REPLY OF PROFESSOR DAVID RUDOVSKY TO PROFESSOR STEPHEN I. VLADECK, "THE *FIELD* THEORY: MARTIAL LAW, THE SUSPENSION POWER, AND THE INSURRECTION ACT"

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Professor Vladeck's article addresses from an historical and constitutional perspective the question of whether Congress may indirectly grant to the President the authority to suspend the writ of habeas corpus by enacting legislation that permits the President to impose martial law.[1] Under this theory, even if the Constitution vests Congress, and not the President, with the sole authority to suspend the writ of habeas corpus, contingent legislation regarding martial law would be viewed as congressional action enabling the suspension of the writ of habeas corpus on the ground that the President can validly determine that habeas jurisdiction is inconsistent with a declaration of martial law.

In an intriguing analysis, Professor Vladeck suggests that President Lincoln may have properly suspended habeas corpus in Baltimore in 1861, not for the reasons he gave at the time, but because he properly imposed martial law in Baltimore.[2] Ultimately, I reject that thesis on constitutional and prudential grounds. As I will explain, martial law is not always inconsistent with habeas corpus. Moreover, given the strong constitutional argument that only Congress can suspend the writ of habeas corpus, to permit the suspension by the President upon the imposition of martial law, without concurrent action by Congress, would present very grave dangers to civil liberties.

To understand my position fully, it is first necessary to broaden the discussion of habeas corpus and the history of civil liberties in wartime in the United States. As an historical matter, in times of war or perceived dangers to national security, the dangers to civil liberties are greatest. When we look back at American wars, both hot and cold, we find a consistent pattern of imposing unnecessary restrictions on civil liberties.[3] In each instance there was wide

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1. Stephen I. Vladeck, *The* Field *Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 80 TEMP. L. REV. 391 (2007).

2. *Id.* at 430. President Lincoln suspended the writ of habeas corpus on several occasions during the American Civil War, and thousands of persons were arrested without judicial proceedings. GEOFFREY R. STONE, PERILOUS TIMES 124 (2004). In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the Supreme Court ruled that Lincoln exceeded his constitutional authority by his suspension of habeas corpus, even in a time of civil war, where the civil courts were functioning. *Milligan*, 71 U.S. (4 Wall.) at 127.

3. *See, e.g.*, ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 27-29 (1941) (describing circumstances leading to Alien and Sedition Acts passed in late eighteenth century); PAUL

support for the limitations at the time that they were imposed, and in each, years later, there was historical, judicial, or governmental acknowledgment that the restrictions were both unjustified and damaging to the country.[4]

At the very beginning of our constitutional history, just a few years after the adoption of the Bill of Rights, the First Amendment met its first significant challenge. In 1798, the French and English were at war, and in the United States, the Federalists favored the English, and the Republicans supported the French.[5] President John Adams, a Federalist, moved the United States into a state of undeclared war with France.[6]

The Federalists sought to undermine Republican resistance to this policy by enacting the Alien and Sedition Acts of 1798. Under the Alien (or Alien Friends) Act, the President could deport any noncitizen deemed to be dangerous to the peace and safety of the United States.[7] The Act provided no right to a hearing, no right to present evidence, and no right to judicial review.[8]

The Sedition Act prohibited criticism of the government, the Congress, or the President with the intent to bring them "into contempt or disrepute."[9] It is difficult to imagine a broader assault on basic First Amendment principles, yet the government successfully prosecuted Republican newspapers and opponents of the Adams administration for engaging in speech critical of the government.[10] Indeed, the very first prosecution under the Act was of Matthew Lyon, an outspoken Republican congressman from Vermont.[11] Such speech would be fully protected under current interpretations of the First Amendment.[12] Fortunately, these acts expired with the election of President Jefferson, who pardoned all convicted parties.[13] Nevertheless, the precedent of overbroad restrictions on speech had been set and future wars were likely to bring similar repressive acts.

The Civil War presented another great challenge to the constitutional framework when President Lincoln claimed the power to suspend the writ of habeas corpus as a means of furthering the war effort. This exercise of executive power was based on compelling exigencies but, as Professor Vladeck has

MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES 71-86 (1979) (describing passage of laws restricting civil liberties in wake of World War I).

4. *See, e.g.*, Civil Liberties Act of 1988, Pub. L. No. 100-383, § 2, 102 Stat. 903, 903-04 (codified as amended at 50 U.S.C. app. § 1989a (2000)) (expressing apology from Congress "on behalf of the Nation" for internment of Japanese American citizens during World War II).

5. STONE, *supra* note 2, at 25-26.

6. JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 5-8 (emended ed. 2d prtg. 1967).

7. Alien Friends Act, ch. 58, § 2, 1 Stat. 570, 570-71 (1798) (expired 1800).

8. *Id.*

9. Sedition Act of 1798, ch. 73, § 2, 1 Stat. 596, 596 (expired 1801).

10. STONE, *supra* note 2, at 46-58, 63.

11. *Id.* at 48-54.

12. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) (acknowledging consensus regarding Sedition Act as inconsistent with First Amendment); JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 166-67 (1951) (illustrating incongruity of First Amendment and Sedition Act).

13. STONE, *supra* note 2, at 73.

demonstrated, was highly controversial.[14]

As the United States entered World War I, dissent to the war effort brought severe condemnation from the Wilson administration.[15] Congress soon enacted the Espionage Act of 1917,[16] which became a centerpiece of the government's effort to criminalize dissent.[17] The government prosecuted more than 2000 dissenters for expressing opposition to the war or the draft, with many defendants receiving severe prison sentences.[18]

In 1918, Congress enacted the Sedition Act, which made it a crime to publish any disloyal or abusive language intended to cause contempt or scorn for the government, the Constitution, or the flag of the United States.[19] In a series of decisions in 1919 and 1920, the Supreme Court upheld the convictions of individuals who simply expressed their opposition to the war, including Eugene Debs, who had received almost one million votes in 1912 as the Socialist Party candidate for President.[20] With the end of hostilities, the repressive acts were reconsidered. In 1921, Congress repealed the Sedition Act and all those convicted under it were released from prison.[21] Further, as with the original Alien and Sedition Acts, the Supreme Court later made clear that its decisions of this era were not in line with the First Amendment.[22]

Immediately following World War I, in the wake of the Russian Revolution, a series of violent strikes and bombings triggered the period known as the "Red Scare" of 1919-20. To combat a new enemy, "radical" dissidents (mainly immigrants), Attorney General A. Mitchell Palmer established the "General Intelligence Division" ("GID") within the Bureau of Investigation.[23] J. Edgar Hoover was put in charge of intelligence gathering, and using law enforcement efforts that bear a strong resemblance to those initiated by Attorney General Ashcroft following 9/11, the GID conducted a series of raids and arrested more

14. *See generally* Vladeck, *supra* note 1, at 397-415 (discussing context of President Lincoln's suspension of writ and chronicling historical and continuing controversy over propriety of his actions).

15. DAVID M. KENNEDY, OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY 21-26 (1980); *see also* STONE, *supra* note 2, at 137-38 (describing President Wilson's resistance to criticism of war effort); Woodrow Wilson, Address of the President of the United States on the State of the Union (Dec. 7, 1915), *in* 53 CONG. REC. 95, 99 (1915) (urging Congress to take active measures to ensure disloyalty to war effort is "crushed out").

16. Pub. L. No. 65-24, ch. 30, 40 Stat. 217, 217-18.

17. *See* Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335, 335-36 (2002) (discussing original objectives of Espionage Act).

18. *See* CHAFEE, *supra* note 3, at 51-52 n.30 (tallying number of Espionage Act convictions, pardons, and commutations reported).

19. Sedition Act of 1918, Pub. L. No. 65-150, ch. 75, 40 Stat. 553, 553-54 (repealed 1921).

20. Abrams v. United States, 250 U.S. 616, 624 (1919); Debs v. United States, 249 U.S. 211, 216 (1919); Schenck v. United States, 249 U.S. 47, 47-48 (1919).

21. STONE, *supra* note 2, at 230-32.

22. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (overruling previous conviction under Sedition Act, citing conflict between Act and First and Fourteenth Amendments); *see also* MURPHY, *supra* note 3, at 268-70 (describing Justice Brandeis's civil liberties concerns and subsequent embrace of those concerns by Court majority).

23. STONE, *supra* note 2, at 222-23.

than 4000 people on suspicion of radicalism.[24] Many were physically abused, and many were illegally deported.[25]

A group of distinguished lawyers and law professors published a report on the activities of the Department of Justice during this period which carefully documented its excesses.[26] In a separate report, Charles Evans Hughes described the governmental abuses as follows:

> We have seen the war powers, which are essential to the preservation of the nation in time of war, exercised broadly after the military exigency has passed . . . and we may well wonder in view of the precedents now established whether constitutional government as heretofore maintained in this republic could survive another great war even victoriously waged.[27]

World War II brought one of the most shameful episodes in our constitutional history. In 1942, 120,000 Japanese Americans were placed in internment camps by executive order[28] notwithstanding the utter lack of evidence that persons of Japanese descent posed any risk to national security.[29] No charges were brought and there were no hearings to determine if any of those ordered to be interned were disloyal or posed any risk to the war effort.[30]

In *Korematsu v. United States*,[31] the Supreme Court upheld the President's action,[32] and in *Hirabayashi v. United States*,[33] the Court upheld the constitutionality of a related curfew order.[34] In an opinion that disingenuously denied the role of race, the Court ruled:

> [W]e are not unmindful of the hardships imposed . . . upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships.
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> . . . .
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> . . . Korematsu was not excluded from the [West Coast] because of hostility to . . . his race . . . [but] because the . . . military authorities . . . decided that the military urgency of the situation demanded that all

24. *Id.* at 223-24.

25. *See id.* (describing systematic targeting and deporting of suspected dissidents).

26. *See generally* NAT'L POPULAR GOV'T LEAGUE, TO THE AMERICAN PEOPLE: REPORT UPON THE ILLEGAL PRACTICES OF THE UNITED STATES DEPARTMENT OF JUSTICE (1920) (documenting instances of illegal government action).

27. Charles Evans Hughes, Address at Harvard Law School (June 21, 1920), *excerpted in* CHAFEE, *supra* note 3, at 102.

28. *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) (authorizing establishment of "military areas" ostensibly to protect nation against espionage and sabotage).

29. *See* David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 94 (2006) (summarizing unwarranted internment of Japanese Americans).

30. *See* PETER IRONS, JUSTICE AT WAR 58-63 (1983) (describing decision-making process that led to forced internment, including recognition that Japanese Americans engaged in no known sabotage prior to internment order).

31. 323 U.S. 214 (1944).

32. *Korematsu*, 323 U.S. at 224.

33. 320 U.S. 81 (1943).

34. *Hirabayashi*, 320 U.S. at 105.

> citizens of Japanese ancestry be segregated from the [area] . . . . We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.[35]

In *Ex parte Endo*,[36] the Court ruled that the detention of persons who might be subject to relocation was unconstitutional.[37] While this case limited presidential powers, the Court did not issue the opinion until President Roosevelt ordered the release of those interned.[38] Once again, the Supreme Court deferred to presidential claims of national security and only reconsidered after the President was willing to forgo the continued use of internment powers.

The Commission on Wartime Relocation and Internment of Civilians concluded that the factors that shaped the internment decision "were race prejudice, war hysteria and a failure of political leadership," rather than military necessity.[39] Shortly thereafter, federal courts vacated the convictions in the *Korematsu*[40] and *Hirabayashi*[41] cases. The courts found that at the time of the internment decision, government officials not only knew that there was no military necessity but had intentionally deceived the Court regarding the supposed risks posed by Japanese Americans on the West Coast.[42] In 1988, President Reagan signed the Civil Liberties Act of 1988, which officially declared the Japanese internment a "grave injustice" that had been "carried out without adequate security reasons" and offered reparations to each formerly interned Japanese American along with a formal presidential apology for the discrimination, loss of liberty, loss of property, and personal humiliation they had suffered.[43]

Following World War II, as the nation moved into the Cold War, anticommunism swept the nation and generated a wide range of restrictions on free expression and free association, including extensive loyalty programs for government employees, emergency detention plans for alleged "subversives," legislative investigations designed to punish by exposure, public and private blacklists of those who had been "exposed," and criminal prosecutions of the leaders and members of the Communist Party of the United States.[44] In *Dennis*

35. *Korematsu*, 323 U.S. at 219, 223-24 (citation omitted).

36. 323 U.S. 283 (1944).

37. *Endo*, 323 U.S. at 302.

38. *See* IRONS, *supra* note 30, at 344-45 (discussing interplay between Court's publication of *Endo* opinion and government's release of persons from internment).

39. COMM'N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 18 (1982).

40. Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

41. Hirabayashi v. United States, 828 F.2d 591, 594 (9th Cir. 1987).

42. *See id.* at 597-98 (discussing suppression of government report that provided basis for exclusionary orders unrelated to military exigency); *Korematsu*, 584 F. Supp. at 1417 (detailing revisions made by government to reports on internment prior to submission to Supreme Court); *see also* IRONS, *supra* note 30, at 206-18, 278-307 (describing deceptions by government officials to justify internment plan).

43. Civil Liberties Act of 1988, Pub. L. No. 100-383, § 2, 102 Stat. 903, 903-04 (codified as amended at 50 U.S.C. app. § 1989a (2000)).

44. *See generally* RALPH S. BROWN, JR., LOYALTY AND SECURITY: EMPLOYMENT TESTS IN THE

v. United States,[45] the Court upheld the Smith Act and ruled that the leaders of the American Communist Party could be punished for their speech under a highly questionable application of the standard of "clear and present danger."[46] Over the next several years, the Court upheld legislative investigations of "subversive" organizations and individuals and the exclusion of members of the Communist Party from the bar, the ballot, and public employment.[47] During the same period, as the "Red Scare" diminished, the Court began the process of limiting the earlier decisions restricting First Amendment rights.[48]

Professor Martin Lederman stated that in times of war, there is silence of the laws.[49] Attorney General Biddle, who was the attorney general during World War II put it a different way: "[T]he Constitution has never greatly bothered any wartime President."[50] I think our current attorney general would probably say the same thing and, further, that it is a good thing that the laws do remain silent.

Thus, it is not surprising that in the war on terrorism we have seen a replay of governmental manipulation of national security to justify significant limitations on constitutional rights. Within months of 9/11, the Department of Justice detained thousands of alleged immigration violators, based solely on their ethnicity, and subjected them to cruel and unconstitutional conditions of confinement.[51] Chief Immigration Judge Michael Creppy ordered his judges to "close immigration proceedings to the press and public . . . in certain 'special interest' cases."[52] Congress passed the Patriot Act[53] that gave federal law

UNITED STATES (1958) (discussing use of loyalty tests to suppress and ferret out communist activity among government employees); FRANK J. DONNER, THE AGE OF SURVEILLANCE: THE AIMS AND METHODS OF AMERICA'S POLITICAL INTELLIGENCE SYSTEM (1980) (discussing methods of targeting and exposing suspected political subversives in attempt to suppress communist activities); STONE, *supra* note 2, at 312-14 (describing anticommunism initiatives and sentiment).

45. 341 U.S. 494 (1951).

46. *Dennis*, 341 U.S. at 516-17.

47. *See, e.g.*, Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 115 (1961) (affirming Board's classification of "Communist Party" as "Communist-action organization"); Barenblatt v. United States, 360 U.S. 109, 134 (1959) (affirming conviction of professor who refused to answer questions regarding his involvement in Communist Party).

48. *See, e.g.*, Yates v. United States, 354 U.S. 298, 320 (1957) (limiting previous decision in *Dennis* to advocacy of forcible overthrow of government, rather than advocacy of abstract doctrine).

49. Martin S. Lederman, Visiting Professor of Law at Georgetown Univ., Keynote Address at the Temple Law Review Symposium: Executive Power: Exploring the Limits of Article II (Mar. 23, 2007). The same challenges to constitutional rights exist even in "metaphorical" wars. Thus, in the war on drugs, the courts have severely compromised the protections of the Fourth Amendment. David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 240.

50. FRANCIS BIDDLE, IN BRIEF AUTHORITY 219 (1962).

51. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 2 (2003), *available at* http://www.usdoj.gov/oig/special/0306/full.pdf (detailing conditions in which detainees were held).

52. Detroit Free Press v. Ashcroft, 195 F. Supp. 2d 937, 941 (E.D. Mich. 2002). The circuit courts ultimately divided on the issue. *Compare* N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 204-05 (3d Cir. 2002) (finding no right of access for press to attend deportation hearings), *with* Detroit Free Press v. Ashcroft, 303 F.3d 681, 711 (6th Cir. 2002) (affirming district court's finding of First

enforcement vast new surveillance powers, including the authority to secure a wide range of personal and political materials without the normal showing of probable cause and a search warrant.[54] The President also claimed unilateral power to declare persons as "enemy combatants" and thereby relegate them to indefinite detention without due process.[55]

Six years later, the scope of the limits on civil liberties is stunning. While the full range of counterterrorism tactics may not be known for years, the constitutional violations already exceed those of previous wars. Thus, we continue to hold "enemy combatants" in the confines of Guantánamo under a regime in which the laws and Constitution, to say nothing of the Geneva Conventions, do not apply;[56] the President has used the National Security Agency ("NSA") to conduct electronic surveillance of large numbers of persons without court approval on vague allegations of terrorist activities;[57] the Federal Bureau of Investigation ("FBI") has issued thousands of "national security letters" for private and personal information, again without any court approval or supervision;[58] the "state secrets" doctrine is regularly invoked to bar claims of torture and other serious constitutional violations;[59] and, notwithstanding the continued official line that we do not torture, the opposite is most decidedly true.[60]

Amendment right of access to deportation proceedings).

53. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.) (renewed 2006).

54. *Id.*; *see also* Susan N. Herman, *The USA PATRIOT Act and the Submajoritarian Fourth Amendment*, 41 HARV. C.R.-C.L. L. REV. 67, 73-75 (2006) (explaining that no probable cause is required for government intrusion).

55. Neil Kinkopf, *The State Secrets Problem: Can Congress Fix It?*, 80 TEMP. L. REV. 489, 493 (2007); Mark C. Rahdert, *Double-Checking Executive Emergency Power: Lessons from* Hamdi *and* Hamdan, 80 TEMP. L. REV. 451, 471 (2007).

56. *See* Boumediene v. Bush, 476 F.3d 981, 994 (D.C. Cir. 2007) (noting that federal courts have no jurisdiction over habeas corpus petitions filed by detained enemy combatants), *cert. granted*, 127 S. Ct. 3078 (2007).

57. *See* ACLU v. NSA, 438 F. Supp. 2d 754, 758 (E.D. Mich. 2006) (granting injunction for plaintiffs whose businesses were harmed by government monitoring of international communication without warrants), *vacated*, 493 F.3d 644 (6th Cir. 2007) (holding plaintiffs lacked standing).

58. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS, at xix (2007), *available at* http://www.usdoj.gov/oig/special/s0703b/final.pdf (estimating more than 56,000 national security letter ("NSL") requests in 2004); Barton Gellman, *The FBI's Secret Scrutiny*, WASH. POST, Nov. 6, 2005, at A1 (estimating 30,000 NSLs per year).

59. *See, e.g.*, Kinkopf, *supra* note 55, at 493 (describing President's assertion of state secrets privilege in case challenging indefinite detention of enemy combatants); D.A. Jeremy Telman, *Our Very Privileged Executive: Why the Judiciary Can (and Should) Fix the State Secrets Privilege*, 80 TEMP. L. REV. 499, 500-01 (2007) (calling for judicial reconsideration of "state secrets" privilege and its foundations because of its immunization of parties accused of statutory, constitutional, and human rights violations).

60. *See* Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 279 (2003) (examining accounts of physical abuse following September 11, 2001 attacks and during occupation of Iraq); Raymond Bonner, *The*

This historical perspective is necessary background to the fundamental questions that Professor Vladeck and others have raised regarding suspension of the writ of habeas corpus. Under what situations should we permit the suspension of the writ? Is the President authorized to suspend the writ, or does Congress have the sole authority in this area? Are other grants of power to the President, and specifically the power to impose martial law, sufficient to authorize suspension of the writ?

The Constitution recognizes the right of habeas corpus in a negative fashion by stating that the writ of habeas corpus "shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[61] As the Suspension Clause is part of Article I of the Constitution, which provides for the powers of Congress, there has been fairly general consensus that the power of suspension is limited to congressional action.[62] But, as Professor Shapiro has stated, "few clauses in the Constitution have proved so elusive."[63] I agree with those scholars and courts that have taken the position that only Congress has the power to suspend the writ,[64] but beyond that issue there are other questions that are equally significant.

First, there is the fundamental question of whether there may be judicial review of suspension of habeas corpus. The Suspension Clause is specific as to the conditions precedent for suspension, but the Court has never determined whether one who is deprived of a habeas remedy may challenge the suspension on grounds that there was not a "Rebellion" or "Invasion" that required suspension? Does a court have any power of judicial review, or is that issue a political question beyond the proper jurisdiction of the courts?[65]

CIA's Secret Torture, N.Y. REVIEW OF BOOKS, Jan. 11, 2007, at 28, 29 (reviewing STEPHEN GREY, GHOST PLANE: THE TRUE STORY OF THE CIA TORTURE PROGRAM (2006); and COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR (2006), *available at* www.ararcommission.ca/eng/26.htm) (examining historical precedent for and detailing recent cases of extraordinary rendition); Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14 & 21, 2005, at 106, 106-08 (describing extraordinary rendition program of Bush administration); Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1 (reporting on covert U.S. prisons in undisclosed European locations); ACLU, Torture Documents Released Under FOIA, http://www.aclu.org/safefree/torture/torturefoia.html (last visited Jan. 6, 2008) (listing U.S. government reports and documents detailing prisoner abuse).

61. U.S. CONST. art. I, § 9, cl. 2.

62. Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2045 (2007); Trevor W. Morrison, Hamdi*'s Habeas Puzzle: Suspension as Authorization*, 91 CORNELL L. REV. 411, 428-30 (2006); Vladeck, *supra* note 1, at 393 n.8.

63. Shapiro, *supra* note 29, at 59.

64. *See, e.g.*, Rahdert, *supra* note 55, at 451 n.6 (2007) (noting that "[the] location [of the language about the writ of habeas corpus] in Article I has led to the conclusion that it is Congress, as opposed to the President" that wields power to suspend writ of habeas corpus). Notably, the Supreme Court has also recognized Congress's power to suspend the writ. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 101 (1807).

65. *See* Shapiro, *supra* note 29, at 77-79 (noting that Supreme Court has never ruled on judicial supervision of suspension); Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV.

Suspension of habeas corpus also presents the important and difficult question of the relationship between suspension of the remedy and the status of the rights at stake.[66] Habeas corpus is a remedy for the violation of substantive rights to liberty and freedom; it cannot issue unless a constitutional deprivation is proven. In the usual case, the petitioner alleges that she is illegally detained or is subject to illegal treatment by the government, and the filing of the petition provides a mechanism by which the court may inquire into the issue of custody. But when there is a suspension of the writ, is the underlying "right" suspended as well? Posed this way, habeas suspension raises the stakes beyond the limitations on individual case remedies.[67] If habeas corpus is suspended with respect to detainees in Guantánamo, what does that say as to the "legality" of the government's policies? If habeas corpus is suspended, does the suspension also terminate all other detention- or trial-related rights—for example, the right to a fair trial, to be free from coercion, or physical abuse, or torture? Does suspension of the writ also suspend any claim for an injunction or damages for the unconstitutional confinement?

Given the serious questions over the scope and breadth of suspension, who has the power to suspend, under what circumstances suspension is authorized, and the scope of judicial review, there is even greater need to focus on the question of whether we are willing to allow suspension by less than an explicit act of Congress. The question discussed by Professor Vladeck is whether Congress has authorized the President to suspend the writ of habeas corpus by legislation permitting imposition of martial law on the theory that martial law is fundamentally inconsistent with the right of habeas corpus.[68] Thus, under Professor Vladeck's analysis, Congress may authorize the suspension of the writ on a conditional basis—the declaration of martial law by the President.

In my view, given the enormous consequences that attach to suspension, we should not accept anything less than a timely and express congressional authorization. It is simply too dangerous to permit Congress to allow for a contingent set of events which in the sole view of the President is sufficient to impose martial law and, by that action, to also suspend habeas corpus. Since the President has the greatest incentive to suspend habeas corpus (as it relieves him of justifying the detention or other treatment of detainees), Congress must exercise the power on a noncontingent basis.

All of this is more than an academic question. As Professor Vladeck demonstrates, the 2006 and 2007 amendments to the Insurrection Act substantially broaden the circumstances under which the President may use

333, 335 (2006) (arguing that suspension should not be considered political question).

66. *See* David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1200-01 (discussing how limits on remedies such as federal habeas relief may "erode" substantive rights). *See generally* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 908-09 (1999) (arguing against bright-line distinction between remedies and constitutional rights).

67. Shapiro, *supra* note 29, at 81-85.

68. *See generally* Vladeck, *supra* note 1 (exploring relationship between imposition of martial law and suspension of habeas corpus).

military force in domestic situations to restore public order and enforce the laws of the United States. The current law provides:

> [W]hen, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition in any State or possession of the United States, the President determines that—
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> (i) domestic violence has occurred to such an extent that the constituted authorities of the State or possession are incapable of maintaining public order; and
>
> (ii) such violence results in a condition described in paragraph (2); or
>
> [Second, the military can be called forth to] suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy if such insurrection, violation, combination, or conspiracy results in a condition described in paragraph (2).[69]

This Act provides a very broad authority on which to impose martial law. The triggering conditions by their very nature do not necessarily implicate "Cases of Rebellion or Invasion."[70] Accordingly, even if in theory there may be a parallel between martial law and suspension of habeas corpus, under this statute where martial law can be imposed in situations that do not present instances of rebellion or invasion, there cannot be a legitimate suspension of habeas corpus.

The fundamental nature of habeas corpus should be preserved and protected against suspension except in the most extreme circumstances. With the inevitable pressure on civil liberties brought on by war and perceptions of dangers to national security, we should be more protective of this fundamental remedy for violation of basic rights. We ought to insist that any attempt to suspend the writ be done in a way that is transparent and direct and puts political accountability on those who would seek to limit liberty.

69. 10 U.S.C.A. § 333(a)(1)(A)-(B) (West Supp. 2007).

70. *See* U.S. CONST. art. I, § 9, cl. 2 (preventing suspension of habeas corpus except in specific circumstances).