

quintessentially a policy and military judgment, namely, the appropriate military measures to take against those who “aided the terrorist attacks that occurred on September 11, 2001.” The plurality’s suggestion that Hamdan’s commission is illegitimate because it is not dispensing swift justice on the battlefield is unworkable. Even a cursory review of the authorities confirms that law-of-war military commissions have wide-ranging jurisdiction to try offenses against the law of war in exigent and nonexigent circumstances alike.

Today a plurality of this Court would hold that conspiracy to massacre innocent civilians does not violate the laws of war. This determination is unsustainable. The judgment of the political branches that Hamdan, and others like him, must be held accountable before military commissions for their involvement with and membership in an unlawful organization dedicated to inflicting massive civilian casualties is supported by virtually every relevant authority, including all of the authorities invoked by the plurality today. It is also supported by the nature of the present conflict. We are not engaged in a traditional battle with a nation-state, but with a worldwide, hydra-headed enemy, who lurks in the shadows conspiring to reproduce the atrocities of September 11, 2001, and who has boasted of sending suicide bombers into civilian gatherings, has proudly distributed videotapes of beheadings of civilian workers, and has tortured and dismembered captured American soldiers. But according to the plurality, when our Armed Forces capture those who are plotting terrorist atrocities like the bombing of the Khobar Towers, the bombing of the U.S.S. Cole, and the attacks of September 11—even if their plots are advanced to the very brink of fulfillment—our military cannot charge those criminals with any offense against the laws of war. Instead, our troops must catch the terrorists “rehandled,” ante, at 48, in the midst of the attack itself, in order to bring them to justice. Not only is this conclusion fundamentally inconsistent with the cardinal principal of the law of war, namely protecting non-combatants, but it would sorely hamper the President’s ability to confront and defeat a new and deadly enemy.

Justice ALITO dissenting.

The holding of the Court, as I understand it, rests on the following reasoning. A military commission is lawful only if it is authorized by 10 U.S.C. § 821; this provision permits the use of a commission to try “offenders or offenses” that “by statute or by the law of war may be tried by” such a commission; because no statute provides that an offender such as petitioner or an offense such as the one with which he is charged may be tried by a military commission, he may be tried by military commission only if the trial is authorized by “the law of war”; the Geneva Conventions are part of the law of war; and Common Article 3 of the Conventions prohibits petitioner’s trial because the commission before which he would be tried is not “a regularly constituted court.” Third Geneva Convention, Art. 3, ¶ 1 (d), Relative to the Treatment of Prisoners of War, Aug.

12, 1949. I disagree with this holding because petitioner’s commission is “a regularly constituted court.”

In sum, I believe that Common Article 3 is satisfied here because the military commissions (1) qualify as courts, (2) that were appointed and established in accordance with domestic law, and (3) any procedural improprieties that might occur in particular cases can be reviewed in those cases. [Justice Alito developed each of these points at length.]

3. Habeas Corpus and the War on Terrorism

Following *Hamdan*, Congress passed and President Bush signed the Military Commission Act of 2006. Pub.L. No. 109-366, 120 Stat. 2600 (2006). Among other things, the Act provides that non-citizens held as enemy combatants shall not have access to federal court via a writ of habeas corpus. Instead, they must go through military proceedings and then seek review in the United States Court of Appeals for the District of Columbia Circuit. The D.C. Circuit is limited to hearing claims under the Constitution and federal statutes, it cannot hear claims under treaties such as the Geneva Accords. The Military Commission Act creates express statutory authority for military commissions and defines their procedures.

In February 2007, the United States Court of Appeals for the District of Columbia Circuit upheld the constitutionality of Military Commission Act, rejecting a challenge that it was an unconstitutional suspension of the writ of habeas corpus. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

In June 2008, the Supreme Court reversed the D.C. Circuit. The decision focuses on what the Constitution requires in terms of the availability of habeas corpus; specifically, what is an unconstitutional suspension of the writ? Underlying the majority and the dissenting are very different views about the appropriate role of the judiciary in the war on terror.

BOUMEDIENE v. BUSH

128 S.Ct. 2229 (2008)

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), 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), 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

Under the Authorization for Use of Military Force (AUMF), the President is authorized "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

In Hamdi v. Rumsfeld (2004), five Members of the Court recognized that detention of individuals who fought against the United States in Afghanistan "for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." After Hamdi, the Deputy Secretary of Defense established Combatant Status Review Tribunals (CSRTs) to determine whether individuals detained at Guantanamo were "enemy combatants," as the Department defines that term. A later memorandum established procedures to implement the CSRTs. The Government maintains these procedures were designed to comply with the due process requirements identified by the plurality in Hamdi.

Interpreting the AUMF, the Department of Defense ordered the detention of these petitioners, and they were transferred to Guantanamo. Some of these individuals were apprehended on the battlefield in Afghanistan, others in places as far away from there as Bosnia and Gambia. All are foreign nationals, but none is a citizen of a nation now at war with the United States. Each denies he is a member of the al Qaeda terrorist network that carried out the September 11 attacks or of the Taliban regime that provided sanctuary for al Qaeda. Each petitioner appeared before a separate CSRT; was determined to be an enemy combatant; and has sought a writ of habeas corpus in the United States District Court for the District of Columbia.

The first actions commenced in February 2002. We granted certiorari and reversed, holding that 28 U.S.C. § 2241 extended statutory habeas corpus jurisdiction to Guantanamo. See *Rasul v. Bush* (2004). After *Rasul*, petitioners' cases were consolidated and entertained in two separate proceedings. In the first

set of cases, Judge Richard J. Leon granted the Government's motion to dismiss, holding that the detainees had no rights that could be vindicated in a habeas corpus action. In the second set of cases Judge Joyce Hens Green reached the opposite conclusion, holding the detainees had rights under the Due Process Clause of the Fifth Amendment.

While appeals were pending from the District Court decisions, Congress passed the DTA. Subsection (e) of § 1005 of the DTA amended 28 U.S.C. § 2241 to provide that "no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." Section 1005 further provides that the Court of Appeals for the District of Columbia Circuit shall have "exclusive" jurisdiction to review decisions of the CSRTs. *Ibid.*

In *Hamdan v. Rumsfeld* (2006), the Court held this provision did *2242 not apply to cases (like petitioners') pending when the DTA was enacted. Congress responded by passing the MCA.

II

As a threshold matter, we must decide whether MCA § 7 denies the federal courts jurisdiction to hear habeas corpus actions pending at the time of its enactment. We hold the statute does deny that jurisdiction, so that, if the statute is valid, petitioners' cases must be dismissed.

As amended by the terms of the MCA, 28 U.S.C.A. § 2241(e) now provides: "(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination. "(2) Except as provided in [§§ 1005(e)(2) and (e)(3) of the DTA] no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."

Section 7(b) of the MCA provides the effective date for the amendment of § 2241(e). It states: "The amendment made by [MCA § 7(a)] shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001."

If this ongoing dialogue between and among the branches of Government is to be respected, we cannot ignore that the MCA was a direct response to Hamdan's holding that the DTA's jurisdiction-stripping provision had no application to pending cases. The Court of Appeals was correct to take note of the

legislative history when construing the statute, and we agree with its conclusion that the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us.

III

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, i.e., petitioners' designation by the Executive Branch as enemy combatants, or their physical location, i.e., their presence at Guantanamo Bay. The Government contends that non-citizens 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.

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.

That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension: "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." Art. I, § 9, cl. 2. The word "privilege" was used, perhaps, to avoid mentioning some rights to the exclusion of others. (Indeed, the only mention of the term "right" in the Constitution, as ratified, is in its clause giving Congress the power to protect the rights of authors and inventors. See Art. I, § 8, cl. 8.) Surviving accounts of the ratification debates provide additional evidence that the Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme.

In our own system the Suspension Clause is designed to protect against these cyclical abuses. The Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the "delicate balance of governance" that is itself the surest safeguard of liberty. The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account.

B

The broad historical narrative of the writ and its function is central to our analysis, but we seek guidance as well from founding-era authorities addressing the specific question before us: whether foreign nationals, apprehended and detained in distant countries during a time of serious threats to our Nation's security, may assert the privilege of the writ and seek its protection. The Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ. But the analysis may begin with precedents as of 1789, for the Court has said that "at the absolute minimum" the Clause protects the writ as it existed when the Constitution was drafted and ratified.

To support their arguments, the parties in these cases have examined historical sources to construct a view of the common-law writ as it existed in 1789—as have amici whose expertise in legal history the Court has relied upon in the past. Diligent search by all parties reveals no certain conclusions. In none of the cases cited do we find that a common-law court would or would not have granted, or refused to hear for lack of jurisdiction, a petition for a writ of habeas corpus brought by a prisoner deemed an enemy combatant, under a standard like the one the Department of Defense has used in these cases, and when held in a territory, like Guantanamo, over which the Government has total military and civil control.

Both arguments are premised, however, upon the assumption that the historical record is complete and that the common law, if properly understood, yields a definite answer to the questions before us. There are reasons to doubt both assumptions. Recent scholarship points to the inherent shortcomings in the historical record. And given the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, the common-law courts simply may not have confronted cases with close parallels to this one. We decline, therefore, to infer too much, one way or the other, from the lack of historical evidence on point. Cf. *Brown v. Board of Education* (1954) (noting evidence concerning the circumstances surrounding the adoption of the Fourteenth Amendment, discussed in the parties' briefs and uncovered through the Court's own investigation, "convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive").

IV

Drawing from its position that at common law the writ ran only to territories over which the Crown was sovereign, the 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.

The United States contends, nevertheless, that Guantanamo is not within its sovereign control. This was the Government's position well before the events of September 11, 2001. And in other contexts the Court has held that questions of sovereignty are for the political branches to decide. Even if this were a treaty interpretation case that did not involve a political question, the President's construction of the lease agreement would be entitled to great respect.

We therefore 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. Accordingly, for purposes of our analysis, we accept the Government's position that Cuba, and not the United States, retains de jure sovereignty over Guantanamo Bay. As we did in *Rasul*, however, we 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.

Were we to hold that the present cases turn on the political question doctrine, we would be required first to accept the Government's premise that de jure sovereignty is the touchstone of habeas corpus jurisdiction. This premise, however, is unfounded. For the reasons indicated above, the history of common-law habeas corpus provides scant support for this proposition; and, for the reasons indicated below, that position would be inconsistent with our precedents and contrary to fundamental separation-of-powers principles.

A

The Court has discussed the issue of the Constitution's extraterritorial application on many occasions. These decisions undermine the Government's argument that, at least as applied to noncitizens, the Constitution necessarily stops where de jure sovereignty ends.

Practical considerations weighed heavily as well in *Johnson v. Eisentrager* (1950), where the Court addressed whether habeas corpus jurisdiction extended to enemy aliens who had been convicted of violating the laws of war. The prisoners were detained at Landsberg Prison in Germany during the Allied Powers' postwar occupation. The Court stressed the difficulties of ordering the Government to produce the prisoners in a habeas corpus proceeding. It "would require allocation of shipping space, guarding personnel, billeting and rations" and would damage the prestige of military commanders at a sensitive time.

True, the Court in *Eisentrager* denied access to the writ, and it noted the prisoners "at no relevant time were within any territory over which the United

States is sovereign, and [that] the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." The Government seizes upon this language as proof positive that the *Eisentrager* Court adopted a formalistic, sovereignty-based test for determining the reach of the Suspension Clause. We reject this reading for three reasons.

First, we do not accept the idea that the above-quoted passage from *Eisentrager* is the only authoritative language in the opinion and that all the rest is dicta. The Court's further determinations, based on practical considerations, were integral to Part II of its opinion and came before the decision announced its holding.

Second, because the United States lacked both de jure sovereignty and plenary control over Landsberg Prison, it is far from clear that the *Eisentrager* Court used the term sovereignty only in the narrow technical sense and not to connote the degree of control the military asserted over the facility. The Justices who decided *Eisentrager* would have understood sovereignty as a multifaceted concept. That the Court devoted a significant portion of Part II to a discussion of practical barriers to the running of the writ suggests that the Court was not concerned exclusively with the formal legal status of Landsberg Prison but also with the objective degree of control the United States asserted over it. 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.

Third, if the Government's reading of *Eisentrager* were correct, the opinion would have marked not only a change in, but a complete repudiation of, the *Insular Cases*' functional approach to questions of extraterritoriality. 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.

B

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. 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.” *Marbury v. Madison* (1803).

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.

C

In addition to the practical concerns discussed above, the Eisentrager Court found relevant that each petitioner:

“(a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.”

Based on this language from Eisentrager, and the reasoning in our other extraterritoriality opinions, we conclude that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.

Applying this framework, we note at the onset that the status of these detainees is a matter of dispute. The petitioners, like those in Eisentrager, are not American citizens. But the petitioners in Eisentrager did not contest, it seems, the Court’s assertion that they were “enemy alien[s].” In the instant cases, by contrast, the detainees deny they are enemy combatants. They have been afforded some process in CSRT proceedings to determine their status; but, unlike in Eisentrager, there has been no trial by military commission for violations of the laws of war. The difference is not trivial. The records from the Eisentrager trials suggest that, well before the petitioners brought their case

to this Court, there had been a rigorous adversarial process to test the legality of their detention. The Eisentrager petitioners were charged by a bill of particulars that made detailed factual allegations against them. To rebut the accusations, they were entitled to representation by counsel, allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution’s witnesses.

In comparison the procedural protections afforded to the detainees in the CSRT hearings are far more limited, and, we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review. Although the detainee is assigned a “Personal Representative” to assist him during CSRT proceedings, the Secretary of the Navy’s memorandum makes clear that person is not the detainee’s lawyer or even his “advocate.” The Government’s evidence is accorded a presumption of validity. The detainee is allowed to present “reasonably available” evidence, but his ability to rebut the Government’s evidence against him is limited by the circumstances of his confinement and his lack of counsel at this stage. And although the detainee can seek review of his status determination in the Court of Appeals, that review process cannot cure all defects in the earlier proceedings.

As to the second factor relevant to this analysis, the detainees here are similarly situated to the Eisentrager petitioners in that the sites of their apprehension and detention are technically outside the sovereign territory of the United States. As noted earlier, this is a factor that weighs against finding they have rights under the Suspension Clause. But there are critical differences between Landsberg Prison, circa 1950, and the United States Naval Station at Guantanamo Bay in 2008. Unlike its present control over the naval station, the United States’ control over the prison in Germany was neither absolute nor indefinite. Like all parts of occupied Germany, the prison was under the jurisdiction of the combined Allied Forces. Guantanamo Bay, on the other hand, is no transient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.

As to the third factor, we recognize, as the Court did in Eisentrager, that there are costs to holding the Suspension Clause applicable in a case of military detention abroad. Habeas corpus proceedings may require expenditure of funds by the Government and may divert the attention of military personnel from other pressing tasks. While we are sensitive to these concerns, we do not find them dispositive. Compliance with any judicial process requires some incremental expenditure of resources. Yet civilian courts and the Armed Forces have functioned along side each other at various points in our history. The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees’ claims. And in light of the plenary control the United States asserts over the base, none are apparent to us.

The situation in Eisentrager was far different, given the historical context and nature of the military’s mission in post-War Germany. When hostilities in the European Theater came to an end, the United States became responsible for an

occupation zone encompassing over 57,000 square miles with a population of 18 million. In addition to supervising massive reconstruction and aid efforts the American forces stationed in Germany faced potential security threats from a defeated enemy. In retrospect the post-War occupation may seem uneventful. But at the time Eisentrager was decided, the Court was right to be concerned about judicial interference with the military's efforts to contain "enemy elements, guerilla fighters, and 'were-wolves.'"

Similar threats are not apparent here; nor does the Government argue that they are. The United States Naval Station at Guantanamo Bay consists of 45 square miles of land and water. The base has been used, at various points, to house migrants and refugees temporarily. At present, however, other than the detainees themselves, the only long-term residents are American military personnel, their families, and a small number of workers. The detainees have been deemed enemies of the United States. At present, dangerous as they may be if released, they are contained in a secure prison facility located on an isolated and heavily fortified military base.

There is no indication, furthermore, that adjudicating a habeas corpus petition would cause friction with the host government. No Cuban court has jurisdiction over American military personnel at Guantanamo or the enemy combatants detained there. While obligated to abide by the terms of the lease, the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base. Were that not the case, or if the detention facility were located in an active theater of war, arguments that issuing the writ would be "impracticable or anomalous" would have more weight. Under the facts presented here, however, there are few practical barriers to the running of the writ. To the extent barriers arise, habeas corpus procedures likely can be modified to address them.

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.

V

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 gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional.

Our case law does not contain extensive discussion of standards defining suspension of the writ or of circumstances under which suspension has occurred. This simply confirms the care Congress has taken throughout our Nation's history to preserve the writ and its function. Indeed, most of the major legislative enactments pertaining to habeas corpus have acted not to contract the writ's protection but to expand it or to hasten resolution of prisoners' claims.

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.

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, 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.

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 "cut[t] through all forms and g[o] 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." Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant.

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. 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. Here that opportunity is constitutionally required.

The extent of the showing required of the Government in these cases is a matter to be determined. We need not explore it further at this stage. 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. 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. 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. 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. 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.

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.

Although we do not hold that an adequate substitute must duplicate § 2241 in all respects, it suffices that the Government has not established that the detainee's 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.

VI

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 and our tradition reflect this precept.

In cases involving foreign citizens detained abroad by the Executive, it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody. If and when habeas corpus jurisdiction applies, as it does in these cases, then proper deference can be accorded to reasonable procedures for screening and initial detention under lawful and proper conditions of confinement and treatment for a reasonable period of time. Domestic exigencies, furthermore, might also impose such onerous burdens on the Government that here, too, the Judicial Branch would be required to devise sensible rules for staying habeas corpus proceedings until the Government can comply with its requirements in a responsible way. Here, as is true with detainees apprehended abroad, a relevant consideration in determining the courts' role is whether there

are suitable alternative processes in place to protect against the arbitrary exercise of governmental power.

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 abstinence 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 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.

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. 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.

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.

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* (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. Subsequent legislation eliminated the statutory habeas jurisdiction over these claims, so that now there must be constitutionally based jurisdiction or none at all. 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.

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. Hence the hollow ring when the dissenters 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. 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. 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. 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.

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 Court does eventually get around to asking whether review under the DTA is, as the Court frames it, an "adequate substitute" for habeas, but even then its opinion fails to determine what rights the detainees possess and whether the DTA system satisfies them. 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. But the habeas process the Court mandates will most likely end up looking a lot like the DTA system it replaces, as the district court judges shaping it will have to reconcile review of the prisoners' detention with the undoubted need to protect the American people from the terrorist threat—precisely the challenge Congress undertook in drafting the DTA. 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 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.

Because the central purpose of habeas corpus is to test the legality of executive detention, the writ requires most fundamentally an Article III court able to hear the prisoner's claims and, when necessary, order release. Beyond that, the process a given prisoner is entitled to receive depends on the circumstances and the rights of the prisoner. After much hemming and hawing, the majority appears to concede that the DTA provides an Article III court competent to order release. The only issue in dispute is the process the Guantanamo prisoners are entitled to use to test the legality of their detention. Hamdi concluded that American citizens detained as enemy combatants are entitled to only limited process, and that much of that process could be supplied by a military tribunal, with review to follow in an Article III court. That is precisely the system we have here. It is adequate to vindicate whatever due process rights petitioners may have.

The Court reaches the opposite conclusion partly because it misreads the statute. The majority appears not to understand how the review system it invalidates actually works—specifically, how CSRT review and review by the D.C. Circuit fit together. After briefly acknowledging in its recitation of the facts that the Government designed the CSRTs "to comply with the due process requirements identified by the plurality in Hamdi," the Court proceeds to dismiss the tribunal proceedings as no more than a suspect method used by the Executive for determining the status of the detainees in the first instance.

The majority is equally wrong to characterize the CSRTs as part of that initial determination process. They are instead a means for detainees to challenge the Government's determination. The Executive designed the CSRTs to mirror Army Regulation 190-8, the very procedural model the plurality in Hamdi said provided the type of process an enemy combatant could expect from a habeas court. The CSRTs operate much as habeas courts would if hearing the detainee's collateral challenge for the first time: They gather evidence, call witnesses, take testimony, and render a decision on the legality of the Government's detention. If the CSRT finds a particular detainee has been improperly held, it can order release.

The majority insists that even if "the CSRTs satisfi[ed] due process standards," full habeas review would still be necessary, because habeas is a collateral remedy available even to prisoners "detained pursuant to the most rigorous proceedings imaginable." This comment makes sense only if the CSRTs are incorrectly viewed as a method used by the Executive for determining the prisoners' status, and not as themselves part of the collateral review to

test the validity of that determination. The majority can deprecate the importance of the CSRTs only by treating them as something they are not.

In short, the Hamdi plurality concluded that this type of review would be enough to satisfy due process, even for citizens. Congress followed the Court's lead, only to find itself the victim of a constitutional bait and switch.

Given the statutory scheme the political branches adopted, and given Hamdi, it simply will not do for the majority to dismiss the CSRT procedures as "far more limited" than those used in military trials, and therefore beneath the level of process "that would eliminate the need for habeas corpus review." The question is not how much process the CSRTs provide in comparison to other modes of adjudication. The question is whether the CSRT procedures—coupled with the judicial review specified by the DTA—provide the "basic process" Hamdi said the Constitution affords American citizens detained as enemy combatants.

To what basic process are these detainees due as habeas petitioners? We have said that "at the absolute minimum," the Suspension Clause protects the writ "as it existed in 1789." The majority admits that a number of historical authorities suggest that at the time of the Constitution's ratification, "common-law courts abstained altogether from matters involving prisoners of war." If this is accurate, the process provided prisoners under the DTA is plainly more than sufficient—it allows alleged combatants to challenge both the factual and legal bases of their detentions.

Assuming the constitutional baseline is more robust, the DTA still provides adequate process, and by the majority's own standards. The DTA system—CSRT review of the Executive's determination followed by D.C. Circuit review for sufficiency of the evidence and the constitutionality of the CSRT process—meets these criteria.

All told, the DTA provides the prisoners held at Guantanamo Bay adequate opportunity to contest the bases of their detentions, which is all habeas corpus need allow. The DTA provides more opportunity and more process, in fact, than that afforded prisoners of war or any other alleged enemy combatants in history.

Despite these guarantees, the Court finds the DTA system an inadequate habeas substitute, for one central reason: Detainees are unable to introduce at the appeal stage exculpatory evidence discovered after the conclusion of their CSRT proceedings. The Court hints darkly that the DTA may suffer from other infirmities, but it does not bother to name them, making a response a bit difficult. As it stands, I can only assume the Court regards the supposed defect it did identify as the gravest of the lot.

If this is the most the Court can muster, the ice beneath its feet is thin indeed. As noted, the CSRT procedures provide ample opportunity for detainees to introduce exculpatory evidence—whether documentary in nature or from live witnesses—before the military tribunals. And if their ability to introduce such evidence is denied contrary to the Constitution or laws of the United States, the D.C. Circuit has the authority to say so on review.

For all its eloquence about the detainees' right to the writ, the 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. What, for example, will become of the CSRT process? The majority says federal courts should generally refrain from entertaining detainee challenges until after the petitioner's CSRT proceeding has finished. But to what deference, if any, is that CSRT determination entitled?

There are other problems. Take witness availability. What makes the majority think witnesses will become magically available when the review procedure is labeled "habeas"? Will the location of most of these witnesses change—will they suddenly become easily susceptible to service of process? Or will subpoenas issued by American habeas courts run to Basra? And if they did, how would they be enforced? Speaking of witnesses, will detainees be able to call active-duty military officers as witnesses? If not, why not?

The majority has no answers for these difficulties. What it does say leaves open the distinct possibility that its "habeas" remedy will, when all is said and done, end up looking a great deal like the DTA review it rejects.

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.

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*.

I shall devote most of what will be a lengthy opinion to the legal errors contained in the opinion of the Court. Contrary to my usual practice, however, I think it appropriate to begin with a description of the disastrous consequences of what the Court has done today.

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. Last week, 13 of our countrymen in arms were killed.

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* (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.

In the long term, then, the Court’s decision today accomplishes little, except perhaps to reduce the well-being of enemy combatants that the Court ostensibly seeks to protect. In the short term, however, the decision is devastating. At least 30 of those prisoners hitherto released from Guantanamo Bay have returned to the battlefield. See S.Rep. No. 110-90, pt. 7, p. 13 (2007) (Minority Views of Sens. Kyl, Sessions, Graham, Cornyn, and Coburn) (hereinafter *Minority Report*). Some have been captured or killed. See also Mintz, *Released Detainees Rejoining the Fight*, *Washington Post*, Oct. 22, 2004, pp. A1, A12. But others have succeeded in carrying on their atrocities against innocent civilians. In one case, a detainee released from Guantanamo Bay masterminded the kidnapping of two Chinese dam workers, one of whom was later shot to death when used as a human shield against Pakistani commandoes. Another former detainee promptly resumed his post as a senior Taliban commander and murdered a United Nations engineer and three Afghan soldiers. Mintz, *supra*. Still another murdered an Afghan judge. It was reported only last month that a released detainee carried out a suicide bombing against Iraqi soldiers in Mosul, Iraq. See White, *Ex-Guantanamo Detainee Joined Iraq Suicide Attack*, *Washington Post*, May 8, 2008, p. A18.

These, mind you, were detainees whom the military had concluded were not enemy combatants. Their return to the kill illustrates the incredible difficulty of assessing who is and who is not an enemy combatant in a foreign theater of operations where the environment does not lend itself to rigorous evidence collection. Astoundingly, the Court today raises the bar, requiring military officials to appear before civilian courts and defend their decisions under procedural and evidentiary rules that go beyond what Congress has specified. As The Chief Justice’s dissent makes clear, we have no idea what those procedural and evidentiary rules are, but they will be determined by civil courts and (in the Court’s contemplation at least) will be more detainee-friendly than those now applied, since otherwise there would be no reason to hold the congressionally prescribed procedures unconstitutional. If they impose a higher standard of proof (from foreign battlefields) than the current procedures require, the number of the enemy returned to combat will obviously increase.

But even when the military has evidence that it can bring forward, it is often foolhardy to release that evidence to the attorneys representing our enemies. And one escalation of procedures that the Court is clear about is affording the detainees increased access to witnesses (perhaps troops serving in Afghanistan?) and to classified information. During the 1995 prosecution of Omar Abdel Rahman, federal prosecutors gave the names of 200 unindicted co-conspirators to the “Blind Sheik’s” defense lawyers; that information was in the hands of Osama Bin Laden within two weeks. In another case, trial testimony revealed to the enemy that the United States had been monitoring their cellular network, whereupon they promptly stopped using it, enabling more of them to evade capture and continue their atrocities.

And today it is not just the military that the Court elbows aside. 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.”

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.

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.