

# ESSAY

## DID THE MADISONIAN COMPROMISE SURVIVE DETENTION AT GUANTÁNAMO?

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*This Essay takes up the Court's less-heralded second holding in Boumediene v. Bush—that a federal habeas court must have the institutional capacity to find facts, which in Boumediene itself meant that a federal district court must be available to the petitioners. Although this aspect of the opinion has gone largely unnoticed, it is inconsistent with the Madisonian Compromise—the standard view that the Constitution does not require Congress to create or to vest jurisdiction in any federal court except the Supreme Court. In fact, it appears that the Court adopted, sub silentio, the position famously advanced by Justice Story in 1816 that the Constitution requires Congress to vest the lower federal courts with jurisdiction to hear executive-detention habeas corpus cases. In considering alternatives to this bold break with long-settled constitutional doctrine, this Essay examines newly uncovered opinions from Supreme Court Justices to determine whether Justices acting in chambers remain a viable habeas forum of last resort post-Boumediene, why the Boumediene Court failed to address this issue directly, and, finally, the degree to which the need for an independent finder of fact is well grounded in constitutional doctrine. This Essay concludes that Boumediene's rejection of the Madisonian Compromise, rather than its decision with respect to the scope of the habeas writ, will come to be its longest-lived legacy for federal courts law.*

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[C]ongress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is exclusively vested in the United States, and of which the supreme court cannot take original cognizance.

—Justice Joseph Story<sup>1</sup>

Clearly, it is unthinkable that the federal courts would jettison the orthodox view and embrace Justice Story’s theory of mandatory vesting of the judicial power in the federal courts.

—Charles Alan Wright et al.<sup>2</sup>

By granting the Court of Appeals “exclusive” jurisdiction over petitioners’ cases, Congress has foreclosed . . . [the] necessity for factfinding that will arise in some [habeas] cases by [not] allowing the appellate judge or Justice to transfer the case to a district court of competent jurisdiction, whose institutional capacity for factfinding is superior to his or her own. . . . Here that opportunity is constitutionally required.

—Justice Anthony Kennedy<sup>3</sup>

## INTRODUCTION

For decades, federal courts scholars have debated the question of Congress’s power to control the jurisdiction of lower federal courts.<sup>4</sup> Until 2008, however, the absolute dearth of any case law challenging the standard view that Congress retains near plenary control over lower federal court jurisdiction had rendered these discussions purely academic.<sup>5</sup> But the Supreme Court’s *Boumediene v. Bush*<sup>6</sup> opinion

<sup>1</sup> *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 331 (1816) (emphasis omitted).

<sup>2</sup> 13 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3526, at 555 (3d ed. 2008).

<sup>3</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2266, 2270 (2008) (citation omitted).

<sup>4</sup> See *infra* notes 94–95 and accompanying text (listing scholarly articles on both sides of issue).

<sup>5</sup> See, e.g., WRIGHT ET AL., *supra* note 2, § 3526, at 555 (noting that it was “unthinkable” that federal courts would “embrace [the] theory of mandatory vesting of the judicial power in the federal courts”).

changed all that. The issue of most immediate concern in the case was whether foreign detainees held at Guantánamo Bay, Cuba, fell within the purview of the constitutional habeas corpus guarantee embodied in the Suspension Clause. The Court, five to four, held that they did.<sup>7</sup> This holding, given its powerful and immediate consequences, has spawned a voluminous literature and garnered the majority of the scholarly attention regarding the case.<sup>8</sup> But the Court also issued a

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<sup>6</sup> 128 S. Ct. 2229.

<sup>7</sup> *Id.* at 2262.

<sup>8</sup> See, e.g., Muneer I. Ahmad, *Resisting Guantanamo: Rights at the Brink of Dehumanization*, 103 Nw. U. L. REV. 1683 (2009) (discussing *Boumediene* in context of rights-based advocacy); Michael Bahar, *As Necessity Creates the Rule: Eisentrager, Boumediene, and the Enemy—How Strategic Realities Can Constitutionally Require Greater Rights for Detainees in the Wars of the Twenty-First Century*, 11 U. PA. J. CONST. L. 277 (2009) (arguing that strategic military concerns require courts to review executive detention of non-state-sponsored militants); Anthony J. Colangelo, “*De Facto Sovereignty*”: *Boumediene and Beyond*, 77 GEO. WASH. L. REV. 623 (2009) (addressing *Boumediene*’s notion of de facto sovereignty and its implications for extending scope of constitutional guarantee of habeas protection to noncitizens in other situations of extraterritorial detention); David D. Cole, *Rights over Borders: Transnational Constitutionalism and Guantanamo Bay, 2007–2008* CATO SUP. CT. REV. 47, 47 (“[The] most profound implications” of *Boumediene* “may lie in [the Court’s] altered conceptions of sovereignty, territoriality, and rights in the globalized world.”); Geoffrey S. Corn, *The Role of the Courts in the War on Terror: The Intersection of Hyperbole, Military Necessity, and Judicial Review*, 43 NEW ENG. L. REV. 17 (2008) (arguing that *Boumediene* will not produce long-term detriment to government’s antiterrorism military campaign); Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 SMU L. REV. 281 (2008) (arguing that Congress’s enactment of section 7 of Military Commissions Act was intentionally unconstitutional and that Court’s decision in *Boumediene* to strike it down was consistent with congressional intent); Ernesto Hernández-López, *Boumediene v. Bush and Guantánamo, Cuba: Does the “Empire Strike Back”?*, 62 SMU L. REV. 117, 167–88 (2009) (addressing unique jurisdictional status of Guantánamo Bay as it relates to scope of Suspension Clause); Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259 (2009) (arguing that Supreme Court’s functional approach to reach of constitutional habeas guarantee could have broader implications for international reach of U.S. Constitution generally); Tung Yin, *Boumediene and Lawfare*, 43 U. RICH. L. REV. 865 (2009) (arguing that procedures exist to prevent detainees from using habeas forum as means of continuing terrorist activities); Eric A. Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism* (Univ. of Chi., Public Law & Legal Theory Working Paper No. 228, 2008), available at <http://ssrn.com/abstract=1211426> (critiquing *Boumediene* as species of judicial cosmopolitanism). In addition to the previous non-exhaustive list, the *Northwestern University Law Review Colloquy* series has published a very thoughtful set of responses to *Boumediene* as well. See Benjamin G. Davis, *No Third Class Processes for Foreigners*, 103 Nw. U. L. REV. COLLOQUY 88 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/32/> (arguing that military commissions are inherently flawed); Amos N. Guiora, *Military Commissions and National Security Courts After Guantánamo*, 103 Nw. U. L. REV. COLLOQUY 199, 204 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/42/> (arguing, post-*Boumediene*, that detainees be tried in “hybrid domestic terror court that would allow for an in camera review of confidential intelligence information presented by the prosecutor and a representative of the intelligence services” (emphasis omitted)); Gregory S. McNeal, *Beyond Guantánamo, Obstacles and Options*,

second holding in *Boumediene* invalidating Congress's attempt to strip the courts of habeas jurisdiction, which to date has not received this same scholarly focus.<sup>9</sup> But it should. I address this jurisdictional aspect of the case. In the process, I explore previously unpublished opinions of Supreme Court Justices and probe the outer boundaries of judicial power.

In reaction to the Supreme Court's taking jurisdiction over Guantánamo detainees' habeas corpus petitions in cases prior to *Boumediene*, Congress stripped the federal courts of jurisdiction to hear Guantánamo detainee habeas petitions and replaced the habeas process with a primarily military review process.<sup>10</sup> The *Boumediene* Court held that this detainee-review process, which allowed for only very circumscribed judicial oversight of the executive's determination that an individual was an "enemy combatant" in the D.C. Circuit Court of Appeals, provided an inadequate substitute for the writ of habeas corpus.<sup>11</sup> As a result, Congress's stripping of habeas jurisdiction from the federal courts in section 7(a) of the Military Commissions Act of 2006 (MCA)<sup>12</sup> violated the Constitution's Suspension Clause.<sup>13</sup> The Court found particular fault in the status review procedures contained in the predecessor statute to the MCA, the Detainee Treatment Act of 2005 (DTA).<sup>14</sup> Pursuant to the DTA, the reviewing Article III court lacked the ability to make independent findings of fact, which is constitutionally required in the context of

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103 NW. U. L. REV. COLLOQUY 29 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/28/> (arguing, post-*Boumediene*, that military commissions can be reformed to conform to constitutional requirements); Stephen I. Vladeck, *On Jurisdictional Elephants and Kangaroo Courts*, 103 NW. U. L. REV. COLLOQUY 172 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/40/> (discussing jurisdictional issues raised by national security courts proposed in reaction to *Boumediene*).

<sup>9</sup> There are two notable exceptions. See Martin J. Katz, *Guantanamo, Boumediene, and Jurisdiction-Stripping: The Imperial President Meets the Imperial Court*, 25 CONST. COMMENT. 377 (2009) (arguing that *Boumediene* should be understood as primarily about separation of powers); Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107 (2009) (discussing "the allusions to the relationship between habeas corpus and the separation of powers" in Justice Kennedy's controlling opinion in *Boumediene*). I touch on both pieces below.

<sup>10</sup> See *infra* notes 46–62 and accompanying text (discussing series of cases and congressional responses leading up to *Boumediene*).

<sup>11</sup> *Boumediene*, 128 S. Ct. at 2274.

<sup>12</sup> Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635–36 (2006) (codified at 28 U.S.C. § 2241(e)(1) note (2006)).

<sup>13</sup> *Boumediene*, 128 S. Ct. at 2274; see also 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.").

<sup>14</sup> Pub. L. No. 109-148, § 1005, 119 Stat. 2739, 2740–44 (2005) (codified as amended at 10 U.S.C. § 801 note (2006)).

habeas petitions seeking relief from executive detention.<sup>15</sup> Given this need for factfinding, the *Boumediene* Court held that some judicial institution with the capacity to make findings of fact must remain open.<sup>16</sup> In *Boumediene*, at least, that meant a federal district court.<sup>17</sup>

This seemingly innocuous assertion—that a lower federal court must remain open to find facts—is in fact tremendously bold and revisionist. In so holding, the Court challenged, sub silentio, the continued soundness of the Madisonian Compromise—the blackletter view that the Constitution does not require the existence of any federal court other than the Supreme Court.<sup>18</sup> Such a move by a federal court is, quite literally, unprecedented.<sup>19</sup> Given this significant consequence, the little-known but historically and structurally significant power of Justices to hear habeas petitions in their personal capacities by way of in-chambers dispositions gains a newfound significance as a forum that might be consistent with both the Madisonian Compromise and *Boumediene*'s factfinding holding.<sup>20</sup> In this Essay, employing in-chambers opinions released from Supreme Court archives only recently, I argue that *Boumediene* undermines the continued soundness of the Madisonian Compromise. In so doing, I explore the role that individual Justices proceeding in chambers might play in preserving the Madisonian Compromise view, concluding that such a role is necessarily limited. I then consider the potential consequences attendant to *Boumediene*'s factfinding holding.

I begin with some conceptual background. The Madisonian Compromise takes its name from events at the Constitutional Convention of 1787.<sup>21</sup> Many members of the Constitutional

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<sup>15</sup> *Boumediene*, 128 S. Ct. at 2272; see also Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2739, 2741–42 (codified as amended at 28 U.S.C. § 2241(e) note (2006)). As used throughout this Essay, “executive detention” refers to detention by the executive branch in the absence of judicial proceedings such as criminal conviction or civil commitment. See *infra* notes 77, 151 and accompanying text (discussing executive detention in relation to courts’ habeas jurisdiction).

<sup>16</sup> See 128 S. Ct. at 2270 (“[T]he court that conducts the habeas proceeding must have . . . the authority to admit and consider relevant exculpatory evidence . . .”).

<sup>17</sup> See *id.* at 2277 (remanding to district court); *id.* at 2266 (discussing provision for transfer of habeas case to district court in general federal habeas statute).

<sup>18</sup> See *infra* notes 21–25, 94–97 and accompanying text (discussing Madisonian Compromise).

<sup>19</sup> See *infra* note 93 and accompanying text (noting that only one federal court has ever held contrary to Madisonian Compromise, only to be reversed, though on other grounds, by Supreme Court).

<sup>20</sup> See *infra* notes 145–47 and accompanying text (describing statutory and constitutional grounds for this practice).

<sup>21</sup> See generally RICHARD H. FALLON, JR. ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 7–9 (6th ed. 2009) (describing Convention debates leading to Madisonian Compromise).

Convention found the creation of a federal judiciary highly controversial.<sup>22</sup> James Madison, in a pitch to save the convention, offered his now-famous compromise, which achieved unanimous support from the delegates.<sup>23</sup> He proposed that the Constitution mandate only the creation of the Supreme Court, leaving the creation of lower federal courts entirely to the discretion of Congress.<sup>24</sup> In line with this history, the majority of commentators and jurists have concurred that the existence and jurisdiction of the lower federal courts remain under the near-complete control of Congress.<sup>25</sup>

Challenging the soundness of the Madisonian Compromise, as *Boumediene* seems to do, is thus controversial—but not wholly without advocates. In addition to several prominent contemporary academics,<sup>26</sup> Justice Joseph Story famously espoused an anti-Madisonian Compromise view in *Martin v. Hunter's Lessee*.<sup>27</sup> Writing in dicta, Justice Story argued that “congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is *exclusively* vested in the United States, and of which the supreme court cannot take original cognizance.”<sup>28</sup> Given that the state courts may not hear federal habeas cases<sup>29</sup> and that the Supreme Court may not hear executive-detention habeas corpus petitions in its original jurisdiction,<sup>30</sup> cases such as *Boumediene* fall squarely into Justice Story’s matrix where Congress is bound, under

<sup>22</sup> See MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 79–80 (1913) (“The most serious question was that of the inferior courts. The difficulty lay in the fact that they were regarded as an encroachment upon the rights of the individual states. . . . [T]he matter was compromised: inferior courts were not required, but the national legislature was *permitted* to establish them.”).

<sup>23</sup> See Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1620 (2008) (“This was the compromise, orchestrated by James Madison, between those who wanted to establish lower federal courts and those who thought they were unnecessary. The two camps split the difference by leaving the creation of the lower federal courts to Congress’ discretion.”); FALLON, JR. ET AL., *supra* note 21, at 8 (“[T]he vote accepting the compromise was unanimous . . .”).

<sup>24</sup> Frost, *supra* note 23, at 1620.

<sup>25</sup> See *infra* note 94 (listing cases and articles taking majority view).

<sup>26</sup> See *infra* note 95 (listing articles questioning Madisonian Compromise).

<sup>27</sup> 14 U.S. (1 Wheat.) 304, 331 (1816). The only other pre-*Boumediene* adoption of the Justice Story position came from the D.C. Circuit, but was overruled by the Supreme Court. See *Eisentrager v. Forrestal*, 174 F.2d 961, 966 & n.26 (D.C. Cir. 1949) (citing Justice Story’s opinion in *Hunter’s Lessee* for proposition that Congress may not strip lower federal courts of habeas jurisdiction), *rev’d on other grounds sub nom.* *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

<sup>28</sup> *Hunter’s Lessee*, 14 U.S. at 331.

<sup>29</sup> See *Tarble’s Case*, 80 U.S. (13 Wall.) 397, 411 (1871) (“State court[s] should proceed no further when it appears . . . that the prisoner is held by an officer of the United States under . . . the authority of the United States . . .”).

<sup>30</sup> See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100–01 (1807) (noting that Supreme Court may exercise original jurisdiction only over such matters that are constitutionally

his view, to grant lower federal court jurisdiction. Indeed, one can readily imagine Justice Story concurring with *Boumediene*'s second, factfinding holding.

But this is not the whole story. As it turns out, a lower federal court was not the only option available to serve as a forum for the *Boumediene* habeas petitioners. Supreme Court Justices in their individual capacities “in chambers”—not the Court en banc or Justices in their capacities as circuit justices<sup>31</sup>—have the power to issue many types of relief ranging from stays to bail to injunctions.<sup>32</sup> Of particular importance here, individual Justices acting in chambers have the power to issue original writs of habeas corpus.<sup>33</sup> This power, while little-known, carries an ancient lineage, dating back to the English Habeas Corpus Act of 1679.<sup>34</sup> Prior to that act, King Charles II had limited the effectiveness of the Great Writ in many ways, including the closing of court sessions to prevent prisoners from filing for redress.<sup>35</sup> Parliament circumvented this abuse by empowering judges in their individual capacities to issue the writ of habeas corpus when the courts were closed.<sup>36</sup> The first Congress, in the Judiciary Act of 1789, adopted this approach as well.<sup>37</sup> Supreme Court Justices had enjoyed this power to issue the Great Writ in chambers uninterrupted until Congress's attempt to strip individual Justices of that power in

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authorized, of which writ of habeas corpus is not one, and holding that Supreme Court may decide habeas cases in its appellate jurisdiction).

<sup>31</sup> See Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251, 279–82 (2005) (discussing distinction between circuit justice and Justice acting in chambers in context of habeas writ issued by Justice Taney and defied by President Lincoln).

<sup>32</sup> See generally Frank Felleman & John C. Wright, Jr., Note, *The Powers of the Supreme Court Justice Acting in an Individual Capacity*, 112 U. PA. L. REV. 981 (1964) (providing overview of these powers).

<sup>33</sup> Hartnett, *supra* note 31, at 271 (listing authorities).

<sup>34</sup> Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.).

<sup>35</sup> See Eric M. Freedman, *Milestones in Habeas Corpus: Part I: Just Because John Marshall Said It, Doesn't Make It So: Ex parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531, 578–79 & nn.153–59 (2000) (providing example of habeas writ denied by English authorities because King's Bench was out of term); see also WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 56–57 (1980) (providing example of King terminating parliamentary session to avoid dispute over habeas petition).

<sup>36</sup> DUKER, *supra* note 35, at 185.

<sup>37</sup> Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (“[E]ither 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.”); see also RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 314 n.4 (5th ed. 2003) (concluding that Justices' in-chambers power to grant Great Writ is “a power granted from 1789 to the present”).

the DTA and MCA.<sup>38</sup> As such, the Justices' authority to act in chambers, which has served as an important structural safety check upon the political branches,<sup>39</sup> may well have been an option for the *Boumediene* Court both to preserve the sanctity of the Madisonian Compromise and to provide the petitioners with a constitutionally adequate forum to pursue habeas relief.

On the other hand, *Boumediene*'s factfinding requirement presents a significant impediment to the use of Justices in chambers as a habeas forum. This holding requires not only that a reviewing forum have the ability to supplement the factual record, but also that the adjudicator have an institutional capacity to do so.<sup>40</sup> A Justice acting in chambers, however, seems an unlikely forum to which such institutional factfinding capacity could adhere. Moreover, haphazard publication of in-chambers dispositions has hampered investigation into this question.<sup>41</sup> Nevertheless, using two newly published in-chambers dispositions, I uncover precedent in *Ex parte Stevens*<sup>42</sup> and *Ex parte Durant*<sup>43</sup> for Justices, in-chambers, engaging in factfinding hearings in executive-detention habeas cases. This precedent presents the quandary: Could the Court have afforded the *Boumediene* petitioners a constitutionally adequate habeas forum without breaching the inviolability of the Madisonian Compromise by pushing these cases to the in-chambers docket, or is the provision of a constitutionally adequate habeas forum necessarily linked to Justice Story's mandatory-lower-court-jurisdiction view?

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<sup>38</sup> See *infra* notes 46–60 and accompanying text (outlining Congress's legislative moves leading up to *Boumediene*).

<sup>39</sup> Freedman, *supra* note 35, at 580–82 (discussing importance of power of judges in chambers to grant writs of habeas corpus).

<sup>40</sup> See *Boumediene v. Bush*, 128 S. Ct. 2229, 2266 (2008) (discussing importance of “institutional capacity for factfinding” of district courts); *id.* at 2272 (“[A]n opportunity for the detainee to present relevant exculpatory evidence that was not made part of the record in the earlier proceedings [is constitutionally required].”).

<sup>41</sup> See *infra* notes 42, 155–57 and accompanying text (discussing recent publication of previously uncirculated in-chambers opinions).

<sup>42</sup> 4 RAPP 1508 (1861) (Wayne, J., in chambers). A word on citation is in order. The in-chambers opinions collected by Deputy Supreme Court Clerk Cynthia Rapp are published by the Green Bag under the title *A Collection of In Chambers Opinions by the Justices of the Supreme Court of the United States*. There are currently three volumes of this reporter with a fourth in supplement form. The Green Bag suggests the citation form of: [Case name], [Vol.] RAPP [Page] ([Year]). I employ this form only in those instances, such as *Ex parte Stevens*, where the Rapp edition is the first publication of the opinion.

<sup>43</sup> 4 RAPP 1416 (1946) (Burton, J., in chambers).

In this Essay, I take up this question, an issue which the Supreme Court failed to address in *Boumediene*.<sup>44</sup> I provide a brief review of the *Boumediene* opinion in Part I and argue that the Court's factfinding holding embraces Justice Story's mandatory-lower-court-jurisdiction view. In Part II, in an attempt to avoid a constitutional rule that rejects the Madisonian Compromise, I consider whether a Justice acting in chambers remains a constitutionally competent forum of last resort for habeas petitioners post-*Boumediene*. I conclude that there is some authority for the continued viability of that view, but that clinging to the Madisonian Compromise in this fashion produces bizarre results that counsel against its adoption. I turn next, in Part III, to a discussion of why the *Boumediene* Court did not pursue the in-chambers option in the opinion. I suggest that one explanation for this silence is that the Court actually sought to embrace Justice Story's mandatory-lower-court-jurisdiction position and thus reject the Madisonian Compromise.<sup>45</sup> Given the radical consequences of *Boumediene*'s factfinding requirement, in Part IV, I contemplate rejecting *Boumediene*'s independent-factfinder rule altogether as a means of preserving the Madisonian Compromise. I conclude, however, that such a requirement is too well rooted in broad swaths of constitutional doctrine to limit the holding to the peculiar facts raised in *Boumediene*. I end with a speculative turn, predicting that the Court's anti-Madisonian Compromise position will come to be *Boumediene*'s lasting legacy.

## I

### *BOUMEDIENE V. BUSH* AND THE MADISONIAN COMPROMISE

I begin with my core proposition: *Boumediene* represents the first challenge to the soundness of the Madisonian Compromise to be issued by the Court. First, I provide a brief review of *Boumediene* and the Guantánamo-based suits leading up to that disposition. In so doing, I focus on the case's factfinding holding. Second, I argue that *Boumediene*'s factfinding holding is in tension with the Madisonian Compromise because no fora outside the Article III judiciary—

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<sup>44</sup> Stephen I. Vladeck, *The Riddle of the One-Way Ratchet: Habeas Corpus and the District of Columbia*, 12 GREEN BAG 2D 71, 72 (2008) (noting that Supreme Court failed to address this issue).

<sup>45</sup> *Boumediene* also offers many important lessons concerning the Supreme Court's appellate jurisdiction. See, e.g., Katz, *supra* note 9, at 409–10 (“*Boumediene*[ ] . . . may be understood as supporting the idea that Congress cannot preclude all routes to the Supreme Court's appellate jurisdiction.”). In the interest of brevity, I do not address these significant issues in this piece.

neither state courts nor Article I courts—can fulfill the *Boumediene* factfinding function.

### A. *The Guantánamo Cases*

First, I offer a brief review of the Supreme Court's Guantánamo litigation to date and of the *Boumediene* opinion itself. Leading up to *Boumediene*, the military, as part of the response to the 9/11 attacks, had captured hundreds of aliens on foreign soil, determined that these persons were aiding terrorist organizations, and held them in executive detention for more than six years at Guantánamo Bay, Cuba.<sup>46</sup> The Department of Defense had adjudged Lakhdar Boumediene, an alien captured abroad, and his co-petitioners enemy combatants, resulting in their continued indefinite detention at Guantánamo.<sup>47</sup> In separate proceedings, these detainees filed for habeas relief in the D.C. District Court, with different judges reaching conflicting judgments.<sup>48</sup>

In the meantime, Congress and the Court were engaging in an exchange over the Guantánamo detainee cases, with the Court attempting to avoid constitutional questions by way of statutory interpretations that preserved judicial review, only to be reversed by Congress at every turn. In 2004, the Court decided its first Guantánamo case, *Rasul v. Bush*, holding, purely as an interpretation of the federal habeas statute (28 U.S.C. § 2241), that habeas jurisdiction reached aliens held at Guantánamo.<sup>49</sup> In the aftermath of *Rasul*, several habeas petitions proceeded in the D.C. District Court, resulting in the Supreme Court granting certiorari in one such case—*Hamdan v. Rumsfeld*.<sup>50</sup>

While *Hamdan* was awaiting disposition by the Court, Congress weighed in by passing the DTA in 2005.<sup>51</sup> In pointed reaction to

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<sup>46</sup> See, e.g., Tim Golden, *The Battle for Guantánamo*, N.Y. TIMES MAG., Sept. 17, 2006, at 60, available at <http://www.nytimes.com/2006/09/17/magazine/17guantanamo.html> (reporting on conditions at Guantánamo). The number of prisoners held at Guantánamo has fluctuated but has generally been publically available. See, e.g., William Glaberson, *6 Guantanamo Detainees Are Released to Other Countries as Questions Linger*, N.Y. TIMES, June 12, 2009, at A6 (reporting that 232 individuals were held at Guantánamo as of mid-2009). The number of persons held at other facilities, both known and secret, surely is much higher. See, e.g., Alissa J. Rubin & Sangar Rahimi, *In Shift, U.S. Military Names 645 Detainees Held at Key Afghanistan Base*, N.Y. TIMES, Jan. 17, 2010, at A6 (reporting that Bagram alone held approximately 750 detainees as of January 2010).

<sup>47</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2240–41 (2008).

<sup>48</sup> *Id.* at 2241.

<sup>49</sup> 542 U.S. 466, 484 (2004).

<sup>50</sup> 546 U.S. 1002 (2005) (mem.).

<sup>51</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (codified as amended in scattered sections of 10, 28, and 42 U.S.C.).

*Rasul*, Congress amended 28 U.S.C. § 2241 to remove habeas jurisdiction from all the federal courts, Justices, and judges in regard to petitioners seeking release from Guantánamo Bay.<sup>52</sup> In reliance upon this provision of the DTA, the government in *Hamdan* moved that the Supreme Court dismiss the case for lack of jurisdiction.<sup>53</sup> The Supreme Court rejected the motion,<sup>54</sup> explaining that “[o]rdinary principles of statutory construction . . . rebut the Government’s theory.”<sup>55</sup> The Court held that absent a clear statement that the stripping of jurisdiction should be enforced retroactively, which was lacking in the DTA, the Court would not enforce the DTA’s jurisdictional bar in cases that were already pending when the DTA was enacted.<sup>56</sup> The *Hamdan* Court went on to strike the Combatant Status Review Tribunals (CSRT), a military adjudicative body established to review the detainees’ status as terrorists,<sup>57</sup> as beyond the power of the executive branch to create unilaterally.<sup>58</sup>

Congress again responded to the Court by passing the MCA in October 2006. First, Congress reconstituted the CSRT system as a matter of statutory, not administrative, law.<sup>59</sup> Second, Congress explicitly stripped all federal courts, Justices, and judges of habeas jurisdiction to hear pending Guantánamo cases.<sup>60</sup> By this point, the *Boumediene* cases were consolidated before the D.C. Circuit Court of Appeals, which responded to the clear dictates of the MCA by dis-

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<sup>52</sup> *Id.* § 1005(e)(1), 119 Stat. at 2741–42 (codified as amended at 28 U.S.C. § 2241(e) note (2006)) (“[N]o 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 Guantánamo Bay, Cuba . . .”).

<sup>53</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 572, 574 (2006); Brief for Respondents at 12, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184).

<sup>54</sup> *Hamdan*, 584 U.S. at 572.

<sup>55</sup> *Id.* at 575–76.

<sup>56</sup> *Id.* at 576–77, 584 n.15 (“[W]e conclude that § 1005(e)(1) does not strip federal courts’ jurisdiction over cases pending on the date of the DTA’s enactment . . .”).

<sup>57</sup> See Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(a), 119 Stat. 2739, 2740 (codified as amended at 10 U.S.C. § 801 note (2006)) (recognizing that executive branch, through Secretary of Defense, created CSRTs).

<sup>58</sup> *Hamdan*, 548 U.S. at 594–95 (“[Relevant statutory authorities] at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the Constitution and laws, including the law of war. Absent a more specific congressional authorization, the task of this Court is . . . to decide whether Hamdan’s military commission is so justified.” (internal quotation marks omitted)); *id.* at 613 (“[T]he commission lacks power to proceed . . . [because] the American common law of war, . . . the [Uniform Code of Military Justice] itself, . . . the rules and precepts of the law of nations, . . . [and] the four Geneva Conventions . . . [are inconsistent with] [t]he procedures that the Government has decreed will govern Hamdan’s trial by commission . . . .” (internal quotation marks and citations omitted)).

<sup>59</sup> See Military Commissions Act of 2006, Pub. L. No. 109-366, § 3, 120 Stat. 2600, 2600–31 (codified at 10 U.S.C. §§ 948a–950w note (2006)).

<sup>60</sup> *Id.* § 7, 120 Stat. at 2635–36 (codified at 28 U.S.C. § 2241(e) note (2006)).

missing the *Boumediene* cases for lack of jurisdiction.<sup>61</sup> After an unusual certiorari process, the Supreme Court took the case.<sup>62</sup>

Justice Kennedy authored the Court's opinion, which first held that section 7(a) of the MCA was an unequivocal attempt to strip every federal court, Justice, and judge of jurisdiction to hear habeas petitions brought by alien detainees held at Guantánamo.<sup>63</sup> This lack of jurisdiction, the Court reasoned, would constitute an injury to the petitioners only if they were entitled to the Great Writ's protections. Thus, the Court next addressed whether the Suspension Clause<sup>64</sup> applies to aliens captured abroad and held at Guantánamo.<sup>65</sup> After a long, and at times pedantic, discourse on eighteenth-century English habeas law, the Court held these detainees protected by the Clause.<sup>66</sup>

Finally, the Court turned its attention from the scope of the Suspension Clause to the substance of its provisions. Given that the Court held that the detainees were entitled to seek the writ and that Congress had not exercised its power to suspend the writ formally,<sup>67</sup> the Court reasoned that section 7(a) of the MCA—which prevented the federal courts from hearing the detainees' habeas claims—must operate as an unconstitutional suspension of the habeas writ unless Congress provided an adequate substitute.<sup>68</sup> The Court next considered whether a military commission's determination that a person was an enemy combatant, followed by a review of that determination by

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<sup>61</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2242 (2008).

<sup>62</sup> The Supreme Court initially denied certiorari in *Boumediene*, but it did so under exceptional circumstances. See *Boumediene v. Bush*, 549 U.S. 1328 (2007) (mem.). Justices Breyer, Ginsberg, and Souter entered a written dissent from the denial of certiorari, a rare event to be sure. *Id.* at 1329. (Breyer, J., dissenting from denial of cert.). Justices Kennedy and Stevens voted for the denial of certiorari, but, in an unprecedented move, all but invited the petitioners to come back directly to the Supreme Court should the government fail to conduct the CSRTs in a constitutional manner. *Id.* (Stevens & Kennedy, JJ., respecting denial of cert.) (“If petitioners later seek to establish that the Government has unreasonably delayed proceedings . . . alternative means exist for us to consider our jurisdiction over the allegations made by petitioners . . . to ensure that the office and purposes of the writ of habeas corpus are not compromised.” (internal quotation marks omitted)). Following counsel Seth Waxman's compelling plea for reconsideration of the denial of certiorari in light of the dearth of procedural protections afforded Guantánamo detainees under the CSRT process, the Court reversed itself and granted *Boumediene*'s petition for a writ of certiorari. *Boumediene v. Bush*, 551 U.S. 1160, 1160 (2007) (mem.).

<sup>63</sup> *Boumediene*, 128 S. Ct. at 2242.

<sup>64</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>65</sup> *Boumediene*, 128 S. Ct. at 2244.

<sup>66</sup> *Id.* at 2262 (“We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay.”).

<sup>67</sup> *Id.* (“The MCA does not purport to be a formal suspension of the writ; and the Government, in its submissions to us, has not argued that it is. Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention.”).

<sup>68</sup> *Id.*

the CSRT coupled with limited judicial oversight in the D.C. Circuit, as proposed by the DTA<sup>69</sup> and later the MCA,<sup>70</sup> constituted a constitutionally adequate substitute for habeas relief.<sup>71</sup> (I will refer to this three-step set of procedures as the “DTA regime.”) The Court concluded it did not.<sup>72</sup>

Interestingly, the Court assumed that “[t]he DTA might be read . . . to allow the petitioners to assert most, if not all, of the legal claims they seek to advance, including their most basic claim: that the President has no authority under the [Authorization for Use of Military Force (AUMF)] to detain them indefinitely.”<sup>73</sup> But the Court found constitutional fault in the inability of an independent court to find facts relevant to the habeas claim in this context.<sup>74</sup>

The Court first held that “the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings.”<sup>75</sup> Thus, in the case of postconviction habeas review, deference to the factfinding of the initial court of record is often appropriate because that court, in rendering the conviction, will have guaranteed basic procedural protections.<sup>76</sup> Such deference, however, is not appropriate in cases where the petitioner seeks habeas relief from preconviction executive detention—especially when the petitioner has been deprived of counsel and denied the ability to present exculpatory evidence and may not be informed of the government’s allegations against him (as was the case in *Boumediene*).<sup>77</sup> The Court explained that “[f]or the writ of habeas corpus, or its substitute, to function as an effective and proper remedy

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<sup>69</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(3), 119 Stat. 2739, 2741–42 (codified as amended at 10 U.S.C. § 801 note (2006)).

<sup>70</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at scattered sections of U.S.C. (2006)).

<sup>71</sup> *Boumediene*, 128 S. Ct. at 2269, 2272 (describing review procedures Congress enacted).

<sup>72</sup> *Id.* at 2274.

<sup>73</sup> *Id.* at 2271; *see also* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

<sup>74</sup> *Boumediene*, 128 S. Ct. at 2272 (“The absence of a release remedy and specific language allowing AUMF challenges are not the only constitutional infirmities from which the statute potentially suffers, however. The more difficult question is whether the DTA permits the Court of Appeals to make requisite findings of fact.”).

<sup>75</sup> *Id.* at 2268.

<sup>76</sup> *See id.* (“Accordingly, where relief is sought from a sentence that resulted from the judgment of a court of record, as [is] the case . . . in most federal habeas cases, considerable deference is owed to the court that ordered confinement.”); *see also id.* at 2273 (“In other contexts, *e.g.*, in post-trial habeas cases where the prisoner already has had a full and fair opportunity to develop the factual predicate of his claims, similar limitations on the scope of habeas review may be appropriate.”).

<sup>77</sup> *See id.* at 2269 (“Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing.”); *see also id.* at 2273 (“In this context, however, where the underlying detention proceedings

in this context, the court that conducts the habeas proceeding must have . . . some authority to assess the sufficiency of the Government's evidence . . . [and] to admit and consider relevant exculpatory evidence."<sup>78</sup> The Court went on to note that this factfinding power has long been a feature of federal habeas proceedings,<sup>79</sup> and that "[h]ere that opportunity is constitutionally required."<sup>80</sup>

Applying these principles, the Court found the DTA regime constitutionally lacking. The DTA regime limited D.C. Circuit review to facial constitutional challenges of the CSRT review standards or procedures and to claims that the Department of Defense failed to follow those procedures.<sup>81</sup> Even assuming that this latter standard allowed for the D.C. Circuit to revise factual conclusions made by the CSRTs, the Court held the DTA regime inadequate because it wholly prohibited the reviewing Article III court from supplementing the factual record.<sup>82</sup>

The Court went further still and found constitutional fault in the D.C. Circuit's inability to transfer habeas claims to a district court under the DTA regime. The Court made this point by contrasting the DTA regime with the pre-DTA version of 28 U.S.C. § 2241:

In § 2241 (2000 ed.) Congress confirmed the authority of "any Justice" or "circuit judge" to issue the writ. . . . That statute accommodates the necessity for factfinding that will arise in some cases by allowing the appellate judge or Justice to transfer the case to a district court of competent jurisdiction, whose institutional capacity for factfinding is superior to his or her own.<sup>83</sup>

The Court further noted that "[b]y granting the Court of Appeals 'exclusive' jurisdiction over petitioners' cases, . . . [the DTA regime] has foreclosed th[e] option" of transfer to a district court.<sup>84</sup> Thus, the

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lack the necessary adversarial character, the detainee cannot be held responsible for all deficiencies in the record.").

<sup>78</sup> *Id.* at 2270.

<sup>79</sup> *See id.* ("Federal habeas petitioners long have had the means to supplement the record on review, even in the postconviction habeas setting."); *see also id.* at 2267 ("[T]he common-law habeas court's role was most extensive in cases of pretrial and noncriminal detention, where there had been little or no previous judicial review . . . . Notably, the black-letter rule that prisoners could not controvert facts in the jailer's return was not followed [consistently] . . . in such cases.").

<sup>80</sup> *Id.* at 2270.

<sup>81</sup> *Id.* at 2272; *see also* Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2)(C), 119 Stat. 2739, 2742 (codified as amended at 10 U.S.C. § 801 note (2006)).

<sup>82</sup> *Boumediene*, 128 S. Ct. at 2272 ("[W]e see no way to construe the statute to allow what is also constitutionally required in this context: an opportunity for the detainee to present relevant exculpatory evidence that was not made part of the record in the earlier proceedings.").

<sup>83</sup> *Id.* at 2266 (citations omitted).

<sup>84</sup> *Id.* (citations omitted).

DTA unconstitutionally foreclosed the possibility of supplementing the record on habeas review.

*B. Boumediene Challenges the Madisonian Compromise*

Having reviewed the Court's decision, I begin building the case that *Boumediene's* factfinding holding runs contrary to the Madisonian Compromise. First, I flesh out exactly the type of factfinding the Court mandates and link that type of factfinding to archetypal trial court functions. Second, I argue that neither state courts nor Article I courts (federal adjudicative bodies that lack the Article III hallmarks of judicial independence—namely, life tenure and salary protections<sup>85</sup>) can fulfill this factfinding function in the habeas setting. Third, I note that even if one believes that an Article I court can fulfill *Boumediene's* factfinding function in habeas cases, *Boumediene* continues to challenge the root notion of the Madisonian Compromise. Thus, absent the existence of an extraordinary forum (such as Justices sitting in chambers), *Boumediene's* factfinding holding appears incompatible with the Madisonian Compromise view.

To engage with this proposition fully, a precise understanding of *Boumediene's* factfinding requirement is necessary. There are two categories of factfinding relevant to this discussion.<sup>86</sup> Article III courts at times independently reach factual conclusions based upon a record created by another court or adjudicative entity. Such is the case, for example, when the Supreme Court reviews state court conclusions of fact based upon the state court record.<sup>87</sup> This type of factfinding is essentially a species of appellate review, because the task only calls for the court to review a preexisting record. As such, this type of factfinding appears compatible with the Madisonian Compromise position (i.e., there is no need for a federal trial court to perform this type of factfinding). The *Boumediene* Court found that the DTA regime allowed the D.C. Circuit to conduct this type of limited factfinding based on the CSRT's record.<sup>88</sup>

But as the *Boumediene* Court held, a federal habeas court in the case of executive detention relief must have the further power to supplement a factual record with new evidence—not just render new con-

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<sup>85</sup> See WRIGHT ET AL., *supra* note 2, §§ 3508, 3528 (providing introduction to role and powers of Article I courts); 17 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 4101–4106 (3d ed. 2007) (similar).

<sup>86</sup> See *infra* Part IV (providing fuller discussion of constitutional necessity for factfinding in Article III courts).

<sup>87</sup> See *infra* notes 255–67 and accompanying text (discussing Supreme Court's doctrine concerning constitutional necessity of engaging in this type of factfinding).

<sup>88</sup> See *supra* notes 81–84 and accompanying text (reviewing *Boumediene* Court's discussion of factfinding under DTA regime).

clusions from a preexisting record—or even to create a factual record from scratch.<sup>89</sup> This record-supplementation power constitutes an archetypal trial court function.<sup>90</sup> Indeed, the *Boumediene* Court suggested that this supplementation function required the ability to transfer cases to federal district courts.<sup>91</sup> In so holding, the Court seems to adopt a version of Justice Story's view of mandatory lower court jurisdiction.<sup>92</sup> Prior to *Boumediene*, no sustained holding from a federal court had ever espoused such a rule.<sup>93</sup>

Such a holding is truly remarkable, not merely for its novelty, but because it runs contrary to the deeply held principle in federal courts law that Congress need not create any lower federal courts at all, nor vest those lower federal courts it does create with any particular font of jurisdiction—including habeas jurisdiction.<sup>94</sup> Although some prominent scholars have questioned the continued soundness of this

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<sup>89</sup> See *supra* notes 75–84 and accompanying text (reviewing *Boumediene* Court's holding that federal habeas petitioners must have opportunity to supplement factual record on review).

<sup>90</sup> See *Boumediene v. Bush*, 128 S. Ct. 2229, 2266 (2008) (noting trial courts' superior institutional capacity for habeas factfinding).

<sup>91</sup> See *id.* (implying that “necessity for factfinding” can be fulfilled by having appellate judge or Justice transfer case to district court).

<sup>92</sup> See, e.g., Katz, *supra* note 9, at 406–07 (reaching similar conclusion that *Boumediene* suggests that lower court must be left open for factfinding).

<sup>93</sup> Justice Story's view was presented in dicta. The only other flirtation with his view was reversed by the Supreme Court. See *Eisentrager v. Forrester*, 174 F.2d 961, 966 & n.26 (D.C. Cir. 1949) (citing Justice Story for proposition that Congress may not strip lower federal courts of habeas jurisdiction in cases addressing jurisdiction of Article III courts to hear habeas claims brought by aliens held in Germany by U.S. military after World War II), *rev'd on other grounds sub nom. Johnson v. Eisentrager*, 339 U.S. 763 (1950).

<sup>94</sup> This understanding of Congress's power is the predominant view expressed by the Court. See, e.g., *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (“All [lower] federal courts . . . derive their jurisdiction wholly from . . . Congress . . . . It could have declined to create any such courts . . . . [As a result, Congress has] the power ‘of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees . . . [it deems] proper . . . .’” (citations omitted)); see also *Yakus v. United States*, 321 U.S. 414, 429 (1944) (similar); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938) (similar); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 233–34 (1922) (similar); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448–49 (1850) (similar). Legal scholars give a similar treatment, of which I provide a mere sampling. See, e.g., Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1030 (1981–1982) (“One of the clearest [provisions in the Constitution] is the [one granting power to] Congress to regulate the jurisdiction of [lower federal courts].”); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 2 (1990) (“[C]ommentators mark out their individual lines defining the precise scope of Congress's authority, but no one has challenged the central assumption that Congress bears primary responsibility for defining federal court jurisdiction.”); Gerald Gunther, *Congressional Power To Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 912 (1984) (contending that Congress's near plenary control over lower federal courts' jurisdiction is “widely supported”); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority*

Madisonian Compromise position,<sup>95</sup> the rejection of the position by the Supreme Court would represent an epic change of course.<sup>96</sup> In fact, the Court has only once before—some 140 years ago—struck down an act of Congress on the theory that the statute constituted an unconstitutional attempt to strip a federal court, in that case the Supreme Court, of jurisdiction.<sup>97</sup>

Given that this reading of *Boumediene* is such a direct affront to the Madisonian Compromise, a less Article III-centric reading of the factfinding-capacity requirement may, to many readers, appear the better interpretation of the case, even if it does not entirely square with the Court's order remanding the case to the district court. One could construct such a reading by discounting the Court's comments

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*To Regulate the Jurisdiction of the Federal Court*, 95 HARV. L. REV. 17, 25–26 (1981) (similar).

<sup>95</sup> See Akhil Reed Amar, *A Neo-federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 206 (1985) (providing Article III textualist and historical arguments that while Framers did not require creation of lower federal courts, they intended for *some* federal court to be open to resolve all federal questions); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 749–50 (1984) (similar). Others argue that there are non-Article III limits on Congress's power, such as the Due Process or Equal Protection Clauses. See *Battaglia v. Gen. Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948) (holding that although "Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation"); Friedman, *supra* note 94, at 6 n.27 (contending that nearly all commentators agree that Congress may not employ jurisdictional limits as means of disfavoring traditionally suspect classes); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 141–46 (1981) (arguing that there are non-Article III limits to Congress's discretion in vesting inferior federal courts with subject matter jurisdiction over congressionally preferred rights yet withholding it for congressionally disfavored rights).

<sup>96</sup> See *supra* note 93 (noting how only one other federal court opinion has even considered adopting Justice Story's view).

<sup>97</sup> See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871). Even *Klein* does not squarely support this proposition. In *Klein*, the Court found an act of Congress, which directed that evidence of presidential pardons be presumptive of disloyalty during the Civil War and that the Supreme Court dismiss all such pending cases that had relied on the contrary presumption, unconstitutional on separation of powers grounds. In so ruling, the Court found the act both an intrusion upon the President's pardon power and an unconstitutional limitation upon the Court's appellate jurisdiction, leaving unclear which of the alternate grounds presented is the holding of the case. See Evan Caminker, *Schiavo and Klein*, 22 CONST. COMMENT. 529, 531–33 (2005) (discussing confusion resulting from *Klein*'s alternative rationales for its ruling). Compare *Klein*, 80 U.S. at 148 ("Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration."), with *id.* at 146 ("It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power."). Moreover, as Dean Caminker notes, "the Supreme Court has hardly ever cited [*Klein*] since and then only to distinguish it . . ." Caminker, *supra* at 529.

on the necessity of an Article III factfinder and focusing on other language used by the Court where it posits the need for a decisionmaker merely “disinterested in the outcome and committed to procedures designed to ensure its own independence.”<sup>98</sup> Such a reading of *Boumediene* would impose the need for a competent, independent, and disinterested factfinder somewhere—but not necessarily in an Article III venue. Presumably, such a role could be fulfilled by state courts, Article I courts, or Article III courts.<sup>99</sup>

This broader reading faces two hurdles, however. First, *Tarble’s Case*<sup>100</sup> bars the state courts from serving as a constitutionally sufficient habeas forum against federal officers, taking the traditional default forum for the enforcement of federal rights off the table.<sup>101</sup> During the Civil War, Edward Tarble was held by the United States military without trial and impressed into service, despite his claim that he was underage.<sup>102</sup> Tarble’s father sought executive-detention habeas relief from these federal officers in the Wisconsin state courts on his son’s behalf, which was granted.<sup>103</sup> The United States Supreme Court, however, held that the state courts were constitutionally barred from issuing such relief against a federal officer.<sup>104</sup> In so holding, the Supreme Court relied extensively upon *Ableman v. Booth*,<sup>105</sup> in which the Court had held that state courts could not issue habeas relief in violation of the federal Fugitive Slave Act, on the grounds that the state courts lack constitutional authority to issue writs of habeas corpus on behalf of persons bound into federal custody by a federal court.<sup>106</sup> *Tarble’s Case* expanded the *Ableman* state court–infirmity rule from covering persons held pursuant to federal judicial order to

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<sup>98</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2269 (2008).

<sup>99</sup> Katz, *supra* note 9, at 407–08 (noting these as typical default options and thus potentially available as alternative fora under “weaker” reading of *Boumediene*).

<sup>100</sup> 80 U.S. (13 Wall.) 397 (1871).

<sup>101</sup> See Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1215 (1988) (“If Congress withdraws lower federal court jurisdiction over a class of cases, the normal result will be that adjudication must occur in state court.”); Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953) (“In the scheme of the Constitution, [state courts] are the primary guarantors of constitutional rights . . . .”); Louise Weinberg, *The Article III Box: The Power of “Congress” To Attack the “Jurisdiction” of “Federal Courts,”* 78 TEX. L. REV. 1405, 1410–11 (2000) (stating that “as long as there is access to state courts for enforcement of federally-created rights, much of our concern about legislation denying access to federal courts must inevitably seem overblown” and that “[u]nder the Supremacy Clause the states have an obligation to try federal cases”).

<sup>102</sup> *Tarble’s Case*, 80 U.S. at 398.

<sup>103</sup> *Id.* at 398–99.

<sup>104</sup> *Id.* at 403–04.

<sup>105</sup> 62 U.S. (21 How.) 506 (1858).

<sup>106</sup> *Id.* at 515–16.

encompassing persons held by any federal officer.<sup>107</sup> In so doing, the Court employed sweeping language, noting that

within their respective spheres of action . . . neither [the states nor the federal government] can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority.<sup>108</sup>

While this broad constitutional bar against state court issuance of habeas relief against a federal officer has been the subject of much academic criticism,<sup>109</sup> the federal courts continue to embrace the rule.<sup>110</sup> Thus, under blackletter doctrine the state courts cannot fulfill *Boumediene's* factfinding function in the federal executive-detention context.

Secondly, as Professor Pfander argues, it is doubtful that under contemporary doctrine an Article I tribunal could serve as a habeas forum and thus meet *Boumediene's* factfinding requirement.<sup>111</sup> The Court, as announced in *Commodity Futures Trading Commission v. Schor*,<sup>112</sup> employs a balancing test to determine whether an Article III court, as opposed to an Article I court, must adjudicate an issue.

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<sup>107</sup> *Tarble's Case*, 80 U.S. at 403–04 (holding that *Ableman* “disposes alike of the claim of jurisdiction by a State court, or by a State judge, to interfere with the authority of the United States, whether that authority be exercised by a Federal officer or be exercised by a Federal tribunal”).

<sup>108</sup> *Id.* at 407.

<sup>109</sup> See, e.g., Richard S. Arnold, *The Power of State Courts To Enjoin Federal Officers*, 73 YALE L.J. 1385, 1406 (1964) (stating that author would “cheerfully accept” reversal of *Tarble*); Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 102–03 (“[T]he effort to rationalize the outcome in *Tarble* should not obscure the fact that the jurisdictional incapacity of state courts in this area still represented, for the old Court, a kind of constitutional common-law generated by structural and supremacy concerns.”); Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2567 (1998) (arguing that *Tarble's Case* is “unsound insofar as it suggests that the *Constitution* precludes state court habeas corpus jurisdiction against federal officials,” and recommending “hesitat[ion before] mak[ing] a constitutional argument dependent on the continuing force of a constitutional reading of that decision”); Sager, *supra* note 94, at 84 (arguing that if Congress were to abolish lower federal courts, “then the implications of the article III compromise make [*Tarble*] wrong”); Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2224–27 (2003) (arguing that *Tarble's Case* is better read as a statutory, rather than constitutional, decision).

<sup>110</sup> See, e.g., *Boumediene v. Bush*, 476 F.3d 981, 988 n.6 (D.C. Cir. 2007) (noting that *Tarble's Case* continues to bar state courts as forum for habeas relief against federal officers), *rev'd on other grounds*, 128 S. Ct. 2229 (2008); see also 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4213 (3d ed. 2007) (same).

<sup>111</sup> See James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 757–59 (2004) (discussing inability of Article I courts to serve as substitute for habeas court in context of war on terror).

<sup>112</sup> 478 U.S. 833 (1986).

Under this view, Congress may insist that issues be raised, at least in the first instance, only in Article I courts unless, on balance, doing so threatens injuries to either an individual's "right to have claims decided before judges who are free from potential domination by other branches of government" or to "the role of the independent judiciary within the constitutional scheme of tripartite government."<sup>113</sup> In the executive-detention habeas context both of these interests are threatened, leading to the conclusion that Congress could not vest habeas jurisdiction exclusively in an Article I court.

As to the first interest, an Article I executive-detention habeas forum—almost by definition—threatens the detainee's right to a judge free from potential domination by the executive branch. In such cases, the detainee seeks an order of release from the very branch of government which claims the person is too dangerous to be released. As the circumstances surrounding the CSRT hearings have shown, there is great potential for domination of the Article I judge by the executive in such a scheme.<sup>114</sup> Moreover, as the *Schor* Court held, when Congress requires a "private right" to be litigated in an Article I court, it significantly affects "a claim of the kind assumed to be at the core of matters normally reserved to Article III courts."<sup>115</sup> A claim is a private right if, at the "time the Constitution was adopted[,] . . . the issue presented was customarily cognizable in the courts."<sup>116</sup> Habeas corpus claims, because they were brought in courts at the time of the founding, are private rights.<sup>117</sup> Any congressional attempt to mandate an Article I-only review of such a claim would thus trigger "searching" judicial examination of "the congressional attempt to control the manner in which those rights are adjudicated."<sup>118</sup> This heightened scrutiny, when coupled with the great potential for domination of Article I judges, leads to the conclusion that an Article I-only habeas forum would substantially threaten the petitioner's interest in an independent judge.

An Article I-habeas forum would also weigh against the second *Schor* interest because such a legislative court would greatly

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<sup>113</sup> *Id.* at 848 (internal quotation marks omitted).

<sup>114</sup> See, e.g., Carol J. Williams, *Judge Critical of War Crimes Case is Ousted*, L.A. TIMES, May 31, 2008, at A24 ("A judge hearing a war crimes case at Guantanamo Bay who publicly expressed frustration with military prosecutors' refusal to give evidence to the defense has been dismissed, tribunal officials confirmed Friday.")

<sup>115</sup> *Schor*, 478 U.S. at 853 (internal quotation marks omitted).

<sup>116</sup> *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982) (plurality opinion).

<sup>117</sup> See *supra* notes 33–37 and accompanying text (discussing role of habeas jurisdiction at English common law and in Judiciary Act of 1789).

<sup>118</sup> *Schor*, 478 U.S. at 854.

“threaten[ ] the institutional integrity of the Judicial Branch.”<sup>119</sup> Although the Court does not employ a formulaic list of threats when conducting this analysis, it will consider the following:

[1] the extent to which the non–Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, [2] the origins and importance of the right to be adjudicated, and [3] the concerns that drove Congress to depart from the requirements of Article III.<sup>120</sup>

All three factors weigh against an Article I executive-detention habeas forum in this context. First, as previously noted, the federal habeas power has, from the founding until the DTA, been vested in federal courts and judges.<sup>121</sup> Thus, Article I courts would be exercising jurisdiction and powers normally vested only in Article III courts. Second, the right at issue, habeas corpus, is of constitutional dimension.<sup>122</sup> Indeed, the Great Writ may well be the *preeminent* constitutional protection.<sup>123</sup> Third, Congress’s motivations in passing the DTA regime could not be more clear.<sup>124</sup> It sought, in the words of the *Schor* Court, “‘to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating’ constitutional courts,”<sup>125</sup> which would result in “the encroachment or aggrandizement of [the executive branch] at the expense of the [judiciary].”<sup>126</sup> These factors again weigh heavily

<sup>119</sup> *Id.* at 851.

<sup>120</sup> *Id.*

<sup>121</sup> See *supra* notes 33–37 and accompanying text (discussing influence of English common law approach to habeas corpus on Congress’s early approach to federal courts).

<sup>122</sup> See U.S. CONST. art. I, § 9, cl. 2.

<sup>123</sup> Many have waxed poetical on the importance of habeas relief to liberty. As I think this is non-controversial, I provide just a representative sample. See, e.g., *Harris v. Nelson*, 394 U.S. 286, 290–91 (1969) (“The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.”); *Fay v. Noia*, 372 U.S. 391, 441 (1963) (describing Great Writ as “the ultimate remedy” in “the struggle for personal liberty”); Robert J. Pushaw, Jr., *Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic?*, 84 NOTRE DAME L. REV. 1975, 2003 (2009) (“No constitutional liberty is more fundamental than freedom from unlawful restraint, which had long been secured in Anglo-American law through the ‘Great Writ’ of habeas corpus.”); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 615 (2009) (“In his *Commentaries on the Laws of England*, Blackstone famously referred to the Great Writ as a ‘second *magna carta*’ and held it out as a ‘bulwark of our liberties’ and the embodiment of the ‘natural inherent right’ of the ‘personal liberty of the subject.’” (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*130, \*136, \*137)).

<sup>124</sup> See, e.g., *supra* Part I.A (discussing repeated congressional reaction to Supreme Court’s asserting habeas jurisdiction in Guantánamo cases); *infra* notes 225–31 and accompanying text (discussing *Boumediene* Court’s impressions of congressional intent to remove Supreme Court from Guantánamo issues by passage of DTA regime).

<sup>125</sup> *Schor*, 478 U.S. at 850 (alteration in original) (quoting *Nat’l Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 644 (1969)).

<sup>126</sup> *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam)); see also *infra* note 244 (collecting floor statements of member of Congress when debating MCA expres-

against an Article I habeas court because, in the words of Justice White, when such “proposed Art[icle] I courts are designed to deal with issues likely to be of [great] interest to the political branches, there is [more] reason to fear that such courts represent a dangerous accumulation of power in one of the political branches of government.”<sup>127</sup>

Even if, contrary to this overwhelming authority, one constructed an argument to allow for an Article I trial court to serve as an executive-detention habeas forum, contemporary constitutional doctrine would mandate a right of appeal to an Article III court with de novo review of both constitutional facts and law. The Court has asserted, since at least the 1930s, that the Constitution requires Article III appellate review of constitutional decisions reached by Article I courts.<sup>128</sup> Of importance here, the Court continues to hold that constitutional facts (i.e., facts necessary to make out a constitutional claim) may not be found definitively by an Article I court. Rather, an Article III court on appeal must find these facts independently.<sup>129</sup> Moreover, exclusively vesting habeas factfinding authority in an Article I court would run counter to deeply held structural concerns that demand, in a wide array of constitutional doctrinal settings, that Article III courts remain free to make their own findings of fact in constitutional cases.<sup>130</sup> And finally, the constitutional imperative that Article I tribunals remain inferior to the Supreme Court means, at a minimum, that the common law supervisory writs—including the writ of habeas corpus—must remain available to the Supreme Court as a means of regulating the inferior tribunal.<sup>131</sup> Thus, it is near impossible—at least under current doctrine—that a constitutionally competent tribunal

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sing need to reverse Supreme Court); *cf.* Pfander, *supra* note 111, at 759 (“[T]he designation of an individual as an enemy combatant presents the classic issue of jurisdictional boundaries on which constitutional rights of the first magnitude depend[.] . . . [which raises] the need for relatively searching review of the government’s enemy combatant designation [which can be done only in an Article III setting].”).

<sup>127</sup> *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 115 (1982) (White, J., dissenting) (presenting outline of balancing test later adopted in *Schor*).

<sup>128</sup> *See, e.g., Crowell v. Benson*, 285 U.S. 22, 60 (1932) (“In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.”).

<sup>129</sup> *See Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) (“The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.” (citing *Crowell*, 285 U.S. at 60)).

<sup>130</sup> *See infra* Part IV (discussing this point in detail).

<sup>131</sup> *See Pfander, supra* note 111, at 728–29, 748 (arguing Article III’s use of “supreme” and Article I’s use of “inferior tribunal” mandate that Supreme Court hold some mechanism by which it can review decisions of Article I courts).

other than an Article III court could fulfill *Boumediene*'s factfinding function exclusively.

But even if a reading of Article I doctrine could be found to embrace the vesting of habeas jurisdiction exclusively in an Article I tribunal, such an approach would not escape conflict with the core premise of the Madisonian Compromise (viz., that the Constitution does not require *any* lower federal adjudicative bodies). Given that *Tarble's Case* prohibits state courts from granting habeas relief against federal officers,<sup>132</sup> this softer reading still imposes a duty on Congress to create federal trial courts—either in an Article III or Article I forum—to engage in the *Boumediene*-required factfinding role for federal executive-detention habeas claims.<sup>133</sup> Thus, even this reading of *Boumediene* necessarily confronts the Madisonian Compromise. At its core, the Madisonian Compromise envisioned the possibility that the Supreme Court would serve as the only federal tribunal and that Congress need not create any other courts—Article I or otherwise.<sup>134</sup> If *Boumediene*, read in this fashion, merely requires the creation of an Article I court—as opposed to that of an Article III court—it still strikes at the heart of the Madisonian Compromise view because it rejects the traditional congressional prerogative to eschew entirely the creation of lower federal tribunals. No matter how *Boumediene*'s factfinding requirement is interpreted, then, so long as *Tarble's Case* is good law, the holding challenges the core premise of the Madisonian Compromise.<sup>135</sup>

## II

### IN-CHAMBERS OPINIONS AND THE MADISONIAN COMPROMISE

I now turn to the question of whether the *Boumediene* Court's factfinding holding necessitated its further conclusion that a federal district court be available to executive-detention habeas petitioners and, thus, its apparent adoption of Justice Story's mandatory-jurisdiction position. Jurists and scholars have not greeted proposals to give up the Madisonian Compromise with open arms. Professor Edward

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<sup>132</sup> 80 U.S. (13 Wall.) 397, 402–04 (1871).

<sup>133</sup> See generally Vladeck, *supra* note 9, at 2144–50 (viewing *Boumediene*'s factfinding holding through lens of access to courts).

<sup>134</sup> See James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 202–03 & n.44 (2007) (discussing Madisonian Compromise principle and its generally applicability to Article I tribunals).

<sup>135</sup> For ease of discourse, I will phrase my remaining discussion primarily in terms of *Boumediene*'s requirement for a federal district court. I do not mean to imply that the Article I option is necessarily off the table, although I address difficulties with that view.

Hartnett, for example, three years prior to *Boumediene*, provided a thorough analysis of whether federal habeas relief requires the existence of lower federal courts.<sup>136</sup> He concluded that the ability of Justices to issue habeas relief in chambers offered a forum for original jurisdiction in federal habeas suits other than a lower federal court.<sup>137</sup> Thus, under Hartnett's view, one may maintain the soundness of the Madisonian Compromise and provide an original-jurisdiction forum for federal executive-detention habeas claims. *Boumediene*'s factfinding holding, however, presents a difficulty for this view. Namely, can Justices in chambers perform the sort of record supplementation that is constitutionally required under *Boumediene* or, as the *Boumediene* Court intimates, must Congress vest a lower federal court (with its intrinsic factfinding expertise) with jurisdiction to hear such claims? Taking up this question, I begin with a brief review of Hartnett's position. Then, based upon newly published in-chambers decisions, I consider whether Justices in chambers have both the authority and the institutional capacity to engage in *Boumediene*-required record supplementation. I conclude that there is some authority for this position, but the resulting scenario would be so bizarre as to warrant the consideration of alternative approaches.

#### A. *The Constitutional Puzzle of Habeas Revisited*

I start with Professor Hartnett's theory. He begins his analysis with the overlapping of four venerable propositions of federal courts law, which lead to a prima facie constitutional inconsistency.<sup>138</sup> First, under *Marbury v. Madison*, the Supreme Court's original jurisdiction is limited constitutionally to cases with foreign diplomats or states as parties.<sup>139</sup> As a result, the Supreme Court cannot entertain original habeas petitions seeking relief from executive detention<sup>140</sup> because

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<sup>136</sup> See Hartnett, *supra* note 31.

<sup>137</sup> *Id.* at 254 ("This Article contends that resolution to this apparent conflict lies in the power of individual Supreme Court Justices to issue writs of habeas corpus—a 'power granted from 1789 to the present.'" (quoting FALLON, JR. ET AL., *supra* note 37, at 314 n.4).

<sup>138</sup> *Id.* at 254–61.

<sup>139</sup> 5 U.S. (1 Cranch) 137, 174 (1803).

<sup>140</sup> Cases in which petitioners are seeking habeas relief after a lower state or federal court has issued a ruling are not, constitutionally speaking, heard pursuant to the Court's original jurisdiction. Such cases arise under the Court's constitutional appellate jurisdiction, even if the petitioner first files in the Supreme Court, because these cases involve reviewing the judgment of a lower court. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100–01 (1807) ("But so far as [*Marbury v. Madison*] has distinguished between original and appellate jurisdiction, that which the court is now asked to exercise is clearly *appellate*. It is the revision of a decision of an inferior court, by which a citizen has been committed to jail.").

such action would require the exercise of original jurisdiction that it lacks, except in the fluke case in which a diplomat is seeking habeas relief from executive detention.<sup>141</sup> Second, following the Madisonian Compromise, the Constitution neither mandates that Congress create lower federal courts at all nor requires that certain types of cases, like habeas relief, find jurisdiction in a lower federal court.<sup>142</sup> Third, under *Tarble's Case*, the state courts lack the power to issue writs of habeas corpus against federal officers.<sup>143</sup> And fourth, the Suspension Clause protects access to the Great Writ with respect to federal authority in some forum, except when Congress formally suspends it in times of invasion or rebellion.<sup>144</sup> Thus, a habeas petitioner seeking relief from executive detention by federal officers of necessity must file a petition in a lower federal court, yet Congress is not constitutionally bound to create such a forum. On its face, then, it appears that the Constitution is logically inconsistent, simultaneously guaranteeing access to habeas relief while not assuring the existence of fora in which to seek it.

Professor Hartnett proposes an elegant cutting of this Gordian knot. He relies on the power of individual Justices in chambers to issue original writs of habeas corpus,<sup>145</sup> a power English—and subsequently American—judges have held since the Habeas Corpus Act of 1679.<sup>146</sup> Pursuant to this view, Professor Hartnett argues that one may maintain the veracity of all four prongs of the apparent puzzle above yet still have a forum for habeas relief from federal executive detention. Namely, Justices acting in chambers may issue the writ. The key to this argument is the notion that the original jurisdiction of a Justice proceeding in chambers is, at least in the habeas context, broader than that of the Court as an institution sitting en banc. That is, Professor Hartnett insists that the holding in *Marbury v. Madison*, limiting the

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<sup>141</sup> See *Ex parte Hung Hang*, 108 U.S. 552, 553 (1883) (suggesting that Supreme Court may issue writ of habeas corpus only to review judicial decisions “except in cases affecting ambassadors, other public ministers, or consuls, and those in which a State is a party”); *Ex parte Siebold*, 100 U.S. 371, 374 (1879) (similar).

<sup>142</sup> See *supra* notes 94–97 and accompanying text (reviewing Madisonian Compromise).

<sup>143</sup> 80 U.S. (13 Wall.) 397, 402–04 (1871).

<sup>144</sup> See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 305 (2001) (“It necessarily follows that a serious Suspension Clause issue would be presented if we were to accept the INS submission that the 1996 statutes have withdrawn that power from federal judges and provided no adequate substitute for its exercise.”).

<sup>145</sup> See Hartnett, *supra* note 31, at 271–75 (noting that Congress vested power to issue writs of habeas corpus in individual Justices before explicitly granting power to whole Supreme Court).

<sup>146</sup> *Id.* at 268 & n.83.

Supreme Court's original jurisdiction to cases with states or diplomats as parties, does not apply to Justices acting in chambers.<sup>147</sup>

Assuming that Professor Hartnett's limitation of *Marbury's* jurisdictional holding to the Court en banc is the best reading, *Boumediene's* factfinding holding presents another obstacle to his view. Namely, it may be the case that the Justices in chambers lack the authority or institutional capacity to make the supplemental findings of fact that the *Boumediene* Court held are constitutionally required in cases where the petitioner is seeking habeas relief from executive detention. Professor Janet Alexander, in a piece presciently predicting the constitutional need for factfinding in habeas cases, critiques Professor Hartnett's view along these lines.<sup>148</sup> I turn now to a consideration of whether Justices in chambers can perform *Boumediene*-required factfinding. If Justices in chambers can perform this function, it may be possible both to avoid the implicit adoption of Justice Story's mandatory-lower-court-jurisdiction view and to preserve the imperative for independent factfinding. I begin with the question of factfinding authority, turning later to the question of institutional capacity to find facts.

#### B. *The Authority of Justices in Chambers To Find Facts*

If Justices in chambers are to serve as a viable alternative to a federal trial court in fulfilling *Boumediene's* factfinding function, there must be some grounds for believing Justices to be so empowered. In this section, I search for such authority. I look first for explicit constitutional, statutory, and rule-based authority and find none. But, using newly released in-chambers opinions, I argue that there are at least two cases where a Justice in chambers supplemented a factual record in order to dispose of an executive-detention habeas case. These cases, then, provide precedential authority for the notion that Justices in chambers can fulfill *Boumediene's* factfinding requirement.

There are several potential sources of authority supporting Supreme Court factfinding that are worth exploring here, although none are persuasive. First, the Constitution assigns appellate jurisdiction over facts to the Supreme Court. But this authority does not sup-

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<sup>147</sup> See *id.* at 277–89. Professor Vladeck offers yet another alternative, arguing that the Superior Court of the District of Columbia—although an Article I court that currently lacks habeas jurisdiction with respect to federal officers—has residual, inherent common law authority to issue the writ and, as a federal court, does not fall under the holding of *Tarble's Case*. See Vladeck, *supra* note 44, at 74. Assuming that the D.C. Superior Court's jurisdiction to entertain federal habeas cases remains barred by statute, however, Professor Hartnett's solution to this constitutional puzzle of habeas remains the leading theory.

<sup>148</sup> See Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 CAL. L. REV. 1193, 1220–21 (2007) (finding Hartnett's conclusion in tension with Article III).

port a Justice's in-chambers engagement in a *Boumediene*-required factfinding hearing because an original habeas petition filed before a Justice in chambers for relief from executive detention does not constitute an exercise of constitutional appellate jurisdiction. As the Court explained in *Ex parte Bollman*,<sup>149</sup> the exercise of constitutional appellate jurisdiction requires that a lower state or federal court have heard the case at hand, even if that court is the sentencing court, before the Supreme Court can exercise appellate jurisdiction.<sup>150</sup> Such is not the case in original petitions for habeas relief in the executive detention context because, by definition, such cases arise due to the fact that the executive refuses to instigate judicial proceedings.<sup>151</sup>

Next, Congress and the Court interpret the Constitution's assignment of original jurisdiction to the Court to imply the authority to find facts in such cases. This constitutional implication is bolstered by statutory authority allowing the Court to empanel juries in original jurisdiction cases<sup>152</sup> and by Supreme Court Rule 17(2), which governs the taking of evidence in original jurisdiction cases.<sup>153</sup> But, again, this will not support a Justice in chambers taking evidence in an original, executive-detention habeas petition because such cases (as a necessary postulate of Professor Hartnett's view) do not fall within the Court's original jurisdiction,<sup>154</sup> and because these grants of factfinding authority are specifically delimited to the Court's original jurisdiction. Thus, there appears to be no statutory or textual constitutional authority for Justices in chambers to make findings of fact.

But the absence of proof is not necessarily proof of absence, particularly in regard to the Justices' rulings in chambers. For the majority of the Court's history, such rulings were published haphaz-

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<sup>149</sup> 8 U.S. (4 Cranch) 75, 100–01 (1807); see also *supra* note 140 (discussing Supreme Court's appellate jurisdiction over postconviction cases).

<sup>150</sup> *Bollman*, 8 U.S. (4 Cranch) at 96–101; see also Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153, 155 ("Any legislation purporting to enlarge the Supreme Court's original jurisdiction to issue a writ of habeas corpus beyond those cases specified in Article III, § 2 would, of course, be unconstitutional.").

<sup>151</sup> *Id.* There is an alternative approach available under the text of the DTA regime. The Supreme Court could, arguably anyway, deem the CSRT review a sufficiently judicial proceeding so as to trigger its constitutional appellate jurisdiction.

<sup>152</sup> 28 U.S.C. § 1872 (2006) ("In all original actions at law in the Supreme Court against citizens of the United States, issues of fact shall be tried by a jury.").

<sup>153</sup> SUP. CT. R. 17(1)–(2) ("This Rule applies only to an action invoking the Court's original jurisdiction under Article III of the Constitution of the United States. . . . In other respects, . . . the Federal Rules of Evidence may be taken as guides.").

<sup>154</sup> This follows even though the in-chambers forum is itself an original jurisdictional forum. See *Fay v. Noia*, 372 U.S. 391, 407 (1963) ("[T]he habeas jurisdiction of the other federal courts and judges, including the individual Justices of the Supreme Court, has generally been deemed original.").

ardly, if at all.<sup>155</sup> Beginning in 2004, however, Cynthia Rapp, Deputy Clerk of the Supreme Court of the United States, began gathering, cataloging, and publishing these in-chambers dispositions.<sup>156</sup> Many of these opinions address requests for habeas relief and speak to the question of finding facts, at least by implication. In the majority of these cases, the Justice takes the facts as presented in the petition.<sup>157</sup> But in two newly published in-chambers rulings, the Justices explicitly note that they took evidence to resolve contested issues and made findings of fact in original-jurisdiction habeas petitions seeking relief from executive detention.

The first case is *Ex parte Stevens*, which was decided in August 1861 but apparently first published in December 2006.<sup>158</sup> Here, Private Edward Stevens had enlisted for a three-month term in the First Minnesota Regiment, which had been called to service in the Civil War.<sup>159</sup> He contended that his commitment expired on July 29, 1861, that he had not reenlisted, and that his colonel, Willis Gorman, held him to service beyond that date.<sup>160</sup> Because Stevens's service called upon him to be in nearly constant movement—from Virginia, to Washington, D.C., to Maryland—local judicial authorities were unable to take habeas jurisdiction over his petition. Thus, Stevens's attorney filed his habeas petition, in the first instance, before Justice James Moore Wayne in chambers.

Based upon the allegations in Stevens's sworn petition, Justice Wayne ordered Gorman to file an answer in person on August 10, 1861.<sup>161</sup> In his answer, Gorman vigorously contested Stevens's allegation that he failed to reenlist.<sup>162</sup> Gorman presented Justice Wayne with three affidavits—which are appended to the in-chambers opinion—attesting to the fact that Stevens signed reenlistment papers on May 27, 1861 and that Stevens was paid a reenlistment bounty.<sup>163</sup> Further, Gorman submitted the reenlistment documents<sup>164</sup> plus an affidavit of General Lorenzo Thomas attesting to the documents'

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<sup>155</sup> See 1 RAPP v (2004) (explaining difficulties in locating unpublished in-chambers opinions).

<sup>156</sup> *Id.* at iv.

<sup>157</sup> See, e.g., *Ex parte Seals*, 4 RAPP 1468, 1468 (1943) (Reed, J., in chambers) (“There is in these facts no room for the conclusion that the United States attorney acted in bad faith, and the petitioner’s charge of fraud must be regarded as unsupported by the factual allegations of his petition.”).

<sup>158</sup> 4 RAPP 1508 (1861) (Wayne, J., in chambers).

<sup>159</sup> *Id.* at 1508–09.

<sup>160</sup> *Id.* at 1509–10.

<sup>161</sup> *Id.* at 1510.

<sup>162</sup> *Id.* at 1511.

<sup>163</sup> *Id.* at 1512.

<sup>164</sup> *Id.*

authenticity.<sup>165</sup> Stevens countered with an attempt to impeach the authenticity of the reenlistment papers.<sup>166</sup>

Stevens's whole case,<sup>167</sup> then, rode on the factual question: Did he reenlist on May 27, 1861? Justice Wayne resolved the contested evidence in favor of the colonel and dismissed the habeas petition.<sup>168</sup> Thus, *Ex parte Stevens* presents a clear instance in which a Justice acting in chambers took evidence to supplement, or, more accurately, create a record and thereby resolved a contested issue of fact that was the dispositive issue in a case in which a petitioner sought habeas relief from executive detention.

The next example of a Justice's in-chambers resolution of a dispositive factual issue in an executive detention habeas case is of more recent vintage, occurring in the aftermath of World War II. On September 6, 1946, Justice Harold H. Burton issued an in-chambers opinion captioned *Ex parte Durant*,<sup>169</sup> which apparently was first published in 2004.<sup>170</sup> Justice Burton denied the habeas petition in chambers, making findings of fact that were essential to his ruling.

Here, the Army charged Captain Kathleen Durant with stealing one million dollars worth of jewels from Kronberg Castle in Germany.<sup>171</sup> During the period when the theft took place, Durant was serving as a custodian of these and other spoils of war of which the Army had taken possession during the occupation of Germany.<sup>172</sup> After her service as custodian, she was placed on inactive duty and returned to the United States in March 1946.<sup>173</sup> On May 24 of that year, however, the Army recalled her to active duty. Durant replied to this order by return telegram, stating she no longer desired active service.<sup>174</sup> She then failed to report as ordered. Authorities arrested her in June 1946. The Army removed her to Germany and began a court-martial proceeding there in August 1946. By August 29, the Army had rested its case-in-chief, but the presiding officer stayed the proceeding

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<sup>165</sup> *Id.* at 1514–15.

<sup>166</sup> *Id.* at 1516.

<sup>167</sup> Stevens also brought an argument in the alternative that the reenlistment procedure was unlawful. Justice Wayne quickly disposed of this argument, and it is not relevant to this discussion. *Id.* at 1516–18.

<sup>168</sup> *Id.* at 1516, 1518.

<sup>169</sup> 4 RAPP 1416 (1946) (Burton, J., in chambers).

<sup>170</sup> The petitioner's habeas claim was considered, and rejected, by the Court as a whole a few weeks later on the grounds that the Court lacked original jurisdiction to hear it. *Ex parte Durant*, 329 U.S. 672 (1946) (mem.). Justice Burton's in-chambers opinion, however, was not appended nor otherwise published at the time.

<sup>171</sup> *Durant*, 4 RAPP at 1416.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 1421.

<sup>174</sup> *Id.*

until mid-September to allow the defense to gather evidence from sources in the United States.<sup>175</sup>

During this adjournment, Durant sought habeas relief. Believing that no district court had jurisdiction to hear such a claim regarding citizens held in Germany, Durant's counsel filed an original habeas petition directly with Justice Burton. Two days later, on September 6, Justice Burton held a hearing in his chambers in which both the Army and Durant were represented. He delivered his ruling at the end of the hearing.<sup>176</sup>

Justice Burton first considered, apparently *sua sponte*, his jurisdiction to hear an original, executive-detention habeas petition in chambers. He was of two minds on the question. On the one hand, in line with Professor Hartnett's view, he considered that "[i]t is possible for an argument to be made that a Justice [in chambers] has a broader original Jurisdiction than has the Supreme Court itself to consider this application."<sup>177</sup> "On the other hand," he acknowledged "if the Supreme Court finds that it lacks original jurisdiction in a matter of this kind"<sup>178</sup>—as it did when the Court eventually considered Durant's petition<sup>179</sup>—"it is highly probable that such reasoning will establish the lack of original jurisdiction on the part of the individual Justice acting [in chambers]."<sup>180</sup> He did not resolve this issue. Rather, he proceeded on to the merits of the petition.<sup>181</sup>

Durant claimed that she was a civilian at the time of the court-martial, rendering the military proceeding without jurisdiction.<sup>182</sup> Justice Burton noted that if this fact could be proven, he might well grant the writ.<sup>183</sup> Nevertheless, as he found the facts, her claim to civilian status was unsupported. In making this determination, Justice Burton took many pieces of evidence under consideration. He considered Durant's conflicting statements regarding her civilian

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<sup>175</sup> *Id.* at 1417.

<sup>176</sup> *Id.* at 1417–18.

<sup>177</sup> *Id.* at 1418.

<sup>178</sup> *Id.*

<sup>179</sup> *Ex parte Durant*, 67 S. Ct. 39, 39 (1946) (mem.) ("The motion for leave to file petition for writ of habeas corpus is denied for want of original jurisdiction.").

<sup>180</sup> *Durant*, 4 RAPP at 1418.

<sup>181</sup> One wonders, does the ban on taking hypothetical jurisdiction apply to Justices in their individual capacity? *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (holding hypothetical jurisdiction unconstitutional). I suspect it does, assuming that Justices in chambers remain Article III actors.

<sup>182</sup> In a discussion not relevant here, Durant also made the argument that the proceedings during her preliminary hearing were so irregular as to justify her release, which Justice Burton quickly rejected. *Durant*, 4 RAPP at 1420.

<sup>183</sup> *Id.*

status in competing affidavits.<sup>184</sup> He also considered evidence that she continued to submit pay requests to the Army after her arrest in June.<sup>185</sup> And he considered her orders from March and May of 1946. After weighing these factors, he concluded that the “evidence . . . does not establish clearly that she is a civilian.”<sup>186</sup>

*Ex parte Stevens* and *Ex parte Durant*, then, provide precedential authority for a Justice acting in chambers to take supplemental evidence and resolve contested issues of fact in cases seeking habeas relief from executive detention. Furthermore, these supplemental factfindings are precisely the type that the *Boumediene* Court held constitutionally required in executive-detention habeas cases.<sup>187</sup> This means that *Boumediene*’s factfinding function technically can be fulfilled without the existence of a federal trial court or the adoption of Justice Story’s mandatory-jurisdiction view. Of course, not every original, executive-detention habeas claim is tried in chambers; Justices have employed their power under 28 U.S.C. § 2241(b) to transfer such cases to district courts of competent jurisdiction.<sup>188</sup> But thin as the authority provided by *Stevens* and *Durant* may be, it nonetheless provides some precedential weight to the power of Justices acting in chambers to make *Boumediene*-required findings of fact in original, executive-detention habeas petitions.<sup>189</sup> As such, *Stevens* and *Durant* offer support for the view that *Boumediene*’s factfinding requirement could be incorporated into our constitutional scheme without rejecting the Madisonian Compromise—contrary to *Boumediene*’s implication.<sup>190</sup>

### C. *The Institutional Capacity of Justices in Chambers To Find Facts*

This finding of compatibility may be too hasty, however, given that the mere authority to engage in supplemental factfinding does not necessarily equate to an institutional capacity to find facts. Indeed, the Court in *Boumediene* was particularly troubled because the DTA regime did not allow appellate judges, who presumably do not excel at

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<sup>184</sup> *Id.* at 1417.

<sup>185</sup> *Id.* at 1421.

<sup>186</sup> *Id.* at 1420–21.

<sup>187</sup> See *supra* text accompanying notes 86–93 (discussing type of record supplementation *Boumediene* requires).

<sup>188</sup> See, e.g., *Ex parte Hayes*, 2 RAPP 614, 615 (1973) (Douglas, J., in chambers) (transferring to D.C. District Court).

<sup>189</sup> Cf. *Goldsmith v. Zerbst*, 1 RAPP 18, 18–19 (1932) (Cardozo, J., in chambers) (considering habeas petition on merits and making finding of fact based on trial record to confirm jurisdiction).

<sup>190</sup> See *Boumediene v. Bush*, 128 S. Ct. 2229, 2266 (2008) (finding inability of D.C. Circuit to transfer cases to district court to be fatal flaw of DTA regime).

factfinding, to transfer cases to district courts, who have special competency in factfinding. Such a transfer power as is found in the pre-DTA § 2241, the Court notes, “accommodates the necessity for factfinding that will arise in some cases by allowing the appellate judge or Justice to transfer the case to a district court of competent jurisdiction, whose institutional capacity for factfinding is superior to his or her own.”<sup>191</sup> Therefore, *Boumediene* requires not only that factfinding authority must be available in habeas cases in which petitioners seek relief from executive detention, but also that “some entity with the institutional capacity for fact-finding must remain open.”<sup>192</sup> If we are to avoid the adoption of Justice Story’s view on mandatory lower court jurisdiction, then Justices in chambers need more than the mere authority for factfinding; they must have the institutional capacity for it as well.

In this section, I engage this institutional-capacity issue. I begin by reviewing the Court’s traditional difficulties with, and avoidance of, factfinding. Nevertheless, I argue that even though the Court en banc lacks an institutional capacity to find facts, Justices in chambers may well avoid these problems because they are acting individually. I also note that the power to appoint special masters to find facts could be useful in overcoming this institutional-capacity problem. I end by recognizing that under normal circumstances, asking Justices to engage in numerous habeas cases is not a wise use of resources, but I counter that the extraordinary move of closing the lower federal courts to habeas claims might justify the practice—at least as a forum of last resort.

This institutional-capacity requirement is difficult to unpack. Institutional capacity could speak to the personnel of the court in question. In this regard, one could argue that Justices in chambers lack institutional capacity to find facts.<sup>193</sup> Unlike trial judges, a Justice does not partake of a steady diet of testimonial and evidentiary issues. The Court itself has noted, with regard to suits filed in its original jurisdiction, that when a dispute “require[s] primarily skills of factfinding[,] . . . [w]e have no claim to such expertise.”<sup>194</sup> On the other hand, there is nothing inherent in the office of Supreme Court Justice that renders

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<sup>191</sup> *Id.*

<sup>192</sup> Katz, *supra* note 9, at 407.

<sup>193</sup> Cf. Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386, 1408 (2006) (“One related fear that critics of our proposal might raise is that Justices lack the competence to serve as federal trial court judges because the skills that make one a good appellate judge are so different from the skills required of a trial judge.”).

<sup>194</sup> *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 505 (1971).

these jurists unable to find facts. Indeed, Justices rode circuit, sitting as trial-court judges, for decades,<sup>195</sup> and many Justices have previously served as trial judges or litigators.<sup>196</sup> The fact—if it is a fact—that any particular set of Justices may not be skilled at factfinding<sup>197</sup> seems irrelevant on a constitutional level.

Given that this personnel-focused understanding seems to hold little weight, perhaps it is better to understand the *Boumediene* Court's institutional-capacity instructions more broadly: Given that Justices in chambers have factfinding authority and have (or could acquire) factfinding skills, does the institutional capacity to find facts as required by *Boumediene* adhere to the setting of a Justice in chambers?

The initial answer would appear to be no. Obviously, the institutional setting of a Justice in chambers is not the most conducive to factfinding or record supplementation. There are no witness stands or court reporters constantly on duty, for instance. Indeed, the Court recognizes that it is “structured to perform as an appellate tribunal, ill-equipped for the task of factfinding and so forced, in original cases, awkwardly to play the role of factfinder without actually presiding over the introduction of evidence.”<sup>198</sup> Finally, as Professor Alexander notes, the Court cannot fulfill the requisite factfinding function because, given their other duties, these nine people lack the time to resolve all the factual issues raised by habeas petitioners seeking relief from executive detention.<sup>199</sup> In this regard, the Court itself has noted that

the problem [is not] merely our lack of qualifications for many of these tasks potentially within the purview of our original jurisdiction; it is compounded by the fact that for every case in which we might be called upon to determine the facts . . . we would unavoidably be reducing the attention we could give to those matters of federal law and national import as to which we are the primary overseers.<sup>200</sup>

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<sup>195</sup> See generally David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1714–17 (2007) (providing overview of practice of riding circuit); Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1756–63 (2003) (similar).

<sup>196</sup> See Calabresi & Presser, *supra* note 193, at 1408 (“[M]ost of the modern Justices were at some point litigators, so they will mostly not be strangers to a trial courtroom.”).

<sup>197</sup> See Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules*, 103 COLUM. L. REV. 243, 284 n.190 (2003) (noting that most members of then-current Court lacked trial judge experience or recent trial litigation experience).

<sup>198</sup> *Wyandotte Chems. Corp.*, 401 U.S. at 498.

<sup>199</sup> Alexander, *supra* note 148, at 1221.

<sup>200</sup> *Wyandotte Chems. Corp.*, 401 U.S. at 498.

So not only does the Court lack the facilities and numbers to engage in significant factfinding, but doing so (at least under normal circumstances) would be a poor use of the Justices' time. Taken together, these concerns provide a weighty indictment against asking Justices in chambers to find facts.

Nevertheless, the setting of Justices in chambers might still hold some promise as a forum that can fulfill the *Boumediene* factfinding function—at least as a venue of last resort. First, many of the critiques of the Court as a factfinder relate to the difficulty a multimember court faces ruling on evidentiary issues, taking testimony, or making factual conclusions.<sup>201</sup> But as *Ex parte Stevens* and *Ex parte Durant* illustrate, a Justice acting alone in chambers avoids these difficulties. Justices in chambers, like trial judges, can take evidence as an individual and make their own determinations on issues such as credibility.

Moreover, the modern role of federal appellate judging is not entirely divorced from the task of factfinding. Although the “clearly erroneous” standard of review typically insulates appellate judges from the practice of reviewing factual conclusions *de novo*,<sup>202</sup> this is not universally the case. As noted below, the Supreme Court will reconsider factual conclusions made by the state courts under certain circumstances.<sup>203</sup> Furthermore, substantive First Amendment law requires appellate judges to review factual findings *de novo*.<sup>204</sup> More apropos to the *Boumediene* rule, federal appellate judges retain the (seldom used) power to supplement records on appeal,<sup>205</sup> which is done from time to time in administrative review cases.<sup>206</sup> Also, appel-

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<sup>201</sup> *See id.*

<sup>202</sup> *See* Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 245 (2009) (providing basic description of clearly erroneous review).

<sup>203</sup> *See infra* notes 255–67 and accompanying text (discussing Supreme Court's ability to review facts found by state courts).

<sup>204</sup> *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 (1984) (“[W]hether the evidence in the record in a defamation case is of convincing clarity required to strip . . . utterance[s] of First Amendment protection is not merely a question for the trier of fact. Judges . . . must independently decide whether the evidence in the record is sufficient to . . . [support a] judgment . . . by clear and convincing proof . . .”).

<sup>205</sup> *See, e.g.*, FED. R. APP. P. 10(e)(2)(C) (court of appeals may supplement district court record); FED. R. APP. P. 16(b) (court of appeals may supplement agency record).

<sup>206</sup> *See, e.g.*, *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973) (holding that courts may supplement agency record when “failure to explain administrative action [may be construed so] as to frustrate effective judicial review”); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (“The court may require the administrative officials who participated in the decision to give testimony explaining their action.”). This course of conduct is the exception to the rule requiring remand to an agency. *See, e.g.*, *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (“If the record . . . does not support the agency action, if

late courts occasionally serve as courts of original jurisdiction beyond state-versus-state suits in the Supreme Court—the most obvious example being mandamus petitions filed against federal district judges, where the appellate court must create a fresh record.<sup>207</sup> On rare occasions, the Supreme Court will issue an original mandamus to a district court as well.<sup>208</sup> Thus, the process of factfinding is not always beyond the institutional capacity of a modern appellate court.

There are two deeper difficulties that these responses do not address. First, there is the problem of the small number of Court members. Second, involving members of the Court in the time-intensive process of making factual findings during in-chambers dispositions would incur extreme societal costs. But even these objections are not necessarily insurmountable. As to the societal-cost difficulty, the Court has noted that the decision of whether to engage in factfinding should be a function of “practical wisdom”—taking into account the social and legal context—rather than a prophylactic measure.<sup>209</sup> As the Court explained in the early 1970s, while extensive use of the Court’s original jurisdiction may have been sound public policy at the time of the founding, “changes in the American legal system and the development of American society have rendered untenable, as a practical matter, the view that this Court must stand willing to adjudicate all or most legal disputes” in its original jurisdiction.<sup>210</sup>

A similar practical approach could apply to in-chambers dockets as well. Under normal circumstances, extensive factfinding in this peculiar forum should be eschewed in favor of focusing the Justices upon other matters. But in a different social and legal milieu—where Congress has closed the district courts to claims of executive-detention habeas relief, for example—a different calculus might apply. In such circumstances, not only are the protections of the Great Writ at issue, but the very independence of the federal judiciary, as

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the agency has not considered all relevant factors, or if the reviewing court . . . cannot evaluate the . . . action on the basis of the record[,] . . . the proper course, except in rare circumstances, is to remand to the agency . . . .”

<sup>207</sup> See FED. R. APP. P. 21(a) (regulating original mandamus practice in courts of appeals).

<sup>208</sup> See, e.g., *Ex parte* Republic of Peru, 318 U.S. 578, 586 (1943) (“[T]he case is one of such public importance and exceptional character as to call for the exercise of our discretion to issue the writ [of mandamus] rather than to relegate the [petitioner] to the circuit court of appeals . . . .”). See generally 16B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4005, at 106–07 & n.35 (2d ed. 1996) (noting that in cases of extreme public importance, Supreme Court can issue writ of mandamus directly to district court, bypassing court of appeals).

<sup>209</sup> *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 499 (1971).

<sup>210</sup> *Id.* at 497.

embodied in its ability to find constitutional facts,<sup>211</sup> would be at stake. Given this context, the Court's tradeoff of time devoted to its appellate docket in favor of time spent finding facts would seem less important, which might make an in-chambers practice worth the candle.<sup>212</sup>

Professor Alexander's lack-of-free-time difficulty can be addressed as well. First, not every commentator concludes that the Justices entirely lack the free time to hold trials. Indeed, some suggest that the Justices could easily give up a month of their three-month summer recess to serve as trial judges.<sup>213</sup> It could be the case, then, that the Justices have sufficient time to fulfill the *Boumediene* factfinding role as things currently stand.

Second, through use of special masters, the Court has the ability to expand its reach without congressional leave,<sup>214</sup> thereby diminishing the adverse effects of an extensive factfinding duty on its appellate docket. Special masters play an important role in most cases that proceed in the Court's original jurisdiction.<sup>215</sup> These individuals essentially hold bench trials on the Court's behalf.<sup>216</sup> Then, in a process akin to a report and recommendation from a magistrate judge to a district court judge, they present conclusions of law and findings of fact to the Court en banc. As one commentator on the Court's original jurisdiction concludes, "it is apparent the special master performs a role similar to the one performed by the U.S. District Court."<sup>217</sup> Special masters are also used in the courts of appeals when records

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<sup>211</sup> See *infra* Part IV.

<sup>212</sup> Cf. *Locks v. Commanding Gen., Sixth Army*, 2 RAPP 408, 408 (1968) (Douglas, J., in chambers) (dismissing original, executive-detention habeas claim but noting "that in time [the Suspension Clause] [may] justify the issuance of a writ of habeas corpus by an individual Justice. The point, however, has not been decided.").

<sup>213</sup> Calabresi & Presser, *supra* note 193, at 1412 ("[By advocating that Justices serve four weeks annually as trial judges,] [w]e do not mean to suggest that Supreme Court Justices and law clerks do not work hard: they mostly work very hard for nine months of the year. The other three months, however, are spent on a lengthy summer vacation that compares to that of schoolchildren.").

<sup>214</sup> See Alexander, *supra* note 148, at 1220 ("One extremely important implication of this theory is that in issuing original writs of habeas in executive detention cases the Justices would be exercising original jurisdiction and therefore the Exceptions and Regulations Clause would not apply." (emphasis omitted)).

<sup>215</sup> See generally EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 642-45 (9th ed. 2007) (describing role of special masters in Supreme Court original jurisdiction cases); JOSEPH F. ZIMMERMAN, *INTERSTATE DISPUTES: THE SUPREME COURT'S ORIGINAL JURISDICTION* 43-60 (2006) (same).

<sup>216</sup> GRESSMAN ET AL., *supra* note 215, at 642-45.

<sup>217</sup> ZIMMERMAN, *supra* note 215, at 29.

require supplementation or when cases arise as original mandamus petitions.<sup>218</sup>

In a scenario in which Congress closed the lower federal courts to habeas petitioners seeking relief from executive detention, Justices in chambers, serving as a forum of last resort, could assign much of this docket to special masters. Indeed, there is as much authority for a Justice in chambers to assign cases to a special master as there is for the Court en banc to do so—which is to say there is none beyond an asserted inherent authority.<sup>219</sup> Moreover, the example of the partnership between magistrate and district judge, especially in postconviction habeas cases, provides a model for such an approach.<sup>220</sup>

Although the partnering of a Justice in chambers and a special master is procedurally unorthodox, it could help overcome the expertise and workload difficulties noted above. Presumably, special masters would be individuals familiar with habeas cases and with an acumen for factfinding, thus partially addressing the Court's institutional capacity problem. Further, the use of special masters en masse could overcome Professor Alexander's judicial economy concern.<sup>221</sup>

Thus, if Congress wished to close the lower courts to habeas petitioners, and the Court decided to take a firm stand against such an action, the in-chambers model is a conceivable (although peculiar) foundation upon which the Court could build its Alamo—preserving habeas corpus without directly challenging Congress's traditionally presumed plenary control over the lower federal courts' jurisdiction.<sup>222</sup> In short, if the Justices-in-chambers model is viable (an

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<sup>218</sup> See, e.g., FED. R. APP. P. 48(a)(3)–(4) (“A court of appeals may appoint a special master to hold hearings, if necessary, and to recommend factual findings . . . [T]he master’s powers . . . include . . . requiring the production of evidence on all matters embraced in the reference; and . . . administering oaths and examining witnesses and parties.”); *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 469 (1984) (“If . . . the Court of Appeals finds that the administrative record is inadequate, it may remand to the agency or in some circumstances refer the case to a special master.” (citations omitted)).

<sup>219</sup> ZIMMERMAN, *supra* note 215, at 44. See generally Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625 (2002) (providing detailed account of role special masters play and criticizing that role).

<sup>220</sup> See Carstens, *supra* note 219, at 680–82 (comparing roles of Supreme Court special masters and magistrate judges).

<sup>221</sup> Cf. *Maryland v. Louisiana*, 451 U.S. 725, 762–63 (1981) (Rehnquist, J., dissenting) (arguing that use of special masters is far from ideal solution to Supreme Court's factfinding problem, but implying no other viable options for mandatory original jurisdiction cases).

<sup>222</sup> Of course, the Court has never faced this unique question prior to *Boumediene*. But it has thwarted presidential closure of the lower federal courts through in-chambers decisions. See *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (Taney, C.J., in chambers) (issuing writ of habeas corpus in face of President Lincoln's unilateral attempt to suspend

assumption, as I argue below, the Court seems unwilling to make), there would be no need to saddle the *Boumediene* Court with the highly controversial endorsement of Justice Story's mandatory-lower-court-jurisdiction view.

### III

#### EXPLAINING THE ABSENCE

Let's assume, at least for the moment, that the in-chambers model presents a viable forum of last resort for federal executive-detention habeas cases. This assumption raises the question, then, of why the Court did not deploy the in-chambers view as a means of circumventing the jurisdiction-stripping difficulty in *Boumediene*. Indeed, the Court often relies on similar arguments when Congress limits its appellate jurisdiction over habeas petitions, holding that Congress has not exceeded its power to regulate the Court's appellate jurisdiction so long as postconviction habeas petitions could be filed directly with the Court.<sup>223</sup> Similarly, the Court often performs feats of statutory-construction gymnastics to avoid the conclusion that Congress has stripped all jurisdiction to hear a constitutional claim.<sup>224</sup> So why not in *Boumediene*? In this part, I contend that under standard severability doctrine, the Justices-in-chambers model should have been an option for the Court to consider. Its failure to do so, I suggest, weighs heavily against the viability of the Justices-in-chambers model, with special masters and all, as too fanciful.

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writ). For a debate as to whether this opinion came in chambers or as circuit justice opinion, see Hartnett, *supra* note 31, at 280–82.

<sup>223</sup> See, e.g., *Felker v. Turpin*, 518 U.S. 651, 654, 661 (1996) (holding that because Antiterrorism and Effective Death Penalty Act (AEDPA) does not strip Supreme Court of jurisdiction to hear postconviction habeas petitions filed initially with it, “[t]his conclusion obviates one of the constitutional challenges raised”); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 104–05 (1868) (similar analysis in relation to Habeas Corpus Act of 1867); *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 515 (1868) (“Counsel . . . [erroneously] supposed . . . [that] the repealing act in question . . . [removes] the whole appellate power of the court[ ] in cases of habeas . . . . The act of 1868 . . . [only] except[s] from that jurisdiction . . . appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.”).

<sup>224</sup> See, e.g., Pfander, *supra* note 134, at 195 (“[T]he Court [has] adopted somewhat strained readings of restrictions on its appellate jurisdiction . . . to avoid the constitutional question that would arise from [such] legislation . . . .”); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1556–62 (2000) (similar). A few examples from the Court include: *Hamdan v. Rumsfeld*, 548 U.S. 557, 575–76 (2006) (offering strained interpretation of DTA so as not to strip habeas jurisdiction over pending cases); *INS v. St. Cyr*, 533 U.S. 289, 325–26 (2001) (offering strained interpretation of AEDPA and Illegal Immigration Reform and Immigrant Responsibility Act so as not to strip habeas jurisdiction); *Zadvydas v. Davis*, 533 U.S. 678, 687–88 (2001) (offering strained interpretation of immigration statute so as not to strip habeas jurisdiction).

The initial short answer to my rhetorical question is that the Court tried such an avoidance strategy, but Congress pushed the issue. As I described above,<sup>225</sup> the history of the Guantánamo cases to date, which the Court itself described as a “dialogue,”<sup>226</sup> has been one in which the Court attempts to avoid constitutional questions by way of statutory interpretations that preserve judicial review only to be reversed by Congress. *Rasul v. Bush*, which held as a matter of statutory interpretation that habeas jurisdiction reaches aliens held at Guantánamo,<sup>227</sup> was overturned by Congress in the DTA.<sup>228</sup> In *Hamdan v. Rumsfeld*, the Court attempted to limit the immediate impact of the DTA on pending cases,<sup>229</sup> only to have Congress respond with a more aggressive jurisdiction-stripping statute in the MCA.<sup>230</sup> By this point, the Court had exhausted its avoidance ploy. As the *Boumediene* Court stated, “we cannot ignore that the MCA was a direct response to *Hamdan*’s holding that the DTA’s jurisdiction-stripping provision had no application to pending cases.”<sup>231</sup> Congress had clearly spoken: No federal court, Justice, or judge was to hear these cases.

Nevertheless, this statutory-interpretation backstory does not fully explain why the Justices-in-chambers model was completely off the table in *Boumediene*. When a provision of an act is held unconstitutional, the Court, as a matter of legislative intent, must determine whether other provisions of the act remain in force.<sup>232</sup> That is, the Court must determine if the offending provision is severable from the body of the act or if the entire act must be struck down. The test in this regard is that, “[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, indepen-

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<sup>225</sup> See *supra* notes 46–60 and accompanying text (discussing Supreme Court’s Guantánamo opinions leading up to *Boumediene* and congressional reaction thereto).

<sup>226</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2243 (2008).

<sup>227</sup> 542 U.S. 466, 473 (2004).

<sup>228</sup> See Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2739, 2741–42 (2005) (codified as amended at 28 U.S.C. § 2241(e) note (2006)) (“[N]o 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 . . .”).

<sup>229</sup> *Hamdan*, 548 U.S. at 575–76 (2006).

<sup>230</sup> See *supra* notes 59–62 and accompanying text (discussing Congress’s passage of MCA).

<sup>231</sup> *Boumediene*, 128 S. Ct. at 2243.

<sup>232</sup> For the Court’s treatment of severability, see *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987); *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion); *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210, 234 (1932).

dently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.”<sup>233</sup>

Although the Court did not specifically address the severability issue, after holding that the DTA regime violated the Suspension Clause, it did face such a severability question. Section 7(a) of the MCA states:

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.<sup>234</sup>

If the Justices-in-chambers view represents the constitutional minimum in terms of federal fora for executive-detention habeas suits, the only offending language in section 7(a) would be “justice.” That is, so long as the in-chambers forum remained available, Congress, under the Madisonian Compromise theory, should have the constitutional power to remove all other habeas jurisdiction. Assuming this to be the case, the Court very well could have struck that one word—“justice”—from section 7(a), preserving a habeas venue of last resort at the Court itself, akin to what is found in *Felker v. Turpin*<sup>235</sup> and *Ex parte McCardle*.<sup>236</sup> The remainder of MCA section 7 would then be fully operative as a law. Moreover, the Court, in striking all of section 7, noted that its focus was narrow, leaving the remainder of the DTA regime intact.<sup>237</sup> If a surgical strike is what the Court was after, then it should have allowed Congress to strip the lower federal courts of habeas jurisdiction, pursuant to the Madisonian Compromise, but preserved the in-chambers option as the constitutional minimum. The Court did not choose this option, of course. From the Court’s choice here, I contend that the best inference is that the Court did not consider the Justices-in-chambers model viable.

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<sup>233</sup> *Mille Lacs Band*, 526 U.S. at 191 (quoting *Champlin Ref. Co.*, 286 U.S. at 234); see also *INS v. Chadha*, 462 U.S. 919, 934 (1983) (“A provision is further presumed severable if what remains after severance ‘is fully operative as a law.’” (quoting *Champlin Ref. Co.*, 286 U.S. at 234)).

<sup>234</sup> Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635–36 (2006) (codified at 28 U.S.C. § 2241(e) note (2006)).

<sup>235</sup> 518 U.S. 651, 661 (1996) (holding that any constitutional infirmities in AEDPA regime are cured by preservation of access to Supreme Court as habeas forum of last resort).

<sup>236</sup> 74 U.S. (7 Wall.) 506, 515 (1868) (holding no constitutional infirmity in Congress’s removal of one type of statutory authority to seek habeas review because Supreme Court retained habeas authority under different statutory regime).

<sup>237</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008) (“The only law we identify as unconstitutional is MCA § 7, 28 U.S.C.A. § 2241(e) (Supp.2007). Accordingly, both the DTA and the CSRT process remain intact.”).

I initially defend this inferential thesis by rejecting other inferences as unsatisfactory. First, it could be the case that the *Boumediene* majority was not aware of the in-chambers option; hence, its silence on the matter should not raise an inference rejecting the approach. Indeed, while in-chambers practice as a general matter is alive and well at the Court, hearing habeas claims in chambers is no longer a regular feature of that practice.<sup>238</sup> But this conclusion seems improbable given the *Boumediene* Court's discussion of the power of individual Justices to issue the writ.<sup>239</sup> Also, several members of the majority had issued at least one in-chambers opinion (although not necessarily in habeas cases) during this decade.<sup>240</sup> Moreover, all the members of the majority had served with Chief Justice Rehnquist, the all-time leader by volume with 112 in-chambers and circuit justice opinions during his tenure.<sup>241</sup> As such, Chief Justice Rehnquist's former colleagues in the *Boumediene* majority most likely were aware of in-chambers practice and its potential scope merely by proximity.<sup>242</sup>

Second, the *Boumediene* majority may have implicitly rejected the in-chambers approach to severability as being inconsistent with legislative intent. Thus, the Court's silence on the in-chambers approach should not be broadly construed. Indeed, the MCA, as read by the Court<sup>243</sup> and in the view of almost all members of Congress,<sup>244</sup>

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<sup>238</sup> See Felleman & Wright, *supra* note 32, at 1017–18 (describing in-chambers habeas practice as of “no practical importance” and asserting that single Justice is not “an appropriate forum for original habeas corpus proceedings”); Cynthia J. Rapp, *In Chambers Opinions by Justices of the Supreme Court*, 5 GREEN BAG 2D 181, 183 (2002) (“[I]ndividual Justices no longer entertain writs of habeas corpus.”).

<sup>239</sup> *Boumediene*, 128 S. Ct. at 2266 (“The differences between the DTA and the habeas statute that would govern in MCA § 7’s absence, 28 U.S.C. § 2241 (2000 ed. and Supp. V), are likewise telling. In § 2241 (2000 ed.) Congress confirmed the authority of ‘any justice’ or ‘circuit judge’ to issue the writ.”).

<sup>240</sup> See *Doe v. Gonzales*, 546 U.S. 1301 (2005) (Ginsburg, J., in chambers); *Multimedia Holding Corp. v. Cir. Ct. of Fla.*, 544 U.S. 1301 (2005) (Kennedy, J., in chambers); *Prato v. Vallas*, 539 U.S. 1301 (2003) (Stevens, J., in chambers); *Kenyeris v. Ashcroft*, 538 U.S. 1301 (2003) (Kennedy, J., in chambers); *Bagley v. Byrd*, 534 U.S. 1301 (2001) (Stevens, J., in chambers).

<sup>241</sup> See 4 RAPP xxi–xxii (Supp. 2006) (listing in-chambers opinions by Justice).

<sup>242</sup> Moreover, the members of the Court as a whole issued twenty-seven in-chambers and circuit court opinions in the 1990s. 1 RAPP xxix (2001). Similarly, fifteen such opinions were issued from 2000 to 2006. See 4 RAPP iii (Supp. 2004) (listing ten in-chambers and circuit court opinions between 2000 and 2006, including *Microsoft Corp. v. United States*, 4 RAPP 1424 (2000), an October term 1999 case decided in 2000); 4 RAPP iii (Supp. 2005) (listing three more); 4 RAPP iii (Supp. 2006) (listing two more).

<sup>243</sup> See *Boumediene*, 128 S. Ct. at 2243–44 (“[W]e cannot ignore that the MCA was a direct response to *Hamdan*’s holding that the DTA’s jurisdiction-stripping provision had no application to pending cases. . . . [W]e agree with its conclusion that the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us.”). It is worth noting, however, the Court uses the phrase “deprives the federal courts” and not courts *and* judges. But, of course, the statute employs both terms: courts and judges. Pub.

was an attempt to remove all federal judicial review (excepting the limited oversight available in the D.C. Circuit). But such an explanation—that Congress wanted no habeas review at all—does not adequately address the argument that once the no-habeas-at-all option was held unconstitutional, the Court should not have employed the narrowest remedy to fix the constitutional infirmity (*viz.*, the in-chambers option).<sup>245</sup> That is to say, the legislative history does not avoid the severability question, it merely re-raises it.

Third, the Court's failure to engage with the in-chambers model may best be interpreted as an act of judicial imperialism, with the Court flexing its muscle as a check upon a President who was at the low-ebb of his popularity.<sup>246</sup> But this political explanation offers no guidance on what the text of the opinion means. Even if the Court was motivated in this way, it still should have offered some explanation as to why the in-chambers model was off the table.

Fourth, the Court's failure to address the in-chambers model may be excused because this question appears not to have been briefed, nor does it seem that any of the petitioners sought in-chambers review. But in past cases as exceptional as *Boumediene*,<sup>247</sup> such procedural niceties have not stopped the Court from employing arguments

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

<sup>244</sup> See, e.g., 152 CONG. REC. S10,357 (daily ed. Sept. 28, 2006) (statement of Sen. Leahy) (“The habeas stripping provisions in the bill go far beyond what Congress did in the Detainee Treatment Act . . . . This new bill strips habeas jurisdiction retroactively, even for pending cases.”); *id.* at S10,367 (statement of Sen. Graham) (“The Hamdan decision did not apply . . . the [DTA] . . . retroactively, so we have about 200 and some habeas cases left unattended and we are going to attend to them now.”); *id.* at S10,403 (statement of Sen. Cornyn) (“[O]nce . . . section 7 is effective, Congress will finally accomplish what it sought to do through the [DTA] . . . . It will finally get the lawyers out of Guantanamo Bay. It will substitute the blizzard of litigation instigated by *Rasul v. Bush* with a narrow DC Circuit-only review of the [CSRT] hearings.”); *id.* at S10,404 (statement of Sen. Sessions) (“Section 7 of the [MCA] fixes this feature of the DTA and ensures that there is no possibility of confusion in the future. . . . I don’t see how there could be any confusion as to the effect of this act on the pending Guantanamo litigation. The MCA’s jurisdictional bar applies to that litigation ‘without exception.’”); 152 CONG. REC. H7938 (daily ed. Sept. 29, 2006) (statement of Rep. Hunter) (“The practical effect of [section 7] will be to eliminate the hundreds of detainee lawsuits that are pending in courts throughout the country and to consolidate all detainee treatment cases in the D.C. Circuit.”).

<sup>245</sup> See *supra* notes 232–37 and accompanying text (discussing severability issue).

<sup>246</sup> See *Katz, supra* note 9, at 416–21 (arguing that Court’s decision not to adopt less bold approach in *Boumediene* suggests Court was responding to President Bush’s previous assertions of executive authority).

<sup>247</sup> In fact, the *Boumediene* Court had already held this case to be procedurally “exceptional” when it addressed whether the DTA regime constituted an adequate substitute for habeas relief—an issue not addressed below, which in a normal case would have merited a remand. See *Boumediene*, 128 S. Ct. at 2262–63.

outside the briefs to support an outcome.<sup>248</sup> This departure from traditional prudential practice is especially justified when, as in cases like *Boumediene*, reaching beyond the issues briefed or presented below would avoid a difficult constitutional question.<sup>249</sup>

Given that these other competing explanations for the Court's failure to adopt the in-chambers model are not satisfying, I contend that the Court's failure to consider the in-chambers view is best thought of as an implicit rejection of the approach.<sup>250</sup> Such a rejection would find many supporters. While the proposed partnering of Justices in chambers with special masters could well preserve the sanctity of the Madisonian Compromise even in the face of *Boumediene*-required factfinding capacity, the picture we are left with is bizarre: each Justice, acting alone in chambers, overseeing a host of separate habeas litigations via assignment to numerous special masters. Further, none of these cases would be reviewable by the Court en banc, or anywhere else.<sup>251</sup> It is a foreign scene to be sure, which, as Professor Alexander argues, is at odds with contemporary norms concerning the appropriate use of judicial power.<sup>252</sup> For many, then, the

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<sup>248</sup> See generally GRESSMAN ET AL., *supra* note 215, at 466–72 (discussing Court's power to control question presented, consider arguments not raised below, adopt positions only raised by amici, and employ arguments not raised in briefing at all); see also *United States v. Leon*, 468 U.S. 897, 905 (1984) (noting Court's power to address question differing from formal question presented in briefing).

<sup>249</sup> Cf. *Plautt v. Spendthrift Farm, Inc.*, 514 U.S. 211, 216 n.2 (1995) (“Since respondents’ reading of the statute would avoid a constitutional question of undoubted gravity, we think it prudent to entertain the argument even though respondents did not make it in the Sixth Circuit.”).

<sup>250</sup> Of course, an implicit rejection of a position is not to be confused with a holding. I do not mean to suggest as much. See *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (holding that if decision does not “squarely address[ ] [an] issue,” the Court remains “free to address [it] on the merits” at later date); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (holding that issues not “raised in briefs or argument nor discussed in the opinion of the Court” cannot be taken as “binding precedent on th[e] point”).

<sup>251</sup> See *In re Kaine*, 55 U.S. (14 How.) 103, 116–17 (1852) (plurality opinion) (stating that Justices in chambers may not transfer habeas petitions for en banc review due to Article III’s limit on Supreme Court’s original jurisdiction); *id.* at 130–31 (Nelson, J., dissenting) (same); *In re Metzger*, 46 U.S. (5 How.) 176, 191 (1847) (“This court can exercise no power, in an appellate form, over decisions made at his chambers by a Justice of this court . . . .”); Hartnett, *supra* note 31, at 283 n.140 (“*Metzger* also might be read to reflect a view that the Supreme Court lacked statutory authorization to review in-chamber[s] decisions. . . . *Metzger* also might stand for the proposition that because appellate jurisdiction involves the revision of another court’s judgment and an individual judge in chambers is not holding court, an in-chambers decision itself cannot be, as a constitutional matter, the predicate for the exercise of the Supreme Court’s appellate jurisdiction.”).

<sup>252</sup> Alexander, *supra* note 148, at 1221.

in-chambers model is not a viable option.<sup>253</sup> Perhaps this is the Court's view as well.

The best reading of *Boumediene*, then, is a return to the first-blush reading of the case. This reading finds that appellate courts and judges inherently lack institutional capacity for factfinding with the ultimate conclusion that a lower federal court must remain open to make such findings in executive-detention habeas cases. Once again, *Boumediene* stands in direct opposition to the core tenets of the Madisonian Compromise.

#### IV

#### FACTFINDING AS A COMPONENT OF JUDICIAL INDEPENDENCE

The consequences of *Boumediene*'s necessary-factfinder rule leave one with an uncomfortable dilemma. Either, contrary to the Madisonian Compromise view, the Constitution compels lower-federal-court habeas jurisdiction, as *Boumediene* implies, or it authorizes the Justices in chambers, aided by special masters, to take individual jurisdiction over scores of executive-detention habeas claims, producing a bizarre procedural landscape. As neither option is attractive, one is tempted to avoid the dilemma by rejecting the constitutional imperative for a *Boumediene*-style factfinder altogether. One might argue, for example, that *Boumediene*'s factfinding requirement is sui generis to the circumstances of Guantánamo Bay and thus limited to the facts of that case. Such a reading of the case would avoid the adoption of Justice Story's mandatory-jurisdiction view without the need to engage in the exotic in-chambers procedures suggested above.

But such a limitation of *Boumediene*'s factfinding holding is not easily done. In fact, the Court jealously guards the ability of Article III courts to find facts in constitutional cases. Moreover, the Court views this factfinding power as a structural feature of constitutional governance that is essential to judicial independence. Indeed, when it comes to the adjudication of constitutional issues, Article III courts are not bound by findings of fact made by state courts, federal administrative agencies, the executive more generally, or Congress.<sup>254</sup> Reviewing these cases illustrates that *Boumediene*'s factfinding

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<sup>253</sup> See, e.g., *id.* (critiquing Hartnett's view on pragmatic grounds); Daniel M. Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. CIN. L. REV. 1159 (2008) (arguing that empowering individual Justices, instead of courts, is in tension with Article III).

<sup>254</sup> See Katz, *supra* note 9, at 33 (discussing applicability of *Boumediene*'s factfinder requirement to constitutional claims beyond habeas).

requirement, rather than being a unique feature of the Guantánamo cases, is deeply entrenched in constitutional doctrine.

I begin with the Supreme Court's power to review, and alter, state court findings of fact. Ultimately, the Court has this authority because the Constitution assigns it "appellate Jurisdiction . . . as to . . . Fact, with such Exceptions, and under such Regulations as the Congress shall make."<sup>255</sup> Except in the context of habeas review of state convictions,<sup>256</sup> "[n]o statute or rule governs [the Court's] review of facts found by state courts."<sup>257</sup> The need to retain the supremacy of federal law has been the primary interest shaping the Court's practice in this area. Even though the Court generally takes a deferential view toward state court findings of fact even in constitutional cases<sup>258</sup>—likely as a function of the presumption of state court parity<sup>259</sup>—the Court does not consider itself to be "completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding."<sup>260</sup> Pursuant to this view, the Court will revise state court findings of fact

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<sup>255</sup> U.S. CONST. art. III, § 2, cl. 2.

<sup>256</sup> See 28 U.S.C. § 2254(d)(2) (2006) ("An application for a writ of habeas corpus . . . shall not be granted . . . unless the adjudication of the [state] claim resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.").

<sup>257</sup> *Hernandez v. New York*, 500 U.S. 352, 366 (1991).

<sup>258</sup> *Id.*

<sup>259</sup> I do not wish to enter into the parity debate here, as it appears insoluble. See Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission*, 23 HARV. J.L. & PUB. POL'Y 233, 237 (1999) (noting that question of "whether state courts are doing a good job of interpreting the Federal Constitution . . . inevitably lead[s] to a conclusion influenced by the normative preconceptions of the person who poses the query"). All that matters for this inquiry is that the Court regularly presumes the parity of the state courts. See, e.g., *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976) (refusing to recognize federal habeas claims premised on Fourth Amendment violations in part because of "unwilling[ness] to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States"); *Dombrowski v. Pfister*, 380 U.S. 479, 484–85 (1965) ("It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."). Of course, there are exceptions to this general rule, but such isolated incidents need not detract from the core premise. See, e.g., *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 827 n.6 (1986) (Brennan, J., dissenting) ("Although this concern [over state hostility] may be less compelling today than it once was, the American Law Institute reported as recently as 1969 that 'it is difficult to avoid concluding that federal courts are more likely to apply federal law sympathetically and understandingly than are state courts.'" (quoting AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 166 (1969))).

<sup>260</sup> *Stein v. New York*, 346 U.S. 156, 181 (1953), *overruled on other grounds by Jackson v. Denno*, 378 U.S. 368 (1964).

in two categories of cases: first, where the factual finding is “shown by the record to be without evidence to support it”;<sup>261</sup> and second, in those instances where the “Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.”<sup>262</sup> Although the Court does not make frequent use of this power—purely fact-bound cases often fail to receive certiorari<sup>263</sup>—this doctrine is not a dead letter.<sup>264</sup> Similarly, the federal courts review state court findings of fact, although under a highly deferential standard,<sup>265</sup> with regard to claims of constitutional error in post-state-conviction habeas review. In *Wiggins v. Smith*,<sup>266</sup> for example, the Court, in an ineffective assistance of counsel case, reversed the lower court’s denial of a writ of habeas corpus in part because the state appellate court relied on a key factual finding that was contradicted by the state court record.<sup>267</sup>

The federal courts also hold close the ability to review findings of fact that impinge upon constitutional rights when reviewing federal agency action. This doctrine has roots dating to old common law practice before King’s Bench,<sup>268</sup> with the Supreme Court giving the modern statement of the so-called constitutional fact doctrine in *Crowell v. Benson*.<sup>269</sup> In that case, the Court held that agency-made factual findings that are necessary for the adjudication of constitu-

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<sup>261</sup> *Fiske v. Kansas*, 274 U.S. 380, 385 (1927).

<sup>262</sup> *Id.* at 385–86.

<sup>263</sup> See, e.g., Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 HARV. J. ON LEGIS. 123, 139 (1992) (“The Supreme Court’s certiorari policy, however, excludes one important class of cases. The Court rarely grants certiorari to resolve ‘fact bound’ issues—issues for which the uniqueness of the facts would make any decision important only to the parties involved.”).

<sup>264</sup> See GRESSMAN ET AL., *supra* note 215, at 228–30 (collecting scores of cases where Supreme Court employed its power to revise state court findings of fact upon direct review).

<sup>265</sup> See 28 U.S.C. § 2254(d)(2) (2006) (instructing federal habeas courts to review state convictions for “an unreasonable determination of the facts in light of the evidence presented in the State court proceeding”).

<sup>266</sup> 539 U.S. 510 (2003).

<sup>267</sup> *Id.* at 528 (finding upon review of state court record, that “the court based its conclusion, in part, on a clear factual error [which was] . . . shown to be incorrect by ‘clear and convincing evidence’”).

<sup>268</sup> See Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 249 (1985) (“Constitutional fact review had its antecedents in the doctrine of jurisdictional fact, which the English superior courts, particularly King’s Bench, developed to confine administrative agencies and inferior courts within their delegated authority.”).

<sup>269</sup> 285 U.S. 22 (1932). See generally LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 624–33 (1965) (providing overview of English common law doctrine of jurisdictional fact as “intellectual kin[ ]” of American constitutional fact doctrine); David L. Franklin, *Enemy Combatants and the Jurisdictional Fact Doctrine*, 29 CARDOZO L. REV. 1001, 1017–34 (2008) (discussing history of doctrine and its application in context of executive detention of enemy combatants).

tional rights are not binding upon Article III courts during the process of judicial review. As with review of state court judgments, structural concerns, as opposed to individual rights, motivated the Court, with separation of powers serving as the dominant rationale.<sup>270</sup> In the Court's view "the question is not the ordinary one as to the propriety of provision for administrative determinations. . . . It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions."<sup>271</sup> Moreover, "the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it."<sup>272</sup> Although administrative law scholars downplay the importance of this structural safeguard in run-of-the-mill administrative review,<sup>273</sup> the Court has consistently reaffirmed the *Crowell* constitutional-fact holding as a linchpin to judicial independence.<sup>274</sup>

The Court, under the banner of the jurisdictional fact doctrine, does not consider the Article III courts bound by executive findings of fact in habeas suits seeking relief from executive detention in non-Guantánamo cases. In *Ng Fung Ho v. White*, for example, the executive branch sought to deport two men under the Chinese Exclusion Act.<sup>275</sup> The executive had made the factual finding that the men were

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<sup>270</sup> Monaghan, *supra* note 268, at 255 ("[This] formulation . . . suggests that article III is not concerned with the personal rights of litigants, but with the institutional independence of the federal adjudicatory process. On this reasoning, it seems that an independent record is only an adjunct to the more basic requirement of independent judicial judgment . . .").

<sup>271</sup> *Crowell*, 285 U.S. at 56; *see also id.* at 60 ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.").

<sup>272</sup> *Id.* at 64.

<sup>273</sup> *See, e.g.*, 3 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 17.9, at 1314 (4th ed. 2002) (contending that constitutional fact doctrine, pragmatically speaking, is dead-letter rule); 33 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE AND PROCEDURE: JUDICIAL REVIEW OF ADMINISTRATIVE ACTION § 8376 (2006) ("Now, constitutionally mandated de novo review has virtually disappeared in federal administrative litigation and rarely finds acceptance in state courts.").

<sup>274</sup> The Court often recites the *Crowell* constitutional-fact holding, most recently doing so in 2007. *See Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) ("The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake." (citing *Crowell*, 285 U.S. at 60)). Nevertheless, the strong reading of *Crowell*—that judicial review of constitutional facts found by an administrative agency requires Article III recreation of a record as opposed to Article III review of the agency-made factual conclusions—is no longer sound. *See Monaghan, supra* note 268, at 256 ("[T]he independent record requirement [has] receded into the constitutional shadows.").

<sup>275</sup> 259 U.S. 276 (1922) (holding that aliens to be deported under Chinese Exclusion Acts, ch. 60, 27 Stat. 24 (1892), who assert citizenship are entitled to judicial determination of that question).

not citizens and sought to deport them summarily. Recognizing that the deportation of a citizen would amount to a constitutional violation, the Court refused to be bound by the executive's finding of fact.<sup>276</sup> The Court held that because the executive has jurisdiction to order deportation only if the person arrested is an alien, a resident has a right to a de novo judicial determination of a claim to citizenship.<sup>277</sup>

Finally, although not analyzed under the nomenclature of constitutional fact, the Court does not necessarily defer to congressional findings of fact when constitutional prerogatives are at issue. Take *United States v. Morrison*, for example, where the Court struck the civil remedy provision of the Violence Against Women Act (VAWA) as beyond Congress's authority under both the Commerce Clause and Section Five of the Fourteenth Amendment.<sup>278</sup> Congress, when passing the VAWA, made the factual finding that violence against women costs the interstate economy some \$5 to \$10 billion annually.<sup>279</sup> The Court held it was not bound by this factual finding, flatly rejecting the sufficiency of a congressional finding of fact "to sustain the constitutionality of Commerce Clause legislation."<sup>280</sup> The Court then emphatically heralded that "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."<sup>281</sup> The Court asserted that "[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."<sup>282</sup> Similarly, in *City of Boerne v. Flores*,<sup>283</sup> the Court rejected Congress's factual finding that the states were, contemporaneous with the passage of the Religious

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<sup>276</sup> See *id.* at 284–85 (remanding case for trial on "the question of citizenship").

<sup>277</sup> Although this case is of old vintage, the Court has reaffirmed it more recently. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 82 n.34 (1982) (recognizing that "the general principle of *Crowell* . . . remains valid, as evidenced by the Court's recent approval of *Ng Fung Ho* . . . on which *Crowell* relied"); *Agosto v. INS*, 436 U.S. 748, 753 (1978) (citing *Ng Fung Ho*, 259 U.S. at 276). Moreover, *Ng Fong Ho* is alive and well in the lower courts, garnering more than 1600 citations on Westlaw.

<sup>278</sup> 529 U.S. 598 (2000) (striking down civil remedy in Violence Against Women Act § 13981(a), Pub. L. No. 322, 108 Stat. 1902, 1941 (1994) (codified in scattered sections of U.S.C.)).

<sup>279</sup> See S. Rep. No. 103-138, at 41 (1993); S. Rep. No. 101-545, at 33 (1990).

<sup>280</sup> *Morrison*, 529 U.S. at 614.

<sup>281</sup> *Id.* (quoting *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995)).

<sup>282</sup> *Id.* (alteration in original) (quoting *Lopez*, 514 U.S. at 557 n.2).

<sup>283</sup> 521 U.S. 507 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc (2006)).

Freedom Restoration Act of 1993,<sup>284</sup> burdening citizens' exercise of religion. Although the Court noted that judicial deference to congressionally found facts is generally due when analyzing such questions,<sup>285</sup> given that the "history of persecution in this country detailed in the [congressional] hearings mentions no episodes occurring in the past 40 years,"<sup>286</sup> the Court found it "difficult to maintain that . . . [the] legislation [was] enacted or enforced due to animus or hostility to the burdened religious practices or that [the facts] indicate some widespread pattern of religious discrimination in this country."<sup>287</sup> That is to say, the Court in reviewing the congressional testimony refused to be bound by Congress's conclusions of fact. Again, the Court offered a structural argument to support this factfinding power, arguing that to hold otherwise would be to cede "the power [the federal courts] have [held] since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution."<sup>288</sup>

*Boumediene's* holding that Article III courts must be free to make their own findings of fact in constitutional cases, then, is not an isolated or spurious holding. The doctrine has a broad base of support that the Court anchors to the very independence of the federal judiciary from the states and other branches of the federal government. Moreover, this factfinding power encompasses not only the need to draw de novo factual conclusions from existing factual records but also the ability to supplement the factual record. As such, *Boumediene's* factfinding holding is not easily dismissed; rather, it should be recognized as an essential plank of judicial independence. We are stuck with this dilemma, then: As factfinding is constitutionally required as a function of judicial independence, at least in habeas cases, one must choose between Justice Story's mandatory-jurisdiction

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<sup>284</sup> Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §2000bb (2006)).

<sup>285</sup> *Id.* at 531 (observing that deference is based "on due regard for the decision of the body constitutionally appointed to decide" (citation omitted)).

<sup>286</sup> *Id.* at 530.

<sup>287</sup> *Id.* at 531.

<sup>288</sup> *Id.* at 536; *see also* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 730–35 (2003) (conducting similar review of congressional factfinding while sustaining Congress's power to pass Family Medical Leave Act as enforceable against states); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 369–72 (2001) (conducting similar review of congressional factfinding in litigation challenging Congress's power to pass portions of Americans with Disabilities Act as enforceable against states); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89–91 (2000) (conducting similar review of congressional factfinding in lawsuit addressing Congress's power to pass portions of Age Discrimination in Employment Act as enforceable against states); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 639–41 (1999) (conducting similar review of congressional factfinding in reviewing action against Congress's power to pass portions of Patent Remedy Act as enforceable against states).

position, as the *Boumediene* opinion implies,<sup>289</sup> and the peculiar in-chambers model. The *Boumediene* Court, as I argue above, appears to adopt the former.

#### CONCLUSION

*Boumediene* holds that a habeas court in a federal executive-detention case must have the capacity to make supplemental findings of fact in order to meet constitutional standards. This factfinding holding, moreover, is neither spurious nor sui generis to detainees at Guantánamo Bay, as the Court reads similar requirements into many other doctrines as part of its commitment to judicial independence. In facing this constitutional factfinding imperative, then, three fora are potentially available. First, state courts could fill this role, but the holding in *Tarble's Case* bars this route. Second, lower federal courts can fulfill this role, but this comes at the cost of rejecting the Madisonian Compromise. Third, Justices in chambers could serve in this factfinding role, but this approach paints a scene best described as bizarre to the modern observer. In looking at these unattractive options, the Court opted for the second, presenting its first ever direct challenge to the Madisonian Compromise.<sup>290</sup> One could argue that there is a fourth forum: Article I courts. It is highly doubtful, however, that vesting an Article I court with exclusive jurisdiction to hear detainee habeas claims would be consistent with contemporary norms surrounding Article I jurisdiction or with the notion that such tribunals must be inferior to the Supreme Court.<sup>291</sup> There does not appear to be an easy means of reconciling the traditional Madisonian Compromise view with *Boumediene's* factfinding requirements. Perhaps Justice Story would concur, then, that *Boumediene's* factfinding holding is best read as mandating the existence of a lower Federal Article III court.

This result is likely to raise more issues than it immediately answers, however, because this conclusion is largely the result of other judicial constructions that are not self-evidently correct. One could deny, for example, that the Court's original jurisdiction acts as a ceiling, thus allowing original executive-detention cases to be heard

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<sup>289</sup> See *Boumediene v. Bush*, 128 S. Ct. 2229, 2266 (2008).

<sup>290</sup> Even though there may be some wiggle room to read the Court's selection of the lower-federal-court option as requiring merely an Article I, as opposed to an Article III, factfinder for federal executive-detention habeas cases, any reading of *Boumediene's* factfinding holding erodes the mooring of the traditional Madisonian Compromise view. See *supra* Part I.B (discussing *Boumediene's* challenge to Madisonian Compromise).

<sup>291</sup> See *supra* notes 111–31 and accompanying text (arguing that Article I court is not likely capable of fulfilling *Boumediene* factfinding function).

directly by the Supreme Court.<sup>292</sup> Or one could limit *Tarble's Case's* ban on state habeas against federal agents to only those circumstances in which the lower federal courts are available.<sup>293</sup> Or finally, one could deny that the Suspension Clause requires the availability of the writ.<sup>294</sup> Should the Court wish to pull back from *Boumediene's* challenge to the Madisonian Compromise in a future case, I suspect it will do so along one of these lines. Post-*Boumediene*, these once-settled questions suddenly have become live issues.

Of course, given the changed political landscape after the 2008 elections, it seems unlikely that we will see further jurisdiction-stripping legislation in the habeas context in the immediate future. Moreover, it is unlikely that Congress will dismantle the entire system of lower federal courts and thereby create the need for Article III institutions with factfinding capacity. Indeed, given the general availability of the state courts to serve this factfinding function and the strong presumption of state court parity with Article III courts,<sup>295</sup> *Boumediene's* factfinding holding will likely carry the most pragmatic weight in those limited instances where the state courts are prohibited from such service (viz., mandamus against federal officers,<sup>296</sup> injunctions against federal officers,<sup>297</sup> and executive-detention habeas petitions). But *Boumediene* is only indirectly a habeas case.<sup>298</sup> As Chief

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<sup>292</sup> See, e.g., Clinton, *supra* note 95, at 778 (arguing that Supreme Court's constitutional grant of original jurisdiction may be better viewed as floor); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 33 (same).

<sup>293</sup> See, e.g., Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1033 (1998) ("In a world without lower federal courts, the Supreme Court would presumably reevaluate the propriety of state court relief from federal detention.").

<sup>294</sup> See *INS v. St. Cyr*, 533 U.S. 289, 340 n.5 (2001) (Scalia, J., dissenting) (arguing that absent congressional action, Suspension Clause is not self-enacting).

<sup>295</sup> See generally *supra* note 259 (discussing state court parity).

<sup>296</sup> See *Ex parte Crane*, 30 U.S. (5 Pet.) 190, 193 (1831) ("A mandamus to an officer is held to be the exercise of original jurisdiction; but a mandamus to an inferior court of the United States, is in the nature of appellate jurisdiction."); 15 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 100.21[3] n.11 (3d ed. 2009) ("State courts may not issue writ of mandamus directed at federal officer." (citing *M'Clung v. Silliman*, 19 U.S. (6 Wheat.) 598 (1821))).

<sup>297</sup> See, e.g., *Wheedlin v. Wheeler*, 373 U.S. 647, 664 n.13 (1963) (Brennan, J., dissenting) ("[I]t is unsettled whether the state courts have jurisdiction . . . to enjoin a federal officer acting under color of federal law . . ."); WRIGHT ET AL., *supra* note 110, § 4213 (noting that Supreme Court has not answered question and that most commentators believe state courts lack authority to enjoin federal officers, but highlighting that arguments have been made that state courts should have such authority); Martin H. Redish & Curtis E. Woods, *Congressional Power To Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 92 (1975) (concluding that weight of authority suggests state courts lack authority to enjoin federal officer).

<sup>298</sup> See Katz, *supra* note 9, at 411 (arguing that "some, and perhaps all, of *Boumediene's* answers extend well beyond habeas cases").

Justice Roberts similarly asserted, “[o]ne cannot help but think . . . that this decision is not really about the detainees at all.”<sup>299</sup> Rather, it is a full-throated assertion of judicial independence and judicial power. Indeed, the rejection of the Madisonian Compromise may be the most aggressive flexing of the judicial muscle we have ever seen. I suspect that long after the last detainees leave Guantánamo Bay, the effects of the Court’s adopting Justice Story’s position on mandatory lower court jurisdiction will continue to shape the scope of federal judicial power—especially in the context of access to the courts for the protection of constitutional interests—for decades to come.<sup>300</sup>

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<sup>299</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2279 (2008) (Roberts, C.J., dissenting); *see also id.* at 2293 (arguing that only winner in case is unelected judiciary).

<sup>300</sup> *See generally* Vladeck, *supra* note 9 (arguing that *Boumediene* is best understood as decision about access to courts).