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]

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

Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants. The political branches crafted these procedures amidst an ongoing military conflict, after much careful investigation and thorough debate. The Court rejects them today out of hand, without bothering to say what due process rights the detainees possess, without explaining how the statute fails to vindicate those rights, and before a single petitioner has even attempted to avail himself of the law's operation. And to what effect? The majority merely replaces a review system designed by the people's representatives with a set of shapeless procedures to be defined by federal courts at some future date. One cannot help but

think, after surveying the modest practical results of the majority's ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants.

The majority is adamant that the Guantanamo detainees are entitled to the protections of habeas corpus—its opinion begins by deciding that question. I regard the issue as a difficult one, primarily because of the unique and unusual jurisdictional status of Guantanamo Bay. I nonetheless agree with JUSTICE SCALIA's analysis of our precedents and the pertinent history of the writ, and accordingly join his dissent. The important point for me, however, is that the Court should have resolved these cases on other grounds. Habeas is most fundamentally a procedural right, a mechanism for contesting the legality of executive detention. The critical threshold question in these cases, prior to any inquiry about the writ's scope, is whether the system the political branches designed protects whatever rights the detainees may possess. If so, there is no need for any additional process, whether called "habeas" or something else.

Congress entrusted that threshold question in the first instance to the Court of Appeals for the District of Columbia Circuit, as the Constitution surely allows Congress to do. See Detainee Treatment Act of 2005 (DTA), §1005(e)(2)(A), 119 Stat. 2742. But before the D. C. Circuit has addressed the issue, the Court cashiers the statute, and without answering this critical threshold question itself. The Court does eventually get around to asking whether review under the DTA is, as the Court frames it, an "adequate substitute" for habeas, *ante*, at 42, but even then its opinion fails to determine what rights the detainees possess and whether the DTA system satisfies them. The majority instead compares the undefined DTA process to an equally undefined habeas right—one that is to be given shape only in the future by district courts on a case-by-

case basis. This whole approach is misguided.

It is also fruitless. How the detainees' claims will be decided now that the DTA is gone is anybody's guess. But the habeas process the Court mandates will most likely end up looking a lot like the DTA system it replaces, as the district court judges shaping it will have to reconcile review of the prisoners' detention with the undoubted need to protect the American people from the terrorist threat—precisely the challenge Congress undertook in drafting the DTA. All that today's opinion has done is shift responsibility for those sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary.

I believe the system the political branches constructed adequately protects any constitutional rights aliens captured abroad and detained as enemy combatants may enjoy. I therefore would dismiss these cases on that ground. With all respect for the contrary views of the majority, I must dissent.

I

The Court's opinion makes plain that certiorari to review these cases should never have been granted. As two Members of today's majority once recognized, "traditional rules governing our decision of constitutional questions and our practice of requiring the exhaustion of available remedies . . . make it appropriate to deny these petitions." *Boumediene* v. *Bush*, 549 U. S. ___ (2007) (slip op., at 1) (citation omitted) (statement of STEVENS and KENNEDY, JJ., respecting denial of certiorari). Just so. Given the posture in which these cases came to us, the 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.

The political branches created a two-part, collateral review procedure for testing the legality of the prisoners'

detention: It begins with a hearing before a Combatant Status Review Tribunal (CSRT) followed by review in the D. C. Circuit. As part of that review, Congress authorized the D. C. Circuit to decide whether the CSRT proceedings are consistent with "the Constitution and laws of the United States." DTA §1005(e)(2)(C), 119 Stat. 2742. No petitioner, however, has invoked the D. C. Circuit review the statute specifies. See 476 F. 3d 981, 994, and n. 16 (CADC 2007); Brief for Federal Respondents 41–43. As a consequence, that court has had no occasion to decide whether the CSRT hearings, followed by review in the Court of Appeals, vindicate whatever constitutional and statutory rights petitioners may possess. See 476 F. 3d, at 994, and n. 16.

Remarkably, this Court does not require petitioners to exhaust their remedies under the statute; it does not wait to see whether those remedies will prove sufficient to protect petitioners' rights. Instead, it not only denies the D. C. Circuit the opportunity to assess the statute's remedies, it refuses to do so itself: the majority expressly declines to decide whether the CSRT procedures, coupled with Article III review, satisfy due process. See *ante*, at 54.

It is grossly premature to pronounce on the detainees' right to habeas without first assessing whether the remedies the DTA system provides vindicate whatever rights petitioners may claim. The plurality in *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 533 (2004), explained that the Constitution guaranteed an American *citizen* challenging his detention as an enemy combatant the right to "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." The plurality specifically stated that constitutionally adequate collateral process could be provided "by an appropriately authorized and properly constituted military tribunal," given the "uncommon

potential to burden the Executive at a time of ongoing military conflict." *Id.*, at 533, 538. This point is directly pertinent here, for surely the Due Process Clause does not afford *non*-citizens in such circumstances greater protection than citizens are due.

If the CSRT procedures meet the minimal due process requirements outlined in *Hamdi*, and if an Article III court is available to ensure that these procedures are followed in future cases, see *id.,* at 536; *INS* v. *St. Cyr*, 533 U. S. 289, 304 (2001); *Heikkila* v. *Barber*, 345 U. S. 229, 236 (1953), there is no need to reach the Suspension Clause question. Detainees will have received all the process the Constitution could possibly require, whether that process is called "habeas" or something else. The question of the writ's reach need not be addressed.

This is why the Court should have required petitioners to exhaust their remedies under the statute. As we explained in *Gusik* v. *Schilder*, 340 U. S. 128, 132 (1950), "If an available procedure has not been employed to rectify the alleged error" petitioners complain of, "any interference by [a] federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion." Because the majority refuses to assess whether the CSRTs comport with the Constitution, it ends up razing a system of collateral review that it admits may in fact satisfy the Due Process Clause and be "structurally sound." *Ante*, at 56. But if the collateral review procedures Congress has provided—CSRT review coupled with Article III scrutiny—are sound, interference by a federal habeas court may be entirely unnecessary.

The only way to know is to require petitioners to use the alternative procedures Congress designed. Mandating that the petitioners exhaust their statutory remedies "is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other correc-

tive procedures are shown to be futile." *Gusik*, *supra*, at 132. So too here, it is not necessary to consider the availability of the writ until the statutory remedies have been shown to be inadequate to protect the detainees' rights. Cf. 28 U. S. C. §2254(b)(1)(A) ("An application for a writ of habeas corpus . . . shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State"). Respect for the judgments of Congress—whose Members take the same oath we do to uphold the Constitution—requires no less.

In the absence of any assessment of the DTA's remedies, the question whether detainees are entitled to habeas is an entirely speculative one. Our precedents have long counseled us to avoid deciding such hypothetical questions of constitutional law. See *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such [questions are] unavoidable"); see also *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring) (Constitutional questions should not be decided unless "'absolutely necessary to a decision of the case'" (quoting *Burton* v. *United States*, 196 U. S. 283, 295 (1905))). This is a "fundamental rule of judicial restraint." *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 467 U. S. 138, 157 (1984).

The Court acknowledges that "the ordinary course" would be not to decide the constitutionality of the DTA at this stage, but abandons that "ordinary course" in light of the "gravity" of the constitutional issues presented and the prospect of additional delay. *Ante*, at 43. It is, however, precisely when the issues presented are grave that adherence to the ordinary course is most important. A principle applied only when unimportant is not much of a principle at all, and charges of judicial activism are most effectively

rebutted when courts can fairly argue they are following normal practices.

The Court is also concerned that requiring petitioners to pursue "DTA review before proceeding with their habeas corpus actions" could involve additional delay. *Ante*, at 66. The nature of the habeas remedy the Court instructs lower courts to craft on remand, however, is far more unsettled than the process Congress provided in the DTA. See *ante*, at 69 ("[O]ur opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined"). There is no reason to suppose that review according to procedures the Federal Judiciary will design, case by case, will proceed any faster than the DTA process petitioners disdained.

On the contrary, the system the Court has launched (and directs lower courts to elaborate) promises to take longer. The Court assures us that before bringing their habeas petitions, detainees must usually complete the CSRT process. See *ante*, at 66. Then they may seek review in federal district court. Either success or failure there will surely result in an appeal to the D. C. Circuit—exactly where judicial review *starts* under Congress's system. The effect of the Court's decision is to add additional layers of quite possibly redundant review. And because nobody knows how these new layers of "habeas" review will operate, or what new procedures they will require, their contours will undoubtedly be subject to fresh bouts of litigation. If the majority were truly concerned about delay, it would have required petitioners to use the DTA process that has been available to them for 2½ years, with its Article III review in the D. C. Circuit. That system might well have provided petitioners all the relief to which they are entitled long before the Court's newly installed habeas review could hope to do so.[1]

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[1] In light of the foregoing, the concurrence is wrong to suggest that I

The Court's refusal to require petitioners to exhaust the remedies provided by Congress violates the "traditional rules governing our decision of constitutional questions." *Boumediene*, 549 U. S., at ___ (slip op., at 1) (statement of STEVENS and KENNEDY, JJ., respecting denial of certiorari). The Court's disrespect for these rules makes its decision an awkward business. It rushes to decide the fundamental question of the reach of habeas corpus when the functioning of the DTA may make that decision entirely unnecessary, and it does so with scant idea of how DTA judicial review will actually operate.

II

The majority's overreaching is particularly egregious given the weakness of its objections to the DTA. Simply put, the Court's opinion fails on its own terms. The majority strikes down the statute because it is not an "adequate substitute" for habeas review, *ante*, at 42, but fails to show what rights the detainees have that cannot be vindicated by the DTA system.

Because the central purpose of habeas corpus is to test the legality of executive detention, the writ requires most fundamentally an Article III court able to hear the pris-

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"insufficiently appreciat[e]" the issue of delay in these cases. See *ante*, at 2 (opinion of SOUTER, J.). This Court issued its decisions in *Rasul* v. *Bush*, 542 U. S. 466, and *Hamdi* v. *Rumsfeld* 542 U. S. 507, in 2004. The concurrence makes it sound as if the political branches have done nothing in the interim. In fact, Congress responded 18 months later by enacting the DTA. Congress cannot be faulted for taking that time to consider how best to accommodate both the detainees' interests and the need to keep the American people safe. Since the DTA became law, petitioners have steadfastly refused to avail themselves of the statute's review mechanisms. It is unfair to complain that the DTA system involves too much delay when petitioners have consistently refused to use it, preferring to litigate instead. Today's decision obligating district courts to craft new procedures to replace those in the DTA will only prolong the process—and delay relief.

oner's claims and, when necessary, order release. See *Brown* v. *Allen*, 344 U. S. 443, 533 (1953) (Jackson, J., concurring in result). Beyond that, the process a given prisoner is entitled to receive depends on the circumstances and the rights of the prisoner. See *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976). After much hemming and hawing, the majority appears to concede that the DTA provides an Article III court competent to order release. See *ante*, at 61. The only issue in dispute is the process the Guantanamo prisoners are entitled to use to test the legality of their detention. *Hamdi* concluded that American citizens detained as enemy combatants are entitled to only limited process, and that much of that process could be supplied by a military tribunal, with review to follow in an Article III court. That is precisely the system we have here. It is adequate to vindicate whatever due process rights petitioners may have.

A

The Court reaches the opposite conclusion partly because it misreads the statute. The majority appears not to understand how the review system it invalidates actually works—specifically, how CSRT review and review by the D. C. Circuit fit together. After briefly acknowledging in its recitation of the facts that the Government designed the CSRTs "to comply with the due process requirements identified by the plurality in *Hamdi*," *ante*, at 3, the Court proceeds to dismiss the tribunal proceedings as no more than a suspect method used by the Executive for determining the status of the detainees in the first instance, see *ante*, at 43. This leads the Court to treat the review the DTA provides in the D. C. Circuit as the only opportunity detainees have to challenge their status determination. See *ante*, at 49.

The Court attempts to explain its glancing treatment of the CSRTs by arguing that "[w]hether one characterizes

the CSRT process as direct review of the Executive's battlefield determination . . . or as the first step in the collateral review of a battlefield determination makes no difference." *Ante*, at 54. First of all, the majority is quite wrong to dismiss the Executive's determination of detainee status as no more than a "battlefield" judgment, as if it were somehow provisional and made in great haste. In fact, detainees are designated "enemy combatants" only after "multiple levels of review by military officers and officials of the Department of Defense." Memorandum of the Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base (July 29, 2004), App. J to Pet. for Cert. in No. 06–1196, p. 150 (hereinafter Implementation Memo).

The majority is equally wrong to characterize the CSRTs as part of that initial determination process. They are instead a means for detainees to *challenge* the Government's determination. The Executive designed the CSRTs to mirror Army Regulation 190–8, see Brief for Federal Respondents 48, the very procedural model the plurality in *Hamdi* said provided the type of process an enemy combatant could expect from a habeas court, see 542 U. S., at 538 (plurality opinion). The CSRTs operate much as habeas courts would if hearing the detainee's collateral challenge for the first time: They gather evidence, call witnesses, take testimony, and render a decision on the legality of the Government's detention. See Implementation Memo, App. J to Pet. for Cert. in No. 06–1196, at 153–162. If the CSRT finds a particular detainee has been improperly held, it can order release. See *id.*, at 164.

The majority insists that even if "the CSRTs satisf[ied] due process standards," full habeas review would still be necessary, because habeas is a collateral remedy available even to prisoners "detained pursuant to the most rigorous

proceedings imaginable." *Ante*, at 55, 56. This comment makes sense only if the CSRTs are incorrectly viewed as a method used by the Executive for determining the prisoners' status, and not as themselves part of the collateral review to test the validity of that determination. See *Gusik*, 340 U. S., at 132. The majority can deprecate the importance of the CSRTs only by treating them as something they are not.

The use of a military tribunal such as the CSRTs to review the aliens' detention should be familiar to this Court in light of the *Hamdi* plurality, which said that the due process rights enjoyed by *American citizens* detained as enemy combatants could be vindicated "by an appropriately authorized and properly constituted military tribunal." 542 U. S., at 538. The DTA represents Congress' considered attempt to provide the accused alien combatants detained at Guantanamo a constitutionally adequate opportunity to contest their detentions before just such a tribunal.

But Congress went further in the DTA. CSRT review is just the first tier of collateral review in the DTA system. The statute provides additional review in an Article III court. Given the rationale of today's decision, it is well worth recalling exactly what the DTA provides in this respect. The statute directs the D. C. Circuit to consider whether a particular alien's status determination "was consistent with the standards and procedures specified by the Secretary of Defense" *and* "whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." DTA §1005(e)(2)(C), 119 Stat. 2742. That is, a *court* determines whether the CSRT procedures are constitutional, and a *court* determines whether those procedures were followed in a particular case.

In short, the *Hamdi* plurality concluded that this type of review would be enough to satisfy due process, even for

citizens. See 542 U. S., at 538. Congress followed the Court's lead, only to find itself the victim of a constitutional bait and switch.

Hamdi merits scant attention from the Court—a remarkable omission, as *Hamdi* bears directly on the issues before us. The majority attempts to dismiss *Hamdi*'s relevance by arguing that because the availability of §2241 federal habeas was never in doubt in that case, "the Court had no occasion to define the necessary scope of habeas review . . . in the context of enemy combatant detentions." *Ante*, at 55. Hardly. *Hamdi* was all about the scope of habeas review in the context of enemy combatant detentions. The petitioner, an American citizen held within the United States as an enemy combatant, invoked the writ to challenge his detention. 542 U. S., at 510–511. After "a careful examination both of the writ . . . and of the Due Process Clause," this Court enunciated the "basic process" the Constitution entitled Hamdi to expect from a habeas court under §2241. *Id.*, at 525, 534. That process consisted of the right to "receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Id.*, at 533. In light of the Government's national security responsibilities, the plurality found the process could be "tailored to alleviate [the] uncommon potential to burden the Executive at a time of ongoing military conflict." *Ibid.* For example, the Government could rely on hearsay and could claim a presumption in favor of its own evidence. See *id.*, at 533–534.

Hamdi further suggested that this "basic process" on collateral review could be provided by a military tribunal. It pointed to prisoner-of-war tribunals as a model that would satisfy the Constitution's requirements. See *id.*, at 538. Only "[i]n the *absence* of such process" before a military tribunal, the Court held, would Article III courts need to conduct full-dress habeas proceedings to "ensure that

the minimum requirements of due process are achieved." *Ibid.* (emphasis added). And even then, the petitioner would be entitled to no more process than he would have received from a properly constituted military review panel, given his limited due process rights and the Government's weighty interests. See *id.*, at 533–534, 538.

Contrary to the majority, *Hamdi* is of pressing relevance because it establishes the procedures American *citizens* detained as enemy combatants can expect from a habeas court proceeding under §2241. The DTA system of military tribunal hearings followed by Article III review looks a lot like the procedure *Hamdi* blessed. If nothing else, it is plain from the design of the DTA that Congress, the President, and this Nation's military leaders have made a good-faith effort to follow our precedent.

The Court, however, will not take "yes" for an answer. The majority contends that "[i]f Congress had envisioned DTA review as coextensive with traditional habeas corpus," it would have granted the D. C. Circuit far broader review authority. *Ante*, at 48. Maybe so, but that comment reveals the majority's misunderstanding. "[T]raditional habeas corpus" takes *no* account of what *Hamdi* recognized as the "uncommon potential to burden the Executive at a time of ongoing military conflict." 542 U. S., at 533. Besides, Congress and the Executive did not envision "DTA review"—by which I assume the Court means D. C. Circuit review, see *ante*, at 48—as the detainees' only opportunity to challenge their detentions. Instead, the political branches crafted CSRT *and* D. C. Circuit review to operate together, with the goal of providing noncitizen detainees the level of collateral process *Hamdi* said would satisfy the due process rights of American citizens. See Brief for Federal Respondents 48–53.

B

Given the statutory scheme the political branches

adopted, and given *Hamdi*, it simply will not do for the majority to dismiss the CSRT procedures as "far more limited" than those used in military trials, and therefore beneath the level of process "that would eliminate the need for habeas corpus review." *Ante*, at 37. The question is not how much process the CSRTs provide in comparison to other modes of adjudication. The question is whether the CSRT procedures—coupled with the judicial review specified by the DTA—provide the "basic process" *Hamdi* said the Constitution affords American citizens detained as enemy combatants. See 542 U. S., at 534.

By virtue of its refusal to allow the D. C. Circuit to assess petitioners' statutory remedies, and by virtue of its own refusal to consider, at the outset, the fit between those remedies and due process, the majority now finds itself in the position of evaluating whether the DTA system is an adequate substitute for habeas review without knowing what rights either habeas or the DTA is supposed to protect. The majority attempts to elide this problem by holding that petitioners have a right to habeas corpus and then comparing the DTA against the "historic office" of the writ. *Ante*, at 47. But habeas is, as the majority acknowledges, a flexible remedy rather than a substantive right. Its "precise application . . . change[s] depending upon the circumstances." *Ante*, at 50. The shape of habeas review ultimately depends on the nature of the rights a petitioner may assert. See, *e.g., Reid* v. *Covert*, 354 U. S. 1, 75 (1957) (Harlan, J., concurring in result) ("[T]he question of which specific safeguards of the Constitution are appropriately to be applied in a particular context . . . can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case").

The scope of federal habeas review is traditionally more limited in some contexts than in others, depending on the status of the detainee and the rights he may assert. See *St. Cyr*, 533 U. S., at 306 ("In [immigration cases], other

than the question whether there was some evidence to support the [deportation] order, the courts generally did not review factual determinations made by the Executive" (footnote omitted)); *Burns* v. *Wilson*, 346 U. S. 137, 139 (1953) (plurality opinion) ("[I]n military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases"); *In re Yamashita*, 327 U. S. 1, 8 (1946) ("The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review"); *Ex parte Quirin*, 317 U. S. 1, 25 (1942) (federal habeas review of military commission verdict limited to determining commission's jurisdiction).

Declaring that petitioners have a right to habeas in no way excuses the Court from explaining why the DTA does not protect whatever due process or statutory rights petitioners may have. Because if the DTA provides a means for vindicating petitioners' rights, it is necessarily an adequate substitute for habeas corpus. See *Swain* v. *Pressley*, 430 U. S. 372, 381 (1977); *United States* v. *Hayman*, 342 U. S. 205, 223 (1952).

For my part, I will assume that any due process rights petitioners may possess are no greater than those of American citizens detained as enemy combatants. It is worth noting again that the *Hamdi* controlling opinion said the Constitution guarantees citizen detainees only "basic" procedural rights, and that the process for securing those rights can "be tailored to alleviate [the] uncommon potential to burden the Executive at a time of ongoing military conflict." 542 U. S., at 533. The majority, however, objects that "the procedural protections afforded to the detainees in the CSRT hearings are . . . limited." *Ante*, at 37. But the evidentiary and other limitations the Court complains of reflect the nature of the issue in contest, namely, the status of aliens captured by our Armed Forces

abroad and alleged to be enemy combatants. Contrary to the repeated suggestions of the majority, DTA review need not parallel the habeas privileges enjoyed by noncombatant American citizens, as set out in 28 U. S. C. §2241 (2000 ed. and Supp V). Cf. *ante*, at 46–47. It need only provide process adequate for noncitizens detained as alleged combatants.

To what basic process are these detainees due as habeas petitioners? We have said that "at the absolute minimum," the Suspension Clause protects the writ "'as it existed in 1789.'" *St. Cyr*, *supra*, at 301 (quoting *Felker* v. *Turpin*, 518 U. S. 651, 663–664 (1996)). The majority admits that a number of historical authorities suggest that at the time of the Constitution's ratification, "common-law courts abstained altogether from matters involving prisoners of war." *Ante*, at 17. If this is accurate, the process provided prisoners under the DTA is plainly more than sufficient—it allows alleged combatants to challenge both the factual and legal bases of their detentions.

Assuming the constitutional baseline is more robust, the DTA still provides adequate process, and by the majority's own standards. Today's Court opines that the Suspension Clause guarantees prisoners such as the detainees "a meaningful opportunity to demonstrate that [they are] being held pursuant to the erroneous application or interpretation of relevant law." *Ante*, at 50 (internal quotation marks omitted). Further, the Court holds that to be an adequate substitute, any tribunal reviewing the detainees' cases "must have the power to order the conditional release of an individual unlawfully detained." *Ibid.* The DTA system—CSRT review of the Executive's determination followed by D. C. Circuit review for sufficiency of the evidence and the constitutionality of the CSRT process—meets these criteria.

C

At the CSRT stage, every petitioner has the right to present evidence that he has been wrongfully detained. This includes the right to call witnesses who are reasonably available, question witnesses called by the tribunal, introduce documentary evidence, and testify before the tribunal. See Implementation Memo, App. J to Pet. for Cert. in No. 06–1196, at 154–156, 158–159, 161.

While the Court concedes detainees may confront all witnesses called before the tribunal, it suggests this right is "more theoretical than real" because "there are in effect no limits on the admission of hearsay evidence." *Ante*, at 55. The Court further complains that petitioners lack "the assistance of counsel," and—given the limits on their access to classified information—"may not be aware of the most critical allegations" against them. *Ante*, at 54. None of these complaints is persuasive.

Detainees not only have the opportunity to confront any witness who appears before the tribunal, they may call witnesses of their own. The Implementation Memo requires only that detainees' witnesses be "reasonably available," App. J to Pet. for Cert. in No. 06–1196, at 155, a requirement drawn from Army Regulation 190–8, ch. 1, §1–6(*e*)(6), and entirely consistent with the Government's interest in avoiding "a futile search for evidence" that might burden warmaking responsibilities, *Hamdi*, *supra*, at 532. The dangerous mission assigned to our forces abroad is to fight terrorists, not serve subpoenas. The Court is correct that some forms of hearsay evidence are admissible before the CSRT, but *Hamdi* expressly approved this use of hearsay by habeas courts. 542 U. S., at 533–534 ("Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government").

As to classified information, while detainees are not permitted access to it themselves, the Implementation

Memo provides each detainee with a "Personal Representative" who may review classified documents at the CSRT stage and summarize them for the detainee. Implementation Memo, *supra*, at 152, 154–155, 156; Brief for Federal Respondents 54–55. The prisoner's counsel enjoys the same privilege on appeal before the D. C. Circuit. That is more access to classified material for alleged alien enemy combatants than ever before provided. I am not aware of a single instance—and certainly the majority cites none—in which detainees such as petitioners have been provided access to classified material in *any* form. Indeed, prisoners of war who challenge their status determinations under the Geneva Convention are afforded no such access, see Army Regulation 190–8, ch. 1, §§1–6(*e*)(3) and (5), and the prisoner-of-war model is the one *Hamdi* cited as consistent with the demands of due process for *citizens*, see 542 U. S., at 538.

What alternative does the Court propose? Allow free access to classified information and ignore the risk the prisoner may eventually convey what he learns to parties hostile to this country, with deadly consequences for those who helped apprehend the detainee? If the Court can design a better system for communicating to detainees the substance of any classified information relevant to their cases, without fatally compromising national security interests and sources, the majority should come forward with it. Instead, the majority fobs that vexing question off on district courts to answer down the road.

Prisoners of war are not permitted access to classified information, and neither are they permitted access to counsel, another supposed failing of the CSRT process. And yet the Guantanamo detainees are hardly denied all legal assistance. They are provided a "Personal Representative" who, as previously noted, may access classified information, help the detainee arrange for witnesses, assist the detainee's preparation of his case, and even aid

the detainee in presenting his evidence to the tribunal. See Implementation Memo, *supra*, at 161. The provision for a personal representative on this order is one of several ways in which the CSRT procedures are *more* generous than those provided prisoners of war under Army Regulation 190–8.

Keep in mind that all this is just at the CSRT stage. Detainees receive additional process before the D. C. Circuit, including full access to appellate counsel and the right to challenge the factual and legal bases of their detentions. DTA §1005(e)(2)(C) empowers the Court of Appeals to determine not only whether the CSRT observed the "procedures specified by the Secretary of Defense," but also "whether the use of such standards and procedures . . . is consistent with the Constitution and laws of the United States." 119 Stat. 2742. These provisions permit detainees to dispute the sufficiency of the evidence against them. They allow detainees to challenge a CSRT panel's interpretation of any relevant law, and even the constitutionality of the CSRT proceedings themselves. This includes, as the Solicitor General acknowledges, the ability to dispute the Government's right to detain alleged combatants in the first place, and to dispute the Government's definition of "enemy combatant." Brief for Federal Respondents 59. All this before an Article III court—plainly a neutral decisionmaker.

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

D

Despite these guarantees, the Court finds the DTA system an inadequate habeas substitute, for one central

reason: Detainees are unable to introduce at the appeal stage exculpatory evidence discovered after the conclusion of their CSRT proceedings. See *ante*, at 58. The Court hints darkly that the DTA may suffer from other infirmities, see *ante*, at 63 ("We do not imply DTA review would be a constitutionally sufficient replacement for habeas corpus but for these limitations on the detainee's ability to present exculpatory evidence"), but it does not bother to name them, making a response a bit difficult. As it stands, I can only assume the Court regards the supposed defect it did identify as the gravest of the lot.

If this is the most the Court can muster, the ice beneath its feet is thin indeed. As noted, the CSRT procedures provide ample opportunity for detainees to introduce exculpatory evidence—whether documentary in nature or from live witnesses—before the military tribunals. See *infra*, at 21–23; Implementation Memo, App. J to Pet. for Cert. in No. 06–196, at 155–156. And if their ability to introduce such evidence is denied contrary to the Constitution or laws of the United States, the D. C. Circuit has the authority to say so on review.

Nevertheless, the Court asks us to imagine an instance in which evidence is discovered *after* the CSRT panel renders its decision, but *before* the Court of Appeals reviews the detainee's case. This scenario, which of course has not yet come to pass as no review in the D. C. Circuit has occurred, provides no basis for rejecting the DTA as a habeas substitute. While the majority is correct that the DTA does not contemplate the introduction of "newly discovered" evidence before the Court of Appeals, petitioners and the Solicitor General agree that the DTA *does* permit the D. C. Circuit to remand a detainee's case for a new CSRT determination. Brief for Petitioner Boumediene et al. in No. 06–1195, at 30; Brief for Federal Respondents 60–61. In the event a detainee alleges that he has obtained new and persuasive exculpatory evidence that

would have been considered by the tribunal below had it only been available, the D. C. Circuit could readily remand the case to the tribunal to allow that body to consider the evidence in the first instance. The Court of Appeals could later review any new or reinstated decision in light of the supplemented record.

If that sort of procedure sounds familiar, it should. Federal appellate courts reviewing factual determinations follow just such a procedure in a variety of circumstances. See, *e.g., United States* v. *White*, 492 F. 3d 380, 413 (CA6 2007) (remanding new-evidence claim to the district court for a *Brady* evidentiary hearing); *Avila* v. *Roe*, 298 F. 3d 750, 754 (CA9 2002) (remanding habeas claim to the district court for evidentiary hearing to clarify factual record); *United States* v. *Leone*, 215 F. 3d 253, 256 (CA2 2000) (observing that when faced on direct appeal with an underdeveloped claim for ineffective assistance of counsel, the appellate court may remand to the district court for necessary factfinding).

A remand is not the only relief available for detainees caught in the Court's hypothetical conundrum. The DTA expressly directs the Secretary of Defense to "provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee." DTA §1005(a)(3). Regulations issued by the Department of Defense provide that when a detainee puts forward new, material evidence "not previously presented to the detainee's CSRT," the Deputy Secretary of Defense "'will direct that a CSRT convene to reconsider the basis of the detainee's . . . status in light of the new information.'" Office for the Administrative Review of the Detention of Enemy Combatants, Instruction 5421.1, Procedure for Review of "New Evidence" Relating to Enemy Combatant (EC) Status ¶¶4(a)(1), 5(b) (May 7, 2007); Brief for Federal Respondents 56, n. 30. Pursuant to DTA §1005(e)(2)(A), the resulting CSRT determination is again reviewable in

full by the D. C. Circuit.[2]

In addition, DTA §1005(d)(1) further requires the Department of Defense to conduct a yearly review of the status of each prisoner. See 119 Stat. 2741. The Deputy Secretary of Defense has promulgated concomitant regulations establishing an Administrative Review Board to assess "annually the need to continue to detain each enemy combatant." Deputy Secretary of Defense Order OSD 06942–04 (May 11, 2004), App. K to Pet. for Cert. in No. 06–1196, p. 189. In the words of the implementing order, the purpose of this annual review is to afford every detainee the opportunity "to explain why he is no longer a threat to the United States" and should be released. *Ibid*. The Board's findings are forwarded to a presidentially appointed, Senate-confirmed civilian within the Department of Defense whom the Secretary of Defense has designated to administer the review process. This designated civilian official has the authority to order release upon the Board's recommendation. *Id*., at 201.

The Court's hand wringing over the DTA's treatment of later-discovered exculpatory evidence is the most it has to show after a roving search for constitutionally problematic scenarios. But "[t]he delicate power of pronouncing an Act of Congress unconstitutional," we have said, "is not to be exercised with reference to hypothetical cases thus imagined." *United States* v. *Raines*, 362 U. S. 17, 22 (1960). The Court today invents a sort of reverse facial challenge

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[2] The Court wonders what might happen if the detainee puts forward new material evidence but the Deputy Secretary refuses to convene a new CSRT. See *ante*, at 62–63. The answer is that the detainee can petition the D. C. Circuit for review. The DTA directs that the procedures for review of new evidence be included among "[t]he procedures submitted under paragraph (1)(A)" governing CSRT review of enemy combatant status §1405(a)(3), 119 Stat. 3476. It is undisputed that the D. C. Circuit has statutory authority to review and enforce these procedures. See DTA §1005(e)(2)(C)(i), *id.,* at 2742.

and applies it with gusto: If there is *any* scenario in which the statute *might* be constitutionally infirm, the law must be struck down. Cf. *United States* v. *Salerno*, 481 U. S. 739, 745 (1987) ("A facial challenge . . . must establish that no set of circumstances exists under which the Act would be valid"); see also *Washington* v. *Glucksberg*, 521 U. S. 702, 739–740, and n. 7 (1997) (STEVENS, J., concurring in judgments) (facial challenge must fail where the statute has "'plainly legitimate sweep'" (quoting *Broadrick* v. *Oklahoma*, 413 U. S. 601, 615 (1973))). The Court's new method of constitutional adjudication only underscores its failure to follow our usual procedures and require petitioners to demonstrate that *they* have been harmed by the statute they challenge. In the absence of such a concrete showing, the Court is unable to imagine a plausible hypothetical in which the DTA is unconstitutional.

E

The Court's second criterion for an adequate substitute is the "power to order the conditional release of an individual unlawfully detained." *Ante*, at 50. As the Court basically admits, the DTA can be read to permit the D. C. Circuit to order release in light of our traditional principles of construing statutes to avoid difficult constitutional issues, when reasonably possible. See *ante*, at 56–57.

The Solicitor General concedes that remedial authority of some sort must be implied in the statute, given that the DTA—like the general habeas law itself, see 28 U. S. C. §2243—provides no express remedy of any kind. Brief for Federal Respondents 60–61. The parties agree that at the least, the DTA empowers the D. C. Circuit to remand a prisoner's case to the CSRT with instructions to perform a new status assessment. Brief for Petitioner Boumediene et al. in No. 06–1195, at 30; Brief for Federal Respondents 60–61. To avoid constitutional infirmity, it is reasonable to imply more, see *Ashwander*, 297 U. S., at 348 (Brandeis,

J., concurring) ("When the validity of an act of the Congress is drawn in question . . . it is a cardinal principle that this Court will . . . ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided" (internal quotation marks omitted)); see also *St. Cyr*, 533 U. S., at 299–300, especially in view of the Solicitor General's concession at oral argument and in his Supplemental Brief that authority to release might be read in the statute, see Tr. of Oral Arg. 37; Supplemental Brief for Federal Respondents 9.

The Court grudgingly suggests that "Congress' silence on the question of remedies suggests acquiescence to any constitutionally required remedy." *Ante*, at 58. But the argument in favor of statutorily authorized release is stronger than that. The DTA's parallels to 28 U. S. C. §2243 on this score are noteworthy. By way of remedy, the general federal habeas statute provides only that the court, having heard and determined the facts, shall "dispose of the matter as law and justice require." *Ibid.* We have long held, and no party here disputes, that this includes the power to order release. See *Wilkinson* v. *Dotson*, 544 U. S. 74, 79 (2005) ("[T]he writ's history makes clear that it traditionally has been accepted as the specific instrument to obtain release from [unlawful] confinement" (internal quotation marks omitted)).

The DTA can be similarly read. Because Congress substituted DTA review for habeas corpus and because the "unique purpose" of the writ is "to release the applicant . . . from unlawful confinement," *Allen* v. *McCurry*, 449 U. S. 90, 98, n. 12 (1980), DTA §1005(e)(2) can and should be read to confer on the Court of Appeals the authority to order release in appropriate circumstances. Section 1005(e)(2)(D) plainly contemplates release, addressing the effect "release of [an] alien from the custody of the Department of Defense" will have on the jurisdiction of the court. 119 Stat. 2742–2743. This reading avoids

serious constitutional difficulty and is consistent with the text of the statute.

The D. C. Circuit can thus order release, the CSRTs can order release, and the head of the Administrative Review Boards can, at the recommendation of those panels, order release. These multiple release provisions within the DTA system more than satisfy the majority's requirement that any tribunal substituting for a habeas court have the authority to release the prisoner.

The basis for the Court's contrary conclusion is summed up in the following sentence near the end of its opinion: "To hold that the detainees at Guantanamo may, under the DTA, challenge the President's legal authority to detain them, contest the CSRT's findings of fact, supplement the record on review with newly discovered or previously unavailable evidence, and request an order of release would come close to reinstating the §2241 habeas corpus process Congress sought to deny them." *Ante*, at 63. In other words, any interpretation of the statute that would make it an adequate substitute for habeas must be rejected, because Congress could not possibly have intended to enact an adequate substitute for habeas. The Court could have saved itself a lot of trouble if it had simply announced this Catch-22 approach at the beginning rather than the end of its opinion.

III

For all its eloquence about the detainees' right to the writ, the Court makes no effort to elaborate how exactly the remedy it prescribes will differ from the procedural protections detainees enjoy under the DTA. The Court objects to the detainees' limited access to witnesses and classified material, but proposes no alternatives of its own. Indeed, it simply ignores the many difficult questions its holding presents. What, for example, will become of the CSRT process? The majority says federal courts should

generally refrain from entertaining detainee challenges until after the petitioner's CSRT proceeding has finished. See *ante*, at 66 ("[e]xcept in cases of undue delay"). But to what deference, if any, is that CSRT determination entitled?

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

The majority has no answers for these difficulties. What it does say leaves open the distinct possibility that its "habeas" remedy will, when all is said and done, end up looking a great deal like the DTA review it rejects. See *ante*, at 66 (opinion of the court) ("We recognize, however, that the Government has a legitimate interest in protecting sources and methods of intelligence gathering, and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible"). But "[t]he role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy." *Landon* v. *Plasencia*, 459 U. S. 21, 34–35 (1982).

The majority rests its decision on abstract and hypothetical concerns. Step back and consider what, in the real world, Congress and the Executive have actually granted aliens captured by our Armed Forces overseas and found to be enemy combatants:

- The right to hear the bases of the charges against

them, including a summary of any classified evidence.

- The ability to challenge the bases of their detention before military tribunals modeled after Geneva Convention procedures. Some 38 detainees have been released as a result of this process. Brief for Federal Respondents 57, 60.
- The right, before the CSRT, to testify, introduce evidence, call witnesses, question those the Government calls, and secure release, if and when appropriate.
- The right to the aid of a personal representative in arranging and presenting their cases before a CSRT.
- Before the D. C. Circuit, the right to employ counsel, challenge the factual record, contest the lower tribunal's legal determinations, ensure compliance with the Constitution and laws, and secure release, if any errors below establish their entitlement to such relief.

In sum, the DTA satisfies the majority's own criteria for assessing adequacy. This statutory scheme provides the combatants held at Guantanamo greater procedural protections than have ever been afforded alleged enemy detainees—whether citizens or aliens—in our national history.

* * *

So who has won? Not the detainees. The Court's analysis leaves them with only the prospect of further litigation to determine the content of their new habeas right, followed by further litigation to resolve their particular cases, followed by further litigation before the D. C. Circuit—where they could have started had they invoked the DTA procedure. Not Congress, whose attempt to "determine—through democratic means—how best" to balance the

security of the American people with the detainees' liberty interests, see *Hamdan* v. *Rumsfeld*, 548 U. S. 557, 636 (2006) (BREYER, J., concurring), has been unceremoniously brushed aside. Not the Great Writ, whose majesty is hardly enhanced by its extension to a jurisdictionally quirky outpost, with no tangible benefit to anyone. Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants. And certainly not the American people, who today lose a bit more control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges.

I respectfully dissent.