NO. 06-1196

In the Supreme Court of the United States

KHALED A.F. AL ODAH, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

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

BRIEF FOR PETITIONERS AL ODAH, ET AL.

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QUESTIONS PRESENTED

1. Whether the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006), as applied to foreign nationals detained at Guantánamo as enemy combatants, violates the Suspension Clause.

2. Whether foreign nationals detained at Guantánamo are entitled to plenary review of the factual and legal bases of their detention by writ of habeas corpus.

PARTIES TO THE PROCEEDING BELOW[1]

1. *Al-Odah v. United States*, No. 02-CV-0828-CKK (D.D.C.). The four petitioners are Fawzi Khalid Abdullah Fahad Al Odah; Fayiz Mohammed Ahmed Al Kandari; Khalid Abdullah Mishal Al Mutairi; and Fouad Mahmoud Al Rabiah.

2. *Abdah v. Bush*, No. 04-CV-1254-HHK (D.D.C.). The twelve petitioners are Mahmoad Abdah, Majid Mahmoud Ahmed, Abdulmalik Abdulwahhab Al-Rahabi, Makhtar Yahia Naji Al-Wrafie, Yasein Khasem Mohammed Esmail, Adnan Farhan Abdul Latif, Jamal Mar'i, Othman Abdulraheem Mohammad, Adil Saeed El Haj Obaid, Mohamed Mohamed Hassen Odaini, Farouk Ali Ahmed Saif, and Salman Yahaldi Hsan Mohammed Saud.

Respondents are the United States of America; George W. Bush, President; Robert M. Gates, Secretary of Defense; Gen. Peter Pace, Chairman, Joint Chiefs of Staff; Donald C. Winter, Secretary of the Navy, Rear Admiral Mark H. Buzby, Commander, Joint Task Force, Guantánamo; and Col. Bruce Vargo, Commander, Joint Detention Operations Group.

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[1] Petitioners are petitioners in two of the cases consolidated in No. 06-1196. Petitioners who have been released from Guantánamo have been omitted, as have next friends who authorized habeas actions in the names of any petitioner. (The next-friend authorizations remain in effect.)

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The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), and is printed in the Appendix to Petition for Writ of Certiorari ("Pet. App.") 1. The opinion of the United States District Court for the District of Columbia is reported at 355 F. Supp. 2d 443 (D.D.C. 2005), and is reprinted at Pet. App. 61.

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).

APPLICABLE PROVISIONS

The Constitutional, statutory, and international law provisions involved, which are set forth verbatim in the appendix, are U.S. Const., art. 1, § 9, cl. 2 and amend. V; 28 U.S.C. § 2241; Military Commissions Act of 2006, § 7, Pub. L. No. 109-366, 120 Stat. 2600, 2635-36 (2006); Detainee Treatment Act of 2005, § 1005(b), (e), Pub. L. No. 109-148, 119 Stat. 2680, 2741-43 (2005) (10 U.S.C. § 801 note); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); and Lease of Lands for Coaling and Naval Stations, art. III, Feb. 23, 1903, U.S.-Cuba T.S. No. 418.

STATEMENT

A. Introduction

In *Rasul v. Bush*, 542 U.S. 466 (2004), the Court remanded petitioners' habeas cases to the District Court to "consider . . . the merits of petitioners' claims." *Id.* at 485. Now, more than three years later, about 360 detainees continue to be held at Guantánamo, and not one has had a hearing on the merits of his claims. The Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600, purports to strip the courts of jurisdiction to entertain petitioners' habeas cases. Meanwhile, Guan-

tánamo has become an international symbol of the Executive branch's contempt for the rule of law and a deep stain on the reputation of the United States at home and abroad.

B. The Petitioners

Beginning in January 2002, the U.S. transported more than 800 foreign nationals to Guantánamo for detention as "enemy combatants." Petitioners – the four citizens of Kuwait in *Al Odah* and the twelve citizens of Yemen in *Abdah* – are among the foreign nationals held at Guantánamo today. Petitioners deny that they have ever engaged in combat against the United States or its allies. They seek nothing more than a day in court to establish their innocence of any wrongdoing that might justify their detention – a hearing the government has fiercely fought to deny them for nearly six years.

Unlike individuals captured in previous military conflicts, none of the foreign nationals brought to Guantánamo was given a field hearing close to the time and place of his capture to determine whether he was an enemy combatant – lawful or otherwise.[2] Instead, these individuals were taken to Guantánamo for indefinite detention without judicial inquiry. As John Yoo, a Deputy Assistant Attorney General at the time, later explained: "[N]o location was perfect," but Guantánamo "seemed to

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[2] *See Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, U.S. Army Regulation 190-8, ch. 1-5, ¶ a ("All persons taken into custody by U.S. forces will be provided with the protections of the [1949 Geneva Convention Relative to the Treatment of Prisoners of War] "GPW" until some other legal status is determined by a competent authority."); ch. 1-6, ¶ b ("[a] competent tribunal shall determine the status of any person . . . concerning whom any doubt . . . exists") (Oct. 1, 1997), *available at* http://www.usapa.army.mil/pdffiles/r190_8.pdf.

fit the bill. . . . [T]he federal courts probably wouldn't consider Gitmo as falling within their habeas jurisdiction."[3]

C. History of the Case

1. In early 2002, the first habeas actions in these consolidated cases were filed in the U.S. District Court for the District of Columbia. One of the actions was brought by the Kuwaiti petitioners in *Al Odah*. The District Court dismissed the actions for lack of jurisdiction, *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), and the D.C. Circuit affirmed. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003). Relying principally on this Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the D.C. Circuit held that federal courts lacked jurisdiction to entertain petitioners' habeas actions because they were aliens held outside U.S. sovereign territory. *Al Odah*, 321 F.3d at 1141.

In *Rasul*, this Court reversed, holding that 42 U.S.C. § 2241 gave federal courts jurisdiction to entertain the detainees' habeas actions. The Court pointed out that the Guantánamo detainees differ "in important respects" from the *Eisentrager* detainees. 542 U.S. at 476. The Court noted that, unlike the *Eisentrager* petitioners, who were tried in China and incarcerated in Germany, the *Rasul* petitioners were held "within 'the territorial jurisdiction' of the United States," in an area "over which the United States exercises exclusive jurisdiction and control." *Id.* As Justice Kennedy stated in his concurrence, "Guantánamo Bay is in every practical respect a United States territory." *Id.* at 487 (Kennedy, J., concurring in judgment).

The Court confirmed that Guantánamo detainees, "no less than American citizens," have the right to challenge the legality of their detention in the U.S. courts through

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[3] John Yoo, *War By Other Means: An Insider's Account of the War on Terror* 142-43 (2006).

habeas actions. *Id.* at 481. In addition, the Court stated that the application of the statutory writ to petitioners was "consistent with the historical reach of the writ of habeas corpus" at common law. *Id.* Stating that the petitioners' allegations "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States,'" *id.* at 484 n.15 (quoting 28 U.S.C. § 2241), the Court remanded to the District Court to "consider . . . the merits of petitioners' claims," *id.* at 485. Following *Rasul*, the *Abdah* petitioners, and others, filed habeas actions in the District Court.

2. Days after the Court's decision in *Rasul*, the Deputy Secretary of Defense announced the creation of Combatant Status Review Tribunals ("CSRTs") to review determinations by the Department of Defense that the detainees were "enemy combatants."[4] The CSRTs were not independent tribunals. According to the announcement, and regulations the panel members were expected to follow, the "enemy combatant" determinations had already been approved "through multiple levels of review by officers of the Department of Defense." Wolfowitz Order § a, Pet. App. 141. The tribunals' procedures denied the detainees counsel and permitted "enemy combatant" designations based on secret, incomplete, unreliable, and one-sided evidence, including evidence obtained by torture or coercion. Even if a detainee is declared *not* to be an "enemy combatant," the Deputy Secretary's memorandum authorizes his continued detention for reasons of "foreign policy." Wolfowitz Order § i, Pet. App. 145.

According to Lt. Col. Stephen Abraham, a reserve military intelligence officer who gathered information for CSRT proceedings from government agencies and sat on a CSRT panel that reviewed a detainee's enemy combatant

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[4] Paul Wolfowitz, *Order Establishing Combatant Status Review Tribunal* (Jul. 7, 2004) ("Wolfowitz Order"), Pet. App. 141.

status, the CSRTs did not have access to important and potentially exculpatory information about detainees and were pressured by superiors to designate detainees as enemy combatants.[5] "[B]ased on the selective review that I was permitted, I was left to 'infer' from the absence of exculpatory evidence I was allowed to review that no such information existed in the materials I was not allowed to review." Abraham Decl. ¶ 14. Col. Abraham stated that the information provided to his CSRT panel to sustain an enemy combatant determination "lacked even the most fundamental earmarks of objectively credible evidence." *Id*. ¶ 22. Accordingly, Col. Abraham's panel determined its detainee not to be an enemy combatant. Thereafter, command pressure was brought to bear on the panel to change its decision. *Id*. ¶ 23. When the panel refused to buckle, the case was reassigned to another panel, which determined that the detainee was an enemy combatant.[6]

3. On October 4, 2004, while the CSRT proceedings were underway, the government moved to dismiss the thirteen habeas cases then pending in the District Court. The government argued that *Rasul* merely held that the District Court had statutory jurisdiction to entertain petitioners' habeas actions but that, once petitioners had filed their habeas actions, the District Court was bound to dismiss the actions because petitioners, as aliens held outside U.S. sovereign territory, had no rights that the

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[5] *See* Declaration of Stephen Abraham, Lieutenant Colonel, U.S. Army Reserve, ("Abraham Decl."), Joint Appendix ("Jt. App.") 103. *See also Upholding the Principles of Habeas Corpus for Detainees, 2007: Hearing before the House Armed Services Comm.*, 110th Cong., 1st Sess. (Jul. 26, 2007) ("HASC Hearing") (statement and testimony of Lt. Col. Abraham).

[6] *See* HASC Hearing, *supra* note 5. An original habeas petition has been filed in this Court for this petitioner, Abdul Hamid Al-Ghizzawi. *In re Al-Ghizzawi*, No. 07-M5 (filed Jul. 31, 2007).

court could enforce. Agreeing, Judge Richard Leon, on January 15, 2005, granted the government's motion to dismiss the two cases assigned to him. *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005). The petitioners in those cases, *Boumediene* and *Khalid*, appealed.

In the eleven other cases (including *Al Odah* and *Abdah*), Judge Joyce Hens Green denied the government's motion to dismiss in material part. *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005). Judge Green first observed that "the right not to be deprived of liberty without due process of law [ ] is one of the most fundamental rights recognized by the U.S. Constitution." *Id.* at 464. Judge Green then held that, in light of *Rasul*, "it is clear that Guantánamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply." *Id.* Judge Green found that the CSRT procedures violated Due Process and the Geneva Conventions because, among other things, the procedures "deprive[d] the detainees of sufficient notice of the factual bases for their detention," "den[ied] them a fair opportunity to challenge their incarceration," and allowed reliance on statements obtained by torture and coercion. *Id.* at 472. On February 3, 2005, Judge Green certified an interlocutory appeal by the government and granted its motion for a stay pending appeal.

4. After this Court granted review in *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), a case challenging the military commissions established by the President to try Guantánamo detainees charged with war crimes, Congress passed and the President signed the Detainee Treatment Act of 2005 ("DTA"), tit. X, Pub. L. No. 109-148, 119 Stat. 2680, 2739-44 (2005) (10 U.S.C. § 801 note), amending 28 U.S.C. § 2241 to strip federal courts of jurisdiction to entertain habeas actions by Guantánamo detainees. In lieu of plenary habeas review in district court, the DTA provides for exclusive and limited review by the D.C. Circuit of final CSRT and military commission deci-

sions. In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), however, this Court held that the DTA did not apply to cases, such as petitioners', that were pending at the time of the DTA's enactment. *Id.* at 2764-69. The Court went on to hold that the President lacked authority to establish the military commissions because Congress had provided a different scheme in the Uniform Code of Military Justice.

The Administration returned to Congress, attempting to obtain legislation that would strip federal courts of jurisdiction over pending habeas actions of Guantánamo detainees and leave DTA review as the detainees' only judicial recourse. Congress passed the legislation, with alterations, as the MCA, and the President signed it on October 16, 2006. MCA § 7(a) purported to strip federal courts of jurisdiction over habeas cases, and MCA § 7(b) specified an effective date for the amendment made by MCA § 7(a).

5. On February 20, 2007, a divided panel of the D.C. Circuit in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), vacated the District Court's decisions and ordered the cases dismissed for lack of jurisdiction. The panel majority (Randolph & Sentelle, JJ.) first held that MCA § 7(b), the effective date provision, made MCA § 7(a), the habeas jurisdiction-stripping provision, applicable to pending cases. *Id.* at 986-87. Relying heavily on *Eisentrager* – as it had in *Al Odah*, 321 F. 3d 1134, *rev'd sub nom. Rasul*, 542 U.S. 466, and *Hamdan*, 415 F.3d 33, *rev'd*, 126 S. Ct. 2749 – the panel majority then held that petitioners could not challenge MCA § 7(a) under the Suspension Clause because, as aliens held outside U.S. sovereign territory, they possess no constitutional rights. *See Boumediene,* 476 F.3d at 990-91.

Judge Rogers dissented. In her view, the majority "fundamentally misconstrue[d]" the nature of the Suspension Clause, which she characterized as "a limitation on the powers of Congress," and it was only by ignoring the

historical record and this Court's decision in *Rasul* that the majority was able to conclude that the Suspension Clause does not protect habeas claims of Guantánamo detainees. *See id.* at 994-96. Judge Rogers noted that this Court in *Rasul* had affirmed that application of the Great Writ to petitioners "is consistent with the historical reach of the writ of habeas corpus," *id.* at 1002, and she concluded that the limited judicial review of CSRT determinations provided under the MCA and DTA were not a sufficient substitute for habeas corpus, *see id.* at 1006.

This Court, after initially denying petitioners' certiorari petition, granted the petition.

SUMMARY OF ARGUMENT

I. The MCA violates the Suspension Clause. The writ of habeas corpus may be suspended only in cases of invasion or rebellion. Neither condition obtains. Nor are the Guantánamo detainees beyond the reach of the writ. The Suspension Clause protects the writ as it existed in 1789. The writ as it existed in 1789 depended not on formal notions of sovereignty, but on the "exact extent and nature of the jurisdiction or dominion exercised" by the government. *Rasul*, 542 U.S. at 482 (citation omitted). The writ extends to Guantánamo because it is within the "territorial jurisdiction" of the United States. *Id.* at 480. Although sovereignty is not the determining factor, the United States exercises all of the incidents of sovereignty in Guantánamo, including the power of the state to apply its laws, and its laws alone, within the territory; the power to subject all persons within the territory to the processes of its courts or other tribunals; and the power to compel compliance or punish noncompliance with its laws. Under its lease with Cuba, it may exercise these incidents of sovereignty in perpetuity.

Moreover, before 1789, the writ was available to individuals who possessed no rights under positive law. Even assuming the Guantánamo detainees have no such rights,

they are within the reach of the writ as existed in 1789, and are therefore entitled to the processes and remedies afforded by habeas.

The detainees also are entitled to habeas because they possess fundamental due process rights. The Court recognized as much in *Rasul*, and, as authority for the proposition that the petitioners had stated a claim, cited Justice Kennedy's concurring opinion in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and the cases cited therein, which included the *Insular Cases*. In his *Verdugo* concurrence, Justice Kennedy endorsed Justice Harlan's view that the Constitution applies to U.S. government actions in the U.S. or abroad except to the extent that application of certain provisions would be "impracticable and anomalous." Habeas is available to the Guantánamo detainees to enforce these fundamental rights. Finally, habeas is available to the Guantánamo detainees to enforce the Suspension Clause as a structural limitation on the power of Congress. Just as a Guantánamo detainee in *Hamdan* enforced a structural constitutional limit on the power of the Executive to disregard a military commission system established by Congress, so a Guantánamo detainee may enforce a structural limitation on the power of Congress to negate the historic judicial remedy of habeas.

The Court, however, need not address these constitutional issues. Congress has not articulated the "specific and unambiguous statutory directive" required to effect a repeal of habeas. *INS v. St. Cyr*, 533 U.S. 289, 299 (2001). The jurisdiction-stripping provisions of the MCA therefore do not apply to habeas cases pending at the time of enactment.

II. The MCA does not provide "a remedy exactly commensurate with that which had been previously available by habeas corpus." *Hill v. United States*, 368 U.S. 424, 427 (1962). On the contrary, in the MCA Congress deliberately created a limited and narrow remedy that has none of the hallmarks of habeas. Under the MCA, the sole

judicial recourse of a Guantánamo detainee is review under the DTA. But DTA review is not an adequate substitute for habeas. *First*, the DTA does not authorize the D.C. Circuit to review the lawfulness of the detention itself. *Second*, DTA review is limited to the information reasonably available to the government. The detainee cannot present additional evidence in a DTA proceeding that might exculpate him or impeach the government's evidence. CSRT regulations direct the CSRTs to presume that the government's evidence is "genuine and accurate," but the detainee cannot rebut that presumption, or otherwise counter the government's evidence, because much of the government's evidence is classified. *Third*, the CSRT process denies the detainee the assistance of counsel. *Fourth*, the CSRT itself is not a neutral, independent decision maker but is subject to command influence and reversal by superior officers in the chain of command. DTA review cannot cure this problem to the extent that the D.C. Circuit's function is to review CSRT decisions, not to conduct a plenary review of its own. *Fifth*, CSRTs were permitted to rely on evidence obtained by torture or coercion. Due process forbids consideration in a habeas proceeding of evidence obtained by such means. *Sixth*, the DTA does not permit a prisoner to challenge the definition of "enemy combatant" under the CSRT regulations, the legal basis of the detention. *Seventh*, the DTA, at least in the government's estimation, does not authorize the remedy that lies at the heart of habeas – the prisoner's release.

III. Because it dismissed the detainees' habeas cases for lack of jurisdiction, the Court of Appeals never reached the question on which it had granted interlocutory review: whether the District Court had correctly denied the government's motion to dismiss on the ground that the detainees have no constitutional rights. The detainees have constitutional rights, but, even if they did not, habeas would still be available to test the govern-

ment's legal and factual bases for detention. The Court should therefore reverse the decision of the Court of Appeals and remand for expedited habeas corpus hearings.

On remand, the detainees are entitled to plenary review of the government's allegations that they are enemy combatants. Under the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"), and the law of war, as construed in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), an "enemy combatant" is an individual who is "part of or supporting forces hostile to the United States or coalition partners and engaged in an armed conflict against the United States." Under the much broader definition that the Executive adopted for CSRT purposes, an "enemy combatant" is not limited to those who are part of or supporting hostile forces, and is broad enough to bring nonbelligerent civilians within its reach. The Executive may no more adopt a definition of "enemy combatant" contrary to statute than the Executive may establish military commissions contrary to the legislative regime.

ARGUMENT

I. THE MCA'S ELIMINATION OF HABEAS VIOLATES THE SUSPENSION CLAUSE.

The Suspension Clause protects the writ at least as it existed in 1789. As the Court has already determined in *Rasul*, that writ extends to foreign nationals held in Guantánamo. The scope of the writ at common law depended not on "formal notions of territorial sovereignty," but on practical questions of jurisdiction and control. 542 U.S. at 482. Whether or not Guantánamo is U.S. sovereign territory, the Court recognized that it is within the "complete jurisdiction and control" of the United States, to the exclusion of any other sovereign. *Id.* at 480. *Rasul* also recognized that the Guantánamo detainees have asserted claims that "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United

States.'" *Id.* at 484 n.15. Finally, even if the detainees do not possess fundamental rights, they can enforce the Suspension Clause because the clause enforces a structural, judicial limit on the power of Congress. Nothing in *Eisentrager* precludes petitioners' access to habeas.

A. Congress May Not Suspend the Writ Absent a Rebellion or Invasion.

The MCA marks the first time Congress has suspended habeas without a finding of rebellion or invasion. On the four earlier occasions when Congress authorized suspension of the writ, Congress met the requirements of the Suspension Clause. *See* Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755, 755 (suspension during Civil War); Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 13, 14-15 (authorizing suspension upon proclamation by President of rebellion during Reconstruction); Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 691, 692 (authorizing suspension upon proclamation by President or Governor, with approval of Philippine Commission, of rebellion or invasion in the Philippines); Hawaiian Organic Act of 1900, ch. 339, § 67, 31 Stat. 141, 153 (authorizing suspension upon proclamation by Governor of rebellion or invasion in Hawaii).

Absent a finding of rebellion or invasion, the Suspension Clause bars Congress from denying Guantánamo detainees access to the Great Writ. Congress' attempt to do so here is void. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871); *Armstrong v. United States*, 80 U.S. (13 Wall.) 154, 154 (1871).[7]

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[7] *Klein* and *Armstrong* addressed a post-Civil War statute that withdrew from the federal courts jurisdiction to hear claims for recovery of seized property brought by pardoned Confederates. See Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress's Power to Restrict the Jurisdiction of the Lower Federal Courts*, 54 Md. L. Rev. 132 (1995); Lawrence G. Sager, *Constitutional Limitations on Congress' Authority to*

(footnote cont'd)

B. The Writ As It Existed in 1789 Extends to Foreign Nationals Held At Guantánamo.

1. The historical writ extends to Guantánamo.

"[A]t the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301 (citation and footnote omitted). In *Rasul*, the Court concluded that applying the federal habeas statute to persons detained at Guantánamo "is consistent with the historical reach of the writ of habeas corpus." 542 U.S. at 481-82. This conclusion was not mere dictum: it was necessary support for the Court's determination that the habeas statute extended to aliens held at Guantánamo. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) ("[F]or the meaning of the term habeas corpus, resort may unquestionably be had to the common law").[8]

The writ as it existed in 1789 applied in places that were not considered sovereign territory. In *The King v. Overton* and *The King v. Salmon*, for example, the writ

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Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 71 (1981) ("It was clear to the *Klein* Court that Congress could not manipulate jurisdiction to secure unconstitutional ends.").

[8] *St. Cyr* also recognized that common law habeas was available to individuals, like petitioners, who are citizens of countries at peace with the United States: "In England prior to 1789, in the colonies, and in this nation during the formative years of our Government, the writ of habeas corpus was available to nonenemy aliens as well as to citizens." *St. Cyr*, 533 U.S. at 301 (footnote omitted); *see also Rex v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759) (habeas corpus jurisdiction over detention of a Swedish national detained as a prisoner of war); *Case of the Hottentot Venus*, 104 Eng. Rep. 344 (K.B. 1810) (detention of a South African national); *Sommersett v. Stewart*, 20 How. St. Tr. 1 (K.B. 1772) (detention of an African slave purchased in Virginia); *United States v. Villato*, 2 U.S. (2 Dall.) 370 (C.C.D. Pa. 1797) (detention of a Spanish national).

was held to run to the Island of Jersey, which was not sovereign English territory, but rather was historically part of the Duchy of Normandy. *Overton*, 1 Sid. 387, 82 Eng. Rep. 1173 (K.B. 1668); *Salmon*, 2 Keb. 450, 84 Eng. Rep. 282 (K.B. 1669); Sir Matthew Hale, *The History of the Common Law of England* 121 (C. Gray ed. 1971); Charles Le Quesne, *A Constitutional History of Jersey* 98 (1856).[9] Despite Justice Scalia's statement in *Rasul* that there is no case in which the writ of habeas corpus has been extended to an alien held outside of sovereign territory, *see Rasul*, 542 U.S. at 502-05 (Scalia, J., dissenting), even before Great Britain in 1813 asserted sovereignty over territories in India controlled by the East India Company, the justices of Great Britain's Supreme Court in Calcutta issued writs of habeas corpus to review detentions of Indian nationals. *See Rex v. Mitter*, 1 Indian Dec. 210 (1775); B.N. Pandey, *The Introduction of English Law into India* 151 (1967).[10]

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[9] After William, Duke of Normandy, conquered England in 1066, he and later English kings held the Duchy of Normandy not as English kings but as Dukes of Normandy, under the suzerainty of the King of France. In the Treaty of Paris of 1259, Henry III of England ceded his claim as Duke of Normandy to the mainland portion of Normandy but retained control of the Norman islands of Jersey, Man, and Guernsey. The islands later separated from Normandy and assumed plenary power to legislate for themselves and conduct their own foreign affairs. *See* Le Quesne, *supra* p. 14, 98-99. Today, the Islands are considered English Crown dependencies but are not part of the United Kingdom. They are not bound by English laws or treaties except as made applicable to them by the English Crown at the request of their own legislatures.

[10] The government has argued that *Mitter* and *Rex v. Hastings*, 1 Indian Dec. 206 (1775), stand for the proposition that the Supreme Court in Calcutta lacked power to issue a writ of habeas corpus in India. *See* Br. in Opp. at 26 n.11. *Mitter*, however, af-

(footnote cont'd)

Nor does *Rex v. Cowle*, 2 Burr. 834, 97 Eng. Rep. 587 (K.B. 1759), stand for the broad proposition that common law habeas did not extend to "foreign dominions" of the Crown, as the panel majority would have it. *See Boumediene*, 476 F.3d at 989. As Judge Rogers pointed out in her dissent, *Cowle* stated only that the writ would not extend to "foreign dominions, *which belong to a prince who succeeds to the throne of England*." 97 Eng. Rep. at 599-600 (emphasis added). Judge Rogers explained: "[T]he exception noted in Lord Mansfield's qualification has nothing to do with extraterritoriality: Instead, habeas from mainland courts was unnecessary for territories like Scotland that were controlled by princes in the line of succession[,] because [those territories] had independent court systems." *Boumediene*, 476 F.3d at 1002 (citations omitted). In deciding that the King's Bench had the authority to issue a prerogative writ to Berwick – a conquered territory that was once part of Scotland – *Cowle* emphasized the need for the writ to extend to such non-sovereign English territory where no other court had authority to ensure "a fair, impartial, or satisfactory trial or judgment." 97 Eng. Rep. at 603. In such a case, the court asked, "who can judge, but this court?" *Id.* at 599.

The thrust of the historical cases, as *Rasul* found, is that "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.'" 542 U.S. at 482 (quoting *Ex parte Mwenya*, [1960] 1 Q.B. 241, 303 (C.A.)).

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firmed that the *justices* of the Supreme Court had power to issue the writ. *Hastings* held that the Supreme Court lacked power to issue a writ of mandamus; but the court distinguished mandamus, then considered a remedial writ, from habeas, a prerogative writ, which the justices affirmed their power to issue. *See* 1 Indian Dec. at 209 (opinion of Chambers, J.) ("we are empowered to grant the writ of habeas corpus").

Because the United States has "complete jurisdiction and control" over Guantánamo, *Rasul*, 542 U.S. at 480-81, and because the essence of the writ of habeas corpus is to protect an individual, whether citizen or nonenemy alien, against arbitrary executive detention, the writ, as it existed in 1789, is available to individuals in the petitioners' position.

2. The United States exercises all of the incidents of sovereignty at Guantánamo.

In the case of Guantánamo, a formalistic insistence on technical sovereignty as a precondition for habeas makes no sense. When the Spanish-American War ended in 1898, the United States occupied Cuba and other former Spanish territories. The U.S. granted Cuba formal independence in 1902 but retained possession of Guantánamo as a naval station. In 1903, when the United States and Cuba entered into a lease of Guantánamo,[11] independent Cuba had never exercised sovereignty over Guantánamo. *See* Kal Raustiala, *The Geography of Justice*, 73 Fordham L. Rev. 2501, 2537 (2005) ("Raustiala").

As Justice Kennedy commented, "this lease is no ordinary lease." *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring in judgment). The Lease grants "complete jurisdiction and control" of Guantánamo to the United States. *See* Lease, *supra* note 11. It is indefinite in duration "[s]o long as the United States of America shall not abandon the . . . naval station of Guantánamo."[12] Indeed, the Lease itself constitutes a relinquishment of sovereignty to the United States. In an amendment to the Lease on December 27, 1912, the United States and Cuba agreed:

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

[12] *See* Treaty between the United States of America and Cuba Defining Their Relations, art. III, May 29, 1934, 48 Stat. 1683, 1683, T.S. No. 866.

> The limits of the areas of land and water of Guantánamo which were *ceded in lease* to the United States of America by the agreements of February 16/23 and July 2, 1903, are hereby enlarged . . . .[13]

A "cession" effects "an actual transfer of sovereignty." 1 Georg Schwarzenberger, *A Manual of International Law* 116 (4th ed. 1960); *see also* Joseph Lazar, *"Cession in Lease" of the Guantánamo Bay Naval Station and Cuba's "Ultimate Sovereignty,"* 63 Am. J. Int'l L. 116 (1969). Therefore, a cession in lease conveys sovereign authority, with a reversionary interest withheld in the lessor. *See id.* at 117. This understanding is also consistent with the United States' acknowledgement that Guantánamo is a "territor[y] for which the U.S. is internationally responsible."[14]

In this respect, the Guantánamo lease is like other territorial leases between sovereigns entered into in about the same period. In 1898, for example, Great Britain leased the New Territories (the lands adjacent to Hong Kong) from China for a period of ninety-nine years. That lease, which expired in 1997 and was not renewed, gave

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[13] Amendments to the Agreements of February 16/23 and July 2, 1903, Dec. 27, 1912, U.S.-Cuba, 1912 U.S. Foreign Relations 295-97 (emphasis added).

[14] Treaty for the Prohibition of Nuclear Weapons in Latin America: Its Status and the Status of Additional Protocols I and II, Introductory Note by Carol M. Schwab, Office of Legal Adviser, U.S. Dep't of State, *Treaty for the Prohibition of Nuclear Weapons in Latin America: Its Status and the Status of Additional Protocols I and II*, 28 I.L.M. 1400, 1403-04 (May 2, 1989) ("The list of territories for which the U.S. is internationally responsible [consists of] Puerto Rico, U.S. Virgin Islands, Guantánamo Base, Navassa Island, Seranilla Bank and Bajo Nuevo (Petrel Island).").

Great Britain "sole jurisdiction" in the leased area.[15] Although the lease did not expressly grant Great Britain sovereignty over the New Territories, the international community, including China, recognized Great Britain's exercise of sovereignty during the term of the lease.[16]

Even if Cuba possesses some vestige of sovereignty over Guantánamo, there is no reason to think of sovereignty as an indivisible "atom" that cannot be split. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). American power at Guantánamo has all the incidents of formal sovereignty: plenary jurisdiction to prescribe, plenary jurisdiction to adjudicate, and plenary jurisdiction to enforce.[17] All the United States lacks is Cuba's qualified remainder inter-

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[15] Convention Between China and Great Britain Respecting an Extension of Hong Kong Territory, June 9, 1898, P.R.C.-Gr. Brit., 186 Consol. T.S. 310.

[16] *See, e.g.*, Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong, Sept. 26, 1984, 23 I.L.M. 1366, ¶ 3(1) (recognizing that China would resume the exercise of sovereignty over Hong Kong and the New Territories on July 1, 1997).

[17] *See Restatement (Third) of Foreign Relations Law of the United States* § 206 cmt. b; § 401, § 402 (1987). Jurisdiction to prescribe refers to the authority of the state to make its law applicable in the territory. Jurisdiction to adjudicate refers to the authority of the state to subject persons within the territory to the processes of its courts. Jurisdiction to enforce refers to the authority of the state to compel compliance or punish noncompliance with its laws or regulations. The United States exercises all three incidents of jurisdiction in Guantánamo. *See, e.g.*, *United States v. Lee*, 906 F.2d 117, 118 n.1 (4th Cir. 1990) (finding Guantánamo a "special maritime and territorial jurisdiction" of the United States subject to the provisions of 18 U.S.C. § 7 for the punishment of crimes in such places). Cuba exercises none.

est.[18] Thus, as Justice Kennedy stated in his concurring opinion in *Rasul*, "Guantánamo 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 of Guantánamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." 542 U.S. at 487 (Kennedy, J., concurring in judgment).

In sum, the historical writ of habeas corpus reaches the Guantánamo detainees. *Rasul*, 542 U.S. at 481. Accordingly, the Suspension Clause ensures their ability to invoke that writ. *St. Cyr*, 533 U.S. at 301.

C. Guantánamo Detainees Have Fundamental Due Process Rights That Habeas Can Vindicate.

In *Rasul*, the Court held that 28 U.S.C. § 2241 gave federal courts jurisdiction over habeas actions brought by Guantánamo detainees. The Court of Appeals apparently believed that dismissal was appropriate because the Guantánamo detainees have no constitutional rights. *Rasul*, however, did more than construe § 2241 to assign federal courts the ministerial role of dismissing actions brought by Guantánamo detainees. *Rasul* recognized that

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[18] That the lease refers to the "ultimate sovereignty" of Cuba over Guantánamo is of no moment. In using "ultimate" to qualify "sovereignty," the lease acknowledges that the United States has sovereignty over Guantánamo during the life of the lease, and that Cuba has sovereignty thereafter. This is a common usage of "ultimate." *See Black's Law Dictionary* 1522 (6th ed. 1990) (defining "ultimate" to mean "At last, finally, or at the end. The last in the train of progression or sequence tended toward by all that precedes; arrived at as the last result; final."). There otherwise would have been no point in using "ultimate" to modify "sovereignty." *See Raustiala*, *supra* p. 16, at 2540-41.

Guantánamo detainees have rights that habeas can vindicate.

In footnote 15, the Court stated:

> Petitioners' allegations – that although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in [E]xecutive 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."

Rasul, 542 U.S. at 483 n.15. As authority, the Court cited Justice Kennedy's concurrence in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990), "and cases cited therein." Those cases include the *Insular Cases*.

In his concurrence in *Verdugo-Urquidez*, Justice Kennedy quoted Justice Harlan's comment in *Reid v. Covert* that the *Insular Cases* stand for the proposition "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." *Verdugo*, 494 U.S. at 277 (Kennedy, J., concurring) (quoting *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring)). Justice Kennedy likewise stated that the Constitution applies unless "the particular local setting" would make application of a constitutional provision "impracticable and anomalous." *See Verdugo,* 494 U.S. at 278.[19]

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[19] Scholars and Courts of Appeals have recognized that Justice Kennedy's concurring opinion in *Verdugo-Urquidez* limits the reach of the majority opinion, because Justice Kennedy's vote was necessary to make the majority of five justices. *See* A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legis-*

(footnote cont'd)

In citing this authority, the Court in *Rasul* recognized that the Guantánamo detainees have fundamental rights, including "personal liberty," "access to courts of justice," and "due process of law." *See Downes v. Bidwell*, 182 U.S. 244, 282-83 (1901). Indeed, it is difficult to conceive a right more fundamental than the right not to be deprived of personal liberty except in accordance with law. *See* Magna Carta ¶ 39 (June 15, 1215) ("No freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed – nor will we go upon or send upon him – save by the lawful judgment of his peers or by the law of the land."); *Groppi v. Leslie*, 404 U.S. 496, 502 (1972); *Hamdi*, 542 U.S. at 529.[20]

Nothing in the *Insular Cases*, *Verdugo-Urquidez*, or *Eisentrager* justifies the bright-line test applied by the panel majority in holding that there can be no constitu-

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lation?, 35 Colum. J. Transnat'l L. 379, 399 (1997); Elizabeth Wilson, *The War on Terrorism and "the Water's Edge": Sovereignty, "Territorial Jurisdiction," and the Reach of the U.S. Constitution in the Guantánamo Detainee Litigation*, 8 U. Pa. J. Const. L. 165, 180 (2006); *Lamont v. Woods*, 948 F.2d 825, 835 n. 1 (2nd Cir. 1991); *United States v. Boynes*, 149 F.3d 208, 212 n. 3 (3rd Cir. 1998); *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 624-25 (5th Cir. 2006).

[20] The panel majority erroneously rejected the application of the *Insular Cases* on the ground that, in Guantánamo, Congress has not exercised "its power under Article IV, Section 3 of the Constitution to regulate 'Territory or other Property belonging to the United States.'" *Boumediene v. Bush*, 476 F.3d 981, 992 (D.C. Cir. 2007). In fact, Congress has exercised its powers under the Territory Clause. For example, 18 U.S.C. § 7, defining the "special maritime and territorial jurisdiction" of the United States, covers crimes committed by aliens in Guantánamo. *See United States v. Lee*, 906 F.2d 117 (4th Cir. 1990); *cf. United States v. Sharpnack*, 355 U.S. 286, 288 (1958) (stating that 18 U.S.C. § 7 was enacted under Congress' power under the Territory Clause).

tional rights in the absence of territorial sovereignty or citizenship. Rather, as *Rasul* recognized, the "particular local setting" of Guantánamo entitles the detainees to the protection of fundamental due process rights.

In *Verdugo-Urquidez*, the Court considered the application of the Fourth Amendment's prohibition on unreasonable searches and seizures performed by U.S. agents of a home in Mexico belonging to a Mexican national in U.S. custody. *Verdugo-Urquidez*, 494 U.S. at 262. In a five to four opinion, this Court held that the Fourth Amendment does not require exclusion of evidence from such searches. The Court based its holding on its view that the prohibition on unreasonable searches and seizures could not be applied to searches of property belonging to aliens in "foreign lands" because of the need to "function effectively in the company of sovereign nations," raising the concern that application of U.S. law on searches and seizures would "plunge [the government] into a sea of uncertainty as to what might be considered reasonable in the way of searches and seizures conducted abroad." *Id.* at 274. The Court's implicit concern, conflict between the Constitution and foreign law, has no application to territory, like Guantánamo, where the U.S. exercises "complete jurisdiction and control." *Rasul*, 542 U.S. at 480-81.

Eisentrager also involved government action in a foreign country outside the territorial jurisdiction of the United States, and its holding rests on particular circumstances of that case that this Court has already concluded are not applicable with respect to the Guantánamo detainees. *Rasul*, 542 U.S. at 476.

Recognition of fundamental due process rights for Guantánamo detainees would not conflict with or disrupt the legal systems of any foreign country. But failure to recognize the fundamental rights of Guantánamo detainees would leave Guantánamo a legal black hole – a land without law – where the Executive can rule arbitrarily and absolutely and can exclude the judiciary by unilateral

determinations of who constitutes an enemy combatant. It would create a zone where the government can act with impunity and without regard for domestic or international law, encouraging further lawless conduct by future administrations. Such a result would be "anomalous," to say the least. *See Reid*, 354 U.S. at 75 (Harlan, J., concurring).

D. Guantánamo Detainees Could Enforce The Suspension Clause Even If They Did Not Possess Fundamental Rights.

The panel majority held that the Suspension Clause did not apply to the Guantánamo detainees because, in the majority's view, "the Constitution does not confer rights on aliens without property or presence within the United States." *Boumediene*, 476 F.3d at 991. As Judge Rogers recognized in her dissent, however, the Suspension Clause is a structural limitation on the power of Congress. *See* 476 F.3d at 996-97. Like bills of attainder and ex post facto laws, which also are prohibited in Article I, § 9, the suspension of habeas (except in cases of rebellion or invasion) belongs to a "category of Congressional actions which the Constitution barred." *United States v. Lovett*, 328 U.S. 303, 315 (1946). "Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void." *Id.* at 314 (quoting *The Federalist No. 78* (Alexander Hamilton)).

Thus, unlike the Fourth and Fifth Amendments, which secure individual *rights* of "the people" or "persons," the Suspension Clause secures a judicial *remedy* for unjustified Executive detention: "[T]he great object of [the writ] is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment." *See, e.g.*, *Ex parte Watkins*, 28 U.S. 193, 202 (1830). The Executive must show a legal and factual basis for the detention, re-

gardless whether the detainee has any substantive rights. A lack of constitutional rights did not shield Executive detention from judicial scrutiny before 1789, and such a justification does not shield Executive detention from judicial scrutiny today.

The Suspension Clause, then, is an essential element of the separation of powers, protecting the power of the judiciary to inquire into the lawful basis of Executive detention, and precluding Congress from removing that power except in accordance with the terms of the Clause. No "rights" are required to challenge a statute that exceeds such a structural limitation on the powers of Congress.

Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), shows that Guantánamo detainees may enforce structural limitations regardless whether they possess fundamental rights. In *Hamdan*, the Court enforced a structural limitation on the Executive's power to try a Guantánamo detainee for war crimes in disregard of the scheme established by Congress in the Uniform Code of Military Justice. In this case, Guantánamo detainees seek to enforce a structural limitation on Congress' power to suspend the judicial remedy of habeas corpus. The Court should enforce that limitation.[21]

E. *Eisentrager* Does Not Preclude Habeas In Petitioners' Circumstances.

In concluding that habeas does not extend to foreign nationals held at Guantánamo, the panel majority relied

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[21] The Court has enforced structural limitations imposed by other constitutional provisions that do not provide individual rights. In *United States v. Lopez*, 514 U.S. 549 (1995), for example, the Court enforced the limitation on Congress' powers under the Commerce Clause. *See also United States v. Butler*, 297 U.S. 1 (1936) (states' rights challenge).

on the same reading of *Eisentrager* that the D.C. Circuit had applied in *Al Odah*, 321 F.3d 1134. *Rasul*, however, rejected that reading in concluding that construing § 2241 to extend to Guantánamo detainees was consistent with the writ as it existed in 1789. The Court did not suggest that *Eisentrager* presented any obstacle to petitioners' access to the common law writ. Moreover, as the Court noted in *Rasul*, *Eisentrager* is inapposite because of the differences between the Guantánamo detainees and the German prisoners in that case. In concluding that the German prisoners were not entitled to habeas, the Court in *Eisentrager* relied on six factors: the prisoners (1) were enemy aliens; (2) never resided in the United States; (3) were captured outside U.S. territory and held outside the U.S. as prisoners of war; (4) were tried and convicted by military commissions in China, with the permission of the Chinese government; (5) for offenses committed outside of the United States; and (6) were at all times imprisoned outside of the U.S. *See Eisentrager*, 339 U.S. at 777; *see also Rasul*, 542 U.S. at 475-76. In *Rasul*, this Court identified all six factors as "critical" to its conclusion that the prisoners had no "constitutional entitlement to habeas corpus." *Id.* at 476 (emphasis omitted). The Court found *Eisentrager* inapplicable because the Guantánamo detainees "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 and convicted of wrongdoing; and for more than two years [now more than five-and-one-half years] they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Id.

Eisentrager does not support the panel majority's conclusion that the common law writ is unavailable to detainees at Guantánamo. To the extent that the Court in *Eisentrager* relied on territorial considerations to distinguish that case from cases such as *In re Yamashita*, 327 U.S. 1 (1946), the Court placed greater weight on the "territorial jurisdiction" of the United States than on its sovereignty. *See Eisentrager*, 339 U.S. at 771 ("[I]t was the alien's presence within its territorial jurisdiction that gave the Judiciary the power to act"). As this Court found in *Rasul*, the Guantánamo detainees are not enemy aliens, and they are within the "territorial jurisdiction" of the United States. *See Rasul*, 542 U.S. at 480.

In his concurring opinion in *Rasul*, Justice Kennedy separately noted that the facts of these cases are "distinguishable from those in *Eisentrager* in two critical ways": (1) Guantánamo "is in every respect a United States territory, and it is one far removed from any hostilities"; and (2) the Guantánamo detainees "are being held indefinitely, and without benefit of any legal proceeding to determine their status." *Id.* at 487-88 (Kennedy, J., concurring in the judgment). Both of these critical distinctions remain true. Justice Kennedy pointed out that "where the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker." *Id.* at 488. When Justice Kennedy wrote those words, the detention had lasted for more than two years; detention of the Guantánamo detainees is approaching its sixth year, creating an even "weaker case of military necessity and much greater alignment with the traditional function of habeas corpus" than existed when the Court decided *Rasul*. *Id.*

F. The MCA Does Not Apply to Pending Habeas Cases.

This Court requires a "clear statement of congressional intent to repeal habeas jurisdiction." *St. Cyr*, 533 U.S. at 298 (citing *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102

(1869)). "Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal." *Id.* at 299. As in the case of the DTA, *see Hamdan*, 126 S. Ct. 2749, Congress has not articulated a "specific and unambiguous statutory directive" to repeal habeas jurisdiction as to cases pending on the date of enactment. The Court therefore need not reach the constitutional issues that such a repeal would present.

MCA § 7(a) is the jurisdiction-stripping provision that applies to Guantánamo detainees. MCA § 7(a) adds a new subsection (e) to 28 U.S.C. § 2241. New subsection (e) consists of two paragraphs (with italicization added):

> (1) No court, justice, or judge shall have jurisdiction to hear or consider *an application for a writ of habeas corpus filed by or on behalf of an alien* detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> (2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider *any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien* who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

MCA § 7(b) specifies the effective date for MCA § 7(a). It provides (with pertinent language in italics):

> The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and

> shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of *the detention, transfer, treatment, trial, or conditions of detention of an alien* detained by the United States since September 11, 2001.

MCA § 7(b) thus makes "[t]he amendment made by subsection (a)" applicable to pending cases described in terms substantially identical to those used to describe the "other action[s]" covered by new § 2241(e)(2), without mentioning the habeas actions covered by new § 2241(e)(1).

The D.C. Circuit offered three reasons for construing MCA § 7(b) to apply to pending habeas actions. First, it said, habeas actions are merely a subset of actions challenging "the detention, transfer, treatment, trial, or conditions of confinement of an alien" under MCA § 7(b). *See Boumediene*, 476 F.3d at 987. Second, it pointed out that MCA § 7(b) makes "[t]he amendment made by subsection (a)" applicable to pending cases, and the amendment made by MCA § 7(a) includes the paragraph covering habeas cases. *See id.* at 986. Third, it said that MCA § 7(b) must apply to pending habeas cases because the legislative history shows unmistakably that this is what Congress intended. *See id.*

This reasoning does not meet the requirement of a "specific and unambiguous statutory directive" to repeal habeas jurisdiction as to pending cases. First, MCA § 7(b) does not *mention* habeas actions. To conclude that MCA § 7(b) applies to pending habeas actions, one must infer from § 2241(e)(2) that habeas actions are a subset of the actions it covers. But that construction of § 2241(e)(2) renders § 2241(e)(1) superfluous, violating the cardinal rule that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (citation omitted). Construing MCA § 7(b) to apply to pending habeas cases thus de-

pends on an inference that violates a cardinal rule of statutory construction.

Second, the fact that MCA § 7(b) applies to the amendment made by MCA § 7(a) does not compel the conclusion that MCA § 7(b) applies to pending habeas actions. The amendment made by MCA § 7(a) adds a new subsection (e) to § 2241. Although the amendment takes effect on the date of enactment, that says nothing about its application to habeas cases already pending. Once again, the repeal of habeas jurisdiction as to pending cases is merely an inference.

Third, although the goal of statutory construction is to divine congressional intent, a repeal of habeas jurisdiction is such a grave step that "[i]mplications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction." *St. Cyr*, 533 U.S. at 299. Instead, a repeal of habeas requires a "specific and unambiguous *statutory* directive" by Congress. Congress provided no such statutory directive here as to pending habeas. The repeal of habeas jurisdiction in MCA § 7(a) therefore does not apply to pending habeas actions, and the judgment below may be reversed on that ground alone.

As Professor Henry Hart explained:

> Habeas corpus aside, I'd hesitate to say that Congress couldn't effect an unconstitutional withdrawal of jurisdiction – that is, a withdrawal to effectuate unconstitutional purposes – if it really wanted to. But the Court should use every possible resource of construction to avoid the conclusion that it did want to.[22]

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[22] Henry M. Hart Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1398-99 (1953) (cited in *St. Cyr*, 533 U.S. at 305).

II. THE MCA DOES NOT PROVIDE AN ADEQUATE SUBSTITUTE FOR HABEAS.

A. Congress May Not Eliminate Habeas Without Providing An Adequate Substitute.

Only twice has the Court recognized a procedure to be an adequate substitute for federal habeas. In one instance, the substitute was nothing less than full habeas review. In *Swain v. Pressley*, 430 U.S. 372 (1977), Congress eliminated federal court habeas review of criminal convictions in D.C. Superior Court. In place of federal court habeas review, Congress provided habeas review in D.C. Superior Court. This Court held the habeas substitute adequate because it afforded all of the protections afforded by federal court habeas review, lacking only the life tenure and salary protection of federal judges. *See id.* at 382. The Court also noted that the statute contained a savings clause allowing federal court habeas review if the review in D.C. Superior Court was found to be "inadequate or ineffective." *Id.* at 381.

The only other time this Court has arguably recognized as adequate an alternative to federal court habeas review was in *Hill v. United States*, 368 U.S. 424 (1962). In *Hill*, the Court upheld 28 U.S.C. § 2255, which places review of federal prison sentences in the district court that adjudged the sentence and withdraws habeas jurisdiction from other federal courts. The Court explained that § 2255 "was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined." *Id.* at 427 (footnote omitted). *See also United States v. Hayman*, 342 U.S. 205, 223 (1952) (footnote omitted) ("In a case where the Section 2255 procedure is shown to be 'inadequate or ineffective', the Section provides that the habeas corpus remedy shall remain open to afford the necessary hearing. Under such circumstances, we do not reach the constitutional question."); *Sanders v. United States*,

373 U.S. 1, 14 (1963) (stating that if a prisoner were provided with a remedy "less swift and imperative than federal habeas corpus, the gravest constitutional doubts would be engendered").

B. DTA Review Is Not An Adequate Substitute For Habeas.

DTA § 1005(e)(2) defines the scope of the D.C. Circuit's review of final decisions of CSRTs. The limited judicial inquiry specified by DTA § 1005(e)(2) bears no resemblance to the plenary inquiry that a federal habeas court would provide in cases of Executive detentions. Indeed, Congress enacted the DTA precisely to deny the writ to the Guantánamo detainees and replace the writ with a far more limited judicial remedy.[23] "Far from merely adjusting the mechanism for vindicating the habeas right, the DTA imposes a series of hurdles while saddling each Guantánamo detainee with an assortment of handicaps that make the obstacles insurmountable." *Boumediene*, 476 F.3d at 1005 (Rogers, J., dissenting). DTA review is not an adequate substitute for habeas.

1. Scope of review

Habeas review inquires into the lawfulness of an individual's detention; DTA review does not. Instead, DTA review is limited to final decisions of a CSRT that a detainee is properly held as an enemy combatant. The avail-

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[23] *See* 152 Cong. Rec. S10354, S10403 (daily ed. Sept. 28, 2006) (Sen. Cornyn) (stating that the purpose of the DTA was to replace habeas "litigation instigated by *Rasul* . . . with a narrow D.C. Circuit – only review of the . . . CSRT hearings"); 152 Cong. Rec. S10243, S10271 (daily ed. Sept. 27, 2006) (Sen. Kyl) ("The only thing the DTA asks the court to do is check that the record of the CSRT hearings reflect[s] that the military has used its own rules"). MCA § 7(a) further amended § 2241 to deny habeas to foreign nationals detained by the United States as enemy combatants anywhere in the world.

ability of even this limited review under the DTA is contingent, because the Executive is under no obligation either to convene a CSRT to determine the status of a detainee or to produce a "final" decision of a CSRT that it has convened.

As the Court explained in *St. Cyr*, "[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." 533 U.S. at 301. In such situations, the petitioner is entitled to a searching, plenary review of the factual and legal bases for detention. DTA review, by contrast, is limited to "the information available to the Tribunal." *Bismullah v. Gates*, Nos. 06-1197, 06-1397, __ F.3d __, 2007 WL 2067938, at *1 (D.C. Cir. July 20, 2007).[24] DTA review does not provide for judicial consideration of other evidence, however helpful to the detainee because it is exculpatory or impeaches the evidence on which the government relied. Petitioners in habeas corpus proceedings, by contrast, "are entitled to careful consideration and plenary processing of their claims including full opportunity for presentation of the relevant facts." *Harris v. Nelson*, 394 U.S. 286, 298 (1969).

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[24] As the D.C. Circuit stated:

> [T]he record on review consists of all the information a Tribunal is authorized to obtain and consider, pursuant to the procedures specified by the Secretary of Defense, hereinafter referred to as Government Information and defined by the Secretary of the Navy as "such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant," which includes any information presented to the Tribunal by the detainee or his Personal Representative.

Bismullah, 2007 WL 2067938, at *1.

2. Opportunity to rebut

Habeas gives the prisoner a meaningful opportunity to see and challenge the evidence against him and to submit exculpatory evidence; DTA review does not.

The DTA directs the D.C. Circuit to invalidate a CSRT decision on the ground that the decision was not supported by a "preponderance of the evidence." DTA § 1005(e)(2)(C). In reviewing the decision, however, the court must indulge "a rebuttable presumption in favor of the Government's evidence." *Id*. These statutory elements mirror CSRT regulations requiring a CSRT to "determine whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant,"[25] applying a rebuttable presumption that the government's evidence is "genuine and accurate," *id.* § G.11, Pet. App. 159.

In practice, a detainee had no opportunity to rebut the presumption in favor of the government's evidence or establish that the CSRT decision was not supported by a preponderance of the evidence. In every CSRT record the government has made public, the government relied on classified evidence to support its allegations.[26] In a majority of cases, the government relied exclusively on classified evidence. *See id.* at 2. Detainees, of course, are not allowed to review classified evidence. Moreover, although the regulations purport to grant the detainee the oppor-

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[25] Gordon England, *Implementation of Combatant Status Review Tribunal Procedures Detained at Guantánamo Bay Naval Base, Cuba*, ("England Mem.") Encl. 1 § B (Jul. 29, 2004), Pet. App. 150.

[26] Mark Denbeaux *et al.*, *No-Hearing Hearings: An Analysis of the Proceedings of the Government's Combatant Status Review Tribunals at Guantánamo* ("Denbeaux Report") 37-39, *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

tunity to examine the government's witnesses, England Mem. § H.8, Pet. App. 161, the government never presented a live witness. *See* Denbeaux Report, at 2. A detainee therefore had no meaningful opportunity to contest the factual basis for his enemy combatant designation. DTA review does not cure these defects.

The case of Abdullah Al Kandari, one of the *Al Odah* petitioners herein, illustrates the unfairness that results when detainees are denied access to the government's evidence. The government alleged that Al Kandari's "alias" was found in a list of names on a document saved on a hard drive allegedly "associated with a senior al Qaeda member." Jt. App. 68. Al Kandari denied that he used any aliases and asked his CSRT to tell him what alias the government claimed he had used. *See id.* The CSRT told Al Kandari that his alleged alias was not in the unclassified evidence. *See id.* Al Kandari was not allowed to know the alias, the identity of the "senior al Qaeda member," or the place where the hard drive was allegedly found. Nor did Al Kandari have an opportunity to determine whether his alleged "alias" actually appeared on the hard drive or whether the hard drive was fabricated. *See id.* Given nothing, Al Kandari could not rebut the government's allegation. As Al Kandari told his CSRT panel, "[t]he problem is the secret information, I can't defend myself." *Id.*

Detainees also were unable to present exculpatory evidence. The CSRT procedures nominally allow the opportunity to call witnesses, but that opportunity is subject to the discretion of the CSRT's presiding officer that the witness is "reasonably available." England Mem. § G.9, Pet. App. 158. The CSRTs denied every request for a witness who was not a Guantánamo detainee and denied three quarters of the requests for witnesses who were in Guantánamo. *See* Denbeaux Report at 2-3.

Col. Abraham described the type of record that results from this one-sided process:

> What were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence. Statements allegedly made by percipient witnesses lacked detail. Reports presented generalized statements in indirect and passive forms without stating the source of the information or providing a basis for establishing the reliability or the credibility of the source.

Abraham Decl. ¶ 22, Jt. App. 108. DTA review provides no mechanism for correcting these deficiencies in the CSRT process.

3. Access to counsel

Habeas affords petitioners the right to counsel; the CSRT process does not. DTA review cannot cure this defect.

In a habeas hearing, a petitioner would have a right to the assistance of counsel. *See Hamdi*, 542 U.S. at 539 ("[The petitioner] unquestionably has the right to access to counsel in connection with the [habeas corpus] proceedings on remand"). Counsel have the training to assess the government's evidence, investigate the government's allegations, and assist detainees to present a meaningful defense. *Al Odah v. United States*, 346 F. Supp. 2d 1, 7-8 (D.D.C. 2004). The assistance of counsel is especially critical where, as here, the prisoner does not speak the language of the jailer, does not understand the legal system to which he is subject, and cannot investigate the government's allegations because he is held in a prison. *See Al Joudi v. Bush*, 406 F. Supp. 2d 13, 22 (D.D.C. 2005). Without the assistance of counsel, detainees could not create a record for review. *Cf. Adem v. Bush*, 425 F. Supp. 2d 7, 24-25 (D.D.C. 2006) (finding "serious questions" as to whether detainees understood DoD's notice that they could file habeas actions challenging CSRT determination). When counsel belatedly becomes available to detainees at the stage of DTA review, the damage has been done. Counsel cannot supplement the record, and the

scope of their representation is limited to "the pursuit of judicial review to 'determine the validity of any final decision of a [CSRT].'" *Bismullah,* 2007 WL 2067938, at *10 (quoting regulations). *See generally United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2563 (2006) ("representation by counsel 'is critical to the ability of the adversarial system to produce just results'"); *Powell v. Alabama*, 287 U.S. 45, 58-65 (1932).

4. Neutral decision maker

Habeas provides for a searching inquiry by a neutral, independent judge; DTA review does not.

At common law, habeas requires the detainee's custodian to provide a neutral, independent judge with a legal and factual basis for the detention. *See* 1 William Blackstone, *Commentaries on the Laws of England* 132-33 (1765). Thus, an essential element of habeas corpus is the right to a hearing in the first instance before a judge on the factual and legal bases for an individual's detention. *See Swain*, 430 U.S. at 380-81. Under the DTA, by contrast, the detainees are afforded a hearing in the first instance by a CSRT, which is not composed of neutral, independent decision makers. Indeed, CSRT regulations instruct panel members *not* to be neutral but to presume that the government's evidence is "genuine and accurate," England Mem. § G.11, Pet. App. 159, and to bear in mind that detainees have already been determined to be enemy combatants through "multiple levels of review by officers of the Department of Defense," *id.* § B, Pet. App. 150. (According to the government's brief in *Rasul*, both the commander of Southern Command and the Secretary of Defense had personally approved the classification of each of the detainees as enemy combatants. *See* Br. for the Resp'ts, *Rasul v. Bush*, S. Ct. Nos. 03-334 and 03-343, at 6.)

Moreover, CSRT members are not independent. Unlike military judges and panel members in courts-martial under the Uniform Code of Military Justice, CSRT members

have no protection against command influence. *See*, *e.g.*, 10 U.S.C. § 837 (prohibiting command influence on court-martial judges and panel members); 10 U.S.C. § 949b (prohibiting command influence on military commission judges and panel members). On the rare occasion when a CSRT found a detainee not to be an enemy combatant, its decision was subject to review by higher Department of Defense officials, who are known to have pressed the panel to reconsider its decision and, if the panel stuck to its guns, to reassign the case to a panel that would reach the desired result. *See* Abraham Decl. ¶ 23 and *supra* note 5.[27]

These biased and malleable tribunals are no substitute for the neutral, independent judges who determine, in the first instance, whether a habeas petitioner is unlawfully detained. Nor can DTA review make up for the deficiencies of these tribunals. The DTA contemplates that the D.C. Circuit will perform only an appellate function, reviewing CSRT final decisions, and not redeciding them.

5. Evidence procured by torture or coercion

A habeas court would not accept evidence procured through torture or coercion, *Brown v. Mississippi*, 297 U.S. 278, 287 (1936); the DTA permits such evidence. Putting aside their illegality and reprehensibility, torture and coercion do not work. Statements procured by such

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[27] Detainees subject to such do-overs include Abdul Hamid Al-Ghizzawi (on whose panel Col. Abraham sat) and Anwar Hassan ("Ali"). Both have filed original habeas petitions in this Court. *In re Al-Ghizzawi*, No. 07-M5 (U.S. filed July 31, 2007); *In re Ali*, No. 06-1194 (U.S. filed Mar. 6, 2007). There have even been instances of detainees subjected to multiple do-overs such as Abdullah Mohammad Kahn, who filed a habeas petition in the district court. *Kahn v. Bush*, No. 05-1001 (D.D.C. filed May 18, 2005).

means are inherently and notoriously unreliable because of the "tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain." *Stein v. New York*, 346 U.S. 156, 182 (1953). For good reason, the Court has held that Due Process bars the government from depriving a person of liberty based on statements obtained through torture. *See Rogers v. Richmond*, 365 U.S. 534, 540-45 (1961); *Rochin v. California*, 342 U.S. 165, 172-74 (1952); *Brown*, 297 U.S. at 287. Yet the DTA *expressly* permits the use of evidence obtained through torture or coercion, if the CSRT panel determines it to have probative value. *See* DTA § 1005(b)(1). The DTA does not require the D.C. Circuit to invalidate a final CSRT decision on the ground that the tribunal based its decision in whole or part on evidence obtained by torture, or provide the detainee with any mechanism to show that the government's evidence was obtained by torture.

6. Legal basis for detention

A habeas hearing tests not only the evidence supporting the prisoner's detention, but also the basis of the government's legal claim for detaining the prisoner. In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), for example, the petitioner was allowed to challenge his designation as a prisoner of war as a matter of law, with reference to the law of war. 71 U.S. (4 Wall.) at 131.

By contrast, the DTA does not allow a prisoner to challenge the definition of "enemy combatant" under the CSRT regulations, which use a definition of "enemy combatant" that is more broad than any that has ever been recognized by international law or this Court. Under the CSRT regulations, even an innocent person who has never been an enemy combatant within the meaning of international or U.S. law can be detained, and the D.C. Circuit can do nothing about it under the DTA, because the CSRT regulations allow it. *See infra* p. 43.

7. Remedy

At common law, habeas contemplates but one remedy should the court determine that the detention is unlawful: release. *See Bollman*, 8 U.S. (4 Cranch) at 136 (when detention is determined to be unjustified, a habeas court "can only direct them to be discharged"). Any process that does not contemplate release is not an adequate substitute for habeas.

According to the government, the only remedy the DTA allows the D.C. Circuit to order is a "remand to the agency" – *i.e.*, a new CSRT. Corrected Br. for Resp't Addressing Pending Prelim. Mots. 62-64, *Bismullah* v. *Gates*, No. 06-1197 (D.C. Cir. filed Apr. 10, 2007). Indeed, the CSRT procedures themselves, to which the DTA review is bound, do not mandate release even to a person who is found not to be an enemy combatant. Wolfowitz Order § i, Pet. App. 145. That result not only denies detainees the habeas remedy but effectively immunizes CSRT decisions from review by this Court by creating a closed loop of CSRT decision, DTA review, and CSRT remand. The detainees are consigned to imprisonment unless and until the Executive, in its sole discretion, decides to release them. A scheme that permits judicial involvement but dooms judicial action to futility is patently an inadequate substitute for habeas.

III. PETITIONERS SHOULD FINALLY BE GIVEN A SEARCHING JUDICIAL REVIEW OF THE FACTUAL AND LEGAL BASES FOR THEIR DETENTIONS.

A. The Guantánamo Detainees Are Entitled to Challenge the Factual Basis for Their Detention.

Because it dismissed the Guantánamo detainees' habeas corpus cases under MCA § 7 for lack of jurisdiction, the Court of Appeals never reached the question on which it had granted interlocutory review – whether the District

Court had correctly denied the government's motion to dismiss on the ground that the Guantánamo detainees have no rights under the Constitution. The government argued before the Court of Appeals that even a court with habeas corpus jurisdiction is powerless to review the detention of aliens held at Guantánamo on the ground that the Guantánamo detainees have no rights under the Due Process Clause of the Fifth Amendment, and that there is no right to habeas corpus except to enforce constitutional rights. The government's argument misconstrues the nature of habeas corpus and would render this Court's decision in *Rasul* meaningless.

This Court has already answered the question whether habeas corpus entitles the Guantánamo detainees to judicial review. Even if they had no Fifth Amendment rights, the habeas corpus power of the federal courts does not depend upon the Fifth Amendment right to due process. *See supra* p. 22. So, in *Bollman*, for example, Chief Justice Marshall "fully examined and attentively considered" the evidence on which the prisoners were committed. 8 U.S. (4 Cranch) at 125. Finding the government's basis for detention insufficient, the Court ordered the prisoners discharged without ever mentioning a constitutional right. *Id.* It is the lack of legal and factual justification for the detention, rather than the violation of any rights granted by positive law, that constitutes the heart of habeas corpus review. As this Court held in *Rasul*, the Guantánamo detainees have the same "right to judicial review of the legality of executive detention." *Rasul*, 542 U.S. at 475.

Accordingly, each detainee is entitled, on remand, to a hearing in which the District Court will consider the evidence presented by both the government and the petitioner, exclude any evidence that the court finds was obtained through torture or coercion, and decide whether the government has demonstrated both a legal and factual justification for detention. In cases where the court determines that continued imprisonment of a petitioner is

not lawful, the court should order the petitioner's immediate release. Finally, in view of the extreme delays that petitioners have already suffered in these cases, the District Court should be directed to expedite the habeas hearings. *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (habeas review "must be speedy if it is to be effective"); *see also Preiser v. Rodriguez*, 411 U.S. 475, 495 (1973); *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968).

B. The Guantánamo Detainees Are Entitled to Challenge Their Designations as Enemy Combatants.

On remand, the Guantánamo detainees also should be given the opportunity, in a habeas corpus hearing, to challenge the government's designation of them as "enemy combatants" under international law. An enemy combatant during wartime may be detained under United States law because detention of enemy soldiers is "a fundamental incident of waging war" and, as such, is authorized by the law of war and the AUMF. *See Hamdi*, 542 U.S. at 519; *see also Ex parte Quirin*, 317 U.S. 1, 37-38 (1942). The President lacks power to detain as an "enemy combatant" an individual who is not an "enemy combatant" under either head of authority. *Cf. Hamdan*, 126 S. Ct. at 2775 (President had no power to try an "enemy combatant" by military commission when neither law of war nor AUMF authorized commission).

In *Hamdi*, the Court made clear that it "only [found] legislative authority to detain under the AUMF once it [was] sufficiently clear that the individual is, in fact, an enemy combatant." 542 U.S. at 523. The AUMF incorporates the law of war, which the courts apply in cases brought by alleged enemy combatants. *See Hamdi*, 542 U.S. at 519; *Quirin*, 317 U.S. at 37-38; *Ex parte Milligan*, 71 U.S. 2, 131 (1866); *Hamdan*, 126 S. Ct. at 2775. *See also The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appro-

priate jurisdiction."). Therefore, the courts must look to the law of war in order to define "enemy combatant."

The Court defined the scope of the authority to detain enemy combatants during war in *Milligan*. Milligan was a resident of Illinois who had been detained during the Civil War. The government alleged that he had been a part of "a secret political organization, armed to oppose the laws," and that he sought "by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war, and thus overthrow the power of the United States." *Milligan*, 71 U.S. at 130. Congress had suspended the writ of habeas corpus as to "prisoners of war, spies, or aiders and abettors of the enemy," as well as to those who were "otherwise amenable to military law, or the rules and articles of war . . . ." *See id.* at 6. The Court held that it had jurisdiction to hear Milligan's case and ruled that he was illegally detained. "If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?" *Id.* at 131.

Quirin further defined the contours of the government's authority to detain enemy combatants. In *Quirin*, eight members of the German armed forces, including one American citizen, snuck into the United States during World War II and disguised themselves as civilians with the intent to destroy war facilities in the United States. *See Quirin*, 317 U.S. at 20-22. They were captured and held as prisoners of war, and were tried and convicted by military commission. *See id.* at 22. This Court upheld their detention and conviction, holding that the government had the authority to detain and try enemy combatants under the law of war. *See id.* at 48.

Both *Quirin* and *Milligan* involved individuals who were captured, detained, and tried by military commission in places where the civil courts of the United States were functioning. Both involved allegations by the government that the petitioners were detained as enemy

combatants because they had engaged in hostile acts against the United States. The only principled way to distinguish the cases is explained in *Quirin*:

> [T]he Court [in *Milligan*] was at pains to point out that Milligan … was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. . . . [T]he Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war . . . .

Id. at 45; *see also Hamdi*, 542 U.S. at 519 (an "enemy combatant" is one who is "part of or supporting forces hostile to the United States or coalition partners and engaged in an armed conflict against the United States").

Further, as the *Hamdi* plurality explained, detention of enemy combatants is limited to "the duration of the particular conflict in which they were captured," "detention may last no longer than active hostilities," and "indefinite detention for the purpose of interrogation is not authorized." *Hamdi*, 542 U.S. at 518-21.

The CSRT process does not use the definition of enemy combatant recognized by the law of war and by this Court. Under the CSRT process "enemy combatant" is defined as:

> 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. *This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.*

England Mem. § B, Pet. App. 150 (emphasis added). The CSRT definition includes, but is not limited to, those who are alleged to have committed a belligerent act *or* directly supported hostilities in aid of enemy armed forces. *See id.* The definition even appears to include those who

merely support "associated forces" with no requirement that such support be "direct," or that such forces be hostile to the United States. The CSRT definition discards important assumptions of the law of war, such as the understanding that there will be an organized enemy force that can be defeated or with whom peace can be made. That definition is broad enough to bring nonbelligerent civilians within its reach.

The legality of the petitioners' detention should be tested against the standard of an "enemy combatant" as recognized by the laws of war, not as unilaterally defined by the U.S. Department of Defense. This is particularly important because the nature of the current "war on terror" requires special considerations not applicable in the same way to more conventional wars in this nation's history. As this Court noted in *Hamdi*, "the national security underpinnings of the 'war on terror,' although crucially important, are broad and malleable." 542 U.S. at 520. The process offered to prisoners of war in the past may not be sufficient in a "war" waged largely against alleged criminal terrorist organizations rather than national governments. "If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding [that enemy combatants may be detained for the duration of the relevant conflict] may unravel." *Id.* at 521.

The Guantánamo detainees have been held for almost six years, longer than the United States' involvement in any war in our history other than Vietnam. There is no end in sight of a "war on terror", nor is it clear how it would be ascertained when such a war has come to an end. *See id.* at 520. The petitioners are therefore facing the very real prospect of detention for the remainder of their lives, and not just until the end of hostilities. Such indefinite and effectively permanent detention without meaningful process is not contemplated by the law of war, and is not consistent with the rule of law.

CONCLUSION

As Thomas Paine wrote, "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."[28] The judgment of the D.C. Circuit should be reversed and the case remanded to the District Court for expedited habeas corpus proceedings.

[28] *In re Yamashita*, 327 U.S. 1, 81 (1946) (Rutledge, J., dissenting) (quoting 2 The Complete Writings of Thomas Paine 588 (Philip Foner ed. 1945)).

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APPENDIX OF CONSTITUTIONAL, STATUTORY, AND INTERNATIONAL LAW PROVISIONS

U.S. CONST., ART. 1, § 9, CL. 2

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.

U.S. CONST., AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 2241

Power to grant writ

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

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

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

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

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

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

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

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

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e) (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to

have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

MILITARY COMMISSIONS ACT OF 2006, § 7,
PUB. L. NO. 109-366, 120 STAT. 2600, 2741-44 (2006)

(a) In General.--Section 2241 of title 28, United States Code, is amended by striking both the subsection (e) added by section 1005(e)(1) of Public Law 109-148 (119 Stat. 2742) and the subsection (e) added by added by section 1405(e)(1) of Public Law 109-163 (119 Stat. 3477) and inserting the following new subsection (e):

> "(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> "(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the

United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.".

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

DETAINEE TREATMENT ACT OF 2005, § 1005(E), PUB. L. NO. 109-148, 119 STAT. 2680, 2741-43 (2005)

(b) Consideration of Statements Derived With Coercion.--

(1) Assessment.-- The procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess--

(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and

(B) the probative value (if any) of any such statement.

(2) Applicability.-- Paragraph (1) applies with respect to any proceeding beginning on or after the date of the enactment of this Act.

***

(e) Judicial Review of Detention of Enemy Combatants.--

(1) In general.-- Section 2241 of title 28, United States Code, is amended by adding at the end the following:

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

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

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

"(A) is currently in military custody; or

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

(2) Review of decisions of combatant status review tribunals of propriety of detention.--

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

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

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

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

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

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

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

(D) Termination on release from custody.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release of such alien from the custody of the Department of Defense.

(3) Review of final decisions of military commissions.--

(A) In general.--Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).

(B) Grant of review.--Review under this paragraph--

(i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of 10 years or more, shall be as of right; or

(ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.

(C) Limitation on appeals.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to an appeal brought by or on behalf of an alien--

(i) who was, at the time of the proceedings pursuant to the military order referred to in subparagraph (A), detained by the Department of Defense at Guantánamo Bay, Cuba; and

(ii) for whom a final decision has been rendered pursuant to such military order.

(D) Scope of review.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an appeal of a final decision with respect to an alien under this paragraph shall be limited to the consideration of--

(i) whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and

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

(4) Respondent.-- The Secretary of Defense shall be the named respondent in any appeal to the United States Court of Appeals for the District of Columbia Circuit under this subsection.

AUTHORIZATION FOR USE OF MILITARY FORCE, PUB. L. NO. 107-40, 115 STAT. 224 (2001)

Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-

defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force".

SECTION 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) In General.--That the President is authorized 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.

(b) War Powers Resolution Requirements.--

(1) Specific statutory authorization.-- Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution. (2) Applicability of other requirements.-- Nothing in this resolution supercedes any requirement of the War Powers Resolution.

LEASE OF LANDS FOR COALING AND NAVAL STATIONS
U.S.-CUBA, T.S. NO. 418 (FEB. 23, 1903)

ARTICLE III

While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire (under conditions to be hereafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.