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Douglas E. Edlin

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INSTITUTIONAL IDENTITY AND THE RULE OF LAW: *BELMARSH*, *BOUMEDIENE*, AND THE CONSTRUCTION OF CONSTITUTIONAL MEANING IN ENGLAND AND THE UNITED STATES

*Douglas E. Edlin**

I. INTRODUCTION

Recent decisions of the United States federal courts and the English House of Lords provide a timely opportunity to compare the respective judicial responses to acts taken by the governments of the United States and United Kingdom in the wake of the terrorist attacks of September 11, 2001.¹ More specifically, I will examine district court opinions, as well as the majority and dissenting opinions of the United States Court of Appeals for the District of Columbia in *Boumediene*,² along with the United States Supreme Court's extraordinary reversal of its initial denial of certiorari in that case,³ and the English House of Lords's decisions in *A v. Secretary of*

* Associate Professor, Department of Political Science, Dickinson College. Harry Pohlman's comments significantly improved this Article and I am grateful for them. Responsibility for any mistakes is mine alone.

1. This is not to say that the situations of the United States and United Kingdom in relation to the September 11 attacks are identical. See generally Michel Rosenfeld, *Judicial Balancing in Times of Stress: Comparing the American, British, and Israeli Approaches to the War on Terror*, 27 CARDOZO L. REV. 2079, 2095–3102 (2006) (contrasting the varying historical experiences, factual circumstances, and legal conditions with respect to terrorism in the United States, the United Kingdom and Israel).

2. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007). The D.C. Circuit consolidated *Boumediene* with *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003). For the sake of simplicity and consistency, I will continue to cite the consolidated cases as *Boumediene*, but I should note that factual distinctions between the two cases might require differentiated evaluation of the respective claims. I note some of these distinctions in my discussion and citations below.

3. *Boumediene v. Bush*, 127 S. Ct. 3078 (2007), *vacating* 127 S. Ct. 1478 (2007).

State for the Home Department.⁴ I will consider certain similarities and points of contrast in English and American cases, focusing on considerations of institutional relationship, judicial authority, and maintenance of constitutional values.

This Article explores the contours of the common law constitution and rule of law principles by comparing decisions of English and American courts. Of course, the traditional view is that English courts do not enjoy the same power of judicial review that American federal courts do. The traditional view is that, unlike federal courts in the United States, English courts cannot invalidate primary legislation; judicial review in the English system is limited to review of administrative agency actions to ensure compliance with the authority delegated by Parliament. The reason for this limitation on judicial review in England is the effort by British judges and constitutional theorists to reconcile the exercise of judicial review with the fundamental British constitutional doctrine of parliamentary sovereignty. On this account, the courts review agency actions to effectuate the intentions of Parliament in creating and empowering the agency.⁵

This traditional effort to reconcile judicial authority with parliamentary supremacy is known as the *ultra vires* doctrine.⁶ And while the doctrine and current debate surrounding it are, in a sense, the theoretical background to the discussion of this Article, they are not the subject of the Article. I consider the decisions of the House of Lords in relation to the English constitutional commitment to the rule of law. I leave for another time the analysis of these cases in relation to the *ultra vires* doctrine and parliamentary sovereignty.

By comparing the responses of English and American judges to their governments' use of detention facilities as national security measures following September 11, this Article attempts to contrast the relative authority of English and United States courts within and across their constitutional environments as a means of demonstrating what is shared in the Anglo-American constitutional tradition, what

4. *A v. Sec'y of State for the Home Dep't (No. 2) (Belmarsh II)* [2005] UKHL 71 (appeal taken from Eng.); *A v. Sec'y of State for the Home Dep't (Belmarsh I)* [2004] UKHL 56 (appeal taken from Eng.).

5. See Mark Elliott, *The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law*, in *JUDICIAL REVIEW AND THE CONSTITUTION* 83, 83–84 (Christopher Forsyth ed., 2000).

6. *Id.* at 95–96.

differences might exist, and the occasional disconnect between what judges actually do and what judges (and others) say they can do. Moreover, I hope to illuminate the meaning of constitutionalism and the courts' institutional responsibility to ensure that the governments remain ruled by the laws of the constitution in the United Kingdom and United States.

II. THE UNITED STATES: HABEAS CORPUS, JURISDICTION-STRIPPING AND INSTITUTIONAL DIALOGUE

A. *The District Court Opinions*

*Boumediene*⁷ is the most recent statement in an ongoing "conversation"⁸ between the federal courts and Congress concerning the scope of the President's and Congress's constitutional authority to restrict access to the federal courts⁹ as a means of gathering information and protecting national security during the ongoing response to terrorist threats against the United States and its interests. As this inter-institutional conversation relates specifically to the *Boumediene* case, the two district court decisions that the D.C. Circuit reviewed had reached conflicting results.¹⁰

The *Boumediene* petitioners are Algerian natives who subsequently acquired Bosnian citizenship or permanent residency.¹¹ They were arrested by Bosnian authorities in October 2001 and were to be released from custody, on January 17, 2002, by order of the Supreme Court of Bosnia and Herzegovina, which determined that

7. *Boumediene*, 476 F.3d 981.

8. The quotation marks here are not intended as (entirely) tongue-in-cheek. Stepping back from the immediacy and importance of the issues at stake, this conversation between the courts and Congress is constitutionally healthy, desirable, and expected. See, e.g., Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992) ("[J]udges play an interdependent part in our democracy . . . [insofar as] [t]hey do not alone shape legal doctrine but . . . they participate in a dialogue with other organs of government, and with the people as well.").

9. Of course, access to the federal courts is itself only one element of the governmental response to terrorist threats. I restrict myself to this aspect of the federal government's response in accordance with the thematic focus of this Article (and attendant space constraints).

10. I should mention that, in fact, this conversation began earlier. The D.C. Circuit's opinion in *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), was reversed by the Supreme Court in *Rasul v. Bush*, 542 U.S. 466 (2004). Space constraints necessitated that I begin my discussion post-*Rasul*.

11. See Brief for the Petitioners at 1–2, *Boumediene v. Bush*, No. 06-1195 (Aug. 24, 2007).

there was inadequate evidence against the petitioners.¹² Later, on January 17, 2002, however, Bosnian police seized the petitioners upon their release from a Sarajevo prison and transferred them to U.S. military custody. U.S. forces then transferred the petitioners to Guantanamo.¹³

In both district court cases, the government moved for dismissal of the petitioners' claims, arguing that non-resident aliens have no constitutional rights of any kind and no statutory right to habeas corpus.¹⁴ As I will explain in this section, the district and circuit court opinions in *Boumediene* ultimately raise questions about the relationship between institutional authority and constitutional principle. Although the decisions frequently speak in the language of individual rights, as I will begin to discuss with respect to the United States cases and as I conclude in my discussion of the House of Lords decisions, whether conceived initially in terms of an individual right to habeas corpus or liberty, these cases ultimately should be addressed in terms of the institutional and constitutional role and responsibility of the courts.

In *Boumediene*, the court granted the government's motion and the case was dismissed.¹⁵ The district court relied heavily on the Supreme Court's decision in *Johnson v. Eisentrager*¹⁶ and concluded that the petitioners enjoyed no constitutional or statutory right to habeas, because petitioners were aliens held at a military facility outside the territory over which the United States exercises sovereignty.¹⁷ Moreover, the district court determined that nothing in the Supreme Court's *Rasul* decision altered this analysis or result.¹⁸ Interestingly, the district court viewed the *Rasul* decision as limited to statutory habeas claims and interpreted this limitation as an implicit endorsement of *Eisentrager*'s¹⁹ holding that non-resident

12. *Id.* at 2.

13. *Id.*

14. The cases also raise issues of international law that I do not discuss here.

15. *Boumediene v. Bush*, 476 F.3d 981, 994 (D.C. Cir. 2007).

16. 339 U.S. 763, 770–71, 778 (1950), *cited in* *Khalid v. Bush*, 355 F. Supp. 2d 311, 321 (D.D.C. 2005).

17. *See Khalid*, 355 F. Supp. 2d at 321–22.

18. *Id.* at 322–23 (discussing *Rasul v. Bush*, 542 U.S. 466 (2004)); *see also Rasul*, 542 U.S. at 481 (holding that under the habeas statute non-resident aliens detained at Guantanamo had a right to judicial review of the legality of their detention).

19. 339 U.S. at 781.

aliens have no constitutional right to habeas.²⁰ This interpretation of the *Rasul* Court's reading of *Eisentrager* seems to ignore the Court's discussion of *Braden v. 30th Judicial Circuit Court*²¹ in *Rasul*:

In [*Braden*], this Court held, contrary to *Ahrens*, that the prisoner's presence within the territorial jurisdiction of the district court is not "an invariable prerequisite" to the exercise of district court jurisdiction under the federal habeas statute. Rather, because "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody," a district court acts "within [its] respective jurisdiction" within the meaning of § 2241 as long as "the custodian can be reached by service of process." *Braden* reasoned that its departure from the rule of *Ahrens* was warranted in light of developments that "had a profound impact on the continuing vitality of that decision." These developments included, notably, decisions of this Court in cases involving habeas petitioners "confined overseas (and thus outside the territory of any district court)," in which the Court "held, if only implicitly, that the petitioners' absence from the district does not present a jurisdictional obstacle to the consideration of the claim." *Braden* thus established that *Ahrens* can no longer be viewed as establishing "an inflexible jurisdictional rule," and is strictly relevant only to the question of the appropriate forum, not to whether the claim can be heard at all.

Because *Braden* overruled the statutory predicate to *Eisentrager*'s holding, *Eisentrager* plainly does not pre-

20. *Id.*; see *Khalid*, 355 F. Supp. 2d at 322–23 ("Nothing in *Rasul* alters the holding articulated in *Eisentrager* and its progeny. The Supreme Court majority in *Rasul* expressly limited its inquiry to whether non-resident aliens detained at Guantanamo have a right to a judicial review of the legality of their detention under the habeas statute, and, therefore, did not concern itself with whether the petitioners had any independent constitutional rights. Indeed, the *Rasul* majority went on to distinguish *Eisentrager* on grounds that *Eisentrager* was primarily concerned with whether the prisoners had any constitutional rights that could be vindicated via a writ of habeas corpus. Thus, by focusing on the petitioners' statutory right to file a writ of habeas corpus, the *Rasul* majority left intact the holding in *Eisentrager* and its progeny." (citations omitted)).

21. 410 U.S. 484 (1973).

clude the exercise of § 2241 jurisdiction over petitioners' claims.²²

The district court did not cite or discuss *Braden* (or its influence on the *Rasul* decision) anywhere in its opinion.

In *Al Odah*, the government's motion was denied with respect to the petitioners' due process claims.²³ Reading *Rasul* somewhat differently from the district court in *Boumediene*, Judge Green understood *Rasul* to hold that "[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under [the habeas statute]."²⁴ Judge Green also did not view the *Rasul* decision as limited to statutory habeas claims:

[T]he majority opinion addressed two grounds upon which a detainee traditionally could assert a right to *habeas* relief: statutory and constitutional. The *Rasul* majority interpreted *Eisentrager* to have focused primarily on the German detainees' lack of a constitutional right to *habeas* review, and distinguished the material facts upon which that portion of the *Eisentrager* decision relied from the circumstances concerning the Guantanamo Bay detainees. Among other distinguishing facts, the *Rasul* opinion emphasized that the Guantanamo Bay detainees were not citizens of countries formally at war with the United States, denied committing any war crimes or other violent acts, were never charged or convicted of wrongdoing, and—most significant to the present motion to dismiss—are imprisoned in "territory over which the United States exercises exclusive jurisdiction and control." Next, *Rasul* turned to the issue of statutory *habeas* jurisdiction and ruled that post-*Eisentrager* precedent required the recognition of statutory jurisdiction even over cases brought by petitioners held outside the territorial jurisdiction of any federal district court. [The

22. *Rasul*, 542 U.S. at 478–79 (second alteration in original) (citations omitted) (quoting *Braden*, 410 U.S. at 494–95, 497–500).

23. See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 481 (D.D.C. 2005). The district court also denied the government's motion regarding petitioners' Geneva Convention claims. I do not discuss these claims here.

24. *Id.* at 449 (quoting *Rasul*, 542 U.S. at 481).

Court noted] that the *habeas* statute made no distinction between citizens and aliens held in federal custody²⁵

In addition to the striking instance of two judges on the same court reading the same precedent in starkly different ways, the district court opinions that the D.C. Circuit reviewed in *Boumediene* also underscore the importance of considering how different judges approach these cases in relation to different aspects of constitutional meaning and institutional responsibility.

B. The Conversation Between Congress and the Courts

In response to *Rasul*, Congress passed the Detainee Treatment Act of 2005 (“DTA”).²⁶ The DTA amended the federal habeas statute to include an ouster clause that read as follows:

Except as provided in section 1005 of the [DTA], no court, justice, or judge [may exercise jurisdiction over] . . . 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 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 . . . has been determined by the United States Court of Appeals for the District of Columbia Circuit . . . to have been properly detained as an enemy combatant.²⁷

The attempt by Congress to deprive the federal courts of jurisdiction to consider habeas petitions and to deny the courts any authority to review any government actions related to any individual detained as an enemy combatant was an attempt to avoid the ruling in *Rasul*.²⁸

The Supreme Court then decided *Hamdan*.²⁹ The government argued that the DTA precluded jurisdiction over future and pending habeas claims filed by detainees.³⁰ The Court disagreed.³¹ Noting

25. *Id.* at 461 (citations omitted).

26. Pub. L. No. 109-148, 119 Stat. 2680 (2005) (codified at 42 U.S.C. §§ 2000dd to -l (2006)).

27. Detainee Treatment Act § 1005, 119 Stat. at 2742.

28. See Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 349 (2006).

29. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

30. *Id.* at 2763.

31. *Id.* at 2764.

the ordinary principle of statutory construction that “a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute,”³² the Court concluded that Congress must have intended to differentiate subsections (e)(2) and (e)(3)—which applied explicitly to pending cases—from subsection (e)(1)—which did not apply on its terms to pending cases.³³ As a result, the Court held that the DTA did not preclude its exercise of jurisdiction in that case, which was pending at the time the DTA was enacted.³⁴

Congress responded to *Hamdan* with the Military Commissions Act of 2006 (“MCA”).³⁵ In the MCA, Congress amended the jurisdiction-stripping provision that the DTA added to the habeas statute:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.³⁶

The MCA attempted to broaden the jurisdictional preclusions of the DTA in four important respects.³⁷ First, unlike the DTA ouster

32. *Id.* at 2765 (citations omitted).

33. *Id.* at 2769.

34. *Id.*

35. Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. §§ 948a–950w (2006)).

36. *Id.* § 7(a), 120 Stat. at 2635–36.

37. I do not mean to suggest that these are the only meaningful ways the MCA altered the DTA statutory scheme. For a discussion of some others, see Patrick O. Gudridge, *An Anti-Authoritarian Constitution? Four Notes*, 91 MINN. L. REV. 1473, 1509–10, 1513 (2007).

clause, which was limited to claims made by or in relation to detainees held at Guantanamo, the MCA clause applied to any habeas petition filed by any detainee designated as an enemy combatant, wherever that individual was held. Second, unlike the DTA clause, which was limited to aspects of detention at Guantanamo, the MCA attempted to deprive federal courts of jurisdiction over claims relating to detention by the United States anywhere in the world. Third, unlike the DTA clause, which was limited to claims arising from aspects of detention,³⁸ the MCA expanded the jurisdictional preclusion to any claims “relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement.”³⁹ Finally, unlike the DTA, which empowered the D.C. Circuit to ensure that an enemy combatant was “properly detained,”⁴⁰ the MCA entrusted this authority to “the United States.”⁴¹

In addition to these increased restrictions on judicial authority to review government action, the MCA sought to eliminate any confusion concerning its applicability to pending as well as future cases:

The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.⁴²

C. The D.C. Circuit Opinions

1. The Majority Opinion

Judge Randolph begins his majority opinion in *Boumediene* by articulating the question raised on appeal: “Do federal courts have jurisdiction over petitions for writs of habeas corpus filed by aliens

38. Detainee Treatment Act § 1004(a).

39. Military Commissions Act § 7(a).

40. Detainee Treatment Act § 1005(c)(2)(A).

41. Military Commissions Act § 7(a). This change in the language does not prevent the D.C. Circuit from engaging in the review of Combat Status Review Tribunal (“CSRT”) determinations countenanced by the DTA.

42. Military Commissions Act § 7(b), 120 Stat. at 2634.

captured abroad and detained as enemy combatants at the Guantanamo Bay Naval Base in Cuba?”⁴³ Judge Randolph interpreted the question of jurisdiction as a “constitutional issue” that was reduced to “whether the MCA, in depriving the courts of jurisdiction over the detainees’ habeas petitions, violates the Suspension Clause of the Constitution”⁴⁴ Judge Randolph then cited his own opinion in *Al Odah* to support the conclusion that *Eisentrager* was the controlling Supreme Court precedent in *Boumediene*.⁴⁵ Judge Randolph’s reading of *Eisentrager* is remarkable, given that the Supreme Court explicitly quoted Judge Randolph’s *Al Odah* opinion when expressing its conclusion that *Eisentrager* does not preclude federal jurisdiction over the detainees’ habeas and other claims:

Eisentrager itself erects no bar to the exercise of federal-court jurisdiction over the petitioners’ habeas corpus claims. It therefore certainly does not bar the exercise of federal-court jurisdiction over claims that merely implicate the “same category of laws listed in the habeas corpus statute.” But in any event, nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the “privilege of litigation” in U.S. courts.⁴⁶

Whatever the reason for Judge Randolph’s treatment of *Eisentrager* in *Boumediene*, I am most interested in its relevance for his view of the jurisdictional preclusion in *Boumediene* as a Suspension Clause issue.

While there are historical links between the creation of military commissions and the suspension of habeas corpus,⁴⁷ and some commentators have noted that deprivation of federal jurisdiction may be tantamount to a suspension of habeas,⁴⁸ these commentators also

43. *Boumediene v. Bush*, 476 F.3d 981, 984 (D.C. Cir. 2007).

44. *Id.* at 988.

45. *Id.* at 991 (citing *Al Odah v. United States*, 321 F.3d 1134, 1140–41 (D.C. Cir. 2003), *rev’d sub nom.* *Rasul v. Bush*, 542 U.S. 466, 485 (2004)).

46. *Rasul*, 542 U.S. at 484 (quoting *Al Odah*, 321 F.3d at 1139).

47. *See, e.g.*, Joseph C. Sweeney, *Guantanamo and U.S. Law*, 30 *FORDHAM INT’L L.J.* 673, 754 n.366 (2007) (“Authorization for military commission trials came indirectly through the 1862 statute dealing with the suspension of habeas corpus” (citation omitted)).

48. *See, e.g.*, Stephen I. Vladeck, *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 95 *GEO. L.J.* 1497, 1552–53 (2007) (“Although the habeas-stripping provision of the

conclude that, to the extent that the jurisdictional preclusion is read to implicate the Suspension Clause, this actually weakens the argument that the preclusion is constitutional.⁴⁹ Moreover, the Supreme Court's comments on the matter also indicate that a statutory preclusion of jurisdiction to review government action in habeas proceedings would not seem supportable on Suspension Clause grounds.⁵⁰

Even assuming for purposes of discussion that the Suspension Clause provides some constitutional basis for the congressional deprivation of jurisdiction over the detainees' habeas petitions in *Boumediene*, there are two further problems with this position. First, and most obviously, by its own terms the Suspension Clause permits Congress to suspend the writ only "when in [c]ases of [r]ebellion or [i]nvasion the public [s]afety may require it."⁵¹ Therefore, any claim that the jurisdictional ouster clause in the MCA (and DTA) is justified by the Suspension Clause must demonstrate that Congress enacted the MCA in direct response to an invasion, and that public safety requires preclusion of judicial review of the detainees' habeas

Military Commissions Act may not implicate the Suspension Clause at all if the appellate remedy provided for in the D.C. Circuit turns out to be meaningful and adequate, it may, particularly in cases in which *no* appeal to the D.C. Circuit, let alone *no meaningful* appeal, is provided." (footnotes omitted)).

49. *Id.* at 1553 ("[I]f the Suspension Clause is 'structural' along the lines of the jurisdictional grants within Article III, it is difficult to conclude anything other than that non-citizens have exactly the same 'right' of access to the writ of habeas corpus as citizens. After all, does the Bill of Attainder and Ex Post Facto Clause (which, like the Suspension Clause, appears in Article I, Section 9) only apply to citizens? Certainly, Justice Scalia's position on the vitality of the Suspension Clause in the *latter* (citizen) context is abundantly clear, as is the analogy to Justice Douglas's concurrence in *Hirota*, and the notion that, because the writ must be available for citizens, it must be available for *non*-citizens as well. This Article's broader argument about *Hirota* and Article III may well suggest, then, that arguments against the constitutionality of the Military Commissions Act on Suspension Clause grounds are on far sounder footing." (footnotes omitted)). As Professor Vladeck points out, the D.C. Circuit's position is also that the detainees have no due process rights whatsoever. If this position were accepted, the conclusion that the MCA's jurisdictional preclusion is unconstitutional would amount to allowing the detainees to appear in the D.C. Circuit just long enough for that court to tell them that they have no rights that the court can recognize. See *id.* at 1553 n.286. For the D.C. Circuit's statements regarding the detainees' lack of constitutional protections, see *Boumediene*, 476 F.3d at 991–92.

50. *Cf.* *INS v. St. Cyr*, 533 U.S. 289, 304–05 (2001) ("In sum, even assuming that the Suspension Clause protects only the writ as it existed in 1789, there is substantial evidence to support the proposition that pure questions of law like the one raised by the respondent in this case could have been answered in 1789 by a common-law judge with power to issue the writ of habeas corpus. It necessarily follows that a serious Suspension Clause issue would be presented if we were to accept the INS's submission that the 1996 statutes have withdrawn that power from federal judges and provided no adequate substitute for its exercise." (citation omitted)).

51. U.S. CONST. art. I, § 9, cl. 2.

petitions. To be sure, the attacks on September 11, 2001, may reasonably be understood as an invasion, but “[a]t some point, the invasion as a predicate for suspension must lapse,”⁵² and it is incumbent upon Congress to justify in express terms the MCA’s ouster provision in accordance with the text and traditional understanding of the Suspension Clause.

This leads directly to the second difficulty in trying to support the preclusion of jurisdiction by reference to the Suspension Clause. Given the threat that jurisdictional preclusion raises for rule of law principles and for the institutional integrity of the judiciary, which is heightened by the historical and constitutional importance of judicial consideration of habeas claims, the federal courts have traditionally required that Congress demonstrate its intention to preclude federal jurisdiction over habeas petitions (and other constitutional claims) with unmistakably clear statutory language.⁵³ Habeas jurisdiction cannot be ousted by implication.⁵⁴ The heightened clarity in statutory language necessary to establish a legislative intention to oust federal jurisdiction in habeas cases (and over constitutional questions more generally) has come to be known as the “‘clear-statement’ rule.”⁵⁵ Indeed, the D.C. Circuit itself has adopted this more stringent test when evaluating assertions that Congress has precluded judicial review of constitutional claims.⁵⁶ Consistent with the development of the law regarding statutory preclusion of jurisdiction over constitutional claims (including habeas cases), there

52. Tyler, *supra* note 28, at 389 n.295.

53. See *St. Cyr*, 533 U.S. at 298–99, 314; *Calcano-Martinez v. INS*, 533 U.S. 348, 350 n.2 (2001); *Richardson v. Reno*, 180 F.3d 1311, 1316 n.5 (11th Cir. 1999); *LaGuerre v. Reno*, 164 F.3d 1035, 1040 (7th Cir. 1998); *cf.* *Califano v. Sanders*, 430 U.S. 99, 109 (1977) (referring to “the well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the ‘extraordinary’ step of foreclosing jurisdiction unless Congress’ intent to do so is manifested by ‘clear and convincing’ evidence.” (citations omitted)).

54. See, e.g., *Felker v. Turpin*, 518 U.S. 651, 660 (1996) (discussing *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868)).

55. See Laura S. Fitzgerald, *Is Jurisdiction Jurisdiction?*, 95 NW. U. L. REV. 1207, 1239 (2001) (citing *St. Cyr*, 533 U.S. at 298).

56. See, e.g., *Ungar v. Smith*, 667 F.2d 188, 193 (D.C. Cir. 1981) (“When, however, plaintiff seeks to invoke the aid of the judicial branch on constitutional grounds, the Supreme Court and this court have both indicated that only the clearest evocation of congressional intent to proscribe judicial review of constitutional claims will suffice to overcome the presumption that the Congress would not wish to court the constitutional dangers inherent in denying a forum in which to argue that government action has injured interests that are protected by the Constitution.”).

is every reason to apply the clear statement rule in *Boumediene* and other detainee cases:

Before honoring a suspension as displacing the habeas remedy in these circumstances, the judiciary should require, at a minimum, a clear statement from Congress setting forth the justification for the suspension and its reach. Indeed, given that the fundamental right to individual liberty is at stake, a clear statement rule is entirely appropriate. Only by requiring such a clear statement can the courts ensure that Congress is not using its suspension power as a ‘pretext’ for unconstitutionally depriving individuals of their liberty. A clear statement norm in this context, moreover, ensures that ‘the political process [has paid] attention to the constitutional values at stake’ and, by the same token, that Congress appreciates the magnitude of the ramifications of its actions.⁵⁷

Applying the clear statement rule in these cases requires that Congress must demonstrate, in the clearest possible terms, not just its intention to preclude federal jurisdiction, but also its justification for doing so in reliance upon the Suspension Clause. After all, if the constitutional basis for depriving the federal courts of their jurisdiction to hear the detainees’ habeas petitions is that Congress is exercising its power under the Suspension Clause, then the courts must determine that the Clause’s constitutional predicates of invasion and public safety have been satisfied.⁵⁸ The D.C. Circuit refers in its

57. Tyler, *supra* note 28, at 390 (footnotes omitted).

58. During oral argument in *Hamdan*, there was a colloquy concerning the constitutional validity of Congress unintentionally or implicitly suspending the writ. See Transcript of Oral Argument at 56–59, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184). More specifically, Justice Stevens began this exchange by asking Solicitor General Paul Clement whether ousting jurisdiction over habeas claims was tantamount to suspending the writ itself. Solicitor General Clement stated during the discussion that, in his opinion, “if Congress . . . stumbles upon a suspension of the writ, but the preconditions are satisfied, that would still be constitutionally valid.” *Id.* at 57. Justice Souter responded that “suspension of the writ . . . is just about the most stupendously significant act that the Congress of the United States can take” and he seemed doubtful in the extreme that “Congress may validly suspend it inadvertently.” *Id.* at 58. Justices Scalia and Ginsburg then joined in. The discussion is interesting in its own right, and the question of whether the clear statement rule applies to acts of Congress under the Suspension Clause is an issue the Court may have to determine, but for now I want to emphasize that Solicitor General Clement assumed that the preconditions for suspension must always be satisfied and Justice Scalia agreed that the acts of Congress must occur during “a state of insurrection or invasion.” *Id.* at 59. Accordingly, the courts always must first determine whether

opinion to the textual prerequisites for congressional suspension,⁵⁹ but the court never determined that Congress made any findings with respect to invasion and public safety to support suspension of the writ (and preclusion of federal jurisdiction).⁶⁰ Although the D.C. Circuit did not engage in this analysis to ascertain whether Congress satisfied (or intended to satisfy) the constitutional prerequisites for suspension of the writ via the MCA or the DTA, the district court did perform this analysis in *Hamdan*.⁶¹ That court concluded that Congress did not intend to suspend the writ when it enacted the MCA.⁶² Whatever their conclusion about the matter, it is incumbent upon the federal courts to make this affirmative determination about congressional intentions, in accordance with the clear statement rule, before acceding to any ouster of their jurisdiction over these habeas claims. Anything less risks upsetting the constitutional allocation of institutional responsibilities and frustrating the constitutional protection of habeas corpus as a means of ensuring, through individual petitions in independent courts, that the government act at all times in accordance with the rule of law.

This last point is truly the crux of the matter here. At the end of the day, the denial of federal jurisdiction over habeas claims brought by Guantanamo detainees (or anyone else who might raise a colorable claim that the government has violated the law) inescapably raises the question of whether Congress can restrict the federal courts' authority to review the legality of government action.⁶³ However it is articulated, and whatever the asserted

the invasion and public safety predicates have been met to evaluate the legitimacy of congressional action restricting habeas jurisdiction under the Clause.

59. See *Boumediene v. Bush*, 476 F.3d 981, 992 n.11 (D.C. Cir. 2007).

60. See *id.* at 995 (Rogers, J., dissenting).

61. See *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 11–16 (D.D.C. 2006).

62. See *id.* at 14, 16 (“Congress has authorized executive suspension of the writ only four times. All such suspensions were accompanied by clear statements expressing congressional intent to suspend the writ and limiting the suspension to periods during which the predicate conditions (rebellion or invasion) existed Neither rebellion nor invasion was occurring at the time the MCA was enacted. Indeed, Congress itself must not have thought that it was ‘suspending’ the writ with the enactment of the MCA, since it made no findings of the predicate conditions” (citations omitted)).

63. To simplify the discussion, I refer to the denial of jurisdiction over habeas claims as the functional impediment to assertion of claims against the government by detainees and as the preclusion of judicial review of these claims. A separate question remains as to whether Congress has afforded some adequate alternative avenue through which the detainees could assert these claims in court. If Congress has provided this alternative process, then the denial of habeas, standing alone, does not necessarily implicate the constitutional concerns discussed in the text.

constitutional basis might be, the courts and Congress must decide what their respective institutional boundaries are in this regard. This is why *Boumediene* and the other detainee cases cannot ultimately be resolved by determining whether Guantanamo Bay Naval Base sits on land over which the United States exercises sovereignty, or which instead is merely leased by the United States from the Cuban government,⁶⁴ or by determining whether aliens possess the same right of habeas corpus enjoyed by United States citizens.⁶⁵

See Swain v. Pressley, 430 U.S. 372, 381 (1977); Richard H. Fallon, Jr., *Applying the Suspension Clause to Immigration Cases*, 98 COLUM. L. REV. 1068, 1082–84 (1998); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366–67 (1953). The statutory provisions for limited review in the D.C. Circuit might arguably provide this alternative to habeas review. *See Detainee Treatment Act of 2005*, Pub. L. No. 109-148, § 1005(e)(2), 119 Stat. 2680, 2742 (2005) (codified at 42 U.S.C. §§ 2000dd to -1 (2006)). Although I cannot fully address this issue here, I have reservations about whether the D.C. Circuit review provided by the MCA and DTA is an adequate alternative to habeas for judicial review of detainee claims. For one thing, the statutes preclude any judicial review of the government’s treatment of detainees during their confinement. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2063 (2007). For evidence of the D.C. Circuit’s efforts to engage in review of CSRT proceedings under the DTA and MCA, see *Bismullah v. Gates*, Nos. 06-1197, 06-1397, 2007 U.S. App. LEXIS 17255, at *8–*10 (D.C. Cir. July 20, 2007). *See also* *Bismullah v. Gates*, Nos. 06-1197, 06-1397, 2007 U.S. App. LEXIS 18265 (D.C. Cir. July 30, 2007).

64. *See Rasul v. Bush*, 542 U.S. 466, 471 (“The United States occupies the base, which comprises 45 square miles of land and water along the southeast coast of Cuba, pursuant to a 1903 Lease Agreement executed with the newly independent Republic of Cuba in the aftermath of the Spanish-American War. Under the agreement, ‘the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas],’ while ‘the Republic of Cuba consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas.’ In 1934, the parties entered into a treaty providing that, absent an agreement to modify or abrogate the lease, the lease would remain in effect ‘[s]o long as the United States of America shall not abandon the . . . naval station of Guantanamo.’” (footnotes omitted)). I do not claim that this issue is irrelevant; I do argue, however, that this issue alone cannot fully determine the outcome because there are other issues that a court must consider, and myopic fixation on the question of sovereignty over the parcel of land will unduly narrow a court’s consideration of these other issues.

65. For a discussion of the different approaches taken by the United Kingdom and the United States regarding this issue, and an argument that the UK approach is actually more consistent with Anglo-American constitutional principles than the current U.S. stance, see Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1392 (2007) (“[T]he experience of Britain under the European Convention on Human Rights is far truer to our backbone of equality than that of our own politicians under our own Constitution, who conveniently forget about equality even on fundamental decisions such as who would face a military trial with the death penalty at stake. Indeed, the United Kingdom reacted to the decision by adopting laws that treated citizens and foreigners alike. Although our Founders broke away from Britain in part because of the King’s refusal to adhere to the basic proposition that ‘all men are created equal,’ it is now Britain that is teaching us about the meaning of those words.” (footnote omitted)). As the discussion of the *Belmarsh* cases later in this Article indicates, it is not entirely accurate to say that the UK adopted laws that treated citizens and foreigners alike. However, the House of Lords

Of course, I do not mean to suggest that the answers to these questions are unimportant. But the answers to these questions are important only insofar as they help to illuminate the larger issue of the operation of the Constitution vis-à-vis the United States government's response to September 11. The *Boumediene* majority viewed the question raised in that case as whether "federal courts have jurisdiction over petitions for writs of habeas corpus filed by aliens captured abroad and detained as enemy combatants at the Guantanamo Bay Naval Base in Cuba?"⁶⁶ By viewing this question as falling under the rubric of the Suspension Clause, however, the D.C. Circuit immediately frames the case as raising questions about the scope of congressional authority. The question whether Congress has the authority to deprive the federal courts of their jurisdiction over habeas cases is approached as the question whether Congress has the authority to suspend habeas corpus under these circumstances.⁶⁷ But this ignores the other half of the constitutional equation: the role of the federal courts in ensuring that the government's various responses to September 11 remain at all times within the practical and principled boundaries of the Constitution. The question cannot be approached in only one direction. It must also be viewed in relation to the authority of the federal judiciary to ensure that the rights of those detained by the United States are

has insisted that English and EU law require Parliament to do so (in these circumstances). *See infra* notes 141–142 and accompanying text. Moreover, and more specifically responsive to the approach of some federal courts that have fixated on the question of whether aliens and citizens enjoy the same ability to invoke habeas corpus, the House of Lords rejected this differentiation unequivocally in its *Belmarsh I* ruling:

Habeas corpus protection is often expressed as limited to 'British subjects.' Is it really limited to British nationals? Suffice it to say that the case law has given an emphatic 'no' to the question. Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection There is nothing here to encourage in the case of aliens or non-patrials the implication of words excluding the judicial review our law normally accords to those whose liberty is infringed.

A v. Sec'y of State for the Home Dep't (*Belmarsh I*) [2004] UKHL 56, [48] (appeal taken from Eng.) (internal quotation marks omitted) (quoting *Khawaja v. Sec'y of State for the Home Dep't*, [1984] A.C. 74, 111–12 (appeal taken from Eng.)). David D. Cole maintains that this principle applies under United States law as well. *See* David D. Cole, *Against Citizenship as a Predicate for Basic Rights*, 75 *FORDHAM L. REV.* 2541, 2547–48 (2007) (arguing that citizenship was irrelevant to the Court's decision in *Hamdi* and favoring the House's approach in *Belmarsh I*).

66. *Boumediene v. Bush*, 476 F.3d 981, 984 (D.C. Cir. 2007).

67. *Id.* at 988.

recognized and protected in accordance with the law of the United States.⁶⁸

Ultimately, the questions raised by *Boumediene*, *Rasul*, *Hamdan*, *Hamdi*, and the other cases engendered by the response of the United States to the attacks of September 11, can only be resolved through a process—a conversation—through which the courts and the legislature define the contours of constitutional government action. Sometimes, this conversation will take the form of a disagreement. And sometimes this disagreement will involve strident, even harsh, tones and phrases. That is to be expected. The central flaw in the D.C. Circuit's *Boumediene* majority opinion is that it fails to consider the questions raised in that case as encompassing the constitutional relationship between legislative and judicial authority. Fundamentally, the issues raised concern the constitutional commitment of the United States to the rule of law during a time of political turbulence and uncertainty.

2. The Dissenting Opinion

In her dissenting opinion in *Boumediene*, Judge Rogers begins by disagreeing with the majority's characterization of the Suspension Clause itself.⁶⁹ According to Judge Rogers, the Suspension Clause functions to restrain legislative power from potential abuse; the Clause was not, and is not, intended to create individual rights, and courts should not interpret the Clause as dependent upon or equivalent to the content of individual rights.⁷⁰ Judge Rogers explains that the Suspension Clause should be read structurally in

68. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778–79 (1991).

69. 476 F.3d at 994 (Rogers, J., dissenting).

70. *Id.* at 994–95 (“[T]he court fundamentally misconstrues the nature of suspension: Far from conferring an individual right that might pertain only to persons substantially connected to the United States, the Suspension Clause is a limitation on the powers of Congress The court holds that Congress may suspend habeas corpus as to the detainees because they have no individual rights under the Constitution. It is unclear where the court finds that the limit on suspension of the writ of habeas corpus is an individual entitlement. The Suspension Clause itself makes no reference to citizens or even persons.” (citations omitted)); see also *id.* at 997 (“The court appears to believe that the Suspension Clause is just like the constitutional amendments that form the Bill of Rights. It is a truism, of course, that individual rights like those found in the first ten amendments work to limit Congress. However, individual rights are merely a subset of those matters that constrain the legislature. These two sets cannot be understood as coextensive unless the court is prepared to recognize such awkward individual rights as Commerce Clause rights” (footnote and citation omitted)).

relation to the attainder and *ex post facto* prohibitions in Article I, Section 9, which were deliberately juxtaposed with the Suspension Clause in the constitutional text, because all of these clauses establish preemptive restrictions on the exercise of legislative authority.⁷¹

Judge Rogers then considers whether the writ of habeas corpus, as it existed in 1789, would have been available to the Guantanamo detainees.⁷² This inquiry appears necessary because of a line of Supreme Court decisions holding that “at the absolute minimum, the Suspension Clause protects the writ ‘as it existed in 1789.’”⁷³ Although other precedent indicates that the Suspension Clause should be interpreted to protect the writ as it has developed since the eighteenth century,⁷⁴ it seems inarguable that, at a minimum, the Constitution incorporated the writ as it existed in English law at the time of constitutional ratification,⁷⁵ and the courts must interpret the Suspension Clause to protect the writ as it was incorporated in the Constitution.

Judge Rogers concludes that, even as it existed in 1789, the writ would have been available to detainees held in a facility such as Guantanamo.⁷⁶ Relying principally on the Supreme Court’s opinion in *Rasul*, together with a close reading of English precedent in force in 1789, Judge Rogers decided that the detainees were entitled to seek judicial review of the legality of their detention.⁷⁷

Judge Rogers then addressed the issue of a viable alternative to habeas for the detainees.⁷⁸ As I discussed above, Congress may limit

71. See *id.* at 996–98; see *infra* note 91.

72. See *Boumediene*, 476 F.3d at 1000–04.

73. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (quoting *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996)). It is worth noting that Chief Justice Rehnquist’s opinion in *Felker* (for a unanimous Court) was actually “that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789.” *Felker*, 518 U.S. at 664. The notion that the Suspension Clause should be interpreted in relation to the law in 1789 appears to originate in a concurring opinion of Chief Justice Burger. See *Swain v. Pressley*, 430 U.S. 372, 384 (1977) (Burger, C.J., concurring) (“The sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted.”).

74. In addition to *Felker* itself on this point, see, for example, *Martinez-Villareal v. Stewart*, 118 F.3d 628, 631 n.2 (9th Cir. 1997).

75. See *infra* note 93 and accompanying text.

76. See *Boumediene*, 476 F.3d at 1002 (Rogers, J., dissenting).

77. *Id.* at 1000–04.

78. *Id.* at 1000–07.

or remove access to habeas so long as some meaningful alternative is afforded to permit those confined by the government to challenge their detention in a neutral forum.⁷⁹ After reviewing the three situations in which the Supreme Court decided that an alternative to habeas was satisfactory,⁸⁰ Judge Rogers decided that the Combatant Status Review Tribunal (“CSRT”) hearings afforded to detainees under the DTA and the MCA, as well as review of these hearings in her own court, are inadequate substitutes for habeas review for at least four reasons: (1) the CSRT places the burden of demonstrating the illegality of detention on the detainee without providing him with the basis of his detention or the assistance of counsel;⁸¹ (2) the military judges who preside over the CSRT hearings are subject to command influence;⁸² (3) review of CSRT hearings in the D.C. Circuit does not allow the detainees to present evidence to contest the government’s case;⁸³ and (4) the D.C. Circuit cannot review evidence presented against a detainee in a CSRT hearing to determine if it was obtained through torture.⁸⁴

According to Judge Rogers, the analysis in *Boumediene* proceeds this way: (1) Did Congress suspend the writ of habeas corpus in circumstances where it would have been available in 1789? (2) If so, has Congress provided a satisfactory alternative process for judicial review of government action challenged by individuals in the custody of the United States? (3) If not, has Congress demonstrated that its actions fit within the constitutional predicates of the Suspension Clause?⁸⁵ For the reasons discussed, Judge Rogers decided that the answer to the first question is yes and that the answer to the next two questions is no. Accordingly, Judge Rogers concluded that the attempt to revoke the Supreme Court’s federal jurisdiction exceeded Congress’s powers.⁸⁶ Therefore, the MCA has

79. *See supra* note 63.

80. *See Boumediene*, 476 F.3d at 1004–05 (Rogers, J., dissenting) (citing *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996); *Swain v. Pressley*, 430 U.S. 372, 381 (1977); *United States v. Hayman*, 342 U.S. 205, 223 (1952)).

81. *Id.* at 1005.

82. *Id.*

83. *Id.* at 1006.

84. *Id.* I return to this point below in my discussion of *Belmarsh II*. *See infra* note 156.

85. *See Boumediene*, 476 F.3d at 1007 (Rogers, J., dissenting).

86. *Id.*

no effect on the jurisdiction of the federal courts to consider these petitions and appeals.⁸⁷

For purposes of this Article, the most important observation in Judge Rogers's dissenting opinion is that the *Boumediene* case is fundamentally about "the role of the judiciary" and its exercise of independent review of government action as indispensable for "the notion of a government under law."⁸⁸ Through sustained discussion of cases in which the courts fulfilled this constitutional role of "reviewing the Executive detention of prisoners" by engaging "in searching factual review of the Executive's claims[,]"⁸⁹ Judge Rogers seems concerned about maintaining the courts' historical position "as the bulwarks of a limited Constitution against legislative [and executive] encroachments."⁹⁰

Through his famous reference to "a limited Constitution" in *The Federalist No. 78*, Hamilton expressly related the nature of a limited constitution to the responsibility of an independent judiciary to enforce restrictions on legislative action such as those articulated in Article I, Section 9.⁹¹ The most historically resonant and sensitive reading of Article I, Section 9 highlights (as Judge Rogers's opinion does) the structural relationship among these provisions within the Constitution and their expression of the rule of law values implicit in the text (particularly when informed by Hamilton in *The Federalist No. 78*).⁹² Each branch of government has a role in maintaining the

87. *Id.*

88. *Id.* at 1009 (citing *Darnel's Case*, (1627) 3 How. St. Tr. 1, 59 (K.B.); WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 44 (1980); DANIEL J. MEADOR, HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY 13-19 (1966)).

89. *Boumediene*, 476 F.3d at 1009-12 (Rogers, J., dissenting).

90. THE FEDERALIST NO. 78 (Alexander Hamilton) (Benjamin Fletcher Wright ed., Belknap Press 1966) (1788).

91. *See id.* ("The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex-post-facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.")

92. For more on this point, see GEORGE ANASTAPLO, THE CONSTITUTION OF 1787: A COMMENTARY 63 (1989) ("The second and third provisions of Section 9, dealing with habeas corpus and with bills of attainder and *ex post facto* laws, are, in effect, an insistence upon the rule of law that it is well to have after such great powers had been recognized for the Government of the United States as are evident in Section 8. Perhaps this insistence upon the rule of law is

government during times of crisis and in ensuring that the government retains its commitment to constitutional principles even when that commitment is tested by the circumstances. Where judicial review of habeas claims brought by those in the custody of the United States is concerned, the Anglo-American legal tradition established, at least since the seventeenth century, that when an individual detained by the government challenges the legality of his detention, the government must establish the legality of the detention before an independent judge.⁹³

This is the principle with which Judge Rogers concludes her dissenting opinion in *Boumediene*:

So long as the Executive can convince an independent Article III habeas judge that it has not acted unlawfully, it may continue to detain those alien enemy combatants who pose a continuing threat during the active engagement of the United States in the war on terror. But it must make that showing and the detainees must be allowed a meaningful opportunity to respond.⁹⁴

particularly to be treasured by a people who could see, in the slavery institutions with which they had come to be saddled, the despotism that a perversion of the rule of law can lead to.”).

93. The Act of Habeas Corpus (1679) is the most important element of English law in this regard, prefigured by the Petition of Right (1628) and supplemented by the Bill of Rights (1689). *See, e.g.*, PAUL O. CARRESE, *THE CLOAKING OF POWER: MONTESQUIEU, BLACKSTONE, AND THE RISE OF JUDICIAL ACTIVISM* 154 (2003) (“He [Blackstone] praises the writ of *habeas corpus* secured by courts independent of the royal power, and other requirements for ‘process from the courts of judicature,’ as bulwarks of personal liberty against despotism Blackstone praises ‘that second *magna carta*,’ the *Habeas Corpus* Act (1679), for fortifying this humane regime, and while a future Parliament could reverse this, his remarks imply a constitutional and juridical limit upon legislative power.” (citation omitted)); SCOTT GORDON, *CONTROLLING THE STATE: CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY* 242–43 (1999) (quoting David Hume’s observation that the Petition of Right demonstrated the fundamental animating principle of English government “that the English have ever been free, and have ever been governed by law and a limited constitution” 5 DAVID HUME, *THE HISTORY OF ENGLAND: FROM THE INVASION OF JULIUS CAESAR TO THE ABDICATION OF JAMES THE SECOND, 1688*, at 37 (Boston, Phillips, Sampson & Co. 1858)); MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 27 (Charles M. Gray ed., Univ. of Chicago Press 1971) (1713) (“Exercise of Martial Law, whereby any Person should lose his Life or Member, or Liberty, may not be permitted in Time of Peace, when the King’s Courts are open for all Persons to receive Justice, according to the Laws of the Land. This is in Substance declared by the Petition of Right, 3 Car. 1, whereby such Commissions and Martial Law were repealed, and declared to be contrary to Law”); JAMES R. STONER, JR., *COMMON LAW AND LIBERAL THEORY: COKE, HOBBS, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 45–47 (1992); R.C. VAN CAENEGEM, *AN HISTORICAL INTRODUCTION TO WESTERN CONSTITUTIONAL LAW* 113–16 (David Johnston trans. 1995).

94. *Boumediene*, 476 F.3d at 1011 (Rogers, J., dissenting) (citations omitted).

The writ of habeas corpus inherited from England and incorporated into the United States Constitution requires the executive to justify the legality of any challenged detention before an independent judge. Congress cannot excuse the executive from this obligation through an attempted statutory preclusion of judicial review unanticipated and unsanctioned by the Constitution.

D. *The Supreme Court*

1. Certiorari Denied and Granted

It is a perilous temptation to predict Supreme Court decisions. Rather than succumb to that temptation, I will instead examine the initial denial of certiorari in an effort to anticipate how the Court will address the questions raised by *Boumediene* rather than how the Court will ultimately decide these questions.

In his dissent from the initial denial of certiorari, Justice Breyer (joined by Justices Souter and Ginsburg) begins by emphasizing that habeas corpus exists to ensure that “judicial inquiry may be had into the legality of the detention of a person.”⁹⁵ Justice Breyer also notes several aspects of the D.C. Circuit majority decision in *Boumediene* that appear to conflict with the Supreme Court’s ruling in *Rasul*: (1) that the federal courts had jurisdiction over the detainees’ habeas claims;⁹⁶ (2) that Guantanamo Bay Naval Base “was under the complete control and jurisdiction of the United States;”⁹⁷ and (3) that under the common law the writ would have been available to the detainees.⁹⁸ Moreover, Justice Breyer highlights certain factual

95. *Boumediene v. Bush*, 127 S. Ct. 1478, 1479 (2007) (Breyer, J., dissenting) (quoting *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968)).

96. *Id.* (citing *Rasul v. Bush*, 542 U.S. 466, 485 (2004), (holding that the detainees had a right to habeas review in federal court under the current law)). *Rasul* was decided before enactment of the DTA and MCA and their purported statutory proscriptions of federal jurisdiction over detainees’ habeas claims. According to Justice Breyer, the Court’s *Hamdan* decision indicates that this may be immaterial where the DTA is concerned. *Id.* at 1480–81 (discussing *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2788 (2006), (holding that although the DTA barred federal court jurisdiction over detainees’ claims until after the DTA-authorized tribunal made a final decision, special circumstances justified early review)). The Court’s forthcoming *Boumediene* ruling will resolve these questions as to the MCA. In addition, Justice Breyer noted that *Rasul* addressed the “then-operative statute” but he went on to mention that the detainees also might have a claim to review of their detention grounded on “the constitutional habeas right as well.” *Id.* at 1479.

97. *Id.* (citing *Rasul*, 542 U.S. at 480–81, 487 (Kennedy, J., concurring in judgment)); see also *supra* note 64.

98. *Boumediene*, 127 S. Ct. at 1479 (citing *Rasul*, 542 U.S. at 481–82).

distinctions between *Rasul* and *Boumediene* that might strengthen the *Boumediene* petitioners' claims for habeas review:

[P]etitioners in *Boumediene* are natives of Algeria, and citizens of Bosnia, seized in Bosnia. Other detainees, including several petitioners in *Al Odah*, also are citizens of friendly nations, including Australia, Canada, Kuwait, Turkey, and the United Kingdom; and many were seized outside of any theater of hostility, in places like Pakistan, Thailand, and Zambia. It is possible that these circumstances will make a difference in respect to our resolution of the constitutional questions presented.⁹⁹

Justice Breyer's emphasis on the "constitutional questions presented" in *Boumediene* also suggests that he is cognizant of the magnitude of the issues raised by the case. He does not simply consider the issues as a matter of clarity in statutory expression of legislative intention. He seems keenly aware that the case raises fundamental questions about access to judicial review as a means of ensuring constitutionality in government action and maintenance of habeas as a constitutional provision to protect against potential abuses of power.¹⁰⁰

Justice Breyer's focus on the constitutional dimension of the issues raised in *Boumediene* is important for an additional reason. The federal courts have consistently distinguished between congressional restriction of jurisdiction to review statutory claims and congressional attempts to remove jurisdiction over constitutional claims. While the courts are generally willing to accede to jurisdictional ouster of statutory claims, the Supreme Court,¹⁰¹ the

99. *Id.* at 1480 (internal citations omitted) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 509, 514, 521 (2004) (plurality opinion)).

100. *See id.* at 1479 ("[T]he 'province' of the Great Writ, 'shaped to guarantee the most fundamental of all rights, is to provide an effective *and speedy* instrument by which judicial inquiry may be had into the legality of the detention of a person.' Yet, petitioners have been held for more than five years. They have not obtained judicial review of their habeas claims. If petitioners are right about the law, immediate review may avoid an additional year or more of imprisonment. If they are wrong, our review is nevertheless appropriate to help establish the boundaries of the constitutional provision for the writ of habeas corpus. Finally, whether petitioners are right or wrong, our prompt review will diminish the legal 'uncertainty' that now 'surrounds' the application to Guantanamo detainees of this 'fundamental constitutional principle.'" (citations omitted) (quoting *Carafas*, 391 U.S. at 238)).

101. *See, e.g., Webster v. Doe*, 486 U.S. 592, 603 (1988) (holding that while the Administrative Procedure Act precludes a statutory claim by a discharged employee against the Director of the Central Intelligence Agency, it does not preclude judicial review of constitutional

D.C. Circuit,¹⁰² and other federal courts¹⁰³ have emphasized that congressional denial of judicial review over constitutional claims would deprive the courts of their constitutional and institutional function of ensuring the legality of government action, and would deprive the litigants of their access to an independent forum in which constitutional claims can be asserted.¹⁰⁴ The ouster clauses at issue in *Boumediene* raise constitutional concerns, and Justice Breyer's dissent from the denial of certiorari addresses the issues from this perspective.¹⁰⁵

In addition to his analysis of the precedential weight of *Rasul* with respect to *Boumediene*, Justice Breyer also offers four factual and legal similarities between *Hamdan* and *Boumediene* (and one dissimilarity that might make *Boumediene* an even stronger case for judicial review of government action than *Hamdan*): (1) both cases involve arguments by the government that the Court should defer decision until the detainees' hearings are completed;¹⁰⁶ (2) both cases involve allegations of significant procedural defects (e.g., denial of

claims); *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986); *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975); *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975); *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967); *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962).

102. *See, e.g., Ramallo v. Reno*, 114 F.3d 1210, 1214 (D.C. Cir. 1997) ("A statute that removes jurisdiction from all courts to vindicate constitutional rights poses serious constitutional objections."); *Bartlett v. Bowen*, 816 F.2d 695, 703 (D.C. Cir. 1987) ("In our view, a statutory provision precluding all judicial review of constitutional issues removes from the courts an essential judicial function under our implied constitutional mandate of separation of powers, and deprives an individual of an independent forum for the adjudication of a claim of constitutional right.").

103. *See, e.g., Jean-Baptiste v. Reno*, 144 F.3d 212, 218 (2d Cir. 1998) (holding that statute divesting courts of jurisdiction over claims of aliens arising from deportation proceedings did not violate constitutional clause forbidding suspension of habeas corpus); *Magana-Pizano v. INS*, 152 F.3d 1213, 1221 (9th Cir. 1998); *Stehney v. Perry*, 101 F.3d 925, 934 (3d Cir. 1996); *Joelson v. United States*, 86 F.3d 1413, 1420 (6th Cir. 1996).

104. *See Davis v. Passman*, 442 U.S. 228, 242 (1979) ("[T]he class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.").

105. As Justice Breyer points out, this is not to say that the petitioners will or should necessarily prevail in their case. *See Boumediene*, 127 S. Ct. at 1480 ("I do not here say petitioners are correct; I say only that the questions presented are significant ones warranting our review."). But the courts must appreciate the nature and gravity of the issues raised to analyze them adequately.

106. *Id.* at 1480 (citing *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2787 (2006)). The Court rejected this argument in *Hamdan*. 126 S. Ct. at 2788.

counsel and access to evidence);¹⁰⁷ (3) both cases concern statutes that prevent supplementation of the record on appeal and provide no remedy for possible constitutional violations;¹⁰⁸ (4) both cases present the Court with procedures that should be reviewed and deemed lawful before they are enforced in the detainees' hearings; and (5) in *Boumediene*, "unlike *Hamdan*, the military tribunals in Guantanamo have completed their work."¹⁰⁹

Consistent with the argument of this Article, Justice Breyer does not seem to characterize the issues raised in *Boumediene* as the D.C. Circuit majority did. Rather than view the case in terms of Congress's authority to restrict federal jurisdiction as an implicit suspension of habeas under Article I, Section 9, Justice Breyer instead indicated that *Boumediene* raises issues that are best understood in terms of the detainees' rights to judicial review of government action. In Justice Breyer's words, *Boumediene* and *Hamdan* ultimately "present[] questions of the scope of the Guantanamo detainees' right to federal-court review" of statutory alternatives to the traditional judicial process.¹¹⁰ Unlike the D.C. Circuit majority, Justice Breyer does not approach *Boumediene* as raising questions about Congress's authority under the Suspension Clause. In fact, Justice Breyer does not discuss suspension per se at all in his dissent from the denial of certiorari. In approaching *Boumediene* and *Hamdan* as cases about the right to court review, Justice Breyer focuses the analysis on whether Congress's restrictions on federal jurisdiction are consistent with the historical purpose of the writ and the constitutional role of the courts, rather than on whether Congress possesses the formal authority under the Constitution to suspend habeas corpus.¹¹¹ Without question, the two

107. *Boumediene*, 127 S. Ct. at 1480 (citing *Hamdan*, 126 S. Ct. at 2788).

108. *Id.* at 1481 (citing The Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2)(C), 119 Stat. 2742 (2005)); *Boumediene v. Bush*, 476 F.3d 981, 1005 (D.C. Cir. 2007) (Rogers, J., dissenting).

109. 127 S. Ct. at 1481.

110. *Id.*; see also *id.* at 1479 (describing the question presented as "whether the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, deprives courts of jurisdiction to consider their habeas claims, and, if so, whether that deprivation is constitutional").

111. See *id.* at 1479 (beginning analysis by examining "the 'province' of the Great Writ"); see also *Hamdan*, 126 S. Ct. at 2799 (noting that "[w]here . . . no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger"). Justice Breyer also acknowledges Congress's authority over habeas corpus, stating that "[n]othing prevents the President from returning to Congress to seek . . . authority" for military commissions. *Id.*

issues cannot be entirely disaggregated. However, the direction in which the questions are addressed is significant for the Court (or at least for Justices Breyer, Ginsburg, and Souter) to preserve the nature of the judicial process and individual access to independent court review of government action, which are so central to the historical and doctrinal development of habeas within the Anglo-American constitutional tradition.

Justice Breyer's dissent from the denial of certiorari, and Justice Rogers's dissent from the D.C. Circuit decision, view *Boumediene* as a matter of the rights of detainees to obtain judicial review of the legality of their detention. If the MCA and the DTA operate to deprive detainees of all meaningful access to challenge the legality of their treatment by the government, then these statutes operate to insulate the government from any genuine accountability to the rule of law. There is no reason to suppose that any provision of the Constitution can provide Congress with this authority. As I explain in my discussion of the *Belmarsh I* decision, the English judiciary's response to certain steps taken by the British government after September 11 seem more consistent with the dissents of Justice Breyer and Judge Rogers, and more fully cognizant of and responsive to the magnitude of the constitutional issues at stake, than the D.C. Circuit majority's approach in *Boumediene*.

2. The Oral Argument

The Supreme Court heard oral argument in *Boumediene* on December 5, 2007. In his initial question of Seth Waxman, counsel for the petitioners, Justice Scalia asked whether counsel could cite "a single case in the 220 years of our country or, for that matter, in the five centuries of the English empire in which habeas was granted to an alien in a territory that was not under the sovereign control of either the United States or England."¹¹² Of course, as I have argued earlier, "sovereignty" is a particularly unhelpful analytic frame through which to consider the issues in *Boumediene*.¹¹³ And, as far

112. Transcript of Oral Argument at 10, *Boumediene v. Bush*, Nos. 06-1195, 06-1196 (U.S. Dec. 5, 2007), 2007 WL 4252686.

113. Counsel's responses to Justice Scalia on the sovereignty and citizenship points address these issues historically and conceptually:

[E]ven with respect to the persons detained outside the English realm, the relevant question was, is this person under the subjection of the crown? Not what is the subjecthood or citizenship of this person? . . . We don't contend that the United States

as Justice Scalia's question goes with respect to an English court recognizing the habeas rights of aliens, one need look no further than the *Belmarsh* cases that I consider in the next part of this Article.

In the questioning of counsel for the government, Solicitor General Paul Clement, Justice Breyer picked up where he left off in his dissent from the initial denial of certiorari. Specifically, Justice Breyer inquired about the adequacy of the statutory alternative to habeas under the DTA. In doing so, Justice Breyer emphasized the constitutional constraints on government action that habeas exists to preserve: "[W]hat you want to say [as a detainee] is: Judge, I don't care how good those procedures are. I'm from Bosnia. I've been here six years. The Constitution of the United States does not give anyone the right to hold me six years in Guantanamo without either charging me or releasing me, in the absence of some special procedure in Congress for preventive detention. . . . If he cannot make that argument, how does this become an equivalent to habeas, since that happens to be the argument that a large number of these 305 people would like to make?"¹¹⁴

In relation to the three principal points of divergence between the D.C. Circuit majority opinion in *Boumediene* and the Supreme Court's ruling in *Rasul*—the federal courts' jurisdiction over the detainees' habeas claims, U.S. control over Guantanamo, and the availability to the detainees of the common law habeas writ—the first point received the least discussion at oral argument. Although the issue of the DTA ouster clause and the purported denial of jurisdiction was raised in passing during the *Boumediene*

exercises sovereignty over Guantanamo Bay. Our contention is that at common law, sovereignty (a) wasn't the test, as Lord Mansfield explained, and (b) wasn't a clear-cut determine—there weren't clear-cut sovereignty lines in those days. Our case doesn't depend on sovereignty. It depends on the fact that, among other things, the United States exercises—quote—"complete jurisdiction and control over this base." No other law applies.

Id. at 13–14. In addition, on the point regarding exclusive U.S. control over Guantanamo, Justice Ginsburg later referred to the determination of that issue in *Rasul*. *See id.* at 31 ("I thought this was decided in *Rasul*. That's why I am so puzzled by the Government's position. I think Justice Kennedy said it most clearly when he said that, well, in every practical respect, Guantanamo Bay is U.S. territory; and whatever Congress recently passed, they can't, as you pointed out, change the terms of the lease.").

114. *Id.* at 38–39; *see also id.* at 54 ("[W]e [detainees] still think that Congress, the President, the Supreme Court under the law, cannot hold us for six years without either trying us, releasing us, or maybe confining us under some special statute involving preventive detention and danger which has not yet been enacted.").

argument,¹¹⁵ it was not addressed in any detail. Of course, there are many conceivable explanations for the lack of questioning by the Court on this question. But, it would be unfortunate if the Court's opinion(s) is similarly silent on the matter.

III. ENGLAND: DETENTION, TORTURE, CONSTITUTIONALISM, AND INSTITUTIONAL INTEGRITY

Like the United States, Britain made legislation a central facet of its response to the attacks of September 11, 2001. The Anti-Terrorism, Crime and Security Act of 2001 ("Anti-Terrorism Act") provided, among other things, for indefinite detention of aliens deemed by the British government to represent a threat to national security.¹¹⁶ As the United States did with the alien enemy combatant detainees held in Guantanamo, Britain detained foreign nationals without counsel or hearing at a facility under the control of the British government.¹¹⁷ The British detention facility is known as "Belmarsh." And as with the Guantanamo detainees, several of the Belmarsh detainees brought a legal challenge to various aspects of their detention, claiming violations of British constitutional principles.¹¹⁸

115. *See id.* at 67 (Ginsburg, J.) ("Congress's statute that set up this system with limited review in the D.C. Circuit and . . . that's it. The D.C. Circuit never got to that question because it said the acts that these people are trying to bring habeas doesn't exist. The only thing that they have, the only remedy they have is the one that Congress provided. And it seems to me the only question before us is whether there is jurisdiction in the court of appeals to decide that threshold issue.").

116. Anti-Terrorism, Crime and Security Act, 2001, 24, § 23 (Eng.).

117. *See* Denise Winterman, *Belmarsh—Britain's Guantanamo Bay?*, BBC NEWS, Oct. 6, 2004, <http://news.bbc.co.uk/1/magazine/3714864.stm> (comparing London's Belmarsh prison to Guantanamo).

118. I do not mean to suggest that the legal responses of the British and American governments, or the detention measures and facilities in Belmarsh and Guantanamo, are identical. Baroness Hale rightly notes that they are not. *See* *A v. Sec'y of State for the Home Dep't (Belmarsh I)* [2004] UKHL 56, [223] (appeal taken from Eng.). Nevertheless, there are important parallels to be drawn, particularly in light of the United States Supreme Court's decisions in *Hamdan*, 126 S. Ct. 2749 (2006), and *Rasul*, 542 U.S. 466 (2004). I should note, though, that the presence of Belmarsh Prison within the United Kingdom and the location of Guantanamo Bay Naval Base outside of the territorial United States is not an issue that I address in detail here (in part because, as I explained above, the physical location of the detention facilities is not necessarily their most salient characteristic for my purposes).

A. Belmarsh I: *Detention*

The House of Lords first reviewed the claims of detainees held at Belmarsh in *A v. Secretary of State for the Home Department*.¹¹⁹ As others have done, I will refer to the case as “*Belmarsh I*” (after the prison where the detainees are held).¹²⁰ As Lord Bingham pointed out in his speech, the detainees “share certain common characteristics which are central to their appeals.”¹²¹ These characteristics include the following: (1) none of the appellants is a British citizen; (2) none has been charged with any crime; (3) none would apparently be charged in the foreseeable future; and (4) all claimed that their detention violated British and international law.¹²²

The legislative response in Britain to the September 11 attacks centers on the Anti-Terrorism Act and the Designated Derogation Order of 2001 (“Derogation Order”) to the Human Rights Act of 1998.¹²³ Within the framework of British law, these two enactments intersected with the Immigration Act of 1971¹²⁴ and the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹²⁵ which was incorporated into U.K. law by the Human Rights Act.¹²⁶ As interpreted and applied by the House of Lords, the Immigration Act permitted detention of non-British nationals “only for such time as was reasonably necessary for the process of

119. [2004] UKHL 56. Ordinarily, the House of Lords hears appeals in panels of five. Occasionally, the House will sit as a panel of seven. See MICHAEL ZANDER, *CASES AND MATERIALS ON THE ENGLISH LEGAL SYSTEM* 622 (9th ed. 2003). Extraordinarily, in something akin to an en banc hearing, nine members of the House heard the *Belmarsh I* appeal.

120. See DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 31, 174 (2006); Ruth Bader Ginsburg, “*A Decent Respect to the Opinions of [Human]kind*”: *The Value of a Comparative Perspective in Constitutional Adjudication*, 1 *FLA. INT’L U. L. REV.* 27, 41 (2006).

121. *Belmarsh I* [2004] UKHL 56 at [3].

122. *Id.* As with my discussion of *Boumediene*, I do not address the international law claims.

123. The Human Rights Act of 1998 (Designated Derogation) Order, 2001, S.I. 2001/3644 (U.K.), available at <http://www.opsi.gov.uk/si/si2001/20013644.htm>. These responses also build upon legislation that predated the September 11 attacks on the United States. The operative legal definition of “terrorism,” for example, derives from the Terrorism Act of 2000. See *Belmarsh I*, [2004] UKHL 56 at [5]. For the importance of this aspect of British law to Lord Walker’s judgment, see *id.* at [198]–[206].

124. Immigration Act, 1971, c. 77 (U.K.).

125. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, available at <http://www.itcilo.it/english/actrav/telearn/global/ilo/law/coeprot.htm>.

126. Human Rights Act, 1998, c. 42 (Eng.), available at <http://www.opsi.gov.uk/ACTS/acts1998/19980042.htm>.

deportation to be carried out.”¹²⁷ Accordingly, there is no provision in British law for the indefinite detention of non-British nationals, and this principle was understood to be consistent with Britain’s incorporation of the European Convention under the Human Rights Act.¹²⁸

As a response to the September 11 attacks, the Derogation Order was a public statement with legislative force that the United Kingdom intended to deviate from the existing legal prohibition against extended detention of foreign nationals. The Order acknowledged the existence and effect of the Immigration Act and the European Convention and articulated the necessity of derogating from those existing legal principles in light of the threat terrorism posed to British national security.¹²⁹ In conjunction with the Order’s expression and explication of the alteration of British law regarding detention of foreign nationals, the Anti-Terrorism Act provided for certification by the Secretary of State of suspected terrorists and indefinite detention of those certified under the Act.¹³⁰

The *Belmarsh I* detainees argued before the House that their detention under the Anti-Terrorism Act and the Derogation Order was improper for several reasons. First, the United Kingdom could not legally derogate from its commitment to honor the European Convention.¹³¹ Second, there was no “public emergency threatening the life of the nation” that would support derogation from Britain’s obligations under Article 15 of the Convention,¹³² because there was no “imminent” threat to the United Kingdom, the emergency was not “temporary,” and no other nation saw fit to derogate from their obligations under the Convention in the aftermath of September 11.¹³³ Third, the derogative elements contained in Part Four of the Anti-Terrorism Act violate the principle of proportionality. According to the proportionality principle, any limitation of a

127. *Belmarsh I* [2004] UKHL 56 at [8] (citing *R v. Governor of Durham Prison (Ex parte Singh)*, [1984] 1 W.L.R. 704 (Q.B. 1983)).

128. *Id.*

129. *Id.* at [11].

130. *Id.* at [12]–[14] (discussing the Anti-Terrorism, Crime and Security Act, 2001, c. 4, §§ 21–23 (Eng.)).

131. *See id.* at [3].

132. *See id.* at [16], [19], [24].

133. *See id.* at [20], [23].

fundamental right (in this case, the right to personal liberty¹³⁴) based upon a claim of public emergency must be strictly limited in proportion to the threat.¹³⁵ The detainees argued that the indefinite detention provisions of the Anti-Terrorism Act and the Derogation Order were excessive because the terrorist threat posed by British nationals and non-British nationals was equivalent, yet only non-British nationals were subject to indefinite detention under the Act.¹³⁶

While the House ultimately rejected the detainees' argument regarding the absence of a "public emergency,"¹³⁷ it ruled that the detainees could seek judicial review of the Derogation Order on proportionality grounds.¹³⁸ And in keeping with the argument of this Article, Lord Bingham emphasized that the House's decision in *Belmarsh I* was driven by the constitutional necessity of maintaining the courts' role in enforcing principled legal constraints on government action:

It also follows that I do not accept the full breadth of the Attorney General's submissions. I do not in particular accept the distinction which he drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true . . . that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-

134. *Id.* at [36] ("In urging the fundamental importance of the right to personal freedom, as the sixth step in their proportionality argument, the appellants were able to draw on the long libertarian tradition of English law, dating back to chapter 39 of Magna Carta 1215, given effect in the ancient remedy of habeas corpus, declared in the Petition of Right 1628, upheld in a series of landmark decisions down the centuries and embodied in the substance and procedure of the law to our own day."); *see also id.* at [81], [100]–[01].

135. *See id.* at [30] (other citation omitted) (citing *De Freitas v. Permanent Sec'y of Ministry of Agric., Fisheries, Lands and Hous.*, [1999] 1 A.C. 69, 80 (P.C. 1998) (appeal taken from Ant. & Barb.)).

136. *See id.* at [31].

137. *See id.* at [26]–[29]. *But see id.* at [94]–[97] (giving credence to the argument that the "public emergency" threat is lacking).

138. *See id.* at [42].

making as in some way undemocratic. . . . The 1998 [Human Rights] Act gives the courts a very specific, wholly democratic, mandate. As Professor Jowell has put it: “The courts are charged by Parliament with delineating the boundaries of a rights-based democracy.”¹³⁹

Lord Bingham’s explicit reference to the function of independent judges in interpreting and applying the law as a cornerstone of the rule of law links the House’s decision in *Belmarsh I* with the opinions of Justice Breyer and Judge Rogers in *Boumediene*. All of these judges recognize the constitutional responsibility of their institutional position to ensure that the rule of law is maintained in the course of their governments’ responses to the threats of terrorism.

In relation to the detainees’ proportionality argument, Lord Bingham acknowledged that the terrorist threat posed by British nationals and foreign nationals is not necessarily identical. But the House determined that this was fundamentally a difference in degree, not a difference in kind.¹⁴⁰ Accordingly, the House ruled that the differentiation between British nationals and foreign nationals, and the potential indefinite detention of foreign nationals, violated British law¹⁴¹ and EU law.¹⁴² Moreover, the House determined that this differentiation between British nationals and foreign nationals for purposes of detention amounted to discrimination on the basis of nationality, which was itself an independent violation of British and EU law.¹⁴³ Finally, the House issued a declaration of incompatibility under Section Four of the Human Rights Act.¹⁴⁴ This declaration of incompatibility is the legal procedure by which a court indicates to a national legislature that a statute conflicts with EU law and should, in

139. *Id.* (other citation omitted) (quoting Jeffrey Jowell, *Judicial Deference: Servility, Civility or Institutional Capacity?*, 2003 Pub. L. 592, 597); see also *id.* at [80].

140. *Id.* at [33]–[34], [43].

141. Their Lordships appear to disagree somewhat about whether the government’s actions in *Belmarsh I* violate British, as opposed to EU, law. Compare *id.* at [144], [160], [164] with *id.* at [36], [81], [100]–[01]. The details of this disagreement are beyond the scope of this Article. But, this disagreement may have something important to do with differing views among their Lordships of the judiciary’s institutional authority in British constitutional government. I mention the disagreement because this concept touches upon my central argument.

142. See *id.* at [43], [76]–[78], [83], [126], [132], [189].

143. See *id.* at [68], [138], [158]–[59].

144. *Id.* at [73], [139], [239].

the court's judgment, be amended or rescinded.¹⁴⁵ In response to the House's declaration of incompatibility in *Belmarsh I*, the offending sections of the Anti-Terrorism, Crime and Security Act were repealed by the Prevention of Terrorism Act of 2005.¹⁴⁶

In addition to Lord Bingham's comments in *Belmarsh I* regarding the function of the judiciary in maintaining the rule of law, Lord Hope emphasized this aspect of the courts' institutional and constitutional responsibility as well. Lord Hope described this as the courts' duty to maintain and enforce individual rights.¹⁴⁷ Lord Hope also noted that British nationals and foreign nationals possess the fundamental right to liberty in equal measure.¹⁴⁸

As the government did in the United States cases, the British government argued in *Belmarsh I* that the courts should defer to the executive and the legislature regarding the nature of the threats posed by terrorism and the necessity of the actions taken in response.¹⁴⁹ Lord Hope's response to this argument is especially important for the

145. See *id.* at [90], [220]; see also A.W. Bradley, *The Sovereignty of Parliament—Form or Substance?*, in *THE CHANGING CONSTITUTION* 23, 53–56 (Jeffrey Jowell & Dawn Oliver eds., 4th ed. 2000); Lord Lester of Herne Hill, *Human Rights and the British Constitution*, in *THE CHANGING CONSTITUTION* 89, 105 (Jeffrey Jowell & Dawn Oliver eds., 4th ed. 2000) (“The declaration of incompatibility is essential in bringing the problem to the attention of the executive and the legislature, and acting as a trigger for amending legislation by means of a remedial order. Despite its incompatibility with Convention rights, the offending legislation will remain valid and effective, unless and until legislative amendments are made.”).

146. See Prevention of Terrorism Act, 2005, c. 2, § 16(2)(a) (Eng.) (repealing Anti-Terrorism, Crime and Security Act, 2001, c. 24, §§ 21–32).

147. See *Belmarsh I* [2004] UKHL 56 at [99].

148. See *id.* at [105]. This is not to say that the British government may not enforce immigration regulations and restrictions against foreign nationals. But this is to say that any derogation from the evenhanded enforcement of those regulations is a potential violation of the right to liberty itself, which is not enjoyed to any diminished extent simply because an individual does not happen to be a British citizen. See *id.* at [105]–[06] (“The Secretary of State was, of course, entitled to discriminate between British nationals on the one hand and foreign nationals on the other for all the purposes of immigration control. . . . What he was not entitled to do was to treat the right to liberty under article 5 of the Convention of foreign nationals who happen to be in this country for whatever reason as different in any respect from that enjoyed by British nationals. . . . I would therefore take as my starting point the proposition that the article 5 right to liberty is a fundamental right which belongs to everyone who happens to be in this country, irrespective of his or her nationality or citizenship. The court is obliged to subject the Derogation Order and the legislation that resulted from it as it affects foreign nationals to the same degree of scrutiny as it would have to be given if it had been designed to deprive British nationals of their right to liberty.” (citations omitted)). For further discussion relating to this point, see Daniel Moeckli, *The Selective “War on Terror”: Executive Detention of Foreign Nationals and the Principle of Non-Discrimination*, 31 *BROOK. J. INT’L L.* 495, 525–31 (2006).

149. See *Belmarsh I* [2004] UKHL 56 at [107] (noting that “[t]he Attorney General also submitted that a wide margin of discretion should be accorded at each stage in the analysis to the executive and to Parliament”).

purposes of this Article. Not only did Lord Hope underscore the nature of the liberty interest involved, he explicitly connected the courts' role in enforcing individual rights against the government to the courts' role in preserving the rule of law:

Here the context is set by the nature of the right to liberty which the Convention guarantees to everyone, and by the responsibility that rests on the court to give effect to the guarantee to minimise the risk of arbitrariness and to ensure the rule of law. Its absolute nature, save only in the circumstances that are expressly provided for by article 5(1), indicates that any interference with the right to liberty must be accorded the fullest and most anxious scrutiny.

Put another way, the margin of the discretionary judgment that the courts will accord to the executive and to Parliament where this right is in issue is narrower than will be appropriate in other contexts. We are not dealing here with matters of social or economic policy, where opinions may reasonably differ in a democratic society and where choices on behalf of the country as a whole are properly left to government and to the legislature. We are dealing with actions taken on behalf of society as a whole which affect the rights and freedoms of the individual. This is where the courts may legitimately intervene, to ensure that the actions taken are proportionate.¹⁵⁰

Lord Hope's discussion of the courts' institutional obligation to enforce individual rights against the government as a means of preserving the rule of law as a constitutional value is instructive. Read as a response to the D.C. Circuit majority's approach in *Boumediene*, Lord Hope simply does not agree that the question should be framed in terms of the formal powers of the legislature.¹⁵¹ Instead, as Lord Bingham, Lord Rodger,¹⁵² Justice Breyer and Judge

150. *Id.* at [107]–[08] (citation omitted); *see also id.* at [114].

151. *See id.* at [176] (stating that “deference to the views of the [legislature] . . . cannot be taken too far. Due deference does not mean abasement before those views. . . . The legitimacy of the courts’ scrutiny role cannot be in doubt.”).

152. *See id.* at [178] (“In discharging that duty British courts are performing their traditional role of watching over the liberty of everyone within their jurisdiction, regardless of nationality Here the exercise happens to take the particular form of examining the grounds for the derogation from the basic guarantees in article 5 of the Convention, which aim to secure the right of individuals in a democracy to be free from arbitrary detention at the hands of the

Rogers did, he treats the issue as a matter of the constitutional role and responsibility of the judiciary.¹⁵³

B. Belmarsh II: Torture

One year after its decision in *Belmarsh I*, the House of Lords heard a subsequent appeal on behalf of the same group of detainees.¹⁵⁴ In this case, which I will refer to as “*Belmarsh II*,” the House was asked to consider whether the Special Immigration Appeals Commission (“SIAC”),¹⁵⁵ which is the administrative tribunal authorized by Parliament to hear cases under the Anti-Terrorism Act, could hear evidence that might have been obtained through torture that was conducted without the participation or authorization of the British government.¹⁵⁶ In the proceedings below, when this issue was raised, the SIAC determined that the procurement of evidence through torture was a fact that went to the weight, but not to the admissibility, of the evidence.¹⁵⁷

authorities. In performing this role and checking whether detention of the foreign suspects, such as the appellants, was strictly required, the courts are entitled to have regard to the extent of the inroad which it makes into the liberty of those foreign suspects: the greater the inroad, the greater the care with which the justification for it must be examined. On any view, the inroad into the appellants’ liberty is far-reaching.” (citations omitted)).

153. See *id.* at [177] (noting that “scrutiny by the courts is appropriate” because “[t]here is always a danger that, by its very nature, a concern for national security may bring forth measures that are not objectively justified”).

154. A v. Sec’y of State for the Home Dep’t (No. 2) (*Belmarsh II*) [2005] UKHL 71 (appeal taken from Eng.). *Belmarsh II* was heard by a panel of seven Law Lords.

155. See Special Immigration Appeals Commission Act, 1997, c. 68, available at http://www.opsi.gov.uk/acts/acts1997/ukpga_19970068_en_1 (creating a court to hear deportation appeals).

156. *Belmarsh II* [2005] UKHL 71 at [1]. The United States courts that have addressed this point have tended to focus on the question of involvement by or authorization of United States officials. See, e.g., *United States v. Yousef*, 327 F.3d 56, 138–39 (2d Cir. 2003) (citing *United States v. Toscanino*, 500 F.2d 267, 281 (2d Cir. 1974)); *United States v. Salameh*, 152 F.3d 88, 117 (2d Cir. 1998). However, the House was less concerned with the question of British involvement than with the impact of the tainted evidence upon the integrity of the judicial process itself. See *Belmarsh II* [2005] UKHL 71 at [51]–[52] (Lord Bingham) (“It trivialises the issue before the House to treat it as an argument about the law of evidence. The issue is one of constitutional principle, whether evidence obtained by torturing another human being may lawfully be admitted against a party to proceedings in a British court, irrespective of where, or by whom, or on whose authority the torture was inflicted. To that question I would give a very clear negative answer. I accept the broad thrust of the appellants’ argument on the common law. The principles of the common law, standing alone, in my opinion compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice.”); see also *id.* at [91].

157. *Belmarsh II* [2005] UKHL 71 at [9].

The House disagreed. Lord Bingham and Lord Nicholls underscored the common law's longstanding prohibition against torture of all types, for all purposes.¹⁵⁸ And although this prohibition was not always respected by Crown, torture was consistently declared to be "totally repugnant to the fundamental principles of English law" and "repugnant to reason, justice, and humanity."¹⁵⁹ The legal proscription of torture in English law was formalized in 1640 and seems to have been followed faithfully (but not entirely without exception).¹⁶⁰

In their argument before the House, the detainees relied upon the common law prohibition against torture as a legal foundation for their more specific claim that the use of evidence obtained via torture violates the principle that the government cannot introduce an involuntary confession as evidence against the defendant.¹⁶¹ The Police and Criminal Evidence Act of 1984¹⁶² codified this common law principle and requires that, where a defendant asserts that a

158. *Id.* at [11] ("[F]rom its very earliest days the common law of England set its face firmly against the use of torture. Its rejection of this practice was indeed hailed as a distinguishing feature of the common law. . . . In rejecting the use of torture, whether applied to potential defendants or potential witnesses, the common law was moved by the cruelty of the practice as applied to those not convicted of crime, by the inherent unreliability of confessions or evidence so procured and by the belief that it degraded all those who lent themselves to the practice." (citations omitted) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 320–21 (William C. Jones ed., Bancroft Whitney 1915) (1769)); 3 SIR EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 34–36 (1644); SIR JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE 47–53 (S.B. Chrimes ed. & trans., Cambridge Univ. Press 1942); 2 SIR THOMAS SMITH, DE REPUBLICA ANGLORUM: A DISCOURSE ON THE COMMONWEALTH OF ENGLAND 104–07 (L. Alston ed., Cambridge Univ. Press 1906); 1 SIR JAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 222 (London, Macmillan 1883)); *see also id.* at [64]–[65] (arguing that torture is unacceptable and discussing the history of torture in the Privy Council).

159. *Id.* at [12] (quoting DAVID JARDINE, A READING ON THE USE OF TORTURE IN THE CRIMINAL LAW OF ENGLAND PREVIOUSLY TO THE COMMONWEALTH 6, 12 (London, Baldwin & Cradock 1837)); *see also id.* at [81]–[83], [112], [129], [152].

160. *Id.* at [12], [13], [86].

161. The detainees also relied on provisions of EU and international law, which I will not discuss due to space constraints. *See id.* at [23]–[52]. And they extended their argument from torture to inhumane and degrading treatment. *See id.* at [53]. The more general argument made by the detainees in relation to evidence procured by torture would seem to suggest that in the United States, as well, a claim could probably arise in the form of a due process violation. For an argument to this effect, see Baher Azmy, *Constitutional Implications of the War on Terror: Rasul v. Bush and the Intra-Territorial Constitution*, 62 N.Y.U. ANN. SURV. AM. L. 369, 419–20, 429–31 (2007), and *see also* John Duberstein, *Excluding Torture: A Comparison of the British and American Approaches to Evidence Obtained by Third Party Torture*, 32 N.C.J. INT'L L. & COM. REG. 159, 180–91 (2006).

162. Police and Criminal Evidence Act, 1984, c. 60 (U.K.).

confession was obtained improperly, the government must demonstrate beyond a reasonable doubt that the confession was not the result of oppressive conduct.¹⁶³ In reliance on the statutory and decisional law on this subject, the House concluded that the use of torture to obtain evidence goes to the admissibility, rather than the weight, of the evidence.¹⁶⁴ In other words, where the government cannot rebut the claim that evidence was obtained by torture, that evidence must be excluded.¹⁶⁵

In addition to their argument that the use of evidence procured by torture is analogous to admission of an involuntary confession, the detainees argued that the use of evidence obtained by torture amounts to an abuse of the judicial process and the judicial institution.¹⁶⁶ For purposes of this Article, this argument is critical. The detainees argued that common law principles protect against the

163. *See Belmarsh II* [2005] UKHL 71 at [14] (citing *Lam Chi-ming v. The Queen*, [1991] 2 A.C. 212, 220 (P.C.) (appeal taken from H.K.); *R v. Harz*, [1967] 1 A.C. 760, 817 (H.L.) (appeal taken from Eng.); *Ibrahim v. The King*, [1914] A.C. 599, 609–10 (P.C.) (appeal taken from H.K.)).

164. *Id.* at [15].

165. *Id.* (citing *Wong Kam-ming v. The Queen*, [1980] A.C. 247 (P.C.) (appeal taken from H.K.)). I should mention that the House could not agree on the burden of proof question. Lords Bingham, Nicholls, and Hoffmann concluded that the initial burden belongs to the individual to assert that evidence was obtained through torture, but at that point the burden should shift to the Secretary of State to demonstrate that evidence was not obtained through torture. And, where the SIAC cannot definitively determine that the evidence was not obtained through torture, it should be excluded. *See id.* at [56], [80], [98]. Lords Hope, Rodger, Carswell, and Brown agreed that the burden should not rest on the individual once the initial assertion of torture has been made; however, Lords Hope, Rodger, Carswell, and Brown believed that the SIAC should determine whether the evidence was definitively acquired via torture, rather than establish that the evidence was *not* acquired via torture. *See id.* at [116]–[26], [138]–[45], [156]–[58], [172]. The key here is that Lords Bingham, Nicholls, and Hoffmann would exclude evidence absent an affirmative showing that the evidence was not tainted, while Lords Hope, Rodger, Carswell, and Brown would accept evidence absent a demonstration that the evidence was tainted. A contrast here between the English and American cases is that the House seemed willing to consider evidence about known practices regarding torture as probative evidence that a particular individual was more likely to have been tortured. *See id.* at [56]. A line of federal cases in the United States seems to establish a fairly broad prohibition against the introduction of evidence obtained through torture. *See, e.g., LaFrance v. Bohlinger*, 499 F.2d 29, 34 (1st Cir. 1974) (“It is unthinkable that a statement obtained by torture or by other conduct belonging only in a police state should be admitted at the government’s behest in order to bolster its case.”); *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980) (quoting Declaration on the Protection of All Persons from Being Subjected to Torture, G.A. Res. 3452 ¶ 91, U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/1034 (Dec. 9 1975) *available at* <http://www.ohchr.org/english/law/declarationcat.htm>). Nevertheless, certain United States courts have indicated some reticence concerning the admissibility of state practices to support an individual claim that evidence was acquired by torture. *See United States v. Yousef*, 327 F.3d 56, 129 n.59 (2d Cir. 2003).

166. *Belmarsh II* [2005] UKHL 71 at [18]–[22].

use of evidence gathered through torture because “the infliction of torture is so grave a breach of . . . the rule of law that any court degrades itself and the administration of justice by admitting it. . . . [T]he court must exercise its discretion to reject such evidence as an abuse of its process.”¹⁶⁷

More than any other issue or argument in the *Belmarsh* cases, the abuse of process principle most directly and concretely links the judicial function to the rule of law as an institutional and constitutional matter. This principle recognizes that the judicial process itself—the individual challenge to government action raised before an independent judge—is intrinsic to the Anglo-American tradition of constitutionalism. The central point, which the House endorsed and reaffirmed, is that the judiciary has an independent constitutional obligation to maintain the rule of law, even in the face of apparent abuse of power by the executive or the legislature:

[T]he judiciary [must] accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. . . .

. . . .

. . . [Where] it offends the court’s sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.

. . . .

. . . [T]he court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court’s conscience as being contrary to the rule of law.¹⁶⁸

Lord Bingham concluded that this principle gave the judiciary the inherent authority to prevent threats to the rule of law by exercising

167. *Id.* at [18].

168. *R v. Horseferry Rd. Magistrates’ Ct. (Ex parte Bennett)*, [1994] 1 A.C. 42, 61–62, 74, 76 (H.L. 1993) (appeal taken from Eng.), *quoted in Belmarsh II* [2005] UKHL 71 at [19]. The House also noted that this principle exists in United States law as well. *See Belmarsh II* [2005] UKHL 71 at [19] (citing *United States v. Toscanino*, 500 F.2d 267, 275–76 (2d Cir. 1974)); *see also R v. Looseley* [2001] UKHL 53, [1] (appeal taken from Eng.); *R v. Mullen*, [2000] Q.B. 520, 535–36.

its “jurisdiction to prevent abuse of executive power.”¹⁶⁹ Lords Nicholls, Hoffmann, and Brown reinforced this point by highlighting explicitly the different institutional functions and responsibilities of the executive and the judiciary.¹⁷⁰ And Lord Hoffmann went on to recognize that preservation of the integrity of the judicial process by the judiciary itself helps to demonstrate that this is the most fundamental basis for excluding improperly obtained evidence:

[What is] the purpose of the rule excluding evidence obtained by torture[?]. . . Is it to discipline the executive agents of the state by demonstrating that no advantage will come from torturing witnesses, or is it to preserve the integrity of the judicial process and the honour of English law? If it is the former, then of course we cannot aspire to discipline the agents of foreign governments. Their torturers would probably accept with indifference the possibility that the work of their hands might be rejected by an English court. If it is the latter, then the rule must exclude statements obtained by torture anywhere, since the stain attaching to such evidence will defile an English court

169. *Belmarsh II* [2005] UKHL 71 at [22].

170. *See id.* at [70] (Lord Nicholls) (“The executive and the judiciary have different functions and different responsibilities. It is one thing for tainted information to be used by the executive when making operational decisions or by the police when exercising their investigatory powers, including powers of arrest. These steps do not impinge upon the liberty of individuals or, when they do, they are of an essentially short-term interim character. Often there is an urgent need for action. It is an altogether different matter for the judicial arm of the state to admit such information as evidence when adjudicating definitively upon the guilt or innocence of a person charged with a criminal offence. In the latter case repugnance to torture demands that proof of facts should be found in more acceptable sources than information extracted by torture.”); *see also id.* at [94]–[95] (Lord Hoffmann) (“[T]he 2001 Act makes the exercise by the Secretary of State of his extraordinary powers subject to judicial supervision. . . . It [the SIAC] is to form its own opinion, after calm judicial process, as to whether it considers that there are reasonable grounds for such suspicion or belief. It is exercising a judicial, not an executive function. Indeed, the fact that the exercise of the draconian powers conferred by the Act was subject to review by the judiciary was obviously an important reason why Parliament was willing to confer such powers on the Secretary of State. In my opinion Parliament, in setting up a court to review the question of whether reasonable grounds exist for suspicion or belief, was expecting the court to behave like a court. In the absence of clear express provision to the contrary, that would include the application of the standards of justice which have traditionally characterised the proceedings of English courts. It excludes the use of evidence obtained by torture, whatever might be its source.”); *id.* at [161]–[62] (Lord Brown). There is an alternative that is not contained in the existing statutory scheme in which prosecutors, rather than the police or the courts, would make the determination regarding the quality and sufficiency of the evidence. *See* Clive Walker, *Keeping Control of Terrorists Without Losing Control of Constitutionalism*, 59 STAN. L. REV. 1395, 1429–30 (2007).

whatever the nationality of the torturer. I have no doubt that the purpose of the rule is not to discipline the executive, although this may be an incidental consequence. It is to uphold the integrity of the administration of justice.¹⁷¹

I discuss this point in detail in the next section.

IV. GOVERNMENT LIMITED BY LAW: THE ANGLO-AMERICAN CONSTITUTION AND THE JURISDICTION TO PRESERVE THE JUDICIAL INSTITUTION

Along with the preservation of trial by jury and the prohibition against bills of attainder and *ex post facto* laws, the preservation of the writ of habeas corpus is a provision of the unamended United States Constitution that most patently incorporates fundamental rights and principles of the English Constitution.¹⁷² At the most fundamental level, the institutional function of the judiciary and the constitutional provisions for the courts' independence are united by a conviction that the rule of law erects "a constitutional barrier between the governors and the governed, between power and the people."¹⁷³ In the Anglo-American legal tradition, the courts occupy the institutional position between the government and the governed,

171. *Belmarsh II* [2005] UKHL 71 at [91]; *see also id.* at [137] (Lord Rodger), [150] (Lord Carswell), [164] (Lord Brown).

172. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 558 (2004) (Scalia, J., dissenting) ("The writ of habeas corpus was preserved in the Constitution—the only common-law writ to be explicitly mentioned."); *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973) ("By the time the American Colonies achieved independence, the use of habeas corpus to secure release from unlawful physical confinement, whether judicially imposed or not, was thus an integral part of our common-law heritage. The writ was given explicit recognition in the Suspension Clause of the Constitution . . ."); *Williams v. Kaiser*, 323 U.S. 471, 484 n.2 (1945) (Frankfurter, J., dissenting) ("We are dealing with a writ antecedent to statute, and throwing its root deep into the genius of our common law . . . It has through the ages been jealously maintained by Courts of Law as a check upon the illegal usurpation of power by the Executive at the cost of the liege." (quoting Sec'y of State for Home Affairs v. O'Brien, [1923] A.C. 603, 609 (H.L.) (appeal taken from Eng.))); *see also* DAVID CLARK & GERARD MCCOY, *THE MOST FUNDAMENTAL LEGAL RIGHT: HABEAS CORPUS IN THE COMMONWEALTH* 29 (2000) ("One of the earliest constitutional provisions to protect the writ of habeas corpus is to be found in the United States Constitution 1787 . . ."); ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 37–38 (2001).

173. Allan C. Hutchinson & Patrick J. Monahan, *Democracy and the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* 97, 97–100 (Allan C. Hutchinson & Patrick J. Monahan eds., 1987).

enforcing the legal limitations on government action that are definitive of constitutionalism.¹⁷⁴

The notion that an independent judiciary possesses a unique institutional and constitutional position in protecting individual rights, thereby preserving the rule of law, is hardly novel.¹⁷⁵ Nevertheless, familiarity should not allow us to underestimate or overlook the enduring emphasis in England and the United States on the institutional role and constitutional responsibility of the independent judiciary to maintain the rule of law.¹⁷⁶ This judicial role and responsibility is a cardinal feature that distinguishes a government bound by the rule of law from the exercise of arbitrary power and the presence of a police state.¹⁷⁷ The United States

174. See, e.g., GORDON, *supra* note 93, at 256 (“During the seventeenth century not only did Parliament become established as a powerful political institution; the foundation was also laid for the role of the judiciary as a protective buffer between the government and the citizenry, a role that it plays in all modern constitutional polities.”); BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 52 (2004) (“The judiciary is the point of most direct confrontation between the government, law, and the individual, and it can therefore serve as the best barrier against lawless governmental actions.”).

175. See generally JOHN PHILLIP REID, RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 6–7 (2004) (explaining how analysis of key historical events can help individuals understand the nuances of the rule of law); ELIZABETH WICKS, THE EVOLUTION OF A CONSTITUTION: EIGHT KEY MOMENTS IN BRITISH CONSTITUTIONAL HISTORY 24–25 (2006) (describing how certain events in British history shaped the Constitution). To be sure, an independent judiciary was never thought to be the panacea for every potential abuse of power, and the familiar reservation that judicial independence could lead to the rule of judges replacing the rule of law has long preoccupied some politicians and scholars. See JEFFREY GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY 149–50, 211 (1999).

176. See, e.g., CARRESE, *supra* note 93, at 182–83 (“The first cause of an independent judiciary and its subsequent rise to power in eighteenth- and nineteenth-century America seems to be the blending of Montesquieu’s complicated liberal constitutionalism with the common-law tradition of mixed constitutionalism, something undertaken nowhere more extensively than in America. . . . Hamilton and Marshall argued for judicial independence, a common-law profession, and judicial review so as to establish judges as guardians of constitutional tradition and limited government.”); TAMANAHA, *supra* note 174, at 117; VAN CAENEGEM, *supra* note 93, at 98 (“The parliamentary and constitutional monarchy which . . . took shape in England . . . provided a solid central government, which protected the national interest, but was nevertheless bound to operate within the parameters of the law, *inter alia*, because of the impact of an influential and independent judiciary.”).

177. See VAN CAENEGEM, *supra* note 93, at 16–18 (“The opposite of the *Rechtsstaat* is the *Polizeistaat* (‘police state’) or the *Machtsstaat* (‘state based on might’), where the arbitrary will of the persons in power prevails and the rulers do not have to observe legal norms. In the one case the citizens are governed by laws rather than by people, in the other the opposite applies. A judiciary which is independent of the political and administrative authorities is an essential element of the *Rechtsstaat*. Only the judges can in conscience and complete freedom reprimand the government and even force it to obey the law and redress injustice. A judiciary which is in the hands of the government would turn the *Rechtsstaat* into a hypocritical farce. . . . [I]n seventeenth-century England the Magna Carta tradition finally won the day. One of the fruits of

Constitution anticipates the pressures of war on law and establishes a legal procedure by which Congress can work with the executive to respond to security threats while maintaining respect for constitutional principles. Whether in response to a putative suspension of habeas corpus or to the attempted introduction of evidence acquired via torture, the courts have an indispensable part to play in ensuring that the politically responsive branches remain responsible to the law at all times. The courts must maintain the availability and integrity of the judicial process as a means of preserving Anglo-American constitutionalism in principle and in practice.

This is another link between the decisions of the American and English courts in *Boumediene* and the *Belmarsh* cases. The House of Lords recognized in the *Belmarsh* cases that indefinite preventive detention, evidence obtained by torture, and interference with habeas corpus present, inescapably, threats to the integrity and independence of the judiciary as an institution, and to the rule of law as a core constitutional value of Anglo-American constitutional government.¹⁷⁸ To preserve the nature of their institution and of their constitution, judges are understood in the common law tradition to possess the authority to disavow acts of the government that violate legal principle. This disavowal is expressed in similar and different ways and through similar and different concepts in England and the United States: judicial review, habeas corpus, due process, abuse of process,

the Glorious Revolution was the Bill of Rights of 1689 and its logical conclusion, the Act of Settlement of 1701, which proclaimed the independence of the judicature from the government. The repercussions of these English developments on the American and European Constitutions are well known. . . ." (footnote omitted)).

178. See *A v. Sec'y of State for the Home Dep't (No. 2) (Belmarsh II)* [2005] UKHL 71, [83] (appeal taken from Eng.); *A v. Sec'y of State for the Home Dep't (Belmarsh I)* [2004] UKHL 56, [36] (appeal taken from Eng.); see also Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1741–42 (2005) ("A third point [regarding the use of torture by the state] addresses the issue of the rule of law—the enterprise of subjecting 'the engines of state' to legal regulation and restraint. We hold ourselves committed to a general and quite aggressive principle of legality, which means that law does not just have a little sphere of its own in which to operate, but expands to govern and regulate every aspect of official practice. . . . I think we should be concerned about the effect not just on American law but on the rule of law of a weakening or an undermining of the legal prohibition on torture. We have seen how the prohibition on torture operates as an archetype of various parts of American constitutional law and law enforcement culture generally. I believe it also operates as an archetype of the ideal we call the rule of law. That agents of the state are not permitted to torture those who fall into their hands seems an elementary incident of the rule of law as it is understood in the modern world. If this protection is not assured, then the prospects for the rule of law generally look bleak indeed.").

incompatibility declarations. But what unites the common law tradition is the constitutional precommitment that the government can only act by and under the law. And where the government acts in a manner inconsistent with that constitutional norm, the judiciary's independence incorporates its institutional obligation to the law.¹⁷⁹ This brings us back to the idea that the judiciary and other branches of government engage in a conversation with each other about the meaning of the Constitution. In the constitutional democracies of the common law world, the rule of government and the people according to legal principles is thought to create and sustain the state.¹⁸⁰ The state cannot exist outside the law and therefore cannot act outside the law.¹⁸¹

This substantive and structural principle—that certain government acts are irretrievably inconsistent with the rule of law and that common law courts are obliged to say so—unifies the analysis of the various judicial opinions in *Boumediene* and the *Belmarsh* cases. The House's decision in the *Belmarsh* cases, and Justice Breyer's and Judge Rogers's opinions in *Boumediene*, protect the judicial institution by asserting the judiciary's institutional identity and constitutional responsibility to maintaining Anglo-American rule of law values. Legislatures and executive officials may act contrary to the rule of law, but this does not mean that the courts must (or should) prescind from saying that they have done so, explaining the nature of those violations, and taking their part in the institutional conversation that helps to construct the principles of their constitution.¹⁸² Moreover, where legislative or executive acts

179. See David Dyzenhaus, Schmitt v. Dicey: *Are States of Emergency Inside or Outside the Legal Order?*, 27 CARDOZO L. REV. 2005, 2035 (2006) (“[I]f the executive is given the equivalent of such a prerogative either by the constitution or by statute, it is the duty of judges to try to understand that delegation of power as constrained by the rule of law. To the extent that the delegation cannot be so understood, judges must treat it as, to use terminology developed by Ronald Dworkin, an embedded mistake, that is, a fact which they have to recognize, but whose force they should try to limit to the extent possible. They are entitled to do this because they should adopt as a regulative assumption of their role the view that all the institutions of government are cooperating in what we can think of as the rule of law project, the project which tries to ensure that political power is always exercised within the limits of the rule of law.” (footnote omitted)).

180. See *id.* at 2008.

181. See *id.* at 2010.

182. See *id.* at 2011 (“[J]udges [need not] always be the principal guardians of the rule of law. Certain situations, and emergencies are one, might require that Parliament or the executive play the lead role. The rule of law project does not require allegiance to a rigid doctrine of the separation of powers in which judges are the exclusive guardians of the rule of law.”)

threaten to undermine the integrity of the judicial process itself, the courts' obligation to preserve their institution amounts to a concomitant defense of constitutional values. The Supreme Court articulated this point over seventy years ago, in a case where the Court refused to countenance a conviction grounded on confessions obtained by torture:

The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." . . . But the freedom of the state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. . . . And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires "that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

. . . "Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief iniquity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions. The Constitution recognized the evils that lay behind these practices and prohibited them in this

Nevertheless, judges will always have some role in ensuring that the rule of law is maintained even when the legislature and the executive are in fact cooperating in the project. Judges also have an important role in calling public attention to a situation in which such cooperation wanes or ceases.").

country. . . . The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure, and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective.”¹⁸³

Indeed, if the courts stood silently by in the face of government acts that would, for all practical purposes, create a space in which government could forgo any reference to or constraint of the law, this would create what Lord Steyn called a “legal black hole.”¹⁸⁴ A legal black hole is irreconcilable with the rule of law, because rule of law values mean at bottom that government action must always be limited by law and a legal black hole is a condition or circumstance in which government is empowered to act entirely outside the law. For purposes of this Article, the most significant threat posed by lawless government action is the implicit or (as the DTA and MCA demonstrate) explicit tension between a legal black hole and the constitutional judicial role. This tension troubled Lord Steyn in relation to American and English courts:

The United States has a long and honourable commitment to the Magna Carta and allegiance to the rule of law. In recent times extraordinary deference of the United States courts to the executive has undermined those values and principles. As matters stand at present the United States courts would refuse to hear a prisoner at Guantanamo Bay who produces credible medical evidence that he has been and is being tortured. They would refuse to hear prisoners who assert that they were not combatants at all. They would refuse to hear prisoners who assert that they were simply soldiers in the Taliban army and knew nothing about Al-Qaeda. They would refuse to examine any complaints of any individuals. The blanket presidential order deprives them all of any rights whatever. As a lawyer

183. *Brown v. Mississippi*, 297 U.S. 278, 285–87 (1936) (final alteration in original) (citations omitted).

184. See Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT’L & COMP. L.Q. 1 (2004). The phrase actually has a longer history in English judicial opinions, but I want to restrict its meaning to the context of this Article and the detainees in Guantanamo and Belmarsh. Even with that limitation, however, the phrase appears in *R (on the application of Abbasi and another) v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA (Civ) 1598, [22] (Eng.).

brought up to admire the ideals of American democracy and justice, I would have to say that I regard this as a monstrous failure of justice.¹⁸⁵

The point here is that the government cannot eliminate judicial review as a means of attempting to insulate itself from accountability to the law. And the courts cannot, and should not, allow their authority and jurisdiction to be extirpated in this fashion. Legislation and executive action that would compromise core elements of the judicial institution—by denying all meaningful judicial review of government acts in relation to detainees in Guantanamo or by permitting evidence acquired through torture to rationalize detention in Belmarsh—threatens to compromise the Anglo-American rule of law tradition.

Here again the principle of abuse of process gains traction. The legislative and executive organs of government may attempt to do things with and through the law in detention facilities, but not in courtrooms. Where these acts conflict with the bedrock constitutional principles of the Anglo-American common law tradition itself, the courts have an obligation to those principles that supersede any institutional habit of deference during times of crisis. In other words, there are areas, such as military operations, in which the courts will appropriately defer to the executive and the legislature. But, there are no instances in which the courts will utterly absent themselves from ensuring the legality of all government action. That would amount to abdicating their own independent institutional obligation to the rule of law as expressed in the written and unwritten constitutions of the United States and the United Kingdom.¹⁸⁶ Of course, the expression of that obligation differs in the United States and United Kingdom. In the United States, it takes the form of voiding the act as unconstitutional, and in the United Kingdom it may take the form of a declaration of incompatibility under the Human Rights Act.¹⁸⁷ But, these differences are far less meaningful than the similar resistance in both national judiciaries to exercises of political power that conflict with

185. Steyn, *supra* note 184, at 11.

186. See DYZENHAUS, *supra* note 120, at 212.

187. See generally STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 92–94 (1996) (describing four variations in constitutional authority that are exercised by the judiciary).

constitutional principles or that would debase the judiciary as an institution. The Anglo-American rule of law tradition means that lawless government action is, by definition, contrary to the constitutional values of the United States and the United Kingdom.¹⁸⁸

V. CONCLUSION

The dissenting opinions of Justice Breyer and Judge Rogers in *Boumediene* and the majority's speeches in the *Belmarsh* cases reflect the Anglo-American commitment to the rule of law and the role of courts in ensuring that the government act only within and according to constitutional principles. This commitment is revealed in their discussions of habeas corpus and the jurisdiction to review claims of constitutional violation by the government, and of abuse of process and proportionality. This dedication to legalism and judicial independence, evinced most plainly through the exercise of judicial review, is intrinsic to the common law tradition. The legislature and the executive can test and even alter the margins, under recognized conditions, but the government cannot act as though there were no margins whatsoever to circumscribe its political authority. The commitment to the rule of law means that, in the end, it is law that rules. And the government cannot act, or force the courts to act, in violation of that basic principle.¹⁸⁹ *Boumediene* and the *Belmarsh* cases are, then, two recent efforts by American and English judges to remind their governments of what their governments already know: a

188. The use of the term "lawless" in the previous sentence is quite deliberately intended to encompass both of its common usages, i.e., the government cannot act contrary to, or in the absence of, legal standards. Cf. Waldron, *supra* note 178, at 1726–27, 1734–39, 1741–43.

189. See, e.g., T.R.S. ALLAN, CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW 251 (2001) ("[A]s a common law doctrine parliamentary sovereignty does not extend to infringements of the rule of law The principle that it is beyond legislative competence to require a court to 'disregard both the law and the essential function of a court of law and do whatever they considered to be desirable in the public interest' assumes that the 'law' cannot itself be made merely a matter of 'the public interest' . . ." (footnote omitted) (quoting *Polyukhovich v. Commonwealth*, (1991) 172 C.L.R. 501, 607)); Dyzenhaus, *supra* note 179, at 2011 ("As I will argue, it is in seeing that judges are but part of the rule of law project that one can begin to appreciate the paradox that arises when rule by law, rule through a statute, is used to do away with the rule of law, to create a legal black hole. I will claim that there is a contradiction in the idea of legal black hole. In other words, one cannot have rule by law without the rule of law. But precisely because I want to argue that judges are but part of the rule of law project, I also am not committed to the conclusion that judges are always entitled to resist statutes that create legal black holes. Whether they are so entitled will depend on the constitutional structure of their legal order. But whatever that structure, they are under a duty to uphold the rule of law.").

nation cannot simultaneously protect itself and sacrifice its principles without sacrificing the nation along with the principles.

I indicated in my discussion of the D.C. Circuit majority opinion in *Boumediene* that this federal court had failed to address the matter of statutory jurisdiction-stripping in the detainees' habeas case as it related to more fundamental matters of judicial independence and constitutionalism. Put differently, I indicated that the D.C. Circuit had failed to maintain its institutional role in ensuring that the government's actions are always evaluated in accordance with the law of the United States and the Constitution. This is why I argued that the D.C. Circuit was mistaken when it addressed the issues in *Boumediene* almost entirely in the context of the Suspension Clause, rather than at a more fundamental level of constitutional allocation of institutional responsibility:

[T]he total preclusion of review in the DTA and MCA is unconstitutional because it contravenes a broader postulate of the constitutional structure of which the Suspension Clause forms a part: that some court must always be open to hear an individual's claim to possess a constitutional right to judicial redress of a constitutional violation. That principle applies whether the remedy sought is habeas relief, an injunction against unconstitutional conditions of confinement, or some other constitutionally required remedy. In the end, the individual's substantive constitutional claim to the remedy requested may or may not prevail, but the foreclosure of jurisdiction cannot, by itself, bar all courts even from considering whether the Constitution gives aliens detained in the United States a right to judicial relief from ongoing violations of constitutional rights involving conditions of confinement.¹⁹⁰

The D.C. Circuit was correct to consider Congress's institutional authority to respond to ongoing threats of terrorism in the post-September 11 world. But, the D.C. Circuit appeared to lose sight of its own institutional responsibility to ensure that Congress exercise its authority, at all times, in accordance with constitutional limitations.

190. Fallon & Meltzer, *supra* note 63, at 2063.