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by Lee Epstein and
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Boumediene v. Bush

553 U.S. ____ (2008)

<http://laws.findlaw.com/US/000/06-1195.html>

Oral arguments may be found at: <http://www.oyez.org>

Vote: 5 (Breyer, Ginsburg, Kennedy, Souter, Stevens)

4 (Alito, Roberts, Scalia, Thomas)

Opinion of the Court: Kennedy

Concurring opinion: Souter

Dissenting opinions: Roberts, Scalia

[Please consult case excerpts and the discussion of *Hamdi v. Rumsfeld* (2004) and *Hamdan v. Rumsfeld* (2006) for more information on “enemy combatants,” the Military Commissions Act, and the Detainee Treatment Act.]

The United States captured Lakhdar Boumediene (and other petitioners whose cases were joined with this one) in Afghanistan and detained him at Guantanamo Bay in Cuba after a Combatant Status Review Tribunal (CSRT) designated him an enemy combatant. Maintaining that he had not been a member of al Qaeda or the Taliban, Boumediene requested a writ of habeas corpus to challenge his detention. The district court dismissed the case for lack of jurisdiction (because Guantanamo is outside of sovereign U.S. territory) and the U.S. Court of Appeals for the District of Columbia affirmed.

The D.C. Circuit read the Military Commissions Act of 2006 (MCA) to strip the jurisdiction of all federal courts from hearing habeas applications from detainees who had been deemed enemy combatants, and so the court refused to hear the case. Appealing to the Supreme Court, Boumediene argued that the system to review detainees’ status established by the Detainee Treatment Act of 2005 (DTA) was not an adequate substitute for habeas corpus. Because the suspension clause of Article 1, Section 9 states that 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,” Boumediene urged the justices to rule that the MCA was unconstitutional.

JUSTICE KENNEDY delivered the opinion of the Court.

In deciding the constitutional questions now presented we must determine whether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status . . . as enemy combatants, or their physical location . . . at Guantanamo Bay. The Government contends that noncitizens designated as enemy combatants and detained in territory located outside our Nation’s borders have no

constitutional rights and no privilege of habeas corpus. Petitioners contend they do have cognizable constitutional rights and that Congress, in seeking to eliminate recourse to habeas corpus as a means to assert those rights, acted in violation of the Suspension Clause. . . .

The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom. Experience taught, however, that the common-law writ all too often had been insufficient to guard against the abuse of monarchical power. That history counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system. . . .

. . . [T]he Government says the Suspension Clause affords petitioners no rights because the United States does not claim sovereignty over the place of detention.

Guantanamo Bay is not formally part of the United States. And under the terms of the lease between the United States and Cuba, Cuba retains “ultimate sovereignty” over the territory while the United States exercises “complete jurisdiction and control.” Under the terms of the 1934 Treaty, however, Cuba effectively has no rights as a sovereign until the parties agree to modification of the 1903 Lease Agreement or the United States abandons the base. . . .

We . . . do not question the Government’s position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay. But this does not end the analysis. Our cases do not hold it is improper for us to inquire into the objective degree of control the Nation asserts over foreign territory. As commentators have noted, “ ‘[s]overeignty’ is a term used in many senses and is much abused.” . . . Indeed, it is not altogether uncommon for a territory to be under the *de jure* sovereignty of one nation, while under the plenary control, or practical sovereignty, of another. . . . [W]e take notice of the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory. . . .

. . . [Former] decisions undermine the Government’s argument that, at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends. . . .

In a series of opinions later known as the Insular Cases, the Court addressed whether the Constitution, by its own force, applies in any territory that is not a State. The Court held that the Constitution has independent force in these territories, a force not contingent upon acts of legislative grace. . . .

The Government’s formal sovereignty-based test raises troubling separation-of-powers concerns as well. The political history of Guantanamo illustrates the deficiencies of this approach. The United States has maintained complete and uninterrupted control of the bay for over 100

years. . . . Yet the Government's view is that the Constitution had no effect there, at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.

Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution." Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is."

These concerns have particular bearing upon the Suspension Clause question in the cases now before us, for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain. . . .

. . . It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest wars in American history. The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government. Under these circumstances the lack of a precedent on point is no barrier to our holding.

We hold that Art. I, §9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause. This Court may not impose a *de facto* suspension by abstaining from these controversies. 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.

In light of this holding the question becomes whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate

because Congress has provided adequate substitute procedures for habeas corpus. The Government submits there has been compliance with the Suspension Clause because the DTA review process in the Court of Appeal, provides an adequate substitute. . . .

To the extent any doubt remains about Congress' intent, the legislative history confirms what the plain text strongly suggests: In passing the DTA Congress did not intend to create a process that differs from traditional habeas corpus process in name only. It intended to create a more limited procedure.

It is against this background that we must interpret the DTA and assess its adequacy as a substitute for habeas corpus. . . .

We do not endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus. We do consider it uncontroversial, however, that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to "the erroneous application or interpretation" of relevant law. And the habeas court must have the power to order the conditional release of an individual unlawfully detained--though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted. These are the easily identified attributes of any constitutionally adequate habeas corpus proceeding. But, depending on the circumstances, more may be required. . . .

To determine the necessary scope of habeas corpus review, therefore, we must assess the CSRT process, the mechanism through which petitioners' designation as enemy combatants became final. . . .

Petitioners identify what they see as myriad deficiencies in the CSRTs. The most relevant for our purposes are the constraints upon the detainee's ability to rebut the factual basis for the Government's assertion that he is an enemy combatant. As already noted, at the CSRT stage the detainee has limited means to find or present evidence to challenge the Government's case against him. He does not have the assistance of counsel and may not be aware of the most critical allegations that the Government relied upon to order his detention. The detainee can confront witnesses that testify during the CSRT proceedings. But given that there are in effect no limits on the admission of hearsay evidence--the only requirement is that the tribunal deem the evidence "relevant and helpful,"--the detainee's opportunity to question witnesses is likely to be more theoretical than real.

The Government defends the CSRT process, arguing that it was designed to conform to the procedures suggested by the plurality in *Hamdi* [*v. Rumsfeld*, 2004]. Setting aside the fact that the relevant language in *Hamdi* did not garner a majority of the Court, it does not control the matter at hand. None of the parties in *Hamdi* argued there had been a suspension of the writ. . . . Accordingly, the plurality concentrated on whether the Executive had the authority to detain and, if so, what rights the detainee had under the Due Process Clause. . . . [T]he Court had no occasion to define the necessary scope of habeas review, for Suspension Clause

purposes, in the context of enemy combatant detentions. . . .

. . . [W]e agree with petitioners that, even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact. . . . And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore. . . .

We now consider whether the DTA allows the Court of Appeals to conduct a proceeding meeting these standards. . . .

The absence of a release remedy and specific language allowing AUMF [Authorization for Use of Military Force] 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. The DTA enables petitioners to request "review" of their CSRT determination in the Court of Appeals, but the "Scope of Review" provision confines the Court of Appeals' role to reviewing whether the CSRT followed the "standards and procedures" issued by the Department of Defense and assessing whether those "standards and procedures" are lawful. Among these standards is "the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence . . . allowing a rebuttable presumption in favor of the Government's evidence."

Assuming the DTA can be construed to allow the Court of Appeals to review or correct the CSRT's factual determinations, as opposed to merely certifying that the tribunal applied the correct standard of proof, we 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.

On its face the statute allows the Court of Appeals to consider no evidence outside the CSRT record. In the parallel litigation, however, the Court of Appeals determined that the DTA allows it to order the production of all "reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant," regardless of whether this evidence was put before the CSRT. The Government, with support from five members of the Court of Appeals, disagrees with this interpretation. For present purposes, however, we can assume that the Court of Appeals was correct that the DTA allows introduction and consideration of relevant exculpatory evidence that was "reasonably available" to the Government at the time of the CSRT but not made part of the record. Even so, the DTA review proceeding falls short of being a constitutionally adequate substitute, for the detainee still would have no opportunity to present evidence discovered after the CSRT proceedings concluded.

Under the DTA the Court of Appeals has the power to review CSRT determinations by assessing the legality of standards and procedures. This

implies the power to inquire into what happened at the CSRT hearing and, perhaps, to remedy certain deficiencies in that proceeding. But should the Court of Appeals determine that the CSRT followed appropriate and lawful standards and procedures, it will have reached the limits of its jurisdiction. There is no language in the DTA that can be construed to allow the Court of Appeals to admit and consider newly discovered evidence that could not have been made part of the CSRT record because it was unavailable to either the Government or the detainee when the CSRT made its findings. This evidence, however, may be critical to the detainee's argument that he is not an enemy combatant and there is no cause to detain him.

This is not a remote hypothetical. One of the petitioners, Mohamed Nechla, requested at his CSRT hearing that the Government contact his employer. The petitioner claimed the employer would corroborate Nechla's contention he had no affiliation with al Qaeda. Although the CSRT determined this testimony would be relevant, it also found the witness was not reasonably available to testify at the time of the hearing. Petitioner's counsel, however, now represents the witness is available to be heard. If a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court. Even under the Court of Appeals' generous construction of the DTA, however, the evidence identified by Nechla would be inadmissible in a DTA review proceeding. The role of an Article III court in the exercise of its habeas corpus function cannot be circumscribed in this manner.

By foreclosing consideration of evidence not presented or reasonably available to the detainee at the CSRT proceedings, the DTA disadvantages the detainee by limiting the scope of collateral review to a record that may not be accurate or complete. In other contexts . . . similar limitations on the scope of habeas review may be appropriate. In this context, however, where the underlying detention proceedings lack the necessary adversarial character, the detainee cannot be held responsible for all deficiencies in the record. . . .

. . . T]he Government has not established that the detainees' access to the statutory review provisions at issue is an adequate substitute for the writ of habeas corpus. MCA §7 thus effects an unconstitutional suspension of the writ. In view of our holding we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.

The real risks, the real threats, of terrorist attacks are constant and not likely soon to abate. The ways to disrupt our life and laws are so many and unforeseen that the Court should not attempt even some general catalogue of crises that might occur. Certain principles are apparent, however. Practical considerations and exigent circumstances inform the definition and reach of the law's writs, including habeas corpus. . . .

The cases before us . . . do not involve detainees who have been held for a short period of time while awaiting their CSRT determinations. Were that the case, or were it probable that the Court of Appeals could complete a prompt review of their applications, the case for requiring temporary

abstention or exhaustion of alternative remedies would be much stronger. These qualifications no longer pertain here. In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands. And there has been no showing that the Executive faces such onerous burdens that it cannot respond to habeas corpus actions. To require these detainees to complete DTA review before proceeding with their habeas corpus actions would be to require additional months, if not years, of delay. The first DTA review applications were filed over a year ago, but no decisions on the merits have been issued. While some delay in fashioning new procedures is unavoidable, the costs of delay can no longer be borne by those who are held in custody. The detainees in these cases are entitled to a prompt habeas corpus hearing.

Our decision today holds only that the petitioners before us are entitled to seek the writ; that the DTA review procedures are an inadequate substitute for habeas corpus; and that the petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court. The only law we identify as unconstitutional is MCA §7. Accordingly, both the DTA and the CSRT process remain intact. Our holding with regard to exhaustion should not be read to imply that a habeas court should intervene the moment an enemy combatant steps foot in a territory where the writ runs. The Executive is entitled to a reasonable period of time to determine a detainee's status before a court entertains that detainee's habeas corpus petition. . . .

Although we hold that the DTA is not an adequate and effective substitute for habeas corpus, it does not follow that a habeas corpus court may disregard the dangers the detention in these cases was intended to prevent. . . . [T]he Suspension Clause does not resist innovation in the field of habeas corpus. Certain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ. . . .

In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches. Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.

. . . Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. . . . Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.

Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not

eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.

Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. This result is not inevitable, however. The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.

. . . We hold that petitioners may invoke the fundamental procedural protections of habeas corpus. The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.

The determination by the Court of Appeals that the Suspension Clause and its protections are inapplicable to petitioners was in error. The judgment of the Court of Appeals is reversed. The cases are remanded to the Court of Appeals with instructions that it remand the cases to the District Court for proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring.

I join the Court's opinion in its entirety and add this afterword only to emphasize . . . things one might overlook after reading the dissents. . . .

It is . . . the very lapse of four years from the time *Rasul* [*v. Bush*, 2004] put everyone on notice that habeas process was available to Guantanamo prisoners, and the lapse of six years since some of these prisoners were captured and incarcerated, that stand at odds with the repeated suggestions of the dissenters that these cases should be seen as a judicial victory in a contest for power between the Court and the political branches. The several answers to the charge of triumphalism might start with a basic fact of Anglo-American constitutional history: that the power, first of the Crown and now of the Executive Branch of the United States, is necessarily limited by habeas corpus jurisdiction to enquire into the legality of executive detention. And one could explain that in this Court's exercise of responsibility to preserve habeas corpus something much more significant is involved than pulling and hauling between the judicial and

political branches. Instead, though, it is enough to repeat that some of these petitioners have spent six years behind bars. After six years of sustained executive detentions in Guantanamo, subject to habeas jurisdiction but without any actual habeas scrutiny, today's decision is no judicial victory, but an act of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value both to prisoners and to the Nation.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants. The political branches crafted these procedures amidst an ongoing military conflict, after much careful investigation and thorough debate. The Court rejects them today out of hand, without bothering to say what due process rights the detainees possess, without explaining how the statute fails to vindicate those rights, and before a single petitioner has even attempted to avail himself of the law's operation. And to what effect? The majority merely replaces a review system designed by the people's representatives with a set of shapeless procedures to be defined by federal courts at some future date. One cannot help but think, after surveying the modest practical results of the majority's ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants.

The majority is adamant that the Guantanamo detainees are entitled to the protections of habeas corpus--its opinion begins by deciding that question. I regard the issue as a difficult one, primarily because of the unique and unusual jurisdictional status of Guantanamo Bay. . . . The important point for me, however, is that the Court should have resolved these cases on other grounds. Habeas is most fundamentally a procedural right, a mechanism for contesting the legality of executive detention. The critical threshold question in these cases, prior to any inquiry about the writ's scope, is whether the system the political branches designed protects whatever rights the detainees may possess. If so, there is no need for any additional process, whether called "habeas" or something else.

Congress entrusted that threshold question in the first instance to the Court of Appeals for the District of Columbia Circuit, as the Constitution surely allows Congress to do. But before the D.C. Circuit has addressed the issue, the Court cashiers the statute, and without answering this critical threshold question itself. . . . The majority instead compares the undefined DTA process to an equally undefined habeas right--one that is to be given shape only in the future by district courts on a case-by-case basis. This whole approach is misguided.

It is also fruitless. How the detainees' claims will be decided now that the DTA is gone is anybody's guess. . . . All that today's opinion has done is shift responsibility for those sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary.

I believe the system the political branches constructed adequately protects any constitutional rights aliens captured abroad and detained as enemy combatants may enjoy. I therefore would dismiss these cases on that ground. With all respect for the contrary views of the majority, I must dissent. . . .

The political branches created a two-part, collateral review procedure for testing the legality of the prisoners' detention: It begins with a hearing before a Combatant Status Review Tribunal (CSRT) followed by review in the D.C. Circuit. As part of that review, Congress authorized the D.C. Circuit to decide whether the CSRT proceedings are consistent with "the Constitution and laws of the United States." No petitioner, however, has invoked the D.C. Circuit review the statute specifies. As a consequence, that court has had no occasion to decide whether the CSRT hearings, followed by review in the Court of Appeals, vindicate whatever constitutional and statutory rights petitioners may possess.

Remarkably, this Court does not require petitioners to exhaust their remedies under the statute; it does not wait to see whether those remedies will prove sufficient to protect petitioners' rights. Instead, it not only denies the D.C. Circuit the opportunity to assess the statute's remedies, it refuses to do so itself: the majority expressly declines to decide whether the CSRT procedures, coupled with Article III review, satisfy due process.

It is grossly premature to pronounce on the detainees' right to habeas without first assessing whether the remedies the DTA system provides vindicate whatever rights petitioners may claim. The plurality in *Hamdi* explained that the Constitution guaranteed an American *citizen* challenging his detention as an enemy combatant the right to "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." The plurality specifically stated that constitutionally adequate collateral process could be provided "by an appropriately authorized and properly constituted military tribunal," given the "uncommon potential to burden the Executive at a time of ongoing military conflict." This point is directly pertinent here, for surely the Due Process Clause does not afford *non-citizens* in such circumstances greater protection than citizens are due.

If the CSRT procedures meet the minimal due process requirements outlined in *Hamdi*, and if an Article III court is available to ensure that these procedures are followed in future cases, there is no need to reach the Suspension Clause question. Detainees will have received all the process the Constitution could possibly require, whether that process is called "habeas" or something else. . . .

In the absence of any assessment of the DTA's remedies, the question whether detainees are entitled to habeas is an entirely speculative one. Our precedents have long counseled us to avoid deciding such hypothetical questions of constitutional law. This is a "fundamental rule of judicial restraint." . . .

[T]he system the Court has launched (and directs lower courts to elaborate)

promises to take longer. The Court assures us that before bringing their habeas petitions, detainees must usually complete the CSRT process. Then they may seek review in federal district court. Either success or failure there will surely result in an appeal to the D.C. Circuit--exactly where judicial review *starts* under Congress's system. The effect of the Court's decision is to add additional layers of quite possibly redundant review. And because nobody knows how these new layers of "habeas" review will operate, or what new procedures they will require, their contours will undoubtedly be subject to fresh bouts of litigation. If the majority were truly concerned about delay, it would have required petitioners to use the DTA process that has been available to them for 2 1/2 years, with its Article III review in the D.C. Circuit. That system might well have provided petitioners all the relief to which they are entitled long before the Court's newly installed habeas review could hope to do so. . . .

The majority's overreaching is particularly egregious given the weakness of its objections to the DTA. Simply put, the Court's opinion fails on its own terms. The majority strikes down the statute because it is not an "adequate substitute" for habeas review, but fails to show what rights the detainees have that cannot be vindicated by the DTA system. . . .

. . . [T]he Court makes no effort to elaborate how exactly the remedy it prescribes will differ from the procedural protections detainees enjoy under the DTA. The Court objects to the detainees' limited access to witnesses and classified material, but proposes no alternatives of its own. Indeed, it simply ignores the many difficult questions its holding presents. . . .

The majority rests its decision on abstract and hypothetical concerns. Step back and consider what, in the real world, Congress and the Executive have actually granted aliens captured by our Armed Forces overseas and found to be enemy combatants:

The right to hear the bases of the charges against them, including a summary of any classified evidence.

The ability to challenge the bases of their detention before military tribunals modeled after Geneva Convention procedures. Some 38 detainees have been released as a result of this process.

The right, before the CSRT, to testify, introduce evidence, call witnesses, question those the Government calls, and secure release, if and when appropriate.

The right to the aid of a personal representative in arranging and presenting their cases before a CSRT.

Before the D.C. Circuit, the right to employ counsel, challenge the factual record, contest the lower tribunal's legal determinations, ensure compliance with the Constitution and laws, and secure release, if any errors below establish their entitlement to such relief.

In sum, the DTA satisfies the majority's own criteria for assessing adequacy. This statutory scheme provides the combatants held at

Guantanamo greater procedural protections than have ever been afforded alleged enemy detainees--whether citizens or aliens--in our national history.

So who has won? Not the detainees. The Court's analysis leaves them with only the prospect of further litigation to determine the content of their new habeas right, followed by further litigation to resolve their particular cases, followed by further litigation before the D.C. Circuit--where they could have started had they invoked the DTA procedure. Not Congress, whose attempt to "determine--through democratic means--how best" to balance the security of the American people with the detainees' liberty interests has been unceremoniously brushed aside. Not the Great Writ, whose majesty is hardly enhanced by its extension to a jurisdictionally quirky outpost, with no tangible benefit to anyone. Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants. And certainly not the American people, who today lose a bit more control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges.

I respectfully dissent.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

Today, for the first time in our Nation's history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war. . . . My problem with today's opinion is more fundamental still: The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military matter is entirely *ultra vires*. . . .

America is at war with radical Islamists. The enemy began by killing Americans and American allies abroad: 241 at the Marine barracks in Lebanon, 19 at the Khobar Towers in Dhahran, 224 at our embassies in Dar es Salaam and Nairobi, and 17 on the USS Cole in Yemen. On September 11, 2001, the enemy brought the battle to American soil, killing 2,749 at the Twin Towers in New York City, 184 at the Pentagon in Washington, D.C., and 40 in Pennsylvania. It has threatened further attacks against our homeland; one need only walk about buttressed and barricaded Washington, or board a plane anywhere in the country, to know that the threat is a serious one. Our Armed Forces are now in the field against the enemy, in Afghanistan and Iraq. . . .

The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed. That consequence would be tolerable if necessary to preserve a time-honored legal principle vital to our constitutional Republic. But it is this Court's blatant *abandonment* of such a principle that produces the decision today. The President relied on our settled precedent . . . when he established the prison at Guantanamo

Bay for enemy aliens. . . . Had the law been otherwise, the military surely would not have transported prisoners there, but would have kept them in Afghanistan, transferred them to another of our foreign military bases, or turned them over to allies for detention. Those other facilities might well have been worse for the detainees themselves. . . .

. . . A mere two Terms ago in *Hamdan v. Rumsfeld* (2006), when the Court held (quite amazingly) that the Detainee Treatment Act of 2005 had not stripped habeas jurisdiction over Guantanamo petitioners' claims, four Members of today's five-Justice majority joined an opinion saying the following:

"Nothing prevents the President from returning to Congress to seek the authority [for trial by military commission] he believes necessary.

"Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine--through democratic means--how best to do so. The Constitution places its faith in those democratic means."

Turns out they were just kidding. For in response, Congress, at the President's request, quickly enacted the Military Commissions Act, emphatically reasserting that it did not want these prisoners filing habeas petitions. It is therefore clear that Congress and the Executive--*both* political branches--have determined that limiting the role of civilian courts in adjudicating whether prisoners captured abroad are properly detained is important to success in the war that some 190,000 of our men and women are now fighting. As the Solicitor General argued, "the Military Commissions Act and the Detainee Treatment Act . . . represent an effort by the political branches to strike an appropriate balance between the need to preserve liberty and the need to accommodate the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States."

But it does not matter. The Court today decrees that no good reason to accept the judgment of the other two branches is "apparent." "The Government," it declares, "presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims." What competence does the Court have to second-guess the judgment of Congress and the President on such a point? None whatever. But the Court blunders in nonetheless. Henceforth, as today's opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails. . . .

The category of prisoner comparable to these detainees are . . . the more than 400,000 prisoners of war detained in the United States alone during World War II. Not a single one was accorded the right to have his detention validated by a habeas corpus action in federal court--and that despite the fact that they were present on U.S. soil. . . .

There is simply no support for the Court's assertion that constitutional rights extend to aliens held outside U.S. sovereign territory. . . .

What drives today's decision is neither the meaning of the Suspension Clause, nor the principles of our precedents, but rather an inflated notion of judicial supremacy. The Court says that if the extraterritorial applicability of the Suspension Clause turned on formal notions of sovereignty, "it would be possible for the political branches to govern without legal constraint" in areas beyond the sovereign territory of the United States. That cannot be, the Court says, because it is the duty of this Court to say what the law is. It would be difficult to imagine a more question-begging analysis. "The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies *properly before them*." Our power "to say what the law is" is circumscribed by the limits of our statutorily and constitutionally conferred jurisdiction. And that is precisely the question in these cases: whether the Constitution confers habeas jurisdiction on federal courts to decide petitioners' claims. It is both irrational and arrogant to say that the answer must be yes, because otherwise we would not be supreme.

But so long as there are *some* places to which habeas does not run--so long as the Court's new "functional" test will not be satisfied *in every case*--then there will be circumstances in which "it would be possible for the political branches to govern without legal constraint." Or, to put it more impartially, areas in which the legal determinations of the *other* branches will be (shudder!) *supreme*. In other words, judicial supremacy is not really assured by the constitutional rule that the Court creates. The gap between rationale and rule leads me to conclude that the Court's ultimate, unexpressed goal is to preserve the power to review the confinement of enemy prisoners held by the Executive anywhere in the world. The "functional" test . . . is so inherently subjective that it clears a wide path for the Court to traverse in the years to come.

. . . [I]t is clear that the original understanding of the Suspension Clause was that habeas corpus was not available to aliens abroad. . . .

. . . [A]ll available historical evidence points to the conclusion that the writ would not have been available at common law for aliens captured and held outside the sovereign territory of the Crown. Despite three opening briefs, three reply briefs, and support from a legion of *amici*, petitioners have failed to identify a single case in the history of Anglo-American law that supports their claim to jurisdiction. The Court finds it significant that there is no recorded case *denying* jurisdiction to such prisoners either. But a case standing for the remarkable proposition that the writ could issue to a foreign land would surely have been reported, whereas a case denying such a writ for lack of jurisdiction would likely not. At a minimum, the absence of a reported case either way leaves unrefuted the voluminous commentary stating that habeas was confined to the dominions of the Crown. . . .

Today the Court warps our Constitution in a way that goes beyond the

narrow issue of the reach of the Suspension Clause, invoking judicially brainstormed separation-of-powers principles to establish a manipulable “functional” test for the extraterritorial reach of habeas corpus (and, no doubt, for the extraterritorial reach of other constitutional protections as well). It blatantly misdescribes important precedents. . . . It breaks a chain of precedent as old as the common law that prohibits judicial inquiry into detentions of aliens abroad absent statutory authorization. And, most tragically, it sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner.

The Nation will live to regret what the Court has done today. I dissent.

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