No. 06-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, validly stripped federal court jurisdiction over habeas corpus petitions filed by foreign citizens imprisoned indefinitely at the United States Naval Station at Guantanamo Bay.

2. Whether Petitioners' habeas corpus petitions, which establish that the United States government has imprisoned Petitioners for over five years, demonstrate unlawful confinement requiring the grant of habeas relief or, at least, a hearing on the merits.

LIST OF PARTIES TO PROCEEDING BELOW

The parties to the proceeding in the court of appeals (*Boumediene, et al.* v. *Bush, et al.*, No. 05-5062) were:

> Lakhdar Boumediene, Mustafa Ait Idir, Belkacem Bensayah, Hadj Boudella, Saber Lahmar, and Mohamed Nechla (Appellants);
>
> Abassia Bouadjmi, Sabiha Delic-Ait Idir, Anela Kobilica, Emina Planja, Emina Lahmar, and Badra Baouche (Next Friends of Appellants); and
>
> George W. Bush, Donald Rumsfeld, Jay Hood, and Nelson J. Cannon (Appellees).

This case was consolidated in the court of appeals with *Khalid* v. *Bush, et al.*, No. 05-5063, in which the parties were:

> Ridouane Khalid (Appellant) and Mohammed Khalid (Next Friend of Appellant); and
>
> George W. Bush, Donald Rumsfeld, Jay Hood, and Nelson J. Cannon (Appellees).

The court of appeals heard *Boumediene* and *Khalid* at the same time as *Al Odah, et al.* v. *United States*, Nos. 05-5064, *et al.* This case was not consolidated with *Al Odah.*

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Lakhdar Boumediene, Mustafa Ait Idir, Belkacem Bensayah, Hadj Boudella, Saber Lahmar, and Mohamed Nechla ("Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the district court (Leon, J.) dismissing Petitioners' habeas corpus petitions (App. 51a-79a) is reported at 355 F. Supp. 2d 311. The opinion of the court of appeals vacating the district court's decision and dismissing for lack of jurisdiction (App. 1a-50a) is not yet reported, but is available at 2007 WL 506581.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article 1, section 9, clause 2 of the United States Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

2. The following statutory provisions are set forth in relevant part in the Appendix hereto:

a. 28 U.S.C. § 2241(c) (2004) (App. 85a);

b. Authorization for Use of Military Force, § 2(a), Pub. L. No. 107-40, 115 Stat. 224 (2001) (*id.*);

c. Detainee Treatment Act of 2005, § 1005(e)(2), Pub. L. No. 109-148, 119 Stat. 2680 (*id.* 85a-87a);

d. Military Commissions Act of 2006, § 7, Pub. L. No. 109-366, 120 Stat. 2600 (*id.* 87a-88a).

INTRODUCTION

In *Rasul* v. *Bush*, 542 U.S. 466 (2004), this Court held that foreign nationals imprisoned by the United States government at the U.S. Naval Station at Guantanamo Bay, a "territory over which the United States exercises exclusive jurisdiction and control," could challenge their confinement through habeas corpus. *Id.* at 476. The Court explained that this conclusion was "consistent with the historical reach of the writ of habeas corpus," which extended not only to "sovereign territory" but also to "all other dominions under the sovereign's control." *Id.* at 481-482. The Court also noted that the petitions in that case "unquestionably describe[d] 'custody in violation of the Constitution or laws or treaties of the United States,'" *id.* at 483 n.15 (quoting 28 U.S.C. § 2241(c)(3)), and remanded the cases "for the District Court to consider in the first instance the merits of petitioners' claims," *id.* at 485.

At the time of *Rasul*, Petitioners had already been imprisoned at Guantanamo for over two years. The United States transported them there from their home country of Bosnia and Herzegovina ("Bosnia"), notwithstanding a three-month investigation and Bosnian court rulings con-

cluding that there was no evidence to support their detention and forbidding their expulsion from Bosnian territory. Petitioners filed habeas petitions shortly after *Rasul* was decided, asserting that their detention was unlawful. Both the district court and court of appeals held, for different reasons, that Petitioners could not seek any meaningful relief. Petitioners are now in their sixth year of detention.

The rulings below disregarded this Court's analysis and conclusions in *Rasul*. In the district court's view, *Rasul* was merely a sterile exercise that allowed Petitioners to *file* a habeas petition, which then was to be summarily dismissed because there was "no viable legal theory" for issuing the writ. App. 74a-79a. The court of appeals held that the habeas jurisdiction confirmed in *Rasul* could be withdrawn without offending the Suspension Clause of the Constitution because, the court believed, the common law writ as it existed in 1789 only extended to "a sovereign territory of the Crown." *Id.* 12a.

The court of appeals' decision cannot be reconciled with this Court's considered conclusion that the historical writ was not limited by "formal notions of territorial sovereignty," but rather extended to "all other dominions under the sovereign's control." *Rasul*, 542 U.S. at 482. The Court should grant certiorari to resolve the direct conflict between the court of appeals' Suspension Clause ruling and this Court's opinion in *Rasul*.

This Court should also determine that Petitioners' habeas petitions demonstrate unlawful confinement and warrant a grant of habeas relief or, at the very least, a hearing on the merits. Although the panel majority in the court of appeals did not reach this issue, the matter has been fully aired and is the subject of conflicting decisions in the United States District Court for the District of Columbia, which is the only court in which Guantanamo habeas cases have been filed. The government claims an immense power unprecedented in our history: to imprison foreign nationals, without bringing criminal charges or providing fair process, for an indefinite period. Hundreds of other habeas cases have been stayed in the district court pending the outcome of this case.

This case is unquestionably of national importance; indeed, it is difficult to imagine a public controversy more in need of this Court's guidance. If the decision below is allowed to stand unreviewed, *Rasul*'s promise of judicial review of "the merits" will prove empty. The Court should grant certiorari and hear the case on an expedited schedule.[1]

STATEMENT OF THE CASE

Petitioners are six natives of Algeria who emigrated to Bosnia and Herzegovina at various times during the 1990s. Five Petitioners acquired Bosnian citizenship, while the sixth (Mr. Lahmar) acquired permanent residency in Bosnia. By 2001, each Petitioner was married, had two or more children, and lived peacefully with his family in Bosnia.[2]

A. Petitioners' Arrest, Investigation, And Release

Petitioners were arrested by Bosnian police in October 2001, purportedly on suspicion of an attempt to commit international terrorism. The Bosnian authorities had no evidence for the arrest, but rather were acting under extreme pressure from United States officials. After a three-month investigation, Bosnian authorities concluded that there was no evidence to support a prosecution.[3]

On January 17, 2002, the Supreme Court of the Federation of Bosnia and Herzegovina ordered Petitioners released, with the concurrence of the Bosnian prosecutor, because the investigation had failed to support any allegation of criminal activity. Ct. App. J.A. 0058-0059.

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[1] Petitioners have filed a motion seeking expedited consideration of this petition, as well as expedited briefing on the merits and oral argument this Term in the event that certiorari is granted.

[2] *See* Mem. in Support of Mot. for Order Enjoining Appellees from Transferring Pet'rs to Algeria at 1; Ex A at 2; Ex. A1 at 3; Ex. A2 at 2-3; Ex. A3 at 2-3; Ex. A4 at 2; Ex. A5 at 3; Ex. A6 at 2-3, *Boumediene* v. *Bush*, No. 05-5062 (D.C. Cir. Sept. 21, 2005).

[3] *See* Pet'rs-Appellants' Supp. Br. Regarding the Military Commissions Act of 2006 at 25-26, *Boumediene* v. *Bush*, No. 05-5062 (D.C. Cir. Nov. 1, 2006).

B. Handover To U.S. Forces And Transportation To Guantanamo Bay

Late in the night of January 17, 2002, as Petitioners were being released from the Central Prison in Sarajevo, Bosnian police officers—acting again at the insistence of United States officials—seized Petitioners, placed them in shackles, put hoods over their heads, and transported them to an unknown location.

Early the next morning, the Bosnian police handed Petitioners over to U.S. military personnel stationed in Bosnia. The U.S. military then transported Petitioners from Bosnia to the U.S. Naval Station at Guantanamo Bay, Cuba. The journey lasted three days, during which time the six men were shackled, hooded, and exposed to extreme cold. Ct. App. J.A. 0469, 0530. Petitioners have been imprisoned at Guantanamo Bay ever since.

The Bosnian authorities acted in violation of a binding order of the Human Rights Chamber for Bosnia and Herzegovina—a civil rights tribunal established under the U.S.-brokered Dayton Peace Agreement—which forbade Petitioners' removal from Bosnian territory. Ct. App. J.A. 0202 ¶ 230. The Human Rights Chamber subsequently issued decisions holding that the Bosnian government violated domestic and European law by expelling Petitioners from Bosnian territory and allowing their removal to Guantanamo Bay. *E.g.*, *id.* 0123-0253.

C. Conditions Of Confinement At Guantanamo Bay

Petitioners are now in their sixth year of imprisonment at Guantanamo. They are confined to individual 8' x 6' cells consisting of concrete walls and steel mesh. Above each man's steel bunk, a fluorescent light remains on 24 hours a day. Petitioners have been subject to, among other things, up to 15 consecutive months of solitary confinement, sleep deprivation, and extreme temperature conditions.[4] In 2004, for ex-

[4] *See, e.g.*, Center for Constitutional Rights, *Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantanamo*

ample, rogue soldiers crushed Mr. Ait Idir's face into a gravel courtyard and broke one of his fingers, even though he was restrained and posed no threat. Ct. App. J.A. 0472. Each Petitioner suffers from serious medical ailments caused or exacerbated by the conditions of his detention.

D. The Petitions And The Government's Response

In July 2004, counsel for Petitioners filed petitions for writs of habeas corpus in the district court. Ct. App. J.A. 0064-0081. Petitioners sought habeas on the grounds that their indefinite detention without criminal charge was unlawful and violated the Constitution, laws, and treaties of the United States. *See* 28 U.S.C. § 2241(c)(1), (3). Several other Guantanamo prisoners filed similar petitions.

On September 15, 2004, the district court assigned a coordinating judge (Green, J.) to manage all pending Guantanamo habeas cases. Ct. App. J.A. 0327-0328. The order permitted any judge of the district court to transfer any Guantanamo case to the coordinating judge or to reclaim any case previously transferred.

Judge Leon, the district judge to whom Petitioners' case was assigned, transferred the case to the coordinating judge on September 29, 2004, for resolution of particular issues. Ct. App. J.A. 0329. The coordinating judge ordered Respondents to file factual returns to the petitions. In response, the government submitted only what it described as the "record" of a "Combatant Status Review Tribunal" (CSRT) that the government had recently held for each Petitioner.

Bay, Cuba 17 (2006), *available at* http://www.ccr-ny.org/v2/reports/docs/Torture_Report_Final_version.pdf (last visited Mar. 2, 2007) (reporting that Petitioners Lahmar and Bensayah were kept in isolation for 15 months and that Mr. Lahmar's cell was "so cold on one occasion that ice formed on the vents"); *id.* at 18 (reporting that Petitioner Boumediene was deprived of sleep for 13 consecutive days); Mavish Khan, *My Guantanamo Diary: Face to Face with the War on Terrorism*, Wash. Post, Apr. 30, 2006, at B1 ("Most [detainees] are held in isolation in cells separated by thick steel mesh or concrete walls.").

The CSRT process was established in the wake of *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), to "review" the military's assertion that prisoners at Guantanamo Bay were being held as "enemy combatants." App. 81a-82a. Each CSRT consisted of three commissioned officers of the United States military. The prisoner was not allowed counsel (even at no cost to the government) or to view any classified evidence offered against him. *Id.* 39a, 62a, 82a. Although the CSRT procedures permitted Petitioners to offer documentary and testimonial evidence, this was limited to evidence that the CSRT concluded was "reasonably available" (*id.* 82a)—a standard that, in practice, excluded much readily-accessible evidence, including documents in the government's possession and readily locatable witnesses. *See infra* p. 21 & n.18.

In deciding "enemy combatant" status, the CSRT was permitted to "consider any information it deem[ed] relevant and helpful to a resolution of the issue before it," including hearsay and evidence procured by torture or coercion. App. 82a. The CSRT applied a "rebuttable presumption in favor of the government's evidence." *Id.*

E. The District Court Judgment

On October 4, 2004, the government moved to dismiss all petitions filed on behalf of Guantanamo prisoners on the theory that the facts alleged in the petitions, even if taken as true, did not warrant a grant of habeas relief. App. 56a & n.6.

On January 19, 2005, Judge Leon granted the government's motion in Petitioners' case. App. 51a-79a. The court believed that the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF") permitted the President to "capture and detain those who the military determined were *either* responsible for the 9/11 attacks *or posed a threat of future terrorist attacks*," *id.* 59a (emphasis added), even though the AUMF's text only authorizes "necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on Sep-

tember 11, 2001, or harbored such organizations or persons," AUMF § 2(a).[5]

Relying primarily on *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), the district court ruled that Petitioners had no cognizable constitutional rights because they are neither U.S. citizens nor aliens "located within sovereign United States territory." App. 63a. The court rejected the argument that Guantanamo Bay is "for all intents and purposes, sovereign United States territory." *Id.* 65a n.13. Although acknowledging that this Court's decision in *Rasul* recognized Petitioners' statutory right to file habeas petitions in federal court, the district court concluded that *Rasul* "did not concern itself with whether the petitioners had any independent constitutional rights." *Id.* 66a. In the court's view, *Rasul*—including the statement that the petitions at issue "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States,'" 542 U.S. at 483 n.15 (quoting 28 U.S.C. § 2241(c)(3))—decided only that Petitioners had the "ability to file an application." App. 67a n.15.

The district court likewise rejected Petitioners' separate habeas claim under 28 U.S.C. § 2241(c)(1), which asserted "common law due process rights to judicial review" in the event Petitioners lacked constitutional rights. App. 68a n.17. Citing no authority, the court held that section 2241(c)(1) "does not give [Petitioners] more rights than they would otherwise possess under the Constitution." *Id.*

Less than two weeks after Judge Leon issued his decision, the coordinating judge ruled directly to the contrary, holding that "all [Guantanamo] detainees possess Fifth Amendment due process rights and . . . some detainees possibly possess rights under the Geneva Conventions." *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 481 (D.D.C. 2005) (Green, J.).

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[5] The district court did not address the government's argument that the President's powers under Article II of the Constitution alone could provide authority for Petitioners' indefinite detention. App. 62a n.11.

F. The Court Of Appeals Judgment

On February 20, 2007, a divided panel of the court of appeals vacated the district court judgment and dismissed the case for lack of jurisdiction.[6] The panel majority concluded that the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ("MCA")—enacted during the pendency of the appeal—operated to strip federal jurisdiction over Petitioners' habeas petitions. App. 6a-9a.

The majority concluded that the MCA's jurisdiction-stripping provision did not offend the Suspension Clause because, in its view, habeas corpus would not have been available as of 1789 to persons "without presence or property within the United States." App. 12a-13a. The panel reached this conclusion notwithstanding this Court's statement in *Rasul* that the ability of Guantanamo prisoners to invoke habeas was consistent with the "'historical reach of the writ'" (*id.* 13a (quoting 542 U.S. at 481-482)). The majority elected instead to follow the reasoning of the *Rasul* dissent (*see id.* 13a-14a (citing 542 U.S. at 502-505 & n.5 (Scalia, J., dissenting))).

Although the panel majority recognized that, unlike the petitioners in *Eisentrager*, Petitioners here are not "enemy aliens," it nonetheless treated *Eisentrager* as controlling. App. 13a & n.8. The majority stated that distinctions between the Naval Station at Guantanamo and the prison at Landsberg, Germany, where the *Eisentrager* petitioners were held, are "immaterial to the application of the Suspension Clause." *Id.* 16a. It likewise concluded that the reasoning of the *Insular Cases*,[7] in which this Court recognized that "'fundamental personal rights'" are applicable in territories outside the United States, did not apply to the "*de facto* sovereignty" at Guantanamo. *Id.* 16a.

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[6] The court of appeals heard Petitioners' appeal together with the government's appeal from the coordinating judge's decision in *Guantanamo Detainee Cases*, although the cases were not consolidated.

[7] *See Balzac* v. *Porto Rico*, 258 U.S. 298 (1922); *Dorr* v. *United States*, 195 U.S. 138 (1904); *Downes* v. *Bidwell*, 182 U.S. 244 (1901).

Judge Rogers dissented. Agreeing that the MCA purported to repeal jurisdiction in this case, Judge Rogers concluded that such a repeal was unconstitutional.

Judge Rogers noted that this Court had already concluded in *Rasul* that the writ's application to Guantanamo prisoners was consistent with its historical reach. App. 33a. Judge Rogers surveyed the scope of the writ, following this Court's analysis in *Rasul* and citing examples where English courts had issued the writ to "faraway lands," *id.* 36a, and also explained that *Eisentrager* did not control this case, s*ee id.* 36a-37a.[8]

Judge Rogers next examined whether the MCA replaced habeas with a "commensurate procedure." App. 37a. She concluded that the procedure asserted—review of the CSRT process in the court of appeals under section 1005(e)(2) of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 ("DTA")—was insufficient. *See id.* 38a. First, she explained, far from providing "'careful consideration and plenary processing of . . . claims and including full opportunity for the presentation of the relevant facts'" (*id.* (quoting *Harris* v. *Nelson*, 394 U.S. 286, 298 (1969))), many aspects of the CSRT proceedings—evidentiary presumptions against the prisoner, lack of access to the government's evidence, obstacles to presenting rebuttal evidence, and the lack counsel—are "inimical to the nature of habeas review." *See id.* 39a-40a.

In addition, Judge Rogers found, judicial review of the CSRT process "is not designed to cure these inadequacies." App. 40a. The DTA prevents the prisoner from offering evidence rebutting the government's case; it "implicitly endorses" detention on the basis of evidence obtained through torture; and even if the court were to find detention unjustified, neither the DTA nor the MCA authorizes that court to

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[8] Judge Rogers also concluded that the application of the Suspension Clause did not depend on a finding that Petitioners possessed "constitutional rights" because the Clause is a "limitation[] on Congress's powers" that courts must enforce regardless of whether the party asserting the Clause enjoys specific rights under the Constitution. App. 25a.

order the prisoner's release. *Id.* 41a. Indeed, in some cases where *CSRTs themselves* found detention to be unjustified, the government simply reconvened CSRTs seriatim until it obtained its desired result. *See id.*

On the merits, Judge Rogers would have remanded the case for the district court to "follow the return and traverse procedures of 28 U.S.C. § 2241 *et seq.*," including an evidentiary hearing on the factual and legal sufficiency of the Executive's asserted bases for detention. App. 50a. Judge Rogers noted that, even in wartime, federal courts have "engaged in searching factual review of the Executive's claims" (*id.* 46a); she distinguished cases involving review of convictions by military tribunal, because "the detainees have been charged with no crimes, nor are charges pending" (*id.* 47a).

REASONS FOR GRANTING THE WRIT

This case presents questions central to the rule of law. The court of appeals majority concluded that Congress could validly abolish the writ of habeas corpus as to hundreds of prisoners who have been held for over five years without judicial process. And the district court held that the writ itself is unavailing to those same prisoners because, in its view, neither the requirements of habeas nor the Constitution, laws, and treaties of the United States place any limitation on Executive detention in this context. The national importance of these questions would warrant this Court's review on their own. Certiorari is even more imperative in light of the oppressive conditions Petitioners endure.[9]

[9] This petition is being filed contemporaneously with a petition in *Al Odah, et al.* v. *United States*, No. 06-____, which seeks review of the same judgment of the court of appeals with respect to *Guantanamo Detainee Cases*. Because of the overlap in issues, the Court may wish to consider granting both petitions.

I. *RASUL*, *HAMDAN*, AND THE MCA'S FAILURE TO PROVIDE AN ADEQUATE SUBSTITUTE FOR HABEAS REVIEW COMPEL REVERSAL OF THE COURT OF APPEALS' JUDGMENT

In the last three years, this Court has twice held that federal courts may hear habeas petitions brought by Guantanamo prisoners. *See Rasul* v. *Bush*, 542 U.S. 466 (2004); *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006). The court of appeals' decision cannot be squared with the analysis in those cases. The Court should grant certiorari to correct the court of appeals' decision, to clarify the scope of the Suspension Clause guarantee, and to ensure that prisoners held at Guantanamo have a meaningful opportunity to challenge their detention.

A. The Court Of Appeals Disregarded This Court's Strict Requirements For The Retroactive Repeal Of Habeas Jurisdiction

The court of appeals' conclusion that the MCA repealed habeas jurisdiction over Petitioners' cases raises grave doubts regarding the MCA's constitutionality under the Suspension Clause. As is explained in Part I.B below, those doubts are well-founded in light of the Suspension Clause's protection of Petitioners' right to seek the writ. As an initial matter, however, the Court may avoid reaching the constitutional question by applying well-settled rules of construction recently reaffirmed in *Hamdan*. As applied to this case, those rules dictate that the MCA does not repeal habeas jurisdiction in cases pending when the MCA was enacted.

First, "Congress must articulate specific and unambiguous statutory directives to effect a repeal" of habeas jurisdiction. *INS* v. *St. Cyr*, 533 U.S. 289, 299 (2001); *cf. Hamdan*, 126 S. Ct. at 2764 (stating that a statute will not be held to revoke this Court's habeas jurisdiction "absent an unmistakably clear statement to the contrary"). Second, "a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." *Hamdan*, 126 S. Ct. at 2765. And third, the Court should avoid construing the MCA in a man-

ner that would give rise to "substantial constitutional questions." *St. Cyr*, 533 U.S. at 300.

Section 7(a) of the MCA purports to strip jurisdiction over two distinct categories of cases: (1) "an application for a writ of habeas corpus" filed by or on behalf of certain aliens, 28 U.S.C. § 2241(e)(1); and (2) "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 such an alien, *id.* § 2241(e)(2) (emphasis added). Section 7(b), which sets out the "effective date" of section 7(a), provides only that section 7(a) applies to pending cases that are in the *second* category—cases "*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." MCA § 7(b) (emphasis added). The MCA does not provide—much less contain an "unmistakably clear statement"—that section 7(a) repeals jurisdiction over cases in the *first* category, *i.e.* habeas cases that were pending on the date of enactment.[10]

Finally, as shown below, construction of the MCA raises serious constitutional questions that would be avoided if the Court were to read the statute to allow the continued adjudication of these petitions. Indeed, the necessity of determining the scope of the Suspension Clause guarantee is "in and of itself a reason to avoid answering the constitutional

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[10] The court of appeals brushed aside the contrast between section 7(b) and section 3(a) of the MCA, the latter of which addresses habeas petitions brought by persons convicted by military commission. Section 3(a) added 10 U.S.C. § 950j, which provides that "notwithstanding any other provision of law (*including section 2241 of title 28 or any other habeas corpus provision*), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever . . . pending on . . . the date of the enactment of the [MCA], relating to the prosecution, trial, or judgment of a military commission under this chapter." 10 U.S.C. § 950j(b) (emphasis added). That section explicitly states that the jurisdiction-stripping provision applies to habeas cases pending on the date of enactment. The textual difference between that section and section 7(b) raises a "negative inference" that section 7(b) did not repeal habeas in pending cases. *Hamdan*, 126 S. Ct. at 2765.

questions that would be raised by concluding that [habeas] review was barred entirely." *St. Cyr*, 533 U.S. at 301 n.13.

B. *Rasul*'s Historical Analysis And Congress's Failure To Provide An Adequate Substitute For Habeas Demonstrate The MCA's Unconstitutionality

This Court has made clear that, at a minimum, the Suspension Clause protects the scope of habeas corpus as it existed in 1789, and that access to the Great Writ may not be restricted unless Congress clearly and validly suspends the writ[11] or provides an adequate and effective substitute for habeas review of unlawful detention. The court of appeals analyzed only the first issue (the scope of the writ in 1789) and did so erroneously—in fact, its decision contradicts this Court's analysis in *Rasul*.

1. The court of appeals ignored this Court's finding that the writ's availability to Guantanamo prisoners is consistent with the historical reach of habeas corpus

"*[A]t the absolute minimum*, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301 (quoting *Felker* v. *Turpin*, 518 U.S. 651, 663-664 (1996)) (emphasis added). As Judge Rogers noted, the panel majority confined its analysis to historical materials predating 1789 and never considered whether the Suspension Clause might protect any post-Founding expansion of the writ. App. 30a & n.5. In other words, the court of appeals ignored this Court's important caveat "[a]t the absolute minimum." Thus, even if the court of appeals' conclusion regarding the

[11] The government has never contended that the MCA meets the requirements for a valid suspension of the writ under the Suspension Clause, nor could it do so. Congress has suspended the writ on only four occasions, and each time Congress has expressly mentioned suspension and given it a limited temporal effect. *See* Act of Mar. 3, 1863, ch. 81, 12 Stat. 755, 755 (Civil War); Act of Apr. 20, 1871, ch. 22, 17 Stat. 13, 14-15 (armed resistance to Reconstruction); Act of July 1, 1902, ch. 1369, 32 Stat. 691, 692 (Philippine rebellion); *Duncan* v. *Kahanamoku*, 327 U.S. 304, 307-308 (1946) (Pearl Harbor).

scope of the writ as of 1789 were sound—though it is not—that would render unavoidable the important question regarding the full contours of the Suspension Clause.[12]

In any event, the panel majority's analysis is erroneous on its own terms because, as Judge Rogers also recognized, the writ would have been available to prisoners in Petitioners' position as of 1789. This Court made clear in *Rasul* that recognizing the right of "persons detained at the [Guantanamo] base" to bring habeas petitions was "consistent with the historical reach of the writ of habeas corpus." 542 U.S. at 481. Quoting a 1759 decision by Lord Mansfield, this

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[12] Analysis of that question warrants reversal as well. *See Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1269 (1970) ("While the framers probably could not have foreseen the extent to which the writ's function would expand, the history of two centuries of expansion through a combination of statutory and judicial innovation in England must have led them to understand habeas corpus as an inherently elastic concept not bound to its 1789 form. The suspension clause then could be read to protect the product of an evolving judicial process." (citing Paul A. Freund's Resp't Br. 35-39, *United States* v. *Hayman*, 342 U.S. 205 (1952)) (footnote omitted)). An evolving interpretation of the Suspension Clause is particularly appropriate in cases of indefinite executive detention—like that at issue here—as opposed to detention pursuant to the judgment of a duly constituted criminal court or military tribunal. The common law right to challenge indefinite detention by the Executive, without benefit of criminal indictment or fair process, falls squarely within the core of habeas corpus as it has been known for centuries and is not a mere technicality of habeas procedure. *See St. Cyr*, 533 U.S. at 301 ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."); *Swain* v. *Pressley*, 430 U.S. 372, 385 (1977) (Burger, C.J., concurring) (stating that the common law writ was available "to inquire into the cause of commitment not pursuant to judicial process"). The Framers intended the Suspension Clause to fight arbitrary imprisonment by the Executive in all its forms. *See* Federalist No. 84 (Hamilton) ("'[C]onfinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government.'" (quoting 1 Blackstone, Commentaries 136)). They never suggested that the government could circumvent the Clause by holding prisoners in locations that, though nominally "offshore," remain subject to the government's exclusive jurisdiction and control.

Court noted that "even if a territory was 'no part of the realm,' there was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown.'" *Id.* at 482 (quoting *King* v. *Cowle*, 97 Eng. Rep. 587, 598-599 (K.B. 1759)). This Court also recognized that, at common law, "the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.'" *Id.* (quoting *Ex parte Mwenya*, [1960] 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M.R.)).

The panel majority openly rejected this Court's analysis and instead agreed with the *Rasul* dissent that, because the cases cited did not expressly involve "'aliens held outside the territory of the sovereign,'" there was no evidence that persons in Petitioners' position would have benefited from the writ in 1789. App. 13a (quoting 542 U.S. at 505 n.5 (Scalia, J., dissenting)). The court did not address several cases cited by Judge Rogers where English courts issued the writ to petitioners in India well before it became a British territory. *Cf. id.* 36a (Rogers, J., dissenting). Moreover, this Court has never held that an assessment of the scope of the 1789 writ for Suspension Clause purposes depends on identifying a specific *case* that exactly mimics the facts of the Petitioners' own. As this Court found in *Rasul*, common law judges considered the writ to run to all places where the Crown held sway and would have had no difficulty applying it to circumstances such as Guantanamo. *See* 542 U.S. at 482. Accordingly, the Court rejected the claim—made by the *Rasul* dissent and adopted by the court of appeals in this case—that "habeas corpus has been categorically unavailable to aliens held outside sovereign territory." *Id.* at 482 n.14.

The court of appeals' decision also failed to account for the "complete jurisdiction and control" the United States exercises over the Guantanamo Bay Naval Station. *Rasul*, 542 U.S. at 480 (internal quotation marks omitted). As Justice Kennedy noted, "Guantanamo Bay is in every practical respect a United States territory." *Id.* at 487 (opinion con-

curring in the judgment). Thus, even if the 1789 writ were limited to "sovereign" territory, this Court's determination of Guantanamo's status as *de facto* sovereign territory for habeas purposes would still compel reversal of the court of appeals' conclusion. When Guantanamo is properly recognized as indistinguishable from "a United States territory," *id.*, any distinction between this case and numerous other pre-1789 cases evaporates completely. *See, e.g.*, *Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779); *Rex* v. *Schiever*, 97 Eng. Rep. 551 (K.B. 1759).

The court of appeals also erred by relying on *Eisentrager*. As this Court explained in *Rasul*, Guantanamo prisoners are "differently situated from the *Eisentrager* detainees" for several reasons. 542 U.S. at 476.[13] Justice Kennedy further agreed that the situation of Guantanamo prisoners is "distinguishable from . . . *Eisentrager* in two critical ways": because Guantanamo is "in every practical respect a United States territory," and because the prisoners were imprisoned indefinitely and lacked "any legal proceeding to determine their status." *Id.* at 487-488 (Kennedy, J., concurring in the judgment). Whatever *Eisentrager* says about the availability of the writ in other circumstances, *Rasul* is clear that *Eisentrager* does not bear on Petitioners' habeas petitions.

Finally, contrary to the court of appeals' suggestion, Petitioners need not establish that they enjoy additional constitutional rights (such as Fifth Amendment rights) in order to invoke the Suspension Clause. As Judge Rogers explained, the Suspension Clause is a limitation on congressional power

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[13] The Court elaborated (*Rasul*, 542 U.S. at 476):

> Petitioners in [*Rasul*] differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

that can be raised by any party prejudiced by legislation that exceeds that limit, whether that party's habeas petition asserts constitutional violations or asserts that the detention is unlawful and unauthorized for other reasons. App. 22a-27a. The court of appeals' reliance on cases addressing constitutional provisions other than the Suspension Clause (*see id.* 14a-15a) is therefore unavailing.[14]

2. The MCA is not an adequate substitute

Having erroneously decided that the Suspension Clause did not apply, the court below did not assess whether Congress provided a substitute remedy that is adequate and effective to "test the legality of a person's detention." *Swain* v. *Pressley*, 430 U.S. 372, 381 (1977) (internal quotation marks omitted); *see also St. Cyr*, 533 U.S. at 305 ("a serious Suspension Clause issue would be presented" absent an adequate substitute). If construed to repeal habeas in this case, the MCA would afford Petitioners only review in the court of appeals of the CSRT process, as provided in section 1005(e)(2) of the DTA. *See* MCA § 7(a) (adding 28 U.S.C. § 2241(e)(2)). As Judge Rogers explained, that procedure falls far short of the core protections guaranteed on habeas.

Section 1005(e)(2) lacks any mechanism for petitioners to probe and rebut the facts relied upon in imprisoning them. It appears to require the reviewing court to accept the government's record and to limit its review to whether (i) the CSRT complied with its own standards and procedures, and (ii) the use of those standards and procedures comports with the Constitution and laws of the United States.

Moreover, the DTA, as interpreted by the government, artificially constrains the "record" forming the basis of petitioners' detention to evidence that *the government* has se-

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[14] *See, e.g., St. Cyr*, 533 U.S. at 302-303 (stating that pre-1789 cases "contain no suggestion that habeas relief in cases involving Executive detention was only available for constitutional error"). In any event, the court of appeals was wrong to hold that Petitioners may not vindicate individual constitutional rights on habeas. *See infra* pp. 23-25.

lected and facts that *the government* has unilaterally deemed reasonably available.[15] Such a procedure is not calculated to produce a record that a reviewing court can confidently assume will fairly disclose the basis for the petitioner's detention. It therefore provides no adequate substitute for the common law writ of habeas corpus, which since time immemorial has authorized courts to examine whether the detaining authority has demonstrated sufficient factual and legal cause for detention. *See, e.g.*, R.J. Sharpe, *The Law of Habeas Corpus* 66, 116 (2d ed. 1989) (noting that habeas courts "were especially ready to consider the facts in cases of impressment" and investigated whether a prisoner was "both in fact and law" a prisoner of war).

The government has also contended that the DTA shifts material burdens to petitioners and requires the court to treat CSRT findings deferentially.[16] In noncriminal habeas, however, it is the government's burden to support the detention, and no deference is owed to the jailor's view of the evidence. *Cf. Hamdi* v. *Rumsfeld*, 542 U.S. 507, 553-554 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); *Bushell's Case*, 124 Eng. Rep. 1006, 1007 (C.P. 1670) ("[T]he cause of the imprisonment ought, by the [return], to appear as specifically and certainly to the Judges of the [return], as it did appear to the Court or person authorized to commit."). These thumbs on the scale further demonstrate the DTA's inadequacy as a substitute for habeas. *See Hamdi*, 542 U.S. at 575 (Scalia, J., dissenting) (the Suspension Clause "would be a sham if it could be evaded by congressional prescription of requirements *other*

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[15] *See, e.g.*, Resp. in Opp. to Mot. to Compel at 14, 18, *Bismullah* v. *Rumsfeld* (No. 06-1197) (D.C. Cir. Aug. 21, 2006) ("Government Response in *Bismullah*") (arguing that the DTA limits the court of appeals' review to "the record before the CSRT" and does not permit review of the process of "identifying and gathering" evidence).

[16] *See* Gov't Resp. 13, *Bismullah* (arguing that the DTA limits the court of appeals' role to "at most" a determination that the CSRT decision "is supported by substantial evidence").

than the common-law requirement of committal for criminal prosecution that render the writ, though available, unavailing.").

A further deficiency in section 1005(e)(2) is that it does not expressly authorize the court of appeals to discharge a prisoner whose CSRT decision is held invalid. As Judge Rogers observed, in some cases when CSRTs have concluded that a prisoner should not be detained, the government has simply convened new CSRTs until one reaches a contrary result. App. 41a. In contrast, a habeas court that find that imprisonment is unjustified "can only direct [the prisoner] to be discharged." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 136 (1807).

DTA review is all the more inadequate when viewed in light of the deficiencies in the underlying CSRT process. For example, the CSRT proceeding does not allow a prisoner to contest the government's factual case. Much of the evidence submitted to the CSRT here was classified and not shown to the prisoners, making any effective response impossible. Petitioner Ait Idir demonstrated the unfairness of this process so effectively that, at one point, the very officials charged with administering the CSRT laughed at its absurdity. App. 83a-84a; *see also Guantanamo Detainee Cases*, 355 F. Supp. 2d at 469-470. This is a far cry from habeas, where petitioners "are entitled to careful consideration and plenary processing of their claims including full opportunity for the presentation of the relevant facts." *Harris* v. *Nelson*, 394 U.S. 286, 298 (1969); *see also Hamdi*, 542 U.S. at 538 (plurality opinion) (stating that a habeas court must "permit[] the alleged combatant to present his own factual case to rebut the Government's return").[17]

[17] Common law courts frequently examined affidavits proffered to support a habeas petitioner. In a 1778 case in which a petitioner was pressed into Admiralty service in apparent violation of an exemption issued by the Navy Board, the court stated that it "could not willfully shut their eyes against such facts as appeared on the affidavits, but which were not noticed on the return." *Goldswain's Case*, 96 Eng. Rep. 711, 712 (C.P.

Moreover, where Petitioners were aware of documentary evidence or testimony to rebut the government's case, the CSRT often declined to obtain it, incanting that the information was not "reasonably available." For example, Petitioner Boudella asked his CSRT to consider the January 2002 order of the Supreme Court of the Federation of Bosnia and Herzegovina ordering him released from custody. Ct. App. J.A. 0576, 0582. The CSRT concluded that the court decision was "not reasonably available" (*id.* 0582), even though the decision had been filed in the district court and served on counsel for the government months before Mr. Boudella's CSRT convened.[18]

The CSRT proceedings also deprive detainees of the right to counsel and to exclude evidence obtained by torture or coercion. *See Guantanamo Detainee Cases*, 355 F. Supp. 2d at 468-78; App. 39a-41a. As Judge Rogers appreciated, these practices are "inimical to the nature of habeas review." App. 40a.

Limited review of an unfair procedure cannot be an adequate substitute for habeas. *See* App. 40a. This Court should grant certiorari and reverse the judgment of the court of appeals.

1778); *see also Case of the Hottentot Venus*, 104 Eng. Rep. 344, 344 (K.B. 1810) (ordering an examination of a "native of South Africa" to determine whether she was confined against her will); *Three Spanish Sailors*, 96 Eng. Rep. at 775 (examining affidavits supporting claim for release).

[18] *See* Pet'rs' Opp. to Resp'ts' Mot. for Joint Case Mgmt. Conference, Entry of Coordination Order and Request for Expedition, Ex. B, *Boumediene* v. *Bush*, No. 1:04-cv-01166-RJL (D.D.C. Aug. 16, 2004). Petitioner Lahmar also requested that the Bosnian decision be considered; his CSRT also deemed it "not reasonably available" on the ground that "[t]he Bosnian government was unable to provide any such document." Ct. App. J.A. 0401. Petitioner Nechla sought the testimony of Mr. Mohmoud Sayed Yousef, his supervisor in the Bosnian office of the Red Crescent. His CSRT concluded that Mr. Yousef was not reasonably available (*see id.* 0520) even though counsel easily located Mr. Yousef by calling the Red Crescent telephone number listed in the Sarajevo telephone directory.

II. THIS COURT SHOULD ALSO GRANT REVIEW TO CLARIFY THAT PETITIONERS HAVE STATED A CLAIM OF UNLAWFUL EXECUTIVE DETENTION

The Court should also grant certiorari to determine whether Petitioners' habeas petitions demonstrate unlawful confinement and warrant grant of habeas relief or, at the very least, a hearing on the merits.

A. The Court Should Resolve The Split In The District Court

The district court has issued two conflicting decisions regarding the substantive standards applied to a habeas petition filed by an alien imprisoned at Guantanamo Bay. In Petitioners' case, Judge Leon held that there was "no viable legal theory" under which the writ could issue. App. 74a-79. In contrast, Judge Green held that Guantanamo detainees could challenge their imprisonment as violative of the Constitution and exceeding the Executive's detention authority. *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 453-476.

Although the issue was fully briefed and argued in the court of appeals, the panel majority did not address the point because it found that it lacked jurisdiction. Judge Rogers would have reversed the judgment in Petitioners' case and remanded for a hearing in which the Executive would be required to "convince an independent Article III habeas judge that it has not acted unlawfully" and Petitioners would have "a meaningful opportunity to respond." App. 49a.

Petitioners respectfully submit that this issue is ripe for resolution by this Court. A remand to the court of appeals would simply delay a case that languished there for two years. Moreover, the conflicting opinions of Judges Leon and Green likely constitute the universe of views to be expressed by the judges of that district court—the only jurisdiction in which any Guantanamo petitions are pending. Remanding the case without further guidance on the merits would delay resolution with no discernible benefit.

B. Petitioners' Indefinite Detention Without Charge Is Unlawful

The district court's holding in Petitioners' case was contrary to this Court's precedent for at least three reasons.

First, the court was wrong to state, in a footnote, that the habeas statute does "not give Petitioners more rights than they would otherwise possess under the Constitution." App. 68a n.17. The common law writ of habeas corpus, codified at 28 U.S.C. § 2241(c)(1), has never been dependent on a showing that a petitioner possessed "rights . . . under the Constitution," which of course did not exist in England or Colonial America. In *St. Cyr*, this Court surveyed cases from "England prior to 1789, in the Colonies, and in this Nation during the formative years of our Government," 533 U.S. at 301 (footnote omitted), and concluded that "those early cases contain no suggestion that habeas relief in cases involving Executive detention was only available for constitutional error," *id.* at 302-303. Thus, as Judge Rogers explained, "the nature of the writ" as it was known at common law requires that a habeas court undertake a "searching factual review of the Executive's claims" as well as determine the scope of the legal authority to detain, irrespective of whether Petitioners can assert rights under the Fifth Amendment. App. 46a, 49a, 50a n.14.

Second, the district court disregarded this Court's reasoning in *Rasul*, which demonstrated that the Executive's ability to confine prisoners at Guantanamo must comply with the Constitution:

> Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—*unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'* 28 U.S.C. § 2241(c)(3); *cf. United States* v. *Verdugo-*

> *Urquidez*, 494 U.S. 259, 277-278 (1990) (Kennedy, J., concurring), and cases cited therein.

542 U.S. at 483 n.15 (emphasis added). The Court thus acknowledged that prisoners in Petitioners' situation could challenge their detention as inconsistent with the Constitution (and laws and treaties) of the United States, notwithstanding the fact that they are imprisoned—by the government's own arbitrary choice—at Guantanamo rather than at a similar facility in the United States proper.

That conclusion in *Rasul* is well supported by the authority cited. "[T]he Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic." *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring). The applicability of constitutional provisions outside the formal territory of the United States depends on the circumstances. *See id.* ("The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place." (quoting *Reid* v. *Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring in the judgment))).

As the Court rightly concluded, the circumstances of Guantanamo (notably the "exclusive jurisdiction and control of the United States," *Rasul*, 542 U.S. at 483 n.15) and the fundamental nature of the constitutional provision at issue (the prohibition against arbitrary and indefinite deprivation of liberty) compel the conclusion that Petitioners' detention must comply with due process. *See id.*; *see also id.* at 487 (Kennedy, J., concurring in the judgment) (reasoning that the United States' absolute control over Guantanamo "extend[s] the 'implied protection' of the United States to it" (quoting *Eisentrager*, 339 U.S. at 777-778)); *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 463-464.

These same factors distinguish prior efforts to invoke procedural or economic provisions of the Constitution in locations with their own established legal systems and populations unfamiliar with U.S. legal traditions. *E.g.*, *Verdugo-Urquidez*, 494 U.S. at 269-270 (Fourth Amendment Search

and Seizure Clause inapplicable in Mexico); *Downes* v. *Bidwell*, 182 U.S. 244, 287 (1901) (Revenue Clauses of Constitution inapplicable to Puerto Rico). Applying those constitutional provisions in those cases would have been "impracticable and anomalous." *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring). But there is nothing anomalous about requiring that detention in a prison controlled entirely *by the United States government* comply with constitutional requirements. Accordingly, Petitioners are, at the very least, entitled to a fair habeas proceeding in which they receive notice of the government's specific asserted grounds for their imprisonment, may offer their own evidence and argument to a neutral Article III judge, and may be represented by counsel.

Third, the district court's conclusion that the AUMF authorized Petitioners' imprisonment was based on a misreading of the AUMF and of its interpretation in *Hamdi*. The AUMF authorized the President to

> use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

AUMF § 2(a) (emphases added). The AUMF thus empowered the President to act against two limited classes of nations, organizations, and persons: those involved in the planning and execution of the September 11 attacks, and those who harbored such persons or organizations. The *Hamdi* plurality confirmed, accordingly, that the AUMF "authorizes the President to use 'all necessary and appropriate force' against 'nations, organizations, or persons' *associated with the September 11, 2001, terrorist attacks*." *Hamdi*, 542 U.S. at 518 (plurality opinion) (citations omitted and emphasis added); *see also Guantanamo Detainee Cases*, 355 F. Supp. 2d at 466 ("[T]he AUMF authorize[s] the President to use all

necessary and appropriate force *against those responsible for the September 11 attacks*." (emphasis added)).

The district court's decision here, by contrast, held that the AUMF "in effect" authorized the President to detain persons who "were *either* responsible for the 9/11 attacks *or* posed a threat of future terrorist attacks." App. 59a (emphasis added). By engrafting the atextual "either/or" onto the AUMF, the district court contravened the bedrock rule that courts "are not free to rewrite the statute that Congress has enacted." *Dodd* v. *United States*, 545 U.S. 353, 359 (2005). The court's reading would permit the President to detain, indefinitely and without charge, anyone whom he deemed (however erroneously) to "pose[] a threat of future terrorist attacks," an astonishingly broad power that would supplant ordinary civilian processes and protections in both the United States and other countries—a result that cannot be read into Congress's language in the AUMF. The facts of this case lay bare the absurdity of the district court's misreading: Petitioners were detained after the civilian authorities in Bosnia—an allied nation at peace with the United States and with functioning judicial institutions—conducted a three-month investigation and concluded that there was no lawful basis to continue Petitioners' confinement.

The district court would have avoided this error had it interpreted the AUMF in accordance with "longstanding law-of-war principles." *Hamdi*, 542 U.S. at 521; *see also id.* at 551 (Souter, J, concurring in part, dissenting in part, and concurring in the judgment). Those laws govern treatment of members of armed forces, persons directly engaged in hostilities, and civilian populations within a zone of armed conflict; they do not govern persons who are citizens of and resident in friendly states, were not members of an armed force of an enemy state, and were never directly involved in hostilities against the detaining power. *See id.* at 518 (plurality opinion) (stating that the AUMF authorized detention of persons in the "limited category" of "individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist

network responsible for those attacks"); Ex parte Milligan, 71 U.S. 2, 121 (1866) (finding that the law of war did not justify Executive detention during the Civil War of civilians who resided in "states which have upheld the authority of the government, and where the courts are open and their process unobstructed").[19] Accordingly, when the government asked this Court to approve its detention of "enemy combatants," it carefully limited the term to "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." *Hamdi*, 542 U.S. at 516 (internal quotation marks omitted).

Since *Hamdi*, however, the government has asserted a broader detention power that extends far beyond the AUMF. The government's latest definition of "enemy combatant," which the CSRTs applied in purporting to "confirm" the propriety of Petitioners' detention, extends to "an individual who was part of *or supporting* Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners [and] . . . *includes* any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." App. 81a (emphasis added). As Judge Green noted in *Guantanamo Detainee Cases*, the word "includes" reveals that the government claims the authority to detain indefinitely "individuals who never committed a belligerent act or who never directly supported hostilities against the U.S. or its allies." 355 F. Supp. 2d at 475. Indeed, the government admitted that its definition of "enemy combatant" would encompass people who *unknowingly* give "support[]" to Taliban or Al Qaeda members. *See id.* (reporting that the government claimed the authority

[19] The Court in *Ex parte Quirin*, 317 U.S. 1 (1942), confirmed that the laws of war do not apply to persons who, like Milligan and like Petitioners here, are not members of an armed force and were not engaged directly in hostilities. *See id.* at 45 (stating that a person "not being a part of or associated with the armed forces of the enemy, was a nonbelligerent, not subject to the law of war").

to detain indefinitely "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities" (internal quotation marks omitted)).

The district court's conclusion that the AUMF authorized Petitioners' detention is at odds with the statute's text, the laws of war, and the reasoning of the plurality and concurring opinions in *Hamdi*. This Court should reverse that conclusion and make clear that the Executive lacks authority under the AUMF to imprison without charge persons who did not engage in armed conflict or directly take part in ongoing hostilities against the United States. Moreover, because the government has never contended—and cannot contend—that Petitioners ever waged war against the United States, the proper application of the AUMF requires that the district court grant habeas relief to Petitioners forthwith.[20]

III. THE ISSUES PRESENTED IN THIS CASE ARE OF PARAMOUNT NATIONAL IMPORTANCE

At issue in this case is nothing less than this country's commitment to the rule of law. Hundreds of men are currently facing lifelong imprisonment without any assurance that they will ever be tried on a criminal charge or given any fair opportunity to challenge the purported basis of their apprehension and detention by the government. A situation so grave demands review by this Court.

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[20] The government has previously contended that, even in the absence of the AUMF, the President's Article II powers would authorize the indefinite detention of prisoners at Guantanamo Bay without more. To date, no court has addressed this argument, although it is clear that "a state of war is not a blank check for the President." *Hamdi*, 542 U.S. at 536 (plurality opinion). This principle carries even greater weight when the President acts without congressional authorization to spirit away men living peacefully in a European country to a distant island prison without any fair process, notwithstanding a judgment of the courts of their home country ordering them released.

The court of appeals' decision has, for the moment, ratified the abolition of the Great Writ, which for centuries has functioned as the "symbol and guardian of individual liberty." *Peyton* v. *Rowe*, 391 U.S. 54, 58 (1968). The scope of the writ—and the liberty it is designed to secure—is one of the central issues facing the federal courts. Likewise, the role of the Constitution, statutes, and traditional habeas as limits on Executive power—an issue of both domestic and international concern—demands guidance from this Court.

Not only are these questions of paramount legal importance, but the extreme and worsening plight of the Guantanamo detainees make them questions of great humanitarian urgency as well. *See, e.g.*, *Preiser* v. *Rodriguez*, 411 U.S. 475, 494 (1973) ("[S]peedy review of [a prisoner's] grievance . . . is so often essential to any effective redress."). Petitioners have already suffered for over five years without any meaningful review of their imprisonment. Abuse of Guantanamo detainees is well documented,[21] and the physical and mental health of the prisoners continues to deteriorate. *See* Guantanamo Detainees' Mot. to Expedite ¶ 4 (D.C. Cir. Feb. 2, 2007). Now more than ever, time is of the essence.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[21] *See, e.g.*, Aff. of Sgt. Heather N. Cerveny (Oct. 4, 2006), *available at* http://abcnews.go.com/images/WNT/gitmo_affidavit.pdf (last visited Mar. 2, 2007) (detailing U.S. Marine Corps Sergeant's conversations with Guantanamo Bay personnel who boasted of abusing detainees, including hitting a detainee's head into a cell door and depriving detainees of water); Letter from T.J. Harrington, Deputy Assistant Director, FBI Counterterrorism Division to Major General Donald J. Ryder, Department of the Army, Criminal Investigation Command, July 14, 2004, *available at* http://www.aclu.org/projects/foiasearch/pdf/DOJFBI001914.pdf (last visited Mar. 2, 2007) (documenting FBI agents' observation of "highly aggressing interrogation techniques," including bending a detainee's thumbs backwards, grabbing a detainee's genitals, and holding a detainee in isolation for one or two months in cell that was "always flooded with light").

Respectfully submitted.

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MARCH 2007