today, rather than as it existed in 1789."[275] This statement, however, appears to be in tension with the theory of congressionally defined *habeas* found in *Bollman*, unless one assumes that a *habeas* right, once created, cannot be diminished. The Court, however, in reviewing provisions of the Antiterrorism and Effective Death Penalty Act[276] that limited *habeas*, passed up an opportunity to delineate Congress's permissive authority over *habeas*, finding that none of the limitations to the writ in that statute raised questions of constitutional import.[277]

For practical purposes, the issue appears to have been resolved by *Boumediene v. Bush*,[278] in which the Court held that Congress's attempt to eliminate all federal *habeas* jurisdiction over "enemy combatant" detainees held at Guantanamo Bay[279] violated the Suspension Clause. Although the Court did not explicitly identify whether the underlying right to *habeas* that was at issue arose from statute, common law, or the Constitution itself, it did decline to infer "too much" from the lack of historical examples of *habeas* being extended to enemy aliens held overseas.[280] In *Boumediene*, the Court instead emphasized a "functional" approach that considered the citizenship and status of the detainee, the adequacy of the process through which the status determination was made, the nature of the sites where apprehension and detention took place, and any practical obstacles inherent in resolving the prisoner's entitlement to the writ.[281]

In further determining that the procedures afforded to the detainees to challenge their detention in court were not adequate substitutes for *habeas*, the Court noted the heightened due process concerns when a detention is based principally on Executive Branch

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[275] Felker v. Turpin, 518 U.S. 651, 663–64 (1996). *See* INS v. St. Cyr, 533 U.S. 289, 300–01 (2001) (leaving open the question of whether post-1789 legal developments are protected); Swain v. Pressley, 430 U.S. 372 (1977) (finding "no occasion" to define the contours of constitutional limits on congressional modification of the writ).

[276] Pub. L. 104–132, §§ 101–08, 110 Stat. 1214, 1217–26, amending, *inter alia*, 28 U.S.C. §§ 2244, 2253, 2254, 2255, and Fed. R. App. P. 22.

[277] Felker v. Turpin, 518 U.S. 651 (1996).

[278] 128 S. Ct. 2229 (2008).

[279] In Rasul v. Bush, 542 U.S. 466 (2004), the Court found that 28 U.S.C. § 2241, the federal *habeas* statute, applied to these detainees. Congress then removed all court jurisdiction over these detainees under the Detainee Treatment Act of 2005, Pub. L. 109–148, § 1005(e)(1) (providing that "no court . . . shall have jurisdiction to hear or consider . . . an application for . . . habeas corpus filed by . . . an alien detained . . . at Guantanamo Bay)." After the Court decided in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), that the Detainee Treatment Act did not apply to detainees whose cases were pending at the time of enactment, it was amended by the Military Commissions Act of 2006, Pub. L. 109–366, to also apply to pending cases where a detainee had been determined to be an enemy combatant.

[280] 128 S. Ct. at 2251.

[281] 128 S. Ct. at 2258, 2259.