SUPREME COURT OF THE UNITED STATES

Nos. 06–1195 and 06–1196

LAKHDAR BOUMEDIENE, ET AL., PETITIONERS
06–1195 *v.*
GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, ET AL.

KHALED A. F. AL ODAH, NEXT FRIEND OF FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL., PETITIONERS
06–1196 *v.*
UNITED STATES ET AL.

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

[June 12, 2008]

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.

I

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. See National Commission on Terrorist Attacks upon the United States, The 9/11 Commission Report, pp. 60–61, 70, 190 (2004). 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. See *id.*, at 552, n. 9. 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*, 339 U. S. 763 (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 *ibid.;* 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. See Khan & Lancaster, Pakistanis Rescue Hostage; 2nd Dies, Washington Post, Oct. 15, 2004, p. A18. 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. See Minority Report 13. 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 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. See *ante*, at 54–55. 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. See Minority Report 14–15. 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. See *id.*, at 15.

And today it is not just the military that the Court elbows aside. A mere two Terms ago in *Hamdan* v. *Rumsfeld*, 548 U. S. 557 (2006), when the Court held (quite amazingly) that the Detainee Treatment Act of 2005 had not stripped habeas jurisdiction over Guantanamo petitioners' claims, four Members of today's five-Justice majority joined an opinion saying the following:

> "Nothing prevents the President from returning to Congress to seek the authority [for trial by military commission] he believes necessary.
>
> "Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means." *Id.,* at 636 (BREYER, J., concurring).[1]

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

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[1] Even today, the Court cannot resist striking a pose of faux deference to Congress and the President. Citing the above quoted passage, the Court says: "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." *Ante*, at 69. Indeed. What the Court apparently means is that the political branches can debate, after which the Third Branch will decide.

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." Brief for Respondents 10–11 (internal quotation marks omitted).

But it does not matter. The Court today decrees that no good reason to accept the judgment of the other two branches is "apparent." *Ante*, at 40. "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." *Id.,* at 39. 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.

II

A

The Suspension Clause of the Constitution provides: "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. As a court of law operating under a written Constitution, our role is to determine whether there is a conflict between that Clause and the Military Commissions Act. A conflict

arises only if the Suspension Clause preserves the privilege of the writ for aliens held by the United States military as enemy combatants at the base in Guantanamo Bay, located within the sovereign territory of Cuba.

We have frequently stated that we owe great deference to Congress's view that a law it has passed is constitutional. See, *e.g.*, *Department of Labor* v. *Triplett*, 494 U. S. 715, 721 (1990); *United States* v. *National Dairy Products Corp.*, 372 U. S. 29, 32 (1963); see also *American Communications Assn.* v. *Douds*, 339 U. S. 382, 435 (1950) (Jackson, J., concurring in part and dissenting in part). That is especially so in the area of foreign and military affairs; "perhaps in no other area has the Court accorded Congress greater deference." *Rostker* v. *Goldberg*, 453 U. S. 57, 64–65 (1981). Indeed, we accord great deference even when the President acts alone in this area. See *Department of Navy* v. *Egan*, 484 U. S. 518, 529–530 (1988); *Regan* v. *Wald*, 468 U. S. 222, 243 (1984).

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," *ante*, at 22, 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. See Part III, *infra*. 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. See *ante*, at 22–23; *Rasul* v. *Bush*, 542 U. S. 466, 500–501 (2004) (SCALIA, J., dissenting). 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.[2]

How, then, does the Court weave a clear constitutional prohibition out of pure interpretive equipoise? The Court resorts to "fundamental separation-of-powers principles" to interpret the Suspension Clause. *Ante*, at 25. According to the Court, because "the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers," the test of its extraterritorial reach "must not be subject to manipulation by those whose power it is designed to restrain." *Ante,* at 36.

That approach distorts the nature of the separation of powers and its role in the constitutional structure. The "fundamental separation-of-powers principles" that the Constitution embodies are to be derived not from some judicially imagined matrix, but from the sum total of the individual separation-of-powers provisions that the Constitution sets forth. Only by considering them one-by-one does the full shape of the *Constitution's* separation-of-powers principles emerge. It is nonsensical to interpret those provisions themselves in light of some general "separation-of-powers principles" dreamed up by the Court. Rather, they must be interpreted to mean what they were understood to mean when the people ratified them. And if the understood scope of the writ of habeas corpus was "designed to restrain" (as the Court says) the actions of the Executive, the understood *limits* upon that

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[2] The opinion seeks to avoid this straightforward conclusion by saying that 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." *Ante*, at 15–16 (citing *INS* v. *St. Cyr*, 533 U. S. 289 300–301 (2001)). But not foreclosing the possibility that they have expanded is not the same as demonstrating (or at least holding without demonstration, which seems to suffice for today's majority) that they have expanded. The Court must either hold that the Suspension Clause has "expanded" in its application to aliens abroad, or acknowledge that it has no basis to set aside the actions of Congress and the President. It does neither.

scope were (as the Court seems not to grasp) just as much "designed to restrain" the incursions of the Third Branch. "Manipulation" of the territorial reach of the writ by the Judiciary poses just as much a threat to the proper separation of powers as "manipulation" by the Executive. As I will show below, manipulation is what is afoot here. The understood limits upon the writ deny our jurisdiction over the habeas petitions brought by these enemy aliens, and entrust the President with the crucial wartime determinations about their status and continued confinement.

B

The Court purports to derive from our precedents a "functional" test for the extraterritorial reach of the writ, *ante*, at 34, 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*, 339 U. S. 763, 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. They had been captured in China, and an American military commission sitting there had convicted them of war crimes—collaborating with the Japanese after Germany's surrender. *Id.*, at 765–766. Like the petitioners here, the Germans claimed that their detentions violated the Constitution and international law, and sought a writ of habeas corpus. 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 any-

thing in our statutes." *Id.*, at 768.

Justice Jackson then elaborated on the historical scope of the writ:

> "The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. . . .
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> "But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." *Id.*, at 770–771.

Lest there be any doubt about the primacy of territorial sovereignty in determining the jurisdiction of a habeas court over an alien, Justice Jackson distinguished two cases in which aliens had been permitted to seek habeas relief, on the ground that the prisoners in those cases were in custody within the sovereign territory of the United States. *Id.*, at 779–780 (discussing *Ex parte Quirin*, 317 U. S. 1 (1942), and *In re Yamashita*, 327 U. S. 1 (1946)). "By reason of our sovereignty at that time over [the Philippines]," Jackson wrote, "Yamashita stood much as did Quirin before American courts." 339 U. S., at 780.

Eisentrager thus held—*held* beyond any doubt—that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign.[3]

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[3] In its failed attempt to distinguish *Eisentrager*, the Court comes up with the notion that "*de jure* sovereignty" is simply an additional factor that can be added to (presumably) "*de facto* sovereignty" (*i.e.,* practical control) to determine the availability of habeas for aliens, but that it is not a necessary factor, whereas *de facto* sovereignty is. It is perhaps in this *de facto* sense, the Court speculates, that *Eisentrager* found "sovereignty" lacking. See *ante*, at 23–25. If that were so, one would have expected *Eisentrager* to explain in some detail why the United States

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." *Ante*, at 32. Formal sovereignty, says the Court, is merely one consideration "that bears upon which constitutional guarantees apply" in a given location. *Ante*, at 34. 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*. As Justice Black accurately said in dissent, "the Court's opinion inescapably denies courts power to afford the least bit of protection for any alien who is subject to our occupation government abroad, even if he is neither enemy nor belligerent and even after peace is officially declared." 339 U. S., at 796.

The Court also tries to change *Eisentrager* into a "func-

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did not have practical control over the American zone of occupation. It did not (and probably could not). Of course this novel *de facto-de jure* approach does not explain why the writ never issued to Scotland, which was assuredly within the *de facto* control of the English crown. See *infra*, at 22.

To support its holding that *de facto* sovereignty is relevant to the reach of habeas corpus, the Court cites our decision in *Fleming* v. *Page*, 9 How. 603 (1850), a case about the application of a customs statute to a foreign port occupied by U. S. forces. See *ante*, at 24. The case used the phrase "subject to the sovereignty and dominion of the United States" to refer to the United States' practical control over a "foreign country." 9 How., at 614. But *Fleming* went on to explain that because the port remained part of the "enemy's country," even though under U. S. military occupation, "its subjugation did not compel the United States, while they held it, to regard it as part of their dominions, nor to give to it any form of civil government, nor to extend to it our laws." *Id.*, at 618. If *Fleming* is relevant to these cases at all, it undermines the Court's holding.

tional" test by quoting a paragraph that lists the characteristics of the German petitioners:

> "To support [the] assumption [of a constitutional right to habeas corpus] we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (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." *Id.*, at 777 (quoted in part, *ante*, at 36).

But that paragraph is introduced by a sentence stating that "[t]he foregoing demonstrates *how much further we must go* if we are to invest these enemy aliens, resident, captured and imprisoned abroad, with standing to demand access to our courts." 339 U. S., at 777 (emphasis added). How much further than *what*? Further than the rule set forth in the prior section of the opinion, which said that "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." *Id.*, at 771. In other words, the characteristics of the German prisoners were set forth, not in application of some "functional" test, but to show that the case before the Court represented an *a fortiori* application of the ordinary rule. That is reaffirmed by the sentences that immediately follow the listing of the Germans' characteristics:

> "We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be in-

> voked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and 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." *Id.*, at 777–778.

Eisentrager nowhere mentions a "functional" test, and the notion that it is based upon such a principle is patently false.[4]

The Court also reasons that *Eisentrager* must be read as a "functional" opinion because of our prior decisions in the Insular Cases. See *ante*, at 26–29. It cites our statement in *Balzac* v. *Porto Rico*, 258 U. S. 298, 312 (1922), that "'the real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were

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[4] JUSTICE SOUTER's concurrence relies on our decision four Terms ago in *Rasul* v. *Bush*, 542 U. S. 466 (2004), where the Court interpreted the habeas statute to extend to aliens held at Guantanamo Bay. He thinks that "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." *Ante*, at 1–2. But *Rasul* was devoted primarily to an explanation of why *Eisentrager*'s statutory holding no longer controlled given our subsequent decision in *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484 (1973). See *Rasul*, *supra*, at 475–479. And the opinion of the Court today—which JUSTICE SOUTER joins—expressly rejects the historical evidence cited in *Rasul* to support its conclusion about the reach of habeas corpus. Compare *id.*, at 481–482, with *ante*, at 18. Moreover, even if one were to accept as true what JUSTICE SOUTER calls *Rasul*'s "well-considered" dictum, that does not explain why *Eisentrager*'s constitutional holding must be overruled or how it can be distinguished. (After all, *Rasul* distinguished *Eisentrager*'s statutory holding on a ground inapplicable to its constitutional holding.) In other words, even if the Court were to conclude that *Eisentrager*'s rule was incorrect as an original matter, the Court would have to explain the justification for departing from that precedent. It therefore cannot possibly be true that *Rasul* controls this case, as JUSTICE SOUTER suggests.

applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements.'" *Ante*, at 28. But the Court conveniently omits *Balzac*'s predicate to that statement: "The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the *sovereign power* of that government is exerted." 258 U. S., at 312 (emphasis added). The Insular Cases all concerned territories acquired by Congress under its Article IV authority and indisputably part of the sovereign territory of the United States. See *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 268 (1990); *Reid* v. *Covert*, 354 U. S. 1, 13 (1957) (plurality opinion of Black, J.). None of the Insular Cases stands for the proposition that aliens located outside U. S. sovereign territory have constitutional rights, and *Eisentrager* held just the opposite with respect to habeas corpus. As I have said, *Eisentrager* distinguished *Yamashita* on the ground of "our sovereignty [over the Philippines]," 339 U. S., at 780.

The Court also relies on the "[p]ractical considerations" that influenced our decision in *Reid* v. *Covert*, *supra*. See *ante*, at 29–32. But all the Justices in the majority except Justice Frankfurter limited their analysis to the rights of *citizens* abroad. See *Reid, supra*, at 5–6 (plurality opinion of Black, J.); *id.*, at 74–75 (Harlan, J., concurring in result). (Frankfurter limited his analysis to the even narrower class of civilian dependents of American military personnel abroad, see *id.*, at 45 (opinion concurring in result).) In trying to wring some kind of support out of *Reid* for today's novel holding, the Court resorts to a chain of logic that does not hold. The members of the *Reid* majority, the Court says, were divided over whether *In re Ross*, 140 U. S. 453 (1891), which had (according to the Court) held that under certain circumstances American citizens abroad do not have indictment and jury-trial rights, should be overruled. In the Court's view, the *Reid*

plurality would have overruled *Ross*, but Justices Frankfurter and Harlan preferred to distinguish it. The upshot: "If citizenship had been the only relevant factor in the case, it would have been necessary for the Court to overturn *Ross*, something Justices Harlan and Frankfurter were unwilling to do." *Ante*, at 32. What, exactly, is this point supposed to prove? To say that "practical considerations" determine the precise content of the constitutional protections American citizens enjoy when they are abroad is quite different from saying that "practical considerations" determine whether aliens abroad enjoy any constitutional protections whatever, including habeas. In other words, merely because citizenship is not a *sufficient* factor to extend constitutional rights abroad does not mean that it is not a *necessary* one.

The Court tries to reconcile *Eisentrager* with its holding today by pointing out that in postwar Germany, the United States was "answerable to its Allies" and did not "pla[n] a long-term occupation." *Ante*, at 38, 39. Those factors were not mentioned in *Eisentrager*. Worse still, it is impossible to see how they relate to the Court's asserted purpose in creating this "functional" test—namely, to ensure a judicial inquiry into detention and prevent the political branches from acting with impunity. Can it possibly be that the Court trusts the political branches more when they are beholden to foreign powers than when they act alone?

After transforming the *a fortiori* elements discussed above into 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. To make the application of the newly crafted "functional" test produce a different result in the present cases, the Court must rely upon factors (d) and (e): 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." *Ante*, at 37. 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. See *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 538 (2004) (plurality opinion) (suggesting, as an adequate substitute for habeas corpus, the use of a tribunal akin to a CSRT to authorize the detention of *American citizens* as enemy combatants during the course of the present 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. See Bradley, The Military Commissions Act, Habeas Corpus, and the Geneva Conventions, 101 Am. J. Int'l L. 322, 338 (2007). The Court's analysis produces a crazy result: Whereas those convicted and sentenced to death for war crimes are without judicial remedy, all enemy combatants detained during a war, at least insofar as they are confined in an area away from the battlefield over which the United States exercises "absolute and indefinite" control, may seek a writ of habeas corpus in federal court. And, as an even more bizarre implication from the Court's reasoning, those prisoners whom the military plans to try by full-dress Commission at a future date may file habeas peti-

tions and secure release before their trials take place.

There is simply no support for the Court's assertion that constitutional rights extend to aliens held outside U. S. sovereign territory, see *Verdugo-Urquidez*, 494 U. S., at 271, and *Eisentrager* could not be clearer that the privilege of habeas corpus does not extend to aliens abroad. By blatantly distorting *Eisentrager*, the Court avoids the difficulty of explaining why it should be overruled. See *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 854–855 (1992) (identifying *stare decisis* factors). The rule that aliens abroad are not constitutionally entitled to habeas corpus has not proved unworkable in practice; if anything, it is the Court's "functional" test that does not (and never will) provide clear guidance for the future. *Eisentrager* forms a coherent whole with the accepted proposition that aliens abroad have no substantive rights under our Constitution. Since it was announced, no relevant factual premises have changed. It has engendered considerable reliance on the part of our military. And, as the Court acknowledges, text and history do not clearly compel a contrary ruling. It is a sad day for the rule of law when such an important constitutional precedent is discarded without an *apologia*, much less an apology.

C

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. *Ante*, at 35. That cannot be, the Court says, because it is the duty of this Court to say what the law is. *Id.*, at 35–36. 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*." *United States* v. *Raines*, 362 U. S. 17, 20–21 (1960) (citing *Marbury* v. *Madison*, 1 Cranch 137 (1803); emphasis added). Our power "to say what the law is" is circumscribed by the limits of our statutorily and constitutionally conferred jurisdiction. See *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 573–578 (1992). And that is precisely the question in these cases: whether the Constitution confers habeas jurisdiction on federal courts to decide petitioners' claims. It is both irrational and arrogant to say that the answer must be yes, because otherwise we would not be supreme.

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

III

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, as Judge Randolph's thorough opinion for the court below detailed. See 476 F. 3d 981, 988–990 (CADC 2007).

The Suspension Clause reads: "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." U. S. Const., Art. I, §9, cl. 2. The proper course of constitutional interpretation is to give the text the meaning it was understood to have at the time of its adoption by the people. See, *e.g.*, *Crawford* v. *Washington*, 541 U. S. 36, 54 (2004). That course is especially demanded when (as here) the Constitution limits the power of Congress to infringe upon a pre-existing common-law right. The nature of the writ of habeas corpus that cannot be suspended must be defined by the common-law writ that was available at the time of the founding. See *McNally* v. *Hill*, 293 U. S. 131, 135–136 (1934); see also *INS* v. *St. Cyr*, 533 U. S. 289, 342 (2001) (SCALIA, J., dissenting); *D'Oench, Duhme & Co.* v. *FDIC*, 315 U. S. 447, 471, n. 9 (1942) (Jackson, J., concurring).

It is entirely clear that, at English common law, the writ of habeas corpus did not extend beyond the sovereign territory of the Crown. To be sure, the writ had an "extraordinary territorial ambit," because it was a so-called "prerogative writ," which, unlike other writs, could extend beyond the realm of England to other places where the Crown was sovereign. R. Sharpe, The Law of Habeas Corpus 188 (2d ed. 1989) (hereinafter Sharpe); see also Note on the Power of the English Courts to Issue the Writ of Habeas to Places Within the Dominions of the Crown, But Out of England, and On the Position of Scotland in Relation to that Power, 8 Jurid. Rev. 157 (1896) (hereinafter Note on Habeas); *King* v. *Cowle*, 2 Burr. 834, 855–856, 97 Eng. Rep. 587, 599 (K. B. 1759).

But prerogative writs could not issue to foreign countries, even for British subjects; they were confined to the

King's dominions—those areas over which the Crown was sovereign. See Sharpe 188; 2 R. Chambers, A Course of Lectures on the English Law 1767–1773, pp. 7–8 (Curley ed. 1986); 3 W. Blackstone, Commentaries on the Laws of England 131 (1768) (hereinafter Blackstone). Thus, the writ has never extended to Scotland, which, although united to England when James I succeeded to the English throne in 1603, was considered a foreign dominion under a different Crown—that of the King of Scotland. Sharpe 191; Note on Habeas 158.[5] That is why Lord Mansfield wrote that "[t]o foreign dominions, which belong to a prince who succeeds to the throne of England, this Court has no power to send any writ of any kind. We cannot send a habeas corpus to Scotland . . . ." *Cowle*, *supra*, at 856, 97 Eng. Rep., at 599–600.

The common-law writ was codified by the Habeas Corpus Act of 1679, which "stood alongside Magna Charta and the English Bill of Rights of 1689 as a towering common law lighthouse of liberty—a beacon by which framing lawyers in America consciously steered their course." Amar, Sixth Amendment First Principles, 84 Geo. L. J. 641, 663 (1996). The writ was established in the Colonies beginning in the 1690's and at least one colony adopted the 1679 Act almost verbatim. See Dept. of Political Science, Okla. State Univ., Research Reports, No. 1, R. Walker, The American Reception of the Writ of Liberty 12–16 (1961). Section XI of the Act stated where the writ could run. It "may be directed and run into any county palatine, the cinque-ports, or other privileged places within the kingdom of England, dominion of Wales, or town of Berwick upon Tweed, and the islands of Jersey or Guernsey." 31 Car. 2, ch. 2. The cinque-ports and county palatine were so-called "exempt jurisdictions"—franchises

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[5] My dissent in *Rasul* v. *Bush,* 542 U. S. 466, 503 (2004), mistakenly included Scotland among the places to which the writ could run.

granted by the Crown in which local authorities would manage municipal affairs, including the court system, but over which the Crown maintained ultimate sovereignty. See 3 Blackstone 78–79. The other places listed—Wales, Berwick-upon-Tweed, Jersey, and Guernsey—were territories of the Crown even though not part England proper. See *Cowle*, *supra*, at 853–854, 97 Eng. Rep., at 598 (Wales and Berwick-upon-Tweed); 1 Blackstone 104 (Jersey and Guernsey); Sharpe 192 (same).

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 (in Article XII of the Act) the shipment of prisoners to places where the writ did not run or where its execution would be difficult. See 31 Car. 2, ch. 2; see generally Nutting, The Most Wholesome Law—The Habeas Corpus Act of 1679, 65 Am. Hist. Rev. 527 (1960).

The Habeas Corpus Act, then, confirms the consensus view of scholars and jurists that the writ did not run outside the sovereign territory of the Crown. The Court says that the idea that "jurisdiction followed the King's officers" is an equally credible view. *Ante*, at 16. It is not credible at all. The only support the Court cites for it is a page in Boumediene's brief, which in turn cites this Court's dicta in *Rasul,* 542 U. S., at 482, mischaracterizing Lord Mansfield's statement that the writ ran to any place that was "under the subjection of the Crown," *Cowle*, *supra*, at 856, 97 Eng. Rep., at 599. It is clear that Lord Mansfield was saying that the writ extended outside the realm of England proper, not outside the sovereign territory of the Crown.[6]

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[6] The dicta in *Rasul* also cited *Ex parte Mwenya*, [1960] 1 Q. B. 241, (C. A.), but as I explained in dissent, "[e]ach judge [in *Mwenya*] made

The Court dismisses the example of Scotland on the grounds that Scotland had its own judicial system and that the writ could not, as a practical matter, have been enforced there. *Ante*, at 20. Those explanations are totally unpersuasive. The existence of a separate court system was never a basis for denying the power of a court to issue the writ. See 9 W. Holdsworth, A History of English Law 124 (3d ed. 1944) (citing *Ex parte Anderson*, 3 El. and El. 487 (1861)). And as for logistical problems, the same difficulties were present for places like the Channel Islands, where the writ did run. The Court attempts to draw an analogy between the prudential limitations on issuing the writ to such remote areas within the sovereign territory of the Crown and the jurisdictional prohibition on issuing the writ to Scotland. See *ante*, at 19–20. But the very authority that the Court cites, Lord Mansfield, expressly distinguished between these two concepts, stating that English courts had the "power" to send the writ to places within the Crown's sovereignty, the "only question" being the "propriety," while they had "no power to send any writ of any kind" to Scotland and other "foreign dominions." *Cowle*, *supra*, at 856, 97 Eng. Rep., at 599–600. The writ did not run to Scotland because, even after the Union, "Scotland remained a foreign dominion of the prince who succeeded to the English throne," and "union did not extend the prerogative of the English crown to Scotland." Sharpe 191; see also Sir Matthew Hale's The Prerogatives of the King 19 (D. Yale ed. 1976).[7]

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clear that the detainee's status as a subject was material to the resolution of the case," 542 U. S., at 504.

[7] The Court also argues that the fact that the writ could run to Ireland, even though it was ruled under a "separate" crown, shows that formal sovereignty was not the touchstone of habeas jurisdiction. *Ante*, at 21. The passage from Blackstone that the Court cites, however, describes Ireland as "a dependent, subordinate kingdom" that was part of the "king's dominions." 1 Blackstone 98, 100 (internal quotation

In sum, *all* available historical evidence points to the conclusion that the writ would not have been available at common law for aliens captured and held outside the sovereign territory of the Crown. Despite three opening briefs, three reply briefs, and support from a legion of *amici,* petitioners have failed to identify a single case in the history of Anglo-American law that supports their claim to jurisdiction. The Court finds it significant that there is no recorded case *denying* jurisdiction to such prisoners either. See *ante*, at 21–22. But a case standing for the remarkable proposition that the writ could issue to a foreign land would surely have been reported, whereas a case denying such a writ for lack of jurisdiction would likely not. At a minimum, the absence of a reported case either way leaves unrefuted the voluminous commentary stating that habeas was confined to the dominions of the Crown.

What history teaches is confirmed by the nature of the limitations that the Constitution places upon suspension of the common-law writ. It can be suspended only "in Cases of Rebellion or Invasion." Art. I, §9, cl. 2. The latter case (invasion) is plainly limited to the territory of the United States; and while it is conceivable that a rebellion could be mounted by American citizens abroad, surely the overwhelming majority of its occurrences would be domestic. If the extraterritorial scope of habeas turned on flexible, "functional" considerations, as the Court holds, why would the Constitution limit its suspension almost entirely to instances of domestic crisis? Surely there is an even greater justification for suspension in foreign lands where the United States might hold prisoners of war

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marks omitted). And Lord Mansfield's opinion in *Cowle* plainly understood Ireland to be "a dominion of the Crown of England," in contrast to the "foreign dominio[n]" of Scotland, and thought that distinction dispositive of the question of habeas jurisdiction. *Cowle*, *supra*, at 856, 97 Eng. Rep., at 599–600.

during an ongoing conflict. And correspondingly, there is less threat to liberty when the Government suspends the writ's (supposed) application in foreign lands, where even on the most extreme view prisoners are entitled to fewer constitutional rights. It makes no sense, therefore, for the Constitution generally to forbid suspension of the writ abroad if indeed the writ has application there.

It may be objected that the foregoing analysis proves too much, since this Court has already suggested that the writ of habeas corpus *does* run abroad for the benefit of United States citizens. "[T]he position that United States citizens throughout the world may be entitled to habeas corpus rights . . . is precisely the position that this Court adopted in *Eisentrager*, see 339 U. S., at 769–770, even while holding that aliens abroad did not have habeas corpus rights." *Rasul*, 542 U. S., at 501, 502 (SCALIA, J., dissenting) (emphasis deleted). The reason for that divergence is not difficult to discern. The common-law writ, as received into the law of the new constitutional Republic, took on such changes as were demanded by a system in which rule is derived from the consent of the governed, and in which citizens (not "subjects") are afforded defined protections against the Government. As Justice Story wrote for the Court,

> "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation." *Van Ness* v. *Pacard*, 2 Pet. 137, 144 (1829).

See also Hall, The Common Law: An Account of its Reception in the United States, 4 Vand. L. Rev. 791 (1951). It accords with that principle to say, as the plurality opinion said in *Reid:* "When the Government reaches out to punish

a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." 354 U. S., at 6; see also *Verdugo-Urquidez*, 494 U. S., at 269–270. On that analysis, "[t]he distinction between citizens and aliens follows from the undoubted proposition that the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory." *Id.*, at 275 (KENNEDY, J., concurring).

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

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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.