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WHEN TO BE A COURT OF LAST RESORT: THE SEARCH FOR A STANDARD OF REVIEW FOR THE SUSPENSION CLAUSE

Abstract: Although the war on terror has not resulted in a suspension of habeas corpus, the conflict has presented the courts with increasingly complex issues regarding what level of due process should be granted to detainees. The judicial scrutiny of legislative acts passed in the wake of the September 11, 2001 attacks, most notably the Military Commissions Act of 2006, creates the potential for Congress to suspend the writ of habeas corpus altogether in the event another terrorist attack occurs. This Note explores what level of scrutiny should be applied to such a suspension, assuming that the courts do not declare the issue a political question. Between a deferential standard focusing on an analogy to the war powers and a more searching form of judicial review focusing on the writ's importance in individual liberty and due process, the courts would have a complex challenge in applying the correct standard. This Note ultimately concludes that the deciding factor in such a case would be the indefinite nature of the suspension itself, determined primarily by the length of detention a detainee had faced, the availability of judicial process, and the length of time that passed since an attack warranting suspension occurred.

INTRODUCTION

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.

—United States Constitution¹

When the founding fathers drafted the Suspension Clause in Philadelphia following the failure of the Articles of Confederation, there was fierce debate over whether the federal government should ever have the power to suspend habeas corpus.² The drafters recognized the significance of the writ as a method of bringing a prisoner before a court, often to ensure that the prisoner's imprisonment or de-

¹ U.S. CONST., art. I, § 9, cl. 2.

² See Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 BUFF. L. REV. 451, 455–58 (1996).

tion is not illegal.³ The drafters themselves had lived through several suspensions of habeas corpus by Parliament throughout colonial times and during the American Revolution, which led to their view that suspension served as an “engine of oppression.”⁴ The suspension of the writ challenges us to examine whether it is ever appropriate to forgo the important right in an effort to protect the nation.⁵ The drafters thought it was appropriate in certain circumstances to suspend the writ, but remained silent about the level of judicial review that should apply to a suspension.⁶ Given this ambiguity, the question of what is considered a “rebellion or invasion” pursuant to the Suspension Clause is increasingly complex, especially amid a war on terrorism.⁷

This Note seeks to explore the standard of review and level of scrutiny that should be applied to the internal limitations of the Suspension Clause by the judicial branch in the event the writ of habeas corpus is suspended.⁸ The term “internal limitation” refers to the requirement of an invasion or rebellion, and ignores the possibility that external limitations could also be used to challenge a suspension.⁹ The

³ BLACK’S LAW DICTIONARY 728 (8th ed. 2004); Freedman, *supra* note 2, at 455–58.

⁴ Freedman, *supra* note 2, at 456–57 (quoting Luther Martin, *Genuine Information VIII* (Jan. 22, 1788), in 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 434 (John P. Kaminski & Gaspare J. Saldino eds., 1984)); Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 344 (2006). These suspensions occurred in 1688, 1696, 1714, 1722, 1744, and during the American Revolution. Tyler, *supra*, at 344. The American Revolution suspensions included six separate suspensions between 1777 and 1783. Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 644, 651 (2008) (noting the irony of suspension in the colonies during rebellion given that “[c]olonial British Americans were stripped of the fundamental characteristic that had bound them to people living in England: their common subjecthood, indicated in part by the common availability of habeas corpus”).

⁵ See Tyler, *supra* note 4, at 413 (quoting *Duncan v. Kahanamoku*, 327 U.S. 304, 330 (1946) (Murphy, J., concurring)).

⁶ See Freedman, *supra* note 2, at 455–58; Tyler, *supra* note 4, at 334.

⁷ See U.S. CONST., art. I, § 9, cl. 2; *Boumediene v. Bush*, 128 S. Ct. 2229, 2274–75 (2008).

⁸ Tyler, *supra* note 4, at 412. The scope and meaning of the Suspension Clause is a complex and debatable issue that remains pertinent today, but is beyond the scope of this Note. See *id.* This Note seeks to expand upon the question left by Professor Tyler as to what level of scrutiny should be applied by the courts in the event of a suspension of habeas corpus, while not completely foreclosing the possibility that suspension may in fact be a political question in certain circumstances. See *id.*

⁹ See *id.* at 408. For example, a prisoner could hypothetically challenge a suspension as a violation of the Fifth Amendment in the face of a suspension that only applies to a suspect class, such as race or creed, in a discriminatory manner. See *id.* It is debatable whether such limitations would apply in the face of a suspension, and this Note does not explore that possibility. See *id.* Rather, the Note focuses on the internal limitations found in the Suspension Clause itself. See U.S. CONST., art. I, § 9, cl. 2.

conventional notion has been that a suspension of habeas corpus would be a non-justiciable political question, but recent developments in the war on terror and commentary by modern legal scholars have challenged this idea.¹⁰ The concept of judicial review of suspension is more than an academic exercise given the recent unsuccessful attempts by Congress to circumvent the writ of habeas corpus by statute.¹¹ Additionally, Professor Amanda L. Tyler speculates there is “good reason to believe that another attack would be met with invocation of the suspension power by Congress.”¹² The idea that suspension is not a political question suggests an important role for judicial review during tumultuous times in our nation, yet leaves unresolved the question of what level of review should be used.¹³

The purpose of this Note is to explore how a court would determine what level of judicial review should be given in an examination of congressional suspension of the writ of habeas corpus.¹⁴ In the event a court did review a suspension, it has been speculated that the lack of applicable precedent could lead a court to apply either a rational basis review, deferential to the political branches, or strict scrutiny, a search-

¹⁰ See, e.g., *Boumediene*, 128 S. Ct. at 2240 (reviewing whether Congress had provided an adequate substitute for habeas corpus for detainees in Guantanamo Bay); *Hamdi v. Rumsfeld*, 542 U.S. 507, 578 (2004) (Scalia, J., dissenting) (suggesting if habeas corpus had been suspended in the wake of the September 11, 2001 attacks, the validity of suspension itself would be a non-reviewable political question); Tyler, *supra* note 4, at 412–13 (concluding that the limitations on the suspension authority constitute judicial questions).

¹¹ See, e.g., Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at scattered sections of 10, 18, 28, and 42 U.S.C.) (“No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”); Authorization for Use of Military Force, Pub. L. No. 107-30, 115 Stat. 224 (codified at 50 U.S.C. § 1541 (2006)) (declaring in the wake of September 11, 2001 terrorist attacks that “the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, 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”). The Military Commissions Act of 2006 was recently challenged in *Boumediene v. Bush*, highlighting the difficulty the government has faced in circumventing the courts in the war on terror and possibly increasing the likelihood that a future attack would lead the government to suspend the writ of habeas corpus altogether. 128 S. Ct. at 2263.

¹² Tyler, *supra* note 4, at 335.

¹³ See *id.*

¹⁴ See *id.* at 412. This question is based upon the assumption that suspension is reviewable, and may very well be reviewed, by the courts in the event it took place. See *id.* Professor Tyler suggests the current war on terror raises the threat of a suspension of habeas corpus given the detention issues that have arisen during the conflict. *Id.* at 335.

ing judicial review standard that gives less weight to the discretion of the political branches.¹⁵ Depending upon the approach taken, the internal limitation contained in the Suspension Clause, that habeas corpus may only be suspended “in cases of rebellion or invasion [when] the public safety may require it,” could be interpreted differently by a court.¹⁶ Part I of the Note lays out a brief history of the Suspension Clause, including the drafting of the clause and case law interpreting its meaning.¹⁷ Part II explores suspensions of the writ of habeas corpus in the United States, examples in martial law and war power cases, and the recent suggestions in the war on terror cases regarding judicial review of suspension.¹⁸ This Part presents two competing views on judicial review of a suspension: the deferential review similar to that granted to the war powers and a searching judicial review standard based upon habeas corpus’ importance as an individual right.¹⁹ Part III applies this framework to a series of hypothetical suspensions in an effort to analyze what judicial review of the internal limitation contained in the Suspension Clause might look like.²⁰

I. A BRIEF HISTORY OF THE SUSPENSION CLAUSE IN THE UNITED STATES

A. *The Suspension Clause in the Constitution*

Before delving into the subject of suspension itself, it is important to recognize some basic concepts regarding the history and exercise of the writ of habeas corpus.²¹ The writ’s historical purpose in the United States has been to ensure that those who are detained have the oppor-

¹⁵ *Id.* at 411. The idea of a searching judicial review refers to a strict scrutiny standard based upon the level of analysis a court is willing to engage in to review governmental action. *See id.*

¹⁶ U.S. CONST., art. I, § 9, cl. 2; Tyler, *supra* note 4, at 408–09; *see also* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 31 (1827) (proposing that the President would have to put forth a weak argument in the exercise of war powers for the Court to engage in a strict scrutiny analysis of whether an invasion exists).

¹⁷ *See infra* notes 21–54 and accompanying text.

¹⁸ *See infra* notes 55–160 and accompanying text.

¹⁹ *See infra* notes 55–160 and accompanying text.

²⁰ *See infra* notes 161–265 and accompanying text.

²¹ *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2036–37 (2007). The term habeas corpus translates literally to “that you have the body.” DANIEL R. COQUILLETTE, *THE ANGLICAN LEGAL HERITAGE* 248 (2d ed. 2004). The writ developed slowly over time, originally used to secure persons in custody, but by the sixteenth century becoming a tool to challenge imprisonment. *Id.* at 248–49. Historically, the purpose of the writ was not to challenge the merits of a detention, but rather whether the detention had a lawful basis. *Id.* at 249. Despite this, “it was, and is, one of the great cornerstones of the rule of law, and is now incorporated into Article I, Section 9 of the Constitution of the United States.” *Id.*

tunity to challenge their detainment before a court.²² This right allows a prisoner, or a representative of the prisoner, to petition a court to issue a writ demanding that the prisoner's custodian appear before a court to show they have the legal authority necessary for the detention.²³ The process raises several issues, but the three primary questions are: Which courts have power to issue these writs and hear such cases? What procedural rights the prisoner should be entitled to? And most importantly, is the detention itself is legal?²⁴

The fierce debate that took place during the drafting of the Suspension Clause left us with little clarity regarding what the right to habeas corpus grants to individuals other than whatever rights are granted by Congress, unless they are suspended.²⁵ In 1807, the U.S. Supreme Court addressed this question in *Ex parte Bollman*, forming a middle-of-the-road approach.²⁶ Chief Justice Marshall's opinion in *Ex parte Bollman* suggested that the Suspension Clause requires that Congress provide some court with jurisdiction to hear habeas review, thus giving the privilege "life and activity."²⁷ Otherwise, Marshall noted, the existence of the Suspension Clause would be meaningless in the Constitution, calling for suspension of a writ only in certain circumstances when in fact the right to utilize the writ may not exist in the first place.²⁸ The Suspension Clause, in addition to specifying when habeas corpus may

²² See Fallon & Meltzer, *supra* note 21, at 2036–37.

²³ *Id.*

²⁴ *Id.* at 2037–40.

²⁵ Tyler, *supra* note 4, at 341; see U.S. CONST., art. I, § 9, cl. 2. Although the courts have never held suspension to be solely within Congress's authority, its position in Article I of the U.S. Constitution suggests this is a correct assumption. Tyler, *supra* note 4, at 343; see U.S. CONST., art. I, § 9, cl. 2.

²⁶ *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807); Tyler, *supra* note 4, at 341–42.

²⁷ *Ex parte Bollman*, 8 U.S. (4 Cranch) at 95; see Adam Marinelli, Comment, *A Call for the Proper Recognition of Habeas Corpus in the 21st Century*, 3 CHARLESTON L. REV. 689, 693–94 (2009). At least one commentator has noted that the Suspension Clause may not in fact provide the right of habeas corpus given that inferior federal courts were created by congressional choice, rather than constitutional command. Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251, 254 (2005). Under this approach, the Suspension Clause only provides protection against temporary suspensions of the writ, allowing suspension only within narrow circumstances, and only so long as Congress authorizes inferior federal courts. See *id.* This is due to the limited jurisdiction of the U.S. Supreme Court. See *id.* The counter to this argument, however, lies in the fact that Congress would have no defense for failing to provide for habeas jurisdiction given that Congress could grant jurisdiction to individual justices on the Supreme Court. *Id.* at 290–91 (noting that Congress should always feel "with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity" (citing *Ex parte Bollman*, 8 U.S. (4 Cranch) at 95)).

²⁸ *Ex parte Bollman*, 8 U.S. (4 Cranch) at 95.

be suspended, confers by necessity the right to habeas corpus itself.²⁹ It is important to emphasize that the framers of the Constitution held the privilege of habeas corpus in high regard given its importance in protecting liberties of individuals.³⁰ The importance of habeas corpus is evidenced by the fact that, except in rebellion or invasion, it cannot be suspended.³¹ Even where these circumstances exist, suspension is not permissible unless the public safety requires the act.³² The writ holds a central place in our nation's understanding of individual liberties and plays an important role in ensuring their protection.³³

Although the importance of discretion and caution in suspending the writ has been emphasized, the power to completely suspend the writ does exist within the Constitution.³⁴ During the drafting of the Constitution, several versions of the Suspension Clause were suggested.³⁵ The first, drafted by Charles Pinckney, included a provision that would allow suspension of habeas corpus, but only for a certain period of time.³⁶ Subsequent motions suggested similar solutions, as well as recommendations that the writ never be suspended.³⁷ The clause we have today passed amid objections that it could become an "engine of oppression" in the hands of the federal government, yet

²⁹ *See id.*

³⁰ *See Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861). Chief Justice Taney stated in *Ex parte Merryman* that:

The great importance which the framers of the constitution attached to the privilege of the writ of habeas corpus, to protect the liberty of the citizen, is proved by the fact, that its suspension, except in cases of invasion or rebellion, is first in the list of prohibited powers; and even in these cases the power is denied, and its exercise prohibited, unless the public safety shall require it.

Id.

³¹ *See id.*

³² *Id.*

³³ *See id.*

³⁴ *See* U.S. CONST., art. I, § 9, cl. 2; *Ex parte Merryman*, 17 F. Cas. at 148.

³⁵ Freedman, *supra* note 2, at 455–56.

³⁶ *Id.* at 455 (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 334, 340–42 (Max Farrand ed., rev. ed. 1966)).

³⁷ *Id.* at 456. Freedman provides several records of the Federal Convention of 1787 taken during the drafting of the Suspension Clause, including suggestions from James Wilson doubting whether a suspension could be necessary in any case. *Id.* John Rutledge declared that habeas corpus was "inviolable" and could not "conceive that a suspension could ever be necessary at the same time through all the States." *Id.* Charles Pinckney "urging the propriety of securing the benefits of the Habeas corpus in the most ample manner, moved 'that it should not be suspended but on the most urgent occasions, [and] then only for a limited time not exceeding twelve months.'" *Id.*

³⁸ *See id.* Luther Martin of Maryland made the last motion in the debate, stating in opposition:

these objections could not overcome voices that insisted that there might be exigencies that could arise in our nation that would necessitate the government exercising the power.³⁸ Importantly, the drafters etched our Suspension Clause into the Constitution without defining what constitutes a rebellion or invasion.³⁹

B. Past Suspensions of the Writ

The writ of habeas corpus has been suspended several times in U.S. history, and by more than one branch of our government.⁴⁰ President Abraham Lincoln attempted to suspend the writ of habeas corpus, despite the majority view given by Chief Justice Marshall's statement in *Ex parte Bollman* that if the public safety requires suspension, "it is for the legislature to say so."⁴¹ During the Civil War, President Lincoln suspended the writ on several occasions, including in 1862 to "all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of

As the State governments have a power of suspending the habeas corpus act (in cases of rebellion or invasion), it was said there could be no good reason for giving such a power to the general government, since whenever the State which is invaded or in which an insurrection takes place, finds its safety requires it, it will make use of that power. And it was urged, that if we gave this power to the general government, it would be an engine of oppression in its hands, since whenever a State should oppose its views, however arbitrary and unconstitutional, and refuse submission to them, the general government may declare it to be an act of rebellion, and suspending the habeas corpus act, may seize upon the persons of those advocates of freedom, who have had virtue and resolution enough to excite the opposition, and may imprison them during its pleasure in the remotest part of the union, so that a citizen of Georgia might be bastiled in the furthest part of New-Hampshire-or a citizen of New-Hampshire in the furthest extreme to the south, cut off from their family, their friends, and their every connection. These considerations induced me, Sir, to give my negative also to this clause.

Id. (emphasis removed).

³⁹ See *id.*; Tyler, *supra* note 4, at 334.

⁴⁰ See, e.g., An Act Relating to Habeas Corpus, and Regulating Judicial Procedure in Certain Cases, ch. 81, § 1, 12 Stat. 755 (1863); *Duncan v. Kahanamoku*, 327 U.S. 304, 313 (1946) (reviewing Hawaii Organic Act, ch. 339, § 67, 31 Stat. 141 (1900) which authorized the governor of Hawaii to employ a variety of powers, including the power to suspend the writ of habeas corpus); *Ex parte Merryman*, 17 F. Cas. at 148 (reviewing suspension authorization granted by President Lincoln with respect to "all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority or by the sentence of any court-martial or military commission"); Proclamation No. 1, 13 Stat. 730 (1862).

⁴¹ 8 U.S. (4 Cranch) at 101; Tyler, *supra* note 4, at 343.

confinement by any military authority or by the sentence of any court-martial or military commission."⁴²

In 1861, Chief Justice Taney in *Ex parte Merryman* held that the President cannot suspend the writ of habeas corpus, implying that only Congress can suspend the writ.⁴³ Noting the Suspension Clause's location in Article I of the Constitution, along with other legislative powers, Taney emphasized that if the executive power was meant to include the power of suspension, the Suspension Clause would instead be located within Article II.⁴⁴ Referencing the power held by the executive branch of the English government, Taney made it clear that the founders were unwilling to give the executive a sweeping power over individual liberties.⁴⁵ President Thomas Jefferson's actions in 1806 during the Burr conspiracy supported this view.⁴⁶ At that time, the President never claimed the power to suspend the writ, but instead communicated the need for suspension to Congress itself.⁴⁷ A suspension, therefore, would likely come from Congress, as it has several times in our history.⁴⁸

Suspensions of habeas corpus may be authorized by Congress, but have been a rare event in the United States.⁴⁹ Following the Civil War, President Grant was authorized by Congress to suspend the writ of habeas corpus in 1871 as part of the federal government's efforts to combat the Ku Klux Klan during the Reconstruction era.⁵⁰ Next, in 1902

⁴² Proclamation No. 1, 13 Stat. 730; *see also* Proclamation No. 16, 13 Stat. 742 (1864); Proclamation No. 7, 13 Stat. 734 (1863).

⁴³ *See* 17 F. Cas. at 146. The procedural posture of *Ex parte Merryman* is rather complex and outside the scope of this Note. *See id.*; Tyler, *supra* note 4, at 343 & n.45. For a discussion on whether Chief Justice Taney heard *Ex parte Merryman* in his capacity as Chief Justice of the U.S. Supreme Court, or rather as a circuit court justice, *see* Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 90 n.27 (1993).

⁴⁴ *Ex parte Merryman*, 17 F. Cas. at 148–49.

⁴⁵ *See id.*

⁴⁶ *See id.* at 148.

⁴⁷ *Id.* There is evidence to support the fact that President Jefferson requested Congress invoke a suspension of the writ in the wake of the Burr conspiracy. *Id.*; Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 630–31 (2009). The writ was never suspended by the legislature, however, and President Jefferson never attempted to suspend the writ himself, leading to the conclusion that the President did not believe he in fact had the power. *See* Tyler, *supra*, at 631.

⁴⁸ *See Ex parte Merryman*, 17 F. Cas. at 148.

⁴⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004). The Court noted that Congress has seen fit to suspend the writ of habeas corpus only in the rarest of circumstances. *Id.*

⁵⁰ Ku Klux Klan Act of 1871, ch. 22, §§ 3–4, 17 Stat. 13, 14–15 (1871). The Act provided that where the President determined, in his judgment, that the public safety required habeas corpus to be suspended in order to overthrow a rebellion, he could suspend the writ. *Id.* § 4, 17 Stat. at 15. The Act then related back to the suspension authorized

Congress passed a statute allowing the governor of the Philippines Territory to suspend the writ in the face of rebellion, insurrection, or invasion in the territory.⁵¹ This provision was exercised briefly by the governor shortly after the law passed to address lawlessness in several provinces.⁵² Lastly, the governor of Hawaii was authorized to suspend the writ of habeas corpus by Congress in 1900.⁵³ This statute was last used during World War II, and the country has not seen a suspension of habeas corpus since.⁵⁴

II. COMPETING STANDARDS OF REVIEW

The standard for judicial review of a suspension can be examined in light of past suspensions in the United States, as well as by analyzing the U.S. Supreme Court's determinations of whether a rebellion or invasion necessitated suspension or the exercise of the war powers for the public's safety.⁵⁵ The level of appropriate deference may be similar to the broad discretion given to the political branches in the exercise of the war powers.⁵⁶ On the other hand, increased scrutiny due to the writ's importance to individual rights may be applied by a court influenced by concerns regarding the separation of powers and the need for review of the important right.⁵⁷

during the Civil War and provided the same due process protections. *Id.* The conditions allowed for suspension whenever any unlawful combination of people formed, defined broadly as those who conspired to overthrow or oppose the government, in a way that could overthrow or set defiance against authorities with violence. *See id.* §§ 2–3, 17 Stat. at 13–14. This Act was specifically aimed at the Ku Klux Klan. *See id.*; *District of Columbia v. Carter*, 409 U.S. 418, 425–26 (1973) (describing the atmosphere in the Southern United States during Reconstruction, including the activity of the Ku Klux Klan, and the congressional response authorizing the suspension of habeas corpus).

⁵¹ An Act Temporarily to Provide for the Administration of the Affairs of Civil Government in the Philippine Islands, ch. 1369, § 5, 32 Stat. 691 (1902).

⁵² *See Fisher v. Baker*, 203 U.S. 174, 179–81 (1906) (describing “a state of insecurity and terrorism among the people” according to the Governor of the Philippines Territory); Tyler, *supra* note 4, at 346 (noting that habeas corpus was suspended in two provinces following open insurrection by organized bandits).

⁵³ Hawaii Organic Act, ch. 339, § 67, 31 Stat. 153 (1900); *see infra* notes 74–90 and accompanying text.

⁵⁴ *See Duncan*, 327 U.S. at 304.

⁵⁵ *See Tyler*, *supra* note 4, at 409–12.

⁵⁶ *Id.* at 409.

⁵⁷ *Id.* at 411; *see also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (noting that where a fundamental right is infringed upon, the correct standard of review to be applied is strict scrutiny); *Duncan v. Kahanamoku*, 327 U.S. 304, 318–19 (1946) (applying a higher level of scrutiny in light of the likelihood that the war powers may be abused by the political branches).

A. *Deferential Standard: Capitulating to the Political Branches Amid Conflict*

Ex parte Merryman set the stage for a congressional suspension of habeas corpus in 1863 and also offers one of the first judicial insights into the standard of review a court might apply to a suspension by Congress.⁵⁸ The case arose out of President Lincoln's belief that the executive not only could suspend habeas corpus at his discretion, as he did several times during the war, but give military officers that same discretion as well, leaving it to them whether they would allow prisoners to exercise the writ.⁵⁹ The Court found that the executive branch had no such power, leading to one of the greatest potential conflicts between the judicial and executive branches.⁶⁰ This potential conflict was defused by congressional authorization of the executive branch to suspend habeas corpus.⁶¹ The opinion, therefore, appears to reinforce the notion that the courts would defer entirely to congressional judgment in the event of a suspension, calling the legislature's judgment "conclusive."⁶² Although steadfast in this view, the Court also emphasized the danger of a suspension and the "extreme caution" that should be exercised in making this decision.⁶³

When Congress granted President Lincoln the authority to suspend the writ of habeas corpus in March of 1863, the determination of when public safety required it was left to the judgment of the President.⁶⁴ The Act added built-in judicial review for any prisoners detained under the Act.⁶⁵ The Act further mandated that the Secretaries of State and War furnish a list of the names and arrest dates of prisoners as soon as practicable to the federal courts in the jurisdiction where the

⁵⁸ See 17 F. Cas. 144, 148 (C.C.D. Md. 1861); cf. An Act Relating to Habeas Corpus, and Regulating Judicial Procedure in Certain Cases, ch. 81, § 1, 12 Stat. 755 (1863); Tyler, *supra* note 47, at 637-38 (noting that the legislature debated whether to suspend the writ of habeas corpus, and thus authorize President Lincoln's 1861 executive suspension, for two years).

⁵⁹ See *Ex parte Merryman*, 17 F. Cas. at 147-48; cf. Proclamation No. 16, 13 Stat. 742 (1864); Proclamation No. 7, 13 Stat. 734 (1863); Proclamation No. 1, 13 Stat. 730 (1862).

⁶⁰ *Ex parte Merryman*, 17 F. Cas. at 148.

⁶¹ See An Act Relating to Habeas Corpus, and Regulating Judicial Procedure in Certain Cases, ch. 81, § 1, 12 Stat. at 755.

⁶² *Ex parte Merryman*, 17 F. Cas. at 148.

⁶³ *Id.*

⁶⁴ An Act Relating to Habeas Corpus, and Regulating Judicial Procedure in Certain Cases, ch. 81, § 1, 12 Stat. 755. At this time, President Lincoln had already been detaining thousands of prisoners on suspicion of disloyalty since the beginning of the Civil War. Tyler, *supra* note 47, at 638.

⁶⁵ An Act Relating to Habeas Corpus, and Regulating Judicial Procedure in Certain Cases, ch. 81, § 2, 12 Stat. at 755.

prisoners were held.⁶⁶ Moreover, the Act provided that prisoners were to be discharged if a court having jurisdiction over the prisoner convened a grand jury and failed to indict the prisoner.⁶⁷ An order for discharge was enforceable against any officer of the United States and a delay or refusal of discharge was punishable under the discretion of the court.⁶⁸ This built-in review suggests that Congress was concerned about prisoners being held indefinitely without sufficient grounds to bring charges against them.⁶⁹ These safeguards suggest a reluctance to grant broad powers to the executive branch and a refusal to eliminate checks and balances altogether, even amid a grant of suspension power to the executive.⁷⁰

In the middle of a rebellion, the courts never challenged this congressional grant of suspension power to the executive, although the text of the Suspension Clause does not explicitly state whether Congress has the authority to grant its suspension powers to another branch.⁷¹ In 1819, the U.S. Supreme Court in *M'Culloch v. Maryland* stated that Congress could authorize the Executive to suspend habeas corpus.⁷² Chief Justice Marshall, writing for the majority, held that Congress must be granted the discretion to perform its duties in a manner which benefits the people, without being unnecessarily restrained by the courts.⁷³ With an ongoing civil war, Congress's Act of March 3, 1863 was likely to be

⁶⁶ *Id.*

⁶⁷ *Id.* The Act specified that where a grand jury attended any of the courts having jurisdiction and ended its session without finding an indictment or presentment, or other proceeding against the prisoner, it was the duty of the judge in that court to order the prisoner before the court. *Id.* Once brought before the court, it was then the judge's duty to discharge the prisoner from imprisonment. *Id.* No exact time-table was given for this safeguard other than the requirement that once a grand jury session was held, any prisoners against whom an indictment had not been obtained when the session terminated were to be discharged. *See id.* This could suggest Congress's belief that once a grand jury could be convened, the exigencies of war no longer weighed heavily enough to eliminate the due process that habeas corpus provides. *See id.*

⁶⁸ *Id.* Refusal to comply with an order to discharge the prisoner was punishable as a misdemeanor, with a penalty of a "fine not less than five hundred dollars and imprisonment in the common jail for a period not less than six months, in the discretion of the court." *Id.*

⁶⁹ *See id.*

⁷⁰ *See id.* This idea echoes Chief Justice Taney's concerns in *Ex parte Merryman*. *See* 17 F. Cas. at 148.

⁷¹ U.S. CONST., art. I, § 9, cl. 2.

⁷² 17 U.S. (4 Wheat) 316, 421 (1819). If a challenge had emerged during the Civil War, the courts may have cited Chief Justice Marshall's opinion in *M'Culloch* as evidence that Congress was well within its power to authorize such a suspension. *See id.*

⁷³ *See id.*

considered an example of this kind of discretion.⁷⁴ There may, however, be circumstances which may not meet the meaning of rebellion or invasion and might spur courts to consider whether the suspension was “legitimate” and “within the scope of the constitution.”⁷⁵ In these circumstances, courts may draw upon a standard of review that parallels the one used to review the war powers, given the review of war powers actions by previous Supreme Courts, or examples of courts reigning in congressional discretion by protecting individual rights.⁷⁶

In 1946 the U.S. Supreme Court heard *Duncan v. Kahanamoku* and considered the question of what degree of deference should be afforded to the political branches when exercising war powers, namely the decision to declare martial law.⁷⁷ The case centered upon a Hawaiian law that authorized the Governor of Hawaii to suspend the writ of habeas corpus in case of actual or threatened rebellion or invasion when the public safety required it, as well as ask for military aid and establish military tribunals under certain circumstances.⁷⁸ Following the attacks on Pearl Harbor in 1941, the Governor exercised this power and also created military tribunals to take the place of the courts in certain areas.⁷⁹ These tribunals operated outside the rules of evidence and procedure of civilian courts.⁸⁰ Lloyd C. Duncan was a civilian shipfitter working in a Navy yard in Honolulu in 1944 when he got in a fight with two Marines at the yard.⁸¹ Civilian courts were still forbidden from try-

⁷⁴ See An Act Relating to Habeas Corpus, and Regulating Judicial Procedure in Certain Cases, ch. 81, § 1, 12 Stat. 755, 755 (1863); *M'Culloch*, 17 U.S. (4 Wheat) at 421. The Act Relating to Habeas Corpus explicitly referred to the ongoing rebellion and stated that the suspension would continue so long as the President deemed it necessary and the rebellion continued. See Act Relating to Habeas Corpus, and Regulating Judicial Procedure in Certain Cases, ch. 81, § 1, 12 Stat. at 755.

⁷⁵ *Ex parte Merryman*, 17 U.S. at 421.

⁷⁶ Tyler, *supra* note 4, at 409.

⁷⁷ See 327 U.S. at 318–19. *Duncan* can be viewed as both a deferential case, given its explanation of the typical standard that should be applied to acts like suspension or martial law, as well as a more searching standard of review case. See *id.* Interpreting *Duncan's* approach as applying strict scrutiny is discussed below. See *infra* notes 97–102 and accompanying text.

⁷⁸ *Duncan*, 327 U.S. at 315; see Hawaii Organic Act, ch. 339, § 67, 31 Stat. 141 (1900). At the time of the case, suspension of habeas corpus was not in effect, but civilian courts were bypassed by military tribunals. See *Duncan*, 327 U.S. at 312.

⁷⁹ *Duncan*, 327 U.S. at 308.

⁸⁰ *Id.*

⁸¹ *Id.* at 310. This case was appealed to the Supreme Court along with a companion case, *White v. Steer*, 146 F.2d 576 (9th Cir. 1944). Harry E. White was a stockbroker in Honolulu who was arrested by military police and charged with embezzling stocks in August of 1942. *Duncan*, 327 U.S. at 309–10. White was sentenced before a military tribunal and subsequently challenged the power of the military tribunal to try him. *Id.* at 310.

ing criminal prosecutions for violations of military orders more than two years after the attacks on Pearl Harbor, and Duncan was sentenced to prison by military tribunal.⁸² Duncan challenged the power of the military tribunal to try him by filing a writ of habeas corpus in the U.S. District Court for the District of Hawaii.⁸³ On appeal to the Supreme Court, the government conceded that suspension of habeas corpus was not still in effect, yet argued military tribunals had been authorized by Congress in section 67, chapter 339 of the Hawaii Organic Act.⁸⁴

The Court concluded that Congress did not intend section 67 to subject civilians to military orders and trial by military tribunal, despite acknowledgment that the executive is typically given broad deference in the exercise of war powers.⁸⁵ Section 67, the Court reasoned, was only intended to authorize actions to maintain order and provide for defense amid an “actual or threatened rebellion or invasion,” and was never meant to circumvent the courts by military tribunals for longer than circumstances required.⁸⁶ Justice Stone, concurring, acknowledged that the executive branch generally has broad discretion to determine when the public safety is endangered to a degree which requires the imposition of martial law and using it to meet the current needs.⁸⁷ Justice Stone underscored the majority’s conclusion by emphasizing that the Court’s review was focused not on the executive’s decision that sufficient exigencies existed to declare martial law, but on the military’s judgment that its actions were within the bounds of martial law.⁸⁸

The view in *Duncan* that the political branches should be accorded deferential scrutiny in the exercise of war powers, or other discretionary measures during exigent circumstances, has deep roots in precedent.⁸⁹ Although expressing the view that these cases should be subject to judicial review, commentators have noted that the review has gravitated towards a deferential standard that grants “extraordinary” deference to the political branches in light of the delicate nature of matters

⁸² *Duncan*, 327 U.S. at 310–11.

⁸³ *Id.* at 311.

⁸⁴ *Id.* at 312.

⁸⁵ *See id.* at 324.

⁸⁶ *Id.*

⁸⁷ *See id.* at 335 (Stone, J., concurring).

⁸⁸ *Duncan*, 327 U.S. at 335 (Stone, J., concurring).

⁸⁹ Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 241–42 (2002); *see Duncan*, 327 U.S. at 335 (Stone, J., concurring).

like national security, foreign affairs, and political issues.⁹⁰ As previously noted, the Court in *M'Culloch* was clearly concerned about the judicial branch overstepping its bounds in reviewing the “necessity” of actions taken under the Necessary and Proper Clause of the Constitution.⁹¹ The Court refused to determine whether a national bank was “necessary and proper” under Section 9 of Article I of the Constitution since the analysis looked like second-guessing of the political branches.⁹² Fearing this would lead them to “tread on legislative ground,” the Court focused not on whether the proper degree of necessity was met, but rather on whether Congress had the power in general.⁹³ Finding that they did, the Court inquired no further.⁹⁴

The Court in *Luther v. Borden* addressed a more complex separation of powers issue, but came to a similar conclusion regarding deference to the political branches.⁹⁵ The Court pointed to the Constitution, which authorizes Congress to decide the established government in a state.⁹⁶ The Court went on to consider the power of the Executive to call on the militia to suppress an insurrection when the President deems a crisis exists that merits this action.⁹⁷ It determined that because Congress had given the President the sole authority to determine whether such exigencies existed, the President had the authority to determine which government was effective.⁹⁸ Once the political branches had determined which state government was valid, the courts had no role in reviewing the decision.⁹⁹ To do so, Justice Taney reasoned, would be to interpret the Constitution as guaranteeing anarchy instead of order.¹⁰⁰

⁹⁰ See Robert J. Pushaw, Jr., *Judicial Review and the Political Question: Reviving the Federalist “Rebuttable Presumption” Analysis*, 80 N.C. L. REV. 1165, 1199 (2002).

⁹¹ See 17 U.S. (4 Wheat) at 423.

⁹² U.S. CONST., art. I, § 9; see *M'Culloch*, 17 U.S. (4 Wheat) at 423.

⁹³ See *M'Culloch*, 17 U.S. (4 Wheat) at 423. This idea is likely what a court primarily would rely upon in the event the court applied a deferential standard of review: a refusal to engage in the strict scrutiny approach that questions whether circumstances specifically warrant the exercise of a power that has been granted to the government by the Constitution. See *id.*

⁹⁴ See *id.*

⁹⁵ 48 U.S. 1, 42 (1849); see Pushaw, *supra* note 90, at 1193–94. The case involved a dispute in Rhode Island, beginning in 1841 with the ratification of a new state constitution, as to whether the new state constitution or the old royal charter from colonial days constituted the effective government of the state. *Luther*, 48 U.S. at 36–38.

⁹⁶ U.S. CONST., art. IV, § 4; *Luther*, 48 U.S. at 36–38. Congress never had the opportunity to make this decision because Rhode Island resolved the dispute before the matter reached the federal level. *Luther*, 48 U.S. at 36–38.

⁹⁷ *Luther*, 48 U.S. at 36–38.

⁹⁸ *Id.* at 42.

⁹⁹ See *id.*

¹⁰⁰ *Id.*

B. *A More Searching Review: Viewing Habeas Corpus in the Light of Individual Liberty*

Although these cases provide compelling reasons for a deferential standard of review should Congress determine that a rebellion or invasion merits suspension, others have suggested that the importance of the writ of habeas corpus in ensuring individual liberty supports a strict standard of review.¹⁰¹ This approach reflects the idea that actions by the government that infringe upon fundamental rights granted by the Constitution require the courts to exercise a searching standard of review in order to serve the judicial branch's role in the checks and balances of the government.¹⁰² To a degree, the same cases in which courts express a desire to defer to the discretion of the political branches often express reluctance to let individual liberty be impinged without judicial review.¹⁰³ The courts, however, have at times expressed hesitancy with giving a clear delegation of power to the political branches, because an act like suspension, or the imposition of martial law as discussed in *Duncan*, would be a drastic departure from our political traditions so as to warrant searching judicial review.¹⁰⁴

The Court in *Duncan* undertook a searching review of the imposition of martial law in Hawaii, scrutinizing section 67 of the Hawaii Organic Act and the extent to which the statute intended to permit martial law.¹⁰⁵ The Court was concerned with balancing the exigencies of war with the constitutional guarantee of a fair trial for all citizens and refused to uphold the military trials of the petitioners.¹⁰⁶ The Court noted the historical reluctance of the American people to place the execution of the law solely within the hands of the military, without the oversight of the judicial courts.¹⁰⁷ For example, the Court pointed to the use of

¹⁰¹ See Tyler, *supra* note 4, at 411–12.

¹⁰² *Id.* at 411.

¹⁰³ See *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008); *Duncan*, 327 U.S. at 317; *Ex parte Merryman*, 17 F. Cas. at 148.

¹⁰⁴ See *Boumediene*, 128 S. Ct. at 2275; *Duncan*, 327 U.S. at 317; *Ex parte Merryman*, 17 F. Cas. at 148.

¹⁰⁵ *Duncan*, 327 U.S. at 314–15; see Hawaii Organic Act, Ch. 339, § 67, 31 Stat. 141 (1900).

¹⁰⁶ See *Duncan*, 327 U.S. at 318.

¹⁰⁷ See *id.* at 319–21. The Court referenced the American Revolution in light of its rebellion against a government that attempted to place the military in a superior position of authority to the civil power. *Id.* at 320. The Court referred to the instructions given by the Governor of Massachusetts to troops intervening during Shay's Rebellion in 1787, which specified the military was to “protect the judicial courts . . . ,” “to assist the civil magistrates in executing the laws . . . ,” and to “aid them in apprehending the disturbers.” *Id.* The military commanders were to consider themselves completely and constantly under the

the militia in 1787 during Shay's rebellion and in 1794 during the Whiskey Rebellion, underscoring that the use of troops was never meant to supplant the civilian authorities.¹⁰⁸ Courts provide procedural safeguards that play a crucial role in the government, put in the Constitution to protect liberties valued by the founders.¹⁰⁹ Although the Court did not consider the use of military tribunals in civilian cases to be a suspension, it is noteworthy that the Court used a searching review in determining the degree of deference that should be granted when a government action drastically curtailed individual rights.¹¹⁰

The Court in *Duncan* drew upon precedent such as *Ex parte Milligan*, a U.S. Supreme Court case from 1866 involving a habeas corpus petition.¹¹¹ In *Ex parte Milligan*, a prisoner filed a petition of habeas corpus following the Civil War after he was arrested by military forces, detained in a military prison in Indiana, and sentenced to death by a military commission.¹¹² The prisoner argued that the military commission had no jurisdiction over him because he was residing in a state that was not in rebellion.¹¹³ The Court held that the military commission did not have jurisdiction and noted that the necessary exigencies must exist for the imposition of martial law.¹¹⁴ Martial law must arise not from a threatened rebellion or invasion, but rather from an "actual and present" threat that closes off the courts and leaves the civil authorities unable to perform their duties.¹¹⁵ The Court made it clear that there are situations where martial law is appropriate and it was courts' duty to review whether the circumstances actually existed and whether martial law was confined to the locality of actual war.¹¹⁶ Therefore, in the event a rebellion or invasion takes place, martial law could be needed in one state, yet in another it would lead to mere lawless violence.¹¹⁷ The opinion concluded that these powers are more likely to be abused by the government than the power to regulate commerce or borrow money, and, therefore, the Court was unwilling to give assent by silence when

direction of civil authorities unless opposed by armed forces. *Id.* Similar instructions were given by President Washington during the Whiskey Rebellion in 1794. *Id.* at 321.

¹⁰⁸ See *id.* at 320–21. Justice Murphy, in his concurrence, noted that "[a]bhorrence of military rule is ingrained in our form of government." *Id.* at 325 (Murphy, J., concurring).

¹⁰⁹ *Id.* at 322 (majority opinion).

¹¹⁰ See *id.* at 324.

¹¹¹ *Ex parte Milligan*, 71 U.S. 2, 107 (1866).

¹¹² *Id.*

¹¹³ *Id.* at 108.

¹¹⁴ See *id.* at 126–27.

¹¹⁵ *Id.* at 127.

¹¹⁶ *Id.*

¹¹⁷ *Ex parte Milligan*, 71 U.S. at 127.

the risks of misapplication were higher than those involved with other powers.¹¹⁸

The need for a searching review of a suspension of habeas corpus also stems from the lasting legacy of cases where the courts deferred to the judgment of the political branches during times of war.¹¹⁹ Past injustices, such as the internment of Japanese-American citizens, serve as a poignant reminder of how judicial deference to the judgments of military commanders can lead to serious consequences.¹²⁰ When the courts refuse to address whether the necessity exists to invoke a suspension of habeas corpus, they effectively leave a constitutional issue to a nonjudicial resolution, and allow the political branches to limit individual liberty as they see fit.¹²¹ A decision to defer to the political branches may be easier during conflict, but it becomes less defensible as time goes on.¹²² It is not unreasonable to predict that precedents like the internment of Japanese-American citizens could be applied to the war on terror in deferring to a suspension of habeas corpus amid the dangers of a future terrorist attack.¹²³

¹¹⁸ *Id.* at 141–42. The Court stated it was “unwilling to give [its] assent by silence to expressions of opinion” that seemed likely to result, even unintentionally, in an erosion of the constitutional powers of the government and an increase in the danger to the public during already dangerous circumstances. *Id.* at 142.

¹¹⁹ See, e.g., Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1294 (2004).

¹²⁰ See *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944) (affirming appellant’s conviction for remaining in a “Military Area” contrary to a military order which directed that all persons of Japanese ancestry be excluded from such area); *Hirabayashi v. United States*, 320 U.S. 81, 104–05 (1943) (affirming appellant’s conviction for knowingly disregarding a curfew order imposed by military commanders on persons of Japanese descent in prescribed military areas); Paulsen, *supra* note 119, at 1294; Tyler, *supra* note 4, at 410–11. Justice Murphy, in his dissent in *Korematsu*, underlined the fact that in dealing with a war, a court must give great respect and consideration to the judgment of military authorities, given that the court is ill-equipped to second-guess their decisions. 323 U.S. at 233–34 (Murphy, J., dissenting). Justice Murphy went on to elaborate, however, that the discretion granted to the military must have definite limits, preventing individuals from having their constitutional rights violated because the military claims necessity that has no substance or support. *Id.* at 234.

¹²¹ Tyler, *supra* note 4, at 410 (quoting J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 146 (1988)).

¹²² See *Korematsu*, 323 U.S. at 223–24; Tyler, *supra* note 4, at 410 (quoting Mulhern, *supra* note 121, at 146).

¹²³ Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1043 (2004).

C. *The War on Terror: Majorities, Pluralities, Dissents, and a Lack of Consensus on a Standard*

The specter of the war on terror has renewed the importance of discussing judicial review of a possible suspension of habeas corpus.¹²⁴ The nation has not experienced a suspension of habeas corpus arising out of the war on terror, yet current cases have hinted at whether such an act would be reviewable and to what extent.¹²⁵ Whether or not the war on terror cases can be viewed as advocating a role for the courts in the event of a suspension is debatable, but they provide insight into the role of the courts and how a suspension of habeas corpus may arise today.¹²⁶ Specifically, both *Hamdi v. Rumsfeld* in 2004 and *Boumediene v. Bush* in 2008 are noteworthy cases in this area because they contain support for both a deferential standard and a more searching standard.¹²⁷

Yaser Esam Hamdi was captured in 2001 by the Northern Alliance in Afghanistan and turned over to the U.S. military, who transferred him to the U.S. naval base in Guantanamo Bay, Cuba in early 2002.¹²⁸ Upon learning that he was an American citizen, the military transferred Hamdi to a naval brig in Norfolk, Virginia and later to a brig in Charleston, South Carolina.¹²⁹ Hamdi's father filed a habeas petition on his behalf under 28 U.S.C. § 2241.¹³⁰ He challenged the legality of the detention of a U.S. citizen as an "enemy combatant" and the due process owed to this kind of prisoner.¹³¹ The U.S. Supreme Court held that even though Congress had authorized the detention of combatants in certain circumstances, Hamdi had not been granted the due process required under the law.¹³²

The majority in *Hamdi* noted that it has only been in rare circumstances that Congress has decided it was appropriate to suspend the

¹²⁴ Tyler, *supra* note 4, at 335.

¹²⁵ See *Boumediene*, 128 S. Ct. at 2263; *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004).

¹²⁶ See Tyler, *supra* note 4, at 338.

¹²⁷ *Boumediene*, 128 S. Ct. at 2263; *Hamdi*, 542 U.S. at 525.

¹²⁸ *Hamdi*, 542 U.S. at 510.

¹²⁹ *Id.*

¹³⁰ *Id.* at 511.

¹³¹ *Id.* at 509; see Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

¹³² *Hamdi*, 542 U.S. at 538. Specifically, the Court found that despite the powers granted under the Authorization for Use of Military Force ("AUMF"), due process requires that a U.S. citizen held within the United States as an enemy combatant be given a "meaningful opportunity" to argue against the basis for his characterization as an enemy combatant before a neutral judge or other decisionmaker. Authorization for Use of Military Force, 115 Stat. at 224; *Hamdi*, 542 U.S. at 535-39.

writ.¹³³ Absent a suspension, the writ remains in place as a check on the executive to ensure that individuals are only detained according to the law.¹³⁴ Although this does not provide much of a basis for furthering the analysis of judicial review of suspension, Justice Scalia provided further ideas in his dissent.¹³⁵ Justice Scalia began by noting that the exigencies of war, such as threats posed to civilians and widespread conflict, may prevent a citizen accused of wrongful actions by the government from receiving full due process.¹³⁶ To enable this, the Suspension Clause allows Congress to authorize the usual protections to be suspended temporarily in the interest of public safety.¹³⁷ Justice Scalia's dissent, citing *Youngstown Sheet & Tube Co. v. Sawyer*, noted that the Suspension Clause was designed to be a safety valve, allowing for suspension, "but limiting the situations in which it may be invoked."¹³⁸ Although Justice Scalia noted that suspension is limited by the Constitution to cases of rebellion or invasion, he asserted that whether events like the September 11, 2001 terrorist attacks qualify as an "invasion" is a question for the legislature, not the courts.¹³⁹ Justice Scalia also noted that whether an attack merits suspension several years later is a question for Congress.¹⁴⁰ This decision, Justice Scalia reasoned, must be done openly and democratically rather than through the judicial branch.¹⁴¹

Judicial review of a suspension of habeas corpus arose again, albeit indirectly, in the Supreme Court's decision of *Boumediene* in 2008.¹⁴² The appeal came before the U.S. Supreme Court as consolidated cases brought by foreign nationals detained as enemy combatants at the U.S. naval base in Guantanamo Bay, Cuba.¹⁴³ The central issue was whether the writ of habeas corpus was in force at the Guantanamo Bay base.¹⁴⁴ If the writ was in force at Guantanamo, the next question was whether the Military Commissions Act ("MCA") provided an adequate substitute for

¹³³ *Hamdi*, 542 U.S. at 525. Although the case presented a number of important issues, including the power of the executive to detain citizens as "enemy combatants," the case is only relevant to this discussion for its views on the possibility of suspension. *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 554 (Scalia, J., dissenting).

¹³⁶ *See id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 562 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring)).

¹³⁹ *Hamdi*, 542 U.S. at 578 (Scalia, J., dissenting).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *See* 128 S. Ct. at 2271.

¹⁴³ *Id.* at 2240.

¹⁴⁴ *Id.*

the procedures granted by habeas corpus in light of the fact that the MCA denies federal courts jurisdiction to hear habeas corpus actions by enemy combatants held there.¹⁴⁵ The Court determined the Suspension Clause has full effect at Guantanamo Bay.¹⁴⁶ These issues were crucial to the case, but *Boumediene* is most useful in this discussion for its consideration of suspension of habeas corpus arising out of the war on terror.¹⁴⁷

Justice Kennedy, writing for the majority, stated that prior case law does not contain extensive analysis of standards that define appropriate suspension of the writ or full descriptions of circumstances under which the writ has been suspended.¹⁴⁸ The Court interpreted this ambiguity to reflect the fact that Congress has taken care throughout history to ensure that the writ and its function of guarding individual liberty is protected, noting that the majority of the statutes passed regarding habeas corpus have strengthened, rather than limited, it.¹⁴⁹ The Court noted that there was a lack of prudential barriers to review habeas corpus under the circumstances, concluding that the jurisdictional bar of habeas corpus claims by the detainees was unconstitu-

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 2262. The Court determined that the Suspension Clause has full effect at Guantanamo Bay, noting that the individuals were detained by executive order during what is now the longest military conflict in the nation's history and held in a territory "under the complete and total control of our Government." *Id.* Addressing the issues of whether the writ travels to that geographical location and to foreign nationals being detained there is outside the scope of this Note. Moreover, the Court's discussion of "the requisites for an adequate substitute for habeas corpus" is also outside the scope of this Note, although the Court's decision to engage in a searching judicial review of whether the MCA was an adequate substitute may suggest something about their willingness to review suspension issues. *See id.*

¹⁴⁷ *See id.* at 2275. The Court held that the MCA § 7 amounted to an unconstitutional suspension of the writ in light of the fact that by retroactively applying the Detainee Treatment Act ("DTA"), the detainee's did not have access to adequate statutory review through the appeal process upon a decision by a Combat Status Review Tribunal ("CSRT") due to the length of time necessary to obtain review. *Id.* at 2266. The Court noted that "[b]y foreclosing consideration of evidence not presented or reasonably available to the detainee at the CSRT proceedings, the DTA disadvantages the detainee by limiting the scope of collateral review to a record that may not be accurate or complete." *Id.* at 2273. This was especially important in a setting where "the underlying detention proceedings lack the necessary adversarial character." *Id.*

¹⁴⁸ *Boumediene*, 128 S. Ct. at 2263.

¹⁴⁹ *Id.*; *cf.* *Harris v. Nelson*, 394 U.S. 286, 299–300 (1969) (interpreting the All Writs Act, 28 U.S.C. § 1651 (2006) to allow discovery in habeas corpus proceedings); *Peyton v. Rowe*, 391 U.S. 54, 64–65 (1968) (interpreting the then-existing version of 28 U.S.C. § 2241 to allow petitioner to proceed with his habeas corpus action, even though he had not yet begun to serve his sentence).

tional.¹⁵⁰ The Court differentiated between situations where a prisoner had just been captured and the one at hand, where detainees had been held for up to six years without the right to habeas corpus or a judicially-adequate substitute.¹⁵¹ Given the amount of time that had passed, the Court could find no justification for deeming temporary procedures adequate.¹⁵²

The constant and unabated nature of terrorist attacks likely influenced the Court's refusal to allow prudential considerations to bar review for a long period of time.¹⁵³ The Court noted that, despite the nature of the threat of terrorism, practical considerations must be made in determining whether the necessary exigent circumstances exist.¹⁵⁴ The fact that this threat would not likely subside had to be viewed alongside the fact that some of the cases on appeal had been without the judicial oversight that habeas corpus provides for over six years.¹⁵⁵ This length of time meant the threat of terrorist attacks did not outweigh the practicality of making the detainees wait even longer to present their case before a neutral decisionmaker.¹⁵⁶

Justice Scalia, writing a separate dissent in *Boumediene*, discussed the dangers terrorism poses to the nation and the difficulty the nation faces in protecting itself from these acts.¹⁵⁷ The Court's decision, Justice Scalia reasoned, leaves military commanders with an impossible task: proving to a court of civilians, under unknown standards yet to be determined by the Court, that the evidence supports the detention of every prisoner the United States captures in the war on terror.¹⁵⁸ Justice

¹⁵⁰ *Boumediene*, 128 S. Ct. at 2275.

¹⁵¹ *See id.*

¹⁵² *See id.*

¹⁵³ *See id.* at 2274–75.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 2275.

¹⁵⁶ *Boumediene*, 128 S. Ct. at 2274–75.

¹⁵⁷ *See id.* at 2294 (Scalia, J., dissenting). Justice Scalia points to a number of examples of detainees returning to the battlefield upon release from military facilities to underscore the unique threat terrorism presents. *Id.* at 2294–95. This point relies upon a Senate report from 2007 detailing the minority views of Senators Kyl, Sessions, Graham, Cornyn, and Coburn. *Id.* at 2295 (citing S. REP. No. 110-90, pt. 7, at 13 (2007)). This report states that a dozen released detainees have been killed in battle by U.S. forces, while others have been recaptured, including two who became regional commanders for the Taliban and another who later attacked U.S. and allied soldiers in Afghanistan. S. REP. No. 110-90, pt. 7, at 13. The Senate minority report points to news stories to substantiate these claims. *See* John Mintz, *Released Detainees Rejoining the Fight*, WASH. POST, Oct. 22, 2004, at A01; David Morgan, *U.S. Divulges New Details on Released Gitmo Inmates*, REUTERS, May 14, 2007, available at <http://www.alertnet.org/thenews/newsdesk/N14322791.htm>.

¹⁵⁸ *Boumediene*, 128 S. Ct. at 2307 (Scalia, J., dissenting).

Scalia noted that the Court, in deciding that the writ traveled to Guantanamo Bay, broke with strong precedent, including the common law prohibition of judicial review of aliens detained abroad in circumstances lacking statutory authorization.¹⁵⁹ This deferential stance to the political branches emphasized the difficulties the nation faces in waging a war on terror and the need to give the political branches the necessary deference in determining how best to combat the threat.¹⁶⁰

III. A FORK IN THE ROAD: WEIGHING WAR'S EXIGENCIES AGAINST THE LIBERTY OF INDIVIDUALS

Two competing views on judicial review of habeas corpus arise from statutes, cases, and commentators.¹⁶¹ On one hand, strong support exists for viewing a suspension of habeas corpus similar to an exercise of the war powers, warranting deference to the political branches.¹⁶² This approach places a suspension along the lines of the imposition of martial law during an extreme circumstance and underscores the need for the political branches to have flexibility during dangerous times.¹⁶³ The result would be a limited review that would only correct the most unfounded interpretations of the Suspension Clause by Congress.¹⁶⁴

On the other hand, the role of habeas corpus in preserving fundamental individual rights may influence a court to play a larger role in reviewing a suspension of habeas corpus.¹⁶⁵ A court may reason that habeas corpus holds importance and value, chiefly the ability to question the basis of one's detention, and that its suspension should be afforded more review.¹⁶⁶ Review may be important even during trying circumstances.¹⁶⁷ The result would be a more searching judicial review which would question whether a rebellion or invasion exists and, if so,

¹⁵⁹ *Id.* Justice Scalia referred to the history of the writ in England to show that the writ would not have been available at common law for aliens captured and held outside the sovereign territory of the Crown. *Id.* at 2305. Based upon this, Justice Scalia reasoned that the text of the Constitution should be given the meaning as it was understood at its adoption, namely that the framers would not have considered the writ available for aliens captured and held outside of the United States' sovereign territory. *See id.* at 2303.

¹⁶⁰ *See id.* at 2296.

¹⁶¹ *See* Tyler, *supra* note 4, at 408; *supra* notes 39–151 and accompanying text.

¹⁶² *See* Tyler, *supra* note 4, at 409.

¹⁶³ *See* Luther v. Borden, 48 U.S. 1, 42 (1849); Tyler, *supra* note 4, at 409.

¹⁶⁴ *See* Tyler, *supra* note 4, at 409.

¹⁶⁵ *See id.* at 411.

¹⁶⁶ *See* Boumediene v. Bush, 128 S. Ct. 2229, 2277 (2008); Tyler, *supra* note 4, at 411.

¹⁶⁷ *See, e.g.,* Duncan v. Kahanamoku, 327 U.S. 304, 324 (1946). These "trying circumstances" assume that events that would meet an "invasion or rebellion" would place the country in a conflict that threatened it. *See id.*

whether the public safety requires that habeas corpus be suspended.¹⁶⁸ Then again, a court may find itself drawn to a middle ground that examines the indefinite nature of the suspension and whether the courts are truly inaccessible, especially if the court has to make a decision amidst extreme controversy.¹⁶⁹

The circumstances surrounding a suspension of habeas corpus could play a major role in determining what standard a court would apply.¹⁷⁰ A series of fact patterns can be used to shed light on how an analysis might be shaped.¹⁷¹ The first fact pattern explores the courts' role in reviewing a traditional exercise of the Suspension Clause by Congress amid an invasion from a foreign nation.¹⁷² The second fact pattern examines how the court might have reacted if Congress had suspended the writ of habeas corpus following the terrorist attacks of September 11, 2001.¹⁷³ The last fact pattern explores how the analysis might change if a suspension dragged on for a significant period of time.¹⁷⁴

A. Traditional Deference Amid Rebellion or Invasion

A suspension of the writ of habeas corpus has historically occurred under circumstances that easily meet the definition of a rebellion or invasion, and a court today could find itself faced with a similar circumstance.¹⁷⁵ Suppose, for example, that the nation faces not just a threat-

¹⁶⁸ See Tyler, *supra* note 4, at 411. This is the internal limitation focused on in this Note, as opposed to the external limitation noted by Tyler which would determine whether other constitutional limitations apply to a suspension of habeas corpus, and if so, what standard of review should be applied. See *id.* at 408. The examination of a standard of review for external limitations would be markedly different because a court would have prior precedent to rely upon in analyzing these constitutional provisions, such as the case law analyzing infringement of the Fourth Amendment protection against unreasonable search or seizures, or the Eighth Amendment prohibition against cruel and unusual punishment. See U.S. CONST., amends. IV, VIII; Tyler, *supra* note 4, at 408 (citing David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 64 (2006)).

¹⁶⁹ See Tyler, *supra* note 4, at 412; Marinelli, *supra* note 27, at 707.

¹⁷⁰ See *Duncan*, 327 U.S. at 335 (Stone, J., concurring); Tyler, *supra* note 4, at 409–12. The Court in *Boumediene* noted a significant difference between a scenario in which a prisoner was recently captured and a scenario in which a prisoner spent years without appropriate due process. See 128 S. Ct. at 2275.

¹⁷¹ See *Boumediene*, 128 S. Ct. at 2275; *infra* notes 175–256 and accompanying text.

¹⁷² See *infra* notes 175–204 and accompanying text.

¹⁷³ See *infra* notes 205–238 and accompanying text.

¹⁷⁴ See *infra* notes 238–265 and accompanying text.

¹⁷⁵ See, e.g., Hawaii Organic Act, Ch. 339, § 67, 31 Stat. 141 (1900); An Act Relating to Habeas Corpus, and Regulating Judicial Procedure in Certain Cases, ch. 81, § 1, 12 Stat. 755 (1863).

ened invasion, but an actual invasion by a foreign country.¹⁷⁶ Foreign troops are on American soil and Congress passes a statute authorizing the President to suspend habeas corpus whenever the public safety requires it in a state that has been invaded or threatened by invasion.¹⁷⁷ The President, in turn, authorizes the military to hold anyone arrested by American forces within such a jurisdiction without affording them the opportunity to present their case before a civilian court or to petition a court for the writ of habeas corpus.¹⁷⁸ This authorization, however, comes with certain limitations imposed by Congress, similar to limitations found in the suspension passed during the Civil War, requiring the military to provide to circuit and district courts the names and dates of arrest of those detained.¹⁷⁹ A limited form of judicial review is built into the suspension by requiring a court in session with jurisdiction over a prisoner to convene a grand jury to indict the prisoner.¹⁸⁰ Failure to obtain an indictment would lead to an order to discharge the prisoner.¹⁸¹

Following this suspension of habeas corpus, suppose an American citizen is arrested for looting in a state which borders a state actively involved in conflict, yet is not itself currently occupied by any enemy forces.¹⁸² The looter's state, however, is in disarray due to the perceived threat by many that enemy troops could enter the state at any time.¹⁸³ The citizen is held by military forces without the right to protest his detainment.¹⁸⁴ Based upon these circumstances, a court decides to hear a petition for habeas corpus due to the citizen's challenge that Congress does not have the authority to suspend habeas corpus in a state which is

¹⁷⁶ See *Duncan*, 327 U.S. at 304–05. In this case, the invasion was threatened rather than ongoing at the time of the arrests in question. See *id.*

¹⁷⁷ See An Act Relating to Habeas Corpus, and Regulating Judicial Procedure in Certain Cases, ch. 81, § 1, 12 Stat. at 755. Assume that the statute authorizing suspension specifies terms similar to that of the suspension during the Civil War discussed above in Part II. See *supra* notes 64–70 and accompanying text.

¹⁷⁸ See An Act Relating to Habeas Corpus, and Regulating Judicial Procedure in Certain Cases, ch. 81, § 1, 12 Stat. at 755.

¹⁷⁹ See *id.* This would mirror the suspension during the Civil War; the writ would remain suspended, but under the statute authorizing suspension, prisoners would be entitled to certain specified due process when a court in that jurisdiction is in session. See *id.*

¹⁸⁰ See *id.*

¹⁸¹ See *id.* The requirement of an indictment assumes that a court is in session within the jurisdiction in question. See *id.*

¹⁸² See *Ex parte Milligan*, 71 U.S. 2, 108 (1866); *Ex parte Merryman*, 17 F. Cas. 144, 147 (C.C.D. Md. 1861).

¹⁸³ See *Ex parte Milligan*, 71 U.S. at 108; *Ex parte Merryman*, 17 F. Cas. at 147.

¹⁸⁴ See *Ex parte Milligan*, 71 U.S. at 108; *Ex parte Merryman*, 17 F. Cas. at 147.

not actually being invaded by enemy troops.¹⁸⁵ The court is faced with the dilemma of whether it should apply a deferential standard of review in light of the circumstances, or apply a more searching review in light of the fact that an American citizen is being held without the right to challenge his detention.¹⁸⁶

The argument for a deferential standard has strong precedent supporting it, such as the Court's view in *Ex parte Bollman* that the legislature is to decide whether the public safety requires the suspension of habeas corpus.¹⁸⁷ Under this view, Congress would be viewed as having full authority to decide whether the writ should be suspended.¹⁸⁸ So long as the government could point towards some circumstances which they deem to meet the definition of an invasion or rebellion, the court would not question Congress's judgment.¹⁸⁹ This is based upon the notion that the political branches should be accorded deferential scrutiny during times of war.¹⁹⁰ Much like the war powers, the Constitution allows the political branches to exercise their judgment during conflict in order to ensure the nation's safety.¹⁹¹ Applied to this fact pattern, under a deferential approach, the court would not inquire into whether suspension of habeas corpus was appropriate in the state that was only threatened with invasion.¹⁹² The decision to suspend the writ is, according to this view, clearly delegated to the political branches in order to ensure that a suspension is done in an open and democratic manner.¹⁹³ Because Congress determined that the threat of invasion was great enough to suspend the writ, even in states that had not actually been invaded yet, the court would not review whether this decision was cor-

¹⁸⁵ See *Ex parte Milligan*, 71 U.S. at 108; *Ex parte Merryman*, 17 F. Cas. at 147.

¹⁸⁶ See Tyler, *supra* note 4, at 408.

¹⁸⁷ 8 U.S. (4 Cranch) 75, 101 (1807).

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*

¹⁹⁰ See *Boumediene*, 128 S. Ct. at 2296 (Scalia, J., dissenting); *Duncan*, 327 U.S. at 335 (Stone, J., concurring). Justice Stone notes that the goal of an action like the imposition of martial law is to preserve public safety and order. *Duncan*, 327 U.S. at 335 (Stone, J., concurring). Based upon this, the goals themselves will define the scope of the action; the actions will only last as long as the circumstances that necessitate them. See *id.* Only when it is clear that the requisite circumstances exist—in that case the threat of rebellion or invasion that forecloses civilian courts—should the courts refuse to intervene. See *id.* The burden of proof on the government, however, seems fairly low according to this argument, specifically that the government be able to point to circumstances that “fairly suggest” such a threat exists. See *id.*

¹⁹¹ See *Duncan*, 327 U.S. at 335 (Stone, J., concurring); *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944).

¹⁹² See *Ex parte Milligan*, 71 U.S. at 108.

¹⁹³ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 578 (2004) (Scalia, J., dissenting).

rect.¹⁹⁴ This is in contrast with an approach that focuses on habeas corpus' value in protecting individual liberties.¹⁹⁵

In 1946, the U.S. Supreme Court in *Duncan v. Kahanamoku* recognized that the political branches are typically granted deference when deciding issues such as the exercise of war powers, yet there still may be a need for judicial review of these decisions.¹⁹⁶ A court, influenced by that decision, may inquire into whether Congress truly intended to suspend the writ in a state that had not been invaded.¹⁹⁷ A court may be spurred to apply a more searching judicial review by focusing on the idea that suspension is authorized only if the circumstances warrant it, and if it ignored this premise, it would allow the political branches to suspend the writ wherever they deemed fit.¹⁹⁸ Under this approach, a court would be less deferential and could find that Congress did not intend to authorize a suspension in this case.¹⁹⁹

In light of the circumstances, it is likely that a court would adopt a view similar to Justice Marshall's in *Ex parte Bollman* and apply a deferential standard to whether the suspension was appropriate.²⁰⁰ Faced with an invading army on American soil, the political branches would be too restricted by the courts if the courts were to scrutinize the decision to suspend the writ.²⁰¹ Moreover, a broad suspension arising directly out of a conflict would make it hard for a court to argue that the suspension, as applied, was not what Congress intended.²⁰² The Suspension Clause was designed to provide Congress with the means for suspending the writ of habeas corpus in a situation like war, when it is unrealistic to expect the government to be able to afford individuals

¹⁹⁴ See *id.*; *Ex parte Milligan*, 71 U.S. at 108.

¹⁹⁵ See Tyler, *supra* note 4, at 411.

¹⁹⁶ See 327 U.S. at 324.

¹⁹⁷ See *id.*

¹⁹⁸ See *id.*

¹⁹⁹ See *id.*

²⁰⁰ See 8 U.S. (4 Cranch) at 101.

²⁰¹ See *id.* Justice Scalia raises this point in his dissent in *Boumediene*, expressing concern that military commanders will be overburdened with an impossible task if they are forced to provide evidence supporting the confinement of every prisoner at a time when the political branches expressly stated they would not have to in light of the circumstances. See 128 S. Ct. at 2307 (Scalia, J., dissenting).

²⁰² See *Duncan*, 327 U.S. at 324. The statute in *Duncan* had been passed in the U.S. Territory of Hawaii over forty years before the provisions were exercised, giving a basis for the Court to determine that Congress had not intended the statute to be used in the manner it was used. *Id.* In this fact pattern, the statute would have been specifically drafted to fit the circumstances, making it markedly different from *Duncan* since Congress's statute is created in the same timeframe as the exigencies it is meant to address. See *id.*

full due process under the law.²⁰³ The application of a deferential review, however, seems predicated upon a court's interpretation of the circumstances surrounding the suspension itself, or at minimum, the assurance that suspension is a temporary solution.²⁰⁴

B. *A New World: The War on Terror and Its Lessons*

Following the events of September 11, 2001, some commentators have suggested that the Bush administration made requests to Congress to suspend the writ of habeas corpus.²⁰⁵ The administration could have been successful in this effort, given the circumstances at the time, even if they did not in fact make such a request.²⁰⁶ The Suspension Clause can be viewed as a safety valve that enables Congress to limit the due process granted to detainees when the exigencies of a conflict would make it too burdensome.²⁰⁷ The events of September 11, 2001 provided a compelling argument that such exigencies existed given the gravity and harm of the attacks.²⁰⁸ In fact, the statutes passed to deal with detainees in the war on terror and the ensuing litigation surrounding them provide a basis for examining what a suspension of habeas corpus might have looked like if it had come to pass.²⁰⁹

The Authorization for Use of Military Force ("AUMF") passed shortly after September 11, 2001, and gave the President the authority to use necessary force against any person determined to have "planned, authorized, committed, or aided the terrorist attacks."²¹⁰ Suppose that instead of only authorizing military force, the AUMF had also authorized the President to suspend the writ of habeas corpus to all suspected

²⁰³ See U.S. CONST., art. I, § 9, cl. 2; *Boumediene*, 128 S. Ct. at 2307 (Scalia, J., dissenting).

²⁰⁴ See *Duncan*, 327 U.S. at 335 (Stone, J., concurring).

²⁰⁵ See Tyler, *supra* note 4, at 334; Jonathan Alter, *Keeping Order in the Courts*, NEWSWEEK, Dec. 10, 2001, at 48 ("When Attorney General John Ashcroft sent the secret first draft of the antiterrorism bill to Capitol Hill in October, it contained a section explicitly titled: 'Suspension of the Writ of Habeas Corpus.'"); Steven Brill, *After: How America Confronted the Sept. 12 Era*, NEWSWEEK, Mar. 10, 2003, at 66. Representative James Sensenbrenner, Chairman of the House Judiciary Committee, was quoted as later telling reporters that the section in the anti-terrorism bill entitled "The Suspension of the Writ of Habeas Corpus," "stuck out like a sore thumb. It was the first thing I crossed out." Roland Watson, *Bush Law Chief Tried to Drop Habeas Corpus*, TIMES (London), Dec. 3, 2001, at 14.

²⁰⁶ See Tyler, *supra* note 4, at 334–35. Reports indicate an immediate unwillingness to embrace such action, but commentators have pointed out that Justice Scalia expressly mentioned the possibility in his dissent in *Hamdi*. See 542 U.S. at 578 (Scalia, J., dissenting).

²⁰⁷ See *Hamdi*, 542 U.S. at 578 (Scalia, J., dissenting).

²⁰⁸ See *id.* at 510 (O'Connor, J., announcing the judgment of the Court).

²⁰⁹ See *id.*

²¹⁰ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

terrorists, described in the same manner as those who the AUMF authorized the use of force against.²¹¹ This suspension would apply not only to known terrorists, but also those who the military suspected of involvement.²¹² Suppose following a suspension an American citizen, under circumstances similar to Yaser Esam Hamdi, is detained by military forces and attempts to file a petition of habeas corpus.²¹³ He alleges that the requirement of an invasion or rebellion has not been met and, therefore, the suspension of habeas corpus is invalid.²¹⁴ This would present a court with a unique challenge, balancing the need for the political branches to be granted deference during a time of conflict while also protecting individual liberties.²¹⁵

The arguments for applying a deferential standard to a congressional suspension of the writ of habeas corpus following the September 11, 2001 attacks are clearly stated in Justice Scalia's dissent in *Hamdi v. Rumsfeld*.²¹⁶ Justice Scalia argues that whether the terrorist attacks constitute an "invasion" is for the legislature to decide.²¹⁷ Applying this view to the attacks on September 11, there is a compelling argument that the court should defer to the judgment of the legislature on whether the requirements of the Suspension Clause have been met.²¹⁸ If courts were to scrutinize this decision, the legislature would be hindered much like Justice Scalia argues the military is hindered following the decision in *Boumediene v. Bush*.²¹⁹ During a time when the nation was recovering from a terrorist attack and bracing against the potential of future attacks, Justice Scalia's argument would likely have significant weight in persuading courts that they should not engage in a searching judicial review to determine whether the terrorist attack constituted an invasion.²²⁰

There is historical precedent for the argument that an event like the September 11 attacks demands that courts step aside and respect the separation of powers between the political branches and the judiciary.²²¹ In this situation, Congress has determined that the President

²¹¹ See Tyler, *supra* note 4, at 335.

²¹² See Authorization for Use of Military Force, 115 Stat. at 224.

²¹³ See *Hamdi*, 542 U.S. at 510.

²¹⁴ See *id.*

²¹⁵ See Tyler, *supra* note 4, at 408–12.

²¹⁶ See 541 U.S. at 578 (Scalia, J., dissenting).

²¹⁷ *Id.*

²¹⁸ *Id.*; *Ex parte Bollman*, 8 U.S. (4 Cranch) at 101.

²¹⁹ See 128 S. Ct. at 2307 (Scalia, J., dissenting).

²²⁰ See *id.*; *M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 316, 421 (1819).

²²¹ See *supra* notes 55–160 and accompanying text.

must have the discretion to detain suspected terrorists without entitling them to the writ of habeas corpus, a level of discretion similar to the grant of authority discussed in *Luther v. Borden*.²²² As the Court observed in *Luther*, these determinations may be necessary to maintain order and safety in the nation, and for the courts to second guess that determination would lead to “anarchy.”²²³ This reasoning led Chief Justice Taney in *Ex parte Merryman* to state in dicta that Congress’s judgment in deciding whether suspension was appropriate would be conclusive, despite acknowledging the caution that should be exercised in taking that step.²²⁴ In light of the threat that the nation faced following September 11, 2001, this precedent would make it difficult for a court to apply a more searching standard of judicial review given the high risk that second-guessing the political branches could place the nation in greater danger, stripping the nation of the tools it needs to defend itself.²²⁵

There are arguments, however, that support a more searching judicial review in light of the value of habeas corpus in protecting a person’s fundamental right to protest his or her confinement.²²⁶ A court may reason that it should review whether Congress can grant broad powers to the executive given that the threat from terrorism is ambiguous: the likelihood of an attack is difficult to determine.²²⁷ The issue, however, is whether a court would find fault with Congress’s suspension when it is narrowly focused on known and suspected terrorists.²²⁸ Although the statute in *Duncan* was passed years before the executive action took place in Hawaii, here the statute in question would have been tailor-made to the circumstances.²²⁹ A court, therefore, would have a difficult time scrutinizing the statute; although one could argue, as the Court did in *Ex parte Milligan*, that a threat must be actual and present

²²² See 48 U.S. 1, 36–38 (1849). *Luther* focused on the power to determine the established government in a state and Congress’s grant of authority permitting the executive branch to call up the militia upon the determination that sufficient exigencies existed to require it, in that case the danger of an insurrection against the official government of the state of Rhode Island as determined by Congress. *Id.* at 42. This authority was upheld by the Court in light of the need to maintain order in the state. *See id.*

²²³ *See id.* at 43.

²²⁴ See 17 F. Cas. at 148.

²²⁵ See Tyler, *supra* note 4, at 409.

²²⁶ *See id.* at 411.

²²⁷ See *Boumediene*, 128 S. Ct. at 2274–75.

²²⁸ See *Duncan*, 327 U.S. at 324.

²²⁹ *See id.* at 320. The statute in *Duncan* permitted the application of military orders to citizens and allowed military officials to try them before military tribunals. *See id.*

rather than simply threatened.²³⁰ Given this requirement, a court could be compelled to apply a more searching judicial review of whether the attacks of September 11 truly constituted an invasion and whether the threat of invasion continued afterwards.²³¹

Overall, there is powerful precedent supporting a conclusive judgment by Congress in determining whether the requisite circumstances exist for a suspension of habeas corpus immediately following a terrorist attack.²³² Theoretically, this precedent creates a safety valve, similar to the Suspension Clause itself, for the courts to use in the event the political branches require deference amid an emergency.²³³ This provides a strong argument that a court would have applied a deferential standard of review following a suspension of habeas corpus in the wake of the September 11 attacks—the suspension in this case would be supported by a clear threat and, given its timing, be immune to criticism that it results in indefinite detainment.²³⁴ This result, however, would place individual liberties in the hands of the political branches alone, with trust that the democratic process will ensure that the right decisions are made.²³⁵ The level of deference is similar to that granted in the Japanese-American internment cases during World War II.²³⁶ Amid the exigencies of a war, these steps may be supported by the public.²³⁷ Regardless of how these actions would be viewed in retrospect, there is strong evidence suggesting that a court would be well-grounded, both in case law and public opinion, in granting deference

²³⁰ See 71 U.S. at 27.

²³¹ See *id.*

²³² See *Ex parte Bollman*, 8 U.S. (4 Cranch) at 101; Tyler, *supra* note 4, at 334, 411.

²³³ See Ackerman, *supra* note 123, at 1043; see, e.g., *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944). Ackerson notes that *Korematsu* has never been overruled, and the September 11, 2001 attacks made this relevant. Ackerman, *supra* note 123, at 1043. This provides a key precedent upon which a court could justify a suspension of habeas corpus, but as Ackerson reasons, once the emergency conditions cease to exist the precedent no longer holds value. See *id.*

²³⁴ See Ackerman, *supra* note 123, at 1043.

²³⁵ See *id.*

²³⁶ See *Korematsu*, 323 U.S. at 223–24; *Hirabayashi v. United States*, 320 U.S. 81, 104–05 (1943); Paulsen, *supra* note 119, at 1294. The actions of the executive branch during World War II in detaining Japanese-Americans in internment camps had full congressional authorization and approval by the Supreme Court. See *Korematsu*, 323 U.S. at 223–24; *Hirabayashi*, 320 U.S. at 104–05; Paulsen, *supra* note 119, at 1294. Some commentators have viewed this evidence of the danger posed when the judicial branch grants too much deference to the political branches in determining when necessity requires certain acts, such as suspension or martial law, amid conflict. See Paulsen, *supra* note 119, at 1294; Tyler, *supra* note 4, at 338–39.

²³⁷ See *Korematsu*, 323 U.S. at 223–24; Ackerman, *supra* note 123, at 1043.

to the political branches as to whether the attacks of September 11 constituted an invasion or rebellion.²³⁸

C. Questions of Timing: How Long Can Exigencies Exist?

The exploration of a hypothetical suspension of habeas corpus immediately following the attacks of September 11, 2001 suggests a limited role for the courts in reviewing whether a suspension was appropriate.²³⁹ Suppose, however, that this suspension did not only span the weeks or months following the terrorist attacks, but went on for years.²⁴⁰ The recent decision in *Boumediene*, holding Combatant Status Review Tribunal proceedings inadequate for suspected terrorists detained by the U.S. government, makes it apparent that the war on terror creates threat and detention issues that continue for years.²⁴¹ Moreover, the very nature of terrorism as a constant and unrelenting threat to the nation could lead the political branches to argue that the suspension of habeas corpus is as necessary today as it was on September 12, 2001.²⁴² When the factor of time is added to the equation, a court's role in reviewing a suspension may change.²⁴³

Suppose that the AUMF authorized the continued suspension of the writ of habeas corpus to all known and suspected terrorists in the years after the September 11 attacks.²⁴⁴ This long-standing suspension would likely have various checks built into it in an effort to establish some substitutes for the due process that habeas corpus affords, much like the suspension arising out of the Civil War and the recent MCA section 7.²⁴⁵ Substitutes like these, combined with the narrow scope of the suspension's applicability, could result in the political branches al-

²³⁸ See *Boumediene*, 128 S. Ct. at 2275.

²³⁹ See *id.*

²⁴⁰ See Ackerman, *supra* note 123, at 1070.

²⁴¹ See 128 S. Ct. at 2274–77 (Scalia, J., dissenting).

²⁴² See *id.* at 2274–75. Justice Scalia reasoned in *Boumediene* that it is unrealistic to expect military commanders to produce evidence in civilian courts that supports the confinement of every enemy prisoner in the war on terror. *Id.* This “unique” attribute of terrorism, as both an ambiguous and ever-present threat, makes it a likely candidate for an extended suspension of habeas corpus. See *id.*

²⁴³ See *id.* at 2275; Ackerman, *supra* note 123, at 1070.

²⁴⁴ See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); *Hamdi*, 542 U.S. at 509; Tyler, *supra* note 4, at 334 (citing Alter, *supra* note 205, at 48); Brill, *supra* note 205, at 73–74.

²⁴⁵ See, e.g., Military Commissions Act of 2006 § 7, Pub. L. No. 109-366, 120 Stat. 2600 (codified at scattered sections of 10, 18, 28, and 42 U.S.C.); An Act Relating to Habeas Corpus, and Regulating Judicial Procedure in Certain Cases, ch. 81, § 1, 12 Stat. 755 (1863).

lowing the suspension to continue for quite some time.²⁴⁶ Suppose, for example, that a prisoner who is detained by the government since the enactment of the suspension in late 2001 challenges the validity of the suspension itself, arguing that sufficient exigencies no longer exist that justify the suspension of habeas corpus and they should be able to file a petition of habeas corpus to challenge the legality of their detention.²⁴⁷ The basis of this argument would be that no terrorist attack has occurred on U.S. soil since 2001 and the threat is no longer “actual and present,” but rather so diminished that it cannot justify a suspension.²⁴⁸ A court would be forced to address whether it is appropriate to apply a searching judicial review to determine if the dangers of a rebellion or invasion still sufficiently exist to justify a suspension of habeas corpus.²⁴⁹

On the one hand, the same justifications for a deferential review that are applied to a short-term suspension enacted on the heels of an attack can be applied to a long-standing suspension.²⁵⁰ According to *Ex parte Bollman*, whether a rebellion or invasion exists is for the legislature to decide.²⁵¹ Under this view, Congress has the power to end the suspension through the democratic process, and the courts should defer to the judgment of the political branches on this issue.²⁵² The fact that Congress can build certain limitations into a suspension may influence a court as well.²⁵³ Despite the fact that the threat of terrorism may continue for years unabated, there are strong arguments for ensuring that the courts do not second-guess the political branches in their assessments of whether the threat to terrorism is any less today than it was on September 18, 2001.²⁵⁴

²⁴⁶ See, e.g., Military Commissions Act of 2006 § 7, Pub. L. No. 109-366, 120 Stat. 2600; An Act Relating to Habeas Corpus, and Regulating Judicial Procedure in Certain Cases, ch. 81, § 1, 12 Stat. at 755.

²⁴⁷ See *Boumediene*, 128 S. Ct. at 2240. This challenge mirrors that of the challenge made by designated enemy combatants in *Boumediene*, except rather than challenging the validity of the MCA, these claimants would be challenging the validity of a suspension of habeas corpus. See *id.*

²⁴⁸ See *Ex parte Milligan*, 71 U.S. at 127.

²⁴⁹ See *id.*; Tyler, *supra* note 4, at 411.

²⁵⁰ See *supra* notes 205–213 and accompanying text.

²⁵¹ 8 U.S. at 101.

²⁵² See *Hamdi*, 542 U.S. at 578 (Scalia, J., dissenting); *Ex parte Bollman*, 8 U.S. at 101.

²⁵³ See, e.g., Military Commissions Act of 2006 § 7, Pub. L. No. 109-366, 120 Stat. 2600 (codified at scattered sections of 10, 18, 28, and 42 U.S.C.); An Act Relating to Habeas Corpus, and Regulating Judicial Procedure in Certain Cases, ch. 81, § 1, 12 Stat. 755 (1863).

²⁵⁴ See Tyler, *supra* note 4, at 410. The AUMF was passed on September 18, 2001 in response to the terrorist attacks on the United States. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); see *Boumediene*, 128 S. Ct. at 2307 (Scalia, J., dissenting); *Korematsu*, 323 U.S. at 223–24.

On the other hand, the length of time a person has been detained without the right to habeas corpus may tip the balance between the need to defer to the political branches and the role judicial review serves in protecting individual liberty.²⁵⁵ As the Court in *Duncan* reasoned, the American people have had a historical reluctance in placing the execution of the law in the hands of the military without ensuring that the courts oversee that the laws are executed faithfully.²⁵⁶ This reluctance, described by the Court in *Ex parte Milligan*, underscores the need for judicial review in determining whether the necessary exigencies still exist for a suspension when such threats may no longer be actual and present.²⁵⁷ Although the Suspension Clause may exist as a safety valve to ensure the protection of the nation during tumultuous times, it is also a dangerous tool capable of crippling the constitutional checks and balances of the government when applied needlessly.²⁵⁸ This suggests a role for the courts in determining whether the Suspension Clause is being abused or used for indefinite detainment of prisoners absent the necessary exigencies of conflict, while acknowledging the courts are poorly equipped to second-guess the legislature on the existence of a rebellion or invasion.²⁵⁹

The recent U.S. Supreme Court decision in *Boumediene* suggests that time may be an important factor in determining when the courts will apply a more searching judicial review.²⁶⁰ In suspension cases, whether the threat that originally justified the suspension has diminished over time could play a major role in determining the role of the courts.²⁶¹ Although the political branches may be afforded deference by the courts when the exigencies of the war on terror make it unrealistic to comply with habeas corpus petitions by suspected terrorists, the longer the detainees are held under a suspension and the further the nation moves temporally from a terrorist attack, the weaker this argu-

²⁵⁵ See Tyler, *supra* note 4, at 410.

²⁵⁶ See 327 U.S. at 319–21.

²⁵⁷ See 71 U.S. at 127.

²⁵⁸ See *Hamdi*, 542 U.S. at 562 (Scalia, J., dissenting). A suspension without end in sight that is supported by the courts could create what some have referred to as the “normalization of emergency conditions.” See Ackerman, *supra* note 123, at 1043. Commentators differ over whether this is preferable to a court declaring the political branches’ actions unconstitutional, but it is nevertheless a serious danger to granting deference in the long-term. See *id.* As Professor Ackerman points out, World War II came to an end, but the war on terror is unlikely to. *Id.* This makes a new *Korematsu* possibly more damaging than the original. See *id.*

²⁵⁹ See Ackerman, *supra* note 123, at 1043; Tyler, *supra* note 47, at 691; Marinelli, *supra* note 27, at 707; see, e.g., *Boumediene*, 128 S. Ct. at 2275; *Duncan*, 327 U.S. at 318.

²⁶⁰ See 128 S. Ct. at 2275.

²⁶¹ See *id.*

ment for deference becomes.²⁶² The government's argument that terrorism presents threats sufficient to constitute an invasion under the Suspension Clause is similar to the arguments made in *Boumediene*, and there the Court held that too much time had elapsed without the judicial oversight that habeas corpus demands.²⁶³ When a suspension of habeas corpus spans years in a conflict without an end in sight, a court may reason that the drafters of the Suspension Clause did not envision this kind of suspension—the clause is no longer being used as a safety valve, but as the primary tool for fighting terrorism.²⁶⁴ The indefinite nature of the suspension itself, stretching for almost six years in *Boumediene*, rather than the exact definition of rebellion or invasion, appears to be the tipping point in determining whether a court will engage in a searching judicial review to establish if the threat of an invasion still exists sufficient to close off the courts and suspend the writ of habeas corpus.²⁶⁵

CONCLUSION

Judicial review of the suspension of habeas corpus has been all but written off during periods of American history. The war on terror has challenged our assumptions about how clear the presence of an invasion or rebellion might be and may force the courts to question whether complete deference should always be granted.

The Supreme Court's 2008 decision in *Boumediene v. Bush* evidenced the role that the actual duration of a detention plays in determining how much deference should be granted to the political branches. Although domestic exigencies may require the Court to abstain from fully reviewing a suspension, the Court expresses reluctance to embrace a "normalization of emergency conditions." Once a reasonable amount of time has passed, the Court became increasingly concerned with the lack of judicial oversight that habeas corpus affords. This may be the tipping point between the competing standards of judicial review of a suspension articulated by Professor Amanda L. Tyler because it represents the point at which individual liberties are more threatened than the public safety. Instead of attempting to meet the impossible task of determining whether an invasion or rebellion exists, a court would likely focus on the indefinite nature of the suspension itself.

²⁶² See *id.*

²⁶³ See *id.*

²⁶⁴ See Ackerman, *supra* note 123, at 1043–44.

²⁶⁵ See 128 S. Ct. at 2275.

Given the need to ensure public safety amid conflict, the historical reluctance to second-guess the legislature on suspensions is understandable. Nevertheless, the war on terror has created a new form of conflict that may challenge the courts with circumstances unlike any faced in the nation's history. The standard for review must be able to adapt to deal with the ever-present threat of terrorism, a threat that could lead to a long-standing suspension with no end in sight. Therefore, the courts must weigh the individual case of the prisoner, and the indefinite nature of their detainment, in light of the circumstances surrounding the detainment. In the case where the courts are not shut off amid conflict, the courts must do everything in their power to prevent indefinite detainments and preserve the Suspension Clause's historical role as a safety valve.

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