No. 06-1195

IN THE
Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,
Petitioners,

v.

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

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

REPLY BRIEF FOR THE *BOUMEDIENE* PETITIONERS

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After six years of imprisonment without meaningful review, it is time for a court to decide the legality of Petitioners' detention. Petitioners have a constitutionally guaranteed right to seek habeas corpus, and the DTA's circumscribed review of flawed CSRT determinations is not an adequate substitute. Petitioners' detention, unauthorized by Congress and unsupported by even minimal due process, is unlawful.

Once again, the government asks this Court to defer review of the important issues in this case, just as the government has consistently sought delay in the lower courts—a strategy that has yielded stays of proceedings, lengthy appeals, and multiple rounds of briefing. This Court should reject the request for further delay and decide the questions it has already accepted for review.

ARGUMENT

I. THE MCA IS UNCONSTITUTIONAL

A. The Suspension Clause Protects Petitioners

In *Rasul* v. *Bush*, 542 U.S. 466 (2004), this Court ruled that noncitizens detained by the United States military at Guantanamo Bay have access to the writ of habeas corpus, a conclusion informed by the Court's analysis of the common law writ. The government offers no persuasive rebuttal to the Court's reading of history. The government's reliance on cases declining to grant habeas relief on the merits to "prisoners of war" is misplaced, as it assumes away the principal issue in this case: Petitioners maintain that they are *not* enemy soldiers subject to military detention. Unlike prisoners of war in traditional armed conflicts—where it is usually clear or undisputed that the prisoners are in fact detainable enemy soldiers—Petitioners are civilians from a friendly nation who were abducted by the government far from any theater of war and have never engaged in armed hostilities against the United States. And Petitioners are being imprisoned indefinitely despite rulings from the courts of their home country that there is no factual basis for their detention.

1. The government offers no reason to reconsider *Rasul*'s historical analysis

The government (at 33) brushes aside what it calls "the Court's brief historical discussion" in *Rasul*, but the Court's review of the common law was anything but "brief." The issue was extensively discussed by the *Rasul* parties and amici; the opinions spent several pages analyzing the history (including *all* the common law cases the government relies on here); and the Court expressly rejected the government's narrow view of the geographic reach of the writ. *See* 542 U.S. at 481-482 & nn.11-14. The Court held that the right of "persons detained at the [Guantanamo] base" to challenge their detention was "consistent with the historical reach of the writ of habeas corpus," which was based on practical considerations of authority and control, not formal notions of "sovereignty." *Id.* at 481-482.[1]

The government provides no new historical evidence justifying reconsideration of the Court's conclusion. It cites only two cases, both of which *Rasul* addressed and which actually undermine the government's position. Revealingly, the government (at 31-32) cites only the *minority* view in *R.* v. *Earl of Crewe*, 2 K.B. 576 (C.A. 1910), failing to mention that two of the three judges concluded that the writ *did* extend beyond sovereign territory, including to places like the Bechuanaland Protectorate, provided there were no local courts able to grant similar relief. *See* 2 K.B. at 604 (Vaughan Williams, L.J.) (referring to "His Majesty's dominion" in terms of "power and jurisdiction" for habeas purposes); *id.* at 605 (writ can be issued to "any country or place under the subjection of

[1] "Sovereignty" at common law did not provide the "bright line" that the government urges for delimiting the reach of the Suspension Clause. The Framers understood that sovereignty was a complex and multifaceted concept, and colonial empires encompassed territories that were treated by the metropolitan powers in various and variable ways. *See* Halliday & White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications* 51 (2007), *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=1118&context=uvalwps (forthcoming 94 Va. L. Rev. __) (noting the "legal complexity of the English king's dominions" and the "many kinds of sovereignties").

the Crown of England" and is not limited to "the King's *territorial* dominions"); *id.* at 618 (Farwell, J.) (writ available wherever someone is "kept imprisoned without trial in a place maintained by England"); *see also Rasul*, 542 U.S. at 483 n.14 (discussing *Crewe* under the name *Ex parte Sekgome*).[2] The other case cited by the government likewise relied only on the minority opinion in *Crewe* and has been criticized on that basis. *See Rasul*, 542 U.S. at 483 n.14 (distinguishing, and noting later British authority disapproving of, *In re Ning Yi-Ching*, 56 T.L.R. 3 (Vacation Ct. 1939)).[3]

The government (at 27-30) cites various statements that the writ extended to territories that were "under the Crown's sovereignty," but that does not mean that common law habeas was unavailable outside "sovereign" territory. Robert Chambers, whom the government (at 28) cites, granted the common law writ on behalf of Indian petitioners while sitting as a judge in India *before* the Crown asserted formal sovereignty there. *See* Pet. Br. 12-13. The government (at 31) responds that British judges in India issued habeas pursuant to a "statutory" grant of power, but the relevant "statute"—the royal charter creating the Supreme Court of Calcutta—simply granted the judges the same common law authority as judges of the King's Bench in England. The British judges thus repeatedly grounded their authority to issue habeas in

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[2] Even counsel for the Crown acknowledged that "if there were no Court in the particular place competent to issue the writ the old jurisdiction of the King's Bench to do so possibly still exists." *Crewe*, 2 K.B. at 588. Guantanamo unquestionably has no local court "competent to issue the writ"; indeed, the government deliberately chose Guantanamo because it believed no court could review the legality of detention of prisoners held there. *See* Yoo, *War by Other Means: An Insider's Account of the War on Terror* 142-143 (2006).

[3] To the extent the government contends that the writ was available only to British subjects, that suggestion is disclaimed by the very opinion upon which the government relies. *See Crewe*, 2 K.B. at 620 (Kennedy, L.J.) ("The remedy obtainable by the writ of habeas corpus is not confined to British subjects."); *see also Rasul*, 542 U.S. at 481 & n.11. Moreover, the common law conception of subjecthood swept much more broadly than modern notions of citizenship. *See* Legal Historians' Amicus Br. 5 n.4.

the common law, which extended the writ to aliens whenever the court had jurisdiction over the jailer, including in territory that was not under formal British sovereignty. *See* Legal Historians' Amicus Br. 13 & n.18. There is no suggestion in the charter or elsewhere that the judges' geographic location in Bengal as opposed to Westminster made any difference to their authority to issue the writ.

Finally, the government (at 15) argues that because the Constitution permits suspension of the writ only in times of "Rebellion or Invasion"—conditions the government asserts occur only within the United States—the writ was not available to prisoners detained elsewhere. But nothing in the Clause places any geographical limitation on the reach of the writ itself; the Clause merely specifies conditions under which the writ may be suspended. The constitutional text thus gives no indication that habeas does not run to territories subject to the exclusive jurisdiction and control of the United States.[4]

Moreover, there is no reason to believe that a "Rebellion or Invasion" cannot take place in territory that is under complete United States control but not formally under its sovereignty. For example, a Cuban military incursion into Guantanamo Bay, where the United States exercises "exclusive jurisdiction and control" (*Rasul*, 542 U.S. at 476), would surely constitute an "Invasion" of that longstanding American settlement.[5] And under the government's reading, the Executive

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[4] The British acts suspending habeas between 1777 and 1783, of which the Framers were undoubtedly aware, were expressly aimed at persons (including impressed American sailors) captured "on the High Seas" or "out of the Realm." 17 Geo. 3, c. 9 (discussed in Halliday & White 61-62). These suspensions would have been unnecessary if such persons could not have invoked the pre-1789 writ at all.

[5] History also refutes the government's premise that a valid suspension can be based only on domestic conflict. Parliament's 1777 suspension of the writ was premised on the "Rebellion and War" in the American colonies, not in England itself. 17 Geo. 3, c. 9. Congress's express authorization of the suspension of habeas corpus in the Philippines (Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 691, 692), which was invoked in 1905 during the insurrection there (*see Fisher* v. *Baker*, 203 U.S. 174, 179-180 (1906)), further confirms that "Rebellion or Invasion" may occur outside the 50 States.

could arbitrarily and permanently detain even a United States *citizen* outside the United States without any access to habeas. The Framers—who were well aware of the need for habeas review of offshore Executive detention—could not have intended such a result. Pet. Br. 14-15 nn.13-14.[6]

2. The government's allegation that Petitioners are "enemy combatants" does not affect their right to dispute that allegation on habeas

Unable to identify a single pre-1789 decision refusing habeas jurisdiction over a petitioner outside sovereign territory, and faced with several that granted relief, the government (at 37-40) argues that alien "prisoners of war" are ineligible for habeas, regardless of the location of imprisonment. Leaving aside the government's opportunistic desire to label Petitioners "prisoners of war" without according them the benefits of such status during six years of confinement, its legal assertion is both incorrect and inapplicable. It is incorrect because courts have considered the merits of (and indeed granted) habeas petitions of persons who did not contest that they were alien soldiers and spies. It is inapplicable because Petitioners *dispute* the government's assertion that they are "enemy combatants," and thus their cases are far removed

[6] Congress's enactment of early statutes providing for habeas corpus in the territories does not support the government's view of the Suspension Clause. Just because Congress provides a statutory basis for courts to issue the writ does not mean that the writ is not constitutionally protected. *See INS* v. *St. Cyr*, 533 U.S. 289, 304 n.24 (2001) (noting that Section 14 of the Judiciary Act of 1789 authorized federal courts to issue the writ protected by the Suspension Clause (citing *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807))). And Congress's guarantee of the writ in the Northwest Territory Ordinance of 1787 (cited at Gov't Br. 18 n.5) occurred *before* the Constitution was ratified; if anything, this suggests that the Framers understood that the writ would issue outside the United States proper.

Nor does the fact that Congress did not specifically provide for habeas in a 1798 statute authorizing detention of persons seized from foreign ships (Gov't Br. 16) suggest that habeas was unavailable to those individuals. Congress had already provided the federal courts with general authority to issue the writ of habeas corpus in the Judiciary Act of 1789; it did not need to reproduce a separate habeas provision in every subsequent statute authorizing detention to guarantee habeas protection for those detained under them.

from those of admitted or adjudicated "prisoners of war" cited by the government.

The government's contention (at 37) that courts lack jurisdiction to grant habeas to "enemy spies and unlawful combatants" is refuted by cases where courts have done just that. In 1697 the King's Bench ordered the discharge of a foreign spy, rejecting the respondent's argument that alien enemy combatants were "not intitled to have a habeas corpus." *Du Castro's Case*, 92 Eng. Rep. 816 (K.B. 1697). In *United States* v. *Villato*, 2 U.S. (2 Dall.) 370 (C.C. Pa. 1797), the court granted habeas to a Spanish-born prisoner who had captured an American vessel while serving aboard a French privateer. Villato was released precisely because he was an alien and thus could not be charged with treason for his belligerent conduct. *See id.* at 377-379.

Several other cases confirm the availability of habeas to alien military prisoners, even where they did not dispute their status as prisoners of war. *See Ex parte Quirin*, 317 U.S. 1, 25 (1942) (rejecting argument that petitioners' status as enemy German saboteurs "foreclose[d] consideration by the courts of petitioners' contentions that the Constitution and laws of the United States" required habeas relief); *Yamashita* v. *Styer*, 327 U.S. 1, 5-6 (1946) (reviewing habeas claims of convicted Japanese general captured and imprisoned in the Philippines); *see also Colepaugh* v. *Looney*, 235 F.2d 429, 431 (10th Cir. 1956) (rejecting argument that a U.S. citizen who acted as a spy for Germany could be denied access to the courts because "to do so would deny the supremacy of the Constitution and the rule of law under it"); *In re Territo*, 156 F.2d 142, 142-143 (9th Cir. 1946) (reviewing, over government's jurisdictional objection, habeas claims of U.S. citizen captured as part of Italian army on the battlefield during World War II and detained as a prisoner of war).[7]

[7] Although Territo was a U.S. citizen, the court expressly treated him as an "alien enemy" belligerent based on his long-term domicile in a hostile nation. 156 F.2d at 145. Notably, the government made the same objection in *Territo* as it makes here: "a military prisoner of war cannot seek a writ of habeas corpus and … as such he is not entitled to access to our civil courts for the purpose of obtaining the writ." Reply Br. 12, *In re Territo*, No. 11214

Unsurprisingly, *admitted* prisoners of war rarely brought habeas petitions and, when they did, rarely succeeded on the merits. This historical fact reflects the reality that such persons (most of whom were captured while in uniform on a battlefield) usually had no basis or incentive to contest prisoner-of-war status; indeed, they frequently desired it. But when a prisoner has *denied* that he is a detainable prisoner of war, habeas courts have consistently exercised jurisdiction to determine that issue. As a treatise cited by the government (at 39) states: "If, however, it appears that the applicant may have been improperly detained as a prisoner of war, ... the court will investigate the propriety of the detention." Sharpe, *The Law of Habeas Corpus* 116 (2d ed. 1989).[8] That is exactly what Petitioners seek: a determination by a fair and neutral judge that they do not fall within the category of persons whose detention Congress authorized when it gave the President the power to use "necessary and appropriate force" against those responsible for the September 11 attacks. *See* Pet. Br. 33-36. The government's expansive definition of "enemy combatant"—which encompasses citizens of a friendly nation, seized far from any battlefield and not engaged in belligerent acts—is significantly more likely to ensnare innocent civilians than the traditional "prisoner of war" category. And the government's refusal to provide Petitioners with the protections ordinarily accorded to prisoners of war makes the consequences of an erroneous designation—indefinite detention without charge—all the more grave.

Contrary to the government's suggestion (at 38-39), *R.* v. *Schiever*, 97 Eng. Rep. 551 (K.B. 1759), and *Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779), do not suggest that habeas is closed to alleged enemy combatants. The petitioners in those cases presented, and the courts examined, evidence challenging their status as prisoners of war, includ-

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(9th Cir. Feb. 1946) (quoting Resp. Br. 31). The court nevertheless heard evidence bearing on Territo's habeas claim and denied relief on the merits. *See* 156 F.2d at 145-148.

[8] On this point, Sharpe (at 115-116) refutes the contrary proposition advanced by Lord McNair, on whom the government relies (at 38).

ing affidavits filed in their support. *See Schiever*, 97 Eng. Rep. at 551; *Three Spanish Sailors*, 96 Eng. Rep. at 775; *see also* Gov't Br. 39 (admitting that, in *Schiever*, the court considered "the fact that the petitioner had been found aboard an enemy ship"). The courts denied habeas relief not because of lack of jurisdiction, but because, "upon their own shewing," the facts demonstrated that the petitioners qualified as lawfully detainable prisoners of war. *Schiever*, 97 Eng. Rep. at 552; *Three Spanish Sailors*, 96 Eng. Rep. at 776.

Finally, the government's recycled argument based on *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), ignores the principal opinions in *Rasul*. *See* Pet. Br. 16-18. The government's insistence (at 18, 22, 23, 24) that Petitioners seek to "overrul[e]" *Eisentrager* is simply wrong; the Court need only reaffirm *Rasul*'s recognition that Guantanamo prisoners are situated differently from the *Eisentrager* petitioners. Even less convincing is the government's attempt (at 24-25) to compare Landsberg prison, a temporary outpost in post-World War II Germany under joint Allied command, to the exclusive and effectively permanent jurisdiction and control the United States exercises at Guantanamo. *See Rasul*, 542 U.S. at 476; *id.* at 487 (Kennedy, J., concurring in the judgment). Nor does CSRT review make Petitioners similarly situated to the *Eisentrager* petitioners. In *Eisentrager*, the prisoners were admitted enemy aliens convicted of war crimes after a full military commission trial authorized by treaty. *See* 339 U.S. at 784, 786. In contrast, the CSRT is a unilateral creation of the Executive that fails to accord even minimal due process protections. *See* Pet. Br. 26-32; *infra* pp. 13-20.[9]

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[9] The Court has already rejected the government's unelaborated assertion (at 43) that Congress "recognize[d] and affirm[ed] the CSRT process." The DTA (both before and after amendment by the MCA) "pointedly reserves judgment" on whether the CSRT review mechanism "actually violate[s] the 'Constitution and laws'" of the United States. *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2775 (2006) (quoting DTA § 1005(e)). Although Congress has "'recognize[d]' the existence of the Guantanamo Bay [CSRTs] in the weakest sense" (*id.* (quoting Resp. Br. 15)), a statute that expressly

B. DTA Review Does Not Satisfy Constitutional Requirements

1. Abstention is inappropriate

The government's request (at 41) that this Court abstain from resolving the Suspension Clause issue in this case until Petitioners "exhaust their available DTA remedies" is a request for unlimited delay. The government has moved to stay Petitioners' DTA cases, as it has most pending DTA actions, in an effort to secure an indefinite freeze of all but five of the 150 DTA cases now before the court of appeals. Pet. Br. 31.[10] And the court of appeals has proposed that the government convene entirely new CSRTs, which presumably would lead to further delay or even dismissal of Petitioners' DTA cases. *See Bismullah* v. *Gates*, 2007 WL 2851702, at *3 (D.C. Cir. Oct. 3, 2007) ("*Bismullah II*") (denying panel rehearing). The government is actively considering this route (*see* Mot. to Govern Further Proceedings 1-2, *Al Ginco* v. *Gates*, No. 07-1090 (D.C. Cir. Oct. 31, 2007)) and, meanwhile, has declined to provide the court of appeals with the "record on review" in even a *single* case.[11] Petitioners cannot be required to exhaust a remedy that the government itself is preventing from proceeding. There is no reason to delay resolution of the crucial questions on which this Court granted certiorari. *See Price* v. *Johnston*, 334 U.S. 266, 283 (1948) ("historic and great usage of the writ" is as "a swift and imperative remedy").[12]

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contemplates possible judicial invalidation of the CSRTs does not demonstrate congressional ratification.

[10] *See, e.g.*, Opp. to Mot. to Compel Prod. of Gov't Info. & Cross-Mot. for Stay 13, *Ait Idir* v. *Bush*, No. 07-1157 (D.C. Cir. Sept. 27, 2007) (requesting immediate stay and subsequent consideration of DTA cases "in stages"); Omnibus Mot. to Stay Orders to File Certified Index of Record 25, 33, *Hamad* v. *Gates*, No. 07-1098 (D.C. Cir. Sept. 27, 2007) (same).

[11] The court of appeals has so far accommodated the government by staying the government's obligation to produce the record in several DTA cases. *See, e.g.*, Order, *Nassar* v. *Gates*, No. 07-1340 (D.C. Cir. Sept. 26, 2007). The Boumediene Petitioners have moved to compel production of the record on review, but the court of appeals has yet to act on the motion. Mot. to Compel Prod. of Gov't Info., *Ait Idir* v. *Bush*, No. 07-1157 (D.C. Cir. Sept. 14, 2007).

[12] Furthermore, although the government asserts (at 41) that "important questions remain subject to consideration or elaboration as to the

2. Habeas requires searching review of Petitioners' detention

Common law habeas, at its "historical core," served "as a means of reviewing the legality of Executive detention," and in that context "its protections have been strongest." *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001). The government does not even address the numerous Founding-era cases demonstrating the rigorous nature of habeas review. *See* Pet. Br. 19-26. Instead, it suggests that this case should be treated like a deportation case, a criminal case, or a battlefield determination of prisoner-of-war status—anything but what it really is, namely a case of indefinite military detention of persons from a friendly country who have been held thousands of miles from any theater of hostilities for six years without any meaningful adversarial process. Whatever level of habeas review is appropriate in the other scenarios the government invokes, they do not govern this case.

The government's analogy to deportation cases surfaces in a misleading discussion of *St. Cyr*, which it cites for the proposition that "traditional habeas review" was limited to review of "'pure questions of law'" and the existence of "'some evidence to support the order'" at issue. Gov't Br. 47 (quoting 533 U.S. at 305-306). The government fails to mention that this passage of *St. Cyr* discussed habeas proceedings "to test the legality of [a] deportation order." 533 U.S. at 306. Deportation proceedings provide aliens with "all opportunity to be heard upon the questions involving [their] right to be and remain in the United States." *Yamataya* v. *Fisher*, 189 U.S. 86, 101 (1903). The *St. Cyr* petitioner thus had the right to counsel (8 U.S.C. § 1229(a)(1)(E)); a meaningful opportunity "to examine the evi-

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scope of the review available under the DTA," the government's sole example is a question whose resolution could only *narrow* the scope of review. The government notes (at 41 n.16) that the D.C. Circuit has yet to decide the government's petition for rehearing *en banc* in *Bismullah*, which seeks to limit the DTA record on review to information that the CSRT *actually* obtained and considered, rather than including all information the CSRT is *authorized* to obtain and consider. The possibility that Petitioners' rights may be curtailed even further is not a reason for abstention; if anything, it confirms the need for this Court's review.

dence against [him], to present evidence on [his] own behalf, and to cross-examine witnesses presented by the Government" (*id.* § 1229a(b)(4)(B)); the benefit of a heavy burden on the government to prove deportability by "clear and convincing evidence" (*id.* § 1229a(c)(3)(A)); and a neutral decisionmaker independent of the prosecuting authority.[13] Additionally, the liberty interest here is weightier than even the grave interest at stake in deportation proceedings, which do not "permit indefinite detention." *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001).

Similarly misplaced is the government's reliance on habeas proceedings involving criminal defendants, including persons tried by military commission. Any limitations on habeas review in the post-conviction context are attributable to the vigorous adversarial and judicial protections that precede a conviction.[14] The scope of habeas review appropriate after such proceedings has no bearing on this case, where Petitioners have had no meaningful judicial process at all. *See* 06-1196 Pet. App. 150 (CSRT procedures mandating a "non-adversarial proceeding"); *see also Rasul*, 542 U.S. at 487-488 (Kennedy, J., concurring in the judgment) ("In *Eisentrager*, the prisoners were tried and convicted by a military commission[.] Indefinite detention without trial or other proceeding presents altogether different considerations.").

Finally, the government (at 44-45) invokes the plurality opinion in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), as authori-

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[13] *See, e.g.*, 8 U.S.C. § 1101(b)(4) (immigration judges "shall not be employed by the Immigration and Naturalization Service" but by the Executive Office for Immigration Review); *Costa* v. *INS*, 233 F.3d 31, 33 n.1 (1st Cir. 2000) (immigration court is "independent[] of the INS"); *cf. United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 267 (1954) (remanding for inquiry into executive influence on Board of Immigration Appeals).

[14] *See Yamashita*, 327 U.S. at 5 (military commission heard 286 witnesses; defendant represented by six lawyers); *Quirin*, 317 U.S. at 23 (defendants represented by counsel and presented extensive evidence); *see also Herrera* v. *Collins*, 506 U.S. 390, 399-401 (1993) (full death penalty trial in civilian court); *Burns* v. *Wilson*, 346 U.S. 137, 141, 145 (1953) ("[r]igorous" court-martial provisions secured "exhaustive inquiry" and "abl[e] represent[ation]"); *Hiatt* v. *Brown*, 339 U.S. 103, 106 (1950) (full criminal court-martial with representation by three attorneys).

zation for permanent detention on the basis of nothing more than a "rudimentary procedure," so long as the government claims that the prisoner is an "enemy combatant." But far from embracing "rudimentary" procedures, the plurality recognized Hamdi's right to "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." 542 U.S. at 533. As previously explained (Pet. Br. 20-21, 28-32, 48), the CSRTs provided none of this. *See also infra* pp. 13-20.

What is more, the balancing of interests undertaken in *Hamdi* requires substantially greater procedural safeguards here. The risk of subjecting the Boumediene Petitioners to "'erroneous deprivation'" of their liberty is much greater, and the government's interest in avoiding "practical difficulties" during live combat much weaker, than in *Hamdi*. 542 U.S. at 529, 531 (citation omitted).

The risk of misclassifying Hamdi was far lower: he was alleged to be part of an enemy State's military, captured in battle with his assault rifle as part of a "Taliban unit" in a "foreign combat zone" during active hostilities. 542 U.S. at 512-513, 523 (emphasis omitted); *cf. id.* at 510-511 (describing America's war against "the Taliban regime" governing Afghanistan). By contrast, the government has never suggested that the Boumediene Petitioners directly participated in hostilities as part of the armed forces of an enemy State; it asserts (at 62) only that Petitioners were "associates of al Qaeda" residing in a European country friendly to the United States. This amorphous accusation is far more subject to error than the case of soldiers captured on a battlefield as part of the fighting forces of an enemy government. *See* Bradley & Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2124 (2005) ("Because the enemy does not wear uniforms and is not affiliated with an enemy state, and because of the potentially indefinite duration of the conflict, designation errors are both more likely and more serious.").

As for the government's interests, the *Hamdi* plurality gave significant weight to governmental concerns that "military officers who are … waging battle would be unnecessarily and dangerously distracted" from live combat by "discovery into

military operations [and] evidence buried under the rubble of war." 542 U.S. at 531-532. Such concerns do not apply to Petitioners, who were civilians in a friendly country far from any active theater of war, arrested and detained by Bosnian law enforcement officials at the behest of U.S. diplomats, not "military officers." Moreover, the government's interest in prolonged detention under exigent circumstances without fair procedures is nowhere near as strong as it was in 2004: "[A]s the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker." *Rasul*, 542 U.S. at 488 (Kennedy, J., concurring in the judgment).

The government fastens on the *Hamdi* plurality's reference (542 U.S. at 538) to "the possibility" that Article 5 tribunals conducted under Army Regulation 190-8 could constitute adequate process for a person in Hamdi's situation, *i.e.*, an alleged armed soldier of a State army caught while "'engaged in an armed conflict against the United States'" on an active battlefield (*id.* at 516). The government's argument ignores the notably different balancing of interests in this case. And in any event, CSRTs fall well short of Article 5 tribunals. Unlike the CSRTs, Article 5 tribunals do not apply any presumption that the government's evidence is "genuine and accurate." 06-1196 Pet. App. 159. They prohibit the use of torture and coercion. Army Reg. 190-8 ¶ 2-1.a(1)(d). They are convened promptly after detention and near the location of capture, maximizing the availability of witnesses and evidence.[15] And whereas the CSRT regulations expressly forbid the participation of counsel, nothing in Army Regulation 190-8 does so. Indeed, the U.S. military's first written procedures for Article 5 tribunals—developed during the Vietnam War, which was waged in significant part against irregular combatants—recognized a detainee's right to counsel as a "fundamental right[] considered to be essential to a fair hearing."

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[15] *See, e.g.*, United States Forces, Korea Reg. 190-6, § 7-2.a ("normally … within 2 days of capture"), *available at* http://www.usfk.mil/usfk/Publications/Publication_Records_Reg_USFK.htm; Nat'l Inst. of Military Justice Amicus Br. 12; Retired Military Officers Amicus Br. 8, 12.

U.S. Military Assistance Command, Vietnam, Directive 20-5, Annex A.7, *reprinted in* 62 Am. J. Int'l L. 754, 771 (1968) ("MACV Directive 20-5"); *see also id.* Annex A.8 (military lawyer provided to unrepresented detainees).[16]

The government (at 52) highlights certain CSRT procedures as not present in the Article 5 context, but those procedures either had no meaningful effect in practice or actually operated to prisoners' detriment. The ability of "a higher authority" to review decisions and "return the record … for further proceedings" (*id.*) led to *reversals* of detainee-favorable rulings and created a culture of preordained results and unwillingness to test the government's assertions. Pet. Br. 30. By contrast, legal review of Article 5 decisions is a protective measure for the detainee's benefit when the tribunal denies prisoner-of-war status. *See* Army Reg. 190-8 ¶ 1-6.g. The provision of a "personal representative" was an ineffectual charade given the lack of a confidential relationship, the ban on serving as an "advocate," and the failure of most personal representatives to provide meaningful assistance. Pet. Br. 31-32. The "unclassified summary of the evidence" was likewise meaningless because, as the government admits (at 4), "most of the CSRT conclusions are based in significant part on classified information." And while the CSRT rules may have required the Recorder to submit evidence favorable to

[16] The government's assertion (at 54) that "aliens captured on a foreign battlefield and held as enemy combatants" have never "been given hearings … at which they were represented by counsel" is thus plainly incorrect. Also historically wrong is its claim (at 52) that Article 5 tribunals have not reviewed detainee-favorable evidence or allowed the detainee to present documentary evidence. In Vietnam, a lawyer acting as "[c]ounsel for the tribunal" was required to present to the Article 5 tribunal "all relevant evidence to which he has access … without regard to whether the evidence is favorable or unfavorable to the detainee." MACV Directive 20-5, Annex A.14.g, 62 Am. J. Int'l L. at 773. Counsel for the detainee was allowed to present "witnesses, documents, affidavits, real evidence, and sworn or unsworn statements in behalf of the detainee." *Id.* Annex A.14.i. Although Article 5 tribunals did not expressly allow detainees to confront classified information (Gov't Br. 49 n.18), there is no indication that Article 5 tribunals have ever relied on hidden evidence in evaluating prisoner-of-war status, whereas the CSRTs relied "in significant part" on secret evidence (*id.* 4).

the detainee, the practice differed significantly in Petitioners' cases. *E.g.*, Pet. Br. 5, 27-29. *Hamdi*'s reference to Army Regulation 190-8 cannot be taken as approval of the use of these very different CSRT procedures in a very different context.[17]

3. DTA review is not comparable to habeas

The government posits (at 48) that this Court should evaluate the adequacy of the DTA review procedure as though Petitioners were "in effect making a facial challenge to the validity of the DTA procedures." Yet this is anything but a facial challenge; it is a habeas petition brought on behalf of specific individuals for whom the DTA does not provide meaningful review at a meaningful time. Whether judicial interpretation of the DTA could render it an adequate substitute for habeas in other circumstances—such as cases of newly-arrived detainees given a meaningful opportunity to contest the government's allegations in an actual adversarial proceeding—it does not give *these* Petitioners an adequate replacement for the rigorous protections of common law habeas. The government may prefer to defend a theoretical version of the DTA that ignores the reality of Petitioners' case, but this Court should consider the means by which the statutory review procedure is actually implemented. *Swain* v. *Pressley*, 430 U.S. 372, 383 n.20 (1977); *cf.* Pet Br. 18 n.17.

The government's suggestion (at 54) that "the combined effect of the CSRTs and the DTA" constitutes the relevant habeas substitute for purposes of the Suspension Clause is likewise mistaken. Habeas is a judicial remedy; it cannot be replaced by a process that (like the CSRT) is ultimately controlled by the jailer. While habeas courts may exercise a less searching review when the prisoner has already received a rigorous and fair adversarial process before a neutral decision-

[17] Adding to sworn statements of Lt. Col. Abraham (J.A. 105-107), another officer who participated as a panelist in 49 CSRT proceedings has come forward with revelations of pervasive pressure to conform CSRT outcomes to command instructions, lack of participation by virtually all "personal representatives," lack of meaningful ability to present evidence, and incompetence of many CSRT panelists. *See* Decl. of William J. Teesdale 3-10, *Hamad* v. *Bush*, No. CV 05-1009 JDB (D.D.C. Oct. 5, 2007) (reproducing content of interview with officer). Petitioners will seek leave to lodge this declaration.

maker (as in criminal and deportation cases), that is not the case here. *See* Pet. Br. 19-20. Far from justifying limited habeas review, the serious structural flaws of the CSRT process—including its ban on counsel, its lack of an independent decisionmaker, and its failure to give prisoners notice of the factual basis for the government's claims or any meaningful opportunity to present their own evidence—bring into sharp relief the inability of the DTA to provide meaningful review of detention. *See Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2807 (2006) (Kennedy, J., concurring in part) (DTA review "cannot correct for structural defects … that can cast doubt on the factfinding process").

No opportunity to present evidence. The D.C. Circuit restricts the DTA "record on review" to evidence "reasonably available" to the government and prevents detainees from presenting their own evidence to the court. *Bismullah* v. *Gates*, 501 F.3d 178, 180 (D.C. Cir. 2007). This restriction—utterly foreign to common law habeas—is particularly harmful here, given that Petitioners strongly dispute the government's factual assertions. The effect of the closed DTA record is worsened by the fact that Petitioners had no way to refute the government's allegations before the CSRT, where "most" conclusions were based "in significant part" on classified information hidden from the prisoner. Gov't Br. 4.[18] The government's only suggestion (at 56) is that counsel should now submit new evidence to the government, which will then decide in its (presumably unreviewable) discretion whether to convene a new CSRT.[19]

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[18] This was certainly true in Petitioners' cases, where the unclassified evidence presented was cursory and unilluminating. *See, e.g.*, CAJA 541-561 (Nechla); CAJA 345-346 (Boumediene); CAJA 495-503 (Ait Idir).

[19] The government cites (at 56) only one situation in which it has decided to convene a new CSRT in response to new evidence—a decision reached after Petitioners filed their opening brief in this Court. Counsel for the Boumediene Petitioners presented significant exculpatory evidence to the government in 2005, but no new proceedings have resulted. *See* Mem. in Supp. of Mot. for Order Enjoining Appellees from Transferring Pet'rs to Algeria, Exs. A1-A6, *Boumediene* v. *Bush*, No. 05-5062 (D.C. Cir. Sept. 21, 2005) (Petitioners' submissions to Administrative Review Board).

No rigorous review of factual determinations. The government ignores the DTA's statutory mandate that the court of appeals apply a rebuttable presumption in favor of the government's evidence—evidence adduced in an essentially *ex parte* and *in camera* process. *See* Pet. Br. 29. Indeed, the government carefully stops short of acknowledging *any* review under the DTA of a CSRT's factual determinations.

The insufficiency of DTA review is compounded by the fact that the CSRTs themselves were required by regulation to presume that the government's evidence was "genuine and accurate." 06-1196 Pet. App. 159. And CSRT panelists were not independent, but were highly susceptible to command influence. Senior military officials publicly tarred all Guantanamo prisoners as the "worst of the worst," and the CSRT regulations warned that "multiple levels of review" had already concluded that each prisoner was properly detained. Pet. Br. 3, 30. Noticeably absent from the government's touted "favorable determinations" list is any instance in which a CSRT ever determined that a prisoner was *not* an enemy combatant and therefore that the detaining authority had made a mistake. *See* Gov't Br. 57 (citing CSRT Summary, *available at* http://www.defenselink.mil/news/Nov2007/CSRT Update-Nov2-07.pdf). At most, a lucky few were designated as "no longer" enemy combatants—and even in some of those cases, panelists' superiors ordered do-overs until the result favored the government. Pet. Br. 30.

No express authority to order release. The government insists that the court of appeals cannot order release but can merely remand cases for a new round of CSRTs—as though DTA proceedings were garden-variety administrative law cases in which railroad ratemaking, rather than individual liberty, were at stake. The government's vision of the DTA process is an endless loop of cursory CSRTs and meaningless court challenges. If this is what the DTA provides, then it is surely an insufficient substitute for habeas. The government suggests (at 60) that habeas relief typically involves a conditional order of release pending retrial, ignoring both the undisputed power of habeas courts to order unconditional release in appropriate circumstances and its own position that the DTA does not

permit even a *conditional* order of release. And a release order would clearly not raise any "diplomatic concerns" (Gov't Br. 61) given that Bosnia has repeatedly stated its willingness to accept the Boumediene Petitioners' return. Pet. Br. 3.[20]

Lack of speed. The government cites no authority for its suggestion (at 59-60) that the snail's pace of DTA review should be assessed only from the beginning of each DTA proceeding. This would allow the government limitless opportunities to restart the clock by convening a new CSRT proceeding and pretending that the last six years of Petitioners' lives have not been spent in U.S. custody—precisely the course of action that has been suggested by the court of appeals. *Bismullah II*, at *3. And even by the government's calculation, DTA review has been exceedingly slow. The first DTA peti-

[20] The government's claim (at 60) that it has "taken on itself" to release every prisoner who received a favorable CSRT determination is disingenuous. As noted above (at p. 17), the military command structure reconvened CSRTs for some detainees until its desired outcome was reached. Moreover, although the Defense Department hierarchy reviewed and finalized all CSRT determinations by March 29, 2005 (*see* Secretary of Navy Gordon England, Defense Dep't Special Briefing on Combatant Status Review Tribunals, Mar. 29, 2005, *available at* http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2504), petitioners who had received favorable CSRT decisions continued to be imprisoned in Guantanamo for nearly two years after that date. *See* Notice of Transfer & Mot. to Dismiss Case as Moot as to Certain Pet'rs, *Kiyemba* v. *Bush*, Nos. 05-5487 & 05-5488 (D.C. Cir. Nov. 22, 2006) (petitioners transferred to Albania in November 2006); *see also* Emergency Mot. to Dismiss as Moot, *Qassim* v. *Bush*, No. 05-5477 (D.C. Cir. May 5, 2006) (petitioners transferred to Albania in May 2006, one business day before oral argument in habeas appeal challenging the government's claimed authority to continue to imprison them). Nor does clearance by Administrative Review Boards (Gov't Br. 4) compel the release of detainees. *See* Emergency Mot. for Leave to Supplement the Record on Pending Mots. 5, *Parhat* v. *Gates*, No. 06-1397 (D.C. Cir. Jan. 22, 2007) (prisoner remains imprisoned at Guantanamo despite October 2005 notice of ARB determination that he is eligible for release); Joint Br. in Supp. of Pending Mots. to Set Procedures & for Entry of Protective Order 27, *Bismullah* v. *Gates*, No. 06-1197 (D.C. Cir. Mar. 26, 2007) (six petitioners remain imprisoned notwithstanding favorable ARB decisions). The government has consistently argued that detention can continue indefinitely regardless of CSRT or ARB determinations and that courts have no power to order release. Pet. Br. 30.

tion was filed twenty-two months ago. Pet. for Review, *Paracha* v. *Rumsfeld*, No. 06-1038 (D.C. Cir. Jan. 24, 2006). The government has yet to produce the "record on review"—and has in fact stated that it "does not possess and cannot produce" such records "in a timely fashion." Mot. to Govern 3, *Al Ginco* v. *Gates*, No. 07-1090 (D.C. Cir. Oct. 31, 2007).

Restrictions on attorney-client relationship. Petitioners' ability to seek relief from their detention under the DTA is hobbled both by the DTA's impairment of the attorney-client relationship (Pet. Br. 31-32) and by the CSRTs' flat *prohibition* on the assistance of counsel in the first instance. The CSRTs' ban on counsel at such a "critical stage" (*cf. Iowa* v. *Tovar*, 541 U.S. 77, 86-87 (2004))—a ban the government claims could extend to American citizens (Br. 52, 54)—is entirely foreign to the Anglo-American legal system. And it has particularly pernicious effects here, since the DTA's "record on review" was created by the CSRTs, which relied "in significant part," and often exclusively, on classified evidence (Gov't Br. 4), which Petitioners never saw, but which could have been rebutted if Petitioners had been represented by security-cleared counsel.[21]

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[21] Existing procedural mechanisms demonstrate that it is entirely possible to safeguard classified information without denying a meaningful opportunity to confront the evidence. *See, e.g.*, 8 U.S.C. §§ 1532-1535 (examination of classified information by security-cleared attorneys and provision of unclassified summaries that enable a defense in removal proceedings for resident aliens accused of terrorist activity); Classified Information Procedures Act, 18 U.S.C. app. 3, §§ 4, 6(c)(1) (judicial supervision of targeted redaction and unclassified summaries that "will provide the defendant with substantially the same ability to make his defense"); Mil. R. Evid. 505(i)(4), (j) (oversight by military judge of proposed redactions and the adequacy of unclassified summaries); Turner & Schulhofer, *The Secrecy Problem in Terrorism Trials* 17-34 (2005), *available at* http://www.brennancenter.org/dynamic/subpages/download_file_34654.pdf (discussing several procedures used by federal courts to accommodate secrecy concerns without weakening the adversarial system or fundamental rights).

Experience abroad confirms that such a balance is workable. For example, the United Kingdom and Canada have used security-cleared special advocates to represent the interests of alien detainees who have been denied access to sensitive information. *See* Special Immigration Appeals Commission Act,

The government's statement (at 55) that the CSRT personal representative "fulfill[ed] some of the most important functions of counsel" reveals a remarkably parsimonious view of the function of lawyers. Personal representatives had no legal training, were not ethically bound to represent Petitioners zealously, were forbidden from serving as "advocates," had no privileged relationship with Petitioners, and could even be forced to testify against them. 06-1196 Pet. App. 155, 170, 172. DTA review of a closed record formed under these conditions cannot be an adequate substitute for habeas.

II. PETITIONERS' DETENTION IS UNLAWFUL

The Court should reject the plea (Gov't Br. 61-62) that it abstain from addressing the merits issues. They were ruled on by the district court, submitted to the court of appeals, and included in the petition for certiorari. No public interest supports deferring these issues for more lengthy rounds of litigation while Petitioners remain imprisoned. The interests of justice and judicial efficiency call for this Court's adjudication of the lawfulness of Petitioners' detention. *See Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985).

A. The AUMF Does Not Authorize The Government's Broad Definition Of "Enemy Combatant"

Neither the AUMF nor the laws of war authorize the government's enormously expansive definition of detainable "enemy combatants." The government studiously avoids discussing, but cannot deny, that its definition—which includes anyone who

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1997, c. 68, § 6 (U.K.); Prevention of Terrorism Act, 2005, c. 2, sched. 7 (U.K.); *Charkaoui* v. *Canada*, 1 S.C.R. 350, ¶¶ 71-74 (2007). The Supreme Court of Canada recently invalidated an alternative procedural scheme that failed to provide security-cleared counsel and severely restricted an alien detainee's ability to challenge the veracity of confidential information. *Charkaoui* ¶ 139 ("solutions can be devised that protect confidential security information and at the same time are less intrusive on the person's rights"); *see also Chahal* v. *United Kingdom*, 23 Eur. H.R. Rep. 413 ¶ 131 (1996) ("[T]here are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice."); *cf.* Specialists in Israeli Military Law & Constitutional Law Amicus Br. 22-23 (describing Israeli efforts to protect due process in cases involving classified information).

"support[ed]" al Qaeda, the Taliban, or "associated forces" (Pet. App. 81a)—sweeps in persons whose connection to those entities is unknowing, trivial, or utterly unrelated to combat. Pet. Br. 34. The government thus does not dispute that an innocent charitable gift could trigger indefinite detention without charge for the unwitting donor, if the recipient turned out to be an al Qaeda front. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005). So, presumably, would the innocent provision of medical, legal, educational or other everyday services.

The government cites no modern law-of-war source or U.S. practice suggesting that the category of "combatants" has so vast a reach. Other than inapposite sections of the 1949 Geneva Conventions, the government (at 64-65) relies exclusively on sources dated 1920 or earlier. The law-of-war backdrop relevant to interpreting the AUMF is more likely to be informed by recent domestic and international commentary and, most importantly, recent U.S. military practice, none of which authorizes the broad standard of detention advanced by the government here. *See* Pet. Br. 38-43. Even the government's sources merely state that certain noncombatant personnel employed by or closely connected to *a foreign State's military* may be detained. But the government has never alleged that the Petitioners were "civil persons engaged in military duty or in immediate connection with an army." Winthrop, *Military Law and Precedents* 789 (2d ed. 1920). Nor are they "'[p]ersons belonging to the auxiliary departments of an army, whether permanently or temporarily employed'" (Baker & Crocker, *The Laws of Land Warfare Concerning the Rights and Duties of Belligerents* 35 (1918) (quoting Hall, *A Treatise on International Law* 420 (4th ed. 1895))); "[p]ersons who accompany the armed forces" (Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(A)(4), 33, 6 U.S.T. 3316); or "medical personnel and chaplains" (*id.* art. 33).

Even if the laws of war were to treat involvement with a terrorist organization like al Qaeda as equivalent to involvement with a foreign State's army, the government points to no law-of-war principle, let alone a "longstanding" one (*Hamdi*, 542 U.S. at 521), that authorizes military detention on the basis of mere "support[]." The government's own authorities require

a significantly closer and intentional connection to the military operations of enemy forces.[22] The government's position that persons who merely "support[]" an enemy army may be indefinitely detained would have allowed Nazi Germany to imprison any American who bought war bonds, entertained U.S. troops, and perhaps merely paid taxes. *Cf.* Bradley & Goldsmith, 118 Harv. L. Rev. at 2115 (noting that, in modern wars, the category of persons "who support[] the war effort … would include everyone"). And the government's alarming claim (at 66) that a "supporter of an entity engaged in armed conflict" forfeits his or her status as a "civilian" would allow enemy States to use *military force* against millions of ordinary American civilians, all of whom would become "combatants" and therefore legitimate targets of attack. Unsurprisingly, the laws of war provide no support for such a vague and illimitable power.[23]

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[22] *See, e.g.*, Baker & Crocker 35 (contemplating detention of persons "'on the ground of the direct services'" to the army (quoting Hall 420)); Winthrop 789 (civilians "in immediate connection" with an army); Adjutant Gen.'s Office, War Dep't, General Orders No. 100, art. 49 (Apr. 24, 1863) ("all those who are attached to the Army for its efficiency *and promote directly the object of the war*" (emphasis added)); s*ee also Hamdi*, 542 U.S. at 519 (stressing that the petitioners in *Quirin* were "bent on hostile acts" with the "aid, guidance, and direction" of the enemy government (internal quotation marks omitted)).

Miller v. *United States*, 78 U.S. (11 Wall.) 268 (1870), did not involve military force or detention, but confiscation of property, and the confiscation was based not on mere "support[]," but on extensive, intentional ties to the Confederate army. Miller was adjudged to be "a person engaged in the rebellion" (*id.* at 301) and—according to averments that the Court deemed established by default—acted as "an officer of the army, and also as an officer of the navy of the rebels, in arms against the government of the United States" (*id.* at 277 (reporter's quotation of libel of information)).

[23] *See, e.g.*, Department of the Navy, *Commander's Handbook on the Law of Naval Operations* 5.3 (1995) (defining "those individuals who do not form a part of the armed forces and who otherwise refrain from the commission or direct support of hostile acts" as "noncombatants" or "the civilian population"); U.S. Air Force Pamphlet 110-31, § 1-2(b) (Nov. 19, 1976) (defining "civilian" as "any person other than one of the categories of persons referred to" as prisoners of war in Third Geneva Convention art. 4(A)(1)-(3) and (6)); Department of the Army, Army Field Manual No. 27-10, ch. 3, ¶ 60 (1956).

In light of this background, there is no reason to believe that Congress authorized such an expansive power to detain. At most, the AUMF's authorization of "necessary and appropriate" force against those responsible for the September 11 attacks implicitly allows the detention of: (1) civilians who directly participate in hostilities (*see* Pet. Br. 41); and (2) members of a State's military—categories that indisputably do not include the Boumediene Petitioners. Petitioners' detention is accordingly unlawful.[24]

B. Petitioners' Imprisonment Violates Due Process

Even apart from the fact that Petitioners' detention is not authorized by law, they are entitled to habeas relief because the procedures by which the government determined that they were "enemy combatants" were fundamentally unfair. Petitioners, as aliens within the territorial jurisdiction of the United States, have fundamental due process rights. *See Downes* v. *Bidwell*, 182 U.S. 244, 277 (1901); *Wong Wing* v. *United States*, 163 U.S. 228, 238 (1896); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886).[25] In *Rasul*, this Court rejected the

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[24] Article II of the Constitution does not empower the President to subject civilians to indefinite military imprisonment without authorization of Congress or the laws of war. Pet. Br. 44 n.45; *see also* President's Message, 11 Annals of Cong. 11, 12 (1801) (statement of President Jefferson that a U.S. warship could not detain the crew of a disabled Tripolitan cruiser because it was "[u]nauthorized by the Constitution, without the sanction of Congress"). Whatever power might be claimed in an immediate emergency (*see The Prize Cases*, 67 U.S. (2 Black) 635, 669-670 (1863)) does not authorize six years' imprisonment without charge. *See Rasul*, 542 U.S. at 488 (Kennedy, J., concurring in the judgment).

[25] The government's attempt (at 69-70) to distinguish the *Insular Cases* on sovereignty grounds is unavailing. To be sure, the United States owned Puerto Rico at the time of *Downes*, but nowhere did the Court suggest, let alone hold, that the right of the people of Puerto Rico "under the principles of the Constitution to … life, liberty, and property" depended on American sovereignty. 182 U.S. at 283. Instead, the Court relied on the notion that certain constitutional prohibitions "go to the very root of the power of Congress to act at all, irrespective of time or place." *Id.* at 277. It was the fundamental notion that our government is one of limited powers—not a sovereignty test—which led the Court "to disclaim any intention to hold that the inhabitants of these territories are subject to an unrestrained

contention that Guantanamo prisoners are beyond the reach of American law, for Guantanamo is "territory over which the United States exercises exclusive jurisdiction and control." 542 U.S. at 476. Under these precedents, Petitioners have at least *some* enforceable due process rights. *See id.* at 483 n.15.[26]

Eisentrager is not to the contrary, because its conclusion rested on the fact that "the scenes of [the prisoners'] offense, their capture, their trial and their punishment were all *beyond the territorial jurisdiction* of any court of the United States." 339 U.S. at 778 (emphasis added). By contrast, *Rasul* recognized that Guantanamo prisoners are "detained within the territorial jurisdiction of the United States." 542 U.S. at 480 (internal quotation marks omitted). It would be anomalous to hold that, although the United States has exercised "'complete jurisdiction and control' over the Guantanamo Bay Naval Base" for more than a century (*id.* (quoting 1903 Lease Agreement, art. III)), the base nonetheless falls "beyond [our] territorial jurisdiction" for constitutional purposes.[27]

On the merits, the government (at 72) merely repeats its comparison of the unfair CSRT procedure and futile DTA review to the Article 5 tribunals mentioned in *Hamdi*. As discussed above (at pp. 12-13), the government is wrong to presume that the due process calculus is the same here as it was

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power … upon the theory that they have no rights which [Congress] is bound to respect." *Id.* at 283.

[26] Petitioners do not seek "wholesale" application of the "full measure" of the Bill of Rights. Gov't Br. 70-71. Rather, consistent with the *Insular Cases*, Petitioners simply seek vindication of their *fundamental* due process rights to meaningful notice and "the opportunity to be heard at a meaningful time and in a meaningful manner" before they are locked away for what could be the rest of their lives. *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks omitted); *see also Hamdi*, 542 U.S. at 533.

[27] *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), is similarly inapposite. The government does not dispute that all references to the Fifth Amendment in *Verdugo-Urquidez* are dicta. Justice Kennedy's concurrence, which envisions the existence of certain "restrictions that the United States must observe with reference to aliens beyond its territory" (*id.* at 276), demonstrates that the dicta on which the government relies were unconvincing to a majority of the Court.

in *Hamdi*. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). The case of these six men—taken from a peaceful European country after that country's civilian courts conducted a lengthy investigation and found no basis for their detention—calls for significant due process protections, particularly given the government's adoption, immediately after *Hamdi*, of an unprecedented definition of "enemy combatant" that carries a high risk of error.

The experience of other allied democracies is relevant here, not only in ascertaining the extent to which the laws of war authorize detention of combatants, but also in determining what process this "particular situation demands." *Morrissey*, 408 U.S. at 481. Courts in Europe and Israel—where the risk of terrorist attack has been substantial for many years—have unflinchingly held that lengthy executive detention without charge or trial offends the rule of law. Pet. Br. 49-50 & n.52.[28] The lesson, of course, is not that this Court is bound by the views of the Supreme Court of Israel or the European Court of Human Rights (Gov't Br. 73), but that those courts, facing similarly grave security threats, have not tolerated indefinite, unreviewable military detention under overbroad standards. Instead, they have confirmed the feasibility of ensuring that imprisonment is promptly reviewed under accepted law-of-war principles in fair, adversarial judicial proceedings. This Court can and should do likewise under our own Constitution and laws.

CONCLUSION

The Court should reverse the judgment of the court of appeals, hold Petitioners' imprisonment unlawful, and direct the district court to grant habeas relief.

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[28] The government's charge (at 73) that Petitioners have engaged in "[s]elective [r]eliance" on foreign law is puzzling. Petitioners cited not only Israeli law but also established precedents from the European Union. Pet. Br. 49-50 & n.52; *see also* Specialists in Israeli Military Law & Constitutional Law Amicus Br. In response, the government cites not a single case, from this country or any foreign jurisdiction, which even purports to justify indefinite detention without charge of persons in Petitioners' position.

Respectfully submitted.

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NOVEMBER 2007