

BACK TO BASICS: HABEAS CORPUS PROCEDURES AND LONG-TERM EXECUTIVE DETENTION

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This article addresses a straightforward question: What should habeas corpus hearings look like for prisoners who challenge long-term detention decisions made solely in the executive branch? Prior to 9/11, we had little reason to ponder the procedural nuts and bolts of such hearings, since they existed only in the hypothetical. Indeed, before the “Global War on Terror” began, habeas litigation in contemporary American courts dealt almost exclusively with collateral challenges to criminal convictions, where detention was premised on an underlying judicial determination of guilt.¹ For this kind of habeas proceeding, the applicability of statutory and judicially-crafted rules was clear.²

But events have conspired to make grappling with the issue of “common law” habeas procedures unavoidable. Over the past seven years, the United States has detained, without charge or trial, both citizens³ and non-citizens⁴ on suspicion of involvement with terrorism. In a

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1. From 2003 to 2007, the federal courts handled roughly 22,000 to 24,000 habeas petitions annually, JAMES C. DUFF, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 149 (2008), available at <http://www.uscourts.gov/judbus2007/contents.html>. Of these, about eighty percent were state-prisoner applications. See *id.* at 146. See also NANCY J. KING ET AL., FINAL TECHNICAL REPORT HABEAS LITIGATION IN U.S. DISTRICT COURTS 9–10 (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf> (noting that each year since 1996, “more than 18,000 cases, or one out of every 14 civil cases filed in federal district courts, are filed by state prisoners seeking habeas corpus relief.”).

2. The applicability of the rules is clear, but their substance remains controversial. Federal habeas challenges to the constitutionality of state-court criminal convictions are governed principally by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1217-1227 (1996) [hereinafter AEDPA] (codified as amended at 28 U.S.C.A. §§ 2244, 2253–2255 and §§ 2261-2266 (West, Westlaw through Jan. 2008 amendments)), legislation which has been described in the leading treatise on habeas as a “not well thought-out form of *habeas corpus* bashing.” Anthony G. Amsterdam, *Forward* to 1 RANDY HERTZ & JAMES S. LIEBMAN’S FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE v, vi (5th ed. 2005).

3. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004) (discussing habeas case of United States citizen detained without charge as an “enemy combatant”); *Al-Marri v. Pucciarelli*, 534 F.3d 213, 217 (4th Cir. 2008) (en banc) (same, for an alien lawfully residing in the United States).

4. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2241 (June 12, 2008) (discussing habeas cases of non-citizens detained without charge at Guantánamo Bay); *Maqalah v. Gates*, Civ. No. 06-1669 at 2 (D.D.C. Jan. 7, 2009) (ordering government to produce information about nationalities of non-citizens detained without charge at Bagram Air Base in Afghanistan).

series of thunderclap rulings, the Supreme Court has held that these detainees are entitled to seek the writ,⁵ notwithstanding congressional attempts to strip the federal courts of their habeas jurisdiction.⁶ For the first time in the modern era, therefore, the federal courts must rule on the legality of non-criminal executive detentions, and they must fashion procedures that provide due process of law without risking national security.

To be sure, contemporary jurists are familiar with the statutory procedures deployed daily by federal district court judges in habeas actions filed by state and federal prisoners. But the issues raised in the executive-detention context are entirely distinct from those that arise in collateral challenges to criminal convictions. Most fundamentally, executive-detention habeas proceedings implicate the relative competence of the judicial and executive branches to oversee detentions, while challenges to criminal convictions (most of which are filed by state prisoners) raise concerns primarily about comity and federalism. Accordingly, procedures that are appropriate for one type of habeas proceeding may not be appropriate for the other.

The question of which procedures should be available to a court in a common-law habeas hearing has immediate importance for the more than two hundred non-citizens who remain detained at Guantánamo Bay and who have not yet had their “day in court.” But establishing an appropriate framework for executive-detention habeas proceedings is equally critical for citizen detainees as well; indeed, the United States has held at least one lawful resident without charge or trial for more than six years.⁷ Because their right to a habeas hearing is now firmly established at a minimum as a constitutional mandate,⁸ district court judges entertaining their petitions must determine such fundamental questions as whether these prisoners have the right to an evidentiary hearing, to discovery, and to disclosure of exculpatory information in the military’s possession. Should hearsay be admitted in the habeas hearings? Who has the burden of establishing the legality of the detention? Under what standard of proof should the district courts operate? These questions and more must be addressed in short order in pending litigation, and they will

5. See *Hamdi*, 542 U.S. at 509 (stating that “due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker”); *Rasul v. Bush*, 542 U.S. 466, 480-81 (2004) (holding that federal courts have statutory jurisdiction to hear Guantánamo detainees’ habeas cases); *Boumediene*, 128 S. Ct. at 2240 (holding that federal courts have jurisdiction over Guantánamo detainees’ habeas actions because Congress’s attempt to strip such jurisdiction was an unconstitutional suspension of the writ).

6. Detainee Treatment Act of 2005, Pub. L. No. 109-48, 119 Stat. 2680, 2742 (2005) (codified as amended at 28 U.S.C.A. § 2241(e) (West, Westlaw through Jan. 2008 amendments); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2636 (2006) (codified as amended at 18 U.S.C.A. § 2241(e)(1) & (2) (West, Westlaw through Jan. 2008 amendments)).

7. See *Al-Marri*, 534 F.3d at 217.

8. See *Boumediene*, 128 S. Ct. at 2274 (holding that “MCA § 7 thus effects an unconstitutional suspension of the writ”).

inevitably recur as more and more detentions in new contexts are challenged in the courts.⁹

In this article, I offer historical, doctrinal, and policy justifications for robust and flexible habeas procedures in the context of challenges to executive detentions. Acknowledging that the historical record is incomplete,¹⁰ in the first part of the article I canvas English and American case law to tell the story of the evolution of habeas as the Great Writ of Liberty, paying particular attention in the English context to the “information-forcing” procedures—most importantly, the requirement of a “return” to the writ—that developed over the centuries to effectuate the writ’s office as protector of individual liberty. I show that the story of habeas is one of dialectical movement, with the courts and executive locked in a struggle to determine the metes and bounds of the habeas right. Moving to the American context, this account reveals that the Framers incorporated into our Constitution a dynamic common-law writ whose procedures had never firmly been set, and that the Framers understood that habeas corpus at its core was a flexible and evolving remedy.¹¹

In the second part, I discuss much of the War on Terror litigation since 9/11, focusing on the Guantánamo habeas actions, congressional attempts to strip the federal courts of jurisdiction to hear habeas petitions from “enemy combatants,” and the Supreme Court’s repeated rebukes to the Bush administration’s argument that the habeas right either does not extend to war-time detainees or else is severely restricted for them. I suggest that these cases reveal in microcosm the same dialectical movement discussed in the first part, with the courts cautiously but deter-

9. The most obvious “next battle” involves more than six hundred detainees held by the United States at Bagram Air Base in Afghanistan on suspicion of association with al Qaeda or the Taliban. Whether those men are entitled to apply for the writ of habeas corpus is an open question that is only now being litigated in the district courts. See *Al Maqaleh v. Gates*, No. 06-CV-1669, 2009 WL 863657, at *2 (D.D.C. Apr. 2, 2009) (holding that “the Suspension Clause extends to, and hence habeas corpus review is available” for several prisoners held by the U.S. military at Bagram); *Boumediene*, 128 S. Ct. at 2275 (“Practical considerations and exigent circumstances inform the definition and reach of the law’s writs, including habeas corpus.”).

10. Scholars have recently called attention to the shortcomings of the historical record concerning habeas, including in the American context the paucity of eighteenth-century law reports on habeas matters. E.g., Paul D. Halliday & G. Edward White, *The Suspension Clause: English Texts, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 713 (2008) (criticizing historians’ reliance on printed law reports rather than archival materials that might “significantly complicate and deepen our understanding of how English jurists thought about and used the ‘Great Writ’ in the generations before the framing of the Constitution”); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2096 (2007) (noting that “efforts to reconstruct historical practice with respect to most kinds of habeas proceedings found quickly, for surviving records are fragmentary and practices were not consistent and shifted over time”). See also *Boumediene*, 128 S. Ct. at 2251 (“[M]ost reports of 18th-century habeas proceedings were not printed.”) (citing Halliday & White, 94 Va. L. Rev. at 714-15).

11. See *Schnecko v. Bustamonte*, 412 U.S. 218, 256 (1973) (Powell, J., concurring) (“No one would now suggest that this Court be imprisoned by every particular of habeas corpus as it existed in the late 18th and 19th centuries.”); *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (noting that, “at the absolute minimum, the Suspension Clause protects the writ as it existed in 1789”) (internal quotation marks omitted).

minedly enlarging their supervisory power over executive decisions concerning deprivations of liberty.

In the last part of the article, I take these lessons from history to make sense of pre-9/11 doctrine on the procedural requisites for a fair habeas hearing. I then propose a set of flexible but muscular principles to be applied to executive-detention habeas proceedings, respecting both the historical office of the writ and potential concerns for protecting national security. Finally, I briefly review the habeas procedures which the district courts have just begun to formulate. I offer an analysis of those procedures as largely appropriate, but conclude that they are insufficiently protective both of the rights of persons detained on suspicion of involvement with terrorism, and also of the right of the American public to information about the purported reasons for these detentions.

I. HABEAS CORPUS AS A CONSTITUTIONAL PRINCIPLE

Although the legal and political issues raised by the habeas corpus authority of federal courts are familiar to most lawyers and legal scholars in the context of federal review of state convictions, in this article I am primarily interested in the use of habeas corpus to challenge executive detentions. Historically, such challenges represented the “core” circumstances in which the habeas right has operated.¹² In this part, I review how the habeas right developed, paying particular attention to the ways in which the courts enhanced their authority over the executive through deployment of procedural devices that force information out of the secret and into the public realm. In particular, I focus on the courts’ growing insistence that the executive provide the court with a specific, factual “return” justifying the legality of the challenged detention.

The lesson from this part is two-fold. First, habeas procedures have grown increasingly robust over time, as the executive and judicial branches have battled for supremacy over detention decisions. Second, in practice, habeas procedures have never been stable or rigid, something of which the Framers would have been aware at the time of incorporating the protections of the writ into Article I of the Constitution.

A. *The Common-Law Background of Habeas Corpus*

Modern federal judges are most familiar with “habeas corpus” as a method for bringing constitutional challenges to presumptively valid state or federal court convictions.¹³ As discussed more fully below,¹⁴ a

12. 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.”).

13. See 28 U.S.C.A. § 2254(a) & (b) (West, Westlaw through Jan. 2008 amendments) (governing challenges to state convictions); *id.* § 2255(a)-(d) (West, Westlaw through April 1996 amendments) (governing challenges to federal convictions).

14. See discussion *infra* Part I.C.3.

thick accretion of case law and statutory provisions has developed for this use of habeas as a post-conviction remedy, which is a function that did not exist in any significant manner until passage of the Reconstruction-era Habeas Corpus Act of 1867.¹⁵ In the twentieth century, the common understanding of habeas as a collateral process—and, some would say, as a second bite at the apple for criminal defendants—became firmly entrenched for the simple reason that extrajudicial executive detentions were rare to nonexistent. Until recently, few have contemplated the core historical functions of the writ, largely because our government has never had a policy of imprisoning persons without providing due process of law.¹⁶

The situation changed, of course, with the attacks of 9/11 and the federal government's response, which included a policy of detaining suspected "enemy combatants" in sites like Guantánamo, where the executive branch refused to acknowledge either the binding force of the Geneva Conventions or an oversight role for the courts.¹⁷ When prisoners at Guantánamo filed habeas corpus petitions, jurists and scholars began to recognize that they must reeducate themselves about the Great Writ of Liberty—a project which is still playing itself out¹⁸—and to recover from the mists of history something about the origins of habeas corpus and its functioning at the common law.¹⁹

15. 14 Stat. 385 (1867). Many scholars have assumed that the Suspension Clause, U.S. CONST., art. I, cl. 9, protected only federal and not state prisoners, but habeas scholar Eric M. Freedman has convincingly argued to the contrary. Eric M. Freedman, *Milestones in Habeas Corpus: Part I: Just Because John Marshall Said It, Doesn't Make It So: Ex Parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531, 536-38 (2000).

16. There are, of course, exceptions. See, e.g., Jonathan L. Hafetz, *The Untold Story of Non-criminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2516-20 (1998).

17. See, e.g., Memorandum from Jay S. Bybee to Alberto R. Gonzales and William J. Haynes II, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002)*, in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 81, 81 (Karen J. Greenberg & Joshua L. Dratel eds., 2005); Alberto R. Gonzales, Memorandum for the President, *Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002)*, in TORTURE PAPERS: THE ROAD TO ABU GHRAIB, *supra*, at 118-121. The Supreme Court subsequently held in *Hamdan v. Rumsfeld* that the detainees at Guantánamo were entitled to at least the protections of common article 3 of the Geneva Conventions. 548 U.S. 557, 629-32 (2006).

18. See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229, 2244-51 (2008) (concluding that the historical record is too spotty to draw firm conclusions); *Rasul v. Bush*, 542 U.S. 466, 473-75 (2004).

19. Though I do not mean to imply that the common law roots of habeas are irrelevant to understanding habeas in the context of collateral challenges to criminal convictions, it is in many ways true that "the modern doctrine of federal habeas as a post-conviction remedy bears little likeness to its common law function." Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1079 (1995); see also OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, *Report to the Attorney General: Federal Habeas Corpus Review of State Judgments*, REPORT NO. 7, TRUTH IN CRIMINAL JUSTICE SERIES, at i (1988) ("[T]he contemporary 'writ of habeas corpus' by which the lower federal courts review state judgments is not the Great Writ of the Constitution and the common law. Rather, it is a purely statutory remedy that is fundamentally different from the traditional habeas corpus remedy whose suspension is prohibited by the Constitution.").

Stated simply, habeas corpus is the legal process by which a prisoner contests the legality of his detention. Its roots lie in the Magna Carta and its promise in 1215 that “no free man shall be seized or imprisoned . . . except by the lawful judgment of his equals or by the law of the land.”²⁰ Although “habeas corpus” is not itself to be found in that document, as has sometimes been assumed,²¹ over time it grew into the primary procedural device for effectuating the Magna Carta’s proscription on extrajudicial detention.²² Habeas corpus—which, roughly translated from the Latin, means “you shall have the body”—has thus historically not been a substantive “right” that someone possesses so much as it has been an evolving set of procedures through which the right to be free from illegal detention may be vindicated.²³

What we have come to know as the “Great Writ of Liberty” is derived from one of a series of “writs of habeas corpus” that were used as management devices in the English courts in the medieval period. Indeed, the origins of the writ are decidedly “humble.”²⁴ As originally conceived, a writ of habeas corpus entailed little more than a command to have a person brought physically before the court for a particular purpose.²⁵ In their early history, the various habeas writs thus served as

20. MAGNA CARTA, cl. 39 (England 1215) (“Nullus liber homo capiatur, vel imprisonatur, aut dissesiatur, aut utlagetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mitemus, nisi per legale iudicium parium suorum vel per legem terrae.”), *photograph of original document available at* http://www.archives.gov/exhibits/features_documents/magna_carta/images/magna_carta.jpg (last visited Mar. 7, 2009), *Latin transcript available at* <http://www.thelatinlibrary.com/magnacarta.html> (last Mar. 7, 2009), and *English translation available at* <http://www.law.ou.edu/ushistory/magnacarta.shtml> (last visited Mar. 7, 2009). Albert V. Dicey observes that the Magna Carta did not “confer” individual rights, but rather recognized them as the basis for the law of the unwritten English constitution. ALBERT V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 206-07 (10th ed. 1958) (1885).

21. *See, e.g., Stander v. Kelley*, 246 A.2d 649, 652 (Pa. 1969) (Musmanno, J., dissenting) (“[D]ating as far back as Magna Charta, Habeas Corpus has always been the mightiest oak in the whole domain of individual rights.”); DANIEL JOHN MEADOR, HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY 5 (1966) (noting that while habeas corpus is often thought to spring from Magna Carta, in fact “the two were unrelated in origin”); J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 537 (3d ed. 1990) (noting that the Magna Carta provided no remedy for the violation of rights). Before the sixteenth century, several other writs were generally used to effectuate the Magna Carta’s proscription on extralegal detention. *See, e.g.,* 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 95-97 (1903) (describing writ *de homine replegiando*, writ of *mainprize*, and writ *de odio et atia*). *Cf. R.J. SHARPE, THE LAW OF HABEAS CORPUS* 3 (1976) (noting that “[t]hese medieval writs really differed in a fundamental way from habeas corpus” in that they “were not remedies of general application but special procedures for special situations”).

22. It is thus an overstatement to contend that there is “little relationship between Magna Carta and Habeas Corpus.” Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. SCH. J. HUM. RTS. 375, 377 (1998) (footnotes omitted).

23. *See* DICEY, *supra* note 20, at 220-21 (“There is no difficulty, and there is often very little gain, in declaring the existence of a right to personal freedom. The true difficulty is to secure its enforcement. The Habeas Corpus Acts have achieved this end, and have therefore done for the liberty of Englishmen more than could have been achieved by any declaration of rights.”).

24. WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 12 (1980).

25. In his *Commentaries*, Blackstone cataloged a number of these distinct writs, including *ad respondendum* (for removing a prisoner from confinement to answer a complaint brought against him), *ad satisfaciendum* (for bringing a prisoner to a superior court for execution of a judgment), *ad prosequendum* (for bringing a prisoner to be prosecuted), *ad testificandum* (for bringing a prisoner to

little more than “interlocutory process” and ancillary court procedure.²⁶ From medieval times through the thirteenth century, there was little about habeas corpus that we would identify as a means of securing liberty or of providing a safeguard against arbitrary detention.²⁷

Crucially, these early forms of the writ of habeas corpus—as demands to produce a person before the court—were not coupled with similar demands to explain the reason for a prisoner’s detention. It was not until the fourteenth century that the English courts fashioned a writ whose purpose was to question the *cause* of a prisoner’s custody.²⁸ But quickly after—by the middle of the century at the latest—the courts were coupling this newly minted show-cause writ with habeas corpus, and doing so with sufficient frequency that a distinct type of habeas writ arose, which was denominated the writ of *habeas corpus cum causa*.²⁹ Only with *cum causa* had the courts established a procedure that began to resemble the modern writ,³⁰ requiring not only production of the body of the prisoner (who was being detained either by the state or by a private party) but also the *reason* for his detention.³¹

The importance of this functional pairing should not be discounted. By requiring both the presence of the prisoner and an articulation of the cause for his detention, the writ of *habeas corpus cum causa* provided the courts with a powerful tool for controlling the authority of the state and private parties to coerce persons to acquiesce to demands, whether legal or not, via their detention powers. Nonetheless, this power remained largely dormant, and for nearly a century and a half it was exercised by the various English courts—including the common law courts, Chancery, the ecclesiastical courts, and Admiralty—to do no more than

testify), and *ad deliberandum* (for bringing a prisoner into the proper jurisdiction for trial). 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 129–30 (Neill H. Alford, Jr. et al. eds., The Legal Classics Library 1983) (1768). See also HOLDSWORTH, *supra* note 21, at 97 (“In Edward I.’s reign the writ [of habeas corpus] was in existence; but it belonged to the law of procedure.”).

26. SHARPE, *supra* note 21, at 1–2.

27. See *id.* at 2 (“The words ‘habeas corpus’ at this early stage were not connected with the idea of liberty, and the process involved an element of the concept of due process of law only in so far as it mirrored the refusal of the courts to decide a matter without having the defendant present.”).

28. See DUKER, *supra* note 24, at 25 (discussing several cases in the first half of the fourteenth century in which the King’s Bench issued this new type of writ that demanded the cause for the detention of a prisoner).

29. See Maxwell Cohen, *Habeas Corpus Cum Causa: The Emergence of the Modern Writ—I*, 18 CAN. B. REV. 10, 13 (1940) [hereinafter Cohen, *Cum Causa I*]; Maxwell Cohen, *Habeas Corpus Cum Causa: The Emergence of the Modern Writ—II*, 18 CAN. B. REV. 172, 176 (1940).

30. See Cohen, *Cum Causa I*, *supra* note 29, at 13 (seeing in the history of *cum causa* the “emergence of the modern writ”).

31. This pairing was initially made by courts issuing a writ of habeas corpus after a prisoner petitioned for an *audita querela* (seeking relief against the consequences of an adverse judgment) or for *certiorari* (asking a court to assume jurisdiction from another court). See SHARPE, *supra* note 21, at 23.

remove cases from one court to another in a protracted battle over their respective jurisdictions.³²

Still, the courts' reliance on *cum causa* as a procedural tool for protecting their prerogatives as against other courts made habeas a familiar tool. While their battles might seem trivial now, by the late sixteenth century the courts' resistance to encroachment on their jurisdiction extended to executive agencies as well. In particular, the courts used the habeas writ to protect their jurisdiction from infringement by the Privy Council, whose detention practices were deemed increasingly unlawful by the courts.³³

Nonetheless, the deployment of habeas against the executive and the perceived abuses of the Privy Council was incremental and characterized by fits and starts. For example, in *Helyard's Case* in 1586, the Court of Common Pleas held insufficient a "return" to the writ—that is, a response to the court's order to produce the prisoner—stating only that the prisoner had been committed by the authority of the principal military secretary of the monarch's household, without providing any more explanation for the cause of the detention.³⁴ Just one year later, in *Howel's Case*, a similar return was made without showing cause of the detention beyond the fact that a member of the Privy Council had ordered it; although that return was deemed insufficient, an amended return stating no more than that the *entire* Privy Council had ordered the detention was deemed adequate.³⁵

By this point in the history of the writ of habeas corpus, the writ *cum causa* had given rise to the writ *ad subjiciendum*, developed by the King's Bench "chiefly to protect subjects against unconstitutional imprisonment by privy councillors and officers of state."³⁶ This form of the writ is the direct descendant of what we now colloquially call "habeas corpus." In his *Commentaries*, Blackstone described the *ad subjiciendum* as "the great and efficacious writ, in all manner of illegal confine-

32. See DUKER, *supra* note 24, at 26 (by the end of the fourteenth century, "the politics of the bench became more transparent . . . and the development of the writ of habeas corpus was largely attributable to the superior courts' desire to extend and secure their jurisdiction"); see generally *id.* at 33-40 (detailing the jurisdictional battles); SHARPE, *supra* note 21, at 4-7 (same); HOLDSWORTH, *supra* note 21, at 97-98 (same).

33. DUKER, *supra* note 24, at 41. The Privy Council consisted of great officers of the state and advisers to the monarch, and it was "through the Council that the royal authority was exercised." HOLDSWORTH, *supra* note 21, at 265.

34. 74 Eng. Rep. 455 (C.P. 1586); see also *Peter's Case*, 74 Eng. Rep. 628 (C.P. 1586) (return insufficient where no cause shown beyond statement that the prisoner was being held by order of a member of the Privy Council); cf. *Searcher's Case*, 74 E.R. 65 (1586) (issuing writ notwithstanding a letter patent from the Queen authorizing arrest).

35. 74 Eng. Rep. 66 (C.P. 1588). See also SHARPE, *supra* note 21, at 7 (collecting cases in which prisoners of state were discharged on habeas corpus); *id.* at 8 (noting that in sixteenth-century cases the idea evolved that habeas corpus "was not precluded simply because an executive committal was involved," and that there was, "nascent, the idea of the writ requiring substantive legal justification for the imprisonment in all cases").

36. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 126 (2d ed. 1979).

ment,” and explained that it “directed to the person detaining another, and commanding him to produce the body of the prisoner with the day and cause of his caption and detention, . . . to do, submit to, and receive, whatsoever the judge or court awarding such writ shall consider in that behalf.”³⁷

By the latter part of the sixteenth century, therefore, it appeared that the common law courts had firmly established that habeas was a tool that could be deployed against the executive and that as a *general* matter a return would be inadequate where it did not show cause for the detention. Indeed, in 1592, the judges of the King’s Bench, Common Pleas and the Exchequer Court assembled to discuss their dissatisfaction with the detention abuses of the Privy Council. At this assembly, they issued a resolution affirming that their practice was to order the release of prisoners who were detained by the monarch’s councilors when the return to a writ of habeas corpus showed no legal cause for the imprisonment, and issued a resolution stating their intent to continue doing so.³⁸ Interestingly, the judges indicated their concern that, as a practical matter, this custom had led to the reincarceration—sometimes in secret prisons—of the men who had been ordered released.

While the Resolution of 1592 is an important milestone in the cabining of executive power via the writ of habeas corpus, the judges also stated in their resolution that a “general” return—one that did not specify the cause of the detention—*would* be deemed sufficient when authorized by special order of the Queen or by the entire Privy Council. Thus, in *Addis’s Case* in 1610, a challenge to the adequacy of a return that stated only that the prisoner was being held “for certain matters concerning the King,” was said to be the first time that exception had been taken to the generality of such a return.³⁹ Similarly, Lord Coke held in three separate cases in 1614 and 1615 that, regardless of the generality of the return, a prisoner was not bailable if he were committed by the full Privy Council.⁴⁰

The power of the state to detain persons without giving an accounting for the legal cause of the detention was politically controversial—engendering two unsuccessful attempts by Parliament to rectify the situation⁴¹—and eventually led to a constitutional crisis during the reign of Charles I. The spark for the controversy was the famous *Darnel’s Case*

37. BLACKSTONE, *supra* note 25, at 131. See also EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 53 (1628) (by the writ of habeas corpus, “it manifestly appeareth, that no man ought to be imprisoned but for some certain cause . . . , and that cause must be shewed: for otherwise how can the Court take order therein according to Law”).

38. Resolution, 1 And. 297 (1592); see also DUKER, *supra* note 24, at 84 n.336 (discussing Resolution of 1592).

39. Cro. Jac. 219 (1610). See SHARPE, *supra* note 21, at 8.

40. Les Bruer’s Case, 1 Rolle 134, 134 (1614); Ruswell’s Case, 1 Rolle 192, 192 (1615); Salkingstowe’s Case, 1 Rolle 219, 219 (1615).

41. See SHARPE, *supra* note 21, at 9 (noting the defeat of such bills in 1593 and 1621).

in 1627, also known as the *Five Knights' Case*.⁴² Charles I had ordered a forced loan from his subjects in order to raise revenue without Parliament's sanction. His agents detained persons who refused to make the loans, including five knights. Probably seeking to test the legality of the King's scheme, they sought a writ of habeas corpus, claiming that their detention was illegal.⁴³ The return made by the Executive stated only that the men were being detained "*per speciale mandatum domini regis*," or by special order of the King.

Was this general return adequate justification for the detention, or could the court order the prisoners bailed? Counsel for the prisoners argued, as per Magna Carta, that no detention was legal except "*per legem terre*," or by the law of the land. In response, the Attorney General noted that Magna Carta did not define "*legem terre*" and that the law of the land was that the King could detain his subjects without giving an accounting of why to the courts. Relying on the Resolution of 1592 and recent cases, the court accepted the Attorney General's argument, ruling that the general return by the Executive was sufficient and that the prisoners could not be bailed.⁴⁴

The fall-out from *Darnel's Case* was swift. In 1627, Parliament passed the Petition of Right, a declaration of grievances against Charles I that included the complaint that subjects had been imprisoned "without any cause showed," and that when "they were brought before your justices by your Majesty's writs of habeas corpus, . . . and their keepers [were] commanded to certify the causes of their detainer, no cause was certified, but that they were detained by your Majesty's special command, signified by the lords of your Privy Council, and yet were returned back to several prisons, without being charged with anything to which they might make answer according to the law."⁴⁵ Even after the Petition of Right was passed, however, Charles I refused to honor it, continuing to offer only general returns⁴⁶ and denying that the Petition had the force of law.⁴⁷

For the most part, the courts did all they could to avoid confronting the executive on its refusal to abide by the Petition of Right. The passivity of the courts eventually led Parliament, when it reconvened, to pass the Habeas Corpus Act of 1640, specifically providing that anyone im-

42. 3 St. Tr. 1, 31 (1627) (Doderidge, J.) (calling the case "the greatest cause that I ever knew in this court").

43. SHARPE, *supra* note 21, at 9.

44. *Id.*

45. 3 Car. 1 c.1 (1627).

46. See, e.g., *Six Members' Case*, 3 St. Tr. 235, 240 (1629) (return states only that detention of members of Parliament was for "notable contempts" and "stirring up sedition against us," without stating a charge on which they could be tried); *Ship Money Case*, 3 St. Tr. 825, 1237 (1637).

47. *Six Members' Case*, 3 St. Tr. at 281-82 (1629).

prisoned by order of the King or his Privy Council must be brought without delay to the court along with the cause of his imprisonment.⁴⁸

It soon became clear, however, that there were procedural defects in this first Habeas Corpus Act and that it was not completely effective. It was a matter of dispute, for example, whether the writ could be awarded while the courts were in vacation, leading to lengthy detentions. There were also a number of abuses, including the movement of prisoners from jail to jail to avoid the writ, or transportation to Scotland or other areas where the writ would not reach.⁴⁹ Indeed, without a muscular writ, it was possible that a prisoner could be secreted and his detention never come to the attention of the public; as Blackstone observed, “confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.”⁵⁰

Parliament sought to remedy the procedural defects through passage of the Habeas Corpus Act of 1679,⁵¹ a piecemeal statute designed to make the writ an effectual remedy and to fortify the courts to discourage their “pitiful evasions.”⁵² Hailed by Blackstone as the “second Magna Carta,” this Act codified the common law writ of habeas corpus *ad subjiciendum* as the law’s primary safeguard against illegal detentions.⁵³ Although by its terms the Act applied only to criminal matters, the Act’s procedures were utilized in non-criminal detentions that were challenging executive detentions via the common-law writ.⁵⁴

Thus, by the latter part of the seventeenth century, the writ of habeas corpus—either as a common law or statutory writ—was indisputably available to Englishmen to contest the legality of all executive detentions by, primarily, forcing the state to make the prisoner available in person in the court and by obliging the state to articulate a legal basis for the detention. By the colonial American era, habeas corpus had fundamentally realigned the relation of the judiciary towards the executive,

48. 16 Car. 1 c.10 (1640).

49. In addition, like Charles I, Oliver Cromwell refused during the Protectorate to answer writs of habeas corpus with the particular cause of a return. See, e.g., Lilburne’s Case, 5 St. Tr. 371, 371 (1653) (no return made on grounds that the prisoner had been committed “for the peace of the nation”); see generally DUKER, *supra* note 24, at 48-52 (discussing habeas cases decided during the Interregnum).

50. BLACKSTONE, *supra* note 25, at 185; see also *id.* at 137-38 (“A remedy the more necessary, because the oppression does not always arise from the ill-nature, but sometimes from the mere inattention, of government. For it frequently happens in foreign countries . . . that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten.”).

51. 310 Car. 2 c.2 (1679).

52. BLACKSTONE, *supra* note 25, at 134.

53. HOLDSWORTH, *supra* note 21, at 117-18.

54. BLACKSTONE, *supra* note 25, at 137-38. The protections of the writ of habeas corpus were not extended by statute to noncriminal detainees in England until the Habeas Corpus Act of 1816, 56 Geo. 3 c.100. The procedural protections of the Habeas Corpus Act of 1679 were, however, in practice extended by judges to prisoners in non-criminal cases. See DICEY, *supra* note 20, at 219 n.2.

putting it on a more even footing by providing a veto for an administrative action of the government that it believed not to be authorized by law.⁵⁵

B. *Judicial Inquiry at the Common Law*

We have seen the growing importance at the common law of the courts' requirement that the executive provide a meaningful "return" to the writ. But having received the executive's explanation for the legality of the detention, how were the petitioner and court to proceed next? Was the petitioner allowed to contest the factual allegations lodged in the return? Were the courts empowered to look behind the return to determine whether the allegations were true?

Although it was a maxim in the eighteenth century that the courts were strictly bound by the four corners of the return and prisoners could not contest facts alleged in the return,⁵⁶ such pronouncements were overbroad and misleading. Most fundamentally, they failed to account for the distinction in habeas practice between criminal and non-criminal executive detentions. Only in the former category of cases were petitioners prevented from "traversing" the return; in contrast, when a petitioner was held in non-criminal detention, historical practice consistently allowed the prisoner to contest the facts justifying his detention.⁵⁷

While courts generally did not allow criminal detainees—who had already received a trial and a jury verdict—to contradict the facts stated in the return, they commonly exercised independent review over the factual assertions of prisoners in cases of executive and other non-criminal detention that lacked the safeguards of a jury trial.⁵⁸ The courts, in short, would consider additional evidence and seek to ensure that individuals challenging executive detention received meaningful review of their claims.

55. See DICEY, *supra* note 20, at 222.

56. See HOLDSWORTH, *supra* note 21, at 120; SHARPE, *supra* note 21, at 61-68; Marc M. Arkin, *The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners*, 70 TUL. L. REV. 1, 12-13 (1995).

57. The distinction between the criminal and non-criminal habeas contexts was recognized by D.H. Oaks in his *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451, 454 n.20 (1966) ("[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].") (quoting R.C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS 270-71 (1858) (modifications in original)).

58. Hafetz, *supra* note 16, at 2535-36. This review extended even to cases of criminal confinement, where courts entertained habeas petitions of detainees seeking bail before trial. See, e.g., Crisp's Case, 94 Eng. Rep. 495, 495 (K.B. 1733) (in considering return of commitment on allegation of highway robbery, examining affidavits "containing very strong circumstances to shew that the prisoner did not commit the fact" and entering *nisi* order to bail); Barney's Case, 87 Eng. Rep. 683, 683 (K.B. 1701) (granting bail for woman indicted for killing her husband after allowing her to introduce affidavits of fact showing malicious prosecution).

There is, however, some evidence from the eighteenth century that, as a doctrinal matter at English law, petitioners could not traverse the return. In 1758, jurists debated a new habeas corpus bill that would have codified common-law practice by extending the procedural reforms available in criminal cases under the Habeas Corpus Act of 1679 to non-criminal cases, including explicitly permitting the habeas petitioner to controvert facts stated in the return.⁵⁹ During the debate, Justice John Eardley Wilmot and Chief Baron Parker contended that habeas judges were constrained by the return and were not at liberty to try the facts contained in the return.⁶⁰

The views of Wilmot and Parker were, however, rejected by half of the common-law judges debating the 1758 bill, and eventually the protections were written into the statute.⁶¹ The champion of this position was Justice Michael Foster, who forcefully argued that, in non-jury executive detention cases, the denial of an opportunity to controvert facts would effectively be denial of an opportunity to contest the deprivation of one's liberty. In such circumstances, a prisoner would be "absolutely without remedy" because "[a]n inadequate ineffectual remedy is no remedy; it is a rope thrown to a drowning man, which cannot reach him, or will not bear his weight."⁶² While Foster conceded that the "general rule" was that a prisoner could not traverse the return and would have a remedy only in a damages action for the filing of a false return, he noted that the case law was rife with principled exceptions to the general rule, where the courts allowed a traverse and read affidavits on both sides. "[T]he principle, as I take it, was, that though in common cases the return is conclusive in point of fact, yet these special cases, as they come not within the general reason of the law, are not within the general rule. The parties are without remedy, if they are not to controvert the truth of the

59. See Hafetz, *supra* note 16, at 2531.

60. "That in no cases whatsoever the judges are so bound by the facts set forth in the return to the writ of *habeas corpus*, that they cannot discharge the person brought up before them, if it should appear most manifestly to the judges, by the clearest and most undoubted proof, that such return is false in fact, and that the person so brought up is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice; *but by the clearest and most undoubted proof he understands the verdict of a jury . . . in an action for a false return.*" Letter, Chief Baron Parker to Justice Foster, n.d. (reprinted in MICHAEL DODSON, *THE LIFE OF SIR MICHAEL FOSTER*, KNT 58 (1811) (italics in reprinted letter). See also *Opinion on the Writ of Habeas Corpus*, 107 Eng. Rep. 29, 60 (H.L. 1758); HOLDSWORTH, *supra* note 21, at 120.

61. See James Oldham & Michael J. Wishnie, *The Historical Scope of Habeas Corpus and INS v. St. Cyr*, 16 GEO. IMMIGR. L.J. 485, 489-95 (2002) (noting that six of the twelve common law judges disagreed with Wilmot and Parker's views, and that after the failure of the 1758 bill, an alternative was drafted by the judges which expressly permitted judicial examination into the truth of the facts alleged in the return); SHARPE, *supra* note 21, at 66 ("[T]here was nothing like unanimity in favour of Wilmot's formulation of the common law rule. In fact, there would seem to have been a preponderance of judicial opinion which favoured a more liberal construction."); Oaks, *supra* note 57, at 454 n.20 (prisoners detained without charge contested the facts in the return in "most" cases).

62. Letter from Justice Michael Foster to Chief Baron Parker (May 24, 1758), reprinted in DODSON, *supra* note 60, at 60.

return in a summary way; and therefore they shall do it.”⁶³ Foster’s statement seems to suggest that in practice the rule against traversing the return applied only for a limited class of factual questions—namely, questions of ultimate fact raised on the pleadings and most appropriately to be settled at trial.⁶⁴

The courts, moreover, were sufficiently flexible as to be able to deploy a host of procedural tools for inquiring into the factual justification for the prisoner’s detention.⁶⁵ By the eighteenth century, courts treated the rule against controverting the truth of the return as essentially a procedural hurdle, and they proceeded to review additional evidence submitted by the prisoner if (1) the return was deemed insufficient; (2) prior to the entry of a return, the court issued a show-cause order; (3) the petitioner “confessed” to the facts contained in the return, which then permitted the introduction of additional factual allegations; or (4) the evidence pertained to jurisdictional facts, which often extended to the very core of the case and effectively vitiated the rule altogether.⁶⁶ The common law courts therefore had an entire toolbox at their disposal to assure that habeas litigants who were not detained as a result of criminal process were assured similar fundamental due process rights to what they would have received in a criminal proceeding.

First, the common law courts would not hesitate to inquire into the facts behind the return if the courts believed the allegations in the return to be evasive or false. In *Leonard Watson’s Case*, for example, where the petitioner’s name and certain other information were either missing or incorrect in the return, the court held that the jailer might amend the return to correct what were presumed to be innocent (albeit negligent) and immaterial mistakes. The court also stated, however, that “had the return been intentionally false, the gaoler would not have been protected by the immateriality, nor by the circumstance that the prisoner had not been injured by the falsehood.”⁶⁷ And in *R. v. Viner*, the court held that

63. *Id.* at 62; see also *Goldswain’s Case*, (1778) 96 Eng. Rep. 711, 712 (K.B.) (“[The court] declared, that they could not wilfully [sic] shut their eyes against such facts as appeared on the affidavits, but which were not noticed on the return. They were inclined to think it their duty immediately to discharge the party.”).

64. See SHARPE, *supra* note 21, at 62.

65. “[C]ourts have never really been prevented by the common law rule from reviewing facts essential to the jurisdiction or authority underlying the order for detention.” SHARPE, *supra* note 21, at 70. See also Gerald Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 986 (1998) (though “[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,” that “general statement papered over exceptions”).

66. See generally Brief of Legal Historians as Amici Curiae in Support of Petitioners at 20-24, *Boumediene v. Bush*, Nos. 06-1195, 06-1196 (Aug. 24, 2007); SHARPE, *supra* note 21, at 61-68.

67. *Leonard Watson’s Case*, (1839) 112 Eng. Rep. 1389, 1390 (K.B.). See also *R. v. Winton*, 101 Eng. Rep. 51, 52 (K.B. 1792) (“The courts always look with a watchful eye at the returns to writs of habeas corpus. The liberty of the subject so essentially depends on a ready compliance with the requisitions of this writ that we are jealous whenever an attempt is made to deviate from the usual form of the return.”) (Grose, J.).

the return was “traversable” when three affidavits were filed contesting the allegation in the return that the petitioner was not in Viner’s custody.⁶⁸

Second, the courts would commonly develop facts and allow a petitioner to controvert factual allegations from his or her custodian by requiring the custodian, before the filing of his return, to show cause why the writ should not issue. For example, in *R. v. Dawes*, Lord Mansfield and the other members of the court “went minutely through the affidavits on both sides” on an order to show cause for the discharge of an impressed sailor, ultimately finding that the impressment was valid.⁶⁹ In a parallel case, the court considered the allegations of a man who claimed he had been illegally conscripted into military service by force. On a rule *nisi*, the lawyers argued “upon the fact only,” and the court, having taken “time . . . to look into the affidavits,” ordered the petitioner’s discharge.⁷⁰

The show-cause procedure was commonly used in private detentions as well. In *R. v. Turlington*, a habeas petition was filed against “the keeper of a private mad-house,” by a woman who was detained there at the behest of her husband. After no return was made, the Court issued a rule *nisi*, thinking “it fit to have a previous inspection of her, by proper persons, physicians and relations; and then to proceed, as the truth should come out upon such inspection.”⁷¹ Similarly, in the infamous *Case of the Hottentot Venus*, the court issued a rule *nisi* where a

female native of South Africa, remarkable for the formation of her person, was exhibited in London in the course of the autumn of this year under the name of the Hottentot Venus . . . by certain persons who had the apparent custody of her, and who received money for such exhibition [As there were] some apparent indications of reluctance on her part during her exhibition, there was reason to believe, and affidavits were accordingly laid before the Court to that effect, . . . that she had been clandestinely inveigled from the Cape of Good Hope, . . . and that she was brought to this country and since kept in custody and exhibited here against her consent.⁷²

These and numerous other examples demonstrate that courts employed the rule *nisi* procedure on habeas to consider new facts in determining whether the prisoner was lawfully detained.

68. 84 Eng. Rep. 829, 829 (K.B. 1675). See also *R. v. Strudwick*, 94 Eng. Rep. 271, 271 (K.B. 1744) (in response to a return that a prisoner was too sick to be produced in court, the court considered affidavits from both sides attesting to the prisoner’s state of health).

69. 97 Eng. Rep. 486, 486 (K.B. 1758).

70. *R. v. Kessel*, 97 Eng. Rep. 486, 486 (K.B. 1758).

71. *Id.* According to the reporter, the petitioner “appeared to be absolutely free from the least appearance of insanity.” *Id.*

72. 104 Eng. Rep. 344, 344 (K.B. 1810).

Third, the courts would permit a habeas petitioner to bring new facts before the court by allowing the petitioner to “confess and avoid the return”—or admit the allegations in the return and then file a special pleading to matters that did not explicitly contradict the return, including additional facts not contained in the return. The best-known example of this procedure occurred in *Goldswain’s Case*, in which a bargeman was contesting his impressment.⁷³ The court rejected the contention that it must defer to the Admiralty’s statement of the factual and legal basis for detention, stating that the court was “not concluded by the return but the petitioner may plead to it any special matter necessary to regain his liberty.”⁷⁴ In a marginal comment, the court further noted that although it

seems that no one can controvert the truth of the return to a habeas corpus, or plead or suggest any matter repugnant to it; yet he may confess and avoid such return, by admitting the truth of the matters contained in it, and suggesting others not repugnant, which take off the effect of them. Also, the Court will sometimes examine, by affidavit, the circumstances of a fact, on which a prisoner brought before them by habeas corpus has been indicted.⁷⁵

The court then decided, on the basis of the additional factual evidence in the petitioner’s special pleading submitted in response to the return, that he had been subject to protection by the Navy-Board and ordered his discharge.⁷⁶ Confessing and avoiding the return, therefore, provided an important opportunity for the courts to supplement the information that was provided in the return and to ensure there was adequate factual basis for executive and other non-criminal detentions.

Fourth, the common law courts would frequently decide jurisdictional questions by relying on extrinsic evidence that the detention in question was beyond the custodian’s authority. This was particularly the case with respect to non-criminal detentions, where there had been no underlying (and there would be no forthcoming) jury decision that might be undermined by the court’s resolution of facts on affidavit in a habeas proceeding.⁷⁷

73. 96 Eng. Rep. 711, 711 (K.B. 1778).

74. *Id.* at 712.

75. *Id.* at 712 n.4 (citations omitted).

76. *Id.* at 713. See also *Gardener’s Case*, 78 Eng. Rep. 1048, 1048 (K.B. 1601) (petitioner, who was convicted and imprisoned for carrying a handgun, on the return confessed to all of its allegations but further noted that he was a sheriff’s officer and therefore entitled to carry a handgun, which plea being confessed, he was discharged).

77. As Justice Abbot stated in *Ex parte Beeching*, “[t]here is a very good reason for not permitting the truth of a return to be traversed where the person is charged with a crime, for that would be trying him upon affidavits, and thus usurping the role of the jury.” Brief of Legal Historians, *supra* note 66, at 24 (citing 107 Eng. Rep. 1010, 1010 (K.B. 1825)). The court in *Beeching* held, however, “that such reservations did not apply to the committing authority’s jurisdiction, including the manner of arrest.” *Id.*

Moreover, jurisdictional questions would often go to the heart of the legality of the detention. For example, where the legality of detention turned on a factual requirement such as enemy alien status, courts conducted an independent inquiry into the underlying facts, including evidence submitted by the prisoner, regardless of the return.⁷⁸ Thus, in *R. v. Schiever*, a Swedish prisoner challenged his detention on the grounds that, although he was taken into custody on an enemy ship, he had been forced into service and was not an enemy combatant; indeed, Schiever swore “that his intention still is (could he obtain his liberty) to enter as a mariner into the English merchants service: and that he would not nor should have served on board the said privateer, had he not been forced thereto and detained.”⁷⁹ Although the court ultimately determined that he was legitimately a prisoner of war, it considered a good deal of evidence beyond the return, including affidavits from Schiever and another person who had been captured in like manner on the ship.⁸⁰

Collectively, these cases provide compelling evidence that in habeas matters the English courts would not be bound by rigid rules preventing them from reaching the heart of a challenge to executive detention. One way or the other, the court would compel the executive to turn over factual information and then test the government’s allegations against facts developed by the petitioner. The heart of these common law protections was eventually codified in the Habeas Corpus of Act of 1816, which extended statutory protection to habeas applicants who were being held in non-criminal detention.⁸¹

C. Habeas Corpus in the American Constitutional System

From the seventeenth century on, these English battles over the meaning of habeas and the depth and breadth of its procedures were followed in the American colonies. The degree to which the common-law and statutory protections of the writ were available (as a matter of principle and of practice) to the colonists differed over time and from location to location. But by the time of the framing of the Constitution, it is manifest that the writ that was enshrined in the Suspension Clause⁸² was

78. See SHARPE, *supra* note 21, at 115-16 (habeas court will investigate whether detainee “is in fact and in law” an enemy alien or a prisoner of war).

79. 97 Eng. Rep. 551, 551 (K.B. 1759).

80. *Id.* at 551-52. *Accord* Case of Three Spanish Sailors, 96 Eng. Rep. 775, 775 (K.B. 1779) (reviewing affidavits of detained sailors and holding that “these men, upon their own shewing, are alien enemies and prisoners of war”).

81. See An Act for More Effectually Securing the Liberty of the Subject, 56 Geo. 3, c. 100, § 3 (1816) (Eng.) (“In all cases provided for by this Act, although the return to any writ of habeas corpus shall be good and sufficient in law, it shall be lawful for the justice or baron, before whom such writ may be returnable, to proceed to examine into the truth of the facts set forth in such return by affidavit . . . and to do therein as to justice shall appertain; and . . . it shall be lawful for the said court to proceed to examine into the truth of the facts set forth in the return, in a summary way by affidavit . . .”). See also Beeching, 107 Eng. Rep. at 1010.

82. “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONST. art. I, § 9, cl. 2.

not a particular set of procedures, but rather a fundamental principle of access to the courts to allow for challenges to arbitrary exertions of executive authority.

1. The Writ in the Colonies

Habeas corpus was available in the American colonies, but settlers were entitled under English law only to the common law protections of the writ, and not to those of the English habeas statutes. The distinction is important, because the colonists felt keenly this infringement of their rights as English subjects. By the time of the drafting of the Constitution, the Suspension Clause was thus undoubtedly understood to protect habeas as a principle rather than as a limited set of procedures.

As an initial matter, whether English law applied at all in the colonies was a matter of some theoretical dispute. Coke and Blackstone, for example, thought that no English law *per se* applied in the colonies, since they were “no part of the mother country, but distinct (though dependent) dominions.”⁸³ Looking back from the vantage of the eighteenth century, however, Joseph Story suggested that Coke and Blackstone had their analysis wrong, and that the colonists *had* been formally entitled to the protections of English law. Because the charters of each colony expressly declared that “no laws [could] be made repugnant to those of England,” and that they “shall be consonant with and conformable thereto,” Story concluded that “either expressly or by necessary implication it is provided that the laws of England so far as applicable shall be in force there.”⁸⁴ The colonists themselves had an even more straightforward understanding of their rights under the English law. Since the English settlers and their descendants had conquered the North American territory from the Native Americans, indigenous law was abolished and English law—their birthright—had been carried to the colonies.⁸⁵

83. BLACKSTONE, *supra* note 25, at 105. In 1607, the year of the founding of Virginia, the first British colony in America, Lord Coke discussed the status of English law in territories that were newly conquered and in possession of the Crown. In the *Case of Robert Calvin*, Coke explained that, for the conquest of a Christian kingdom, the established laws of the land would remain in effect unless and until the monarch chose to extend the laws of England to the conquered territory. 77 Eng. Rep. 377, 398 (K.B. 1607). For the conquest of an “infidel” kingdom, indigenous laws were instantly dissolved, leaving the monarch and his delegates to adjudicate any matters by a standard of “natural equity.” *Blankard v. Galdy*, 91 Eng. Rep. 356, 357 (K.B. 1693) (“[I]n such cases where the laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity.”). In reviewing the legal status of the American colonies, Blackstone adopted Coke’s analysis, and concluded that neither the statutory nor the common law of England were available to the colonists *per se*.

84. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 156 (1833). Story also had an alternative explanation for the availability of the writ in the colonies—that the North American territory had been acquired by “discovery” rather than having been “conquered.” *Id.* § 152. In that situation, the laws of England would be in force. *See, e.g., Blankard*, 91 Eng. Rep. at 357 (“In case of an uninhabited country newly found out by English subjects, all laws in force in England are in force there.”). That said, the consensus in the seventeenth century was that the colonies were conquerors over an infidel kingdom. *See* DUKER, *supra* note 24, at 96-97.

85. *See Blankard*, 91 Eng. Rep. at 357; DUKER, *supra* note 24, at 97.

In practice, it was clear that the colonists were protected by the common law and that they were subject to legislation directed to them. As a general matter, however, they were not protected by English statutory law. As explained in 1720 by a Mr. West, Counsel of the Board of Trade, the common law of England “is the Common Law of the Plantations, and all statutes in affirmance of the Common Law passed in England antecedent to the settlement of the colony, are in force in that colony, unless there is some private Act to the contrary; though no statutes made since those settlements are there in force unless the colonists are particularly mentioned.”⁸⁶

Habeas rights under the English statute were accordingly not respected in the colonies, leading to real discontent among the settlers. For example, the denial of statutory habeas rights led Cotton Mather, one of the foremost intellectuals in late seventeenth-century Massachusetts, to complain that the colonists were little more than slaves because they lacked the writ’s statutory protections. In 1689, he sought the peaceful ouster of Governor Edmund Andros (an autocrat who had been installed to rule over the northern colonies by the now-deposed James II), complaining that during Andros’s rule the writ had not been honored:

It was now plainly affirmed, both by some in open Council and by the same in private convers[ation], that the people in New-England were all Slaves, and the only difference between them and Slaves is their not being bought and sold, and it was a maxim delivered in open Court unto us by one of the Council that we must think the Privileges of Englishmen would follow us to the end of the World; Accordingly we have been treated with multiplied contradictions to [the] Magna Charta, the rights of which we laid claim unto. . . . People [have] been fined most unrighteously; and some not of the meanest Quality have been kept in long and close Imprisonment without any the least Information appearing against them, or an Habeas Corpus allowed unto them.⁸⁷

Indeed, even when the colonists tried to pass their own habeas acts, to guarantee them access to the statutory protections of the English writ, the Privy Council would disallow them. For example, in 1692, several years after the Andros affair, Massachusetts passed an act modeled on the English Habeas Corpus Act of 1679. Three years later the act was struck down by the Privy Council on the grounds that, under the Massa-

86. Letter from Mr. West to Lords Commissioners of Trade and Plantations, in GEORGE CHALMERS, OPINIONS OF EMINENT LAWYERS ON VARIOUS POINTS OF ENGLISH JURISPRUDENCE, CHIEFLY CONCERNING THE COLONIES FISHERIES AND COMMERCE OF GREAT BRITAIN 206 (1858). Likewise, sitting as a Justice, Joseph Story explained that at the very least, “we take it to be a clear principle that the *common law* in force at the emigration of our ancestors is deemed the birthright of the colonies, unless so far as it is inapplicable to their situation or repugnant to their other rights and privileges.” *Town of Pawlet v. Clark*, 13 U.S. (9 Cranch) 292, 333 (1815) (emphasis added).

87. BOSTON DECLARATION OF GRIEVANCES § 6 (Apr. 18, 1689), available at <http://tinyurl.com/cd4jml> (emphasis omitted).

chusetts statute, “the writt of Habeas Corpus is required to be granted in like manner as is appointed by the Statute 31 Car. II. in England., which priviledge has not as yet been granted to any of His Majtys Plantations, [and] It was not thought fitt in His Majtys absence that the said Act should continue in force and therefore the same is repealed.”⁸⁸

Although some form of the writ of habeas corpus was clearly available in the colonies (Samuel Sewall, for example, describes the issuance of a habeas corpus in Massachusetts in 1705, well after the Massachusetts Habeas Corpus Act was repealed by the Privy Council),⁸⁹ it rested on the common law, without the protections of the return guaranteed to the colonists.⁹⁰ The colonists, in short, were well aware of the functions of the writ and of the degree to which the fullness of its protections had been denied them.

2. The Writ from the Early Republic to the Civil War

After an initial flurry of colonial habeas legislation was repealed by the Privy Council or other officers of the Crown, habeas corpus acts were not passed in the New World until after Independence. But in the early days of the Republic, the protections of the English statutory writ were quickly written into the statutes or constitutions of each of the separate states.⁹¹ By 1833, as Joseph Story noted in his *Commentaries*, the Eng-

88. A.H. Carpenter, *Habeas Corpus in the Colonies*, 8 AM. HIST. REV. 18, 21 (1902) (quoting 1 Acts and Resolves of the Province of Massachusetts Bay 99), available at <http://tinyurl.com/crtvqv> (last visited Mar. 7, 2009). The Habeas Corpus Act of 1679 was officially titled “An Act for the better securing the liberty of the subject and for the prevention of imprisonments beyond the seas,” explicitly extending its protections beyond the territorial bounds of England (to Wales, Berwick on Tweed, and the Isles of Guernsey and Jersey), but not by its terms to the American colonies. A habeas provision in New York’s Charter of Liberties was similarly challenged before the committee of trade and plantations in 1684; noting that the Charter stated that the “Inhabitants of New York shall be governed by and according to the Laws of England,” the committee “observed that This Privilege is not granted to any of His Majtys Plantations where the Act of habeas corpus and all such other Bills do not take Place.” *Id.* at 21 (quoting 3 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF NEW YORK 357).

89. *Id.* at 22 (quoting 6 MASS. HISTORICAL SOCIETY COLLECTIONS, SERIES 5, 147). Carpenter has collected similar accounts from seventeenth and eighteenth century New Hampshire, New York, and Virginia, concluding that “the rights of the colonists as regards the writ of habeas corpus rested upon the common law.” *Id.* at 26. Carpenter describes, among other things, “bystanders hissing the court” after an insufficient return was made to a writ of habeas corpus, “which clearly shows the common ideas regarding the rights of habeas corpus” and that there was “nothing to indicate that the issuance of the writ was anything extraordinary.” *Id.* at 22.

90. Carpenter notes, however, that South Carolina, unique among the colonies, may have in practice been protected by the English habeas statute. *Id.* at 23. As William F. Duker has described in detail, understanding the reach of English law—and in particular of the writ of habeas corpus in its common-law and statutory forms—requires a colony-by-colony review. *See* DUKER, *supra* note 24, at 98–116.

91. *See, e.g.*, MASS. CONST. OF 1780, pt. 2, ch. 6, art. VII, reprinted in 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1910 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS] (stating that the “privilege and benefit of the writ of *habeas corpus* shall be enjoyed in this Commonwealth in the most free, easy, cheap, expeditious and ample manner”); N.H. CONST. OF 1784, reprinted in 4 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2469 (stating that the “privilege and benefit of the

lish Habeas Corpus Act of 1679 had been, “in substance, incorporated into the jurisprudence of every state in the Union; and the right to it ha[d] been secured in most, if not in all, of the state constitutions by a provision, similar to that existing in the constitution of the United States.”⁹²

The history of the writ as a protection against the executive branch was, as Judge Robertson has recently observed, known to “[e]very member of the Constitutional Convention that convened in Philadelphia 110 years after the Habeas Corpus Act of 1679 . . . English history was their history, after all, so they knew that the Great Writ had been forged on the anvil of struggle between King and Parliament over nearly a century.”⁹³ Indeed, the inclusion of the writ of habeas corpus in the United States Constitution was thoroughly uncontroversial. The first proposal for its inclusion was made on August 20, 1787, by Charles Pinkney, who sought to insure that the “privileges and benefit of the writ of habeas corpus shall be enjoyed in this government in the most expeditious and ample manner: and shall not be suspended by the Legislature except upon the most urgent and pressing occasions and for a limited time not exceeding __ months.”⁹⁴ According to James Madison, all substantive discussion of the writ took place one week later at the end of the Convention, on August 28, 1787.⁹⁵ Nowhere in the historical record is there any dispute about the fundamental importance of the writ, nor is there any suggestion but that it should be given the widest possible scope.

The only substantive discussions among the Framers involved whether it was necessary to provide for the suspension of the writ since, as James Wilson stated, judges already had adequate power “in most important cases” to keep a petitioner in prison.⁹⁶ Indeed, John Rutledge wanted to declare habeas corpus “inviolable” and he “did not conceive that a suspension could ever be necessary at the same time through all the States.”⁹⁷ With some minor modifications to the language of Pinkney’s original proposal, the habeas provision came out of committee of style and was passed as, “The privilege of the writ of Habeas Corpus shall not be suspended; unless where in cases of Rebellion or invasion the public safety may require it.”⁹⁸ After ratification of the Constitution,

habeas corpus, shall be enjoyed in this state, in the most free, easy, cheap, expeditious, and ample manner”); 2 LAWS OF THE STATE OF NEW YORK COMPRISING THE CONSTITUTION, AND THE ACTS OF THE LEGISLATURE SINCE THE REVOLUTION 76 (1789) (guaranteeing “speedy [habeas] relief of all persons imprisoned for any such criminal, or supposed criminal matters”).

92. 3 STORY, *supra* note 84, § 1335.

93. James Robertson, *Quo Vadis, Habeas Corpus?*, 55 BUFF. L. REV. 1063, 1071 (2008).

94. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 485-86 (Ohio Univ. Press 1966) (1920).

95. *Id.* at 540-41.

96. *Id.* at 541.

97. *Id.*

98. *Id.* The “where” in this version was changed to “when” in the final draft of the Constitution.

the first Congress also granted the federal courts jurisdiction to issue the writ of habeas corpus in section 14 of the Judiciary Act of 1789.⁹⁹

The writ was issued twice by the Supreme Court in the decade following the passage of the Judiciary Act, in *United States v. Hamilton*¹⁰⁰ and *Ex parte Burford*.¹⁰¹ At issue in *Burford* was the refusal of a detainee's custodian to provide an adequate return to the writ. John Atkins Burford, a shopkeeper who, apparently, was held in little regard in his community in the District of Columbia, filed in federal court a petition for a writ of habeas corpus after he was detained on the order of a justice of the peace. The return to the writ, sent by the justice of the peace, failed to articulate any legal reason for detaining Burford:

Forasmuch as we are given to understand, from the information, testimony and complaint of many credible persons, that John A. Burford, of the said county, shop-keeper, is not of good name and fame, nor of honest conversation, but an evil doer and disturber of the peace of the United States, so that murder, homicide, strifes, discords, and other grievances and damages, amongst the citizens of the United States, concerning their bodies and property, are likely to arise thereby, Therefore, on the behalf of the United States, we command you, and every of you, that you omit not, by reason of any liberty within the county aforesaid, but that you attach, or one of you do attach, the body of the aforesaid John A. Burford, so that you have him before us, or other justices of the said county, as soon as he can be taken, to find and offer sufficient surety and mainprize for his good behaviour towards the said United States, and the citizens thereof, according to the form of the statute in such case made and provided.¹⁰²

Chief Justice Marshall acknowledged the insufficiency of the return in *Burford*, noting that it did "not allege that witnesses were examined in his presence, or any other matter whatever, which can be the ground of [the respondents'] order to find sureties [in the sum of 4,000 dollars, for his good behaviour for life]" and that there "ought to have been a conviction of his being a person of ill fame," with "the fact . . . established by testimony, and the names of the witnesses stated."¹⁰³ Accordingly, Marshall held that "the warrant of commitment was illegal, for want of stat-

99. Section 14 of the Act states, in pertinent part, that "either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment—*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73 (1789).

100. 3 U.S. (3 Dall.) 17, 18 (1795).

101. 7 U.S. (3 Cranch) 448, 453 (1806).

102. *Id.* at 450-51.

103. *Id.* at 452.

ing some good cause certain, supported by oath.”¹⁰⁴ Although expressing some hesitation about the jurisdiction of the Court,¹⁰⁵ the Chief Justice ordered the writ to issue on the authority of *Hamilton*, which had been the first habeas case before the Court.¹⁰⁶

The substantive protections of habeas corpus continued to be given an expansive construction in the court decisions of the early republic. Reviewing the history of the writ’s English origins in *Ex parte Watkins*, for example, Chief Justice Marshall emphasized the breadth of its protections and the depth of its roots in the common law and English statutory law. Defining the broad reach of the writ, Marshall measured the Constitution’s habeas protections against the English statutory and common law:

The English judges, being originally under the influence of the crown, neglected to issue this writ where the government entertained suspicions which could not be sustained by evidence; and the writ when issued was sometimes disregarded or evaded, and great individual oppression was suffered in consequence of delays in bringing prisoners to trial. To remedy this evil the celebrated habeas corpus act of the 31st of Charles II. was enacted, for the purpose of securing the benefits for which the writ was given. This statute may be referred to as describing the cases in which relief is, in England, afforded by this writ to a person detained in custody. It enforces the common law.¹⁰⁷

In *Watkins*, Chief Justice Marshall thus suggests that the meaning of constitutional habeas corpus was to be found in the common law, but that equally important was the English statutory law that effectuated the purpose of the common-law writ. *Watkins* thus makes clear that something more than just the common law writ was enshrined in the Constitution’s Suspension Clause.

104. *Id.* at 453. *Cf.* *Bushell’s Case*, 124 Eng. Rep. 1006, 1007 (1669) (releasing the prisoner from custody “because the cause return’d of his imprisonment is too general,” and there was no way to tell “whether the evidence given [before the lower court] were full and manifest, or doubtful, lame and dark, or indeed evidence at all material to the issue, because it is not return’d what evidence in particular, as it was delivered, was given”).

105. *Burford*, 7 U.S. (3 Cranch) at 449.

106. *Id.* at 449, 453. The jurisdictional issue was eventually addressed by Chief Justice Marshall in *Ex parte Bollman*, where he held (in reasoning that would be much critiqued over the next two hundred years) that the courts had no authority to issue the writ absent the statutory grant of jurisdiction by Congress in section 14 of the Judiciary Act of 1789. 8 U.S. (4 Cranch) 75, 94 (1807) (“[T]he power to award the writ by any of the courts of the United States, must be given by written law.”).

107. *Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 201-02 (1830); *see also* 3 STORY, *supra* note 84, § 1335 (“In England, however, the benefit of it was often eluded prior to the reign of Charles the Second; and especially during the reign of Charles the First. These pitiful evasions gave rise to the famous *Habeas Corpus Act of 31 Car. 2, c. 2*, which has been frequently considered, as another magna charta in that kingdom; and has reduced the general method of proceedings on these writs to the true standard of law and liberty.”).

It is unsurprising, therefore, that the courts, in early republic and antebellum habeas cases, insisted as a matter of course that petitioners could controvert the returns, and that the federal courts could determine the truth of factual allegations made to justify the legality of the challenged detentions.

For example, in *Ex parte Bollman*, Chief Justice Marshall refused to defer to a magistrate's factual finding that the detention of a pretrial detainee for treason was justified, and instead held five days of factual hearings on the matter. During that time the Court "fully examined and attentively considered" the relevant evidence and ordered the petitioner released.¹⁰⁸ And in *United States v. Green*, Justice Story made it clear that he felt it was the court's duty on habeas to determine the facts underlying the justification for detention. *Green* was a civil habeas matter in which a father sought to release his minor son from the custody of a third party. "In cases of this nature," Story wrote, "the court will look into all the facts stated in the return, and ascertain if they contain a satisfactory statement, upon which the party ought to be discharged."¹⁰⁹

Chancellor Kent expressed similar sentiments several years earlier in a New York habeas case in which the petitioner complained that he had been taken into military custody and held without charge.¹¹⁰ The military commander to whom the writ was directed filed a return stating simply that the petitioner was not in *his* custody. Chancellor Kent thought the return deceptive—"insufficient and bad upon the face of it"—and refused the invitation to accept at face value what was "evidently an evasive return."¹¹¹ The prisoner, Kent observed, might not be in the commander's custody, but to all appearances he was in the commander's control. He noted a King's Bench precedent in which that court had "observed 'that the courts always looked with a watchful eye at the returns to writs of habeas corpus; that the liberty of the subject essentially depended on a ready compliance with the requisitions of the writ, and the courts were jealous whenever an attempt was made to deviate from the usual form of the return, that the party had not the person in his possession, custody or power, and that it had not been adopted in that case, but an equivocal one substituted, and the words 'power and possession' omitted.'"¹¹²

108. *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 125, 136 (1807).

109. 26 F. Cas. 30, 31 (C.C.D.R.I. 1824). Story refused to accept the defendant's return at face value, noting that the court would "not discharge the defendant, simply because he declares, that the infant is not 'in his power, possession, control, or custody,' if the conscience of the court is not satisfied, that all the material facts are fully disclosed. That would be to listen to mere forms against the claims of substantial justice, and the rights of personal liberty in the citizen." *Id.*

110. *In re Stacy*, 10 Johns. 328 (N.Y. Sup. Ct. 1813).

111. *Id.* at 331.

112. *Id.* at 331–32 (quoting *The King v. Winton*, 5 Term. R. 89).

Other examples of the federal courts diving to the heart of factual disputes in habeas cases include the 1833 case of *Ex parte Randolph*, in which Chief Justice Marshall, after receiving supplementary exhibits and records, issued the writ to a man who had been taken into custody at the order of the solicitor of the treasury;¹¹³ and the 1843 case of *Ex parte Smith*, in which the court granted the writ to Mormon leader Joseph Smith, who submitted alibi evidence controverting the Missouri government's allegation in the factual return that Smith was an accessory before the fact to an assault with intent to kill.¹¹⁴

From its earliest history, therefore, the writ in America has been understood, in Blackstone's terms, as the bulwark of our liberty precisely *because* it undermines arbitrary exercises of executive authority by forcing information out of secret and into the public consciousness, via the factual return and judicial inquiry into its adequacy.

3. The Writ from the Civil War to the AEDPA Era

As a practical matter, the writ with which most jurists are familiar today—as a challenge to state court criminal convictions in federal court—derives from the Habeas Corpus Act of 1867, which amended section 14 of the Judiciary Act of 1789 and granted the federal courts significant supervisory power over the state courts.¹¹⁵

Although devised primarily to assure that African-Americans in the South would “get fair and impartial justice at the hands of local tribunals,”¹¹⁶ the breadth of the 1867 Act is stunning. It grants authority to the federal courts to issue writs of habeas corpus in “*all cases* where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.”¹¹⁷ As the Supreme Court noted in *Ex parte McCardle*, which was the first case to reach the Court under the new Act, Congress had brought within the federal courts' authority “every possible case of privation of liberty contrary to the National . . . laws”—a jurisdiction it would be “impossible to widen.”¹¹⁸ And in *Ex parte Royall*, the Court similarly noted that the Act

113. 20 F. Cas. 242, 253, 257 (C.C.D. Va. 1833) (opinion of Marshall, J., sitting as Circuit Justice). Also of interest in *Randolph* is Judge Barbour's comfort with extending the reach of the writ to the civil commitment context, explaining that the writ protected by the Suspension Clause is not limited in scope to what was available just at English common law or even by the Habeas Corpus Act of 1679. *See id.* at 252-53 (opinion of Barbour, J.).

114. 22 F. Cas. 373, 376, 380 (C.C.D. Ill. 1843). Indeed, to the extent the common-law limitation barring petitioners from controverting the return was ever enforced, by the antebellum period it was exceedingly weak. *See Arkin, supra* note 56, at 22-23 (noting that “the traditional common-law limitation that prevented a federal habeas court from accepting evidence to contradict a facially sufficient return had weakened significantly” in antebellum America).

115. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (codified as amended at 28 U.S.C.A. §§ 2241-43, 2254(a) (West 2009)).

116. H.R. REP. NO. 730, at 5 (1884).

117. *Id.* (emphasis added).

118. 73 U.S. (6 Wall.) 318, 326 (1867).

conferred judicial power “in language as broad as could well be employed.”¹¹⁹

The realignment of federal and state relations in the Habeas Corpus Act of 1867 and the Reconstruction Amendments is a well-rehearsed story. But what goes unremarked is that the 1867 Act codified precise methods for adjudicating whether the writ should issue and the prisoner be released. These procedures were designed to respect the underlying due process principles of habeas that had themselves been codified in England in the Habeas Corpus Acts of 1679 and 1816, thereby setting a baseline for the process that Congress deemed essential to determining the legality of a detention.¹²⁰ These skeletal procedures have been retained by statute to this day.¹²¹

Encomiums to the postbellum, muscular writ abound in the case-law,¹²² and the history of the writ in the United States from the early twentieth century through the Warren Court years was one that largely expanded federal court protections for state prisoners, albeit in fits and starts.¹²³ The high-water mark for a robust, muscular writ was *Fay v. Noia*, in which Justice Brennan enthused that habeas was “perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal re-

119. 117 U.S. 241, 247 (1886).

120. The Act requires that the writ be directed to the person detaining the petitioner, and that this custodian “make return of said writ and bring the party before the judge who granted the writ, and certify the true cause of the detention of such person within three days thereafter.” Act of Feb. 5, 1867, ch. 28, § 1. Upon the return of the writ, “a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning shall request a longer time.” *Id.* At the hearing, the petitioner “may deny any of the material facts set forth in the return, or may allege any fact to show that the detention is in contravention of the constitution or laws of the United States, which allegations or denials shall be made on oath.” *Id.* The return and traverses may be amended, “that thereby the material facts may be ascertained,” with the court “hearing testimony and the arguments of the parties interested.” *Id.*

121. See 28 U.S.C.A. § 2243 (West 2009).

122. In *Ex parte Yenger*, for example, the Supreme Court “esteemed” the writ as “the best and only sufficient defence of personal freedom.” 75 U.S. 85, 95 (1869). See also *Brown v. Allen*, 344 U.S. 443, 500 (1953) (opinion of Frankfurter, J., for the Court) (habeas statute gives federal courts “the final say” on federal constitutional issues); *Fay v. Noia*, 372 U.S. 391, 426 (1963) (federal authority to issue the writ “is not defeated by anything that may occur in the state court proceedings”), *overruled by Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5 (1992).

123. One of the chief restrictions on federal courts providing habeas relief, for example, was the “exhaustion” doctrine that the Supreme Court adopted in 1886 in *Ex parte Royall*, requiring state prisoners to take advantage of all state-court corrective processes before they would be allowed to proceed on habeas in federal court. 117 U.S. 241, 251 (1886). In *Frank v. Mangum*, 237 U.S. 309, 334 (1915), and *Moore v. Dempsey*, 261 U.S. 86, 91 (1923) (Holmes, J.), the res judicata effect of the exhaustion doctrine was limited to state processes that were “full and fair.” What the content of “full and fair” would be, however, was not easy to discern. The facts of *Frank* and *Moore* are universally acknowledged to be almost identical—involving trials affected by threats of mob violence—but the Court granted habeas relief in only the former. And by 1953, in *Brown v. Allen*, the Court had adopted a *de novo* standard for reviewing not only legal claims but also mixed questions of fact and law. *Brown*, 344 U.S. at 458 (federal courts may consider previous state court judgments on federal issues, but cannot defer to those judgments).

straint or confinement,”¹²⁴ and that “there is no higher duty than to maintain it unimpaired.”¹²⁵

But, true to the dictates of the federalist counterrevolution, the Burger and Rehnquist Courts began to lay significant obstacles to state-prisoners’ attempts to gain habeas relief and, indeed, habeas hearings in the first place. The federal courts were precluded on habeas, for example, from reviewing alleged violations of the Fourth Amendment.¹²⁶ A “total exhaustion” rule was adopted in order to assure that all federal habeas applicants brought only a single, unitary habeas case to the federal courts.¹²⁷ And, perhaps most significant for state-prisoner habeas petitioners, the Court adopted a rigorous procedural default doctrine that precluded the federal courts from entertaining on habeas any constitutional claims that had not been properly preserved in the state courts.¹²⁸

The procedural thicket that state prisoners must pass through in order to have their habeas claims adjudicated grew yet more tangled with the passage in 1996 of the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”),¹²⁹ which not only codified the Court’s exhaustion and procedural default rules, but also introduced a short limitations period for bringing habeas claims¹³⁰ and set a very high bar for federal-court deference to state court legal determinations.¹³¹

Several points about habeas for state prisoners are in order. These are the cases with which the federal judiciary is most familiar. The federal courts review thousands of such petitions from state prisoners every year, finding a constitutional violation meriting issuance of the writ in less than one percent of the cases filed.¹³² Federal judges find the cases

124. 372 U.S. at 400 (internal quotation omitted).

125. *Id.*

126. *Stone v. Powell*, 428 U.S. 465, 494 (1976).

127. *Rose v. Lundy*, 455 U.S. 509, 520 (1982); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991) (“This exhaustion requirement is . . . grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of [a] state prisoner’s federal rights.”).

128. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). In *Coleman*, a prisoner who had been sentenced to death had his notice of appeal filed one day late by his attorney. The state court refused to hear his claim, declaring it defaulted. The Supreme Court held that the federal courts were precluded by procedural-default doctrine from hearing the claim with Justice O’Connor stating in the opinion’s opening sentence that this was “a case about Federalism.” 501 U.S. at 726.

129. Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996) (codified in scattered sections of Title 28 in the U.S. Code.).

130. 28 U.S.C. § 2244(d)(1). The limitations period ordinarily begins to run on “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” *Id.* § 2244(d)(1)(A).

131. Under AEDPA, the federal court is precluded from granting habeas relief for a state prisoner unless the state court’s previous adjudication of his claim “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” *Id.* § 2254(d).

132. *See KING, supra* note 1, at 58-59 n.109 (noting that in the years after the passages of AEDPA, the writ has been granted in only .35 percent of cases).

tedious. Not only are there proportionately few worthy claims, but judges feel compelled to avoid reaching merits determinations on any claims until they have addressed time bars, exhaustion, and procedural defaults. Federal judges are also aware of comity and federalism concerns, as they are being asked to find that the state courts failed to comprehend or to respect the dictates of the federal Constitution. In short, the “habeas” with which most of us have grown familiar for decades is a process in which the federal judge has been primed to be deferential.

It is therefore important to contextualize the office of the writ in the executive detention context and to remember, as the Supreme Court observed in *INS v. St. Cyr*, that 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.”¹³³ Stated differently, we must be careful not to allow the deferential stance that federal courts have adopted (for comity reasons) in the state-prisoner habeas context to color our judgment about the degree of deference that the federal courts should adopt (for separation-of-powers reasons) in the executive-detention context.

To be sure, conventional scholarship suggests that in the war context, decisions about detention are properly located in the political branches, because if executive action is unfaithful to constitutional principles (or if Congress authorizes unjust detention) the political process will force correction. The problem with such an approach is that the facts about detention may not be available to the public for deliberation. For this reason, habeas procedures—and in particular the requirement of the factual return and an opportunity to contest its assertions via discovery and examination at a hearing before a neutral magistrate—must be robust.

II. WAR ON TERROR CASES AND LEGISLATION

Prior to 9/11, the federal courts had never held that the privilege of habeas corpus extended to non-citizens held outside of the sovereign territory of the United States. Had the Bush administration provided its War on Terror detainees with some substantial process to determine whether their detention was legal—and to determine whether, for example, they had actually been captured on a battlefield fighting U.S. troops—it seems likely that the Supreme Court would have avoided answering such a question altogether. But, as discussed below, the administration failed to provide a fair administrative process for its detainees, compelling the courts to provide one themselves.

133. 533 U.S. 289, 301 (2001). See also *Swain v. Pressley*, 430 U.S. 372, 380, n.13 (1977); *id.* at 385-86 (Burger, C.J., concurring) (noting that “the traditional Great Writ was largely a remedy against executive detention”); *Brown*, 344 U.S. at 533 (Jackson, J., concurring in result) (“The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.”).

A. The Guantánamo Litigation Generally

The story of Guantánamo is the story of a failure of process. Guantánamo Bay opened as a detention center in the War on Terror in January 2002. Most of the nearly 775 prisoners who have been held there over the years were first taken into custody in or around Afghanistan in the weeks following United States bombing of Taliban and al Qaeda strongholds in the country. Although Bush administration officials repeatedly stated that the men were “picked up on the battlefield trying to kill Americans,”¹³⁴ the military’s own documents reveal that fully eighty-six percent of the detainees were in fact taken into custody by Pakistani rather than American security forces, at the Afghanistan-Pakistan border rather than on anything resembling an actual battlefield.¹³⁵ These men were eventually turned over to the American military as suspected associates of al Qaeda or the Taliban and were held at the Bagram or Kandahar Air Force bases before being sent to Guantánamo.

Our military made mistakes about who many of these men were and about what they were doing in Afghanistan. It should not be surprising that errors were made, since the American military failed to follow international law and Army regulations when it chose not to hold field hearings after the capture of these men, all of whom were wearing civilian clothing when taken into custody.

There are two reasons that a person caught near a battlefield would be wearing civilian clothes. One is that the person is an enemy soldier disguised as a civilian, and the other is that the person actually *is* a civilian. How does one tell the difference? Article 5 of the Third Geneva Conventions and section 190-8 of the U.S. Army Regulations provide the answer, requiring that a status hearing be held when the privileged status of a captured person is unclear.¹³⁶ During the First Gulf War, the United

134. See, e.g., Interview with President George W. Bush, in the East Room (June 20, 2005), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/06/20050620-19.html> (“These are people picked up off the battlefield in Afghanistan. They weren’t wearing uniforms . . . but they were there to kill.”); Press Briefing by White House Press Secretary Scott McClellan (June 21, 2005), available at <http://www.globalsecurity.org/military/library/news/2005/06/mil-050621-usia02.htm> (“These detainees are dangerous enemy combatants . . . They were picked up on the battlefield, fighting American forces, trying to kill American forces.”); Interview by Wolf Blitzer with Vice President Cheney in the Vice President’s Ceremonial Office (June 23, 2005), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/06/20050623-8.html> (“The people that are there are people we picked up on the battlefield, primarily in Afghanistan. They’re terrorists. They’re bomb makers. They’re facilitators of terror. They’re members of Al Qaeda and the Taliban . . .”).

135. MARK DENBEAUX & JOSHUA DENBEAUX, REPORT ON GUANTÁNAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 2, <http://law.shu.edu/aaafinal.pdf> (last visited Mar. 7, 2009).

136. Article 5 of the Geneva Conventions requires a “competent tribunal” to “determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.” Geneva Convention Relative to the Treatment of Prisoners of War art. 5(2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. See also U.S. Dep’t of Army, Reg. 190-8, Enemy Prisoners of

States held 1,196 of these Article 5 hearings, and as a result we determined that we had picked up innocent civilians in 886 instances, meaning that our error rate was almost exactly seventy-five percent.¹³⁷ During the Afghan conflict, not a single Article 5 hearing was held.

Why were these captured men brought to Guantánamo? There seem to be only two plausible reasons. First, the naval station is a secure and heavily guarded location, far from both the battlefield in Afghanistan and from any (American) civilian centers, making an attack on the prison housing these detainees thoroughly unlikely.¹³⁸ Second, and doubtless most important, the Bush administration posited that the federal courts would have no jurisdiction over habeas petitions brought by prisoners held there since the detainees are not citizens and Guantánamo is not sovereign United States territory.¹³⁹

Lawyers were not allowed to visit Guantánamo, and even the International Committee of the Red Cross was given only limited access to the prisoners there. Nonetheless, not long after its opening as a detention center, public interest lawyers and a private law firm filed the first habeas petitions for several prisoners. Although the lower federal courts determined that they had no jurisdiction to hear habeas actions brought by non-citizens held in non-sovereign U.S. territory,¹⁴⁰ in June 2004, the Supreme Court ruled that the courts did have jurisdiction under the federal habeas statute to hear the claims.¹⁴¹

War, Retained Personnel, Civilian Internees and Other Detainees, para. 1-6 (1 Oct. 1997), available at http://www.army.mil/usapa/epubs/pdf/r190_8.pdf (last visited Mar. 7, 2009).

137. Final Report to Congress, Conduct of the Persian Gulf War, at 578 (Apr. 1992), available at <http://www.ndu.edu/library/epubs/cpgw.pdf>.

138. See JOHN YOO, WAR BY OTHER MEANS 142-43 (Atlantic Monthly Press 2006) (“No location was perfect, but the U.S. Naval Station at Guantanamo Bay, Cuba, seemed to fit the bill Gitmo was well-defended, militarily secure, and far from any civilians. The first Bush and Clinton administrations had used Gitmo to hold Haitian refugees who sought to enter the United States illegally.”).

139. This is not mere conjecture. An Office of Legal Counsel memorandum has recently been released in which precisely this question was addressed. See Memorandum from Patrick F. Philbin and John C. Yoo, Deputy Assistant Att’y’s Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to William J. Haynes, II, Gen. Counsel, U.S. Dep’t of Def., *Re: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba* (Dec. 28, 2001), in TORTURE PAPERS, *supra* note 17 at 29. For discussion of the “sovereignty” status of Guantánamo, see Michael J. Strauss, *The Leasing of Guantánamo Bay* (forthcoming 2009) (manuscript on file with author); Elizabeth A. Wilson, *The War on Terrorism and “The Water’s Edge”*: Sovereignty, “Territorial Jurisdiction,” and the Reach of the U.S. Constitution in the Guantánamo Detainee Litigation, 8 U. PA. J. CONST. L. 165, 166 (2006).

140. See *Rasul v. Bush*, 215 F. Supp. 2d 55, 72-73 (D.D.C. 2002); *Al Odah v. United States*, 321 F.3d 1134, 1145 (D.C. Cir. 2003).

141. *Rasul*, 542 U.S. at 473. Although footnote 15 of the *Rasul* opinion suggested that the Court may have reached the constitutional rights of the prisoners, the Court subsequently stated in *Boumediene v. Bush* that it had not. See *id.* at 484 n.15 (noting that the petitioners’ “allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe ‘custody in violation of the Constitu-

In the aftermath of *Rasul*, lawyers filed habeas petitions for those prisoners whose names were known. Immediately, the Bush administration asked the federal courts to dismiss them all, arguing that even though the courts might have statutory jurisdiction over the case, as per *Rasul*, nonetheless the prisoners did not have any constitutional rights, because they were non-citizen “enemy combatants” held outside of “sovereign” U.S. territory. Their detention was therefore, according to the government, *per se* legal.

The judge before whom the Guantánamo habeas cases were consolidated denied the government’s motion to dismiss, holding that the prisoners were entitled to fundamental protections of the Constitution—including due process of law—and that they therefore were entitled to habeas hearings to determine whether those rights had been infringed.¹⁴² In particular, the judge found that the Guantánamo detainees were protected by the Fifth Amendment’s Due Process Clause, and that the administrative review panels that were convened by the military in the aftermath of *Rasul*—called Combatant Status Review Tribunals, or CSRTs—violated due process by denying the petitioners access to counsel, preventing them from seeing the government’s evidence, and allowing the introduction into evidence of statements procured by torture.¹⁴³

The government’s contention had been that a Guantánamo prisoner could be held in prison for life based solely on a CSRT panel’s determination that the prisoner was an “enemy combatant.”¹⁴⁴ Under the CSRT’s rules, the prisoner was presumed guilty, having already “been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense.”¹⁴⁵ The prisoner was not entitled to the assistance of a lawyer and could instead rely only on a “per-

tion”); *Boumediene v. Bush*, 128 S. Ct. 2229, 2241 (2008) (“The constitutional issue . . . was not reached in *Rasul*.”).

142. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 477 (D.D.C. 2005).

143. *Id.* at 468.

144. The term “enemy combatant” has a sparse legal pedigree and is unknown to international law. *See generally* *Johnson v. Eisentrager*, 339 U.S. 763, 765 (1950) (referring to “enemy aliens” without any discussion or analysis of the term); *Ex parte Quirin*, 317 U.S. 1, 31 (1942) (distinguishing unlawful from lawful combatants, and noting that the definition of “unlawful combatant” could include “an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property”). The Bush Administration itself has made the definition a moving target. As Justice O’Connor explained in *Hamdi* in 2004, the government “has never provided any court with the full criteria that it uses in classifying individuals as such,” and therefore the “permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them.” 542 U.S. at 516, 522 n.1. *See also* Peter Jan Honigsberg, *Chasing ‘Enemy Combatants’ and Circumventing International Law: A License for Sanctioned Abuse*, 12 UCLA J. INT’L L. & FOR. AFF. 1, 55 (2007); Marc D. Falkoff, *Litigation and Delay at Guantánamo Bay*, 10 N.Y. CITY L. REV. 393, 397 n.15 (2007).

145. Paul Wolfowitz, Order Establishing Combatant Status Review Tribunal at 1 (July 7, 2004), <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>; *see also* Defense Department Background Briefing on Combatant Status Review Tribunal (July 7, 2004), available at <http://www.dod.mil/transcripts/2004/tr20040707-0981.html>. New rules, differing in no material respect in relation to the issues discussed in the accompanying text, were promulgated following Congress’s passage of the Detainee Treatment Act of 2005.

sonal representative” from the military—a person who by regulation *may not* be a lawyer, with whom the prisoner *may not* share a confidential relationship, and who *must* report any inculpatory statements from the prisoner to the tribunal.¹⁴⁶ The prisoner was not allowed to see any of the classified evidence against him. Having never seen the witness statements, of course, the prisoner could not seek to controvert them on the grounds that they are untrustworthy hearsay—or even that they were derived from abuse or torture.

The government was allowed to appeal Judge Green’s order on an interlocutory basis and, while the appeal was pending, Congress passed the Detainee Treatment Act of 2005 (“DTA”), which purported to withdraw the power of the federal courts to hear habeas petitions from Guantánamo detainees.¹⁴⁷

Passage of the DTA set the stage for the first return of the Guantánamo cases to the Supreme Court. This time, in *Hamdan v. Rumsfeld*, the Court held that Congress’s jurisdiction-stripping statute was not meant to apply to Guantánamo prisoners who had already filed habeas petitions.¹⁴⁸ Providing a rather strained reading of the DTA’s “effective date” provisions, the Court seemed to go out of its way to protect the habeas right, refusing to infer that Congress would take so momentous a step as to retroactively strip this statutory right from the Guantánamo petitioners absent clearer indication of its intent.

In the waning days of Republican control, Congress responded by passing the Military Commissions Act of 2006 (“MCA”),¹⁴⁹ this time clarifying that it intended the habeas right to be stripped from Guantánamo prisoners retroactively.¹⁵⁰ In short order, the Court of Appeals dismissed the habeas cases on its docket for lack of jurisdiction.

The Guantánamo prisoners sought *certiorari* from the Supreme Court, but were initially denied the opportunity to return one last time.

146. See Gordon England, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantánamo Bay Naval Base, Cuba, Encl. 1 ¶ C3 (July 14, 2004), available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf> (personal representative “shall not be a judge advocate”); *id.* at Encl. 3 ¶ C1 (personal representative “shall explain to the detainee that no confidential relationship exists or may be formed between” them); *id.* at Encl. 3 ¶ D (personal representative directed to tell prisoner, “None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing”).

147. See Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742 (amending 28 U.S.C. § 2241 to provide that “no court, justice or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba”).

148. 548 U.S. 557, 584 & n.15 (2006).

149. Pub. L. No. 109-366, 120 Stat. 2600.

150. Section 7(b) provides that the effective date of the jurisdiction-stripping provisions will be “the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.” *Id.* at 2636.

In a “statement” respecting the denial of *certiorari*, Justices Stevens and Kennedy explained that, although the case was of profound importance, Congress had provided an alternative remedy to habeas corpus—direct review in the court of appeals, limited to the sole question of whether the military had followed its own procedures when it determined that the Guantánamo detainees were “enemy combatants.”¹⁵¹ Borrowing a doctrine from state-prisoner habeas cases, the Court told the Guantánamo petitioners to exhaust their administrative remedies before seeking further intervention from the federal courts.

The habeas petitioners, however, sought reconsideration of the denial of *certiorari* after Lieutenant Colonel Stephen Abraham—who had sat on several of these CSRT tribunals—drafted a declaration exposing the fundamentally unfair nature of those proceedings. Abraham explained, among other things, that even when a tribunal reached a determination that a prisoner was *not* an enemy combatant, the panel was often commanded by superiors to perform a “do-over.” The Supreme Court granted the prisoners’ reconsideration motion and reversed its denial of *certiorari*,¹⁵² agreeing to hear the case of *Boumediene v. Bush*.

In *Boumediene*, which is discussed in more detail below, Justice Kennedy held for the Court that, by passing the MCA, Congress had unconstitutionally suspended the writ of habeas corpus¹⁵³—something the Suspension Clause allows Congress to do only “when in Cases of Rebellion or Invasion the public Safety may require it.”¹⁵⁴ Justice Kennedy concluded, in short, that the Guantánamo detainees were protected by the Suspension Clause and had a constitutional right to the fundamental protections of the writ of habeas corpus.

B. Hamdi and Boumediene on Habeas Corpus Procedures

Two Supreme Court cases in recent years have discussed the general principles to be used by the courts when dealing with habeas petitions from men held in wartime executive-detention. The first, *Hamdi v. Rumsfeld*, directly addressed the habeas procedural rights of a citizen,¹⁵⁵ and the second, *Boumediene v. Bush*, discussed the same issues for non-citizens.¹⁵⁶ Subsequent cases in the lower federal courts have sought, with greater or lesser success, to glean from these decisions guidance on developing actual procedures to utilize during habeas hearings.

In *Hamdi*, five Justices held that the detention of a U.S. citizen who fought against the United States in Afghanistan could be detained for the

151. *Boumediene v. Bush*, 127 S. Ct. 1478, 1479 (2007).

152. *Id.* at 3078.

153. *Id.* at 2229, 2240.

154. U.S. CONST. art. 1 § 9.

155. 542 U.S. 507, 518 (2004).

156. 128 S. Ct. at 2241.

duration of the conflict, consistent with the “necessary and appropriate force” that Congress authorized the President to exercise via the Authorization for Use of Military Force.¹⁵⁷ Justice O’Connor went on to address the question of “what process is constitutionally due to a citizen who disputes his enemy-combatant status,” though on this topic she was writing for only a plurality of the Justices.¹⁵⁸

Noting that the Court had jurisdiction to hear Hamdi’s claims pursuant to the federal habeas statute, Justice O’Connor stated that “all agree that [28 U.S.C.] § 2241 and its companion provisions provide at least a skeletal outline of the procedures to be afforded a petitioner in federal habeas review,” and that, “[m]ost notably, § 2243 provides that ‘the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts,’ and § 2246 allows the taking of evidence in habeas proceedings by deposition, affidavit, or interrogatories.”¹⁵⁹ Justice O’Connor read the habeas statute, in other words, as ensuring that “habeas petitioners would have some opportunity to present and rebut facts and that the courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process.”¹⁶⁰

She recognized, however, that precisely what process was due to a citizen accused of being an “enemy combatant” during time of conflict was a more difficult question. Again, writing only for a plurality, she took seriously the government’s argument that separation of powers concerns warranted deference to the executive branch and that these same concerns meant that an assumption of the accuracy of the government’s evidence was appropriate.¹⁶¹ At the same time, Justice O’Connor acknowledged that citizens were entitled to a fair process for determining whether their detention was legal.

Justice O’Connor saw a way to resolve the tension between these competing values by invoking *Mathews v. Eldridge*¹⁶² and its balancing test. “*Mathews* dictates that the process due in any given instance is determined by weighing ‘the private interest that will be affected by the official action’ against the Government’s asserted interest, ‘including the function involved’ and the burdens the Government would face in providing greater process.”¹⁶³ The court’s role, Justice O’Connor explained, was to engage in a “judicious balancing of these concerns, through an analysis of ‘the risk of an erroneous deprivation’ of the private interest if

157. Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), note following 50 U.S.C. §1541 (2000 ed., Supp. V).

158. 542 U.S. at 524.

159. *Id.* at 525.

160. *Id.* at 526.

161. *Id.* at 527.

162. 424 U.S. 319 (1976).

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

the process were reduced and the ‘probable value, if any, of additional or substitute procedural safeguards.’”¹⁶⁴

Accordingly, Justice O’Connor stated 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 decision-maker,” which she declared were “essential constitutional promises” that “may not be eroded.”¹⁶⁵ Beyond that, she offered few specifics of what procedures must be in place at a habeas hearing, noting only that, in the view of the plurality, “the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”¹⁶⁶

Thus, according to the *Hamdi* plurality, “hearsay *may* need to be accepted as the most reliable available evidence from the Government in such a proceeding,” and “the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.”¹⁶⁷ The *Hamdi* plurality also envisioned a constitutionally acceptable burden-shifting scheme, whereby “once the Government puts forth credible evidence that the habeas petitioner meets the enemy combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.”¹⁶⁸ The plurality even suggested that an “appropriately authorized and properly constituted military tribunal” might suffice to provide the process due.¹⁶⁹

The *Hamdi* plurality’s adoption of the *Mathews v. Eldridge* balancing test has struck many scholars as extraordinary, not only because *Mathews* was an administrative law case concerning social security benefits rather than liberty interests,¹⁷⁰ but also because the Court in *Medina v. California* had held more than a decade earlier that the *Mathews* bal-

164. *Id.* (quoting *Mathews*, 424 U.S. at 335).

165. *Id.* at 533.

166. *Id.* at 534.

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

168. *Id.* at 534.

169. *Id.* at 538.

170. *Id.* at 442. See Tung Yin, *Procedural Due Process to Determine “Enemy Combatant” Status in the War on Terrorism*, 73 TENN. L. REV. 351, 398-99, 400 (2006) (arguing that *Mathews* balancing is the wrong approach for assessing the level of process due to detainees held in the war on terrorism, “since the clash of individual and national security interests allows the judicial decisionmaker to reach any plausible outcome”). See also Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1418 (2008) (proposing alternative balancing test derived from the law of “targeting”).

ancing test was an inappropriate framework for assessing the adequacy of due process rules in the criminal context.¹⁷¹

Discussion of due process and acceptable habeas procedures must, of course, be addressed by any federal judge deciding what habeas hearings in her courtroom will look like. But the ruminations on hearsay and burdens in *Hamdi* were issued by only a plurality of the Court, and thus provide no definitive guidance for trial-line habeas judges.¹⁷² Indeed, Justice Souter emphatically refused to endorse the constricted procedures proposed by Justice O'Connor's plurality, noting that it "should go without saying" that

in joining with the plurality to produce a judgment, I do not adopt the plurality's resolution of constitutional issues that I would not reach. It is not that I could disagree with the plurality's determinations . . . that someone in Hamdi's position is entitled at a minimum to notice of the Government's claimed factual basis for holding him, and to a fair chance to rebut it before a neutral decisionmaker; nor, of course, could I disagree with the plurality's affirmation of Hamdi's right to counsel. On the other hand, I do not mean to imply agreement that the Government could claim an evidentiary presumption casting the burden of rebuttal on Hamdi, or that an opportunity to litigate before a military tribunal might obviate or truncate enquiry by a court on habeas.¹⁷³

In addition, it is important to recognize that the plurality's prescriptions were couched in conditional terms and were drafted in the context of a detainee who was assertedly picked up on an actual battlefield fighting the troops of United States allies.¹⁷⁴ In the end, therefore, *Hamdi* provides relatively little guidance about what an adequate set of habeas procedures in the non-criminal detention context might look like for prisoners whose connection to a battlefield is far more attenuated.

The *Boumediene* decision from June 2008 should likewise give pause to those who are tempted to rely too heavily on the *Hamdi* plurality. Most importantly, in *Boumediene* Justice Kennedy flatly rejected the government's argument that the *Hamdi* plurality's discussion of habeas

171. 505 U.S. 437 (1992).

172. The *Hamdi* plurality opinion is binding only to the degree to which Justice Souter concurred with the plurality opinion. See *Marks v. United States*, 430 U.S. 188, 193 (1977). Justice Souter's concurrence was, in turn, of limited scope. He explained that "the need to give practical effect to the conclusions of eight Members of the Court rejecting the Government's position calls for me to join with the plurality in ordering remand on terms closest to those I would impose." 542 U.S. at 553 (Souter, J., concurring in part) (citing *Screws v. United States*, 325 U.S. 91 (1945) (Rutledge, J., concurring in result)).

173. *Hamdi*, 542 U.S. at 553-54 (citations omitted); see also *Rapanos v. United States*, 547 U.S. 715, 810 (2008) (Stevens, J., dissenting) (discussing the practice and practical effect of plurality and concurring opinions which espouse differing tests).

174. *Hamdi*, 542 U.S. at 512-13.

procedures was binding precedent.¹⁷⁵ Although he refused to provide a “comprehensive summary” of the requisites for a fair habeas hearing, he did offer some further observations about procedures.

Justice Kennedy began by noting that it was “uncontroversial” that “the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law” and that the “habeas court must have the power to order the conditional release of an individual unlawfully detained.”¹⁷⁶ But beyond that, Justice Kennedy added, “depending on the circumstances, more may be required.”¹⁷⁷

To determine what more might be needed, Justice Kennedy noted that habeas was at common-law “an adaptable remedy” whose “precise application and scope changed depending on the circumstances.”¹⁷⁸ In particular, he correctly observed that the evidence from nineteenth-century American sources indicated that “habeas courts in this country routinely allowed prisoners to introduce exculpatory evidence that was either unknown or previously unavailable to the prisoner,” and that—crucially—the “scope of habeas review in part depends upon the rigor of any earlier proceedings.”¹⁷⁹

Justice Kennedy thus acknowledged that more muscular procedural protections were constitutionally necessary in habeas cases challenging non-criminal executive detentions than are necessary in challenges to state-court criminal convictions. Exhaustion requirements and deference to the state courts were reasonable, he explained, where the relief sought was from a court of record, “because it can be assumed that, in the usual course, a court of record provides defendants with a fair, adversary proceeding.”¹⁸⁰ Such deference also accords with principles of federalism, a concern that executive detention cases do not implicate.

175. In rejecting the government’s argument that the CSRT process conformed with the procedures suggested by the plurality in *Hamdi*, Justice Kennedy wrote that, “[s]etting aside the fact that the relevant language in *Hamdi* did not garner a majority of the Court,” the *Hamdi* plurality’s opinion “does not control the matter at hand.” *Boumediene v. Bush*, 128 S. Ct. 2229, 2269 (2008); *cf. id.* at 2284-86 (Roberts, C.J., dissenting) (attacking the *Boumediene* majority opinion as inconsistent with the *Hamdi* plurality opinion, but without arguing that the plurality’s opinion was binding); *id.* at 2302 (Scalia, J., dissenting) (same).

176. *Boumediene*, 128 S.Ct. at 2266 (2008).

177. *Id.* at 2267.

178. *Id.* at 2267 (citing, inter alia, BLACKSTONE, *supra* note 25, at 131 (describing habeas as “the great and efficacious writ, in all manner of illegal confinement”); *Schlup v. Delo*, 513 U.S. 298, 319 (1995) (noting that habeas “is, at its core, an equitable remedy”); *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (noting that habeas is not “a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose”).

179. *Boumediene*, 128 S.Ct. at 2267-68. See also Fallon & Meltzer, *supra* note 10, at 2102 (noting that the “early practice was not consistent” and that “courts occasionally permitted factual inquiries when no other opportunity for judicial review existed”).

180. *Boumediene*, 128 S.Ct. at 2268.

Indeed, it is precisely where the petitioner has been detained by executive order that collateral review is “most pressing”:

A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures. In this context the need for habeas corpus is more urgent. The intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry. Habeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order. But the writ must be effective. The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive’s power to detain.¹⁸¹

Of course, in the end these observations too are of limited value in guiding the lower courts in how to conduct a habeas hearing in the executive detention context, and Justice Kennedy acknowledged that the Court in *Boumediene* would “make no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees’ habeas corpus proceedings.”¹⁸² Balancing the government’s legitimate security needs against the prisoners’ right to adjudication of the legality of their detention, Justice Kennedy concluded, is “within the expertise and competence of the District Court to address in the first instance.”¹⁸³

III. HABEAS PROCEDURES AND NON-CRIMINAL EXECUTIVE DETENTION

Having canvassed the history of habeas in the English and American context, and reviewed relevant war-on-terror cases since 9/11, in this part I provide a doctrinal justification for robust habeas measures in the executive-detention context. After setting forth my recommendations for appropriate habeas procedures, I end by assessing the adequacy of those procedures that to date have been deployed by the courts in the small number of executive-detention habeas hearings that have so far taken place.

A. *Habeas as a Flexible Remedy*

In theory, the process due to a petitioner at his habeas hearing may depend upon the basis of the federal court’s jurisdiction to hear the case. If the Guantánamo petitioners, for example, are properly before the courts pursuant to section 2241 of the Title 28 of the United States Code, they would presumably be entitled to at least the “skeletal” procedures provided by Congress for other habeas petitioners. If, however, their

181. *Id.* at 2269.

182. *Id.* at 2276.

183. *Id.*

presence in the federal court depends solely on the Constitution, they might arguably be entitled only to the kind of common law hearing that would have been available to a habeas petitioner in 1787, at the time of the Constitution's ratification.

As discussed above, in the DTA and MCA, Congress sought to amend the modern habeas statute by removing the federal courts' jurisdiction to hear cases from, respectively, the Guantánamo prisoners and all detainees being held as "enemy combatants" by the Department of Defense. The Supreme Court in *Boumediene* held that this jurisdiction strip was an unconstitutional suspension of the writ with respect to, at least, the Guantánamo petitioners because they were in fact protected by the Suspension Clause.¹⁸⁴ Does *Boumediene*'s holding mean that the jurisdiction of the federal courts to hear the detainees' habeas petitions flows directly from the Constitution and that the federal courts need no further statutory authority to entertain the habeas petitions?¹⁸⁵ Or does the *Boumediene* decision mean that Congress's attempt to modify (via the DTA and MCA) its own statutory grant of habeas jurisdiction to the federal courts (in the habeas statute) is itself inoperative, leaving the federal courts with statutory jurisdiction pursuant to the habeas statute?

In *Ex parte Bollman*, Chief Justice Marshall held that the federal courts would not have jurisdiction to issue the writ absent written law and that it was for this reason that Congress, acting "under the immediate influence" of the Suspension Clause, "must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted."¹⁸⁶ Chief Justice Marshall's reasoning in *Bollman* has, of course, been criticized over the years,¹⁸⁷ but the holding has never successfully been challenged. If *Bollman* remains good law, therefore, the Guantánamo habeas petitioners would appear to be properly in the federal courts only because statutory jurisdiction remains pursuant to section 2241, notwithstanding the DTA and MCA.

Regardless of whether the Guantánamo petitioners possess a statutory or only a constitutional right to habeas, the federal courts should resist calls to return to the time of the framing of the Constitution in order to determine what a habeas corpus hearing looked like at that time. As discussed at length above, habeas by its very nature is an evolving and dynamic vehicle for reining in arbitrary executive action. There is

184. *Id.* at 2240.

185. Such might be the implication of Justice Souter's observation, concurring in *Boumediene*, that, because Congress by legislation had "eliminated the statutory habeas jurisdiction" over the Guantánamo detainees' habeas claims, "now there must be constitutionally based jurisdiction or none at all." *Id.* at 2278 (Souter, J., concurring).

186. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807).

187. See Freedman, *supra* note 15, at 536-37.

no evidence in the historical record to indicate that the Framers believed they were enshrining in the Constitution a particular set of procedures rather than a fundamental principle when they provided that the privilege of the writ of habeas corpus could be suspended in only certain dramatic circumstances.

Instead, in devising habeas procedures, the courts should begin with the premise that habeas has always been a flexible remedy, equitable in nature, and designed to reach the substantive heart of the matter.¹⁸⁸ Although it is certain that we should “look to the common law” for guidance about the reach of habeas,¹⁸⁹ “[n]o one would now suggest that this Court be imprisoned by every particular of habeas corpus as it existed in the late 18th and 19th centuries.”¹⁹⁰ As discussed above, the essence of habeas historically has been that it required a searching and independent inquiry into the lawfulness of a prisoner’s detention.¹⁹¹ Indeed, the crux of the habeas right has long been to provide prisoners with enough information to meaningfully challenge the factual basis of their detention and for the courts to have an opportunity to assess the legality of the detention based on the facts that have been developed before it.¹⁹²

The Supreme Court has recognized these facts. In *Harris v. Nelson* in particular, the Court made clear that the trial court must retain the power to provide the quantum of due process that is necessary in any particular case. The “very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.”¹⁹³ A habeas proceeding “must not be allowed to founder in a ‘procedural morass,’”

188. “[H]abeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell.” Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).

189. See *Bollman*, 8 U.S. at 93-94 (“[F]or the meaning of the term habeas corpus, resort may unquestionably be had to the common law.”).

190. *Schnecko v. Bustamonte*, 412 U.S. 218, 256 (1973); *Peyton v. Rowe*, 391 U.S. 54, 66 (1968) (noting that “the development of the writ of habeas corpus did not end in 1789”); *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (“[The writ] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.”). But see *Ex parte Kaine*, 14 F. Cas. 78, 80 (C.C.S.D.N.Y. 1853) (stating that “the proceedings upon this writ in the federal courts . . . [are governed] by the common law of England, as it stood at the adoption of the constitution, subject to such alterations as congress may see fit to prescribe”).

191. See, e.g., *Ex parte Watkins*, 28 U.S. 193, 202 (1830) (“[T]he great object of [the writ] is the liberation of those . . . imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment.”); *Price v. Johnston*, 334 U.S. 266, 283 (1947) (explaining that the writ’s “most important result . . . has been to afford a swift and imperative remedy in all cases of illegal restraint upon personal liberty”).

192. See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229, 2266-69 (2008) (stating that because “the writ must be effective. The habeas court must have sufficient authority to conduct a meaningful review of . . . the cause for detention”; *id.* at 2270 (stating that habeas “includes some authority to assess the sufficiency of the Government’s evidence against the detainee,” and the court “also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding”).

193. *Harris v. Nelson*, 394 U.S. 286, 291 (1969).

particularly where the petitioner is “handicapped in developing the evidence needed to support in necessary detail the facts alleged in his petition.”¹⁹⁴

B. Sources of Authority to Develop Habeas Procedures

There are four possible sources for the federal courts to draw on when fashioning habeas procedures in the executive detention context: the Judiciary Act of 1867, as amended and codified; the Federal Rules of Civil Procedure; the Rules Governing Section 2254 Cases in the U.S. District Courts; and the courts’ inherent authority to fashion appropriate modes of procedure pursuant to the All Writs Act. Although taken together these sources mandate little in the way of discovery and other due process rights for habeas applicants, they provide adequate discretion for the district courts to fashion procedures that comport with the historical purposes of the writ.

First, there is little dispute that petitioners who have appropriately invoked the habeas jurisdiction of the federal courts are entitled to the benefits of the “skeletal procedures” that originated in the Judiciary Act of 1867 and that have since been amended.¹⁹⁵ These procedures include, first and foremost, provision for the custodian to make a prompt “return certifying the true cause of the detention,”¹⁹⁶ and an opportunity for the detained petitioner to “deny any of the facts set forth in the return or allege any other material facts.”¹⁹⁷

In addition, the statute since 1948 has provided that “evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.”¹⁹⁸ Concededly, this provision has been construed by the Supreme Court to be of restrained scope, “limited to interrogatories for the purpose of obtaining evidence from affiants where affidavits were admitted in evidence.”¹⁹⁹ These provisions are therefore of limited value to a court fashioning procedures seeking to determine whether a detention is well-founded in fact and law.

Second, because habeas corpus is nominally a civil action, one might suppose that the Federal Rules of Civil Procedure—and particularly their liberal discovery rules—would apply of their own force to habeas actions. To a certain extent they do, but there are significant limitations within the Rules themselves.

194. *Id.* at 291-92 (citation omitted).

195. Codified at 28 U.S.C.A. §§ 2243-2248 (West 2008). *See* Hamdi v. Rumsfeld 542 U.S. 553, 525 (2004).

196. 28 U.S.C.A. § 2243, ¶ 3 (West 2008).

197. *Id.* § 2243, ¶ 6.

198. 28 U.S.C.A. § 2246 (West 2008).

199. *Harris v. Nelson*, 394 U.S. 286, 296 (1969).

As an initial matter, a glance at the Federal Rules of Civil Procedure will make clear why a habeas petitioner would want them to apply to his court action. The Rules, promulgated in 1938, were designed to be largely self-executing and to streamline litigation by forcing both sides in a dispute to turn over material information in their possession. Thus, for example, Rule 26 calls for prompt initial disclosures of “the name . . . of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses”; Rule 30 allows for depositions; Rule 33 allows a party to serve interrogatories; and Rule 34 allows for the production of documents.²⁰⁰ These procedures would be invaluable for a litigant challenging the legality of his detention since they would operate automatically to provide a wealth of information, while demanding little of the petitioner in return.

While Rule 1 provides that the Federal Rules of Civil Procedure “govern the procedure in all civil actions and proceedings in the United States district courts,” they do so only with the exceptions stated in Rule 81.²⁰¹ The first part of Rule 81(a)(4), in turn, provides that the civil procedure rules “apply to proceedings for habeas corpus” only “to the extent that the practice in those proceedings . . . is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases.”²⁰² Where there is a conflict, in short, the court must follow the statute or more-specific set of rules—in particular the rules governing state prisoner challenges to the constitutionality of their conviction (section 2254) and federal prisoner challenges (section 2255). The Rules Governing Section 2254 Cases will be discussed briefly below.

The second part of Rule 81(a)(4) states that the Federal Rules of Civil Procedure apply to habeas proceedings only “to the extent that the practice in those proceedings . . . has previously conformed to the practice in civil actions.”²⁰³ The meaning of this provision is not perfectly clear. Is a “practice” a specific procedural device like interrogatories, or is a “practice” a general approach to certain matters? Does “previously conformed” mean that the procedural device (or general approach) was similar in habeas and other civil matters before the promulgation of the Federal Rules of Civil Procedure in 1938? Or does “previously conformed” mean that where habeas and other civil matters were treated similarly before 1938, they should be treated similarly today, thereby

200. FED. R. CIV. P. 26(a)(1)(A)(i), 30, 33, 34.

201. FED. R. CIV. P. 1.

202. FED. R. CIV. P. 81(a)(4)(A).

203. FED. R. CIV. P. 81(a)(4)(B).

allowing habeas petitioners the benefit of the innovative rules of the Federal Rules of Civil Procedure?²⁰⁴

As it happens, these interesting questions have in practice been mooted by the Supreme Court. In *Harris v. Nelson*, the Court addressed whether Federal Rule of Civil Procedure 33—which allows a party to propound interrogatories—was available as of right to habeas petitioners. The Court noted that it was “true that the availability of Rule 33 would provide prisoners with an instrument of discovery which could be activated on their own initiative, without prior court approval, and that this would be of considerable tactical advantage to them in the prosecution of their efforts to demonstrate such error in their trial as would result in their release.”²⁰⁵

Nonetheless, the Court concluded that Rule 81 precluded the availability of Rule 33 as of right to habeas petitioners. There was “no indication,” according to the Court, “that with respect to pretrial proceedings for the development of evidence, habeas corpus practice had conformed to the practice at law or in equity ‘to the extent’ that the application of rules newly developed in 1938 to govern discovery in ‘civil’ cases should apply in order to avoid a divergence in practice which had theretofore been substantially uniform.”²⁰⁶ Not only could the automatic operation of the discovery provisions of the Federal Rules of Civil Procedure be burdensome and vexatious, but Congress itself had indicated no intent to extend the Rules to habeas petitioners.²⁰⁷ In sum, it was clear to the Court there was no intention on the part of the draftsmen of the Federal Rules of Civil Procedure to extend their broad discovery provisions to habeas proceedings.²⁰⁸

That said, habeas petitioners are none the worse for the decision in *Harris*. As the Court explained, to “conclude that the Federal Rules’ discovery provisions do not apply completely and automatically by virtue of [Rule 81] is not to say that there is no way in which a district court

204. See Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1154, 1155 (1970) (raising these questions).

205. *Harris v. Nelson*, 394 U.S. 286, 297-98 (1969).

206. *Id.* at 294. Discovery per se in criminal matters is itself a relatively recent phenomenon. See, e.g., William J. Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279, 294 (1963) (calling for more criminal discovery); *The King v. Holland*, 100 Eng. Rep. 1248, 1249 (K.B. 1792) (stating that to grant pretrial discovery would “subvert the whole system of criminal law”); SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 226 (1883) (calling the view in *Holland* barbaric and noting that “it did not occur to the legislature that, if a man is to be tried for his life, he ought to know beforehand what the evidence against him is”). Even in civil cases, discovery was “nonexistent prior to the nineteenth century.” See Note, *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 946 (1961) (discussing the common-law reliance upon the pleading process and the gradual formalization of pleadings).

207. The Court noted that the “restricted scope of this legislation”—i.e., 28 U.S.C. § 2246—“indicates that the adoption in 1938 of the Federal Rules of Civil Procedure was not intended to make available in habeas corpus proceedings the discovery provisions of those rules.” *Harris*, 394 U.S. at 296.

208. *Id.* at 295-96.

may, in an appropriate case, arrange for procedures which will allow development, for purposes of the hearing, of the facts relevant to disposition of a habeas corpus petition."²⁰⁹ The Court proceeded to make clear that the federal courts had an independent obligation and authority to fashion habeas procedures that would effectuate the office of the Great Writ:

But with respect to methods for securing facts where necessary to accomplish the objective of the proceedings Congress has been largely silent. Clearly, in these circumstances, the habeas corpus jurisdiction and the duty to exercise it being present, the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage. Where their duties require it, this is the inescapable obligation of the courts.²¹⁰

This authority, the Court stated, was expressly confirmed in the All Writs Act.²¹¹

Harris therefore made clear that although particular rules of federal procedure might not be operative in habeas matters, the federal courts could adopt and adapt those rules, using procedures derived from them by analogy based on their authority under the All Writs Act. The only prerequisites set out in *Harris* were that the petitioners establish a prima facie case for relief. Once "specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry."²¹² Indeed, under the reasoning of *Harris*, there would be no reason for the federal courts to hesitate to adopt procedures set forth in the Federal Rules of Criminal Procedure as well.²¹³

209. *Id.* at 298.

210. *Id.* at 299.

211. *Id.*; see also *Price v. Johnston*, 334 U.S. 266, 283-84 (1948) (holding that purpose and function of the All Writs Act to supply the courts with the instruments needed to perform their duty, as prescribed by the Congress and the Constitution, provided only that such instruments are "agreeable" to the usages and principles of law, extend to habeas corpus proceedings).

212. *Harris*, 394 U.S. at 300.

213. See *id.* at 293-94 ("It is, of course, true that habeas corpus proceedings are characterized as 'civil.' But the label is gross and inexact. Essentially, the proceeding is unique.") (citation and footnote omitted). See also *Hilton v. Braunskill*, 481 U.S. 770, 776 n.5 (1987) (stating that it is appropriate to use general civil rules, by analogy or otherwise, where need is evident for principles to guide conduct of federal habeas corpus proceedings, although under Rule 81(a)(2) there are some circumstances in which habeas corpus proceedings should not be governed by civil rule of procedure); *Harris*, 394 U.S. at 300 ("Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elsewhere in the 'usages and principles of law.'") (quoting 28 U.S.C. § 1651 (2008)); Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1160 (1970) [hereinafter, *Harvard Habeas Note*] ("Habeas corpus has both civil and criminal elements, and the district courts should consider, without regard to labels, any procedure well-suited to the particular problems that habeas presents.").

Subsequent to *Harris*, the Supreme Court promulgated rules pursuant to the Rules Enabling Act to govern habeas corpus proceedings. Although designed primarily for use in federal habeas challenges to the legality of state criminal convictions, the Rules Governing Section 2254 Cases in the United States District Courts may be utilized, at the discretion of the district court, in any other habeas actions.²¹⁴

Because they were designed for the predominant type of habeas case to reach the courts—constitutional challenges to state criminal convictions—many of the Section 2254 Rules are, however, inapplicable to an executive-detention habeas case. For example, Rule 5 requires that a petitioner’s answer to the return “must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations.”²¹⁵ Such concerns are not present in the executive-detention context.

But several of the Section 2254 Rules, relating to discovery and evidentiary hearings, are indeed applicable to executive-detention habeas actions. Rule 6(a) authorizes a judge, “for good cause,” to allow parties “to conduct discovery under the Federal Rules of Civil Procedure,” though the same rule also authorizes the judge to “limit the extent of discovery.”²¹⁶ Rule 6(b) also clarifies that it has not imported the discovery provisions of the Federal Rules of Civil Procedure wholesale into the Section 2254 rules by placing further requirements on the party seeking discovery, including requirements to “provide reasons for the request,” to “include any proposed interrogatories and requests for admission,” and to “specify any requested documents.”²¹⁷ Also, if the judge does not dismiss the habeas petition summarily, he or she is instructed by Rule 8 to “review the answer, any transcripts and records of state-court proceedings, and any materials submitted under Rule 7 [concerning expansion of the record] to determine whether an evidentiary hearing is warranted.”²¹⁸

Finally, in accord with *Harris v. Nelson*, Rule 12 provides that the court may apply the Federal Rules of Civil Procedure, though only “to the extent that they are not inconsistent with any statutory provisions or these rules.”²¹⁹ Whether or not the civil procedure rules are consistent with other statutory provisions is the subject of the next section.

214. Rule 1(a), setting forth the scope of the Rules, states that they “govern a petition for a writ of habeas corpus filed in a United States district court under 28 U.S.C. § 2254,” but Rule 1(b) further provides that the “district court may apply any or all of these rules to a habeas corpus petition not covered by Rule 1(a).” Rules Governing Section 2254 Cases, Rule 1, 28 U.S.C.A. foll. § 2254 (2004).

215. *Id.* Rule 5(b).

216. *Id.* Rule 6(a).

217. *Id.* Rule 6(b).

218. *Id.* Rule 8(a).

219. *Id.* Rule 12.

C. What Habeas Hearings Should Look Like

Although the courts possess and should retain authority to develop flexible procedures for adjudicating habeas claims in the executive-detention context, we may glean from the historical purpose and practice of habeas over the centuries certain fundamental principles about what the hearings should entail. Courts adjudicating habeas petitions from detainees in the War on Terror will have to grapple with whether (and to what degree) they should allow evidentiary hearings, discovery, and the admission into evidence of hearsay. In addition, following the plurality's statements in *Hamdi v. Rumsfeld*, the courts will likewise be asked to consider which party bears the ultimate burden of proof as to the legality of the detention, and whether the government's evidence is entitled to any kind of presumption of reliability.

It seems clear that the districts courts, in devising procedures, will inevitably heed the warnings of the *Hamdi* plurality by proceeding in a "prudent and incremental"²²⁰ manner, deferring to some significant degree to the political branches.²²¹ But in doing so, the courts should first determine, as a threshold matter, whether the kinds of exigent circumstances posited by Justice O'Connor in her *Hamdi* plurality are extant, and whether they make deviating from ordinary habeas procedures potentially necessary.²²² While historically the courts have treated executive claims of privilege with tremendous deference,²²³ ideally the habeas courts will exercise independent judgment in deciding when to take the extraordinary step of abridging fundamental due process principles.²²⁴ Moreover, in devising appropriate habeas procedures, the courts should heed the historical information-forcing role of the writ, with an eye toward flushing facts into the public realm. The information-forcing func-

220. *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004) (plurality opinion).

221. *Boumediene v. Bush*, 128 S. Ct. 2229, 2276 (2008) ("In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches."). A number of scholars have, in fact, suggested that the most appropriate course would be for the judiciary to stay entirely out of the business of reviewing executive detentions. See, e.g., Earl M. Maltz, *The Exigencies of War*, 36 RUTGERS L.J. 861, 869-70 (2005); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 287-90 (1996); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1665, 1682 (2002).

222. See Carl Tobias, *The Process Due Indefinitely Detained Citizens*, 85 N.C. L. REV. 1687, 1730-31 (2007).

223. See, e.g., *United States v. Reynolds*, 345 U.S. 1, 11 (1953) (refusing even to review *in camera* reports that the executive claimed contained military secrets, stating that "even the most compelling necessity cannot overcome the claim of [executive] privilege if the court is ultimately satisfied that military secrets are at stake").

224. *Reynolds*, the fountainhead case for deference to claims of executive privilege on national security grounds, is an object lesson in this regard. In 2006, the documents at issue in the case were made public pursuant to the Freedom of Information Act, and in fact were found to contain no military secrets whatsoever. See LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE (Univ. Press of Kansas 2006); BARRY SIEGEL, CLAIM OF PRIVILEGE: A MYSTERIOUS PLANE CRASH, A LANDMARK SUPREME COURT CASE, AND THE RISE OF STATE SECRETS (Harper 2008).

tions of the writ are important not only to provide the petitioner a fair opportunity to challenge the legality of his detention, but also to allow the citizenry an opportunity to determine whether the political branches have acted wisely in making their detention decisions.

Evidentiary Hearings. Whenever a dispute arises as to a material fact concerning the legality of the detention of terror suspect, the district courts have a duty to hold a hearing to resolve the dispute. The need for evidentiary hearings to resolve factual disputes has long been recognized in habeas corpus jurisprudence,²²⁵ and the Court in *Harris v. Nelson* has even concluded that it is “now established beyond the reach of reasonable dispute that the federal courts not only may grant evidentiary hearings to applicants, but *must* do so upon an appropriate showing.”²²⁶ The threshold showing should be low in a challenge to executive detentions, because there is no underlying factual determination by a state or federal court.²²⁷

Of course, the district courts should retain discretion as to whether or not to hold a hearing in a particular instance, as per the 2245 Rules.²²⁸ But unlike the collateral appeal process for prisoners convicted of crimes in state court, ordinarily good cause will be shown by petitioners who raise a material factual dispute, since no other court will previously have adjudicated the issue.

In addition, in the executive-detention context, factual disputes relating to alleged prior confessions made by the petitioner or to the credibility of prior statements made by third parties are likely to occur with some frequency, at least if the Guantánamo litigation portends the future. For example, the reliability of any confessions that Guantánamo prisoner Mohammed al-Qahtani may have made to interrogators will necessarily be called into question, since during his interrogations he was indisputably tortured.²²⁹ Likewise, any incriminating statements that Qahtani

225. See *Stewart v. Overholser*, 186 F.2d 339, 342 (D.C. Cir. 1950) (“When a factual issue is at the core of a detention challenged by an application for the writ it ordinarily must be resolved by the hearing process. This is a chief purpose of the habeas corpus proceeding.”); *id.* at 342-43 (collecting cases).

226. *Harris v. Nelson*, 394 U.S. 286, 291 (1969) (citing *Townsend v. Sain*, 372 U.S. 293, 313 (1963); *Brown v. Allen*, 344 U.S. 443, 464 & n.19 (1953)) (emphasis added); see also *Walker v. Johnston*, 312 U.S. 275, 285-86 (1941) (“[A habeas petitioner is entitled to] ‘a judicial inquiry . . . into the very truth and substance of the causes of his detention . . .’ Such a judicial inquiry involves the reception of testimony.”) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 466 (1938)).

227. Cf. *Townsend*, 372 U.S. at 312-13 (stating that if historical acts have not been found by the state courts, federal habeas judge must hold an evidentiary hearing to determine them).

228. “If the petition is not dismissed, the judge must review the answer, [and] any transcripts and records of state-court proceedings . . . to determine whether an evidentiary hearing is warranted.” Rules Governing § 2254 Cases, Rule 8(a), 28 U.S.C.A. foll. § 2254 (West 2004).

229. Judge Susan J. Crawford, the “convening authority” of the military commissions for the Bush administration, told Bob Woodward of the *Washington Post* that she refused to allow the prosecution of Qahtani because “his treatment met the legal definition of torture.” Bob Woodward, *Detainee Tortured, Says U.S. Official*, WASH. POST, Jan. 14, 2009, at A1. Qahtani was threatened with a military working dog, forced to wear women’s underclothing, led around on a leash and made

made about other prisoners²³⁰ would necessarily be suspect and would surely require the district court to hold an evidentiary hearing to determine their trustworthiness.²³¹

Discovery. Likewise, the authority to order discovery must remain with the district court judge and, consistent with usual habeas practice, should be allowed for good cause shown.²³² But, as with evidentiary hearings, the “good cause” standard will ordinarily be met more easily by habeas petitioners in the executive-detention context, because they will not have been afforded the right to discovery in any previous judicial proceeding.²³³

All of the rationales for allowing discovery in a court proceeding will be present in habeas actions challenging executive detentions. Discovery focuses the litigation by removing issues from contention that are unlikely to be seriously contested²³⁴ and, at least in theory, brings out into the open all of the relevant evidence that should be needed to resolve a dispute.²³⁵ In addition, there can be no argument against discovery in the executive-detention context on the ground that discovery rights remain limited in the criminal context, since the chief concern in a criminal trial is on the *timing* of the discovery rather than on whether or not it can be ordered.²³⁶ Finally, it is precisely in the discovery phase of habeas

to perform dog tricks, told that his mother and sisters were whores, and subjected to eighteen to twenty hour interrogations for forty-eight of fifty-four consecutive days, sometimes while standing naked in front of a female agent. Once during this period, Qahtani’s heart rate dropped to thirty-five beats per minute, and he was taken to the camp hospital to prevent total heart failure. Classified interrogation logs of these sessions were leaked to *TIME Magazine* and are available at <http://www.time.com/time/2006/log/log.pdf> (last visited Mar. 7, 2009).

230. Statements made by Qahtani have been used to justify the detentions of perhaps scores of men at Guantánamo. In a press release issued in June 2005, the Pentagon averred that Qahtani was the primary source for the military’s conclusion that at least thirty prisoners at Guantánamo were affiliated with al Qaeda. See Press Release, U.S. Department of Defense, Guantanamo Provides Valuable Intelligence Information (June 12, 2005), available at <http://www.fas.org/irp/news/2005/06/dod061205.html>.

231. *Accord Machibroda v. United States*, 368 U.S. 487, 493 (1962) (“There can be no doubt that, if the allegations [regarding coercion] contained in the petitioner’s motion and affidavit are true, he is entitled to have his sentence vacated.”); see *Waley v. Johnston*, 316 U.S. 101, 104 (1942) (holding that petitioner is entitled to a hearing on “the material issue whether the plea was in fact coerced by the particular threats alleged”).

232. “A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery.” Rules Governing § 2254 Cases, Rule 6(a), 28 U.S.C.A. foll. § 2254 (West 2004).

233. As Justice Kennedy explained in *Boumediene v. Bush*, “[t]he idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context This principle has an established foundation in habeas corpus jurisprudence as well.” *Boumediene v. Bush*, 128 S. Ct. 2229, 2268 (2008) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

234. Discovery is efficient in that it “may reduce the number of habeas hearings a court must hold.” *Harvard Habeas Note*, *supra* note 213, at 1181.

235. Discovery “tends to ensure that all evidence will be unearthed and that concealment of relevant information and materials will be minimized.” Note, *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 945 (1961).

236. “[T]he limitation on criminal discovery restricts only the time at which a defendant can obtain information. At trial he has very broad fact-finding powers. The policies which prevent a

litigation that the government will ordinarily be compelled to demonstrate whether there is indeed an evidentiary basis for the legality of the detention.

It is unsurprising, therefore, that the Supreme Court in its War on Terror cases has affirmed that discovery will ordinarily be appropriate in executive-detention habeas hearings. *Boumediene*, for example, emphasized that the availability of discovery to a habeas petitioner counted among the procedural rights that historically “preserve the writ and its function,”²³⁷ and also noted that the failure of the DTA review process to allow discovery was partly responsible for its “falli[ng] short of being a constitutionally adequate substitute” for habeas.²³⁸

Nonetheless, in the War on Terror context there may well be times when the courts will act within their discretion to limit discovery, and as a matter of policy the vindication of the habeas right might have to be balanced against legitimate concerns about national security. Of course, as discussed above, discovery in the habeas context does not happen automatically without rule of court, in part because it can be “exceedingly burdensome and vexatious” and in part because the extensive discovery contemplated by the Federal Rules of Civil Procedure is “ill-suited to the special problems and character of [habeas] proceedings.”²³⁹

Of particular concern to the government in an executive-detention habeas action may be national security, including the potential revelation of intelligence and intelligence-gathering methods and the burden of producing battlefield evidence. As one district court judge recently observed, the “discovery process alone risks aiding our enemies by affording them a mechanism to obtain what information they could about military affairs and disrupt command missions by wresting officials from the battlefield to answer compelled deposition and other discovery inquiries.”²⁴⁰ In theory, then, the potential for disruption should of course be

defendant from obtaining this information prior to trial are inapplicable to a habeas proceeding. These limitations are grounded on a fear that disclosure of the prosecution’s case will encourage perjury, intimidation of witnesses and manufacturing of evidence, and that the accused, relying on the fifth amendment, will block all discovery against himself. As a basis for restricting criminal discovery, these limitations have been severely criticized.” *Harvard Habeas Note*, *supra* note 213, at 1182-83.

237. *Boumediene*, 128 S. Ct. at 2263 (citing *Harris v. Nelson*, 394 U.S. 286, 299-300 (1969)); *see also* *Al-Marri v. Pucciarelli*, 534 F.3d 213, 273 n.16 (4th Cir. 2008) (en banc) (Traxler, J., concurring) (citing “discovery” as part of the “process normally available [to persons] who challenge their executive detention”); *El-Banna v. Bush*, No. 04-CV-1144, 2005 WL 1903561 (D.D.C. July 18, 2005) (ordering the government to preserve evidence regarding petitioners’ detention at Guantanamo, in view of the habeas court’s plenary power of inquiry, and petitioners’ right to discovery).

238. *Boumediene*, 128 S. Ct. at 2272 (noting the detainee’s lack of opportunity “to present evidence discovered after the CSRT proceeding concluded”).

239. *Harris*, 394 U.S. at 296-97; *see also* *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (“A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course.”).

240. *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 105 (D.D.C. 2007).

weighed against the petitioner's right to a fair hearing.²⁴¹ But by the same token, it should be incumbent upon the government to make a substantial showing that security will be compromised by fulfilling the discovery request. In short, the government must make at least a threshold showing that exigent circumstances exist before the court considers restraints on discovery.²⁴²

This is surely what the *Hamdi* Court envisioned when it sought to ensure that "military officers" engaged in combat operations would not "be unnecessarily and dangerously distracted by litigation half a world away."²⁴³ Experience with the Guantánamo cases, however, suggests that in practice the courts may find no exigent circumstances. Indeed, many of the detainees at Guantánamo are not even alleged to have been captured on a battlefield, nor are they alleged ever to have been in combat with U.S. forces; there may be no evidence to be gleaned from the battlefield or that even had its source on a battlefield.²⁴⁴

During wartime, one can expect the courts to maintain a deferential attitude toward the President and Congress, the branches with expertise in military affairs and the responsibility for making policy judgments. And, of course, unlike an unelected judiciary, the members of the political branches will be held accountable to the people. Nonetheless, in determining what habeas procedures should look like, the courts should take into account that the premise for political accountability performing its democratic role is that the people have access to adequate information to make sound choices about their leaders. And it is precisely political accountability that will suffer if habeas procedures are weak and the facts underlying executive detentions are never brought into the public realm.²⁴⁵ Thus, in deciding whether discovery should be allowed, the courts should consider that the harm they seek to prevent—the disclosure

241. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (applying due process balancing test from *Mathews v. Eldredge*, 424 U.S. 319, 335).

242. Likewise, concerns about leaks of classified information will likely be mitigated in most habeas litigation by stringent protective orders assuring that counsel is both security cleared and sanctionable for releases of classified information. See, e.g., Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, In Re Guantanamo Detainee Cases, 344 F. Supp. 2d 174, 179-80 (D.D.C. 2004).

243. *Hamdi*, 542 U.S. at 531-32.

244. Abdulsalam Abdulrahman Al Hela, for example, was taken into custody by Egyptian security forces in Cairo, Egypt. Other Guantánamo detainees were taken into custody in Gambia, Bosnia, and Thailand.

245. Indeed, it may be asking a lot of the political process to expect that the public will rein in the executive where a minority's rights are at stake. As a report of the Association of the Bar of the City of New York noted, as "a practical possibility in the context of the exercises of the President's war power," the political process might provide a meaningful check when there is an "impact widely on many citizens, such as mobilization, the draft, or rationing or higher taxes," but "where the exercise of the war power focuses on a discrete minority—the Japanese-Americans in World War II or Arab-Americans and other Muslims in the war on terror—it is unrealistic to expect too much of the political process." Association of the Bar of the City of New York, Committee on Federal Courts, *The Indefinite Detention of "Enemy Combatants": Balancing Due Process and National Security in the Context of the War on Terror*, 59 THE REC. 41, 106 (2004) (footnotes omitted).

of information to our enemies—must be balanced against the benefit of bringing information to light for the citizenry. Operating by much the same principle that resulted in the development of the return requirement at common law, discovery rights now will force the executive to justify its detention decisions and then pay the political price (or reap the political rewards) from those decisions, once the public can assess knowledgeably on what basis they were made.²⁴⁶

Exculpatory Evidence. Complementary to the government's discovery obligations should be an obligation to provide the habeas petitioner with exculpatory evidence within its control. In criminal proceedings, the government "has a duty to learn of any favorable evidence known to the others acting on the government's behalf,"²⁴⁷ and must disclose exculpatory and impeaching evidence that is "material."²⁴⁸

Failure to disclose exculpatory information "undermines confidence in the outcome" of a hearing.²⁴⁹ The obligation thus not only guarantees fair treatment for detainees subject to a substantial liberty deprivation,²⁵⁰ but is also necessary to preserve the truth-seeking function of an adjudicatory proceeding.²⁵¹

As Justice Kennedy noted in *Boumediene*, there is "evidence from 19th-century American sources indicating that, even in States that accorded strong *res judicata* effect to prior adjudications, habeas courts in this country routinely allowed prisoners to introduce exculpatory evidence that was either unknown or previously unavailable to the prisoner."²⁵² Justice Kennedy went on to conclude that the DTA procedures authorized by Congress were an inadequate substitute for habeas in part because the Guantánamo petitioners were not allowed to submit exculpatory evidence obtained subsequent to a CSRT determination that might prove he was improperly classified as an "enemy combatant."²⁵³

246. *But see* Robert J. Pushaw, *The "Enemy Combatant" Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1078-83 (2007) (arguing that the courts have appropriately been deferential to the executive in the war-on-terror context); Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 606-11 (2003) (suggesting that the courts should defer to the politically accountable executive branch and its military expertise).

247. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

248. *United States v. Bagley*, 473 U.S. 667, 668 (1985).

249. *Bagley*, 473 U.S. at 668.

250. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963).

251. *Monroe v. Blackburn*, 476 U.S. 1145, 1148 (1986).

252. *Boumediene v. Bush*, 128 S. Ct. 2229, 2267 (2008) (citing cases from 1848 to 1879). *See also* Arkin, *supra* note 56, at 16-17.

253. *Boumediene*, 128 S. Ct. at 2270 ("For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings. This includes . . . the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding."). *See also* *Townsend v. Sain*, 372 U.S. 293, 313 (1963), *overruled in part by* *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5 (1992).

Exculpatory evidence in the executive-detention context could, of course, include statements from other prisoners that might tend to exonerate a petitioner. But another major category of exculpatory information that the courts are likely to have to address includes any evidence that would support the exclusion of statements attributed to the petitioner. In *Crane v. Kentucky*,²⁵⁴ for example, a unanimous Supreme Court held that evidence of coercion is relevant not just for determining whether a defendant's statement was admissible at trial, but also (if deemed admissible) whether it was credible.²⁵⁵ As the Court went on to hold,

the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. Confessions, even those that have been found to be voluntary, are not conclusive of guilt. And, as with any other part of the prosecutor's case, a confession may be shown to be "insufficiently corroborated or otherwise . . . unworthy of belief."²⁵⁶

Other types of exculpatory information that are particularly likely to be relevant in the executive-detention context include contradictory witness statements and evidence that a witness had been shown a photograph of the accused before identifying him.

In the criminal context, it is well-settled that the government has a duty to disclose exculpatory material in the possession of the prosecution even if the defendant fails to request such material.²⁵⁷ But as with discovery, given national security concerns the government will surely argue with some frequency that it will not be appropriate in the executive-detention context to impose upon the government an automatic obligation to disclose exculpatory evidence. That said, where a request for exculpatory information has been made by a petitioner, the government should be compelled to search for and turn over such information absent a showing that the national security would be imperiled by such an order.

Hearsay. As a practical matter, one of the key issues in determining adequate habeas procedures in the executive-detention context involves the potential admission into evidence of hearsay. The courts have long recognized that hearsay can be a particularly unreliable form of evidence,²⁵⁸ and the common law thus generally forbade its use, allowing only narrowly-defined exceptions for statements made in circumstances tending to lend them particularized guarantees of trustworthiness. These narrow exceptions to the rule against hearsay have largely been codified

254. 476 U.S. 683 (1986).

255. *Id.* at 689.

256. *Id.* (quoting *Lego v. Twomey*, 404 U.S. 477 (1972)).

257. *United States v. Agurs*, 427 U.S. 97, 112-13 (1976).

258. *See Ellicott v. Pearl*, 35 U.S. 412, 436 (1836).

in the Federal Rules of Evidence, each pursuant to a well-recognized reason to expect the statement would have a circumstantial guarantee of trustworthiness.²⁵⁹ And, by their terms, the Federal Rules of Evidence apply in habeas corpus proceedings “to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority.”²⁶⁰

That said, there have long been persuasive arguments for more liberal admission into evidence of hearsay declarations, so long as the court is attuned not only to the probative nature of the evidence but also to its indicia of reliability.²⁶¹ In the context of executive detentions during wartime, relaxed hearsay rules may be appropriate, and it would be reasonable for some hearsay to be allowed if other sources of evidence are unavailable—either because of intelligence and national security concerns, or because of the difficulties attending the gathering of evidence and testimony from soldiers deployed on the battlefield.

Broadly speaking, this was the view of a plurality of the Supreme Court opined in *Hamdi*, where Justice O’Connor wrote that “military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously detracted by [developing the case in chief for] litigation half a world away,” by a judicially-made prohibition against the use of hearsay evidence to support wartime status determinations.²⁶² In war there is no evidence room and there are no chain of custody procedures; evidence of combatancy (like weapons) is generally destroyed; and much of the physical evidence may be “buried under the rubble of war.”²⁶³

It remains important, however, to focus on both the actual *need* to use hearsay and on the criteria for allowing it into evidence. The *Hamdi* plurality stated only that hearsay “*may* need to be accepted as the most reliable available evidence from the Government in such a proceeding.”²⁶⁴ In acknowledging that hearsay may sometimes—in the specific

259. See FED. R. EVID. 803 advisory committee’s notes.

260. FED. R. EVID. 1101(e). See e.g., Greiner v. Wells, 417 F.3d 305, 325–26 (2d Cir. 2005), cert. denied, 546 U.S. 1184 (2006) (excluding hearsay in a habeas case pursuant to Federal Rules of Evidence).

261. The best treatment of this issue remains Jack B. Weinstein, *The Probative Force of Hearsay*, 46 IOWA L. REV. 331, 344–45 (1961) (advocating for abandonment categorical exceptions in favor of individual treatment in the setting of the individual case; admissibility would be determined by balancing probative force of the evidence against possibility of prejudice, waste of time, and availability of more satisfactory evidence).

262. *Hamdi v. Rumsfeld*, 542 U.S. 507, 531-32 (2004) (plurality).

263. *Id.* at 532.

264. *Id.* at 533 (emphasis added). The plurality likewise stated that “the exigencies of the circumstances *may* demand that, aside from [the] core elements [of notice and an opportunity to be heard], enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.” *Id.* (emphasis added).

context of a traditional battlefield detention²⁶⁵—be accepted as “the most reliable available evidence,” the *Hamdi* plurality did not approve jettisoning the Federal Rules of Evidence altogether in the habeas context. Indeed, in *Boumediene*, Justice Kennedy found that one of the fundamental due process flaws in the CSRTs was that “there [were] in effect no limits on the admission of hearsay evidence,” since “the only requirement [was] that the tribunal deem the evidence ‘relevant and helpful.’”²⁶⁶

The lesson from the *Hamdi* plurality and the Court in *Boumediene* is not that all hearsay is admissible in an executive-detention habeas action, but rather that the district courts should exercise their discretion in determining whether to allow particular hearsay statements into evidence²⁶⁷ and should seriously consider the degree to which such statements could be relied upon when assessing the legality of a detention.

These are not, of course, merely academic matters. In the case of Ali Saleh Kahlal al-Marri, a United States resident who has been held since June 2003 without charge as an enemy combatant,²⁶⁸ the government’s sole submission into evidence to justify the legality of the detention was a hearsay statement from Jeffrey N. Rapp, the Pentagon’s senior counterintelligence officer, who wrote that al-Marri possessed information of high intelligence value, including information about personnel and activities of al Qaeda. In a five-to-four decision, the Fourth Circuit Court of Appeals rejected the government’s argument that such a declaration should automatically be allowed into evidence on the authority of *Hamdi*.

Writing for a majority of the court on the issue of procedures for al-Marri’s habeas hearing, Judge Traxler stated that the *Hamdi* plurality had done no more than recognize that, in a particular case, it *might* be necessary to modify ordinary due-process standards as a result of wartime exigency. “*Hamdi*’s relaxed evidentiary standard of accepting hearsay evidence and presumption in favor of the government arose from the plurality’s recognition that the process warranted in enemy-combatant proceedings *may* be lessened *if* the practical obstacles the Executive

265. The *Hamdi* plurality addressed only “the narrow question” of the process due an enemy soldier captured during combat against the U.S. and its allies on a foreign battlefield. *Id.* at 513, 516, 517, 522 n.1 (plurality opinion).

266. *Boumediene v. Bush*, 128 S. Ct. 2229, 2269 (2008).

267. The habeas statute permits admission of affidavits in habeas corpus cases, in the court’s discretion, but such permission triggers the opposing party’s “right to propound written interrogatories to affiants, or to file answering affidavits.” 28 U.S.C.A. § 2246 (West 2008). Discretion to admit evidence by affidavit must be exercised with caution. *See Herrera v. Collins*, 506 U.S. 390, 417 (1993) (“affidavits are disfavored [in a habeas corpus action] because the affiants’ statements are obtained without the benefit of cross-examination and an opportunity to make credibility determinations”).

268. Al-Marri was initially arrested in December 2001 and held as a material witness in relation to the 9/11 attacks; in January and February 2002 he was indicted on charges relating to credit card fraud and making false statements to the FBI; charges were dropped with prejudice in June 2003, and he has been held without charge as an enemy combatant since then.

would confront in providing the procedural protections normally due warrant such a modification.”²⁶⁹

Judge Traxler explained that hearsay evidence might be admitted upon a proper showing of need by the government, but that

the *Hamdi* plurality neither said nor implied that normal procedures and evidentiary demands would be lessened in *every* enemy-combatant habeas case, regardless of the circumstances. And I cannot endorse such a view, which would allow the government to seize and militarily detain any person (including American citizens within this country) and support such military detention solely with a hearsay declaration of a government official who has no first-hand information about the detainee—*regardless* of whether more reliable evidence is readily available or whether the presentation of such evidence would impose any burden upon the government or interfere at all with its war or national security efforts.²⁷⁰

Under Judge Traxler’s persuasive reading of the *Hamdi* plurality’s opinion, categorical admission of hearsay evidence was improper. While hearsay declarations “*may* be accepted upon a weighing of the burdens in time of warfare of providing greater process against the detainee’s liberty interests,” in order to decide whether a hearsay declaration is acceptable, “the court must first take into account the risk of erroneous deprivation of the detainee’s liberty interest, the probable value, if any, of any additional or substitute procedural safeguards, and the availability of additional or substitute evidence which might serve the interests of both litigants.”²⁷¹

One further elaboration on hearsay is in order. While the district courts should take into consideration the government’s interest in protecting its sources and methods of intelligence gathering, these interests should not excuse admitting hearsay without sufficient information to assess its reliability.²⁷² Among other circumstances that should be considered with regard to the credibility of the source is the manner by which any hearsay declaration was obtained. The court should, for example, require the proponent of hearsay to disclose to the district court and opposing counsel the interrogation techniques employed on its sources.²⁷³ In addition, in determining whether exigent circumstances

269. *Al-Marri v. Pucciarelli*, 534 F.3d 213, 265 (4th Cir. 2008) (en banc) (Traxler, J., concurring). Judge Traxler went on to note that Justice Kennedy’s decision in *Boumediene* likewise emphasized that relaxation of due process norms would be appropriate only in “particular circumstances.” *Id.* at 265 n.7.

270. *Id.* at 268.

271. *Id.* at 269 (citation and internal quotation marks omitted).

272. *See Parhat v. Gates*, 532 F.3d 834, 849 (D.C. Cir. 2008) (“[W]e do *not* suggest that hearsay evidence is never reliable—only that it must be presented in a form, or with sufficient additional information, that permits the Tribunal and court to assess its reliability.”).

273. *See Stein v. New York*, 346 U.S. 156, 182 (1953) (“The tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so

exist meriting the introduction of hearsay, the courts should also consider the extent to which the Classified Information Procedures Act²⁷⁴ and the Foreign Intelligence Surveillance Act²⁷⁵ provide adequate procedures obviating the need to stray further from the baseline of the Federal Rules of Evidence.

Burdens. In a typical habeas action, the petitioner initially bears the burden of proof.²⁷⁶ Executive-detention habeas actions, however, are not typical, and in the context of habeas challenges to executive-detentions, the burden should rightly fall on the government. Once a petitioner has established that he is in prison, the justification for the imprisonment should fall by law on the custodian to justify his act.²⁷⁷ In this respect, at least, the *Hamdi* plurality's suggestion of a burden-shifting scheme²⁷⁸ should be rejected by district court judges, regardless of the existence of exigent circumstances.

Habeas petitioners in the executive-detention context will be seeking review of the executive's unilateral decision to detain them, rather collaterally attacking the judgment of a prior competent court of record.²⁷⁹ Thus, in contrast to a petition challenging a criminal conviction, the executive has not already demonstrated to the satisfaction of a neutral adjudicator that the evidence is sufficient to meet the executive's asserted need for detention. As Justice Kennedy noted in *Boumediene*, a "criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures."²⁸⁰ In this context, the burden should remain on the government to convince the fact-finder of the legality of the detention.²⁸¹

strong that judges long ago found it necessary to . . . treat[] any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt.").

274. 18 U.S.C. app. 3 § 1-16 (1982) (applicable by its terms only in criminal cases).

275. 50 U.S.C. §§ 1801(a)-(p).

276. See *Garlotte v. Fordice*, 515 U.S. 39, 46 (1995) (stating that the "habeas petitioner generally bears the burden of proof"); *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 314 (1946) (stating that the petitioner "had the burden of showing that he was unlawfully detained"); *Williams v. Kaiser*, 323 U.S. 471, 472, 474 (1945) (similar); *Walker v. Johnson*, 312 U.S. 275, 286 (1941) (similar); *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938) (similar).

277. Cf. *Liversidge v. Anderson*, [1942] A.C. 206, 245 (Atkin, L., dissenting) (stating this it is "one of the pillars of liberty . . . that in English law every imprisonment is *prima facie* unlawful and that it is for the person directing the imprisonment to justify his act").

278. See *infra* text accompanying notes 282-84.

279. Compare *Ex parte Watkins*, 28 U.S. 193, 202-03 (1830) (recognizing limitation on habeas courts authority to review factual judgments of "court of competent jurisdiction"), with *Boumediene v. Bush*, 128 S. Ct. 2229, 2268 ("The present cases fall outside these categories, however; for here the detention is by executive order.").

280. *Boumediene*, 128 S. Ct. at 2269 (2008).

281. Cf. *In re Winship*, 397 U.S. 358, 364 (1970) ("Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.").

In *Hamdi*, it is true, the plurality suggested that a burden-shifting scheme might be appropriate and constitutional in some habeas cases.²⁸² The process envisioned by the plurality begins with the Government's submission of a factual return that "puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria."²⁸³ If the Government files a return supported by credible evidence, the burden shifts to the petitioner to rebut, "with more persuasive evidence," the Government's classification.²⁸⁴ The parties should then have the opportunity to brief the legality of detention based on the record and to make arguments as to the credibility and weight of the evidence presented. If a petitioner is unable to overcome the Government's evidence, no further steps need be taken and the Government prevails.

Still, as with the plurality's suggestions about the treatment of hearsay, the burden-shifting scheme is presented only as a constitutionally adequate alternative to ordinary due-process procedures that *might* be appropriate upon a showing of need by the government. As Judge Traxler observed in *Al-Marri*, the *Hamdi* plurality did not "provide a cookie-cutter procedure appropriate for every alleged enemy-combatant, regardless of the circumstances of the alleged combatant's seizure or the *actual* burdens the government might face in defending the habeas petition in the normal way."²⁸⁵ Moreover, it is difficult even in the abstract to imagine what circumstances should relieve the government of its burden, since it is a fundamental tenet of our jurisprudence that imprisonments are presumptively illegal.

Absent an extraordinary showing of the need for an alternative, the burden should therefore be on the government to justify the legality of the executive detention. Exactly *what* the burden should be, however, is another question left open by the Supreme Court cases.²⁸⁶ In the criminal context, of course, the government must justify detentions with proof beyond a reasonable doubt. In the context of ordinary civil litigation, the ordinary burden is proof by a preponderance of the evidence. Because habeas actions are civil in nature, a preponderance standard might seem to be an appropriate default. But habeas actions are only nominally civil,²⁸⁷ and the deprivation of liberty at stake in the executive-detention context should therefore raise the government's burden.

282. *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004).

283. *Id.*

284. *Id.*

285. *Al-Marri v. Pucciarelli*, 534 F.3d 213, 272 (4th Cir. 2008) (en banc) (Traxler, J., concurring) (emphasis in original).

286. In *Boumediene*, the Court left open for the district courts to decide the "extent of the showing required of the Government in these cases." *Boumediene v. Bush*, 128 S. Ct. 2229, 2271 (2008) (emphasis added).

287. *Harris v. Nelson*, 394 U.S. 286, 293-94 (1969).

In civil commitment cases, for example, the government's burden is to show by "clear and convincing" evidence that continued detention is proper. The D.C. Circuit has noted that "where the various interests of society are pitted against restrictions on the liberty of the individual, a more demanding standard is frequently imposed, such as proof by clear, unequivocal and convincing evidence."²⁸⁸ This standard has been deployed in a host of civil commitment contexts, including detention for deportation,²⁸⁹ sex-offender civil commitment,²⁹⁰ continued commitment of criminal defendant found not guilty by reason of insanity,²⁹¹ and pre-trial detention based on dangerousness.²⁹²

Despite the government's suggestion that the Guantánamo prisoners have all been taken into custody from the battlefield, a reasonable argument can be made that many of the detentions are in fact criminal in nature and the result of police rather than wartime actions. In such cases, placing a reasonable doubt standard on the government would doubtless be justified.²⁹³ But given the Supreme Court's holding in *Hamdi* that the detainees captured pursuant to the Afghanistan conflict are being held pursuant to the Authorization for Use of Military Force,²⁹⁴ and the wartime context for most of the habeas petitioners in federal court at the present time, the courts will likely conclude that something less than a reasonable doubt standard is appropriate.²⁹⁵

Presumptions. Finally, the plurality in *Hamdi* suggested that "the Constitution would not be offended by a presumption in favor of the Government's evidence."²⁹⁶ As with hearsay and burden-shifting, the rationale for such a presumption is that the wartime context of executive detention decision may, in some situations, make normal procedures impracticable due to concerns about revelations concerning intelligence and intelligence gathering or about difficulties in managing evidence gathered from the battlefield.

288. *In re Ballay*, 482 F.2d 648, 662 (D.C. Cir. 1973).

289. *Woodby v. INS*, 385 U.S. 276, 286 (1966).

290. *Kansas v. Hendricks*, 521 U.S. 346, 353 (1997).

291. *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992).

292. *United States v. Salerno*, 481 U.S. 739, 750 (1987).

293. *Cf. Tobias*, *supra* note 222, at 1735.

294. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004).

295. Matthew C. Waxman has compared the detention of "enemy combatants" with the targeting of terror suspects, suggesting that the standard of certainty for detention should be "reasonable due care played out over time." Waxman, *supra* note 171, at 1407. He suggests, among other things, that repeated periodic status reviews by the executive will eventually weed out "false-positives." *Id.* at 1412. Experience at Guantánamo, however, has proven such assumptions wrong. Of the first twenty-seven habeas hearing to reach decision, fully twenty of the petitioners were granted the writ after their detention was held illegal by an Article III judge. *See* Marc Falkoff, *No Room Left for Doubt: New Revelations About Guantanamo*, JURIST (Jan. 17, 2009) <http://jurist.law.pitt.edu/forumy/2009/01/no-room-left-for-doubt-new-revelations.php>. Each of those men was held at Guantánamo for nearly seven years, each received both a status hearing and yearly reviews, and each was held for years without any sign that the military would ever acknowledge its errors.

296. *Hamdi*, 542 U.S. at 534.

Whether a presumption is appropriate, however, should again depend upon the individual circumstances of an individual case, and the presumption should certainly be disallowed absent a particularized showing by the government that it is necessary to relieve the government of an undue burden in the litigation. In addition, according to the *Hamdi* plurality, in order to be constitutional, the presumption must “remain[] a rebuttable one and [a] fair opportunity for rebuttal [must be] provided.”²⁹⁷

Of course, assuming that a presumption in favor of the government’s evidence would ever be appropriate, a categorical presumption in favor of the government’s evidence would certainly never be.²⁹⁸

D. What (Some) Habeas Hearings Already Look Like

After the *Boumediene* decision came down in June 2008, the district courts in the D.C. Circuit heard argument about what procedures would be used in the Guantánamo habeas actions that had been pending, in some cases, for more than six years. For the most part, the habeas cases were consolidated before Judge Thomas F. Hogan, to allow him to devise common procedures to be used by the other members of the court. Judge Hogan issued a Case Management Order (“Hogan CMO”) in November 2008 which has, with limited exceptions, been adopted in large part by the other judges in the district—although as this article goes to print, few habeas hearings have actually taken place in which such procedures were deployed.

Although the Hogan CMO offered little in the way of supplementary analysis, the procedures are largely in accord with the recommendations contained in this article.²⁹⁹ Most importantly, the judges of the district court have declined to make blanket rulings about the admissibility of hearsay or presumptions in favor of the reliability of government evidence. Instead, they have reserved to themselves discretion to determine whether ordinary procedures associated with due process should be suspended in the particular circumstances of the particular habeas cases before them. Of most concern, however, is the adoption of a preponderance standard—with the burden on the government—to determine whether a petitioner is an “enemy combatant.”

297. *Id.*

298. See *Al-Marri v. Pucciarelli*, 534 F. 3d. 213, 265 (4th Cir. 2008) (en banc) (Traxler, J., concurring) (noting that “*Hamdi*’s relaxed evidentiary standard of accepting hearsay evidence and presumption in favor of the government arose from the plurality’s recognition that the process warranted in enemy-combatant proceedings *may* be lessened *if* the practical obstacles the Executive would confront in providing the procedural protections normally due warrant such a modification”) (emphasis in original).

299. Among other things, the court ordered the government to file factual returns for cases in which they had not already been provided, and it ordered the petitioners to file traverses. See *In re Guantánamo Bay Detainee Litigation*, Misc. No. 08-0442, 2008 U.S. Dist. LEXIS 97095, at *97, *103 (D.D.C. Nov. 6, 2008) [hereinafter *Hogan CMO*].

The basics of the Hogan CMO can be easily described. The petitioners will be allowed discovery, some of which they will be entitled to upon request (documents referenced in the factual return, statements made by the petitioner and relied on in the return),³⁰⁰ and some of which they may receive on a showing of good cause (for which he must “explain why the requested discovery will enable the petitioner to rebut the factual basis for his detention without unfairly disrupting or unduly burdening the government”).³⁰¹ The chief objection to such provisions is the requirement that the petitioner shoulder the burden of proving that his discovery request will not burden the government.

In contrast, most of the judges in the district have chosen to allow either party to introduce hearsay evidence that is “material and relevant to the legality of the petitioner’s detention,” upon a showing that the hearsay “is reliable and that the provision of nonhearsay evidence would unduly burden the movant or interfere with the government efforts to protect national security.”³⁰² In other words, the burden with respect to the introduction of hearsay evidence is (appropriately) on the party seeking to deviate from the ordinary rules of evidence. The *government*, in short, must prove that use of hearsay is necessary to protect the national security.

The Hogan CMO also provides that the government produce “all reasonably available evidence in its possession that tends materially to undermine the information presented to support the government’s justification for detaining the petitioner.”³⁰³ The potential difficulty with such a provision is determining what “reasonably available” means. Does it include any exculpatory evidence on government data bases? Only such evidence as government lawyers have come across? All evidence that does not require disruption of battlefield interruptions?³⁰⁴

300. *Id.* at *99-100. The petitioner is also entitled under the Hogan CMO to information about the circumstances in which his statements were made or adopted. This category is particularly interesting, since it seems geared at determining whether any kind of coercion was used in procuring them. Indeed, Judge Bates modified Judge Hogan’s CMO for use in cases in his court by adding that the government must provide information about the circumstances of petitioner statements that “including but not limited to any evidence of coercive techniques used during any interrogation or any inducements or promises made.” Case Management Order at 2, *Zaid v. Bush*, Civ. No. 15-1646 (JDB) (D.D.C. Dec. 22, 2008) [hereinafter *Bates CMO*].

301. *Hogan CMO*, *supra* note 298, at *101.

302. *Id.* at *105. Judge Bates has informed the parties before him that hearsay may be admissible, but only if “the movant establishes that the hearsay evidence is reliable and that the presentation of the evidence in compliance with the Federal Rules of Evidence would unduly burden the movant or pose an unwarranted risk to national security.” *Bates CMO*, *supra* note 299, at 3.

303. *Hogan CMO*, *supra* note 298, at *98.

304. Judge Bates revised his CMO to reflect that, “[i]n this context, the term ‘reasonably available evidence’ means evidence contained in any information reviewed by *any* attorney preparing factual returns for *any* detainee,” and “includes any other evidence the government discovers while litigating habeas corpus petitions filed by detainees at Guantánamo Bay.” *Bates CMO*, *supra* note 299, at *2 (emphasis added). The *Bates CMO* is thus more in accord with the ordinary practice in federal criminal trials. See *Brady v. Maryland*, 373 U.S. 83, 87 (1967) (holding that “that the suppression by the prosecution of evidence favorable to an accused upon request violates due process

Finally, all of the courts' CMOs place the burden of justifying the legality of the petitioner's detention on the government. The government's burden, however, is only to prove "enemy combatant" status by a preponderance of the evidence.³⁰⁵ As I argue above, the burden is on the right party, but the civil standard is far too low to justify the long-term deprivation of a petitioner's liberty. With respect to presumptions, each of the district court judges has likewise adopted the provision in Judge Hogan's CMO stating that the merits judge "may accord a rebuttable presumption of accuracy and authenticity to any evidence the government presents as justification for the petitioner's detention if the government establishes that the presumption is necessary to alleviate an undue burden presented by the particular habeas corpus proceeding."³⁰⁶ This provision is, of course, in accord with the plurality's suggestion in *Hamdi* that such a presumption might not offend the Constitution in an appropriate case.

Those courts deciding whether to deploy the presumption should, however, require the government to justify why such a presumption is necessary. Presumably, there must be something unique about the nature of the government's evidence in a particular case that would justify such a presumption. The mere fact that all evidence in cases of this nature necessarily touches on issues of national security should not be an adequate justification.

CONCLUSION

Seven years after the opening of Guantánamo Bay as a detention center, judges are only now beginning to address what habeas corpus procedures should look like for persons indefinitely detained, without charge, on suspicion of association with terrorist organizations.³⁰⁷ Be-

where the evidence is material either to guilt or to punishment"). In addition, other judges on the court included provisions clarifying that the government was obligated to use "reasonable diligence" to find all exculpatory information in its possession. See Case Management Order at 4, *Al-Adahi v. Bush*, Civ. No. 05-0280 (GK) (D.D.C. Nov. 13, 2008) [hereinafter *Kessler CMO*]; Case Management Order at 2, *Gherebi v. Bush*, Civ. No. 01-1164 (RBW) (D.D.C. Nov. 12, 2008) (referring to the Hogan CMO). Judge Gladys Kessler also modified the Hogan CMO provisions for her cases, defining the term "exculpatory evidence" to include "any evidence of abusive treatment, torture, mental incapacity, or physical incapacity which could affect the credibility and/or reliability of evidence being offered." *Kessler CMO*, *supra* note 303, at 4. And Judge Ellen Huvelle was sufficiently concerned about abuse to include language defining "exculpatory information" to include "evidence that casts doubt on a speaker's credibility, evidence that undermines the reliability of a witness's identification of the petitioner, or evidence that indicates a statement is unreliable because it is the product of abuse, torture, or mental or physical incapacity." Case Management Order at ¶ 4, *Qattaa v. Bush*, Civ. No. 080-CV-1233 (ESH) (D.D.C. Jan. 14, 2009).

305. See, e.g., *Hogan CMO*, *supra* note 298, at *104.

306. *Id.* at *104 (emphasis added).

307. On his second full day in office, President Obama issued an executive order to close Guantánamo within one year. See Exec. Order No. 13,492, 74 FR 4897 (Jan. 22, 2009) (section 3 states that it "shall be closed as soon as practicable, and no later than 1 year from the date of this order"). Habeas hearings have continued, however, because the current Administration has not determined which if any of the petitioners will be released into freedom once Guantánamo is closed as a prison.

cause most judges have come of age in an era in which they have been compelled to exercise their latent habeas powers in a constrained manner, there is a danger that they will see their role in the review of the legality of long-term executive detentions through a similarly deferential prism. But habeas was transformed over the centuries into the great protector of individual liberties only because the courts were willing to challenge the executive to produce evidence and information justifying its detention decisions.

As our courts continue to devise procedures for managing challenges to executive-detentions, we must remain cognizant of the historical nexus between the due-process protections of habeas and the writ's information-forcing character. In short, we must remember that habeas procedures have evolved to protect the rule of law not only by assuring that the prisoner gets his fair day in court, but also by promoting the democracy-enhancing effects of bringing information into the public realm.