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Habeas Without Rights

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ABSTRACT

For almost six years, the habeas corpus petitions brought by foreign detainees held by the United States at Guantanamo Bay, Cuba, have stalled because the courts have struggled to answer a single question: whether the detainees possess enforceable rights. Although that question remains unresolved, the courts have uniformly concluded that the Guantanamo habeas claims, as well as the habeas claims brought by other accused enemy combatants, require a showing that the detainees possess cognizable rights violated by the detentions, most especially constitutional rights. This Article argues that the courts have been asking the wrong question and that habeas relief does not require the possession of rights. For most of the long history of habeas corpus, courts resolved habeas claims by determining whether the jailer had authority to impose detention, without undertaking any inquiry into the petitioner's rights. Habeas did not address "rights" in the modern sense of a discrete group of personal trumps against governmental action, such as those protected by the Bill of Rights. Habeas did not protect rights in this sense for a simple reason: habeas predates rights. Rather than addressing rights, habeas cases traditionally were framed in terms of power: "The question is," Justice Marshall asked in Ex parte Burford*, "what authority has the jailor to detain him?" In the Guantanamo detainee cases, the traditional habeas inquiry would require the government to establish, as a matter of fact and law, that the detainees are enemy combatants.*

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INTRODUCTION

The writ of habeas corpus has long been understood to provide an "effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person."[1] Yet, in February 2008, six years will have passed since the first petition for habeas corpus was filed on behalf of accused enemy combatants held at Guantanamo Bay, Cuba.[2] In that time, no hearings have been held on the merits of any of the more petitions filed by the detainees challenging the legality of their detentions. No discovery has proceeded. No depositions have been taken. And no court has examined the evidence offered to support the detentions or ruled on whether any of the detainees are legally held.[3] Now, with the enactment of the Military Commissions Act of 2006 (MCA), which purports to withdraw federal jurisdiction over the habeas claims, the prospect that any of the detainees will get their proverbial day in court seems more remote than ever.[4]

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[1] *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968). The function of habeas of providing a quick and efficient judicial remedy for unlawful detention dates back at least to the Habeas Corpus Act of 1679, 31 Car. 2, c.2 (27 May 1679), which Parliament enacted to provide "more speedy relief of all persons imprisoned for any such criminal or supposed criminal matters" and which required that a jailer provide a return on the writ within three days.

[2] *See* Docket, *Rasul v. Bush*, Civil Action No. 1:02cv00299 (D.D.C.) (opened Feb. 19, 2002).

[3] In January 2005, Judge Richard Leon ruled that the Guantanamo detainees' habeas petitions should be dismissed for failure to state a claim because the detainees lack cognizable rights. *Khalid v. Bush*, 355 F.Supp.2d 311 (D.D.C. 2005), *aff'd sub nom.*, *Boumediene v. Bush*, 476 F.3d 981, 991 (D.C. Cir. 2007), *cert. granted*, 127 S.Ct. 3078 (June 29, 2007). Although Judge Leon effectively upheld the legality of the detentions, neither he nor any court has reviewed the particular evidence or allegations put forward to justify the detention of any individual detainees.

[4] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006). The never-ending delays in resolving the detainees' habeas claims have contributed to significant deterioration in the detainees' condition. My client Mohammad Daihani, a Kuwaiti government accountant brought to the

Rather than reviewing the sufficiency of the evidence or allegations against any of the detainees or assessing the legality the detentions, the courts have spent six years attempting to answer a single question: whether the detainees possess any legally cognizable rights.[5] Even that issue remains unresolved. Although one might have expected that the detainees would be the parties attempting to make their rights the focus of the habeas cases, it has been the government, at every turn, that has made the detainees' rights the central issue in the Guantanamo cases. From the beginning, the government has argued that the detainees lack legally enforceable rights because they are foreigners held outside U.S territory, and the government has continued to make this argument in various forms throughout the litigation. Initially, the government's no-rights argument was framed in terms of jurisdiction: the courts lack jurisdiction, the government argued, because the detainees have no right to go to court.[6] In June 2004,

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base in January 2002, compared life in the nine-foot by six-foot cells at Guantanamo with being locked in a bathroom. Imagine you accidentally got locked in the bathroom, Daihani told me, with the lights on all day and night, nothing to read, day after day, year after year, and you have no idea when anyone is going to come open the door and let you out. The lack of any discernible progress in the litigation has undermined the detainees' already-fragile trust in their American lawyers, their only contact with the outside world. *See* Neil A. Lewis, *Detainee's Lawyer Says Captors Foment Mistrust*, N.Y. Times, Dec. 7, 2005. The hopelessness resulting from indefinite detention has also contributed to grave mental health problems at the prison. *See* James Risen and Tim Golden, *Three Prisoners Commit Suicide at Guantanamo*, N.Y. Times, June 11, 2006, 1.

[5] *See Rasul v. Bush*, 215 F.Supp.2d 55 (D.D.C. 2002) (holding that the federal courts have no jurisdiction to review the petitioner's habeas claims because the petitioners have no cognizable rights), *aff'd, Al Odah v. United States.*, 321 F.3d 1134 (D.C. Cir., 2003), *rev'd, Rasul v. Bush*, 542 U.S. 466 (2004) (holding that the detainees have the statutory right to pursue habeas), *upon remand, In re Guantanamo Detainee Cases,* 355 F.Supp. 2d 482 (D.D.C., 2005) (denying motion to dismiss on the ground that the detainees have enforceable rights under the Fifth Amendment), *rev'd*, *Boumediene v. Bush*, 476 F.3d 981, 991 (D.C. Cir. 2007) (holding that the petitioners lack constitutional rights, including rights under the Suspension Clause), *cert. granted*, *Boumediene v. Bush*, 127 S. Ct. 3078 (June 29, 2007). This litigation history, and the central role played by the question of the existence of the detainees' rights, is discussed in Section I.A, *infra*.

[6] *See Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

the Supreme Court rejected that argument,[7] but upon remand the government argued that the cases must be dismissed on the merits because, as foreigners held outside U.S. territory, the detainees have no rights.[8] In the latest phase of the litigation, the government defends the withdrawal of federal jurisdiction under the MCA against a Suspension Clause challenge on the ground that the detainees have no rights under the Suspension Clause or any other source because they are aliens held outside U.S. territory.[9] In June 2007, the Supreme Court granted *certiorari* to review the application of the Suspension Clause to the MCA, and the Court now appears poised, at long last, to determine whether the detainees possess enforceable rights.[10]

With so much judicial attention devoted to determining whether the detainees have any legal rights, a great deal of scholarship likewise has addressed which categories of accused enemy combatants, if any, possess rights through habeas.[11]

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[7] *Rasul v. Bush*, 542 U.S. 466 (2004).

[8] *In re Guantanamo Detainee Cases,* 355 F.Supp. 2d 482 (D.D.C. 2005); *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).

[9] Brief for the Respondents in Opposition, *Boumediene v. Bush,* Nos. 06-1195 and 06-1196, at 19-25 (filed March 2007).

[10] *Boumediene v. Bush*, 127 S.Ct. 3078 (June 29, 2007) (granting *certiorari*).

[11] *See, e.g.,* Richard H. Fallon, Jr., and Danel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029 (2007); Benjamin J. Priester, *Return of the Great Writ: Judicial Review, Due Process, and the Detention of Alleged Terrorists as Enemy Combatants,* 37 Rutgers L.J. 39, 76 (2005) (declaring that "[a] writ of habeas corpus may only be issued to terminate custody in violation of the Constitution or federal laws."); Roberto Iraola, *Enemy Combatants, the Courts and the Constiution,* 56 Okla. L. Rev. 565 (2003); Tung Yin, *Procedural Due Process to Determine "Enemy Combatant" Status in the War on Terrorism*, 73 Tenn. L. Rev. 351 (2006); *Tung* Yin, *The Role of Article III Courts in the War on Terrorism*, 13 William & Mary Bill of Rights J. 1061, 1084 (2005) (declaring that for the Guantanamo detainees' habeas claims to proceed they "must allege custody in violation of federal law, the Constitution, or a treaty."); Tung Yin, *Coercion and Terrorism Prosecutions in the Shadow of Military Detention*, 2006 B.Y.U. L. Rev. 1255; David A. Martin, *Offshore Detainees and the Role of Courts After* Rasul v. Bush*: The Underappreciated Virtues of Deferential Review*, 25 B.C. THIRD WORLD L.J. 125 (2005).

Scholars have come to differing conclusions about whether aliens held outside U.S. territory are entitled to enforceable rights.[12] Professors Richard H. Fallon, Jr., and Daniel J. Meltzer recently summarized the state of the law by describing an ascending scale of rights possessed by accused enemy combatants, which is determined by the detainees' citizenship, place of seizure, and site of detention.[13] Corresponding to the varying strengths of the detainees' rights are varying degrees of judicial review available in habeas actions: the stronger the detainees' rights, the more stringent the judicial review.[14] Notwithstanding this profusion of scholarship on the scope of detainees' rights, no one appears to have challenged the premise that the detainees' habeas claims rise or fall based on the strength of their rights.[15]

This Article argues that habeas relief does not require the possession of rights. As Part I explains, although the courts have not decided whether the detainees possess enforceable rights, the courts have uniformly and mistakenly concluded that the Guantanamo detainees' habeas claims, as well as the habeas claims brought by other accused enemy combatants, require a showing

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[12] *Compare* Randolph N. Jonakait, *Rasul v. Bush: Unanswered Questions* 13 Wm. & Mary Bill Rts. J. 1129, 1141 (2005) (arguing that aliens held outside the United States have no enforceable rights), *with* Jonathan L. Hafetz, *The Supreme Court's "Enemy Combatant" Decisions: Recognizing the Rights of Non-Citizens and the Rule of Law*, 14 TEMP. POL. & CIV. RTS. L. REV. 409, 410 (2005) (arguing that aliens detained abroad are entitled to constitutional rights).

[13] *See* Fallon & Meltzer, *supra* note 11, at 2050-2060; *see also Johnson v. Eisentrager,* 339 U.S. 763, 770 (1950) (describing an "ascending scale of rights" afforded to individuals by U.S. laws depends on citizenship and connections with the United States).

[14] *Id.* at 2065-2070.

[15] In *Enemy Combatants and the Jurisdictional Fact Doctrine*, —Cardozo L. Rev.— (forthcoming), David L. Franklin presents an argument that is fully in accord with my own. Professor Franklin argues that a structural approach rather than an individual rights approach to the enemy combatants cases provides for greater clarity and would in practice be more protective of individual rights than the individual rights approach. Professor Franklin bases his approach on the jurisdictional fact doctrine. Professor Franklin does not, however, address the issue I am addressing: whether individual rights are necessary to bring a habeas claim.

that the detainees possess cognizable rights violated by the detentions, most especially rights protected by the Constitution. Part II argues, however, that, for most of the long history of habeas corpus, courts resolved habeas claims by determining whether the jailer had authority to impose detention, without undertaking any inquiry into the petitioner's rights. Habeas did not address "rights" in the modern sense of a discrete group of personal trumps against governmental action, such as those protected by the Bill of Rights. Habeas did not protect rights in this sense for a simple reason: habeas predates rights.[16] Traditionally, habeas cases were not framed in terms of rights but in terms of power. As Justice Marshall framed the judicial inquiry in habeas cases: "The question is, what authority has the jailor to detain him?"[17] Part III seeks to illustrate how the common law inquiry into the jailer's power would apply in the Guantanamo detainee cases and argues that the traditional inquiry into power, not modern individual rights analysis, provides the best framework for resolving the cases.

I. THE GUANTANAMO CASES HAVE BEEN ANALYZED MISTAKENLY AS INDIVIDUAL RIGHTS CLAIMS

This Part explores how the unresolved question of whether the Guantanamo detainees possess cognizable rights has dominated the Guantanamo detainee habeas litigation. Although the detainees assert both that the detentions violate their individual rights and that the government lacks authority to impose the detentions, the courts have analyzed the cases solely in terms of individual rights. The court's monomaniacal focus on whether the detainees possess enforceable rights, to the near exclusion of all other issues raised by the detainees, has been the primary reason that the cases have been stalled for almost six years. Because the cases have been analyzed only in terms of the detainees' rights, the courts have

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[16] To the extent that habeas was understood to protect an individual right, it protected a general "right of liberty," which was violated whenever imprisonment was imposed without a lawful basis. *See, e.g.,* Rollin C. Hurd, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS 143 (1858); *see infra* notes 66-69 and accompanying text.

[17] *Ex parte Burford,* 3 Cranch (7 U.S.) 448 (1806).

failed to address the basic challenge to executive power that the detainees bring.

A. The Detainees' Central Claim Is That They Are Not Enemy Combatants

In January 2002, the United States began bringing men seized in the war in Afghanistan to the United States Naval Base in Guantanamo Bay, Cuba. At its peak, the Guantanamo detention center held over 700 detainees, who were citizens of forty-four different countries.[18] Most of the detainees were seized in Pakistan, many were seized in Afghanistan, and others were seized in places as far afield from the Afghanistan as Gambia, Zambia, Bosnia, and Thailand.[19] As of June 2007, after more than 400 detainees have been returned to their home countries, Guantanamo held approximately 375 detainees.[20]

The government has declared the Guantanamo prisoners to be "enemy combatants" subject to indefinite detention pursuant to the Authorization to Use Military Force (AUMF),[21] passed by Congress on September 18, 2002, and pursuant to the President's

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[18] *See* James McGarrah, Dir., Dep't of Defense Office for the Admin. Review of the Det. of Enemy Combatants, Defense Department Special Briefing on Administrative Review Boards for Detainees at Guantanamo Bay, Cuba (July 8, 2005), http://www.defenselink.mil/transcripts/2005/tr20050708-3322.html.

[19] *See e.g., El-Banna et al v. Bush*, 04-CV-1144 (D.D.C. filed July 6, 2004) (involving British petitioners arrested in Gambia and Zambia); *Boumediene v. Bush*, 04-CV-1166 (D.D.C. filed July 12, 2004) (involving six Algerian permanent residents of Bosnia arrested in Sarajevo); *Paracha v. Bush*, 04-CV-2022 (D.D.C. filed Nov. 17, 2004) (involving Pakistani citizen arrested in Thailand).

[20] *See* Department of Defense News Release, *Detainee Transfer Announced*, *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=11030 (June 29, 2007) (last visited Sept. 1, 2007).

[21] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 115 Stat. 224 (Sept. 18, 2001). The AUMF gives the President power 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."

constitutional powers as Commander-in-Chief.[22] The government has concluded that the detainees are not entitled to the protections for prisoners of war under the Geneva Conventions.[23] Initially, the military employed an informal and apparently unwritten process for determining whether a detainee is an enemy combatant.[24] In July 2004, in response to the Supreme Court's decisions in *Rasul v. Bush*[25] and *Hamdi v. Rumsfeld*,[26] the Department of Defense announced that the detainees' designation as enemy combatants would be reviewed through Combatant Status Review Tribunals (CSRTs), a new Department of Defense administrative process.[27]

Since February 2002, around 200 habeas petitions have been filed on behalf of the Guantanamo detainees.[28] The heart of the

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[22] *See* Brief for the Respondents, *Rasul v. Bush*, Nos. 03-334, 03-343, at 42 (S. Ct., filed March 23, 2004).

[23] *See* Dep't of Defense, *Fact Sheet: Guantanamo Detainees*, *available at* http://www.defenselink.mil/news/Apr2004/d20040406gua.pdf; Office of the White House Press Secretary, Fact Sheet, *Status of Detainees at Guantanamo* (Feb. 7, 2002), *available at* www.whitehouse.gov/news/releases/2002/02/20020207-13.html.

[24] *See id.* at 4 (describing "a multi-step screening process to determine if . . . detention is necessary").

[25] *Rasul v. Bush*, 542 U.S. 466 (2004).

[26] *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004).

[27] Paul Wolfowitz, Memorandum, *Order Establishing Combatant Status Review Tribunals* (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf

[28] *See* Docket, *Rasul v. Bush*, Civil Action No. 1:02cv00299 (D.D.C.) (opened Feb. 19, 2002); 151 Cong.Rec. S12652-01 (Nov. 10, 2005) (Sen. Lindsey Graham) (asserting that 160 cases had been filed on behalf of the Guantanamo detainees); Alberto Gonzales, Attorney General, Prepared Remarks of Attorney General Alberto R. Gonzales at the JAG Corps Leadership Summit, October 23, 2006, *available at* http://www.usdoj.gov/ag/speeches/2006/ag_speech_061023.html ("Our civil litigators are defending more than 200 cases pending in federal courts related to detainees, including habeas petitions, FOIA lawsuits, and tort claims."); Hilzoy, *Why Are They Doing This? (Special Habeas-Stripping Edition)*, Obsidian Wings, available at http:// obsidianwings.blogs.com/obsidian_wings/2006/09/why_are_they_do.html (Sept. 23, 2006) ("[W]hile no one seems to know the exact number of habeas

detainees' claims is that they are innocent civilians seized by mistake, not enemy combatants:

> Petitioners do not challenge the government's authority to capture and detain members of enemy armed forces who engage in combat against the United States and its allies. Nor do petitioners challenge the government's authority to arrest and incarcerate people who engage in acts of international terrorism. But petitioners contend that they have not engaged in combat against the United States or its allies and have not participated in acts of terrorism. All they seek – and have ever sought for the almost six years that they have been detained – is a fair and impartial hearing at which they have the opportunity to confront and rebut whatever accusations there are against them and to present evidence of their own to establish their innocence.[29]

The detainees' habeas claims are thus quite narrowly focused on the validity of their designation as enemy combatants.

The detainees' habeas claims rely alternatively on theories that

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cases filed by the Guantanamo detainees, estimates range from 160 to 200."); *cf. Hamdan v. Rumsfeld*, 126 S. Ct. 2748, 2810 (2006) (Scalia, J., dissenting) ("The Solicitor General represents that '[h]abeas petitions have been filed on behalf of a purported 600 [Guantanamo Bay] detainees.").

[29] Brief for Petitioners El-Banna et al., filed in *Al Odah v. United States*, No. 06-1196 (S.Ct., filed Aug. 24, 2007); *see also Al Odah v. United States*, Petition for Certiorari, S.Ct. No. 06-1196, at 2 ("All [of the petitioners] maintain that they have never engaged in combat against the United States and are wholly innocent of wrongdoing."); *Rasul v. Bush*, Petition ¶ 22 ("The detained petitioners are not enemy aliens. On information and belief, [petitioners] had no involvement, direct or indirect, in either the terrorist attacks on the United States September 11, 2001, or any act of international terrorism attributed by the United States to al Qaida or any terrorist group."); *Boumediene v. Bush*, Petition ¶¶ 21-22 ("The Detained Petitioners are not, nor have they ever been, enemy aliens, lawful or unlawful belligerents, or combatants in any context involving hostilities against the citizens, government or armed forces of the United States. . . The Detained Petitioners are not, nor have they ever been, 'enemy combatants' . . ."); *Rasul*, 124 S. Ct. at 2699 (stating that the detainees "claim to be wholly innocent of wrongdoing").

the detentions violate their individual rights and that the detentions exceed the President's constitutional and statutory powers.[30] The primary focus of the individual rights theory is that the CSRT process violated the detainees' rights to due process under the Fifth Amendment's Due Process Clause.[31] In the CSRTs, the detainees were not represented by counsel and instead received advice from "personal representatives" appointed by the military.[32] The detainees were not allowed to see any evidence the government deemed classified, which comprised most of the evidence offered to support their enemy combatant designations and therefore their detentions.[33] The detainees had no opportunity to confront their accusers because the government called no witnesses and instead relied on summaries of interrogation and intelligence reports.[34] The detainees had no ability to argue that the evidence against them was obtained through coercion or torture. The detainees could not present any evidence unless the CSRT panels found it was "reasonably available," which the panels rarely did.[35] The CSRT procedures established a presumption in favor of the government's evidence, including the evidence kept secret from the detainees.[36] Under the CSRTs, the detainees thus bore the burden of proving themselves innocent of allegations supported by evidence they had not seen, made by anonymous sources they could not confront.

In addition to their claims that the CSRTs violated their rights of due process, the detainees assert that the President has exceeded

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30 *See, e.g., Rasul* Pet. ¶¶ 40-53.

31 In addition, the detainees assert that the detentions violate their rights under the Geneva Conventions, the Convention Against Torture, and the Alien Tort Claims Act. *See, e.g., Rasul v. Bush*, Petition ¶¶ 40-49 (reciting claims).

32 *See* Wolfowitz Memorandum, *supra* note 27, at ¶ c.

33 *Id.* at ¶ (g)(4); Mark Denbeaux et al., *No-Hearing Hearings: An Analysis of the Proceedings of the Government's Combatant Status Review Tribunals at Guantánamo* 37-39, *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

34 *See* Denbeaux, *supra* note 33, at 2.

35 *Id.* at 39.

36 Wolfowitz Memorandum, *supra* note 27, at ¶ (g)(12).

his authority by holding them as enemy combatants. The detainees argue that the President has never been granted authority to impose detention on "enemy combatants" under the government's definition of that term, under which enemy combatants include anyone who could be said to have "supported" Al Qaida or the Taliban in any way, without any requirement that they participated in combat or even supported combat.[37] The detainees' challenge to the government's power to hold them also focuses on the factual basis for their designations as enemy combatants.[38] Thus, while the detainees' individual rights claims focus on the *process* by which they were designated enemy combatants, the detainees' challenge to the government's power focuses on the *substance* of that designation.

B. The Courts Have Analyzed the Guantanamo Detainees' Claims Exclusively in Terms of Individual Rights

It is unsurprising that the detainees' claims employ the discourse of both power and rights. The writ of habeas corpus has long provided "the usual remedy for unlawful imprisonment,"[39] and, broadly speaking, imprisonment can be "unlawful" in two ways—when it violates specific rights protected by law or when the jailer lacks power to impose it.[40] Claims that imprisonment

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[37] *Id.* at ¶ 1.

[38] As the petitions explain, the United States dropped leaflets in Afghanistan and Pakistan offering thousands of dollars in bounties to anyone turning in supporters of Al Qaida or the Taliban, and, in response, local villagers turned over hundreds of foreigners. *See* Mark Denbeaux, *Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data* App. A, *available at* http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf (reproducing and translating leaflets).

[39] *Chin Yow v. U.S.*, 208 U.S. 8, 13 (1908); *see also Holmes v. Jennison*, 39 U.S. 540, 564 (1840) ("If a party is unlawfully imprisoned, the writ of habeas corpus is his appropriate legal remedy."); *Ex parte Watkins*, 28 U.S. 193, 202 (1830) (the purpose of habeas corpus is "to examine the legality of the commitment"); *Nishimura Ekiu v. United States,* 142 U.S. 651, 662 (1892).

[40] *See, e.g.,* IX THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW 184-185 (John Houston Merrill, ed., 1889) (declaring that habeas relief must be granted if the petition establishes that "the imprisonment is illegal, or that there

violates the prisoner's rights focus on whether the government has transgressed limits on its power. Claims of unauthorized detention, in contrast, focus on whether the government possesses detention power in the first place.

Federal habeas law includes separate subsections authorizing habeas relief for unauthorized detention and for violations of federally protected individual rights. The primary federal habeas provision, 28 U.S.C. § 2241(c), provides in relevant part:

> The writ of habeas corpus shall not extend to a prisoner unless—
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> **(1)** He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> . . .
>
> **(3)** He is in custody in violation of the Constitution or laws or treaties of the United States.

Section (c)(1) is the successor to Section 14 of the Judiciary Act of 1789, which first authorized federal courts to issue habeas relief for federal prisoners.[41] Although Section (c)(1) does not expressly establish any standard for issuing the writ, it was understood at the time of its enactment to refer to the existing common law habeas

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is no reasonable ground for detention"). Professors Fallon & Meltzer declare that habeas petitioners challenging the lawfulness of detention can raise three types of claims:

> The first kind focuses on separation-of-powers matters: does the Executive possess authority—either with or without congressional authorization, or in the teeth of a congressional prohibition—to detain? The second involves claims of protected constitutional rights: for example, even with congressional authorization, the Executive could not detain a citizen merely for voicing opposition to a war. The third involves claims of subconstitutional rights—in statutes or treaties—to be free from detention in specified circumstances.

Fallow & Meltzer, *supra* note 11, at 2039. In this Article, I refer to the first type of habeas claim as a claim of unauthorized detention and the second two types as individual rights claims.

[41] Judiciary Act of 1789, 1 Stat. 73 (Sept. 24, 1789); *see infra* note 109.

tradition developed under English law and to incorporate the traditional standards.[42]As Part II, *infra*, discusses, the traditional common law habeas inquiry focused on whether detention is authorized by law and did not require the petitioner to establish that his rights had been violated.[43] Section (c)(3), in contrast, codifies the Habeas Corpus Act of 1867, which extended federal habeas protection to state prisoners. By its terms, Section (c)(3) focuses judicial attention on whether the petitioner is being held "in violation" of the Constitution, laws, and treaties of the United States, that is, in violation of rights protected by federal law.

While the detainees have framed their habeas claims in terms of both rights and powers, the government has sought to frame the claims within the paradigm of individual rights. The government has continually argued that the cases must be dismissed because the detainees have no rights. In attempting to keep the cases focused on the detainees' rights, the government appears to rely on an intuition that judges will lack sympathy with any assertions of the rights of terrorists bent on our national destruction, who the government has repeatedly sought to portray as the "worst of the worst."[44] The government has continually ridiculed the notion that

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[42] *See Ex parte Bollman*, 4 Cranch (8 U.S.) 75, 88 (1807) ("[F]or the meaning of habeas corpus, resort may unquestionably be had to the common law."); *see also infra* Part II.B.

[43] *See infra* Part II.A.

[44] *See, e.g.,* Secretary Rumsfeld Roundtable with Radio Media (Jan. 15, 2002), *available at* United States Department of Defense, http://www.defenselink.mil/transcripts/2002/t01152002_t0115sdr.html; White House Press Report: Argentina, Philippines, Guantanamo, South Asia (Jan. 16, 2002), *available at* United States Department of State http://usinfo.state.gov/regional/nea/sasia/afghan/text/0116wthsrpt.htm; *see also Rumsfeld: 'Captives Will Not be POWs,'* USA Today, Jan. 28, 2002, at Al (quoting Secretary Rumsfeld: "[The prisoners are] among the most dangerous, best-trained vicious killers on the face of the Earth."); DoD News Briefing - Secretary Rumsfeld and Gen. Myers (Jan. 28, 2002) ("These are people that would gnaw through hydraulic lines in the back of a C-17 to bring it down, so these are very, very dangerous people, and that's how they're being treated.") *available at* http://www.defenselink.mil/transcripts/2002/t01112002_t0111sd.html; DoD News Briefing - ASD PA Clarke and Rear Adm. Stuffiebeem (Jan. 28, 2002) *available*

the Constitution could provide such persons with legal rights.[45]

Initially, the government employed the argument that the detainees have no rights in service of a motion to dismiss for lack of jurisdiction. The government argued, and the U.S. Court of Appeals for the D.C. Circuit agreed, that the detainees have no rights because they are aliens held outside the United States.[46] Because they have no rights, the court concluded, the detainees could not pursue relief through habeas: "the right to a writ of habeas corpus [is] a 'subsidiary procedural right that follows from the possession of substantive constitutional rights.'"[47] Because the detainees lack substantive rights, the courts lack jurisdiction: "If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty."[48] In *Rasul v. Bush*, the Supreme Court reversed, ruling that the federal habeas statute provides jurisdiction, although the Court did not expressly address whether the detainees possess cognizable rights.[49]

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at *30 http://www.defenselink.mil/transcripts/2002/t01282002-t0128asd.html (Rear Admiral John D. Stuffiebeem, Joint Staff: "These are the worst of the worst, and if let out on the street, they will go back to the proclivity of trying to kill Americans and others. So that is well established.").

45 *See, e.g.,* Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support, *Hicks v. Bush*, Civil Action No. 02-CV-0299 (D.D.C., filed Oct. 4, 2004) ("Petitioners demand an unprecedented judicial intervention into the conduct of war operations, based on the extraordinary, and unfounded, proposition that aliens captured outside this country's borders and detained outside the territorial sovereignty of the United States can claim rights under the U.S. Constitution.").

46 *See Al Odah v. United States.,* 321 F.3d 1134, 1141 (D.C. Cir. 2003).

47 *Id.* at 1140.

48 *Id.* at 1141.

49 *Rasul v. Bush*, 542 U.S. 466, 480 (2004). In a footnote, the Court strongly suggested that the detainees adequately allege a habeas claim based on violation of their rights: "Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States,

Upon remand, the government again moved to dismiss on the ground that the detainees have no rights because they are aliens held outside the United States.[50] This time, the no-rights argument was yoked to a motion to dismiss on the merits: the habeas petitions are meritless, the government argued, because the detainees cannot allege any violation of their rights. The government's argument that the detainees possess no cognizable rights was addressed by two different district court judges, who reached opposing conclusions. In *Khalid v. Bush*, Judge Richard Leon agreed with the government that aliens held outside U.S. territory have no cognizable rights and therefore the detainees' habeas petitions must be dismissed.[51] Two weeks later, Judge Joyce Hens Green ruled that all of the detainees are entitled to fundamental due process under the Fifth Amendment, and the detainees accused of supporting the Taliban are also entitled to the protections of the Geneva Conventions.[52]

Although Judges Leon and Green disagreed about whether the detainees possess any legal rights, they agreed on the underlying premise that the detainees' ability to pursue habeas relief depends on whether they can claim that they are in custody "in violation" of their rights under "the Constitution or laws or treaties of the United States," as 28 U.S.C. § 2241(c)(3) provides. Judge Leon expressly rejected the argument that the detainees' habeas claims could proceed without any alleged violation of rights. In a brief footnote, Judge Leon held that the detainees' lack of any cognizable rights mandated the dismissal of their habeas claims under Section (c)(1), just as it required the dismissal of their claims under Section

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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.'" *Id.* at 483 n.15 (quoting 28 U.S.C. § 2241(c)(3)).

[50] *See* Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support, filed in *Hicks v. Bush,* Civil Action no. 02-CV-0299 and 12 other cases (D.D.C. Oct. 4, 2004)

[51] *Khalid v. Bush*, 355 F.Supp.2d 311 (D.D.C. 2005).

[52] *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443 (D.D.C. 2005).

(c)(3).[53] Judge Green, in contrast, did not even mention the claim for common law habeas relief under section (c)(1). Thus, to both judges, the central and dispositive question in assessing the habeas claims was whether the detainees possessed enforceable rights.

With the enactment of the Military Commissions Act of 2006 (MCA), the question whether the detainees possess rights, the question that has dominated the litigation, has arisen in yet another way. Enacted while the two district court decisions were pending on appeal, the MCA purports to overrule *Rasul* and withdraw the federal courts' jurisdiction to hear the detainees' habeas claims.[54] The government argues that the MCA requires dismissal of the petitions, while the detainees argue that the MCA is inconsistent with the Suspension Clause.[55] The government defends the constitutionality of the MCA by once again trotting out its familiar no-rights argument: the Suspension Clause does not protect the detainees, the government argues, because they are aliens held outside the United States. In *Boumediene v. Bush*, the D.C. Circuit once again agreed with the government that "the Constitution does not confer rights on aliens without property or presence within the United States."[56] The D.C. Circuit thus concluded that the detainees' supposed lack of rights (again, because they are aliens held outside the United States) means that they cannot invoke the Suspension Clause.

Dissenting, Judge Rogers construed the Suspension Clause to impose a limitation on congressional power rather than establish an individual right. Judge Rogers characterized the Suspension Clause as a "structural" limitation on Congress, not an individual right, and concluded that application of the Suspension Clause does not

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[53] *Khalid*, 355 F.Supp.2d at 324 n.17. Without any citation or support, Judge Leon concluded that the habeas statute could not give the detainees "more rights than they would otherwise possess under the Constitution." *Id.*

[54] Military Commissions Act of 2006, § 7, Pub. L. No. 109-366, 120 Stat. 2600, 2635-36 (2006).

[55] U.S. Const., Art. I § 9, cl. 2, provides: "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."

[56] *Boumediene v. Bush*, 476 F.3d 981, 991 (D.C. Cir. 2007).

depend on whether the detainees possess constitutional rights: "It is unclear where the court finds that the limit on suspension of the writ of habeas corpus is an individual entitlement."[57] According to Judge Rogers, if Congress exceeded the constitution's structural limitations when it withdrew federal habeas authority, the withdrawal was void even if the detainees possess no individual rights.[58] The *Boumediene* majority, however, found the distinction between rights and power analysis to be incomprehensible:"[T]he dissent offers the distinction that the Suspension Clause is a limitation on congressional power rather than a constitutional right. But this is no distinction at all."[59] To the *Boumediene* majority, Congress could be said to have exceeded its authority under the Suspension Clause only if the detainees could establish a corresponding right against it. In other words, power claims and rights claims are simply two sides of the same coin.

C. The Other Enemy Combatant Cases Likewise Have Been Framed in Terms of the Detainees' Rights

The dominant role that the question of the existence of individual rights has played in the Guantanamo detainee litigation has been repeated in all the other enemy combatant cases. As with the habeas cases brought by Guantanamo detainees, the habeas cases brought Yasser Hamdi, Jose Padilla, Salim Hamdan, Ali Al Marri, among others, have also focused largely, if not exclusively, on the existence and strength of the detainees' rights.[60] As Professors Fallon and Meltzer have recently summarized, the enemy combatant cases, taken together, have created a sliding scale of constitutional rights based on the detainees' citizenship, where they were seized, and where they are detained.[61] The strength of the detainees' rights determines the scope of executive

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[57] 476 F.3d at 997 n.3, 995.

[58] *Id.* at 997

[59] *Id.* at 993.

[60] *See Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006); *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004); *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007); *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

[61] *See* Fallon & Meltzer, *supra* note 11, at 2065-2089.

power to detain them and judicial power to review the detentions. At one end of the spectrum are American citizens seized in the United States and detained on U.S. soil, who have the full protection of the Constitution and therefore are entitled to the most searching judicial review in challenging their detentions.[62] On the other end are foreign citizens detained outside the United States, who have few or no rights and therefore are entitled to little or no judicial review.[63] In between lie detainees who have rights of varying strengths—for instance, Americans detained abroad and foreigners detained in the United States.[64]

Thus, under the courts' decisions in the enemy combatant cases, the first and likely dispositive question to be resolved in any habeas case challenging executive detention is a determination of the strength of the detainee's rights. Under this scheme, detainees possessing strong rights are entitled to fulsome judicial review, detainees possessing weak rights are entitled only to cursory review, and detainees possessing no rights are entitled to no review. Corresponding to the spectrum of individual rights are spectra of executive power and judicial review. The executive branch has the least amount of power in its treatment of Americans seized and detained in the United States: they can only be imprisoned based on a criminal trial.[65] The executive branch has the most power in its treatment of foreigners held outside the United States: they can be imprisoned forever without judicial review, can be transferred to countries that engage in torture, and presumably could be tortured without judicial interference. In between lie cases in which the government can impose detention based on something less than criminal standards and can engage in perhaps just a little torture.

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62 *Id.* at 2066-2082.

63 *Id.* at 2087.

64 *See, e.g., Munaf v. Geren,* 482 F.3d 582 (D.C. Cir. 2007). Professors Fallon & Meltzer consider Guantanamo an intermediate case because it is neither wholly foreign nor wholly sovereign territory. *See* Fallon & Meltzer, *supra* note 11, at 2058-2060, 2088-2089.

65 *See Al Marri*, 487 F.3d at 193.

II. COMMON LAW HABEAS ACTIONS ADDRESS QUESTIONS OF POWER RATHER THAN RIGHTS

Claims that imprisonment violates the petitioner's rights have become so prevalent in contemporary habeas corpus actions that it is easy to miss a fundamental fact about habeas history: habeas predates rights. This Part explores that history to show that, until the modern era, habeas courts determined whether detention was lawful by demanding that the jailer establish that he had acted within the scope of his lawful authority. Traditionally, habeas cases were not framed in terms of the prisoner's rights.

Section A shows that, by the late seventeenth century, habeas actions were governed by well-established procedures, standards, and burdens of proof, which focused habeas courts' inquiries on the jailer's power and did not require a determination of whether the petitioner possessed any legal rights. Section B discusses the application of those standards in the United States and explains that federal habeas protection was understood from the outset to embody common law habeas standards. Indeed, in the 126 reported federal habeas cases from 1789, when federal habeas authority was first established, until 1867, when it was expanded, federal courts uniformly engaged in the traditional habeas inquiry into the custodian's authority and saw no need to inquire into the scope or even existence of the petitioner's rights. Section C discusses the modern trend of framing habeas claims in terms of individual rights, which began roughly with the adoption of the Habeas Corpus Act of 1867 and accelerated through the twentieth century. As that section argues, federal habeas claims can now be based on almost any asserted violation of individual rights, but it does not follow that establishing a violation of individual rights is required to make out a habeas claim. Common law habeas claims of unauthorized detention, without regard to rights, remain available under federal law.

A. Habeas Developed As a Check on Imprisonment Power, Not as a Protection of Individual Rights

When the writ of habeas corpus developed under English law, the concept of legal rights was in its infancy.[66] By this I mean the modern conception of rights, what rights theorists characterize as "subjective rights"—personal privileges or powers inherent in individuals that the government cannot take away except in extraordinary circumstances or with strong justifications; that is, the conception of rights as "trumps" famously coined by Ronald Dworkin.[67] Rather than protecting discrete individual rights, such as the right to jury trial, the right to counsel, or the right to confrontation, the writ developed as a means of ensuring that detention could only be imposed based on lawful authority. Habeas cases thus focused on the jailer's power, not the prisoner's rights, as Justice Cooley explained in 1867:

> The important fact to be observed in regard to the mode of procedure upon this writ is that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. . . . The whole force of the writ is spent upon the respondent.[68]

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[66] *See* Brian Tierney, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW 1150-1625 (Scholars Press 1997); Brian Tierney, *Historical Roots of Modern Rights: Before Locke and After* 3 Ave Maria L. Rev. 23 (2005); Charles J. Reid, Jr., Book Review, *The Medieval Origins Of The Western Natural Rights Tradition: The Achievement Of Brian Tierney*, 83 Cornell L. Rev. 437 (1998); Kenneth Pennington, *The History of Rights in Western Thought*, 47 Emory L.J. 237 (1998); James H. Hutson, *The Emergence of the Modern Concept of a Right in America: The Contribution of Michel Villey*, 39 Am. J. Juris. 185 (1994).

[67] *See, e.g.*, Ronald Dworkin, TAKING RIGHTS SERIOUSLY 194 (1977) ("A right against the Government must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done."); *see also* John Hart Ely, Democracy And Distrust 36 (1980) (asserting that "rights and powers are not simply the absence of one another but that rights can cut across or 'trump' powers"); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. Legal Stud. 725, 727 (1998).

[68] *In the Matter of Jackson*, 15 Mich. 417, 439-440 (1867); *see also Ex parte Endo*, 323 U.S. 283, 306 (1944) (quoting *Jackson*).

To the extent that habeas was characterized as protecting individual rights, it was not understood to protect discrete rights but rather to protect the general "right to liberty," which is violated whenever imprisonment is imposed without lawful authority.[69]

From its earliest uses, the central purpose of habeas has been to require that jailers justify the legal cause of detentions.[70] The earliest known uses of the English common law writs of habeas corpus were in the thirteenth century, when several related writs were employed to compel the appearance of a person in court.[71] These writs had in common the Latin phrase "habeas corpus," a command to "have the body" brought to court.[72] One of the early habeas writs, the writ of *habeas corpus cum causa*, was so named because it required an inquiry into the cause of detention.[73] Beginning in the sixteenth century, the English crown courts expanded the use of these writs to resolve conflicts with rival courts and other quasi-judicial bodies.[74] As part of this expansion, the crown courts required the inferior courts to clearly declare a sufficient legal cause justifying any imprisonments or detentions

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[69] *See* 3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 129-137 (1768) (characterizing the "personal liberty of the subject" as a "natural inherent right, which could not be surrendered or forfeited unless by the commission of some great and atrocious crime, nor ought to be abridged in any case without the special permission of law"); Hurd, *supra* note 16, at 143.

[70] *See, e.g.,* Hurd, *supra* note 16, at 255 ("[T]he aim and effect of the writ is to require the defendant to show the cause of the imprisonment."); Story, *supra* note 70, at § 1333 (describing habeas corpus as "the appropriate remedy to ascertain, whether any person is rightfully in confinement or not, and the cause of his confinement; and if no sufficient ground of detention appears, the party is entitled to his immediate discharge").

[71] *See* William F. Duker, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 12-23 (1980).

[72] *Id.* at 17.

[73] *See* Duker, *supra* note 71, at 24-25; Maxwell Cohen, *Habeas Corpus Cum Causa: The Emergence of the Modern Writ—II*, 18 Can. B. Rev. 172, 197 (1940).

[74] *See* Duker, *supra* note 71, at 62; Jonathan Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 Yale L.J. 2521-2522 (1998).

they ordered.[75] In this way, the writ was used to test the legality of the "cause" of imprisonment.

By the sixteenth century, the writ began to be employed to challenge the legality not only of detention by inferior courts but by executive officials as well.[76] The English courts used writs of habeas corpus to demand that the king's officers provide justifications for holding political prisoners.[77] For instance, in 1587, the Court of Common Pleas issued a writ of habeas corpus to produce the body of a man named Hellyard, who was held by royal command at Fleet Prison.[78] In response, the warden of the prison submitted a return simply explaining that Hellyard was being held by the command of Sir Francis Walsingham, the Secretary of State.[79] The court ruled that the return was inadequate because "the warden did not shew in his return for what cause the said Hellyard was committed."[80] Likewise, in *Addis' Case* of 1615, the jailer's return to the writ merely declared that the prisoner was held for matters concerning the king, but the court held the return insufficient "for it shews not for what cause he was committed."[81]

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[75] *See* Duker, *supra* note 71, at 41-43; R.J. Sharpe, THE LAW OF HABEAS CORPUS 5 (1989).

[76] Rollin Hurd traced the earliest uses of the writ against the crown to the reign of Henry VII, who ruled from 1485 to 1509. Hurd, *supra* note 16, at 145; *see also* R.J. Sharpe, *The Law of Habeas Corpus* 7 (1976) (declaring that by late 1500s, habeas corpus had been "shown to be a remedy fit to challenge the authority of the crown").

[77] *See* Duker, *supra* note 71, at 41-43.

[78] *Hellyard's Case,* 74 Eng. Rep. 455 (C.P. 1587).

[79] *Id.*.

[80] *Id.* Five years after *Hellyard's Case*, the court declared that "her Majesties Writs have sundry times been directed to divers persons having the custody of such persons unlawfully imprisoned, upon which Writs no good or lawful cause of imprisonment hath been returned or certified; whereupon according to the Laws they have been discharged from their imprisonment."1 Anderson's Reports 297, 123 Eng. Rep. 482 (1592).

[81] 79 Eng. Rep. 190 (K.B. 1615); *see also Howel's Case*, 74 Eng. Rep. 66 (C.P. 1587) (discharging prisoner for insufficient cause stated in return); *Peter's Case*, 74 Eng. Rep. 628 (C.P. 1586) (same).

Although these cases required that even the crown had a duty to explain the legal basis for holding prisoners, the principle was not firmly established until 1679. Controversy erupted in 1627 in the seminal *Five Knights Case*, also known as *Darnel's Case*, over whether the king's word alone was sufficient to establish sufficient legal cause.[82] *Darnel's Case* arose when the king ordered suspected state enemies detained based solely upon his "special command," and sought to block any judicial inquiry into the basis for their confinement.[83] The prisoners argued that, unless criminal charges were brought, "imprisonment shall not continue for a time, but for ever; and the subjects of this kingdom may be restrained of their liberties perpetually," in violation of the Magna Carta.[84] The court, however, sided with the king.[85]

Parliament strongly objected to the suggestion that the king and his officers enjoyed unchecked detention authority and responded by enacting a series of statutes to prohibit detention without legal cause. In 1628, Parliament enacted the Petition of Right, which prohibited imprisonment upon royal command and without formal charges.[86] When the king nonetheless continued to impose imprisonment without charges, Parliament enacted the Habeas Corpus Act of 1641, which commanded the king's custodians to provide a legal basis for a prisoner's detention and instructed judges to act "without delay" in response to a petition for habeas corpus.[87] Under the 1641 Act, whenever the legal authority of any person holding another was challenged through a petition for habeas corpus, the custodian was required to "certify the true cause of such his detainer or imprisonment," and the court was required

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[82] 3 How. St. Tr. 1 (K.B. 1627); *see also* Duker, *supra* note 71, at 43; 3 Blackstone, *supra* note 69, at 129-137.

[83] *Id.* at 37.

[84] *Darnel's Case*, 3 How. St. Tr. at 8; *see also* Magna Carta art. 39 (1215) ("No freeman shall be taken or imprisoned … except by the lawful judgment of his peers or by the law of the land.").

[85] *Darnel's Case*, 3 How. St. Tr. at 8.

[86] 3 Car. 1, c. 1, §§ 5, 10 (1628).

[87] The Habeas Corpus Act of 1641, 16 Car. 1, c.10 (1641); Duker, *supra* note 71, at 45; 3 Blackstone, *supra* note 69, at 129-137.

to "proceed to examine and determine whether the cause of such commitment appealing upon the said return be just and legal, or not . . ."[88] When even the 1641 Act proved ineffective, Parliament adopted the Habeas Corpus Act of 1679, which remedied various procedural flaws that had prevented prompt judicial inquiry into the legality of confinement.[89]

With the adoption of the 1679 Act, habeas became, in Blackstone's words, an effective remedy for "all manner of illegal confinement."[90] The writ was available to challenge unlawful restraints by private actors as well as imprisonment ordered by the King, Parliament, or the courts.[91] Blackstone later declared that the 1679 Act represented a "second magna carta and stable bulwark of our liberties" because it effectively prohibited any detention imposed without lawful authority.[92] The writ served its function by requiring anyone restraining another's liberty to provide legal justification for the restraint.[93]

Under the 1641 and 1679 Habeas Corpus Acts, the ultimate issue in all habeas cases was whether the jailer could establish a legal "cause" to justify the detention. In 1758, the Chief Justice of the Court of Common Pleas described the writ as a judicial command to the custodian to "'[t]ell the reason why you confine him.' The Court will determine whether it is a good or bad reason."[94] A group of legal historians recently described the writ in similar terms: "Its very essence—its substance—was a searching inquiry by neutral judges into the factual and legal validity of the

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[88] Act for the Abolition of the Star Chamber, July 5, 1641, 16 Car. 1, c. 10 § 8(4); *see* Duker, *supra* note 71, at 47.

[89] The Habeas Corpus Act of 1679, 31 Car. 2, c.2 (27 May 1679); *see* Duker, *supra* note 71, at 48-58.

[90] *See* 1 Blackstone, *supra* note 69, at 131.

[91] Hurd, *supra* note 16, at 147.

[92] 1 Blackstone, *supra* note 69, at 137.

[93] *See* Duker, *supra* note 71, at 55; Hurd, *supra* note 16, at 144.

[94] Wilmot, *Opinion on the Writ of Habeas Corpus*, 97 Eng. Rep. 29, 43 (1758).

Executive's proffered justification for the detention."[95]

Judicial inquiry into the legal cause of detention required the jailer to establish with strict precision his legal authority for holding the petitioner. As Blackstone explained:

> [T]he glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This induces an absolute necessity of expressing upon every commitment the reason for which it is made; that the court upon an *habeas corpus* may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.[96]

As Blackstone thus made clear, a sufficient justification for detention could only be based upon positive law, whether under the common law or by statute, which clearly defined and limited when detention was authorized and by whom.[97]

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[95] Supplemental Brief of Amici Curiae of British and American Habeas Scholars Listed Herein in Support of Petitioners Addressing Section 1005 of the Detainee Treatment Act of 2005, *Boumediene v. Bush*, No. 05-5064 at 11 (D.C. Cir., submitted Mar. 30, 2006).

[96] 3 Blackstone, *supra* note 69, at 129-37.

[97] *See* 1 Blackstone, *supra* note 69, at 131-133 ("To make imprisonment lawful, it must either be, by process from the courts of judicature, or by warrant from some legal officer, having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a *habeas corpus.*"); *see also* Hurd, *supra* note 16, at 256 ("To justify the detention, the return must show it to be founded on sufficient authority, either public or private.") Legal authority for imposing detention could be established by statute or by common law. For instance, English common law authorized husbands, fathers, guardians, and masters to impose restraints "in order to enforce a performance of those natural, moral, and civil duties, which wives, children, wards, and apprentices, owe to their superiors." Wilmot, *supra* note 94, at 36. Thus, in habeas actions challenging private detentions, courts looked to whether the common law granted the custodian authority to impose the detention and whether he had acted in accordance with that authority. *Id.*

The 1641 and 1679 Habeas Corpus Acts codified not only the common law standard for issuing habeas relief—the absence of a valid cause of detention—but also codified the procedures for determining whether detention was based on lawful authority. The petitioner began a habeas action by submitting a request for the writ and, in doing so, bore the burden of establishing probable cause that he was being held without a lawful basis.[98] If probable cause were established, courts had no discretion but were required to issue the writ.[99] Upon receiving the writ, the custodian was required to bring the petitioner to court and to justify the basis for the commitment. As provided by the 1641 Habeas Corpus Act and continued in the 1679 Act, the jailer bore the burden of establishing the "cause" of commitment, and the court was required to "examine" that cause and "determine" whether it was sufficient.[100] If the court ruled the cause insufficient, it would order the custodian to discharge the petitioner.[101]

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[98] *See* Wilmot, *supra* note 94, at 36 (stating that courts would not issue writs of habeas corpus "upon a mere suggestion; but upon some proof of a wrong and injury done to a subject."); 3 Blackstone, *supra* note 69, at 132 (stating that writs of habeas corpus and other prerogative writs "do not issue as of mere course, without shewing some probable cause why the extraordinary power of the crown is called in to the party's assistance."); *see also* Duker, *supra* note 71, at 4.

[99] *See* Blackstone, *supra* note 69, at 133 ("[I]f a probable ground be shewn, that the party is imprisoned without just cause, the writ of habeas corpus is then 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, though it be by the command of the king, the privy council, or any other."); *see also* Duker, *supra* note 71, at 5 ("Once probable ground was shown that the party was committed for no crime, or that he was imprisoned for a crime by a person or an organ lacking jurisdiction, habeas corpus became a matter of right. If doubt existed whether a crime was committed or not, or whether the party was committed by a competent jurisdiction, or there appeared to be a bailable crime, habeas corpus again would be granted as a matter of right.").

[100] The 1679 Act maintained the common law's focus on whether the jailer could establish his lawful authority for imposing detention. 31 Car. 2, c.2, § II(4) (May 27, 1679) (requiring the jailer to "certify the true causes of his detainer or imprisoner").

[101] *See* 3 Blackstone, *supra* note 69, at 129-137 (stating that a jailer must specifically express the cause of imprisonment so that "the court upon an *habeas*

As the traditional habeas standards and procedures make clear, habeas corpus historically served as a mechanism for ensuring that detention was imposed only based upon lawful authority. To determine whether detention was authorized—that is, whether a sufficient legal "cause" supported the detention—courts asked whether the jailer could show that by statute or otherwise he had been granted power to impose imprisonment and that he had acted within the scope of that power in imprisoning the petitioner. Habeas courts thus had no occasion to ask whether the petitioner's rights had been violated because the only right at issue was the right not to be imprisoned without legal cause, an inquiry that was resolved by determining the scope of the jailer's authority.

B. Until the Modern Era, Federal Habeas Actions Followed Traditional Standards By Focusing on the Custodian's Authority, Not the Petitioner's Rights

Federal habeas authority was established in 1789 with the ratification of the Constitution, which expressly limits Congress's power to suspend the writ, and with the enactment the same year of Section 14 of the Judiciary Act, which authorizes federal courts to issue the writ.[102] The writ of habeas corpus protected by federal law was the familiar habeas corpus described by Blackstone, and the standards and procedures for issuing habeas relief were well-established: the jailer was required to establish his lawful authority for imposing detention; authority was only lawful if established by positive law; and, in cases of executive detention, courts would scrutinize the proffered basis with exacting scrutiny. Habeas corpus under Section 14 of the Judiciary Act did not require the petitioner to make any showing of violation of rights, except to the extent that unauthorized detention itself violated the petitioner's liberties. The standards established under Section 14 remain quite relevant to contemporary habeas action because Section 14 remains part of federal law and is now codified at 28 U.S.C. §

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corpus may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner").

[102] U.S. Const. Art. I § 9; Judiciary Act of 1789, 1 Stat. 73 (Sept. 24, 1789).

2241(c)(1).[103]

1. The Suspension Clause and the Judiciary Act Embody the Common Law Protection Against Unauthorized Detention

The original grants of federal habeas authority, the Suspension Clause and Section 14 of the Judiciary Act, incorporate common law habeas standards, which focus on the jailer's authority, not the prisoner's rights. The Suspension Clause, Article I, Section 9 of the Constitution, provides: "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."[104] Section 14 of the Judiciary Act, adopted six months after the Constitution went into effect, provides that "the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment."[105] The texts of the Suspension Clause and Judiciary Act are quite sparse, and neither expressly defines what habeas corpus is or provides any guidance upon what grounds it could issue.[106] From the outset, these provisions have been understood to incorporate common law habeas standards. As Chief Justice Marshall declared, the term "habeas corpus" was "well understood" in 1789, and the content of habeas corpus could be

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[103] The 1875 revision to the federal laws codified Section 14 at R.S. § 752 and made slight changes to the statutory language, authorizing federal courts "to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty." Revised Statutes § 752 (1875); *Carbo v. United* States, 364 U.S. 611, 616 (1961) (reviewing statutory history of Section 14). In 1948, that section was codified at 28 U.S.C. § 2241, and the quoted words were omitted, as the statutory revisor explained, because they were understood to be "merely descriptive of the writ." *See Carbo*, 364 U.S. at 619 (quoting H.R.Rep. No. 2646, 79th Cong., 2d Sess., p. A169; H.R.Rep. No. 308, 80th Cong., 1st Sess., pp. A177-A178).

[104] U.S. Const. Art. I § 9.

[105] Judiciary Act of 1789, 1 Stat. 73 (Sept. 24, 1789).

[106] *Ex parte Watkins*, 28 U.S. 193, 201 (1830) ("No law of the United States prescribes the cases in which this great writ shall be issued, nor the power of the court over the party brought up by it.").

gleaned from a historical understanding of the traditional writ.[107] As Justice Marshall declared, "for the meaning of habeas corpus, resort may unquestionably be had to the common law."[108]

By authorizing federal courts to employ the writ of habeas corpus "for the purpose of an inquiry into the cause of commitment," Section 14 makes clear that federal habeas law embodies the common law habeas standards. As discussed above, an inquiry into the cause of commitment had long been the traditional function of habeas, as codified in the Habeas Corpus Act of 1641, which required English courts to "examine and determine whether the cause of such commitment appearing upon the said return be just and legal, or not."[109] The clear implication that Section 14 incorporates common law standards holds the same implication for the Suspension Clause because the Judiciary Act, passed by many of the constitutional framers, has long been characterized as "a contemporaneous exposition of the Constitution," in which Congress gave "this great constitutional privilege life and activity."[110]

The common law habeas standards did not depend on any showing that rights had been violated. Indeed, in 1789 when the Suspension Clause and the Judiciary Act went into effect, the Bill of Rights had not been ratified. Plainly, the framers of the Constitution and the First Congress, who considered habeas corpus to be a fundamental protection against tyranny, could not have intended that protection to depend on the assertion of rights not yet

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[107] *Id.*

[108] *Ex parte Bollman*, 4 Cranch (8 U.S.) 75, 88 (1807). Ever since then, as Dallin Oaks remarked, "the history of this venerable remedy has played an important role in the Supreme Court." Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 451 (1966); *see also* James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 Colum. L. Rev. 1997, 1999 (1992) ("[A proper determination of the Great Writ's future requires an accurate understanding of its past.").

[109] Act for the Abolition of the Star Chamber, July 5, 1641, 16 Car. 1, c. 10 § 8(5).

[110] *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 420 (1821); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807).

in existence.

The common law understanding of the function of habeas as protection against unauthorized detention, rather than as protection of discrete individual rights, comports with Federalist conceptions of the relationship between governmental powers and rights.[111] In Federalist No. 84, Alexander Hamilton argued that no bill of rights was required because, among other reasons, the Suspension Clause already prohibited "arbitrary imprisonments, [which] have been in all ages the favourite and most formidable instruments of tyranny." Hamilton then stated:

> The observations of the judicious Blackstone in reference to [habeas corpus], are well worthy of recital. "To bereave a man of life (says he) 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 goal, 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 every where peculiarly emphatical in his encomiums on the *habeas corpus* act, which in one place he calls "the BULWARK of the British constitution."[112]

Federalist No. 84 thus makes clear that the "habeas corpus" protected by the Suspension Clause is the familiar writ praised by Blackstone and codified in "the habeas corpus act," that is, the

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111 *See, e.g.,* Letter from James Madison to George Washington (Dec. 5, 1789), *reprinted in*, 5 Documentary History of the Constitution, 1786-1870, at 221, 221-22 (U.S. Dep't of State ed., 1905) ("If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter to be secured by declaring that they shall not be abridged, or that the former shall not be extended.").

112 Federalist No. 84.

famous Habeas Corpus Act of 1679.[113] As Hamilton explained, the writ protected against "arbitrary imprisonments," that is, imprisonments without legal cause, precisely the standard codified under English law. [114]

The Federalists thus sought to protect individual rights by establishing limits on the government's powers, not by enumerating discrete individual rights.[115] Enumerated individual rights were unnecessary, the Federalists argued, because the Constitution established sufficient structural mechanisms to ensure that the government operates within its limited powers. In 1833, Justice Story captured the way that the Federalists understood habeas corpus to protect individual rights:

> It is, therefore, justly esteemed the great bulwark of personal liberty; since it is the appropriate remedy to ascertain, whether any person is rightfully in confinement or not, and the cause of his confinement; and if no sufficient ground of detention appears, the party is entitled to his immediate discharge.[116]

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[113] Federalist No. 84; *see also* 1 Blackstone, *supra* note 69, at 136; Habeas Corpus Act of 1679, discussed *infra* notes 89-93 and accompanying text.

[114] The ratification debates also suggest that the writ protected by the Suspension Clause referred to the traditional writ. Several state legislatures that ratified the Constitution sought to clarify that the habeas corpus enshrined in Article I was the traditional writ. Thus, Virginia endorsed an amendment that provided "That every freeman restrained of his liberty is entitled to a remedy, to enquire into the lawfulness thereof, and to remove the same if unlawful, and that such remedy ought not to be denied or delayed," and similar recommendations were endorsed by the conventions of Rhode Island and North Carolina.3 Elliot 658; Duker, *supra* note 71, at 134.

[115] *See, e.g.,* Federalist No. 84; *see also* Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 Colum. L. Rev. 1215, 1225 (1990) ("[T]he founding generation was very comfortable with the idea that structural provisions, including provisions that define governmental powers and clarify that powers not granted are reserved, constitute individual rights provisions of the first order.").

[116] Story, *supra* note 70, at § 1333; *see also* Thomas B. McAffee, *The Federal System As Bill Of Rights: Original Understandings, Modern*

As Story explained, habeas served as the great bulwark of liberty not by protecting a discrete set of individual rights but by requiring that the government act within the bounds of its authority, that is, by imposing imprisonment only for a lawful cause. Habeas thus served to protect individual freedom against tyranny but it did so solely by focusing on whether detention exceeded the government's powers.

2. Federal Habeas Claims Under Section 14 of the Judiciary Act Focused on Power, Not Rights

Consistent with the prevailing view that habeas served as a check on governmental detention power, federal habeas actions brought under Section 14 of the Judiciary Act uniformly followed common law procedures and standards. As Rollin Hurd explained in 1858, under American habeas law "the general principles of practice are substantially the same as those prevailing at common law and under the Habeas Corpus Act of 1679."[117] Thus, in federal habeas actions, as under English actions, the jailer bore the burden of establishing the cause of detention.[118] Moreover, federal habeas actions under Section 14 uniformly were framed as challenges to unauthorized detention, not as claims that any particular rights of the petitioners were violated. Indeed, in the 126 reported federal habeas decisions between 1789 and 1867, not one was framed as alleging a violation of a discrete individual right.[119] Instead, each of the petitioners alleged that detention was unauthorized by law.

Misreadings, 43 Vill. L. Rev. 17, 18 (1998) (arguing that "our familiarity with the modern judiciary's reliance upon specific textual rights provisions as 'trumps' against otherwise valid claims of legislative authority has blinded us to the fact that [to the Constitution's Framers] civil rights claims based on a lack of governmental authority are also 'individual rights' claims.").

[117] Hurd, *supra* note 16, at 209.

[118] *See Ex parte Frederich*, 149 U.S. 70 (1892); *In re Boardman*, 169, U.S. 39, 43 (1898); *In re Keeler*, 14 Fed. Cas. 173 (1843); *In re Taylor*, 23 Fed. Cas. 728 (1879); *In re Winder*, 30 Fed. Cas. 288 (1862); *see also* Duker, *supra* note 71, at 6.

[119] For a summary of the claims asserted for habeas relief in the reported federal habeas decisions brought under Section 14 of the Judiciary Act prior to 1867, *see* the Appendix to this Article.

One of the first cases decided under Section 14, *Ex parte Burford*, is particularly instructive on the judicial inquiry in federal habeas cases.[120] The habeas petition in that case was filed by John Atkins Burford, who had been imprisoned by justices of the peace because they found that he was a man of "not of good name and fame, nor of honest conversation, but an evil-doer and disturber of the peace."[121] The petition alleged that detention was unauthorized because no federal law made it a crime to have a notorious reputation.[122] In evaluating the petition and awarding habeas relief, the Court neither inquired whether the detention violated Burford's rights nor identified any right that the detention violated. Instead, Chief Justice Marshall framed the Court's inquiry solely in terms of the government's power: "The question is, what authority has the jailor to detain him?"[123] The Court granted habeas relief, not because Burford had identified a right violated by the imprisonment but because "the warrant of commitment was illegal, for want of stating some good cause certain, supported by oath."[124]

All federal habeas actions under Section 14 were understood to pose the same question raised by *Burford*—"what authority has the jailor to detain him?" Petitions were brought under Section 14 challenging the authority of a warden to continue imprisonment after the petitioner received a presidential pardon;[125] challenging the authority of a military commission to try the petitioner;[126] challenging a court's authority to impose detention for the purpose of extradition;[127] challenging whether the crime with which the

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120 3 Cranch (7 U.S.) 448 (1806).

121 *Id.* at 451.

122 *Id.* at 459.

123 *Id.* at 451.

124 *Id.* at 452.

125 *Ex parte Wells,* 59 U.S. 307 (1955).

126 *Ex parte Vallandigham*, 68 U.S. 243 (1863).

127 *In re Kaine*, 55 U.S. 103 (1852); *In re Metzger*, 46 U.S. 176 (1847).

petitioners were charged constituted a lawful offense;[128] challenging a trial court's authority to impose contempt;[129] and challenging the court's authority to impose detention based on civil process.[130] All of these claims were framed as challenges to the custodian's detention authority, not as violations of individual rights.[131]

C. Modern Habeas Actions Focus on Individual Rights

Judicial inquiry in habeas actions has undergone a significant change since 1789. Little more than a hundred years passed between Chief Justice Marshall's declaration that in a habeas case "the question is, what authority has the jailor to detain him?" and Justice Holmes' very different way of framing the merits inquiry in a habeas cases: "what we have to deal with [is] solely the question whether [petitioner's] constitutional rights have been preserved."[132] In the years between these two decisions, courts had stopped thinking of the writ as solely a mechanism for ensuring that detention was imposed based on lawful power and had begun to see it more broadly as a means of protecting the growing body of individual rights. The shift had a number of causes—the expansion of federal habeas authority under the Habeas Corpus

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[128] *Ex parte Watkins*, 28 U.S. 193 (1830); *Ex parte Bollman*, 8 U.S 75 (1807).

[129] *Ex parte Kearney*, 20 U.S. 38 (1822).

[130] *Ex parte Wilson*, 10 U.S. (6 Cranch) 52 (1810).

[131] Lower federal courts hearing habeas claims likewise focused exclusively on the jailer's authority, not the petitioner's rights. For instance, in *United States v. Bainbridge*, 24 F. Cas. 946 (C.C. Mass. 1816), a habeas petition was brought challenging the authority of the United States to maintain custody over a minor who had enlisted in the Navy allegedly without his father's consent. The sole focus of Justice Story's opinion was on whether Congress had by statute authorized the Navy to accept enlistment by minors. Finding that Congress had done so, whether the statute was enacted pursuant to enumerated authority. Focusing on whether enlistment by minors was authorized by law, the court never considered whether the petitioner possessed a right against military service. *See* Appendix (listing reported federal habeas decisions between 1789 and 1867).

[132] *Burford*, 3 Cranch (7 U.S.) at 451; *Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923).

Act of 1867, the growing federal authority to employ habeas corpus for collateral review of state criminal convictions, and, more generally, the expanding canon of individual rights.

The primary change to the text of the federal habeas statute was made by the Habeas Corpus Act of 1867, which authorizes federal courts to issue habeas relief for any person "in custody in violation of the Constitution or laws or treaties of the United States."[133] The terms of the 1867 Act effected a significant expansion of federal habeas authority by providing federal habeas review for state prisoners. As explained by Senator Lyman Trumbull, the Chairman of the Judiciary Act, the Judiciary Act of 1789 "confines the jurisdiction of the United States Courts in using writs of habeas corpus to persons who are held under United States laws," while the 1867 Act authorized the writ to any person "held under a State law in violation of the Constitution and laws of the United States."[134] The 1867 Act thus greatly expanded the potential pool of federal habeas petitioners.

The 1867 Act also significantly shifted the judicial inquiry demanded in federal habeas actions. Section 14 of the Judiciary Act authorizes the traditional habeas inquiry into the "cause of commitment," which requires courts to determine whether any positive law authorizes the petitioner's detention. In contrast, the 1867 Act authorizes relief for custody imposed in "violation" of federal law, which requires courts to determine whether detention conflicts with federal law. The 1867 Act thus shifts the judicial inquiry from whether detention is *authorized* to whether it is *prohibited*. The most important prohibitions on the government's imprisonment powers, such as the right to jury trial and the right to counsel, are found in the Bill of Rights, and so the 1867 Act signaled a shift in the judicial focus in habeas cases away from the jailer's power and to the petitioner's rights. This shift gained in significance as constitutional criminal protections began to be applied to the states via the Fourteenth Amendment. Habeas claims

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[133] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385; *see* Duker, *supra* note 71, at 189-194.

[134] *Id.*

thus began to be framed in terms of the prisoner's rights, rather than the jailer's power.[135]

The 1867 Act ultimately led to perhaps the most dramatic change in federal habeas litigation: collateral review of state criminal judgments. The habeas inquiry into the jailer's authority ordinarily meant that habeas courts engaged in minimal review of detention imposed through judicial proceedings. A habeas court reviewing imprisonment imposed by another court ordinarily reviewed only whether the sentencing court had competent jurisdiction.[136] Over the course of the twentieth century, however, the Supreme Court authorized increasingly rigorous federal review of state criminal judgments, under the guise that state courts acting contrary to federal rights exceeded their jurisdiction. Eventually, the Court, by its own admission "discarded the concept of jurisdiction, by then more a fiction than anything else as a touchstone of the availability of federal habeas review," and expressly acknowledged that habeas review is available "for claims of disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights."[137] The shift in focus in habeas cases from power to rights thus resulted at least as much by direction of the Court as from the change in statutory language.

With few exceptions, federal habeas review is now available to consider all alleged violations of federal rights occurring in state courts.[138] At the same time that the Court allowed habeas to

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[135] The sponsors of the 1867 Act appear to have intended this change. Senator Trumbull thus declared: "It is a bill in aid of the rights of the people." Congressional Globe, 39th Cong., 1st Sess. 4229 (27 July 1866).

[136] *See Ex Parte Watkins,* 28 U.S. 193 (1830) ("This writ is, as has been said, in the nature of a writ of error which brings up the body of the prisoner with the cause of commitment. The court can undoubtedly inquire into the sufficiency of that cause; but if it be the judgment of a court of competent jurisdiction,. . . is not that judgment in itself sufficient cause?"); *see also* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441, 463-474 (1963).

[137] *Wainwright v. Sykes*, 433 U.S. 72, 79 (1977).

[138] *See McCleskey v. Zant*, 499 U.S. 467, 479 (1991) ("With the exception of Fourth Amendment violations that a petitioner has been given a full and fair

address almost any asserted violation of constitutional rights, the Court greatly expanded the variety of constitutional rights available in criminal proceedings.[139] As a result, habeas became available to hear a vast array of individual rights claims that previously were not cognizable through habeas claims, either because they had not yet been recognized or because they only arose in criminal cases where habeas review was rarely available.[140]

As a result of the dual expansion of both federal habeas authority and the scope of individual rights cognizable in habeas, federal habeas cases became dominated by claims that judicial

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opportunity to litigate in state court, the writ today appears to extend to all dispositive constitutional claims presented in a proper procedural manner.") (internal citation omitted).

[139] *See, e.g., Mapp v. Ohio*, 367 U.S. 643 (1961) (creating the exclusionary rule); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (guaranteeing the right to assistance of counsel); *Miranda v. Arizona*, 384 U.S. 436 (1966) (providing procedural safeguards for the privilege against self-incrimination); *see generally See generally* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 Yale L.J. 153 (2002); Michael Edmund O'Neill, *Criminal Law and Procedure*, 34 U. Rich. L. Rev. 749 (2000) (discussing "the dramatic expansion of criminal defendants' rights" by the Warren Court).

[140] *See, e.g., Ex parte Wilson,* 114 U.S. 417 (Fifth Amendment grand jury right); *In re Converse*, 137 U.S. 624 (Due Process Clause of Fourteenth Amendment); *Rogers v. Peck*, 199 U.S. 425; *Callan v. Wilson*, 127 U.S. 540, 557 (constitutional right to jury trial in federal criminal cases); *Arndstein v. McCarthy*, 254 U.S. 71 (Self-Incrimination Clause of Fifth Amendment); *Morgan v. Devine*, 237 U.S. 632 (double jeopardy); *Andersen v. Treat*, 172 U.S. 24 (Sixth Amendment right to counsel); *Wade v. Mayo*, 334 U.S. 672 (1948) (right to counsel); *White v. Ragen*, 324 U.S. 760, 764-65 (1945) (perjured testimony violates due process); *Withrow v. Williams*, 507 U.S. 680 (1993) (Miranda rights); *Burns v. Wilson*, 346 U.S. 137, 142 (1953) (federal courts have habeas corpus jurisdiction to review all constitutional issues not fully and fairly considered by military tribunals) *see also* Liebman, *supra* note 108, at 2082 (stating that by 1948, "[o]n the state-prisoner side, the range of available constitutional rights grew as slowly as incorporationism, but all rights that did exist were enforced on habeas corpus, as on appeal, with de novo legal review.").

processes violated the petitioner's individual rights.[141] The shift from the traditional inquiry into the jailer's authority to the modern inquiry into individual rights violations is not merely a new way of phrasing the old test. It reflects a changed conception of rights and, with it, the function of the writ. Under the individual rights inquiry, petitioners bear the burden of identifying rights violated by imprisonment, while under traditional habeas standards the burden of establishing the lawfulness of detention falls on the jailer. Moreover, the judicial task in undertaking individual rights claims requires the application of a large variety of tests, principally balancing tests weighing the individual and governmental interests at stake, while the inquiry in traditional habeas claims is the relatively straightforward question whether the government has acted within the scope of its imprisonment power in the particular context of the petitioner's case.

With the dominance of individual rights claims in federal habeas actions, the traditional inquiry into the jailer's authority to impose detention became a largely forgotten relic of history. Courts and commentators began to talk about habeas as if it had always been focused on individual rights.[142] By the time that

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[141] *See* Louis H. Pollak, *Proposals To Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 Yale L.J. 50, 52 (1956) ("Typically, the applicant will urge that the state trial was fatally tainted by lack of counsel, by a coerced confession, by officially suborned perjury, by discriminatory jury selection, or by other deprivations of Fourteenth Amendment rights.").

[142] *See, e.g., Slack v. McDaniel*, 529 U.S. 473, 483 (2000) ("The writ of habeas corpus plays a vital role in protecting constitutional rights"); *Sawyer v. Whitley*, 505 U.S. 333, 352 (1992) (Blackmun, J., concurring) ("By the traditional understanding of habeas corpus, a 'fundamental miscarriage of justice' occurs whenever a conviction or sentence is secured in violation of a federal constitutional right."); *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 524 (1982) (Blackmun, J., dissenting) ("Historically, the English common-law courts permitted parents to use the habeas writ to obtain custody of a child as a way of vindicating their own rights"); *Bounds v. Smith*, 430 U.S. 817, 827 (1977) ("As this Court has 'constantly emphasized,' habeas corpus and civil rights actions are of 'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights."); *Francis v. Henderson*, 425 U.S. 536, 543 (1976) (Brennan, J., dissenting) (discussing "this Court's solemn constitutional duty to preserve intact the

Judges Leon and Green issued their rulings in the Guantanamo cases, it became conceivable that judges who might otherwise disagree on fundamental questions could nonetheless agree that habeas claims could proceed only if they were based on allegations that individual rights were violated.[143]

III. THE COMMON LAW HABEAS INQUIRY INTO UNAUTHORIZED DETENTION PROVIDES THE BEST ANALYTICAL FRAMEWORK FOR RESOLVING THE GUANTANAMO CASES

This Part seeks to illustrate how the traditional habeas inquiry into the jailer's authority would apply in the Guantanamo detainees' cases. As Part II showed, habeas traditionally did not require a petitioner to establish that his individual rights were violated, or even to establish that he possessed rights, but instead required the jailer to demonstrate that the detention was authorized by law. The traditional habeas claim of unauthorized detention remains available under 28 U.S.C. § 2241(c)(1), which codifies Section 14 of the Judiciary Act, and which embodies the common law habeas standards.

As this Part argues, the common law inquiry into the government's authority to hold the detainees provides the best framework for resolving the detainees' central claim—that, as a matter of law and fact, they are not enemy combatants. As Section A explains, individual rights analysis does not squarely address the detainees' claim that they are not enemy combatants but instead focuses judicial attention on the process by which the detainees

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sanctity of the Great Writ of habeas corpus and to ensure that 'federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.'); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 Va. J. Int'l L. 585, 631 (2005) ("Habeas claims traditionally focus on violation of a prisoner's constitutional rights."); Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability Of State Courts to Protect Fundamental Rights,* 54 Wash. & Lee L. Rev. 1, 4 (1997) ("Traditionally, habeas corpus review has existed to correct violations of constitutional rights.") Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 Dick. L. Rev. 557, 563 (1994) (stating that the Suspension Clause "mirrors the commitment of the Framers to individual rights")

143 *See Khalid v. Bush*, 355 F.Supp.2d 311 (D.D.C. 2005).

were designated enemy combatants, not the substance of that designation. Although the procedures for designating the detainees to be enemy combatants lacked most of the rudiments of due process, the due process balancing test may not lead to searching judicial review of the detainees' claims of innocence. By contrast, as Section B argues, the traditional habeas inquiry into the jailer's authority would require the courts to determine whether sufficient basis in law and fact exists for holding the Guantanamo detainees as enemy combatants.

A. Individual Rights Analysis Is Unresponsive to the Guantanamo Detainees' Central Claim that They Are Not Enemy Combatants

Given the dominance of the individual rights analysis, it is hardly surprising that the Guantanamo detainees' cases have been construed in terms of individual rights. Individual rights analysis focuses judicial as well as public attention on the concrete harms to the detainees, who have been detained indefinitely without charges and based on secret evidence, deprived of contact with the outside world, and subjected to interrogation techniques such as stress positions, extreme temperatures, sexual humiliation, and the use of dogs for intimidation, that have frequently been characterized as torture.[144] To describe these claims as violating the detainees' individual rights invokes the inviolability of all individuals, who

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[144] The International Committee of the Red Cross, among others, has characterized the treatment of Guantanamo detainees as "tantamount to torture." *See* Neal A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. Times, Nov. 30, 2004, at A1. The Parliamentary Assembly of the Council of Europe likewise has concluded that many Guantanamo detainees have been subjected to treatment amounting to torture, which occurred systematically and with the knowledge and complicity of the United States Government. Resolution 1433 of 26 April 2005, para. 7 ii; *see generally* The Torture Papers: The Road to Abu Ghraib 134-35 (Karen J. Greenberg & Joshua L. Dratel eds., 2005); Stephen Grey, Ghost Plane: The True Story of the CIA Torture Program (2006); Joseph Margulies, Guantánamo and the Abuse of Presidential Power (2006) Physicians for Human Rights, *Break Them Down: Systematic Use of Psychological Torture by US Forces* (2005), available at http:// www.physiciansforhumanrights.org/library/documents/reports/break-them-down-the.pdf; David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 Va. L. Rev. 1425 (2005).

are understood to have personal rights to liberty that can only be taken away if the government adheres to the requirements of due process.[145]

Notwithstanding the appeal of individual rights, it is far from clear that it provides a framework for resolving the detainees' claims that they are not enemy combatants. The question whether the Guantanamo detainees have any rights to assert has tied up the litigation for almost six years. Even if the detainees are found to possess cognizable rights, the detainees' individual rights claims focus on the *process* by which they were designated enemy combatants, not the *substance* of that designation. To be sure, the detainees have strong claims that the process they received was grossly inadequate. Yet, even if they are found to have due process rights, the detainees may never receive judicial review of their claims of innocence because it is far from clear that the Due Process Clause, as conventionally understood, guarantees the detainees stringent processes.

The prevailing due process balancing test is not directed to claims of innocence. Instead, under *Mathews v. Eldridge*, the courts would attempt to determine whether the CSRT procedures established a valid mechanism for designating enemy combatants by balancing the detainees' liberty interests against the competing demands of national security.[146] Applying the *Mathews* test, the *Hamdi* plurality described its task as balancing the petitioner's interest in liberty and the government's interest in national security:

> 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' is the most elemental of liberty interests—the interest in being free from physical detention by one's own government. . . . 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

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145 *See, e.g.,* 3 Blackstone, *supra* note 69, at 129-137.

146 *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

> enemy during a war do not return to battle against the United States.[147]

In *Hamdi*, the Court found that the appropriate balance between these competing interests means 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."[148] Nonetheless, the *Hamdi* plurality concluded that national security interests dictate considerable departures from ordinary due process requirements. The plurality thus agreed that fact-finding proceedings could be "tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict," and hearsay "may need to be accepted as the most reliable available evidence from the Government in such a proceeding."[149] Moreover, the plurality

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147 *Hamdi v. Rumsfeld*, 542 U.S. 507, 530-531 (2004). *Hamdi* exemplifies the tendency since September 11th to debate all government policies—not only detention policies but also interrogation techniques, intelligence gathering, immigration, and even the availability of drivers licenses—as conflicts between national security and civil rights. *See* Kent Roach, *Must We Trade Rights for Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain*, 27 Cardozo L. Rev. 2151, 2151 (2006) ("Most debates about terrorism proceed on the assumption that there is a trade-off between security and rights. The question is often defined in terms of the proper balance between these two important values."); David Cole, *Against Citizenship As a Predicate for Basic Rights*, 75 Fordham L. Rev. 2541, 2547 (2007) ("Due process analysis in this setting essentially consists of weighing the government's interests in national security against the individual's interest in a deprivation of liberty."); Raquel Aldana and Sylvia R. Lazos Vargas, *"Aliens" in Our Midst Post-9/11: Legislating Outsiderness Within the Borders*, 38 U.C. Davis. L. Rev. 1683, 1718 (2005) ("Whatever national security gains the government claims to gain from the driver's license reforms, these must be balanced against the civil rights of citizens and noncitizens, including privacy."); Amos N. Guiora, *Transnational Comparative Analysis of Balancing Competing Interests in Counter-Terrorism*, 20 Temp. Int'l & Comp. L.J. 363, 363 (2006) ("Finding a balance between national security and the rights of individuals is the most significant issue liberal democratic nations face in developing their counter-terrorism strategies.").

148 *Id.* at 533.

149 *Id*. at 533–34.

concluded that the "Constitution would not be offended by a presumption in favor of the government's evidence."[150] The Court further suggested "the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal," rather than an Article III court.[151]

Despite the substantial limitations on traditional judicial processes accepted in *Hamdi* for citizens accused of being enemy combatants, *Hamdi* may represent the strongest procedural protections that enemy combatants could hope to obtain. Judicial balancing under *Mathews v. Eldridge* creates a sliding scale of procedural protections, under which some detainees get rigorous review and others get little or no review depending on the detainee's citizenship, where he was seized, and where he is detained.[152] Hamdi was a U.S. citizen detained on U.S. soil. Greater rights would be accorded only to U.S. citizens seized and detained on U.S. soil, such as Jose Padilla, who was given a full criminal trial.[153] The Guantanamo detainees, in contrast, are foreigners detained outside the technical sovereignty of the United States.[154] As such, they are entitled to diminished procedural

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150 *Id.* at 534.

151 *Id*. at 538.

152 *See* Fallon & Meltzer, *supra* note 11, at 2090 (declaring that there is a "large range of potentially pertinent variables" for determining the scope of detainees' rights to procedural protections, which include "whether a detainee is a citizen or an alien"; "whether an alien detained and held abroad has significant contacts with the United States that might justify recognition of constitutional rights"; "where the seizure was effected—in the United States or abroad, and on or off a battlefield"; "where a petitioner is currently detained—in the United States, in another nation, or at Guantánamo Bay"; and "whether the claimed rights find support in historical practice, precedent, or the due process balancing framework of *Mathews v. Eldridge*.").

153 *See Hanft v. Padilla*, 546 U.S. 1084 (2006) (granting government's motion "to transfer Padilla from military custody to the custody of the warden of a federal detention center in Florida, to face criminal charges").

154 *See* John Yoo, *National Security and the Rehnquist Court*, Geo. Wash. L. Rev. 1144, 1160 (2006) (arguing that under the *Mathews* test aliens accused of being enemy combatants should receive less procedural protections than citizens because their "individual liberty interest[s] might be reduced").

protections, and a court balancing the relative interests of the government and the detainees would likely give less weight to the detainees' interests than to Hamdi's, allowing the government to provide procedures even less stringent than those approved by the *Hamdi* plurality.[155]

The *Mathews-Hamdi* balancing may provide little relief for the Guantanamo detainees because of the absence of a reliable scale upon which to measure and balance the detainees' liberty interests against the government's national security interests.[156] It is unclear whether courts are competent to undertake such balancing.[157] The

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[155] This is precisely what Professors Fallon and Meltzer appear to suggest *should* happen. They argue that the Guantanamo detainees are entitled only to fundamental procedural protections because they are foreigners held outside the United States at a location under exclusive U.S control. Under this scheme, detainees held by the United States in more remote locations would be entitled to no procedural protections. *See* Fallon & Metzger, *supra* note 11, at 2071-2081. It bears noting that the belief that Guantanamo was selected to house accused enemy combatants precisely because it was believed that foreigners detained abroad would be entitled to few or no individual rights. *See* Memorandum, "Possible Habeas Jurisdiction over Aliens Held at Guantanamo Bay, Cuba," in The Torture Papers: The Road to Abu Ghraib 29 (Karen J. Greenberg & Joshua L. Dratel, eds., 2005); John Yoo, War By Other Means: An Insider's Account of the War on Terror 142-43 (2006) (explaining that while "[n]o location was perfect," Guantánamo seemed "to fit the bill" because it would allow military interrogations without challenges to their lawfulness); Scott Higham et al., Guantánamo: A Holding Cell in War on Terror, Wash. Post, May 2, 2004, at A1.

[156] On this issue, I find myself in agreement with John Yoo, who argued that "*Eldridge* seems particularly inappropriate because of its lack of coherence or predictability. How are courts to measure values such as 'the private interest' or 'the government interest' in any systematic manner?" Yoo, *supra* note 154, at 1159; *see also* Michael C. Dorf, *The Orwellian Military Commissions Act of 2006*, 5 J. Int'l Crim. Just. 10, 14 (2007) ("[I]t is possible that the Court would uphold procedures for classifying aliens as unlawful enemy combatants even though those procedures would be impermissible under *Hamdi* for citizens.").

[157] Many commentators expressed great skepticism of courts' ability to balance the competing factors, *see, e.g.,* John Yoo, *Courts At War*, 91 Cornell L. Rev. 573, 574-575 (2006), as have several judges, *see Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2822 (2006) (Scalia, J., dissenting) (arguing that judicial review of Hamdan's habeas claim "brings the Judicial Branch into direct conflict with the Executive in an area where the Executive's competence is maximal and ours is

ease with which the *Mathews* test could be manipulated to deny the detainees judicial review of their claims of innocence can be seen in the application of its third factor, the likelihood of erroneous decisions under existing and more rigorous procedures. A court could conclude that strong procedural protections could result in an erroneous decision to release a terrorist bent on our national destruction, as the government suggests has already occurred.[158] While the criminal law establishes rigorous procedural safeguards out of fear of the consequences of a false positive—an innocent individual sent to jail—the war on terrorism is shaped by fears of the consequences of a false negative—terrorist plotters who were not identified in time. In this context, Vice President Cheney has declared that the government should respond to a one-percent chance of a major terrorist attack as if it were a certainty.[159] Given

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virtually nonexistent"); *Hamdi v. Rumsfeld*, 542 U.S. 507, 583 (2004) (Thomas, J., dissenting) ("First, with respect to certain decisions relating to national security and foreign affairs, the courts simply lack the relevant information and expertise to second-guess determinations made by the President based on information properly withheld."); *Al Odah v. United States*, 321 F.3d 1134, 1150 (D.C. Cir. 2003) (Randolph, J., concurring) (concluding that the judgments required to address the detainees' habeas claims "have traditionally been left to the exclusive discretion of the Executive Branch, and there they should remain."). A lack of judicial competence was also cited in the Senate as a reason for removing habeas jurisdiction over the Guantanamo detainees' claims. *See* 151 Cong.Rec. S12752-01, 12756 (Nov. 14, 2005) (Sen. Kyl) ("My belief is the military is the best group to run the war, not Federal judges.").

158 *See* Press Release, *Ex-Guantanamo Detainees who have returned to the fight*, *available at* http://www.defenselink.mil/news/d20070712formergtmo.pdf (asserting that "at least 30 former GTMO detainees have taken part in anti-coalition militant activities after leaving U.S. detention"); *but see* H. Candace Gorman *Return to the Battlefield: The Number One Guantánamo Myth*, Huffington Post (Mar. 13, 2007), *available at* http://www.huffingtonpost.com/h-candace-gorman-/return-to-the-battlefield_b_43344.html.

159 *See* Ron Suskind, THE ONE PERCENT DOCTRINE 7 (2007) ("We have to deal with this new type of threat in a way we haven't yet defined. . . . With a low-probability, high-impact event like this . . . If there's a one percent chance that Pakistani scientists are helping al Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response.") (quoting Vice President Cheney); *cf.* Cass R. Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 Colum. L. Rev. 503 (2007).

the scale of the terrorist events of September 11th, the costs of mistakenly ordering a detainee's release might be catastrophic. Indeed, the government has presented the risks to national security that would result from judicial involvement in detention decisions in truly apocalyptic terms.[160] Because the potential costs of an erroneous decision a detainee's favor could be seen as outweighing the costs of an error in the government's favor, a court applying *Mathews* could approve diminished procedural protections for accused enemy combatants.[161]

Thus, once the Guantanamo detainee cases are analyzed as individual rights claims, where modern habeas jurisprudence channels them, the cases call on courts to balance the detainees' rights, which may be seen as carrying little or no weight, against the necessity of military detention decisions, a test courts seem ill-equipped to undertake. As individual rights claims, the cases pose considerable difficulties for the courts. It is perhaps not surprising that the cases have long been stalled and Congress has sought to remove the courts' jurisdiction. As discussed in the next part, the cases present more straightforward judicial questions if they are understood as challenges to the President's detention authority rather than as allegations of individual rights violations.

B. The Guantanamo Detainees' Claims Are Best Analyzed As Claims of Unauthorized Detention

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160 For instance, the government argued in its motion to dismiss upon remand from *Rasul* that "[i]nvolvement of the judiciary in second-guessing the determinations of the Military regarding combatant status would . . . strike at the heart of the Military's ability to conduct war successfully and implicate the safety of the Nation's troops and, ultimately, its citizens, as well as the safety and support of allied and coalition forces and countries." Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support, *Hicks v. Bush*, Civil Action No. 02-CV-0299, at 45 (D.D.C., filed Oct. 4, 2004).

161 That concern, too, helped persuade Congress to remove the courts' habeas jurisdiction. *See* 151 Cong.Rec. S12752-01, 12754 (Nov. 14, 2005) (Sen. Lindsey Graham) (asserting that at least a dozen released detainees "have gone back to fighting").

While individual rights analysis provides an appropriate vehicle for challenging the *process* by which the detainees were designated enemy combatants, the common law habeas inquiry into the jailer's authority presents the proper framework for analyzing the detainees' challenge to the *substance* of their designation as enemy combatants. The detainees' central claim is that they are innocent civilians, not enemy combatants.[162] That argument is a claim of unauthorized detention—while the government may have authority to hold enemy combatants, the detainees argue, it lacks authority to hold the petitioners because they are innocent civilians, not enemy combatants. The traditional common law habeas action provides a procedure for reaching this question because, as the Supreme Court has recognized, "[a]t common law, ... 'an attack on an executive order could raise all issues relating to the legality of the detention.'"[163]

1. The Common Law Habeas Tradition Framework for Resolving the Detainees' Legal Challenges to the Scope of the Government's Authority to Hold Enemy Combatants

The scope of the government's authority to hold enemy combatants presents a straightforward legal question of executive power. In *Hamdi*, the Supreme Court held that Congress authorized the President power to detain enemy combatants by adopting the Authorization to Use Military Force (AUMF).[164] The *Hamdi* plurality concluded that the AUMF authorizes the President to employ the accepted "incidents of warmaking," which

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162 *See supra* Part I.A.

163 St. Cyr, 533 U.S. at 301 n.14 (quoting *Developments in the Law--Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1238 (1970)).

164 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 115 Stat. 224 (Sept. 18, 2001). That resolution gives the President power 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." *Id.*

encompass the detention of enemy combatants.[165] Because *Hamdi* has resolved the question whether the President has authority to hold enemy combatants seized in Afghanistan, the detainees' claims that the government lacks authority to hold them boils down to whether the government has acted within the scope of that authority. That claim includes the legal question whether the government has employed an overly broad definition of "enemy combatant."

In designating the Guantanamo detainees as enemy combatants, the government applied a much broader definition of enemy combatants approved in *Hamdi.* The *Hamdi* plurality concluded that the AUMF authorizes the President to detain "enemy combatants," a term it understood to mean individuals who were "part of or supporting forces hostile to the United States or coalition partners and who engaged in an armed conflict against the United States there."[166] *Hamdi* thus upheld the President's authority under the AUMF to detain persons who "engaged" in combat against the United States. In declaring the Guantanamo detainees to be enemy combatants, however, the government applied a definition of enemy combatants under which anyone who could be said to have "supported" Al Qaida or the Taliban was considered an enemy combatant, even if the detainee did not engage in combat. Under the definition employed by the CSRTs, an enemy combatant is "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."[167] The touchstone for enemy combatant designation in the CSRTs is "support" for Al Qaida or the Taliban.

Pursuant to the broad definition of enemy combatant, the CSRTs designated as enemy combatants individuals whose "support" for Al Qaida or the Taliban was, by the government's

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165 542 U.S. at 518.

166 *Id.* at 516 (internal quotations omitted).

167 Wolfowitz Memorandum, *supra* note 27, at 1.

own allegations, minor, inadvertent, or unwilling.[168] In response to questioning by the district court, the government agreed that the CSRT definition of enemy combatant would encompass "a little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] [sic] really is a front to finance al-Qaeda activities."[169] The possibility that the government would hold detainees based on such loose connections to terrorism is far from hypothetical. A comprehensive study of the government's allegations in the CSRTs reveals that 60% of the detainees were designated as enemy combatants based on the allegation that they were "associated with" Al Qaida, the Taliban, or another related group.[170] Over half of the detainees were found to be enemy combatants without any allegation that they undertook *any* acts hostile to the United States, let alone that they "engaged" in combat operations against the United States.[171]

The question whether the government has authority to hold detainees who meet the broad definition of "enemy combatant" employed in the CSRTs is a pure question of government authority typical of common law challenges to executive detention authority.

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[168] For instance, the CSRT for my client Omar Amin did not identify any evidence that he undertook any actions to support terrorism. Instead, the CSRT relied upon evidence that during an interrogation Mr. Amin once referred to the Northern Alliance as "the opposition," a usage that the CSRT stated was "persuasive to the Tribunal that the Detainee was supportive of the Taliban." *See* Respondent's Answer to Complaint/Petition for Writ of Habeas Corpus by Petitioner Omar Rajab Amin, Case No. 02-0828, dkt. no. 173, Exh. R15 at 2. In another case, the Legal Advisor to the CSRTs concluded that a detainee forced against his will to work for Al Qaida or the Taliban could properly be designated as an enemy combatant because "a detainee's motive for joining or supporting al Qaida is irrelevant to a determination of their status as an enemy combatant. . . . In other words, if the detainee had claimed that he was forced to join al Qaida, then his motive would be irrelevant to the Tribunal's purpose." *See* Memorandum from Legal Advisor, *Legal Sufficiency Review of Combatant Status Review Tribunal for Detainee ISN # —*, p.2 (Oct. 5, 2004), *available at* http:// www.cageprisoners.com/downloads/martinmubanga.pdf.

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

[170] Denbeaux, *supra* note 38, at 8.

[171] *Id.* at 11.

For instance, in the landmark case of *Ex Parte Bollman,* the Court examined habeas petitions submitted by two prisoners charged with treason for participating in Aaron Burr's conspiracy to form an independent nation in Mexico.[172] The petitioners alleged that the government had employed an overly broad definition of "treason."[173] The Court heard legal arguments from both sides and reached a de novo determination on the meaning of "treason" at odds with the government's.[174] Indeed, the primary question raised by most federal habeas cases brought under Section 14 have been similar questions of the scope of the government's lawful authority to impose detention.[175] As in *Bollman,* the Guantanamo detainees are entitled to an independent judicial determination of whether the government has authority to hold enemy combatants under the government's broad definition.[176]

2. The Common Law Habeas Tradition Guarantees Searching and Independent Judicial Review of the Detainees' Factual Challenges to Their Designation as Enemy Combatants

In addition to challenging the scope of the government's authority to hold enemy combatants, the detainees bring basic factual challenges that they are not enemy combatants under any appropriate definition. There are good reasons for believing that

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172 4 Cranch (8 U.S.) 75 (1807).

173 *Id.*.

174 *Id.* at 126-127.

175 *See* Appendix.

176 The question whether the CSRT definition of enemy combatant exceeds the President's power can be resolved by examining the scope of historical warmaking powers. To the extent that the Geneva Conventions codify the traditional incidents of warmaking, they shed important light on whether the AUMF authorized the Executive Branch to impose indefinite detention on persons who may have "supported" Al Qaida only in their hearts. As Ryan Goodman and Derek Jinks have concluded, the "President's notion of 'enemy combatants' exceeds the scope" of traditional detention authority under the Geneva Conventions. Ryan Goodman & Derek Jinks, *Replies to Congressional Authorization: International Law, U.S. War Powers, and the Global War on Terrorism*, 118 Harv. L. Rev. 2653, 2657 (2005).

the government could not establish the factual basis for the enemy combatant designations of most of the detainees if that term requires personal involvement in combat or operations to support combat. One study of the evidence offered by the government in the CSRTs concluded:

> A high percentage [of the detainees] . . . were not captured on any battlefield . . . Fewer than 20 percent . . . have ever been Qaeda members. Many scores, and perhaps hundreds, of the detainees were not even Taliban foot soldiers, let alone Qaeda terrorists. They were innocent, wrongly seized noncombatants with no intention of joining the Qaeda campaign to murder Americans.[177]

Military officials have repeatedly acknowledged that many of the detainees are being held by mistake. The former Guantanamo commander stated: "Sometimes we just didn't get the right folks," yet "[n]obody wants to be the one to sign the release papers."[178] Indeed, it now appears that five years ago, the CIA sent a confidential memorandum to the White House that concluded that most of the Guantanamo detainees "didn't belong there."[179]

The detainees' factual challenges to their designations as enemy combatants fit squarely within the common law habeas inquiry into governmental authority, which requires the government to establish both a legal and factual basis for holding detainees and requires courts to assess independently the facts and law offered to support the detentions. Habeas guarantees rigorous judicial review of the government's proffered factual basis for

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[177] Stuart Taylor, Jr., *Falsehoods About Guantanamo*, NAT'L J., Feb. 4, 2006, at 13; Corine Hegland, *Who Is at Guantanamo Bay*, NAT'L J., Feb. 4, 2006, at 33-35.

[178] Christopher Cooper, *Detention Plan: In Guantanamo, Prisoners Languish in Sea of Red Tape*, WALL ST. J., Jan. 26, 2005, at A1, A10.

[179] *See* Jane Mayer, *The Hidden Power: The Legal Mind Behind the White House's War on Terror*, NEW YORKER, July 3, 2006, at 54.

holding the petitioner, as it has long been established that generic assertions of authority to hold a detainee are insufficient.[180]

Although habeas traditionally provided little or no judicial review of the factual basis for imprisonment imposed through criminal convictions, habeas required exacting judicial review of executive detention. Courts imposing criminal sentences were understood to have acted pursuant to their lawful authority as long as they were courts of competent jurisdiction.[181] Thus, the first and often the last question that courts asked in resolving a habeas petition challenging a criminal conviction was whether the sentencing court had acted within its jurisdiction.[182] Deferential habeas review of criminal convictions dates back at least to the Habeas Corpus Act of 1679, which provided that a custodian receiving a writ of habeas corpus was required to certify the cause of detention "unless it shall appear . . . that the party so committed is detained upon a legal process, order or warrant, out of some court that hath jurisdiction of criminal matters."[183] Federal courts hearing habeas petitions under the Judiciary Act adhered to this standard. As the Court stated in 1847, "[h]owever erroneous the judgment of the court may be, either in a civil or criminal case, if it had jurisdiction, and the defendant had been duly committed,

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180 *See supra* notes 76-93 and accompanying text.

181 *See St. Cyr*, 533 U.S. at 301 n.14 ("At common law, while habeas review of a court judgment was limited to the issue of the sentencing court's jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention.") (internal quotations omitted). The conclusion that habeas courts traditionally undertook little review of criminal convictions is challenged in Eric M. Freedman, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY (2001); and Liebman, *supra* note 108.

182 Hurd, *supra* note 16, at 153-154, 331-351; Bator, *supra* note 136, at 463-474. To be sure, even in habeas actions challenging criminal judgments, which were limited to a review of the criminal court's "jurisdiction," flexible notions of jurisdictional review often allowed broad factual and legal inquiries. *See* R.J. Sharpe, THE LAW OF HABEAS CORPUS 70 (2d ed. 1989) ("The courts have really never been prevented by [this] common law rule from reviewing facts essential to the jurisdiction or authority underlying the order for detention"); Liebman, *supra* note 108.

183 31 Car. I, c. 2, § III(8) (May 27, 1679).

under execution or sentence, he [could] not be discharged by this writ."[184]

The narrow scope of judicial review for resolving habeas petitions challenging criminal convictions contrasts sharply with the broad judicial review of detention imposed through all other processes, most especially for executive detention imposed without trial.[185] Exacting judicial review of detentions imposed without trial dates back at least to *Bushell's Case*, decided in 1670, which addressed a habeas petition brought on behalf of a jurors held in contempt for failing to convict William Penn on the charge of disturbing the peace.[186] The Court of Common Pleas held that it was required to rigorously review the factual and evidentiary support for holding the petitioners because they were not held based on an "indictment and tryal"[187] Unless a jailer could establish that he was holding the petitioner based on a criminal trial, with its attendant procedural protections, the jailer was required to provide sufficient factual details that the court could assess for itself whether the detention was lawful: "the cause of the imprisonment ought, by the return, to appear as specifically and certainly to the judges of the return, as it did appear to the court or person authorized to commit."[188]

American courts followed these precedents and federal courts have long insisted on undertaking independent factfinding in reviewing executive detentions and other detentions imposed

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184 *In re Metzer*, 5 How. 176, 191 (1847); *see also* In *Ex parte Kearney*, 20 U.S. 38 (1822) (holding that habeas was not a proper remedy for imprisonment imposed by the circuit court in a criminal case because "the Court could not inquire into the sufficiency of the cause of commitment").

185 *See, e.g.,* Oaks, *supra* note 108, at 454 n.20 ("[W]ith respect to imprisonments other than for criminal matters, however, the exceptions to the rule against controverting the return were 'governed by a principle sufficiently comprehensive to include . . . most cases' so that it was impossible to specify those [non-criminal] cases in which it could not [be controverted].'").

186 124 Eng. Rep. 1006 (C.P. 1670).

187 *Id.* at 1010.

188 *Id.*.

without trial.[189] Thus, in *Ex parte Bollman*, the Court concluded that it could not rely on the recognized executive authority to impose arrests for treason. Nor could the Court defer to the executive determinations that the petitioners had committed treason. Instead, the Court held five days of hearings and examined in detail the affidavits and other evidence presented to justify the petitioners' arrests.[190] Having "fully examined and attentively considered" the evidence offered by the government to justify the detention, the Court ruled that "there is not sufficient evidence" to uphold them.[191] Numerous other cases confirm that in common law habeas cases courts routinely examined the factual underpinnings of executive detentions.[192]

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[189] *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."); *Lonchar v. Thomas*, 116 S. Ct. 1293, 1298 (1996) (stating that the common law writ's "most basic purpose [was] avoiding serious abuses of power by a government, say a king's imprisonment of an individual, without referring the matter to a court"); *Swain v. Pressley*, 430 U.S. 372, 385 (1977) (Burger, C.J., concurring) (noting that traditionally the writ was used "to inquire into the cause of commitment not pursuant to judicial process"); *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"); Hafetz, *supra note* 74, at 2525 ("Executive detention implicated the core function of the writ of habeas corpus."); Developments in the Law--Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1238 (1970) ("While habeas review of a court judgment was limited to the issue of the sentencing court's jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention").

[190] 4 Cranch (8 U.S.) at 125.

[191] *Id.* at 107.

[192] *See, e.g., R. v. Dawes,* 97 Eng. Rep. 486 (K.B. 1758) (declaring that the Court "went minutely through the affidavits on both sides" in order to determine whether a sailor had been lawfully impressed); *R. v. Kessel*, 97 Eng. Rep. 486 (K.B. 1758) (ordering the petitioner released from military service after taking "time . . . to look into the affidavits" and independently assessing the facts underlying the detention); *Sommersett's Case*, 20 Howell's State Trials 1 (K.B. 1772) (holding a factual hearing on the return); *Rex v. Turlington,* 97 Eng. Rep. 741 (K.B. 1761); *King v. Lee,* 83 Eng. Rep. 482 (K.B. 1676) (considering "divers affidavits" from both sides in deciding habeas petition)); *see also* Dallin Oaks, *supra* note 108, at 454 n.20 (listing instances in which individuals could

As these precedents establish, the common law habeas inquiry into the government's authority to hold the Guantanamo detainees requires independent judicial review of the facts and evidence offered to support the designation of the detainees as enemy combatants. Federal courts could not defer to the legal or factual conclusions of the CSRTs because, at common law, habeas courts routinely undertook factual inquiry into the basis for detention, notwithstanding previous executive determinations. For example, in *In re Randolph*, Chief Justice Marshall reviewed the commitment of a civil debtor by a municipal authority, took new evidence, and reached his own conclusions, notwithstanding the municipal authority's previous factfinding.[193] Indeed, in many cases of executive detention imposed without trial, habeas courts resisted arguments to defer to executive determinations of facts and insisted on conducting independent factual investigation into the basis for holding the petitioners.[194] In a series of cases, the Supreme Court agreed that determinations of citizenship by executive immigration officials were not conclusive and could be examined independently through habeas proceedings.[195] In *Hamdi,*

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contradict facts in return too numerous to specify); Hafetz, *supra* note 74, at 2535.

[193] *In re Randolph*, 20 F. Cas. 242 (C.C.D. Va. 1833) (Marshall, C.J., riding circuit).

[194] *See* Hafetz, *supra* note 74, at 2535-2336; *cf.* Gerald Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 980 (1998) (acknowledging that "[o]ne of the maxims of eighteenth-century habeas corpus practice had been that the petitioner could not controvert the facts stated in the return," but noting that the "general statement papered over exceptions").

[195] *See, e.g., Ng Fung Ho v. White*, 259 U.S. 276 (1922) (holding that habeas petitioners "are entitled to a judicial determination of their claims that they are citizens of the United States," notwithstanding an executive determination to the contrary); *Chin Yow v. United S*tates, 208 U.S. 8 (1908) (same); *see also Holiday v. Johnston*, 313 U.S. 342,351-352 (1941) (rejecting deference to factfinding by a prison commissioner and declaring that in habeas cases "Congress has seen fit to lodge in the judge the duty of investigation. One of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony. Plainly it was intended that the prisoner might invoke the exercise of this appraisal by the judge himself."); *see generally*

the Supreme Court likewise agreed that habeas requires independent judicial review not only of the legal authority for imposing detention but of the facts as well.[196] To be sure, in the modern era of administrative agencies, exceptions have been established under which federal courts in habeas cases give deference to factfinding by executive agencies, but such deference is limited to determinations made "in a judicial capacity," resolving "disputed issues of fact properly before it which the parties … had an adequate opportunity to litigate."[197] The designation of the Guantanamo detainees as enemy combatants does not fall within such an exception, considering the absence of any traditional procedural protections in the CSRTs, and therefore they are entitled to no judicial deference in habeas actions.[198]

Thus, under the common law habeas tradition, the Guantanamo detainees are entitled to searching judicial review of the factual basis for the government's claim that they are enemy combatants. From the course of the litigation, it appears that such evidentiary hearings are exactly what the government fears most.[199] And apparently for good reason: the evidence against most of the detainees appears to be weak or nonexistent.[200] Yet evidentiary

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Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961 (1998).

196 *See Hamdi,* 542 U.S. at 535-536 ("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.").

197 *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966).

198 Professors Fallon & Meltzer conclude that executive determinations that the Guantanamo detainees are enemy combatants are entitled to some deference and should be upheld if "a rational trier of fact could have found by a preponderance of the evidence that a petitioner was an enemy combatant." Fallon & Meltzer, *supra* note 11, at 2108. They recognize, however, that "[m]odern notions of deference to administrative decisionmakers, developed primarily in other contexts, are in considerable tension with the historic office of the Great Writ." *Id.* at 2069.

199 *See supra* note 160.

200 *See supra* notes 177-179 and accompanying text.

hearings are precisely what is required once the claims brought by the Guantanamo detainees are recognized for what they are, traditional habeas challenges to the government's detention powers.

CONCLUSION

The Guantanamo detainees' habeas cases have been stalled for almost six years because the courts have been asking the wrong question: whether the detainees possess any rights. Courts in habeas actions traditionally have asked a different question: whether the jailer has power to hold the prisoner. In the Guantanamo cases, the traditional habeas inquiry would mean that the government must show that the detentions fall within the scope of executive authority to hold enemy combatants. That judicial inquiry involves both a legal question—the meaning of "enemy combatant"—and a factual question—whether the detainees fall within that category. There is substantial reason to doubt that the government could make a sufficient showing. If the government cannot establish its lawful authority to hold the Guantanamo detainees, habeas relief must be granted even if the detainees otherwise have no cognizable rights.

The conclusion that habeas claims of unauthorized detention can proceed without allegations that the petitioner possesses cognizable rights holds significant implications for other enemy combatant cases, as well as any other cases in which the government holds persons whose possession of rights may be in doubt. When the government holds prisoners without a lawful basis, the absence of cognizable rights should not preclude habeas relief. Yet this conclusion does not mean that everyone held by the United States anywhere in the world—such as prisoners of war held during declared wars, or military prisoners in Iraq or Afghanistan—are entitled to pursue habeas and to receive an evidentiary hearing by an Article III court. Numerous doctrines unrelated to the possession of rights would efficiently preclude such suits on the merits. For instance, during World War II there could be no legitimate question that the military had been granted broad authority to hold prisoners of war because that authority was granted by express act of Congress, acting within its

constitutionally enumerated war powers, and it was equally clear that the vast majority of prisoners were properly designated prisoners of war because they served in enemy militaries and were captured wearing enemy uniforms. Because the military clearly was acting within its lawful authority in holding prisoners of war, habeas claims challenging the detentions could readily be dismissed on the merits. Whether there is a lawful basis for holding the Guantanamo detainees, however, is far less clear, and it is the time-honored function of habeas corpus for courts to resolve that question.