

Materials on Non-Criminal Habeas Corpus Procedure After *Boumediene*

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Excerpts from *Boumediene v. Bush*, 128 S. Ct. 2229 (2008)

JUSTICE KENNEDY delivered the opinion of the Court.

Petitioners are aliens designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay, Cuba. There are others detained there, also aliens, who are not parties to this suit.

Petitioners present a question not resolved by our earlier cases relating to the detention of aliens at Guantanamo: whether they have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, § 9, cl. 2. We hold these petitioners do have the habeas corpus privilege. Congress has enacted a statute, the Detainee Treatment Act of 2005 (DTA), that provides certain procedures for review of the detainees' status. We hold that those procedures are not an adequate and effective substitute for habeas corpus. Therefore § 7 of the Military Commissions Act of 2006 (MCA), operates as an unconstitutional suspension of the writ. We do not address whether the President has authority to detain these petitioners nor do we hold that the writ must issue. These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court.

* * *

II

As a threshold matter, we must decide whether MCA § 7 denies the federal courts jurisdiction to hear habeas corpus actions pending at the time of its enactment. We hold the statute does deny that jurisdiction, so that, if the statute is valid, petitioners' cases must be dismissed.

As amended by the terms of the MCA, 28 U.S.C.A. § 2241(e) now provides:

"(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

"(2) Except as provided in [§§ 1005(e)(2) and (e)(3) of the DTA] no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."

Section 7(b) of the MCA provides the effective date for the amendment of § 2241(e). It states:

"The amendment made by [MCA § 7(a)] shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001."

There is little doubt that the effective date provision applies to habeas corpus actions. * * * [We agree] that the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us.

III

In deciding the constitutional questions now presented we must determine whether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status, i.e., petitioners' designation by the Executive Branch as enemy combatants, or their physical location, i.e., their presence at Guantanamo Bay. The Government contends that noncitizens designated as enemy combatants and detained in territory located outside our Nation's borders have no constitutional rights and no privilege of habeas corpus. Petitioners contend they do have cognizable constitutional rights and that Congress, in seeking to eliminate recourse to habeas corpus as a means to assert those rights, acted in violation of the Suspension Clause.

[Justice Kennedy discussed at length the history and origins of the writ, concluding that the historical record was too sparse to determine the extraterritorial scope of the writ or its application to enemy aliens.]

Each side in the present matter argues that the very lack of a precedent on point supports its position. The Government points out there is no evidence that a court sitting in England granted habeas relief to an enemy alien detained abroad; petitioners respond there is no evidence that a court refused to do so for lack of jurisdiction.

Both arguments are premised, however, upon the assumption that the historical record is complete and that the common law, if properly understood, yields a definite answer to the questions before us. There are reasons to doubt both assumptions. Recent scholarship points to the inherent shortcomings in the historical record. And given the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, the common-law courts simply may not have confronted cases with close parallels to this one. We decline, therefore, to infer too much, one way or the other, from the lack of historical evidence on point. * * *

IV

Drawing from its position that at common law the writ ran only to territories over which the Crown was sovereign, the Government says the Suspension Clause affords petitioners no rights because the United States does not claim sovereignty over the place of detention. * * *

Guantanamo Bay is not formally part of the United States. And under the terms of the lease between the United States and Cuba, Cuba retains "ultimate sovereignty" over the territory while the United States exercises "complete jurisdiction and control." See Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III. Under the terms of the 1934 Treaty, however, Cuba effectively has no rights as a sovereign until the parties agree to modification of the 1903 Lease Agreement or the United States abandons the base.

The United States contends, nevertheless, that Guantanamo is not within its sovereign control. This was the Government's position well before the events of September 11, 2001. Even if this were a treaty interpretation case that did not involve a political question, the President's construction of the lease agreement would be entitled to great respect..

We therefore do not question the Government's position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay. But this does not end the analysis. Our cases do not hold it is improper for us to inquire into the objective degree of control the Nation asserts over foreign territory. * * *

C

* * * The United States Naval Station at Guantanamo Bay consists of 45 square miles of land and water. The base has been used, at various points, to house migrants and refugees temporarily. At present, however, other than the detainees themselves, the only long-term residents are American military personnel, their families, and a small number of workers. See History of Guantanamo Bay online at <https://www.cniv.navy.mil/Guantanamo/AboutGTMO/gtmohistorygeneral/gtmohistgeneral>. The detainees have been deemed enemies of the United States. At present, dangerous as they may be if released, they are contained in a secure prison facility located on an isolated and heavily fortified military base.

There is no indication, furthermore, that adjudicating a habeas corpus petition would cause friction with the host government. No Cuban court has jurisdiction over American military personnel at Guantanamo or the enemy combatants detained there. While obligated to abide by the terms of the lease, the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base. Were that not the case, or if the detention facility were located in an active theater of war, arguments that issuing the writ would be "impracticable or anomalous" would have more weight. Under the facts presented here, however, there are few practical barriers to the running of the writ. To the extent barriers arise, habeas corpus procedures likely can be modified to address them.

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

We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause. The MCA does not purport to be a formal suspension of the writ; and the Government, in its submis-

sions to us, has not argued that it is. Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention.

V

In light of this holding the question becomes whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus. The Government submits there has been compliance with the Suspension Clause because the DTA review process in the Court of Appeals provides an adequate substitute. Congress has granted that court jurisdiction to consider

"(i) whether the status determination of the [CSRT] . . . was consistent with the standards and procedures specified by the Secretary of Defense . . . and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." § 1005(e)(2)(C).

The Court of Appeals, having decided that the writ does not run to the detainees in any event, found it unnecessary to consider whether an adequate substitute has been provided. In the ordinary course we would remand to the Court of Appeals to consider this question in the first instance. It is well settled, however, that the Court's practice of declining to address issues left unresolved in earlier proceedings is not an inflexible rule.

The gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional. . . . Under the circumstances we believe the costs of further delay substantially outweigh any benefits of remanding to the Court of Appeals to consider the issue it did not address in these cases.

A

* * * [T]he DTA's jurisdictional grant is quite limited. The Court of Appeals has jurisdiction not to inquire into the legality of the detention generally but only to assess whether the CSRT complied with the "standards and procedures specified by the Secretary of Defense" and whether those standards and procedures are lawful. DTA § 1005(e)(2)(C). If Congress had envisioned DTA review as coextensive with traditional habeas corpus, it would not have drafted the statute in this manner.

The differences between the DTA and the habeas statute that would govern in MCA § 7's absence, 28 U.S.C. § 2241, are likewise telling. In § 2241 (2000 ed.) Congress confirmed the authority of "any justice" or "circuit judge" to issue the writ. That statute accommodates the necessity for factfinding that will arise in some cases by allowing the appellate judge or Justice to transfer the case to a district court of competent jurisdiction, whose institutional capacity for factfinding is superior to his or her own. See 28 U.S.C. § 2241(b). By granting the Court of Appeals "exclusive" jurisdiction over petitioners' cases, see DTA § 1005(e)(2)(A), Congress has foreclosed that option. This choice indicates Congress intended the Court of Appeals to have a more limited role in enemy combatant status determinations than a district court has in habeas corpus proceedings. The DTA should be interpreted to accord some latitude to the Court of Appeals to fashion procedures necessary to make its review function a meaningful one, but, if congressional intent is to be respected, the procedures adopted cannot be as extensive or as protective of the rights of the detainees as they would be in a § 2241 proceeding. Otherwise there would have been no, or very little, purpose for enacting the DTA. * * *

It is against this background that we must interpret the DTA and assess its adequacy as a substitute for habeas corpus.

B

We do not endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus. We do consider it uncontroversial, however, that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to "the erroneous application or interpretation" of relevant law. And the habeas court must have the power to order the conditional release of an individual unlawfully detained--though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted. These are the easily identified attributes of any constitutionally adequate habeas corpus proceeding. But, depending on the circumstances, more may be required.

Indeed, common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances. See 3 Blackstone *131 (describing habeas as "the great and efficacious writ, in all manner of illegal confinement"); see also *Schlup v. Delo*, 513 U.S. 298 (1995) (Habeas "is, at its core, an equitable remedy"); *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (Habeas is not "a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose"). It appears the common-law habeas court's role was most extensive in cases of pretrial and noncriminal detention, where there had been little or no previous judicial review of the cause for detention. Notably, the black-letter rule that prisoners could not controvert facts in the jailer's return was not followed (or at least not with consistency) in such cases.

There is evidence from 19th-century American sources indicating that, even in States that accorded strong *res judicata* effect to prior adjudications, habeas courts in this country routinely allowed prisoners to introduce exculpatory evidence that was either unknown or previously unavailable to the prisoner.

The idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (noting that the Due Process Clause requires an assessment of, *inter alia*, "the risk of an erroneous deprivation of [a liberty interest;] and the probable value, if any, of additional or substitute procedural safeguards"). This principle has an established foundation in habeas corpus jurisprudence as well.

Accordingly, where relief is sought from a sentence that resulted from the judgment of a court of record, as was the case in *Watkins* and indeed in most federal habeas cases, considerable deference is owed to the court that ordered confinement. Likewise in those cases the prisoner should exhaust adequate alternative remedies before filing for the writ in federal court. Both aspects of federal habeas corpus review are justified because it can be assumed that, in the usual course, a court of record provides defendants with a fair, adversary proceeding. In cases involving state convictions this framework also respects federalism; and in federal cases it has added justification because the prisoner already has had a chance to seek review of his conviction in a federal forum through a direct appeal. The present cases fall outside these categories, however; for here the detention is by executive order.

Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures. In this context the need for habeas corpus is more urgent. The intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry. Habeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order. But the writ must be effective. The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain.

To determine the necessary scope of habeas corpus review, therefore, we must assess the CSRT process, the mechanism through which petitioners' designation as enemy combatants became final. Whether one characterizes the CSRT process as direct review of the Executive's battlefield determination that the detainee is an enemy combatant--as the parties have and as we do--or as the first step in the collateral review of a battlefield determination makes no difference in a proper analysis of whether the procedures Congress put in place are an adequate substitute for habeas corpus. What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral.

Petitioners identify what they see as myriad deficiencies in the CSRTs. The most relevant for our purposes are the constraints upon the detainee's ability to rebut the factual basis for the Government's assertion that he is an enemy combatant. At the CSRT stage the detainee has limited means to find or present evidence to challenge the Government's case against him. He does not have the assistance of counsel and may not be aware of the most critical allegations that the Government relied upon to order his detention. The detainee can confront witnesses that testify during the CSRT proceedings. But given that there are in effect no limits on the admission of hearsay evidence--the only requirement is that the tribunal deem the evidence "relevant and helpful" --the detainee's opportunity to question witnesses is likely to be more theoretical than real.

The Government defends the CSRT process, arguing that it was designed to conform to the procedures suggested by the plurality in *Hamdi*. See 542 U.S., at 538. Setting aside the fact that the relevant language in *Hamdi* did not garner a majority of the Court, it does not control the matter at hand....

Even if we were to assume that the CSRTs satisfy due process standards, it would not end our inquiry. Habeas corpus is a collateral process that exists, in Justice Holmes' words, to "cu[t] through all forms and g[o] to the very tissue of

the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell." *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (dissenting opinion). Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant. This is so even where the prisoner is detained after a criminal trial conducted in full accordance with the protections of the Bill of Rights.

Although we make no judgment as to whether the CSRTs, as currently constituted, satisfy due process standards, we agree with petitioners that, even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact. This is a risk inherent in any process that, in the words of the former Chief Judge of the Court of Appeals, is "closed and accusatorial." See *Bismullah III*, 514 F.3d at 1296 (Ginsburg, C. J., concurring in denial of rehearing en banc). And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore.

For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings. This includes some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. Federal habeas petitioners long have had the means to supplement the record on review, even in the postconviction habeas setting. Here that opportunity is constitutionally required.

The extent of the showing required of the Government in these cases is a matter to be determined. We need not explore it further at this stage. We do hold that when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release.

C

We now consider whether the DTA allows the Court of Appeals to conduct a proceeding meeting these standards....

The DTA does not explicitly empower the Court of Appeals to order the applicant in a DTA review proceeding released should the court find that the standards and procedures used at his CSRT hearing were insufficient to justify detention. This is troubling. Yet, for present purposes, we can assume congressional silence permits a constitutionally required remedy. In that case it would be possible to hold that a remedy of release is impliedly provided for. The DTA might be read, furthermore, to allow the petitioners to assert most, if not all, of the legal claims they seek to advance, including their most basic claim: that the President has no authority under the AUMF to detain them indefinitely. (Whether the President has such authority turns on whether the AUMF authorizes--and the Constitution permits--the indefinite detention of "enemy combatants" as the Department of Defense defines that term. Thus a challenge to the President's authority to detain is, in essence, a challenge to the Department's definition of enemy combatant, a "standard" used by the CSRTs in petitioners' cases.) At oral argument, the Solicitor General urged us to adopt both these constructions, if doing so would allow MCA § 7 to remain intact.

The absence of a release remedy and specific language allowing AUMF challenges are not the only constitutional infirmities from which the statute potentially suffers, however. The more difficult question is whether the DTA permits the Court of Appeals to make requisite findings of fact. The DTA enables petitioners to request "review" of their CSRT determination in the Court of Appeals; but the "Scope of Review" provision confines the Court of Appeals' role to reviewing whether the CSRT followed the "standards and procedures" issued by the Department of Defense and assessing whether those "standards and procedures" are lawful. § 1005(e)(C). Among these standards is "the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence . . . allowing a rebuttable presumption in favor of the Government's evidence." § 1005(e)(C)(i).

Assuming the DTA can be construed to allow the Court of Appeals to review or correct the CSRT's factual determinations, as opposed to merely certifying that the tribunal applied the correct standard of proof, we see no way to construe the statute to allow what is also constitutionally required in this context: an opportunity for the detainee to present relevant exculpatory evidence that was not made part of the record in the earlier proceedings....

Under the DTA the Court of Appeals has the power to review CSRT determinations by assessing the legality of standards and procedures. This implies the power to inquire into what happened at the CSRT hearing and, perhaps, to remedy certain deficiencies in that proceeding. But should the Court of Appeals determine that the CSRT followed appropriate and lawful standards and procedures, it will have reached the limits of its jurisdiction. There is no language in

the DTA that can be construed to allow the Court of Appeals to admit and consider newly discovered evidence that could not have been made part of the CSRT record because it was unavailable to either the Government or the detainee when the CSRT made its findings. This evidence, however, may be critical to the detainee's argument that he is not an enemy combatant and there is no cause to detain him.

This is not a remote hypothetical. One of the petitioners, Mohamed Nechla, requested at his CSRT hearing that the Government contact his employer. The petitioner claimed the employer would corroborate Nechla's contention he had no affiliation with al Qaeda. Although the CSRT determined this testimony would be relevant, it also found the witness was not reasonably available to testify at the time of the hearing. Petitioner's counsel, however, now represents the witness is available to be heard. If a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court. Even under the Court of Appeals' generous construction of the DTA, however, the evidence identified by Nechla would be inadmissible in a DTA review proceeding. The role of an Article III court in the exercise of its habeas corpus function cannot be circumscribed in this manner.

By foreclosing consideration of evidence not presented or reasonably available to the detainee at the CSRT proceedings, the DTA disadvantages the detainee by limiting the scope of collateral review to a record that may not be accurate or complete. In other contexts, e.g., in post-trial habeas cases where the prisoner already has had a full and fair opportunity to develop the factual predicate of his claims, similar limitations on the scope of habeas review may be appropriate. See *Williams v. Taylor*, 529 U.S. 420, 436-437 (2000) (noting that § 2254 "does not equate prisoners who exercise diligence in pursuing their claims with those who do not"). In this context, however, where the underlying detention proceedings lack the necessary adversarial character, the detainee cannot be held responsible for all deficiencies in the record.

The Government does not make the alternative argument that the DTA allows for the introduction of previously unavailable exculpatory evidence on appeal. It does point out, however, that if a detainee obtains such evidence, he can request that the Deputy Secretary of Defense convene a new CSRT. Whatever the merits of this procedure, it is an insufficient replacement for the factual review these detainees are entitled to receive through habeas corpus. The Deputy Secretary's determination whether to initiate new proceedings is wholly a discretionary one. And we see no way to construe the DTA to allow a detainee to challenge the Deputy Secretary's decision not to open a new CSRT pursuant to [the promulgated regulations]. Congress directed the Secretary of Defense to devise procedures for considering new evidence, see DTA § 1005(a)(3), but the detainee has no mechanism for ensuring that those procedures are followed. DTA § 1005(e)(2)(C) makes clear that the Court of Appeals' jurisdiction is "limited to consideration of . . . whether the status determination of the Combatant Status Review Tribunal with regard to such alien 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)(A), further narrows the Court of Appeals' jurisdiction to reviewing "any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." The Deputy Secretary's determination whether to convene a new CSRT is not a "status determination of the Combatant Status Review Tribunal," much less a "final decision" of that body.

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. For even if it were possible, as a textual matter, to read into the statute each of the necessary procedures we have identified, we could not overlook the cumulative effect of our doing so. 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 exculpatory evidence, and request an order of release would come close to reinstating the § 2241 habeas corpus process Congress sought to deny them. The language of the statute, read in light of Congress' reasons for enacting it, cannot bear this interpretation. Petitioners have met their burden of establishing that the DTA review process is, on its face, an inadequate substitute for habeas corpus.

Although we do not hold that an adequate substitute must duplicate § 2241 in all respects, it suffices that the Government has not established that the detainees' access to the statutory review provisions at issue is an adequate substitute for the writ of habeas corpus. MCA § 7 thus effects an unconstitutional suspension of the writ. In view of our holding we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.

VI

A

In light of our conclusion that there is no jurisdictional bar to the District Court's entertaining petitioners' claims the question remains whether there are prudential barriers to habeas corpus review under these circumstances.

The Government argues petitioners must seek review of their CSRT determinations in the Court of Appeals before they can proceed with their habeas corpus actions in the District Court. As noted earlier, in other contexts and for prudential reasons this Court has required exhaustion of alternative remedies before a prisoner can seek federal habeas relief. Most of these cases were brought by prisoners in state custody, and thus involved federalism concerns that are not relevant here. But we have extended this rule to require defendants in courts-martial to exhaust their military appeals before proceeding with a federal habeas corpus action.

The real risks, the real threats, of terrorist attacks are constant and not likely soon to abate. The ways to disrupt our life and laws are so many and unforeseen that the Court should not attempt even some general catalogue of crises that might occur. Certain principles are apparent, however. Practical considerations and exigent circumstances inform the definition and reach of the law's writs, including habeas corpus. The cases and our tradition reflect this precept.

In cases involving foreign citizens detained abroad by the Executive, it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody. If and when habeas corpus jurisdiction applies, as it does in these cases, then proper deference can be accorded to reasonable procedures for screening and initial detention under lawful and proper conditions of confinement and treatment for a reasonable period of time. Domestic exigencies, furthermore, might also impose such onerous burdens on the Government that here, too, the Judicial Branch would be required to devise sensible rules for staying habeas corpus proceedings until the Government can comply with its requirements in a responsible way. Here, as is true with detainees apprehended abroad, a relevant consideration in determining the courts' role is whether there are suitable alternative processes in place to protect against the arbitrary exercise of governmental power.

The cases before us, however, do not involve detainees who have been held for a short period of time while awaiting their CSRT determinations. Were that the case, or were it probable that the Court of Appeals could complete a prompt review of their applications, the case for requiring temporary abstention or exhaustion of alternative remedies would be much stronger. These qualifications no longer pertain here. In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands. And there has been no showing that the Executive faces such onerous burdens that it cannot respond to habeas corpus actions. To require these detainees to complete DTA review before proceeding with their habeas corpus actions would be to require additional months, if not years, of delay. The first DTA review applications were filed over a year ago, but no decisions on the merits have been issued. While some delay in fashioning new procedures is unavoidable, the costs of delay can no longer be borne by those who are held in custody. The detainees in these cases are entitled to a prompt habeas corpus hearing.

Our decision today holds only that the petitioners before us are entitled to seek the writ; that the DTA review procedures are an inadequate substitute for habeas corpus; and that the petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court. The only law we identify as unconstitutional is MCA § 7. Accordingly, both the DTA and the CSRT process remain intact. Our holding with regard to exhaustion should not be read to imply that a habeas court should intervene the moment an enemy combatant steps foot in a territory where the writ runs. The Executive is entitled to a reasonable period of time to determine a detainee's status before a court entertains that detainee's habeas corpus petition. The CSRT process is the mechanism Congress and the President set up to deal with these issues. Except in cases of undue delay, federal courts should refrain from entertaining an enemy combatant's habeas corpus petition at least until after the Department, acting via the CSRT, has had a chance to review his status.

B

Although we hold that the DTA is not an adequate and effective substitute for habeas corpus, it does not follow that a habeas corpus court may disregard the dangers the detention in these cases was intended to prevent. Felker, Swain, and Hayman stand for the proposition that the Suspension Clause does not resist innovation in the field of habeas corpus. Certain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ.

In the DTA Congress sought to consolidate review of petitioners' claims in the Court of Appeals. Channeling future cases to one district court would no doubt reduce administrative burdens on the Government. This is a legitimate objective that might be advanced even without an amendment to § 2241. If, in a future case, a detainee files a habeas petition in another judicial district in which a proper respondent can be served, the Government can move for change of venue to the court that will hear these petitioners' cases, the United States District Court for the District of Columbia..

Another of Congress' reasons for vesting exclusive jurisdiction in the Court of Appeals, perhaps, was to avoid the widespread dissemination of classified information. The Government has raised similar concerns here and elsewhere. We make no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees' habeas corpus proceedings. 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.

These and the other remaining questions are within the expertise and competence of the District Court to address in the first instance.

* * *

In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.

Officials charged with daily operational responsibility for our security may consider a judicial discourse on the history of the Habeas Corpus Act of 1679 and like matters to be far removed from the Nation's present, urgent concerns. Established legal doctrine, however, must be consulted for its teaching. Remote in time it may be; irrelevant to the present it is not. Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.

Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.

Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. This result is not inevitable, however. The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.

It bears repeating that our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined. We hold that petitioners may invoke the fundamental procedural protections of habeas corpus. The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.

The determination by the Court of Appeals that the Suspension Clause and its protections are inapplicable to petitioners was in error. The judgment of the Court of Appeals is reversed. The cases are remanded to the Court of Appeals with instructions that it remand the cases to the District Court for proceedings consistent with this opinion.

It is so ordered.

[Concurring and dissenting opinions have not been included.]

Excerpts from *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)

JUSTICE O'CONNOR announced the judgment of the Court and delivered an opinion, in which the Chief Justice, Justice Kennedy, and Justice Breyer join.

At this difficult time in our Nation's history, we are called upon to consider the legality of the Government's detention of a United States citizen on United States soil as an "enemy combatant" and to address the process that is constitutionally owed to one who seeks to challenge his classification as such. The United States Court of Appeals for the Fourth Circuit held that petitioner Yaser Hamdi's detention was legally authorized and that he was entitled to no further opportunity to challenge his enemy-combatant label. We now vacate and remand. We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker. * * *

II

The threshold question before us is whether the Executive has the authority to detain citizens who qualify as "enemy combatants." There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such. It has made clear, however, that, for purposes of this case, the "enemy combatant" that it is seeking to detain is an individual who, it alleges, was "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan and who "engaged in an armed conflict against the United States" there. We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized. * * *

Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of "necessary and appropriate force," Congress has clearly and unmistakably authorized detention [in its Authorization for Use of Military Force ("AUMF")] in the narrow circumstances considered here. * * *

Hamdi contends that the AUMF does not authorize indefinite or perpetual detention. Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who "engaged in an armed conflict against the United States." If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of "necessary and appropriate force," and therefore are authorized by the AUMF. * * *

III

Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status. * * *

A

. . . All agree suspension of the writ has not occurred here. Thus, it is undisputed that Hamdi was properly before an Article III court to challenge his detention under 28 U.S.C. § 2241. Further, all agree that § 2241 and its companion provisions provide at least a skeletal outline of the procedures to be afforded a petitioner in federal habeas review. Most notably, § 2243 provides that "the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts," and § 2246 allows the taking of evidence in habeas proceedings by deposition, affidavit, or interrogatories.

The simple outline of § 2241 makes clear both that Congress envisioned that habeas petitioners would have some opportunity to present and rebut facts and that courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process. The Government recognizes the basic procedural protections required by the habeas statute, but asks us to hold that, given both the flexibility of the habeas mechanism and the circumstances presented in this case, the presentation of [a hearsay Declaration] to the habeas court completed the required factual development. It suggests two separate reasons for its position that no further process is due.

B

First, the Government urges the adoption of the Fourth Circuit's holding below--that because it is "undisputed" that Hamdi's seizure took place in a combat zone, the habeas determination can be made purely as a matter of law, with no further hearing or factfinding necessary. This argument is easily rejected. As the dissenters from the denial of rehearing en banc noted, the circumstances surrounding Hamdi's seizure cannot in any way be characterized as "undisputed," as "those circumstances are neither conceded in fact, nor susceptible to concession in law, because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances." Further, the "facts" that constitute the alleged concession are insufficient to support Hamdi's detention. Under the definition of enemy combatant that we accept today as falling within the scope of Congress' authorization, Hamdi would need to be "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States" to justify his detention in the United States for the duration of the relevant conflict. The habeas petition states only that "[w]hen seized by the United States Government, Mr. Hamdi resided in Afghanistan." An assertion that one *resided* in a country in which combat operations are taking place is not a concession that one was "*captured* in a zone of active combat" operations in a foreign theater of war, and certainly is not a concession that one was "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States." Accordingly, we reject any argument that Hamdi has made concessions that eliminate any right to further process.

C

The Government's second argument requires closer consideration. This is the argument that further factual exploration is unwarranted and inappropriate in light of the extraordinary constitutional interests at stake. Under the Government's most extreme rendition of this argument, "[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict" ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme. At most, the Government argues, courts should review its determination that a citizen is an enemy combatant under a very deferential "some evidence" standard. Under this review, a court would assume the accuracy of the Government's articulated basis for Hamdi's detention, as set forth in the [hearsay] Declaration, and assess only whether that articulated basis was a legitimate one.

In response, Hamdi emphasizes that this Court consistently has recognized that an individual challenging his detention may not be held at the will of the Executive without recourse to some proceeding before a neutral tribunal to determine whether the Executive's asserted justifications for that detention have basis in fact and warrant in law.

Both of these positions highlight legitimate concerns. And both emphasize the tension that often exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right. The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not "deprived of life, liberty, or property, without due process of law," U.S. Const., Amdt. 5, is the test that we articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Mathews* dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the Government's asserted interest, "including the function involved" and the burdens the Government would face in providing greater process. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute procedural safeguards." * * *

3

Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.

With due recognition of these competing concerns, we believe that neither the process proposed by the Government nor the process apparently envisioned by the District Court below strikes the proper constitutional balance when a

United States citizen is detained in the United States as an enemy combatant. That is, "the risk of an erroneous deprivation" of a detainee's liberty interest is unacceptably high under the Government's proposed rule, while some of the "additional or substitute procedural safeguards" suggested by the District Court are unwarranted in light of their limited "probable value" and the burdens they may impose on the military in such cases.

We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker. These essential constitutional promises may not be eroded.

At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant. In the words of *Mathews*, process of this sort would sufficiently address the "risk of an erroneous deprivation" of a detainee's liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government.

We think it unlikely that this basic process will have the dire impact on the central functions of warring that the Government forecasts. The parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have been seized. The Government has made clear in its briefing that documentation regarding battlefield detainees already is kept in the ordinary course of military affairs. Any factfinding imposition created by requiring a knowledgeable affiant to summarize these records to an independent tribunal is a minimal one. Likewise, arguments that military officers ought not have to wage war under the threat of litigation lose much of their steam when factual disputes at enemy-combatant hearings are limited to the alleged combatant's acts. This focus meddles little, if at all, in the strategy or conduct of war, inquiring only into the appropriateness of continuing to detain an individual claimed to have taken up arms against the United States. While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.

In sum, while the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator. * * *

D

In so holding, we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. *Youngstown Sheet & Tube*, 343 U.S., at 587. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. Likewise, we have made clear that, unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions. Thus, while we do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his Government, simply because the Executive opposes making available such a

challenge. Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process. * * *

There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention. See Army Regulation 190-8, ch. 1, § 1-6 (1997). In the absence of such process, however, a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved. * * * We anticipate that a District Court would proceed with the caution that we have indicated is necessary in this setting, engaging in a factfinding process that is both prudent and incremental. We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns. * * *

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, concurring in part, dissenting in part, and concurring in the judgment.

[Justice Souter disagreed with the Plurality that the Government had demonstrated that the AUMF authorized the detention complained of by Hamdi even on the facts the Government claimed, and concluded that if the Government raised nothing further than the record now showed, the Non-Detention Act entitled Hamdi to be released.]

* * *

IV

Because I find Hamdi's detention forbidden by § 4001(a) and unauthorized by the Force Resolution, I would not reach any questions of what process he may be due in litigating disputed issues in a proceeding under the habeas statute or prior to the habeas enquiry itself. For me, it suffices that the Government has failed to justify holding him in the absence of a further Act of Congress, criminal charges, a showing that the detention conforms to the laws of war, or a demonstration that § 4001(a) is unconstitutional. I would therefore vacate the judgment of the Court of Appeals and remand for proceedings consistent with this view.

Since this disposition does not command a majority of the Court, however, the need to give practical effect to the conclusions of eight Members of the Court rejecting the Government's position calls for me to join with the plurality in ordering remand on terms closest to those I would impose. See *Screws v. United States*, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring in result). Although I think litigation of Hamdi's status as an enemy combatant is unnecessary, the terms of the plurality's remand will allow Hamdi to offer evidence that he is not an enemy combatant, and he should at the least have the benefit of that opportunity.

It should go without saying that in joining with the plurality to produce a judgment, I do not adopt the plurality's resolution of constitutional issues that I would not reach. It is not that I could disagree with the plurality's determinations (given the plurality's view of the Force Resolution) that someone in Hamdi's position is entitled at a minimum to notice of the Government's claimed factual basis for holding him, and to a fair chance to rebut it before a neutral decisionmaker; nor, of course, could I disagree with the plurality's affirmation of Hamdi's right to counsel. On the other hand, I do not mean to imply agreement that the Government could claim an evidentiary presumption casting the burden of rebuttal on Hamdi, or that an opportunity to litigate before a military tribunal might obviate or truncate enquiry by a court on habeas.

Subject to these qualifications, I join with the plurality in a judgment of the Court vacating the Fourth Circuit's judgment and remanding the case.

[The remaining dissenting and concurring opinions have not been included.]

Excerpts from *Al-Marri v. Pucciarelli*, No. 06-7427 (4th Cir. July 15, 2008) (en banc)

PER CURIAM:

Ali Saleh Kahlah al-Marri filed a petition for a writ of habeas corpus challenging his military detention as an enemy combatant. After the district court denied all relief, al-Marri noted this appeal. A divided panel of this court reversed the judgment of the district court and ordered that al-Marri's military detention cease.

Subsequently, this court vacated that judgment and considered the case *en banc*. The parties present two principal issues for our consideration: (1) assuming the Government's allegations about al-Marri are true, whether Congress has empowered the President to detain al-Marri as an enemy combatant; and (2) assuming Congress has empowered the President to detain al-Marri as an enemy combatant provided the Government's allegations against him are true, whether al-Marri has been afforded sufficient process to challenge his designation as an enemy combatant.*

Having considered the briefs and arguments of the parties, the *en banc* court now holds: (1) by a 5 to 4 vote (Chief Judge Williams and Judges Wilkinson, Niemeyer, Traxler, and Duncan voting in the affirmative; Judges Michael, Motz, King, and Gregory voting in the negative), that, if the Government's allegations about al-Marri are true, Congress has empowered the President to detain him as an enemy combatant; and (2) by a 5 to 4 vote (Judges Michael, Motz, Traxler, King, and Gregory voting in the affirmative; Chief Judge Williams and Judges Wilkinson, Niemeyer, and Duncan voting in the negative), that, assuming Congress has empowered the President to detain al-Marri as an enemy combatant provided the Government's allegations against him are true, al-Marri has not been afforded sufficient process to challenge his designation as an enemy combatant.

Accordingly, the judgment of the district court is reversed and remanded for further proceedings consistent with the opinions that follow.

REVERSED AND REMANDED

DIANA GRIBBON MOTZ, Circuit Judge, concurring in the judgment:

* * * Because we find that neither the AUMF nor the President's inherent authority permits the military to detain al-Marri indefinitely as an enemy combatant, we would not reach the question of whether the Government has afforded al-Marri sufficient process to challenge his designation as an enemy combatant. We would simply reverse the judgment of the district court and remand the case with instructions to issue a writ of habeas corpus directing the Secretary of Defense to release al-Marri from military custody within a reasonable period of time to be set by the district court. Pursuant to this directive, the Government could transfer al-Marri to civilian authorities to face criminal charges, initiate deportation proceedings against him, hold him as a material witness in connection with grand jury proceedings, or detain him for a limited time pursuant to the Patriot Act, but military detention of al-Marri would have to cease.

This disposition, however, does not command a majority of the *en banc* court. Accordingly, to give practical effect to the conclusions of the majority of the court who reject the Government's position, we join in ordering remand on the terms closest to those we would impose. *See Hamdi*, 542 U.S. at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). We believe that it is unnecessary to litigate whether al-Marri is an enemy combatant, but joining in remand for the evidentiary proceedings outlined by Judge Traxler will at least place the burden on the Government to make an initial showing that normal due process protections are unduly burdensome and that the Rapp declaration is "the most reliable available evidence," supporting the Government's allegations before it may order al-Marri's military detention. Therefore, we concur in the per curiam opinion reversing and remanding for evidentiary proceedings to determine whether al-Marri actually is an enemy combatant subject to military detention.

Judges Michael, King, and Gregory have authorized me to indicate that they join in this opinion.

TRAXLER, Circuit Judge, concurring in the judgment:

* * *

III. Due Process

While I agree with my colleagues who would hold that the President has the legal authority under the AUMF to detain al-Marri as an enemy combatant for the duration of the hostilities, we part company on the issue of whether the

process afforded al-Marri to challenge his detention was sufficient to meet the minimum requirements of due process of law. In my opinion, due process demands more procedural safeguards than those provided to al-Marri in the habeas proceedings below.

A.

Consideration of "the question of what process is constitutionally due to a [person] who disputes his enemy-combatant status" begins with consideration of the Supreme Court's decision in *Hamdi*, which addressed not only the legal authority of the President to detain enemy combatants but also the process due to those so designated. *Hamdi*, 542 U.S. at 524.

Hamdi was captured on the battlefield in Afghanistan by our allies, transferred into our military custody, and then transported to the United States, where a habeas petition was filed on his behalf. In support of Hamdi's designation as an enemy combatant, the government filed the hearsay declaration of Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy, summarizing the factual basis for Hamdi's detention. The government argued that "[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict' ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme," or "[a]t most," review "under a very deferential 'some evidence' standard," which the government asserted the Mobbs Declaration met. *Id.* at 527. The district court disagreed, imposing procedural safeguards and discovery burdens "approach[ing] the process that accompanies a criminal trial." *Id.* at 528. The plurality of the Court, however, disagreed with both positions, noting that due process and normal habeas procedures demand more than the government sought to give, but also recognized that the exigencies and burdens of military warfare may necessitate a modification of the procedures and evidentiary showings normally demanded by our habeas jurisprudence.

As noted by the *Hamdi* plurality at the outset, "§ 2241 and its companion provisions provide at least a skeletal outline of the procedures to be afforded a petitioner in federal habeas review." *Id.* at 525. Once the petition is filed by or on behalf of the detainee setting forth "the facts concerning the applicant's . . . detention," 28 U.S.C.A. § 2242, the habeas court "direct[s] the respondent to show cause why the writ should not be granted," 28 U.S.C.A. § 2243, which places the burden upon "[t]he person to whom the writ or order is directed [to] make a return certifying the true cause of the detention," *id.* Section "2243 provides that 'the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts,' and § 2246 allows the taking of evidence in habeas proceedings by deposition, affidavit, or interrogatories." *Hamdi*, 542 U.S. at 525. However, while "Congress envisioned that habeas petitioners would have some opportunity to present and rebut facts[,] . . . courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process." *Id.* at 526.

In determining what process would be appropriate in light of the facts at hand, the *Hamdi* plurality recognized the fundamental "tension that often exists between the autonomy that the [g]overnment asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right." *Id.* at 528. The individual's interest, of course, is "the most elemental of liberty interests -- the interest in being free from physical detention." *Id.* at 529. The government's interests, however, are equally compelling -- the interest "in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict," *id.* at 530, and the interest in "ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States," *id.* at 531. Arriving at the procedures necessary to ensure that a person, even an enemy combatant, is not deprived of his liberty without due process of law, the plurality noted, requires a balancing of these "serious competing interests." *Id.* at 529. To balance those competing interests, the plurality turned to the test articulated by the Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which

dictates that the process due *in any given instance* is determined by weighing "the private interest that will be affected by the official action" against the [g]overnment's asserted interest, "including the function involved" and the burdens the [g]overnment would face in providing greater process. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute procedural safeguards."

Hamdi, 542 U.S. at 529 (internal citations omitted) (emphasis added) (quoting *Mathews*, 424 U.S. at 335).

Applying the *Mathews* test to the situation at hand, the plurality ultimately rejected both the "some evidence" standard proposed by the government *and* the criminal-like process suggested by the district court, ruling that:

neither the process proposed by the [g]overnment nor the process apparently envisioned by the District Court below strikes the proper constitutional balance when a United States citizen is detained in the United States as an enemy combatant. That is, "the risk of an erroneous deprivation" of a detainee's liberty interest is unacceptably high under the [g]overnment's proposed rule, while some of the "additional or substitute procedural safeguards" suggested by the District Court are unwarranted in light of their limited "probative value" and the burdens they may impose on the military in such cases.

Hamdi, 542 U.S. at 532-33 (quoting *Mathews*, 424 U.S. at 335). However, while the plurality rejected the notion that a criminal-like process was mandated, it concluded that, at a minimum, a "citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the [g]overnment's factual assertions before a neutral decisionmaker." *Hamdi*, 542 U.S. at 533. "[T]he full protections that accompany challenges to detentions in other settings *may* prove unworkable and inappropriate in the enemy-combatant setting," the plurality recognized, but "the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the [g]overnment's case and to be heard by an impartial adjudicator." *Id.* at 535 (emphasis added). [n.5]

[n.5] In a partially concurring opinion, Justice Souter and Justice Ginsberg joined with the plurality in ordering remand to "allow Hamdi to offer evidence that he is not an enemy combatant." *Hamdi*, 542 U.S. at 553 (Souter, concurring in part). Although they declined to adopt the plurality's precise resolution of the due process issue, the concurring justices indicated that they would not "disagree with the plurality's determinations (given the plurality's view of the [AUMF]) that someone in Hamdi's position is entitled at a minimum to notice of the [g]overnment's claimed factual basis for holding him, and to a fair chance to rebut it before a neutral decisionmaker." *Id.*

Because Hamdi was a battlefield detainee captured in a foreign nation, the core of the government's argument was that the need for lessened process was "heightened by the practical difficulties that would accompany a system of trial-like process." *Id.* at 531. Specifically, the government argued that "military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away, and discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war." *Id.* at 531-32.

As dictated by *Mathews*, the plurality took account of these military burdens in weighing the interests at stake, and recognized that, when balancing the competing interests, these burdens *might* indeed demand a lessening of the normal process due:

[T]he *exigencies* of the circumstances *may* demand that, aside from these core elements [of notice and an opportunity to be heard], enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. *Hearsay, for example, may need to be accepted as the most reliable available evidence from the [g]overnment in such a proceeding.* Likewise, the Constitution would not be offended by a *presumption in favor of the [g]overnment's evidence*, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the [g]overnment puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant. In the words of *Mathews*, process of this sort would sufficiently address the "risk of an erroneous deprivation" of a detainee's liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the [g]overnment.

Hamdi, 542 U.S. at 533-34 (emphasis added).

In sum, *Hamdi's* relaxed evidentiary standard of accepting hearsay evidence and presumption in favor of the government arose from the plurality's recognition that the process warranted in enemy-combatant proceedings *may* be lessened *if* the practical obstacles the Executive would confront in providing the procedural protections normally due warrant such a modification. [n.7]

[n.7] The Supreme Court's recent decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), I believe, confirms this approach to the question of whether and how the normal process due may be lessened in enemy-combatant

proceedings. There, the Court reiterated the "uncontroversial" principles that "the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law" and that "the habeas court must have the power to order the conditional release of an individual unlawfully detained." *Id.* at , 128 S. Ct. at 2266. But, the Court went on to recognize that these are only "the easily identified attributes of any constitutionally adequate habeas corpus proceeding. . . . [D]epending on the circumstances, more may be required." *Id.* As noted by the Court, "common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed *depending upon the circumstances.*" *Id.* (emphasis added); *see also id.* at , 128 S. Ct. at 2283 (Roberts, C.J., dissenting) ("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 prisoner's claims and, when necessary, order release. Beyond that, the process a given prisoner is entitled to receive *depends on the circumstances* and the rights of the prisoner." (citation omitted) (emphasis added)).

* * *

C.

The dispute in this appeal is relatively straight-forward, although its resolution is not. Al-Marri contends that he stands in a different posture from Hamdi and that due process demands more rigorous procedural safeguards than those provided by the district court here and by the plurality in *Hamdi*. The government counters that the *Hamdi* plurality's framework provided al-Marri all the process he was due, asserting (1) that the *Hamdi* framework for providing process to a *citizen* enemy combatant captured on a foreign battlefield is, *a fortiori*, constitutionally sufficient for an *alien* enemy combatant seized in the United States; and (2) that al-Marri failed to take advantage of the process he was provided, making his claim for additional process unpersuasive.

Having carefully considered the plurality's guidance in *Hamdi* and the precedents upon which it relies, I am of the opinion that the district court erred in categorically applying the framework discussed by the *Hamdi* plurality to al-Marri's situation and accepting the Rapp Declaration as sufficient to shift the burden of persuasion to al-Marri without considering the specific circumstances before it. As was the case in *Hamdi*, "the full protections that accompany challenges to detentions in other settings [might] prove unworkable and inappropriate in [al-Marri's] enemy-combatant [proceeding]." *Hamdi*, 542 U.S. at 535. But that remains to be seen because, in my opinion, the district court erred in the initial step of accepting the hearsay affidavit of Rapp "as the most reliable available evidence from the [g]overnment," *id.* at 534, without any inquiry into whether the provision of nonhearsay evidence would unduly burden the government, and erred in failing to then weigh the competing interests of the litigants in light of the factual allegations and burdens placed before it for consideration.

1.

I begin with a general observation of the breadth of the ruling below. The district court concluded that the *Hamdi* decision was not limited to the facts surrounding Hamdi's apprehension and that the Supreme Court intended its framework to apply to every habeas petition filed by an alleged enemy combatant. On this broad point, I have no particular quarrel. However, from this premise, the district court also ruled that the Rapp Declaration, like the Mobbs Declaration in *Hamdi*, was sufficient to satisfy the government's initial step in the burden-shifting scheme, without requiring any showing by the government that the circumstances demanded that the proceedings should be "tailored to alleviate their uncommon potential to burden the Executive" or that the hearsay affidavit of Rapp was "the most reliable available evidence from the [g]overnment" because the presentation of more reliable evidence would unduly burden the government or otherwise interfere with the military or other national security efforts of the Executive. *Id.* at 534.

In my opinion, the *Hamdi* plurality neither said nor implied that normal procedures and evidentiary demands would be lessened in *every* enemy-combatant habeas case, regardless of the circumstances. And I cannot endorse such a view, which would allow the government to seize and militarily detain any person (including American citizens within this country) and support such military detention solely with a hearsay declaration of a government official who has no first-hand information about the detainee - *regardless* of whether more reliable evidence is readily available or whether the presentation of such evidence would impose *any* burden upon the government or interfere at all with its war or national security efforts. [n.12]

[n.12] Once such evidence (which might also enjoy a favorable presumption) is presented, the burden will shift to the detainee to rebut the showing with evidence that is "more persuasive" than that of the government. *See Hamdi*, 542 U.S. at 534. A detainee's general denial of the hearsay allegations will be insufficient. Rather, he will be required to refute the fact-specific allegations made against him by presenting "more persuasive evidence that he falls outside the criteria." *Id.*

Although I do not rule out the possibility that hearsay evidence might ultimately prove to be the most reliable available evidence from the government in this case, *Hamdi* does not support such a categorical relaxation of the protections due persons who are detained within our borders. As noted earlier, the *Hamdi* plurality balanced the competing interest of the detainee in being free from governmental detention against the interest of the government in detaining those who pose a threat to national security and concluded that "the full protections that accompany challenges to detentions in other settings *may* prove unworkable and inappropriate in the enemy-combatant setting." *Id.* at 535 (emphasis added). The *Hamdi* plurality's acceptance of hearsay evidence from the government in such settings, however, clearly arose from the context of a battlefield detainee, the "exigencies of [such] circumstances," and the "uncommon potential to burden the Executive at a time of ongoing military conflict." *Id.* at 533. The relaxed evidentiary standard was accepted in the balance as appropriate in light of the facts of that case -- a person initially detained abroad by our allies on a battlefield in Afghanistan. The plurality rejected an outright disapproval of such hearsay declarations, and described lesser procedures it believed might be sufficient to satisfy the due process rights of such detainees, noting that the normal evidentiary requirements *might* need to be relaxed to account for the governmental interest in military matters. *See id.* at 533-34 (explaining that hearsay "*may* need to be accepted as the most reliable available evidence from the [g]overnment" and "a presumption in favor of the [g]overnment's evidence" would not "offend[]" the Constitution in battlefield detainee proceedings). But while the plurality refused to categorically prohibit hearsay declarations, neither did it categorically approve the use of such hearsay declarations in all enemy-combatant proceedings. [n.13] Hearsay declarations *may* be accepted upon a weighing of the burdens in time of warfare of "providing greater process" against the detainee's liberty interests. *Id.* at 529. But to decide whether a hearsay declaration is acceptable, the court must first take into account "the risk of erroneous deprivation" of the detainee's liberty interest, "the probable value, if any, of any additional or substitute procedural safeguards," and the availability of additional or substitute evidence which might serve the interests of both litigants. *Id.* (internal quotation marks omitted).

[n.13] Thus, I do not believe *Hamdi* recognized that the government's burden in enemy-combatant proceedings could always be satisfied by a knowledgeable affiant who summarizes the evidence on which the detention was based. That is not what *Hamdi* said at all. Instead, the plurality merely noted that, in the context of the case before it, the Government had made it clear "that documentation regarding *battlefield detainees* already is kept in the ordinary court of military affairs" and that "[a]ny factfinding imposition created by requiring a knowledgeable affiant to summarize *these* records to an independent tribunal is a minimal one." *Hamdi*, 542 U.S. at 534 (emphasis added). For this reason, the *Hamdi* plurality was unpersuaded by the government's claim that "this basic

In sum, I disagree that the plurality in *Hamdi* endorsed a categorical acceptance of such hearsay declarations for all alleged enemy combatants regardless of the place of seizure or the other circumstances at hand. In my view, the balancing test set forth in *Mathews*, and discussed in the context of enemy-combatant proceedings in *Hamdi*, presumes that the process due a detainee, including enemy combatants, will indeed vary with the facts surrounding the detention and the precise governmental burdens that would result from providing the normal procedures due under our constitution. *See Mathews*, 424 U.S. at 334 ("[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands" (internal quotation marks and alteration omitted)); *Hamdi*, 542 U.S. at 526 (noting that courts in habeas cases "retain some ability to vary the ways in which" enemy combatants may present and rebut facts "as mandated by due process"). This balancing will require flexibility on the part of the habeas court in order to deal with the wide variety of situations involved in each individual case and is a necessary component of the *Hamdi* framework. Thus, on remand, the locus of al-Marri's seizure will not forbid his classification as an enemy combatant subject to military detention or foreclose the district court from lessening the normal procedures where appropriate in the balance of the competing interests, but it is not irrelevant to the task of weighing the interests at stake and balancing the risks involved to determine what due process [would] have [a] dire impact on the central functions of warmaking." *Id.* I cannot read this language divorced from the context in which it was written and would demand no more than the same benefits/burdens analysis given to *Hamdi*. cess protections are due him in his quest to challenge his designation and continued detention by our military. *See Mathews*, 424 U.S. at 334 ("[R]esolution of the issue of whether [the] procedures provided . . . are constitutionally sufficient requires analysis of the governmental and private interests that are affected."). [n.14]

14 Thus, the locus of capture is not an artificial or categorical distinction, nor is it the lynchpin of my view. I have made it clear that I do not rule out the possibility that the Rapp Declaration *might* be acceptable, although al-Marri is entitled to have the basis for such acceptance explained to an Article III court before he is deprived of his liberty interest in being free from physical detention. Actually, I propose that alMarri receive exactly what the *Hamdi* plurality gave to *Hamdi* - a directive that the district court weigh his rights against the *actual* governmental burdens to determine whether a lessening of the normal procedures is warranted. For the reasons dis-

cussed by the *Hamdi* plurality, the locus of capture affects the question of whether we should accept less reliable evidence, such as a hearsay affidavit, than we normally would in habeas cases. But this is because capture in a war zone almost certainly will increase the burden placed upon the Executive by requiring production of direct or first-hand evidence supporting the designation. It is not simply because the detainee was abroad when seized.

2.

In this case al-Marri's "private interest affected by the official action" is the same as that of Hamdi, *i.e.*, the liberty interest in being free from unlawful seizure and detention. *Hamdi*, 542 U.S. at 529 (internal quotation marks and ellipsis omitted). The risk of an erroneous deprivation of al-Marri's liberty interest, however, is not identical to the risk that was present in *Hamdi*. Al-Marri was not captured on the battlefields of Afghanistan or Iraq, nor even apprehended in a neighboring country where al Qaeda trains its soldiers. He was arrested by civilian federal authorities while residing in Illinois. I am acutely aware of the dangers of detention and imprisonment without compliance with criminal process safeguards, dangers that are even greater when the military detains persons inside the borders of the United States. In my view, the risk of erroneously detaining a civilian or citizen in this country as an enemy combatant is much greater inside the United States than in the very different context addressed by the Supreme Court in *Hamdi*, *i.e.*, a conventional battlefield within the borders of a foreign country in which we are fighting our enemies.

On the other hand, we must consider the government's interest "in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict," *Hamdi*, 542 U.S. at 530, and in "ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States," *id.* at 531, as well as "the burdens the [g]overnment would face in providing greater process," *id.* at 529.

Here, the government asserts that the Rapp Declaration, which summarizes the intelligence gathered on al-Marri's activities as an al Qaeda operative, is sufficient to meet its initial burden of proving that al-Marri was properly designated an enemy combatant. However, unlike in *Hamdi*, the government has presented *only* the Rapp Declaration. It has made no attempt to show that this hearsay evidence "need[s] to be accepted as the most reliable available evidence from the [g]overnment," *id.* at 533-34, or that additional protections to ensure that the innocent are not detained by our military would be "unworkable and inappropriate in th[is] enemy-combatant setting," *id.* at 535. Nor has there been any consideration of the "probable value, if any, of additional or substitute procedural safeguards" or the availability of more reliable evidence that might be presented by substitute methods which account for the government's weighty interests. *Id.* at 529 (internal quotation marks omitted).

As previously noted, al-Marri argued below that he believed the discovery sought would be primarily from civilian agencies that could produce it without interfering with the war powers and war operations of this government. At a minimum, I believe the government should be required to demonstrate to the district court why this is not the case and why, in balancing the liberty interest of the detainee and the heightened risk of erroneous deprivation, the Rapp Declaration should be accepted as the most reliable available evidence the government can produce without undue burden or serious jeopardy to either its war efforts or its efforts to ensure the national security of this nation.

3.

In this context, the Constitution prohibits subjecting an individual inside the United States to military detention *unless* he fits within the legal category of an enemy combatant in the armed conflict against al Qaeda or its supporting nations. If the allegations contained within the Rapp Declaration are true, then al-Marri fits within the exception and can be properly designated an enemy combatant and militarily detained pursuant to the authority granted the President in the AUMF. He would be properly classified as an enemy combatant who infiltrated our country under false pretenses for the purpose of waging war via terrorist activities.

Because al-Marri was seized and detained in this country, however, he is entitled to habeas review by a civilian judicial court and to the due process protections granted by our Constitution, interpreted and applied in the context of the facts, interests, and burdens at hand. To determine what constitutional process al-Marri is due, the court must weigh the competing interests, and the burden-shifting scheme and relaxed evidentiary standards discussed in *Hamdi* serve as important guides in this endeavor. *Hamdi* does not, however, provide a cookie-cutter procedure appropriate for every alleged enemy-combatant, regardless of the circumstances of the alleged combatant's seizure or the *actual* burdens the government might face in defending the habeas petition in the normal way.

Al-Marri clearly stands in a much different position from Hamdi. He was not captured bearing arms on the battlefield of Afghanistan, but was arrested within the United States by the FBI as a result of the 9/11 investigation and subsequent intelligence operations conducted by our government. This does not preclude his designation as an enemy combatant, but we cannot ignore that the evidence supporting his designation is not likely buried under the rubble of a foreign battlefield -- although it might be equally unavailable for national security reasons. Thus, unlike in *Hamdi*, the

government's interest "in *reducing* the process available to alleged enemy combatants" may not be "heightened by the practical difficulties that would accompany a system of trial-like process." *Id.* at 531 (emphasis added). In sum, the government has not demonstrated that al-Marri's fair opportunity for rebuttal requires no more than that which would have been accorded to Hamdi on remand.

Al-Marri, like any person accused of being an enemy combatant, is entitled to a fair, meaningful opportunity to contest that designation by requiring the government to demonstrate through "the most reliable available evidence" that he is an enemy combatant, denying the allegations against him, and presenting evidence in support of his contest. *Id.* at 534. As in *Hamdi*, the evidence which will be accepted and the determination of the manner in which due process proceedings must occur will again be left largely to the district courts. *See id.* at 538-39 (noting that "[w]e anticipate that a District Court [will] proceed with the caution that we have indicated is necessary in this setting, engaging in a factfinding process that is both prudent and incremental. We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns"); *accord Boumediene*, 553 U.S. at , 128 S. Ct. at 2276 ("We make no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees' habeas corpus proceedings. 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. . . . These and . . . other remaining questions are within the expertise and competence of the District Court to address in the first instance."). In this regard, the district court retains all its normal flexibility to vary the manner in which the presentation of evidence occurs in enemy-combatant proceedings. It is not precluded from accepting the hearsay declaration should it conclude that threats to national security or the war efforts dictate its use. *See Hamdi*, 542 U.S. at 533-34; *see also Boumediene*, 553 U.S. at , 128 S. Ct. at 2276 (Habeas corpus courts may not "disregard the dangers the detention in these cases was intended to prevent. . . . Certain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ."). But, it is not handcuffed by an inflexible procedure that would demand acceptance of a hearsay declaration from the government simply because the government has labeled al-Marri an enemy combatant.

The general rule, therefore, is that al-Marri would be entitled to the normal due process protections available to all within this country, including an opportunity to confront and question witnesses against him. But, if the government can demonstrate to the satisfaction of the district court that this is impractical, outweighed by national security interests, or otherwise unduly burdensome because of the nature of the capture and the potential burdens imposed on the government to produce non-hearsay evidence and accede to discovery requests, then alternatives should be considered and employed. Given the grave national security concerns in matters such as this, and that the Rapp Declaration references not only al-Marri's activities in this country but also those he engaged in abroad prior to his entry here, the Rapp Declaration might conceivably prove to be "the most reliable available evidence" within the meaning of *Hamdi*, at least as to some allegations. However, I am not satisfied to let matters stand as they are when the government has not even been required to demonstrate to the district court why it cannot or should not be required to produce, even for *ex parte* examination, any of the supporting evidence relied upon by Rapp to justify al-Marri's detention. Here, the government has made no showing that "[h]earsay . . . [needs] to be accepted as the most reliable available evidence from the [g]overnment" or that the "exigencies of the circumstances . . . demand . . . [that the] enemy-combatant proceeding[] . . . be [otherwise] tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." *Hamdi*, 542 U.S. at 533-34; *cf. Boumediene*, 128 S. Ct. at 2275 ("Practical considerations and exigent circumstances inform the definition and reach of the law's writs, including habeas corpus. The cases and our tradition reflect this precept."). [n.16]

[n.16] The *Boumediene* Court held that the procedural protections given to enemy combatants under the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, fell "well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review," *id.*, 553 U.S. at , 128 S. Ct. at 2260, noting in particular that while "[t]he detainee is allowed to present 'reasonably available' evidence, . . . his ability to rebut the Government's evidence against him [which is accorded a presumption of validity] is limited by the circumstances of his confinement and his lack of counsel at th[at] stage," *id.*, 553 U.S. at , 128 S. Ct. at 2260 (citation omitted). And while the dissent disagreed that the CSRT hearings were an insufficient substitute for habeas, it too pointed out in defense that the CSRT provides "every petitioner . . . the right to present evidence that he has been wrongfully detained," "includ[ing] the right to call witnesses who are reasonably available, question witnesses called by the tribunal, introduce documentary evidence, and testify before the tribunal." *Id.*, 553 U.S. at , 128 S. Ct. at 2287 (Roberts, C.J., dissenting). Nowhere, in either *Hamdi* or *Boumediene*, do I find support for the view that a detainee may be wholly deprived of all discovery *and* all rights to cross-examination and confrontation -- regardless of the availability of the witnesses and documentary evidence --

without any inquiry into whether exigent circumstances or other concerns for national security necessitate such a drastic lessening of the process normally available who challenge their executive detention.

I think due process, at a minimum, demands that the government make this showing. It is only after *that* showing has been made, *i.e.*, "once the [g]overnment puts for *credible* evidence that the habeas petitioner meets the enemy-combatant criteria," that "the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria." *Id.* at 534 (emphasis added). "In the words of *Mathews*, process of this sort would sufficiently address the 'risk of an erroneous deprivation' of a detainee's liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the [g]overnment." *Id.* * * *

[The other concurring and dissenting opinions are not included.]

Selections from Habeas Provisions in Title 28 of U.S. Code, Sections 2241–2248

28 U.S.C. § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial. * * *

28 U.S.C. § 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require. * * *

28 U.S.C. § 2246. Evidence; depositions; affidavits

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

28 U.S.C. § 2247. Documentary evidence

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

28 U.S.C. § 2248. Return or answer; conclusiveness

The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.

Selections from Detainee Treatment Act of 2005

TITLE X – MATTERS RELATING TO DETAINEES * * *

SEC. 1005. PROCEDURES FOR STATUS REVIEW OF DETAINEES OUTSIDE THE UNITED STATES * * *

(e) Judicial Review of Detention of Enemy Combatants –

(1) IN GENERAL – Section 2241 of title 28, United States Code, is amended by adding at the end the following:

“(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider –

“(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

“(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who –

“(A) is currently in military custody; or

“(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.”.

(2) REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION –

(A) IN GENERAL – Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

(B) LIMITATION ON CLAIMS- The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien –

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW- The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of –

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States. * * *

Selections from Military Commissions Act of 2006

SEC. 7. HABEAS CORPUS MATTERS.

(a) In General. – Section 2241 of title 28, United States Code, is amended by [substituting] the following new subsection (e):

“(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

“(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 ..., no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”.

(b) EffectiveDate. – The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

* * *

SEC. 10. DETENTION COVERED BY REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION.

Section 1005(e)(2)(B)(i) of the Detainee Treatment Act of 2005 (title X of Public Law 109-148; 119 Stat. 2742; 10 U.S.C. 801 note) is amended by striking “the Department of Defense at Guantanamo Bay, Cuba” and inserting “the United States”.

Selections from Rules Governing Section 2254 Cases in the U.S. District Courts

Rule 1. Scope

(a) Cases Involving a Petition under 28 U.S.C. § 2254. These rules govern a petition for a writ of habeas corpus filed in a United States district court under 28 U.S.C. § 2254

(b) Other Cases. The district court may apply any or all of these rules to a habeas corpus petition not covered by Rule 1 (a).

Rule 4. Preliminary Review; Serving the Petition and Order

The clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order. In every case, the clerk must serve a copy of the petition and any order on the respondent and on the attorney general or other appropriate officer of the state involved.

Rule 5. The Answer and the Reply

(a) When Required. The respondent is not required to answer the petition unless a judge so orders.

(b) Contents: Addressing the Allegations; Stating a Bar. The answer must address the allegations in the petition. In addition, it must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations. * * *

(e) Reply. The petitioner may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.

Rule 6. Discovery

(a) Leave of Court Required. A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery. If necessary for effective discovery, the judge must appoint an attorney for a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A.

(b) Requesting Discovery. A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents. * * *

Rule 7. Expanding the Record

(a) In General. If the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the petition. The judge may require that these materials be authenticated.

(b) Types of Materials. The materials that may be required include letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record.

(c) Review by the Opposing Party. The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

Rule 8. Evidentiary Hearing

(a) Determining Whether to Hold a Hearing. If the petition is not dismissed, the judge must review the answer, any transcripts and records of state-court proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted. * * *

(c) Appointing Counsel; Time of Hearing. If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A. The judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare. These rules do not limit the appointment of counsel under § 3006A at any stage of the proceeding.

Rule 9. Second or Successive Petitions

Before presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition as required by 28 U.S.C. § 2244 (b)(3) and (4). * * *

Rule 11. Applicability of the Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

Selections from Classified Information Procedures Act, 18 U.S.C. Appx. §§ 1–16

§ 1. Definitions

(a) "Classified information", as used in this Act, means any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security....

(b) "National security", as used in this Act, means the national defense and foreign relations of the United States.

§ 3. Protective orders

Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States.

§ 4. Discovery of classified information by defendants

The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

§ 5. Notice of defendant's intention to disclose classified information

(a) Notice by Defendant.— If a defendant reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant, the defendant shall, within the time specified by the court or, where no time is specified, within thirty days prior to trial, notify the attorney for the United States and the court in writing. Such notice shall include a brief description of the classified information. Whenever a defendant learns of additional classified information he reasonably expects to disclose at any such proceeding, he shall notify the attorney for the United States and the court in writing as soon as possible thereafter and shall include a brief description of the classified information. No defendant shall disclose any information known or believed to be classified in connection with a trial or pretrial proceeding until notice has been given under this subsection and until the United States has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in section 6 of this Act, and until the time for the United States to appeal such determination under section 7 has expired or any appeal under section 7 by the United States is decided.

(b) Failure to Comply.— If the defendant fails to comply with the requirements of subsection (a) the court may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the defendant of any witness with respect to any such information.

§ 6. Procedure for cases involving classified information

(a) Motion for Hearing.— Within the time specified by the court for the filing of a motion under this section, the United States may request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding. Upon such a request, the court shall conduct such a hearing. Any hearing held pursuant to this subsection (or any portion of such hearing specified in the request of the Attorney General)

shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information. As to each item of classified information, the court shall set forth in writing the basis for its determination. Where the United States' motion under this subsection is filed prior to the trial or pretrial proceeding, the court shall rule prior to the commencement of the relevant proceeding.

(b) Notice.—

(1) Before any hearing is conducted pursuant to a request by the United States under subsection (a), the United States shall provide the defendant with notice of the classified information that is at issue. Such notice shall identify the specific classified information at issue whenever that information previously has been made available to the defendant by the United States. When the United States has not previously made the information available to the defendant in connection with the case, the information may be described by generic category, in such forms as the court may approve, rather than by identification of the specific information of concern to the United States.

(2) Whenever the United States requests a hearing under subsection (a), the court, upon request of the defendant, may order the United States to provide the defendant, prior to trial, such details as to the portion of the indictment or information at issue in the hearing as are needed to give the defendant fair notice to prepare for the hearing.

(c) Alternative Procedure for Disclosure of Classified Information.—

(1) Upon any determination by the court authorizing the disclosure of specific classified information under the procedures established by this section, the United States may move that, in lieu of the disclosure of such specific classified information, the court order—

(A) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or

(B) the substitution for such classified information of a summary of the specific classified information.

The court shall grant such a motion of the United States if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information. The court shall hold a hearing on any motion under this section. Any such hearing shall be held in camera at the request of the Attorney General.

(2) The United States may, in connection with a motion under paragraph (1), submit to the court an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information. If so requested by the United States, the court shall examine such affidavit in camera and ex parte.

(d) Sealing of Records of In Camera Hearings.— If at the close of an in camera hearing under this Act (or any portion of a hearing under this Act that is held in camera) the court determines that the classified information at issue may not be disclosed or elicited at the trial or pretrial proceeding, the record of such in camera hearing shall be sealed and preserved by the court for use in the event of an appeal. The defendant may seek reconsideration of the court's determination prior to or during trial.

(e) Prohibition on Disclosure of Classified Information by Defendant, Relief for Defendant When United States Opposes Disclosure.—

(1) Whenever the court denies a motion by the United States that it issue an order under subsection (c) and the United States files with the court an affidavit of the Attorney General objecting to disclosure of the classified information at issue, the court shall order that the defendant not disclose or cause the disclosure of such information.

(2) Whenever a defendant is prevented by an order under paragraph (1) from disclosing or causing the disclosure of classified information, the court shall dismiss the indictment or information; except that, when the court determines that the interests of justice would not be served by dismissal of the indictment or information, the court shall order such other action, in lieu of dismissing the indictment or information, as the court determines is appropriate. Such action may include, but need not be limited to—

(A) dismissing specified counts of the indictment or information;

(B) finding against the United States on any issue as to which the excluded classified information relates; or

(C) striking or precluding all or part of the testimony of a witness.

An order under this paragraph shall not take effect until the court has afforded the United States an opportunity to appeal such order under section 7, and thereafter to withdraw its objection to the disclosure of the classified information at issue. * * *

§ 8. Introduction of classified information

(a) Classification Status.— Writings, recordings, and photographs containing classified information may be admitted into evidence without change in their classification status.

(b) Precautions by Court.— The court, in order to prevent unnecessary disclosure of classified information involved in any criminal proceeding, may order admission into evidence of only part of a writing, recording, or photograph, or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the classified information contained therein, unless the whole ought in fairness be considered. * * *