

**LAKHDAR BOUMEDIENE, ET AL., PETITIONERS v. GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, ET AL.; KHALED A. F. AL ODAH, NEXT FRIEND OF FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL., PETITIONERS v. UNITED STATES ET AL.**

Nos. 06-1195 and 06-1196

SUPREME COURT OF THE UNITED STATES

*128 S. Ct. 2229; 171 L. Ed. 2d 41; 2008 U.S. LEXIS 4887; 76 U.S.L.W. 4406; 21 Fla. L. Weekly Fed. S 329*

**December 5, 2007, Argued  
June 12, 2008 \***

\* Together with No. 06-1196, Al Odah, Next Friend of Al Odah, et al. v. United States et al., also on certiorari to the same court.

**PRIOR HISTORY:** [\*\*\*1]

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

*Boumediene v. Bush*, 375 U.S. App. D.C. 48, 476 F.3d 981, 2007 U.S. App. LEXIS 3682 (2007)

**DISPOSITION:** Reversed and remanded.

**SYLLABUS**

In the Authorization for Use of Military Force (AUMF), Congress empowered the President "to use all necessary and appropriate force against those . . . he determines planned, authorized, committed, or aided the terrorist attacks . . . on September 11, 2001." In *Hamdi v. Rumsfeld*, 542 U.S. 507, 518, 588-589, 124 S. Ct. 2633, 159 L. Ed. 2d 578, five Justices recognized that detaining individuals captured while fighting against the United States in Afghanistan for the duration of that conflict was a fundamental and accepted incident to war. Thereafter, the Defense Department established Combatant Status Review Tribunals (CSRTs) to determine whether individuals detained at the U.S. Naval Station at Guantanamo Bay, Cuba, were "enemy combatants."

Petitioners are aliens detained at Guantanamo after being captured in Afghanistan or elsewhere abroad and designated enemy combatants by CSRTs. Denying membership in the al Qaeda terrorist network that carried out the September 11 attacks and the Taliban regime that supported al Qaeda, each petitioner sought a writ of habeas corpus in the District Court, which ordered the cases dismissed for lack of jurisdiction because Guantanamo is outside sovereign U.S. territory. The D. C. Circuit affirmed, but this Court reversed, holding that 28 U.S.C. § 2241 extended statutory habeas jurisdiction to Guantanamo. See *Rasul v. Bush*, 542 U.S. 466, 473, 124 S. Ct. 2686, 159 L. Ed. 2d 548. Petitioners' cases were then consolidated into two proceedings. In the first,

the district judge granted the Government's motion to dismiss, holding that the detainees had no rights that could be vindicated in a habeas action. In the second, the judge held that the detainees had due process rights.

While appeals were pending, Congress passed the Detainee Treatment Act of 2005 (DTA), § 1005(e) of which amended 28 U.S.C. § 2241 to provide that "no court, justice, or judge shall have jurisdiction to . . . consider . . . an application for . . . habeas corpus filed by or on behalf of an alien detained . . . at Guantanamo," and gave the D. C. Court of Appeals "exclusive" jurisdiction to review CSRT decisions. In *Hamdan v. Rumsfeld*, 548 U.S. 557, 576-577, 126 S. Ct. 2749, 165 L. Ed. 2d 723, the Court held this provision inapplicable to cases (like petitioners') pending when the DTA was enacted. Congress responded with the Military Commissions Act of 2006 (MCA), § 7(a) of which amended § 2241(e)(1) to deny jurisdiction with respect to habeas actions by detained aliens determined to be enemy combatants, while § 2241(e)(2) denies jurisdiction as to "any other action against the United States . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of a detained alien determined to be an enemy combatant. MCA § 7(b) provides that the 2241(e) amendments "shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after [that] date . . . which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained . . . since September 11, 2001."

The D. C. Court of Appeals concluded that MCA § 7 must be read to strip from it, and all federal courts, jurisdiction to consider petitioners' habeas applications; that petitioners are not entitled to habeas or the protections of the Suspension Clause, *U.S. Const.*, Art. I, § 9, cl. 2, which provides that "[t]he 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"; and that it was therefore unnecessary to consider whether the DTA provided an adequate and effective substitute for habeas.

### OPINION

*JUSTICE KENNEDY* delivered the opinion of the Court.

Petitioners are aliens designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay, Cuba. There are others detained there, also aliens, who are not parties to this suit.

Petitioners present a question not resolved by our earlier cases relating to the detention of aliens at Guantanamo: whether they have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, § 9, cl. 2. We hold these petitioners do have the habeas corpus privilege. Congress has enacted a statute, the Detainee Treatment Act of 2005 (DTA), 119 Stat. 2739, that provides certain procedures for review of the detainees' status. We hold that those procedures are not an adequate and effective substitute for habeas corpus. Therefore § 7 of the Military Commissions Act of 2006 (MCA), 28 U.S.C. A. § 2241(e) (*Supp.* 2007), operates as an unconstitutional suspension of the writ. We do not address whether the President has authority to detain these petitioners nor do we hold that the writ must issue. These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court.

I

II

[P]rotection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no *Bill of Rights*. In the system conceived by the Framers the writ had a centrality that must inform proper interpretation of the Suspension Clause. A

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.

Magna Carta decreed that no man would be imprisoned contrary to the law of the land. Art. 39, in *Sources of Our Liberties* 17 (R. Perry & J. Cooper eds. 1959) ("No free man shall be taken or imprisoned or

dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land"). Important as the principle was, the Barons at Runnymede prescribed no specific legal process to enforce it. Holdsworth tells us, however, that gradually the writ of habeas corpus became the means by which the promise of Magna Carta was fulfilled. 9 W. Holdsworth, *A History of English Law* 112 (1926) (hereinafter Holdsworth).

The development was painstaking, even by the centuries-long measures of English constitutional history. The writ was known and used in some form at least as early as the reign of Edward I. *Id.*, at 108-125. Yet at the outset it was used to protect not the rights of citizens but those of the King and his courts. The early courts were considered agents of the Crown, designed to assist the King in the exercise of his power. See J. Baker, *An Introduction to English Legal History* 38-39 (4th ed. 2002). Thus the writ, while it would become part of the foundation of liberty for the King's subjects, was in its earliest use a mechanism for securing compliance with the King's laws.

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The necessary implication of the argument [that the U.S. claims no sovereignty over Guantanamo] 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. . . . 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. . . .

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.

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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.

[The government relies heavily upon *Johnson v. Eisentrager*, 339 U.S. 763, where habeas relief was sought by enemy aliens who had been convicted of violating the laws of war. They were incarcerated in Landsberg prison in Germany during the Allied postwar occupation.] . . . Even if we assume the *Eisentrager* Court considered the United States' lack of formal legal sovereignty over Landsberg Prison as the decisive factor in that case, its holding is not inconsistent with a functional approach to questions of extraterritoriality. The formal legal status of a given territory affects, at least to some extent, the political branches' control over that territory. De jure sovereignty is a factor that bears upon which constitutional guarantees apply there. . . . We cannot accept the Government's view. Nothing in *Eisentrager* says that de jure sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus. Were that the case, there would be considerable tension between *Eisentrager*, on the one hand, and the *Insular Cases* and *Reid*, on the other. Our cases need not be read to conflict in this manner. A constricted reading of *Eisentrager* overlooks what we see as a common thread uniting the *Insular Cases*, *Eisentrager*, and *Reid*: the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism.

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. See *Oxford Companion to American Military History* 849 (1999). 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. Cf. *Hamdi*, 542 U.S., at 564, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (SCALIA, J., dissenting) ("[I]ndefinite imprisonment on reasonable suspicion is not an available option of treatment for those accused of aiding the enemy, absent a suspension of the writ"). This Court may not impose a *de facto* suspension by abstaining from these controversies. See *Hamdan*, 548 U.S., at 585, n. 16, 126 S. Ct. 2749, 165 L. Ed. 2d 723 ("[A]bstention is not appropriate in cases . . . in

which the legal challenge 'turn[s] on the status of the persons as to whom the military asserted its power'" (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 759, 95 S. Ct. 1300, 43 L. Ed. 2d 591 (1975))). 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.

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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.

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There is evidence from 19th-century American sources indicating that, even in States that accorded strong *res judicata* effect to prior adjudications, habeas courts in this country routinely allowed prisoners to introduce exculpatory evidence that was either unknown or previously unavailable to the prisoner. See, e.g., *Ex parte Pattison*, 56 Miss. 161, 164 (1878) (noting that "[w]hile the former adjudication must be considered as conclusive on the testimony then adduced" "newly developed exculpatory evidence . . . may authorize the admission to bail"); *Ex parte Foster*, 5 Tex. Ct. App. 625, 644 (1879) (construing the State's habeas statute to allow for the introduction of new evidence "where important testimony has been obtained, which, though not newly discovered, or which, though known to [the petitioner], it was not in his power to produce at the former hearing; [and] where the evidence was newly discovered"); *People v. Martin*, 7 N. Y. Leg. Obs. 49, 56 (1848) ("If in custody on criminal process before indictment, the prisoner has an absolute right to demand that the original depositions be looked into to see whether any crime is in fact imputed to him, and the inquiry will by no means be confined to the return. Facts out of the return may be gone into to ascertain whether the committing magistrate may not have arrived at an illogical conclusion upon the evidence given before him . . . "); see generally W. Church, *Treatise on the Writ of Habeas Corpus* § 182, p. 235 (1886) (hereinafter *Church*) (noting that habeas courts would "hear evidence anew if justice require it"). Justice McLean, on Circuit in 1855, expressed his view that a habeas court should consider a prior judgment conclusive "where there was clearly jurisdiction and a

full and fair hearing; but that it might not be so considered when any of these requisites were wanting." *Ex parte Robinson*, 20 F. Cas. 969, 971, F. Cas. No. 11935, (No. 11,935) (CC Ohio 1855). To illustrate the circumstances in which the prior adjudication did not bind the habeas court, he gave the example of a case in which "[s]everal unimpeached witnesses" provided new evidence to exculpate the prisoner. *Ibid.*

The idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context. See *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (noting that the *Due Process Clause* requires an assessment of, *inter alia*, "the risk of an erroneous deprivation of [a liberty interest;] and the probable value, if any, of additional or substitute procedural safeguards"). This principle has an established foundation in habeas corpus jurisprudence as well, as Chief Justice Marshall's opinion in *Ex parte Watkins*, 28 U.S. 193, 3 Pet. 193, 7 L. Ed. 650 (1830), demonstrates. Like the petitioner in *Swain*, *Watkins* sought a writ of habeas corpus after being imprisoned pursuant to a judgment of a District of Columbia court. In holding that the judgment stood on "high ground," 28 U.S. 193, 3 Pet., at 209, 7 L. Ed. 650, the Chief Justice emphasized the character of the court that rendered the original judgment, noting it was a "court of record, having general jurisdiction over criminal cases." *Id.*, at 203, 3 Pet. 193, 7 L. Ed. 650. In contrast to "inferior" tribunals of limited jurisdiction, *ibid.*, courts of record had broad remedial powers, which gave the habeas court greater confidence in the judgment's validity. See generally Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 *Colum. L. Rev.* 961, 982-983 (1998).

Accordingly, where relief is sought from a sentence that resulted from the judgment of a court of record, as was the case in *Watkins* and indeed in most federal habeas cases, considerable deference is owed to the court that ordered confinement. See *Brown v. Allen*, 344 U.S. 443, 506, 73 S. Ct. 397, 97 L. Ed. 469 (1953) (opinion of Frankfurter, J.) (noting that a federal habeas court should accept a state court's factual findings unless "a vital flaw be found in the process of ascertaining such facts in the State court"). Likewise in those cases the prisoner should exhaust adequate alternative remedies before filing for the writ in federal court. See *Ex parte Royall*, 117 U.S. 241, 251-252, 6 S. Ct. 734, 29 L. Ed. 868 (1886) (requiring exhaustion of state collateral processes). Both aspects of federal habeas corpus review are justified because it can be assumed that, in the usual course, a court of record provides defendants with a fair, adversary proceeding. In cases involving state convictions this framework also respects federalism; and in federal cases it has added justification because the prisoner already has had a chance to seek review of his conviction in a federal

forum through a direct appeal. The present cases fall outside these categories, however; for here the detention is by executive order.

Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures. In this context the need for habeas corpus is more urgent. The intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry. Habeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order. But the writ must be effective. The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain.

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. Whether one characterizes the CSRT process as direct review of the Executive's battlefield determination that the detainee is an enemy combatant--as the parties have and as we do--or as the first step in the collateral review of a battlefield determination makes no difference in a proper analysis of whether the procedures Congress put in place are an adequate substitute for habeas corpus. What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral.

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, see Part IV-C, *supra*, 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. See App. to Pet. for Cert. in No. 06-1196, at 156, PF(8) (noting that the detainee can access only the "unclassified portion of the Government Information"). The detainee can confront witnesses that testify during the CSRT proceedings. *Id.*, at 144, Pg(8). 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," *ibid.*, Pg(9)--the detainee's opportunity to question witnesses is likely to be more theoretical than real.

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Even if we were to assume that the CSRTs satisfy due process standards, it would not end our inquiry. Habeas corpus is a collateral process that exists, in Justice Holmes' words, to "cu[t] through all forms and g[lo] to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell." *Frank v. Mangum*, 237 U.S. 309, 346, 35 S. Ct. 582, 59 L. Ed. 969 (1915) (dissenting opinion). Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant. See 2 Chambers, *Course of Lectures on English Law 1767-1773*, at 6 ("Liberty may be violated either by arbitrary imprisonment without law or the appearance of law, or by a lawful magistrate for an unlawful reason"). This is so, as *Hayman* and *Swain* make clear, even where the prisoner is detained after a criminal trial conducted in full accordance with the protections of the *Bill of Rights*. Were this not the case, there would have been no reason for the Court to inquire into the adequacy of substitute habeas procedures in *Hayman* and *Swain*. That the prisoners were detained pursuant to the most rigorous proceedings imaginable, a full criminal trial, would have been enough to render any habeas substitute acceptable *per se*.

Although we make no judgment as to whether the CSRTs, as currently constituted, satisfy due process standards, we 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. This is a risk inherent in any process that, in the words of the former Chief Judge of the Court of Appeals, is "closed and accusatorial." See *Bismullah III*, 514 F.3d at 1296 (Ginsburg, C. J., concurring in denial of rehearing en banc). 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.

For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings. This includes some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. Federal habeas petitioners long have had the means to supplement the record on review, even in the postconviction habeas setting. See *Townsend v. Sain*, 372 U.S. 293, 313, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963), overruled in part by *Keeney v. Tamayo-Reyes*, 504 U.S.

*I*, 5, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992). Here that opportunity is constitutionally required.

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We do hold that when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release.

C

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

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The DTA does not explicitly empower the Court of Appeals to order the applicant in a DTA review proceeding released should the court find that the standards and procedures used at his CSRT hearing were insufficient to justify detention. This is troubling. Yet, for present purposes, we can assume congressional silence permits a constitutionally required remedy. In that case it would be possible to hold that a remedy of release is impliedly provided for. The DTA might be read, furthermore, to allow the petitioners to assert most, if not all, of the legal claims they seek to advance, including their most basic claim: that the President has no authority under the AUMF to detain them indefinitely. (Whether the President has such authority turns on whether the AUMF authorizes--and the Constitution permits--the indefinite detention of "enemy combatants" as the Department of Defense defines that term. Thus a challenge to the President's authority to detain is, in essence, a challenge to the Department's definition of enemy combatant, a "standard" used by the CSRTs in petitioners' cases.) At oral argument, the Solicitor General urged us to adopt both these constructions, if doing so would allow MCA § 7 to remain intact. See Tr. of Oral Arg. 37, 53.

The absence of a release remedy and specific language allowing AUMF challenges are not the only constitutional infirmities from which the statute potentially suffers, however. The more difficult question is whether the DTA permits the Court of Appeals to make requisite findings of fact. The DTA enables petitioners to request "review" of their CSRT determination in the Court of Appeals, DTA § 1005(e)(2)(B)(i), 119 Stat. 2742; 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. § 1005(e)(C), *ibid.* 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." § 1005(e)(C)(i), *ibid.*

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. See *Bismullah I*, 501 F.3d at 180. The Government, see Pet. for Cert. pending in *Gates v. Bismullah*, No. 07-1054 (hereinafter *Bismullah Pet.*), with support from five members of the Court of Appeals, see *Bismullah III*, 514 F.3d at 1299 (Henderson, J., dissenting from denial of rehearing en banc); *id.*, at 1302 (opinion of Randolph, J.) (same); *id.*, at 1306 (opinion of Brown, J.) (same), 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. See Brief for Boumediene Petitioners 5. 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, *e.g.*, in post-trial habeas cases where the prisoner already has had a full and fair opportunity to develop the factual predicate of his claims, similar limitations on the scope of habeas review may be appropriate. See *Williams v. Taylor*, 529 U.S. 420, 436-437, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000) (noting that § 2254 "does not equate prisoners who exercise diligence in pursuing their claims with those who do not"). 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.

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We do not imply DTA review would be a constitutionally sufficient replacement for habeas corpus but for these limitations on the detainee's ability to present exculpatory evidence. For even if it were possible, as a textual matter, to read into the statute each of the necessary procedures we have identified, we could not overlook the cumulative effect of our doing so. To hold that the detainees at Guantanamo may, under the DTA, challenge the President's legal authority to detain them, contest the CSRT's findings of fact, supplement the record on review with exculpatory evidence, and request an order of release would come close to reinstating the § 2241 habeas corpus process Congress sought to deny them. The language of the statute, read in light of Congress' reasons for enacting it, cannot bear this interpretation. Petitioners have met their burden of

establishing that the DTA review process is, on its face, an inadequate substitute for habeas corpus.

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The cases before us, however, 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, 28 U.S.C. A. § 2241(e) (Supp. 2007). 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. The CSRT process is the mechanism Congress and the President set up to deal with these issues. Except in cases of undue delay, federal courts should refrain from entertaining an enemy combatant's habeas corpus petition at least until after the Department, acting via the CSRT, has had a chance to review his status.

## B

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. *Felker*, *Swain*, and *Hayman* stand for the

proposition that the 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 the DTA Congress sought to consolidate review of petitioners' claims in the Court of Appeals. Channeling future cases to one district court would no doubt reduce administrative burdens on the Government. This is a legitimate objective that might be advanced even without an amendment to § 2241. If, in a future case, a detainee files a habeas petition in another judicial district in which a proper respondent can be served, see *Rumsfeld v. Padilla*, 542 U.S. 426, 435-436, 124 S. Ct. 2711, 159 L. Ed. 2d 513 (2004), the Government can move for change of venue to the court that will hear these petitioners' cases, the United States District Court for the District of Columbia. See 28 U.S.C. § 1404(a); *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 499, n. 15, 93 S. Ct. 1123, 35 L. Ed. 2d 443 (1973).

Another of Congress' reasons for vesting exclusive jurisdiction in the Court of Appeals, perhaps, was to avoid the widespread dissemination of classified information. The Government has raised similar concerns here and elsewhere. See Brief for Respondents 55-56; *Bismullah* Pet. 30. We make no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees' habeas corpus proceedings. We recognize, however, that the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible. Cf. *United States v. Reynolds*, 345 U.S. 1, 10, 73 S. Ct. 528, 97 L. Ed. 727 (1953) (recognizing an evidentiary privilege in a civil damages case where "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged").

These and the other remaining questions are within the expertise and competence of the District Court to address in the first instance.

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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. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320, 57 S. Ct. 216, 81 L. Ed. 255 (1936). 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.

Officials charged with daily operational responsibility for our security may consider a judicial discourse on the history of the Habeas Corpus Act of 1679 and like matters to be far removed from the Nation's present, urgent concerns. Established legal doctrine, however, must be consulted for its teaching. Remote in time it may be; irrelevant to the present it is not. Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. 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. Cf. *Hamdan*, 548 U.S., at 636, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (BREYER, J., concurring) ("[J]udicial 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").

It bears repeating that our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined. 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.

## CONCUR

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 two things one might overlook after reading the dissents.

Four years ago, this Court in *Rasul v. Bush*, 542 U.S. 466, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (2004) held that statutory habeas jurisdiction extended to claims of foreign nationals imprisoned by the United States at Guantanamo Bay, "to determine the legality of the Executive's potentially indefinite detention" of them, *id.*, at 485, 124 S. Ct. 2686, 159 L. Ed. 2d 548. Subsequent legislation eliminated the statutory habeas jurisdiction over these claims, so that now there must be constitutionally based jurisdiction or none at all. JUSTICE SCALIA is thus correct that here, for the first time, this Court holds there is (he says "confers") constitutional habeas jurisdiction over aliens imprisoned by the military outside an area of *de jure* national sovereignty, see *post*, at 1 (dissenting opinion). But no one who reads the Court's opinion in *Rasul* could seriously doubt that the jurisdictional question must be answered the same way in purely constitutional cases, given the Court's reliance on the historical background of habeas generally in answering the statutory question. See, e.g., 542 U.S., at 473, 481-483, and nn. 11-14, 124 S. Ct. 2686, 159 L. Ed. 2d 548. Indeed, the Court in *Rasul* directly answered the very historical question that JUSTICE SCALIA says is dispositive, see *post*, at 18; it wrote that "[a]pplication of the habeas statute to persons detained at [Guantanamo] is consistent with the historical reach of the writ of habeas corpus," 542 U.S., at 481, 124 S. Ct. 2686, 159 L. Ed. 2d 548. JUSTICE SCALIA dismisses the statement as dictum, see *post*, at 21, but if dictum it was, it was dictum well considered, and it stated the view of five Members of this Court on the historical scope of the writ. Of course, it takes more than a quotation from *Rasul*, however much on point, to resolve the constitutional issue before us here, which the

majority opinion has explored afresh in the detail it deserves. But whether one agrees or disagrees with today's decision, it is no bolt out of the blue.

A second fact insufficiently appreciated by the dissents is the length of the disputed imprisonments, some of the prisoners represented here today having been locked up for six years, *ante*, at 66 (opinion of the Court). Hence the hollow ring when the dissents suggest that the Court is somehow precipitating the judiciary into reviewing claims that the military (subject to appeal to the Court of Appeals for the District of Columbia Circuit) could handle within some reasonable period of time. See, *e.g.*, *post*, at 3 (opinion of ROBERTS, C. J.) ("[T]he Court should have declined to intervene until the D. C. Circuit had assessed the nature and validity of the congressionally mandated proceedings in a given detainee's case"); *post*, at 6 ("[I]t is not necessary to consider the availability of the writ until the statutory remedies have been shown to be inadequate"); *post*, at 8 ("[The Court] rushes to decide the fundamental question of the reach of habeas corpus when the functioning of the DTA may make that decision entirely unnecessary"). These suggestions of judicial haste are all the more out of place given the Court's realistic acknowledgment that in periods of exigency the tempo of any habeas review must reflect the immediate peril facing the country. See *ante*, at 64-65.

It is in fact the very lapse of four years from the time *Rasul* 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 dissents that these cases should be seen as a judicial victory in a contest for power between the Court and the political branches. See *post*, at 2, 3, 28 (ROBERTS, C. J., dissenting); *post*, at 5, 6, 17, 18, 25 (SCALIA, J., dissenting). 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. See *ante*, at 69.

## DISSENT

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

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. I nonetheless agree with *JUSTICE SCALIA*'s analysis of our precedents and the pertinent history of the writ, and accordingly join his dissent. 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.

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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.

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*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. *THE CHIEF JUSTICE*'s dissent, which I join, shows that the procedures prescribed by Congress in the Detainee Treatment Act provide the essential protections that habeas corpus guarantees; there has thus been no suspension of the writ, and no basis exists for judicial intervention beyond what the Act allows. 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*.

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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 in *Johnson v. Eisentrager*, 339 U.S. 763, 70 S. Ct. 936, 94 L. Ed. 1255 (1950), when he established the prison at Guantanamo Bay for enemy aliens. Citing that case, the President's Office of Legal Counsel advised him "that the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantanamo Bay]." Memorandum from Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys General, Office of Legal Counsel, to William J. Haynes II, General Counsel, Dept. of Defense (Dec. 28, 2001). 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.

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In sum, because I conclude that the text and history of the Suspension Clause provide no basis for our jurisdiction, I would affirm the Court of Appeals even if *Eisentrager* did not govern these cases.

\* \* \*

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, most conspicuously Justice Jackson's opinion for the Court in *Johnson v. Eisentrager*. 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.