**Nos. 06-1195 and 06-1196**

IN THE

# Supreme Court of the United States

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LAKHDAR BOUMEDIENE, *et al.*,
*Petitioners*,

v.

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

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KHALED A. F. AL ODAH, *et al.*,
*Petitioners*,

v.

UNITED STATES, *et al.*,
*Respondents.*

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**On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF *AMICUS CURIAE* OF UNITED STATES SENATOR ARLEN SPECTER IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus curiae*, Senator Arlen Specter, is the Ranking Member of the Senate Committee on the Judiciary. During the 109th Congress, when the Military Commissions Act of 2006 and the Detainee Treatment Act of 2005 moved through the Senate, *amicus* was Chairman of that Committee and held several hearings to consider whether it is constitutionally permissible for Congress to deny the right of habeas corpus to detainees held at the United States Naval Station at Guantanamo Bay without providing an adequate and effective alternative to challenge the legality of their detention. *Amicus*, being intimately familiar with the statutory provisions implicated in these cases, urges this Court to recognize the constitutional infirmity inherent in Congress' effort to foreclose the Great Writ.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The United States began sending alien detainees to Guantanamo over five years ago, after capturing them in the field and declaring them "enemy combatants." Approximately 415 detainees have been released to other countries while additional prisoners have since been interned at the installation.[2] In total, the base remains home to roughly 360 detainees, of whom eighty have been designated for release.[3] By all accounts, certain dangerous individuals reside within the walls of Guantanamo. Toward the end of 2006, for example,

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[1] This brief is filed with the written consent of the parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* and his counsel, make a monetary contribution to the preparation or submission of this brief.

[2] Dep't of Defense, News Release, *Detainee Transfer Announced* (July 16, 2007), *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=11130 (last visited Aug. 22, 2007).

[3] *Id.*

the government transferred fourteen "high value" detainees to the base, including the alleged (and now, reportedly, confessed) 9/11 mastermind, Khalid Sheikh Muhammad.[4] Moreover, reports indicate that as many as thirty former detainees released from Guantanamo have returned to the battlefield to face U.S. forces.[5]

The question presented here is not whether some of the individuals should continue to be detained. They should. The question is whether the U.S. Constitution ensures that the writ of habeas corpus is available for detainees to contest the legality of their detention by the executive.

The writ of habeas corpus is an age-old legal means for challenging unlawful detention at the hands of an executive authority. The Founders imported this common law right from England; afforded it constitutional protection in the Suspension Clause, U.S. CONST. art. I, § 9, cl. 2; and authorized the federal courts to issue the writ, *see* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

Three years ago, in *Rasul v. Bush*, 542 U.S. 466 (2004), this Court explained that the common law writ extends both to citizens and to aliens within United States territory. *See id.* at 481. In turn, the Court reasoned that, because the United States exercises exclusive jurisdiction and control over Guantanamo, "[a]pplication of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus." *Id.*; *see* 28 U.S.C. § 2241 (2000). Shortly thereafter, the Department of Defense (DoD) insti-

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[4] *See* Dep't of Defense, *Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10024* (Mar. 10, 2007), *available at* http://www.defenselink.mil/news/transcript_ISN10024.pdf (last visited Aug. 22, 2007).

[5] *See, e.g.*, Griff Witte, *Taliban Leader Once Held by U.S. Dies in Pakistan Raid*, WASH. POST, July 25, 2007, at A1.

tuted Combatant Status Review Tribunals (CSRTs) to ascertain whether each detainee should still be considered an enemy combatant and remain detained at the Guantanamo facility. *See* Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004) ("CSRT Order"); Memorandum from Gordon England, Deputy Sec'y of Def., to the Sec'ys of the Military Dep'ts et al., Implementation of Combatant Status Review Tribunal Procedures (July 14, 2006) (previously issued July 29, 2004) ("CSRT Procedures").

The following year, with the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (DTA), Congress purported to preclude habeas petitions from aliens detained at Guantanamo, *id.* § 1005(e)(1), while at the same time providing for a limited review of CSRT determinations in the D.C. Circuit, *id*. § 1005(e)(2). In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), this Court held that this so-called jurisdiction-stripping provision did not apply to pending cases and therefore found it unnecessary to address its constitutional implications. In response, Congress passed the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (MCA), to preclude habeas petitions from Guantanamo detainees in all cases—pending and future, *id*. § 7 (superseding DTA § 1005(e)(1)).

In the present cases, the court of appeals relied on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), to hold that the Guantanamo detainees have no constitutional right to seek habeas relief because Guantanamo is not within the sovereign territory of the United States. *Boumediene v. Bush*, 476 F.3d 981, 990-92 (D.C. Cir. 2007), *cert. denied*, 127 S. Ct. 1478 (Apr. 2, 2007), *reh'g and cert. granted*, 127 S. Ct. 3078 (June 29, 2007). This decision flies directly in the teeth of this Court's reasoned conclusion in *Rasul* as to Guantanamo's unique territorial status, which places it within the "historical reach

of the writ" as it existed at common law prior to and during the founding era. At a minimum, that writ enables the Guantanamo detainees to challenge, in federal court, the legality of their detention.

Although this Court has permitted legal means to challenge detention other than through a habeas petition, such means must be an "adequate and effective" substitute for habeas. The procedures for reviewing enemy combatant status provided pursuant to the DTA depart dramatically from the core features of habeas relief, however, and are therefore a wholly inadequate substitute. In particular, they fail to provide an independent forum for the challenge to be heard, a fair opportunity to contest enemy combatant status, and an imperative remedy to end unlawful detention.

Accordingly, this Court should hold that the MCA's attempt to curtail the Guantanamo detainees' access to habeas corpus is constitutionally infirm. Habeas must be restored to ensure that the rule of law prevails at Guantanamo.

## ARGUMENT

### I. The MCA Precludes Habeas Relief In Pending Cases

As a preliminary matter, this Court should decline Petitioners' invitation to exempt pending detainee cases from the ambit of the MCA. *See* Pet. 12-14, No. 06-1195; Pet. 25-26, No. 06-1196. The Petitioners' argument is aimed at avoiding this Court's review of the pressing constitutional issues. The language of the statute, however, is straightforward: it precludes pending and future actions, both habeas and non-habeas (except for limited CSRT appeals in the D.C. Circuit), that relate to "any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of alien detainees alleged to be enemy combatants. *See* MCA § 7 (codified at 28 U.S.C § 2241(e)).

Section 7(a) of the MCA removes the federal courts' jurisdiction to hear or consider (1) "an application for a writ of habeas corpus" and (2) "any *other* action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement." (Emphasis added.) In turn, section 7(b) states that "subsection (a) . . . 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." (Emphasis added.) Although this list mirrors the language that section 7(a) uses to address non-habeas cases (in the second clause), it does not mean that section 7(b) exempts habeas cases (which are referenced in section 7(a)'s first clause). To the contrary, section 7(b) explicitly references the entirety of 7(a) and conspicuously omits the word "other"—a qualifier used in section 7(a) to address non-habeas actions. In short, there is no significance to section 7(b)'s use of one clause to refer to what section 7(a) refers to in two clauses. *Cf.* MCA § 3(a) (adding 10 U.S.C. § 950j).

Moreover, as Congress debated and passed the MCA, both the Members who opposed and the Members who supported these provisions recognized the effect on pending habeas cases. *See, e.g.*, 152 CONG. REC. S10357 (daily ed. Sept. 28, 2006) (statement of Sen. Leahy, who voted against the MCA) ("This new bill strips habeas jurisdiction retroactively, even for pending cases."); *id*. at S10404 (statement of Sen. Sessions, who voted in favor of the MCA) ("I don't see how there could be any confusion as to the effect of this act on the pending Guantanamo litigation. The MCA's jurisdictional bar applies to that litigation 'without exception.'").[6] Sim-

[6] *See also* 152 CONG. REC. S11197 (daily ed. Dec. 5, 2006) (Sen. Specter); *id.* at S10364-65 (daily ed. Sept. 28, 2006) (Sens. Smith and Levin); *id.* at S10269-70 (daily ed. Sept. 27, 2006) (Sen. Kyl); *id*. at H7938 (daily ed. Sept. 29, 2006) (Rep. Hunter); *id*. at H7942 (Rep. Jackson-Lee); *id*. at H7544 (daily ed. Sept. 27, 2006) (Rep. Sensenbrenner).

ilarly, the lone dissenter below agreed with the majority that the statute impacts pending habeas cases. *Boumediene*, 476 F.3d at 986-88 & n.2; *id*. at 999 (Rogers, J., dissenting).

Any attempt to avoid this interpretation runs headlong into the plain statutory text as well as the clear understanding of the legislators. *See Swain v. Pressley*, 430 U.S. 372, 378 n.11 (1977). As a consequence, this Court should move past the statutory argument and determine whether the MCA's jurisdiction-stripping provisions are constitutional.

## II. The Great Writ Extends To Guantanamo Detainees

The Constitution provides that "[t]he 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." U.S. CONST. art. I, § 9, cl. 2. At a minimum, this constitutional protection extends to the writ as it existed at common law in 1789. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). Although it has expanded since that time to include post-conviction collateral review of detentions, "[a]t 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." *Id*.

In *Rasul*, this Court held that the federal habeas statute was available to aliens being detained at Guantanamo. *See* 542 U.S. at 485; 28 U.S.C. § 2241 (2000). In reaching this conclusion, this Court reasoned that extending habeas to such individuals was "consistent with the historical reach of the writ of habeas corpus," given that Guantanamo was "territory over which the United States exercises exclusive jurisdiction and control." *Rasul*, 542 U.S. at 476, 481-82. At common law, this Court declared, "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, 598-99 (K.B. 1759)).

Although the court of appeals held that "[t]he text of the lease and decisions of circuit courts and the Supreme Court all make clear that Cuba—not the United States—has sovereignty over Guantanamo Bay," *Boumediene*, 476 F.3d at 992, this conclusion is of no moment given that, under *Rasul*, the "historical reach of the writ" turns not on *de jure* sovereignty, but rather on *de facto* exclusive jurisdiction and control. This Court conclusively determined that the United States enjoys complete *de facto* control of Guantanamo.

It bears emphasizing that Guantanamo, for the reasons articulated in *Rasul*, is uniquely situated. 542 U.S. at 471, 480-81. Under the 1903 lease agreement, although Cuba retains "ultimate sovereignty," the United States "shall exercise complete jurisdiction and control over and within said areas."[7] Also, pursuant to a subsequent treaty, the arrangement is to last indefinitely and it cannot unilaterally be terminated by Cuba.[8] As Justice Kennedy explained, "Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. . . . From a practical perspective, the indefinite lease . . . 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 (concurring opinion) (quoting *Eisentrager*, 339 U.S. at 777-78).

Additional facts illustrate this exclusive control. First, under the lease agreement, "[t]he United States exercises ex-

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[7] Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418 ("*Lease*").

[8] *See* Treaty Between the United States and Cuba Defining Their Relations, May 29, 1934, U.S.-Cuba, art. III, T.S. No. 866.

clusive criminal jurisdiction over all persons, citizens and aliens alike, who commit criminal offenses at the Base[.]" *Gherebi v. Bush*, 352 F.3d 1278, 1289 (9th Cir. 2003), *vacated on other grounds*, 542 U.S. 952 (2004).[9] Second, the United States has the power of eminent domain at Guantanamo. *See Lease* art. III. Third, when Fidel Castro severed water and supplies to the base in 1964, the base promptly "became and remains entirely self-sufficient, with its own water plant, schools, transportation, entertainment facilities, and fast-food establishments." *Gherebi*, 352 F.3d at 1295. Fourth, although Cuba has declared its belief that the United States has not adhered to restrictions in the original agreement, Cuba nonetheless has recognized that it is powerless to do anything about it.[10] Fifth, the base remains in place despite the lack of formal relations between the United States and Cuba.

The contrast between Guantanamo and other American military bases, past and present, further highlights the exclusivity of American control of the base. For example, Diego Garcia, located in the Indian Ocean, is operated under an agreement with Great Britain that, unlike the Guantanamo

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[9] *See* Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, art. IV, T.S. No. 426; *United States v. Lee*, 906 F.2d 117, 117 & n.1 (4th Cir. 1990) (Jamaican national charged with sexual abuse occurring at Guantanamo); *United States v. Rogers*, 388 F. Supp. 298, 301 (E.D. Va. 1975) (U.S. civilian employee at Guantanamo Bay under contract with the Navy was prosecuted for drug offenses and tried in Virginia).

[10] *Compare Lease* art. II (permitting the United States "generally to do any and all things necessary to fit the premises for use as coaling or naval stations only, and for no other purpose"), *with* Statement by the Government of Cuba to the National and International Public Opinion (Jan. 11, 2002) ("Cuba could do absolutely nothing to prevent [other activities]."), *available at* http://ciponline.org/cuba/cubaproject/cubanstatement.htm (last visited July 31, 2007).

lease, is terminable by either party.[11] Similarly, the United States has operated various military facilities under agreements that run only for a specific period of time,[12] articulate very narrow purposes,[13] or provide for joint control.[14] Indeed, Landsberg, the post-WWII prison in Germany that housed the petitioners in *Eisentrager*, was operated under three flags (those of the United States, Great Britian, and France). *Gherebi*, 352 F.3d at 1287 n.10. In still other instances of American control abroad, the host country has pressured the United States to leave or make changes.[15] Such is not the case at Guantanamo, where the United States "is accountable to no one." Gerald L. Neuman, *Anomalous*

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[11] *See* Availability of Certain Indian Ocean Islands for Defense Purposes, Dec. 30, 1966, U.S.-U.K., para. 11, 18 U.S.T. 28 (terminating two years after "either Government shall have given notice of termination to the other"); *see also*, *e.g.*, Establishment of Long Range Aid to Navigation Station in the Bahama Islands, June 24, 1960, U.S.-U.K., art. XXVI, 11 U.S.T. 1587; Mutual Defense Treaty, Oct. 1, 1953, U.S.-S. Korea, art. VI, 5 U.S.T. 2368.

[12] *See, e.g.*, Treaty Regarding United States Defence Areas and Facilities in Antigua, Jan. 1, 1978, U.S.-Ant. & Barb., art. XXIV, 29 U.S.T. 4183 ("This Agreement shall come into force on January 1, 1978, and shall remain in force through December 31, 1988.").

[13] *See, e.g.*, Connie Veillette, CRS Report RL32337, *Andean Counterdrug Initiative (ACI) and Related Funding Programs: FY2005 Assistance* 18 (May 10, 2005) (describing agreement for use of location "solely for the detection of drug trafficking flights in the region").

[14] *See, e.g.*, Defense of Greenland, June 8, 1951, U.S.-Den., art. II, 2 U.S.T. 1485.

[15] *See, e.g.*, Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1 (reporting that, in 2003, the Thai government insisted CIA shut down "black" site where it was holding and interrogating suspected terrorists); Matthew L. Wald, *U.S. Curbs Low-Flight Training in Italy Near '98 Ski-Lift Deaths*, N.Y. TIMES, Mar. 11, 1999, at A7 (describing Italian response to accident involving U.S. pilots based out of Aviano).

*Zones*, 48 STAN. L. REV. 1197, 1230 (1996); *see also Gherebi*, 352 F.3d at 1300 ("[T]he United States' territorial relationship with the Base is without parallel today . . . .").

Consequently, the lower court's reliance on *Eisentrager* is misplaced. *See Boumediene*, 476 F.3d at 990-92. In *Eisentrager*, this Court turned back the habeas claims of enemy aliens who were captured, tried, convicted, and detained on non-U.S. territory. Once Guantanamo is understood to be under the exclusive authority of the United States, as *Rasul* holds it must, then *Eisentrager* no longer controls. Nor can the court below draw support from the DTA provision stating that "'United States,' when used in a geographic sense . . . does not include the United States Naval Station, Guantanamo Bay, Cuba." DTA § 1005(g). Whether or not "the determination of sovereignty over an area is for the legislative and executive departments," *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948), *see Boumediene*, 476 F.3d at 992, the inquiry, per *Rasul*, into the common law scope of the writ turns not on formal sovereignty, but rather on the functional level of control. Here, it is plain that the United States exercises such control over Guantanamo.

In short, contrary to the court of appeals decision, *Rasul*'s analytical path leads inexorably to the conclusion that the Constitution prevents Congress from eliminating the writ for the Guantanamo detainees—absent the prerequisites for suspension (rebellion or invasion), which no one asserts here. With Guantanamo under the plenary control of the United States and isolated from the heat of battle, the "ordinary constitutional processes" can, and must, move forward. *Korematsu v. United States*, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting); *see also Rasul*, 542 U.S. at 487 (Kennedy, J., concurring) (observing that Guantanamo is "far removed from any hostilities").

## III. The Framework Established for Challenging Detention Is an Insufficient Substitute For The Great Writ

Although the MCA deprives the Guantanamo detainees of the legal right to petition for a writ of habeas corpus, the Suspension Clause will not be offended if there remains a substitute remedy that is "neither inadequate nor ineffective to test the legality of a person's detention." *Swain*, 430 U.S. at 381; *see also St. Cyr*, 533 U.S. at 314 n.38; *Sanders v. United States*, 373 U.S. 1, 14 (1963). However, no adequate substitute appears here.

This Court has upheld statutory alternatives that shifted the challenge to a different court, while not otherwise materially altering the nature of the habeas remedy. For example, this Court has approved a provision shifting habeas challenges to local D.C. courts, notwithstanding their lack of tenure and salary protections, *Swain*, 430 U.S. at 383-84, and a provision requiring actions to be brought by federal convicts in the sentencing district rather than the district of detention, *United States v. Hayman*, 342 U.S. 205 (1952) (upholding 28 U.S.C. § 2255). These substitutes avoided constitutional difficulties largely by virtue of an escape clause allowing habeas relief in an Article III court any time the alternative proves "inadequate or ineffective." *Swain*, 430 U.S. at 381; *Hayman*, 342 U.S. at 223.[16] No such escape clause exists here, as the

[16] Restrictions on filing successive petitions have also been approved because such constraints fall "well within the compass of [the] evolutionary process" of the writ. *Felker v. Turpin*, 518 U.S. 651, 664 (1996). Lower courts have upheld other modest limitations, such as a one-year statute of limitation—albeit often acknowledging equitable tolling as a means to avoid constitutional impropriety. *See, e.g.*, *Souter v. Jones*, 395 F.3d 577, 602 (6th Cir. 2005); *Delaney v. Matesanz*, 264 F.3d 7, 12 (1st Cir. 2001); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998).

procedures established under the DTA are the sole mechanism by which detention may be challenged.

Far from a mere change in venue or an inconvenient hurdle, the procedures available to the Guantanamo detainees for contesting detention represent a dramatic departure from the essence of habeas relief and, accordingly, are ill-suited as an alternative. The limited status review mechanisms include CSRTs (to assess the detainees' status upon arrival) and Administrative Review Boards (ARBs) (to reassess the status annually). The DoD is given wide discretion in designing these tribunals, *see* DTA § 1005(a)-(b), and it can alter them at will, *see id*. § 1005(c)

Moreover, the DTA only makes available a limited appeal of CSRT decisions in the D.C. Circuit to determine whether the CSRT complied with the DoD's "standards and procedures" (including the requirement that a CSRT base its conclusions on a preponderance of the evidence, allowing a rebuttable presumption in favor of the government's evidence), and whether those "standards and procedures" are "consistent with the Constitution and laws of the United States." *Id.* § 1005(e)(2)(C). The courts are otherwise barred from hearing actions (including habeas petitions) relating to the "detention, transfer, treatment, trial, or conditions of confinement" of alien detainees alleged to be enemy combatants. MCA § 7.

The inquiry into the necessary scope of an adequate habeas substitute, while potentially murky at the margins, is informed by the Due Process Clause. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (plurality opinion) (explaining that Due Process Clause "informs the procedural contours" of the writ of habeas corpus); David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 75 n.67 (2006) ("[T]he habeas remedy (or an adequate alternative) and the right of a detainee not to be deprived of liberty without due process are intertwined.").

Here, in light of the *Rasul* Court's characterization of Guantanamo as being under plenary U.S. control—which perhaps makes it akin to the "unincorporated territories" in the so-called "Insular Cases"—the detainees are entitled to at least a bare minimum of due process in contesting enemy combatant status.[17]

Whatever the precise metes and bounds of the inviolable core of habeas, the exclusive framework established by the DTA and MCA provides an insufficient substitute for habeas because it lacks three fundamental features of due process: a hearing before an impartial adjudicator, a fair opportunity to rebut the government's allegations, and an imperative remedy.

### A. The Framework Lacks an Independent Tribunal

The DTA fails to provide an independent forum in which to contest executive detention in the first instance, contrary to the requirements of habeas corpus and fundamental due process. *See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617 (1993) ("[D]ue process requires a neutral and detached judge *in the*

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[17] *See, e.g.*, *Balzac v. Porto Rico*, 258 U.S. 298, 311-13 (1922) (Constitution affords "certain fundamental personal rights" to inhabitants of territories not yet "incorporated" by Congress); *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1342-43 (2d Cir. 1992) ("fundamental constitutional rights" are guaranteed to Guantanamo inhabitants), *vacated as moot*, 509 U.S. 918 (1993); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2094 (2007) ("Guantanamo Bay is sufficiently similar, functionally, to American territory that at least fundamental constitutional rights extend to all who are held there."); *but see Cuban Am. Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412, 1425 (11th Cir. 1995); *Vermilya-Brown*, 335 U.S. at 405 (Jackson, J., dissenting) (arguing Guantanamo is not a "possession").

*first instance* . . . ." (emphasis added; internal quotation marks and citation omitted)); *Zadvydas v. Davis*, 533 U.S. 678, 723 (2001) (Kennedy, J., dissenting) (highlighting the importance of a "neutral administrative official" in cases involving prolonged alien detention); *Hamdi*, 542 U.S. at 533 (plurality opinion) (finding citizen entitled to "neutral decisionmaker" in challenging enemy combatant status in habeas action). Instead, detainees must initially face a non-neutral tribunal—a CSRT staffed with executive branch officials. *See* CSRT Procedures, encl.1 § C; *Boumediene*, 476 F.3d at 1005 (Rogers, J., dissenting) ("[T]hese proceedings occur before a board of military judges subject to command influence."). Labeling the CSRT panel members as "*neutral* commissioned officers," CSRT Procedures, encl.1 § C(1) (emphasis added), is of little comfort to the detainee, whose plea for release depends on the very executive branch that is detaining him. Indeed, that turns traditional habeas corpus on its head, putting the king in the role of both jailer and judge. *See Lonchar v. Thomas*, 517 U.S. 314, 322 (1996) (describing the writ's "most basic purpose" as "avoiding serious abuses of power by a government, say a king's imprisonment of an individual without referring the matter to a court").

Although this Court has understood that non-Article III courts may entertain petitions challenging the legality of executive detention, *see Swain*, 430 U.S. at 383-84, never has it allowed the executive branch the authority to assess the lawfulness of its own detentions. It is clear why the Court has never done so. Consolidating the decision to detain with the review of that decision is anathema to fundamental liberty interests.

In fact, the CSRT procedures have allowed the government, upon receiving an unfavorable CSRT decision, to convene multiple tribunals until the detainee is found to be an enemy combatant. *See Boumediene*, 476 F.3d at 1006-07 (Rogers, J., dissenting); Decl. of Stephen Abraham, Lt. Col.,

U.S. Army Reserve ¶ 23 (June 15, 2007) ("Abraham Decl."), *appended to* Reply to Br. in Opp. to Reh'g, No. 06-1196; *see also Upholding the Principles of Habeas Corpus for Detainees, 2007: Hearing before the House Armed Servs. Comm.*, 110th Cong. (Jul. 26, 2007) (testimony of Stephen Abraham) (noting that CSRTs have been empanelled "precisely for the purpose of overturning prior findings that were favorable to the detainees"). Plainly, the CSRTs (and, similarly, the ARBs) are in no sense independent and, accordingly, are not a passable substitute to the Great Writ.

Moreover, such a fundamental structural flaw cannot be remedied on review, especially given the limited scope of authority afforded the D.C. Circuit. *See Hamdan*, 126 S. Ct. at 2807 (Kennedy, J., concurring) (expressing concern for DTA's limited review of military commissions and noting that "provisions for review of legal issues after trial cannot correct for structural defects . . . that can cast doubt on the factfinding process and the presiding judge's exercise of discretion during trial"); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 61-62 (1972) (holding that due process requires "a neutral and detached judge in the first instance" and that a biased initial adjudication cannot be cured simply by offering an impartial tribunal on appeal).

Recently, in *Bismullah v. Gates*, the D.C. Circuit highlighted its constrained authority in CSRT review cases, acknowledging that its "jurisdiction under the [DTA] is expressly 'limited to the consideration of' whether a detainee's status determination was 'consistent with the standards and procedures specified by the Secretary of Defense for [a CSRT].'" --- F.3d ----, ----, 2007 WL 2067938, at *7 (D.C. Cir. July 20, 2007) (quoting DTA § 1005(e)(2)(C)(i)). The court further fleshed out its deferential posture in explaining that the DTA "does not authorize [the] court to determine whether a status determination is arbitrary and capricious because . . . it is inconsistent with the status

determination of another detainee who was detained under similar circumstances." *Id*. *Cf. Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting) ("As persons within our jurisdiction, the aliens are entitled to the protection of the Due Process Clause[,] . . . includ[ing] protection against . . . arbitrary personal restraint or detention."). This suggests that, faced with similar evidence in two cases, the court will not make its own determination but will instead defer to a non-neutral panel.[18]

In sum, by permitting the executive branch to determine the legality of its own detention decisions and then by constraining the D.C. Circuit's review of this inherently biased tribunal, the DTA fails to provide an adequate substitute to habeas corpus. This deficiency alone is fatal to the MCA's habeas-stripping provision.

### B. The Framework Lacks a Fair Opportunity to Rebut the Accusations

The limited nature of the D.C. Circuit's review is even more problematic when considered in light of the CSRTs' other deficiencies that deny detainees due process and make it impossible meaningfully to contest enemy combatant status.

Aside from the lack of a truly neutral and independent adjudicator, the additional shortcomings of the CSRTs have been well-documented. *See Boumediene*, 476 F.3d at 1005-06 (Rogers, J., dissenting); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2100 & n.286 (2007); Abraham Decl. ¶¶ 5-23. Those deficiencies include the lack of counsel; the lack of standards and safeguards in

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[18] *Cf. Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (court will not "displace [an agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*").

sifting through evidence; the potential use of information obtained under abusive interrogation techniques; the limitation on discovery of classified information; the tribunal's discretion to screen out evidence and witnesses found to be not "reasonably available"; the inability to ascertain the factual basis underlying the government's case; the government's low burden of proof; the admission of hearsay evidence; and the rebuttable presumption in favor of the government's evidence. *See* DTA § 1005(b)(1), (e)(2)(C)(i); CSRT Procedures, encl.1 §§ B, E(2)-(3), F(5)-(6), F(8), G(2), G(7), G(9)-(11), H(7); *id*., encl.3 §§ A(1), C(1), D; *id*., encl.10 § B. While some of these elements might individually be justifiable under certain limited circumstances, *see Hamdi*, 542 U.S. at 533-34 (plurality opinion) (giving qualified approval of hearsay evidence and rebuttable presumptions), in the aggregate, this framework denies a detainee a "fair opportunity to rebut the Government's factual assertions" and "present his own factual case to rebut the Government's return," *id*. at 533, 538.

The CSRTs' shortcomings are hardly surprising given the haste with which they were issued in the wake of *Rasul*—and given that the DoD *itself* contemplated the continuing availability of habeas corpus as a failsafe. *See* CSRT Order at 1 ("[A]ll detainees shall be notified . . . of the right to seek a writ of habeas corpus in the courts of the United States."). Apparently, even on its own terms, the DoD did not intend CSRTs to act a substitute for habeas.

One particular anecdote, recounted in an opinion rendered by the United States District Court for the District of Columbia below, brings the matter into focus. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005). An individual was being detained on allegations that he was "associated with a known Al Qaida operative." *Id.* at 469. However, he was not told his purported associate's name (the tribunal did not even know it) and was unable to

view the evidence against him (if any even existed). Unable to defend himself, and lacking independent defense counsel, he simply denied the charges and stated: "I was hoping you had evidence that you can give me. . . . [I]f a supervisor came to me and showed me accusations like these, I would take these accusations and I would hit him in the face with them. Sorry about that." *Id*. The resulting laughter by those in the tribunal room demonstrates the absurdity of the situation. As the district court judge noted, it would have been humorous, had it not been so serious and "had the detainee's criticism of the process not been so piercingly accurate." *Id*. at 470.

A process such as this, which lacks even the fundamental indicia of a fair judicial proceeding, demands robust habeas review. That is, given that the procedural protections afforded by the CSRTs are "rudimentary at best," Fallon & Meltzer, *supra*, at 2100 & n.286, a habeas court's duty must be correspondingly heightened. *See Hamdi*, 542 U.S. at 538-39 (plurality opinion) (calibrating scope of the habeas review based on deficiencies in prior executive proceedings and expecting the habeas court to "permit[] the alleged combatant to present his own factual case to rebut the Government's return" and to "engag[e] in a factfinding process"); Fallon & Meltzer, *supra*, at 2098 ("[T]he appropriate scope of review often depends on the nature of the prior executive proceeding[.]").[19]

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[19] *See also Swain*, 430 U.S. at 383 ("Normally a state judge's resolution of a factual issue will be presumed to be correct [by a federal habeas court] *unless the factfinding procedure employed by the state court was not adequate*." (emphasis added)); *Burns v. Wilson*, 346 U.S. 137, 141 (1953) (plurality opinion) (approving of limitations on habeas review of court-martial determinations where "[r]igorous provisions guarantee a trial as free as possible from command influence, the right to prompt arraignment, the right to counsel of the accused's own choosing, and the right to secure witnesses and prepare an adequate defense").

The DTA is not up to the task, notwithstanding the government's assurances to the contrary. The government contends that the various CSRT deficiencies can be addressed by the D.C. Circuit as it ascertains whether a CSRT "misapplied" the DoD's specified standards and procedures. Br. in Opp. to Cert. 17; *see* DTA § 1005(e)(2)(C)(i). While this argument is not without force as to certain issues, *see Bismullah*, --- F. 3d at ----, 2007 WL 2067938, at *6 & n.* (noting that court will review pre-hearing actions taken by CSRT staff for compliance with DoD procedures), there are at least three concerns that resist such an easy response: the lack of counsel, the lack of reliable process to uncover exculpatory information, and the lack of prohibitions on evidence adduced by coercion.

**1.** First, the CSRT is a "non-adversarial proceeding" at which the detainee "shall not be represented by legal counsel," and will only have access to a "Personal Representative"—a commissioned officer who is not necessarily trained in the law, who is appointed by the Director, who is forbidden from acting as a detainee's advocate, and with whom "no confidential relationship exists." CSRT Procedures, encl.1 §§ B, F(5); *id*., encl.3 §§ A(1), C(1), D. Although access to legal counsel is well-established as an essential aspect of challenging one's detention, *see Hamdi*, 542 U.S. at 539, the CSRTs fail to provide this fundamental protection. As this Court has noted in other contexts, the right to counsel is "necessary to insure fundamental human rights of life and liberty," given that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Gideon v. Wainwright*, 372 U.S. 335, 343, 344-45 (1963) (internal quotation marks and citations omitted).

This lack of counsel cannot be cured on review in the D.C. Circuit. During the CSRT's crucial factfinding stage, the detainee will be unaided by an advocate in preparing his case,

discerning what evidence and witnesses to seek, and attempting to digest the non-confidential evidence against him. And it is at that stage that a detainee most needs the "guiding hand of counsel," *id*. at 345 (internal quotation marks and citation omitted), given that the choices made will chart and constrain the appellate court's course on review. Rather than being in a position to correct the absence of counsel below, the appellate court's ability to review the case will be hampered by the absence of counsel below.

The D.C. Circuit's decision in *Bismullah*, --- F.3d ----, 2007 WL 2067938, issued in July 2007, does not mitigate the problem. There, the court determined that detainees challenging a CSRT decision would have access to counsel, that the record on review would include "all the information a [CSRT] is authorized to obtain and consider" (not just the subset actually presented to the CSRT), and that the court can review whether the CSRT properly determined witnesses and evidence not to be "reasonably available." *Id.* at *1, *7. Such apparent concessions, however, are of little practical solace for the detainee who, unaided by counsel in the CSRT, was not savvy enough to request certain witnesses or evidence in the first instance. Similarly, as a detainee is unable to draw upon classified information in the CSRT, it is little help that, on review, counsel is given access to such information and is presumed to have a "need to know," *id*. at *1, *8—after the factfinding damage is already done.

Indeed, the court seems disinclined to allow such factual development as might be necessary to offset the prior lack of counsel. *See id*. at *7 (finding further discovery not necessary "in order to challenge a CSRT's ruling that a requested witness or item of evidence was not 'reasonably available'" because "that ruling must be made on the record, which should be sufficient to determine whether the [CSRT] acted in accordance with the specified procedures"). In like fashion, the government has made clear its view that a detainee

cannot adduce new evidence in his DTA court challenge. *See* Br. in Opp. to Reh'g 7 n.3 (DTA procedures "permit detainees to present new evidence *to the Defense Department*" (emphasis added)). Thus, the lack of counsel as the CSRT purports to sort out the facts injects a persistent taint that undermines the adequacy of the D.C. Circuit's review.

**2.** Second, the CSRT procedures lack standards and safeguards for culling exculpatory information from the various federal agencies. *See* Abraham Decl. ¶¶ 10-18 (explaining the inability to discern whether agencies produce all exculpatory evidence and noting the absence of a requirement that staff members have legal or intelligence training). This represents a serious deficit of due process, doing little to "minimize the risk of erroneous decisions." *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979).[20]

In particular, the procedures allow government agencies (such as intelligence organizations) to decline CSRT requests for information, merely by providing instead a "certification to the Tribunal that none of the withheld information would support a determination that the detainee is not an enemy combatant." CSRT Procedures, encl.1 § E(3)(a). However, there are no specified standards by which the sundry agencies are to exercise discretion in assessing what constitutes exculpatory information. *See* Abraham Decl. ¶ 16 ("The content of intelligence products, including databases, made

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[20] *Cf. Youngblood v. West Virginia*, 126 S. Ct. 2188, 2190 (2006) ("A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused[—]even evidence that is known only to policy investigators and not to the prosecutor." (internal quotation marks and citation omitted)); *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

available to case writers, Recorders, or liaison officers, was often left entirely to the discretion of the organizations providing the information."); *id.* ¶¶ 10-16 (detailing irregularities in certification process and in collection of exculpatory information). Similarly, individual military commanders are tasked with deciding if their subordinates are "reasonably available," and civilian witnesses can simply "decline properly made requests to appear at a hearing." CSRT Procedures, encl.1 § G(9)(a), (b).

This standardless discretion cannot be cured on review, as the D.C. Circuit's limited inquiry only addresses final decisions *of the CSRT*. *See* DTA § 1005(e)(2)(A). In other words, a hodgepodge of other federal agencies, military commanders, and civilian witnesses—not a court, and not even the CSRT—are making potentially unreviewable decisions about the universe of evidence that is available to the CSRT. As such, notwithstanding a CSRT's full compliance with the governing procedures, any resulting CSRT fact-finding on a "preponderance of the evidence," DTA § 1005(e)(2)(C)(i), is inherently unreliable and unworthy of deference.[21] A review premised on such an *ad hoc* set of standards (or lack thereof) does not ensure the due process necessary for a detainee to meaningfully contest his detention, as is required by an adequate habeas substitute.

Nor is it sufficient to ensure that, on review, the D.C. Circuit will have access to all of the government's evidence (including exculpatory evidence) that the CSRT is "authorized to obtain and consider." *See Bismullah*, --- F.3d at ----, 2007 WL 2067938, at *1. In order to have a meaningful opportunity to contest the basis of detention, the detainee must have access to the exculpatory evidence during the

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[21] *Cf.* Fallon & Meltzer, *supra*, at 2069 ("Modern notions of deference to administrative decisionmakers, developed primarily in other contexts, are in considerable tension with the historic office of the Great Writ.").

initial CSRT proceedings as he formulates a strategy and attempts to persuade the factfinder.

**3.** Third, a CSRT faces no solid barriers whatsoever to using evidence obtained under abusive conditions. The procedures simply require the CSRT to "assess, to the extent practicable, whether any statement derived from or relating to such detainee was obtained as a result of coercion and the probative value, if any, of such statement." CSRT Procedures, encl.10 § B. There is no requirement that such statements be excluded—a shortcoming not remedied on appeal given that the statute itself contemplates such evidence. *See* DTA § 1005(b)(1). While no one suggests that statements taken in the context of military action be subjected to the same level of scrutiny as if taken in the course of routine police actions, it is incumbent that there be *some* articulated standards for assessing probity, allowing for appropriate consideration of weighty national security concerns. As currently designed, however, the CSRTs are given no such guidance.

In short, there are several impediments to a fair and meaningful opportunity to contest detention that are not cured by the D.C. Circuit's relatively constrained review. An adequate habeas remedy cannot consist of making sure an executive tribunal followed its own patently inadequate rules.[22] Even if, by promulgation of certain regulations, the executive branch remedied several of these procedural

[22] Nor is it dispositive, as the government suggests, that the DTA permits the D.C. Circuit to determine whether the CSRTs' standards and procedures are consistent with the Constitution and laws of the United States. *See* Br. in Opp. to Cert. 17; DTA § 1005(e)(2)(C)(ii). Where, as here, the mechanism for reviewing detention as *currently* enacted by Congress and implemented by the DoD is, on its face, an insufficient substitute for habeas corpus, such a mechanism does not suddenly become adequate simply by providing an additional forum where its flaws can be identified.

deficiencies, the detainee still would be dependent on the discretion of the executive. Congress has not spelled out the precise framework for the CSRTs (and ARBs)—except that they must "provide for periodic review of any new evidence" and must, "to the extent practicable, assess" the probative value of any statements resulting from coercion, DTA § 1005(a)(3), (b)(1)—and has, instead, entrusted the DoD to fill in the gaps, *see id*. § 1005(a)(1)(A). And the DoD is free to alter the procedures at will. *See id*. § 1005(c); CSRT Procedures § 3. Such a flimsy and ephemeral set of procedural safeguards is an inadequate substitute for habeas.

### C. The Framework Lacks an Imperative Remedy

Finally, the DTA does not provide either the CSRTs or the D.C. Circuit with the power to order the release of individuals whose indefinite detentions are unlawful. At its core, the writ's function is "to afford a *swift and imperative* remedy in all cases of illegal restraint upon personal liberty." *Price v. Johnston*, 334 U.S. 266, 283 (1948) (emphasis added). As imported from England, "the use of habeas corpus to *secure release* from unlawful physical confinement . . . was thus an integral part of our common-law heritage." *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973). This is reflected, for example, in the federal statute providing post-conviction relief for federal convicts (as a substitute to habeas under § 2241): if the sentence is illegal, the court is authorized to "discharge the prisoner" after "vacat[ing] and set[ting] the judgment aside." 28 U.S.C. § 2255. While, over time, the writ may have expanded, a claim for "'immediate release' . . . lies at 'the core of habeas corpus.'" *Wilkinson v. Dotson*, 544 U.S. 74, 79 (2005) (quoting *Preiser*, 411 U.S. at 482, 487).

**1.** A CSRT has no power to order a detainee released, even if it determines that the detainee is not an enemy combatant. As implemented, if the CSRT "determines that the detainee shall no longer be classified as an enemy

combatant," its decision (once approved by the Director) is forwarded "in order to *permit* the Secretary of State to coordinate the transfer of the detainee with representatives of the detainee's country of nationality for release *or other disposition* consistent with applicable laws," CSRT Procedures, encl.1 § I(9) (emphases added), and "consistent with domestic and international obligations and the foreign policy of the United States," CSRT Order § i. Also, the "implementing directive is subject to revision at any time." CSRT Procedures § 3. The lack of an imperative remedy is apparent from this permissive language.[23]

Accordingly, in the absence of statutory constraints, there is ample wiggle room for continued detention at the discretion of executive officials—who are under no obligation to reach an agreement with the host countries at all, let alone in an expeditious fashion. By claiming it has not received adequate assurances from the home countries to address security risks posed by the individuals to be released, the executive branch can refrain indefinitely from actually releasing the detainees.[24] Moreover, as noted above, a finding of non-enemy combatant status might result in nothing more than a new CSRT. *Boumediene*, 476 F.3d at 1006-07 (Rogers, J., dissenting).

**2.** Nor is the D.C. Circuit given authority to order release. Even if that court, in exercising its limited review,

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[23] In similar fashion, ARBs offer little remedial hope. *See* Memorandum from Gordon England, Deputy Sec'y of Def., to the Sec'ys of the Military Dep'ts et al., Revised Implementation of Administrative Review Procedures, encl.3 § 1(b) (July 14, 2006); *id*., encl.4 § 5(c)-(d). *Cf*. 18 U.S.C. § 4203 (explicitly authorizing U.S. Parole Commission to "grant . . . an application [for] parole" with respect to certain offenders).

[24] *See* Dep't of Defense, News Release, *Detainee Transfer Announced* (July 16, 2007) (discussing 80 detainees still in custody despite being "designated for release or transfer").

concludes that the CSRT's procedures were improper—that is, the court determines either that the CSRT did not comply with the Defense Secretary's "standards and procedures" or that the "standards and procedures" are inconsistent with the Constitution and laws of the United States—the court is only given authority "to determine the validity of any final decision of a [CSRT]." DTA § 1005(e)(2)(A), (C).

In other statutory schemes, Congress has explicitly empowered courts to order release, *e.g.* 28 U.S.C. § 2255 (authorizing court to discharge federal convict), or, more generally, to compel agency action, *e.g.*, 5 U.S.C. § 706(1) (authorizing court to "compel agency action unlawfully withheld or unreasonably delayed"). Tellingly, it has not done so here. In fact, the government has acknowledged implicitly that, under the DTA, the D.C. Circuit can only remand to the CSRT, not order release. Br. in Opp. to Reh'g 7. Voiding the CSRT's decision would thus apparently leave the detainee in his *ex ante* position—*i.e.*, detained.[25]

In sum, lacking an imperative remedy to cure unlawful detention, these procedures are not an adequate substitute for the Great Writ. As has been the case over the last five years, the resulting "indefinite detention of an alien" represents a "serious constitutional problem," *Zadvydas*, 533 U.S. at 690, impacting "friends and foes alike," *Rasul*, 542 U.S. at 488 (Kennedy, J., concurring).

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[25] Moreover, the DTA's statutory review provisions do not allow the D.C. Circuit to step in when the government refuses to release a detainee that has received a *favorable* CRST decision. *See* DTA § 1005(e)(2)(A) (authorizing court to "determine the validity of any *final decision* of a [CSRT] that an alien is *properly detained as an enemy combatant*" (emphasis added)). That is, a detainee cannot challenge whether the government's asserted reasons for continued detention (e.g., inability to secure agreement from a destination country) are instead mere pretense or the result of a lack of diligence.

At the end of the day, Congress is, of course, capable of amending the statute to prescribe a framework commensurate with traditional habeas review. Indeed, efforts statutorily to specify CRST procedures are underway. *See, e.g.*, S. Amdt. 2011, 110th Cong. § 1023(a) (proposed July 9, 2007) (substitute amendment to H.R. 1585).[26] However, this Court should provide guidance to legislators and clarify that although the detainees' legal authority to petition for habeas may be statutorily removed, Congress must—at a minimum—establish a constitutionally adequate procedure to enable the Guantanamo prisoners to challenge the legality their detentions. While Congress will undoubtedly continue to work its will, it is incumbent upon this Court to provide appropriate constitutional guidance and to restore habeas to its rightful place. By making clear that certain constitutional minimums apply, this Court will preserve Congress' role in mapping out the path forward while simultaneously allowing the detainees the opportunity to be heard and to advance the merits of their individual cases without further delay.

After all, these detainees are not "some undefined, limitless class of noncitizens who are beyond our territory." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (Kennedy, J., concurring). They are 360 individuals who "face continued detention, perhaps for life," and, even though aliens are "subject to limitations and conditions not applicable to citizens," they are nonetheless entitled to a "fair hearing under lawful and proper procedures." *Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting); *see also Hamdi*, 542 U.S. at

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[26] Among other things, the proposed legislation specifies that a detainee appearing before a CSRT is entitled to legal counsel; may "compel witnesses to appear and testify and to compel the production of other evidence"; and may cross-examine witnesses against him. S. Amdt. 2011, § 1023(a) (amending DTA § 1005(b)). Furthermore, it requires a CSRT President to be a military judge and prohibits a CSRT from considering a statement resulting from torture. *Id.*

530 (plurality opinion) ("[A]n unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present [an immediate] threat [to the national security of the United States during ongoing international conflict]."). We do not shield our eyes from the danger those interned at Guantanamo may present. But neither can we blind ourselves to the shunting aside of our constitutional values. Our nation is strong, our Constitution revered, precisely because our laws apply equally to all persons—regardless of how heinous their actions may have been.

In an address at Buffalo Law School in 1951, Justice Jackson warned that "suspension of privilege of the writ of habeas corpus is in effect a suspension of every other liberty." Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103, 109 (1951). In the most recent iteration of that same lecture series, another federal judge appropriately echoed these sentiments: "[T]he Great Writ and the liberty interests that it represents are supported by balanced power in government and challenged when power is unbalanced and unchecked." James Robertson, *Quo Vadis, Habeas Corpus?*, 55 BUFF. L. REV. (forthcoming 2008). To avoid an incongruous legal "black hole" at Guantanamo, this Court should strike down the MCA's illegal suspension of the Great Writ and allow Congress to establish procedures consistent with what national security and the Constitution require.

## CONCLUSION

This Court should reverse the judgment of the court of appeals and remand for further proceedings.

Respectfully submitted,

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