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

I join the Court's opinion in its entirety and add this afterword only to emphasize two things one might overlook after reading the dissents.

Four years ago, this Court in *Rasul* v. *Bush*, 542 U. S. 466 (2004) held that statutory habeas jurisdiction extended to claims of foreign nationals imprisoned by the United States at Guantanamo Bay, "to determine the legality of the Executive's potentially indefinite detention" of them, *id.,* at 485. Subsequent legislation eliminated the statutory habeas jurisdiction over these claims, so that now there must be constitutionally based jurisdiction or none at all. JUSTICE SCALIA is thus correct that here, for the first time, this Court holds there is (he says "confers") constitutional habeas jurisdiction over aliens imprisoned

by the military outside an area of *de jure* national sovereignty, see *post,* at 1 (dissenting opinion). But no one who reads the Court's opinion in *Rasul* could seriously doubt that the jurisdictional question must be answered the same way in purely constitutional cases, given the Court's reliance on the historical background of habeas generally in answering the statutory question. See, *e.g.,* 542 U. S., at 473, 481–483, and nn. 11–14. Indeed, the Court in *Rasul* directly answered the very historical question that JUSTICE SCALIA says is dispositive, see *post,* at 18; it wrote that "[a]pplication of the habeas statute to persons detained at [Guantanamo] is consistent with the historical reach of the writ of habeas corpus," 542 U. S., at 481. JUSTICE SCALIA dismisses the statement as dictum, see *post,* at 21, but if dictum it was, it was dictum well considered, and it stated the view of five Members of this Court on the historical scope of the writ. Of course, it takes more than a quotation from *Rasul,* however much on point, to resolve the constitutional issue before us here, which the majority opinion has explored afresh in the detail it deserves. But whether one agrees or disagrees with today's decision, it is no bolt out of the blue.

A second fact insufficiently appreciated by the dissents is the length of the disputed imprisonments, some of the prisoners represented here today having been locked up for six years, *ante,* at 66 (opinion of the Court). Hence the hollow ring when the dissenters suggest that the Court is somehow precipitating the judiciary into reviewing claims that the military (subject to appeal to the Court of Appeals for the District of Columbia Circuit) could handle within some reasonable period of time. See, *e.g., post,* at 3 (opinion of ROBERTS, C. J.) ("[T]he Court should have declined to intervene until the D. C. Circuit had assessed the nature and validity of the congressionally mandated proceedings in a given detainee's case"); *post,* at 6 ("[I]t is not necessary to consider the availability of the writ until the

statutory remedies have been shown to be inadequate"); *post,* at 8 ("[The Court] rushes to decide the fundamental question of the reach of habeas corpus when the functioning of the DTA may make that decision entirely unnecessary"). These suggestions of judicial haste are all the more out of place given the Court's realistic acknowledgment that in periods of exigency the tempo of any habeas review must reflect the immediate peril facing the country. See *ante,* at 64–65.

It is in fact the very lapse of four years from the time *Rasul* put everyone on notice that habeas process was available to Guantanamo prisoners, and the lapse of six years since some of these prisoners were captured and incarcerated, that stand at odds with the repeated suggestions of the dissenters that these cases should be seen as a judicial victory in a contest for power between the Court and the political branches. See *post,* at 2, 3, 28 (ROBERTS, C. J., dissenting); *post,* at 5, 6, 17, 18, 25 (SCALIA, J., dissenting). The several answers to the charge of triumphalism might start with a basic fact of Anglo-American constitutional history: that the power, first of the Crown and now of the Executive Branch of the United States, is necessarily limited by habeas corpus jurisdiction to enquire into the legality of executive detention. And one could explain that in this Court's exercise of responsibility to preserve habeas corpus something much more significant is involved than pulling and hauling between the judicial and political branches. Instead, though, it is enough to repeat that some of these petitioners have spent six years behind bars. After six years of sustained executive detentions in Guantanamo, subject to habeas jurisdiction but without any actual habeas scrutiny, today's decision is no judicial victory, but an act of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value both to prisoners and to the Nation. See *ante,* at 69.