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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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BOUMEDIENE ET AL. *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL.

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

No. 06–1195. Argued December 5, 2007—Decided June 12, 2008*

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, 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. 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 vindi-

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*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.

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cated 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, 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.

Held:

1. MCA §7 denies the federal courts jurisdiction to hear habeas actions, like the instant cases, that were pending at the time of its enactment. Section §7(b)'s effective date provision undoubtedly applies to habeas actions, which, by definition, "relate to . . . detention" within that section's meaning. Petitioners argue to no avail that §7(b) does not apply to a §2241(e)(1) habeas action, but only to "any other action" under §2241(e)(2), because it largely repeats that section's language. The phrase "other action" in §2241(e)(2) cannot be understood without referring back to §2241(e)(1), which explicitly mentions the "writ of habeas corpus." Because the two paragraphs' structure implies that habeas is a type of action "relating to any as-

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pect of . . . detention," etc., pending habeas actions are in the category of cases subject to the statute's jurisdictional bar. This is confirmed by the MCA's legislative history. Thus, if MCA §7 is valid, petitioners' cases must be dismissed. Pp. 5–8.

2. Petitioners have the constitutional privilege of habeas corpus. They are not barred from seeking the writ or invoking the Suspension Clause's protections because they have been designated as enemy combatants or because of their presence at Guantanamo. Pp. 8–41.

(a) A brief account of the writ's history and origins shows that protection for the habeas privilege was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights; in the system the Framers conceived, the writ has a centrality that must inform proper interpretation of the Suspension Clause. That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken in the Suspension Clause to specify the limited grounds for its suspension: The writ may be suspended only when public safety requires it in times of rebellion or invasion. The Clause is designed to protect against cyclical abuses of the writ by the Executive and Legislative Branches. It protects detainee rights by a means consistent with the Constitution's essential design, ensuring that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the "delicate balance of governance." *Hamdi, supra,* at 536. Separation-of-powers principles, and the history that influenced their design, inform the Clause's reach and purpose. Pp. 8–15.

(b) A diligent search of founding-era precedents and legal commentaries reveals no certain conclusions. None of the cases the parties cite reveal whether a common-law court would have granted, or refused to hear for lack of jurisdiction, a habeas petition by a prisoner deemed an enemy combatant, under a standard like the Defense Department's in these cases, and when held in a territory, like Guantanamo, over which the Government has total military and civil control. The evidence as to the writ's geographic scope at common law is informative, but, again, not dispositive. Petitioners argue that the site of their detention is analogous to two territories outside England to which the common-law writ ran, the exempt jurisdictions and India, but critical differences between these places and Guantanamo render these claims unpersuasive. The Government argues that Guantanamo is more closely analogous to Scotland and Hanover, where the writ did not run, but it is unclear whether the common-law courts lacked the power to issue the writ there, or whether they refrained from doing so for prudential reasons. The parties' arguments that the very lack of a precedent on point supports their respective

positions are premised upon the doubtful assumptions that the historical record is complete and that the common law, if properly understood, yields a definite answer to the questions before the Court. Pp. 15–22.

(c) The Suspension Clause has full effect at Guantanamo. The Government's argument that the Clause affords petitioners no rights because the United States does not claim sovereignty over the naval station is rejected. Pp. 22–42.

(i) The Court does not question the Government's position that Cuba maintains sovereignty, in the legal and technical sense, over Guantanamo, but it does not accept the Government's premise that *de jure* sovereignty is the touchstone of habeas jurisdiction. Common-law habeas' history provides scant support for this proposition, and it is inconsistent with the Court's precedents and contrary to fundamental separation-of-powers principles. Pp. 22–25.

(ii) Discussions of the Constitution's extraterritorial application in cases involving provisions other than the Suspension Clause undermine the Government's argument. Fundamental questions regarding the Constitution's geographic scope first arose when the Nation acquired Hawaii and the noncontiguous Territories ceded by Spain after the Spanish-American War, and Congress discontinued its prior practice of extending constitutional rights to territories by statute. In the so-called Insular Cases, the Court held that the Constitution had independent force in the territories that was not contingent upon acts of legislative grace. See, *e.g., Dorr* v. *United States*, 195 U. S. 138. Yet because of the difficulties and disruption inherent in transforming the former Spanish colonies' civil-law system into an Anglo-American system, the Court adopted the doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories. See, *e.g., id.,* at 143. Practical considerations likewise influenced the Court's analysis in *Reid* v. *Covert,* 354 U. S. 1, where, in applying the jury provisions of the Fifth and Sixth Amendments to American civilians being tried by the U. S. military abroad, both the plurality and the concurrences noted the relevance of practical considerations, related not to the petitioners' citizenship, but to the place of their confinement and trial. Finally, in holding that habeas jurisdiction did not extend to enemy aliens, convicted of violating the laws of war, who were detained in a German prison during the Allied Powers' post-World War II occupation, the Court, in *Johnson* v. *Eisentrager*, 339 U. S. 763, stressed the practical difficulties of ordering the production of the prisoners, *id.*, at 779. The Government's reading of *Eisentrager* as adopting a formalistic test for determining the Suspension Clause's reach is rejected because: (1) the

discussion of practical considerations in that case was integral to a part of the Court's opinion that came before it announced its holding, see *id.,* at 781; (2) it mentioned the concept of territorial sovereignty only twice in its opinion, in contrast to its significant discussion of practical barriers to the running of the writ; and (3) if the Government's reading were correct, the opinion would have marked not only a change in, but a complete repudiation of, the Insular Cases' (and later *Reid*'s) functional approach. A constricted reading of *Eisentrager* overlooks what the Court sees as a common thread uniting all these cases: The idea that extraterritoriality questions turn on objective factors and practical concerns, not formalism. Pp. 25–34.

(iii) The Government's sovereignty-based test raises troubling separation-of-powers concerns, which are illustrated by Guantanamo's political history. Although the United States has maintained complete and uninterrupted control of Guantanamo for over 100 years, the Government's view is that the Constitution has no effect there, at least as to noncitizens, because the United States disclaimed formal sovereignty in its 1903 lease with Cuba. The Nation's 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. To hold that the political branches may switch the Constitution on or off at will would lead to a regime in which they, not this Court, say "what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177. These concerns have particular bearing upon the Suspension Clause question here, for the habeas writ is itself an indispensable mechanism for monitoring the separation of powers. Pp. 34–36.

(iv) Based on *Eisentrager, supra*, at 777, and the Court's reasoning in its other extraterritoriality opinions, at least three factors are relevant in determining the Suspension Clause's reach: (1) the detainees' citizenship and status and the adequacy of the process through which that status was determined; (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. Application of this framework reveals, first, that petitioners' status is in dispute: They are not American citizens, but deny they are enemy combatants; and although they have been afforded some process in CSRT proceedings, there has been no *Eisentrager*–style trial by military commission for violations of the laws of war. Second, while the sites of petitioners' apprehension and detention weigh against finding they have Suspension Clause rights, there are critical differences between *Eisentrager*'s German prison, circa 1950, and the Guantanamo Naval Station in 2008, given the Government's absolute and indefinite control over the naval station. Third, although the

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Court is sensitive to the financial and administrative costs of holding the Suspension Clause applicable in a case of military detention abroad, these factors are not dispositive because the Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas courts had jurisdiction. The situation in *Eisentrager* was far different, given the historical context and nature of the military's mission in post-War Germany. Pp. 36–41.

(d) Petitioners are therefore entitled to the habeas privilege, and if that privilege is to be denied them, Congress must act in accordance with the Suspension Clause's requirements. Cf. *Rasul,* 542 U. S., at 564. Pp. 41–42.

3. Because the DTA's procedures for reviewing detainees' status are not an adequate and effective substitute for the habeas writ, MCA §7 operates as an unconstitutional suspension of the writ. Pp. 42–64.

(a) Given its holding that the writ does not run to petitioners, the D. C. Circuit found it unnecessary to consider whether there was an adequate substitute for habeas. This Court usually remands for consideration of questions not decided below, but departure from this rule is appropriate in "exceptional" circumstances, see, *e.g., Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U. S. 157, 169, here, the grave separation-of-powers issues raised by these cases and the fact that petitioners have been denied meaningful access to a judicial forum for years. Pp. 42–44.

(b) Historically, Congress has taken care to avoid suspensions of the writ. For example, the statutes at issue in the Court's two leading cases addressing habeas substitutes, *Swain* v. *Pressley*, 430 U. S. 372, and *United States* v. *Hayman*, 342 U. S. 205, were attempts to streamline habeas relief, not to cut it back. Those cases provide little guidance here because, *inter alia,* the statutes in question gave the courts broad remedial powers to secure the historic office of the writ, and included saving clauses to preserve habeas review as an avenue of last resort. In contrast, Congress intended the DTA and the MCA to circumscribe habeas review, as is evident from the unequivocal nature of MCA §7's jurisdiction-stripping language, from the DTA's text limiting the Court of Appeals' jurisdiction to assessing whether the CSRT complied with the "standards and procedures specified by the Secretary of Defense," DTA §1005(e)(2)(C), and from the absence of a saving clause in either Act. That Congress intended to create a more limited procedure is also confirmed by the legislative history and by a comparison of the DTA and the habeas statute that would govern in MCA §7's absence, 28 U. S. C. §2241. In §2241, Congress authorized "any justice" or "circuit judge" to issue the writ, thereby accommodat-

ing the necessity for factfinding that will arise in some cases by allowing the appellate judge or Justice to transfer the case to a district court. See §2241(b). However, by granting the D. C. Circuit "exclusive" jurisdiction over petitioners' cases, see DTA §1005(e)(2)(A), Congress has foreclosed that option in these cases. Pp. 44–49.

(c) This Court does not endeavor to offer a comprehensive summary of the requisites for an adequate habeas substitute. It is uncontroversial, however, that the habeas privilege entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to "the erroneous application or interpretation" of relevant law, *INS* v. *St. Cyr*, 533 U. S. 289, 302, and the habeas court must have the power to order the conditional release of an individual unlawfully detained. But more may be required depending on the circumstances. Petitioners identify what they see as myriad deficiencies in the CSRTs, the most relevant being the constraints upon the detainee's ability to rebut the factual basis for the Government's assertion that he is an enemy combatant. At the CSRT stage the detainee has limited means to find or present evidence to challenge the Government's case, 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. His opportunity to confront witnesses is likely to be more theoretical than real, given that there are no limits on the admission of hearsay. The Court therefore agrees with petitioners that there is considerable risk of error in the tribunal's findings of fact. And given that the consequence of error may be detention for the duration of hostilities that may last a generation or more, the risk is too significant to ignore. Accordingly, for the habeas writ, or its substitute, to function as an effective and meaningful remedy in this context, the court conducting the collateral proceeding must have some ability to correct any errors, to assess the sufficiency of the Government's evidence, and to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. *In re Yamashita*, 327 U. S. 1, 5, 8, and *Ex parte Quirin*, 317 U. S. 1, 23–25, distinguished. Pp. 49–57.

(d) Petitioners have met their burden of establishing that the DTA review process is, on its face, an inadequate substitute for habeas. Among the constitutional infirmities from which the DTA potentially suffers are the absence of provisions allowing petitioners to challenge the President's authority under the AUMF to detain them indefinitely, to contest the CSRT's findings of fact, to supplement the record on review with exculpatory evidence discovered after the CSRT proceedings, and to request release. The statute cannot be read to contain each of these constitutionally required procedures. MCA §7 thus effects an unconstitutional suspension of the writ.

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There is no jurisdictional bar to the District Court's entertaining petitioners' claims. Pp. 57–64.

4. Nor are there prudential barriers to habeas review. Pp. 64–70.

(a) Petitioners need not seek review of their CSRT determinations in the D. C. Circuit before proceeding with their habeas actions in the District Court. If these cases involved detainees held for only a short time while awaiting their CSRT determinations, 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. But these qualifications no longer pertain here. In some instances six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands. To require these detainees to pursue the limited structure of DTA review before proceeding with habeas actions would be to require additional months, if not years, of delay. This holding 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. Except in cases of undue delay, such as the present, federal courts should refrain from entertaining an enemy combatant's habeas petition at least until after the CSRT has had a chance to review his status. Pp. 64–67.

(b) In effectuating today's holding, certain accommodations—including channeling future cases to a single district court and requiring that court to use its discretion to accommodate to the greatest extent possible the Government's legitimate interest in protecting sources and intelligence gathering methods—should be made to reduce the burden habeas proceedings will place on the military, without impermissibly diluting the writ's protections. Pp. 67–68.

5. In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, the courts must accord proper deference to the political branches. However, security subsists, too, in fidelity to freedom's first principles, chief among them being freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. Pp. 68–70.

476 F. 3d 981, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. SOUTER, J., filed a concurring opinion, in which GINSBURG and BREYER, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA, THOMAS, and ALITO, JJ., joined. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined.