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I. INTRODUCTION

The current debate over judicial review of the detention of "enemy combatants" is dominated by the question of whether the Constitution's Suspension Clause[1] applies to non-citizens detained outside the territorial United States, including those held at Guantánamo Bay, Cuba.[2] But an equally important question is lurking just beneath the surface in *Boumediene v. Bush*, the lead case currently[3] before the Supreme Court: If the Suspension

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1. U.S. CONST. art. I, § 9, cl. 2 ("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.").

2. *See, e.g.*, Boumediene v. Bush, 476 F.3d 981 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3078 (2007) (Nos. 06-1195, 06-1196). For two differing academic takes on the question, *compare* J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463 (2007), *with* Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. 275 (2008). *See generally* Paul Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Context, and American Implications*, 94 VA. L. REV. 575 (2008).

3. As this article went to print, the Supreme Court handed down its decision in *Boumediene*, holding that the Suspension Clause *does* apply to the Guantánamo detainees, and that the substitute for habeas corpus provided by the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 is an *inadequate* substitute for habeas corpus. *See* Boumediene v. Bush, 128 S. Ct. 2229 (2008). For Justice Kennedy's analysis of the latter issue, *see*

Clause does protect the right to habeas corpus for non-citizens held abroad (or at least at Guantánamo),[4] is the jurisdiction-stripping provision of the Military Commissions Act of 2006 (MCA)[5] actually inconsistent therewith?

The prevailing assumption is that this question necessarily reduces to whether the MCA, along with the Detainee Treatment Act of 2005 (DTA),[6] provides an "adequate" and "effective" substitute for the remedy provided by the writ of habeas corpus. And the reason why *that* appears to be the ultimate question is the Supreme Court's oft-cited—but seldom read—1977 decision in *Swain v. Pressley* (*Pressley*).[7] *Pressley*, a case arising indirectly out of the 1970 reorganization of the D.C. judicial system, is commonly invoked for the proposition that the Suspension Clause is not implicated unless the relevant remedial scheme provides no adequate or effective substitute for habeas corpus.[8]

As significant as *Pressley* figures in current debates, very

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id. at 2262–74, unquestionably merits a discussion that is simply not possible here. For now, though, it suffices to note the *Boumediene* majority's conclusion that "[t]he present cases . . . test the limits of the Suspension Clause in ways that *Hayman* and *Swain* did not," *id.* at 2266, for many of the same reasons articulated in more detail herein.

4. Indeed, much of the focus of the current litigation is whether Guantánamo is "different," i.e., whether there is a colorable argument that non-citizens held in Cuba might have a stronger claim to constitutional protections, including those enmeshed with the Suspension Clause, than those held elsewhere outside the United States. *See, e.g.*, Rasul v. Bush, 542 U.S. 466, 485–88 (2004) (Kennedy, J., concurring in the judgment); Gherebi v. Bush, 352 F.3d 1278, 1285–99 (9th Cir. 2003).

5. Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635–36 (2006) (codified at 28 U.S.C. § 2241(e)(1)) ("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.").

6. Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739–44 (2005).

7. 430 U.S. 372 (1977). Although the case is usually referred to in shorthand as "*Swain*," the habeas petitioner was Jasper Pressley, and so I refer to the case as *Pressley* throughout this essay.

8. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 314 n.38 (2001) (citing *Pressley* for the proposition that "Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals"); *see also* Boumediene v. Bush, 127 S. Ct. 1478, 1480 (2007) (Breyer, J., dissenting from the denial of certiorari); Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2818 (2006) (Scalia, J., dissenting).

little has been written about the case itself, or the rule for which it has since become the standard citation.[9] Thus, in attempting to analyze whether the remedy provided by the MCA and DTA to detained "enemy combatants" comports with the Suspension Clause, courts and commentators have little precedent or academic discussion to guide them. The animating purpose of this symposium essay, then, is to reconstruct the Court's decision in *Pressley* so as to understand the implications of its holding, and its potential relevance both to the current Guantánamo cases and to other recent legislative attempts to provide a substitute remedy for habeas corpus.

To reconstruct *Pressley*, Part II begins with the Supreme Court's 1952 decision in *United States v. Hayman*.[10] In *Hayman*, the Court vacated a Ninth Circuit decision that had invalidated 28 U.S.C. § 2255, one of Congress's first attempts to provide a statutory alternative to habeas corpus. The Court's unanimous decision in *Hayman* nevertheless reserved any question as to the constitutional implications of such legislation. Thus, when the *Pressley* Court considered a statute modeled on § 2255—section 23-110(g) of the D.C. Code—it was resolving a question of first impression.

As Part II concludes, *Pressley* did not go much further than *Hayman* had, holding only that there is no constitutional defect with a statute that provides an "adequate" and "effective" means of challenging detention other than habeas corpus. Pointedly, the Court in *Pressley* did not decide whether "inadequate" or "ineffective" remedies were necessarily unconstitutional, leaving that question open for later courts.

In Part III, I turn to *Pressley*'s aftermath, and briefly survey those contexts wherein *Swain v. Pressley* has figured prominently since it was decided. Part III therefore begins with the Supreme

9. Even recent academic discussions of the "adequate" and "effective" substitute issue have given short shrift to *Pressley* itself. *See, e.g.*, Christopher J. Schatz & Noah A.F. Horst, *Will Justice Delayed Be Justice Denied? Crisis Jurisprudence, the Guantánamo Detainees, and the Imperiled Role of Habeas Corpus in Curbing Abusive Government Detention*, 11 LEWIS & CLARK L. REV. 539 (2007).

10. 342 U.S. 205 (1952).

Court's 1996 decision in *Felker v. Turpin*,[11] in which the Court upheld the so-called "gatekeeper" provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[12] on the ground that an alternative remedy remained available. Part III next turns to the context of immigration law, where AEDPA, and later the REAL ID Act of 2005,[13] attempted to preclude immigration habeas petitions in favor of direct review of administrative decisions. Finally, Part III concludes with the application of *Swain v. Pressley* to the current cases arising out of Guantánamo, and the question whether the review provided by the DTA and the MCA constitutes an "adequate" and "effective" substitute for habeas corpus.

Given that the Supreme Court is due to decide *Boumediene* later this year, and will quite likely reach the question of whether the DTA and MCA provide an "adequate" alternative to habeas corpus, Part III assiduously avoids handicapping the merits of this question. Instead, in Part IV, I turn to the "myth" of *Swain v. Pressley*—the extent to which the "rule" *Pressley* enunciates might actually serve to *distort* courts' review of the adequacy of alternative remedies to habeas corpus. Because of this effect, Part IV suggests several reasons why *Pressley* is not nearly as helpful in defining the limits of Congress's power to fashion alternative remedies to habeas corpus as is generally suggested. Whatever the Court ultimately holds in *Boumediene*, any discussion of the constitutional adequacy of the alternative remedy will, in reality, resolve a question of first impression.

II. ALTERNATIVE REMEDIES: FROM *HAYMAN* TO *PRESSLEY*

Arguably, the first time Congress ever provided a statutory substitute for the writ of habeas corpus was in the Judiciary Act of 1789, section 14 of which created a federal statutory cause of action by the same name:

> That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas*

11. 518 U.S. 651 (1996).

12. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 15, 18, 21, 22, 28, 40, 42, 49, and 50 U.S.C.).

13. Pub. L. No. 109-13, div. B, 119 Stat. 231, 302–23 (2005) (codified as amended in scattered sections of 8 U.S.C.).

> *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.[14]

As Chief Justice Marshall would explain less than two decades later, although federal courts could resort to the common law for the "meaning" of "habeas corpus," they were only empowered to exercise that jurisdiction conferred by statute.[15] Thus, at least in the federal courts, the federal "statutory" writ became a complete substitute for the "common-law" (or what is sometimes referred to as the "constitutional") writ of habeas corpus.[16]

Notwithstanding *Bollman*'s elimination of common-law habeas in the federal courts, questions about the substantive sufficiency of the federal statutory writ did not arise until well into the twentieth century.[17] Thus, Part II begins with Congress's first attempt to provide a substitute remedy for the statutory writ of habeas corpus, before moving onto *Swain v. Pressley* and its implications.

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14. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (codified as amended at 28 U.S.C. § 2241(a) (2000)).

15. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93–94 (1807).

16. On the constitutional origins of habeas corpus, see generally WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980); and Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605 (1970).

17. For a discussion of why *Bollman*'s preclusion of federal common-law habeas did not raise more serious Suspension Clause problems, see Vladeck, *supra* note 2.

A. *Hayman* and 28 U.S.C. § 2255

Perhaps ironically, the Supreme Court itself was largely responsible for the first concerted effort on Congress's part to provide a substitute remedy for the federal statutory writ of habeas corpus. At the heart of the problem were a series of decisions during the 1940s that seemingly opened the door to potential abuses of the writ by prisoners.

In *Waley v. Johnston*, for example, the Court for the first time allowed federal prisoners to contest their convictions even where the trial record itself was unassailable—a holding that necessarily contemplated review of facts *dehors* the record.[18] In *Walker v. Johnston*, the Court held that in certain circumstances, habeas petitioners were entitled to a full evidentiary hearing in the habeas court.[19] And in *Ahrens v. Clark*, the Court concluded that habeas petitions must be filed in the district of the prisoner's confinement.[20]

Taken together, *Ahrens*, *Waley*, and *Walker* created a logistical nightmare; at the time, most federal prisoners were held somewhere *other* than the district in which they were convicted. Between 1942 and 1948, for example, 63% of federal prisoners were held in just *five* districts.[21] Thus, district courts considering (the growing number of) post-conviction habeas petitions brought by federal prisoners were beset by serious administrative problems, including the routine unavailability of the trial court record and of key witnesses.[22]

In response to the problems posed by these decisions (combined with growing abuse of the writ by federal prisoners unintentionally emboldened by them), the Judicial Conference of the United States proposed legislation to create a statutory remedy for those in custody pursuant to a federal conviction. Such

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18. 316 U.S. 101, 104 (1942) (per curiam).
19. 312 U.S. 275 (1941).
20. 335 U.S. 188 (1948).
21. *See* William H. Speck, *Statistics on Federal Habeas Corpus*, 10 OHIO ST. L.J. 337 (1949). In *Hayman*, the Court relied heavily upon Speck's article. *See, e.g.*, United States v. Hayman, 342 U.S. 205, 212 n.14, 214 n.18 (1952).
22. For an overview of the problems motivating § 2255, see John J. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171 (1949); Louis E. Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313 (1948).

a motion for post-conviction relief would be filed in the district of conviction and sentence, rather than in the district of confinement.[23] Although there was little movement on the proposal between 1942 and 1948,[24] *Ahrens* apparently rekindled the momentum for such a measure, so that when the Judicial Code was re-codified in June 1948, it included new 28 U.S.C. § 2255.[25]

Critically, while creating a statutory post-conviction remedy in the district of conviction, § 2255 also precluded post-conviction habeas corpus in the district of confinement:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.[26]

Thus, for the first time, Congress displaced the statutory writ of habeas corpus unless "the remedy by motion is inadequate or ineffective to test the legality of [the petitioner's] detention." The statute was silent, though, on the criteria by which "adequacy" or "effectiveness" was to be measured.

The constitutionality of the preclusion of habeas corpus quickly came before the courts. Although the Fifth and Tenth Circuits explicitly upheld § 2255 against constitutional challenge,[27] the Ninth Circuit, in a controversial and divided opinion, disagreed.[28]

At the heart of the complicated series of five opinions from the three judges in the Ninth Circuit was the argument that § 2255

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23. *See Hayman*, 342 U.S. at 210–19 & nn.13–14, 17–19, 23, 25 (summarizing the evolution of what became § 2255).

24. *See id.*

25. *See id.* at 218.

26. 28 U.S.C. § 2255(e) (2000).

27. *See* Barrett v. Hunter, 180 F.2d 510 (10th Cir. 1950); Martin v. Hiatt, 174 F.2d 350 (5th Cir. 1949).

28. *See* Hayman v. United States, 187 F.2d 456 (9th Cir. 1950), *vacated*, 342 U.S. 205 (1951).

was not in fact an adequate alternative to habeas corpus in the case before the court (an appeal of the denial of a § 2255 motion).[29] On the majority's view, the district court correctly denied Hayman's § 2255 motion because, *inter alia*, it lacked the authority to produce Hayman as a witness. But such a denial would prejudice (if not formally preclude) his ability to challenge the constitutionality of his conviction via habeas corpus. Thus, because the § 2255 remedy was inadequate, and because habeas would not effectively be available, the court (eventually) concluded that § 2255 was unconstitutional.[30]

On certiorari, the Supreme Court unanimously vacated the Ninth Circuit's decision.[31] Conceding that "respondent's motion states grounds to support a collateral attack on his sentence,"[32] the Court read § 2255 as *not* precluding resort to habeas corpus in such a case. After exhaustively recounting the background to § 2255, Chief Justice Vinson noted how:

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29. The defendant, Herman Hayman, was convicted on six counts and sentenced to twenty years' imprisonment by the United States District Court for the Central District of California. He was subsequently imprisoned in the federal prison at McNeil Island, Washington. *See id.* 457.

30. All three members of the panel filed opinions with respect to the initial decision: Chief Judge Denman wrote for the court, and held that the § 2255 remedy was inadequate on the ground that the defendant was unable to be a witness at his § 2255 hearing, which prejudiced his ability to assert his constitutional right to effective assistance of counsel. *See id.* at 457–66. Judge Stephens concurred in the result, but went further, reading the § 2255 hearing as having preclusive effect in any subsequent habeas petition, even if—as in the case sub judice—the § 2255 remedy was "inadequate" or "ineffective." Thus, Judge Stephens concluded that the statute was an unconstitutional suspension of habeas corpus. *See id.* at 466–68 (Stephens, J., concurring in the result). Finally, Judge Pope dissented, arguing that, as Hayman had not yet attempted to file a federal habeas petition, resolution of the constitutional question was premature. Moreover, Judge Pope disagreed with Chief Judge Denman that the § 2255 remedy was inadequate. *See id.* at 468–71 (Pope, J., dissenting).

On rehearing, Chief Judge Denman came around to Judge Stephens's position, and concluded that § 2255 was unconstitutional. *See id.* at 471–74 (Denman, C.J., concurring in the denial of rehearing). Judge Pope reiterated his dissent. *See id.* at 474–75 (Pope, J., dissenting).

31. Hayman v. United States, 342 U.S. 205, 224 (1951). Technically, the vote in support of Chief Justice Vinson's opinion was 6-0. Justices Black and Douglas concurred in the result only (without explaining why), *see id.*, and Justice Minton did not participate. *See id.*

32. *Id.* at 210.

> [§ 2255] was passed at the instance of the Judicial Conference to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts. Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.[33]

With that admonition in mind, the Court turned to the merits of the Ninth Circuit's analysis. Disagreeing with the Ninth Circuit that the defendant would not have been able to appear before the sentencing court,[34] the Supreme Court concluded that the district court "did not proceed in conformity with Section 2255 when it made findings on controverted issues of fact relating to [Hayman's] own knowledge without notice to [him] and without his being present."[35] In other words, the Ninth Circuit's conclusion that the § 2255 remedy was inadequate in Hayman's case was correct, but only because the district court had misconstrued the scope of its authority under that section—not, as the Ninth Circuit had concluded, because the district court *lacked* the requisite authority. There was no need for the Ninth Circuit to decide that § 2255 was therefore unconstitutional; it needed only to have remanded the proceedings back to the lower court:

> Nothing has been shown to warrant our holding at this stage of the proceeding that the Section 2255 procedure will be "inadequate or ineffective" if respondent is present for a hearing in the District Court on remand of this case. In a case where the Section 2255 procedure is shown to be "'inadequate or ineffective'," the Section provides that the habeas corpus remedy shall remain open to afford the necessary hearing. Under such circumstances, we do not reach constitutional questions. This Court will not pass upon the constitutionality of an act of Congress where the

33. *Id.* at 219.

34. *See id.* at 220–21, 221 n.33 (noting the sentencing court's authority under the All Writs Act, 28 U.S.C. § 1651).

35. *Hayman*, 342 U.S. at 220.

> question is properly presented unless such adjudication is unavoidable, much less anticipate constitutional questions.[36]

Hayman thereby endorsed a broad reading of the scope of review that sentencing courts could undertake pursuant to § 2255, while reiterating that habeas *would* be available where the § 2255 proceedings were inadequate or ineffective. The Supreme Court did nothing to clarify what "inadequate" or "ineffective" might mean, but its broad construction of the sentencing court's authority in entertaining § 2255 motions made that issue much less likely to arise.[37]

B. *Swain v. Pressley* and the D.C. Courts

A quarter-century after *Hayman*, the Court again confronted the question of whether Congress could provide a substitute remedy for habeas corpus in the context of section 23-110(g) of the District of Columbia Code, a provision expressly modeled on 28 U.S.C. § 2255.[38]

Section 23-110(g) was codified as part of the massive reorganization of the District of Columbia judicial system in 1970.[39] Prior to 1970, the District of Columbia had what was effectively a unitary court system,[40] pursuant to which the courts of the District of Columbia exercised both local *and* federal

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36. *Id.* at 223 (footnotes omitted).

37. Indeed, the Court would subsequently characterize *Hayman* as "avoid[ing] the constitutional question by holding that § 2255 was as broad as habeas corpus." Sanders v. United States, 373 U.S. 1, 13 (1963).

38. *See* Palmore v. Superior Court of D.C., 515 F.2d 1294, 1306 (D.C. Cir. 1975) (en banc).

39. *See generally* D.C. Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473. For cogent summaries, see JEFFREY BRANDON MORRIS, CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT 233–35 (2001); Susan Low Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 GEO. L.J. 549, 561–63 (2002); John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 387–89 (2006).

40. Technically, there *were* purely "local" courts in the District of Columbia prior to 1970, but they were courts of extremely limited subject-matter jurisdiction, and appeals could be taken from their decisions to the quasi-federal courts.

jurisdiction.[41] Indeed, it was because of the unique "hybrid" nature of the D.C. courts' jurisdiction that, from 1837 to 1962, those courts were the only tribunals in the country with the power to entertain petitions for writs of mandamus against federal officials.[42]

As part of a package of "home rule" measures (or, according to some, to curb the influence of the then-left-leaning D.C. Circuit over criminal law and criminal procedure), Congress bifurcated the courts into distinctly local and distinctly federal systems, and apportioned jurisdiction accordingly.[43] Along with the criminal

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41. *See generally* Bloch & Ginsburg, *supra* note 39; Roberts, *supra* note 39.

42. In 1813, the Supreme Court held that the lower federal courts lacked the power to issue such common-law writs. *See* McIntire v. Wood, 11 U.S. (7 Cranch) 504 (1813). Eight years later, the Court held that the state courts lacked the power to provide such relief against federal officials. *See* McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821). The clever solution, initially theorized by D.C. Circuit Chief Judge William Cranch, was that, because the D.C. district court was a federal court that could also exercise local jurisdiction, it alone had the power to issue writs of mandamus against federal officers. *See* United States *ex rel.* Stokes v. Kendall, 5 D.C. (5 Cranch) 163 (1837), *aff'd*, 37 U.S. (12 Pet.) 524 (1838). *See generally* Roberts, *supra* note 39, at 380–82 (summarizing the background to the *Kendall* case). Finally, in 1962, Congress enacted the Mandamus and Venue Act, 28 U.S.C. § 1361, which confers jurisdiction on *all* federal district courts to entertain petitions for writs of mandamus against federal officers.

One point that bears mentioning, and that I have never seen discussed before, is whether the D.C. courts, *a fortiori*, would also have retained common-law *habeas* jurisdiction for federal prisoners during this same time period. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), only disavowed common-law habeas corpus in the *Article III* courts, and *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872), only disavowed habeas for federal prisoners in *state* courts. Although this is a fun academic question, the 1970 reorganization act appears to have closed this loophole and vitiated any potential contemporary significance. *See* D.C. Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. at 560 (codified at D.C. CODE § 16-1901(b)) ("Petitions for writs directed to Federal officers and employees shall be filed in the United States District Court for the District of Columbia."). For more on this curious historical footnote, see Stephen I. Vladeck, *The Riddle of the One-Way Ratchet: Habeas Corpus and the District of Columbia*, 11 GREEN BAG 2d (forthcoming 2008).

43. On the partisan motives behind the bifurcation, see Bloch & Ginsburg, *supra* note 39, at 562 n.61; Patricia M. Wald, *Ghosts of Judges Past*, 62 GEO. WASH. L. REV. 675, 680–81 (1994). *See also* Patricia M. Wald, *The Contribution of the D.C. Circuit to Administrative Law*, 40 ADMIN. L. REV. 507, 509 (1988) (noting that "it is no secret that a major motivation for [the

jurisdiction allocated to the new D.C. local courts (and taken away from the D.C. federal district court), Congress provided for a post-conviction remedy mirroring that provided by 28 U.S.C. § 2255, and one that otherwise appeared to preclude post-conviction habeas corpus in the federal courts:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of detention.[44]

Unlike in *Hayman*, however, the post-conviction remedy under D.C. law was a motion before *local* D.C. judges—Article I judges not subject to Article III's salary and tenure protections.[45] *Pressley* therefore raised the issue—not considered in *Hayman*—of whether a post-conviction remedy could be an "adequate" and "effective" substitute for habeas corpus if it did not include consideration by an Article III judge.

Interestingly, that issue was essentially sidestepped by the D.C. Circuit, which held in *Palmore v. Superior Court of the District of Columbia* that section 23-110(g) did not preclude the district court's exercise of habeas jurisdiction, but only interposed a requirement for the exhaustion of local remedies *prior* to seeking

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Act] was the Nixon Administration's fierce opposition" to various decisions by liberal D.C. Circuit judges).

44. D.C. CODE § 23-110(g) (1970). There is little legislative history that explains why Congress would be concerned about remedying the same problem § 2255 was supposed to address. After all, a post-conviction remedy in the D.C. district court, as opposed to the D.C. Superior Court, would hardly raise comparable logistical difficulties. That being said, if part of the purpose for the reorganization of the D.C. courts was to undermine the D.C. Circuit's role in shaping constitutional criminal procedure, it would have made little sense to allow that court to accomplish indirectly (by hearing habeas appeals of defendants convicted in the local D.C. courts) what the statute clearly precluded it from doing directly.

45. *See generally* Palmore v. United States, 411 U.S. 389 (1973).

federal habeas relief.[46] Noting that "the district court construed a statute which created a statutory remedy for post-conviction relief in the new court system as *eliminating* by implication a remedy which the inferior article III courts and the Supreme Court have exercised for two hundred years,"[47] the en banc court found insufficient indication that Congress meant to force such a potentially significant constitutional issue.[48] Instead, as Judge Tamm wrote for the court, "we find that Congress never intended to, nor does section 110 actually, affect the district court's jurisdiction to entertain post-conviction habeas petitions from local prisoners. Instead, we hold that section 110(g) is an exhaustion of remedies statute, requiring initial submission of claims to the local courts . . ."[49]

The same day, the en banc D.C. Circuit applied *Palmore* to the habeas petition of Jasper Pressley. Pressley was convicted in April 1971 by the D.C. Superior Court of grand larceny and larceny from the government. He was sentenced to concurrent prison sentences to run between twenty and ninety-six months, and was unsuccessful in two motions under section 23-110(g) for post-conviction relief.[50] After an interlocutory back-and-forth with the D.C. Circuit, the district court denied Pressley's habeas petition on the ground that "it appeared that appellant had not adequately exhausted his remedies in the local court system."[51]

The en banc D.C. Circuit reversed. Relying on *Palmore*, the court of appeals held that:

> [T]he local courts fully considered the constitutional claims on the merits. Thus, the local courts "had a full opportunity to determine the federal constitutional issues before resort was made to a federal forum, and the policies served by the exhaustion requirement would not be furthered by requiring submission of the claims to the

46. 515 F.2d 1294 (D.C. Cir. 1975) (en banc).
47. *Id.* at 1307.
48. *See id.* at 1308–13.
49. *Id.* at 1313.
50. *See* Pressley v. Swain, 515 F.2d 1290, 1291–92 (D.C. Cir. 1975) (en banc) (summarizing the background).
51. *Id.* at 1292.

(local) courts."[52]

The Supreme Court granted certiorari in both *Pressley* and *Palmore* and consolidated the cases for argument,[53] only to subsequently vacate and remand *Palmore* at the Solicitor General's request (in light of the Court's intervening decision in *Stone v. Powell*).[54] Thus, *Pressley* became the vehicle for resolving the meaning—and constitutionality—of section 23-110(g).

On certiorari, the Court emphatically rejected the D.C. Circuit's conclusion in *Palmore* that section 23-110(g) was merely an exhaustion requirement. First, the majority noted that the statute expressly covers the exhaustion of local remedies, and provides that habeas corpus should not be available unless the local remedy was "inadequate" or "ineffective."[55] Second, as Justice Stevens observed, section 23-110(g) was patterned squarely on 28 U.S.C. § 2255, which was meant to preclude habeas corpus, and not just interpose an exhaustion requirement.[56]

Thus, unlike the D.C. Circuit, the Supreme Court was squarely faced with the constitutional question of whether section 23-110(g), in divesting Pressley of the ability to pursue habeas corpus proceedings in the district court, violated the Suspension Clause. Justice Stevens made fairly quick work of this issue:

> We are persuaded that the final clause in § 23-110(g) avoids any serious question about the constitutionality of the statute. That clause allows the District Court to entertain a habeas corpus application if it "appears that the remedy by motion is inadequate or ineffective to test the legality of [the applicant's] detention." Thus, the only constitutional question presented is whether the substitution of a new collateral remedy which is both adequate and effective should be regarded as a suspension of the Great Writ within the meaning of the

52. *Id.* at 1293 (quoting Francisco v. Gathright, 419 U.S. 59, 63 (1974)).
53. Super. Ct. of D.C. v. Palmore, 424 U.S. 907 (1976) (mem.).
54. *See* Super. Ct. of D.C. v. Palmore, 429 U.S. 915 (1976) (mem.) (citing Stone v. Powell, 428 U.S. 465 (1976)); *see also* Swain v. Pressley, 430 U.S. 372, 376 n.7 (1977) (summarizing the facts).
55. *See Pressley*, 430 U.S. at 377.
56. *See id.* at 377–78.

Constitution.[57]

That is to say, because section 23-110(g) precluded habeas unless the post-conviction remedy was "inadequate" and "ineffective," the negative implication was that habeas *would* be available unless the post-conviction remedy was adequate and effective to test the legality of the defendant's detention. And so, the only question was whether such a substitute for habeas—i.e., one that was both adequate *and* effective in challenging the legality of the defendant's detention—violated the Suspension Clause. That question, according to Justice Stevens, had been answered in *Hayman*: "The Court implicitly held in *Hayman*, as we hold in this case, that the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus."[58] Thus, in one sentence, the Court in *Pressley* enunciated what appeared to be a constitutional rule.

Three points are worth flagging: First, *Hayman*, as we saw above, held no such thing. Instead, the Court in *Hayman* expressly *avoided* the question whether § 2255 was constitutional,[59] holding that the district court had simply misconstrued the scope of its authority to fashion post-conviction relief.[60]

Second, there is an element of Justice Stevens's analysis that seems tautological: under section 23-110(g), a defendant was only precluded from pursuing a federal habeas petition if his motion for local post-conviction relief was both "adequate" and "effective" in testing the legality of his detention. Thus, as a *statutory* matter, a defendant was entitled either to habeas, or to an adequate and

57. *Id.* at 381 (alteration in original).

58. *Id.*

59. *See* United States v. Hayman, 342 U.S. 205, 223 (1952) ("Under such circumstances, we do not reach constitutional questions. This Court will not pass upon the constitutionality of an act of Congress where the question is properly presented unless such adjudication is unavoidable, much less anticipate constitutional questions.") (footnote omitted).

60. *See id.* at 223–24 ("We conclude that the District Court erred in determining the factual issues raised by respondent's motion under Section 2255 without notice to respondent and without his presence. We hold that the required hearing can be afforded respondent under the procedure established in Section 2255.").

effective substitute. So the only *constitutional* question the *Pressley* Court decided was whether Congress can replace habeas corpus with adequate and effective substitutes (which the Court answered in the affirmative). The Court said nothing at all about whether the replacement of habeas corpus with an inadequate or ineffective substitute would necessarily violate the Suspension Clause; under section 23-110(g), just as under 28 U.S.C. § 2255, that question simply could not ever arise.

Finally, although the requirement that the substitute remedy be "adequate" and "effective" came from the D.C. Code, as opposed to the Suspension Clause, the Court went on reach the question of D.C. law—whether, in Pressley's case, the local post-conviction remedy was in fact an "adequate" and "effective" substitute. Rejecting the argument that Article I judges, as a general matter, could not be trusted to decide federal constitutional questions,[61] the Court noted that there were no specific allegations of insufficiency in *Pressley* itself. Thus:

> [W]e have no occasion to consider what kind of showing would be required to demonstrate that the § 23-110 remedy is inadequate or ineffective in a particular case, or whether the character of the judge's tenure might be relevant to such a showing in a case presenting issues of extraordinary public concern.[62]

In short, then, *Pressley* held that the mere presence of an Article I judge, by itself, was not enough to render the remedy provided by section 23-110(g) "inadequate" or "ineffective." As such, Pressley was therefore not entitled to pursue habeas relief in the federal district court.[63] The Court said nothing about what

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61. *See Pressley*, 430 U.S. at 382–83 (citing Palmore v. United States, 411 U.S. 389, 410–22 (1973)). Justice Stevens also noted that defendants in Pressley's position still had two opportunities for Article III review—to the Supreme Court on direct appeal from his conviction, and to the Court again on appeal of the denial of his motion for post-conviction relief under section 23-110(g). *See id.* at 382 n.16.

62. *Id.* at 383 n.20.

63. Concurring in the judgment, Chief Justice Burger—joined by Justices Blackmun and Rehnquist—would have upheld section 23-110(g) on the ground that the Constitution confers no right to habeas corpus to collaterally attack a criminal conviction by a court of competent jurisdiction. *See id.* at 384–86 (Burger, J., concurring in part and concurring in the

would constitute an "inadequate" or "ineffective" substitute, and it also did not say that such a substitute would necessarily violate the Suspension Clause; at the heart of the decision was the statutory safety valve, i.e., that section 23-110(g) expressly reserved access to habeas corpus if the post-conviction remedy proved "inadequate" or "ineffective."

In that regard, the majority opinion in *Pressley* is curiously cursory, for one might assume that those two points are related—that a court's analysis of whether a particular remedy is an "adequate" substitute for habeas corpus might depend to some degree on whether a negative holding would raise a serious constitutional question. Because of the language of section 23-110(g), however, *Pressley* did not need to address any of these weighty questions.

III. ALTERNATIVE REMEDIES AFTER *PRESSLEY*

For two decades, *Swain v. Pressley* languished in obscurity. Congress made no new attempts to provide a substitute remedy for habeas corpus, and the significance (or lack thereof) of the Court's discussion of the limitations on such legislation went effectively unnoticed in both the courts and the academy. Instead, the potential significance of *Swain v. Pressley* did not become apparent until the enactment of a series of statutes constraining the habeas jurisdiction of the federal courts. First, of course, was the enactment of "AEDPA",[64] which dramatically reworked the habeas corpus jurisdiction of the federal courts both in cases where prisoners sought to collaterally attack their state-court convictions and in immigration cases. Also of significance is the REAL ID Act of 2005,[65] which reapportioned jurisdiction between the Courts of Appeals (on direct review) and habeas proceedings in the district courts. After surveying the role *Swain v. Pressley* played in these sets of cases, Part III turns to the other major area where *Swain v. Pressley* has been invoked—the detention of non-citizens as "enemy combatants" as part of the "war on terrorism,"

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judgment).

64. Pub. L. No. 104-132, 110 Stat. 1214 (1996)(codified as amended in scattered sections of 8, 15, 18, 21, 22, 28, 40, 42, 49, and 50 U.S.C.).

65. Pub. L. No. 109-13, div. B, 119 Stat. 231, 302–23 (2005) (codified as amended in scattered sections of 8 U.S.C.).

and Congress's repeated attempts to constrain their access to the federal courts.

A. *Felker*: Alternative Remedies and Habeas Appeals

One of the major changes wrought by AEDPA was the creation of a "gatekeeper" system for "second or successive" federal habeas petitions filed by state prisoners seeking to collaterally attack their conviction.[66] Under 28 U.S.C. § 2244(b)(3), as added by AEDPA, a petitioner seeking to file a second or successive habeas petition challenging a state-court conviction must first obtain permission from the relevant Court of Appeals.[67] If the court grants permission, the petitioner may proceed to file his petition in the district court.[68] If the court denies permission, the statute expressly divests the Supreme Court of jurisdiction to review that denial either as an appeal or via a writ of certiorari.[69] In *Felker v. Turpin*,[70] the Court considered whether AEDPA was unconstitutional in so precluding the Court's review.

Writing for the Court, Chief Justice Rehnquist relied on the fact that Congress had not divested *all* of the Supreme Court's possible jurisdiction. Instead, Rehnquist invoked the Court's so-called "original" habeas jurisdiction, which AEDPA had left untouched:

> Although § 2244(b)(3)(E) precludes us from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court, it makes no mention of our authority to hear habeas petitions filed as original matters in this Court. As we declined to find a repeal of § 14 of the Judiciary Act of 1789 as applied to this Court by implication [in *Ex parte Yerger*[71]], we decline to find a similar repeal of § 2241 of Title 28—its descendant—by

66. *See generally* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1556–62 (2000) (discussing Felker v. Turpin, 518 U.S. 651 (1996)).
67. *See* 28 U.S.C. § 2244(b)(3)(A) (2001).
68. *Id.* § 2244(b)(3)(C).
69. *Id.* § 2244(b)(3)(E).
70. 518 U.S. 651 (1996).
71. 75 U.S. (8 Wall.) 85 (1869).

implication now.[72]

Thus, because Felker could have sought habeas relief directly in the Supreme Court once his application was denied, the Court concluded that AEDPA's gatekeeping provision did not violate the Exceptions Clause of Article III.[73]

One might also characterize such a holding in *Pressley*'s terms—i.e., that an "original" habeas petition in the Supreme Court was an adequate and effective substitute for an appeal of the denial of a habeas petition by the circuit court. As part of that implicit conclusion, Chief Justice Rehnquist emphasized that the substantive restrictions contained within AEDPA would not apply to the Supreme Court's review of an original habeas petition (suggesting that there might be a problem if they did).[74] Finally, the Court also rejected Felker's argument that AEDPA's gatekeeping provision violated the Suspension Clause, concluding that Congress was acting well within its authority in codifying necessary responses to the "abuse of the writ" by second and successive petitioners.[75]

Although the decision was unanimous, Justice Souter—joined by Justices Stevens and Breyer—wrote separately "only to add that if it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open."[76] In other words, from Justice Souter's perspective, if the alternative remedies turned out to be ineffective, the constitutional question avoided in *Felker* would be squarely presented.[77]

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72. *Felker*, 518 U.S. at 661 (citations omitted).

73. *See id.* at 662–63.

74. *See id.*

75. *See id.* at 663–64. The majority then considered—and quickly rejected—whether Felker would be entitled to original habeas relief. *See id.* at 664–65.

76. *Id.* at 667 (Souter, J., concurring).

77. Indeed, though it might seem perverse to rely on the availability of a remedy (an "original" habeas petition) that has not been successfully invoked in over eighty years, the Supreme Court has shown repeated awareness of the possibility of such relief as a last resort. *See, e.g.*, Padilla v. Hanft, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring in the denial of certiorari); *see also* Boumediene v. Bush, 127 S. Ct. 1478, 1478 (2007) (Stevens and Kennedy, JJ., respecting the denial of certiorari) (noting the potential

B. The REAL ID Act of 2005: Alternative Remedies and Immigration Law

The harder questions raised by AEDPA vis-à-vis habeas corpus went to its constriction of the *substantive* grounds for relief in petitions filed by state prisoners,[78] and its attempted cabining of the federal courts' habeas jurisdiction in immigration cases.[79] In *INS v. St. Cyr*,[80] the Supreme Court—following the lead of virtually all of the circuits—adopted a somewhat counter-textual interpretation of various provisions in AEDPA and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[81] in holding that neither statute actually precluded access to habeas corpus.[82] Instead, the Court held that only the clearest statement of congressional intent would compel reaching the serious constitutional questions that would arise if AEDPA and IIRIRA precluded habeas review.[83]

Citing *Swain v. Pressley*, the majority in *St. Cyr* recognized Congress's power to displace habeas by providing adequate alternative remedies in the courts of appeals.[84] Nevertheless, the Court's holding suggested that the relevant provisions of AEDPA and IIRIRA instead *cabined* the jurisdiction of the courts of

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availability of original relief "[i]f petitioners later seek to establish that the Government has unreasonably delayed proceedings under the Detainee Treatment Act of 2005, or some other and ongoing injury" (citation omitted)).

78. *See generally* Irons v. Carey, 479 F.3d 658, 665–70 (9th Cir. 2007) (Noonan, J., concurring) (summarizing the problematic nature of post-AEDPA review).

79. *See generally* Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* INS v. St. Cyr, 33 COLUM. HUM. RTS. L. REV. 555 (2002) (discussing the background to *St. Cyr* and the larger constitutional issues).

80. 533 U.S. 289 (2001).

81. Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8, 18, 20, 22, 28, 32, 42, 48, and 50 U.S.C.).

82. *See St. Cyr*, 533 U.S. at 299–305.

83. *See, e.g.*, *id.* at 301 n.13 ("The fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely."). *See also id.* at 326–27 (Scalia, J., dissenting) (referring to the majority's rationale as "a superclear statement, 'magic words' requirement").

84. *See id.* at 314 n.38 (majority opinion) ("Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals.").

appeals to entertain petitions for review, shifting even more immigration claims into the habeas jurisdiction of the district courts (especially where "criminal aliens" were concerned).[85] Thus, in the ensuing years, there was mounting confusion over which claims had to be pressed on direct review from the Board of Immigration Appeals (BIA), and which claims could only be brought via habeas, a distinction that often turned on the very facts in dispute in individual cases.[86]

Congress eventually responded through the REAL ID Act of 2005,[87] the jurisdiction-stripping provisions of which attempted to reverse the direction of immigration litigation.[88] Thus, the Act significantly *expands* the scope of the Courts of Appeals' jurisdiction over petitions for review, while otherwise purporting to preclude habeas petitions in any case where an immigrant seeks to challenge a final order of removal.[89] As new 8 U.S.C. § 1252(a)(2)(D) provides:

> Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.[90]

In other words, the REAL ID Act of 2005 attempts to preclude the habeas review relied upon in *St. Cyr*, substituting for it the administrative review provided by the Courts of Appeals.[91] As

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85. Indeed, the same day as *St. Cyr*, the Court rejected the argument that the courts of appeals could hear otherwise precluded claims as an alternative to habeas. *See* Calcano-Martinez v. INS, 533 U.S. 348 (2001). *See generally* Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133, 135 (2006).

86. *See, e.g.*, Noriega-Lopez v. Ashcroft, 335 F.3d 874, 877–79 (9th Cir. 2003) (citing Sareang Ye v. INS, 214 F.3d 1128, 1131 (9th Cir. 2000)).

87. Pub. L. No. 109-13, div. B, 119 Stat. 231, 302–23 (2005).

88. *See* 8 U.S.C. § 1252 (2005).

89. *See* Neuman, *supra* note 85, at 136–41.

90. 8 U.S.C. § 1252(a)(2)(D); *see also* 8 U.S.C. § 1252(a)(5) (which provides that such review is exclusive).

91. *See, e.g.*, Bonhometre v. Gonzales, 414 F.3d 442, 446 (3d Cir. 2005) ("These modifications effectively limit all aliens to one bite of the apple with

Professor Neuman cogently asks:

> Will direct review in the courts of appeals, as reframed by the REAL ID Act, provide an adequate and effective substitute for the writ of habeas corpus sufficient to satisfy the requirements of the Suspension Clause? The answer depends on how the statutory structure will be interpreted, and on what the Suspension Clause requires.[92]

Thus, Professor Neuman highlighted as major areas of concern "the effect of the thirty-day filing period in limiting the availability of review of removal orders, the fact-finding capacity of the courts of appeals, and the availability of review for questions that arise after a removal order has been issued."[93]

Professor Neuman was writing shortly after the REAL ID Act was enacted, and subsequent developments in the courts have not added too much to his cogent analysis. For the most part, the courts of appeals have upheld the REAL ID Act against constitutional challenge, focusing in almost every case on the REAL ID Act's expansion of the courts' jurisdiction to review the administrative decision on direct appeal.[94] Even when the adequacy of the remedy has been open to some question, courts have uniformly upheld the congressional displacement of habeas corpus.[95] In Part IV, I will return to the implications of some of these cases.

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regard to challenging an order of removal, in an effort to streamline what the Congress saw as uncertain and piecemeal review of orders of removal, divided between the district courts (habeas corpus) and the courts of appeals (petitions for review)."). The Conference Report for the statute even relies upon *Swain v. Pressley*. *See* H.R. REP. NO. 109-72, at 175 (2005), 2005 U.S.C.C.A.N. at 300.

92. Neuman, *supra* note 85, at 142.

93. *Id.*

94. *See, e.g.*, Iasu v. Smith, 511 F.3d 881 (9th Cir. 2007); Jean-Pierre v. U.S. Att'y Gen., 500 F.3d 1315 (11th Cir. 2007); Kolkevich v. Att'y Gen., 501 F.3d 323 (3d Cir. 2007); Dalombo Fontes v. Gonzales, 498 F.3d 1 (1st Cir. 2007); De Ping Wang v. D.H.S., 484 F.3d 615 (2d Cir. 2007); Ramadan v. Gonzales, 479 F.3d 646 (9th Cir. 2007); Mohamed v. Gonzales, 477 F.3d 522 (8th Cir. 2007).

95. Indeed, two decisions have expressly invoked *Swain v. Pressley*. *See* Xiao Ji Chen v. U.S. D.O.J., 471 F.3d 315, 326 (2d Cir. 2006); Enwonwu v. Gonzales, 438 F.3d 22, 32 (1st Cir. 2006).

Ultimately, though, the REAL ID Act was really just a preview for the far more serious battle that was to come—the question of providing a substitute remedy for individuals detained in conjunction with the war on terrorism.

C. *Hamdan*: Alternative Remedies and Guantánamo, Part I

The scope of federal habeas jurisdiction has been at the heart of the United States' detention of non-citizen "enemy combatants" at Guantánamo Bay, Cuba, since the first detainees were transferred there early in 2002.[96] Although the lower courts divided over whether the habeas statute extended to petitions filed by the Guantánamo detainees,[97] the Supreme Court, in *Rasul v. Bush*, held that it did.[98] Shortly after the *Rasul* decision, and (arguably) motivated by the Court's same-day decision in *Hamdi v. Rumsfeld*,[99] the government established "Combatant Status Review Tribunals" (CSRTs) to provide administrative review of the detainees' claims that they were not "enemy combatants" in the first place.[100]

But it was not until December 2005, after the Supreme Court granted certiorari in *Hamdan v. Rumsfeld*[101]—which challenged the legality of the military tribunals established pursuant to President Bush's November 13, 2001 Military Order[102]—that Congress attempted to cast the CSRTs as an "alternative" to

96. For an overview, see Richard H. Fallon, Jr., & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007).

97. *Compare* Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002) (rejecting jurisdiction), *and* Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003) (same), *with* Gherebi v. Bush, 352 F.3d 1278 (9th Cir. 2003) (sustaining jurisdiction).

98. 542 U.S. 466 (2004).

99. 542 U.S. 507 (2004) (plurality).

100. *See, e.g.*, *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 450–51 (D.D.C. 2005).

101. For the grant, see *Hamdan v. Rumsfeld*, 546 U.S. 1002 (2005) (mem.). The district court had struck down the commissions, only to be reversed by the D.C. Circuit. *See* Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005).

102. Military Order of November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 FED. REG. 57, 833 (Nov. 16, 2001).

habeas corpus. Thus, in the Detainee Treatment Act of 2005,[103] Congress attempted to restrict all judicial review of the detainees' claims to two avenues: an appeal to the D.C. Circuit from the CSRT,[104] and, for certain detainees convicted by military commission, an appeal to the D.C. Circuit from the final judgment of conviction.[105]

Critically, the DTA provided that such review would be exclusive. The statute otherwise purported to oust the habeas jurisdiction of the federal courts—including the Supreme Court:

> Except as provided in section 1005 of the Detainee Treatment Act of 2005, 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 Department of Defense at Guantanamo Bay, Cuba . . . [106]

In *Hamdan*, the majority sidestepped all questions as to the

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103. Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739-44 (2005).

104. Under the DTA, the D.C. Circuit could only review:

> (i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

DTA § 1005(e)(2)(C), 119 Stat. at 2742.

105. Again, the DTA limited the D.C. Circuit's review to:

> (i) whether the final decision was consistent with the standards and procedures specified in [Military Commission Order No. 1, dated August 31, 2005]; and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.

Id. § 1005(e)(3)(D), 119 Stat. at 2743. Curiously, such appeals were only as of right for defendants convicted and sentenced to death or to imprisonment for 10 years or more. For defendants receiving lesser sentences, the statute provided that the appeal "shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit." *Id.* § 1005(e)(3)(B)(ii), 119 Stat. at 2743.

106. DTA § 1005(e)(1), 119 Stat. at 2742.

constitutionality of the DTA's exclusive review scheme, holding that the statutory language was insufficiently clear concerning whether the jurisdiction-stripping provision should apply to pending cases (including *Hamdan* and most of the other petitions brought by the Guantánamo detainees).[107] Thus, the adequacy of DTA review was irrelevant; on the *Hamdan* Court's view, the DTA did not preclude access to habeas corpus in all cases pending on the date of the statute's enactment.

Although the majority therefore did not reach the *Swain v. Pressley* question, Justice Scalia—who concluded that the DTA's applicability to pending cases was beyond question—did. In his view, "even if petitioner were fully protected by the [Suspension] Clause, the DTA would create no suspension problem."[108] In Justice Scalia's view:

> [T]he "standards and procedures specified in" Order No. 1 include every aspect of the military commissions, including the fact of their existence and every respect in which they differ from courts-martial. Petitioner's claims that the President lacks legal authority to try him before a military commission constitute claims that "the use of such standards and procedures," as specified in Order No. 1, is "[in]consistent with the Constitution and laws of the United States." The D.C. Circuit thus retains jurisdiction to consider these claims on postdecision review . . . Thus, the DTA merely defers our jurisdiction to consider petitioner's claims; it does not eliminate that jurisdiction. It constitutes neither an "inadequate" nor an "ineffective" substitute for petitioner's pending habeas application.[109]

Whether Justice Scalia was correct or not, the DTA's lack of clarity ensured that the issue would be left for another day. As it turned out, that day came rather quickly.

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107. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2762–69 (2006).
108. *Id.* at 2818 (Scalia, J., dissenting).
109. *Id.* at 2818–19 (citations omitted) (alteration in original).

D. *Boumediene* and *Bismullah*: Alternative Remedies and Guantánamo, Part II

In response to *Hamdan*, Congress enacted the MCA.[110] In addition to providing statutory authority for trials by military commission and creating both trial-level courts and the Court of Military Commission Review (CMCR),[111] the MCA, in stronger statutory language, attempted to make the CSRT review scheme exclusive. Thus, section 7 of the MCA provides that:

> 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.[112]

Although the MCA tweaks the appellate review of military commissions in several significant ways,[113] it effectively leaves the DTA procedure intact with respect to judicial review of CSRT decisions. Thus, under the DTA/MCA, individuals determined to be "enemy combatants" by CSRTs, but *not* subject to trial by military commission, have only one appeal to the D.C. Circuit to test the legality of their detention.[114]

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110. Pub. L. No. 109-366, 120 Stat. 2600 (2006).

111. *See id.* § 3, 120 Stat. at 2621 (codified at 10 U.S.C. § 950(f)).

112. *Id.* § 7(a), 120 Stat at 2635 (codified at 28 U.S.C. § 2241(e)(1)). The statute further provides that, except as provided by the DTA:

> no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2241(e)(2).

113. *See id.* § 9, 120 Stat. at 2636–37. Although these amendments appear to be technical, they solve several potential problems with the DTA's review provisions, including the DTA's limitation to challenges to the "August 31, 2005" military commission order, its provision for discretionary appeals for detainees receiving sentences of less than ten years, and its limitation on applicability to those individuals detained at Guantánamo Bay.

114. One hard question is whether this provision applies to Ali Saleh Kahlah Al-Marri, the one non-citizen held as an "enemy combatant" *within*

Understandably, much of the focus on the MCA has been on the constitutionality of its foreclosure of habeas jurisdiction, which the D.C. Circuit addressed (and upheld) in *Boumediene v. Bush*.[115] As Judge Randolph wrote for the majority, the Suspension Clause does not protect non-citizens outside the territorial United States, and so the MCA could not raise a constitutional question, even if the substitute remedy it provided were inadequate.[116] Judge Rogers dissented as to the reach of the Suspension Clause,[117] and also concluded that the DTA/MCA remedy was constitutionally inadequate.[118] In her words:

> Even if the CSRT protocol were capable of assessing whether a detainee was unlawfully held and entitled to be released, it is not an adequate substitute for the habeas writ because this remedy is not guaranteed. Upon concluding that detention is unjustified, a habeas court "can only direct [the prisoner] to be discharged." But neither the DTA nor the MCA require this, and a recent report studying CSRT records shows that when at least three detainees were found by CSRTs not to be enemy combatants, they were subjected to a second, and in one case a third, CSRT proceeding until they were finally found to be properly classified as enemy combatants.[119]

As Judge Rogers's dissent underscores, the question whether the MCA violates the Suspension Clause (to the extent it applies)[120] simply cannot be decoupled from questions as to the scope of review under the DTA/MCA, which a different panel of the D.C. Circuit has considered in a series of opinions in

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the territorial United States. A panel of the United States Court of Appeals for the Fourth Circuit held that it did not, Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007), but that decision has since been vacated and is pending rehearing en banc.

115. 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007).

116. *See id.* at 988–92.

117. *See id.* at 995–1004 (Rogers, J., dissenting).

118. *See id.* at 1004–07.

119. *Id.* at 1006 (citations omitted) (alteration in original).

120. On why the *Boumediene* majority's argument that the Suspension Clause simply does not "apply" to Guantánamo is unconvincing, see Vladeck, *supra* note 2.

Bismullah v. Gates.[121]

In *Bismullah "I,"* the first appeal from a CSRT entertained by the D.C. Circuit, the court rejected the government's argument that its review should be limited to the record produced *by* the CSRT. Thus, as Chief Judge Ginsburg wrote for the panel:

> [T]he record on review consists of all the information a Tribunal is authorized to obtain and consider, pursuant to the procedures specified by the Secretary of Defense, hereinafter referred to as Government Information and defined by the Secretary of the Navy as "such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant," which includes any information presented to the Tribunal by the detainee or his Personal Representative.[122]

The court went on to issue a series of orders governing the means by which that record should be disclosed to counsel for the detainees.[123] The upside of the decision, though, was that review of a CSRT appeal could include information outside the record. The court then denied the government's petition for rehearing in *Bismullah "II,"* and a divided court denied rehearing en banc. Lest there be any doubt about *Bismullah*'s significance, consider the Supreme Court's order granting certiorari in *Boumediene*: "As it would be of material assistance to consult any decision in *Bismullah* . . . currently pending in the United States Court of Appeals for the District of Columbia Circuit, supplemental briefing will be scheduled upon issuance of any decision in those cases."[124]

Thus, it is abundantly clear that the adequacy of DTA/MCA review *as a substitute* for habeas corpus is perhaps the most important issue before the Court in *Boumediene*. But inasmuch as the D.C. Circuit's focus has been on the scope of the *factual* record

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121. *See* Bismullah v. Gates, 503 F.3d 137 (D.C. Cir. 2007); Bismullah v. Gates, 501 F.3d 178 (D.C. Cir. 2007); *see also* Bismullah v. Gates, 514 F.3d 1291 (D.C. Cir. 2008) (mem.) (denying rehearing en banc).

122. *See Bismullah*, 501 F.3d at 180.

123. *See id.* at 189–91.

124. Boumediene v. Bush, 127 S. Ct. 3078 (2007) (mem.).

available for the court of appeals to review a CSRT decision, two hard *legal* questions remain unanswered as of this writing:

First, does the DTA/MCA review encompass claims challenging whether the detainee is subject to military detention in the first place, let alone whether he is an "enemy combatant," as defined by applicable regulations (and, now, the MCA)? That is to say, in challenging the procedures by which the CSRT arrives at its determination that a detainee is an "enemy combatant," does the detainee have the ability to contest his amenability to military detention (and military jurisdiction) in the first place?

Second, and separately, what is the significance of section 5 of the MCA, which provides that "[n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding [against the United States or an officer thereof] . . . as a source of rights in any court of the United States or its States or territories"?[125] If habeas corpus, as a general matter, encompasses claims that detention is in violation of a duly-enacted federal treaty,[126] section 5 appears to preclude review of one (important) ground by which the detention of some—if not many—of the Guantánamo detainees might be unlawful.

One answer might be that Congress has the power to override (or at least "un-execute") treaties.[127] But if not, then the harder

125. Military Commissions Act of 2006, Pub. L. No. 109-366, § 5, 120 Stat. 2600, 2631.

126. *See, e.g.*, Wildenhus's Case, 120 U.S. 1 (1887) (recognizing the power to enforce treaties via the federal habeas statute); 28 U.S.C. § 2241(c)(3) (2008) (providing that habeas is available to prisoners "in custody in violation of the Constitution or laws *or treaties* of the United States" (emphasis added)). For an argument that habeas might therefore provide a cause of action for the enforcement of "non-self-executing" treaties, see Stephen I. Vladeck, Case Comment, *Non-Self-Executing Treaties and the Suspension Clause After* St. Cyr, 113 YALE L.J. 2007 (2004).

127. Such an argument might actually have more weight in light of the Supreme Court's decision in *Medellin v. Texas*, 128 S. Ct 1346 (2008), which appears to establish—for the first time—that "non-self-executing" treaties are *not* binding federal law. *See, e.g., id.* at 1356-57 n.2. Even if the MCA was intended to "un-execute" the Geneva Conventions, the Supreme Court has traditionally required a clear statement from Congress when it intends to so provide. *See, e.g.*, Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984); Cook v. United States, 288 U.S. 102, 120 (1933). Whatever else might be said about the MCA, it is hardly "clear" on this point. *See* Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva*

question remains: whether the rule of *Swain v. Pressley* includes the ability to press *all* possible claims that federal detention is unlawful. *Pressley* itself, again, is of little help in providing any answers.

IV. THE MYTH OF *SWAIN V. PRESSLEY*

Perhaps the most important characteristic of both *Swain v. Pressley* and its predecessor, *United States v. Hayman*, is that the statutes in question in each case had a habeas "safety-valve." Thus, if the alternative remedy provided by § 2255 or D.C. Code section 23-110(g) proved to be "inadequate" or "ineffective," the statutes expressly contemplated the continuing availability of habeas corpus to test the legality of detention.[128] Judges interpreting whether, in particular cases, the remedy had proven "adequate" or "effective" to test the legality of the petitioner's confinement could therefore err on the side of caution, safe in the knowledge that their decision had no constitutional implications, and that habeas remained available in cases where the post-conviction remedy was deemed insufficient.

The modern substitutes, in contrast, contain no such safety valve. They create alternative remedies to habeas corpus, and then provide that those remedies are exclusive. Thus, statutes such as the REAL ID Act, the DTA, and the MCA, put judges in an incredibly difficult position, with enormous pressure to conclude that the substitute remedy provided by the statute is "adequate" and "effective," even when (as in *Boumediene*, perhaps) there are considerable arguments to the contrary. Otherwise, jurists considering such claims would be left to strike down the

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Conventions, and the Courts: A Critical Guide, 101 AM. J. INT'L L. 73, 76–92 (2007).

128. *Compare* 28 U.S.C. § 2255 (2008) ("An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained . . . unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."), *with* D.C. CODE § 23-110(g) ("An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court . . . unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.").

statute as violating the Suspension Clause, something the Supreme Court has never done.[129]

As a result, in a number of cases arising under the REAL ID Act, courts have already gone out of their way to conclude that the restoration of direct review provided by the statute is an "adequate" and "effective" substitute to habeas corpus, even when the analysis seems somewhat counterintuitive. Thus, courts either read into the statute the ability to consider claims that the statute seems to preclude, or the court concludes that procedural limitations on direct review do not actually serve to render such review "inadequate" or "ineffective."

The "myth" of *Swain v. Pressley*, then, is that it provides a meaningful test to apply to circumstances wherein Congress has attempted to provide an alternative remedy to habeas corpus. At most, it provides a useful example of how Congress might legislate responsibly to do so. But where Congress provides that the alternative remedy is exclusive, even where it might be inadequate or ineffective, the precedents suggest that *Swain v. Pressley*, coupled with the constitutional avoidance canon, actually distorts the courts' analysis of the underlying issue.

* * *

Whatever the merits of the underlying claims in the Guantánamo cases, one point seems clear: If the Suspension Clause does "apply to" or otherwise protect the Guantánamo detainees, the central question before the Supreme Court will be whether the remedy provided by the DTA/MCA constitutes an "adequate" and "effective" substitute for habeas corpus. As the above discussion demonstrates, *Swain v. Pressley* holds that Congress has the power to so provide, but does little to elaborate upon what "adequate" means. Moreover, because of constitutional avoidance, the Court would be under enormous pressure to conclude that the remedy *is* adequate and effective, even if it has to adopt a strained interpretation to reach such a result.

At the very least, *Boumediene* provides the Court with an opportunity to shed light on questions that were avoided in *Hayman*, and only cursorily addressed in *Pressley*. And if the last

129. The Court has shied away from even *interpreting* the Suspension Clause. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 301 n.13 (2001).

decade is any indication, clarification of the limitations on Congress's power to fashion alternative remedies to habeas corpus will have ramifications far afield of Guantánamo and the war on terrorism.

Given the unquestioned importance of the writ of habeas corpus, and the Supreme Court's repeated admonitions that "we have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements,"[130] it is long-past time for greater clarity in delineating the limits on Congress's power to displace the writ with alternative remedies, lest that power become the means by which Congress further "suffocate[s] the writ."

130. Hensley v. Mun. Court, 411 U.S. 345, 350 (1973).