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 EL-BANNA ET AL.

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QUESTIONS PRESENTED

1. Did the D.C. Circuit err in adopting a categorical rule that the Constitution places no limits on the authority of the government in detaining aliens outside U.S. sovereign territory?

2. Did the D.C. Circuit err in holding that the petitioners' right to the writ of habeas corpus was not protected by the Suspension Clause in light of this Court's finding in *Rasul v. Bush*, 542 U.S. 466 (2004), that the writ would have extended to them at common law?

3. Did the D.C. Circuit err in holding that the petitioners' right to the writ of habeas corpus was not protected by the Suspension Clause, in light of the fact that these petitioners have been detained by the United States for more than five years in exclusive U.S. custody and within the "territorial jurisdiction" of the United States and are therefore entitled to fundamental constitutional protections?

4. Is the review provided under the Detainee Treatment Act of 2005 an adequate substitute for the writ of habeas corpus to which these petitioners are entitled?

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW[i]

1. Petitioners in *Al-Odah v. United States*, No. 02-CV-0828-CKK (D.D.C.), are Fawzi Khalid Abdullah Fahad Al Odah, Omar Rajab Amin, Nasser Nijer Naser Al Mutairi, Khalid Abdullah Mishal Al Mutairi, Abdullah Kamal Abdullah Kamal Al Kandari, Abdulaziz Sayer Owain Al Shammari, Abdullah Saleh Ali Al Ajmi, Mohammed Funaitel Al Dihani, Fayiz Mohammed Ahmed Al Kandari, Fwad Mahmoud Al Rabiah, Adil Zamil Abdull Mohssin Al Zamil, and Saad Madai Saad Hawash Al-Azmi, and their next friends Khaled A.F. Al Odah, Mohammad R. M. R. Ameen, Nayef N.N.B.J. Al Mutairi, Meshal A.A. Th Al Mutairi, Mansour K.A. Kamel, Sayer O.Z. Al Shammari, Mesfer Saleh Ali Al Ajmi, Mubarak F.S.M. Al Daihani, Mohammad A.J.M.H. Al Kandari, Monzer M.H.A. Al Rabieah, Walid Z.A. Al Zamel, and Hamad Madai Saad.

Respondents include the United States of America and the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Gen. Richard B. Myers, Chairman, Joint Chiefs of Staff; Gen. Rick Baccus, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Terry Carrico, Commander, Camp Delta, Camp X-Ray, Guantanamo Bay, Cuba.

2. Petitioners in *Habib v. Bush*, No. 02-CV-1130-CKK (D.D.C.), are Mamdouh Habib and his next friend Maha Habib. Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Gen. Rick Baccus,

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[i] This brief is filed on behalf of all petitioners except those in *Al Odah v. United States*, No. 02-CV-0828-CKK (D.D.C.), and *Abdah v. Bush*, No. 04-CV-1254-HHK (D.D.C.).

LIST OF ALL PARTIES—continued

Commander, Joint Task Force, Guantanamo Bay, Cuba; and Lt. Col. William Cline, Commander, Camp Delta.

3. Petitioners in *Kurnaz v. Bush*, No. 04-CV-1135-ESH (D.D.C.), are Murat Kurnaz and his next friend Rabiye Kurnaz. Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

4. Petitioners in *El-Banna v. Bush*, No. 04-CV-1144-RWR (D.D.C.), are Jamil El-Banna, Bisher Al-Rawi, and Martin Mubanga, and their next friends Sabah Sunnrqrout, Jahida Sayyadi, and Kathleen Mubanga. Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

5. Petitioners in *Gherebi v. Bush*, No. 04-CV-1164-RBW (D.D.C.), are Falen Gherebi (also known as Salim Gherebi) and his next friend Belaid Gherebi. Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; and "1,000 Unknown Named United States Military Personnel and Government Officers and/or Officials."

6. Petitioners in *Anam v. Bush*, No. 04-CV-1194-HHK (D.D.C), are Suhail Abdoh Anam, Bashir Nasir Ali Al Marwalah, Musa'ab Omar Al Madhwani, Abdul Khaleq Ahmed Sahleh Al Baidhani, Ali Ahmed Mohammed Al Raezehi, Saeed Ahmed Mohammed Al Sarim, Emad Abdullah Hassan, Jalal Salim Bin Amer, Ali Yahya Mahdi, Riyad Atag Ali Abdoh Al Haj, Khaled Ahmed Qassim Muse'd, Fahmi Abdullah Ahmed Al Tawlaqi, and Abdulaziz Abdoh Abdullah Ali Al Swidhi, and their next friends

LIST OF ALL PARTIES—continued

Mohamed Abdu Anam, Hussein Naser Ali Al Marwalah, Ali Omar Al Madhwani, Khalid Ahmed Saleh Al Baidhani, Abdullah Ahmed Mohammed Al Razehi, Samir Ahmed Al Sarim, Amro Abdullah Hassan, Faez Bin Amer, Mohamed Yahya Mahdi, Atag Ali Abdoh Al Hag, Fadhle Ahmed Kassim, Abdullah Ahmed Ubad Al Tawlaqi, Kmal Abdullah Ahmed, and Adnan Abdoh Al Swidhi.

Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

7. Petitioners in *Almurbati v. Bush*, No. 04-CV-1227-RBW (D.D.C.), are Isa Ali Abdulla Almurbati, Adel Kamel Abdulla Hajee, Salah Abdul Rasool Al Bloushi, Abdullah Majed Sayyah Hasan Alnoaimi, Salman Bin Ibrahim Bin Mohammed Bin Ali Al-Kalifa, and Jum'ah Mohammed Abdullatif Aldossari, and their next friends Mohamed Ali Abdulla Almurbati, Abdullah Kamel Abdulla Hajee, Abdul Rasool Ali Al Bloushi, Majed Sayah Alnoaimi, Ibrahim Bin Mohammed Bin Ali Al-Khalifa, and Khalid Mohammed Abdullatif Aldossari.

Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

8. Petitioners in *Abdah v. Bush*, No. 04-CV-1254-HHK (D.D.C.), are Mahmoad Abdah, Majid Mahmoud Ahmed (also known as Majed Mohmood, and Majid M. Abdu Ahmed), Abdulmalik Abdulwahhab Al-Rahabi, Makhtar Yahia Naji Al-Wrafie, Aref Abd II Rheem, Yasein Khasem Mohammad Esmail, Adnan Farhan Abdul Latif, Jamal Mar'i, Othman Abdulraheem Mohammad, Adil Saeed El Haj Obaid,

LIST OF ALL PARTIES—continued

Mohamed Mohamed Hassan Odaini, Sadeq Mohammed Said, Farouk Ali Ahmed Saif, and Salman Yahaldi Hsan Mohammed Saud, and their next friends Mahmoad Abdah Ahmed, Mahmoud Ahmed, Ahmed Abdulwahhab, Foade Yahla Naji Al-Wrafie, Aref Abd Al Rahjm, Jamel Khasem Mohammad, Mohamed Farhan Abdul Latif, Nabil Mokamed Mar'I, Araf Abdulraheem Mohammad, Nazem Saeed El Haj Obaid, Bashir Mohamed Hassan Odaini, Abd Alsalam Mohammed Saeed, Sheab Al Mohamedi, and Yahiva Hsane Mohammed Saud Al-Rewaye.

Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

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OPINIONS BELOW

The opinion of the U.S. District Court for the District of Columbia (App. 61-128)[1] is reported at 355 F. Supp. 2d 443 (D.D.C. 2005). The opinion of the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") (App. 1-54) is reported at 476 F.3d 981 (D.C. Cir. 2007).

JURISDICTION

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

APPLICABLE PROVISIONS

U.S. Constitution, art. I, § 9, cl. 2 and amend. V; Authorization for Use of Military Force ("AUMF"), 115 Stat. 224 (2001); Military Commissions Act of 2006 ("MCA") §§ 3(a) (adding 10 U.S.C. § 950j(b)), 7, Pub. L. No. 109-366, 120 Stat. 2600; Detainee Treatment Act of 2005 ("DTA") § 1005, Pub. L. No. 109-148, 119 Stat. 2740, 10 U.S.C. § 801 note. These provisions are reprinted at App. 129-140.

STATEMENT OF THE CASE

A. Petitioners

Petitioners are prisoners detained by the United States at the U.S. Naval Base at Guantanamo Bay. None is an enemy alien; all are nationals of countries allied with the United States. Most have been in U.S. custody for more than five years. Some were taken into custody in Afghanistan and Pakistan, and were turned over by local warlords for large financial bounties. Others were taken into custody thousands

[1] "App." refers to the Appendix to the Petition for Writ of Certiorari (March 5, 2007). "J.A." refers to the Joint Appendix filed concurrently with this brief pursuant to Rule 26 of the Supreme Court Rules. "S.A." refers to the Supplemental Public Joint Appendix filed by the parties below in the D.C. Circuit on August 1, 2005.

of miles from the conflict in Afghanistan.[2] All maintain that they have never engaged in combat against the United States and have never participated in acts of terrorism. They seek a single remedy: a fair and impartial hearing before a neutral decision maker to determine whether there is a valid basis for detaining them. They have never received such a hearing, although this Court ruled more than three years ago that they are entitled to one. *See Rasul v. Bush*, 542 U.S. 466 (2004).

B. Guantanamo

In 1903, the United States entered into a lease for Guantanamo with the newly formed Republic of Cuba. While recognizing Cuba's "ultimate sovereignty" over Guantanamo, the lease expressly states that the United States shall exercise "complete jurisdiction and control" over the area with the right to do so permanently if it so chooses.[3] U.S. law applies at Guantanamo. Animals there, including iguanas, are protected by U.S. laws and regulations, and anyone, including any federal official, who violates those laws is subject to U.S. civil and criminal penalties.[4] The U.S. Navy web site describes Guantanamo as a "Naval reservation, which, for all practical purposes, is American territory. . . . [T]he United States has for [over one hundred years] exercised the essential elements of sovereignty over

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[2] Jamil El-Banna, for example, was seized at the airport in Gambia while on a business trip and turned over to CIA agents who rendered him to Afghanistan. He was held and brutally interrogated, first at a secret site and then at the Bagram Air Force Base, before being shipped to Guantanamo. *See* Intelligence Security Comm. (UK), RENDITION, 2007, Cm. 7171, at 40-44.

[3] Lease of Lands for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, art. III, T.S. 418.

[4] *See* Endangered Species Act, 16 U.S.C. §§ 1536(a)(2), 1538(a)(1)(F); 50 C.F.R. §§ 17.11 (extending protection to Cuban iguanas), 17.21(f), 17.31(a).

this territory, without actually owning it."[5]

C. Prior Proceedings

This litigation has been pending for more than five and a half years. The first case was filed on February 19, 2002, *Rasul v. Bush*, D.D.C., No. 02-CV-0299 (CKK), followed soon after by *Al Odah v. United States*, D.D.C., No. 02-CV-0828 (CKK). Both cases sought impartial hearings to determine if lawful bases existed for the detentions. The government moved to dismiss for lack of jurisdiction, the district court granted the motion, and the D.C. Circuit affirmed. Relying principally *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the D.C. Circuit held that, as aliens outside the area of technical U.S. sovereignty, petitioners had no rights under the Constitution and therefore no access to the U.S. courts through the writ of habeas corpus or otherwise. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

This Court reversed. It found that the Guantanamo 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 with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Rasul, 542 U.S. at 476. The Court held that aliens at Guantanamo, "no less than American citizens," have the right to challenge the legality of their detention in the U.S. courts through the writ of habeas corpus. *Id*. at 481. In

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[5] *See The History of Guantanamo Bay: An Online Edition* (1964), ch. 3, *available at* http://www.cnic.navy.mil/Guantanamo/AboutGTMO/gtmohistgeneral/gtmohistmurphy/gtmohistmurphyvol1/gtmohistmurphyvol1ch03 ("U.S. Navy Website").

addition to holding that petitioners were entitled to the writ under statute, the Court concluded that application of the writ to them was "consistent with the historical reach of the writ of habeas corpus" at common law. *Id*. It observed that "[h]abeas corpus is . . . 'a writ antecedent to statute,'" and at common law the writ extended to persons detained not only "within sovereign territory of the realm," but in "all other dominions under the sovereign's control." *Id.* at 473, 481-82. The Court also noted that the Guantanamo petitioners' claims "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'" *Id.* at 484 n.15. The Court remanded to the district court with instructions "to consider in the first instance the merits of petitioners' claims." *Id.* at 485.

Just days later, Deputy Secretary of Defense Paul Wolfowitz announced, as a matter of internal department "management," a new, so-called Combatant Status Review Tribunal ("CSRT") process at Guantanamo.[6] That process did not purport to provide *de novo* determinations of whether the detainees were properly detained. According to the announcement, those determinations had already been made "through multiple levels of review by officers of the Department of Defense."

The CSRTs provided a process under which panels of three military officers would review those determinations previously made by their superiors in the Department. The detainees were not allowed counsel. They were not allowed to see any information the government considered classified, although "all of the CSRT's decisions substantially relied upon classified evidence." App. 103. They could not confront their accusers or question their reliability or whether their accusations were obtained through coercion, and they were not allowed to present evidence unless the CSRT panels found it was "reasonably available," which the

[6] Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004) (App. 141-46).

panels rarely did.[7] The CSRT procedures established a presumption in favor of the government's evidence, including all the evidence kept secret from the detainees.

In short, the detainees had the burden of proving themselves innocent of charges that, for the most part, they could not see, let alone examine or rebut, made by anonymous sources they could not confront. Predictably, in over 90 percent of the cases, the tribunals confirmed the closed-door decisions previously made by their superiors that the detainees were properly detained as enemy combatants. And in cases where the panels concluded that a detainee was not an enemy combatant, new panels were often convened to conclude that he was.[8]

On October 4, 2004, while it was still conducting CSRTs at Guantanamo, the government moved in the district court to dismiss these cases as a matter of law. It argued again that, because petitioners are aliens detained outside sovereign U.S. territory, they have no constitutional rights and therefore no right to obtain relief. Judge Richard Leon agreed and granted the government's motion to dismiss in two of the cases that were then pending. *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005). The judges in the other 11 pending cases transferred those cases for decision to Judge Joyce Hens Green, who denied the government's motion in large part. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005) (App. 61-127).

Judge Green rejected the government's contention that it could deny the detainees constitutional rights by placing

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[7] The CSRTs denied every request made by a detainee for a witness who was not already detained at Guantanamo. *See* Mark Denbeaux *et al*., Seton Hall University School of Law, *No Hearing Hearings: An Analysis of the Proceedings of the Government's Combatant Status Review Tribunals at Guantánamo* at 2-3, 28 (2006), *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf ("Denbeaux Report").

[8] *See id*. at 37-39; Declaration of Stephen Abraham ¶ 23 (J.A. 109).

them in Guantanamo. Judge Green held 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," and that, in light of the decision in *Rasul*, "it is clear that Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply." App. 96. Judge Green also rejected the government's alternative argument that the CSRT proceedings afforded petitioners the equivalent of due process. App. 96-102. She found that the CSRT procedures "deprive[d] the detainees of sufficient notice of the factual bases for their detention and den[ied] them a fair opportunity to challenge their incarceration," and also improperly allowed for reliance on statements obtained through torture and coercion. App. 103, 111-12.

On February 3, 2005, Judge Green certified respondents' request for interlocutory appeal and granted their motion for a stay of proceedings pending the outcome of the appeal. The D.C. Circuit consolidated those appeals with petitioners' appeal from Judge Leon's decision.

D. The DTA and the MCA

On December 30, 2005, after the cases had been briefed and argued before the D.C. Circuit, the President signed into law the Detainee Treatment Act of 2005 (the "DTA"). Section 1005(e) of the DTA purported to strip the courts of jurisdiction over habeas petitions filed by Guantanamo detainees. App. 132-38. In lieu of plenary habeas review in the district court, the DTA confers jurisdiction on the D.C. Circuit "to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." App. 135. It provides that the D.C. Circuit's scope of review "shall be limited" to consideration of whether the CSRT determination was "consistent with the standards and procedures specified by the Secretary of Defense," and whether the use of the Secretary's standards and procedures "is consistent with the

Constitution and laws of the United States," to "the extent that the Constitution and laws of the United States are applicable." App. 135-36.

This Court held in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764-69 (2006), that the DTA did not deprive the courts of jurisdiction over habeas cases pending in court when the legislation was enacted.

On October 17, 2006, the President signed into law the Military Commissions Act of 2006 (the "MCA"). App. 139-40. Section 7(a) of the MCA substituted for the amendment to 28 U.S.C. § 2241 made by the DTA a new amendment stripping the courts of jurisdiction over two categories of cases: (1) "application[s] for a writ of habeas corpus" and (2) "other action[s]" that relate "to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of aliens detained by the United States as enemy combatants. That amendment takes effect upon enactment of the MCA and applies "to all cases, without exception, pending on or after the date of the enactment . . . which relate to any aspect of the detention."

E. Court of Appeals Opinion

The D.C. Circuit held that the MCA eliminated the courts' jurisdiction over petitioners' pending habeas cases. App. 6-10. The majority (Randolph & Sentelle, JJ.) also held that the elimination of habeas did not violate the Suspension Clause of the U.S. Constitution. App. 14-21. In reaching that decision, the majority found it unnecessary to examine whether the review process under the statute provided an adequate substitute for habeas because it held that, as aliens detained outside U.S. sovereign territory, petitioners had no right to the writ under common law or the Constitution. Relying again principally on *Eisentrager*, the majority concluded categorically that "the Constitution does not confer rights on aliens without property or presence within the United States." App. 15.

Judge Rogers dissented. She concluded that petitioners' right to obtain habeas review of their detentions is protected by the Suspension Clause, which "is a limitation on the powers of Congress." App. 23. She further concluded that the DTA review procedure did not provide an adequate substitute for the habeas review to which petitioners were entitled. She found that:

> Far from merely adjusting the mechanism for vindicating the habeas right, the DTA imposes a series of hurdles while saddling each Guantanamo detainee with an assortment of handicaps that make the obstacles insurmountable . . . . [The statutory] alternatives are neither adequate to test whether detention is unlawful nor directed toward releasing those who are unlawfully held.[9]

SUMMARY OF ARGUMENT

More than three years ago, this Court rejected the government's contention that it could operate a prison at Guantanamo outside the law. The Court held that the Guantanamo detainees had the statutory right to habeas, but also found more broadly that Guantanamo was not "extraterritorial," but rather that, as an area within the complete jurisdiction and control of the United States, it was within U.S. "territorial jurisdiction," and that the writ of habeas corpus to review the reasonableness of their detentions would have extended to detainees there at common law. *Rasul*, 542 U.S. at 480-81.

The D.C. Circuit decision rejects those central findings of *Rasul*. Narrowly, it holds that the MCA does not violate the Suspension Clause because petitioners have no common law or constitutionally protected right to habeas corpus. But, more broadly, it says that Congress could repeal the

[9] App. 41.

petitioners' right to habeas corpus because aliens detained outside the area of technical U.S. sovereignty have no constitutional protections whatsoever. In so holding, the D.C. Circuit opinion establishes a broad and far-reaching rule that would allow the Executive Branch to disregard any constitutional restraints on its actions simply by choosing to detain foreigners outside U.S. sovereign territory even in areas where the U.S. exercises complete jurisdiction and control such as Guantanamo. The executive's exemption from constitutional restraint and from legal review of its actions would not depend on a state of war, or the duration of the imprisonment, or the treatment of the detainees. The government could forever avoid any constitutional restraint merely by choosing to hold foreigners in areas outside technical U.S. sovereignty. Quite simply, the D.C. Circuit opinion authorizes the U.S. government to establish off-shore prison camps far removed from any battlefield that are totally outside the law. There is no precedent for that in U.S. history, and it is contrary to our most fundamental traditions.

The petitioners seek modest relief, but relief that is essential to America's standing as a nation committed to the rule of law. Petitioners do not challenge the government's authority to capture and detain members of enemy armed forces who engage in combat against the United States and its allies. Nor do petitioners challenge the government's authority to arrest and incarcerate people who engage in acts of international terrorism. But petitioners contend that they have not engaged in combat against the United States or its allies and have not participated in acts of terrorism. All they seek – and have ever sought for the almost six years that they have been detained – is a fair and impartial hearing at which they have the opportunity to confront and rebut whatever accusations there are against them and to present evidence of their own to establish their innocence. They have never had that opportunity, and the MCA would deprive them of it forever.

There is good reason to believe that petitioners' claims may be true. The *National Journal* summarized its exhaustive study of the government's CSRT records as follows:

> A high percentage [of the detainees] . . . were not captured on any battlefield . . .
>
> Fewer than 20 percent . . . have ever been Qaeda members.
>
> Many scores, and perhaps hundreds, of the detainees were not even Taliban foot soldiers, let alone Qaeda terrorists. They were innocent, wrongly seized non-combatants with no intention of joining the Qaeda campaign to murder Americans.
>
> The majority were not captured by U.S. forces but rather handed over by reward-seeking Pakistanis and Afghan warlords and by villagers of highly doubtful reliability.[10]

Military personnel at Guantanamo have acknowledged that many of the detainees are there by mistake. The former Guantanamo commander stated: "Sometimes we just didn't get the right folks," and the reason these "folks" were still in Guantanamo was that "Nobody wants to be the one to sign the release papers . . . . There's no muscle in the system."[11] We now know that five years ago the CIA had sent a confidential memorandum to Washington reporting that most of the Guantanamo detainees "didn't belong there."[12]

This Court held in *Rasul* that petitioners are entitled to challenge the legality of their detentions through the writ of

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[10] Stuart Taylor, Jr., *Falsehoods About Guantanamo*, NAT'L J., Feb. 4, 2006, at 13; Corine Hegland, *Who Is at Guantanamo Bay*, NAT'L J., Feb. 4, 2006, at 33-35.

[11] Christopher Cooper, *Detention Plan: In Guantanamo, Prisoners Languish in Sea of Red Tape*, WALL ST. J., Jan. 26, 2005, at A1, A10.

[12] That report was brought to the attention of White House officials and ignored. *See* Jane Mayer, *The Hidden Power: The Legal Mind Behind the White House's War on Terror*, NEW YORKER, July 3, 2006, at 54.

habeas corpus. That right is protected by the Suspension Clause in Article I, Section 9, Clause 2 of the Constitution. The D.C. Circuit's decision that the Suspension Clause is inapplicable here because the petitioners have no rights to the writ under the common law or the Constitution is simply incorrect:

1. The Suspension Clause is a direct and explicit structural limit on the power of Congress. Unless the circumstances specified in the Constitution for a suspension exist – and they clearly do not – Congress may not suspend the writ. It is simply without power to do so.

2. Moreover, petitioners' right to habeas corpus falls squarely within the protections of the Suspension Clause. As this Court has made clear, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). The Court concluded in *Rasul* that petitioners would have been entitled to the writ as of 1789. Thus, it held not only that petitioners were entitled to the writ under the habeas statute, but also that application of the writ to them "is consistent with the historic reach of the writ of habeas corpus" at common law, where it extended to such persons detained not only "within sovereign territory of the realm," but in "all other dominions under the sovereign's control." *Id.* at 473, 481-82.

3. Petitioners' constitutional protections are not limited to the Suspension Clause. These petitioners, who have been detained by the U.S. government for more than five years in exclusive U.S. custody and within the territorial jurisdiction of the United States, are entitled to fundamental constitutional protections, including the protections of due process of law as well as the Suspension Clause.

They are entitled to those protections, first, because as the Court made clear in *Rasul*, Guantanamo is not extraterritorial; it is within U.S. "territorial jurisdiction." *Rasul*, 542 U.S. at 480. Fundamental constitutional protections apply to "all persons within the territorial

jurisdiction" of the United States. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

Second, they are entitled to those protections because the rights they assert – to habeas corpus and due process of law – are fundamental. The courts long ago rejected the proposition that the Constitution limits U.S. government action only within our borders. As Justice Frankfurter stated: that "notion . . . has long since evaporated. Governmental action abroad is performed under both the authority and the restrictions of the Constitution . . . ." *Reid v. Covert*, 354 U.S. 1, 56 (1957) (Frankfurter, J., concurring); *see United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring). Although certain provisions of the Constitution might not apply in all locations and in all circumstances, "a fundamental right . . . goes wherever the jurisdiction of the United States extends . . . ." *Dorr v. United States*, 195 U.S. 138, 148 (1904). No court has ever found that the rights of habeas corpus and due process of law are anything less than fundamental.

Finally, petitioners are entitled to fundamental constitutional protections because they are being confined – potentially indefinitely – by the U.S. government. The United States has deprived them of their liberty and imposed its control over them and, in doing so, must act in accordance with those principles of fairness fundamental to our constitutional system. The government has never cited a case holding that it may deprive people of their liberty except in accordance with due process of law. The process that is due may differ depending on the circumstances, but there is no rigid rule automatically exempting U.S. government officials abroad from the obligation to act in accordance with the "traditional notions of fair play and substantial justice" embodied in the Fifth Amendment. *See Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 113 (1987).

Accordingly, fundamental constitutional protections, including the protections of the Suspension Clause and due process of law, apply. In the absence of a rebellion or invasion, Congress cannot suspend the writ to which petitioners are entitled without providing them an adequate and effective substitute that is equivalent to habeas. *See Swain v. Pressley*, 430 U.S. 372, 381 (1977). It has not done so. The alternative process under the DTA is not commensurate with habeas and was not intended to be. It was purposely designed to curtail the detainees' rights to challenge the legality of their detentions.

Unlike the plenary reviews conducted by district courts in habeas, under the DTA, the D.C. Circuit is not allowed to accept or consider new evidence; rather, it is restricted to considering, based solely on the evidence already before the government, whether the CSRTs followed their own "standards and procedures" in reaching their decisions. Those standards and procedures, however, deprived the detainees of the most basic requirements of due process: an alien prisoner held virtually incommunicado was required to overcome secret allegations, the particulars of which he could not know and the reliability of which he could not test, before a military panel whose superiors had repeatedly prejudged the result, and he was required to do all this without counsel.

The DTA does not correct those problems; it condones and perpetuates them. Most importantly, by continuing to deprive the detainees of the ability to confront the accusations against them and to introduce evidence to the court rebutting those accusations and establishing their innocence, the DTA is patently inadequate. Those rights are essential to any fair hearing, and they are fundamental to the writ of habeas corpus.

ARGUMENT

"Freedom of the person under the protection of the habeas corpus I deem [one of the] essential principles of our government."

– THOMAS JEFFERSON, 1ST INAUGURAL ADDRESS.

"It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement."

– SECRETARY OF STATE FOR HOME AFFAIRS V. O'BRIEN [1923] A.C. 603, 609 (H.L.).

"*Under the best tradition of Anglo-American law, courts will not deny hearing to an unconvicted prisoner just because he is an alien whose keep, in legal theory, is just outside our gates . . . . United States officers [may not] take without due process of law the life, the liberty or the property of an alien who has come within our jurisdiction; and that means he must meet a fair hearing with fair notice of the charges*."

– SHAUGHNESSY V. UNITED STATES EX REL. MEZEI, 345 U.S. 209, 218-19, 226-27 (1953) (JACKSON, J., DISSENTING).

"[W]hy are we proud? We are proud, first of all, because from the beginning of this Nation, a man can walk upright, no matter who he is . . . . He can walk upright and meet his friend – or his enemy; and he does not fear that because that enemy may be in a position of great power that he can be suddenly thrown in jail to rot there without charges and with no recourse to justice. We have the habeas corpus act, and we respect it."

– PRESIDENT DWIGHT D. EISENHOWER, B'NAI B'RITH ANTI-DEFAMATION LEAGUE (NOV. 23, 1953).

I. THE GOVERNMENT MAY NOT AVOID THE CONSTITUTIONAL LIMITS ON ITS AUTHORITY BY ELECTING TO HOLD PRISONERS OUTSIDE U.S. SOVEREIGN TERRITORY.

The D.C. Circuit decision creates a categorical rule that, if allowed to stand, would have far reaching effect. It empowers the government to disregard any constitutional restraints on its actions whenever it chooses to imprison aliens in areas outside technical U.S. sovereignty.

It is important to understand the breadth of that rule. It does not depend on a state of war or whether the foreigners detained are enemy combatants. It would apply in times of peace as well as war. It would as clearly authorize executive officials to seize an English civilian off the streets of London in time of peace as an Arab fighter off the battlefield in Afghanistan in time of war. In either case, the officials would not need to explain to any court why their actions are required to further the nation's security interests, or attempt to reconcile those interests with the commands of legality, fairness, or due process – so long as its prisoners are foreigners jailed outside U.S. sovereign territory.

That would be so no matter how long the prisoners are held – for a few months, or a few years, or forever. U.S. officials could do whatever they want to those foreigners, denying them not only the most basic procedural protections but substantive protections as well, including guarantees against discrimination, torture and coercion. Indeed, the U.S. courts would even be barred from considering a claim by detainees that U.S. government officials had suddenly ordered them to be placed before a firing squad and shot, without charge, trial or conviction of any crime.[13] The D.C. Circuit's decision quite literally empowers the government

[13] In fact, the government has expressly asserted its authority to take just such actions with respect to aliens it holds prisoner outside U.S. sovereign territory. *See Gherebi v. Bush*, 374 F.3d 727, 738 (9th Cir. 2004) (concerning Falen Gherebi, a petitioner in this case).

to establish offshore prison camps for aliens far from any battlefield and totally outside the law.

Preserving the military's flexibility on the battlefield does not require the executive to be exempted from our laws in safer times and more secure locations. Whatever support there might be for denying aliens in certain foreign locations certain constitutional protections in certain circumstances, there is absolutely no support for the broad and rigid rule that the D.C. Circuit has adopted. It is without precedent in the law and contrary to our most fundamental values.

II. THE SUSPENSION CLAUSE LIMITS CONGRESS' AUTHORITY TO SUSPEND THE WRIT OF HABEAS CORPUS TO WHICH THIS COURT HELD PETITIONERS ARE ENTITLED.

The D.C. Circuit held the Suspension Clause inapplicable to this case because, it said, petitioners have no constitutional rights under the Suspension Clause or otherwise. In so doing, the D.C. Circuit misconstrued both the nature of the Suspension Clause and the rights to which petitioners are entitled.

A. The Suspension Clause is an Explicit Structural Limitation on the Power of Congress.

Article I, Section 9, Clause 2 of the Constitution provides: "The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Unlike the Fourth, Fifth, and Sixth Amendments, this Clause does not itself confer rights on individuals. Rather, it provides constitutional protection to a preexisting right founded in the common law: the right to obtain independent judicial review of a detention to ensure that no person is deprived of liberty by the Executive without a satisfactory basis in law and in fact.

The Founders considered that right essential. *See* Federalist No. 84 (Hamilton). They recognized that in times of stress the political branches might be tempted to restrict

the liberties of those most subject to the current public ire, and they adopted the Suspension Clause to protect the Great Writ from intrusion by the legislature except in the most extreme public emergencies.[14]

The Suspension Clause is a direct and explicit limit on the power of Congress. That is why the Framers placed it in Article I of the Constitution. It permits Congress to suspend the writ only in certain, narrowly defined circumstances, and no others. Unless those circumstances exist – and they clearly do not – Congress may not suspend the writ. That is the beginning and end of the inquiry. Congress may no more suspend the writ in the absence of "Rebellion" or "Invasion" consistently with Article I, Section 9, Clause 2 of the Constitution than it may pass a bill of attainder or ex-post facto law consistently with Article I, Section 9, Clause 3. It could not pass a bill of attainder with respect to a foreign national abroad any more than it could with respect to a U.S. citizen at home. It is simply without power to do so.

The Founders also made clear that they expected the courts to enforce these constitutional limits on Congress' authority and to declare void any legislative act in excess of those limits. As Alexander Hamilton explained:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the

[14] *See* Brief of Legal Historians as *Amici Curiae* in Support of Petitioners; Brief for *Amici Curiae* Coalition of Non-Government Organizations.

> reservations of particular rights or privileges would amount to nothing. . . .
>
> There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm that . . . men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

Federalist No. 78 (Hamilton); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Congress has authorized suspension of the Great Writ only four times, and each occurred during times of undisputed, and congressionally declared, rebellion or invasion.[15] In enacting the MCA, Congress did not even purport to find the constitutionally required rebellion or invasion. Thus, Congress has no power to suspend the writ.[16]

B. Petitioners' Right to Habeas Corpus Established by This Court in *Rasul* Falls Directly Within the Protections of the Suspension Clause.

This Court has not yet resolved whether the protections of the Suspension Clause encompass all of the evolutions the writ has undergone since 1789. The Court has emphasized, however, that, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301.

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[15] *See* William F. Duker, *A Constitutional History of Habeas Corpus* 149, 178 n.190 (1980).

[16] Like any litigants aggrieved by unauthorized congressional action, petitioners are entitled to raise this issue and challenge whether Congress has acted beyond the constitutional limits of its authority in depriving them of their right to habeas. *See INS v. Chadha*, 462 U.S. 919, 936-37 (1983).

The Court found in *Rasul* not only that these petitioners are entitled to the writ under statute, but also that they would have been entitled to it at common law as of 1789. The Court stated:

> Application of the habeas statute to persons detained at the [Guantanamo] base is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called "exempt jurisdictions," where ordinary writs did not run, and all other dominions under the sovereign's control. As Lord Mansfield wrote in 1759, even if a territory was "no part of the realm," there was "no doubt" as to the court's power to issue writs of habeas corpus if the territory was "under the subjection of the Crown."

542 U.S. at 481-82. The Court thus found that the writ of habeas corpus at common law applied to aliens detained outside the realm but in territories under the subjection of the Crown. The Court also noted that "[l]ater cases confirmed 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.'" *Id*. at 482.

Because the United States exercises "complete jurisdiction and control" over Guantanamo, petitioners detained there would have been entitled to petition for the writ as of 1789, and their right to do so falls squarely within the core protection of the Suspension Clause.[17]

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[17] Restricting the reach of the writ on the basis of rigid, formal notions of territorial sovereignty would be inconsistent with the essential purpose of the writ; to protect individuals, whether citizens or aliens, against arbitrary executive detention. *See St. Cyr*, 533 U.S. at 301 ("it is in that context that [the writ's] protections have been strongest."). As this Court has emphasized, habeas corpus "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its

C. These Petitioners, Who Have Been Detained by U.S. Officials for More than Five Years in Exclusive U.S. Custody and Within the "Territorial Jurisdiction" of the United States, are Entitled to Fundamental Constitutional Protections.

In addition, as prisoners held in U.S. custody at Guantanamo, an area within the complete jurisdiction and control of the United States, petitioners are entitled to fundamental constitutional protections, including the protections of the Suspension Clause and of due process.

1. Fundamental Constitutional Protections Apply to All Persons Within the "Territorial Jurisdiction" of the United States.

As the history on the Navy web site states: Guantanamo, "for all practical purposes, is American territory."[18] The Guantanamo lease differs significantly from other leases for U.S. military bases; it is the only one that continues indefinitely so long as the United States chooses to stay there.[19] As Justice Kennedy pointed out: "Guantanamo Bay is in every practical respect a United States territory . . . . [The Guantanamo] lease is no ordinary lease. Its term is indefinite and at the discretion of the United States . . . . From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring).

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grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones v. Cunningham*, 371 U.S. 236, 243 (1963). *See also* Brief of Legal Historians as *Amici Curiae* in Support of Petitioners; Brief for the Commonwealth Lawyers Association as *Amicus Curiae*.

[18] *The History of Guantanamo Bay*, *supra* note 6.

[19] *See* Lease of Lands for Coaling and Naval Stations, T.S. 418.

The Court held in *Rasul* that Guantanamo is not "extraterritorial." As an area under the "complete jurisdiction and control" of the United States, the Court found that Guantanamo is within U.S. "territorial jurisdiction." *Id.* at 480. Fundamental constitutional protections apply to "all persons within the territorial jurisdiction" of the United States. *See Yick Wo*, 118 U.S. at 369 (the Due Process Clause of the Fourteenth Amendment protects "all persons within the territorial jurisdiction" of the United States); *see also Plyler v. Doe*, 457 U.S. 202, 215 (1982); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2681-82 (2006). Because petitioners are within the "territorial jurisdiction" of the United States, they are entitled to fundamental constitutional protections.[20]

2. Fundamental Constitutional Protections Apply Wherever the Jurisdiction of the United States Extends.

As Justice Frankfurter pointed out fifty years ago, the notion that the Constitution operates only in lands over which the United States flag flies "has long since evaporated. Governmental action abroad is performed both under the authority and the restrictions of the Constitution . . . ." *Reid v. Covert*, 354 U.S. at 56 (Frankfurter, J., concurring). *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring) ("[T]he

[20] Holding these petitioners entitled to constitutional protection is thus entirely consistent with *Eisentrager*. To the extent that the Court in *Eisentrager* relied on territorial considerations, it placed greater weight on the "territorial jurisdiction" of the United States than on sovereignty. *See* 339 U.S. at 771 ("in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its *territorial jurisdiction* that gave the Judiciary the power to act") (emphasis added). In finding that Guantanamo is within the "territorial jurisdiction" of the United States, the Court in *Rasul* thus used the very words identified by *Eisentrager* as defining the scope of the geographic application of the Constitution.

Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic"). As Justice Harlan phrased it:

> The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions of the Constitution which do not *necessarily* apply in all circumstances in every foreign place. . . . [T]here is no rigid and abstract rule . . . .

Reid, 354 U.S. at 74 (Harlan, J., concurring). The adoption of just such a rigid rule by the D.C. Circuit – categorically denying constitutional protections to aliens outside sovereign U.S. territory – is, of course, directly contrary to that teaching.

Justice Harlan went on to explain that, depending on the particular locality, conditions and circumstances, adherence to specific constitutional guarantees abroad might prove to be "impractical and anomalous." *Id.* As Justice Frankfurter explained further: "The territorial cases . . . held that certain specific constitutional restrictions on the Government did not automatically apply . . . . [M]any of our laws and customs found an uncongenial soil because they ill accorded with the history and habits of [the local] people." *Id*. at 51 (Frankfurter, J., concurring).

That was never the case, however, with respect to "fundamental" rights. As Justice Frankfurter pointed out, quoting one of the earlier Insular Cases, "a fundamental right . . . goes wherever the jurisdiction of the United States extends . . . ." *Id.* at 51-52 (quoting *Dorr v. United States*, 195 U.S. at 148). The rights that petitioners assert here – to due process of law and independent review of the legality of their detentions – are "fundamental right[s]" that apply "wherever the jurisdiction of the United States extends." *Id*. *See Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922) ("The guaranties of certain fundamental personal rights declared in the Constitution, *as for instance that no person could be deprived of life, liberty or property without due*

process of law, had from the beginning full application in the Philippines and Porto Rico . . . .") (emphasis added).

3. Petitioners are Entitled to Fundamental Constitutional Protections Because the United States has Deprived Them of their Liberty.

In addition, petitioners are entitled to fundamental constitutional protections because they are being imprisoned by the United States. The U.S. government has forcibly taken, transported and jailed them against their will, deprived them of their liberty, and asserted exclusive control over them.[21] In doing so, the U.S. government must act in accordance with the authority granted to it by the Constitution and the limits on that authority imposed by the Constitution. No rigid rule exempts the government from its constitutional obligations when it imprisons people outside the sovereign borders of the United States.

No case is cited in the D.C. Circuit decision, has ever been cited by the government, or exists, for the proposition that where, as here, the U.S. government has forcibly taken, transported, and jailed aliens against their will, deprived them of their liberty, and asserted exclusive custodial authority over them, it is entitled to a blanket exemption from the Constitution simply because it is holding them outside U.S. sovereign territory. *Eisentrager* does not stand

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[21] In that regard, these cases differ from the Insular Cases discussed earlier. *See, e.g., Dorr v. United States*, 195 U.S. 138; *Balzac v. Porto Rico*, 258 U.S. 298. The question in those cases was the extent to which the Constitution applied in proceedings pending against the plaintiffs in the local courts of those territories, which had their own, different legal customs and traditions. The plaintiffs in those cases – unlike here – were not challenging U.S. government actions upon them. The issue before the Court was whether the plaintiffs were entitled to full U.S. constitutional protections in those proceedings because they happened to be residents of territories acquired by the United States. As discussed, the Court held that residents of these territories are entitled to "fundamental" constitutional protections.

for that proposition. The petitioners in that case had been convicted after trial before a duly constituted commission where they were represented by counsel, had the right to examine and rebut the evidence against them, cross examine witnesses and present evidence of their own. Indeed, six of the detainees charged in that case were acquitted. They received due process of law and never even challenged in this Court the fairness of the procedures under which they were tried. *Eisentrager* provides no support for the D.C. Circuit's holding that the U.S. government may avoid the obligation of providing due process and fundamental fairness to aliens under its exclusive custodial authority by acting outside U.S. sovereign territory.[22]

Recognizing that obligation will not hamstring our military or threaten our security. *See Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.") The process due an individual on or near a battlefield in the heat or immediate aftermath of battle is clearly different from the process due more than five years

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[22] The government and the D.C. Circuit have cited this Court's decision in *Verdugo-Urquidez,* 494 U.S. 259, to support this proposition, but its holding clearly does not. That case involved the application of the warrant requirement of the Fourth Amendment to a search in Mexico of the residence of a Mexican citizen. The search was authorized by Mexican officials, and the different traditions and institutions there made "adherence to the Fourth Amendment's warrant requirement impracticable and anomalous." *Id*. at 278 (Kennedy, J., concurring).

Guantanamo, of course, is not a foreign jurisdiction like Mexico. It is under the complete jurisdiction and control of the United States; only U.S. laws apply and only U.S. courts have jurisdiction there. Recognition of fundamental rights for Guantanamo detainees therefore would not conflict with or disrupt the legal systems of any foreign country. But failure to afford fundamental constitutional protections to detainees there would leave Guantanamo a legal black hole – a land without law – where the executive can rule arbitrarily and absolutely. Such a result would be "anomalous."

later, thousands of miles from any battlefield, in a secure and safe location, such as Guantanamo.

The experience of other nations facing ongoing threats of terrorism demonstrates that judicial review of detentions can be exercised consistently with national security. Perhaps more than any other nation, the State of Israel has faced terrorism, both within and outside its territorial sovereignty, but its courts have always remained open to challenges to the legality of national security measures alleged to infringe fundamental rights. Although the Israel High Court of Justice has ruled that "the court will not take any stance on the manner of conducting the combat,"[23] the court has ruled on various petitions challenging detentions of suspected terrorists, and struck down an order issued in the midst of a terrorist crisis that allowed suspected terrorists to be detained for up to 30 days without access to an impartial judicial official.[24]

The court recognized that "there is room to postpone . . . the judicial intervention until after detainees are taken out of the battlefield to a place where the initial investigation and judicial intervention can be carried out properly."[25] Once that happened, however, access to a judicial official cannot be delayed. The court held that allowing detention for 30 days without access to judicial authority "unlawfully infringes upon the judge's authority, thus infringing upon the detainee's liberty, which the international and Israeli legal frameworks are intended to protect."[26]

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[23] *Barakeh v. Minister of Defense*, HCJ 3114/02, 56(3) P.D. 11, 16 (Israel High Ct. of Justice 2002).

[24] *Marab v. IDF Commander in the West Bank*, HCJ 3239/02, slip op. at 15 (Israel High Ct. of Justice 2003).

[25] *Marab*, slip op. at 20.

[26] *Id*. at 23. In 2002, the President of the Israel Supreme Court emphasized the critical role that judges play in fighting terrorism:

* * *

These petitioners, detained by the United States in its exclusive custody for more than five years far from any battlefield and in a place that is for all practical purposes American territory, must be accorded fundamental constitutional protections. They are entitled to due process of law, and their right to habeas corpus established by this Court in *Rasul* is protected by the Suspension Clause.

III. THE DTA PROVIDES NO ADEQUATE OR EFFECTIVE SUBSTITUTE FOR HABEAS.

The Suspension Clause brooks no compromise. There is no rebellion or invasion and Congress is therefore without authority to suspend the writ. It may provide a substitute remedy, but only if the substitute is "commensurate with habeas corpus relief" and is "neither inadequate nor ineffective to test the legality" of the detention. *Swain v. Pressley*, 430 U.S. at 381, 384.

The substitute Congress has provided here falls well short of meeting that test. It is not commensurate with habeas and was not intended to be.

A. Habeas Provides a "Swift and Imperative Remedy," Guaranteeing Petitioners in Executive Detention a Searching Judicial Review into the Legal and Factual Bases for their Detentions.

As Justice Jackson explained, the writ of habeas corpus was the fundamental protection developed by the English common law courts to protect the right secured by the

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> We, the judges in modern democracies, are responsible for protecting democracies both from terrorism and from the means that the state wants to use to fight terrorism . . . .
>
> The power of society to stand up against its enemies is based on its recognition that it is fighting for values that deserve protection. The rule of law is one of these values.

Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 149-51 (2002).

Magna Carta to be free from unwarranted executive restraint. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218-19 (1953) (Jackson, J., dissenting). Chief Justice Marshall explained: "the great object of [the writ] is the liberation of those who may be imprisoned without sufficient cause." *Ex parte Watkins*, 28 U.S. 193, 202 (1830). The writ has always been interpreted broadly to give courts flexibility to accomplish its great purpose and "to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969).

This Court has emphasized that, "[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." *St. Cyr*, 533 U.S. at 301. In cases such as these of pure executive detention, where the petitioners are not being detained following judicial trial and have no prospect of a prompt judicial trial, a habeas court at common law would itself conduct a searching and plenary examination into the basis for the detention. The government would be required to file a return specifying its asserted legal and factual justifications for the detention, but the court would not simply accept the government's return as true. Rather, the petitioner would be entitled to controvert the return and to present evidence. The whole purpose of the procedure was to require the government to come forward and present its factual and legal grounds for the detention so that the prisoner could confront and have the opportunity to refute those grounds before a neutral decision maker. In cases of executive detention, the court would review the evidence, hold a hearing if necessary and resolve disputed facts. *See* Brief of Legal Historians as *Amici Curiae* (describing the factual review undertaken by common law habeas courts); *Harris v. Nelson*, 394 U.S. at 298 ("Petitioners in habeas corpus proceedings . . . are entitled to careful consideration and

plenary processing of their claims including full opportunity for the presentation of the relevant facts.").

At common law, if the Executive had undertaken some prior process of its own to justify the detention, such as the CSRT process, a habeas court could not be bound by that process, or restricted simply to reviewing whether the executive had followed its own rules in conducting the process. Indeed, the Habeas Corpus Act of 1640 was passed by the English Parliament largely to prevent judicial deference to internal processes employed by the King and his Council – including the infamous Star Chamber – and to require independent judicial review of the factual and legal bases for the detention so that the court itself could "examine and determine whether the cause of commitment . . . be just and legal[] or not." 16 Car. 1 (1640). *See* R. J. Sharpe, *The Law of Habeas Corpus* 7-16 (2d ed. 1989). As Justice Holmes stated:

> [H]abeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from outside, not in subordination to the [prior] proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell.

Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). *See Moore v. Dempsey*, 261 U.S. 86, 92 (1923).

In conducting its review, the court would disregard any evidence obtained through torture or coercion. At common law, there was a clear prohibition against the use of evidence obtained by torture, not simply because of its "inherent unreliability" but also because "it degraded all those who lent themselves to the practice." *A. v. Secretary of State*, [2006] A.C. 221, ¶ 11, ¶ 51 (H.L.) (the "common law has regarded torture and its fruits with abhorrence for over 500 years"). *See Jackson v. Denno*, 378 U.S. 368, 385-86 (1964).

Particularly in cases of executive detention, habeas is also supposed to provide speedy relief, so that innocent people are not left rotting in jail at the whim of the executive

without trial or judicial review. This Court has emphasized "the need to preserve the writ of habeas corpus as a '*swift and imperative remedy* in all cases of illegal restraint or confinement,'" *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490 (1973) (emphasis added) (citing *Secretary of State for Home Affairs v. O'Brien*, [1923] A.C. 603, 609 (H.L.) (habeas is "perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy")).

Finally, there is but one remedy in habeas if the executive is unable to justify the detention: "an order releasing the petitioner." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). *See Ex parte Watkins*, 28 U.S. at 202 ("the great object of [the writ] is the liberation of those . . . imprisoned without sufficient cause."); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 136 (1807) (when detention has not been justified a habeas court "can only direct [the prisoner] to be discharged").

B. Congress Intended to Deprive Petitioners of a Review Commensurate with Habeas.

As discussed in detail below, the limited judicial review permitted under the DTA does not provide petitioners a remedy that is even remotely equivalent to the searching judicial review that would be available in habeas. In fact, that was Congress' purpose; it had no intention of providing petitioners a review commensurate with habeas.

This case differs markedly in that regard from the earlier cases of *Swain v. Pressley*, 430 U.S. 372; *Hill v. United States*, 368 U.S. 424 (1962); and *United States v. Hayman*, 342 U.S. 205 (1952). In upholding the substitute procedures provided by Congress in those cases, the Court placed great weight on Congress' intent *not* to impinge on the petitioners' full rights to pursue habeas relief. It found that Congress' purpose was to provide a remedy "exactly commensurate" with habeas, *Hill*, 368 U.S. at 427, and that "[n]owhere" in the legislative history was there an indication of "any

purpose to impinge upon prisoners' [habeas] rights . . . ." *Hayman*, 342 U.S. at 217, 219.[27]

That is certainly not the case here. As Senator Cornyn said during the debates on the MCA, the purpose of the legislation was to replace the habeas "litigation instigated by *Rasul v. Bush* with a narrow D.C. Circuit-only review of the [CSRT] hearings." 152 Cong. Rec. S10403 (daily ed. Sept. 28, 2006). As Senator Kyl, another sponsor of the legislation, explained: "It is not for the courts to decide if someone is an enemy combatant . . . . The only thing the DTA asks the courts to do is check that the record of the CSRT hearings reflect that the military *has used its own rules.*" 152 Cong. Rec. S10271 (daily ed. Sept. 27, 2006) (Sen. Kyl) (emphasis added).

In other words, Congress had no intention of providing petitioners a remedy commensurate with habeas. The entire purpose of the legislation was to deprive petitioners of habeas or anything remotely resembling it. Congress accomplished that purpose and, in doing so, violated the Suspension Clause.

C. Rather than the Plenary Review Required in Habeas, the DTA Allows Only a Limited Appellate Review of an Existing Record that is Inherently Incomplete, Inadequate and Corrupt.

The scope of the review permitted under the DTA is plainly not commensurate with habeas. Rather than the plenary review conducted by trial courts in habeas, the DTA restricts the D.C. Circuit to conducting an appellate review of existing evidence developed under procedures that deprived detainees of the most basic rights to confront the accusations against them. It precludes the court from accepting and considering new evidence and limits it to

[27] Congress, in enacting the laws at issue in those cases, also included express "savings clauses" providing that traditional habeas relief remained available if the substitute provisions proved "inadequate" or "ineffective." Congress put no such savings clause in the MCA or DTA.

considering, on the basis of existing evidence before the government, whether the CSRT determination "was consistent with the standards and procedures specified by the Secretary of Defense"[28] – in other words, as Senator Kyl said, whether "the record of the CSRT hearings reflect that the military has used its own rules." 152 Cong. Rec. S10271.

Congress placed the responsibility for conducting the review in the D.C. Circuit rather than the district court to ensure that it would be an appellate review of the existing record. *See* 152 Cong. Rec. S10403 (daily ed. Sept. 28, 2006) (the MCA authorizes limited DTA review "by design" because "[c]ourts of appeals do not hold evidentiary hearings or otherwise take in evidence outside of the administrative record") (remarks of Sen. Cornyn); 152 Cong. Rec. S10268 (daily ed. Sept. 27, 2006) ("the DTA does not allow re-examination of the facts . . . and it limits the review to the administrative record.") (remarks of Sen. Kyl).[29]

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[28] App. 135-36. Subsection (C)(ii) also authorizes the D.C. Circuit to consider "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures . . . is consistent with the Constitution and laws of the United States." Most importantly, subsection (C)(ii) does not allow a plenary, trial-level review of the factual basis for the petitioner's detention, as would habeas review under 28 U.S.C. §2241 and the common law. Subsection (C)(ii) would allow the court to determine whether the CSRT procedures were consistent with the Constitution, if the Constitution applies. But, if this Court agrees that the Constitution applies, then it is clear, as Judge Green held, that the CSRT procedures violate the most basic requirements of due process. *See* App. 62, 103, 111-12. In that case, the review permitted under the DTA, of whether the CSRTs had followed their constitutionally deficient procedures, would clearly not be an adequate substitute for habeas, and habeas would be required to test the legality of the detentions.

[29] As the government has put it: "This language evokes [the D.C. Circuit's] familiar function of reviewing a final administrative decision based upon the record before the agency" and "underscores the fact that Congress intended [the D.C. Circuit] to assess the CSRT record rather than attempt to create a new factual record based on discovery." Corrected Brief for Respondent Addressing Pending Preliminary Motions

There is a dispute over the scope of the "record" in a DTA case.[30] But however the issue is eventually resolved, it is clear that a plenary factual hearing of the type conducted by trial courts in habeas proceedings is not allowed, and new facts and evidence, even of innocence and torture, are not permitted. DTA review is limited to an appellate review by the D.C. Circuit of existing evidence already in the government's possession.[31]

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at 51-52, *Bismullah v. Gates* and *Parhat v. Gates*, Nos. 06-1197, 06-1397 (D.C. Cir. Apr. 10, 2007).

[30] In a recent order in *Bismullah v. Gates*, Nos. 06-1197, 06-1397, 2007 WL 2067938, at *13 (D.C. Cir. July 20, 2007), the D.C. Circuit ruled that the "record" consists of "all '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.'" It rejected the government's contention that the record is limited to the portion of that information which a military agent selected for presentation to the CSRT. However, on August 22, 2007, the government asked the D.C. Circuit not to order production of the record until November 12, 2007, while it considers whether to seek rehearing, or until 60 days after the D.C. Circuit disposes of a motion for rehearing, whichever is later. It is evidently the government's view that, in contrast to habeas, under the DTA the Executive rather than the Judiciary decides what the courts should know about the cases before them. *See Bracy v. Gramley*, 520 U.S. 899, 903 & n.3, 909 (1997); *Harris v. Nelson*, 394 U.S. at 300.

[31] The government has claimed that, under a new DoD instruction (OARDECINST 5421.1, May 7, 2007), petitioners may submit new evidence regarding their status as enemy combatants. Brief for the Respondents in Opposition to Petition for Certiorari at 17, *Boumediene v. Bush* and *Al Odah v. United States*, Nos. 06-1195, 06-1196 (U.S. Mar. 21, 2007) However, the new instruction, which purportedly implements DTA § 1005(a)(3) requiring CSRT procedures to "provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee," allows petitioners to submit new evidence *only* to DoD, which has "unreviewable discretion" to decide whether to convene a CSRT to reconsider a detainee's status on the basis of new evidence. Critically, neither the new instruction nor DTA § 1005(a)(3) permits petitioners to present *any* new evidence to the court, or permits the court to consider it. The D.C. Circuit may consider only existing evidence already before the government.

Because the CSRT procedures themselves were so flawed, the record produced as a result of those procedures is flawed as well, and inherently incomplete and corrupt. By limiting judicial review to an appellate review by the D.C. Circuit of the existing record, the DTA locks those flaws in place forever.

1. The Record Is Incomplete Because, Without Counsel or Notice of the Accusations Against Them, Petitioners Could Not Introduce Evidence to Establish Their Innocence.

At their CSRTs, the petitioners had the burden of proving themselves innocent of charges that, for the most part, they could not see, let alone examine or rebut, made by anonymous sources they could not confront. The DTA does not correct those basic problems; it perpetuates them.

Under the CSRT rules, detainees were not shown or given an opportunity to rebut any information the government considered classified. As Judge Green found, "it appears that all of the CSRT's decisions substantially relied upon classified evidence." App. 103. In fact, the record shows that, in every case, the CSRTs relied upon classified evidence that was withheld from the detainees, and in many cases, this secret evidence provided the only justification for the CSRT's decision.[32]

The unfairness of this procedure is apparent even from the face of the unclassified CSRT records. For instance, Mustafa Ait Idir was deemed an enemy combatant based, in part, on the allegation that while he lived in Bosnia he "associated with a known Al Qaeda operative." *See* App. 103. Mr. Ait Idir pleaded for the CSRT panel to give him the name of this alleged associate or the basis for the

[32] *See* S.A. 1315-22; 1335-42; 1360-64; 1373-82; 1661-64; 1694-1700; 1760-63; 1772-78; 1806-14; 1850-52; *see also* Denbeaux Report, *supra* note 2, at 37-39.

allegation that this unknown individual was an al Qaeda operative. The panel refused; the information was classified. App. 104-06. Mr. Ait Idir could only attempt to defend himself against the accusation that *someone* he associated with was an al Qaeda operative, but of course it is not possible to prove that *everyone* with whom one has ever associated is unconnected to al Qaeda. As Mr. Ait Idir stated, "I do not know if this person is Bosnian, Indian or whatever. If you tell me the name, then I can respond and defend myself against this accusation." App. 104.

Likewise, Abdullah Al Kandari was designated an enemy combatant principally because, more than a year after he was brought to Guantanamo and more than a year after this suit was brought, an "alias" of his name was allegedly found on a list of names on a document saved on a computer hard drive allegedly "associated with a senior al Qaeda member." S.A. 1360. Mr. Al Kandari stated that he is not known by any alias, and asked what name appeared on the list. He was not allowed to know; the information was classified. J.A. 68. The name of the "senior al Qaeda member" was likewise classified, as was the place where the hard drive was found. *Id*. Mr. Al Kandari was thus left to defend himself against the accusation that an unknown alias of his appeared on a list on a computer found somewhere in the world associated with someone. It is impossible to rebut such a charge, and Mr. Al Kandari said so: "The problem is the secret information, I can't defend myself." *Id*.

Because the CSRTs relied on classified information in every case, these examples can be readily multiplied.[33] They underscore the impossibility of defending against allegations based on secret evidence because the accused, "like Joseph K. in *The Trial* – can prevail . . . only if he can rebut the undisclosed evidence against him . . . . It is difficult to imagine how even someone innocent of all wrongdoing

[33] *See generally* Brief for *Amici Curiae* Coalition of Non-Government Organizations.

could meet such a burden." *Rafeedie v. INS*, 880 F.2d 506, 516 (D.C. Cir. 1989).[34]

The DTA simply perpetuates the problem. Because the detainees were not notified of the accusations against them, they could not put evidence into the record to rebut those accusations. And the record is now closed. The DTA locks it in place, and prevents them from ever having the opportunity to meet and rebut the charges against them.[35]

Not only were the detainees not informed of the key accusations against them, they were also not allowed lawyers, something they would clearly be entitled to in habeas. And they were denied counsel even though each of the petitioners was already represented by counsel in these habeas cases when their CSRTs took place. Instead of a lawyer, the detainees were assigned a "personal representative" who was instructed to tell the detainee: "I am neither a lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing.

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[34] This Court has long held that a person may not be deprived of liberty based on such secret evidence:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental actions seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

Greene v. McElroy, 360 U.S. 474, 496 (1959).

[35] The courts of appeals consistently have held that, despite *Hayman*, 28 U.S.C. § 2255 is *not* an adequate or effective substitute for habeas in circumstances where it prevents prisoners from presenting evidence of actual innocence to the courts, such as where the prisoner is making a successive motion, and to preserve section 2255 against Suspension Clause attack, the courts have invoked its "savings clause" and allowed prisoners to make those claims in applications for habeas corpus under 28 U.S.C. § 2241. *See, e.g. In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002); *Reyes-Requena v. United States*, 243 F.3d 893, 900-06 (5th Cir. 2001); *In re Davenport*, 147 F.3d 605, 608-612 (7th Cir. 1998).

None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing." App. 172.

This Court has long recognized the critical importance of counsel in assisting one accused of wrongdoing: "He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell v. Alabama*, 287 U.S. 45, 69 (1932).[36]

Assistance of counsel was particularly important here because the detainees were isolated at Guantanamo with virtually no ability to communicate with the outside world. In these circumstances, assistance of counsel was essential to test the allegations and gather evidence to disprove them. For instance, one of the principal reasons for detaining Murat Kurnaz as an enemy combatant was that he was a friend of Selcuk Bilgin, who was "alleged to have been a suicide bomber." App. 107. Detained at Guantanamo, without counsel or access to the outside world, Mr. Kurnaz could only express shock at that allegation. He did not know and could not find out that that his friend, Mr. Bilgin, far from being a suicide bomber, was alive and well and living peacefully and without criminal suspicion in their hometown of Bremen, Germany.[37] That is something his counsel could have found out and proved in short order, had he been allowed counsel. Because he was not, the allegation that his friend was a suicide bomber was accepted by the CSRT as true, as it would be on review under the DTA, even though it was objectively false. Thus, even when the detainees were informed of the accusations against them, without the

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[36] *See* Brief of *Amicus Curiae* the Association of the Bar of the City of New York in Support of Petitioners.

[37] Carol Leonnig, *Panel Ignored Evidence on Detainee: U.S. Intelligence, German Authorities Found No Ties to Terrorists*, WASH. POST, March 27, 2005, at A01.

assistance of counsel, they were deprived of a meaningful opportunity to rebut the accusations and to develop and present the evidence needed to establish their innocence.

Victims of mistaken identity – a serious risk in this unconventional conflict, *see Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality opinion) – also were helpless without the assistance of counsel at their CSRT hearings. For example, one detainee was seized from his home by Pakistani officers, shipped to Guantanamo and accused at his CSRT of being Abdur Rahman Zahid, a former Taliban deputy foreign minister. The detainee protested that his name is Abdur *Sayed* Rahman, not Abdur *Rahman* Zahid, and that "I am only a chicken farmer in Pakistan."[38] Pleading the obvious, however, Mr. Rahman stated: "I have no proof because I am here at Guantanamo." *Id*. Unfortunately for Mr. Rahman, his counsel would be precluded now by the narrow review provisions of the DTA from presenting evidence of his client's true identity to the court; a preclusion unimaginable under habeas review.

As mentioned, in the *Bismullah* case, the D.C. Circuit recently ruled that, for purposes of DTA review, the "record" consists of "all 'reasonably available information in the possession of the U.S. Government . . . .'" Although that ruling is apparently of concern to the government, it is of little solace to detainees. They are not permitted to introduce new evidence to the court under the statute. And they had no practical way of introducing evidence earlier rebutting charges they were not informed of, or which they could not gather evidence to disprove while isolated in Guantanamo without counsel. Because they were uninformed and unrepresented – in accordance with the CSRT rules – the

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[38] Department of Defense, Reprocessed Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) Documents, (Mar. 3, 2006) [hereinafter "DOD Documents"], Set 3 at 00272-94 (Summarized Sworn Detainee Statement for Abdur Sayed Rahman, ISN No. 581), http://www.defenselink.mil/pubs/foi/detainees/csrt/ index.html.

record is necessarily incomplete; it lacks the exculpatory evidence that they could have introduced had they been informed and represented.

The government has argued that review under the DTA is adequate because it allows the D.C. Circuit to determine if the CSRT decision is supported by a preponderance of the evidence. But as Judge Rogers pointed out, "assessing whether the government has more evidence in its favor than the detainee is hardly the proper antidote" in these circumstances where the record is inherently incomplete. App. 43.

2. The Record is Replete With and Corrupted By Evidence Obtained Through Coercion.

As Judges Rogers and Green both pointed out, the CSRT procedures allow continued detentions to be justified on the basis of evidence resulting from torture – something that would clearly be prohibited in habeas proceedings and which the common law "has regarded . . . with abhorrence for over 500 years." *A. v. Sec'y of State*, [2006] 2 A.C. 221, ¶ 51 (H.L.) (appeal taken from Eng.) (Bingham, L.).

Judge Green described the case of Mamdouh Habib, who alleged that he had been sent by the United States to Egypt for interrogation where he was subjected to severe beatings, locked in handcuffs in a room that gradually filled with water to a level just below his chin as he stood for hours on the tips of his toes, and that he was suspended from a wall with his feet resting on an electrified cylindrical drum. Mr. Habib alleged that, while undergoing this treatment, he admitted to doing many things he had never done. App. 112-13. Without resolving the accuracy of Mr. Habib's allegations, the CSRT relied on the statements that he made while in Egypt and concluded that he was an enemy combatant. App. 111-13.

Interrogation techniques officially approved for use at Guantanamo included isolation for up to thirty days; twenty-hour interrogations; extreme and prolonged stress positions;

sleep deprivation; sensory assault; deprivation of clothing; hooding; and use of dogs.[39] Judge Green, in her opinion, refers to a number of cases of alleged abuse there and quotes from a memorandum by an FBI agent, produced in response to a Freedom of Information Act request, summarizing his observations of interrogation methods used at Guantanamo:

> On a couple of occassions [sic], I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defacated [sic] on themselves, and had been left there for 18-24 hours or more. On one occassion [sic], the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. When I asked the MP's what was going on, I was told that interrogators from the day prior had ordered this treatment, and the detainee was not to be moved. On another occassion [sic], the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconcious [sic] on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night. On another occassion [sic], not only was the temperature unbearably hot, but extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor.

App. 112-14.

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[39] *See* Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism (Apr. 4, 2003), *reprinted in The Torture Papers: The Road to Abu Ghraib*at 340-43 (Karen J. Greenberg and Joshua L. Dratel, eds. 2005); Memorandum for Commander, Joint Task Force 170 from Lt. Col. Diane E. Beaver (Oct. 11, 2002), *reprinted in The Torture Papers*, *supra*, at 234.

Other memoranda from FBI agents also complained about the "torture techniques" and "extreme interrogation techniques" employed at Guantanamo, and reported, among other incidents: (1) a female interrogator grabbing the genitals of a detainee and bending his thumbs back; (2) a detainee gagged with his head wrapped with duct tape; (3) the use of dogs to intimidate detainees; and (4) a detainee left in isolation for three months in a cell constantly flooded with bright light who afterward showed signs of "extreme psychological trauma." *See* J.A. 80-90.

More information of brutal treatment at Guantanamo has come to light since those memoranda were disclosed. A government interrogation log obtained and published by *Time* magazine, for example, reveals in gruesome detail how one detainee, Mohammed al Qahtani, was subjected to gross and humiliating physical and psychological abuse over extended periods of time.[40] Significantly, according to the government, that abuse resulted in statements by Mr. al Qahtani implicating not only himself, but 30 other detainees at Guantanamo as well.[41] Under the CSRT procedures, none of these men was allowed to know the identity of his accuser, or to question the credibility of those accusations.

In some cases, DTA review might be able to identify and possibly exclude accusations made by certain individuals, such as Mr. al Qahtani, whom everyone now knows were subjected to coercive techniques. But in most cases, the record will either not identify an accuser or not reveal whether accusations were the result of coercion. There is no way for the court of appeals to know from the cold record how long the accuser had been kept awake before he made his statements, what treatment he had been subjected to or

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[40] *See* Interrogation Log: Detainee 063, *available at* http://www.time.com/time/2006/log/log.pdf.

[41] U.S. Dep't of Defense, Press Release No. 592-05, *Guantanamo provides valuable intelligence information* (June 12, 2005), *at* http://www.defenselink.mil/releases/release.aspx?releaseid=8583.

what threats or promises had been made to him in extracting information. Under the CSRT procedures and the standards applied under the DTA, a rebuttable presumption will apply that all these accusations are true, and there will be no way to rebut them.

The DTA required the Secretary of Defense to adopt new rules in 2006, requiring future CSRTs to determine, to the extent practicable, whether any statements were obtained as a result of coercion. App. 133.[42] But those rules only came into effect *after* these petitioners' CSRTs were held. There was no requirement then to determine whether any of the accusations against them were derived through torture or coercion, and there is no way of knowing that now. The record therefore was developed without any of the safeguards of reliability and integrity that are built into the records of lower court decisions and administrative proceedings normally reviewed on appeal. The record here is replete with evidence obtained through coercion and is therefore inherently corrupt and unreliable.

There is another problem. Even if a CSRT panel did identify evidence as derived from torture, there was (and is) no requirement that it disregard that evidence. To the contrary, a panel even now is authorized by the statute, and under the standards and procedures specified by the Secretary, to rely on such statements if it finds them "probative." App. 133. The CSRT rules therefore expressly permit what habeas and the common law clearly prohibit: detention based upon coerced evidence.

[42] In enacting the DTA, Congress therefore acknowledged that the "standards and procedures specified by the Secretary of Defense" for the prior CSRTs, which were applied to these petitioners, were inadequate.

3. The Entire CSRT Process was Infected with Bias Resulting from Command Influence.

For more than two and a half years prior to the CSRTs, the President, the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, and various high ranking officers had uniformly and repeatedly declared that the Guantanamo detainees were all "dangerous enemy combatants" who were "picked up on the battlefield" while "fighting American forces."[43] In its brief to this Court three and a half years ago, the government emphasized that both the commander of the U.S. Southern Command and the Secretary of Defense had personally reviewed and approved the classification of each of the Guantanamo detainees as an enemy combatant.[44]

The CSRTs, made up of panels of mid-level officers, were then convened to review whether the decisions already made "through multiple levels of review" by their superiors were correct. They were given no institutional protections of independence. Unlike military judges and panel members in courts-martial under the Uniform Code of Military Justice, and even panel members in military commissions under the MCA, members of CSRTs have no protection against unlawful command influence. *See, e.g.*, 10 U.S.C. § 837 (prohibiting unlawful command influence on court-martial judges and panel members); 10 U.S.C. § 949b (prohibiting unlawful command influence on military commission judges and panel members).[45]

For officers on the CSRT panels to conclude that a detainee was improperly classified as an enemy combatant,

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[43] Taylor, *supra* note 10, at 13.

[44] Brief for Respondents at 7, *Rasul v. Bush* and *Al Odah v. United States*, Nos. 03-334, 03-343 (U.S. Mar. 2004).

[45] The U.S. Court of Military Appeals correctly described command influence as the "mortal enemy of military justice." *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). *See also* Brief *Amicus Curiae* of Retired Military Officers.

they would have to conclude that all their superiors, including the commander of the U.S. Southern Command, the Secretary of Defense, and the President, were wrong. Without calling into question the good faith and integrity of the military officers who served on the CSRTs, it is not reasonable to expect that they could be totally disinterested in reviewing the longstanding decisions of their superiors.[46]

Lieutenant Colonel Stephen Abraham, a long-time military intelligence officer who assisted in the CSRT process, described his experience as a member of a CSRT panel: "When our panel questioned the evidence, we were told to presume it to be true. When we found no evidence to support an enemy-combatant determination, we were told to leave the hearings open. When we unanimously held the detainee not to be an enemy-combatant, we were told to reconsider. And ultimately, when we did not alter our course . . . a new panel was selected that reached a different result."[47]

This experience was by no means unique. For example, a CSRT panel concluded that Ali Mohammed, a Chinese Uighur was not an enemy combatant. Other panels concluded that 12 identically situated Uighurs were. Defense Department officials expressed concern that "[i]nconsistencies will not cast a favorable light on the

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[46] As this Court has observed:

> [T]he requirement of due process of law . . . is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required . . . or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.

Tumey v. Ohio, 273 U.S. 510, 532 (1927). *See Connally v. Georgia*, 429 U.S. 245 (1977).

[47] Testimony of Stephen Abraham, Lt. Colonel, U.S. Army Reserve, before the House Armed Services Committee (July 26, 2007).

CSRT process or the work done by OARDEC," and directed that Mr. Ali's classification be reconsidered. Petition for Original Writ of Habeas Corpus at 7-8, *In re Ali*, No. 06M73 (U.S. Feb. 12, 2007). A new panel was convened and classified Mr. Ali as an enemy combatant, notwithstanding the first tribunal's conclusions, and the fact that years before military officials had determined he "was not fighting for the Taliban or Al Qaida" and "does not represent a threat to the United States nor its interests." *Id*. at 6.

Abdulla Mohammed Kahn was declared an enemy combatant only after a third panel reversed the first two CSRTs proceedings that cleared him. Unclassified CSRT Record at 2-6 & 9-14, *Kahn v. Bush*, No. 05-1001 (D.D.C. Oct. 10, 2006). Panels were also held open and repeatedly reconvened until they reached the conclusion that the detainees were enemy combatants. *See*, *e.g.*, J.A. 73-75 (El-Banna) (CSRT reconvened three times before reaching enemy combatant finding over personal representative's objection); Unclassified Pages from the CSRT Administrative Record for Hammad Memet at 2 n. 1, *Parhat v. Gates*, No. 06-1197 (D.C. Cir. May 8, 2007) (applying same procedure).

Colonel Abraham summarized his experience with the CSRT process:

> What I expected to see was a fundamentally fair process in which we were charged to seek the truth, free from command influence. In reality, command influence determined not only the lightning fast pace of the 500-plus proceedings, but in large part, the outcome – little more than a validation of prior determinations that the detainees at Guantanamo were enemy-combatants, and . . . presumed to be terrorists who could be detained indefinitely. . . .
>
> The process of which I was a part did not discover the truth but ratified conclusions made long before my

> assignment. Those conclusions are entitled to no deference . . . .[48]

This problem of inherent bias – conscious or not – by the finders of fact at the adjudication level has infected and corrupted the entire CSRT process. That problem cannot be fixed now by a neutral, second-level review at the appellate level. *See Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972) ("Petitioner is entitled to a neutral and detached judge in the first instance"). What petitioners are entitled to now, after more than five and a half years in jail, is habeas review by the district court of the legality of their detentions.

D. DTA Review Is Neither Swift Nor Imperative.

This Court has cautioned that, if an individual in executive detention "were subject to any substantial procedural hurdles which made his remedy . . . less swift and imperative than federal habeas corpus, the gravest constitutional doubts would be engendered." *Sanders v. United States*, 373 U.S. 1, 14 (1963). There is no doubt that the DTA remedy is both less "swift" and less "imperative" than habeas.

Since the DTA went into effect at the end of 2005, not a single hearing on the merits has yet been held in any of the cases filed under the DTA.[49] Indeed, the record has not even been produced in any DTA case, and what constitutes "the record" is still under dispute, as are the terms of the protective order governing counsel access to the detainees to

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[48] *Id*.

[49] In fact, the government has urged the D.C. Circuit to take the DTA cases in "stages," and effectively stay all but the five first-filed cases. *See, e.g.*, Opposition to Motion for Production of Information and Other Procedural Relief at 3, *Al-Haag v. Gates*, No. 07-1165 (D.C. Cir. Aug. 6, 2007). This suggestion, if accepted, would keep over a hundred DTA petitioners waiting in prison, possibly for years, before the D.C. Circuit would consider their clearly ripe claims.

pursue DTA claims.[50] Potential rehearings and remands portend further extensive delays.[51] In the meantime, in the year and a half since Congress enacted the DTA eliminating their habeas rights, according to press reports, four detainees have committed suicide.

The DTA is also not imperative. According to the government, the statute does not authorize the D.C. Circuit to order the release of any detainee, even if it finds no factual or legal basis for the detentions; instead, the Court may only order further remands for further CSRTs, which could end up in an endless cycle of remands without release, the single imperative remedy mandated by habeas. *See Bollman*, 8 U.S. (4 Cranch) at 136.

E. The MCA Does Not Allow a Judicial Officer to Make an Unfettered Determination of the Legal Sufficiency of the Detentions.

Under the DTA, once a CSRT determines that a detainee is properly detained as an enemy combatant, judicial review

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[50] The government has not complied with the D.C. Circuit's July 30, 2007 order requiring it to produce the "record on review," as defined in *Bismullah*, 2007 WL 2067938 at *1. The government indicated that it would provide petitioners' counsel with certain information already submitted to the court in May 2007, but only if the petitioners acquiesce to government-proposed changes to the court's July 30, 2007 protective order. Petitioners' Emergency Motion For Entry of Scheduling Order at 4 n.2 & Ex. 8, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Aug. 15, 2007).

[51] For example, in *Paracha v. Gates*, No. 06-1038 (D.C. Cir.), the first DTA case filed, the government is seeking a delay in producing the record, stating that it may move for rehearing of *Bismullah* and that a "clarification in *Bismullah* could markedly alter the scope of the record in this case." Motion for Temporary Stay of Order Requiring Respondent to File Revised Certified Index at 6, *Paracha v. Gates*, No. 06-1038 (D.C. Cir. Aug. 20, 2007). The government also stated that it will take an extensive amount of time to prepare the record because the "material that is being reviewed [by respondents] – which is for the most part highly sensitive intelligence information – was never before reviewed in anticipation that it might be filed in court or turned over to private civilian counsel." *Id*. at 8.

is limited to a decision of whether the determination was "consistent with the standards and procedures specified by the Secretary of Defense" and whether the use of those standards and procedures "is consistent with the Constitution and laws of the United States." App. 135-36. The DTA, as enforced by the MCA, thereby constricts judicial review of the Executive's justification for detaining petitioners (in this case, that they are "enemy combatants") in a manner antithetical to common law habeas.

The rule of decision applied by a judge adjudicating a common law habeas petition was drawn from whatever legal sources the judge determined to be applicable, regardless of the statutes, regulations, or other legal standards the detaining authority proposed by way of self-justification. *See, e.g.*, *Goldswain's Case*, 96 Eng. Rep. 711 (C.P. 1778) (rejecting Admiralty's contention that legal sufficiency of bargeman's detention should be determined solely by reference to the statute authorizing impressment); *Sommersett v. Stewart*, 98 Eng. Rep. 499 (K.B. 1772) (rejecting slave owner's contention that legal sufficiency of slave's detention should be determined solely by reference to the slavery laws of Virginia). Common law judges would have summarily rejected the proposition that the sole applicable standard for determining the legal sufficiency of Executive detention was the edict of the Executive itself, even if the edict were lawful.[52] That notion would gut the

[52] The Executive's "standards" for adjudicating petitioners' detentions are based on Deputy Secretary Wolfowitz's definition of "enemy combatant," which has no precedent in U.S. statutes or case law and is contrary to longstanding principles of the laws of war as they have been interpreted and applied by the United States. *See, e.g.*, AUMF, App. 130-31; *Hamdi*, 542 U.S. at 519 (plurality opinion); *Ex parte Quirin*, 317 U.S. 1 (1942); *Al-Marri v. Wright*, 487 F.3d 160, 181 (4th Cir. 2007). That the CSRTs determined the propriety of petitioners' detentions on the basis of an erroneous legal definition is an additional flaw in the MCA/DTA process that further corrupts the CSRT records and renders the factual determinations in them inherently unreliable. *See Rogers v. Richmond*, 365 U.S. 534, 543-49 (1961).

central office of habeas – to test the legal sufficiency of the Executive's asserted justification for the detention. Indeed, by compelling the D.C. Circuit to adjudicate petitioners' pending claims solely on the basis of the Executive's putatively valid rules of decision, Congress, in derogation of the Article III principle of separation of powers, has overstepped its legislative role and impermissibly intruded into the role of the Judiciary. *See United States v. Klein*, 80 U.S. 128, 146-48 (1871).

Further, in limiting the D.C. Circuit to deciding whether the use of the Secretary's "standards and procedures" for determining the lawfulness of petitioners' detentions is consistent with "the Constitution and laws of the United States," the MCA displaced the general federal habeas statute, 28 U.S.C. § 2241(c)(3), which recognizes habeas jurisdiction over claims based on "the Constitution or laws *or treaties* of the United States" (emphasis added).[53] Inasmuch as the Constitution and other federal jurisdictional statutes similarly distinguish between "treaties" and "laws of the United States (*see, e.g.*, U.S. Constitution, Article III, Section 2; U.S. Constitution, Article VI; 28 U.S.C. § 1331; 28 U.S.C. § 1257), it would appear that one of the intended effects of the MCA is to eliminate judicial consideration of treaty-based claims.

Since the inception of this litigation petitioners have alleged that they are in custody in violation of the Geneva Conventions.[54] In *Hamdan*, 126 S. Ct. at 2796, this Court

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[53] Although Section 5(a) of the MCA purports to bar the invocation of the Geneva Conventions "in any habeas corpus . . . proceeding to which the United States" is a party, it would not bar petitioners from invoking the Conventions before a habeas court. Section 5 possesses no indicia of retroactive intent and thus cannot be given retroactive effect. *See Landgraf v. USI Film Products*, 511 U.S. 244, 272 (1994) (statutes "will not be construed to have retroactive effect unless their language requires this result") (citation omitted).

[54] The Geneva Conventions have the status of supreme federal law under Article VI of the Constitution, as a "treat[y]" within the meaning of

held that all persons detained at Guantanamo are protected by "at least" Common Article 3 of the Conventions. And in *Rasul* this Court explicitly acknowledged that petitioners' allegations "unquestionably describe 'custody in violation of the Constitution or laws *or treaties* of the United States'" that are cognizable in habeas. 542 U.S. at 483 n.15 (emphasis added). To the extent that the MCA purports to strip petitioners of the right to assert, and the D.C. Circuit to consider, their treaty-based claims, it suspends the writ.

* * *

There are other inadequacies in the DTA review process not covered here. But, most critically, the limited judicial review available under the DTA is structurally inconsistent and incompatible with the plenary and searching factual review required in habeas. Moreover, it is neither swift nor imperative. The DTA provides a substitute that is neither adequate nor effective to test the legality of the detentions.

Article III of the Constitution and 28 U.S.C. § 2241(c)(3), and therefore provide a substantive source of rights that may be vindicated on habeas. The Conventions "operate[] of [themselves] without the aid of any legislative provision." *See Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). The Conventions also "prescribe [] rule[s] by which the rights of the private citizen or subject may be determined" and hence to be "enforced in a court of justice." *Head Money Cases*, 112 U.S. 580, 598-99 (1884); *see also Hamdan*, 126 S. Ct. at 2794 n.57 ("the 1949 Geneva Conventions were written 'first and foremost to protect individuals, and not to serve State interests'" (citing 4 Int'l Comm. of Red Cross, *Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 21 (1958))). Neither the text nor the surrounding legislative history of the DTA or the MCA provide any indication that Congress intended to alter the status of the Conventions as supreme federal law.

CONCLUSION

The Court should reverse and remand for the habeas hearings mandated by this Court more than three years ago to allow the detainees to test the lawfulness of their detentions before the district court.

Because of the long delays that have already occurred and the government's record of delay and obstruction, in order to ensure that these petitions receive full, fair, and prompt consideration, petitioners respectfully request that the Court remand with instructions that each of petitioners' habeas corpus petitions be reinstated in the district court, that the district court promptly hear and consider those petitions in accordance with the procedures set forth in 28 U.S.C. § 2241 *et. seq.*, and that, in any case where the district court determines that a satisfactory factual or legal basis does not exist for the detention, it order petitioners' immediate release.

Respectfully submitted,

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