No. 06-1195

IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,
Petitioners,

v.

GEORGE W. BUSH, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

STEPHEN H. OLESKEY
ROBERT C. KIRSCH
MARK C. FLEMING
JOSEPH J. MUELLER
PRATIK A. SHAH
LYNNE CAMPBELL SOUTTER
JEFFREY S. GLEASON
LAUREN G. BRUNSWICK
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 663-6000

DOUGLAS F. CURTIS
PAUL M. WINKE
JULIAN DAVIS MORTENSON
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

The government is correct that the issues raised in this case are "important" (Opp. 8), but it is seriously mistaken in suggesting that their resolution should be deferred.

ARGUMENT

1. After years of litigation, the government now suggests that the federal courts should "decline to consider [this] habeas petition" until Petitioners "first exhaust [their] remedies," by which the government means filing a petition under section 1005(e)(2) of the Detainee Treatment Act, Pub. L. No. 109-148, 119 Stat. 2680 (DTA), and pursuing that action until the "review process" has "run its course." Opp. 15-16. The government's argument is unpersuasive on multiple grounds.

In the first place, this case does not raise any issue of "exhaustion." Petitioners could not have "exhausted" DTA review prior to filing their petitions for habeas corpus in July 2004 or even before seeking relief in the court of appeals in early 2005, as the DTA had not been enacted. The exhaustion doctrine does not require habeas petitioners to complete proceedings that do not exist at the time the petition is filed. *See, e.g.*, R. Hertz & J. Liebman, 2 *Federal Habeas Corpus Practice & Procedure* § 23.4(a), at 1093 (5th ed. 2005). Cases requiring exhaustion of preexisting state court or court-martial appellate procedures, *see* Opp. 15, are thus irrelevant.

The government's suggestion that this Court should delay this case until the District of Columbia Circuit opines regarding the scope of DTA review is curious, as the government previously urged the D.C. Circuit to stay the *DTA cases* pending resolution of this habeas corpus case.[1] In one such case, the government argued that "[b]ecause this Court's ruling in the *Al Odah*/*Boumediene* appeals is likely to

---

[1] *See, e.g.*, Opp. to Mots. for Entry of Protective Order & for Order Setting Procedures & Cross Mot. to Enter Proposed Protective Order & to Stay Proceedings 5-6, *Parhat* v. *Gates*, No. 06-1397 (D.C. Cir. Dec. 29, 2006); Mot. to Hold Briefing in Abeyance Until This Court Issues Its Ruling in *Al Odah* v. *United States* & *Boumediene* v. *Bush* 2-3, *Bismullah* v. *Gates*, No. 06-1197 (D.C. Cir. July 25, 2006).

resolve one or more of the primary issues in the present case, we ask that this Court hold the briefing in abeyance until the *Al Odah/Boumediene* ruling is issued by this Court."[2]

The government's inconsistency aside, courts have never required habeas petitioners to wade through alternative procedures before addressing a Suspension Clause challenge to a repeal of habeas. On the contrary, this Court has adjudicated Suspension Clause cases as they are presented. *See Swain* v. *Pressley*, 430 U.S. 372, 373-376, 381-384 (1977) (evaluating adequacy of statutory alternative to habeas even though the habeas petitioner had not invoked it); *see also Felker* v. *Turpin*, 518 U.S. 651, 663-664 (1996) (interpreting statute on its face without reference to actual operation of alternate procedure). Just as a petitioner has "a compelling interest in knowing *in advance* whether [he] may be tried by a military commission that arguably is without basis in law," *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2772 (2006) (emphasis added), Petitioners here have an equally compelling interest in knowing in advance whether a replacement of habeas with a different (and potentially more limited) procedure is constitutional before embarking on that procedure. *See also Ex parte Quirin*, 317 U.S. 1, 23-24, 38-40 (1942) (considering challenge to military commission procedures on an expedited basis prior to conclusion of trial).

The Suspension Clause would be a dead letter if Congress could repeal habeas and indefinitely delay a habeas petitioner's ability to challenge that repeal by erecting manifestly inadequate substitute procedures. To require a habeas petitioner to pursue a non-habeas proceeding as a prerequisite to raising a constitutional challenge is to decide the Suspension Clause issue in the government's favor, since the very issue to be decided in a Suspension Clause case is whether a petitioner can be constitutionally required to forgo the writ's expeditious remedy in the first place. *See, e.g.*, *Preiser* v. *Rodriguez*, 411 U.S. 475, 495 (1973) ("[S]peedy review of [a prisoner's]

---

[2] Mot. to Hold Briefing in Abeyance 2-3, *Bismullah*, *supra*.

grievance . . . is so often essential to any effective redress."); R.J. Sharpe, *The Law of Habeas Corpus* 18-20 (2d ed. 1989) (noting that the Habeas Corpus Act of 1679, the basis for the modern writ, was designed to ensure that "judges would come to a speedy determination"); *see also Hamdi* v. *Rumsfeld*, 542 U.S. 507, 575 (2004) (Scalia, J., dissenting) (the Suspension Clause "would be a sham if it could be evaded by congressional prescription of requirements *other than the common-law requirement of committal for criminal prosecution* that render the writ, though available, unavailing").

This Court can and should review the adequacy of the DTA procedure as a substitute for habeas in light of the government's own interpretation of the DTA, as Judge Rogers did. Pet. App. 37a-41a. As interpreted by the government, the DTA: (a) further restricts the limited access to counsel that was granted to detainees in this and related cases; (b) denies even the most basic discovery requests made by petitioners in those cases; (c) requires the court of appeals to decide the DTA petitions entirely on the basis of the one-sided record compiled by the government in the CSRT proceedings, where reasonable requests for documents and testimony were repeatedly denied; (d) imposes a "strong presumption of regularity" with respect to the compilation of the record; and (e) restricts the remedy available to a remand for further consideration, without vacating the "enemy combatant" designation in the interim. *See* Mot. to Govern Further Proceedings & Opp. to Mot. to Govern at 2, 9-17, *Parhat* v. *Gates*, No. 06-1397 (D.C. Cir. Mar. 9, 2007) ("Gov't Mot. to Govern DTA Cases"); *see also* Opp. 30 (stating that the D.C. Circuit can only "review the record evidence"). The government underscored the vast difference between habeas and DTA review when it chided the DTA petitioners for "seek[ing] to recreate much of the district court habeas regime that Congress abrogated." Gov't Mot. to Govern DTA Cases 8.

The government attempts to save the DTA's review procedure by suggesting that the level of review to which Petitioners are entitled is no greater than it would be had they been "convicted by a military commission and sentenced to

death." Opp. 14. This argument turns the law on its head. In the cases the government cites, the petitioners had been convicted of crimes following trials that afforded extensive procedural protections, including notice of the charges against them and the opportunity to present their own defense through counsel. *See, e.g.*, *Johnson* v. *Eisentrager*, 339 U.S. 763, 786 (1950) (prisoners were "formally accused of violating the laws of war and fully informed of particulars of these charges"); *Yamashita* v. *Styer*, 327 U.S. 1, 5 (1946); *Quirin*, 317 U.S. at 23. And what the government calls "conventional habeas petitions" under 28 U.S.C. § 2254(e) (Opp. 15) are collateral attacks on criminal convictions in state courts, which likewise afford the accused full due process protections. In contrast to these scenarios, Petitioners' indefinite Executive detention without trial or judgment falls squarely within the "historical core" of habeas corpus, where "its protections have been strongest." *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001); *see also* Sharpe, *supra*, at 66, 116 (stating that common law habeas courts considered factual and legal objections to non-criminal Executive detention, including cases of impressment and prisoners of war).[3]

2. The government devotes significant space to defending the court of appeals' decision regarding the Suspension Clause (Opp. 19-28). Even if the court of appeals were correct, however, this case would still strongly deserve this Court's review. The court of appeals overtly discarded this Court's analysis in favor of the *Rasul* dissent's (Pet. App. 13a-14a). Indeed, the government does not even attempt to

[3] The government miscites *St. Cyr* for the proposition that "traditional habeas review" was confined to review of legal issues and "'whether there was some evidence to support the order.'" Opp. 14 (quoting *St. Cyr*, 533 U.S. at 305-306). That passage of *St. Cyr* did not discuss "traditional habeas review" at all, but rather habeas to "test the legality of [a] *deportation order*." 533 U.S. at 306 (emphasis added). An alien who has been found deportable from this country has previously received "all opportunity to be heard upon the questions involving his right to be and remain in the United States." *Yamataya* v. *Fisher*, 189 U.S. 86, 101 (1903). Petitioners have had no such process.

reconcile the decision below with this Court's analysis of the historical reach of the common law writ in *Rasul*. Thus, while there may be no split among circuits—an unsurprising fact, given that all Guantanamo habeas petitions have been filed in the District of Columbia—there is most certainly a split between the court of appeals and this Court's analysis in *Rasul*. The Court should grant certiorari to resolve that conflict and, as Petitioners would demonstrate further in merits briefing, reverse the court of appeals' erroneously formalistic view of the common law writ.

The government's substantive arguments fail to engage the basic issues. As both the Court and concurrence concluded in *Rasul*, the case of Guantanamo prisoners like Petitioners is distinguishable from *Eisentrager* on multiple grounds. Citizens of friendly nations uncharged with any crime and "imprisoned in territory over which the United States exercises exclusive jurisdiction and control" are differently situated from citizens of enemy nations convicted of war crimes after full trials and held at a temporarily-controlled Allied prison in Germany. *Rasul* v. *Bush*, 542 U.S. 466, 476 (2004). And while the *Eisentrager* petitioners could not seek habeas because they were not within the "implied protection" of the United States (339 U.S. at 777-778), the United States' indefinite control and jurisdiction over Guantanamo Bay "has produced a place that belongs to the United States, *extending the 'implied protection' of the United States to it*" (*Rasul*, 542 U.S. at 487 (Kennedy, J., concurring in the judgment) (quoting *Eisentrager*, 339 U.S. at 777-778)). Justice Kennedy's recognition that Guantanamo prisoners are covered by the "implied protection" of the United States—the test used by *Eisentrager* for the "*constitutional* right[] to sue in some court of the United States for a writ of habeas corpus" (339 U.S. at 777)—refutes

the government's effort to confine the *Rasul* reasoning solely to statutory issues.[4]

The government's statement that "aliens outside the United States have no rights under the Constitution" (Opp. 20) misstates the law. The government's cases state only that "*certain* constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001) (emphasis added). As Petitioners pointed out—and the government does not address—this Court has declined to apply particular provisions to conduct occurring in other countries where doing so would be "impracticable and anomalous." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (internal quotation marks omitted); Pet. 24-25. As the Court recognized in *Rasul*, however, there is no such anomaly here. *See* 542 U.S. at 483 n.15.[5]

3. Finally, the government asserts that the Court should not review the merits issues that have split the district court because the court of appeals did not rule on them. Opp. 28. But the very case the government cites decided an issue

---

[4] The government's suggestion that the Court "rejected" Justice Kennedy's conclusion that Guantanamo "should be treated as sovereign territory" for habeas purposes (Opp. 22) is without merit. The Court concluded that the "the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of" the jurisdiction and control exercised, and that the United States' control over Guantanamo rendered the writ as available to Guantanamo prisoners as to prisoners held in the 50 states. The fact that the United States does not exercise "ultimate sovereignty" (Opp. 22 (internal quotation marks omitted)) was irrelevant to both the Court and Justice Kennedy.

[5] Similarly, while the voluntariness of one's presence in the United States may be relevant to claims under the Fourth Amendment's Search and Seizure Clause, *cf.* Opp. 24-25, this Court has never suggested, much less approved, the government's contention that involuntary presence has any bearing on the Fifth Amendment's prohibition against arbitrary detention. Under the government's position, the Executive could presumably abduct a foreign citizen and detain him *in the United States* without any meaningful judicial review on the theory that his presence here was "involuntary." Opp. 25.

on which neither the district court nor the court of appeals had ruled, that the parties had not initially briefed, and that was raised for the first time by an *amicus curiae* in this Court. *See Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984) (deciding a preemption issue even though it was merely "acknowledged" by the district court and court of appeals and was only briefed in response to a special order of this Court). Here, Petitioners' ability to assert substantive rights on habeas was not only briefed but also *decided* by the district court and fully briefed and argued in the court of appeals.

The government avoids all discussion of Petitioners' major merits arguments: that they have validly stated claims under both common law habeas and the Constitution that warrant a hearing, contrary to Judge Leon's holding. Pet. 23-25. The government's failure to address Petitioners' right to a "searching factual review of the Executive's claims" under the common law writ codified in 28 U.S.C. § 2241(c)(1) (Pet. App. 46a (Rogers, J., dissenting)), or the fact that petitions indistinguishable from Petitioners' "unquestionably describe" constitutional violations cognizable under section 2241(c)(3) (*Rasul*, 542 U.S. at 483 n.15), demonstrates the weakness of the government's position on these points.

The government likewise fails to confront the fact that the CSRTs' expanded definition of "enemy combatant" allows the detention of people who render assistance to others who, *without their knowledge*, are allegedly associated with Al Qaeda. The government tellingly does not dispute that the CSRT definition would permit detention of Judge Green's hypothetical "little old lady in Switzerland" who innocently gives money to a disguised terrorist organization. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005) (internal quotation marks omitted).[6] Whether

[6] The government attempts to blunt the force of Judge Green's hypothetical by asserting that Petitioner Boumediene was detained for supposedly "provid[ing] assistance" to a "known al Qaida operative" (Opp. 29 & n.13). But the government's careful language never says that the per-

each and every detainee at Guantanamo fits within that hypothetical is irrelevant. The point is that the government's latest definition of "enemy combatant," which the government all but concedes is far broader than the definition previously put before the Court (Opp. 28-29), significantly exceeds Congress's mandate in the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) and the traditional detention power under the laws of war. Moreover, because Petitioners clearly do not fall within these latter legitimate categories of detainable persons, the writ should issue forthwith.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STEPHEN H. OLESKEY
ROBERT C. KIRSCH
MARK C. FLEMING
JOSEPH J. MUELLER
PRATIK A. SHAH
LYNNE CAMPBELL SOUTTER
JEFFREY S. GLEASON
LAUREN G. BRUNSWICK
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 663-6000

DOUGLAS F. CURTIS
PAUL M. WINKE
JULIAN DAVIS MORTENSON
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

MARCH 2007

---

son's supposed status as an "al Qaida operative" was "known" *to Mr. Boumediene.*