Can Government Indefinitely Detain Individuals Accused of Being Enemy Combatants?

Deva Solomon
CAN GOVERNMENT INDEFINITELY DETAIN INDIVIDUALS ACCUSED OF BEING ENEMY COMBATANTS?

Deva Solomon†

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† The author expects to receive his J.D. in May, 2008, from the West Virginia
University College of Law. While in law school, the author served as an Associate
Editor and as the Executive Articles Selection Editor for the West Virginia Law Review.
Additionally, the author served as a research assistant for Professors Gerald
Ashdown and James Friedberg. After graduation, the author will join Steptoe &
Johnson PLLC in Morgantown, West Virginia, as an associate. The author would
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[T]he practice of arbitrary imprisonments . . . [is one of] the favourite [sic] and most formidable instruments of tyranny.¹

[The writ of habeas corpus] has also been raised to the importance and clothed with the power of a political principle, so that while and because it is an invaluable and incomparable protection for personal liberty, it is also in turn protected by the highest power in the state, constitutional and legislative, as a cherished popular right and safeguard of civil liberty.²

I. INTRODUCTION

Since September 11, 2001, the government has held individuals at the U.S. Naval Station at Guantanamo Bay, Cuba (GITMO) based on the government’s belief that these individuals (GITMO

detainees) are "enemy combatants" in the War on Terror. The government detains these individuals, but contends that they are not entitled to prisoner-of-war status or the protections of the Constitution. The government's actions are part of a "new kind of war" in which it can assert all of the powers associated with the laws of war, but abide by none of its constraints.

The GITMO detainees have challenged the propriety of their detention by filing writs of habeas corpus. Recently, the government removed the statutory vehicle that permitted the GITMO detainees to file these writs, eliminating their ability to contest their detention, unless the Constitution grants the detainees the right to habeas corpus. The GITMO detainees have challenged the government's ability to limit their access to the writ of habeas corpus in Boumediene v. Bush. In previous cases addressing the propriety of the government's detention of the GITMO detainees, the Supreme Court has not addressed whether the GITMO detainees are entitled to file writs of habeas corpus as a constitutional right. The issue before the Court in Boumediene is whether the GITMO detainees have this constitutional right. The D.C. Circuit concluded that they did not.

This article addresses the proper resolution of whether the GITMO detainees possess the constitutional right to challenge their detention at GITMO via a writ of habeas corpus. Part II examines the history and usage of the writ of habeas corpus. It considers Johnson v. Eisentrager, the case relied upon by the government

7. See infra Parts II.B.2.c, II.B.2.e. The constitutional provision relied upon by the detainees is the Suspension Clause in Article I, § 9, cl. 2. See infra Part III.A for a discussion of whether the Suspension Clause guarantees access to habeas corpus as of right.
8. 476 F.3d at 981.
10. See infra Part II.B.2.f, III.A.
11. See infra Part II.B.2.f.
12. See infra Part II.
to argue that the GITMO detainees are not entitled to habeas corpus, and *Eisentrager*'s relation to the recent habeas corpus petitions brought by GITMO detainees to challenge the basis for their detention in federal court.\(^\text{13}\)

In Part III, this article shows that the writ of habeas corpus is a constitutional right.\(^\text{14}\) The differences between the petitioners in *Eisentrager* and the GITMO detainees require courts to entertain writs of habeas corpus and adjudicate the propriety of executive detention of the GITMO detainees.\(^\text{15}\) This note concludes, however, that the GITMO detainees can be deprived of this right for six months after their initial detention.\(^\text{16}\) Those subject to trial by military commission or declared prisoners of war also lack habeas rights because of the deference courts generally show the Executive during times of war.\(^\text{17}\)

II. BACKGROUND: THAT GREAT WRIT OF HABEAS CORPUS AND THE CASES BEARING ON WHETHER GITMO DETAINEES ARE CONSTITUTIONALLY ENTITLED TO PETITION FEDERAL COURTS FOR WRITS OF HABEAS CORPUS IN THE ABSENCE OF STATUTORY JURISDICTION

A. The History of the Writ of Habeas Corpus

The writ of habeas corpus\(^\text{18}\) is the primary tool used to challenge the propriety of an individual’s detention. The writ “functions as a minimal guarantor of due process by requiring, upon issuance of the writ or an order to show cause, an executive detainor [sic] to justify the legality of the petitioner’s detention.”\(^\text{19}\)

13. *Id.*
14. *See infra* Part III.
15. *Id.*
16. *Id.*
17. *Id.*
18. There are many different writs of habeas corpus. The one that is generally known as the writ of habeas corpus today is technically the writ of habeas corpus ad subjiciendum. *See William F. Duker, A Constitutional History of Habeas Corpus* 4 (1980) (emphasis removed); Hurd, *supra* note 2, at 229. The writ of habeas corpus ad subjiciendum became known as *the* writ of habeas corpus because it became “inseparably associated” with the “vindication of the right of personal liberty” against “whatever power infringed.” Hurd, *supra* note 2, at 129–30 (emphasis added).
The establishment of the writ in England is "'esteemed the best and only sufficient defense of personal liberty.'"

Initially, the writ was a tool used to establish and protect the jurisdiction of the Crown's courts against the interference of local courts, by requiring the recipient of the writ to produce "'the body.'" The writ slowly developed over time from a jurisdictional tool into a significant check on the power of the Crown to detain someone without cause. By 1620, the writ developed into a powerful "vehicle to free someone held by the Executive" without justification.

Prior to the enactment of the first Habeas Corpus Act in 1641, the writ was not universally available to those detained by the Crown without cause. The Crown was still able to avoid judicial review by using the Court of the Star Chamber. By abolishing the Court of the Star Chamber, which heard cases in secret with no right to appeal, "Parliament firmly established that the Writ could be asserted against any detention ordered by the King." The passage of the second Habeas Corpus Act in 1679, described by Blackstone as the "second Magna Carta," fully matured the writ into a powerful check on executive power, as the Act "clearly stated that no person should be held by the Crown without good cause." As Blackstone explained:

To make imprisonment lawful, it must either be, by proc-

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20. DUKER, supra note 18, at 7 (citing Ex parte Yerger, 75 U.S. 85, 95 (1868)).
21. See John A. Sholar, Jr., Habeas Corpus and the War on Terror, 45 DUQ. L. REV. 661, 667 (2007); see also DUKER, supra note 18, at 24, 27 ("[T]he prerogative writ of habeas corpus was a judicial mechanism by which the sheriff or other custodian was commanded to 'have the body' of some person before the court.").
22. See DUKER, supra note 18, at 4 ("By the writ of habeas corpus, the High Court . . . at the insistence of a subject aggrieved, commanded the production of that subject, and inquired into the cause of his imprisonment. If there were no legal justification for the detention, the party was ordered released . . . .") (citations omitted); see also INS v. St. Cyr, 533 U.S. 289, 301 (2001) ("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."); Brown v. Allen, 344 U.S. 443, 533 (1953) (Jackson, J., concurring) (discussing the historical purpose of the writ as relieving detention by executive authorities without judicial trial).
23. See Sholar, supra note 21, at 668–69.
25. See Sholar, supra note 21, at 668–69.
26. See id. at 669.
27. Id.
28. WILLIAM BLACKSTONE, 1 COMMENTARIES *133.
29. Sholar, supra note 21, at 669.
ess from the courts of judicature, or by warrant from some legal officer, having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a habeas corpus. For the law judges in this respect . . . that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him.

The protections afforded by the writ as it developed in England were brought over to the American Colonies and were incorporated in the U.S. Constitution. The Suspension Clause has been interpreted by the Court and commentators to protect the writ as it existed in 1789. It states, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." At the framing of the Constitution, the founding fathers understood that the writ was an important part of the system of checks and balances created by the Constitution. It is the only common-law writ spe-

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30. WILLIAM BLACKSTONE, 1 COMMENTARIES *131—33.
31. See Preiser v. Rodriguez, 411 U.S. 475, 485 (1973) ("By the time the American Colonies achieved independence, the use of habeas corpus to secure release from unlawful physical confinement, whether judicially imposed or not, was thus an integral part of our common-law heritage."); see also DUKER, supra note 18, at 115; Benjamin J. Priester, Return of the Great Writ: Judicial Review, Due Process, and the Detention of Alleged Terrorists as Enemy Combatants, 37 RUTGERS L.J. 39, 69 (2005); Sholar, supra note 21, at 670—71.

As the writ has developed in America, it is used in two typical scenarios. First, the writ is routinely used by convicted criminals to prosecute collateral challenges to the propriety of their incarceration. See Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 1290—1324 (5th ed. 2003); DUKER, supra note 18, at 181—211. This article is unconcerned with this type of habeas corpus, as it has no bearing on whether GITMO detainees are constitutionally entitled to challenge the basis for their detention. Instead, this article focuses on the second use of the writ: a tool to challenge unauthorized executive detention. See Part II.A.

32. U.S. CONST. art. I, § 9, cl. 2.
34. U.S. CONST. art. I, § 9, cl. 2.
35. Sholar, supra note 21, at 687—88.
specifically mentioned in the Constitution and has been described as "a central tenet of American democracy." In Rasul v. Bush, the Court noted that habeas corpus is "a writ antecedent to statute, throwing its root deep into the genius of our common law." It has been described as "the symbol and guardian of individual liberty." Its "primary purpose . . . [is] to rein in the power of the Executive."

The writ is a creature of statute as well. Prior to the enactment of the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006, federal district courts could hear applications for habeas corpus by anyone claiming to be held "in custody in violation of the Constitution or laws or treaties of the United States." As the Supreme Court explained, "Section 14 of the Judiciary Act of 1789 authorized federal courts to issue the writ of habeas corpus to prisoners who are 'in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same.'" The Detainee Treatment Act of 2005 and Military Commissions Act of 2006 expressly deprive those detained at GITMO from filing applications for habeas corpus with federal courts.

39. Id. at 473 (quoting Williams v. Kaiser, 323 U.S. 471, 484 n.2 (1945)) (internal quotation marks and ellipses omitted).
40. DUKER, supra note 18, at 7 (quoting Peyton v. Rowe, 391 U.S. 54, 58 (1968)).
41. Sholar, supra note 21, at 673; see INS v. St. Cyr, 533 U.S. 289, 301 (2001) ("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."); Brown v. Allen, 344 U.S. 443, 533 (1953) (Jackson, J., concurring); DUKER, supra note 18, at 4 ("By the writ of habeas corpus, the High Court . . . at the insistence of the subject aggrieved, commanded the production of that subject, and inquired into the cause of his imprisonment. If there were no legal justification for the detention, the party was ordered released.") (citations omitted).
42. See infra Part II.B.2.c.
43. See infra Part II.B.2.e.
44. 28 U.S.C. § 2241 (c) (3) (2006).
45. Rasul v. Bush, 542 U.S. 466, 473 (2004) (quoting the Judiciary Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82). In 1867, Congress extended access to the writ to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.
Habeas corpus has a powerful history of acting as a check on executive power. It is no surprise that the GITMO detainees attempted to use it to challenge their indefinite detention by the government. The primary issue determining whether the GITMO detainees are entitled to challenge their detention after the passage of the Detainee Treatment Act of 2005 and Military Commissions Act of 2006 is whether the detainees have a constitutional right to do so. The government relies on Johnson v. Eisentrager, discussed below, to argue that they do not.

B. Johnson v. Eisentrager’s Role in the GITMO Detainee Litigation and Congressional Attempts to Limit Habeas Corpus

Johnson v. Eisentrager is the primary tool used by the government to argue that detainees have no constitutional habeas corpus rights. Eisentrager and subsequent Supreme Court cases, as well as Congress’s response to the Supreme Court, provide the framework on the issue of whether GITMO detainees have a constitutional right at stake.

1. Johnson v. Eisentrager

In Eisentrager, the Supreme Court ruled that German citizens, characterized by the Court as “alien enem[ies] engaged in the hostile service of a government at war with the United States,” did not have a constitutional right to challenge their convictions via habeas corpus. Federal courts lacked statutory jurisdiction under Ahrens v. Clark because the petitioners were not within the territorial jurisdiction of the district court.

46. See infra Part II.B.2.c; II.B.2.e.
47. See infra Part II.B.2.
48. See infra Part III.A.1.
49. See infra Part II.B.1.
51. Id. at 785.
52. Id. at 790–91.
54. Eisentrager, 339 U.S. at 767 (citing Ahrens v. Clark, 335 U.S. 188 (1948), abrogated by Braden v. 30th Judicial Cir. Ct. of Ky., 410 U.S. 484 (1973)). Federal courts initially had statutory jurisdiction in the GITMO detainee litigation because Braden eliminated Ahrens’ jurisdictional requirement that a prisoner be within the territorial jurisdiction of the district court. See infra notes 66–67 and accompany-
The D.C. Circuit had ruled that despite the absence of statutory jurisdiction, the petitioners were constitutionally entitled to challenge their detention. The court held that "any person, including an enemy alien, deprived of his liberty anywhere under any purported authority of the United States is entitled to the writ if he can show that extension to his cases of any constitutional rights or limitations would show his imprisonment illegal."\(^{55}\) To reach this conclusion, the D.C. Circuit relied on the inherent judicial power of U.S. courts, arguing that the Constitution required that there be a court with jurisdiction to hear the petitioners' claims.\(^{56}\)

The Supreme Court reversed the D.C. Circuit. After assuming that there was no statutory jurisdiction for the writ, the Court ruled that the petitioners were not constitutionally entitled to petition for a writ of habeas corpus in the absence of statutory jurisdiction because they were alien enemies. The Court began its opinion by stating:

We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.\(^{57}\)

The Court in *Eisentrager* articulated a sliding scale test to determine whether those detained outside the United States have constitutional rights. Under the test, aliens' rights increase with their degree of connection to the United States.\(^{58}\) According to this scale, an alien lawfully present in the United States receives significant constitutional protection\(^{59}\) and cannot be detained or deported without a "full and fair hearing."\(^{60}\) During a time of war,
however, citizens of countries that are at war with the United States, or "enemy aliens," were historically subject to summary arrest and deportation. Additionally, during a time of war, a resident enemy alien's right to litigation is limited if the exercise of that right would hinder the war effort or assist the opposing country. The Eisentrager Court did not state that during a time of war enemy aliens were subject to indefinite detention, without access to any means to determine the propriety of their detention.

The Eisentrager Court's argument for denying the petitioners a constitutional right to habeas is that a resident enemy alien's rights are diminished during a time of war and, therefore, an enemy alien who lacks presence or property within the United States certainly does not have the right to bring litigation in U.S. courts. Ultimately, the Court held that no right to habeas corpus exists when the prisoner:

(a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

Because Eisentrager held that enemy combatants detained in Germany were not constitutionally entitled to the protections of habeas corpus, Eisentrager is one of the main barriers to the GITMO detainees' attempts to argue that they are entitled to such protection. In Part III, this note argues that Eisentrager does not support denying a constitutional right to habeas to the GITMO detainees because according to Eisentrager's sliding scale of rights for aliens, the GITMO detainees possess the constitutional right to habeas relief.

2. The GITMO Detainee Litigation and Congressional Action

The Supreme Court and Congress have gone back and forth on how exactly to treat the GITMO detainees. In Rasul v. Bush and

61. Id. at 771–72, 775.
62. Id. at 776 (citing Ex parte Kawato, 317 U.S. 69 (1942)).
63. Id. at 777 (citing Ex parte Colonna, 314 U.S. 510 (1942); Masterson v. Howard, 85 U.S. (18 Wall.) 99, 105 (1873); Caperton v. Bowyer, 81 U.S. (14 Wall.) 216, 236 (1871)).
64. Id. (emphasis added).
Hamdi v. Rumsfeld, the Court refused to allow the government to detain alleged enemy combatants indefinitely without process, and Congress responded by enacting the Detainee Treatment Act of 2005. Then, Hamdan v. Rumsfeld assessed the propriety of trying a GITMO detainee by military commission and the effect of the Detainee Treatment Act on the GITMO detainees' ability to file writs of habeas corpus. The Military Commissions Act of 2006 was enacted after Hamdan and stripped federal courts of jurisdiction to hear habeas petitions brought by GITMO detainees. Finally, Boumediene v. Bush challenges the constitutionality of that action.

a. Rasul v. Bush

In Rasul, the first GITMO detainee case to reach the Supreme Court, the Court addressed whether federal courts had statutory jurisdiction over writs of habeas corpus filed by the GITMO detainees to challenge the legality of their detention.65 The detainees claimed that their indefinite detention at GITMO was illegal because they never engaged in terrorist activity or took up arms against the United States.66 The Court ruled that according to the then-current habeas corpus jurisdictional statute, federal courts had jurisdiction over the GITMO detainees' petitions for habeas corpus.67 Because it found statutory jurisdiction, the Court did not determine whether the GITMO detainees have a constitutional right to challenge their detention via writs of habeas corpus.68

The Court first explained that Eisentrager did not bar the exercise of jurisdiction over the GITMO detainees' claims because the Court had jurisdiction according to the habeas jurisdictional statute.69 After explaining how Eisentrager was not implicated, the Court provided a number of insightful comments that suggest that the Court was attuned to the separation-of-powers concerns raised by not allowing the petitioners to challenge the legality of their detention.70 Additionally, the Court explained in dicta how it would resolve whether the GITMO detainees had a constitutional right to challenge their detention via habeas corpus.71

66. Id. at 471-72.
67. Id. at 485.
68. Id. at 476.
69. See id. at 479.
70. Id. at 480-84.
71. Id.
The Court provided a number of comments that are probative on the issue of whether the GITMO detainees enjoy the constitutional right to habeas corpus. It noted that according to common law, "even if a territory was 'no part of the realm,' there was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown.'" Furthermore, "[l]ater cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.'"

The Court also hinted that *Eisentrager* would not have controlled its determination of whether the GITMO detainees were constitutionally entitled to habeas corpus, even if there was no statutory basis for habeas jurisdiction, because of the key distinctions between the GITMO detainees and the *Eisentrager* petitioners. These distinctions included the fact that the GITMO detainees are not nationals of countries at war with the United States, and that the GITMO detainees have not been determined to be enemy combatants by any independent tribunal.

The Court gave another strong hint that *Eisentrager* would not have barred federal court jurisdiction over the GITMO detainees' habeas claims, even in the absence of statutory jurisdiction, when it stated "nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the 'privilege of litigation' in U.S. courts."

Justice Kennedy's concurrence in *Rasul* is also instructive. He suggests that *Eisentrager* is really a separation-of-powers case and should be applied to the GITMO detainees, but that it does not bar federal court jurisdiction over the GITMO detainees. Instead, Justice Kennedy explained that *Eisentrager* merely "indicates that there is a realm of political authority over military affairs where the judicial power may not enter." Kennedy suggests that *Eisentrager* sets up a framework that requires courts to determine whether the habeas petitions of those in military custody intrude upon the realm

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72. *Id.* at 482 (citing King v. Cowle, 2 Burr. 834, 854–55, 97 Eng. Rep. 587, 598–99 (K.B.)).
73. *Id.* (citing *Ex parte* Mwenya, [1960] 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M. R.)).
74. *Id.* at 476.
75. *Id.*
76. *Id.* at 484.
77. *Id.* at 487 (Kennedy, J., concurring).
of exclusive executive power by examining the facts underlying the detention.\textsuperscript{78} Kennedy conducted this analysis of the status of the GITMO detainees and concluded that jurisdiction over the GITMO detainees' habeas petitions was proper because GITMO was "in every practical respect a United States territory . . . far removed from any hostilities."\textsuperscript{79}

Justice Kennedy then examines the separation-of-powers ramifications of denying the GITMO detainees the writ to challenge their detention, and reasoned that under \textit{Eisentrager}'s framework, jurisdiction is proper. Justice Kennedy reasoned that, "\textit{In}definite detention without trial or other proceeding presents altogether different considerations [than those present in \textit{Eisentrager}]. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus."\textsuperscript{80}

\textit{Rasul} begins the GITMO detainees' attempt to challenge their detention with a victory for the detainees. The Court found statutory jurisdiction and set the framework for arguing that the GITMO detainees had a constitutional right to habeas relief despite \textit{Eisentrager}.

\textbf{b. Hamdi v. Rumsfeld}

In \textit{Hamdi}, the Court considered what process was owed an American citizen who challenged his designation as an enemy combatant.\textsuperscript{81} Hamdi, as an American citizen was not subject to \textit{Eisentrager}'s barrier and accordingly, the Court again did not directly address whether the GITMO detainees are constitutionally entitled to the writ of habeas corpus. A plurality of the Court did significantly limit the scope of review available on habeas corpus for American citizens, holding that as long as a detainee has notice and an opportunity to be heard before a neutral decision maker, the review traditionally available on habeas might be delegated to a military tribunal.

Yaser Hamdi, an American citizen, was captured in Afghanistan after he allegedly took up arms against the United States and fought with the Taliban in the months after al Qaeda's terrorist at-

\textsuperscript{78} See id.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 488.
\textsuperscript{81} 542 U.S. 507 (2004).
tack against the United States on September 11, 2001.\textsuperscript{82} Hamdi was initially detained at GITMO for three months, but when the government learned Hamdi was an American citizen, it transferred him to military custody within the United States.\textsuperscript{83} A writ of habeas corpus was filed on Hamdi's behalf, claiming that he was not an enemy combatant and challenging his indefinite detention without access to counsel.\textsuperscript{84}

The government argued that it was entitled to detain Hamdi indefinitely because it had classified him as an enemy combatant.\textsuperscript{85} The only justification offered by the government for its conclusion that Hamdi was an enemy combatant was an affidavit based on hearsay that stated that this designation was "'[b]ased upon his interviews and in light of his association with the Taliban.'"\textsuperscript{86} The district court held that this affidavit "fell far short" of justifying Hamdi's detention and ordered the government to produce more evidence.\textsuperscript{87} The Fourth Circuit reversed the district court's ruling, reasoning that the affidavit was sufficient because "separation of powers principles prohibited a federal court from 'delv[ing] further into Hamdi's status and capture.'"\textsuperscript{88} The Fourth Circuit also held that if congressional authorization was required for Hamdi's detention, the Authorization for Use of Military Force\textsuperscript{89} (AUMF) provided sufficient justification.\textsuperscript{90}

A majority of the Supreme Court agreed that Hamdi's detention was authorized, but there was no majority opinion of the Court.\textsuperscript{91} Justice O'Connor, joined by Justices Rehnquist, Kennedy,
and Bryer, wrote for a plurality of the Court. The plurality concluded that the detention of American citizens who actually took up arms against the United States as enemy combatants was specifically authorized by the AUMF, as it was "so fundamental and accepted an incident to war" as to be part of the "necessary and appropriate force" authorized by the AUMF.

The plurality then addressed what process is constitutionally due a citizen detained as an enemy combatant who challenges his enemy combatant designation. The government contended that, because of the "extraordinary constitutional interests at stake," a factual review of the propriety of Hamdi’s detention was unwarranted. To determine what process is constitutionally due, the plurality applied the *Matthews v. Eldridge* test, which weighs "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.”

After conducting the *Matthews* balancing, the plurality held that Hamdi was entitled to notice of the factual basis of his enemy combatant designation and the ability to challenge this designation before a neutral decision maker. To relieve the government of the burden of providing such a hearing during wartime, several reductions in the ordinary level of process were found appropriate, including the acceptance of hearsay evidence and a rebuttable presumption in favor of the government, and a properly constituted military tribunal.

The plurality rejected the government’s argument that separation-of-powers concerns required courts to essentially “butt-out” of military affairs by making clear that the deference to the Executive traditionally shown during wartime does not mean the Executive
It held that "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." 102

Justice Souter, joined by Justice Ginsberg, concurred with the plurality opinion in part, dissented in part, and concurred in the judgment. 103 Justice Souter argued that a citizen's detention was not authorized by the AUMF in this circumstance and that Hamdi should therefore be released. 104 Justice Souter first argued that clear congressional authority was required to detain a citizen as an enemy combatant because of the Non-Detention Act, 105 which states in no uncertain terms, "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 106 Justice Souter then examined the language of the AUMF and the historical propriety of detaining citizens as enemy combatants and concluded that the AUMF was insufficiently clear to authorize Hamdi's detention under the Non-Detention Act. 107 Justice Souter stated that even without the explicit congressional authorization, which he believed was required for the detention of a citizen as an enemy combatant, such detention was constitutionally permitted for a short time during a genuine emergency. 108

Despite Justice Souter's disagreement with the plurality's conclusion that the AUMF authorized the detention of a citizen as an enemy combatant, he joined the judgment of the plurality because he understood the importance of issuing an opinion by the Court that would give Hamdi the benefit of notice and an opportunity to

101. See Hamdi, 542 U.S. at 536.
102. Id. (citing Mistretta v. United States, 488 U.S. 361, 380 (1989)).
103. Id. at 539 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).
104. Id. at 541.
106. Id. § 4001(a).
108. Id. at 552. Justice Souter cited Ex parte Milligan, 71 U.S. (4 Wall.) 2, 127 (1866), which considered the propriety of trying citizens by military commission for allegedly treasonous activity during the end of the Civil War, for the possibility that an emergency may lead the detention of citizens by the military for a short period of time. Based on Milligan, Justice Souter concluded that it was not proper in this case because civilian courts are open. Hamdi, 542 U.S. at 552 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).
Justice Scalia dissented. He argued that absent suspension of the writ of habeas corpus, the government could not detain a citizen indefinitely without charge. According to Justice Scalia, the government’s claim of military exigency was not sufficient to justify indefinite detention without charge unless Congress suspends the writ of habeas corpus. Justice Scalia argued “[w]here the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime.” Justice Scalia’s view is based in his understanding of the role of the writ of habeas corpus in the separation-of-powers framework. As Justice Scalia explains, the writ of habeas corpus’ traditional use was to ensure “freedom from indefinite imprisonment at the will of the Executive” and as such was a core function of the courts in the constitutional system of separated powers.

Justice Scalia took specific issue with the plurality’s characterization of the indefinite detention of citizens as enemy combatants as being a common practice of war and therefore authorized by the AUMF. Justice Scalia argued, instead, that this was an accurate description of the fate of resident alien enemy combatants, but was not the traditional fate of citizens accused of treason. Justice

109. *Hamdi*, 542 U.S. at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) ("[I]n joining with the plurality to produce a judgment, I do not adopt the plurality’s resolution of constitutional issues that I would not reach. It is not that I could disagree with the plurality’s determinations (given the plurality’s view of the Force Resolution) that someone in Hamdi’s position is entitled at a minimum to notice of the Government’s claimed factual basis for holding him, and to a fair chance to rebut it before a neutral decisionmaker; 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.") (citations omitted)).

110. Justice Thomas also dissented. Justice Thomas went further afield than the other members of the Court. He reasoned that Hamdi’s indefinite detention was an appropriate exercise of the government’s war power. Accordingly, no judicial oversight of Hamdi’s detention was constitutionally proper. *See id.* at 579–99 (Thomas, J., dissenting). This conclusion seems untenable.

111. *See id.* at 554 (Scalia, J., dissenting).

112. *Id.*

113. *Id.*

114. *See id.* at 554–55. *See also supra* Part II.A.


116. *Id.* at 558–59.
Scalia argues that non-citizen enemy combatants (who were not charged with war crimes) were traditionally detained until the end of hostilities. This is consistent with the sliding scale of rights articulated in *Eisentrager*, but noticeably says nothing about the propriety of indefinitely detaining aliens who contest their enemy combatant status. Justice Scalia's position is reconcilable with the idea that the GITMO detainees have constitutional rights, especially because they have not received process to determine whether they are actually enemy combatants. Furthermore, the facts of the GITMO detainees' detention point towards the availability of habeas relief.

c. The Detainee Treatment Act of 2005

After the Court's decisions in *Rasul* and *Hamdi*, Congress enacted the Detainee Treatment Act of 2005 (DTA). The DTA purports to set up a framework for handling the detention of enemy combatants at GITMO consistent with the procedures the government believed were required after *Hamdi*. While trying to respond to *Hamdi*, Congress went too far, as the DTA unconstitutionally strips federal courts of jurisdiction over the habeas petitions brought by the GITMO detainees, in violation of the Suspension Clause.

Before stripping federal courts of jurisdiction, the DTA established several procedural protections for the GITMO detainees. Section 1002 of the DTA sets forth standards for interrogating detainees, while section 1003 prohibits cruel, inhuman, or degrading treatment of the GITMO detainees. The most important portion of the DTA is the provision that sets out the framework for reviewing the status of GITMO detainees. Section 1005 of the DTA provides an administrative procedure for determining the enemy combatant status of detainees. It requires the Secretary of Defense to give annual reports to Congress on the number of detain-

117. See infra Part II.B.2.e.
118. *Hamdi*, 542 U.S. at 558-59 (Scalia, J., dissenting).
119. See supra notes 58-62 and accompanying text.
120. See supra notes 77-79 and accompanying text.
122. Id. § 1002, 119 Stat. at 2739.
123. Id. § 1003, 119 Stat. at 2739-40.
124. Id. § 1005, 119 Stat. at 2740-44.
ees whose status was reviewed and the procedures for the review. 125

The DTA limits judicial review for all GITMO detainees by stating in section 1005(e)(1) that except as provided in the DTA, "no court, justice, or judge shall have jurisdiction to hear or consider...an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." 126 The DTA provides for limited review of the administrative determination in the D.C. Circuit, but this review is only available to detainees who have been determined by the administrative process to be enemy combatants. 127 The scope of this review is also limited to whether the administrative determination is consistent with the DTA's procedures and whether those procedures are consistent with the laws and Constitution of the United States "to the extent applicable." 128

As discussed in Part III, the DTA violates the Constitution. For all intents and purposes, the DTA removes the availability of habeas corpus, without providing a way for detainees to challenge the propriety of their detention until after the administrative process has run its course. Perhaps this would be acceptable if the DTA required that the administrative process take place within a certain period of time, but it does not. Essentially, it allows the government to hold an alleged enemy combatant, without allowing that enemy combatant to challenge the propriety of the detention until the government is ready to initiate the administrative process. This violates the Suspension Clause because the GITMO detainees are constitutionally entitled to challenge the basis for their detention. 129

d. Hamdan v. Rumsfeld

Unsurprisingly, the DTA's stripping of habeas jurisdiction was challenged almost immediately. In Hamdan, the Court addressed the propriety of trying detainees by military commission. 130 By ruling that Hamdan was not subject to trial by military commission, the Court significantly lessened the deference it had shown to the government in Hamdi. Additionally, the Court set forth important

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125. Id. § 1005(d), 119 Stat. at 2741.
126. Id. § 1005(e)(1), 119 Stat. at 2742.
127. Id. § 1005(e)(2), 119 Stat. at 2742–43.
128. Id. § 1005(e)(2)(C), 119 Stat. at 2742.
129. See infra Part III.
principles determining when the use of military commissions is appropriate.

Hamdan, a GITMO detainee charged with conspiracy to commit offenses triable by military commission, challenged the government's contention that he was subject to trial by military commission. The D.C. Circuit rejected Hamdan's contention that he was not subject to trial by military commission and denied his petition for a writ of habeas corpus. The Supreme Court reversed the D.C. Circuit because the Court held that the military commission convened to try Hamdan violated the procedures of the Uniform Code of Military Justice (UCMJ). Additionally, a plurality of the Court held that Hamdan was not charged with an offense triable by military commission.

Hamdan's primary importance to this article is its discussion of the applicability of the DTA to Hamdan's habeas petition. After the Court granted certiorari from the D.C. Circuit's dismissal of Hamdan's habeas petition, Congress enacted the DTA. The government argued that the jurisdiction-stripping provisions contained in section 1005(e) of the DTA stripped the Court of jurisdiction over Hamdan's habeas petition. Justice Stevens, writing for the majority of the Court, rejected the government's argument because according to ordinary principles of statutory construction, the DTA did not strip the Court's jurisdiction for cases pending at the time the DTA was enacted. Accordingly, the Court could exercise statutory jurisdiction.

The Court then moved on to address whether Hamdan was subject to trial by military commission. The government argued that its authority to try Hamdan by military commission stemmed from an Executive order issued November 13, 2001. President Bush proclaimed that individuals covered by the order "shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties

131. Id. at 2759–60.
132. Id. at 2759.
134. Id. at 2759–60.
135. Id. at 2762–69.
136. Id. at 2764–69. The Court relied on a contextual reading of the language of the DTA to conclude that Congress had not intended the DTA to apply to pending cases. Id. at 2765–66.
provided under applicable law, including imprisonment or death.” 137 The order covers “noncitizen[s] for whom the President determines ‘there is reason to believe’ that he or she (1) ‘is or was’ a member of al Qaeda or (2) has engaged or participated in terrorist activities aimed at or harmful to the United States.” 138 President Bush declared Hamdan subject to trial by military commission on July 3, 2003. 139 Hamdan was charged with conspiracy to commit offenses triable by military commission, such as “attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism.” 140

Again the Court fractured. A plurality of the Court determined that Hamdan had not been charged with an offense triable by military commission 141 and a majority of the Court held that the commission did not have authority to try Hamdan because the structure and procedure of the military commission violated the UCMJ. 142

The Court ruled that the DTA, the AUMF, and the UCMJ “at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the ‘Constitution and laws,’ including the law of war.” 143 Because the commission convened to try Hamdan was not specifically authorized by Congress, the plurality had to determine whether the commission was justified. The plurality noted that military commissions were traditionally used in three scenarios. 144 First, when martial law is declared, military commissions substitute for civilian courts. 145 Second, military commissions are used “as part of a temporary military

137. Id. at 2760 (quoting Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter Detention Order]).
139. Id.
140. Id. at 2761 (internal quotation omitted).
141. Id. at 2759–60.
142. Id.
143. Id. at 2775 (majority opinion).
144. Id. (plurality opinion) (citing WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831–46 (Igor I. Kavass & Adolf Sprudzs eds., William S. Hein & Co., Inc. 1979) (1920)).
145. Id. The plurality noted that in Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866), the Court summarized the limitations on this use of military commissions as “if this [military] government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.” Hamdan, 126 S. Ct. at 2776 n.25 (quoting Milligan, 71 U.S. (4 Wall.) at 127).
government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function. Third and most pertinent to this note, military commissions are “convened as an ‘incident to the conduct of war’ when there is a need ‘to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war . . . .'” The plurality noted that this type of commission was very different from the other two and that “its role is primarily a factfinding one—to determine, typically on the battlefield itself, whether the defendant has violated the law of war.” This was the type of commission convened to try Hamdan, because martial law had not been declared and Hamdan was not being held in enemy territory.

The plurality noted the common law limitations on the third type of military commission, convened as an incident to war. First, the military commission only has jurisdiction over offenses committed in the theater of war. Second, the military commission may not try offenses committed before or after the war, only those committed during the war. Third, the military commission may only try “[i]ndividuals of the enemy’s army who have been guilty of illegitimate warfare or other offences [sic] in violation of the laws of war’ and members of one’s own army ‘who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war.’” Fourth and finally, the military commission may only try “[v]iolations of the laws and usages of war” cognizable by military tribunal and certain breaches of military orders and regulations.

The plurality then argued that the charges against Hamdan

146. Hamdan, 126 S. Ct. at 2776 (quoting Duncan v. Kahanamoku, 327 U.S. 304, 314 (1946)). The plurality noted that this type of commission must be “tailored to the tribunals’ purpose and the exigencies that necessitate their use. They may be employed ‘pending the establishment of civil government,’” which may in some cases “extend beyond the ‘cessation of hostilities.’” Id. at 2776 n.26 (citing Madsen v. Kinsella, 343 U.S. 341, 348, 354–55 (1952)).
147. Id. (citing Ex parte Quirin, 317 U.S. 1, 28–29 (1942)).
148. Id. (citing John M. Bickers, Military Commissions are Constitutionally Sound: A Response to Professors Katyal and Tribe, 34 TEX. TECH L. REV. 899, 902 (2003)).
149. Id. at 2777.
150. Id.
151. Id. (quoting WINTHROP, supra note 144, at 836).
152. Id. (quoting WINTHROP, supra note 144, at 837).
153. Id. (quoting WINTHROP, supra note 144, at 838).
154. Id. (quoting WINTHROP, supra note 144, at 839).
did not satisfy the above requirements for numerous reasons, including the fact that the events upon which the charge of conspiracy were based occurred before September 11, 2001, and that none of the events occurred in the theater of war.\textsuperscript{155} The larger problem the plurality identified with trying Hamdan by military commission was that conspiracy was not a violation of the laws of war and therefore was not triable by this third type of military commission.\textsuperscript{156}

A majority of the Court reversed the D.C. Circuit because it held that the procedures the government had established for the military commission violated the UCMJ.\textsuperscript{157} The Court arrived at this conclusion due to unexplained variances between the procedures set forth to try Hamdan and the procedures set forth in the UCMJ.\textsuperscript{158}

Justice Kennedy joined the majority's judgment that the military commission established to try Hamdan lacked the power to proceed because it violated the procedures set forth the UCMJ and explained several key separation-of-powers problems with trial by military commission.\textsuperscript{159} Justice Kennedy noted that "[t]rial by military commission raises separation-of-powers concerns of the highest order. Located within a single branch, these courts carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review."\textsuperscript{160} Because these courts are located within a single branch, they concentrate power and "[c]oncentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid."\textsuperscript{161}

The end result of the Court's decision in Hamdan is that the DTA did not apply to cases pending at the time of its enactment. Accordingly, federal courts retained statutory jurisdiction over habeas petitions pending prior to the DTA's enactment. Additionally, the Court became increasingly sensitive to the government's infringement upon the traditional role of the courts. The Court still

\textsuperscript{155} Id. at 2777-78.
\textsuperscript{156} Id. at 2779. Although the plurality's position that Hamdan was not accused of an offense triable by military commission did not command a majority of the Court, it is worth noting because it lends strength to the argument that using military procedures alone is not appropriate. See infra Part III.
\textsuperscript{157} Hamdan, 126 S. Ct. at 2786 (majority opinion).
\textsuperscript{158} Id. at 2793.
\textsuperscript{159} Id. at 2799-2804 (Kennedy, J., concurring).
\textsuperscript{160} Id. at 2800.
\textsuperscript{161} Id.
did not delve into the issue of primary concern to this article, whether the GITMO detainees have a constitutional right to the protections of habeas corpus in the absence of statutory authorization. However, by ruling that Hamdan was not subject to trial by military commission, the Court provided a strong hint that it was becoming less and less willing to defer completely to the government's assertion of executive power to detain individuals indefinitely.

e. The Military Commissions Act of 2006

As Hamdan ruled the jurisdiction stripping provisions of the DTA inapplicable to pending cases, it is not surprising that Congress attempted to cure this defect. Congress's answer to Hamdan was the Military Commissions Act of 2006 (MCA). In the MCA, Congress completely stripped all courts of jurisdiction over all pending or future habeas petitions brought by, or on behalf of, GITMO detainees. As the D.C. Circuit noted in Boumediene v. Bush, with the MCA, Congress was saying "When we say all [habeas petitions], we mean all—without exception!"

In Congress's effort to be extraordinarily clear that it intended to strip courts of jurisdiction, section 7(a) of the MCA states 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 United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Section 7(b) of the MCA specifically provides that section 7(a) of the MCA:

shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the

164. Id. at 987 (internal quotation and emphasis omitted).
165. Military Commissions Act § 7(b), 120 Stat. at 2636.
INDEFINITE DETENTION

United States since September 11, 2001.166

The practical effect of these two provisions is "to permanently
deny aliens the right to challenge before an independent legal
body the reasons, if any, for their imprisonment." 167 As there can
be no realistic argument that the MCA does not apply to the
GITMO detainees' habeas petitions, the stage is set for the Court's
resolution of whether the GITMO detainees have a constitutional
right to challenge their detention, absent statutory authorization.

f. Boumediene v. Bush

Now that the Court has granted certiorari in Boumediene v. Bush,168
the question discussed by this article is squarely before the
Court. What follows is an explanation of the D.C. Circuit's opinion
and the stage it sets for the Court's resolution of whether GITMO
detainees are constitutionally entitled to the protections of habeas
corpus.

In Boumediene, numerous non-citizen GITMO detainees peti-
tioned for habeas relief.169 After the passage of the MCA, the D.C.
Circuit held first that the MCA applied to the habeas petitions be-
fore it and second that the MCA's stripping of habeas jurisdiction
did not constitute an unconstitutional suspension of habeas cor-
170
pUS.

On the question of whether the MCA applied to the petition-
ers' habeas petitions, the court effectively dismissed out of hand
any argument that the MCA did not apply to pending cases. 171 The
court held that section 7(b) of the MCA was clear and that it ap-
plied to the detainees' habeas petitions.172

This brought the court to the constitutional issue, whether the
MCA violates the Suspension Clause. In answering this question,

166. Id. § 7(b), 120 Stat. at 2636.
167. Michael, supra note 37, at 479.
169. Boumediene, 476 F.3d at 984.
170. Id. at 986, 992.
171. Id. at 986–88. In fact, the court noted that Congress could not have been
clearer that it intended to strip jurisdiction completely. Id. at 987 ("Section 7(b)
could not be clearer. It states that 'the amendment made by subsection (a)'—
which repeals habeas jurisdiction—applies to 'all cases, without exception' relating
to any aspect of detention. It is almost as if the proponents of these words were
slamming their fists on the table shouting 'When we say "all," we mean all-without
120 Stat. 2600, 263)).
172. Boumediene, 476 F.3d at 988.
the court traced the protection afforded the writ by the Constitution\textsuperscript{173} and framed the issue in terms of whether, prior to 1789, the writ would have been available to aliens outside the sovereign territory of the United States.\textsuperscript{174} The court answered this question in the negative based on its review of the common law and its interpretation of Eisentrager as a complete bar to jurisdiction.\textsuperscript{175} The court concluded that no case holds, and no treatise suggests, that aliens detained outside the sovereign territory had a right to habeas relief.\textsuperscript{176}

The D.C. Circuit's conclusion appears to be at odds with the Supreme Court's dictum in \textit{Rasul} that its extension of statutory habeas to the GITMO detainees was consistent with the common law availability of habeas corpus.\textsuperscript{177} The D.C. Circuit distinguished the cases relied upon by \textit{Rasul}, by arguing that "[n]ot one of the cases mentioned in \textit{Rasul} held that an alien captured abroad and detained outside the United States—or in 'territory over which the United States exercises exclusive jurisdiction and control,'—had a common law or constitutionally protected right to the writ of habeas corpus."\textsuperscript{178} Essentially, the D.C. Circuit went against Supreme Court dicta by saying that the Court was wrong.

Yet, in its analysis, the D.C. Circuit may have inadvertently hinted at the reason that habeas may not have been available to aliens outside sovereign territory in 1789, and additionally one of the reasons it should presently be available. Due to the second Habeas Corpus Act of 1679,\textsuperscript{179} which required the production of the prisoner within twenty days after receipt of the writ if the prisoner was detained more than one hundred miles from the court, application of the writ beyond the sovereign territory of the crown would have made compliance with the Habeas Corpus Act impossi-
ble. This difficulty is no longer present, as modern technology easily allows the production of the prisoner.

The D.C. Circuit's resolution of the constitutional issue is open to attack in the Supreme Court on two main grounds. First, that GITMO is under the exclusive jurisdiction and control of the United States and accordingly should be treated as part of the sovereign territory of the United States. This is the attack focused upon by the Boumediene petitioners in their brief to the Supreme Court. If successful, the Boumediene petitioners would be constitutionally entitled to habeas corpus because they would not be outside the sovereign territory of the United States. Therefore, the GITMO detainees would gain the right to habeas corpus because of the sliding scale of rights afforded aliens articulated by Eisentrager.

The second attack on the D.C. Circuit's resolution of the constitutional issue is addressed in Part III of this article. Essentially, the argument is that the Suspension Clause requires Congress to confer jurisdiction to hear the GITMO detainees' habeas petitions because the GITMO detainees are markedly different from the Eisentrager petitioners and accordingly possess habeas rights according to Eisentrager's sliding scale.

It should also be noted that even if the GITMO detainees are constitutionally entitled to the writ, the government has argued that courts still lack jurisdiction because the Combatant Status Review Tribunals (CSRT) established by the MCA provide an adequate alternative to habeas review. A full treatment of this argument is outside the scope of this note, which focuses solely on whether the GITMO detainees are constitutionally entitled to the writ in the first place.

180. Boumediene, 476 F.3d at 990.
183. See supra notes 58–62 and accompanying text.
185. However, it should be noted that Judge Rogers and a growing number of commentators have concluded that the CSRTs are not an adequate alternative to habeas review. Boumediene v. Bush, 476 F.3d 981, 1004–07 (D.C. Cir. 2007) (Rogers, J., dissenting); see also Janet Cooper Alexander, Jurisdiction-Stripping in a Time of Terror, 95 CAL. L. REV. 1193, 1201, 1231 (2007); Fiona de Londras, The Right to Challenge the Lawfulness of Detention: An International Perspective on U.S. Detention of Suspected Terrorists, 12 J. CONFLICT & SECURITY L. 223, 227 (2007); Christopher J. Schatz & Noah A. F. Horst, Will Justice Delayed Be Justice Denied? Crisis Jurisprudence,
III. ANALYSIS: THE GITMO DETAINEES POSSESS THE RIGHT TO HABEAS CORPUS, BUT SEPARATION-OF-POWERS PRINCIPLES REQUIRE THAT THE GITMO DETAINEES' HABEAS RIGHTS BE LIMITED

This part sets forth the argument that the GITMO detainees have the right to habeas corpus according to Eisentrager's sliding scale of rights for aliens and that the government's attempt to curtail that right via the MCA violates the Suspension Clause. It does so without addressing the argument advanced by the petitioners in Boumediene that GITMO should be treated as part of the United States. The analysis balances the separation-of-powers principles in play and, after concluding that the traditional deference shown the Executive during a time of war justifies a minor limitation on the GITMO detainees' habeas rights, sets out the proper scope of these rights.

A. Under Eisentrager's Sliding Scale of Rights for Aliens, the GITMO Detainees Have a Constitutional Right to the Protections of Habeas Corpus

1. Access to the Writ of Habeas Corpus is a Constitutional Right

In accord with the important stature the writ of habeas corpus has achieved, many argue that the Suspension Clause requires Congress to confer habeas jurisdiction upon the judiciary. The plain language of the Suspension Clause supports the proposition that Congress is required to confer habeas jurisdiction on the judiciary, absent an express suspension of habeas corpus as provided in the Constitution. If Congress was not required to confer habeas jurisdiction on the judiciary, the Suspension Clause would not be


186. See supra notes 182–183 and accompanying text.

187. See, e.g., Halliday & White, supra note 33, at 107–08 (“The power granted to the Supreme Court must include more than simply the power to issue writs of habeas corpus ad testificandum, because otherwise the proviso would, in effect, be taking away a power and giving it back in the same breath.”); Shapiro, supra note 36, at 61–65 (arguing that the “broader view—that the writ is in fact guaranteed by implication in the Suspension clause” is the most appropriate and plausible interpretation); Ekeland, supra note 19, at 1513–19 (arguing that the writ of habeas is constitutionally guaranteed).

188. U.S. CONST. art. I, § 9, cl. 2, states “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”
necessary. Accordingly, Congress must confer jurisdiction to hear writs of habeas corpus unless the Suspension Clause’s requirements are met. The failure to do so violates the Suspension Clause.

Not all agree that the Suspension Clause requires Congress to enact a statute conferring jurisdiction on the courts. Some argue that the Suspension Clause was intended only to stop Congress from infringing upon the ability of state courts to inquire into the detention of federal prisoners. This argument is relatively weak since *Tarble’s Case* held that state courts could not exercise jurisdiction over habeas petitions of those in federal custody.

Furthermore, commentators and the Supreme Court have confirmed that if Congress withholds jurisdiction or fails to confer jurisdiction in the first place, Congress has suspended the writ. In *Ex parte Bollman*, Chief Justice Marshall noted, while discussing the Suspension Clause, that “if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted.” This language has been read to mean that Congress is required to confer jurisdiction. Professor Shapiro argues that the best reading of Marshall’s statement in *Bollman* is that “the Suspension Clause imposed on Congress an obligation to confer habeas corpus jurisdiction on the judiciary.” The primary tool used to argue that the Suspension Clause does not require federal court jurisdiction be available is Chief Justice Marshall’s dictum in *Bollman*, that “the power to award the writ by any of the courts of the United States, must be given by written law.” Professor Neuman explains that the proper reading of Marshall’s passage in dictum is that the “Suspension Clause did not by its own force vest habeas jurisdiction in any particular federal court.”

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189. See Schatz & Horst, *supra* note 185, at 591–93 (Congress is tasked “by the Constitution to enact implementing legislation to ensure that the habeas corpus component of the judicial power may be exercised by the federal courts . . . . [I]t is easy to lose sight of the function performed by this component of the judicial power of the United States in preserving liberty from encroachment by the Executive Branch.”); Shapiro, *supra* note 36, at 61–65.


191. *Duker, supra* note 18, at 126.

192. 80 U.S. (13 Wall.) 397, 407–08 (1871) (ruling that the Supremacy Clause forbade state courts from inquiring into the propriety of federal detention).

193. 8 U.S. (4 Cranch,) 75, 95 (1807) (emphasis added).

194. Shapiro, *supra* note 36, at 64.


is compelling in light of Marshall’s statement that the Suspension Clause obligated Congress to provide “efficient means by which this great constitutional privilege should receive life and activity.”

The Court has confirmed this reading as well. First, in *Ex parte Milligan*, the Court understood that even in the absence of congressional authorization, it still had jurisdiction to receive the writ. The Court stated, “[t]he writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it.” In other words, even in the absence of statutory jurisdiction, a court still has jurisdiction to receive the writ and determine whether to move forward.

Second, in *INS v. St. Cyr*, the Court made clear that “at the absolute minimum, the Suspension Clause protects the writ ‘as it existed in 1789.’” Furthermore, Justice Stevens explicitly adopted a reading of Marshall’s comment in *Bollman* similar to that of Professors Shapiro and Neuman.

Professors Fallon and Meltzer concur in this reading of the Suspension Clause. They explain that in *St. Cyr*, “the Supreme Court . . . essentially treated . . . [the Suspension Clause’s presupposition of the existence of habeas], together with the clause’s concern about unwarranted suspension, as precluding the possibility that the writ would be unavailable, whether through congressional action or inaction—unless, of course, Congress had properly invoked its power to suspend.”

The writ was part of the common law in 1789. Its protection in the Suspension Clause requires Congress confer jurisdiction to hear writs of habeas corpus on the judiciary or else suspend the writ.

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198. 71 U.S. (4 Wall.) 2, 82 (1866).
199. *Id.*
200. *See* Ekedland, supra note 19, at 1496 (writing that the *Milligan* court held “a court may still issue a writ of habeas corpus when Congress has suspended the writ”).
201. 533 U.S. 289, 301 (2001). *See also* MIAN, supra note 24, at 166–97 (arguing that the Supreme Court has power to issue writs of habeas corpus in the absence of statute due to its common law ability to do so prior to 1789).
202. *St. Cyr*, 533 U.S. at 304 n.24 (“Marshall’s comment expresses the far more sensible view that the Clause was intended to preclude any possibility that ‘the privilege itself would be lost’ by either the inaction or the action of Congress.”)
203. Fallon & Meltzer, supra note 56, at 2051.
if it is a time of rebellion or invasion. Because Congress in the DTA and MCA has attempted to remove the judiciary’s habeas jurisdiction without meeting the requirements of the Suspension Clause, Congress is prohibited from suspending the writ by ousting federal courts of jurisdiction.

2. The Differences Between the GITMO Detainees and the Eisentrager Detainees Constitutionally Entitle the GITMO Detainees to Challenge Their Detention According to the Sliding Scale of Rights in Eisentrager

Under Eisentrager’s framework for analyzing the claim that aliens possess constitutional rights, the GITMO detainees are constitutionally entitled to the writ of habeas corpus. Although Eisentrager appears to reject the availability of any constitutional rights for aliens who lack presence or property in the United States, in reality, Eisentrager should be read narrowly.

First, even though aliens within the United States may be subject to deportation and detention if they are enemy aliens, nothing in Eisentrager supports the proposition that the government can indefinitely hold without process those accused of being enemy aliens. In fact, Eisentrager supports the contrary conclusion in the case of the GITMO detainees. It is important to note that Eisentrager does not sanction the ability of government to do as it wishes during a time of war. While discussing the diminishing rights of the enemy alien during a time of war, the Eisentrager Court noted:

[...the resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a 'declared war' exists. Courts will entertain his plea for freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy and so subject to the Alien Enemy Act. Once these jurisdictional elements have been determined, courts will not inquire into any other is-...]

204. See U.S. Const. art. I, § 9, cl. 2.
205. See generally Erwin Chemerinsky, Federal Jurisdiction § 3.2 (4th ed. 2003). A discussion of whether the requirements of the Suspension Clause are met in the case of the GITMO detainees is outside the scope of this article, but it appears plain that they are not. No rebellion or invasion threatens the United States.
206. See Justice Kennedy’s characterization of Eisentrager’s holding in Rasul, discussed supra notes 77–80 and accompanying text.
207. See generally Johnson v. Eisentrager, 339 U.S. 763 (1950) (referring repeatedly to “enemy aliens,” not alleged or accused enemy aliens).
sue as to his internment. 208

According to this language, \textit{Eisentrager} itself expects that courts will play a role in determining whether an individual accused of being a resident enemy alien is in fact an enemy alien.

Second, there are several key factual distinctions between the \textit{Eisentrager} petitioners and the GITMO detainees, which could lead to a different result than in \textit{Eisentrager}. 209 First and most importantly, the Court in \textit{Eisentrager} did not have to address how to proceed when the alleged enemy aliens challenge their classification as enemy combatants because the petitioners in \textit{Eisentrager} had been found guilty during a full military commission trial. 210 Their trial by military commission was justified under the traditional basis for convening military commissions. 211 Thus, they had no argument that they should not have been classified as enemy aliens. On the other hand, the GITMO detainees present an entirely different situation from that in \textit{Eisentrager}. As the Court in \textit{Rasul} pointed out:

Petitioners in these cases differ from the \textit{Eisentrager} detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control. 212

In essence, the GITMO detainees are not conclusively enemy combatants and, therefore, should not be placed at the low end of \textit{Eisentrager}'s sliding scale of rights, as the petitioners in \textit{Eisentrager} were.

Supporters of \textit{Eisentrager} claim that it has recently been affirmed by the Supreme Court. However, while the Supreme Court has followed \textit{Eisentrager} on two recent occasions, neither requires \textit{Eisentrager}'s application to the GITMO detainees. In \textit{United States v. Verdugo-Urquidez}, the Court rejected the contention that the Fourth Amendment to the Constitution applied to the "search and seizure

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209. See generally Sholar, \textit{supra} note 21, at 676–78.
211. See \textit{supra} notes 145–154 and accompanying text.
by United States agents of property that is owned by a nonresident alien and located in a foreign country.” 213 The Court relied on Eisentrager, explaining that application of the Fourth Amendment to the defendant’s claim “would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries.” 214 In Zadvydas v. Davis, the Court cited Eisentrager for the proposition that “certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.” 215

Although these cases cite Eisentrager, they do not require the conclusion that Eisentrager bars the habeas petitions brought by the GITMO detainees. First, Zadvydas dealt with the government’s ability to indefinitely detain aliens the government declared deportable. 216 The Court’s cite to Eisentrager is best understood as an articulation of the sliding scale of rights, not as an inflexible rule that aliens outside the sovereign territory of the United States may never bring a habeas petition in federal courts in the absence of statutory authority. 217 Second, Verdugo-Urquidez appears to rely on Eisentrager’s identification of “deleterious consequences” if constitutional rights are extended beyond the territorial borders of the United States. 218 As related to GITMO detainees, no one contests the government’s ability to hold alleged enemy combatants for a short period of time to determine whether they are, in fact, enemy combatants. 219 I propose a six-month delay before the GITMO detainees’ habeas corpus rights are exercisable. Such a delay will alleviate any deleterious consequences to the government of permitting the GITMO detainees to petition for habeas corpus. 220

Factual comparisons aside, the plain language of Eisentrager does not apply to GITMO detainees. The Eisentrager Court held that “the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the

214. Id. at 273.
216. See id. at 682.
217. See, e.g., Clark v. Martinez, 543 U.S. 371, 386 (2005) (applying its holding in Zadvydas to aliens the INS had deemed inadmissible, thereby extending further the protections against indefinite detention to those who were not entitled to be in the United States).
220. See infra Part III.B.
United States." This does not, on its face, affect the right of alleged enemy combatants to challenge that designation. Moreover, nothing in Eisentrager permits indefinite government detention simply because the government claims an individual is an enemy combatant. All Eisentrager does is establish that an individual who is an enemy combatant and who lacks presence and property within the United States does not have the constitutional right to challenge in civil court their conviction by military commission for violating the laws of war. It does not give the government carte blanche over detainees who may or may not be enemy combatants. Additionally, the Court in Eisentrager undercuts the argument that aliens without presence or property in the United States lack all constitutional rights. The Eisentrager Court actually decided the merits of the case, holding that the Eisentrager petitioners were properly tried by military commissions. The inference can then be made that the Court’s decision in Eisentrager was governed by the Court’s belief that the Eisentrager petitioners were rightfully detained, and not by the rule that no alien without presence or property in the United States was entitled to constitutional rights.

Based on the differences between the Eisentrager petitioners and the GITMO detainees, the GITMO detainees should receive higher placement on the sliding scale of rights articulated in Eisentrager. Accordingly, the Constitution requires that Congress confer jurisdiction to hear writs of habeas corpus brought by GITMO detainees. Subject only to a minor limitation discussed in Part III.B, Congress may not deprive the GITMO detainees of their ability to challenge their detention via habeas corpus without running afoul of the Suspension Clause. Because the conditions required for suspension of the writ are not present, the MCA and DTA are unconstitutional insofar as they strip the courts of jurisdiction.

B. Separation of Powers Permits Minor Limitations on the GITMO Detainees’ Habeas Rights, Despite the Importance of Judicial Review

This subpart balances the importance of the writ of habeas

222. See id.
223. Id. at 777–81.
224. See supra notes 209–223 and accompanying text.
225. See supra Part III.A.1.
226. Id.
227. See supra note 205.
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corpus and judicial review with the deference generally shown the Executive during a time of war. It sets up a framework by which the GITMO detainees’ access to the writ of habeas corpus can be protected without infringing on the Executive’s ability to wage the War on Terror.

As discussed above, Congress’s attempt to curtail the GITMO detainees’ habeas rights violates the Suspension Clause. But not every detainee in the world is entitled to challenge his or her detention via a writ of habeas corpus. Some are legitimately detained for violations of the laws of war. Additionally, Hamdi signifies that bodies other than courts may be appropriate tribunals to determine whether individuals are enemy combatants. Despite the importance of judicial review in the U.S. constitutional system, certain limitations on the GITMO detainees’ habeas rights are permissible because of the deference generally shown the Executive during a time of war according to separation-of-powers principles.

The Constitution contemplates a system of government made up of three coequal branches: the executive, judicial, and legislative branches. This separation of powers is “essential to the preservation of liberty” and each branch has an important role in ensuring that the others do not violate the Constitution. The writ of habeas corpus provides the judiciary with an essential check on executive power; it allows challenges to the propriety of executive detention. Indeed, the writ was developed in England primarily for this purpose. Blackstone explained that:

Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of

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228. See supra Part III.A.2.
229. See, e.g., Johnson v. Eisentrager, 339 U.S. 763, 790–91 (1950) (holding that alien enemies do not have a right to the writ of habeas).
230. See id.
231. See supra Part II.B.2.b.
232. U.S. CONST. art. I–III.
233. Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2799 (2006) (Kennedy, J., concurring); see also Mistretta v. United States, 488 U.S. 361, 380 (1989) (noting that it was “the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty”).
234. See supra Part II.A.
235. Schatz & Horst, supra note 185, at 582 (“The Constitution vests the Supreme Court with authority to wield the judicial power of the United States, and one of the essential attributes of that power is habeas corpus review of claims of unlawful detention.”).
any, the highest, magistrate to imprison arbitrarily whom-
soever he or his officers thought proper . . . there would
soon be an end of all other rights and immunities . . . . To
bereave a man of life, or by violence to confiscate his es-
tate, without accusation or trial, would be so gross and
notorious an act of despotism, as must at once convey the
alarm of tyranny throughout the whole kingdom. But
confinement of the person, by secretly hurrying him to
jail, where his sufferings are unknown or forgotten; is a
less public, a less striking, and therefore a more dan-
gerous engine of arbitrary government.

Under our constitutional system, the judiciary is obligated to
curb abuses of executive power through the exercise of judicial re-
view. 236 Blackstone understood that the judiciary was an important
check on executive power, and the Supreme Court from very early
on understood that to be its function as well. By exercising the ju-
diciary’s essential functions under the Constitution, to serve as a
check on executive and legislative power and to declare the su-
preme law of the land, 237 the Court ensures that Blackstone’s fear of
an arbitrary government does not come true.

The argument that the GITMO detainees should not receive
the right to habeas corpus because of executive war powers is un-
founded. 238 First, even during a time of war, the Executive’s author-
ity to act is not entirely unfettered. 239 Courts retain the duty to re-

236. WILLIAM BLACKSTONE, 1 COMMENTARIES *131-33.
237. See Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 256 (1985) (Brennan, J., dissenting) (stating that an “essential function of the federal courts” is to “pro-
vide a fair and impartial forum for the uniform interpretation and enforcement of
the supreme law of the land”); see also Loving v. United States, 517 U.S. 748, 757
(1996) (noting that “the separation-of-powers doctrine requires that a branch not
impair another in the performance of its constitutional duties”); Marbury v. Madi-
son, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty
of the judicial department to say what the law is.”).
238. See supra note 237.
239. Jay Alan Bauer, Detainees Under Review: Striking the Right Constitutional Bal-
ance Between the Executive’s War Powers and Judicial Review, 57 ALA. L. REV. 1081,
1095-98 (2006) (noting that courts generally defer to executive authority during
times of war, but do not and should not abdicate the right of judicial review).
240. See Home Bldg. & Loan Ass’n. v. Blaisdell, 290 U.S. 398, 426 (1934) (The
war power “is a power to wage war successfully, and thus it permits the harnessing
of the entire energies of the people in a supreme cooperative effort to preserve
the nation. But even the war power does not remove constitutional limitations
safeguarding essential liberties.”); Bauer, supra note 239, at 1084 (“It is repugnant
to the fundamental concepts of American liberty to allow the executive branch to
act without allowing the judiciary to determine whether those actions are a con-
titutional exercise of executive power. This is true even when the executive is acting
view the constitutionality of executive action, as illustrated by numerous prior cases. Second, the situation faced by the GITMO detainees is especially ripe for judicial oversight given that the practice of indefinite detention and trial by military commission raises separation-of-powers concerns of the highest order. Furthermore, the enemy combatant label is less clear-cut in the War on Terror than it is during a conventional war because the War on Terror faces a movement, not a nation-state. An easy example of this lack of clarity is that in a conventional war, soldiers wear uniforms, while combatants in the War on Terror may not. Given this lack of clarity, total deference to the Executive is inappropriate.

But some deference to the Executive is appropriate to ensure that the GITMO detainees’ exercise of their habeas rights does not

241. See, e.g., Ex parte Quirin, 317 U.S. 1 (1942); Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866). Eisentrager itself recognized that executive power is not unfettered. Despite holding that the petitioners did not have the constitutional right to habeas corpus, the Court went ahead and inquired into the propriety of subjecting the petitioners to trial by military commission. Johnson v. Eisentrager, 339 U.S. 763, 777-81 (1950). See also Riley, supra note 240, at 714 (“No matter what the national crisis, the President [cannot] usurp Congress’s lawmaking abilities, nor . . . replace the Judicial Branch with military tribunals that did not promise the same guarantees set forth in the Bill of Rights.”).

242. As Justice Kennedy wrote in Hamdan v. Rumsfeld:

Trial by military commission raises separation-of-powers concerns of the highest order. Located within a single branch, these courts carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review. Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution’s three-part system is designed to avoid.


243. See Hamdi v. Rumsfeld, 542 U.S. 507, 520 (2004) (discussing the more indefinite nature of a War on Terror as compared to a war against a nation state). See also Huskey, supra note 5, at 43 (noting that the War on Terror is a “new kind of war” where the government “can assert all of the powers associated with the laws of war, but abide by none of its constraints”); Riley, supra note 240, at 730-32; Sholar, supra note 21, at 663 (noting that “[w]ho is and who is not a combatant in a conflict has become a matter of subjective judgment based on incomplete information”); Id. at 696-98 (discussing the “indefinite nature of warfare in the modern world”); Melissa M. Tomkiel, Enemy Combatants and Due Process: The Judiciary’s Role in Curbing Executive Power, 21 St. John’s J. Legal Comment 411, 443 (2006); Jennifer A. Lohr, Note, A “Full and Fair” Trial: Can the Executive Ensure it Alone? The Case For Judicial Review of Trials by Military Commissions at Guantanamo Bay, 15 Duke J. Comp. & Int’L L. 387, 396 (2005) (noting that the nature of warfare and national security has changed “from a practical standpoint”).
infringe on the Executive's ability to conduct the War on Terror.\footnote{See generally \textit{Hamdi v. Rumsfeld}, 542 U.S. 507 (2004) (recognizing the need to give the Executive some latitude in handling the war on terrorism).} As Justice Kennedy explained in his concurring opinion in \textit{Rasul}, "there is a realm of political authority over military affairs where the judicial power may not enter."\footnote{\textit{Rasul v. Bush}, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring). See also infra notes 77–80 and accompanying text.} In evaluating how much deference is owed the Executive during a time of war, the judiciary should both ensure the rule of law and take account of the "changed reality" of war.\footnote{\textit{Burt Neuborne, The Role of Courts in Time of War}, 29 N.Y.U. REV. L. & SOC. CHANGE 555, 556 (2005).}

There are problems associated with judicial review of executive action during a time of war. One concern is that judicial micro-management will displace the "judgments of military commanders in ways that will hamper the military effort."\footnote{David A. Martin, \textit{Judicial Review and the Military Commissions Act: On Striking the Right Balance}, 101 AM. J. INT’L L. 344, 358 (2007)} Another concern is that the availability of judicial review at all will prompt lawsuits that "divert commanders from their real business."\footnote{Id. at 358–59.}

To address these concerns, I propose that the GITMO detainees should have to wait six months after their initial detention in United States' custody before exercising their habeas rights.\footnote{Of course, the exact waiting period is not important. Six months is used here because that was the period of time deemed permissible to detain individuals pending deportation in \textit{Zadvydas}.} This right should be limited to those who the government contends are enemy combatants and who have not been declared prisoners of war and are not subject to trial by military commission for violating the law of war.\footnote{See supra notes 145–154 and accompanying text.} These limitations would ensure that the GITMO detainees' exercise of this right does not hamper the Executive's ability to conduct the War on Terror.\footnote{Because the government would be able to detain an individual for a short period of time, there is a much lower risk of interference with battlefield operations.} This proposal would also allow the government time to determine whether to classify new GITMO detainees as prisoners of war and to review whether new GITMO detainees are indeed enemy combatants. Thus, the "flood of lawsuits" would be contained.

Limiting the GITMO detainees' habeas rights in this way also shows the proper respect for the traditional role of military com-
missions. As the Court explained in *Hamdan*, the use of military commissions is accepted in certain circumstances, most notably when the detainee is accused of violating the laws of war. If a GITMO detainee is properly subject to trial by military commission, then that detainee's right to habeas is practically eliminated due to much lower placement on *Eisentrager*’s sliding scale of rights for aliens.

By upholding *Eisentrager*’s denial of habeas to those convicted of law of war violations, and by requiring the GITMO detainees alleged to be enemy combatants to wait six months after their initial detention before exercising their habeas rights, the judiciary continues to show proper deference to the Executive.

IV. CONCLUSION: THE GOVERNMENT CANNOT INDEFINITELY DETAIN INDIVIDUALS IN A SO-CALLED JURISDICTIONAL BLACK HOLE

This article demonstrates that GITMO detainees are constitutionally entitled to the writ of habeas corpus to challenge their detention at the U.S. naval base at Guantanamo Bay. After explaining the importance and background of the writ of habeas corpus, it concludes that the writ of habeas corpus is a constitutional right, protected by the Suspension Clause, which applies to the GITMO detainees. However, a minor limitation on this right is appropriate due to the traditional deference shown the Executive during times of war.

Any conclusion to the contrary creates a zone of government activity without judicial oversight. This is untenable given the Constitution’s emphasis on an individual’s right to liberty unless detention is justified. Habeas corpus traditionally has protected this liberty interest from unjustified executive interference and that it does so for the GITMO detainees is entirely appropriate.

252. *See supra* notes 151–154 and accompanying text.