

ARTICLE:

JURISDICTION-STRIPPING IN THE  
WAR ON TERRORISM

Janet Cooper Alexander\*

“This would be an interesting exam question for a law school class.”<sup>1</sup>

I. INTRODUCTION

Jurisdiction-stripping is a familiar set piece of federal courts law, much of whose charm, until now, lay in its hypothetical nature. For decades, drafting up jurisdiction-stripping statutes has given a lot of people unhappy with particular Supreme Court decisions something to do with their time, and has produced a great many law review articles that can be grouped into several convenient categories to make a nice typology of theories. It is traditional to conclude the review of jurisdiction-stripping, while the students’ brains are still aching, with two points of consolation. First, even if Congress has plenary or near-plenary power over all of the jurisdiction of the inferior federal courts and the appellate jurisdiction of the Supreme Court, wisdom usually prevails. Congress in the end backs off.<sup>2</sup> And second, even if Congress were to strip jurisdiction over particular constitutional questions, habeas (along with the state courts) provides a backstop. It’s difficult to strip away all jurisdiction, and habeas, with its special recognition in the Constitution, is often at least theoretically available as a way to raise a constitutional question. Even in *McCardle*,<sup>3</sup> the high point of judicial acquiescence to jurisdiction-stripping, the Court noted that an alternative route to judicial review, by way of original writ of

---

\* Frederick I. Richman Professor of Law, Stanford Law School. An earlier version of this article was presented to the Section on Federal Courts at the American Association of Law Schools Annual Meeting in January 2006. I would like to thank Neal Katyal, Ed Hartnett, Larry Yackle, and participants in a faculty workshop at Stanford Law School, as well as my wonderful research assistants, Sara Cames and Emily Coleman.

<sup>1</sup> National Defense Authorization Act for Fiscal Year 2006 – Conference Report, 151 CONG. REC. S14256, 14263 (daily ed. Dec. 21, 2005) (statement of Sen. Kyl).

<sup>2</sup> See, e.g., Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953).

<sup>3</sup> Ex parte *McCardle*, 74 U.S. 506 (1869).

habeas corpus in the Supreme Court, was still available and had not been foreclosed.<sup>4</sup>

Suddenly things are different. Jurisdiction-stripping is a ripped-from-the-headlines story, an accomplished fact. And Congress has eliminated the sacred writ itself, not only for Guantanamo detainees in the Graham Amendment (now § 1405 of the Detainee Treatment Act of 2005 [“DTA”]<sup>5</sup>) but also, in the Real ID Act passed in May 2005, for certain immigrants facing removal.<sup>6</sup>

This Article offers a preliminary assessment of the DTA, particularly the immediately pressing question of its applicability to pending cases, including *Hamdan v. Rumsfeld*, currently pending before the Supreme Court, and a sketch of other major issues raised by the statute.

## II. THE DETAINEE TREATMENT ACT

The Graham Amendment was originally proposed as a sort of supplement to the McCain Amendment. The McCain Amendment, which passed the Senate by a vote of 90-9, banned cruel, inhuman and degrading treatment of prisoners by all U.S. personnel.<sup>7</sup> The Senate agreed to a proposal by Senator Graham, a former JAG officer, to prohibit the use of “unduly coerced” testimony in CSRT tribunals and to provide Congressional oversight of CSRTs; the proposal was to be included in the Defense appropriations bill.<sup>8</sup> In the final flurry of legislation in November, Senator Graham reintroduced this provision but added on the crucial jurisdiction-stripping provision, which had not been part of the earlier amendment. It was this version that initially became known as the Graham Amendment.<sup>9</sup>

---

<sup>4</sup> The Court confirmed the availability of review by an original writ of habeas corpus in the Supreme Court after an attempted stripping of jurisdiction in *Ex parte Yerger*, 75 U.S. 85 (1969), and again very recently in *Felker v. Turpin*, 518 U.S. 651 (1996).

<sup>5</sup> National Defense Authorization Act for Fiscal Year 2006, H.R. 1815 §§ 1401-06, 109th Cong. (1st Sess. 2006).

<sup>6</sup> Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 2005 HR 1268, Div. B, Title I., § 106(b), Stat. 311 (2005), codified at 8 U.S.C. §1252.

<sup>7</sup> The McCain Amendment became § 1402 of the Act, which prohibits the use by the Department of Defense of interrogation techniques not listed in the Army Field Manual on Intelligence Interrogation, and § 1403, which prohibits cruel, inhuman, or degrading treatment of individuals in the custody or under the physical control of the United States government, regardless of nationality or physical location.

<sup>8</sup> See 151 CONG. REC. S12652, 12655 (daily ed. Nov. 10, 2005). This amendment, co-sponsored by Senator McCain, was adopted by unanimous consent on October 5, 2005 for inclusion in the defense appropriations bill. *Id.* at S12665 (statement of Sen. Bingaman).

<sup>9</sup> Senator Bingaman explained the last minute change: “There are four parts to the amendment . . . There are parts A, B, C, and D. Parts A, B, and C are perfectly acceptable and provisions that I support and Senator Levin supports. They were worked out. They were added to the Defense appropriations bill. The first deals with procedures for status review of detainees. The second sets out what those procedures would generally provide. The third is a report . . . that would be made to the Congress. It is the last part, this section D, judicial

This version was presented as a quid pro quo: On one hand it set up congressional oversight of the Civilian Status Review Tribunals (CSRTs) established after *Rasul v. Bush* and *Hamdi v. Rumsfeld* to determine whether Guantanamo detainees were enemy combatants who could properly be kept in custody<sup>10</sup> and (as introduced and passed on November 10) prohibited the use of statements obtained by “undue coercion” in CSRT proceedings.<sup>11</sup> On the other, it stripped federal courts of jurisdiction over habeas petitions by Guantanamo detainees. As Senator Graham put it, the bill would legislatively overrule *Rasul v. Bush*.<sup>12</sup> Detainees would no longer be able to seek habeas relief from federal courts; the only judicial review would be a limited review by the D.C. Circuit of CSRT determinations of enemy combatant status, confined to an inquiry whether the tribunal followed its own rules and standards. (The scope of review was later broadened, and the D.C. Circuit’s reviewing authority was expanded to include final decisions of military commissions as well.)

The sponsors’ rationale for abolishing habeas for Guantanamo detainees was twofold. First, the legislation set up procedures, under congressional oversight, to give detainees “due process in accordance with the Geneva Conventions, and then some,” in proceedings that Senator Graham called “the Geneva Conventions protections on steroids,” and “also is being modeled based on the O’Connor opinion in *Hamdi*.”<sup>13</sup> These reforms would “recapture the moral high ground” that was lost with reports at Abu Ghraib and elsewhere “that at times we have lost our way in

---

review, that is such a terrible mistake, in my opinion.” 151 CONG. REC. S12652, 12665 (daily ed. Nov. 10, 2005) (statement of Sen. Bingaman).

<sup>10</sup> As enacted, § 1405(a) requires the Secretary of Defense to submit a report to Congress within 180 days on the procedures of the Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards (ARBs) in operation at Guantanamo Bay and the procedures in operation in Afghanistan and Iraq for determining the status of noncitizens in custody or under the physical control of the Department of Defense. Section 1405(c) requires the Secretary to report modifications of the procedures within 60 days. Section 1405(d) requires an annual report to Congress on the annual review process for aliens in Defense Department custody outside the United States. The statute does not provide for congressional oversight of military commissions.

<sup>11</sup> This provision was substantially weakened in conference. Instead of an exclusionary rule prohibiting the use of evidence obtained as a result of undue coercion, the statute as enacted required the CSRT to “assess” whether any statement derived from or relating to the detainee was obtained as a result of “coercion,” and the probative value of any such statement.

<sup>12</sup> 542 U.S. 466 (2004). According to Senator Kyl, a co-sponsor of the final version of the DTA, *Rasul*’s interpretation of § 2241 to permit detainees held outside the U.S. to file habeas petitions “is both without precedent and is utterly impractical.” 151 CONG. REC. S14256-01, 14260 (daily ed. Dec. 21, 2005) (statement of Sen. Kyl). “Eisenrager was the law of the land for over 45 years, until *Rasul* carved a hole into it. Through this act, Congress patches that hole and restores Eisenrager’s role as the governing standard.” *Id.* at S14264 (statement of Sen. Kyl). “The *Rasul* decision is at war with the role and duties of the Federal judiciary in our constitutional framework.” *Id.* (statement of Sen. Kyl).

<sup>13</sup> 151 CONG. REC. at S12656 (statement of Sen. Graham); see *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

fighting this war.”<sup>14</sup> Second, Senators Graham and Kyl argued that permitting habeas petitions by non-citizen detainees was “undermining the role Gitmo plays in helping our own national security.”<sup>15</sup> They objected to treating the Guantanamo detainees like criminal defendants, giving them protections of the same order as those given American citizens, and giving them more rights than even Nazis had had after World War II. The strongest version of this argument was Senator Kyl’s “the Great Writ does not apply to terrorists.”<sup>16</sup> They also argued that “interference” by federal judges would hinder intelligence-gathering. Noting that 160 habeas petitions had been filed on behalf of over 300 detainees, Senator Kyl complained, “It is impossible to interrogate people with this much court intervention.”<sup>17</sup> The objection was not only that courts would second-guess military judgments, but that civilian judges should not interfere in military matters,<sup>18</sup> that introducing review by civilian judges would lessen control and discipline over the detainees (“in the name of human rights, we are not going to let this jail run amok”<sup>19</sup>), and that the very presence of lawyers interferes with the relationship of “dependency” between interrogator and subject that is necessary for intelligence-gathering.<sup>20</sup> Finally, there was great indignation about frivolous petitions concerning conditions of confinement filed by “the worst of the worst.” Examples cited included requests for dictionaries, books, and “family videos,” internet access for detainees’ counsel, and “opportunities for exercise, communication, recreation, and worship,”<sup>21</sup> as well as “[t]wo medical malpractice claims.”<sup>22</sup> Even an alleged petition by an Arizona *state* prisoner who sought to be served chunky rather than creamy peanut butter was cited.<sup>23</sup>

Senator Graham presented his amendment as a compromise. On the one hand, detainees would receive due process protections far beyond what (he asserted) they were entitled to under international or domestic law, and would be entitled to review of adverse CSRT determinations by the D.C. Circuit for compliance with those procedures. As a quid pro quo, detainees would be limited to that avenue of review, and would not be

---

<sup>14</sup> 151 CONG. REC. at S12655 (statement of Sen. Graham).

<sup>15</sup> *Id.* at S12657 (statement of Sen. Graham).

<sup>16</sup> *Id.* at S12659 (statement of Sen. Kyl). Citing Justice Scalia’s dissent in *Rasul*, Senator Kyl argued that the Constitution does not require habeas for non-citizens.

<sup>17</sup> *Id.* at S12656 (statement of Sen. Graham).

<sup>18</sup> For example, Senator Graham stated that a detainee had sought an “injunction forbidding interrogation of him or engaging in cruel, inhumane, or degrading treatment of him. It was a motion to a Federal judge to regulate his interrogation in military prison.” *Id.*

<sup>19</sup> *Id.* at S12657 (statement of Sen. Graham).

<sup>20</sup> “Keeping war-on-terror detainees out of the court system is a prerequisite for conducting effective and productive interrogation, and interrogation has proved to be an important source of critical intelligence that has saved American lives. . . . Giving detainees access to federal judicial proceedings threatens to seriously undermine vital U.S. intelligence-gathering activities.” 151 CONG. REC. S14256, S14260 (daily ed. Dec. 21, 2005) (statement of Sen. Kyl).

<sup>21</sup> 151 CONG. REC. S12652, S12656 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at S12660 (statement of Sen. Kyl).

permitted to bring habeas actions to challenge either the legality of their detention as such or their conditions of confinement.

Despite the arguments of Senators Specter, Leahy, Levin, and Bingaman that the legislation went to unprecedented lengths in abolishing due process protections that have historically been considered fundamental,<sup>24</sup> and that the drastic step of eliminating access to habeas should not be undertaken without hearings by the appropriate committees,<sup>25</sup> particularly when Congress was trying to address instances of mistreatment of detainees and when the Supreme Court had decided that detainees should be able to seek habeas relief,<sup>26</sup> the Graham amendment passed by a vote of 49-42 after only a very short debate.

After an effort to roll back the elimination of habeas failed,<sup>27</sup> a somewhat kinder, gentler version known as the Graham-Levin-Kyl Amendment was negotiated and passed the Senate. Graham-Levin-Kyl weakened the protection against use of coerced testimony, but it broadened the grounds on which adverse determinations could be reviewed by the D.C. Circuit and extended review by the D.C. Circuit to convictions by military commissions.<sup>28</sup>

---

<sup>24</sup> Senator Levin had argued against the original version of the Graham Amendment because it “would eliminate the appeal of a conviction that led to a capital offense, the death penalty, for these same terrorists. . . . [I]t would be the first time that that would ever happen, that we would purport, as the Senate, to strip the court of habeas corpus opportunity to review that kind of a conviction. . . . We strip courts of the right to hear a habeas corpus petition on a death sentence.” *Id.* at S12665. Senator Graham responded that convictions by military commissions were subject to review by a three-judge panel of civilians within “the military commission system.” *Id.*

<sup>25</sup> “But if the habeas corpus proceedings were added to the Senator’s amendment – they were not part of the Senator’s amendment to begin with, and I think all of us shared the original amendment of the Senator from South Carolina, but then the court-stripping provisions were added relative to habeas corpus. That is where we are getting into very precipitous trouble.” *Id.* at S12663 (statement of Sen. Levin). “The Judiciary Committee should be considering any effort by the Congress to limit or prohibit or suspend the writ of habeas corpus. We should not be trying to do that sort of ‘oh, by the way, let’s do this.’” *Id.* at S12665 (statement of Sen. Bingaman).

<sup>26</sup> *See, e.g.*, remarks by Senator Levin before the passage of the first Graham Amendment on November 10: “In the Rasul case, which has been already decided by the Supreme Court, the Supreme Court concluded that Federal courts have jurisdiction to determine the legality of the executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. This decision of the Supreme Court would be reversed if we adopted this language. . . . [T]here is pending a decision at the Supreme Court which would be retroactively prohibited. . . . In the Hamdan case, the Supreme Court, a few days ago, agreed to determine the legality of the military commissions established by the President to try enemy combatants and about whether detainees at Guantanamo are entitled to protections under the Geneva Conventions. That case would be wiped out under the language which is retroactive in the Senator’s amendment. The Supreme Court . . . would be stymied in hearing a case they have agreed to hear. . . .” *Id.* at S12664.

<sup>27</sup> This effort, sponsored by Senator Bingaman, failed by a vote of 55-45. 151 CONG. REC. S12777, 12800 (daily ed. Nov. 15, 2005).

<sup>28</sup> It is possible that by providing an avenue for judicial review of constitutional questions, even though limited in scope and not available to all detainees who might have constitutional claims, Senator Levin and his allies actually saved the jurisdiction-stripping bill. The original version was so draconian that there would almost certainly have been five

The House version of the bill, meanwhile, did not contain anything remotely resembling either the McCain or Graham amendments. Under the pressure of necessity (the defense authorization bill needed to be passed before the holiday adjournment), the joint conference committee adopted both amendments with some significant changes including language relating to the effective date of the provisions. Both houses agreed to the conference version. The legislative history at this point contains a series of statements, many clearly inserted after the bill had been passed, attempting to spin the interpretation of what Congress had just done. Democratic senators asserted that textual changes from the original Graham Amendment had significantly ameliorated its effects; in particular, they contended that the withdrawal of jurisdiction did not apply to pending cases and that the scope of review by the D.C. Circuit had been widened. Republican senators, in contrast, insisted that the Act abolished jurisdiction over all habeas claims by detainees and that courts should dismiss the cases. Senators Graham and Kyl later reiterated their arguments in a letter to the Attorney General.<sup>29</sup> At the bill signing the President issued a formal statement announcing that the executive branch would construe the Act as abolishing jurisdiction over all pending habeas claims, and the Justice Department immediately took steps toward obtaining dismissal of pending cases.<sup>30</sup>

As finally passed and signed into law the Graham Amendment has the following principal provisions. First, it is an amendment to § 2241. Senators Graham and Kyl noted that the Supreme Court’s decisions had been based on statutory interpretation of § 2241, not on any constitutional right to habeas.<sup>31</sup> Senator Kyl understood this to support his view that the Constitution’s preservation of the right to habeas did not apply to non-citizens outside the territorial United States (“the Great Writ does not apply to terrorists”),<sup>32</sup> whereas at least one Democrat seemed to be careful to create a record that the bill was not intended to alter any rights other than those provided by § 2241. Structuring the jurisdiction-stripping provisions as an amendment to § 2241 leaves an opening for arguments, discussed below, that the Act does not disturb other avenues of judicial review.

Next, the statute eliminates § 2241 habeas review for Guantanamo detainees. The operative language is: “[N]o court, justice or judge shall have jurisdiction to hear or consider” an application for a writ of habeas

---

votes on the Supreme Court to hold it unconstitutional. The fate of the compromise that was enacted is more difficult to predict.

<sup>29</sup> 152 CONG. REC. S970, 970-73 (daily ed. Feb. 9, 2006).

<sup>30</sup> Statement on Signing of the “Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006,” H.R. 2863, 109th Cong. (1st Sess. 2005) [hereinafter Signing Statement].

<sup>31</sup> “The habeas corpus writ that is being exercised does not come from the Constitution. This is not a constitutional right that an enemy combatant has under our law. This is an interpretation of a statute we passed, 2241.” 151 CONG. REC. S12652, 12663 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

<sup>32</sup> *Id.* at S12659 (statement of Sen. Kyl).

*STANFORD JOURNAL OF CIVIL RIGHTS & CIVIL LIBERTIES*  
**DRAFT**

filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay.<sup>33</sup> The statute does not apply, however, to U.S. citizens, or to detainees held in locations other than Guantanamo Bay or by other government agencies such as the CIA. The Act also denies jurisdiction for “any other action” against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay who is currently in military custody or has been determined by the D.C. Circuit to have been properly detained as an enemy combatant.

Finally, the Act provides for limited judicial review of CSRT and military commission decisions. The D.C. Circuit is given exclusive jurisdiction “to determine the validity of any final decision of a CSRT that an alien is properly detained as an enemy combatant” and to determine the validity of any final decision by a military commission.<sup>34</sup> The scope of

---

<sup>33</sup> H.R. 1815 § 1405(e)(1), 109th Cong. (2006) (enacted) provides:

(1) **In general**—Section 2241 of title 28, United States Code, is amended by adding at the end the following:

(e) Except as provided in section 1405 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider –

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

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

(A) is currently in military custody; or

(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1405(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.

<sup>34</sup> Section 1405(e)(2) provides:

(2) **Review of decisions of Combatant Status Review Tribunals of propriety of detention** –

(A) **In general** – Subject to subparagraphs (B), (C), and (C), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

(B) **Limitation on claims** – The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien –

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) **Scope of review** – The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims . . . under this paragraph shall be limited to the consideration of –

(i) whether the status determination . . . was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government’s evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

review of both CSRT and military commission decisions is limited to two questions: whether the decision was consistent with the standards and procedures adopted by the Department of Defense, and whether the use of such standards and procedures is consistent with the Constitution and laws of the United States, to the extent that they apply.<sup>35</sup>

The D.C. Circuit's review of CSRT proceedings is limited to persons who are being detained (the court's jurisdiction terminates on release from custody) and for whom a CSRT has been conducted and has reached a final decision. Similarly, the D.C. Circuit has jurisdiction to review proceedings before military commissions only after the commission has rendered a final decision.<sup>36</sup> There is no provision for judicial review before the military proceedings are complete; and if a prisoner does not receive a CSRT or a trial before a military commission the statute appears to contemplate that no judicial review of the detention would be possible. Detainees may obtain review of right of convictions by military commissions in capital cases or where the sentence is for more than ten years; in other cases, review is at the court's discretion.<sup>37</sup>

---

**(D) Termination on release from custody** – The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release of such alien from the custody of the Department of Defense.

Section 1405(e)(3)(A) gives the D.C. Circuit “exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).”

<sup>35</sup> As originally proposed (and passed by the Senate on November 10, 2005), the statute would have limited the scope of review in the D.C. Circuit to whether the CSRT had complied with its own standards and procedures as promulgated by the Defense Department. No provision was made for review in the civilian courts of decisions of military commissions. After negotiations with senators who objected to the withdrawal of judicial review, the Graham-Levin-Kyl amendment substituted a broader scope of review in the D.C. Circuit and added review of convictions before military commissions. The statute as enacted permits the D.C. Circuit to consider at least some claims that the proceedings violate federal law. *See id.* §§ 1405(e)(2)(C), (e)(3)(D). After the final language was reported out of conference, Senators Graham and Kyl inserted remarks into the Congressional Record to the effect that this provision permitted only a general challenge to the statute as a whole whose resolution would then be *stare decisis* as to all other proceedings; in other words, as-applied challenges would not be permitted. Senator Levin took the opposite view of the statutory language.

<sup>36</sup> Section 1405(e)(3)(C) provides:

**(C) Limitation on appeals** – The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to an appeal brought by or on behalf of an alien –

(i) who was, at the time of the proceedings pursuant to the military order referred to in subparagraph (A), detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a final decision has been rendered pursuant to such military order.

<sup>37</sup> Section 1405(e)(3)(B) provides that such review “(i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of 10 years or more, shall be as of right; or (ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.” Sections 1405(e)(3)(C) and (D) set out limitations on jurisdiction over appeals and the scope of review that parallel the provisions of § 1405(e)(2) with respect to CSRTs.

### III. APPLICATION OF THE ACT TO PENDING CASES

The most immediate and crucial question concerning the DTA is whether it applies to cases that were pending when it was enacted. Some 160 habeas petitions are currently pending on behalf of over 300 Guantanamo detainees. These include *Hamdan v. Rumsfeld*, a challenge to military commissions that is scheduled to be argued before the Supreme Court this term;<sup>38</sup> *Al Odah* (the *Rasul* case on remand), which is pending in the D.C. Circuit;<sup>39</sup> the cases of a number of detainees who have obtained district court orders to protect them from extraordinary rendition—being sent away from Guantanamo for detention and interrogation in third countries, where the federal courts would lose jurisdiction over their habeas cases—or from being released to countries that are not their countries of residence or citizenship;<sup>40</sup> and detainees who challenge their CSRT determinations, the failure to give them a hearing, or their treatment while in U.S. custody. Does the Act withdraw federal jurisdiction to hear these pending cases, or will it apply only to cases filed after the Act became law?

The statutory language is simple: “This section shall take effect on the date of the enactment of this Act.”<sup>41</sup> But the answer is hardly clear.

President Bush, in a statement issued at the signing ceremony, characterized the amendments as applying “to past, present, and future

---

<sup>38</sup> *Hamdan v. Rumsfeld*, No. 05-184, *cert. granted*, 126 S. Ct. 622 (2005).

<sup>39</sup> *Al Odah v. United States (In re Guantanamo Detainee Cases)*, 2005 U.S. App. LEXIS 4651 (Mar. 11, 2005) (interlocutory appeal granted).

<sup>40</sup> See *Habib v. Bush*, No. 02-CV-1130 (CKK) (D.D.C. filed Nov. 24, 2004); *Al-Masri v. Tenet*, No. 05-1417 (E.D. Va. filed Dec. 6, 2005); *Abdah v. Bush*, 2005 U.S. Dist. LEXIS 4942 (D.D.C. 2005) (preliminary injunction granted); *Abdah v. Bush*, 2005 U.S. Dist. LEXIS 4144 (D.D.C. 2005) (TRO granted); *cf. Sliti v. Bush*, 2005 U.S. Dist. LEXIS 18888 (D.D.C. 2005) (request of detainees, including Sami Al Laithi, for preliminary injunction denied). The practice of extraordinary rendition has been extensively covered by journalists. See, e.g., Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, available at [http://www.newyorker.com/fact/content/?050214fa\\_fact6](http://www.newyorker.com/fact/content/?050214fa_fact6); Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake; German Citizen Released After Months in "Rendition"*, WASH. POST, Dec. 4, 2005 at A1. For reports on the efforts by detainees to avoid rendition by resort to the federal courts, see, e.g., Neil A. Lewis, *Detainee Seeking to Bar His Transfer Back to Egypt*, N.Y. TIMES, Jan. 6, 2005 at A24 (Mamdouh Habib); Carol D. Leonnig, *Guantanamo Detainee Says Beating Injured Spine; Now in Wheelchair, Egyptian-Born Teacher Objects to Plan to Send Him to Native Land*, WASH. POST, Aug. 13, 2005 at A18 (detainee, Sami al-Laithi, had been exonerated in May 2005 by a CSRT); Carol Rosenberg, *U.S. Returns Guantanamo Detainee to Egypt*, KNIGHT RIDDER/BOSTON HERALD, Oct. 3, 2005.

<sup>41</sup> Section 1405(h) provides:

(h) Effective date –

(1) In general – This section shall take effect on the date of the enactment of this Act.

(2) Review of Combatant Status Tribunal and military commission decisions – Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this act.

actions,” and said that the executive branch will construe the provisions “to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus, described in [the Act].”<sup>42</sup> The government quickly moved to dismiss all pending habeas cases for lack of subject matter jurisdiction.<sup>43</sup> The Supreme Court has consolidated its consideration of the issue with the merits, and the issue has also been briefed in the D.C. Circuit.

Senator Kyl, one of the sponsors of the Graham-Levin-Kyl Amendment, stated flatly at the presentation of the conference report that the bill “strips every court of jurisdiction to hear claims from detainees held in Guantanamo Bay.” He explained, “We’re not just changing the law governing the action. We are eliminating the forum in which that action can be heard.” He argued that as a general rule “legislation ousting the courts of jurisdiction is applied to pending cases.”<sup>44</sup> Citing *McCardle* as authority for Congress’s constitutional power to strip jurisdiction from pending habeas cases,<sup>45</sup> Senator Kyl opined that “the Court should dismiss *Hamdan* for want of jurisdiction.”<sup>46</sup>

The Graham-Kyl colloquy, however, was not part of the debate during Congress’s consideration of the DTA. Rather, it was a scripted exchange that was inserted into the Congressional Record after the fact.<sup>47</sup> Senator Levin, the other sponsor of the Graham-Levin-Kyl Amendment and the author of the specific language that is contained in the statute as enacted, took the opposite view. In his presentation of the Joint Conference Report, he stated that while the original Graham Amendment would have applied “retroactively,” the version in the final bill “does not apply to or alter any habeas case pending in the courts at the time of enactment.”<sup>48</sup> Senator Levin had advanced this interpretation during the floor debate on the Graham-Levin-Kyl amendment, and his reading was not contested by his co-sponsors at that time.<sup>49</sup> Senator Levin and others raised particular

---

<sup>42</sup> Signing Statement, *supra* note 28.

<sup>43</sup> See, e.g., Respondents’ Motion to Dismiss for Lack of Jurisdiction, *Hamdan v. Rumsfeld*, No. 05-184 (Jan. 2006).

<sup>44</sup> National Defense Authorization Act for Fiscal Year 2006-Conference Report, 151 CONG. REC. S14256, 14263 (daily ed. Dec. 21, 2005) (statement of Sen. Kyl).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at S14264.

<sup>47</sup> See *id.* at S14260 (daily ed. Dec. 21, 2005) (statement of Senator Kyl) (“*Comments on Final Passage*. Mr. Kyl. I would like to say a few words about the *now-completed* National Defense Authorization Act . . .”) (emphasis added); Petitioner’s Opposition to Respondents’ Motion to Dismiss, *Hamdan v. Rumsfeld*, 126 S. Ct. 1317 (2006) (No. 05-184) (“That legislative history is entirely *post hoc*, consisting of a single scripted colloquy that *never actually took place*, but was instead inserted into the record *after* the legislation passed.”); see also Dan Eggen, *Record Shows Senators’ “Debate” That Wasn’t*, WASH. POST, Mar. 29, 2006, at A6.

<sup>48</sup> 151 CONG. REC. at S14257 (statement of Sen. Levin).

<sup>49</sup> 151 CONG. REC. S12777, S12802 (daily ed. Nov. 15, 2005) (statement of Sen. Levin) (“The Graham-Levin-Kyl amendment would not apply the habeas prohibition in paragraph (1) to pending cases. So, although the amendment would change the substantive law applicable to pending cases, it would not strip the courts of jurisdiction to hear them. Under the Graham-Levin-Kyl amendment, the habeas prohibition would take effect on the date of

concerns about stripping the Supreme Court of jurisdiction to hear *Hamdan*, on which certiorari had already been granted. Senator Levin pointed to both the language of the bill and its legislative history to show that Congress had “avoid[ed] repeating the unfortunate precedent in *Ex parte McCardle*.”<sup>50</sup>

The statutory language, particularly when read in light of the history and structure of the statute, supports the Levin construction. As originally proposed by Senator Graham and passed by the Senate by a vote of 49-42 on November 10, 2005, the Graham Amendment was unambiguous. It would have stripped jurisdiction from “any application or other action that is pending on or after the date of the enactment of this Act.” There was substantial opposition, however, to any attempt to terminate pending cases by legislation.<sup>51</sup> When the Bingaman Amendment to eliminate the jurisdiction-stripping provision from the bill was defeated, opponents worked to make the provision prospective only. The language applying the jurisdiction-stripping provision to pending cases was affirmatively removed by the Graham-Levin-Kyl Amendment. The Graham-Levin-Kyl version drew a distinction between the new procedures for review by the D.C. Circuit of CSRT and military commission decisions, which would—like the original language of the Graham Amendment—apply to “any claim . . . that is *pending on or after* the date of the enactment of this Act,”<sup>52</sup> and the remainder of the bill, including the jurisdiction-stripping provision. New language was substituted for those provisions, which “shall take effect *on the date of* the enactment of this act.”<sup>53</sup> Efforts to reinstate the original language were rejected twice in the joint conference.<sup>54</sup>

In other words, the D.C. Circuit’s jurisdiction for the new avenue of review is to apply to requests to review claims that were pending on the date of enactment, but the jurisdiction-stripping provisions only became effective on the date of enactment. The legislation was specifically amended to make this distinction, and it was the language relating to

---

enactment of the legislation. Thus, this prohibition would apply only to new habeas cases filed after the date of enactment.”) *Id.* at S12803 (statement of Sen. Reid) (“I agree with Senator LEVIN that his amendment does not divest the Supreme Court of jurisdiction to hear the pending case of *Hamdan v. Rumsfeld*. I believe the effective date provision of the amendment is properly understood to leave pending Supreme Court cases unaffected.”).

<sup>50</sup> *Id.* at S12802 (statement of Sen. Levin).

<sup>51</sup> *See, e.g.*, 151 CONG. REC. S12652, 12665 (daily ed. Nov. 10, 2005) (statement of Sen. Bingaman) (“This amendment . . . essentially denies all courts anywhere the right to consider any petition from any prisoner being held at Guantanamo Bay. In my view, it is contrary to the way the court decisions have come down already. . . Senator Specter has spoken against the amendment. Senator Levin has spoken against the amendment. Senator Leahy has spoken against the amendment. . .”).

<sup>52</sup> H.R. 1815 § 1405(h)(2), 109th Cong. (2006) (enacted).

<sup>53</sup> *Id.* at § 1405(h)(1).

<sup>54</sup> A proposal in a draft of the Graham-Levin-Kyl bill to apply the jurisdiction-stripping provision to pending cases but permit the Supreme Court to determine the legality of stripping jurisdiction for any case in which it had already granted cert was also rejected. 151 CONG. REC. S14256, 14257 (daily ed. Dec. 21, 2005) (statement of Sen. Levin).

jurisdiction-stripping that was altered. According to Senator Levin, “[t]hese words have their ordinary meaning—that the provision is prospective in its application, and does not apply to pending cases.”<sup>55</sup> Courts would still have jurisdiction to hear those cases.<sup>56</sup> The fact that language unambiguously applying the provision to pending cases was removed and that subsequent efforts to reintroduce it were rejected demonstrates, he argued, that Congress “has chosen not to apply the habeas-stripping provision to pending cases.”<sup>57</sup> Other Democratic senators also expressed the view that pending cases would not be affected.<sup>58</sup>

Senator Graham responded that, in response to *Rasul*, the final bill provides for review by the D.C. Circuit of pending cases, and that “we wanted those cases to be recast as appeals of their CSRT determinations . . . . This is really no different than transferring a case from one court to another. But in this case, . . . we were required to extinguish these habeas and other actions in order to effect a transfer of jurisdiction over these cases to the DC Circuit Court.”<sup>59</sup> In other words, jurisdiction over habeas claims would be abolished on the date of enactment, and pending habeas cases would be transformed into petitions for review of CRST determinations in the D.C. Circuit.<sup>60</sup>

The contradictory statements of Republican and Democratic senators may suggest that under pressure to reach quick agreement in order

---

<sup>55</sup> *Id.* at S14257. Citing *Lindh v. Murphy*, 521 U.S. 320 (1997), Sen. Levin asserted that because Congress chosen not to apply the jurisdiction-stripping provision to pending cases, courts would retain jurisdiction over them. *Id.*

<sup>56</sup> See *Lindh v. Murphy*, 521 U.S. 320 (1997) (holding that most of AEDPA’s amendments to habeas statutes governing non-capital cases were inapplicable to pending cases).

<sup>57</sup> 151 CONG. REC. at S14257 (statement of Sen. Levin); see also *id.* at S14275 (remarks of Sen. Reid) (“I am pleased that Senator Graham’s original language was altered so that the Supreme Court would not be divested of jurisdiction to hear the pending case of *Hamdan v. Rumsfeld*. In fact, subsection (h) of section 1005 makes clear that the DC Circuit and other courts will maintain jurisdiction to hear all pending habeas cases, in accordance with the Supreme Court’s decision in *Lindh v. Murphy*”).

<sup>58</sup> See *id.* at S14274 (statement of Sen. Durbin) (“A critical feature of this legislation is that it is forward looking. A law purporting to require a Federal court to give up its jurisdiction over a case that is submitted and awaiting decision would raise grave constitutional questions. The amendment’s jurisdiction-stripping provisions clearly do not apply to pending cases, including the *Hamdan v. Rumsfeld* case, which is currently pending before the Supreme Court. In accordance with our traditions, this amendment does not apply retroactively to revoke the jurisdiction of the courts to hear pending claims invoking the Great Writ of Habeas Corpus . . . . The amendment alters the original language introduced by Senator Graham so that those pending cases are not affected by this provision”); *id.* (statement of Sen. Kerry) (“When I voted for this legislation . . . , one essential aspect was that the limitations placed on the review of habeas corpus claims of Guantanamo detainees were prospective only. I am pleased to say that the bill’s effective date was not altered in conference. As a result, as the Supreme Court held in *Lindh v. Murphy*, it still employs the normal rule that our laws operate prospectively”).

<sup>59</sup> *Id.* at S14264 (statement of Sen. Graham).

<sup>60</sup> “What this paragraph § 1405(h)(2) means is that, at the same time that the courts like the DC District courts kick these cases out of their courtrooms, they can also tell them where they should go next. And if, for example, a habeas action currently is in the DC Circuit, that court can simply construe that action as a request of review of the detainee’s CSRT pursuant to subsection (e) of 1405, and allow that claim to go forward in that form.” *Id.*

to pass the overall defense bill before the holiday recess, neither side could obtain perfectly clear language expressing its preference and the conferees then attempted to spin the language of the Graham-Levin-Kyl Amendment.

The Court will almost certainly be divided on this issue. *McCardle* is precedent for Congress's power to repeal jurisdiction over habeas cases even when the Supreme Court has granted jurisdiction, and the jurisdiction-stripping provision starts out with very strong language: "[N]o court, justice, or judge shall have jurisdiction to hear or consider . . ." <sup>61</sup> Moreover, it could be difficult to accomplish the purposes stated by the proponents of the statutes if the 160 petitions currently pending on behalf of more than half of the Guantanamo detainees, none of which have gone to final judgment, were permitted to continue.

But the Court has construed repealers of habeas jurisdiction narrowly. *Ex parte Yerger* held that a repeal of a statute authorizing appeals of decisions on habeas petitions did not prevent the Court from exercising appellate review through means of an original writ of habeas under § 14 of the First Judiciary Act. In *Felker v. Turpin*, <sup>62</sup> the Court used the doctrine of constitutional avoidance to find that its jurisdiction under § 2241, the successor to § 14 of the First Judiciary Act, to review a circuit court decision in a habeas case by means of an original writ of habeas filed in the Supreme Court was not affected by a statute, even though the statute provided that the circuit court's decision "shall not be appealable and shall not be the subject of a petition for . . . writ of certiorari." <sup>63</sup> In *INS v. St. Cyr* the Court construed AEDPA not to preclude federal habeas because "a serious constitutional issue would be presented" if habeas were withdrawn and no adequate substitute provided, at least as to constitutional questions and errors of law, including the application or interpretation of statutes. <sup>64</sup>

Here, the structure and legislative history of the statute provide strong grounds for construing the repealer narrowly. To begin with, the text of the statute clearly permits the construction that the jurisdiction-stripping provisions do not take effect until after enactment and thus that the jurisdiction of pending cases is not affected. The legislative history provides exceptionally strong support for this reading.

The original language, passed by the Senate on November 10, was unambiguous. It would have stripped jurisdiction from pending cases. The amendment retained the original language, "pending on or after the date of

---

<sup>61</sup> H.R. 1815 § 1405(e)(1), 109th Cong. (2006) (enacted).

<sup>62</sup> 518 U.S. 651 (1996).

<sup>63</sup> *Id.* at 657. This move may not be available with the Graham Amendment, which purports to strip jurisdiction "to hear or consider" an application for a writ of habeas corpus. H.R. 1815 § 1405(e)(1), 109th Cong. (2006) (enacted). Direct appeal by certiorari of the petition filed in the district court, as well as review by an original writ of habeas filed in the Supreme Court, would both require the Court to hear or consider an application for a writ of habeas.

<sup>64</sup> 533 U.S. 289, 300, 305 (2001).

enactment,” for the new statutory avenue of review by the D.C. Circuit.<sup>65</sup> But with respect to the jurisdiction-stripping provision, it replaced that language with “shall take effect on the date of the enactment.”<sup>66</sup> Not only that, but the new language was co-sponsored by Senator Levin, who had made an impassioned objection to the withdrawal of habeas jurisdiction; and Senator Levin consistently, both before and after the conference version was reported, described the compromise language as retaining habeas jurisdiction over cases that had already been filed. In the floor debate on the Graham-Levin-Kyl Amendment, for example, Senator Levin stated, “What we have done in this amendment, we have said that the standards in the amendment will be applied in pending cases, but the amendment will not strip the courts of jurisdiction over those cases. For instance, the Supreme Court jurisdiction in Hamdan is not affected.”<sup>67</sup> Moreover, attempts in conference to reinstate the original effective date language to the jurisdiction-stripping provisions were rejected.

It is very difficult to tell a statutory interpretation story under which the substitute language means the same thing as the original language it replaced, when the substitute explicitly makes a distinction between the effective date of the provisions relating to habeas and those relating to direct review. It is not necessary to resort to legislative history in the form of legislators’ statements about what they meant; it is enough to look at what they did. That is unambiguous: they deleted clear language applying the jurisdiction-stripping provisions to pending cases and replaced it with language saying the provisions take effect after enactment; they kept the original clear language with respect to the new review procedures; and they rejected several attempts to restore the original language. Indeed, one has only to look at the statutory text itself. The effective date of the jurisdiction-stripping provisions is different from the effective date of the new procedures. Under the principle that statutes should be interpreted so that each word means something, “effective on the date of enactment” must mean something different from “apply with respect to any claim . . . that is pending on or after the date of enactment.” This conclusion is strengthened by the principles that withdrawals of jurisdiction, and withdrawals of habeas, should be construed narrowly.

The language of § 1405(h) also contrasts with the language of another recent repealer of habeas jurisdiction. The Real ID Act, passed on May 7, 2005, eliminated habeas jurisdiction and made direct review in the Court of Appeals the exclusive means of judicial review of certain deportation and removal orders.<sup>68</sup> In that statute Congress specified that the repealer “shall take effect upon the date of the enactment of this division and shall apply to cases in which the final administrative order of removal, deportation, or exclusion was issued before, on, or after the date of the

---

<sup>65</sup> H.R. 1815 § 1405, 109th Cong. (2006).

<sup>66</sup> *Id.*

<sup>67</sup> 151 CONG. REC. S12777, 12755 (daily ed. Nov. 15, 2005) (statement of Sen. Levin).

<sup>68</sup> 8 U.S.C. §1252, Pub. L. No. 109-13 (2005).

enactment of this division.”<sup>69</sup> Other sections of that Act were made effective for “all cases in which the final administrative removal order is or was issued before, on, or after such date,” and “all cases pending before any court on or after such date.”<sup>70</sup> Additionally, provisions were made for transferring habeas cases pending in the district courts to the courts of appeals for treatment as petitions for review.<sup>71</sup> No such language can be found in the Graham Amendment—except in the provisions that apply to direct review by the D.C. Circuit.<sup>72</sup>

The 109th Congress obviously knew how to draft a statute that clearly specified that a repeal of habeas jurisdiction was to apply to pending cases. The “effective date” provision of the Graham amendment was the subject of debate and negotiation. The fact that weaker and at best ambiguous language was substituted for the original clear language on a point that the drafters were paying attention to indicates that the better and more prudent reading would be to read the repealer narrowly and hold that jurisdiction over *Hamdan* and the other pending cases was not extinguished.<sup>73</sup> At least this should be true of *Hamdan*, because that specific case was clearly on the minds of many on the senate side when the legislation was considered and passed.

#### IV. ALTERNATIVE AVENUES TO JUDICIAL REVIEW

The Act states that except for the direct review provided in § 1405, “no court, justice or judge shall have jurisdiction to hear or consider” a habeas petition by or on behalf of a non-citizen Guantanamo detainee. In presenting the conference report, Senator Kyl asserted, “All habeas actions are terminated by this bill.”<sup>74</sup> President Bush, in his signing statement,

---

<sup>69</sup> Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 2005 HR 1268, Div. B, Title I., § 106(b), 119 Stat. 311 (2005).

<sup>70</sup> *Id.* at §§ 101(h)(3), (4), 119 Stat. 305.

<sup>71</sup> *Id.* at § 106(c), 119 Stat. 311.

<sup>72</sup> Moreover, in contrast to the Real ID Act’s provision for transfer, Senator Graham’s assertion that the pending habeas cases would be transformed into D.C. Circuit petitions is implausible because many such cases would not meet the Graham Amendment criteria for review.

<sup>73</sup> The Court might not be eager to decide the legality of military commissions now, particularly since the Chief Justice has recused himself. The Court’s decision to allow Jose Padilla to be transferred to civilian custody following his criminal indictment may be some slight evidence to this effect, though the transfer need not, by itself, moot the case. If that is so, the creation of direct judicial review of the decision of the military commissions would give the Court an opportunity to abstain, remand, and wait for the issue to come up after the commission trial. The fact that Hamdan and others might have to remain in custody for years until their commission trials were final might not bother the Court unduly—although the district judge declined to abstain from deciding Hamdan’s petition until after trial because he had “raised substantial arguments denying the right of the military to try [him] at all.” Petition for an Extraordinary Writ, or, in the Alternative, for an Original Writ of Habeas Corpus, *In re Hamdan*, No. 05-790 (Dec. 2005) at 4. And in *Hamdi* a majority was willing to approve substantial inroads in due process safeguards in CSRT proceedings involving citizens. It is not clear, however, that the Court could actually dodge deciding the jurisdiction-stripping issue and if it did, the issue would come up again and soon.

<sup>74</sup> 151 CONG. REC. S14256, 14268 (daily ed. Dec. 21, 2005) (statement of Sen. Kyl).

agreed. “[G]iven the decision of the Congress reflected in [ §§ 1405(h)(1) and (2)] that the amendments . . . shall apply to past, present, and future actions, including applications for writs of habeas corpus, described in that section, . . . the executive branch shall construct [the Act] to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future actions . . .”<sup>75</sup>

The statute is framed as an amendment to § 2241. In the floor debate, Senators Graham and Kyl made it clear that their intention was only to amend § 2241, because they regarded *Rasul* as based solely on interpretation of insufficiently clear statutory language.<sup>76</sup> By analogy to *St. Cyr*, *Felker*, and *Yerger*, where Congress took away the right to review of habeas petitions by appeal or certiorari but the Court held that the pre-existing avenue of an original writ of habeas in the Supreme Court was still available, is there any other source of authority for habeas? There are several possibilities.

#### A. Common Law (or Constitutional) Habeas

The Constitution clearly presupposes the existence of habeas, in much the way that the Court has held it presupposes state sovereignty,<sup>77</sup> and provides constitutional protection for it in the Suspension Clause. The Court has long recognized habeas as an “immemorial right[.]”<sup>78</sup> Indeed, “The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom.”<sup>79</sup> It is “a writ antecedent to statute, . . . throwing its root deep into the genius of our common law.”<sup>80</sup>

---

<sup>75</sup> Statement on Signing of H.R. 2863, the “Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (Dec. 30, 2006) *available at* <http://www.whitehouse.gov/news/releases/2005/12/print/20051230-8.html> (last viewed June 3, 2006).

<sup>76</sup> See 151 CONG. REC. S12652, 12663 (Nov. 10, 2005) (statement of Sen. Graham) (“The habeas corpus writ that is being exercised does not come from the Constitution. This is not a constitutional right that an enemy combatant has under our law. This is an interpretation of a statute we passed, 2241.”); *id.* at S12659 (statement of Sen. Kyl) (“Absent congressional direction, the U.S. Supreme Court had to interpret an existing statute, section 2241. It held that, since Congress has not expressed any intention outside of section 2241 in interpreting that section, the courts had jurisdiction to consider habeas corpus petitions regarding these detainees. . . . As Justice Scalia said in his dissent, ‘the petitioners do not argue that the Constitution independently requires jurisdiction here.’ . . . No one argued in the *Rasul* case that the Constitution required habeas corpus petitions. It was, rather, a matter of statutory construction. . . . We have the statutory jurisdiction to write whatever kind of laws we want. We clearly have the statutory jurisdiction to say it does not apply to foreign terrorists.”); *id.* at S12731 (statement of Sen. Graham) (“Habeas petitions are not coming from the Constitution. They are coming from an interpretation of section 2241.”).

<sup>77</sup> “[Habeas] was brought to America by the colonists, and claimed as among the immemorial rights descended to them from their ancestors.” *Ex parte Yerger*, 75 U.S. 85, 95 (1868). *Cf., e.g., Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

<sup>78</sup> *Yerger*, 75 U.S. at 95.

<sup>79</sup> *Id.*

<sup>80</sup> *Rasul v. Bush*, 542 U.S. 466, 473 (2004) (quoting *Williams v. Kaiser*, 323 U.S. 471, 484, n.2 (1945)).

As such, it is “an integral part of our common-law heritage.”<sup>81</sup> Habeas corpus is one of the common law writs—the Great Writ, to be sure, but still a common law writ.<sup>82</sup>

*Yerger* intimated that the Supreme Court would have habeas power even if Congress had not enacted a jurisdictional statute.

The terms of [the Suspension Clause] necessarily imply judicial action. In England, all the higher courts were open to applicants for the writ, and it is hardly supposable that, under the new government, founded on more liberal ideas and principles, any court would be, intentionally, closed to them.<sup>83</sup>

*Yerger* also asserted that the scope of the habeas power in the United States, where it is guaranteed by the written Constitution, cannot be less than that guaranteed in the Habeas Corpus Act of 1679 in England.

It would have been, indeed, a remarkable anomaly if this court, ordained by the Constitution for the exercise, in the United States, of the most important powers in civil cases of all the highest courts in England, had been denied, under a Constitution which absolutely prohibits the suspension of the writ, except under extraordinary exigencies, that power in cases of alleged unlawful restraint, which the Habeas Corpus Act of Charles II expressly declares those courts to possess.<sup>84</sup>

*Ex parte Bollman*<sup>85</sup> held that the power to issue the writ was not inherent but required statutory authorization.<sup>86</sup> Some scholars have argued, however, that in the founding period the federal courts had common law and state law powers to issue writs of habeas corpus even without statutory authority.<sup>87</sup>

Arguments about jurisdictional power may go further than is necessary today. *Bollman* and *Yerger* were decided before 1875, when general federal question jurisdiction was unavailable and specific jurisdictional grants were necessary. Today it would be commonplace to

---

<sup>81</sup> *Id.* (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973)).

<sup>82</sup> *See, e.g.*, *Ex parte Peru*, 318 U.S. 578 (1943); *Ex parte Siebold*, 100 U.S. 371 (1880) (the name and incidents of the writ come from the common law).

<sup>83</sup> *Yerger*, 75 U.S. at 95-96.

<sup>84</sup> *Id.* at 95-96.

<sup>85</sup> 8 U.S. (4 Cranch) 75 (1807).

<sup>86</sup> “The power to award the writ by any of the courts of the United States, must be given by written law.” *Id.* at 94.

<sup>87</sup> Eric M. Freedman, *Just Because John Marshall Said It, Doesn't Make It So*, 51 ALA. L. REV. 531 (2000); James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 CORNELL L. REV. 497 (2005); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433 (2000).

analyze a case such as a habeas action using three separate concepts: the existence of a substantive right (for example, the right to due process, the right against compelled self-incrimination, or rights guaranteed by the Geneva Conventions); the existence of a cause of action (such as an action for wrongful death, a *Bivens*-type action, or an action under 42 U.S.C. § 1983); and subject matter jurisdiction, the power of the court to hear that type of case.

The existence of the substantive right (e.g., whether the Geneva Conventions confer individually enforceable rights, whether the Bill of Rights protects non-citizens imprisoned outside the United States, and if so, the content of that protection) goes to the merits. The main issue in the detainee cases thus far has been whether noncitizens being held outside the United States have the claimed rights. So long as the claim arises under federal law, § 1331 would provide subject matter jurisdiction whether or not a specialized habeas statute was available.

The writ of habeas corpus acts much like 42 U.S.C. § 1983. Just as § 1983 provides a cause of action for plaintiffs who are deprived of federal rights by persons acting under color of state law, habeas provides a cause of action for petitioners who are in custody in violation of the Constitution or laws. In both cases the substantive law defines the scope of the right, and § 1983 or habeas provides the vehicle for getting into court.<sup>88</sup>

If the common law writ of habeas corpus has not been abolished, therefore, it could provide the third ingredient without having to also constitute a grant of jurisdiction. *Yerger*, *Felker*, and *St. Cyr* suggest that when new statutory rights were enacted, the old forms of habeas corpus were not abolished but remained available for use if needed. The writ of habeas corpus has been in use continuously since before the founding, even if the scope of the writ has gone through an “evolutionary” process.<sup>89</sup> Like other common law writs, such as mandamus and prohibition, it has survived to our time. Indeed, the respondent and amici on the government’s side in *Felker* argued that it is precisely the common law writ against executive detention that the suspension clause protects.<sup>90</sup>

---

<sup>88</sup> For example, Hamdan’s habeas petition alleges violations of his right to a speedy trial (Uniform Code of Military Justice, Art 10; Geneva Convention III; and federal regulations); pre-sentencing judicial process (Geneva Conventions, Common Article 3); constitutional right not to be tried by a military commission that had not been authorized by Congress; equal protection; 42 U.S.C. § 1981; constitutional and statutory right not to be tried by a military commission whose subject matter jurisdiction contravenes the recognized laws of war; and right to be subject to prosecution only for the offenses authorized in the presidential order creating the military tribunals. Petition for an Extraordinary Writ, or, in the Alternative, for an Original Writ of Habeas Corpus, *In re Hamdan*, No. 05-790, at 4.

<sup>89</sup> See *Felker v. Turpin*, 518 U.S. 651, 664 (1996).

<sup>90</sup> See Respondent’s brief, 1995 U.S. Briefs 8836 (1996); Brief for the United States as Amicus Curiae, 1995 U.S. Briefs 8836 (1996).

The Court in *Bollman*<sup>91</sup> held that § 14 of the First Judiciary Act created an independent writ of habeas corpus that could stand alone and did not need a separate jurisdictional grant. Moreover, *St. Cyr* invoked the “long-standing rule requiring a clear statement of congressional intent to repeal habeas jurisdiction,”<sup>92</sup> and teaches that Congress must make a very clear statement when it abolishes a right to habeas.<sup>93</sup> The Graham Amendment, which by its terms and in the statements of its sponsor aims only to amend § 2241, gives no hint that it was intended to abolish any available common law habeas right—or, indeed, any habeas other than that authorized by § 2241.

Just two years ago, the Court reiterated the pre-constitutional status of habeas.

Habeas corpus is, however, ‘a writ antecedent to statute, . . . throwing its root deep into the genius of our common law.’ The writ appeared in English law several centuries ago, became ‘an integral part of our common-law heritage’ by the time the Colonies achieved independence, and received explicit recognition in the Constitution.<sup>94</sup>

The Court also quoted *INS v. St. Cyr* with approval: “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.”<sup>95</sup>

If the writ of habeas corpus indeed has the ancient, pre-constitutional antecedents that the Court has repeatedly affirmed, and if, as the Court has also repeatedly held, amendments to later enactments such as § 2241 do not disturb the pre-existing routes to habeas, then the argument that when the DTA eliminated the statutory right to habeas in § 2241, the historical, nonstatutory entitlement to habeas remained in force is at least entitled to very serious consideration.

## B. Original Writ of Habeas in the Supreme Court under § 2241

Might one argue that although the Act is an amendment to § 2241, it leaves some portion of § 2241 untouched, in particular the original writ in the Supreme Court? Unquestionably a long shot, this argument could find support in *Felker*. The statute at issue in *Felker* amended § 2244(b) to limit second or successive habeas petitions. The Supreme Court held that this limitation did not affect the Court’s authority to hear an original writ

---

<sup>91</sup> 8 U.S. (4 Cranch) 75 (1807).

<sup>92</sup> 533 U.S. 289, 298 (2001).

<sup>93</sup> “Congress must articulate specific and unambiguous statutory directives to effect a repeal.” *Id.* at 299.

<sup>94</sup> *Rasul v. Bush*, 542 U.S. at 473.

<sup>95</sup> *Id.* at 474 (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)).

filed under § 2241, because Congress had not clearly stated its intention to do so.

No provision of [the statute] mentions our authority to entertain original habeas petitions . . . . Although [the statute] precludes us from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court, it makes no mention of our authority to hear habeas petitions filed as original matters in this Court.<sup>96</sup>

As in *Yerger*, the Court said, it would not find repeal by implication. Similarly, in *INS v. St. Cyr*, the Court held that Congress can take away jurisdiction only by so stating with unmistakable clarity.<sup>97</sup>

There is no specific mention in the text of the Graham amendment or in the floor debate of the original writ of habeas in the Supreme Court. To the contrary, in the floor debate Senator Graham confirmed that the statute did not reach anything but statutory habeas under § 2241 because, he explained, no habeas petitions had been filed asserting any other grounds for judicial review. At that time, no detainee had filed an original writ in the Supreme Court. Thus, even though § 2241 also authorizes the original writ, the Court could find that Congress did not clearly state an intention to abolish the original writ, but only the ordinary writ, filed in the lower federal courts. This approach would allow the Court to avoid the conclusion that Congress intended, without any specific discussion, to eliminate what has been considered a fundamental backstop to judicial review and due process ever since *McCardle* and *Yerger*. The approach also has the advantage of opening only a small hole in the Act. The original writ only pertains to review by the Supreme Court, in cases that have already been properly before an inferior federal court.<sup>98</sup>

When passage of the Graham Amendment began to look like a certainty, Hamdan applied for an original writ of habeas in the Supreme Court, arguing that if the Graham Amendment is construed to deprive the Court of jurisdiction to decide the questions on which cert was granted and the Court does not issue an extraordinary writ, then there will be no other Court from which he can get relief because no other court can review a decision of the D.C. Circuit.<sup>99</sup> Moreover, Hamdan argues, if the D.C. Circuit's decision is allowed to stand, Hamdan might not be able to get

---

<sup>96</sup> *Id.* at 660.

<sup>97</sup> 533 U.S. at 298-99.

<sup>98</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). On the facts of *Hamdan*, the “original writ” would be an exercise of the Court’s appellate jurisdiction, as required by *Marbury*, because the Court would be reviewing the decision of the D.C. Circuit. Because the detainees are subject to executive detention and have not been tried, the “original writ” would only be available if the petitioner had been able to get into some other court whose decision the Supreme Court could then review.

<sup>99</sup> See Petition for an Extraordinary Writ, or, in the Alternative, for an Original Writ of Habeas Corpus, *Hamdan v. Rumsfeld*, No. 05-790 (Dec. 2005).

review in any court because of the second or successive petition rule. This argument was probably written before the final version of the Graham Amendment, which does permit at least some questions of constitutional and statutory law to be litigated in the D.C. Circuit, emerged. The statute as enacted does authorize direct review of a final decision of the military commission in the circuit court, including constitutional questions and questions of law. The circuit court's decision would be reviewable by the Supreme Court. There would be no issue of second or successive petitions since by hypothesis even first petitions are barred.

*Felker* and *Yerger* did not depend, however, on a showing that there was no other alternative for judicial review. The argument for an original writ based on the lack of a sufficiently clear statement that Congress intended to bar it could be successful.

### C. Habeas under § 1651, the All Writs Act

It is often said that “[s]ection 14 [of the First Judiciary Act] is the direct ancestor of 28 U.S.C. § 2241, subsection (a).”<sup>100</sup> But § 14 is also the direct ancestor of 28 U.S.C. § 1651, the All Writs Act, which provides in its current version: “The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” By its terms, § 1651 appears to authorize writs of habeas corpus. The fact that a different statutory provision, § 2241, also authorizes writs of habeas corpus does not mean that § 1651 does not do so as well. Section 1651 no longer contains the phrase “not specifically provided for by statute” that was part of § 14 of the First Judiciary Act. Indeed, as Congress dispensed with the various abstruse common law extraordinary writs, this phrase was dropped from the All Writs Act, and § 1651 consolidates writs formerly available under several separate statutory provisions (each of which also derives from § 14).<sup>101</sup> As *Yerger* and *Felker* noted, when the broad habeas provided by § 2241 is in place, there is no reason for petitioners to proceed under the earlier authorities—but that does not mean that they have been

---

<sup>100</sup> *Felker v. Turpin*, 518 U.S. 651, 660 n.1 (1996). Section 14 of the First Judiciary Act provided:

*And be it further enacted*, That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And 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.

<sup>101</sup> Section 1651 consolidates §§ 342 (writs of prohibition and mandamus), 376 (writs of *ne exeat*) and 377 (writs of *scire facias* and all writs not specifically provided for by statute) of the 1940 Act. The 1911 Act, 36 Stat. 1156, 1162, contained § 234 (writs of prohibition and mandamus), §§ 261 (*ne exeat*) and 262 (*scire facias*).

extinguished. They are still available to be used if the broader, more recent procedure is repealed.

I am not aware of a case where § 1651 was found to be a basis for habeas. However, it derives from § 14 and there does not appear to be anything in the statutory text that would prevent it. The All Writs Act is not itself a jurisdictional grant, but as discussed above, with § 1331 on the books it is no longer necessary to find a specialized jurisdictional grant. It is only necessary to find authorization to issue the writ.

Indeed, in the Real ID Act Congress repeatedly specified the All Writs Act and § 1361 (mandamus) in addition to § 2241 in its habeas repealer.<sup>102</sup> This suggests that the drafters of that statute believed that a plausible case might be made for issuing habeas under the All Writs Act.

The weakest point in the argument for § 1651 is that it authorizes the court to issue writs “in aid of its jurisdiction.” If the habeas jurisdiction of § 2241 has been withdrawn, however (assuming for now that the DTA applies to pending cases), there appears to be no jurisdiction to aid. In *Hamdan*, the Court probably would not find that it could issue the writ to aid its own certiorari jurisdiction over the pending petition; such an argument appears inconsistent with *McCardle*. However, courts have issued writs under the All Writs Act in aid of their own potential appellate jurisdiction. The Supreme Court would have certiorari jurisdiction over a direct appeal to the D.C. Circuit as provided in the DTA. It may be more likely that the Court would find “in aid of jurisdiction” applicable in a mandamus case, which I discuss below. If § 1651 authorizes habeas writs, however, the reasoning should also apply to such writs. In *Al-Odah*,<sup>103</sup> moreover, the Court could aid its jurisdiction (and to effectuate its decision) in *Rasul*, as well as its potential appellate jurisdiction over the disposition on the remand, for the petitioners in *Al-Odah* were parties in *Rasul*.

#### D. Mandamus under § 1361 or § 1651

*Hamdan* has also applied for a writ of mandamus directing the Court of appeals to affirm the district court’s grant of habeas relief, and directing the individuals named as respondents in the habeas petition to obey their duties under the applicable laws.<sup>104</sup> Writs of mandamus are

---

<sup>102</sup> 8 U.S.C. §1252 (a)(2).

<sup>103</sup> *Al Odah v. United States (In re Guantanamo Detainee Cases)*, 2005 U.S. App. LEXIS 4651 (Mar. 11, 2005) (interlocutory appeal granted).

<sup>104</sup> Mandamus is authorized by 28 U.S.C. § 1361. It was originally authorized by § 13 of the First Judiciary Act, which provided:

The supreme court shall also have appellate jurisdiction, from the circuit courts and courts of the several states, . . . and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principles and usages of law, to any courts

authorized by § 1361, not § 2241, and thus arguably are not affected by the DTA's amendment to § 2241. Through a writ of mandamus the Supreme Court can review the actions of inferior federal courts. Lower federal courts may use mandamus to order government officials, such as the custodians of detainees, to act in accordance with the Constitution and laws.<sup>105</sup> The Supreme Court, of course, can only issue mandamus to a court, and this requires that a court have jurisdiction of a case. In *Hamdan* this requirement might be met through the proceedings that have already been held and the decision that is already outstanding. If the D.C. Circuit should have enjoined the military commissions from proceeding, then mandamus may be appropriate.

Mandamus or other extraordinary relief may also be available under § 1651, the All Writs Act. In *Felker v. Turpin*, for example, two concurring opinions noted that although AEDPA precluded review by "certiorari" or "appeal," it did not foreclose appellate review by way of writs in aid of jurisdiction under § 1651.<sup>106</sup>

Professor Pfander suggests a more powerful version of this analysis, arguing that the First Judiciary Act and Article III conferred a general power on the Supreme Court to supervise the decisions of the lower federal courts through writs of habeas corpus and mandamus, even decisions that the Court lacks statutory jurisdiction to review.<sup>107</sup>

Of course, a different analysis is also possible. Even if the Court of Appeals decision was wrong, if Congress has validly withdrawn jurisdiction for pending cases, then the *case* should be dismissed and the previous opinions withdrawn. If this were done, there would be nothing for the Supreme Court to correct. This course would also avoid the problem of whether the Supreme Court can issue a mandamus order, or the Court of Appeals can obey it, without "consider[ing] . . . an application for a writ of habeas corpus," which would be prohibited by the DTA.

#### E. Appellate Jurisdiction, § 1254

Hamdan has argued that because the DTA is framed solely as an amendment to § 2241 (and, as discussed above, as a withdrawal of habeas

---

appointed, or persons holding office, under the authority of the United States.

The All Writs Act would also apparently support a writ of mandamus, as the words "not otherwise provided by statute" have been deleted.

<sup>105</sup> Insofar as Hamdan seeks mandamus directly from the Supreme Court to executive officials, the petition appears to be outside the Court's appellate jurisdiction. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137. But because the case has already been in the D.C. Circuit, the Supreme Court could issue the writ to that court instead.

<sup>106</sup> 518 U.S. 651, 665-66 (1996) (Stevens, J., concurring) (no limitation on appellate jurisdiction under § 1254(2) or § 1651), 666, 667 (Souter, J., concurring) (same; also Supreme Court Rule 20.3 and original writs of habeas corpus).

<sup>107</sup> *See* James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433 (2000).

jurisdiction it must be construed strictly), it has no effect on the Court’s jurisdiction over Hamdan’s petition for certiorari, which is based on § 1254 (governing the Court’s appellate jurisdiction), not § 2241.

It might seem strange that the Court could retain jurisdiction over an appeal in a habeas case if Congress has withdrawn jurisdiction to “hear or consider” such habeas petitions. In particular, the argument seems contrary to *McCardle*, where the Court held that the repealer ousted it of jurisdiction over McCardle’s habeas appeal even though it had been fully briefed and argued. But on closer examination *Hamdan* stands in a different posture.

In *McCardle*, Congress had passed a statute in 1867 (the precursor of our present § 2241) that greatly expanded the scope of federal habeas,<sup>108</sup> and for the first time gave the Supreme Court jurisdiction to hear appeals of habeas cases. In 1868 Congress, apprehensive that the Court was about to strike a blow at Reconstruction in its decision of *McCardle*’s appeal, passed another statute repealing the Court’s appellate jurisdiction under § 2241. The Court held that the repealer stripped it of jurisdiction, regardless of the fact that the Court was in the midst of its proceedings and regardless of Congress’s motive in repealing jurisdiction. Significantly, however, the Court was careful to observe that an alternate route to Supreme Court review was still open—the “original writ” of habeas, which had been the customary way for the Supreme Court to exercise appellate review in habeas cases before the 1867 Act. Shortly thereafter, in *Ex parte Yeger*,<sup>109</sup> the Court confirmed that the repeal of the 1867 Act had not affected the jurisdiction that had previously been granted in the First Judiciary Act; the original writ of habeas was still available as an avenue to review in the Supreme Court.

If the Court were to construe the DTA narrowly, it would be possible to hold that its jurisdiction to hear the case comes not from § 2241 but from § 1254; and Congress did nothing to amend § 1254. The apparent anomaly could be explained through the conventional view that when it attempts to strip jurisdiction, Congress must “turn square corners,”<sup>110</sup> and that it is not easy to block all avenues of judicial review.

In my view this argument is a distinct long shot. The statute directs that “no court, justice or judge” shall “hear or consider” a habeas petition from a Guantanamo detainee. Surely an appellate court hearing a direct appeal of a decision granting or denying a petition is at least “considering” the petition. In this sense, the *McCardle* analogy is not exact because *McCardle* involved the repeal of a specific part of a statute that provided for review by appeal. Thus, Congress deleted an avenue of review. In the

---

<sup>108</sup> In particular, federal courts for the first time were given jurisdiction to hear habeas petitions from state prisoners who claimed that their detention, even pursuant to conviction, was in violation of the Constitution and laws.

<sup>109</sup> 75 U.S. 85 (1869).

<sup>110</sup> Hart, *supra* note 2.

DTA, however, Congress deleted original jurisdiction and specifically provided that “no court” may “consider” the petition. The most plausible common sense reading of this language appears to be that it would bar an appellate court from “considering” a habeas petition filed under § 2241. Moreover, if the DTA does not affect the Supreme Court’s appellate jurisdiction under § 1254, it presumably would also not affect the Court of Appeals’ jurisdiction under § 1291. If that were so, the language “no court, justice or judge” would not apply to any court or judge exercising appellate jurisdiction.<sup>111</sup>

The argument that the Supreme Court’s § 1254 jurisdiction over *Hamdan* may find support from an unexpected source. Senators Kyl and Graham emphatically rejected the suggestion of Senators Bingaman and Levin that the provision for “exclusive jurisdiction” in the D.C. Circuit might prevent the Supreme Court from taking review of those decisions. They stated that the ordinary provisions for Supreme Court review would be unaffected by the DTA.<sup>112</sup> If § 1254 still provides for review of D.C. Circuit decisions appealing CSRT determinations or military commission convictions, perhaps its application to a petition for certiorari that has already been granted would be similarly unaffected.

If the Court is sympathetic enough to *Hamdan*’s case on the merits to try to find a way to hear the case, however, it seems more likely that it would simply construe the statute as not applying to pending cases—or at least to *Hamdan* itself, which was specifically mentioned in the floor debates. Placing the decision on statutory interpretation of a specific statutory text would allow the Court to avoid creating precedent that might be inconvenient later.

The mandamus argument is closely similar to the § 1254 argument, however, and that argument, I believe, has merit. Courts can exercise mandamus in aid of their jurisdiction, including their potential jurisdiction of a future appeal.<sup>113</sup> The Supreme Court would have jurisdiction of a petition for certiorari from a future decision of the D.C. Circuit reviewing a CSRT determination of *Hamdan*’s status (or a judgment of conviction by a military commission).<sup>114</sup> Courts have issued writs of mandate while cases are still in lower courts, in aid of their potential jurisdiction on appeal.<sup>115</sup>

---

<sup>111</sup> The statutory reference to courts and judges other than the district courts does not by itself undermine *Hamdan*’s argument, because § 2241 authorizes “the Supreme Court, any justice thereof, the district courts and any circuit judge” to grant writs of habeas corpus within their respective jurisdictions. § 2241(a).

<sup>112</sup> 151 CONG. REC. S12652 (daily ed. Nov. 10, 2005).

<sup>113</sup> See 28 U.S.C. § 1651 (2006).

<sup>114</sup> The government has taken the position that pending habeas cases would be converted into applications for review in the D.C. Circuit. Reply Brief in Support of Respondents’ Motion to Dismiss for Lack of Jurisdiction at 2, *Hamdan v. Rumsfeld*, cert. granted 126 S. Ct. 622 (Nov. 7, 2005) (No. 05-184) at <http://www.usdoj.gov/osg/briefs/2005/3mer/2mer/2005-0184.mer.rep.pdf> (June 3, 2006); see also 152 CONG. REC. S97073 (daily ed. Feb. 9, 2006) (statement of Senators Kyl and Graham after the passage of the Graham Amendment). The government envisions a procedure similar to that following during the traditional period after AEDPA abolished

V. THE SUSPENSION CLAUSE

The Suspension Clause recognizes the constitutional stature of the writ of habeas corpus, and permits the privilege of the writ to be suspended only “in cases of invasion or rebellion, when the public safety requires it.” It would require an extraordinary flight of the imagination to argue that this condition is met today, and I will assume that it is not met. (In any event, Congress made no legislative findings that the constitutional preconditions for suspension of the writ are satisfied, and nothing in the floor debate or the remarks inserted after passage even remotely suggests this rationale.) I also assume that the *St. Cyr* solution—this is not a suspension of habeas, just an evolutionary adjustment in its scope—is not available here.

The question whether the withdrawal of jurisdiction over habeas petitions violates the Suspension Clause brings together two difficult questions that have inspired much academic work: the power of Congress to take away the jurisdiction of the federal courts and the nature of the Suspension Clause.<sup>116</sup> I will not attempt to do more than gesture toward them. The “traditional” view of jurisdiction-stripping is that Congress’s power is plenary.<sup>117</sup> Congress must speak very clearly to strip jurisdiction,<sup>118</sup> but it has the power to do so. Other theories attempt to find some limitation on congressional power, such as the “essential functions” theory,<sup>119</sup> or independent unconstitutionality. It could be argued that eliminating Supreme Court review, or all federal judicial review, or all judicial review, of claims that persons are in custody in violation of the Constitution would destroy the essential function of the Supreme Court. A stronger argument is that the Suspension Clause is an independent constitutional constraint on Congress’s control over federal jurisdiction. The Suspension Clause prohibits the withdrawal of habeas jurisdiction unless either the conditions for suspension of the writ are satisfied, or Congress provides an effective substitute for habeas.

The Court has held that even if the ability to file a habeas petition is taken away, there is no suspension clause violation if there is another

---

appeals of certain immigration decisions. *See, e.g., Felker v. Turpin*, 518 U.S. 651 (1996). Of course, if CSRT determinations have not been made as to Hamdan or other detainees with pending cases, such transfer would presumably be premature.

<sup>115</sup> *See, e.g., Ex parte Peru*, 318 U.S. 578 (1943) (Supreme Court issued writ of mandamus directly to district court in aid of Supreme Court’s appellate jurisdiction).

<sup>116</sup> I will not discuss here the debates over the nature of the Suspension Clause, whether habeas as it was available in 1789 can be abolished, whether habeas is a one-way ratchet that, once expanded, cannot be retracted, and so on.

<sup>117</sup> Congress’s power over the inferior federal courts is plenary because of the Madisonian Compromise, and its power over the Supreme Court’s appellate jurisdiction is plenary because of the Exceptions and Regulations Clause. The Supreme Court’s habeas jurisdiction can only be appellate. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807).

<sup>118</sup> That is, with respect to the Supreme Court’s appellate jurisdiction and the whole of the jurisdiction of the lower federal courts.

<sup>119</sup> *See Hart, supra* note 2.

adequate avenue for obtaining judicial review.<sup>120</sup> Conversely, the Court has said that “[a] construction . . . that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions.”<sup>121</sup> Assuming that the Graham Amendment eliminated the lower federal courts’ jurisdiction over habeas, the Supreme Court’s appellate jurisdiction, and the original writ of habeas in the Supreme Court, the only remaining avenue of judicial review would be the limited direct review by the D.C. Circuit of final decisions by CSRTs and military commissions. Thus, the question of the Act’s constitutionality may boil down to whether that review is good enough to substitute for habeas.

The original version of the Graham Amendment would have permitted judicial review only of the question whether the CSRT had complied with its own standards and procedures as specified by the Department of Defense; no review at all outside the military system was provided for review of convictions by military commissions. This version of the legislation would have foreclosed any review at all of whether the procedures themselves violated the Constitution, as well as whether the detention, the conditions of confinement, or the treatment of individual detainees violated the Constitution. The Graham Amendment would thus have squarely “preclude[d] review of a pure question of law by any court,” which the Court has said would raise “substantial constitutional questions.”<sup>122</sup>

The statute as enacted does permit detainees to raise constitutional questions and questions of law,<sup>123</sup> and the Supreme Court can review the circuit court’s decision. This single shot at judicial review may be enough to avoid invalidity under the Suspension Clause—if claims of violations of constitutional, statutory and treaty rights can indeed be fairly litigated through that procedure. If this is so, the opponents of the amendment will, by insisting on including this review for both CSRT and military

---

<sup>120</sup> See, e.g., *Felker v. Turpin*, 518 U.S. 651 (1996) (eliminating almost all opportunities to file second or successive habeas petition did not violate Suspension Clause because ample opportunities for judicial review remained). Some have contended that *McCardle* upheld the 1868 repealer because an alternate avenue to Supreme Court review was available through the original writ procedure.

<sup>121</sup> Citing the Supremacy Clause, the Court continued, “Because of that Clause, some ‘judicial intervention in deportation cases’ is unquestionably ‘required by the Constitution.’” 533 U.S. at 300. See Richard H. Fallon, Jr., *Applying the Suspension Clause in Immigration Cases*, 98 COLUM. L. REV. 1068 (1998); see also Calcano-Martinez, 533 U.S. 348 (2001); *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001) (construing statute, in light of avoidance canon, not to authorize indefinite detention of removable alien whom no other country would accept).

<sup>122</sup> *INS v. St. Cyr*, 533 U.S. 289, 300 (2001).

<sup>123</sup> The final language provides:

(C) SCOPE OF REVIEW. The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of—

. . . .  
(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

commission decisions, ironically have saved the abolition of habeas for detainees.<sup>124</sup> Here again, the Graham Amendment as originally proposed was seriously lacking, as it only offered judicial review for CSRT determinations limited to whether the proceedings complied with the Defense Department's own standards and procedures. Opponents forced the inclusion of judicial review of constitutional questions and questions of law, as well as the same type of review of convictions by military commissions.

Just how effective this review would be is not clear. The statutory language is much improved over the original proposal by Senator Graham, which was susceptible to the interpretation that it did not permit an "as applied" challenge.<sup>125</sup> After the statute was passed, however, Senator Kyl stated that the final version permits only a facial challenge, and that one case will decide the issue for all time.

Nor does it invite an as-applied challenge. All that this language asks is whether using these systems is good enough for the ends that they serve—to justify continued detention or to try an enemy combatant for war crimes. The only thing that this provision authorizes is, in effect, a facial challenge. In fact, we anticipate that once the District of Columbia Circuit decides these questions in one case, at least so long as military orders do not substantially change, that decision will operate as circuit precedent in all future cases, with no need to relitigate this second inquiry in the future. In effect, the second inquiry—into the constitutionality and lawfulness of the use of CRSTs and commissions—need only be decided once by the court.<sup>126</sup>

If Senator Kyl is correct in his interpretation, then for most detainees and most claims, the review provided by the statute will be essentially ineffective. The statute already prevents review of the correctness of the decision, as well as any matters that cannot be tied to the operation of the standards and procedures governing the tribunal. If only facial challenges can be raised, and if every litigant after the first one will be bound by *stare decisis*, the process will not be even a minimally effective substitute for habeas.

However, the statutory language does not appear consistent with Senator Kyl's interpretation. The court is permitted to review "whether the *use*" of the standards and procedures "to make *the* determination"—presumably, the determination with respect to this detainee—is consistent

---

<sup>124</sup> Of course, it would have been unconscionable for the opponents of jurisdiction-stripping to have left the detainees without any means of judicial review of their constitutional claims solely to improve the chances that the Supreme Court would strike down the entire scheme.

<sup>125</sup> The original language was, "whether subjecting an alien enemy combatant to such standards and procedures is consistent with the Constitution and laws."

<sup>126</sup> 151 CONG. REC. S14256, 14267 (daily ed. Dec. 21, 2005) (statement of Sen. Kyl).

with the Constitution and laws.<sup>127</sup> These words suggest an individualized determination that can accommodate an as-applied challenge.

Even if the limited judicial review that is available to detainees of final decisions by CSRTs and military commissions is enough to convince the Court that it is a sufficiently effective substitute for habeas review, however, many, many constitutional claims will not be entitled to any judicial review at all under the procedures created by the DTA. For these detainees, the DTA strips the federal courts of jurisdiction over their habeas claims and provides no substitute procedure. For them, the withdrawal of jurisdiction would violate the Suspension Clause.

The DTA provides jurisdiction to review appeals only by detainees who have had a CSRT status determination or who have completed a trial before a military commission. However, without habeas, there is no way to enforce the DTA requirement (and that of *Rasul*) that detainees be given CSRT determinations. For almost four years, up until the Supreme Court's decision in *Rasul*, detainees were held without any opportunity to contest the factual basis for their detention. Even after *Rasul*, the government has not provided hearings to all detainees. In fact, it has turned to a policy of holding "high-value" detainees outside of Guantanamo and keeping their names, where they are being held, what they are alleged to have done, and what is happening to them secret. Some Guantanamo detainees have been rendered to foreign countries where they have no procedural rights and where the federal courts where they had already filed habeas petitions would lose their jurisdiction. Others have obtained orders preventing the government from transporting them without prior notice to the court; if the DTA's withdrawal of jurisdiction applies to these pending cases, those injunctions would presumably be of no further effect.

Even if the provision for review of final decisions by CSRTs and military commissions is an adequate substitute for habeas, there are categories of detainees who may have viable constitutional or statutory claims but who will not be eligible for judicial review under the statute. For them, habeas—or some other form of judicial review, by extraordinary writ or otherwise—may be constitutionally required.

We know, for example, that there are detainees who have gone through a CSRT and have been found not to be enemy combatants, and yet are still being held at Guantanamo, chained to the floor.<sup>128</sup> (In some of these cases, the government says it cannot find a country willing to take the detainee. Yet the Supreme Court has already held that illegal immigrants cannot be held in custody indefinitely simply because no country will take them.<sup>129</sup>) They would not be eligible for judicial review. Even if the procedures crafted by the Department of Defense and approved by

---

<sup>127</sup> H.R. 1815 § 1405, 109th Cong. (2006).

<sup>128</sup> Senator Durbin referred to this case at 151 CONG. REC. S14256, 14271 (daily ed. Dec. 21, 2005).

<sup>129</sup> *Zadvydas v. Davis*, 533 U.S. 678 (2001).

Congress called for release of detainees who were found not to be enemy combatants, under the statute there would be no way for a detainee who was not released to obtain review.<sup>130</sup>

We also know that detainees were held for years at Guantanamo without being given a hearing until the *Rasul* decision, that prisoners have been held as “ghost detainees” at Guantanamo as well as in other prisons without being listed on official registers, and that prisoners are being held in CIA black sites in a number of foreign countries.<sup>131</sup> No one has yet received a trial by military commission, though some detainees have been held for over four years. The DTA eliminates habeas for the Guantanamo detainees, but does not provide any way for a detainee who is not given a CSRT hearing or a military commission trial to obtain judicial review.

Under the DTA, detainees’ right to judicial review of the legality of their detentions is completely dependent on the military’s decision to bring them before a CSRT or military commission.

Some forty detainees have obtained injunctions from district judges to protect them from being sent off to countries like Egypt or Yemen for detention and interrogation—a practice that is sometimes known as “rendition to torture.”<sup>132</sup> Not only does this practice raise the most serious questions about violation of detainees’ fundamental rights, it also destroys the basis for habeas jurisdiction over their claims by removing them from U.S. custody. For detainees who learn in the future that they may be subject to extraordinary rendition, it will not be possible to obtain any protection from the federal courts. Indeed, if the Graham Amendment is held to apply to pending cases, the existing injunctions may be dissolved. (The detainees are not being paranoid; one detainee whose request for an injunction was denied was promptly shipped off to Egypt, despite a representation to the judge by the government that this would not happen without prior notification to the court.<sup>133</sup>)

Under the DTA, there is no habeas for complaints about conditions of confinement. If detainees at Guantanamo were to be subject to cruel,

---

<sup>130</sup> The DTA calls for an annual review of whether detainees should continue to be held as enemy combatants, but that would be a long time to wait for a person who had been determined not to be an enemy combatant, and it is not clear that a person who has *not* been determined to be an enemy combatant would be eligible for such a review. See § 1405(e)(2)(A) (the D.C. Circuit “shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal *that an alien is properly detained as an enemy combatant*” (emphasis supplied)).

<sup>131</sup> See, e.g., *Rasul v. Bush*, 542 U.S. 473 (2004) (detainees held for more than three years); Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq; Practice Is Called Serious Breach of Geneva Conventions*, NY TIMES, Oct. 24, 2004, A1 (ghost detainees); Ian Fisher, *Rights Group Lists 26 It Says U.S. Is Holding in Secret Abroad*, NY TIMES, Dec. 5, 2005, A6 (ghost detainees); Amnesty International, *United States of America/Yemen: Secret Detention in CIA “Black Sites,”* AI Index 51/177/2005 (“black sites”).

<sup>132</sup> See *supra* note 40 and accompanying text.

<sup>133</sup> See Carol Rosenberg, *U.S. Returns Guantanamo Detainee to Egypt*, MIAMI HERALD (Florida), Oct. 4, 2005.

inhumane or degrading treatment, or to torture, there would be no way for them to obtain judicial relief of any sort, at least as long as they remained in military custody—even though both torture and cruel, inhumane or degrading treatment are banned by statute as well as by treaty. In fact, the U.N. Commission on Human Rights has produced a report concluding that Guantanamo prisoners have been subjected to both cruel, inhumane and degrading treatment and to torture, including violent force-feeding of hunger strikers.

Detainees who are being subjected to torture surely raise claims at the very core of habeas. Yet the DTA makes no provision for judicial review (or, indeed, any review) of such claims. Furthermore, the DTA bars “any other action . . . relating to any aspect of the detention” by a noncitizen who “is currently in military custody” or who has been determined by the D.C. Circuit to have been properly detained as an enemy combatant.<sup>134</sup> Thus, if a detainee either is in military custody but has not had a status determination, or if he remains in custody following a determination that he is an enemy combatant, he has no avenue for judicial review of a claim of torture.

For these categories of detainees, the DTA does not provide an adequate substitute for habeas—in fact, it provides no substitute at all. Even if the DTA procedures could be considered an effective substitute for habeas for those who have received final CSRT determinations or trials by military commission—and to reach that conclusion, the statute would have to be interpreted to permit detainees to raise all constitutional and statutory claims, both facial and as-applied—the withdrawal of habeas jurisdiction should not be permissible for the rest.

After *Rasul*'s holding that detainees are entitled to judicial review of their constitutional claims, surely foreclosing these most fundamental claims without providing any means of judicial review whatsoever is a violation of the Suspension Clause.

## VI. THE PROHIBITION ON “OTHER ACTIONS”

The Act strips jurisdiction over “any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba.”<sup>135</sup> The ban on “any other action” applies only if the alien is currently in military custody or has been determined *by the D.C. Circuit* to have been properly detained as an enemy combatant.<sup>136</sup>

---

<sup>134</sup> Section 1405(e)(1).

<sup>135</sup> § 1405(e)(1)(e)(2).

<sup>136</sup> Senator Feingold stated that *Hamdan* was not barred because of this provision, “because that case involves a challenge to trial by military commission, not to an aspect of a detention, and of course was not brought under this provision.” 151 CONG. REC. S14256, 14272 (statement of Sen. Feingold). Unless Sen. Feingold was speaking to the remote possibility that this section might be construed as an independent bar to the *Hamdan* case, separate from the ban on habeas actions, these remarks seem opaque.

Plainly, this language forecloses a § 1983 suit by prisoners over the conditions of their detention—or any suit at all by any Guantanamo detainee so long as he is in military custody anywhere. And it appears to forbid any action “relating to any aspect of the detention” for any detainee who has been determined to be an enemy combatant by a CSRT which has been affirmed by the D.C. Circuit. But the provision does not appear to bar a civil action for damages or other relief after a detainee is released from military custody, so long as the detainee was not determined to have been an enemy combatant in a case that went through direct review in the D.C. Circuit.<sup>137</sup> If the detainee receives a CSRT hearing, is determined to be an enemy combatant, and the decision is affirmed by the D.C. Circuit, and the prisoner is then released from custody, the government and its agents are apparently immune from liability for damages. (The “any other action” language is too vague, however, to foreclose the alternate routes to judicial review discussed above, under the “specific and unambiguous statutory directive” standard of *Felker* and *St. Cyr*.)

The DTA expressly provides that it does not “confer any constitutional right on an alien detained as an enemy combatant outside the United States.”<sup>138</sup> The legislative history makes clear that the purpose of this provision was to ensure that the McCain Amendment (§§ 1402, 1403) would not be held to imply a private right of action.<sup>139</sup> Similarly, however, the statute does not purport to abolish any rights that would otherwise exist, and the legislative history tends to confirm this reading as well.<sup>140</sup> A number of civil suits have been filed by former detainees seeking damages for their detention and treatment under a number of theories, including the Alien Tort Statute, *Bivens*-type actions, customary international law, the Geneva Conventions, and others.<sup>141</sup> Nothing in the statute seems to bar such suits, whether pending or in the future, so long as the plaintiffs are no longer in military custody and have not been individually determined by the D.C. Circuit to be enemy combatants. If the plaintiff was released without having gone through a CSRT, if the CSRT determined that he was not an enemy combatant, if it determined that he was an enemy combatant but he was released without a final determination by the D.C. Circuit, if he was released before the DTA procedures went into effect—in all these cases an action would not be barred.

---

<sup>137</sup> In fact, if being an “enemy combatant” is not an element of the offense, a detainee who was convicted by a military commission could, apparently, bring a civil action.

<sup>138</sup> H.R. 1815 § 1405(f), 109th Cong. (2006) (enacted).

<sup>139</sup> See, e.g., 151 CONG. REC. S14256, 14269 (statement of Sen. Warner); *id.* (statement of Sen. Levin).

<sup>140</sup> *Id.* (statement of Sen. Levin) (“I do not believe that the amendment was intended either to create such a private right of action, or to eliminate or undercut any private right of action such as a claim under the Alien Tort Statute that is otherwise available to an alien detainee.”).

<sup>141</sup> E.g., *El-Masri v. Tenet* (D. Va. filed Dec. 6, 2005) (complaint for damages filed on behalf of Khaled El-Masri by the ACLU), at [http://www.aclu.org/images/extraordinaryrendition/asset\\_upload\\_file829\\_22211.pdf](http://www.aclu.org/images/extraordinaryrendition/asset_upload_file829_22211.pdf) (last visited June 3, 2006).

The provision is a bit of a mystery, because even though the statute expressly does not create a “constitutional” right and the legislative history indicates that it does not create an implied statutory right, the McCain Amendment does create a statutory standard of conduct for U.S. personnel that could be the basis for a finding of liability under an independent cause of action, such as the Alien Tort Statute.<sup>142</sup>

The question may be purely academic, because so far the suits by former detainees have not accomplished much beyond a certain amount of publicity when they have been filed.<sup>143</sup> But if the prospect of “other actions” was threatening enough to call for legislation, one might expect the clause to have been more carefully drafted.

## VII. CONCLUSION

The authoritative case law on jurisdiction stripping is not so much a body of doctrine as a small set of relatively discontinuous data points. When the Supreme Court decides the scope and constitutionality of the Detainee Treatment Act, as eventually it must, the decision will be momentous. Jurisdiction-stripping always raises deep issues of separation of powers and whether Congress or the court is pre-eminent. In this case, the decision will be even more profound, for it will go far to determine whether the Constitution has any constraining power on the President when he exercises military power, or acts in the name of national security, abroad.

Ever since it began taking prisoners in Afghanistan in late 2001, the Administration has sought to create a law-free zone in Guantanamo, a place where it could detain prisoners indefinitely, interrogate them as it saw fit, and hold them in whatever conditions it chose. We have seen the results of this experiment—prisoners held for four years and more without charge, held even after military tribunals found them not to be enemy combatants; interrogated with inhumane methods, transferred to countries where they have not lived for many years and where they fear torture, and in some cases apparently transferred to foreign countries for the purpose of interrogation under torture. The DTA was enacted as a complement to the McCain Amendment forbidding cruel, inhumane, or degrading treatment by any U.S. personnel of any prisoner of any nationality anywhere in the world. But the Bush Administration has declared that the McCain Amendment does not apply in Guantanamo<sup>144</sup> or elsewhere outside the

---

<sup>142</sup> See 151 CONG. REC. at S14269 (statement of Sen. Levin (“Rather, the McCain amendment would establish a legal standard applicable to any criminal prosecution or any private right of action that is otherwise available under law.”)).

<sup>143</sup> “This language places a limit on legal recourse available to detainees. While we do not know whether any legal remedies other than habeas corpus actions would have been available to detainees, I would have preferred not to have this limitation in the bill.” *Id.* at S14260 (statement of Sen. Levin).

<sup>144</sup> Josh White & Carol D. Leonnig, *U.S. Cites Exception in Torture Ban*, WASH. POST, Mar. 4, 2006, at A4.

United States, that non-citizens detained outside the United States have no constitutional protections, and that neither the Constitution, nor Congress, nor treaties such as the Geneva Conventions can restrain the President when he acts outside U.S. borders in the name of fighting terrorism. The administration justifies these extraordinary powers on the ground that they are needed to fight the “war on terrorism,” which it claims is a threat that is far beyond any we have ever experienced, and which it acknowledges will go on for decades.

The Supreme Court’s decisions in *Rasul* and *Hamdi* placed a barrier in the road to this law-free zone, affirming that the federal courts were open to hear constitutional claims by Guantanamo detainees. In the aftermath, the government began shipping detainees to other countries for interrogation, held “high-value” prisoners in secret CIA “black sites” in foreign countries, and demonstrated that it would go to great lengths to avoid having to subject its methods or judgments to scrutiny by federal courts.<sup>145</sup> It brought very few criminal charges or charges before military tribunals;<sup>146</sup> when it did bring criminal charges, it argued that it should be excused from discovery and confrontation requirements because “terrorism is different.”<sup>147</sup>

In the meantime, the United Nations issued a report concluding that Guantanamo detainees were being subjected to degrading treatment in violation of the International Covenant on Civil and Political Rights (ICCPR), and torture as defined in the Convention Against Torture.<sup>148</sup> The report also found several other violations of the Convention Against Torture, including force-feeding of detainees, excessive violence during transportation, and rendition to countries where there is a substantial risk of torture; and other violations of international law. The report recommended that the Guantanamo Bay detention facility be closed “without further delay,”<sup>149</sup> and that the government “should either expeditiously bring all Guantanamo Bay detainees to trial . . . or release them without further delay.”<sup>150</sup> Civil liberties organizations as well as mainstream journalists also documented widespread occurrences of atrocious treatment. At the same time, the Administration has stepped up its efforts to prevent

---

<sup>145</sup> The Court had remanded the third of the 2004 detainee cases, *Rumsfeld v. Padilla*, because of a venue issue. When the case worked its way through proceedings in the correct court and it appeared likely that the Court would again grant cert, the government abruptly charged him as a co-conspirator in a pending criminal case (on much less serious charges than it had alleged when seeking to detain him as an enemy combatant), applied to transfer him to civilian custody, and moved to dismiss his habeas case.

<sup>146</sup> According to the Defense Department website, as of March 12, 2006 a total of ten detainees had been charged before military commissions. See [http://www.defenselink.mil/news/Nov2004/charge\\_sheets.html](http://www.defenselink.mil/news/Nov2004/charge_sheets.html) (last visited June 3, 2006).

<sup>147</sup> See, e.g., *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004) (criminal defendant’s request for access to prosecution witnesses under FED. R. CRIM. P. 15).

<sup>148</sup> United Nations Economic and Social Council, Commission on Human Rights, Situation of detainees at Guantanamo Bay (report of the Chairperson of the Working Group on Arbitrary Detention et al.), E/CN.4/2006/120 (Feb. 15, 2006) at 37 ¶¶ 87, 88.

<sup>149</sup> *Id.* at 38-39, ¶ 96.

<sup>150</sup> *Id.* at 38, ¶ 95.

detainees from raising their claims in courts, and has argued more energetically that even Congress cannot impose limits or oversight on the treatment of non-citizens.

From *Ex parte Milligan*<sup>151</sup> on, the Supreme Court has emphasized the central importance of habeas in maintaining constitutional principles and the rule of law. It has construed both withdrawals of jurisdiction and limitations on habeas narrowly, and has required that statutory substitutes for traditional habeas actually be effective. If the Court continues in this tradition, it will go cautiously in reading the DTA as a bar to a federal court forum for habeas claims by detainees—particularly in light of the significant and accumulating evidence that in the absence of judicial oversight, detainees are not being treated humanely, or in accordance with either international law or the fundamental principles of due process.

---

<sup>151</sup> 71 U.S. 2 (1866).