AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers

Boumediene v. Bush, 553 U.S. 723 (2008)

Lakhdar Boumediene was born in Algeria and acquired Bosnian citizenship during the 1990s. In 2001, he and five other persons were arrested by the Bosnian police, who suspected them of international terrorism. On January 17, the Supreme Court of Bosnia and Herzegovina ordered them released on the ground that no evidence supported that accusation. That night, Bosnian police transferred Boumediene and his alleged confederates to the United States. They were immediately shipped to the detention center in Guantanamo Bay, Cuba.

The detainees allege that from 2002 to 2008 they were confined to individual 8′ × 6′ cells consisting of concrete walls and steel mesh. Among other things, they were subject to months of solitary confinement, sleep deprivation, extreme temperature conditions, and constant light. Each of the six petitioners was said to suffer from serious medical ailments caused or exacerbated by the conditions of his detention. They denied that they had any associations with the al Qaeda terrorist network.

Sometime during 2004, each man appeared before a Combatant Status Review Tribunal (CRST). Each was determined to be an enemy combatant. Each then asked for a writ of habeas corpus. Their cases were consolidated into two separate legal proceedings heard by two federal district court judges. The two courts reached conflicting decisions on whether aliens had a constitutional right to a writ of habeas corpus. Before the appeals could be heard in the federal circuit court, Congress passed the Detainee Treatment Act of 2005 (DTA). That measure declared 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." The Court of Appeals for the District of Columbia consolidated all cases and determined that this measure was constitutional and had effectively stripped the federal courts of the jurisdiction to hear habeas cases coming out of Guantanamo. Boumediene and others appealed that decision to the Supreme Court of the United States.

Numerous groups filed amicus briefs. Seven retired generals along with a number of conservative legal organizations filed a brief urging the Supreme Court to sustain the Detainee Treatment Act. That brief asserted,

> *if the federal courts attempt to exert jurisdiction over the types of claims raised in these cases, the Executive and Legislative Branches will be deprived of the flexibility necessary to confront the imminent threats posed to national security by terrorist groups throughout the world. Amici do not mean to denigrate the liberty interests being asserted by Petitioners. Nonetheless, amici do not believe that a federal habeas corpus proceeding is the proper forum for reviewing those interests, particularly given the determination of the elected branches of government that the CSRT process provides the proper balance between Petitioners' claims and national security concerns.*[1]

Prominent liberal rights organizations, libertarian organizations, and international human rights groups filed amicus briefs urging the Supreme Court to recognize that detainees at Guantanamo Bay had the right to habeas corpus. The brief of other retired military offices declared,

> *Providing Guantanamo prisoners with meaningful judicial review of their imprisonment is especially important to the members of the United States Armed Forces. If the United States detains "enemy combatants" without providing a fair and meaningful heating, it increases the likelihood that foreign forces capturing American troops in the future will ignore the Geneva*

[1] Brief of Retired Generals and Admirals, Washington Legal Foundation, et al., as *Amici Curiae* in Support of Respondents, *Boumediene v. Bush*, in the Supreme Court of the United States (October 9, 2007), 4.

> *Conventions entirely - thereby putting the lives of American prisoners at risk. And even if our enemies do not comply with the Geneva Conventions, it is important for our military to do so. Adhering to U.S. law and upholding traditional American values are well-established hallmarks of the American military tradition; they also provide moral authority that is critically important to the ability of our soldiers to wage and win war with a minimum of resistance.*[2]

The most interesting amicus brief in Boumediene *may have been filed by Arlen Specter, who was then the senior Republican senator from Pennsylvania.*[3] *Specter was chairman of the Senate Judiciary Committee when the DTA became law. Although he indicated that he believed provisions of the DTA were unconstitutional, Specter voted for the final version of the bill. He then submitted an amicus brief to the Supreme Court urging them to declare the bill unconstitutional.*

The Supreme Court by a 5-4 vote determined that Congress could not deprive Guantanamo Bay detainees of their right to habeas corpus. Justice Kennedy's majority opinion ruled that aliens being held in areas where Americans had de facto sovereignty had a right to habeas corpus and that Congress had not provided an adequate substitute to the writ when passing the DTA. After the Court's decision, Boumediene and his family were transferred into the custody of the French government and released. The Court of Appeals for the District of Columbia has been left to work out adequate procedures for resolving detainee cases. Senior Circuit Judge Laurence Silberman has observed of the aftermath of Boumediene,

> *I doubt any of my colleagues will vote to grant a petition if he or she believes that it is somewhat likely that the petitioner is an al Quaeda adherent or an active supporter. . . . But I, like my colleagues, certainly would release a petitioner against whom the government could not muster even 'some evidence.' Of course, if it turns out that regardless of our decisions the executive branch does not release winning petitioners because no other country will accept them and they will not be released into the United States, then the whole process leads to virtual advisory opinions. It becomes a charade prompted by the Supreme Court's defiant – if only theoretical – assertion of judicial supremacy, sustained by posturing on the part of the Justice Department, and providing litigation exercise for the detainee bar.*[4]

Kennedy claims that the majority opinion is supported both by past precedents and by basic constitutional principles. How do the majority and dissent characterize those precedents and principles? Which side has the better of the argument? When Boumediene *was decided in 2008, support for President Bush and the Iraq War had fallen to new lows. Do you think that the political environment influenced the justices? Would the case have been decided similarly had President Bush had a 70 percent approval rating? What do you think of Senator Specter's behavior? Should a senator vote for a bill that has important provisions the senator thinks are unconstitutional?*

JUSTICE KENNEDY delivered the opinion of the Court.

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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 noncitizens designated as enemy combatants and detained in territory located outside our Nation's borders have no constitutional rights and no privilege of habeas corpus. Petitioners contend they do have cognizable constitutional rights and that Congress, in seeking to eliminate recourse to habeas corpus as a means to assert those rights, acted in violation of the Suspension Clause.

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[2] Brief Amicus Curiae of Retired Military Officers in Support of Petitioners, *Boumediene v. Bush*, in the Supreme Court of the United States (August 2007), 3.

[3] Shortly after President Obama took office in 2009, Specter became a Democrat.

[4] Esmail v. Obama, No. 10-5235 (D.C. Cir., 2011) (Silberman, J., concurring).

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 monarchial 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." . . .

. . . .

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. . . . 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.

. . . .

The Government argues . . . that Guantanamo is more closely analogous to Scotland and Hanover, territories that were not part of England but nonetheless controlled by the English monarch. . . . Given the English Crown's delicate and complicated relationships with Scotland and Hanover in the 1700's, we cannot disregard the possibility that the common-law courts' refusal to issue the writ to these places was motivated not by formal legal constructs but by what we would think of as prudential concerns. This appears to have been the case with regard to other British territories where the writ did not run. . . .

. . . .

The prudential barriers that may have prevented the English courts from issuing the writ to Scotland and Hanover are not relevant here. We have no reason to believe an order from a federal court would be disobeyed at Guantanamo. No Cuban court has jurisdiction to hear these petitioners' claims, and no law other than the laws of the United States applies at the naval station. The modern-day relations between the United States and Guantanamo thus differ in important respects from the 18th-century relations between England and the kingdoms of Scotland and Hanover. This is reason enough for us to discount the relevance of the Government's analogy.

. . . .

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. . . . Cuba, and not the United States, retains *de jure* sovereignty over Guantanamo Bay. As we did in *Rasul v. Bush* (2004), 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. . . . .

. . . .

True, the Court in *Johnson v. Eisentrager* (1950) denied access to the writ, and it noted the prisoners [in an Allied camp in occupied Germany] "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 . . . .

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. . . [I]f 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*' (1898) . . . 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. . . .

The Government's formal sovereignty-based test raises troubling separation-of-powers concerns as well. . . . [A]lthough it recognized, by entering into the 1903 Lease Agreement, that Cuba retained "ultimate sovereignty" over Guantanamo, the United States continued to maintain the same plenary control it had enjoyed since 1898. Yet the Government's view is that the Constitution had no effect there, at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.

Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution." . . . Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is." *Marbury v. Madison* (1803).

. . . .

Based on . . . *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 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. . . .

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. . . .

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. . . . [But u]nlike its present control over the naval station, the United States' control over the prison in Germany was neither absolute nor indefinite. . . .

As to the third factor, . . . [t]he 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.

. . . .

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

We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause. . . .

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 Detainee Treatment Act's] jurisdictional grant is quite limited. The Court of Appeals has jurisdiction not to inquire into the legality of the detention generally but only to assess whether the CSRT complied with the "standards and procedures specified by the Secretary of Defense" and whether those standards and procedures are lawful. . . . If Congress had envisioned DTA review as coextensive with traditional habeas corpus, it would not have drafted the statute in this manner. . . .

. . . .

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. . . .

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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.

. . . .

. . . . Our holding with regard to exhaustion should not be read to imply that a habeas court should intervene the moment an enemy combatant steps foot in a territory where the writ runs. The Executive is entitled to a reasonable period of time to determine a detainee's status before a court entertains that detainee's habeas corpus petition. The CSRT process is the mechanism Congress and the President set up to deal with these issues. Except in cases of undue delay, federal courts should refrain from entertaining an enemy combatant's habeas corpus petition at least until after the Department, acting via the CSRT, has had a chance to review his status.

. . . .

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

. . . .

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.

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

I join the Court's opinion in its entirety. . .

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. . . . 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.

. . . .

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.

. . . .

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

. . . . The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military matter is entirely *ultra vires*.

. . . .

America is at war with radical Islamists. The enemy began by killing Americans and American allies abroad: 241 at the Marine barracks in Lebanon, 19 at the Khobar Towers in Dhahran, 224 at our embassies in Dar es Salaam and Nairobi, and 17 on the USS Cole in Yemen. . . . . 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. . . .

In the long term, . . . 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. . . .

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. . . .

. . . .

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. . . .

But it does not matter. The Court today decrees that no good reason to accept the judgment of the other two branches is "apparent." . . . 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.

. . . .

We have frequently stated that we owe great deference to Congress's view that a law it has passed is constitutional. . . .

In light of those principles of deference, the Court's conclusion that "the common law [does not] yiel[d] a definite answer to the questions before us," . . . leaves it no choice but to affirm the Court of Appeals. The writ as preserved in the Constitution could not possibly extend farther than the common law provided when that Clause was written. . . . The Court admits that it cannot determine whether the writ historically extended to aliens held abroad, and it concedes (necessarily) that Guantanamo Bay lies outside the sovereign territory of the United States. . . . Together, these two concessions establish that it is (in the Court's view) perfectly ambiguous whether the common-law writ would have provided a remedy for these petitioners. If that is so, the Court has no basis to strike down the Military Commissions Act, and must leave undisturbed the considered judgment of the coequal branches.

. . . .

The Court purports to derive from our precedents a "functional" test for the extraterritorial reach of the writ . . . which shows that the Military Commissions Act unconstitutionally restricts the scope of habeas. That is remarkable because the most pertinent of those precedents, *Johnson v. Eisentrager* . . .

conclusively establishes the opposite. There we were confronted with the claims of 21 Germans held at Landsberg Prison, an American military facility located in the American Zone of occupation in postwar Germany. . . . Writing for the Court, Justice Jackson held that American courts lacked habeas jurisdiction:

> "We are cited to [sic] no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes." . . .

. . . .

The Court would have us believe that *Eisentrager* rested on "[p]ractical considerations," such as the "difficulties of ordering the Government to produce the prisoners in a habeas corpus proceeding." . . . Formal sovereignty, says the Court, is merely one consideration. . . . This is a sheer rewriting of the case. *Eisentrager* mentioned practical concerns, to be sure - but not for the purpose of determining under what circumstances American courts could issue writs of habeas corpus for aliens abroad. It cited them to support its holding that the Constitution does not empower courts to issue writs of habeas corpus to aliens abroad in any circumstances.

. . .

After [establishing] a "functional" test, the Court is still left with the difficulty that most of those elements exist here as well with regard to all the detainees. . . . The Germans had been tried by a military commission for violations of the laws of war; the present petitioners, by contrast, have been tried by a Combatant Status Review Tribunal (CSRT) whose procedural protections, according to the Court's ipse dixit, "fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review." . . . But no one looking for "functional" equivalents would put *Eisentrager* and the present cases in the same category, much less place the present cases in a preferred category. The difference between them cries out for lesser procedures in the present cases. The prisoners in *Eisentrager* were prosecuted for crimes after the cessation of hostilities; the prisoners here are enemy combatants detained during an ongoing conflict. . . .

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

. . . .

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

. . . .

Putting aside the conclusive precedent of *Eisentrager*, it is clear that the original understanding of the Suspension Clause was that habeas corpus was not available to aliens abroad. . .

It is entirely clear that, at English common law, the writ of habeas corpus did not extend beyond the sovereign territory of the Crown. . . .

The common-law writ was codified by the [English] Habeas Corpus Act of 1679. . . . The Act did not extend the writ elsewhere, even though the existence of other places to which British prisoners could be sent was recognized by the Act. The possibility of evading judicial review through such spiriting-away

was eliminated, not by expanding the writ abroad, but by forbidding the shipment of prisoners to places where the writ did not run or where its execution would be difficult. . . .

. . . .

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.