Hamdi’s Habeas Puzzle: Suspension as Authorization

Trevor W. Morrison

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HAMDI'S HABEAS PUZZLE: SUSPENSION AS AUTHORIZATION?

Trevor W. Morrisont

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INTRODUCTION

Cases involving the executive detention of individuals outside the criminal justice system implicate the "historical core" of the writ of habeas corpus.1 Yet there persists in this area a remarkable amount of uncertainty and disagreement over fundamental questions concerning the nature of habeas corpus and its place in our constitutional

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1 INS v. St. Cyr, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."); see, e.g., Swain v. Pressley, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring) ("[T]he traditional Great Writ was largely a remedy against executive detention."); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 218-19 (1953) (Jackson, J., dissenting) ("The judges of England developed the writ of habeas corpus largely to preserve [certain individual freedoms] from executive restraint.").
One of those cases, \textit{Hamdi v. Rumsfeld}, involved a challenge to the executive branch’s detention, without charge, of a U.S. citizen alleged to be an enemy combatant.\textsuperscript{4} The case divided the Court, producing four opinions in all.\textsuperscript{5} Two of those opinions—a plurality by Justice O’Connor and a dissent by Justice Scalia—are particularly intriguing, especially when read against one another. Although both opinions adopted positions substantially favoring the alleged enemy combatant, they did so in radically different ways, reflecting starkly opposed visions of habeas corpus and the Suspension Clause,\textsuperscript{6} and, more deeply, the nature of the separation of powers in our constitutional system.\textsuperscript{7}

These differences have been largely overlooked in the commentary on \textit{Hamdi}, but they are worth examining. Indeed, the divisions that the case produced, combined with recent changes in the Court’s personnel, suggest that the Court has not yet reached a point of stability in this area. The aim of this Article is to highlight the differences between the O’Connor and Scalia opinions, to show that they reflect two contrasting models of habeas as it relates to executive detention, to discuss some of the tradeoffs the models entail, and to suggest which model I think is best.\textsuperscript{8}

In doing this, I draw in part on recent work by Samuel Issacharoff and Richard Pildes, in which they identify three divergent approaches to the tension between civil liberties and national security in times of
national crisis. At one end of the spectrum, "executive unilateralists" argue that because the executive branch is capable of acting with "'speed, secrecy, flexibility, and efficiency that no other governmental institution can match,'" it should be permitted to undertake whatever measures it deems appropriate when faced with heightened threats to national security. At the other end of the spectrum, "civil libertarian idealists" either "deny . . . that shifts in the institutional frameworks and substantive rules of liberty/security tradeoffs do, indeed, regularly take place during times of serious security threats," or they "recognize the historical patterns of these shifts but refuse to accept any induction from experience that would legitimate such changes." As Professors Issacharoff and Pildes show, American courts have generally favored neither of these polar positions, preferring instead a "process-based, institutionally-oriented (as opposed to rights-oriented) framework" for assessing the lawfulness of governmental action in times of heightened national security risks. By taking this middle approach, courts have encouraged "bilateral institutional endorsement of both political branches of new legal structures for addressing exigent security contexts," thus "shift[ing] the responsibility [for] these difficult decisions away from themselves and toward the joint action of the most democratic branches of the government." That is, instead of aggressively enforcing individual rights by invalidating broad governmental initiatives, and instead of simply rubber-stamping those initiatives by deferring to the executive's unilateral assertions of national necessity, courts have sought to ensure that the legislative and executive branches work together to decide how best to balance liberty and security in times of national crisis.

Justice Jackson's concurring opinion in the Steel Seizure Case is perhaps the most famous exemplar of this approach. As he put it, "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum."

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10 Id. at 4 (quoting HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 119 (1990), but noting that Dean Koh himself is not a proponent of executive unilateralism).
11 Id.
12 Id. at 5. Cass Sunstein has developed an approach similar to that of Professors Issacharoff and Pildes. His terms for executive unilateralism and civil libertarian idealism are "National Security Maximalism" and "Liberty Maximalism," respectively. See Cass R. Sunstein, Minimalism at War, 2004 SUP. CT. REV. 47, 49–50. Like Issacharoff and Pildes, Professor Sunstein rejects both polar positions in favor of a "minimalist approach to intrusions on freedom amidst war." Id. at 50. Such minimalism, he contends, "captures the practices of the American courts when national security is threatened." Id. at 50–51.
13 Issacharoff & Pildes, supra note 9, at 5.
14 Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case), 343 U.S. 579 (1952).
15 Id. at 635 (Jackson, J., concurring).
trast, "the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." And "[w]hen the President acts in absence of either a congressional grant or denial of authority," he occupies a "zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." Within this three-tiered framework, a President claiming extraordinary powers to respond to national emergencies is on strongest ground when acting pursuant to congressional authorization, and on weakest ground when attempting to override congressional prohibition. In short, legislative action is central to the analysis.

In the half-century since the Steel Seizure Case was decided, Justice Jackson's analytical framework has been embraced as a "canonical" guide to modern separation-of-powers analysis. But the framework itself does not resolve all issues that might arise; new cases bring new complications. Hamdi, for example, exposes an additional, heretofore

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16 Id. at 637.
17 Id.
18 As Justice Jackson put it,

[E]mergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. . . . In the practical working of our Government we already have evolved a technique within the framework of the Constitution by which normal executive powers may be considerably expanded to meet an emergency. Congress may and has granted extraordinary authorities which lie dormant in normal times but may be called into play by the Executive in war or upon proclamation of a national emergency.

Id. at 652.
19 Neal K. Katyal & Laurence H. Tribe, Waging War, Deciding Guilt: Trying the Military Tribunals, 111 Yale L.J. 1259, 1274 (2002); see Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2047, 2050 (2005) (describing the framework as "widely accepted"). One measure of the Steel Seizure Case's continuing influence—both that of Justice Jackson's concurrence and that of the case more generally—is that any analysis of a complex separation-of-powers issue that fails to cite and discuss the case is liable to be deemed incompetent. Such was the case for the August 2002 "torture memo" produced by the Office of Legal Counsel for then-White House Counsel Alberto Gonzales. See Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005). The section of the memorandum addressing the President's authority as Commander-in-Chief failed to discuss, or even cite, the Steel Seizure Case. See id. at 204-07. When the memorandum was released to the public, this omission brought widespread condemnation. See, e.g., Adam Liptak, Legal Scholars Criticize Memos on Torture, N.Y. Times, June 25, 2004, at A14 (quoting Jack Balkin saying, "You just don't begin a discussion of presidential power without mentioning Youngstown"); Douglass Cassel calling the omission "not just poor judgment" but "incompetence"; Harold Koh calling the memo generally "embarrassing"; and Cass Sunstein describing the legal analysis as "very low level, . . . very weak, embarrassingly weak, just short of reckless"). In the wake of this criticism, the memorandum was withdrawn and replaced. See Memorandum from Daniel Levin, Acting Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to James B. Comey, Deputy Attorney Gen., U.S. Dep't of Justice (Dec. 30, 2004), available at http://www.usdoj.gov/olc/dagmemo.pdf.
underappreciated fault line within the institutional-process approach articulated by Justice Jackson and applauded by Professors Issacharoff and Pildes. Specifically, *Hamdi* reveals the importance of the precise form of the congressional authorization in question.

It is on this point that the opinions of Justices O'Connor and Scalia in *Hamdi* so interestingly diverge. On the question of the President’s authority to detain U.S. citizens as enemy combatants, Justice O'Connor concluded that Congress could confer the authority by legislation, and that it had in fact done so in a statute empowering the President to “use all necessary and appropriate force against those nations, organizations, or persons” he determines to be responsible for the September 11 attacks.\(^2\) Critically, however, Justice O’Connor also preserved for the courts a vital role in ensuring that individual exercises of the detention authority comport both with the scope of the statutory grant and with the constitutional demands of due process.\(^2\)

In contrast, Justice Scalia took the position that Congress could not, by ordinary legislation, authorize the executive detention of U.S. citizens outside the criminal justice system.\(^2\) In his view, the executive branch had only two options when seeking to detain a citizen like Hamdi: either prosecute him for committing a federal crime or convince Congress to suspend the writ of habeas corpus.\(^2\) On its face, this position may look like a broad rejection of the entire project of enemy combatant detention, at least as applied to U.S. citizens. Indeed, that is how Justice Scalia’s opinion has been received by many commentators.\(^2\) I read the opinion differently. In my view, far from rejecting the extraordinary detention of alleged enemy combatants, Justice Scalia’s opinion simply requires such detention to be authorized in a specific way. The opinion suggests that if Congress wants to authorize the President to detain U.S. citizens as enemy combatants during times of national crisis, it may do so, *but only by suspending habeas corpus*.\(^2\) Suspending the writ, in other words, is both a necessary and a sufficient condition for authorizing this form of extraordinary detention. It is this model of legislative authorization, which I call “suspension as authorization,” that I want to examine in this Article and to compare to Justice O’Connor’s more conventional approach. More specifically, I seek to show that, although Justice Scalia’s *Hamdi* opinion has been widely hailed as the most liberty-pro-


\(^{21}\) See infra text accompanying notes 47–58.

\(^{22}\) See infra text accompanying note 64.

\(^{23}\) See infra text accompanying notes 65–70.

\(^{24}\) See infra text accompanying notes 89–90.

\(^{25}\) See infra text accompanying notes 71–79.
tective of all the opinions in the case, in fact the suspension-as-authori-
zation model could, if adopted more broadly, pose a serious threat to
the safeguards of liberty built into the law of habeas corpus and the
Constitution itself.

This Article has four Parts. Part I introduces the *Hamdi* case and
summarizes the four opinions it generated at the Supreme Court. Be-
cause the opinions diverge so widely on some of the key issues in the
case, and because some of those divergences are central to this Arti-
cle, I describe each opinion in considerable detail. Part II then exam-
ines more closely the suspension-as-authorization model set out in
Justice Scalia's dissent, and shows why I think it is misguided. My ar-
gument is that treating congressional suspensions of the writ as au-
thorizing otherwise-forbidden executive action is both formally
untenable and functionally undesirable. Formally speaking, a suspen-
sion simply removes a judicial remedy for unlawful detention. It does
not authorize any executive action that was not already permitted.
Functionally speaking, the suspension-as-authorization model requires
one branch of government (the judiciary) to be read out of the equa-
tion in order for another (the executive) to act. But that is contrary to
the basic principle of checks and balances established by the constitu-
tional separation of powers. Rather than creating a protocol for dis-
ensing with one of the three branches in times of emergency, the
Constitution is better read to contemplate that all three branches will
check each other in times of war as well as peace.

As Part III shows, this latter model is reflected fairly well in Justice
O'Connor's opinion for a plurality of the Court. Without necessarily
defending the specifics of Justice O'Connor's analysis, I seek in Part
III to show that her general approach is sound. That approach grants
Congress fairly broad latitude to authorize extraordinary measures in
times of national crisis, including the detention of alleged enemy
combatants in the "war on terror." But as Justice O'Connor empha-
sized, it is equally critical that the courts remain available to check the
executive's exercise of this extraordinary power. Thus, Justice
O'Connor permitted Congress to authorize executive detention of en-
emy combatants by appropriate legislation, but also reserved a role for
the courts to ensure that individual exercises of that authority remain
within the bounds of the statutory grant and otherwise comply with
basic constitutional constraints. In this way, Justice O'Connor sought
to accommodate the prerogatives of all three branches, rather than
setting one against another in times of national emergency. Finally,
having made the case for the three-branch approach reflected in Jus-
tice O'Connor's opinion, I address in Part IV a series of potential ob-
jections to my argument.
Ultimately, I do not aim to take any definitive position on the scope of Congress's power to authorize executive detention. The power is surely limited to some extent by the constitutional guarantees of due process and the like, and the courts are surely competent to enforce those limits in at least some contexts. But I do not plan to examine those issues here. Instead, I want to advance a narrower point: if it is within Congress's power to authorize a particular type of executive detention, the authorization should take the form of ordinary legislation, not suspension of the writ.

I

Hamdi v. Rumsfeld

Yaser Hamdi, a U.S. citizen, was captured in Afghanistan by the Northern Alliance (a coalition of groups opposed to the Taliban government and allied with the United States) and turned over to the U.S. military in late 2001. According to the government, Hamdi had been fighting on behalf of the Taliban against the Northern Alliance and the United States. Deemed by the government to be an enemy combatant, he was taken to the U.S. Naval Base at Guantanamo Bay in January 2002. In April 2002, after learning of Hamdi's U.S. citizenship, the government transferred him to a naval brig in Norfolk, Virginia, and later to a brig in Charleston, South Carolina. He faced no formal criminal charges, and, for the first twenty-one months of his detention, he was not permitted to communicate with anyone outside the brig where he was held.

In June 2002, Hamdi's father filed a petition for a writ of habeas corpus in federal district court, challenging his son's detention. After protracted litigation in the lower courts, the case finally reached the Supreme Court, which granted certiorari to address two questions: First, does the executive branch have the authority to detain U.S. citizens as enemy combatants? Second, if so, what right, if any, does a

27 See id. at 512-15 (quoting the declaration of Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy, that Hamdi was “affiliated with a Taliban military unit and received weapons training,” that he “remained with his Taliban unit following the attacks of September 11,” and that his Taliban unit ultimately surrendered to the Northern Alliance during a time when the Taliban was “engaged in armed conflict with the armed forces of the United States”).
28 See id. at 510.
29 Id.
30 See id. at 539–40 (Souter, J., concurring in part). The bar on communication included prohibiting Hamdi from communicating with counsel. Id. at 540. Then, in February 2004, two months before the case was to be argued before the Supreme Court, the government finally allowed Hamdi to consult with counsel, but only as a matter of policy, without conceding that Hamdi had any right to such consultation. See id. at 540 n.1.
31 Id. at 511 (plurality opinion).
32 See id. at 511–16.
detainee like Hamdi have to challenge the accuracy of the government's determination that he is an enemy combatant? 33

On the first question, the government argued that the President possesses the plenary authority to detain U.S. citizens he deems to be enemy combatants by virtue of Article II of the Constitution. 34 This was a bold articulation of the kind of executive unilateralism criticized by Professors Issacharoff and Pildes. 35 No one on the Court accepted it. Instead, Justice O'Connor in a plurality opinion (joined by the Chief Justice and Justices Kennedy and Breyer) 36 and Justice Thomas in a solo dissent 37 both avoided the question of unilateral presidential authority by concluding that Congress had authorized Hamdi's detention. In doing so, they both looked to the Authorization for Use of Military Force (AUMF), passed by Congress on September 18, 2001. 38 The AUMF authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . , or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." 39 Although the statute does not speak explicitly of detention, Justice O'Connor concluded for the plurality that "detention of individuals falling into the limited category we are considering, 40 for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." 41 The fact that Hamdi was a U.S. citizen did not change the analysis; Justice O'Connor saw "no bar to this Nation's holding one of its own

33 See id. at 509.
34 See id. at 516.
35 See supra text accompanying note 10.
36 See Hamdi, 542 U.S. at 516–17.
37 See id. at 587 (Thomas, J., dissenting).
38 Pub. L. No. 107-40, 115 Stat. 224 (2001); see Hamdi, 542 U.S. at 516–18 (plurality opinion); id. at 587 (Thomas, J., dissenting).
40 Justice O'Connor confined her analysis to the detention of an enemy combatant, which she defined very narrowly as "an individual who, [the government] alleges, was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there." Hamdi, 542 U.S. at 516 (plurality opinion) (quotations omitted).
41 Id. at 518 (citation added). In response to Hamdi's objection that he might be subject to literally "perpetual detention" under this reasoning, Justice O'Connor suggested that if hostilities persisted in Afghanistan for two generations, Hamdi's continued detention could indeed become effectively "perpetual" and thus might exceed the government's authority under the AUMF. See id. at 521–22.
citizens as an enemy combatant." Justice Thomas agreed, providing a Court majority on this point.

For Justice Thomas, the conclusion that Congress had authorized the detention of individuals like Hamdi was enough to dispose of the case. In his view, empowering the President to detain enemy combatants implicitly authorizes him to make "virtually conclusive factual findings" regarding any particular individual's status as an enemy combatant. The courts, Justice Thomas reasoned, "lack the capacity and responsibility to second-guess this determination." But he was alone in that view.

In contrast, Justice O'Connor stressed in her plurality opinion that the executive's decision to detain a particular citizen as an enemy combatant is not immune from judicial scrutiny:

[T]he position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government. . . . [A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.

The principal means of judicial involvement in this context, Justice O'Connor explained, is the writ of habeas corpus:

[Un]less Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions. . . . [I]t would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge. Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process.

Justice O'Connor went on to sketch the contours of constitutionally adequate process for a citizen-detainee like Hamdi. To do this,

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42 Id. at 519 (citing Ex parte Quirin, 317 U.S. 1, 37-38 (1942)).
43 See id. at 587 (Thomas, J., dissenting).
44 See id. at 579.
45 Id. at 589.
46 Id.
47 Id. at 535-36 (plurality opinion) (citation omitted).
48 Id. at 536-37.
she applied the standard test, first articulated by the Court in *Mathews v. Eldridge* for deciding what process is due. On the basis of that analysis, she concluded, a detainee in Hamdi’s position “must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” To facilitate that process, the detainee also has a right to the assistance of counsel. On these points, Justice O’Connor’s opinion commanded a Court majority.

But Justice O’Connor also made certain allowances in recognition of the burdens judicial review could impose on the executive branch as it prosecutes the war on terror. Specifically, she would (1) allow the government to introduce hearsay; (2) allow the evidentiary burden to be shifted to the detainee, once the government puts forth credible evidence that the detainee meets the enemy-combatant criteria; and (3) allow each case to proceed, at least initially, before a military tribunal rather than an Article III court. As to the last of these concessions, however, Justice O’Connor apparently insisted that the federal courts remain open to ensure that the procedures and

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First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* at 335.

50 See *Hamdi*, 542 U.S. at 532–33.

51 *Id.* at 533.

52 See *id.* at 539 (concluding that Hamdi “unquestionably has the right to access to counsel in connection with the proceedings on remand”).

53 As described below, Justice Souter, joined by Justice Ginsburg, disagreed with Justice O’Connor on the threshold question of authority to detain under the AUMF. See *id.* at 541 (Souter, J., concurring in part). Despite that disagreement, they partially joined Justice O’Connor’s opinion for the purposes of creating a Court majority governing the terms of the remand. See *id.* at 553.

54 In contrast to the rights described in the preceding paragraph, Justice Souter pointedly did not join Justice O’Connor’s concessions to the government. See *id.* at 553–54.

55 See *id.* at 533–34 (plurality opinion).

56 See *id.* at 534.

57 See *id.* at 538. The government has accepted this invitation in cases involving noncitizens detained as enemy combatants at Guantanamo Bay by establishing “Combatant Status Review Tribunals” (CSRTs) whose purpose is to review the designation of each detainee as an enemy combatant. *See Memorandum from Paul Wolfowitz, Deputy Sec’y of Defense, U.S. Dep’t of Defense, to the Sec’y of the Navy (July 7, 2004), available at http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.* Whether Justice O’Connor’s due process analysis applies to the detention of noncitizens at Guantanamo Bay, and whether CSRT proceedings satisfy whatever due process or other judicially enforceable rights those detainees possess, is the topic of ongoing litigation. See *infra* note 88 (citing cases).
decisions of the tribunal are constitutionally adequate. That is the overarching feature of Justice O’Connor’s entire analysis of the due process question in the case—the Constitution demands that the courts retain a role in the process.

The other four members of the Court disagreed with Justices O’Connor and Thomas on the threshold question in the case, namely, whether the AUMF authorized the detention in question. Justice Souter, joined by Justice Ginsburg, placed special emphasis on a federal statute known as the Non-Detention Act, which provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” As Justice Souter recounted, Congress passed the Non-Detention Act “to preclude reliance on vague congressional authority . . . as authority for detention or imprisonment at the discretion of the Executive.” Accordingly, he reasoned, the Act’s bar on detaining citizens except “pursuant to an act of Congress” should be construed “to require a congressional enactment that clearly authorize[s] detention or imprisonment.” Finding no clear statement in the AUMF, Justice Souter concluded that it did not authorize Hamdi’s detention. In short, he disagreed with Justice O’Connor on a matter of statutory construction. He did not conclude that Congress could not authorize the detention of individuals like Hamdi; he simply thought that Congress had not done so in the AUMF.

58 Justice O’Connor noted that, in the absence of military tribunal procedures along the lines of those established for determining enemy detainees’ status under the Geneva Convention, “a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved.” Hamdi, 542 U.S. at 538.

59 Id. at 542 (Souter, J., concurring in part) (quoting 18 U.S.C. § 4001(a) (2000)).

60 Id. at 543-44. More specifically, Congress sought “to preclude another episode like the one described in Korematsu v. United States,” where U.S. citizens of Japanese ancestry were interned pursuant to an executive order. Id. at 542. As Justice Souter explained, “Although an Act of Congress ratified and confirmed an Executive order authorizing the military to exclude individuals from defined areas and to accommodate those it might remove, the statute said nothing whatever about the detention of those who might be removed; internment camps were creatures of the Executive, and confinement in them rested on assertion of Executive authority.” Id. at 543 (citations omitted).

61 Id. at 544.

62 See id. at 547-51. According to Justice Souter, the AUMF’s “focus is clear, and that is on the use of military power. It is fairly read to authorize the use of armies and weapons, whether against other armies or individual terrorists. But . . . it never so much as uses the word detention.” Id. at 547. Justice Souter further rejected the government’s assertion that the President could detain Hamdi pursuant to his “inherent, extrastatutory authority under a combination of Article II of the Constitution and the usages of war.” Id. at 552. In doing so, he cited Justice Jackson’s three-tiered framework and, in particular, his statement that the President’s authority is “at its lowest ebb” when he acts contrary to Congress’s will. Id. (quoting Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case), 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring)).
Justice Scalia, joined by Justice Stevens, also concluded that the AUMF could not be construed to authorize the detention of citizens like Hamdi. But he went further, concluding that if the AUMF did purport to authorize the detention with the requisite clarity, it would be unconstitutional. Justice Scalia advanced this position in two basic steps. First, he maintained that "[w]here the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime." Second, he observed that "[w]here the exigencies of war prevent that, the Constitution's Suspension Clause allows Congress to relax the usual protections temporarily." But in the absence of a suspension of habeas corpus, "the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge."

Justice Scalia grounded his first point in the Due Process Clause, which he read as generally guaranteeing citizens held within the United States for alleged criminal conduct the right to be charged and tried in the criminal justice system. He acknowledged that the government has traditionally engaged in certain types of noncriminal detention—such as civil commitment of the mentally ill and quarantine of the diseased—without affording all the protections of criminal procedure, but he stressed that such cases fall within "a limited number of well-recognized exceptions." Beyond those exceptions, Justice Scalia maintained, the Due Process Clause requires the government to charge and prosecute those citizens whose liberty it wishes to deprive.

Justice Scalia's second point focused on the role of the habeas writ, which he described as the historical vehicle for vindicating a detainee's due process rights. The writ was preserved in the Constitution's Suspension Clause, he maintained, precisely in order to guard against "'arbitrary imprisonment[ ]' by the executive branch." Yet

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63 See id. at 573–74 (Scalia, J., dissenting).
64 See id. at 574–75.
65 Id. at 554.
66 Id. (citation omitted).
67 Id.
68 See id. at 555–56. The detainee's citizenship and the location of his detention were evidently central to Justice Scalia's analysis; he would apparently grant the government much broader leeway to detain noncitizens without trial, and might also do so for the detention of citizens outside the United States. See id. at 577 (stating that his analysis "appl[ies] only to citizens, accused of being enemy combatants, who are detained within the territorial jurisdiction of a federal court").
69 Id. at 556.
70 See id.
71 See id. at 557.
72 Id. at 558 (quoting The Federalist No. 84, at 444 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001)).
Justice Scalia also stressed that the Suspension Clause permits Congress to suspend the writ in circumstances of military exigency.73

Building on his observation that the Suspension Clause permits Congress to suspend the writ in certain limited circumstances, Justice Scalia then made two critical moves. First, although the exigent circumstances referenced in the Suspension Clause are by their terms quite narrow, Justice Scalia stated that Congress alone has the authority to decide whether those circumstances exist in any particular situation.74 That is, if Congress decides to suspend the writ because the war on terror (or any other conflict) poses a threat amounting to a rebellion or invasion within the terms of the Suspension Clause, that determination would, in Justice Scalia's view, be conclusive on the judiciary.75 Second, Justice Scalia suggested in several places that if Congress were to suspend habeas corpus, it would not simply deprive detainees like Hamdi of access to a judicial remedy, but would actually authorize the executive branch to engage in detention for which it otherwise lacked the authority. In the opening few paragraphs of the opinion, for example, Justice Scalia stated that, "[a]bsent suspension, . . . the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge."76 Later, he favorably quoted Blackstone for the proposition that "the parliament . . . whenever it sees proper, can authorize the crown, by suspending the habeas corpus act for a short and limited time, to imprison suspected persons without giving any reason for so doing."77 Near the end of the opinion, Justice Scalia responded to Justice Thomas's concern that there might be circumstances in which the constitutional predicates for suspension (rebellion or invasion) are lacking, yet detention authority is still necessary, by maintaining that "[i]t is difficult to imagine situations in which security is so seriously threatened as to justify indefinite imprisonment without trial, and yet the constitutional conditions or rebellion or invasion are not met."78 The premise

73 See id. at 554. 578. The text of the Suspension Clause makes clear that it is the "Privilege of the Writ," not the writ itself, that may be suspended. U.S. Const. art. I, § 9, cl. 2. "The suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it." Ex parte Milligan, 71 U.S. (4 Wall.) 2, 130-31 (1866). Nevertheless, courts and commentators tend to refer colloquially to "suspending the writ" or "suspending habeas," and this Article follows those conventions.
74 See Hamdi, 542 U.S. at 578 (Scalia, J., dissenting).
75 See id. In his separate dissent, Justice Thomas expressed agreement with Justice Scalia on this point. See id. at 594 n.4 (Thomas, J., dissenting) ("I agree with Justice Scalia that this Court could not review Congress' decision to suspend the writ.").
76 Id. at 554 (Scalia, J., dissenting).
77 Id. at 561 (quoting 1 William Blackstone, Commentaries *132). But see infra note 146.
78 Hamdi, 542 U.S. at 578 n.6 (Scalia, J., dissenting).
of that response must be that suspending the writ would indeed "justify" extraordinary detention.

In all these passages, Justice Scalia embraced a model of congressional authorization of executive action that I have labeled "suspension as authorization": he would grant Congress the exclusive authority to decide whether the constitutional conditions for suspension exist, and he would treat Congress's suspension of the writ as authorizing executive detention that Congress could not authorize by ordinary legislation and that would otherwise be unconstitutional. On this model, the authorization provided by suspension would evidently be conclusive: It would not just grant the executive branch the requisite statutory authority to engage in extraordinary detention, but would also dispense with any constitutional objections that might be raised to the exercise of that authority.\(^7\)

Justice Scalia closed his dissent by taking aim at Justice O'Connor's treatment of the second question in the case—whether detainees like Hamdi have any due process right to challenge their designation as enemy combatants.\(^8\) Fundamentally, Justice Scalia objected to what he saw as an attempt by Justice O'Connor and those who joined her "to make illegal detention legal by supplying a process that the Government could have provided, but chose not to."\(^9\) Allowing that "[a] suspension of the writ could, of course, lay down conditions for continued detention, similar to those that today's opinion prescribes under the Due Process Clause," he stressed that "there is a world of difference between the people's representatives' determining the need for that suspension (and prescribing the conditions for it), and this Court's doing so."\(^10\) The latter, he maintained, is simply beyond the judicial role in habeas corpus.\(^11\) Accordingly, Justice Scalia would have had the Court simply declare Hamdi's detention unlawful, leaving it to the executive branch to decide whether to prosecute him within the criminal justice system, release him, or convince Congress to suspend the writ.\(^12\)

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79 Recall that Justice Scalia grounded his constitutional objection to the executive detention of U.S. citizens alleged to be enemy combatants in the Due Process Clause. See supra text accompanying notes 68–70. That is, he concluded that Congress could not by ordinary legislation authorize the detention in question without violating the detainee's constitutional rights. By then taking the position that a suspension of the writ would justify the detention, see supra text accompanying notes 76–78, he necessarily suggested that suspension would trump the detainee's constitutional rights.

80 See Hamdi, 542 U.S. at 573–77 (Scalia, J., dissenting).

81 Id. at 576.

82 Id. at 573.

83 See id. at 576 ("The role of habeas corpus is to determine the legality of executive detention, not to supply the omitted process necessary to make it legal.").

84 See id. at 573.
Justice Scalia's position—and in particular his suspension-as-authorization model—did not carry the day in *Hamdi*. Instead, the case was remanded to the lower federal courts for additional proceedings in accordance with Justice O'Connor's plurality opinion. Before those proceedings got very far, however, Hamdi and the government agreed to terms for his release, removal from the country, and renunciation of citizenship. The case thus ended before the courts could finally determine whether Hamdi's detention was lawful. Still, the various opinions in the case remain vitally important, and future enemy combatant cases—involving both citizens and noncitizens—will

85 See id. at 539 (plurality opinion).
87 See, for example, the continuing litigation regarding the government's detention of Jose Padilla. After the Supreme Court held in *Rumsfeld v. Padilla*, 542 U.S. 426, 442 (2004), that Padilla had filed his habeas petition in the wrong federal district, he refilled in the correct venue and the district judge ruled that the government lacked the authority to detain him as an enemy combatant. See Padilla v. Hanft, 389 F. Supp. 2d 678, 691 (D.S.C. 2005), rev'd, 423 F.3d 386 (4th Cir. 2005). The United States Court of Appeals for the Fourth Circuit recently reversed, holding that the AUMF authorizes Padilla's detention. See Padilla, 423 F.3d at 391. Padilla sought certiorari from the Supreme Court, but less than one week before the government's response was due, and just as this Article went to press, the government removed Padilla from military custody and brought terrorism-related criminal charges against him in federal court. See Eric Lichtblau, In Legal Shift, U.S. Charges Detainee in Terrorism Case, N.Y. TIMES, Nov. 23, 2005, at A1. As a result, the government evidently views the challenge to Padilla's executive detention as moot. See id. To date, however, the mootness issue has not yet been resolved by a court.
88 See, for example, the continuing litigation concerning the detention of noncitizen enemy combatants at Guantanamo Bay. As of this writing, two such cases are pending before the United States Court of Appeals for the D.C. Circuit. See Al-Odah v. United States, Nos. 05-5064, 05-0595 through 05-116 (D.C. Cir. argued Sept. 8, 2005); Boumedienne v. Bush, Nos. 05-5062, 05-5063 (D.C. Cir. argued Sept. 8, 2005). As this Article went to press, however, the United States Senate adopted a measure that would substantially restrict the federal courts' jurisdiction to review enemy combatant detentions at Guantanamo Bay. See 151 Cong. Rec. S12771-72 (daily ed. Nov. 14, 2005) (providing the text of Senate Amendment 2524); 151 Cong. Rec. S12803 (daily ed. Nov. 15, 2005) (recording the 84-14 vote in favor). Although the measure does not purport to be a formal suspension of the writ, it does remove federal courts' jurisdiction to entertain habeas petitions by noncitizens held at Guantanamo Bay by the Department of Defense. See 151 Cong. Rec. S12771 (daily ed. Nov. 14, 2005) (section (d)(1) of Senate Amendment 2524). In place of that review, it grants the D.C. Circuit "exclusive jurisdiction to determine the validity of any [final executive branch] decision . . . that an alien is properly detained as an enemy combatant," provided a CSRT proceeding has been conducted for the detainee in question. Id. (section (d)(2)). That review is limited to the consideration of "whether the status determination of the [CSRT] with regard to [the alleged enemy combatant] applied the correct standards and was consistent with [Defense Department] procedures," and "whether subjecting an alien enemy combatant to such standards and procedures is consistent with the Constitution and laws of the United States." Id. (section (d)(2)(C)). At present, it remains unclear whether this amendment will become law. If it does, it will likely face a number of constitutional challenges. If it survives those challenges, it will presuma-
undoubtedly be litigated, at least in part, on the terms set by these opinions. In particular, the opinions of Justices O'Connor and Scalia articulate two very different understandings of habeas corpus, the Suspension Clause, and the separation of powers, and examining those differences can help craft a sensible approach going forward. The balance of this Article undertakes that examination.

II
SUSPENSION AS AUTHORIZATION

Justice Scalia's opinion has been hailed by observers as the most liberty-protective of all the opinions in Hamdi, and has even inspired claims that Justice Scalia is “the most authentic civil libertarian on the Court.” Hyperbole aside, his opinion does exhibit some liberty-protective characteristics. In particular, Justice Scalia advanced a robust understanding of the liberty secured by the Due Process Clause when he argued that the government generally must afford citizens the protections of the criminal justice system in order to detain them. Additionally, parts of his opinion insist that the Suspension Clause itself limits Congress's power to authorize novel forms of detention outside the criminal justice system. As Justice Scalia put it:

The Suspension Clause of the Constitution, which carefully circumscribes the conditions under which the writ can be withheld, would be a sham if it could be evaded by congressional prescription of requirements other than the common-law requirement of committal for criminal prosecution that render the writ, though available, unavailing. If the Suspension Clause does not guarantee the citizen that he will either be tried or released, unless the conditions for suspending the writ exist and the grave action of suspending the writ has been taken; if it merely guarantees the citizen that he will not be detained unless Congress by ordinary legislation says he can be detained; it guarantees him very little indeed.

91 See Hamdi, 542 U.S. at 554 (Scalia, J., dissenting). As noted above, however, Justice Scalia would apparently grant the government much broader authority to detain noncitizens without trial. See supra note 68.
92 See Hamdi, 542 U.S. at 575 (Scalia, J., dissenting).
93 See id.
The problem, however, lies with Justice Scalia's view of what happens if Congress does decide to suspend habeas corpus. As described above, Justice Scalia repeatedly suggested that by suspending the writ, Congress could grant the President the power to detain U.S. citizens he deems to be enemy combatants—the very power Justice Scalia would not allow Congress to confer by ordinary legislation—and could also trump any constitutional argument against the exercise of that authority. Suspending the writ, in other words, uniquely and completely authorizes extraordinary executive detention. Suspension on this view is both a necessary and, by itself, sufficient condition for conducting such detention. In what follows, I argue that this view of suspension as authorization is at odds both with the best understanding of habeas corpus itself and with the process-based, institutionally oriented separation-of-powers framework discussed in the Introduction.

A. Habeas and Suspension

In this subpart, I show that the suspension-as-authorization model is at odds with the nature and function of habeas corpus and with the accepted understanding of what it means to suspend the writ. More specifically, the main point of this subpart is to show that suspension by itself is not sufficient to authorize detention. The history of the writ makes this clear: Suspending the writ has never been understood to authorize otherwise-unlawful detention. To place this point in its proper context, I begin the subpart by surveying some basic features of habeas corpus and its constitutional base, the Suspension Clause.

Habeas corpus, or habeas corpus ad subjiciendum, is a judicial writ directing an individual holding another person to bring that person to court. It is a vehicle for judicial inquiry into the legality of the detainee's confinement. As Chief Justice Marshall famously described, it is a "high prerogative writ... the great object of which is the liberation of those who may be imprisoned without sufficient cause." At bottom, then, habeas corpus is a remedial measure: It provides a judicial remedy for unlawful detention.

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94 See supra text accompanying notes 76–79.
95 See infra text accompanying notes 127–35.
96 Translated from the Latin, the term means "that you have the body to submit to." BLACK'S LAW DICTIONARY 728 (8th ed. 2004). As the Supreme Court has explained, although there are a variety of other forms of habeas corpus, "when the words 'habeas corpus' are used alone, they have been considered a generic term understood to refer to the common-law writ of habeas corpus ad subjiciendum, which was the form termed the 'great writ.'" Preiser v. Rodriguez, 411 U.S. 475, 484 n.2 (1973).
98 See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 675, at 483 (Carolina Academic Press 1987) (1833) ("It is, therefore, justly esteemed the great bulwark of personal liberty; since it is the appropriate remedy to ascertain, whether
The Constitution’s only reference to habeas corpus is in the Suspension Clause, which provides: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”99 The Clause itself does not specify which branch of government may suspend the writ, but the prevailing view has long been that Congress holds this power.100 Historical practice supports this view: Every suspension but one in American history has been implemented pursuant to congressional authorization.101 The lone exception is President Lincoln’s unilateral

99 U.S. CONST. art. I, § 9, cl. 2. The original meaning of the Suspension Clause is ambiguous in numerous respects, including on the question whether it referred to a state or federal court remedy. As Gerald Neuman has explained, some ratifiers of the Constitution and some early commentators understood the Suspension Clause to restrict congressional interference with the habeas jurisdiction of state courts. See Gerald L. Neuman, The Habeas Corpus Suspension Clause After INS v. St. Cyr, 33 COLUM. HUM. RTS. L. REV. 555, 568-69 (2002). This has led some scholars to contend that the original purpose of the Suspension Clause was to safeguard the power of state habeas courts to order the release of federal prisoners. See, e.g., William F. Duker, A Constitutional History of Habeas Corpus 126-80 (1980). The Supreme Court, however, never seems to have read the Clause that way. In Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807), the Court construed the Clause as referring to a congressionally supplied remedy against unlawful federal detention, and gave no consideration to the possibility of state habeas for federal prisoners. Later, in Ableman v. Booth, 62 U.S. (21 How.) 506, 525-26 (1858), and Tarble’s Case, 80 U.S. (13 Wall.) 397, 409 (1871), the Court held that state courts lacked the power in habeas to review the legality of federal detentions. Those decisions may be best read as statutory, not constitutional, holdings. See, e.g., Seth P. Waxman & Trevor W. Morrison, What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause, 112 YALE L.J. 2195, 2224-27 (2003). But in any event, the federal law of habeas corpus has come to reflect the view that the Suspension Clause should be understood to preserve (though it may not by itself create) a federal remedy, and this Article will proceed on the basis of that understanding.

100 See Duker, supra note 99, at 142; 3 Story, supra note 98, § 676, at 483. Similarly, “[t]he history of the writ of habeas corpus in England shows that parliament alone can suspend or authorize the suspension of the habeas corpus act.” William S. Church, A Treatise on the Writ of Habeas Corpus § 51, at 43 (photo. reprint 1997) (2d ed. 1893).

101 In 1871, President Grant suspended habeas corpus in parts of South Carolina in order to quell a rebellion involving the Ku Klux Klan. See Proclamation No. 4 of 1871, reprinted in 17 Stat. 951, 951-52 (1871). He had been authorized to do so by the Ku Klux Klan Act of 1871, ch. 22, § 4, 17 Stat. 13, 14-15. Id. In 1905, the Civil Governor of the Philippines suspended habeas corpus pursuant to authority granted to him and the President by the Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 691, 692. See Fisher v. Baker, 205 U.S. 174, 180-81 (1906). Finally, immediately after the Japanese attack on Pearl Harbor in December 1941, the Governor of Hawaii suspended the writ in Hawaii pursuant to the Hawaiian Organic Act of 1900, ch. 399, § 67, 31 Stat. 141, 153. See Duncan v. Kahanamoku, 327 U.S. 304, 307-08 (1946). In addition, President Jefferson asked Congress to suspend the writ in order to help deal with Aaron Burr’s conspiracy to overthrow the government, but he acquiesced in Congress’s refusal. See Developments in the Law—Federal Habeas Corpus, 83 HARV. L. REV. 1038, 1265 (1970).
suspension of the writ during the Civil War.\footnote{102} But Chief Justice Taney (sitting as a lower court judge) famously rejected that suspension as exceeding the President’s power,\footnote{103} and many agreed with his assessment.\footnote{104} The issue soon became moot, however, when Congress passed legislation authorizing Lincoln to suspend the writ.\footnote{105} Today, the dominant view is that only Congress can suspend the writ, directly or by delegation.\footnote{106} To say that Congress has the exclusive authority to suspend the writ is not necessarily to say that Congress’s suspension decisions are entirely unreviewable. One possibility is that Congress does indeed enjoy unilateral authority to decide whether a particular conflict rises to the level of a “rebellion or invasion” such that the “public safety” requires a suspension. Another possibility, however, is that the courts may entertain challenges to Congress’s suspensions and nullify them in the absence of an adequate showing that the constitutional predicates exist. The Supreme Court has not definitively resolved the issue, but dictum from an early decision appears to cede the matter entirely to Congress. In \textit{Ex parte Bollman}, the Court stated that, “[i]f at any time the public safety should require the suspension of the [writ], it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide.”\footnote{107} Similarly, Joseph Story in his \textit{Commentaries on the Constitution} reasoned that, “as the power is given to congress to suspend the writ of habeas corpus in cases of rebellion or invasion, . . . the right to judge, whether exigency

\footnote{102} See generally \textsc{Daniel Farber}, \textsc{Lincoln’s Constitution} 157–63 (2003) (discussing Lincoln’s suspension of the writ and the question of authority to suspend); \textsc{William H. Rehnquist}, \textsc{All the Laws but One: Civil Liberties in Wartime} 11–39 (1998) (describing the circumstances surrounding Lincoln’s suspension of the writ and Chief Justice Taney’s rejection of it). Professor Farber claims that Andrew Jackson also unilaterally suspended the writ in his capacity as commanding general in New Orleans during the War of 1812. See Farber, supra, at 160. In that episode, Jackson ordered the arrest and detention of a local legislator and then refused to comply with a federal habeas court’s issuance of the writ. See Abraham D. Sofaer, \textit{Emergency Power and the Hero of New Orleans}, 2 \textsc{Cardozo L. Rev.} 233, 242–43 (1981). Jackson’s actions were certainly extreme: He even went so far as to have the federal judge in question arrested. See \textit{id}. It is not clear, though, whether Jackson claimed the formal authority to suspend the writ, as opposed simply to acting in defiance of it. See \textit{id}. at 246–48. In any event, Jackson was ultimately found in contempt of court and fined $1,000, which he paid himself. See \textit{id}. at 248–49.

\footnote{103} See \textit{Ex parte Merryman}, 17 F. Cas. 144, 151–52 (C.C.D. Md. 1861) (No. 9487).

\footnote{104} See Hamdi v. Rumsfeld, 542 U.S. 507, 563 (2004) (Scalia, J., dissenting) (noting that there were “many who thought President Lincoln’s unauthorized proclamations of suspension . . . unconstitutional”).

\footnote{105} See Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755, 755.

\footnote{106} The scope of Congress’s power to delegate suspension authority has never been conclusively determined, and there is considerable variation in the legislation authorizing past suspensions. See \textit{Developments in the Law, supra} note 101, at 1265 n.14.

\footnote{107} 8 U.S. (4 Cranch) 75, 101 (1807).
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had arisen, must exclusively belong to that body." As noted above, Justices Scalia and Thomas both embraced this position in their *Hamdi* opinions, and no member of the Court expressly disagreed. In short, under the prevailing view the question whether any particular suspension falls within the terms of the Suspension Clause is essentially a nonjusticiable political question.

Suppose, then, that Congress suspends the writ, or that it authorizes the President or other executive official to suspend the writ under certain circumstances and the official then exercises that authority. What follows? To answer that question, we need to distinguish between total and partial suspensions. If Congress were to suspend the writ for all federal detentions nationwide, it would insulate all such detentions from federal review on habeas. But suspensions need not be total. Instead, Congress could limit a suspension in temporal, geographic, or substantive ways. Geographically limited suspensions include the 1905 suspension of the writ in certain parts of the Philippines and the World War II suspension of the writ in Hawaii. Substantively limited suspensions include President Grant’s 1871 suspension of the writ in parts of South Carolina pursuant to the Ku Klux Klan Act of 1871, which authorized the President to suspend the writ in areas where resistance to Reconstruction made regular law enforcement impracticable.

The Supreme Court reviewed a partial suspension in *Ex parte Milligan*, a Civil War case that proved to be one of the key precedents in the *Hamdi* litigation. In that case, the Court considered President Lincoln’s legislatively authorized suspension of the writ in 1863 as it applied to Milligan, a citizen who had been arrested and tried by a military commission for offenses including conspiracy to overthrow the government. Milligan filed a habeas petition arguing that the

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108 3 Story, supra note 98, § 676, at 483; see Duker, supra note 99, at 142 ("After the adoption of the federal Constitution, that suspension was to be by the legislature exclusively was assumed by the President, the Congress, the Judiciary, and commentators alike.").

109 See supra notes 74–75 and accompanying text.

110 I do not necessarily agree with this position as an original matter, and I think a plausible argument could be made that the courts should retain the authority to review whether individual suspensions satisfy the constitutional predicates set forth in the Suspension Clause. However, my principal aim in this Article is to consider the law of habeas corpus as it has historically been understood, not to argue for a fundamental change in that law. Thus, for purposes of this Article, I accept the prevailing view that the Suspension Clause is essentially nonjusticiable.


114 71 U.S. (4 Wall.) 2 (1866).

115 See id. at 6–8.
military commission lacked the authority to try and convict him.\textsuperscript{116} To adjudicate that claim, the Court had to consider whether Milligan was covered by the suspension Congress had authorized.\textsuperscript{117} The relevant statute authorized what amounted to only a partial suspension: Although the first section of the statute empowered the President to suspend the writ anywhere in the country, the second and third sections limited that authority for non-prisoner-of-war detainees held in states where the federal courts continued to operate, and provided that such detainees should be discharged if a grand jury did not indict them in a timely fashion.\textsuperscript{118}

Noting that Milligan had been arrested in Indiana (where the federal courts remained open) and that a grand jury had failed to indict him, the Milligan Court concluded that the writ had not been suspended as to him.\textsuperscript{119} Only after reaching that conclusion did the Court proceed to examine the legality of Milligan's confinement, to find that the government lacked the authority to hold and prosecute him militarily, and to order his discharge.\textsuperscript{120} The Court's holding on these latter points was far reaching: It held not just that Congress had not authorized Milligan's detention and military trial, but that Congress could not authorize such action in those circumstances.\textsuperscript{121} Four members of the Court vigorously dissented on that point.\textsuperscript{122} I will have more to say about this aspect of the case below,\textsuperscript{123} but for now it suffices to read Milligan as confirming that in cases of partial suspension, the Court's first task is to determine whether the instant detention falls within the scope of the suspension. If the answer is yes—if the suspension does cover the detention in question—the Court stops there.\textsuperscript{124}

Now suppose that Congress authorizes (or directly legislates) the total suspension of the writ, or that it authorizes a partial suspension and a case arises within the scope of the suspension. What follows then? We know already that suspending the writ makes habeas unavailable as a remedy against unlawful detention. As described above, however, Justice Scalia went further in his \textit{Hamdi} dissent and sug-

\textsuperscript{116} See id. at 107–08.

\textsuperscript{117} See id. at 115–16.


\textsuperscript{120} See id. at 106–07, 130–31.

\textsuperscript{121} See id. at 127 ("Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.").

\textsuperscript{122} See id. at 136–42.

\textsuperscript{123} See infra text accompanying notes 132–33, 175–81.

gested that a suspension of the writ actually authorizes—indeed, constitutionalizes—detention. A hypothetical example illuminates the implications of this position. Suppose the government, fearing an imminent terrorist attack by members of a certain racial or ethnic background, decided to arrest and detain all citizens in that racial or ethnic group. Would the strong presumption that the government had acted unconstitutionally be rebutted simply because habeas had been suspended? Justice Scalia’s suspension-as-authorization approach would apparently answer yes. On that point, Justice Scalia is mistaken.

SUSPENDING THE Writ does not authorize detention; a detention’s illegality stands apart from whether the courts are in a position to redress it via habeas. This is true, first, as a matter of the English practice from which habeas corpus in this country derives. Following the passage of the Habeas Corpus Act of 1679, Parliament occasionally enacted “Habeas Corpus Suspension Acts.” Historians agree that these measures simply removed a judicial remedy against unlawful detention, nothing more. Indeed, suspension removed only a judicial remedy, not even all such remedies: By themselves, suspension acts did not insulate the detaining authority from later-imposed liability for unlawful arrest and detention. To do that, Parliament typically accompanied suspension acts with acts of indemnity. If additional

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125 See supra text accompanying notes 76—79.
126 See Ex parte Endo, 323 U.S. 283 (1944) (holding that the continued internment of Japanese Americans during World War II was illegal; reaching that conclusion as a matter of statutory and executive-order interpretation, explicitly informed by constitutional principles). But see Korematsu v. United States, 323 U.S. 214 (1944) (affirming, after purporting to apply strict scrutiny to, the petitioner’s conviction for remaining in a “military area” from which persons of Japanese ancestry had been ordered excluded). Endo is little-known today. For a thoughtful discussion of the case, see Patrick O. Gudridge, Remember Endo?, 116 HARV. L. REV. 1933 (2003).
127 This point holds without regard to whether, during the period of suspension, the judicial doctrines implementing the relevant constitutional provision would govern the constitutional analysis outside the courts. Whether judicial doctrine binds the political branches when they separately and independently interpret the Constitution is a topic of considerable disagreement in the academic literature. See infra note 144. On either view, however, the constitutionality of a particular governmental action (assessed via judicially created doctrine or otherwise) is distinct from the availability of habeas to remedy any unconstitutionality in the action.
128 The first such act was passed in 1688, but Parliament ceased using them in the nineteenth and twentieth centuries. See R.J. Sharpe, THE LAW OF HABEA CORPUS 94–95 (2d ed. 1989).
129 See Duker, supra note 99, at 171 n.118 (“It should be noted that suspension did not legalize arrest and detention. It merely suspended the benefit of a particular remedy in the specified cases.” (citation omitted)); Sharpe, supra note 128, at 95 (“On its face, a suspension act gave no general power to arrest and detain people simply because they were thought to be dangerous, although the effect was to deprive a suspected traitor of the opportunity to have guilt or innocence determined.”).
130 See Duker, supra note 99, at 171 n.118; Sharpe, supra note 128, at 95.
legislation was required to protect officials from liability for detaining people unlawfully while the writ was suspended, clearly the suspension itself did not legalize the detention.

Suspension has long been understood to have a similarly limited effect under the U.S. Constitution. The Supreme Court's clearest statement on this point is found in Ex parte Milligan: "The suspension of the writ does not authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty." There can be no doubt that the Court meant what it said here. Although it was unanimous in its conclusion that Milligan's detention did not fall within the scope of the partial suspension then in effect, the Court divided five to four on the precise question whether Congress could, by suspending the writ as to Milligan, authorize his detention. The majority addressed the question directly; its answer, quoted above, was a clear no.

Moreover, Milligan is no anomaly on this point. As a leading nineteenth-century treatise on habeas explained, suspension of the writ has essentially the same limited effect in American constitutional practice as it had in seventeenth- and eighteenth-century England:

A wrongful arrest and imprisonment . . . can not be legalized by the suspension of the privilege of the writ. The suspension . . . only deprives an individual wrongfully arrested of the means of procuring his liberty; it does not exempt the one making an arrest illegally from liability to damages in a civil action for such arrest. Neither does it exempt him from punishment in a criminal prosecution.

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131 See McNally v. Hill, 293 U.S. 131, 136 (1934) ("To ascertain its meaning and the appropriate use of the [habeas] writ in the federal courts, recourse must be had to the common law, from which the term was drawn."). To be sure, the framers of the Constitution could have decided to depart from English tradition and to provide that suspensions of the writ would both remove the judicial remedy and authorize the detention. But there is no indication that they meant to do so. The records of the Constitutional Convention contain very little discussion of the Suspension Clause, but what little discussion there was did not touch on the question whether suspension of the writ might constitute affirmative authorization. See 2 The Records of the Federal Convention of 1787, at 341, 435, 438 (Max Farrand ed., rev. ed. 1966). Moreover, the Suspension Clause is found in section 9 of the Constitution's first article, which is prohibitory, not in section 8, which confers affirmative authority. It would be odd to read a provision aimed principally at restricting Congress's authority to suspend as also silently expanding the meaning of a suspension.

132 71 U.S. (4 Wall.) 2, 115 (1866). Justice Thomas made the same point very briefly in his Hamdi dissent, though no one else on the Court took it up. See Hamdi v. Rumsfeld, 542 U.S. 507, 594 (2004) (Thomas, J., dissenting) ("I do not see how suspension would make constitutional otherwise unconstitutional detentions ordered by the President. It simply removes a remedy.").


134 Church, supra note 100, § 50, at 42–43. Arguably, habeas might not be the only means of obtaining judicially ordered release from ongoing detention. A detainee might alternatively sue the federal officials holding him, asking the court for an injunction ordering his release. If so, then suspending the writ would not even remove all contemporane-
Habeas, in sum, is a judicial remedy for unlawful detention, separate from the law governing the legality of the detention.\(^\text{135}\)

At this point, a skeptic might object that the above discussion advances a mere academic point with no real consequence. Even if suspending the writ does not actually authorize any particular detention, it does remove the principal judicial remedy against unlawful detention. And if the courts are not able to provide the remedy, one might be tempted to say that, for all practical purposes, the executive branch

ous forms of judicial relief from unlawful detention. There are a number of potential problems here, however. First, an action for injunctive relief might not be available in this circumstance. For state prisoners challenging their criminal convictions or sentences in federal court, the Supreme Court has held that, when the prisoner “is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.” Preiser v. Rodriguez, 411 U.S. 475, 500 (1973). An action under 42 U.S.C. § 1983 thus is not available in that circumstance. Similarly here, an individual held in executive detention might not be able to sue for ordinary injunctive relief; habeas might be the exclusive remedy. But see James E. Pfander, The Limits of Habeas Jurisdiction and the Global War on Terror, 91 CORNELL L. REV. 497, 530 (2006) (explaining that the principle of “habeas exclusivity arose to prevent petitioners from sidestepping the special rules that apply to collateral review of the constitutionality of state court convictions. Such exclusivity does not govern challenges to executive detention, where alternative remedies, including declaratory relief, have long been seen as appropriate substitutes for habeas litigation.”).

Second, even if an action for injunctive relief is possible in this circumstance, such relief is available only in the sound discretion of the trial judge, and that discretion should be informed by a consideration of the public interest. See United States v. Oakland Cannabis Buyers' Coop., 552 U.S. 483, 496 (2001); Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982). Faced with a suit seeking immediate relief from detention during a period when the writ is suspended, a judge might well construe the suspension itself as evidence that the public interest weighs against granting the injunction. That is, the judge might view the suit as an attempted end-run around the suspension of the writ, and conclude that the public interest lies in honoring the suspension.

Finally, Congress could simply “intervene and guide or control the exercise of the courts' discretion” by directing courts not to order the release of detainees as to whom the writ has been suspended. Weinberger, 456 U.S. at 313. At most, therefore, a Congress wanting to excuse the executive branch from having to go to court to justify certain detentions during times of national emergency would need only to include in its suspension legislation a separate limitation on the equitable authority of the courts in other actions targeting the detentions in question.

As Zechariah Chafee explained in a celebrated article on habeas corpus:

The writ of habeas corpus operates effectively within the limits of unlawful imprisonment. But it is useless against a lawful imprisonment, however unwise or unjust. Much consequently depends on the location of the line between lawful and unlawful imprisonments. If the area of lawful imprisonments is made large, the value of habeas corpus is correspondingly lessened. The existence of the writ enables a prisoner to find out from judges where the line lies, but the writ does not fix the line. That is done by other parts of the law.

Chafee, supra note 98, at 159. Just as the availability of habeas does not fix the line between lawful and unlawful detention, suspending the writ does not move the line.
will be able to detain whomever it wants. Thus, one might say that practically, even if not formally, suspension does authorize detention.

There are at least two responses to this objection. First, as described above, because suspending the writ does not affect the legality of the detention, those responsible for unlawful detention could ultimately face civil or even criminal liability for their actions at some later date. On the civil side, the official might face a so-called Bivens action for damages. The theory, presumably, would be that in detaining an individual without lawful authority, the official deprived the detainee of his liberty in violation of the Due Process Clause. To be sure, there are a number of potential obstacles to such suits, but it is always possible that those obstacles could be overcome. On the criminal side, the responsible official might face prosecution under the Non-Detention Act or some other federal criminal law. Here

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136 See Lynch, supra note 89, at 34 ("Suspending the writ . . . leaves the liberty of every citizen resting on the judgment or even whim of any law enforcement agent.").
138 See Davis v. Passman, 442 U.S. 228, 248–49 (1979) (holding that Bivens actions are available to remedy Fifth Amendment violations).
139 One potential obstacle is that courts might view the quasi-military context of the detention as a "special factor[ ] counselling hesitation," and on that basis conclude that the Bivens remedy is categorically unavailable in this area. See Chappell v. Wallace, 462 U.S. 296, 298 (1983) (quoting Bivens, 403 U.S. at 396). On the other hand, there is a great difference between cases like Chappell, which involved a claim by enlisted military personnel against their superior officers and thus invited the courts to examine the internal hierarchical structure of the military itself, see id. at 304, and cases of enemy combatant detention. The latter would not appear to implicate internal military or other executive prerogatives the way cases like Chappell do. In addition, one might note that Justice Scalia’s dissenting opinion in Rasul v. Bush—a case formally limited to the question whether the federal courts had jurisdiction to entertain habeas petitions from alleged enemy combatants detained at Guantanamo Bay—charged that, under the reasoning of the majority, the detainees at Guantanamo Bay could sue their captors under Bivens. See 542 U.S. 466, 500 (2004) (Scalia, J., dissenting). The Rasul majority did not explicitly reject that assertion.

A second obstacle is qualified immunity, which shields officials from damages liability “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Whether an officer sued under Bivens would enjoy qualified immunity in this context may depend on whether an officer could reasonably understand Congress’s suspension of the writ to authorize an otherwise unlawful detention. As I have been arguing in this Article, that is a mistaken view of the law. One hopes that recognition of the mistake will at some point become sufficiently widespread that officers cannot claim it was reasonable.

140 For a discussion of the Non-Detention Act, see supra text accompanying notes 59–60.
141 One possibility might be 18 U.S.C. § 242, which provides:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the
too, there would be certain obstacles, not the least of which would be that the presidential administration responsible for the detentions would be unlikely to prosecute its own officials for those actions. But administrations change, and a new President might take office motivated to punish the misdeeds of the old. In sum, although the likelihood of imposing civil or criminal liability is uncertain, unlawful detention during a suspension is not necessarily consequence-free.

Second, even if suspending the writ did remove all potential judicial remedies, executive officials would not be free simply to ignore applicable constitutional and other legal constraints. The President has an independent duty to abide by the Constitution and faithfully execute the laws, a duty confirmed by his oath of office and the Take Care Clause. That duty is not contingent on judicial enforcement. Indeed, the fact that the courts are not in a position to enforce particular constitutional or statutory provisions in particular cases does not excuse the executive branch from having to comply with those provisions. In political question cases, for example, the nonjusticiability

punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both . . . .

18 U.S.C. § 242 (2000). The section provides for more severe punishment if the unlawful conduct causes bodily injury or death. Id. The statute’s requirement that the defendant act “willfully” has been construed, together with the due process requirement of “fair warning” applicable to all criminal statutes, to protect defendants from criminal liability in cases where they could claim qualified immunity from civil liability. See United States v. Lanier, 520 U.S. 259, 266–71 (1997). For a discussion of Lanier and a comparison of the fair warning requirement to the standard for qualified immunity, see Trevor W. Morrison, Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes, 74 S. Cal. L. Rev. 455, 484–89 (2001).

Another possibility is prosecution under state criminal law, the availability of which would turn on the scope of the federal officer’s “Supremacy Clause immunity.” For a discussion of that doctrine, see generally Waxman & Morrison, supra note 99.

142 Notably, the Office of Legal Counsel went to great lengths to argue that government officials who interrogate alleged enemy combatants using “cruel, inhuman, or degrading” methods would generally not violate federal criminal prohibitions on torture, and that methods that would violate the statute could be justified on grounds of necessity or self-defense. See Memorandum from Jay S. Bybee, supra note 19, withdrawn and replaced by Memorandum from Daniel Levin, supra note 19. That the Office of Legal Counsel would resort to such lengths suggests that the prospect of criminal prosecution in this general area is not completely unrealistic.

143 See U.S. Const. art. II, § 1, cl. 8; id. art. II, § 3.

of a particular constitutional provision does not render the provision meaningless. Instead, the political branches must bind themselves to their best understanding of the provision, without the aid (or interference) of the courts. Similar to this, when Congress suspends habeas corpus, it does not suspend the Constitution itself. Rather, suspension merely removes a judicial remedy while leaving intact the President's independent obligation to comply with the Constitution and laws.

With the limited effect of a suspension thus established, a skeptic might now wonder what the point is of suspending the writ. If suspension does not alter the legality of the government's actions, and if those responsible for unlawful detention remain exposed to liability for their actions, what does the government gain when the writ is suspended? The response is that the government gains at least two benefits. To grasp the first, assume the government has the authority (under some other statute) to detain a particular person during a time of national emergency. Thus, if habeas were not suspended, and if the detainee filed a habeas petition challenging the detention, the government would be able to establish the legality of the detention. Yet even though the government would prevail, it might still legitimately prefer not to litigate the case while the national crisis persists. If, for example, the decision to detain is based on sensitive information implicating national security, the government might want to de-

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145 See Pillard, supra note 144, at 690 ("[A judicial] decision not to invalidate government action on political question grounds 'is of course very different from a decision that specific congressional action does not violate the Constitution,' because it leaves open the possibility that the political branches might themselves find a violation." (quoting U.S. Dep't of Commerce v. Montana, 503 U.S. 442, 458 (1992))). This point is often neglected. As Walter Dellinger and Jefferson Powell have noted, "Contemporary discussions of the 'political question' doctrine often treat the claim that one of the political branches has (judicially) unreviewable authority to decide a question as, in effect and perhaps even in principle, a claim that the question is nonconstitutional in nature." Walter Dellinger & H. Jefferson Powell, Marshall's Questions, 2 GREEN BAG 2D 367, 368 (1999). Yet as Dellinger and Powell show, even the most celebrated champion of judicial supremacy, Chief Justice Marshall, did not view the matter that way. See id. at 367. Marshall's opinion for the Court in Marbury v. Madison articulated the beginnings of a political question doctrine by recognizing the existence of certain legal questions that are "in their nature political." 5 U.S. (1 Cranch) 137, 170 (1803); see Rachel E. Barkow, More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy, 102 COLUM. L. REV. 237, 239 (2002). Marshall did not, however, view political questions as operating outside the law. Indeed, as Dellinger and Powell describe, in 1800 Marshall gave a speech while serving in the House of Representatives, taking the position that "the Constitution does not vest in the federal courts the exclusive authority to decide issues arising under the Constitution, laws and treaties; while such issues are by definition questions of law, some of them are 'questions of political law,' and must be answered by one (or both) of the political branches of the government." Dellinger & Powell, supra, at 367 (quoting John Marshall, Speech (Mar. 7, 1800), in 4 THE PAPERS OF JOHN MARSHALL 103 (Charles T. Cullen ed., 1984)). In short, Marshall thought "the courts are not the only institutions whose province and duty includes the exposition and interpretation of the law." Id. at 375-76.
lay revealing that evidence in court until after the crisis has passed.Suspending the writ helps the government do just that, by removing the principal means through which the responsible official can be haled into court during the detention. To be sure, after the crisis has subsided and the detention has ended, the former detainee might sue for damages. At that point the suit will proceed, and, if the detention was indeed lawful, the government will prevail. But the suspension will have helped insulate the government from suit until after the national emergency had passed.

Suspension’s second benefit to the government applies in cases where the detention is unlawful. In situations of true national emergency, the President might determine that certain individuals must be detained for a time, even though there is no lawful basis for doing so. For example, in the immediate aftermath of a large-scale terrorist attack, the President might order the detention of a large number of people with the same racial, religious, or ideological characteristics as those responsible for the attack. Knowing he lacks the lawful authority to order such detentions, and despite the fact that he is bound by oath to uphold the Constitution and laws, the President might decide to violate the law. In such circumstances, suspending the writ amounts to a forced sale of the detainee’s right to be free from the

146 This may be what Blackstone meant when he said that “the parliament . . . can authorize the crown, by suspending the habeas corpus Act for a short and limited time, to imprison suspected persons without giving any reason for so doing.” 1 WILLIAM BLACKSTONE, COMMENTARIES *136 (emphasis added). Justice Scalia, on the other hand, apparently interpreted Blackstone’s use of the word “authorize” in the sense of the suspension-as-authorization model. See supra text accompanying note 77. Yet in context, Blackstone seems to have been referring principally to the sort of timing issue I address in the text: He described suspension as relieving the burden of having to justify, on habeas, a detention for the “short and limited” duration of the suspension itself.

147 One qualification is in order here. Even though the government possessed the authority for the now-completed detention, it may still be liable for a violation of the detainee’s procedural due process rights if he was held without the requisite process. See Carey v. Piphus, 435 U.S. 247, 266 (1978) (describing “the right to procedural due process [as] ‘absolute’ in the sense that it does not depend upon the merits of a claimant’s substantive assertions”). If the writ were not suspended, the detainee through a habeas action could likely obtain a judicial order directing the government to provide the requisite process or release him. But if the writ is suspended during the period of detention, the likely result is a forced sale of the detainee’s procedural due process rights along the lines I describe in the next paragraph in the text. That is, those procedural rights will be vindicable only in a later action for damages. But the vindication may be rather hollow, as the damages are likely to be very modest. As the Supreme Court’s cases make clear, “in cases where the deprivation would have occurred anyway”—here, because the result of the required process would have been a conclusion that the government possesses the power to detain—a plaintiff suing after the fact “may recover only nominal damages.” Zinermon v. Burch, 494 U.S. 113, 126 n.11 (1990).


149 See supra text accompanying note 143.
detention: It converts the detainee’s entitlement to specific relief from unlawful detention into an entitlement to after-the-fact compensation for the deprivation. In the main, constitutional law strongly disfavors the forced sale of individual rights, preferring specific enforcement instead. By departing from that preference, suspending the writ creates the possibility that a President facing a national security emergency might opt to act illegally and pay for it later.

Critically, though, suspension is not sufficient to authorize detention. Regardless of whether the writ has been suspended, unlawful detention remains unlawful. Suspension may make it somewhat easier for the executive branch to detain people, but that greater ease does not move the line between legality and illegality. Thus, an authoriza-

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150 Borrowing from the pathmarking work of Guido Calabresi and Douglas Melamed, we might say that suspending the writ converts the principal remedy for unlawful detention from a kind of property rule into a liability rule. See Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089 (1972). Two recent articles by Eugene Kontorovich apply Calabresi and Melamed’s conceptual framework to constitutional law. See Eugene Kontorovich, The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies, 91 VA. L. REV. 1135 (2005) [hereinafter Kontorovich, The Constitution in Two Dimensions]; Kontorovich, Liability Rules, supra note 148. As Professor Kontorovich explains, “Because the [habeas] writ is only available to those already in custody [and thus] does not prophylactically prevent forcible takings of liberty, as an injunction would,” it “cannot be characterized as . . . a true property rule.” Kontorovich, The Constitution in Two Dimensions, supra, at 1160 n.56 (citation omitted). Still, insofar as the habeas remedy prevents the continuation of unlawful detention, it is closer to a property rule than a liability rule.

151 See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 404 (1971) (Harlan, J., concurring) (acknowledging “the presumed availability of federal equitable relief against threatened invasions of constitutional interests”); Ashutosh Bhagwat, Hard Cases and the (D)Evolution of Constitutional Doctrine, 30 CONN. L. REV. 961, 1008 (1998) (“In constitutional law . . . equitable relief has become the standard remedy for most constitutional violations, and one which is available essentially as a matter of right.”); Walter E. Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 HARV. L. REV. 1532, 1563 (1972) (“However one resolves the question of whether a valid contract creates a normative duty or merely presents an option to breach and pay damages, it is inconsistent with a constitutional system to view duties imposed by basic guarantees in the latter way.”). But see Kontorovich, The Constitution in Two Dimensions, supra note 150, at 1139 (“[M]uch of constitutional law . . . already uses liability rules. Constitutional theory’s insistence on property rule protection fails to describe how constitutional values are actually protected.”). Professor Kontorovich acknowledges, however, that liability rules are more prevalent in areas relating to constitutional protections of property, and that when it comes to liberty entitlements, “constitutional law[ ] [is] reluctant[ ] to afford anything other than property rule protection.” Id. at 1158; see id. at 1159–60.

152 I do not mean that the President himself will literally pay money to compensate for the illegal detention. The President is immune from Bivens liability for his official actions. See Nixon v. Fitzgerald, 457 U.S. 731, 748 n.27 (1982). But if the officials more immediately responsible for the detention were found personally liable, the government would very likely indemnify them and cover their litigation costs. See Cornelia T.L. Pillard, Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability Under Bivens, 88 GEO. L.J. 65, 67 (1999). In that sense, the government would ultimately pay for the illegal action. In addition, the President himself might have to pay in a variety of nonmonetary ways, ranging from a tarnished legacy to electoral defeat to impeachment. See Nixon, 457 U.S. at 757.
tion model that treats suspension as permitting otherwise-unlawful detention is a model centered on governmental lawlessness. A model of congressional authorization should do better than that.

B. Checks and Balances

In the preceding subpart, I showed that because suspending the writ merely removes a judicial remedy, suspension by itself is insufficient to authorize otherwise-unlawful detention. To this, a proponent of the suspension-as-authorization model might respond that even if suspension is not sufficient to authorize such detention, it should be a necessary component of the authorization. On this view, to the extent Congress is able to permit certain types of detention, its authorizing legislation must contain an additional provision suspending the writ. As I show in this subpart, however, the fundamental problem with this view is that it frustrates the constitutional separation of powers. Suspending the writ, as described above, removes the principal judicial restraint on unlawful detention. If Congress must suspend the writ in order to authorize Hamdi-style detention, it is effectively encouraged to read the courts out of the process, thus undermining the Constitution's three-branch system of checks and balances. In the main, the mere fact that the Constitution divides federal power among three branches of government is rather too generalized and indeterminate to resolve specific controversies of its own force. But if there is one thing that cuts against the basic structure of the constitutional order, it is an argument that in order to empower the executive to act, the legislature must oust the judiciary from its constitutional role.

The suspension-as-authorization model rests on a strikingly static conception of the judicial role. In Justice Scalia's view, the constitutional status of any particular executive detention depends principally on whether it falls within a sharply limited set of historically recognized forms of detention. If the answer is yes, the detention may proceed, subject to ordinary judicial review. But if the answer is no, the courts may have nothing to do with the detention, and the executive must either release the detainee or convince Congress to suspend the writ, thus removing the courts from the equation. Thus, in Hamdi itself, the first critical point in Justice Scalia's dissent was his determination that the detention was fundamentally dissimilar to all the kinds of legitimate citizen-detention in which the federal courts

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153 See Hamdi v. Rumsfeld, 542 U.S. 507, 594 (2004) (Thomas, J., dissenting) ("Justice Scalia's position might... require one or both of the political branches to act unconstitutionally in order to protect the Nation.").

154 See supra text accompanying notes 68–70.

155 See supra text accompanying note 84.
have historically been involved. The safeguards of the criminal justice system were missing, and the case fell outside the limited set of traditionally accepted noncriminal executive detentions—civil commitment of the mentally ill, quarantine of the infectious, and so on. From there, it necessarily followed for Justice Scalia that the courts could not be involved in the detention. That conclusion yielded the second critical point in his reasoning: that the Constitution nevertheless permitted Hamdi’s detention to go forward, provided the courts were removed from the process via suspension of the writ. It is not, therefore, that the Constitution actually prohibits novel forms of executive detention unknown to our constitutional tradition; it is simply that the courts must be uninvolved in such detentions.

By providing that the courts must be removed before extraordinary detentions like Hamdi’s can proceed, Justice Scalia’s approach deserves the basic values animating our system of divided government. To be clear, I do not mean to argue that a formal approach to separation-of-powers issues is invariably inferior to a more functional one. But even assuming, arguendo, that some variety of formalism is appropriate in some separation-of-powers contexts, an approach that requires ousting one branch in order to empower another is unsupported. As James Madison described, “The constant aim [of the separation of powers] is to divide and arrange the several offices in such a manner as that each may be a check on the other.” The idea is to “so contriv[e] the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.” And as Justice Jackson later explained in the Steel Seizure Case, “While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”

156 See Hamdi, 542 U.S. at 554–72 (Scalia, J., dissenting).
157 See id. Of course, Justice O’Connor took a different view of whether there were historical precedents for Hamdi’s detention. See infra text accompanying notes 192–93.
158 See supra text accompanying notes 71–79.
159 The academic literature houses a lively debate over whether separation-of-powers issues should be addressed formally or functionally. See M. Elizabeth Magill, The Real Separation in Separation of Powers Law, 86 Va. L. Rev. 1127, 1136–47 (2000) (outlining the debate between formalist and functionalist approaches); Thomas W. Merrill, The Constitutional Principle of Separation of Powers, 1991 Sup. Ct. Rev. 225, 226–35 (detailing the Supreme Court’s “formal” and “functional” conceptions of separation of powers). This is not the place to join that debate.
161 Id. at 320.
162 Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case), 343 U.S. 579, 635 (1952) (Jackson, J., concurring); cf. Buckley v. Valeo, 424 U.S. 1, 121 (1976) (“The Framers of the Constitution saw that] a hermetic sealing off of the three branches of Govern-
to ensure that the three branches check each other by according to
each a central role in the operation of government.

Justice Scalia’s suspension-as-authorization model, in contrast,
concentrates governmental power in two branches. His dissent rings
with worry that by allowing Congress to authorize Hamdi’s detention
by ordinary legislation, Justice O’Connor’s plurality opinion effec-
tively eliminates the protections afforded by the Suspension Clause.¹⁶³
But it is Justice Scalia’s willingness to treat suspension as authorization
that is most at odds with the Constitution’s methods for securing lib-
erty. If suspending the writ is the only way to authorize certain forms
of extraordinary detention—that is, if suspension is a necessary condi-
tion for such detention—then a Congress motivated to permit the de-
tention during times of national crisis must suspend the writ to do so.
And if Congress wields the exclusive authority to decide whether the
constitutional predicates for suspension exist,¹⁶⁴ then the courts are
powerless to review the suspension decision or to police the detention
thus authorized. By making the exclusion of one branch necessary for
the exercise of power by the other two, the suspension-as-authorization
model undermines the constitutional design.

* * *

In sum, suspending the writ is not sufficient and should not be
necessary to authorize otherwise-unlawful executive detention. As for
sufficiency, the history of the writ in both England and the United
States confirms that suspension has always been understood simply to
remove a judicial remedy, not to confer any substantive legal author-
ity. In that respect, although the Suspension Clause is sometimes
viewed as a kind of emergency powers provision, that is something of a
misnomer: Suspension itself does not alter the lawful power of the
executive branch. As for necessity, to the extent Congress may be able
to grant certain extraordinary detention authority by regular legisla-
tion, it should not be required to include an additional provision sus-
pending the writ. As Justice O’Connor emphasized in Hamdi, even in
times of war and other national crises, the Constitution “most assur-
edly envisions a role for all three branches when individual liberties
are at stake.”¹⁶⁵ By requiring Congress to oust the judiciary in order
to empower the executive, the suspension-as-authorization model de-
parts from that vision. As I describe in the next Part, there is a better
way.

¹⁶⁴ See supra text accompanying notes 74–75.
¹⁶⁵ Hamdi, 542 U.S. at 536 (plurality opinion).
III
A Three-Branch Institutional Process Model

This Part moves from a critique of the suspension-as-authorization model to a discussion of the model adopted by Justice O'Connor in her Hamdi plurality opinion. That model, which is also reflected in part in Justice Souter's opinion, involves all three branches in what I argue is a more sensible process-oriented, but still liberty-protective, regime. In contrast to Justice Scalia, Justice O'Connor allowed ordinary legislation—the AUMF—to authorize Hamdi's detention. But the inquiry did not stop there. Instead, she insisted that the courts remain open to adjudicate challenges to individual exercises of the authority conferred by the AUMF and to ensure that executive detention remains within constitutional limits. As this Part shows, Justice O'Connor's approach combines attentiveness to the process-based, institutionally oriented values espoused by Professors Issacharoff and Pildes with fidelity to the basic three-branch structure of our constitutional order.

A. The Judicial Role in an Institutional Process Model

As Professors Issacharoff and Pildes describe, when courts have confronted assertions of extraordinary governmental power during times of war or national crisis, they have "show[n] a high level of judicial attentiveness to questions of institutional decision making in general and, more specifically, to the role of the Constitution as a check on unilateralism by the executive." That is, the courts have sought to ensure that Congress is "a partner in the determination of the nature and scope of national emergency." The principal judicial role in this context is not to enforce individual rights over governmental action, but to encourage the political branches of government to act together when addressing matters of national emergency.

Still, the courts have preserved a constitutional role for themselves, a role that entails respecting the joint action of the political branches while still providing a check on that action. Thus, as the

166 See supra text accompanying notes 36–42.
167 See supra text accompanying notes 47–58.
168 See supra text accompanying notes 12–13.
169 Issacharoff & Pildes, supra note 9, at 8.
170 Id.
171 See id. at 5.
172 See Rostker v. Goldberg, 453 U.S. 57, 67 (1981) (noting that when Congress acts in the area of "military affairs," the Court "of course do[es] not abdicate [its] ultimate responsibility to decide the constitutional question"); cf. Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991) ("Violations of the separation-of-powers principle have been uncommon because each branch has traditionally respected the prerogatives of the other two. Nevertheless, the Court has been sensitive to its responsibility to enforce the principle when necessary.").
Supreme Court has explained, the political branches’ collective power to declare and wage war “permits the harnessing of the entire energies of the people in a supreme coöperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.”

The role of the courts is not simply to protect against executive unilateralism by encouraging Congress and the President to act together, but to enforce at least some minimum constitutional constraints on even congressionally authorized executive action.

Professors Issacharoff and Pildes do not leave much room within the process-based framework they espouse for a judicial check on congressional as well as executive action. In their discussion of *Ex parte Milligan*, for example, they chastise the five-Justice majority for holding not just that Congress had not authorized Milligan’s detention and military trial, but that it *could not* do so without violating Milligan’s constitutional rights. In contrast, they applaud the four concurring Justices for deciding the case on the ground that Congress simply had not authorized the detention and military trial, while leaving Congress free to provide that authority in the future.

“The enormous failing of the majority approach,” they argue,

was to transform [Milligan’s] challenge to executive authority into a challenge to legislative authority; indeed, the majority approach, by constitutionalizing the issues around matters of individual rights, transformed the case into a challenge to the power of the entire national government, even when acting in concert, to invoke emergency powers (such as suspension of habeas corpus) and re-calibrate the rights of individuals during wartime.

As Professors Issacharoff and Pildes show, the *Milligan* majority’s “absolutist, non-pragmatic vision of constitutional law” is uncharacteristic of the Court’s approach during most times of national crisis. The *Milligan* concurrence, in contrast, exhibits at least some of the traits of a more restrained, process-oriented approach.

But the devil is in the details. What Professors Issacharoff and Pildes fail to acknowledge is that, in adopting a more process-based approach, the *Milligan* concurrence also embraces a suspension-as-authorization model that goes beyond deferring to the decisions of the political branches and risks dispensing with the courts altogether.

174 See Rostker, 453 U.S. at 67; United States v. Robel, 389 U.S. 258, 263 (1967) (“[T]he phrase ‘war power’ cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit.”).
175 See Issacharoff & Pildes, supra note 9, at 10–12.
176 See id. at 12–13.
177 Id. at 12.
178 See id. at 12, 15–19.
The concurrence identifies two specific points of disagreement with the majority:

[W]e concur . . . in what is said [by the majority] of the writ of habeas corpus, and of its suspension, with two reservations: (1.) That, in our judgment, when the writ is suspended, the Executive is authorized to arrest as well as to detain; and (2.) that there are cases in which, the privilege of the writ being suspended, trial and punishment by military commission, in states where civil courts are open, may be authorized by Congress, as well as arrest and detention.\textsuperscript{179}

The precise meaning of the two points in this passage, as well as the relationship between them, is somewhat obscure. It is not clear, for example, whether the concurring Justices viewed the suspension of the writ referenced in the first point as a necessary condition for authorizing the arrest and detention in question, or merely a sufficient one. Conversely, although the concurring Justices seem to have viewed suspending the writ as a necessary condition for the military commissions referenced in the second point, it is not clear whether they saw suspension alone as sufficient to authorize the commissions, or whether they would also demand separate statutory authorization. At the very least, though, the concurring Justices evidently regarded suspension of the writ as sufficient for the arrest and detention—and necessary for the military trials—in question.

Professors Issacharoff and Pildes applaud the Milligan concurrence for its willingness to grant Congress the “power, though not exercised, to authorize the military commission which was held in Indiana.”\textsuperscript{180} But they appear not to have considered the precise form of the authorization. To the extent the concurring Justices saw suspending the writ as the mechanism for permitting Milligan’s arrest, detention, and possibly even military trial, they embraced a suspension-as-authorization model under which Congress could potentially read the courts out of the equation entirely. On that model, a habeas court’s sole task would be to determine whether the detention falls within the scope of the suspension.\textsuperscript{181} If it answered yes to that question, the court’s involvement would end.

A better approach would be to rely on ordinary legislation as the authorizing vehicle, and then subject exercises of that authority to some judicially enforced constitutional limits. The judicial inquiry would proceed in three steps. First, the court would ascertain, as a matter of statutory interpretation, whether the detention falls within the scope of the statutory authorization. If so, it would ask, second, whether Congress has the constitutional power to provide the statu-

\textsuperscript{179} \textit{Ex parte Milligan}, 71 U.S. (4 Wall.) 2, 137 (1866) (Chase, C.J., concurring).

\textsuperscript{180} Id.; see Issacharoff & Pildes, \textit{supra} note 9, at 12-13.

\textsuperscript{181} See \textit{supra} text accompanying note 124.
tory authority. *Third,* if the court concluded that the statutory authorization fell within Congress’s power, the court would review individual instances of detention to ensure that they comply with basic constitutional guarantees.

The second and third steps just described involve constitutional review: At the second stage, the court examines whether it is within Congress’s constitutionally conferred legislative power to authorize the detention in question; at the third, the court asks whether the executive branch’s exercise of that authority complies with the Due Process Clause and other constitutional provisions securing individual rights. To be sure, a court’s constitutional review at the second and third steps could accord considerable deference to the joint actions of the political branches in times of national crisis. That is presumably what Professors Issacharoff and Pildes mean to advocate. But “deference does not mean abdication.”182 Indeed, there is an enormous difference between an approach under which courts generally defer to the political branches, provided they remain within certain broad constitutional boundaries, and the total removal of judicial review.

To put the point differently, a court applying a process-based, institutionally oriented approach need not confine its review only to “second-order question[s] of whether the right institutional processes have been used to make the decision at issue,” while completely ignoring first-order questions regarding the “the content of the underlying rights.”183 True, as Professors Issacharoff and Pildes explain, courts have generally emphasized second-order issues during periods of national security crisis.184 But even in cases falling within the first tier of Justice Jackson’s *Steel Seizure Case* framework—that is, cases in which “the President acts pursuant to an express or implied authorization of Congress”185—a process-oriented judge may occasionally find it necessary to enforce first-order constitutional requirements directly. Although presidential actions authorized by Congress are entitled to “the strongest of [favorable] presumptions and the widest latitude of judicial interpretation,” Justice Jackson recognized that it might still be appropriate for a court to declare some such actions unconstitutional, as where “the Federal Government as an undivided whole lacks [the asserted] power.”186 In short, a judicial approach generally em-

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183 Issacharoff & Pildes, supra note 9, at 2.
184 See id. at 44–45.
185 Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure Case*), 343 U.S. 579, 635 (1952) (Jackson, J., concurring).
186 Id. at 636–37.
phasizing second-order issues can accommodate some engagement with first-order principles in extreme cases.\(^{187}\)

\(^{187}\) Justice Jackson may have viewed *Korematsu v. United States*, 323 U.S. 214 (1944), as just such a case. The Court in that case upheld the criminal conviction of a Japanese American man for violating an order excluding Japanese Americans from the West Coast of the United States during World War II. See *id.* at 215–24. Justice Jackson was one of three dissenters. See *id.* at 242 (Jackson, J., dissenting). Although Congress had ratified the Executive Order authorizing the exclusions, see *id.* at 216–17, Justice Jackson did not defer to the joint action of the political branches. Instead, he viewed the race-based exclusion orders as inconsistent with first-order constitutional values:

> [I]f any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. . . . But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is a son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign. . . . [T]he existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty.

*Id.* at 243, 48 (Jackson, J., dissenting). Accordingly, Justice Jackson would have held the exclusion orders judicially unenforceable and the criminal conviction judicially unsustaintable: "I do not think [the courts] may be asked to execute a military expedient that has no place in law under the Constitution." See *id.* at 248.

Yet Justice Jackson’s *Korematsu* dissent also reveals a marked skepticism about judicial review of military action: "In the very nature of things," he observed, "military decisions are not susceptible of intelligent judicial appraisal." *Id.* at 245. Accordingly, a court "can never have any real alternative to accepting the mere declaration of the authority that issued the [military] order that it was reasonably necessary from a military viewpoint." *Id.*

This necessary deference to tactical and other factual matters inevitably compromises the court’s ability to enforce constitutional limits on military action: "My duties as a justice as I see them do not require me to make a military judgment as to whether [the] evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task." *Id.* at 248. In this respect, Justice Jackson’s opinion is something of a puzzle: He condemned the race-based exclusion orders as inconsistent with bedrock constitutional values, but he also suggested that, had the military enforced the exclusion orders without implicating the courts (i.e., without criminally prosecuting violators), the courts should have remained uninvolved. See generally John Q. Barrett, *A Commander’s Power, A Civilian’s Reason: Justice Jackson’s Korematsu Dissent*, LAW & CONTEMP. PROBS., Summer 2005, at 57 (discussing these two facets of the opinion); Dennis J. Hutchinson, *The “Achilles Heel” of the Constitution: Justice Jackson and the Japanese Exclusion Cases*, 2002 SUP. CT. REV. 435 (same). On one hand, therefore, the opinion arguably stands as an example of an otherwise process-oriented judge insisting that, when judicial review of military action is unavoidable, courts must be prepared to enforce first-order constitutional principles. On the other hand, Justice Jackson himself later recognized that his general preference for judicial abstention, "if followed, would come close to a suspension of the writ of habeas corpus or recognition of a state of martial law at the time and place found proper for military control." Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103, 116 (1951). Understood this second way, the opinion may be a kind of early forbear of Justice Scalia’s suspension-as-authorization model: Rather than insisting on a role for all three branches even during wartime, Justice Jackson’s opinion arguably simply directed the military "to do its deeds on its own, without judicial assistance or imprimatur." Barrett, *supra*, at 63. In my view, the opinion can defensibly be read in both ways, which is to say that it contains a fair amount of internal tension.
B. The Three-Branch Approach in *Hamdi*

The judicial approach advocated in the preceding subpart is well reflected in the *Hamdi* plurality opinion. Justice O'Connor's analysis proceeded along each of the three steps described above. First, she examined the AUMF and determined that it authorized the detention of alleged enemy combatants like Hamdi.\(^{188}\) Second, she concluded that Congress had the constitutional power to authorize the kind of detention at issue.\(^{189}\) Third, and critically, she concluded that a finding of valid statutory authority to detain does not end the judicial inquiry.\(^{190}\) Rather, the courts must stand ready to ensure that the executive exercises its statutorily conferred power in a manner consistent with basic constitutional guarantees.\(^{191}\)

It is not my aim here to defend the particulars of Justice O'Connor's constitutional analysis. In concluding that the AUMF permissibly authorizes the detention of citizens like Hamdi, she drew analogies to prisoner-of-war detentions in earlier conflicts. She pointed especially to *Ex parte Quirin*,\(^{192}\) the World War II case approving the military detention, trial, and execution of eight Nazi saboteurs, one of whom was a U.S. citizen.\(^{193}\) Justice O'Connor might have been right to rely on *Quirin*; Justice Scalia might have been right not to do so. I take no position on that point. Similarly, I do not necessarily agree with the specifics of Justice O'Connor's procedural due process analysis under *Mathews v. Eldridge*.\(^{194}\) Her assessment of

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\(^{188}\) See *supra* text accompanying notes 36–41.

\(^{189}\) See *supra* text accompanying note 42. Justice O'Connor's conclusion on this point amounted to comparing the detention of alleged enemy combatants like Hamdi to the detention of prisoners of war in earlier conflicts including World War II, and to precedents upholding that detention such as *Ex parte Quirin*, 317 U.S. 1 (1942). See *infra* text accompanying notes 192–93, 211–12.

\(^{190}\) See *supra* text accompanying notes 47–58.

\(^{191}\) See *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (plurality opinion) ("While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here."); see also Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1393–94 (1953) (describing the "great and generating principle . . . that the Constitution always applies when a court is sitting with jurisdiction in habeas corpus," and stating that the "principle forbids a constitutional court with jurisdiction in habeas corpus from ever accepting as an adequate return to the writ the mere statement that what has been done is authorized by act of Congress").

\(^{192}\) 317 U.S. 1 (1942).

\(^{193}\) See *Hamdi*, 542 U.S. at 518–24 (plurality opinion).

\(^{194}\) See *supra* text accompanying notes 49–58. I am, however, unpersuaded by Justice Scalia's insistence that Justice O'Connor's reliance on *Mathews* was inappropriate because that case "involv[ed] . . . the withdrawal of disability benefits." *Hamdi*, 542 U.S. at 575 (Scalia, J., dissenting) (second alteration in original). Professor Yoo echoes that criticism in his contribution to this Symposium: "That the Court had to resort to a case about the procedu-
the scope of the right to individualized review may have tilted too far in Hamdi's direction; it might have conceded too much to the government. Whatever the merits of her review of those issues, the critical point for my purposes is her insistence that there be such review at all.\textsuperscript{195}

That said, arguably the best process-based treatment of the first question described above—whether the AUMF by its terms authorized the detention in question—is found in Justice Souter's partial concurrence, not Justice O'Connor's plurality opinion. As discussed above, Justice Souter's approach was similar to Justice O'Connor's in that he, too, would evidently allow ordinary legislation to authorize the executive detention of citizens like Hamdi.\textsuperscript{196} Unlike Justice O'Connor, however, Justice Souter did not find any such authorization in the AUMF. As a matter of statutory interpretation, he would require a clearer congressional statement before concluding that Congress had authorized the detention in question.\textsuperscript{197} Clear statement rules of this sort can be an effective means of implementing process-oriented values. As Cass Sunstein has explained, requiring clear congressional au-

\textsuperscript{195} I also take no position on the precise scope of review that courts should employ when reviewing executive action in this area. To address that issue, one would need, \textit{inter alia}, to translate the Constitution's general contemplation of a three-branch system of checks and balances into a specific understanding of the scope of the "judicial power" conferred by Article III, as well as investigate the contours of whatever minimum scope of federal judicial review the Due Process Clause and the Suspension Clause demand in cases involving the deprivation of liberty. These are important issues, and there is some impressive scholarship examining them in the context of executive detention. See, e.g., Richard H. Fallon, Jr., \textit{Applying the Suspension Clause to Immigration Cases}, 98 COLUM. L. REV. 1068 (1998); Neuman, \textit{supra} note 124. But those issues are beyond the focus of this Article. Arguments about the constitutional minimum scope of judicial review of executive detention are directed to circumstances in which the writ has not been validly suspended. That is, such arguments assert that, as long as the writ has not been suspended, some combination of Article III, the Due Process Clause, and the Suspension Clause itself require that executive detentions be subject to a certain measure of judicial review. In contrast, the basic issue for this Article concerns what happens when the writ is suspended, and whether suspension should be deemed the exclusive vehicle for congressional authorization of certain forms of executive detention.

\textsuperscript{196} See \textit{supra} text accompanying notes 59–61.

\textsuperscript{197} See \textit{supra} text accompanying note 62.
thorization helps "provide[] a check on unjustified intrusions on liberty" without compromising Congress's ability to provide such authorization "when there is a good argument for it."198 Clear statement rules thus tend to "promote liberty without compromising legitimate security interests."199 Moreover, to the extent a process-based approach would lead courts to grant the President very broad leeway when his actions are authorized by Congress,200 a clear statement rule helps ensure that courts do not grant such leeway in error.201

Thus, to the extent that the principal aim of a process-based, institutionally oriented framework is to encourage the direct participation of each branch of government, Justice Souter's clear statement requirement may provide the most attractive approach to the threshold question of whether Congress has authorized the detention in question.202 Because he answered that question in the negative, Justice Souter had no need to reach the second and third questions identified above—whether it is within Congress's constitutional power to authorize the detention in question, and whether the executive branch has complied with basic constitutional requirements of due process when exercising its detention authority. It appears, however, that Justice Souter would proceed to those two questions if he concluded that the relevant statute authorized the detention in question.203 In terms of the overall analytical model, therefore, Justice Souter's opinion can be grouped together with Justice O'Connor's.

The basic strength of the general approach adopted by both Justice O'Connor and Justice Souter is that it allows congressional authorization and judicial review to coexist.204

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198 Sunstein, supra note 12, at 54.
199 Id.
200 See supra text accompanying note 15.
201 See Gregory v. Ashcroft, 501 U.S. 452, 461 (1991) ("In traditionally sensitive areas,... the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." (quotation omitted)).
202 On the other hand, Professor Sunstein himself is inclined to think that the AUMF's "necessary and appropriate force" language provides a sufficiently clear statement of authorization to detain alleged enemy combatants like Hamdi, although he concedes that Justice Souter's contrary position is reasonable. See Cass R. Sunstein, Administrative Law Goes to War, 118 HARV. L. REV. 2663, 2670 (2005). Professor Sunstein reached that conclusion in a short reply to an article in which Curtis Bradley and Jack Goldsmith argue that a clear statement requirement is appropriate for wartime presidential actions that restrict the liberty of noncombatants in the United States, but not for presidential actions that restrict the liberty of combatants like Hamdi. See Bradley & Goldsmith, supra note 19, at 2102-06.
203 As noted above, Justice Souter joined parts of Justice O'Connor's due process analysis for purposes of providing a Court majority on those points. See supra note 53.
204 Professor Tushnet has contrasted a "separation-of-powers mechanism," akin to the institutional-process approach championed by Professors Issacharoff and Pildes, with a "judicial-review mechanism." Mark Tushnet, Controlling Executive Power in the War on Terrorism,
fundamentally pragmatic: It seeks both to afford the political branches enough leeway to manage national crises effectively and to ensure that they remain within basic, judicially enforced constitutional boundaries. By preserving “a role for all three branches,” this model “enjoins upon [the] branches separateness but interdependence, autonomy but reciprocity.”

IV

Objections

In this final Part, I defend the institutional-process approach as I have articulated it against a series of potential objections. While doing so, I hope to elaborate on some of the features of the approach and to demonstrate further its overarching strengths as against the suspension-as-authorization approach. I speak here principally of Justice O’Connor’s plurality opinion as embodying the kind of process-based model I endorse, though, as discussed above, I really have in mind a combination of Justice Souter’s and Justice O’Connor’s approaches.

First, one might reiterate Justice Scalia’s claim that the Suspension Clause is a “sham if it . . . does not guarantee the citizen that he will either be tried or released, unless the conditions for suspending the writ exist and the grave action of suspending the writ has been taken.” The argument here, in other words, is that if Congress can “by ordinary legislation” authorize the extrajudicial detention of any citizen, then the Suspension Clause guarantees the citizen “very little indeed.”

This objection overstates what the Hamdi plurality would allow. To conclude, as Justice O’Connor did, that the AUMF validly authorizes the detention of citizen enemy combatants is not to say that Congress may, by ordinary legislation, authorize literally any kind of extrajudicial detention. Justice O’Connor was careful to say that the executive detention in that case was “detention to prevent a combatant’s return to the battlefield,” which she deemed “a fundamental incident of waging war.” As discussed above, she drew support for

118 HARV. L. REV. 2673, 2673–74 (2005). As discussed above, however, some measure of judicial review is not necessarily incompatible with a model generally focused on legislative authorization. See supra text accompanying note 186.


206 Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case), 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

207 Hamdi, 542 U.S. at 575 (Scalia, J., dissenting).

208 Id.

209 See supra text accompanying notes 36–42.

210 Hamdi, 542 U.S. at 519 (plurality opinion).
that conclusion from *Ex parte Quirin*,\(^{211}\) the World War II case involving alleged German saboteurs, one of whom was a U.S. citizen.\(^{212}\) To be sure, Justice Scalia disagreed with Justice O'Connor's reading of *Quirin* and other precedents.\(^{213}\) But that disagreement was not over whether Congress had an effectively unlimited power to authorize executive detention; it was over whether the particular detention at issue in *Hamdi* fell within what Justice O'Connor described as a well-recognized, narrow category of permissible wartime detentions. By answering yes, Justice O'Connor did not purport to write Congress a blank check to authorize, by ordinary legislation, any kind of novel executive detention it wished. In other words, Justice Scalia simply read Justice O'Connor's plurality opinion much more broadly than she likely intended. His charges notwithstanding, Justice O'Connor left ample room for future cases with different facts to come out differently.

If anything, it is the suspension-as-authorization model that most threatens the protections built into our constitutional system. If suspending the writ could authorize otherwise illegal forms of executive detention, then the same act that empowered extraordinary executive action would also dispense with the principal check—the courts—on that action. The protection of liberty would depend on executive officials' own self-imposed restraint. To be sure, we properly expect executive actors to bind themselves to their best good-faith understanding of the Constitution.\(^{214}\) But the premise of the constitutional separation of powers is that we cannot rely exclusively on such self-restraint.\(^{215}\) Moreover, if, as Justice Scalia suggested, suspending the writ actually legalized the detentions it covered, executive actors would have no reason to constrain themselves: The detention would be lawful.\(^{216}\) Ultimately, then, this first objection is better targeted at Justice Scalia's suspension-as-authorization model. If suspending the writ—and only suspending the writ—authorizes otherwise-illegal executive detention, the Constitution's protections of liberty are easily circumvented and, indeed, a sham.

Second, defenders of the suspension-as-authorization model might object that the model does not empower Congress to suspend the writ for mere expediency whenever it wants. Specifically, they might point

\(^{211}\) 317 U.S. 1 (1942).

\(^{212}\) See supra text accompanying notes 192-93.

\(^{213}\) See *Hamdi*, 542 U.S. at 569-72 (Scalia, J., dissenting). Justice Scalia also questioned the validity of *Quirin* itself, calling the decision "not this Court's finest hour." *Id.* at 569.

\(^{214}\) See supra text accompanying notes 143-45.

\(^{215}\) See *The Federalist* No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (stating that, "[i]f men were angels, no government would be necessary," and noting that "[i]n framing a government which is to be administered by men over men," the Founders sought to "supply[ ] by opposite and rival interests, the defect of better motives" so that each branch of government "may be a check on the other").

\(^{216}\) See supra text accompanying notes 76-79.
to the fact that the Suspension Clause permits suspension only "in Cases of Rebellion or Invasion [when] the public Safety may require it." As noted above, however, the prevailing view appears to be that Congress has the unilateral authority to decide when the constitutional predicates for suspension are met. Thus, although the Suspension Clause limits the circumstances in which the writ may be suspended, the courts are powerless to police Congress’s decisions to suspend. Instead, we are again left to rely on the self-restraint of a political branch, a restraint we properly expect, but upon which the Constitution does not place exclusive reliance. Moreover, as Justice Scalia noted in his Hamdi dissent, the practical reality is that the issue of extraordinary executive detention is most likely to arise when Congress can credibly contend that the nation is faced with a rebellion or invasion of some form. Accordingly, as both a formal and a practical matter, the Suspension Clause itself provides no basis for constraining the suspension-as-authorization model.

Third, one might object that, even if congressional decisions to suspend are not subject to outside review, suspension does not necessarily dispense with all judicial involvement in the detention at issue. The argument here would focus on partial suspensions of the writ, and the courts’ role in determining whether a particular detention falls within the scope of the suspension. That inquiry is quite similar to the first step of Justice O’Connor’s approach in Hamdi, but it could go even further. Indeed, Congress could attach a wide range of conditions to the partial suspension, including, potentially, the same rights of individualized review that Justice O’Connor granted to Hamdi as a matter of due process.

In response, I would note that Congress could elect to attach such conditions to its suspensions, but that nothing in the suspension-as-authorization model requires Congress to do so. Indeed, Congress could decide instead to suspend the writ entirely, or to enact a partial suspension that affords individuals no right to challenge the accuracy

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217 U.S. Const. art. I, § 9, cl. 2.
218 See supra text accompanying notes 107–10.
219 See Hamdi v. Rumsfeld, 542 U.S. 507, 578 n.6 (2004) (Scalia, J., dissenting) (describing Justice Thomas, in his separate opinion, as “worry[ed] that the constitutional conditions for suspension of the writ will not exist ‘during many . . . emergencies during which . . . detention authority might be necessary,’” and responding that “[i]t is difficult to imagine situations in which security is so seriously threatened as to justify indefinite imprisonment without trial, and yet the constitutional conditions of rebellion or invasion are not met” (alterations in original)).
220 See supra text accompanying notes 111–24.
221 See supra text accompanying notes 36–42.
222 See Hamdi, 542 U.S. at 573 (Scalia, J., dissenting) (“A suspension of the writ could, of course, lay down conditions for continued detention, similar to those that today’s opinion prescribes under the Due Process Clause.”).
of the executive's decision to detain them. The constitutional system of checks and balances should not be subject to unilateral invalidation by any one branch. Yet that is just what the suspension-as-authorization model entails.

Fourth, some might criticize Justice O'Connor's due process analysis on grounds of institutional competence. The argument here would be that Congress, not the courts, is in the best position to establish the rules governing individualized review of enemy combatant detention cases. I am inclined to agree. But criticizing Justice O'Connor's opinion on this ground misses the mark. Nothing in the opinion precludes Congress from establishing particular procedures for reviewing individual enemy combatant detentions. True, Justice O'Connor did set forth in considerable detail a scheme of individualized review that would satisfy the demands of due process. But many of the elements she contemplated—bearsay, burden-shifting, non-Article III tribunals, even counsel—may be best viewed as a kind of "constitutional common law" that Congress may amend, modify, or replace with alternative procedures adequate to protect the basic constitutional values at stake. And even under the scheme Justice O'Connor laid out, there is ample room for Congress (and the executive branch) to experiment with a variety of procedures. The executive branch has done just that by establishing Combatant Status Review Tribunals at Guantanamo Bay. The work of those tribunals will presumably remain subject to some measure of judicial oversight, but the mere existence of judicial review does not preclude the political branches from taking the lead in deciding how to structure large portions of the process.

Fifth, and reprising a version of the first objection discussed above, a critic interested in maximizing protections for individual liberty might favor the suspension-as-authorization model on the theory that Congress will rarely agree to suspend the writ. That is, by requiring the "grave" act of suspension to authorize certain forms of extraordinary detention, the suspension-as-authorization model arguably minimizes the occasions in which Congress will provide that authorization. Congress, on this view, will be extremely reluctant to

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223 Justice Scalia criticized Justice O'Connor on this point. See id. at 573, 577-78. Professor Yoo advances a more detailed version of the same basic criticism in his contribution to this Symposium. See Yoo, supra note 194, at 590-600.
224 See supra text accompanying notes 51-58.
226 See supra note 57.
227 See supra text accompanying note 58.
228 See Hamdi, 542 U.S. at 575 (Scalia, J., dissenting).
suspend the writ, either because members of Congress themselves appreciate the intrinsic values of "the most important human right in the Constitution," or, more cynically, because they believe that their constituents value habeas corpus and will penalize those who too easily suspend it. In contrast, if during times of national crisis Congress need only pass ordinary legislation to authorize certain forms of detention, it may be more likely to do so. Precisely because it does not exclude the judiciary from the process, ordinary legislation may appear more acceptable to both Congress and the voting public. But if the judiciary then defers substantially to the executive branch when reviewing individual cases of detention, this model may ultimately lead to greater deprivation of liberty than a suspension-as-authorization model, under which the threshold barrier to authorization is much higher. In sum, the choice, on this view, is between (1) a suspension-as-authorization model under which Congress will be strongly disinclined ever to provide the authority in question, and (2) a more conventional model under which Congress may more easily provide the authority, but where the perceived protections of judicial review are largely illusory because of the deference courts will predictably accord to the executive. The second model, one might object, thus threatens liberty more than the first.

This objection is based on a premise and a prediction. The premise is that extraordinary executive detention, to the extent it is constitutionally permissible at all, should be limited as much as possible. The prediction is that the best means to that end is to require Congress to suspend the writ before such detention can take place. Consider the prediction first. Given the sparse historical record, I see no way to prove or disprove it as an empirical matter. My own inclination is to doubt that Congress would really be so reluctant to suspend the writ, if that were the only way to authorize the detention of enemy combatants like Hamdi. That is, if the Hamdi Court had adopted Justice Scalia’s position and held that the government’s only options for detainees like Hamdi were to release them, charge them criminally, or convince Congress to suspend the writ, I suspect that many in Congress would have been willing to entertain a suspension. I concede, though, that there is no way to settle this empirical question at this juncture.

That is not to say, however, that this last objection cannot be resolved. Rather, the objection fails because its premise contains two related and fundamental flaws. First, the premise of the objection, which is really a restatement of what Professors Issacharoff and Pildes

229 The phrase is the title of Zechariah Chafee’s famous article on habeas corpus, cited supra note 98.
call the civil libertarian idealist position, is inconsistent with our constitutional history. Issacharoff and Pildes have shown that during times of national security crisis, courts have tended to respond not by imposing maximum constraints on the actions of the executive branch, but by ensuring that the political branches act together to address the problem. And although I have argued in this Article that the courts should retain a role to keep both Congress and the President within basic constitutional boundaries, I have not argued that such a three-branch approach should seek to constrain the political branches to the maximum possible extent. As Mark Tushnet has described, the aim here is "to regulate the exercise of power so that it is used wisely—forcefully enough to meet threats to national security but delicately enough to preserve liberty within the United States— and not (merely) to limit the exercise of power."

Second, and relatedly, whatever the accuracy of our present predictions about which approach will best balance liberty and security, the Constitution itself adopts a particular stance on the issue—that liberty is best and most appropriately secured by dividing governmental power among three branches, and by arranging those branches so that each is an effective check on the other two. The suspension-as-authorization model, in contrast, is really a two-branch model. It provides no external check on the legislative branch, and instead assumes Congress will restrain itself by generally refusing to suspend the writ. Such a theory of self-limiting power might make practical sense, and there might even be reason to believe it would meaningfully constrain Congress in some cases. But it is not the theory upon which the constitutional separation of powers rests. Conversely, whether or not the three-branch model actually provides the best means of balancing liberty and security in all cases, our constitutional system proceeds from the premise that it does, and we are not free to revise that premise.

CONCLUSION

There is much to commend the proposition that courts should react flexibly in times of national crisis, privileging multilateral institutional processes instead of routinely invalidating them with absolutist conceptions of individual rights. Hamdi, however, underscores that

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230 See supra text accompanying note 11.
231 See supra text accompanying notes 12-13.
232 Tushnet, supra note 204, at 2673 n.6.
233 See supra Part II.B.
234 Judge Learned Hand once made a similar point about the constitutional guarantee of free speech: "[The First Amendment] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).
not all process-privileging approaches are the same. In particular, it highlights the importance of encouraging the political branches to work together while still retaining a checking role for the courts. An institutional-process approach can, and should, make room for some measure of judicial review to ensure that the processes honor basic constitutional commitments. As Justice O'Connor made clear for the Hamdi plurality, such review is particularly critical in areas implicating individual freedoms, where the Constitution "most assuredly envisions a role for all three branches."\textsuperscript{235}
