

FEDERAL COURTS — POLITICAL QUESTION DOCTRINE — D.C. CIRCUIT HOLDS CLAIMS OF HARMS TO NATIVE INHABITANTS OF THE BRITISH INDIAN OCEAN TERRITORY CAUSED BY THE CONSTRUCTION OF A U.S. MILITARY BASE NONJUSTICIABLE. — *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006).

Courts and commentators, struggling to make sense of the “murky” political question doctrine,<sup>1</sup> have suggested that individual rights cases should be less amenable to dismissal under the doctrine than should cases dealing with structural concerns such as the separation of powers.<sup>2</sup> Whether this consideration is a broad one or is limited to “important” constitutional rights, however, has not been clearly answered. Recently, in *Bancoult v. McNamara*,<sup>3</sup> the D.C. Circuit discussed the individual rights consideration in dismissing on political question grounds claims arising out of alleged United States depopulation of certain islands in the Indian Ocean. The court’s ultimate disposition is defensible as a relatively easy application of *Baker v. Carr*,<sup>4</sup> and its language affirming an individual rights limitation in foreign policy-related cases is largely welcome. However, the court complicated matters by suggesting a legally dubious distinction between constitutional and statutory rights which, if taken up by courts addressing the war on terrorism, may threaten congressional oversight and contravene the political question doctrine’s purpose by aggrandizing judicial power in the foreign policy realm.

In the 1960s, the United States and United Kingdom agreed to displace the inhabitants of the Chagos Archipelago in the British Indian Ocean Territory in order to construct a military facility on the island of Diego Garcia.<sup>5</sup> The Chagossians were allegedly forced from the islands through starvation and death threats.<sup>6</sup> Deprived of their real and personal property, barred from returning, and provided with no relocation assistance, they subsequently lived in poverty in Mauritius and the Seychelles.<sup>7</sup> In 2001, Olivier Bancoult, other indigenous

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<sup>1</sup> See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 803 n.8 (D.C. Cir. 1984) (Bork, J., concurring) (stating that the “murky and unsettled” nature of the doctrine is demonstrated by the “lack of consensus about its meaning” among judges and scholars).

<sup>2</sup> See, e.g., *Goldwater v. Carter*, 444 U.S. 996, 1004 (1979) (distinguishing cases involving “co-equal branches of our Government” from cases involving private litigants); 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3534.2, at 504–08 & nn.35–39 (2d ed. 1984 & Supp. 2006) (noting that “concern for protecting individual rights frequently leads to decision of claims that come close to political question domain” and listing examples).

<sup>3</sup> 445 F.3d 427 (D.C. Cir. 2006).

<sup>4</sup> 369 U.S. 186 (1962).

<sup>5</sup> See *Bancoult*, 445 F.3d at 429–30.

<sup>6</sup> *Id.* at 430.

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

Chagossians, and nonprofit organizations concerned with Chagossian welfare sued the United States and senior officials of the Departments of Defense and State under the Alien Tort Statute<sup>8</sup> (ATS), alleging common law torts as well as violations of international law.<sup>9</sup>

The District Court for the District of Columbia found the named defendants immune, as their conduct was a “direct outgrowth” of their national security duties and thus within the scope of their employment.<sup>10</sup> Plaintiffs forfeited their remaining Federal Tort Claims Act<sup>11</sup> (FTCA) claims against the United States by failing to exhaust administrative remedies.<sup>12</sup> Additionally, the district court held that plaintiffs’ claims raised a nonjusticiable political question.<sup>13</sup> Reviewing the well-known six factors elucidated in *Baker*,<sup>14</sup> the court found each factor to counsel dismissal.<sup>15</sup>

The D.C. Circuit affirmed. Judge Brown<sup>16</sup> held that the court lacked jurisdiction over the claims against both the United States and the individual defendants because they presented nonjusticiable political questions.<sup>17</sup> Relying heavily on its exposition of the *Baker* factors in its recent decision in *Schneider v. Kissinger*,<sup>18</sup> the court recalled “an extensive list of constitutional provisions that entrusted foreign affairs and national security powers to the political branches” and that was unrivaled by any constitutional commitment of such matters to the judiciary.<sup>19</sup> The court also restated *Schneider*’s conclusion that, in general, it “could not ‘recast[] foreign policy and national security questions in tort terms,’” and that doing so would require impermissibly

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<sup>8</sup> 28 U.S.C. § 1350 (2000).

<sup>9</sup> *Bancoult*, 445 F.3d at 430–31. The international law claims included forced relocation; torture; racial discrimination; cruel, inhuman, or degrading treatment; and genocide. *See id.* at 431.

<sup>10</sup> *Bancoult v. McNamara*, 370 F. Supp. 2d 1, 8–9 (D.D.C. 2004).

<sup>11</sup> 28 U.S.C. §§ 1346(b), 2671–2680 (2000).

<sup>12</sup> *Bancoult*, 445 F.3d at 11.

<sup>13</sup> *See id.* at 17.

<sup>14</sup> The six *Baker* factors, the presence of any one of which can make a case nonjusticiable, are: [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>15</sup> *See Bancoult*, 370 F. Supp. 2d at 13–17.

<sup>16</sup> Judges Tatel and Griffith joined Judge Brown’s opinion.

<sup>17</sup> *Bancoult*, 445 F.3d at 432–38.

<sup>18</sup> 412 F.3d 190 (D.C. Cir. 2005).

<sup>19</sup> *Bancoult*, 445 F.3d at 433–34.

reviewing whether drastic foreign policy measures were necessary, which could evince disrespect for the executive branch.<sup>20</sup>

The D.C. Circuit recognized the “murk[iness]” of the political question doctrine<sup>21</sup> and echoed *Baker*’s admonition that not all cases implicating foreign relations require judicial abstention.<sup>22</sup> Yet it rejected the idea that its previous decisions finding justiciable cases involving the constitutional rights of U.S. citizens rescued the Chagossians’ claims.<sup>23</sup> While stating that “[t]he courts may not bind the executive’s hands on matters such as these,” the court granted that “the presence of constitutionally-protected liberties could require us to address limits on the foreign policy and national security powers assigned to the political branches.”<sup>24</sup> Since no such rights were at stake here, however, the political question doctrine appropriately barred judicial review.<sup>25</sup>

As a matter of adherence to precedent, the D.C. Circuit correctly applied the *Baker* factors in dismissing Bancoult’s claims under the political question doctrine. In its swift dispatch of the case, however, the court unnecessarily addressed the relationship between the doctrine and individual rights. Although Judge Brown’s acknowledgment of the importance of adjudicating individual rights claims when political question considerations might otherwise bar review is both legally correct and normatively welcome, her suggestion that it is the constitutional nature of such rights that tips the scale in favor of justiciability is problematic. Beyond overlooking the legal equality of constitutional and nonconstitutional rights in this context, this dictum, if later embraced, could alter the well-settled balance of executive and legislative powers, particularly in politically delicate emergency situations.

The D.C. Circuit’s ease in deciding this case is unsurprising. As a separation of powers doctrine, the political question doctrine generally counsels judicial abstention in foreign relations matters, such as military policy, deemed to be beyond judges’ competence.<sup>26</sup> Whether

<sup>20</sup> *Id.* at 434–35 (alteration in original) (quoting *Schneider*, 412 F.3d at 197).

<sup>21</sup> *Id.* at 435 (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 803 n.8 (D.C. Cir. 1984) (Bork, J., concurring)).

<sup>22</sup> *See id.* (citing *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

<sup>23</sup> *See id.* at 435, 437 (citing *Cnty. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 935 (D.C. Cir. 1988); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1515 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985)).

<sup>24</sup> *Id.* at 437.

<sup>25</sup> *See id.*

<sup>26</sup> *See, e.g.*, *Gilligan v. Morgan*, 413 U.S. 1, 10–11 (1973); *Baker*, 369 U.S. at 211; *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir. 1997). Whether the need for such abstention is constitutional or prudential in nature — indeed, even whether the doctrine is about abstention or rather about jurisdiction — is unclear. *See, e.g.*, Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *YALE L.J.* 517, 517–19 (1966). The argument that the doctrine should give equal treatment to constitutional and statutory rights is more obvious if the doctrine is understood as prudential, because there would be no worry of a statutory right prevail-

courts in fact lack competence in balancing security with other interests may be debated,<sup>27</sup> but the D.C. Circuit's decision not to evaluate the implementation of a broad Cold War-era policy is doctrinally understandable and consistent. Moreover, the Supreme Court's holding in *Sosa v. Alvarez-Machain*<sup>28</sup> that Congress, in enacting the FTCA, did not waive sovereign immunity for government acts occurring in foreign countries but proximately caused by domestic acts<sup>29</sup> suggests that Congress never granted the Chagossians judicially enforceable rights to begin with — making a countervailing individual rights consideration inapplicable.

Given this possibility, it seems particularly odd that Judge Brown would have invoked a potential individual rights limitation on the political question doctrine, only to qualify the scope of such a consideration. Doctrinally, the D.C. Circuit's recognition of the importance of adjudicating individual rights claims seems correct. The Supreme Court acknowledged individual rights as an essential consideration at the political question doctrine's inception in *Marbury v. Madison*.<sup>30</sup> An expanded emphasis on reviewing cases implicating such rights emerged in *Goldwater v. Carter*,<sup>31</sup> in which a plurality of the Supreme Court observed that private litigants' claims are more appropriate for adjudication than claims by branches of government with political resources of their own.<sup>32</sup>

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ing despite a constitutional consideration — i.e., the doctrine itself. Nonetheless, even if the doctrine is understood as constitutional, the separation of powers considerations that justify limiting it when statutory rights are implicated are themselves grounded in the Constitution. Because, as discussed below, the notion that Congress would play a role in safeguarding rights is embedded in the Constitution, viewing the political question doctrine as taking this fact into account would not impermissibly overlook any constitutional requirements that characterize the doctrine.

<sup>27</sup> For example, the Israeli Supreme Court has asserted a role in reviewing security policy precisely on the grounds of institutional competence: "The military commander determines where, on hill and plain, the separation fence will be erected. That is his expertise. We examine whether this route's harm to the local residents is proportional. That is our expertise." HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Isr. [2004] IsrSC 58(5) 807, para. 48, available at [http://elyon1.court.gov.il/files\\_eng/04/560/020/a28/04020560.a28.pdf](http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf). For an analysis of the domestic political question doctrine concluding that courts do in fact have competence to evaluate executive overreaching and breaches of international law, see *In re "Agent Orange" Product Liability Litigation*, 373 F. Supp. 2d 7, 69–78 (E.D.N.Y. 2005).

<sup>28</sup> 542 U.S. 692 (2004).

<sup>29</sup> See *id.* at 712.

<sup>30</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803) (recognizing as beyond judicial interference those political issues that "respect the nation, not individual rights").

<sup>31</sup> 444 U.S. 996 (1979).

<sup>32</sup> See *id.* at 1004. Numerous lower courts have also found individual rights violations particularly ill-suited for nonjusticiability. See, e.g., *United States v. Decker*, 600 F.2d 733, 738 (9th Cir. 1979) ("Even if in other respects a traditional political question analysis could apply, we would be reluctant to declare these cases nonjusticiable because such a holding would prevent us from reviewing the propriety of appellants' convictions and prison sentences. We are less inclined to withhold review when individual liberty, rather than economic interest, is implicated."); see also

Yet in addition to referencing a presumption in favor of hearing cases implicating individual rights, the D.C. Circuit seemingly proceeded to elevate a select segment of those rights — namely, “*constitutionally-protected liberties*”<sup>33</sup> — for which judicial review must be preserved, relegating the rest to more facile political question dismissal. Intuitively, of course, this idea that constitutional rights are more important than statutory rights seems accurate. Indeed, when a constitutional edict and an act of Congress conflict, the former must prevail.<sup>34</sup> Nonetheless, there are at least three serious problems with Judge Brown’s implied distinction between constitutional and statutory rights.<sup>35</sup>

First, this distinction is contradicted by numerous cases in other circuits. For instance, the Seventh Circuit has observed that courts should less hastily dismiss cases “based on a constitutional right, treaty, congressional directive or established administrative procedure.”<sup>36</sup> The Ninth Circuit reflected a similar preference against declining to enforce congressionally granted rights in distinguishing between “reviewing claims based in tort and brought under federal statutes instructing the judiciary to adjudicate such claims” and “second guessing the foreign policy judgments of the political branches.”<sup>37</sup>

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13A WRIGHT ET AL., *supra* note 2, § 3534.2, at 504–08 & nn.35–39 (noting that “the pervasive influence of political question doctrine in fields touching on foreign affairs has not led courts to surrender their power to protect individuals against government action” and listing cases in which courts have adjudicated the merits of cases implicating individual rights); Jesse Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1465–69 (2005) (arguing that political question abstention is most appropriate in cases implicating federalism or separation of powers questions in which the national political process can be trusted to arrive at an appropriate outcome, whereas serving as a countermajoritarian protector of individual rights is precisely the role for which the judiciary is best suited).

<sup>33</sup> *Bancoult*, 445 F.3d at 437 (emphasis added); *see also id.* (concluding that no individual rights exception to political question dismissal of a national security case was necessary because there were “no . . . constitutional claims . . . at issue”).

<sup>34</sup> *Marbury*, 5 U.S. (1 Cranch) at 176–77.

<sup>35</sup> To be clear, included in the latter category must be federal common law rights incorporated from customary international law via a statutory grant of lawmaking power to the judiciary. As the Supreme Court inferred in *Sosa*, the ATS constitutes such a grant, authorizing “courts to create causes of action for [customary international law] violations, in narrow circumstances, as a matter of post-*Erie* federal common law.” Curtis A. Bradley, Jack L. Goldsmith, & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. (forthcoming Feb. 2007) (manuscript at 26, on file with the Harvard Law School Library).

<sup>36</sup> *Flynn v. Schultz*, 748 F.2d 1186, 1191 (7th Cir. 1984) (emphasis added); *see also* *Pangilinan v. INS*, 796 F.2d 1091, 1096 (9th Cir. 1986) (finding justiciable Filipino war veterans’ claims to U.S. citizenship based on statutory rights granted by the Nationality Act of 1940), *rev’d on other grounds*, 486 U.S. 875 (1988); *Louis v. Nelson*, 544 F. Supp. 973, 987–88 (S.D. Fla. 1982) (noting the import of the individual rights considerations in an immigration case in which both statutory and constitutional rights were at stake), *rev’d on other grounds sub. nom.* *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983).

<sup>37</sup> *Alvarez-Machain v. United States*, 331 F.3d 604, 614 n.7 (9th Cir. 2003) (en banc), *rev’d on other grounds sub nom.* *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

Second, no Supreme Court precedent directly supports such a distinction, and various Supreme Court Justices have criticized analogous distinctions between statutory and constitutional rights. For example, Justice Harlan, in his famous concurrence in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,<sup>38</sup> challenged the divide between statutory and constitutional rights for remedial purposes and concluded that the appropriateness of a damages remedy should not turn on “the nature of the legal interest.”<sup>39</sup> Even as the heyday of implied rights of action under *Bivens* has waned, the fate of constitutional rights has remained linked to that of statutory rights; Justice Scalia has even suggested that the demise of implied statutory rights of action necessitates further constriction of implied constitutional remedies, since the inability of congressional override should make courts even more hesitant to create constitutional remedies than they are to create statutory ones.<sup>40</sup>

More explicitly, in *Webster v. Doe*,<sup>41</sup> Justice Scalia stated in dissent:

The *only* respect in which a constitutional claim is necessarily more significant than any other kind of claim is that . . . it can be asserted against the action of the legislature itself . . . . [That distinction] has no relevance to the question whether, as between executive violations of statute and executive violations of the Constitution — both of which are equally unlawful . . . — one or the other category should be favored by a presumption against exclusion of judicial review.<sup>42</sup>

This point — that statutory and constitutional rights, when not in conflict, are on equal footing for enforceability purposes — is not necessarily contradicted by the *Webster* majority’s apparent constitutional-statutory distinction. In its opinion, the majority held that the National Security Act<sup>43</sup> precluded a CIA employee’s statutory claims arising from his dismissal based on his homosexuality,<sup>44</sup> but that his constitutional claims were less easily legislatively circumvented.<sup>45</sup> The Court, in so doing, elucidated a requirement that Congress clearly state its intent to proscribe judicial review of constitutional claims before the Court would interpret a statute to carry this meaning, a rule intended to avoid the “serious constitutional question” posed by such ju-

<sup>38</sup> 403 U.S. 388 (1971).

<sup>39</sup> See *id.* at 403–04 (Harlan, J., concurring in the judgment) (noting that it would be anomalous to prevent courts from inferring causes of action for constitutional violations when such implied causes of action are appropriate for statutory violations).

<sup>40</sup> See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

<sup>41</sup> 486 U.S. 592 (1988).

<sup>42</sup> *Id.* at 618 (Scalia, J., dissenting).

<sup>43</sup> 50 U.S.C.A. §§ 401–442a (West 2003 & Supp. 2006).

<sup>44</sup> *Webster*, 486 U.S. at 601.

<sup>45</sup> *Id.* at 603–04.

isdiction-stripping.<sup>46</sup> From a legal realist perspective, however, the notion that constitutional *remedies* should be protected from congressional overrule need be no more controversial than the proposition that Congress cannot overrule constitutional *rights*.<sup>47</sup> One can thus easily subscribe to the *Webster* Court's greater protection of constitutional remedies from *congressional* overrule and remain persuaded by Justices Harlan and Scalia that remedies for constitutional and statutory violations should receive equivalent treatment from the *courts*. Unlike the congressional action at stake in *Webster*, the political question doctrine is a matter of judicial action or inaction in enforcing rights; in this context, considering the "type" of right cannot helpfully distinguish between actions that are, for judicial purposes, "equally unlawful."<sup>48</sup>

Third, and perhaps most importantly, this distinction threatens to undermine the principle that the political question doctrine is "essentially a function of the separation of powers" and is intended to preclude undue interference with political branch determinations.<sup>49</sup> If one such branch — the legislature — confers a right on an individual, it turns the logic of the political question doctrine on its head to suggest that the judiciary should not enforce it. Thus, if Congress, acting within its constitutional authority, determined that it would serve U.S. interests in the war on terrorism for foreign detainees under U.S. control to have an actionable right to not be mistreated, judicial abstention from — not judicial review of — claims of alleged executive branch mistreatment would amount to impermissible "second guessing."<sup>50</sup>

Unnecessary as it was in deciding *Bancoult* itself, Judge Brown's allusion to this novel constitutional-statutory justiciability distinction should be viewed in light of potential war-on-terrorism cases. Indeed, the government has already invoked the doctrine in seeking judicial

<sup>46</sup> *Id.* at 603.

<sup>47</sup> *Cf.* K.N. LEWELLYN, *THE BRAMBLE BUSH* 84 (1960) ("A right is as big, precisely, as what the courts will do.")

<sup>48</sup> *Webster*, 486 U.S. at 618 (Scalia, J., dissenting).

<sup>49</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>50</sup> Whether Congress has the substantive power to do this is a separate matter. *Compare* Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172, 203 (Karen J. Greenberg & Joshua Dratel eds., 2005) ("A construction of Section 2340A [of the War Crimes Act] that applied the provision to regulate the President's authority as Commander-in-Chief to determine the interrogation and treatment of enemy combatants would raise serious constitutional questions."), with Cass R. Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 *GEO. WASH. L. REV.* 693, 697 n.25 (2005) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644 (1952) (Jackson, J., concurring), in arguing that "Congress almost certainly has the authority to forbid the practice of torture"). The argument here does not concern the scope of presidential power; rather, the point is that *if* the President cannot override Congress on substantive grounds, the political question doctrine should not allow an end-run around the legislative branch.

abstention in a number of cases relating to terrorism.<sup>51</sup> But as Professors Samuel Issacharoff and Richard Pildes have noted, the Supreme Court for over a century has safeguarded rights during times of emergency chiefly by preserving Congress's ability to check executive power.<sup>52</sup> In fact, this state of affairs may have been presaged by James Madison's observation that interbranch competition could safeguard the people's rights.<sup>53</sup> Conscripting the political question doctrine to thwart attempts at legislative oversight threatens to upset this long-standing structural balance, not only in the war-on-terrorism context but also in any politically contentious area where Congress plays a constitutional role. Yet in the war-on-terrorism context, in which non-resident aliens enjoying fewer constitutional protections<sup>54</sup> face the possibility of unregulated detention and abuse, legislative action may become especially important. Although the court's mention of an individual rights consideration in political question cases reflects an important theme within the doctrine, its language implying a preference for judicial review of constitutional claims over statutory claims could actually hinder congressional oversight power in the war on terrorism — paradoxically resulting in judicial intrusion via judicial abstention.

<sup>51</sup> See, e.g., *Arar v. Ashcroft*, No. CV-04-0249, 2006 WL 1875375, at \*2 (E.D.N.Y. July 5, 2006) (noting the government's position that the political question doctrine could be raised on appeal in an extraordinary rendition case); *Omar v. Harvey*, 416 F. Supp. 2d 19, 27 (D.D.C. 2006) (rejecting the government's request for political question abstention in an American citizen's habeas petition from detention in Iraq); *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 64–65 (D.D.C. 2004) (rejecting political question abstention in detention case involving an American citizen in Saudi Arabia).

<sup>52</sup> See Samuel Issacharoff & Richard Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, in *THE CONSTITUTION IN WARTIME* 161, 162–63 (Mark Tushnet ed., 2005); see also Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1, 9 (2005) (positing that the Court decides crisis-related cases from an institutional-process perspective).

<sup>53</sup> See *THE FEDERALIST NO. 51*, at 317–18 (James Madison) (Clinton Rossiter ed., 1961). This point defeats the contention that courts should prioritize constitutional rights over statutory rights because only the former offer countermajoritarian protections. Cf. Choper, *supra* note 32, at 1468–69 (linking the individual rights consideration to the problem of majoritarianism).

<sup>54</sup> Cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990) (holding the Fourth Amendment inapplicable to the search and seizure of a nonresident alien in a foreign country). The extent to which constitutional rights cognizable in habeas corpus proceedings apply to aliens is another contested issue in which congressional participation might be important. Compare *Khalid v. Bush*, 355 F. Supp. 2d 311, 322–23 (D.D.C. 2005) (interpreting *Rasul v. Bush*, 542 U.S. 466 (2004), as granting only habeas rights and not substantive constitutional rights to Guantanamo detainees), with *In re Guantánamo Detainees Cases*, 355 F. Supp. 2d 443, 454 (D.D.C. 2005) (holding that *Rasul's* recognition of habeas rights for Guantánamo detainees implies the existence of underlying substantive constitutional rights). The extension of habeas jurisdiction extraterritorially beyond Guantánamo remains more controversial. See Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After Rasul v. Bush*, 153 U. PA. L. REV. 2073, 2073 (2005) (noting the ambiguity as to whether any recognition of constitutional rights in *Rasul* arises out of “long-term U.S. custody” or “the special character of U.S. authority at Guantánamo”).