living under its authority.</p>

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National Standards for Civics and Government (Grades 9-12)	Lesson: Rights at Risk in Wartime
Specific Content Standards	Understandings Reinforced by the Lesson
<p>II.C.1. American national identity and political culture. Students should be able to explain the importance of shared political and civic beliefs and values to the maintenance of constitutional democracy in an increasingly diverse American society.</p>	<p>The U.S. Constitution identifies basic values and principles that are American distinctives. These include respect for the law, protection of individual rights, and justice under the law.</p>
<p>II.C.2. Character of American political conflict. Students should be able to describe the character of American political conflict and explain factors that usually prevent violence or that lower its intensity.</p>	<p>Wartimes generate much political conflict when issues of national security and individual liberty are at stake.</p>
<p>II.D.3. Fundamental values and principles. Students should be able to evaluate, take, and defend positions on what the fundamental values and principles of American political life are and their importance to the maintenance of constitutional democracy.</p>	<p>The following values and principles are important for maintaining a constitutional democracy:</p> <ul style="list-style-type: none"> • individual rights (majority and minority rights) • the common or public good • justice • truth <p>Principles fundamental to American constitutional democracy include:</p> <ul style="list-style-type: none"> • Separated and shared powers • Checks and balances • Individual rights • Rule of law
<p>II.D.4. Conflicts among values and principles in American political and social life. Students should be able to evaluate, take, and defend positions on issues in which fundamental values and principles may be in conflict.</p>	<p>When a nation is threatened, disputes and conflicts often arise over how to protect individual rights and ensure national security.</p>
<p>II.D.5. Disparities between ideals and reality in American political and social life. Students should be able to evaluate, take, and defend positions about issues concerning the disparities between American ideals and realities.</p>	<p>Important American ideals include an informed citizenry, equal justice for all, concern for the common good, and respect for the rights of others.</p> <p>During times of war American ideals tend to get blurred.</p>
<p>III.A.1. Distributing governmental power and preventing its abuse. Students should be able to explain how the United States Constitution grants and distributes power to national and state government and how it seeks to prevent the abuse of power.</p>	<p>The Constitution identifies the limits and powers for each branch of government. There is a balance and check of war powers within the three-branch system.</p>

National Standards for Civics and Government

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National Standards for Civics and Government (Grades 9-12)	Lesson: Rights at Risk in Wartime
Specific Content Standards	Understandings Reinforced by the Lesson
<p>III.B.1. The institutions of the national government. Students should be able to evaluate, take, and defend positions on issues regarding the purposes, organization, and functions of the institutions of the national government.</p>	<p>The three branches of government share powers over the laws:</p> <ul style="list-style-type: none"> • Legislative branch: Congress makes the laws • Executive branch: President and agencies in the executive branch enforce the laws • Judicial branch: Supreme Court of the United States and other federal courts interpret the law
<p>III.D.1. The place of law in American society. Students should be able to evaluate, take, and defend positions on the role and importance of law in the American political system.</p>	<p>The courts make decisions based on the rule of law in order to protect the rights of citizens. The Supreme Court hears cases related to the Constitution and federal laws.</p>
<p>III.D.2. Judicial protection of the rights of individuals. Students should be able to evaluate, take, and defend positions on current issues regarding the judicial protection of individual rights.</p>	<p>The right of habeas corpus gives prisoners the right to appear before a judge. The right to due process helps ensure that one gets a fair trial.</p>
<p>IV.A.2. Interactions among nation-states. Students should be able to explain how nation-states interact with each other.</p>	<p>World War II was a conflict of nation-states. The war on terror is an unconventional war in which the enemy is seeking to become a nation-state and expand its control.</p>
<p>IV.B.2. Making and implementing United States foreign policy. Students should be able to evaluate, take, and defend positions about how United States foreign policy is made and the means by which it is carried out.</p>	<p>There is a tension between the power of Congress to declare war and the need for the president to make expeditious decisions in times of national emergency.</p>
<p>IV.B.3. The ends and means of United States foreign policy. Students should be able to evaluate, take, and defend positions on foreign policy issues in light of American national interests, values, and principles.</p>	<p>There are inevitable tensions among American values, principles, and interests when the nation deals with trying to balance a commitment to human rights with the need for national security.</p>
<p>V.A.1. The meaning of citizenship in the United States. Students should be able to explain the meaning of citizenship in the United States.</p>	<p>All citizens have equal rights under the law that give them access to the judicial process to resolve legal disputes. Guantanamo Bay detainees who are American citizens cannot be denied their right to habeas corpus.</p>
<p>V.B.1. Personal rights. Students should be able to evaluate, take, and defend positions on issues regarding personal rights.</p>	<p>The right of habeas corpus was at the heart of these Guantanamo cases: Hamdi v. Rumsfeld Rasul v. Bush Hamdan v. Rumsfeld Boumediene v. Bush</p>

National Standards for Civics and Government

Lesson: Rights at Risk in Wartime

National Standards for Civics and Government (Grades 9-12)	Lesson: Rights at Risk in Wartime
Specific Content Standards	Understandings Reinforced by the Lesson
V.B.5. Scope and limits of rights. Students should be able to evaluate, take, and defend positions on issues regarding the proper scope and limits of rights.	National security and public safety are criteria often used to limit individual rights. The suspension clause in the Constitution states that habeas corpus may be suspended “when in Cases of Rebellion or Invasion the public Safety may require it.”
V.C.2. Civic responsibilities. Students should be able to evaluate, take, and defend positions on the importance of civic responsibilities to the individual and society.	There are civic responsibilities associated with being an American citizen. These include: <ul style="list-style-type: none">• obeying the law• respecting the rights of others• being informed and attentive to public issues• monitoring political leaders and governmental agencies and taking appropriate action if their adherence to constitutional principles is lacking

Common Core State Standards

Lesson: Rights at Risk in Wartime

Document: *English Language Arts & Literacy in History/Social Studies, Science and Technical Subjects*
<http://www.corestandards.org/ELA-Literacy>

Reading in History/Social Studies 6-8	Lesson: Rights at Risk in Wartime
Key Ideas and Details	Support from the Lesson
CCSS.ELA-Literacy.RH.6-8.1 Cite specific textual evidence to support analysis of primary and secondary sources.	Students cite text from the Constitution related to habeas corpus. They cite text from Supreme Court opinions.
CCSS.ELA-Literacy.RH.6-8.2 Determine the central ideas or information of a primary or secondary source; provide an accurate summary of the source distinct from prior knowledge or opinions.	Students summarize the facts of each Guantanamo case after reading the background story in Supreme Court opinions.
Craft and Structure	
CCSS.ELA-Literacy.RH.6-8.4 Determine the meaning of words and phrases as they are used in a text, including vocabulary specific to domains related to history/social studies.	History, government, and civics terms are provided for review and study. Students identify the origin and literal meaning of habeas corpus.
CCSS.ELA-Literacy.RH.6-8.6 Identify aspects of a text that reveal an author’s point of view or purpose (e.g., loaded language, inclusion or avoidance of particular facts).	Students extract points made in the majority opinions for each case as well as the dissenting opinions.
Integration of Knowledge and Ideas	
CCSS.ELA-Literacy.RH.6-8.7 Integrate visual information (e.g., in charts, graphs, photographs, videos, or maps) with other information in print and digital texts.	Students synthesize information from print and online sources (e.g., videos, books, excerpts)
CCSS.ELA-Literacy.RH.6-8.8 Distinguish among fact, opinion, and reasoned judgment in a text.	Students learn about the facts of each Guantanamo case and the reasoned judgment behind each opinion by the Court.
CCSS.ELA-Literacy.RH.6-8.9 Analyze the relationship between a primary and secondary source on the same topic.	Students use and compare primary and secondary sources to gather details about each Guantanamo case.
Range of Reading and Level of Text Complexity	
CCSS.ELA-Literacy.RH.6-8.10 By the end of grade 8, read and comprehend history/social studies texts in the grades 6–8 text complexity band independently and proficiently.	Students engage informational text that includes material appropriate for this grade band. (See text exemplars in Appendix B of the ELA standards)
Writing 6-8	Lesson: Rights at Risk in Wartime
Text Types and Purposes	Support from the Lesson
CCSS.ELA-Literacy.WHST.6-8.2 Write informative/explanatory texts, including the narration of historical events, scientific procedures/ experiments, or technical processes.	Students respond to questions and issues that require the narration of historical events, such as the events of 9/11.
Production and Distribution of Writing	
CCSS.ELA-Literacy.WHST.6-8.4 Produce clear and coherent writing in which the development, organization, and style are appropriate to task, purpose, and audience.	Students have different writing tasks and write for different purposes. These include writing to explain, describe, convey personal opinion, answer questions, reflect, analyze and interpret.
Research to Build and Present Knowledge	

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CCSS.ELA-Literacy.WHST.6-8.7 Conduct short research projects to answer a question (including a self-generated question), drawing on several sources and generating additional related, focused questions that allow for multiple avenues of exploration.	Extension activities provide prompts for short research projects.
CCSS.ELA-Literacy.WHST.6-8.8 Gather relevant information from multiple print and digital sources, using search terms effectively; assess the credibility and accuracy of each source; and quote or paraphrase the data and conclusions of others while avoiding plagiarism and following a standard format for citation.	Students research to gather information from print and digital sources identified in the lesson. They are required to quote, paraphrase and cite sources.
CCSS.ELA-Literacy.WHST.6-8.9 Draw evidence from informational texts to support analysis reflection, and research.	Students consult a variety of informational texts in order to answer questions that require analysis, reflection, and research.
Range of Writing	
CCSS.ELA-Literacy.WHST.6-8.10 Write routinely over extended time frames (time for reflection and revision) and shorter time frames (a single sitting or a day or two) for a range of discipline-specific tasks, purposes, and audiences.	Students write for a variety of purposes (e.g., to explain, describe, list, answer questions, report, reflect).
Reading in History/Social Studies 9-10	Lesson: Rights at Risk in Wartime
Key Ideas and Details	Support from the Lesson
CCSS.ELA-Literacy.RH.9-10.1 Cite specific textual evidence to support analysis of primary and secondary sources, attending to such features as the date and origin of the information.	Students cite text from the Constitution related to habeas corpus. They cite text from Supreme Court opinions.
CCSS.ELA-Literacy.RH.9-10.2 Determine the central ideas or information of a primary or secondary source; provide an accurate summary of how key events or ideas develop over the course of the text.	Students summarize the facts of each Guantanamo case after reading the background story in Supreme Court opinions.
CCSS.ELA-Literacy.RH.9-10.3 Analyze in detail a series of events described in a text; determine whether earlier events caused later ones or simply preceded them.	Students consider the series of events and executive actions made by presidents in three wars.
Craft and Structure	
CCSS.ELA-Literacy.RH.9-10.4 Determine the meaning of words and phrases as they are used in a text, including vocabulary describing political, social, or economic aspects of history/social science.	History, government, and civics terms are provided for review and study. Students identify the origin and literal meaning of habeas corpus.
CCSS.ELA-Literacy.RH.9-10.5 Analyze how a text uses structure to emphasize key points or advance an explanation or analysis.	Students consider the structure and organization of Supreme Court opinions
CCSS.ELA-Literacy.RH.9-10.6 Compare the point of view of two or more authors for how they treat the same or similar topics, including which details they include and emphasize in their respective accounts.	Students extract points made in the majority opinions for each case as well as the dissenting opinions.
Integration of Knowledge and Ideas	
CCSS.ELA-Literacy.RH.9-10.9 Compare and contrast treatments of the same topic in several primary and secondary sources.	Students use and compare primary and secondary sources to gather details about each Guantanamo case.
Range of Reading and Level of Text Complexity	

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CCSS.ELA-Literacy.RH.9-10.10 By the end of grade 10, read and comprehend history/social studies texts in the grades 9–10 text complexity band independently and proficiently.	Students engage informational text that includes material appropriate for this grade band. (See text exemplars in Appendix B of the ELA standards)
Writing 9-10	Lesson: Rights at Risk in Wartime
Text Types and Purposes	Support from the Lesson
CCSS.ELA-Literacy.WHST.9-10.2 Write informative/explanatory texts, including the narration of historical events, scientific procedures/ experiments, or technical processes.	Students respond to questions and issues that require the narration of historical events, such as the events of 9/11.
Production and Distribution of Writing	
CCSS.ELA-Literacy.WHST.9-10.4 Produce clear and coherent writing in which the development, organization, and style are appropriate to task, purpose, and audience.	Students have different writing tasks and write for different purposes. These include writing to explain, describe, convey personal opinion, answer questions, reflect, analyze and interpret.
Research to Build and Present Knowledge	
CCSS.ELA-Literacy.WHST.9-10.7 Conduct short as well as more sustained research projects to answer a question (including a self-generated question) or solve a problem; narrow or broaden the inquiry when appropriate; synthesize multiple sources on the subject, demonstrating understanding of the subject under investigation.	Extension activities provide prompts for short research projects.
CCSS.ELA-Literacy.WHST.9-10.8 Gather relevant information from multiple authoritative print and digital sources, using advanced searches effectively; assess the usefulness of each source in answering the research question; integrate information into the text selectively to maintain the flow of ideas, avoiding plagiarism and following a standard format for citation	Students research to gather information from print and digital sources identified in the lesson. They are required to quote, paraphrase and cite sources.
CCSS.ELA-Literacy.WHST.9-10.9 Draw evidence from informational texts to support analysis, reflection, and research.	Students consult a variety of informational texts in order to answer questions that require analysis, reflection, and research.
Range of Writing	
CCSS.ELA-Literacy.WHST.9-10.10 Write routinely over extended time frames (time for reflection and revision) and shorter time frames (a single sitting or a day or two) for a range of discipline-specific tasks, purposes, and audiences.	Students consult a variety of informational texts in order to answer questions that require analysis, reflection, and research.
Reading in History/Social Studies 11-12	Lesson: Rights at Risk in Wartime
Key Ideas and Details	Support from the Lesson
CCSS.ELA-Literacy.RH.11-12.1 Cite specific textual evidence to support analysis of primary and secondary sources, connecting insights gained from specific details to an understanding of the text as a whole.	Students cite text from the Constitution related to habeas corpus. They cite text from Supreme Court majority opinions and dissenting opinions.
CCSS.ELA-Literacy.RH.11-12.2 Determine the central ideas or information of a primary or secondary source; provide an accurate summary that makes clear the relationships among the key details and ideas.	Students summarize the facts of each Guantanamo case after reading the background story in Supreme Court opinions.

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CCSS.ELA-Literacy.RH.11-12.3 Evaluate various explanations for actions or events and determine which explanation best accords with textual evidence, acknowledging where the text leaves matters uncertain.	Students consider the series of events and executive actions made by presidents in three wars.
Craft and Structure	
CCSS.ELA-Literacy.RH.11-12.4 Determine the meaning of words and phrases as they are used in a text, including analyzing how an author uses and refines the meaning of a key term over the course of a text (e.g., how Madison defines faction in Federalist No. 10).	History, government, and civics terms are provided for review and study. Students identify the origin and literal meaning of habeas corpus.
CCSS.ELA-Literacy.RH.11-12.5 Analyze in detail how a complex primary source is structured, including how key sentences, paragraphs, and larger portions of the text contribute to the whole.	Students consider the structure and organization of Supreme Court opinions
CCSS.ELA-Literacy.RH.11-12.6 Evaluate authors' differing points of view on the same historical event or issue by assessing the authors' claims, reasoning, and evidence.	Students consider different points of view about specific events by reading dissenting and majority opinions by Supreme Court justices.
Integration of Knowledge and Ideas	
CCSS.ELA-Literacy.RH.11-12.7 Integrate and evaluate multiple sources of information presented in diverse formats and media (e.g., visually, quantitatively, as well as in words) in order to address a question or solve a problem.	Students synthesize information from print and online sources (e.g., videos, articles, books, excerpts).
CCSS.ELA-Literacy.RH.11-12.9 Integrate information from diverse sources, both primary and secondary, into a coherent understanding of an idea or event, noting discrepancies among sources.	Students use information from multiple sources to better understand the important role of habeas corpus in a constitutional democracy and its controversial use or abuse in wartime
Range of Reading and Level of Text Complexity	
CCSS.ELA-Literacy.RH.11-12.10 By the end of grade 12, read and comprehend history/social studies texts in the grades 11–CCR text complexity band independently and proficiently.	Students engage informational text that includes material appropriate for this grade band. (See text exemplars in Appendix B of the ELA standards)
Writing 11-12	Lesson: Rights at Risk in Wartime
Text Types and Purposes	Support from the Lesson
CCSS.ELA-Literacy.WHST.11-12.2 Write informative/explanatory texts, including the narration of historical events, scientific procedures/ experiments, or technical processes.	Students respond to questions and issues that require the narration of historical events, such as the events of 9/11.
Production and Distribution of Writing	
CCSS.ELA-Literacy.WHST.11-12.4 Produce clear and coherent writing in which the development, organization, and style are appropriate to task, purpose, and audience.	Students have different writing tasks and write for different purposes. These include writing to explain, describe, convey personal opinion, answer questions, reflect, analyze and interpret.
Research to Build and Present Knowledge	
CCSS.ELA-Literacy.WHST.11-12.7 Conduct short as well as more sustained research projects to answer a question (including a self-generated question) or solve a problem; narrow or broaden the inquiry when appropriate; synthesize multiple sources on the subject, demonstrating understanding of the subject under investigation.	Extension activities provide prompts for short research projects.

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CCSS.ELA-Literacy.WHST.11-12.8 Gather relevant information from multiple authoritative print and digital sources, using advanced searches effectively; assess the strengths and limitations of each source in terms of the specific task, purpose, and audience; integrate information into the text selectively to maintain the flow of ideas, avoiding plagiarism and overreliance on any one source and following a standard format for citation.	Students research to gather information from print and digital sources identified in the lesson. They are required to quote, paraphrase and cite sources.
CCSS.ELA-Literacy.WHST.11-12.9 Draw evidence from informational texts to support analysis, reflection, and research.	Students consult a variety of informational texts in order to answer questions that require analysis, reflection, and research.
Range of Writing	
CCSS.ELA-Literacy.WHST.11-12.10 Write routinely over extended time frames (time for reflection and revision) and shorter time frames (a single sitting or a day or two) for a range of discipline-specific tasks, purposes, and audiences.	Students write for a variety of purposes (e.g., to explain, describe, outline, answer questions, reflect).