

# Common-Law Habeas and the Separation of Powers

Stephen I. Vladeck\*

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As a result of the Supreme Court’s June 2008 decision in *Boumediene v. Bush*, which held that the Constitution’s Suspension Clause applies to the detention of non-citizens at Guantánamo Bay,<sup>1</sup> the judges of the U.S. District Court for the District of Columbia have finally reached the merits in dozens of habeas petitions filed by the Guantánamo detainees.<sup>2</sup> In the process, they have found little in the way of legislative guidance with respect to the substantive, procedural, and evidentiary rules governing the detainees’ claims. Other than the vague language of the Authorization for the Use of Military Force (“AUMF”) enacted on September 18, 2001,<sup>3</sup> and scattered provisions of statutes directed more specifically to military commissions or the elimination of judicial review thereof,<sup>4</sup> Congress has been decidedly—

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\* Professor of Law, American University Washington College of Law. My thanks to participants in a faculty workshop at George Mason University School of Law, especially Jonathan Mitchell and Nathan Sales, for their helpful comments.

1. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

2. See, e.g., Del Quentin Wilber, *2008 Habeas Ruling May Pose Snag as U.S. Weighs Indefinite Guantanamo Detentions*, WASH. POST, Feb. 13, 2010, at A2.

3. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

4. See, e.g., Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.) (authorizing trial by military commission for violations of various offenses purportedly in violation of the laws of war); Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739, 2739–

and surprisingly—silent with respect to the law governing military detention, leaving the courts to their own devices to decide whom the government may and may not detain without charges.

In response, these jurists have fashioned what Professor Baher Azmy describes as a “new common law of habeas,” the parameters of which his article proceeds to document thoroughly.<sup>5</sup> So conceived, Professor Azmy’s article makes a vital contribution to the academic literature, bringing together dozens of seemingly disparate district court decisions in an attempt to identify sets of governing principles. Moreover, as he notes, in applying these judge-made rules the D.C. District Court has granted habeas relief in an overwhelming majority of the cases heretofore adjudicated,<sup>6</sup> providing a stronger defense of the appropriateness of the court’s efforts than any academic argument ever could. Thus, and perhaps not surprisingly, Professor Azmy is careful to avoid making his own normative judgments, presenting this “new common law of habeas” more as a *fait accompli*.

And yet, in recent weeks and months, increasing criticisms have emerged questioning not only the results the D.C. District Court has reached in individual cases but also the practical feasibility and normative desirability of the entire post-*Boumediene* project.<sup>7</sup> Even a Brookings Institution report purporting to offer a neutral analysis of the district court’s jurisprudence in the post-*Boumediene* cases noted the report’s authors’ “significant concerns about the habeas process as a lawmaking device.”<sup>8</sup> To be sure, many of the criticisms have been directed at Congress and its purported irresponsibility in leaving such momentous questions of individual rights and national security for courts to pass upon in the first

44 (codified as amended in scattered sections of 28 and 42 U.S.C.) (providing, inter alia, that the federal courts will only have jurisdiction in Guantánamo cases over appeals from Combatant Status Review Tribunals or convictions of a military commission).

5. See generally Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445 (2010).

6. As of this writing, thirty-four of the forty-seven petitioners have prevailed where the district court has reached the merits. See *id.* at app. (listing the individual habeas wins and losses). For an updated list, see Chisun Lee, *An Examination of 41 Gitmo Detainee Lawsuits*, PROPUBLICA, July 22, 2009, <http://www.propublica.org/special/an-examination-of-31-gitmo-detainee-lawsuits-722>.

7. See, e.g., Benjamin Wittes & Robert Chesney, *The Courts’ Shifting Rules on Guantanamo Detainees*, WASH. POST, Feb. 5, 2010, at A17 (criticizing the emerging jurisprudence in the D.C. District Court); Jack Goldsmith & Benjamin Wittes, *No Place To Write Detention Policy*, WASH. POST, Dec. 22, 2009, at A19 (questioning the judiciary’s ability to “craft . . . detention policy”).

8. BENJAMIN WITTES ET AL., THE BROOKINGS INST., THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING 7 (2010), available at [http://www.brookings.edu/~media/Files/rc/papers/2010/0122\\_guantanamo\\_wittes\\_chesney/0122\\_guantanamo\\_wittes\\_chesney.pdf](http://www.brookings.edu/~media/Files/rc/papers/2010/0122_guantanamo_wittes_chesney/0122_guantanamo_wittes_chesney.pdf). Increasingly, these arguments have dovetailed with the ongoing debate over whether to try Khalid Sheikh Mohammed and the other “9/11” defendants in civilian court. See, e.g., Benjamin Wittes & Jack L. Goldsmith, *The Best Trial Option for KSM: Nothing*, WASH. POST, Mar. 19, 2010, at A23.

instance.<sup>9</sup> But some critics have gone out of their way to question whether, even in the absence of legislative intervention, the courts have still overstepped their bounds.<sup>10</sup>

Perhaps nowhere has this concern more pointedly been expressed than in Judge Janice Rogers Brown's concurring opinion in *Al-Bihani v. Obama*, the D.C. Circuit's first case reviewing a post-*Boumediene* district court decision on the merits.<sup>11</sup> Asking rhetorically "whether a court-driven process is best suited to protecting both the rights of petitioners and the safety of our nation,"<sup>12</sup> Judge Brown went out of her way to criticize the common-law decisionmaking that has characterized post-*Boumediene* habeas cases, stressing that "in the midst of an ongoing war, time to entertain a process of literal trial and error is not a luxury we have."<sup>13</sup> Instead,

These cases present hard questions and hard choices, ones best faced directly. Judicial review, however, is just that: *re*-view, an indirect and necessarily backward looking process. And looking backward may not be enough in this new war. . . .

. . . .

War is a challenge to law, and the law must adjust. It must recognize that the old wineskins of international law, domestic criminal procedure, or other prior frameworks are ill-suited to the bitter wine of this new warfare. We can no longer afford diffidence. This war has placed us not just at, but already past the leading edge of a new and frightening paradigm, one that demands new rules be written. Falling back on the comfort of prior practices supplies only illusory comfort.<sup>14</sup>

In short, in Judge Brown's view, the federal courts are ill-suited—especially without the aid of statutory elucidation (of "new rules")—to sit in judgment of the executive branch. Echoing more general conservative criticisms of the common-law powers the federal courts exercised during

9. See, e.g., Wittes & Chesney, *supra* note 7 ("Congress has shown a relentless tendency to play politics with Guantanamo rather than offer itself as a constructive partner for either administration.").

10. See, e.g., Editorial, *Courting Disaster*, DAILY NEWS (N.Y.), Nov. 8, 2008, at 22 ("Civilian judges don't belong in this game—particularly when no one has set rules for holding hearings, weighing evidence or deciding what to do with a detainee if a judge concludes the government is wrong to hold him."); Andrew C. McCarthy, *So You Want to Close Gitmo?*, NAT'L REV., Mar. 25, 2010 (criticizing the post-*Boumediene* litigation and arguing that, prior to 2004, "we didn't involve courts because it wasn't the courts' affair; fighting war is the military's job, under the direction of the commander in chief and the authorization of Congress").

11. *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010).

12. *Id.* at 881 (Brown, J., concurring).

13. *Id.* at 882.

14. *Id.*

and in the early years after the Warren Court,<sup>15</sup> Judge Brown's concurrence suggests that the "new common law of habeas" that Professor Azmy so richly describes is in fact an inappropriate exercise of judicial power and one the courts should refrain from pursuing.

In the short response essay that follows, I aim to put Professor Azmy's descriptive work—with which I have no quarrel—on firmer prescriptive foundations. In particular, I argue that what he describes as the "new common law of habeas" is in fact just a new variation on an old theme: that, well into the twentieth century, the law of habeas corpus in the United States *was*, almost entirely, a set of judge-made substantive, procedural, and evidentiary rules. Indeed, even after the Supreme Court in *Erie* famously eschewed general federal common law,<sup>16</sup> it continued to articulate judge-made principles to govern virtually every aspect of federal habeas litigation, only moving away from this trend in cases decided after 1948, when Congress first started to legislate more specifically in the habeas context.

More than just historical fortuity, this essay will demonstrate that the effectively common-law nature of habeas corpus is a product of its unique constitutional status—protected except in the most extreme circumstances by the Suspension Clause, one of only two remedies guaranteed by the Constitution. Even though the federal courts all but depend on legislation for their existence, the writ does not. Mirroring the prerevolutionary English experience, the Framers intended to provide a permanent constitutional protection for individual rights *by* protecting the role of the courts in detention cases—a protection that would be utterly meaningless if it turned in any way on popular will and/or legislative whim.

As Justice Kennedy wrote in *Boumediene*, "the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers."<sup>17</sup> This essay concludes that we would do well to remember that it is common-law habeas as much as—if not more than—any statute that protects the ability of the writ (and, as such, of the courts) to conduct such monitoring.

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15. See, e.g., *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (explaining that the *Bivens* doctrine "is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition").

16. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts.").

17. *Boumediene v. Bush*, 128 S. Ct. 2229, 2259 (2008). See generally Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107 (2009) (documenting the significance of the relationship between habeas corpus and the separation of powers within Justice Kennedy's *Boumediene* opinion).

## I. A SHORT HISTORY OF COMMON-LAW HABEAS IN THE UNITED STATES

## A. COMMON-LAW HABEAS JURISDICTION IN THE ANTEBELLUM PERIOD

An important factor in the neglected history of common-law habeas in the United States is the simple fact that Congress created a statutory basis for habeas in the Judiciary Act of 1789—the same statute that created the federal courts. Thus, as section 14 of the Judiciary Act provided, each of these new federal courts:

shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.<sup>18</sup>

For federal prisoners, then, section 14 thereby appeared to obviate the need for any resort to the common law, at least where the issue was a jurisdictional basis for habeas corpus relief in the federal courts. But it does not follow that section 14 thereby superseded the common-law writ in every case. Indeed, as any number of scholars have pointed out, the jurisdiction conferred by section 14 was not meant to be—and in fact *wasn't*—exclusive.

First, throughout the antebellum period, *state* courts (to which section 14 did not apply) routinely entertained petitions for writs of habeas corpus filed by federal prisoners, often relying on their common-law powers to dispose of the claims.<sup>19</sup> The Supreme Court would eventually disavow this practice in decisions bookending the Civil War,<sup>20</sup> but even those historically criticized decisions did not rest (as they might easily have) on any argument

18. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82.

19. See Todd E. Pettys, *State Habeas Relief for Federal Extrajudicial Detainees*, 92 MINN. L. REV. 265, 270–81 (2007) (discussing the states' general belief during the first half of the nineteenth century that they could hear cases involving extrajudicial federal detentions).

20. See, e.g., *Tarble's Case*, 80 U.S. (13 Wall.) 397, 412 (1872) (holding that a prisoner held by and under the jurisdiction of the United States could not receive a writ of habeas corpus from the Wisconsin state courts); *Ableman v. Booth*, 62 U.S. (21 How.) 506, 524 (1859) (holding that “[n]o State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them”). For a useful recent summary of these cases, see Ann Wooldhandler & Michael Collins, *The Story of Tarble's Case: State Habeas and Federal Detention*, in FEDERAL COURTS STORIES 141 (Judith Resnik & Vicki C. Jackson eds., 2009).

that section 14 implicitly preempted the common-law powers of state courts.<sup>21</sup>

Second, the First Congress did not clearly intend section 14 to preempt the *federal* courts' common-law powers to issue writs of habeas corpus. As Eric Freedman has demonstrated, common-law habeas jurisdiction at the Founding was understood in much the same way that common-law criminal jurisdiction was—as a modest but necessary authority that the federal courts, once created, would be entitled to exercise.<sup>22</sup> Moreover, such a hybrid basis for jurisdiction was hardly novel. At the time of the Founding, the practice of the King's Bench in England was entirely similar—issuing writs of habeas corpus as exercises of both its statutory and common-law jurisdiction and relying on the common law when the relevant statutes, especially the Habeas Corpus Act of 1679,<sup>23</sup> proved inadequate. As Professors Halliday and White have explained,

A persistent misapprehension about the English history of habeas is that “the Great Writ” was a parliamentary rather than a judicial gift. This mistake arises from a fascination with the Habeas Corpus Act of 1679, which Blackstone over-enthusiastically called “that second magna carta.” In fact, the celebrated Habeas Corpus Act merely codified practices generated by King's Bench justices. In whig histories, the statutory writ of the 1679 Habeas Corpus Act provides a moment for parliamentary self-congratulation that all but erased the significance of the role judges had played in developing the equitable dimensions of habeas corpus jurisprudence.

Judges continued to take the lead in developing habeas corpus jurisprudence right up to 1787. This is apparent in the failure in 1758 of the bill “for giving more speedy remedy” on habeas corpus. Jurists consulted at the time, such as Chief Justice Lord Mansfield of King's Bench and Lord Chancellor Hardwicke, opposed the bill in part because of the constraints it would put on judicial freedom in using the writ. They feared the damage a statute might do to the equitable flexibility of common law habeas. Parliamentary debates in 1758 show a broad awareness of the surprising ways in which the 1679 Act had produced just this result. After the failure of the 1758 bill—to remedy the supposed incapacity of the statutory writ to challenge impressment orders—Mansfield's King's Bench issued

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21. See, e.g., RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 439 (5th ed. 2003) (inquiring whether implicit preemption could withstand scrutiny as an alternative ground to support the holding in *Tarble's Case*).

22. ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 36–41 (2001).

23. Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.).

numerous writs at common law for just that purpose. As a general matter, in the century after the passage of the Habeas Corpus Act of 1679, all the important innovations in habeas corpus jurisprudence occurred through judicial use of the common law writ rather than the statutory one.<sup>24</sup>

The original understanding of the federal courts' common-law powers is, of course, not without some difficulties. Notwithstanding two decades of case law to the contrary, the Supreme Court expressly rejected the proposition that the federal courts could exercise common-law criminal jurisdiction in 1812.<sup>25</sup> Five years earlier, Chief Justice Marshall himself had so held with regard to habeas corpus. As Marshall concluded for the Court in *Ex parte Bollman*, "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."<sup>26</sup> Thus, as Marshall continued, "for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law."<sup>27</sup>

It would be easy to dismiss Marshall's statements from *Bollman* as inconvenient and unfortunate dicta, given that it was unnecessary to his holding that the Court *could* issue the writ as an original matter in order to exercise its constitutional *appellate* jurisdiction to review a decision by the lower federal courts. But Marshall was also writing at a time when state courts were clearly available to entertain common-law habeas petitions from federal prisoners, removing the possibility that his discussion had Suspension Clause implications. Moreover, although the Court would repeatedly reaffirm during (and after) this period that Article III federal courts generally could not exercise common-law jurisdiction, it also affirmed in 1838 an ingenious D.C. Circuit opinion holding that the then-unitary D.C. courts, which exercised a unique hybrid of local *and* federal jurisdiction, *could* issue common-law writs of mandamus against federal officers—authority that, at the time, no federal statute provided.<sup>28</sup> As I have suggested elsewhere, the same analysis would almost certainly have extended

24. Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 611–12 (2008) (footnotes omitted). Professor Halliday has expanded upon this analysis in a masterful new revisionist history of the English experience with habeas corpus. See PAUL D. HALLIDAY, *HABEAS CORPUS FROM ENGLAND TO EMPIRE* 237–46 (2010). For a more in-depth look at how Halliday's work should prompt us to rethink a number of longstanding assumptions about what the Suspension Clause protects, see Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. (forthcoming Feb. 2011) (reviewing HALLIDAY, *supra*).

25. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

26. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807).

27. *Id.* at 93–94.

28. See *United States ex rel. Stokes v. Kendall*, 26 F. Cas. 702, 713–14 (C.C.D.C. 1837) (No. 15,517), *aff'd*, 37 U.S. (12 Pet.) 524 (1838).

to common-law writs of habeas corpus, but the issue never arose thanks to section 14's statutory authority.<sup>29</sup> Indeed, the only reason why the current heir to the old D.C. Circuit's "local" jurisdiction—the D.C. Superior Court—cannot exercise such common-law power in appropriate cases today is because the D.C. Code expressly forbids it from doing so.<sup>30</sup>

The upshot of the above discussion is to highlight how circumstances have conspired to hide from history's plain view the full scope of the common-law writ of habeas corpus during the antebellum period—when state courts routinely entertained such prayers for relief and when at least one federal court almost certainly had comparable authority. Equally as significant, there was never a scenario in which a state or federal prisoner had no court in which they could pursue habeas relief. Therefore, there was never a need for the Supreme Court to clarify the circumstances in which the Constitution required a remedy, even if no statute provided one. And last, but certainly not least, by the time the Supreme Court forever repudiated the (mostly common-law) power of state courts to direct writs of habeas corpus to federal officers, Congress had, in the Habeas Corpus Act of 1867, extended the substantive scope of federal statutory habeas jurisdiction "to its constitutional limit."<sup>31</sup> The common-law writ was forgotten because it was wholly unnecessary.

#### B. A "COMMON-LAW WRIT" IN EVERY OTHER SENSE

Even as the federal courts after *Bollman* eschewed the possibility that the common law might provide them with jurisdiction to issue writs of habeas corpus in appropriate cases, they nevertheless took seriously Chief Justice Marshall's suggestion in *Bollman* that "for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law." Such judicial innovation was not only possible but necessary given the silence of section 14 of the Judiciary Act of 1789 and its early successors as to the appropriate substantive standard, procedural rules, and evidentiary burdens to be applied by the federal courts in exercising their statutory jurisdiction to entertain habeas petitions. Thus, although section 14 was amended in 1833, 1842, 1867, and 1925, it was still the case in 1934 that:

The statute does not define the term *habeas corpus*. To ascertain its meaning and the appropriate use of the writ in the federal courts, recourse must be had to the common law, from which the term was

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29. Stephen I. Vladeck, *The Riddle of the One-Way Ratchet: Habeas Corpus and the District of Columbia*, 12 GREEN BAG 2D 71, 74–77 (2008).

30. See D.C. CODE § 16-1901(b) (2001) ("Petitions for writs directed to Federal officers and employees shall be filed in the United States District Court for the District of Columbia.").

31. See WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 191 (1980). See generally William M. Wiecek, *The Great Writ and Reconstruction: The Habeas Corpus Act of 1867*, 36 J. S. HIST. 530 (1970) (providing background on the scope and significance of the Habeas Corpus Act of 1867).

drawn, and to the decisions of this Court interpreting and applying the common law principles which define its use when authorized by the statute.<sup>32</sup>

To be sure, the Habeas Corpus Act of 1867 imposed a number of specific procedural requirements.<sup>33</sup> But virtually all of these requirements dealt with the timing of the proceedings and the form of particular filings. And although the 1867 Act expanded the scope of individuals to whom habeas relief was available to include *anyone* (including those convicted in state courts) who claimed that their detention violated the Constitution, laws, or treaties of the United States, it did nothing to elaborate upon the specific circumstances in which detention would so qualify—the substantive detention criteria. In short, nothing in the 1867 statute clarified the standard courts should apply in adjudicating the legality of the prisoner’s detention, nor of the evidentiary rules that would govern the disposition of the pleadings. Instead, well into the 1930s, the federal courts did what was a matter of routine at the time—they borrowed from common law.

Moreover, the heavy reliance upon the common law did not stop with the Court’s paradigm-shifting decision in *Erie*, which otherwise called into question the power of the federal courts to fashion rules of general common law.<sup>34</sup> Less than one month after *Erie*, the Court in *Johnson v. Zerbst* effected a subtle but decisive expansion of the scope of review in post-conviction habeas cases. The *Johnson* Court held, with only passing references to the habeas statute, that a constitutional procedural error at trial (in *Johnson*, a

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32. *McNally v. Hill*, 293 U.S. 131, 136 (1934).

33. As then-Justice Stone summarized the extant statutory requirements in 1941:

The statutes of the United States declare that the supreme court and the district courts shall have power to issue writs of habeas corpus; that application for the writ shall be made to the court or justice or judge authorized to issue the same by complaint in writing, under oath, signed by the petitioner, setting forth the facts concerning his detention, in whose custody he is and by virtue of what claim or authority, if known. The court or justice or judge “shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto.” The writ shall be directed to the person in whose custody the petitioner is detained. The person to whom the writ is directed must certify to the court or judge the true cause of detention and, at the same time he makes his return, bring the body of the party before the judge who granted the writ. When the writ is returned a day is to be set for the hearing, not exceeding five days thereafter, unless the petitioner requests a longer time. The petitioner may deny the facts set forth in the return or may allege any other material facts, under oath. The court or judge “shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.

*Walker v. Johnston*, 312 U.S. 275, 283–84 (1941) (footnotes omitted).

34. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). See generally John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974) (summarizing *Erie*’s significance—and its misunderstandings).

deprivation of the defendant's Sixth Amendment right to counsel) constituted a *jurisdictional* defect that was open to correction via the collateral remedy afforded by Congress.<sup>35</sup> As Justice Frankfurter would later explain, *Johnson* "blazed a new trail," making it possible for any number of constitutional defects at trial not previously characterized as "jurisdictional" to nevertheless provide a basis for habeas relief.<sup>36</sup> Indeed, recognizing the limitlessness of this understanding, the Court would formally abandon the "kissing of the jurisdictional book"<sup>37</sup> just four years later in *Waley v. Johnston*.<sup>38</sup>

The Court after *Erie* continued to resort to common-law principles for points of procedure as well, even when the habeas statute itself appeared to provide rules to the contrary. Thus, in its 1941 decision in *Walker v. Johnston*, the Court sanctioned the practice of resolving habeas petitions that raised only legal questions on a motion to show cause (prior to the formal issuance of the writ), thereby dispensing with the unambiguous statutory requirement that the government formally produce the prisoner's body in every case.<sup>39</sup> In *Walker*, as in many of these cases, the lower courts had been divided over whether to follow the statutorily mandated procedure or the more efficient common-law variation. And it was no doubt significant to the Court that the very same accommodation—in the form of a rule *nisi* procedure—had been adopted by English courts at common law during the seventeenth and eighteenth centuries.<sup>40</sup>

Of course, *Erie* did not forever eradicate the common-law powers of the federal courts.<sup>41</sup> But the continuing transparent resort to the common law even in *Erie*'s immediate aftermath reaffirms the extent to which it was familiar and accepted practice, even *after Erie*, for federal courts to resort to the common law to fill in the myriad gaps that Congress had left open in their adjudication of federal habeas petitions. There was still a statutory basis for the courts' jurisdiction, but there were no sustained objections to the courts relying entirely on judge-made law in choosing when and how to exercise the jurisdiction that Congress had conferred.

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35. *Johnson v. Zerbst*, 304 U.S. 458, 466–69 (1938).

36. *See Burns v. Wilson*, 346 U.S. 844, 846–47 (1953) (Frankfurter, J., dissenting from the denial of rehearing).

37. *See* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 151 (1970) (describing the open-endedness of Justice Black's opinion in *Johnson v. Zerbst*).

38. *See Waley v. Johnston*, 316 U.S. 101, 104–05 (1942).

39. *See Walker v. Johnston*, 312 U.S. 275, 284 (1941) (concluding that if the undisputed facts provide no ground as a matter of law for granting the writ, then the body need not be presented).

40. *See* HALLIDAY, *supra* note 24, at 112–16.

41. *See, e.g.,* Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1963) (noting the new varieties of specialized federal common law that emerged in the wake of *Erie*).

Beginning in 1948,<sup>42</sup> but especially in revisions enacted in 1966 and rules promulgated pursuant to the 1966 amendments,<sup>43</sup> Congress codified many of the procedural and evidentiary innovations that the Court had extracted from the common law, often tweaking (and sometimes simply overruling) the Court's work.<sup>44</sup> Thus, the writ that lawyers encounter today is one thoroughly encumbered with detailed (statutory) procedural and evidentiary rules. But irrespective of the merits of the move toward codification of the writ, it cannot be gainsaid that it is a *modern* innovation. Federal courts routinely and as a matter of course exercised common-law powers in identifying the governing considerations in habeas cases well into the twentieth century, and at least up to 1948.

C. "CONSTITUTIONAL" HABEAS: U.S. CITIZENS DETAINED ABROAD, 1948–73

1948 was also significant in another respect. Just four days before Congress enacted the revisions to the Judicial Code noted above, the Supreme Court precipitated a serious constitutional issue in its interpretation of 28 U.S.C. § 452, the descendant of section 14. Specifically, in *Ahrens v. Clark* Justice Douglas construed the language of the statute as limiting the jurisdiction of district courts to cases in which the petitioner was confined within that court's territorial jurisdiction.<sup>45</sup> Douglas's opinion purported to reserve the question of whether the statute provided jurisdiction in cases in which the petitioner was confined in *no* district,<sup>46</sup> an immensely significant issue in the immediate aftermath of World War II. Nonetheless, courts and commentators in the ensuing months and years consistently understood Douglas's analysis as precluding jurisdiction in those cases, as well—thereby raising questions as to what process, if anything, the Constitution might itself require.<sup>47</sup>

Although the Court twice found no constitutional problem with the absence of jurisdiction over habeas petitions brought by non-citizens detained outside the territorial United States,<sup>48</sup> the Justices were far more

42. For a discussion of the movement toward codification and the role of various federal judges in habeas reform in the 1940s, see John W. Winkle III, *Judges as Lobbyists: Habeas Corpus Reform in the 1940s*, 68 JUDICATURE 263 (1985).

43. For a concise overview, see LARRY W. YACKLE, FEDERAL COURTS: HABEAS CORPUS 40–52 (2003).

44. As one example among dozens, *Walker's* approval of the show-cause procedure is codified in 28 U.S.C. § 2243 (2006).

45. *Ahrens v. Clark*, 335 U.S. 188, 190 (1948).

46. *See id.* at 192 n.4 ("We need not determine the question of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights.")

47. For a far more thorough treatment of this issue, see Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. 275, 292–300 (2008).

48. *See Johnson v. Eisentrager*, 339 U.S. 763, 780–81 (1950) (holding that German nationals detained in Germany and convicted by a properly constituted military commission

circumspect with regard to petitions brought by U.S. citizens, rejecting “original” jurisdiction in one case while suggesting that the petitioner try his hand in district court.<sup>49</sup> Finally, in 1953, the Court upheld the lower federal courts’ jurisdiction over habeas petitions filed by U.S. citizens detained overseas, albeit without squarely confronting the issue. Instead, Chief Justice Vinson’s plurality opinion in *Burns v. Wilson*, which otherwise upheld the petitioners’ conviction by court-martial, merely asserted that “we are dealing with habeas corpus applicants who assert—rightly or wrongly—that they have been imprisoned and sentenced to death as a result of proceedings which denied them basic rights guaranteed by the Constitution. The federal civil courts have jurisdiction over such applications.”<sup>50</sup>

Two years later, a majority implicitly endorsed similar jurisdictional analysis in *United States ex rel. Toth v. Quarles*.<sup>51</sup> In *Toth*, the Court reached the merits and ordered relief in a habeas petition brought by an ex-serviceman challenging his trial by court-martial in Korea.<sup>52</sup> Justice Frankfurter vociferously objected to the Court’s tacit resolution of such an important question.<sup>53</sup> But by 1973, “it ha[d] been decided, even if sub silentio and by fiat, that at least a citizen held abroad by federal authorities has access to the writ in the District of Columbia.”<sup>54</sup>

The significance of *Burns* and *Toth* is perhaps best described by Justice Scalia: “The constitutional doubt that the Court of Appeals in *Eisenstrager* had erroneously attributed to the lack of habeas for an alien abroad might indeed exist with regard to a *citizen* abroad—justifying a strained construction of the habeas statute, or (more honestly) a determination of constitutional right to habeas.”<sup>55</sup> Thus, one of two conclusions had to be true: either the habeas statute, as interpreted in *Ahrens*, supported an entirely atextual distinction based upon citizenship, or the jurisdictional rule laid down in *Burns* and *Toth* was an implicit recognition that the petitioners had a constitutional right to habeas corpus and that the federal courts were therefore compelled to entertain the petitioners’ claims, whether or not a statutory basis for jurisdiction was available.

have no constitutional right to habeas corpus); *Hirota v. MacArthur*, 338 U.S. 197, 200–01 (1948) (per curiam) (holding that the federal courts lack jurisdiction over habeas petitions brought by Japanese nationals convicted by an international military tribunal).

49. See *In re Bush*, 336 U.S. 971, 971 (1949) (mem.) (denying the motion to file a writ of habeas corpus directly in the Supreme Court without prejudice).

50. *Burns v. Wilson*, 346 U.S. 137, 139 (1953) (plurality opinion).

51. *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

52. *Id.* at 23.

53. See *Burns v. Wilson*, 346 U.S. 844, 851–52 (1953) (Frankfurter, J., dissenting from the denial of rehearing).

54. PAUL M. BATOR ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 359 n.52 (2d ed. 1973); see also *Ex parte Hayes*, 414 U.S. 1327, 1328–29 (Douglas, Circuit Justice 1973) (referencing this quotation).

55. *Rasul v. Bush*, 542 U.S. 466, 497 (2004) (Scalia, J., dissenting).

On the latter view, the federal courts between 1948 and 1973 were exercising a constitutionally compelled species of common-law jurisdiction whenever they entertained a habeas petition from a U.S. citizen held overseas—constitutionally compelled because no other court could hear the petitioner’s claims. It may seem odd that courts created by Congress could be forced to entertain claims that Congress sought to preclude. But the Suspension Clause, to mean anything, must guarantee a right to judicial review in *some* court, and Supreme Court decisions had eliminated the state courts and the Court itself (at least as an original matter) from the list of candidates.<sup>56</sup>

In 1973, the Court retreated to a looser construction of the habeas statute, holding in *Braden v. 30th Judicial Circuit Court of Kentucky* that the statute was satisfied so long as the district court had jurisdiction over the *custodian*, and not the petitioner.<sup>57</sup> *Braden* thereby vitiated the constitutional questions that might otherwise have recurred under *Ahrens*, at least for the moment. It also capped, without fanfare, a quarter century in which the federal courts routinely exercised what could best be understood as a form of common-law jurisdiction over habeas petitions brought by U.S. citizens held overseas. It would not be until *Boumediene* that the Court would again be forced to directly address what the Constitution required when no statutory jurisdiction was available, with the Military Commissions Act of 2006 presenting the specter of an unequivocal preclusion of federal habeas review.<sup>58</sup>

## II. COMMON-LAW HABEAS AND THE SEPARATION OF POWERS

I have written elsewhere in some detail about the separation-of-powers doctrine’s odd but undeniable centrality to Justice Kennedy’s analysis for the *Boumediene* majority,<sup>59</sup> and I will not rehash those arguments here. In short, though, what is telling about not just the result of Kennedy’s opinion but its analytical organization is the central role the separation of powers doctrine played in underscoring the Court’s interpretation of the Suspension Clause. As Justice Kennedy explained,

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56. See generally Vladeck, *supra* note 29 (noting how various statutes and Supreme Court decisions had combined to restrict the forums in which federal detainees could seek habeas relief).

57. See *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 497–501 (1973) (describing why a more flexible jurisdictional rule is appropriate in light of statutory and judicial developments).

58. To be fair, the question had been before the Court in a number of cases, including *Felker v. Turpin*, 518 U.S. 651 (1996), *INS v. St. Cyr*, 533 U.S. 289 (2001), and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), among others. In each of those instances, though, the Court had adhered to the “time-honored tradition for the [courts] to find that Congress did not intend to preclude altogether judicial review of constitutional claims in light of the serious due process concerns that such preclusion would raise.” *Bartlett v. Bowen*, 816 F.2d 695, 699 (D.C. Cir. 1987).

59. See generally Vladeck, *supra* note 17 (discussing the *Boumediene* case in detail).

The [Suspension] Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the “delicate balance of governance” that is itself the surest safeguard of liberty. The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account. The separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause.<sup>60</sup>

It should follow without much difficulty, though, that to whatever extent habeas corpus is an integral part of the separation of powers, it is the constitutionally protected writ, not merely its statutory incarnation, which plays that vital role. After all, Justice Kennedy’s discussion in *Boumediene* focused not at all on the availability of statutory habeas throughout American history, but on the vital role that the Suspension Clause was meant to play both directly and indirectly in our system of government. As Kennedy explained, “protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights. In the system conceived by the Framers the writ had a centrality that must inform proper interpretation of the Suspension Clause.”<sup>61</sup> English history had established “the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system,”<sup>62</sup> and it would be beyond odd if simple legislative inaction could undermine such a constitutional command.

But we need not draw inferences from Justice Kennedy’s repeated allusions to the role of the Suspension Clause in protecting the separation of powers. After all, he devoted an entire section of his *Boumediene* opinion—VI(B)—to the pivotal role that the lower federal courts would have to play as a result of his analysis. Responding to concerns about the potential dissemination of classified information, Kennedy emphasized that:

We make no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees’ habeas corpus proceedings. We recognize, however, that the Government has a legitimate interest in protecting sources and

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60. *Boumediene v. Bush*, 128 S. Ct. 2229, 2247 (2008) (citations omitted); see also Vladeck, *supra* note 17, at 2110 (“Reading *Boumediene*, one is left with the distinct impression that for Justice Kennedy, at least, the writ of habeas corpus is in part a means to an end—a structural mechanism protecting individual liberty by preserving the ability of the courts to check the political branches.”).

61. *Boumediene*, 128 S. Ct. at 2244.

62. *Id.*

methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible.<sup>63</sup>

More generally, the opinion concluded that “[t]hese and the other remaining questions are within the expertise and competence of the District Court to address in the first instance,”<sup>64</sup> recognizing that the district court would be acting not just in the absence of statutory authority, but also without almost any legislative guidance on questions ranging from the substantive criteria to establish whether a petitioner is within the substantive scope of the AUMF’s detention authority to the procedural rules that would apply in resolving that question.<sup>65</sup>

Kennedy thereby anticipated exactly what has followed in the D.C. District Court: a process of common-law judicial decision making in which the courts have articulated the rules that they have then enforced. To argue that the litigation in the D.C. District Court is therefore consistent with both the explicit and implicit mandate in *Boumediene* is not to commend it per se, but to at least suggest that the separation of powers mechanism so central to Justice Kennedy’s opinion is a writ of habeas corpus that is largely a creature of judge-made rather than statutory rules.

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Reasonable people will surely disagree about whether the D.C. District Court would be better off if Congress intervened to provide more precise substantive detention criteria, clearer evidentiary rules, and other specified procedures. I, for one, am not at all convinced that Congress could so easily legislate precise answers to the questions that have preoccupied the judges who have entertained post-*Boumediene* habeas petitions. Nor am I convinced that the disagreements that have arisen in some of these decisions are anything more than the inevitable result of allowing similar questions to be resolved by different jurists—jurists who might just as easily interpret the

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63. *Id.* at 2276.

64. *Id.*; *see also id.* at 2277 (“It bears repeating that our opinion does not address the content of the law that governs petitioners’ detention. That is a matter yet to be determined.”).

65. Similar language—and deference to the district court—also characterized Justice O’Connor’s opinion for the plurality in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Justice O’Connor stated:

We anticipate that a District Court would proceed with the caution that we have indicated is necessary in this setting, engaging in a factfinding process that is both prudent and incremental. We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.

*Id.* at 538–39 (plurality opinion); *see also id.* at 533–34 (leaving other issues for the trial court on remand).

same statute in ways that differ to the same degree. That being said, I see no reason why the legislature could not constitutionally attempt to provide more textually grounded standards and rules, if it really believes that, contrary to my own viewpoint, the current process is not “working.”

But courts and commentators alike need to be incredibly careful to distinguish between criticisms of the systematic legislative inaction that has plagued the detention cases to date and criticisms of the role the courts have played in the face of such legislative silence. The reality is that common-law habeas is neither a new phenomenon nor one that is inconsistent with the finest traditions of judicial responsibility. It is a happy coincidence that the federal courts have so seldom been forced into exercising the unusual powers that follow from the Constitution’s special protection of the writ of habeas corpus, but not one that should be confused for an absence of precedent or of principled justification. Whatever criticism the Court may have received at various points in its history for assuming common-law powers to infer causes of action, it is the Constitution itself that so provides in the case of habeas, a proposition that simply cannot reasonably be disputed.

Instead, one may well take serious issue with the Supreme Court’s conclusion in *Boumediene* that the Suspension Clause applies to cases brought by non-citizens detained at Guantánamo, or that the alternative review process that Congress created was an inadequate substitute for habeas, and therefore violated the Clause. But if *Boumediene* is the law of the land, then the Suspension Clause mandates that the detainees are entitled to the constitutionally protected writ of habeas corpus, whether Congress has provided for it or not. Judge Brown is certainly right that “[w]ar is a challenge to law, and the law must adjust.”<sup>66</sup> But as Justice Kennedy concluded his opinion in *Boumediene*, “[l]iberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.”<sup>67</sup>

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66. *Al-Bihani v. Obama*, 590 F.3d 866, 882 (D.C. Cir. 2010) (Brown, J., concurring).

67. *Boumediene*, 128 S. Ct. at 2277.