APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5062

LAKHDAR BOUMEDIENE,
DETAINEE, CAMP DELTA, ET AL., APPELLANTS

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL., APPELLEES

Argued: September 8, 2005 Decided: February 20, 2007

Consolidated with 05-5063

Appeals from the United States District Court for the District of Columbia (No. 04cv01142) (No. 04cv01166)

No. 05-5064

KHALED A. F. AL ODAH, NEXT FRIEND OF FAWZI KHALID
ABDULLAH FAHAD AL ODAH, ET AL.
APPELLEES/CROSS-APPELLANTS

v.

UNITED STATES OF AMERICA, ET. AL.,
APPELLANTS/CROSS-APPELLEES

Consolidated with 05-5095, 05-5096, 05-5097, 05-5098, 05-5099, 05-5100, 05-5101, 05-5102, 05-5103, 05-5104, 05-5105, 05-5106, 05-5107, 05-5108, 05-5109, 05-5110, 05-5111, 05-5112, 05-5113, 05-5114, 05-5115, 05-5116

Appeals from the United States District Court for the District of Columbia (No. 02cv00828) (No. 02cv00299) (No. 02cv01130) (No. 02cv01135) (No. 02cv01136) (No. 02cv01137) (No. 02cv01144) (No. 02cv01164) (No. 02cv01194) (No. 02cv01227) (No. 02cv01254)

[2007 WL 506581]

Before: SENTELLE, RANDOLPH and ROGERS, Circuit Judges.

Opinion for the court filed by Circuit Judge RANDOLPH.

Dissenting opinion filed by Circuit Judge ROGERS.

RANDOLPH, Circuit Judge.

[*1] Do federal courts have jurisdiction over petitions for writs of habeas corpus filed by aliens captured abroad and detained as enemy combatants at the Guantanamo Bay Naval Base in Cuba? The question has been the recurring subject of legislation and litigation. In these consolidated appeals, foreign nationals held at Guantanamo filed petitions for writs of habeas corpus alleging violations of the Constitution, treaties, statutes, regulations, the common law, and the law of nations. Some detainees also raised non-habeas claims under the federal question statute, 28 U.S.C. § 1331, and the Alien Tort Act, *id.* § 1350. In the "Al Odah" cases (Nos. 05-5064, 05-5095 through 05-5116), which consist of eleven cases involving fifty-six detainees, Judge Green denied the government's motion to dismiss with respect to the claims arising from alleged violations of the Fifth Amendment's Due Process Clause and the Third Geneva Convention, but dismissed all other claims. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005). After Judge Green certified the order for interlocutory appeal under 28 U.S.C. § 1292(b), the government appealed and the detainees cross-appealed. In the "Boumediene" cases (Nos. 05-5062 and 05-5063)—two cases involving seven detainees—Judge Leon granted the government's motion and dismissed the cases in their entirety. *See Khalid* v *Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).

In the two years since the district court's decisions the law has undergone several changes. As a result, we have had two oral arguments and four rounds of briefing in these cases during that period. The developments that have brought us to this point are as follows.

In *Al Odah* v. *United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev 'd sub nom. Rasul* v. *Bush*, 542 U.S. 466 (2004), we affirmed the district court's dismissal of various claims—habeas and non-habeas—raised by Guantanamo detainees. With respect to the habeas claims, we held that "no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees." 321 F.3d at 1141. The habeas statute then stated that "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241(a) (2004). Because Guantanamo Bay was not part of the sovereign territory of the United States, but rather land the United States leases from Cuba, *see Al Odah*, 321 F.3d at 1142-43, we determined it was not within the "respective jurisdictions" of the district court or any other court in the United States. We therefore held that § 2241 did not provide statutory jurisdiction to consider habeas relief for any alien—enemy or not—held at Guantanamo. *Id.* at 1141. Regarding the non-habeas claims, we noted that "'the privilege of litigation' does not extend to aliens in military custody who have no presence in 'any territory over which the United States is sovereign,'" *id.* at 1144 (quoting *Johnson* v. *Eisentrager*, 339 U.S. 763, 777-78 (1950)), and held that the district court properly dismissed those claims.

[*2] The Supreme Court reversed in *Rasul* v. *Bush*, 542 U.S. 466 (2004), holding that the habeas statute extended to aliens at Guantanamo. Although the detainees themselves were beyond the district court's jurisdiction, the Court determined that the district court's jurisdiction over the detainees' custodians was sufficient to provide subject-matter jurisdiction under § 2241. *See Rasul*, 542 U.S. at 483-84. The Court further held that the district court had jurisdiction over the detainees' non-habeas claims because nothing in the federal question statute or the Alien Tort Act categorically excluded aliens outside the United States from bringing such claims. *See Rasul*, 542 U.S. at 484-85. The Court remanded the cases to us, and we remanded them to the district court.

In the meantime Congress responded with the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005) (DTA), which the President signed into law on December 30, 2005. The DTA added a subsection (e) to the habeas statute. This new provision stated that, "[e]xcept as provided in section 1005 of the [DTA], no court, justice, or judge" may exercise jurisdiction over

> (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or
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> (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who
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> > (A) is currently in military custody; or
> >
> > (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit . . . to have been properly detained as an enemy combatant.

DTA § 1005(e)(1) (internal quotation marks omitted). The "except as provided" referred to subsections (e)(2) and (e)(3) of section 1005 of the DTA, which provided for exclusive judicial review of Combatant Status Review Tribunal determinations and military commission decisions in the D.C. Circuit. *See* DTA § 1005(e)(2), (e)(3).

The following June, the Supreme Court decided *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006). Among other things, the Court held that the DTA did not strip federal courts of jurisdiction over habeas cases pending at the time of the DTA's enactment. The Court pointed to a provision of the DTA stating that subsections (e)(2) and (e)(3) of section 1005 "shall apply with respect to any claim . . . that is pending on or after the date of the enactment of this Act." DTA § 1005(h). In contrast, no provision of the DTA stated whether subsection (e)(1) applied to pending cases. Finding that Congress "chose not to so provide . . . after having been presented with the option," the Court concluded "[t]he omis-

sion [wa]s an integral part of the statutory scheme." *Hamdan*, 126 S. Ct. at 2769.

In response to *Hamdan*, Congress passed the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (MCA), which the President signed into law on October 17, 2006. Section 7 of the MCA is entitled "Habeas Corpus Matters." In subsection (a), Congress again amended § 2241(e). The new amendment reads:

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

MCA § 7(a) (internal quotation marks omitted). Subsection (b) states:

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

MCA § 7(b) (emphasis added).

The first question is whether the MCA applies to the detainees' habeas petitions. If the MCA does apply, the second question is whether the statute is an unconstitutional suspension of the writ of habeas corpus.[1]

I.

As to the application of the MCA to these lawsuits, section 7(b) states that the amendment to the habeas corpus statute, 28 U.S.C. § 2241(e), "shall apply to all cases, without exception, pending on or after the date of the enactment" that relate to certain subjects. The detainees' lawsuits fall within the subject matter covered by the amended § 2241(e); each case relates to an "aspect" of detention and each deals with the detention of an "alien" after September 11, 2001. The MCA brings all such "cases, without exception" within the new law.

Everyone who has followed the interaction between Congress and the Supreme Court knows full well that one of the primary purposes of the MCA was to overrule *Hamdan*.[2]

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[1] Section 7(a) of the MCA eliminates jurisdiction over non-habeas claims by aliens detained as enemy combatants. That alone is sufficient to require dismissal even of pending non-habeas claims. See *Bruner* v. *United States*, 343 U.S. 112, 116-17 (1952). Section 7(b) reinforces this result.

[2] Without exception, both the proponents and opponents of section 7 understood the provision to eliminate habeas jurisdiction over pending cases. *See*, *e.g.*, 152 Cong. Rec. S10357 (daily ed. Sept. 28, 2006) (statement of Sen. Leahy) ("The habeas stripping provisions in the bill go far beyond what Congress did in the Detainee Treatment Act . . . This new bill strips habeas jurisdiction retroactively, even for pending cases."); *id.* at S10367 (statement of Sen. Graham) ("The only reason we are here is because of the *Hamdan* decision. The *Hamdan* decision did not apply . . . the [DTA] retroactively, so we have about 200 and some habeas cases left unattended and we are going to attend to them now."); *id.* at S10403 (statement of Sen. Cornyn) ("[O]nce . . . section 7 is effective, Congress will finally accomplish what it sought to do through the [DTA] last year. It will finally get the lawyers out of Guantanamo Bay. It will substitute the blizzard of litigation instigated by *Rasul* v. *Bush* with a narrow DC Circuit-only review of the [CSRT] hearings."); *id.* at S10404 (statement of Sen. Sessions) ("It certainly was not my intent, when I voted for the DTA,

Everyone, that is, except the detainees. Their cases, they argue, are not covered. The arguments are creative but not cogent. To accept them would be to defy the will of Congress. Section 7(b) could not be clearer. It states that "the amendment made by subsection (a)"—which repeals habeas jurisdiction—applies to "all cases, without exception" relating to any aspect of detention. It is almost as if the proponents of these words were slamming their fists on the table shouting "When we say 'all,' we mean all—**without exception**!"[3]

[*4] The detainees of course do not see it that way. They say Congress should have expressly stated in section 7(b) that habeas cases were included among "all cases, without exception, pending on or after" the MCA became law. Otherwise, the MCA does not represent an "unambiguous statutory directive[]" to repeal habeas corpus jurisdiction. *INS* v. *St. Cyr*, 533 U.S. 289, 299 (2001). This is nonsense. Section 7(b) specifies the effective date of section 7(a). The detainees' argument means that Congress, in amending the habeas statute (28 U.S.C. § 2241), specified an effective date only for non-habeas cases. Of course Congress did nothing of the sort. Habeas cases are simply a subset of cases deal-

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to exempt all of the pending Guantanamo lawsuits from the provisions of that act. * * * Section 7 of the [MCA] fixes this feature of the DTA and ensures that there is no possibility of confusion in the future. . . . I don't see how there could be any confusion as to the effect of this act on the pending Guantanamo litigation. The MCA's jurisdictional bar applies to that litigation 'without exception.'"); 152 Cong. Rec. H7938 (daily ed. Sept. 29, 2006) (statement of Rep. Hunter) ("The practical effect of [section 7] will be to eliminate the hundreds of detainee lawsuits that are pending in courts throughout the country and to consolidate all detainee treatment cases in the D.C. Circuit."); *id.* at H7942 (Rep. Jackson-Lee) ("The habeas provisions in the legislation are contrary to congressional intent in the [DTA]. In that act, Congress did not intend to strip the courts of jurisdiction over the pending habeas [cases].").

[3] Congress has rarely found it necessary to emphasize the *absence* of exceptions to a clear rule. Indeed, the use of "without exception" to emphasize the word "all" occurs in only one other provision of the U.S. Code. *See* 48 U.S.C. § 526(a).

ing with detention. *See*, *e.g.*, *Preiser* v. *Rodriguez*, 411 U.S. 475, 484 (1973).[4] Congress did not have to say that "the amendment made by subsection (a)"—which already *expressly* includes habeas cases—shall take effect on the date of enactment and shall apply to "all cases, without exception, *including habeas cases*." The *St. Cyr* rule of interpretation the detainees invoke demands clarity, not redundancy.

The detainees also ask us to compare the language of section 7(b) to that of section 3 of the MCA. Section 3, entitled "Military Commissions," creates jurisdiction in the D.C. Circuit for review of military commission decisions, *see* 10 U.S.C. § 950g. It then adds 10 U.S.C. § 950j, which deals with the finality of military commission decisions. Section 950j strips federal courts of jurisdiction over any pending or future cases that would involve review of such decisions:

> Except as otherwise provided in this chapter and notwithstanding any other provision of law (*including section 2241 of title 28 or any other habeas corpus provision*), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

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[4] If section 7(b) did not include habeas cases among cases "which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention," it would be inconsistent with section 7(a). Section 7(a) of the MCA first repeals jurisdiction "to hear or consider an application for a writ of habeas corpus" by detainees. 28 U.S.C. § 2241(e)(1). It then repeals jurisdiction over "any *other* action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of a detainee, *id.* § 2241(e)(2) (emphasis added), thus signifying that Congress considered habeas cases as cases relating to detention, as indeed they are.

10 U.S.C. § 950j(b) (emphasis added). The detainees maintain that § 950j calls into question Congress's intention to apply section 7(b) to pending habeas cases.

The argument goes nowhere. Section 7(b), read in conjunction with section 7(a), is no less explicit than § 950j. Section 7(a) strips jurisdiction over detainee cases, including habeas cases, and section 7(b) makes section 7(a) applicable to pending cases. Section 950j accomplishes the same thing, but in one sentence. A drafting decision to separate section 7 into two subsections—one addressing the scope of the jurisdictional bar, the other addressing how the bar applies to pending cases—makes no legal difference.[5]

II.

This brings us to the constitutional issue: whether the MCA, in depriving the courts of jurisdiction over the detainees' habeas petitions, violates the Suspension Clause of the Constitution, U.S. Const., art. I, § 9, cl. 2, which states that "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."

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[5] The detainees suggest that federal courts retain some form of residual common law jurisdiction over habeas petitions. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807), holds the opposite. *See Ex parte McCardle*, 74 U.S. 506 (1868). "Jurisdiction of the lower federal courts is . . . limited to those subjects encompassed within a statutory grant of jurisdiction." *Ins. Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982). The observations about common law habeas in *Rasul*, 542 U.S. at 481-82, referred to the practice in England. Even if there were such a thing as common law jurisdiction in the federal courts, § 2241(e)(1) quite clearly eliminates all "jurisdiction to hear or consider an application for a writ of habeas corpus" by a detainee, whatever the source of that jurisdiction.

In order to avoid "serious 'due process,' Suspension Clause, and Article III problems," the detainees also urge us not to read section 7 of the MCA to eliminate habeas jurisdiction over Geneva Convention claims. But that reading is unavoidable. Section 7 is unambiguous, as is section 5(a), which states that "No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding . . . as a source of rights in any court of the United States."

The Supreme Court has stated the Suspension Clause protects the writ "as it existed in 1789," when the first Judiciary Act created the federal courts and granted jurisdiction to issue writs of habeas corpus. *St. Cyr*, 533 U.S. at 301; *cf.* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 170 (1970). The detainees rely mainly on three cases to claim that in 1789 the privilege of the writ extended to aliens outside the sovereign's territory. In *Lockington's Case*, Bright. (N.P.) 269 (Pa. 1813), a British resident of Philadelphia had been imprisoned after failing to comply with a federal marshal's order to relocate. The War of 1812 made Lockington an "enemy alien" under the Alien Enemies Act of 1798. Although he lost on the merits of his petition for habeas corpus before the Pennsylvania Supreme Court, two of three Pennsylvania justices held that he was entitled to review of his detention.[6] In *The Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779), three Spanish seamen had boarded a merchant vessel bound for England with a promise of wages on arrival. After arriving in England, the English captain refused to pay their wages and turned them over to a warship as prisoners of war. The King's Bench denied the sailors' petitions because they were "alien enemies and prisoners of war, and therefore not entitled to any of the privileges of Englishmen; much less to be set at liberty on a habeas corpus." *Id.* at 776. The detainees claim that, as in *Lockington's Case*, the King's Bench exercised jurisdiction and reached the merits. The third case—*Rex* v. *Schiever*, 97 Eng. Rep. 551 (K.B. 1759)—involved a citizen of Sweden intent on entering the English merchant trade. While at sea on an English merchant's ship, a French privateer took Schiever along with the rest of the crew as prisoners, trans-

[6] During this period, state courts often employed the writ of habeas corpus to inquire into the legality of federal detention. The Supreme Court later held in *Ableman* v. *Booth*, 62 U.S. (21 How.) 506 (1859), and *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871), that state courts had no such power.

ferred the crew to another French ship, and let the English prisoners go free. An English ship thereafter captured the French ship and its crew, and carried them to Liverpool where Schiever was imprisoned. From Liverpool Schiever petitioned for habeas corpus, claiming he was a citizen of Sweden and only by force entered the service of the French. The court denied him relief because it found ample evidence that he was a prisoner of war. *Id.* at 552.

[*5] None of these cases involved an alien outside the territory of the sovereign. Lockington was a resident of Philadelphia. And the three Spanish sailors and Schiever were all held within English sovereign territory.[7] The detainees cite no case and no historical treatise showing that the English common law writ of habeas corpus extended to aliens beyond the Crown's dominions. Our review shows the contrary. *See* William F. Duker, *A Constitutional History of Habeas Corpus* 53 (1980); 9 William Holdsworth, *A History of English Law* 116-17, 124 (1982 ed.); 3 Blackstone, *Commentaries* 131 (1768); *see also* 1 Op. Att'y Gen. 47 (1794); *In re Ning Yi-Ching*, 56 T. L. R. 3, 5 (Vacation Ct. 1939) (noting prior judge "had listened in vain for a case in which the writ of *habeas corpus* had issued in respect of a foreigner detained in a part of the world which was not a part of the King's dominions or realm"). Robert Chambers, the successor to Blackstone at Oxford, wrote in his lectures that the writ of habeas corpus extended only to the King's dominions. 2 Robert Chambers, *A Course of Lectures on the English Law Delivered at Oxford* 1767-1773 (composed in association with Samuel Johnson), at 7-8 (Thomas M. Curley ed., 1986). Chambers cited *Rex* v. *Cowle*, 97 Eng. Rep. (2 Burr.) 587 (K.B. 1759), in which Lord Mansfield stated that "[t]o foreign

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[7] The dissent claims that the difference between Schiever and the detainees is "exceedingly narrow," Dissent at 14, because Schiever was brought *involuntarily* to Liverpool. For this proposition, the dissent cites *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). *Verdugo-Urquidez* was a Fourth Amendment case. Obviously, it had nothing to say about habeas corpus in Eighteenth Century England.

dominions . . . this Court has no power to send any writ of any kind. We cannot send a habeas corpus to Scotland, or to the electorate; but to Ireland, the Isle of Man, the plantations [American colonies] . . . we may." Every territory that Mansfield, Blackstone, and Chambers cited as a jurisdiction to which the writ extended (e.g., Ireland, the Isle of Man, the colonies, the Cinque Ports, and Wales) was a sovereign territory of the Crown.

When agents of the Crown detained prisoners outside the Crown's dominions, it was understood that they were outside the jurisdiction of the writ. *See* Holdsworth, *supra*, at 116-17. Even British citizens imprisoned in "remote islands, garrisons, and other places" were "prevent[ed] from the benefit of the law," 2 Henry Hallam, *The Constitutional History of England* 127-28 (William S. Hein Co. 1989) (1827), which included access to habeas corpus, *see* Duker, *supra*, at 51-53; Holdsworth, *supra*, at 116; *see also* Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 Int'l & Comp. L.Q. 1, 8 (2004) ("the writ of habeas corpus would not be available" in "remote islands, garrisons, and other places" (internal quotation marks omitted)). Compliance with a writ from overseas was also completely impractical given the habeas law at the time. In *Cowle*, Lord Mansfield explained that even in the far off territories "annexed to the Crown," the Court would not send the writ, "notwithstanding the power." 97 Eng. Rep. at 600. This is doubtless because of the Habeas Corpus Act of 1679. The great innovation of this statute was in setting time limits for producing the prisoner and imposing fines on the custodian if those limits were not met. *See* Chambers, *supra*, at 11. For a prisoner detained over 100 miles from the court, the detaining officer had twenty days after receiving the writ to produce the body before the court. *See id.* If he did not produce the body, he incurred a fine. One can easily imagine the practical problems this would have entailed if the writ had run outside the sovereign territory of the Crown and reached British soldiers holding foreign prisoners in overseas conflicts, such as the War of 1812. The short of the matter is that given the history of the writ in England prior to the founding, habeas

corpus would not have been available in 1789 to aliens without presence or property within the United States.

[*6] *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), ends any doubt about the scope of common law habeas. "We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes." *Id.* at 768; *see also* Note, *Habeas Corpus Protection Against Illegal Extraterritorial Detention*, 51 Colum. L. Rev. 368, 368 (1951). The detainees claim they are in a different position than the prisoners in *Eisentrager*, and that this difference is material for purposes of common law habeas.[8] They point to dicta in *Rasul*, 542 U.S. 481-82, in which the Court discussed English habeas cases and the "historical reach of the writ." *Rasul* refers to several English and American cases involving varying combinations of territories of the Crown and relationships between the petitioner and the country in which the writ was sought. *See id.* But as Judge Robertson found in *Hamdan*, "[n]ot one of the cases mentioned in *Rasul* held that an alien captured abroad and detained outside the United States—or in 'territory over which the United States exercises exclusive jurisdiction and control,' *Rasul*, 542 U.S. at 475—had a common law or constitutionally protected right to the writ of habeas corpus." *Hamdan* v. *Rumsfeld*, No. 04-1519, 2006 WL 3625015, at *7 (D.D.C. Dec. 13, 2006). Justice Scalia made the same point in his *Rasul* dissent, *see Rasul*, 542 U.S. at 502-05 & n.5 (Scalia, J., dissenting) (noting the absence of "a single case holding that aliens held outside the territory of the sovereign were within reach of the writ"),

[8] The detainees are correct that they are not "enemy aliens." That term refers to citizens of a country with which the United States is at war. *See Al Odah*, 321 F.3d at 1139-40. But under the common law, the dispositive fact was not a petitioner's enemy alien status, but his lack of presence within any sovereign territory.

and the dissent acknowledges it here, *see* Dissent at 12. We are aware of no case prior to 1789 going the detainees' way,[9] and we are convinced that the writ in 1789 would not have been available to aliens held at an overseas military base leased from a foreign government.

The detainees encounter another difficulty with their Suspension Clause claim. Precedent in this court and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States. As we explained in *Al Odah*, 321 F.3d at 1140-41, the controlling case is *Johnson* v. *Eisentrager*. There twenty-one German nationals confined in custody of the U.S. Army in Germany filed habeas corpus petitions. Although the German prisoners alleged they were civilian agents of the German government, a military commission convicted them of war crimes arising from military activity against the United States in China after Germany's surrender. They claimed their convictions and imprisonment violated various constitutional provisions and the Geneva Conventions. The Supreme Court rejected the proposition "that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses," 339 U.S. at 783. The Court continued: "If the Fifth Amendment confers its rights on all the world . . . [it] would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and 'werewolves' could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the Fourth, as

[9] The dissent claims the lack of any case on point is a result of the unique combination of circumstances in this case. But extraterritorial detention was not unknown in Eighteenth Century England. *See* Holdsworth, *supra*, at 116-17; Duker, *supra*, at 51-53. As noted, *supra*, these prisoners were beyond the protection of the law, which included access to habeas corpus. And *Eisentrager* (and the two hundred other alien petitioners the court noted, *see* 339 U.S. at 768 n.l) involved both extraterritorial detention and alien petitioners.

well as rights to jury trial as in the Fifth and Sixth Amendments." *Id.* at 784. (Shortly before Germany's surrender, the Nazis began training covert forces called "werewolves" to conduct terrorist activities during the Allied occupation. See http://www.archives.gov/iwg/declassified_records/oss_records_263_wilhelm_hoettl.html.)

[*7] Later Supreme Court decisions have followed *Eisentrager*. In 1990, for instance, the Court stated that *Eisentrager* "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). After describing the facts of *Eisentrager* and quoting from the opinion, the Court concluded that with respect to aliens, "our rejection of extraterritorial application of the Fifth Amendment was emphatic." *Id.* By analogy, the Court held that the Fourth Amendment did not protect nonresident aliens against unreasonable searches or seizures conducted outside the sovereign territory of the United States. *Id.* at 274-75. Citing *Eisentrager* again, the Court explained that to extend the Fourth Amendment to aliens abroad "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries," particularly since the government "frequently employs Armed Forces outside this country," *id.* at 273. A decade after *Verdugo-Urquidez*, the Court—again citing *Eisentrager*—found it "well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001).[10]

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[10] The *Rasul* decision, resting as it did on statutory interpretation, *see* 542 U.S. at 475, 483-84, could not possibly have affected the constitutional holding of *Eisentrager*. Even if *Rasul* somehow calls *Eisentrager*'s constitutional holding into question, as the detainees suppose, we would be bound to follow *Eisentrager*. *See Rodriguez de Quijas* v. *Shearson/American Exp., Inc.*, 490 U.S. 477, 484-85 (1989).

Any distinction between the naval base at Guantanamo Bay and the prison in Landsberg, Germany, where the petitioners in *Eisentrager* were held, is immaterial to the application of the Suspension Clause. The United States occupies the Guantanamo Bay Naval Base under an indefinite lease it entered into in 1903. *See Al Odah*, 321 F.3d at 1142. The text of the lease and decisions of circuit courts and the Supreme Court all make clear that Cuba—not the United States—has sovereignty over Guantanamo Bay. *See Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 381 (1948); *Cuban Am. Bar Ass'n* v. *Christopher*, 43 F.3d 1412 (11th Cir. 1995). The "determination of sovereignty over an area," the Supreme Court has held, "is for the legislative and executive departments." *Vermilya-Brown*, 335 U.S. at 380. Here the political departments have firmly and clearly spoken: "'United States,' when used in a geographic sense . . . does not include the United States Naval Station, Guantanamo Bay, Cuba." DTA § 1005(g).

The detainees cite the *Insular Cases* in which "fundamental personal rights" extended to U.S. territories. *See Balzac* v. *Porto Rico*, 258 U.S. 298, 312-13 (1922); *Dorr* v. *United States*, 195 U.S. 138, 148 (1904); *see also Ralpho* v. *Bell*, 569 F.2d 607 (D.C. Cir. 1977). But in each of those cases, Congress had exercised its power under Article IV, Section 3 of the Constitution to regulate "Territory or other Property belonging to the United States," U.S. Const., art. IV, § 3, cl. 2. These cases do not establish anything regarding the sort of *de facto* sovereignty the detainees say exists at Guantanamo. Here Congress and the President have specifically disclaimed the sort of territorial jurisdiction they asserted in Puerto Rico, the Philippines, and Guam.

[*8] Precedent in this circuit also forecloses the detainees' claims to constitutional rights. In *Harbury* v. *Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2000), *rev'd on other grounds sub nom. Christopher* v. *Harbury*, 536 U.S. 403 (2002), we quoted extensively from *Verdugo-Urquidez* and held that the Court's description of *Eisentrager* was "firm and considered dicta that binds this court." Other decisions of this

court are firmer still. Citing *Eisentrager*, we held in *Pauling* v. *McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960) (per curiam), that "non-resident aliens . . . plainly cannot appeal to the protection of the Constitution or laws of the United States." The law of this circuit is that a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." *People's Mojahedin Org. of Iran* v. *U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999); *see also 32 County Sovereignty Comm.* v. *U.S. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002).[11]

As against this line of authority, the dissent offers the distinction that the Suspension Clause is a limitation on congressional power rather than a constitutional right. But this is no distinction at all. Constitutional rights are rights against the government and, as such, *are* restrictions on governmental power. *See H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 534 (1949) ("Even the Bill of Rights amendments were framed only as a limitation upon the powers of Congress.").[12] Consider the First Amendment. (In contrasting the Suspension Clause with provisions in the Bill of Rights, *see* Dissent at 3, the dissent is careful to ignore the First Amendment.) Like the Suspension Clause, the First Amendment is framed as a limitation on Congress: "Congress shall make no law . . . ." Yet no one would deny

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[11] The text of the Suspension Clause also does not lend itself freely to extraterritorial application. The Clause permits suspension of the writ only in cases of "Rebellion or Invasion," neither of which is applicable to foreign military conflicts. *See Hamdi* v. *Rumsfeld*, 542 U.S. 507, 593-94 (2004) (Thomas, J., dissenting); *see also* J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 Geo. L.J. (forthcoming 2007) (manuscript at 59-60, *available at* http://ssrn.com/abstract=888602).

[12] James Madison's plan was to insert almost the entire Bill of Rights into the Constitution rather than wait for amendment. His proposed location of the Bill of Rights? Article I, Section 9—next to the Suspension Clause. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 700-01 & n.437 (1999).

that the First Amendment protects the rights to free speech and religion and assembly.

The dissent's other arguments are also filled with holes. It is enough to point out three of the larger ones.

There is the notion that the Suspension Clause is different from the Fourth, Fifth, and Sixth Amendments because it does not mention individuals and those amendments do (respectively, "people," "person," and "the accused"). *See* Dissent at 3. Why the dissent thinks this is significant eludes us. Is the point that if a provision does not mention individuals there is no constitutional right? That cannot be right. The First Amendment's guarantees of freedom of speech and free exercise of religion do not mention individuals; nor does the Eighth Amendment's prohibition on cruel and unusual punishment or the Seventh Amendment's guarantee of a civil jury. Of course it is fair to assume that these provisions apply to individuals, just as it is fair to assume that petitions for writs of habeas corpus are filed by individuals.

The dissent also looks to the Bill of Attainder and Ex Post Facto Clauses, both located next to the Suspension Clause in Article I, Section 9. We do not understand what the dissent is trying to make of this juxtaposition. The citation to *United States* v. *Lovett*, 328 U.S. 303 (1946), is particularly baffling. *Lovett* held only that the Bill of Attainder Clause was justiciable. The dissent's point cannot be that the Bill of Attainder Clause and the Ex Post Facto Clause do not protect individual rights. Numerous courts have held the opposite.[13] "The fact that the Suspension Clause abuts

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[13] *See South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-24 (1966) ("[C]ourts have consistently regarded the Bill of Attainder Clause of Article I and the principle of the separation of powers only as protections for individual persons and private groups . . . .") (citing *United States* v. *Brown*, 381 U.S. 437 (1965); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866)); *see also Wilkinson* v. *Dotson*, 544 U.S. 74, 82 (2005); *Weaver* v. *Graham*, 450 U.S. 24, 28-29 (1981); *Nixon* v. *Adm'r of Gen. Servs.*, 433 U.S. 425, 468-69 (1977); *Shabazz* v. *Gabry*, 123 F.3d 909, 912 (6th Cir. 1997).

the prohibitions on bills of attainder and ex post facto laws, provisions well-accepted to protect individual liberty, further supports viewing the habeas privilege as *a core individual right*." Amanda L. Tyler, *Is Suspension a Political Question?*, 59 Stan. L. Rev. 333, 374 & n.227 (2006) (emphasis added).[14]

[*9] Why is the dissent so fixated on how to characterize the Suspension Clause? The unstated assumption must be that the reasoning of our decisions and the Supreme Court's in denying constitutional rights to aliens outside the United States would not apply if a constitutional provision could be characterized as protecting something other than a "right." On this theory, for example, aliens outside the United States are entitled to the protection of the Separation of Powers because they have no individual rights under the Separation of Powers. Where the dissent gets this strange idea is a mystery, as is the reasoning behind it.

III.

Federal courts have no jurisdiction in these cases. In supplemental briefing after enactment of the DTA, the government asked us not only to decide the habeas jurisdiction question, but also to review the merits of the detainees' designation as enemy combatants by their Combatant Status Review Tribunals. *See* DTA § 1005(e)(2).[15] The detainees objected to converting their habeas appeals to appeals from their Tribunals. In briefs filed after the DTA became law and after the Supreme Court decided *Hamdan*, they argued

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[14] *Accord* Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 Tul. L. Rev. 251, 318, 321 (2000) ("[W]e could easily describe [Article I,] Section 9 as a bill of rights for the people of the United States.").

[15] *See* Supplemental Br. of the Federal Parties Addressing the Detainee Treatment Act of 2005 53-54 ("This Court can and should convert the pending appeals into petitions for review under [DTA section] 1005(e)(2).").

that we were without authority to do so.[16] Even if we have authority to convert the habeas appeals over the petitioners' objections, the record does not have sufficient information to perform the review the DTA allows. Our only recourse is to vacate the district courts' decisions and dismiss the cases for lack of jurisdiction.

So ordered.

[16] *See* The Guantanamo Detainees' Supplemental Br. Addressing the Effect of the Supreme Ct.'s Op. in *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006), on the Pending Appeals 8-9 ("The detainees in the pending petitions challenge the lawfulness of their detentions—not the subsequent CSRT decisions . . . ."); Corrected Supplemental Br. of Pet'rs Boumediene, et al., & Khalid Regarding Section 1005 of the Detainee Treatment Act of 2005 56-59 ("Nothing in the [DTA] authorizes the Court to 'convert' Petitioners' notices of appeal of the district court's judgment into original petitions for review of CSRT decisions under section 1005(e)(2) of the Act."); The Guantanamo Detainees' Corrected Second Supplemental Br. Addressing the Effect of the Detainee Treatment Act of 2005 on this Ct.'s Jurisdiction over the Pending Appeals 43-44 ("[T]his court should not convert these petitions into petitions for review under the DTA as the government suggests.").

ROGERS, Circuit Judge, dissenting.

I can join neither the reasoning of the court nor its conclusion that the federal courts lack power to consider the detainees' petitions. While I agree that Congress intended to withdraw federal jurisdiction through the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ("MCA"), the court's holding that the MCA is consistent with the Suspension Clause of Article I, section 9, of the Constitution does not withstand analysis. By concluding that this court must reject "the detainees' claims to constitutional rights," Op. at 21, the court fundamentally misconstrues the nature of suspension: Far from conferring an individual right that might pertain only to persons substantially connected to the United States, *see United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 271 (1990), the Suspension Clause is a limitation on the powers of Congress. Consequently, it is only by misreading the historical record and ignoring the Supreme Court's well-considered and binding dictum in *Rasul* v. *Bush*, 542 U.S. 466, 481-82 (2004), that the writ at common law would have extended to the detainees, that the court can conclude that neither this court nor the district courts have jurisdiction to consider the detainees' habeas claims.

A review of the text and operation of the Suspension Clause shows that, by nature, it operates to constrain the powers of Congress. Prior to the enactment of the MCA, the Supreme Court acknowledged that the detainees held at Guantanamo had a statutory right to habeas corpus. *Rasul*, 542 U.S. at 483-84. The MCA purports to withdraw that right but does so in a manner that offends the constitutional constraint on suspension. The Suspension Clause limits the removal of habeas corpus, at least as the writ was understood at common law, to times of rebellion or invasion unless Congress provides an adequate alternative remedy. The writ would have reached the detainees at common law, and Congress has neither provided an adequate alternative remedy, through the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Div. A, tit. X, 119 Stat. 2680, 2739 ("DTA"), nor invoked the exception to the Clause by making the required findings

to suspend the writ. The MCA is therefore void and does not deprive this court or the district courts of jurisdiction.

[*10] On the merits of the detainees' appeal in *Khalid* v. *Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005) and the cross-appeals in *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), I would affirm in part in *Guantanamo Detainee Cases* and reverse in *Khalid* and remand the cases to the district courts.

I.

Where a court has no jurisdiction it is powerless to act. *See*, *e.g.*, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 173-74 (1803). But a statute enacted by Congress purporting to deprive a court of jurisdiction binds that court only when Congress acts pursuant to the powers it derives from the Constitution. The court today concludes that the Suspension Clause is an individual right that cannot be invoked by the detainees. *See* Op. at 22. The text of the Suspension Clause and the structure of the Constitution belie this conclusion. The court further concludes that the detainees would have had no access to the writ of habeas corpus at common law. *See* Op. at 14-17. The historical record and the guidance of the Supreme Court disprove this conclusion.

In this Part, I address the nature of the Suspension Clause, the retroactive effect of Congress's recent enactment on habeas corpus—the MCA—and conclude with an assessment of the effect of the MCA in light of the dictates of the Constitution.

A.

The court holds that Congress may suspend habeas corpus as to the detainees because they have no individual rights under the Constitution. It is unclear where the court finds that the limit on suspension of the writ of habeas corpus is an individual entitlement. The Suspension Clause itself makes no reference to citizens or even persons. Instead, it directs that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or

Invasion the public Safety may require it." U.S. Const., art. I, § 9, cl. 2. This mandate appears in the ninth section of Article I, which enumerates those actions expressly excluded from Congress's powers. Although the Clause does not specifically say so, it is settled that only Congress may do the suspending. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807); *see Hamdi* v. *Rumsfeld*, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting); *Ex parte Merryman*, 17 F. Cas. 144, 151-152 (No. 9487) (Taney, Circuit Justice, C.C.D. Md. 1861); 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1342 (5th ed. 1891). In this manner, by both its plain text and inclusion in section 9, the Suspension Clause differs from the Fourth Amendment, which establishes a "right of the people," the Fifth Amendment, which limits how a "person shall be held," and the Sixth Amendment, which provides rights to "the accused." These provisions confer rights to the persons listed.[1]

The other provisions of Article I, section 9, indicate how to read the Suspension Clause. The clause immediately following provides that "[n]o Bill of Attainder or ex post facto Law shall be passed."[2] The Supreme Court has construed

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[1] The Suspension Clause is also distinct from the First Amendment, which has been interpreted as a guarantor of individual rights. *See*, *e.g.*, *United States* v. *Robel*, 389 U.S. 258, 263 (1967); *Gitlow* v. *New York*, 268 U.S. 652, 666 (1925). The court cannot seriously maintain that the two provisions are alike while acknowledging that the First Amendment confers an individual right enforceable by the courts and simultaneously claiming that the Suspension Clause does not, *see* Op. at 13 n.5 (citing *Bollman*, 8 U.S. (4 Cranch) at 95); *see also In re Barry*, 42 F. 113, 122 (C.C.S.D.N.Y. 1844), *error dismissed sub nom. Barry* v. *Mercein*, 46 U.S. 103 (1847) ("The ninth section of the first article of the constitution, par. 2, declaring that '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,' does not purport to convey power or jurisdiction to the judiciary. It is in restraint of executive and legislative powers, and no further affects the judiciary than to impose on them the necessity, if the privilege of habeas corpus is suspended by any authority, to decide whether the exigency demanded by the constitution exists to sanction the act.").

[2] Suspensions and bills of attainder have a shared history. In England, suspensions occasionally named specific individuals and therefore

the Attainder Clause as establishing a "category of Congressional actions which the Constitution barred." *United States* v. *Lovett*, 328 U.S. 303, 315 (1946). In *Lovett*, the Court dismissed the possibility that an Act of Congress in violation of the Attainder Clause was non-justiciable, remarking:

> **[*11]** Our Constitution did not contemplate such a result. To quote Alexander Hamilton,
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> > * * * a limited constitution * * * [is] 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 the 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 reservations of particular rights or privileges would amount to nothing.

Id. at 314 (quoting *The Federalist* No. 78) (emphasis added) (alteration and omissions in original). So too, in *Weaver* v. *Graham*, 450 U.S. 24, 28-29 & n.10 (1981), where the Court noted that the ban on *ex post facto* legislation "restricts governmental power by restraining arbitrary and potentially vindictive legislation" and acknowledged that the clause "confin[es] the legislature to penal decisions with prospective effect." *See also Marbury*, 5 U.S. (1 Cranch) at 179-80; *Foretich* v. *United States*, 351 F.3d 1198, 1216-26 (D.C. Cir. 2003). For like reasons, any act in violation of the Suspension Clause is void, *cf. Lovett*, 328 U.S. at 316, and cannot operate to divest a court of jurisdiction.[3]

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amounted to bills of attainder. *See* Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 Cal. L. Rev. 335, 339 (1952).

[3] The court cites a number of cases for the proposition that the Attainder Clause confers an individual right instead of operating as a struc-

The court dismisses the distinction between individual rights and limitations on Congress's powers. It chooses to make no affirmative argument of its own, instead hoping to rebut the sizable body of conflicting authorities.

The court appears to believe that the Suspension Clause is just like the constitutional amendments that form the Bill of Rights.[4] It is a truism, of course, that individual rights

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tural limitation on Congress. *See* Op. at 23 n. 13. None of these cases makes the court's point. In *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-24 (1966), the Supreme Court held that it is not a bill of attainder for Congress to punish a state. This speaks to the definition of a bill of attainder and says nothing about the operation of the Attainder Clause. *Weaver* v. *Graham*, 450 U.S. 24, 30 (1981), says the opposite of what the court asserts. In *Weaver*, the Supreme Court emphasized that the *Ex Post Facto* Clause is not intended to protect individual rights but governs the operation of government institutions:

> The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

The Court also emphasized the structural nature of the limitations of Article I, section 9, in *Nixon* v. *Adm'r of Gen. Servs.*, 433 U.S. 425, 469 (1977) (noting that "the Bill of Attainder Clause [is] . . . one of the organizing principles of our system of government"). Unsurprisingly, the court cites no authority that would support its novel construction of section 9 by providing that certain individuals lack Attainder Clause or *Ex Post Facto* Clause rights.

[4] For this point, the court quotes, without context, from *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525 (1949), *see* Op. at 22. In that case, the Supreme Court emphasized that the Bill of Rights limited the powers of Congress and did not affect the powers of the individual states, *H.P. Hood & Sons*, 336 U.S. at 534, at least until certain amendments were incorporated after ratification of the Fourteenth Amendment. This says

like those found in the first ten amendments work to limit Congress. However, individual rights are merely a subset of those matters that constrain the legislature. These two sets cannot be understood as coextensive unless the court is prepared to recognize such awkward individual rights as Commerce Clause rights, *see* U.S. Const., art. I, § 8, cl. 3, or the personal right not to have a bill raising revenue that originates in the Senate, see U.S. Const., art. I, § 7, cl. 1; *see also Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 224 (1974) (finding no individual right under the Ineligibility Clause).

That the Suspension Clause appears in Article I, section 9, is not happenstance. In Charles Pinckney's original proposal, suspension would have been part of the judiciary provision. It was moved in September 1789 by the Committee on Style and Arrangement, which gathered the restrictions on Congress's power in one location. *See* William F. Duker, *A Constitutional History of Habeas Corpus* 128-32 (1980); 2 *The Records of the Federal Convention of 1787*, at 596 (Max Farrand ed., rev. ed. 1966). By the court's reasoning, the Framers placed the Suspension Clause in Article I merely because there were no similar individual rights to accompany it. It is implausible that the Framers would have viewed the Suspension Clause, as the court implies, as a budding Bill of Rights but would not have assigned the provision its own section of the Constitution, much as they did with the only crime specified in the document, treason, which appears alone in Article III, section 3. Instead, the court must treat the Suspension Clause's placement in Article I, section 9, as a conscious determination of a limit on Congress's powers. The Supreme Court has found similar meaning in the placement of constitutional clauses ever since *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 419-21 (1819) (Necessary and Proper Clause); *see also, e.g.*, *Skinner*

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nothing about the distinction, relevant here, between individual rights and limitations on Congress.

v. *Mid-America Pipeline Co.*, 490 U.S. 212, 220-21 (1989) (Taxing Clause).

[*12] The court also alludes to the idea that the Suspension Clause cannot apply to foreign military conflicts because the exception extends only to cases of "Rebellion or Invasion." Op. at 21 n. 11. The Framers understood that the privilege of the writ was of such great significance that its suspension should be strictly limited to circumstances where the peace and security of the Nation were jeopardized. Only after considering alternative proposals authorizing suspension "on the most urgent occasions" or forbidding suspension outright did the Framers agree to a narrow exception upon a finding of rebellion or invasion. *See* 2 *The Records of the Federal Convention of 178*7, *supra*, at 438. Indeed, it would be curious if the Framers were implicitly sanctioning Executive-ordered detention abroad without judicial review by limiting suspension—and by the court's reasoning therefore limiting habeas corpus—to domestic events. To the contrary, as Alexander Hamilton foresaw in *The Federalist No. 84*, invoking William Blackstone,

> To bereave a man of life (says he), or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore *a more dangerous engine* of arbitrary government.

The Federalist No. 84, at 468 (E.H. Scott ed. 1898) (quoting William Blackstone, 1 *Commentaries* *131-32); *see also Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 125 (1866).

B.

This court would have jurisdiction to address the detainees' claims but for Congress's enactment of the MCA. In *Rasul*, 542 U.S. at 483-84, the Supreme Court held that the federal district courts had jurisdiction to hear petitions for

writs of habeas corpus filed pursuant to 28 U.S.C. § 2241 by persons detained as "enemy combatants" by the United States at the Guantanamo Bay Naval Base. At the time, the habeas statute provided, in relevant part, that upon the filing of such a petition, the district court would promptly determine whether the petitioner was being held under the laws, Constitution, and treaties of the United States, utilizing the common-law procedure of a return filed by the government and a traverse filed by the petitioner. See 28 U.S.C. §§ 2242-2253. After *Rasul*, Congress enacted the DTA, which purported to deprive the federal courts of habeas jurisdiction. DTA § 1005(e), 118 Stat. at 2741-43. The Supreme Court held in *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2764-69 (2006), however, that the DTA does not apply retroactively, and so it does not disturb this court's jurisdiction over the instant appeals, which were already pending when the DTA became law.

As for the MCA, I concur in the court's conclusion that, notwithstanding the requirements that Congress speak clearly when it intends its action to apply retroactively, *see Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265-73 (1994), and when withdrawing habeas jurisdiction from the courts, *see INS* v. *St. Cyr*, 533 U.S. 289, 299 (2001); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102 (1869), Congress sought in the MCA to revoke all federal jurisdiction retroactively as to the habeas petitions of detainees held at Guantanamo Bay. *See* Op. at 9-12. I do not join the court's reasoning. The court stresses Congress's emphasis that the provision setting the effective date for the jurisdictional change "shall apply to all cases, without exception." However, the absence of exceptions does not establish the scope of the provision itself. The entire provision reads:

> **[*13]** (b)—EFFECTIVE DATE. The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act *which relate to* any aspect of the detention, transfer, treatment,

> trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

MCA § 7(b), 120 Stat. at 2636 (emphasis added). Subsection (a), in turn, amends 28 U.S.C. § 2241(e), which confers habeas jurisdiction on the federal courts. New section 2241(e)(1) repeals "jurisdiction to hear or consider an application for a writ of habeas corpus." New section 2241(e)(2) repeals "jurisdiction to hear or consider any other action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement."

The detainees suggest that by singling out habeas corpus in § 2241(e)(1) and by failing to do so in section 7(b)—and instead repeating the same list ("detention, transfer, treatment, trial, or conditions of confinement") that appears in § 2241(e)(2)—Congress was expressing its intent to make the MCA retroactive only as to § 2241(e)(2). This argument hinges on their view that a petition for a writ of habeas corpus is not "relating to any aspect of. . . detention." But, by the plain text of section 7, it is clear that the detainees suggest ambiguity where there is none. As the court notes, *see* Op. at 11 n. 4, whereas § 2241(e)(1) refers to habeas corpus, § 2241 (e)(2) deals with "any *other* action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement." (Emphasis added). By omitting the word "other" in section 7(b), and by cross-referencing section 7(a) in its entirety, Congress signaled its intent for the retroactivity provision to apply to habeas corpus cases. This conclusion has nothing to do with Congress's emphasis that there are no exceptions and everything to do with the intent it expressed through the substantive provisions of the statute.

C.

The question, then, is whether by attempting to eliminate all federal court jurisdiction to consider petitions for writs of habeas corpus, Congress has overstepped the boundary established by the Suspension Clause. The Supreme Court has stated on several occasions that "*at the absolute minimum*, the Suspension Clause protects the writ

'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301 (quoting *Felker* v. *Turpin*, 518 U.S. 651, 663-64 (1996)) (emphasis added). Therefore, at least insofar as habeas corpus exists and existed in 1789, Congress cannot suspend the writ without providing an adequate alternative except in the narrow exception specified in the Constitution.[5] This proscription applies equally to removing the writ itself and to removing all jurisdiction to issue the writ. *See United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). *See generally* Erwin Chemerinsky, *Federal Jurisdiction* § 3.2 (4th ed. 2003).

[*14] 1.

Assessing the state of the law in 1789 is no trivial feat, and the court's analysis today demonstrates how quickly a few missteps can obscure history. In conducting its historical review, the court emphasizes that no English cases predating 1789 award the relief that the detainees seek in their petitions. Op. at 15-17. "The short of the matter," the court concludes, is that "habeas corpus would not have been available in 1789 to aliens without presence or property within the United States." Op. at 17. But this misses the mark. There may well be no case at common law in which a court exercises jurisdiction over the habeas corpus claim of an

[5] It is unnecessary to resolve the question of whether the Constitution provides for an affirmative right to habeas corpus—either through the Suspension Clause, the Fifth Amendment guarantee of due process, or the Sixth Amendment—or presumed the continued vitality of this "writ antecedent to statute," *Williams* v. *Kaiser*, 323 U.S. 471, 484 n.2 (1945) (internal quotation marks omitted). Because the Supreme Court in *Rasul* held that the writ existed in 2004 and that there was, therefore, something to suspend, it is sufficient to assess whether the writ sought here existed in 1789. Given my conclusion, *see infra* Part C.1, it is also unnecessary to resolve the question of whether the Suspension Clause protects the writ of habeas corpus as it has developed since 1789. *Compare St. Cyr*, 533 U.S. at 304-05, *and LaGuerre* v. *Reno*, 164 F.3d 1035, 1038 (7th Cir. 1998), *with Felker*, 518 U.S. at 663-64, *and* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 970 (1998). The court oddly chooses to ignore the issue by truncating its reference to *St. Cyr*, without comment, and omitting the qualifier "at the absolute minimum." *See* Op. at 14.

alien from a friendly nation, who may himself be an enemy, who is captured abroad and held outside the sovereign territory of England but within the Crown's exclusive control without being charged with a crime or violation of the Laws of War. On the other hand, the court can point to no case where an English court has refused to exercise habeas jurisdiction because the enemy being held, while under the control of the Crown, was not within the Crown's dominions.[6] The paucity of direct precedent is a consequence of the unique confluence of events that defines the situation of these detainees and not a commentary on the reach of the writ at common law.

The question is whether by the process of inference from similar, if not identical, situations the reach of the writ at common law would have extended to the detainees' petitions. At common law, we know 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.'" *Rasul*, 542 U.S. at 482 (quoting *Ex parte Mwenya*, [1960] 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M.R.)). We also know that the writ extended not only to citizens of the realm, but to aliens, *see id.* at 481 & n.11, even in wartime, *see id.* at 474-75; *Case of Three Spanish Sailors*,

[6] The court's assertion that "extraterritorial detention was not unknown in Eighteenth Century England," Op. at 18 n.9, is of no moment. The court references the 1667 impeachment of the Earl of Clarendon, Lord High Chancellor of England. *See id.* at 16, 18 n.9. Clarendon was accused of sending enemies to faraway lands to deprive them of effective legal process. The court makes the unsupported inference that habeas corpus was therefore unavailable abroad. Nothing in the Clarendon affair suggests that habeas corpus was sought and refused. Instead, as remains the case today, legal process can be evaded when prisoners are detained without access to the courts. That the detainees at Guantanamo were able to procure next friends and attorneys to pursue their petitions whereas seventeenth-century Englishmen would have found this difficult, if not impossible, says nothing about the availability of the writ at common law. The court's obfuscation as to the distinction between impracticality and unavailability is further addressed *infra*.

2 Black. W. 1324, 96 Eng. Rep. 775 (C.P. 1779); Rex v. Schiever, 2 Burr. 765, 97 Eng. Rep. 551 (K.B. 1759). A War of 1812-era case in which Chief Justice John Marshall granted a habeas writ to a British subject establishes that even conceded enemies of the United States could test in its courts detention that they claimed was unauthorized. See Gerald L. Neuman & Charles F. Hobson, John Marshall and the Enemy Alien: A Case Missing from the Canon, 9 Green Bag 2d 39 (2005) (reporting United States v. Williams (C.C.D. Va. Dec. 4, 1813)). To draw the ultimate conclusion as to whether the writ at common law would have extended to aliens under the control (if not within the sovereign territory) of the Crown requires piecing together the considerable circumstantial evidence, a step that the court is unwilling to take. Analysis of one of these cases, the 1759 English case of *Rex* v. *Schiever*, shows just how small this final inference is. Barnard Schiever was the subject of a neutral nation (Sweden), who was detained by the Crown when England was at war with France. *Schiever*, 2 Burr. at 765, 97 Eng. Rep. at 551. He claimed that his classification as a "prisoner of war" was factually inaccurate, because he "was desirous of entering into the service of the merchants of England" until he was seized on the high seas by a French privateer, which in turn was captured by the British Navy. *Id.* In an affidavit, he swore that his French captor "detained him[] against his will and inclination . . . and treated him with so much severity[] that [his captor] would not suffer him to go on shore when in port . . . but closely confined him to duty [on board the ship]." *Id.* at 765-66, 97 Eng. Rep. at 551. The habeas court ultimately determined, on the basis of Schiever's own testimony, that he was properly categorized and thus lawfully detained. *Id.* at 766, 97 Eng. Rep. at 551-52.

[*15] The court discounts *Schiever* because, after England captured the French privateer while en route to Norway, it was carried into Liverpool, England, where Schiever was held in the town jail. *Id.*, 97 Eng. Rep. at 551. As such, the case did not involve "an alien outside the territory of the sovereign." Op. at 14-15. However, Schiever surely was not

voluntarily brought into England, so his mere presence conferred no additional rights. As the Supreme Court observed in *Verdugo-Urquidez*, "involuntary [presence] is not the sort to indicate any substantial connection with our country." 494 U.S. at 271. Any gap between *Schiever* and the detainees' detention at Guantanamo Bay is thus exceedingly narrow.

This court need not make the final inference. It has already been made for us. In *Rasul*, the Supreme Court stated that "[a]pplication of the habeas statute to persons detained at the [Guantanamo] base is consistent with the historical reach of the writ of habeas corpus." 542 U.S. at 481. By reaching a contrary conclusion, the court ignores the settled principle that "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *Sierra Club* v. *EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003) (quoting *United States* v. *Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997)) (internal quotation marks omitted). Even setting aside this principle, the court offers no convincing analysis to compel the contrary conclusion. The court makes three assertions: First, Lord Mansfield's opinion in *Rex* v. *Cowle*, 2 Burr. 834, 97 Eng. Rep. 587 (K.B. 1759), disavows the right claimed by the detainees. Second, it would have been impractical for English courts to extend the writ extraterritorially. Third, *Johnson* v. *Eisentrager*, 339 U.S. 763 (1949), is controlling. None of these assertions withstands scrutiny.

In *Cowle*, Lord Mansfield wrote that "[t]here is no doubt as to the power of this Court; where the place is under the subjection of the Crown of England; the only question is, as to the propriety." 2 Burr, at 856, 97 Eng. Rep. at 599. He noted thereafter, by way of qualification, that the writ would not extend "[t]o foreign dominions, which belong to a prince who succeeds to the throne of England." *Id.*, 97 Eng. Rep. at 599-600. Through the use of ellipsis marks, the court excises the qualification and concludes that the writ does not extend "[t]o foreign dominions." Op. at 16. This masks two problems in its analysis. A "foreign dominion" is not a foreign country, as the court's reasoning implies, but rather "a coun-

try which at some time formed part of the dominions of a foreign state or potentate, but which by conquest or cession has become a part of the dominions of the Crown of England." *Ex parte Brown*, 5 B. & S. 280, 122 Eng. Rep. 835 (K.B. 1864). And the exception noted in Lord Mansfield's qualification has nothing to do with extraterritoriality: Instead, habeas from mainland courts was unnecessary for territories like Scotland that were controlled by princes in the line of succession because they had independent court systems. See William Blackstone, 1 *Commentaries* *95-98; James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 Cornell L. Rev. 497, 512-13 (2006). In the modern-day parallel, where a suitable alternative for habeas exists, the writ need not extend. *See* 2 Robert Chambers, *A Course of Lectures on the English Law Delivered at Oxford* 1767-1773, at 8 (Thomas M. Curley, ed., 1986) (quoting *Cowle* as indicating that, notwithstanding the power to issue the writ "in *Guernsey*, *Jersey*, *Minorca*, or the *plantations*," courts would not think it "proper to interpose" because "the most usual way is to complain to the *king in Council*, the supreme court of appeal from those provincial governments"); *see also infra* Part C.2. The relationship between England and principalities was the only instance where it was "found necessary to restrict the scope of the writ." 9 William Holdsworth, *A History of English Law* 124 (1938). *Cowle*, by its plain language, then, must be read as recognizing that the writ of habeas corpus ran even to places that were "no part of the realm," where the Crown's other writs did not run, nor did its laws apply. 2 Burr, at 835-36, 853-55, 97 Eng. Rep. at 587-88, 598-99. The Supreme Court has adopted this logical reading. *See Rasul*, 542 U.S. at 481-82; *see also* Mitchell B. Malachowski, *From Gitmo with Love: Redefining Habeas Corpus Jurisdiction in the Wake of the Enemy Combatant Cases of 2004*, 52 Naval L. Rev. 118, 122-23 (2005).[7]

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[7] The significance of a 1794 opinion by the U.S. Attorney General, *see* Op. at 15, which expresses the view that the writ should issue to the foreign commander of a foreign ship-of-war in U.S. ports, reasoning that the

[*16] The court next disposes of *Cowle* and the historical record by suggesting that the "power" to issue the writ acknowledged by Lord Mansfield can be explained by the Habeas Corpus Act of 1679, 31 Car. 2, c. 2. *See* Op. at 16. The Supreme Court has stated that the Habeas Corpus Act "enforces the common law," *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1730), thus hardly suggesting that the "power" recognized by Lord Mansfield was statutory and not included within the 1789 scope of the common-law writ. To the extent that the court makes the curious argument that the Habeas Corpus Act would have made it too impractical to produce prisoners if applied extraterritorially because it imposed fines on jailers who did not quickly produce the body, Op. at 16-17, the court cites no precedent that suggests that "practical problems" eviscerate "the precious safeguard of personal liberty [for which] there is no higher duty than to maintain it unimpaired," *Bowen* v. *Johnston*, 306 U.S. 19, 26 (1939). This line of reasoning employed by the court fails for two main reasons:

First, the Habeas Corpus Act of 1679 was expressly limited to those who "have beene committed for criminall or supposed criminall Matters." 31 Car. 2, c. 2, § 1. Hence, the burden of expediency imposed by the Act could scarcely have prevented common-law courts from exercising habeas jurisdiction in non-criminal matters such as the petitions in these appeals. Statutory habeas in English courts did not

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foreign ship has "no exemption from the jurisdiction of the country into which he comes," 1 Op. Att'y Gen. 47 (1794), is unclear. Nor is it clear what point the court is making by referencing *In re Ning Yi-Ching*, 56 T.L.R. 3 (K.B. Vacation Ct. 1939). In *Rasul*, the Supreme Court noted that *Ning Yi-Ching* "made quite clear that 'the remedy of *habeas corpus* was not confined to British subjects,' but would extend to 'any person . . . detained' within the reach of the writ," 542 U.S. at 483 n.13 (quoting *Ning Yi-Ching*, 56 T.L.R. at 5), and that the case does not support a "narrow view of the territorial reach of the writ," *id.* Here, the court provides a parenthetical quotation for *Ning Yi-Ching* that recalls a dissenting position from a prior case that was later repudiated. *See Rasul*, 542 U.S. at 483 n. 14; *Mwenya*, [1960] 1 Q.B. at 295 (Lord Evershed, M.R.).

extend to non-criminal detention until the Habeas Corpus Act of 1816, 56 Geo. 3, c. 100, although courts continued to exercise their common-law powers in the interim. *See* 2 Chambers, *supra*, at 11; 9 Holdsworth, *supra*, at 121.

Second, there is ample evidence that the writ did issue to faraway lands. In *Ex parte Anderson*, 3 El. & El. 487, 121 Eng. Rep. 525 (Q.B. 1861), *superseded by statute*, 25 & 26 Vict., c. 20, § 1, the Court of Queen's Bench exercised its common-law powers to issue a writ of habeas corpus to Quebec in Upper Canada after expressly acknowledging that it was "sensible of the inconvenience which may result from such a step." *Id.* at 494-95,121 Eng. Rep. at 527-28; *see also Brown*, 5 B. & S. 280, 122 Eng. Rep. 835 (issuing a writ to the Isle of Man in the sea between England and Ireland). English common-law courts also recognized the power to issue habeas corpus in India, even to non-subjects, and did so notwithstanding competition from local courts, well before England recognized its sovereignty in India. *See* B.N. Pandey, *The Introduction of English Law into India* 112, 149, 151 (1967); *see also Rex* v. *Mitter*, Morton 210 (Sup. Ct., Calcutta 1781), *reprinted in* 1 *The Indian Decisions* (Old Series) 1008 (T.A. Venkasawmy Row ed., 1911); *Rex* v. *Hastings*, Morton 206, 208-09 (Sup. Ct., Calcutta 1775) (opinion of Chambers, J.), *reprinted in* 1 *The Indian Decisions*, *supra*, at 1005, 1007; *id.* at 209 (opinion of Impey, C.J.); Kal Raustiala, *The Geography of Justice*, 73 Fordham L. Rev. 2501, 2530 n. 156 (2005).

[*17] Finally, the court reasons that *Eisentrager* requires the conclusion that there is no constitutional right to habeas for those in the detainees' posture. *See* Op. at 17-18. In *Eisentrager*, the detainees claimed that they were "entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*." 339 U.S. at 777. Thus *Eisentrager* presented a far different question than

confronts this court.[8] The detainees do not here contend that the Constitution accords them a positive right to the writ but rather that the Suspension Clause restricts Congress's power to eliminate a preexisting statutory right. To answer that question does not entail looking to the extent of the detainees' ties to the United States but rather requires understanding the scope of the writ of habeas corpus at common law in 1789. The court's reliance on *Eisentrager* is misplaced.

2.

This brings me to the question of whether, absent the writ, Congress has provided an adequate alternative procedure for challenging detention. If it so chooses, Congress may replace the privilege of habeas corpus with a commensurate procedure without overreaching its constitutional ambit. However, as the Supreme Court has cautioned, if a subject of Executive detention "were subject to any substantial procedural hurdles which ma[k]e his remedy . . . less swift and imperative than federal habeas corpus, the gravest constitutional doubts would be engendered [under the Suspension Clause]." *Sanders* v. *United States*, 373 U.S. 1, 14 (1963).

The Supreme Court has, on three occasions, found a replacement to habeas corpus to be adequate. In *United States* v. *Hayman*, 342 U.S. 205 (1952), the Court reviewed 42 U.S.C. § 2255, which extinguished the writ as to those convicted of federal crimes before Article III judges in exchange for recourse before the sentencing court. Prior to the enactment of section 2255, the writ was available in the jurisdiction of detention, not the jurisdiction of conviction. The Court concluded that this substitute was acceptable in part because the traditional habeas remedy remained available by statute where section 2255 proved "inadequate or ineffective." *Id.* at 223. The Court came to a similar conclu-

[8] To the extent that the court relies on *Eisentrager* as proof of its historical theory, the Supreme Court rejected that approach in *Rasul*, *see* 542 U.S. at 475-79.

sion in *Swain* v. *Pressley*, 430 U.S. 372 (1977), reviewing a statute with a similar "inadequate or ineffective" escape hatch, *id.* at 381 (reviewing D.C. Code § 23-110). In that case, the Court concluded that a procedure for hearing habeas in the District of Columbia's courts, as distinct from the federal courts, was an adequate alternative. Finally, in *Felker*, 518 U.S. at 663-64, the Court found no Suspension Clause violation in the restrictions on successive petitions for the writ under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1217, concluding that these were "well within the compass of [the] evolutionary process" of the habeas corpus protocol for abuse of the writ and did not impose upon the writ itself.

[*18] These cases provide little cover for the government. As the Supreme Court has stated, "[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. With this in mind, the government is mistaken in contending that the combatant status review tribunals ("CSRTs") established by the DTA suitably test the legitimacy of Executive detention. 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.

At the core of the Great Writ is the ability to "inquire into illegal detention with a view to an order releasing the petitioner." *Preiser* v. *Rodriguez*, 411 U.S. 475, 484 (1973) (internal quotation marks and alteration omitted). An examination of the CSRT procedure and this court's CSRT review powers reveals that these alternatives are neither adequate to test whether detention is unlawful nor directed toward releasing those who are unlawfully held.

"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." *Harris* v. *Nelson*, 394 U.S. 286, 298 (1969).

The offerings of CSRTs fall far short of this mark. Under the common law, when a detainee files a habeas petition, the burden shifts to the government to justify the detention in its return of the writ. When not facing an imminent trial,[9] the detainee then must be afforded an opportunity to traverse the writ, explaining why the grounds for detention are inadequate in fact or in law. *See*, *e.g.*, 28 U.S.C. §§ 2243, 2248; *Bollman*, 8 U.S. (4 Cranch) at 125; *Ex parte Beeching*, 4 B. & C. 137, 107 Eng. Rep. 1010 (K.B. 1825); *Schiever*, 2 Burr. 765, 97 Eng. Rep. 551; *cf. Hamdi*, 542 U.S. at 537-38 (plurality opinion). A CSRT works quite differently. *See* Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf. The detainee bears the burden of coming forward with evidence explaining why he should *not* be detained. The detainee need not be informed of the basis for his detention (which may be classified), need not be allowed to introduce rebuttal evidence (which is sometimes deemed by the CSRT too impractical to acquire), and must proceed without the benefit of his own counsel.[10] Moreover, these proceedings occur before a board of military judges subject to command influence, *see Hamdan*, 126 S. Ct. at 2804, 2806 (Kennedy, J., concurring in part); *Weiss* v. *United States*, 510 U.S. 163, 179-80 (1994); *cf.* 10 U.S.C. § 837(a). Insofar as each of these practices impedes the

[9] At common law, where criminal charges were pending, a prisoner filing a habeas writ would be remanded, although habeas incorporated a speedy-trial guarantee. *See*, *e.g.*, *Ex parte Beeching*, 4 B. & C. 137, 107 Eng. Rep. 1010 (K.B. 1825); *Bushell's Case*, Vaugh. 135, 124 Eng. Rep. 1006, 1009-10 (C.P. 1670). *But see* MCA § 3(a)(1), 120 Stat. at 2602 (codified at 10 U.S.C. § 948b(d)(A)). Once there was "a judgment of conviction rendered by a court of general criminal jurisdiction," release under the writ was unavailable. *Hayman*, 342 U.S. at 210-11.

[10] With a few possible exceptions, the Guantanamo detainees before the federal courts are unlikely to be fluent in English or to be familiar with legal procedures and, as their detentions far from home and cut off from their families have been lengthy, they are likely ill prepared to be able to obtain evidence to support their claims that they are not enemies of the United States.

process of determining the true facts underlying the lawfulness of the challenged detention, they are inimical to the nature of habeas review.

[*19] This court's review of CSRT determinations, *see* DTA § 1005(e)(2), 119 Stat. at 2742, is not designed to cure these inadequacies. This court may review only the record developed by the CSRT to assess whether the CSRT has complied with its own standards. Because a detainee still has no means to present evidence rebutting the government's case—even assuming the detainee could learn of its contents—assessing whether the government has more evidence in its favor than the detainee is hardly the proper antidote. The fact that this court also may consider whether the CSRT process "is consistent with the Constitution and laws of the United States," DTA § 1005(e)(2)(C)(ii), 119 Stat. at 2742, does not obviate the need for habeas. Whereas a cognizable constitutional, statutory, or treaty violation could defeat the lawfulness of the government's cause for detention, the writ issues whenever the Executive lacks a lawful justification for continued detention. The provisions of DTA § 1005(e)(2) cannot be reconciled with the purpose of habeas corpus, as they handcuff attempts to combat "the great engines of judicial despotism," *The Federalist* No. 83, at 456 (Alexander Hamilton) (E.H. Scott ed. 1898).

Additionally, and more significant still, continued detention may be justified by a CSRT on the basis of evidence resulting from torture. Testimony procured by coercion is notoriously unreliable and unspeakably inhumane. *See generally Intelligence Science Board, Educing Information: Interrogation: Science and Art* (2006), *available at* http://www.fas.org/irp/dni/educing.pdf. This basic point has long been recognized by the common law, which "has regarded torture and its fruits 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.); *see also Hamdan*, 126 S. Ct. at 2786; *Jackson* v. *Denno*, 378 U.S. 368, 386 (1964); *Proceedings Against Felton*, 3 Howell's St. Tr. 367, 371 (1628) (Eng.); John H. Langbein, *Torture and the Law of Proof* 73

(1977) ("Already in the fifteenth and sixteenth centuries, . . . the celebrated Renaissance 'panegyrists' of English law were . . . extolling the absence of torture in England.") (footnote omitted). The DTA implicitly endorses holding detainees on the basis of such evidence by including an anti-torture provision that applies only to future CSRTs. DTA § 1005(b)(2), 119 Stat. at 2741. Even for these future proceedings, however, the Secretary of Defense is required only to develop procedures to assess whether evidence obtained by torture is probative, not to require its exclusion. *Id.* § 1005(b)(1), 119 Stat. at 2741.

Even if the CSRT protocol were capable of assessing whether a detainee was unlawfully held and entitled to be released, it is not an adequate substitute for the habeas writ because this remedy is not guaranteed. Upon concluding that detention is unjustified, a habeas court "can only direct [the prisoner] to be discharged." *Bollman*, 8 U.S. (4 Cranch) at 136; *see also* 2 Story, *supra*, § 1339. But neither the DTA nor the MCA require this, and a recent report studying CSRT records shows that when at least three detainees were found by CSRTs not to be enemy combatants, they were subjected to a second, and in one case a third, CSRT proceeding until they were finally found to be properly classified as enemy combatants. Mark Denbeaux et al, *No-Hearing Hearings: CSRT: The Modern Habeas Corpus?*, at 37-39 (2006), http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

[*20] 3.

Therefore, because Congress in enacting the MCA has revoked the privilege of the writ of habeas corpus where it would have issued under the common law in 1789, without providing an adequate alternative, the MCA is void unless Congress's action fits within the exception in the Suspension Clause: Congress may suspend the writ "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., art. I, § 9, cl. 2. However, Congress has not invoked this power.

Suspension has been an exceedingly rare event in the history of the United States. On only four occasions has Congress seen fit to suspend the writ. These examples follow a clear pattern: Each suspension has made specific reference to a state of "Rebellion" or "Invasion" and each suspension was limited to the duration of that necessity. In 1863, recognizing "the present rebellion," Congress authorized President Lincoln during the Civil War "whenever, in his judgment, the public safety may require it, . . . to suspend the writ of habeas corpus." Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755, 755. As a result, no writ was to issue "so long as said suspension by the President shall remain in force, and said rebellion continue." *Id.* In the Ku Klux Klan Act of 1871, Congress agreed to authorize suspension whenever "the unlawful combinations named [in the statute] shall be organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or set at defiance the constituted authorities of such State, and of the United States within such State," finding that these circumstances "shall be deemed a rebellion against the government of the United States." Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 13, 14-15. Suspension was also authorized "when in cases of rebellion, insurrection, or invasion the public safety may require it" in two territories of the United States: the Philippines, Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 691, 692, and Hawaii, Hawaiian Organic Act, ch. 339, § 67, 31 Stat. 141, 153 (1900); *see Duncan* v. *Kahanamoku*, 327 U.S. 304, 307-08 (1946). *See also* Duker, *supra*, at 149, 178 n.190.

Because the MCA contains neither of these hallmarks of suspension, and because there is no indication that Congress sought to avail itself of the exception in the Suspension Clause, its attempt to revoke federal jurisdiction that the Supreme Court held to exist exceeds the powers of Congress. The MCA therefore has no effect on the jurisdiction of the federal courts to consider these petitions and their related appeals.

II.

In *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), Judge Joyce Hens Green addressed eleven coordinated habeas cases involving 56 aliens being detained by the United States as "enemy combatants" at Guantanamo Bay, *id.* at 445. These detainees are citizens of friendly nations—Australia, Bahrain, Canada, Kuwait, Libya, Turkey, the United Kingdom, and Yemen—who were seized in Afghanistan, Bosnia and Herzegovina, The Gambia, Pakistan, Thailand, and Zambia. Each detainee maintains that he was wrongly classified as an "enemy combatant." Denying in part the government's motion to dismiss the petitions, the district court ruled:

> **[*21]** [T]he petitioners have stated valid claims under the Fifth Amendment to the United States Constitution and . . . the procedures implemented by the government to confirm that the petitioners are "enemy combatants" subject to indefinite detention violate the petitioners' rights to due process of law.

Id. at 445. The district court further ruled that the Taliban but not the al Qaeda detainees were entitled to the protections of the Third and Fourth Geneva Conventions. *Id.* at 478-80.

In *Khalid* v. *Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005), Judge Richard J. Leon considered the habeas petitions of five Algerian-Bosnian citizens and one Algerian citizen with permanent Bosnian residency. They were arrested by Bosnian police in 2001 on suspicion of plotting to attack the United States and British embassies in Sarajevo. After the Supreme Court of the Federation of Bosnia and Herzegovina ordered the six men to be released in January 2002,[11] they were seized by United States forces and transported to Guantanamo Bay. The *Khalid* decision also covers the separate case of a French citizen seized in Pakistan and trans-

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[11] *See* Supreme Court of the Federation of Bosnia and Herzegovina, Sarajevo, Jan. 17, 2003, Ki-1001/01.

ported to Guantanamo Bay. Rejecting the petitioners' claim that their detention is unjustified, the district court ruled that "no viable legal theory exists by which [the district court] could issue a writ of habeas corpus under" the circumstances presented, *id.* at 314, noting the President's powers under Article II, Congress's Authorization for the Use of Military Force ("AUMF"), and the Order on Detention (Nov. 13, 2001), *see id.* at 317-20. The district court granted the government's motion and dismissed the petitions. *Id.* at 316.

The fundamental question presented by a petition for a writ of habeas corpus is whether Executive detention is lawful. A far more difficult question is what serves to justify Executive detention under the law. At the margin, the precise constitutional bounds of Executive authority are unclear, *see Hamdan*, 126 S. Ct. at 2773-74; *id.* at 2786 (citing *Ex parte Quirin*, 317 U.S. 1, 28 (1942)), and the Executive detention at issue is the product of a unique situation in our history. Unlike the uniformed combat that is contemplated by the laws of war, *see generally* William Winthrop, *Military Law and Precedents* (2d ed. 1920), the Geneva Conventions, *e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, and the Constitution, *see* U.S. Const., art. I, § 8, cl. 11, the United States confronts a stateless enemy in the war on terror that is difficult to identify and widely dispersed. *See Hamdi*, 519 U.S. at 519-20.

The parties recite in their several briefs the substantial competing interests of individual liberty and national security that are at stake, much as did the Supreme Court in *Hamdi*, 542 U.S. at 529-32 (plurality opinion); *see id.* at 544-45 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment). In *Hamdi*, the plurality acknowledged that "core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." *Id.* at 531. At the same time, it acknowledged that for Hamdi "detention could last for the rest of his life." *Id.* at 520. Although Hamdi was a United States citizen, the prem-

ise underlying the conclusion that there is a role for the judiciary, *id.* at 532-33, was that "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat," *id.* at 530. In short, the nature of the conflict makes true enemies of the United States more troublesome. At the same time, the risk of wrongful detention of mere bystanders is acute, particularly where, as here, the Executive detains individuals without trial.

[*22] Parsing the role of the judiciary in this context is arduous. The power of the President is at its zenith, after all, when the President acts in the conduct of foreign affairs with the support of Congress. *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). Even assuming the AUMF and the Order on Detention provide such support for the detentions at issue, still the President's powers are not unlimited in wartime. *See, e.g., Milligan*, 71 U.S. (4 Wall.) at 125. The Founders could have granted plenary power to the President to confront emergency situations, but they did not; they could have authorized the suspension of habeas corpus during any state of war, but they limited suspension to cases of "Rebellion or Invasion." U.S. Const., art. I, § 9, cl. 2; *see* 2 Story, *supra*, § 1342; *see also* 2 *The Records of the Federal Convention of 1787*, *supra*, at 341 (proposal of Charles Pinckney). Even in 1627, at a time when "[a]ll justice still flowed from the king [and] the courts merely dispensed that justice," Duker, *supra*, at 44, the idea that a court would remand a prisoner merely because the Crown so ordered ("*per speciale mandatum Domini Regis*") was deemed to be inconsistent with the notion of a government under law. *See Darnel's Case*, 3 Howell's St. Tr. 1, 59 (K.B. 1627); Meador, *supra*, at 13-19. While judgments of military necessity are entitled to deference by the courts and while temporary custody during wartime may be justified in order properly to process those who have been captured, the Executive has had ample opportunity during the past five years during which the detainees have been held at Guantanamo Bay to

determine who is being held and for what reason. *See, e.g.*, *Hamdan*, 126 S. Ct. at 2773; *cf. Hamdi*, 542 U.S. at 521.

Throughout history, courts reviewing the Executive detention of prisoners have engaged in searching factual review of the Executive's claims. In *Bollman*, the Supreme Court reviewed a petition of two alleged traitors accused of levying war against the United States. The petitioners were held in custody by the marshal but had not yet been charged. 8 U.S. (4 Cranch) at 75-76, 125. After the "testimony on which they were committed [was] fully examined and attentively considered," the Court ordered the prisoners released. *Id.* at 136-37. The 1759 English case of *Rex* v. *Schiever*, discussed *supra* Part I.C.1, also shows that habeas courts scrutinized the factual basis for the detention of even wartime prisoners. In *Schiever*, the court reviewed the prisoner's affidavit and took further testimony from a witness, who "sw[ore] that Schiever was forced against his inclination . . . to serve on board [the French privateer]." 2 Burr, at 766, 97 Eng. Rep. at 551. Nonetheless, to the court it was clear that Schiever had, in fact, fought against England. As such, "the Court thought this man, upon his own shewing, clearly a prisoner of war and lawfully detained as such. Therefore they Denied the motion." *Id.*, 97 Eng. Rep. at 552 (footnote omitted). Similar themes and factual inquiry appear in *Three Spanish Sailors*, 2 Black. W. 1324, 96 Eng. Rep. 775, in which three alien petitioners submitted affidavits during wartime but failed to convince the court that they were not enemies of the Crown, and *Goldswain's Case*, 5 Black. W. 1207, 96 Eng. Rep. 711 (C.P. 1778), in which a wrongly impressed Englishman was released from service during wartime. *See also Beeching*, 4 B. & C. 137, 107 Eng. Rep. 1010.

[*23] In the early history of the United States, two cases further suggest that factual review accompanied even writs during wartime. In *United States* v. *Williams* (C.C.D. Va. Dec. 4, 1813), a previously unreported case researched for a recent essay in *The Green Bag*, Chief Justice John Marshall, riding circuit, released an enemy alien from detention by civil authorities. The Chief Justice concluded that "the

regulations made by the President of the United States respecting alien enemies [did] not authorize the confinement of the petitioner in this case." Neuman & Hobson, *supra*, at 42 (quoting the circuit court's order book). A majority of the Supreme Court of Pennsylvania, in *Lockington's Case*, 1 Brightly's (N.P.) 269 (Pa. 1813), agreed that alien enemies were entitled to a judgment on the merits as to whether their detention was justified,[12] and thereafter remanded the prisoners. *Id.* at 283-84 (Tilghman, C.J.); *id.* at 285, 293 (Yeates, J.).

The government maintains that a series of World War II-era cases undercuts the proposition that habeas review of uncharged detainees requires a factual assessment. It cites several cases in which courts have refused to engage in factual review of the findings of military tribunals imposing sentences under the laws of war. *See, e.g.*, *Eisentrager*, 339 U.S. 763; *In re Yamashita*, 327 U.S. 1 (1945); *Quirin*, 317 U.S. at 25. There is good reason to treat differently a petition by an uncharged detainee—who could be held indefinitely without even the prospect of a trial or meaningful process—from that of a convicted war criminal. *See Rasul*, 542 U.S. at 476; *Omar* v. *Harvey*, No. 06-5126, slip op. at 13 (D.C. Cir. Feb. 9, 2007); *see also supra* note 9. For example, in *Yamashita*, the prisoner petitioned for a writ of habeas corpus only after a trial before a military tribunal where his six attorneys defended against 286 government witnesses. 327 U.S. at 5. *Quirin* involved a military commission, *see* 317 U.S. at 18-19, where the government presented "overwhelming" proof that included confessions from the German saboteurs. Pierce O'Donnell, *In Time of War* 152-53, 165-66, 189 (2005). In *Eisentrager*, 339 U.S. at 766, the military tribunal conducted a trial lasting months. By contrast, the detainees have been charged with no crimes, nor are charges pending. The

[12] Prior to *Ableman* v. *Booth*, 62 U.S. (21 How.) 506 (1859), and *Tarble's Case*, 80 U.S. (13 Wall.) 397, 411-12 (1872), state courts regularly issued writs of habeas corpus as to federal prisoners.

robustness of the review they have received to date differs by orders of magnitude from that of the military tribunal cases.[13]

The Supreme Court in *Rasul* did not address "whether and what further proceedings may become necessary after respondents make their responses to the merits of petitioners' claims," 542 U.S. at 485. The detainees cannot rest on due process under the Fifth Amendment. Although the district court in *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 454, made a contrary ruling, the Supreme Court in *Eisentrager* held that the Constitution does not afford rights to aliens in this context. 339 U.S. at 770; *accord Verdugo-Urquidez*, 494 U.S. at 269. Although in Rasul the Court cast doubt on the continuing vitality of *Eisentrager*, 542 U.S. at

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[13] There is also good reason to distinguish between these detainees' cases and parallel cases where detainees have been accorded prisoner-of-war status and the benefits of Army Regulation 190-8, which implements the Third Geneva Convention. These provisions contemplate the end of hostilities and prisoner exchanges, *id.* §§ 3-11, 3-13, and provide for more extensive process for determining the status of prisoners, *id.* § 1-6. The regulations further specify that:

> Persons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed. The record of every Tribunal proceeding resulting in a determination denying [Enemy Prisoner of War] status shall be reviewed for legal sufficiency when the record is received at the office of the Staff Judge Advocate for the convening authority.

Id. § l-6g. In *Hamdi*, the Supreme Court recognized that it was conceivable that procedures similar to Army Regulation 190-8 may suffice to provide due process to a citizen-detainee. 542 U.S. at 538 (plurality opinion); *id.* at 550-51 (Souter, J., with whom Ginsburg, J., joins, concurring in part, dissenting in part, and concurring in the judgment). Even assuming that according Guantanamo detainees rights under Army Regulation 190-8 would provide adequate and independent factual review of their claims sufficient to satisfy the dictates of habeas corpus, as well as any treaty obligations that the detainees are able to enforce, the Executive has declined to accord such detainees prisoner-of-war status, *see, e.g.*, The President's News Conference With Chairman Hamid Karzai of the Afghan Interim Authority, 1 *Pub. Papers* 121, 123 (Jan. 28, 2002).

475-79, absent an explicit statement by the Court that it intended to overrule *Eisentrager's* constitutional holding, that holding is binding on this court. *See Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); Op. at 21. Rather, the process that is due inheres in the nature of the writ and the inquiry it entails. The Court in *Rasul* held that federal court jurisdiction under 28 U.S.C. § 2241 is permitted for habeas petitions filed by detainees at Guantanamo, 542 U.S. at 485; *id.* at 488 (Kennedy, J., concurring in the judgment), and this result is undisturbed because the MCA is void. So long as the Executive can convince an independent Article III habeas judge that it has not acted unlawfully, it may continue to detain those alien enemy combatants who pose a continuing threat during the active engagement of the United States in the war on terror. *See id.* at 488 (Kennedy, J., concurring in the judgment); *cf. Hamdi*, 542 U.S. at 518-19. But it must make that showing and the detainees must be allowed a meaningful opportunity to respond. *See* Meador, *supra*, at 18; *see also Hamdi*, 542 U.S. at 525-26.

[*24] Therefore, I would hold that on remand the district courts shall follow the return and traverse procedures of 28 U.S.C. § 2241 *et seq.* In particular, upon application for a writ of habeas corpus, 28 U.S.C. § 2242, the district court shall issue an order to show cause, whereupon "[t]he person to whom the writ is or order is directed shall make a return certifying the true cause of the detention," *id.* § 2243. So long as the government "puts forth credible evidence that the [detainee] meets the enemy-combatant criteria," *Hamdi*, 542 U.S. at 533, the district court must accept the return as true "if not traversed" by the person detained. *Id.* § 2248. The district court may take evidence "orally or by deposition, or, in the discretion of the judge, by affidavit." *Id.* § 2246. The district court may conduct discovery. *See Harris*, 394 U.S. at 298-99; *cf.* Rules Governing Section 2254 Cases, R. 6-8; Rules Governing Section 2255 Cases, R. 6-8. Thereafter, "[t]he [district] court shall summarily hear and determine the facts, and dispose of the matter as law and

justice require."[14] District courts are well able to adjust these proceedings in light of the government's significant interests in guarding national security, as suggested in *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 467, by use of protective orders and ex parte and in camera review, *id.* at 471. The procedural mechanisms employed in that case, *see*, *e.g.*, *id.* at 452 & n.12, should be employed again, as district courts must assure the basic fairness of the habeas proceedings, *see generally id.* at 468-78.

Accordingly, I respectfully dissent from the judgment vacating the district courts' decisions and dismissing these appeals for lack of jurisdiction.

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[14] Because the Suspension Clause question must be decided by the Supreme Court in the detainees' favor in order for the district court proceedings to occur, I leave for another day questions relating to the evolving and unlimited definition of "enemy combatant," *see Guantanamo Detainee Cases*, 355 F. Supp. 2d at 474-75, a detainee's inability to rebut evidence withheld on national security grounds, *see id.* at 468-72, as well as the detainees' claims under other statutes, international conventions, and treaties, and whether challenges to the conditions of confinement are cognizable in habeas. *Compare Khalid*, 355 F. Supp. 2d at 324-25, *with Miller* v. *Overholser*, 206 F.2d 415, 419-21 (D.C. Cir. 1953). Congressional action may also clarify matters. *See, e.g.*, S. 185, S. 576, 110th Cong. (2007).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Case No. 1:04-1142 (RJL)

RIDOUANE KHALID, PETITIONER,

v.

GEORGE WALKER BUSH, ET AL., RESPONDENTS.

Civil Case No. 1:04-1166 (RJL)

LAKHDAR BOUMEDIENE, ET AL., PETITIONERS,

v.

GEORGE WALKER BUSH, ET AL., RESPONDENTS.

January 19, 2005

[355 F. Supp. 2d 311]

[314]

MEMORANDUM OPINION AND ORDER

LEON, District Judge.

Petitioners are seven foreign nationals who were seized by United States forces and have been detained at the United States naval base at Guantanamo Bay, Cuba ("Guantanamo") pursuant to military orders arising out of the ongoing war against terror initiated in the aftermath of September 11, 2001 ("9/11"). Based on the Supreme Court's decision in *Rasul* v. *Bush*, 124 S. Ct. 2686 (2004), each detainee has filed a petition for a writ of habeas corpus with this Court seeking to challenge the lawfulness of his continued detention. Each petitioner claims, in essence, that he is being held

in violation of the United States Constitution, certain federal laws and United States treaties, and certain international laws. In stark contrast, the respondents ("United States") have moved to dismiss these petitions claiming, in essence, that there is no viable legal theory by which this Court could issue such a writ because: (1) non-resident aliens detained under these circumstances have no rights under the Constitution; (2) no existing federal law renders their custody unlawful; (3) no legally binding treaty is applicable; and (4) international law is not binding under these circumstances.

Thus, these cases pose the novel issue of whether there is any viable legal theory under which a federal court could issue a writ of habeas corpus challenging the legality of the detention of non-resident aliens captured abroad and detained outside the territorial sovereignty of the United States, pursuant to lawful military orders, during a Congressionally authorized conflict.

After due consideration of the respondents' Motion, the petitioners' individual and joint oppositions, oral arguments and various supplemental briefs, the Court, for the following reasons, concludes that no viable legal theory exists by which it could issue a writ of habeas corpus under these circumstances. Accordingly, the Court GRANTS the respondents' Motion to Dismiss or for Judgment as a Matter of Law, and, therefore, will not issue the writs of habeas corpus.

I. BACKGROUND[1]

On 9/11, members of the al Qaeda terrorist network orchestrated the most devastating **[315]** terrorist attack in the history of the United States when they hijacked and plunged three commercial airliners into the World Trade Center, the Pentagon, and an open field in rural Pennsylvania. Approximately 3,000 innocent civilians were killed that day and the United States economy was severely damaged.

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[1] The following facts were drawn from the petitions, various affidavits, and other supporting materials submitted by the petitioners.

In response, Congress overwhelmingly passed a joint resolution authorizing the President to:

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

Authorization for Use of Military Force, Pub. L. 107-40, §§ 1-2, 115 Stat. 224 (Sept. 18, 2001) (hereinafter "AUMF"). Capturing and detaining enemy combatants, however, was not specifically referenced as a necessary and appropriate use of force therein.

The events of 9/11 and the passage of the AUMF was followed by immediate Executive action. First, the President sent United States Armed Forces into Afghanistan to commence a military campaign against al Qaeda and the Taliban regime that supported it. Soon thereafter, on November 13, 2001, the President issued an Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, November 13, 2001, 66 Fed. Reg. 57,833 (2000) (hereinafter "Detention Order").

The Detention Order authorizes the Secretary of Defense, Donald Rumsfeld, to detain anyone that the President has "reason to believe":

> (i) is or was a member of the organization known as al Qaeda;
>
> (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threatened to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii)[.]

Pursuant to this order, the United States has targeted and captured, to-date, a large number of foreign nationals both on and off the battlefields of Afghanistan and transported them for detention to Guantanamo Bay, Cuba. In addition, the military has determined that many of these individuals should be detained for the duration of the conflict as "enemy combatants."[2] At present, the Department of Defense ("DoD") is holding nearly 550 of these foreign nationals at Guantanamo, although recent media reports indicate that **[316]** the DoD intends to release or transfer hundreds in the near future.

Seven of these foreign nationals are the petitioners in this case.[3] None are United States citizens or have any connection to the United States, other than their current status as detainees at a U.S. military base.[4] To the contrary, the

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[2] The scope of the term "enemy combatant" has prompted much debate. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2639 (2004) (noting "the Government has never provided any court with the full criteria that it uses in classifying individuals as [enemy combatants.]"). In July 2004, the Government adopted the following definition, which it now applies to foreign nationals held at Guantanamo:

> [A]n individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

See Deputy Secretary of Defense Paul Wolfowitz, Memorandum for the Secretary of the Navy, *Order Establishing Combatant Status Review Tribunal* (July 7, 2004) (hereinafter "CSRT Order").

[3] Currently before the Court are two separate petitions that were filed by or on behalf of a total of nine detainees held at Guantanamo. *See* First Amended Petition for a Writ of Habeas Corpus (the "Boumediene Petition" or "FAP") ¶ 1; Petition for Writ of Habeas Corpus ("Khalid Pet.") ¶¶ 1-2. Only seven of the original nine petitioners remain.

[4] The United States occupies Guantanamo pursuant to a 1903 Lease Agreement executed with the Republic of Cuba after the Spanish-American War. Under the Agreement, "the United States recognizes the

petitioners are non-resident aliens captured outside of Afghanistan. They include five Algerian-Bosnian citizens (Lakhdar Boumediene, Mohammed Nechle, Hadj Boudella, Belkacem Bensayah, and Mustafa Ait Idir), *see* FAP ¶¶ 5-13; one Algerian citizen with permanent Bosnian residency (Saber Lahmar), *id.* ¶ 15; and one French citizen (Ridouane Khalid), *see* Khalid Pet. ¶ 2. All, with the exception of Khalid, were captured in Bosnia around October 2001. *See* FAP ¶¶ 24, 28, 30-33, & 35. Khalid was seized in Pakistan sometime during the early fall of 2001. *See* Khalid Pet. ¶¶ 32, 45. In January 2002, shortly after they were captured and transferred to United States military authorities, the petitioners were transported to Guantanamo, where they currently remain. *See* FAP ¶ 46; Khalid Pet. ¶ 46.

In the wake of the Supreme Court's ruling in *Rasul*, petitioners filed writs of habeas corpus on their own behalf and through certain relatives as their "next friend" (collectively, petitioners and their relatives are referred to herein as "petitioners"). Both petitions raise nearly identical claims, in that they challenge the legality of their detention and the conditions of their confinement under the Constitution, certain federal statutes and regulations,[5] and international law.

In particular, the petitions challenge the President's authority to issue the November 13, 2001 Detention Order, *see* FAP ¶ 58; Khalid Pet. ¶ 77; *see also* Petitioners' Joint Supplemental Opposition Brief ("Pets. Joint Supp. Opp."), pp. 5-12, and, even if legal, they claim it is unconstitutional as applied to them because they have been or are being denied

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continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]." *See* Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T.S. No. 418. The Lease further provides that "the Republic of Cuba consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas." *Id.*

[5] The Khalid Petition states claims for violations of two statutes—the Alien Tort Claims Act, 28 U.S.C. § 1350 and the Administrative Procedures Act, 5 U.S.C. § 701 *et seq*.—which the Boumediene Petitioners did not include as claims in their petition.

their constitutional rights, *see* FAP ¶ 50; Khalid Pet. ¶ 55. Finally, even if those rights are not being violated, they claim their continued detention violates certain federal statutes and international law. *See* FAP ¶¶ 51-56; Khalid Pet. ¶¶ 57-75, 80-81. In the final analysis, the petitioners are asking this Court to do something no federal court has done before: evaluate the legality of the Executive's capture and detention of non-resident aliens, outside of the United States, during a time of armed conflict.

II. STANDARD OF REVIEW

The dispositive motion now before the Court is the respondents' Motion to Dismiss or for Judgment as a Matter of Law ("Motion to Dismiss"). *See* Respondents' **[317]** Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law.[6] The Court will only grant dismissal if "it appears beyond doubt that [petitioners] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957); *Kowal* v. *MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). The Court must accept the well-pleaded facts as they appear in the writ of habeas corpus petition and extend the petitioners every reasonable inference in their favor. *See Doe* v. *U.S. Dept. of Justice*, 753 F.2d 1092, 1102 (D.C. Cir. 1985); *Kiely* v. *Raytheon Co.*, 105 F.3d 734, 735 (1st Cir. 1997). While the Court

[6] The Court notes that it will treat the respondents' Motion to Dismiss within the traditional framework of Fed. R. Civ. P. 12(b)(6). The Court recognizes, however, that under the Habeas Rules the respondents are only entitled to respond with a pleading and, therefore, do not have an absolute *right*, as they would in non-habeas civil litigation, to file a Rule 12(b)(6) motion. *See* Habeas Rule 4 ("[T]he judge shall order the respondent to file *an answer* or *other pleading* . . . .") (emphasis added). Nevertheless, the Court has the discretion to allow such a motion where it deems, as it does in this case, that the issues raised are appropriate for summary resolution. *See* Habeas Rule 4 (Advisory Committee Note) ("For example, the judge may want to authorize the respondent to make a motion to dismiss . . . ."); *see also Shariff* v. *Artuz*, 1998 WL 17734, *1 n.1 (S.D.N.Y. Jan. 16, 1998).

construes the petitions liberally in favor of the petitioners, *see Schuler* v. *United States*, 617 F.2d 605, 608 (D.C. Cir. 1979), it "need not accept the inferences drawn by [the petitioners] if such inferences are unsupported by the facts set out in the [petitions]." *See Kowal*, 16 F.3d at 1276. Nor is the Court required to accept any legal conclusions incorporated in the factual allegations set forth by the petitioners. *Warren* v. *District of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004). Stated simply, the petitioners must establish at least one viable legal theory, accepting the facts as they plead them to be true, under which this Court could issue a writ of habeas corpus challenging the legality of their detention. For the following reasons, they have failed to do so.

III. ANALYSIS

The petitioners have essentially mounted a two-front attack on the legality of their detention. In the first instance, they challenge the President's authority, under either the Constitution or the AUMF, to issue the Detention Order pursuant to which they are detained. Next, they contend that even if the President had the authority to issue an order that would detain them for the indefinite period between now and the completion of the war, their continued detention violates: (1) each non-resident alien's rights under the United States Constitution; (2) certain federal laws; (3) certain treaties to which the United States is a signatory State; and (4) certain international law provisions that have been incorporated into this country's common law. In the final analysis, petitioners contend that at least one of these alleged violations constitutes a legal theory which provides this Court with a viable basis to not only issue a writ of habeas corpus, but to ultimately find their detention unlawful. For the following reasons, the Court disagrees and finds no viable legal theory under which it could issue the writ they each seek.

A. Congress Authorized the President to Capture and Detain Enemy Combatants.

Petitioners' initial theory challenging the lawfulness of their detention (i.e., that the President's Detention Order is not authorized by either the Constitution or the **[318]** AUMF) is, for the following reasons, completely without merit.

In drafting the Constitution, the Founding Fathers chose to allocate the rights and duties for securing the Nation's "common defence" between Congress and the President (the political branches). *Compare* U.S. Const. Art. I, § 8 (enumerating Congress' "war powers"), *with* U.S. Const. Art. II, §§ 2-3 (enumerating the President's "war powers"). The Constitution specifically gives to Congress the power to "provide for the common Defence," Art. I, § 8, cl, 1; "To raise and support Armies," "To provide and maintain a Navy," *id.* § 8, cls. 12-13; "To make Rules for the Government and Regulation of the land and naval Forces," *id.* § 8, cl. 14, and "To declare War," *id.* § 8, cl. 1. The President, on the other hand, is charged with "tak[ing] Care that the Laws [are] faithfully executed," Art. II, § 3, and is identified as the Commander-in-Chief of the Army and Navy, *id.* § 2, cl. 1. These rights and duties govern the lawful prosecution of an armed conflict from beginning to end. And, in *Ex parte Quirin*, the Supreme Court clearly articulated the relationship between Congress and the President in declaring and prosecuting armed conflict:

> The Constitution thus invests the President as Commander in Chief with the power to wage war which Congress has declared, *and to carry into effect all laws passed by Congress* for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war.

Ex parte Quirin, 317 U.S. 1, 26 (1942) (emphasis added).

The President's ability to make the decisions necessary to effectively prosecute a Congressionally authorized armed

conflict must be interpreted expansively. Indeed, the Constitution does not delegate to Congress the power to "conduct" or to "make" war; rather, Congress has been given the power to "declare" war.[7] This critical distinction lends considerable support to the President's authority to make the operational and tactical decisions necessary during an ongoing conflict. Moreover, there can be no doubt that the President's power to act at a time of armed conflict is at its strongest when Congress has specifically authorized the President to act. *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (noting that the President's powers "fluctuate, depending upon their disjunction or conjunction with those of Congress").[8]

Thus, when Congress, through the AUMF, authorized the President "to use all necessary and appropriate force against those . . . persons he determines planned, authorized, committed, or aided the terrorist attacks [of 9/11]" "to prevent any future **[319]** acts of international terrorism against the United States by such . . . persons[,]" *see* AUMF § 2, it, in effect, gave the President the power to capture and detain those who the military determined were either responsible for the 9/11 attacks or posed a threat of future terrorist attacks. Indeed, the President's war powers could not be reasonably interpreted otherwise.

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[7] In fact, an early draft of the Committee on Detail gave Congress the power to "make" war. *See* 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 313, 318-19 (Rev. Ed. 1937). Ultimately, however, the Framers gave Congress the power to "declare" war in order to avoid any confusion over the President's ability to wage or prosecute the war.

[8] In *Youngstown*, Justice Jackson stated that the relative strength of a President's war power depends on the level of Congressional authorization. Under this model, the President's authority is at its maximum where he acts pursuant to express Congressional authorization. *Youngstown*, 343 U.S. at 635. In the absence of a Congressional grant of authority, the President can only act pursuant to any independent or inherent authority that he possesses under the Constitution. *Id.* at 637. The President's power is at its "lowest ebb" when he acts contrary to the express or implied will of Congress. *Id.* at 637-38.

The history of armed conflict in which this Nation has engaged since our inception has firmly established that the President's "war power" *must* include the power to capture and detain our enemies. Indeed, the Supreme Court acknowledged as much in its recent decision in *Hamdi* v. *Rumsfeld*. *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633, 2640 (2004) ("The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by universal agreement and practice, are important incident[s] of war.") (internal quotations omitted); *see also*, *e.g.*, *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 615 (1850) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and *conquer and subdue* the enemy.") (emphasis added).

Moreover, the petitioners' contention, in effect, that the President's conduct is illegally excessive because Congress did not *expressly* authorize the detention of enemy combatants not captured on or near the battlefields of Afghanistan is fanciful, at best.

The Supreme Court, in *Hamdi*, made clear that specific Congressional authorization of detention is unnecessary "[b]ecause detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war" and, thus, permitted by Congress under the clause of the AUMF authorizing the President to use "necessary and appropriate force."[9] *Hamdi*, 124 S. Ct. at 2641; *see also Dames & Moore* v. *Regan*, 453 U.S. 654, 678 (1981) ("Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act[.]"). In addition, with respect to the duration of detention, the Supreme Court found that it is an equally clear and well-established principle of the law

[9] In *Hamdi*, the petitioner was a United States citizen, who members of the Northern Alliance captured in 2001 on a battlefield in Afghanistan for allegedly supporting the Taliban. *Hamdi*, 124 S. Ct. at 2635-36.

of war that detention may last for the duration of active hostilities, *Hamdi*, 124 S. Ct. at 2641 (citing Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364), and, thus, the Supreme Court interpreted the AUMF to mean that Congress has granted the President the authority to detain enemy combatants for the duration of the current conflict, *id.* ("[W]e understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict[.]").[10]

[320] The fact that the petitioners in this case were not captured on or near the battlefields of Afghanistan, unlike the petitioner in *Hamdi*, is of no legal significance to this conclusion because the AUMF does not place geographic parameters on the President's authority to wage this war against terrorists. Thus it is unmistakable that Congress, like the Supreme Court in *Quirin*, concluded that enemies who have committed or attempted to commit acts of violence outside of the "theatre or zone of active military operations" are equally as "belligerent" as those captured on the battlefield. *See Quirin*, 317 U.S. at 38. As the respondents aptly observe, the 9/11 attacks were orchestrated by a global force operating in such far-flung locations as Malaysia, Germany, and the United Arab Emirates. *See* Mot. to Dismiss, p. 14 (citing *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, 156-68, 236-37 (2004)). Any interpretation of

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[10] Notwithstanding the foregoing, the Court recognizes petitioners' concern at the prospect of indefinite or perpetual detention. However, as noted, the law of war, as it has been adopted over the years by the political branches, permits detention for the duration of the hostilities. If the current conflict continues for an unacceptable duration, inadequacies in the law of "traditional" warfare maybe exposed, *see Hamdi*, 124 S. Ct. at 2641-42 ("If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel."), requiring a reevaluation of the laws by the *political branches*, not the judiciary.

the AUMF that would require the President and the military to restrict their search, capture, and detention to the battlefields of Afghanistan would contradict Congress's clear intention, and unduly hinder both the President's ability to protect our country from future acts of terrorism and his ability to gather vital intelligence regarding the capability, operations, and intentions of this elusive and cunning adversary. *See* Howard S. Levie, *Prisoners of War in the Int'l Armed Conflict*, 59 Int'l Law Studies 5 at 108-09 (U.S. Naval War College 1977). Indeed, if nothing else, the attacks on 9/11 exposed the weaknesses in, and the importance of, our intelligence gathering capabilities in preventing future terrorist attacks against our country. For this Court to interpret the AUMF as the petitioners contend, would make a mockery of Congress's intent, contradict the President's necessary and natural war powers, and improperly narrow the Supreme Court's ruling in *Hamdi*.

Thus, for all of these reasons, the Court finds that the President's Detention Order was lawful under the AUMF and consistent with his war powers under the Constitution. Accordingly, it will turn now to the petitioners' remaining legal theories by which they seek to challenge the lawfulness of their detention.[11]

B. Non-Resident Aliens Captured and Detained Outside the United States Have No Cognizable Constitutional Rights.

Petitioners' next theoretical basis for challenging the lawfulness of their continued detention under the habeas statute is their contention that it violates their substantive rights under the United States Constitution (e.g., due process, right to confrontation, right to counsel, and protection

[11] In *Hamdi*, the Supreme Court did not decide the issue of whether the President possesses plenary authority to detain enemies under Article II of the Constitution, in the absence of the AUMF. *Hamdi*, 124 S. Ct. at 2639. Because this Court also rests its holding on Congressional authorization, the Court similarly does not reach the question of whether Article II gives the President plenary authority to detain enemies.

against cruel and unusual punishment). *E.g.*, FAP ¶¶ 40, 47; Khalid ¶¶ 49, 53; Petitioners Memorandum in Opposition to Respondents' Motion to Dismiss ("Pets. Opp. Mem."), pp. 28-40; Boumediene and El-Banna Petitioners' Supplemental Reply and Opposition to Government's Motion to Dismiss ("Boumediene Supp. Reply"), pp. 32-37. This argument, of course, *presupposes* that non-resident aliens captured outside of the United States and held at a military base that is not located on sovereign U.S. territory enjoy such rights. Notwithstanding the Supreme Court's unequivocal and repeated **[321]** denial of such rights to such non-resident aliens, *see infra*, petitioners cling to an expansive interpretation of the Supreme Court's recent opinion in *Rasul* as authority for this novel proposition. For the following reasons, the Court rejects the petitioners' interpretation of *Rasul* and, relying upon a long line of Supreme Court opinions, holds that non-resident aliens captured and detained pursuant to the AUMF and the President's Detention Order have no viable constitutional basis to seek a writ of habeas corpus.

The petitioners in this case are neither United States citizens nor aliens located within sovereign United States territory. To the contrary, they are non-resident aliens, captured in foreign territory, and held at a naval base, which is located on land subject to the "ultimate sovereignty" of Cuba. *See* Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T.S. No. 418. Due to their status as aliens outside sovereign United States territory with no connection to the United States, it was well established prior to *Rasul* that the petitioners possess no cognizable constitutional rights. *See Johnson* v. *Eisentrager*, 339 U.S. 763, 783-85 (1950); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens.").

The Supreme Court's opinion in *Eisentrager* is instructive on this point. In *Eisentrager*, twenty-one German nationals were captured in China while assisting Japanese forces during World War II. *Eisentrager* 339 U.S. at 765-66.

The Germans were tried by an American military commission headquartered in Nanking, convicted of violating the laws of war, and transferred to a prison in Germany under the control of the United States Army. *Id.* One of the prisoners, on behalf of himself and the twenty others, sought writs of habeas corpus in the United States District Court for the District of Columbia, claiming violations of the Constitution as the petitioners do in the case at bar. *Id.* at 767. The District Court dismissed for lack of jurisdiction, but our Court of Appeals disagreed and reversed its judgment. *Eisentrager* v. *Forrestal*, 174 F.2d 961 (D.C. Cir. 1949).

On appeal, the Supreme Court rejected the non-resident alien petitioners' attempt to invoke a "constitutional right" to a habeas petition. The Supreme Court reasoned that the "prisoners at no relevant time were within any territory over which the United States is *sovereign*, and the scenes of their offense, their capture, their trial, and their punishment were all beyond the territorial jurisdiction of any court of the United States." *Eisentrager*, 339 U.S. at 778.

The Supreme Court then engaged in an extensive discussion specifically regarding the constitutional right to habeas afforded to our citizens, and the absence of such rights afforded to non-resident aliens. *Id.* at 770-71.[12] In the final analysis, the lynchpin for extending constitutional protections beyond the citizenry to aliens was and remains "the alien's presence within its territorial jurisdiction." *Id.* at 771 ("Mere lawful presence in the country . . . gives [the alien] certain rights[.]").

[322] The Supreme Court, thereafter, repeatedly reaffirmed its holding in *Eisentrager*. *E.g.*, *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the

[12] In highlighting the distinction between citizens and aliens, the Court stated, "[w]ith the citizen we are now little concerned, except to set his case apart as untouched by this decision and to make measure of the difference between his status and that of all categories of aliens." *Eisentrager*, 339 U.S. at 769.

United States are unavailable to aliens outside of our geographic borders."); *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 266 (1990) ("Respondent is an alien who has had no previous significant voluntary connection with the United States, so these cases [conferring constitutional rights on aliens] avail him not."). And similarly, our Circuit Court has repeatedly held that a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." *32 County Sovereignty Comm.* v. *Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (quoting *People's Mojahedin Org. of Iran* v. *Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999)); *see also*, *e.g.*, *Jifry* v. *F.A.A.*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) ("The Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections."); *Pauling* v. *McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960) ("The nonresident aliens here plainly cannot appeal to the protection of the Constitution or laws of the United States.").[13]

Petitioners contend, however, that the *Rasul* majority overruled *Eisentrager* when it permitted non-resident aliens detained at Guantanamo to file these petitions for a writ of habeas corpus. In short, the petitioners contend that *Rasul* also holds that such non-resident aliens possess substantive

[13] Petitioners also argue that Guantanamo is, for all intents and purposes, sovereign United States territory and, therefore, the non-resident aliens held there should possess the same constitutional rights as an alien held within the continental United States. *See* Mot. Trans., p. 41. Under the express terms of the lease between the United States and Cuba, however, Guantanamo is not a United States sovereignty. *See* Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T.S. No. 418 ("[T]he United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas] . . . ."). Therefore, unless and until such time as the political branches renegotiate the terms of the lease to alter this status, *see Vermilya-Brown Co., Inc.* v. *Connell*, 69 S. Ct. 140, 142 (1948) ("[T]he determination of sovereignty over an area is for the legislative and executive departments[.]"); the non-resident, alien detainees held there do not possess the same legal status as resident aliens.

due process rights cognizable in habeas, *see* Motion Hearing Transcript ("Mot. Trans."), p. 38, because such rights are inextricably linked to the right to file a petition, *see* Pets. Opp. Mem., p. 1. The Court disagrees.

Nothing in *Rasul* alters the holding articulated in *Eisentrager* and its progeny. The Supreme Court majority in *Rasul* expressly limited its inquiry to whether non-resident aliens detained at Guantanamo have a right to a judicial review of the legality of their detention under the habeas statute, *Rasul*, 124 S. Ct. at 2693 ("The question now before us is whether the *habeas statute* confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'") (emphasis added), and, therefore, did not concern itself with whether the petitioners had any independent constitutional rights. Indeed, the *Rasul* majority went on to distinguish *Eisentrager* on grounds that *Eisentrager* was primarily concerned with whether the prisoners had any *constitutional* rights that could be vindicated via a writ of habeas corpus. *Id.* at 2693-94 ("The [*Eisentrager*] Court had far less to say on the question of the petitioners' *statutory* entitlement to habeas review.") **[323]** (emphasis in original). Thus, by focusing on the petitioners' statutory *right* to file a writ of habeas corpus, the *Rasul* majority left intact the holding in *Eisentrager* and its progeny.

Finally, petitioners' expansive reliance upon *Rasul*'s "footnote 15" for the proposition that the *Rasul* majority intended to overrule, *sub silentio*, *Eisentrager* and its progeny is equally misplaced and unpersuasive.[14] *See Rasul*, 124

[14] Footnote 15 states, "Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'" *Rasul*, 124 S. Ct. at 2698 n.15.

S. Ct. at 2698 n.15. Stated simply, footnote 15 must be read in light of the context of the paragraph and opinion in which it is embedded. The paragraph in which it is included specifically focuses on the "question presented" in the case. *Id.* at 2698. The "question presented" in the case was unequivocally limited to: "the narrow . . . question whether the United States courts lack ***jurisdiction*** to consider challenges to the legality of the detention of foreign nationals captured abroad . . . and incarcerated at Guantanamo . . . ." *Rasul*, 124 S. Ct. at 2690 (emphasis added). The *Rasul* majority thereafter further emphasized the limitations on its holding in the concluding paragraph of the opinion by stating "[w]hat is presently at stake is only whether the federal courts have ***jurisdiction*** to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing." *Id.* at 2699. Thus, in its own words, the Supreme Court chose to only answer the question of jurisdiction, and not the question of whether these same individuals possess any substantive rights on the merits of their claims. Indeed, the *Rasul* Court expressly acknowledged that it expected that its decision would cause "further proceedings" among the lower courts to consider the very issue that it had not: the "merits of petitioners' claims."[15] *See id.*

Accordingly, for all of these reasons the Court concludes that the petitioners lack any viable theory under the United States Constitution to challenge the lawfulness of their continued detention at Guantanamo.[16]

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[15] It should be noted that this Court's conclusion that *Rasul* has merely separated jurisdiction from an inquiry on the merits comports with the habeas statute on a practical level as well. The habeas statute enumerates a very specific process that the court and parties must follow, which has several distinct and discernable steps. *See* 28 U.S.C. §§ 2241-2255. The first step, the detained's ability to file an application, is easily severable from a decision on the merits regarding the legality of his detention.

[16] Each of the petitioners in this case is currently having his status as an enemy combatant reviewed by the Combatant Status Review Tri-

[324]

C. Petitioners Have Failed to Identify any United States Law or Treaty the Violation of Which Would Provide a Viable Basis to Grant a Habeas Petition.

Having no constitutional rights upon which to base the issuance of a habeas petition, petitioners next seek to rely upon alleged violations of certain legal statutes and treaties as the basis for the issuance of a writ. In doing so, of course, they must demonstrate that the violation of that law or treaty would in turn render the petitioners' *custody* unlawful. *See* 28 U.S.C. § 2241(c)(3) ("The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in *custody* in violation of the Constitution or laws or treaties of the United States[.]") (emphasis added).[17]

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bunal ("CSRT"). *See* Mot. to Dismiss, p. 31. The Secretary of Defense established the CSRTs in July 2004 in response to the Supreme Court's decisions in *Rasul* and *Hamdi*. *See* Mot. Trans., pp. 6-7. In *Hamdi*, the Court considered the process that is owed under the Constitution for United States citizens detained as enemy combatants. *Hamdi*, 124 S. Ct. at 2648. A plurality of the Court held that Due Process for even United States citizens requires only "notice of the factual basis for the [detainee's] classification, and a fair opportunity to rebut the Government's factual assertion before a neutral decisionmaker." *Id.* In this regard, even assuming, arguendo, that the petitioners do possess constitutional rights, which they do not, the Court notes that the CSRTs provide each petitioner with much of the same process afforded by Article 5 of the Geneva Conventions.

[17] The petitioners also raised a claim for review of their detention under the common law of habeas embodied in 28 U.S.C. § 2241(c)(1). *See* Pet. Jt. Supp. Br., p. 4; Mot. Trans., p. 45-47. Section 2241(c)(1) provides that "[t]he writ of habeas corpus shall not extend to a prisoner unless . . . He is in custody under or by color of the authority of the United States . . . ." The petitioners contend that they need not allege their detainment violates the Constitution or laws or treaties of the United States under § 2241(c)(3) because, under § 2241(c)(1), they have common law due process rights to judicial review. *See* Pets. Opp. Mem., pp. 10, 26-27. The Court, however, rejects petitioners' argument on this point based upon its holding, *supra*, that non-resident aliens have no such rights and the habeas statute does not give them more rights than they would otherwise possess under the Constitution.

The petitioners, however, have not offered any viable theory relating to any existing federal laws or treaties that could serve as the basis for the issuance of a writ. By and large, their petitions do not contain detainee-specific allegations of mistreatment at the hands of the respondents. Instead, the petitioners have essentially cast their grievances in generalized terms. The crux of the petitioners' allegations is the amorphous contention that their detention somehow violates certain federal laws (e.g., the War Crimes Act, 18 U.S.C. § 2441(a), (c)(1); Alien Tort Claims Act, 28 U.S.C. § 1350), because they: (1) have been held "virtually incommunicado," (2) "have been or will be interrogated repeatedly . . . though they have not been charged with an offense," and (3) have been held "in accommodation[s] that fail[] to satisfy both domestic and internationally accepted standards of accommodation for any person subject to detention." *See* FAP ¶ 40; Khalid Pet. ¶149.

The mere fact that the petitioners are in custody, of course, does not violate any specific federal statutory law because Congress has not, to-date, enacted any legislation restricting the President's ability to capture and detain alien combatants in the manner applicable to these petitioners. To the contrary, as discussed previously, Congress has authorized the President to use "all necessary and appropriate force" through the AUMF. *See* AUMF § 2. Here, as conceded by the parties, the capture and detention of each petitioner was executed pursuant to a *lawful* military order, even if it were based upon flawed or incomplete intelligence. *See* Mot. Trans., p. 60 (wherein petitioners assert that they believe that the "continued detention" and the "capture under the circumstances under which it occurred" made the detention unlawful, but not that the order to capture the petitioners was itself unlawful). And with respect to their allegations that the *conditions* of their custody might violate existing United States law, such alleged conduct, even if it had occurred, and there is no specific allegation that it did, does not support the issuance of a writ because, though de-

plorable if true, it does not render the *custody* itself unlawful.[18] *See*, *e.g.*, *Miller* v. *Overholser*, 206 F.2d 415, 419-20 (D.C. Cir. 1953) (distinguishing **[325]** habeas corpus claims challenging the legality of the petitioner's confinement from habeas claims challenging the conditions of the confinement); *see also*, *e.g.*, *McIntosh* v. *U.S. Parole Comm'n*, 115 F.3d 809, 812 (10th Cir. 1997) (holding that § 2241 of the habeas statute governs the constitutionality or legality of the *basis* of the prisoner's custody and not the *conditions* of that custody).

Moreover, the petitioners have chosen to assert claims under federal laws the violation of which do not create a private right of action and, therefore, are not cognizable in ha-

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[18] Safeguards and mechanisms are in place to prevent such conduct and, if it occurred, to ensure it is punished. Indeed, as recently as October 2004, Congress enacted legislation dealing specifically with the standards governing the detention of the foreign prisoners at Guantanamo. *See* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, *see* Pub. L. No. 108-375, § 1091(a) ("Reagan Act"). In the Reagan Act, which covers foreign prisoners, Congress reaffirmed the commitment of the United States to ensuring "that no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment . . . ." *Id.* at § 1091(b)(1). To safeguard the interests of these prisoners, Congress emphasized that "[i]t is the policy of the United States to . . . ensure that all personnel . . . understand their obligations in both wartime and peacetime to comply with the legal prohibitions against torture, cruel, inhuman, or degrading treatment of detainees . . . ." *Id.* at § 1091(b)(3). Congress, however, recognized that the punishment of those in violation of the Act is and should remain with the military and the military judicial process. *See id.* at § 1091(a)(4) ("[T]he Armed Forces are moving swiftly and decisively to identify, try, and, if found guilty, punish persons who perpetrated such abuse[.]"); *id.* at § 1091(a)(5) ("[T]he Department of Defense and appropriate military authorities must continue to undertake corrective action, as appropriate, to address chain-of-command deficiencies . . . ."). In this regard, in the first full-scale court-martial resulting from the Abu Ghraib prison scandal, a military jury recently convicted Army Reserve Spec. Charles A. Graner, Jr. on five counts of assault, maltreatment and conspiracy in connection with the beating and humiliation of Iraqi detainees for which he was sentenced to ten years in prison. *E.g.*, T.R. Reid, *Guard Convicted in the First Trial From Abu Ghraib*, The Washington Post, at A1 (January 15, 2005).

beas.[19] Specifically, **[326]** they contend their detention violates certain Army Regulations, which provide the "policy, procedures, and responsibilities" for the military with respect to detainment situations, *see* Army Regulation 190-8 § 1-1.a ("Army Reg."), and the War Crimes Act, which criminalizes "grave breach[es] in any of the international conventions signed at Geneva 12 August 1949" committed by United States military personnel, *see* 18 U.S.C. § 2441(c)(1).

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[19] While the petitions do contain two claims that would provide a private right of action, (e.g., the Alien Tort Statute and the Administrative Procedure Act), neither of those claims is legally viable. The Khalid Petition contends that the allegations in the habeas application constitute "torture," "cruel, inhuman, or degrading treatment," and "arbitrary arrest and detention," all within the meaning of the Alien Tort Statute ("ATS"), and "arbitrary" and "unlawful" detention within the Administrative Procedure Act ("APA"). *See* Khalid Pet. ¶¶ 60-73, 80-81. The Boumediene Petition only makes an oblique reference to relief under the APA in its "Prayer for Relief." *See* FAP, p. 16 ¶ 10. To the extent these claims are sufficiently raised by either party, they too must be dismissed because the ATS, *as petitioners concede*, does not waive sovereign immunity, *see* Pets. Opp. Mem., p. 44, and because the APA, despite their contention, does not operate to provide a waiver of sovereign immunity for the petitioners' ATS claims.

However, even assuming, arguendo, that petitioners' claims otherwise satisfy the APA criteria and, moreover, are not subject to one of the APA exemptions from the limited waiver of sovereign immunity provided in the statute, this Court still concludes that the APA does not save the petitioners' ATS claims. Section 702 of the APA provides: "[n]othing herein . . . affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground . . . ." The petitioners' seek a declaration that their detention is unlawful based upon the facts of their capture and the conditions of their detention. Granting this relief during a time of armed conflict would, of course, require the Court to inject itself into sensitive matters of foreign affairs, military policy, and other national security areas. As the Court explains at length in this opinion, it would be an impermissible use of judicial power to provide the relief requested by the petitioners and thus these claims must be dismissed as a matter of law. *See Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985) ("Whether or not this is, as the District Court thought, a matter so entirely committed to the care of the political branches as to preclude our considering the issue at all, we think it at least requires the withholding of discretionary relief.").

See FAP ¶ 40; Pets' Jt. Supp. Br., p. 32. Neither of these statutes, however, create a private right of action for a detainee to challenge the legality of their custody in an habeas proceeding. *See Pharm. Research and Mfrs. of Am.* v. *Walsh*, 123 S. Ct. 1855, 1878 (2003) ("Where Congress wishes to allow private parties to sue to enforce federal law, it must clearly express this intent."). Indeed, these provisions, at most, address the punishment available for those who would violate them. *Cf. Branch* v. *Smith*, 123 S. Ct. 1429, 1456 (2003) (noting that §§ 2a(c) and 2c of the current statutory scheme governing apportionment of the House of Representatives only "address the remedy that a federal court must order if it finds a violation of a constitutional or statutory right"). Accordingly, for all of the above reasons, the Court concludes that the petitioners have failed to advance any legal theory based upon federal law, by which the lawfulness of their continued detention could be questioned.

Similarly, petitioners have offered no viable theory regarding any treaty that could serve as the basis for the issuance of a writ. Although the petitioners assert that their continued detention violates the Geneva Convention, *see* FAP ¶ 40; Khalid Pet. ¶ 48, they subsequently conceded at oral argument that that Convention does not apply because these petitioners were not captured in the "zone of hostilities . . . in and around Afghanistan." Mot. Trans., pp. 98-99; *see also* Boumediene Supp. Reply, p. 26. As a result, petitioners are left contending that their detention unlawfully violates other United States treaties because their living conditions, in effect, constitute "torture" as that term is defined in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984) ("CAT") and the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess.,

Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) ("ICCPR").[20] *See* Pet. Jt. Supp. Br., pp, 32-35. For the following reasons, however, these claims are not a viable basis in a habeas proceeding to evaluate the legality of the petitioners' detention.

[327] Treaties, as a general rule, are not privately enforceable. Indeed, enforcement in the final analysis is reserved to the executive authority of the governments who are parties to the treaties. *See*, *e.g.*, *Comm. of the U.S. Citizens Living in Nicaragua* v. *Reagan*, 859 F.2d 929, 937-38 (D.C. Cir. 1988); *see also The Head Money Cases*, 112 U.S. 580, 598 (1884) ("A treaty . . . depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. . . . It is obvious that with all this the judicial courts have nothing to do and can give no redress."). Where a treaty is not self-executing, its terms give rise to a private cause of action *only* if Congress enacts authorizing legislation. *See Whitney, et al.* v. *Robinson*, 124 U.S. 190, 194 (1888) ("When the stipulations [of a treaty] are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, ..."). In the absence of a self-executing treaty and Congressional implementation, the individual does not have standing to assert the alleged violation in federal court. *See United States* v. *Tapia-Mendoza*, 41 F. Supp. 2d 1250, 1253 (D. Utah 1999) ("[O]nly signatory nations generally have standing to enforce treaty provisions absent evidence, considering the document as a whole, that

[20] Petitioners referenced a virtual patchwork quilt of other international agreements, including the American Declaration on the Rights and Duties of Man ("ADRDM"), art. I, O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser. L./V/I.4 Rev. (1965), and the American Convention on Human Rights ("ACHR"), Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673. *See* FAP ¶¶ 40, 52, & 54; Khalid Pet. ¶¶ 48, 57, & 59; *see also* Pets. Opp. Mem., p. 23 & n.20. These documents, however, have not been ratified by the United States and therefore they do not create binding rights enforceable in habeas. *See Garza* v. *Lappin*, 253 F.3d 918, 925 (7th Cir. 2001) ("The [ADRDM] . . . is an inspirational document which, . . . did not on its own create any enforceable obligations . . . . [The U.S.] has not ratified the [ACHR], and so that document does not yet qualify as one of the 'treaties' of the United States that creates binding obligations.").

the signing parties expressly or impliedly intended the treaty to provide independent rights to citizens of either country.").

In this case, neither the CAT nor the ICCPR is a self-executing treaty. Indeed, in giving its advice and consent to ratification of both treaties, the Senate expressly declared that the provisions of both would *not* be privately enforceable. *See* 136 Cong. Rec. S36,198 (Oct. 27, 1990) (dealing with the CAT); 138 Cong. Rec. S4781-01 (April 2, 1992) (dealing with the ICCPR). Furthermore, Congress has not enacted any implementing legislation, with respect to either convention, that would authorize the petitioners to challenge the legality of their detention in federal court.[21] *See Wesson* v. *U.S. Penitentiary Beaumont, TX*, 305 F.3d 343, 348 (5th Cir. 2002) ("Habeas relief is not available for a violation of the [ICCPR] because Congress has not enacted implementing legislation."). As a result, the petitioners cannot rely on either the CAT or the ICCPR as a viable legal basis to support the issuance of a writ of habeas corpus. Accordingly, the Court finds no viable theory based on United States treaties upon which a writ could be issued.

D. There is No Viable Legal Theory under International Law upon Which This Court Could Issue a Writ of Habeas Corpus.

Because the petitioners' claims under the aforementioned treaties fail, they are left to rely in the final analysis

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[21] Congress has enacted implementing legislation with respect to the CAT, but none of the legislation purports to give the petitioners a private cause of action to challenge the legality of their detention. The implementing legislation, for example, confers standing to sue for (1) aliens that can demonstrate it is "more likely than not" that he or she would be tortured if removed to a particular country, *see* Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), § 2242(b), Pub. L. No. 105-277 (codified as Note to 8 U.S.C. § 1231), and (2) victims of torture who seek damages against individuals whom they allege subjected them, under the authority of a foreign nation, to torture, *see* Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256.

on principles of international law for a viable theory by which to challenge the lawfulness of their detention. This effort, similarly, is to no avail. The United States Supreme Court, many years ago, established that international law is part of this **[328]** country's jurisprudence. *See*, *e.g.*, *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . . ."); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423 (1964) (same). "[W]here there is no treaty, and no controlling executive or legislative act or judicial decision," the courts must look to the "customs and usages of civilized nations." *Paquete*, 175 U.S. at 700. For further guidance regarding the "norms" of international law, courts and international law scholars look to whether the standard is "universal, definable and obligatory." *Xuncax* v. *Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995) (holding allegations of torture, summary execution, disappearance, and arbitrary detention constitute fully recognized violations of international law). Here, petitioners essentially allege the United States has, in effect, violated international legal norms by subjecting them to arbitrary and prolonged detention, *e.g.*, FAP ¶¶ 52, 54; Khalid Pet. ¶ 59, and torture, *e.g.*, Khalid Pet. ¶¶ 62. In response, the respondents acknowledge, as they must, that "torture" is already illegal under existing law and that United States soldiers are prohibited from engaging in torture. *See*, *e.g.*, Mot. Trans., p. 82 ("Torture is against U.S. policy."); *see also*, *e.g.*, Reagan Act, § 1091(6) ("[T]he Constitution, laws, and treaties of the United States and the applicable guidance and regulations of the United States Government prohibit the torture or cruel, inhuman, or degrading treatment of foreign prisoners held in custody by the United States[.]").

However, having concluded that Congress, through the AUMF, has conferred authority on the President to detain the petitioners, *see supra*, it would be impermissible, for the following reasons, under our constitutional system of separation of powers for the judiciary to engage in a substantive evaluation of the conditions of their detention. Simply

stated, it is the province of the Executive branch and Congress, should it choose to enact legislation relating thereto, to define the conditions of detention and ensure that United States laws and treaties are being complied therewith.

It is not surprising that the petitioners have been unable to cite any case in which a federal court has engaged in the substantive review and evaluation they seek of either the military's decision to capture and detain a non-citizen as an enemy combatant, or the conditions under which that combatant was being held. The leading cases dealing with applications for habeas relief *brought by an alien* during a time of war clearly hold that judicial review is limited to the question of whether Congress has given the military the authority to detain or charge the individual as an enemy combatant, rather than whether the military's decision was correct or otherwise supported by the facts. *See*, *e.g.*, *Ex parte Quirin*, 317 U.S. at 25; *Application of Yamashita*, 327 U.S. 1 (1946); *Eisentrager*, 339 U.S. at 786.

Indeed, the Supreme Court itself in *Yamashita* articulated the governing rule, the underlying rationale, and the resulting limitation on this Court's inquiry in the instant proceedings as follows:

> [O]n application for habeas corpus we are not concerned with the guilt or innocence of the petitioners. We consider here only the lawful power of the commission to try the petitioner for the offense charged. In the present cases it must be recognized throughout that the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this **[329]** Court. . . . They are tribunals whose determinations are reviewable by the military authorities either as provided in the military orders constituting such tribunals or as provided by the Articles of War. Congress conferred on the courts no power to review their determinations save only as it has granted judicial power 'to grant writs of habeas corpus for the purpose of an

> inquiry into the cause of the restraint of liberty.' *The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions.*

Yamashita, 327 U.S. at 344-45 (emphasis added).

Thus, even if the petitioners had presented specific legal violations, which they do not, this Court's review would be limited to the legality of the "authority of those detaining the petitioner." *Id.* at 345. In this case, the petitioners have conceded, as they must, that the military orders given to capture and initially detain them were lawful orders. Moreover, the military had the blessing of Congress in seizing and detaining them because the President's Detention Order comports with the authorization conferred by the AUMF. For these reasons, this Court will not probe into the factual basis for the petitioners' detention.

In the final analysis, the Court's role in reviewing the military's decision to capture and detain a non-resident alien is, and must be, highly circumscribed. The Court is well aware of the measures that have been adopted by the political branches—Congress and the Executive—to ensure that abuse does not occur and to ensure these petitioners are given the treatment that they deserve. Indeed, Congress recently enacted the Reagan Act to ensure that all United States personnel clearly understand their obligations with respect to the treatment of detainees. *See* Reagan Act, § 1091(b)(3). Conspicuous in its absence in the Reagan Act is any reference by Congress to federal court review where United States personnel engages in impermissible treatment of a detainee. Indeed, any enforcement and/or punishment for impermissible conduct under the Act remains, as it always has, with the Department of Defense and appropriate

military authorities. *E.g.*, Reagan Act, § 1091(a)(4) ("[T]he *Armed Forces* are moving swiftly and decisively to identify, try, and, if found guilty, punish persons who perpetrated such abuse[.]") (emphasis added); *id.* § 1091(a)(5) ("[T]he *Department of Defense* and *appropriate military authorities* must continue to undertake corrective action, as appropriate, to address chain-of-command deficiencies and the systemic deficiencies identified in the incidents in question[.]") (emphasis added). In fact, the Act will soon be codified in Title 10 of the United States Code, which is the Title governing the Armed Forces. *See generally* Regan Act, Pub. L. 108-375, 118 Stat. 1811.

Moreover, the absence of federal court review of the conditions of the detention of a non-resident alien is also consistent with the text of the Constitution and other Supreme Court precedent. The Founders allocated the war powers among Congress and the Executive, not the Judiciary. As a general rule, therefore, the judiciary should not insinuate itself into foreign affairs and national security issues. As Justice Jackson eloquently stated:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign **[330]** affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil.

> They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chi. & South. Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). While a state of war certainly does not give the President a "blank check," *see Hamdi*, 124 S. Ct. at 2650, and the courts must have some role when individual liberty is at stake, *see Mistretta* v. *United States*, 488 U.S. 361, 380 (1989), any role must be limited when, as here, there is an ongoing armed conflict and the individuals challenging their detention are non-resident aliens, *see*, *e.g.*, *Yamashita*, 327 U.S. at 8-9.

Thus, to the extent these non-resident detainees have rights, they are subject to both the military review process already in place and the laws Congress has passed defining the appropriate scope of military conduct towards these detainees. The extent to which these rights and conditions should be modified or extended is a matter for the political branches to determine and effectuate through either Constitutional amendments, federal laws, or treaties with the appropriate international entities. Thus, until Congress and the President act further, there is similarly no viable legal theory under international law by which a federal court could issue a writ.

Accordingly, for this and all the reasons stated above, the respondents' motion to dismiss must be GRANTED.

ORDER

It is, this 19th day of January, 2005, hereby

ORDERED that the Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or For Judgment as a Matter of Law [#25] is **GRANTED**; and it is further

ORDERED that the above-captioned cases be, and hereby are, **DISMISSED**;

SO ORDERED.

APPENDIX C

ORDER OF DEPUTY SECRETARY OF DEFENSE, PAUL WOLFOWITZ [Court of Appeals Joint Appendix 1207-1210 (excerpts)]

DEPUTY SECRETARY OF DEFENSE
1010 Defense Pentagon
Washington, DC 20301-1010

-7 JUL 2004

MEMORANDUM FOR THE SECRETARY OF THE NAVY

SUBJECT: Order Establishing Combatant Status Review Tribunal

This Order applies only to foreign nationals held as enemy combatants in the control of the Department of Defense at the Guantanamo Bay Naval Base, Cuba ("detainees").

a. Enemy Combatant. For purposes of this Order, the term "enemy combatant" shall mean an individual who was part of or supporting Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense.

* * * *

e. Composition of Tribunal. A Tribunal shall be composed of three neutral commissioned officers of the U.S. Armed Forces, each of whom possesses the appropriate security clearance and none of whom was involved in the apprehension, detention, interrogation, or previous determination of status of the detainee. One of the members shall be a judge advocate. The senior member (in the grade of 0-5 and above) shall serve as President of the Tribunal. Another non-voting officer, preferably a judge advocate, shall serve as the Recorder and shall not be a member of the Tribunal.

* * * *

g. Procedures.

(1) The Recorder shall provide the detainee in advance of the proceedings with notice of the unclassified factual basis for the detainee's designation as an enemy combatant.

* * * *

(8) The detainee shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal. The Tribunal shall determine the reasonable availability of witnesses. If such witnesses are from within the U.S. Armed Forces, they shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would affect combat or support operations. In the case of witnesses who are not reasonably available, written statements, preferably sworn, may be submitted and considered as evidence.

(9) The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issue before it. At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances. The Tribunal does not have the authority to declassify or change the classification of any national security information it reviews.

* * * *

(12) Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine in closed session by majority vote whether the detainee is properly detained as an enemy combatant. Preponderance of evidence shall be the standard used in reaching this determination, but there shall be a rebuttable presumption in favor of the Government's evidence.

* * * *

This order is effective immediately.

/s/ [Paul Wolfowitz]

APPENDIX D

RESPONDENTS' FACTUAL RETURN TO PETITION FOR WRIT OF HABEAS CORPUS BY PETITIONER MUSTAFA AIT IDIR [Court of Appeals Joint Appendix 0477-0479 (excerpts)]

Recorder: [Item 3.a.4.] While living in Bosnia, the Detainee associated with a known Al Qaida operative.

Detainee: Give me his name.

Tribunal President: I do not know.

Detainee: How can I respond to this?

Tribunal President: Did you know of anybody that was a member of Al Qaida?

Detainee: No, no.

Tribunal President: I'm sorry, what was your response?

Detainee: No.

Tribunal President: No?

Detainee: No. This is something the interrogators told me a long while ago. I asked the interrogators to tell me who this person was. Then I could tell you if I might have known this person, but not if the person is a terrorist. Maybe I knew this person as a friend. Maybe it was a person that worked with me. Maybe it was a person that was on my team. But 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.

Tribunal President: We are asking you the questions and we need you to respond to what is on the unclassified summary.

* * * *

Recorder: [Item 3.b.2.] The detainee was arrested because of his involvement with a plan to attack the U.S. Embassy located in Sarajevo.

Detainee: The same answer as before. The only thing I can tell you is I did not plan or even think of that. Did you find any explosives with me? Any weapons? Did you find me in

front of the embassy? Did you find me in contact with the Americans? Did I threaten anyone? I am prepared now to tell you, if you have anything or any evidence, even if it is just very little, that proves I went to the embassy and looked like that [Detainee made a gesture with his head and neck as if he were looking into a building or a window] at the embassy, then I am ready to be punished. I can just tell you that I did not plan anything. Point by point, when we get to the point that I am associated with Al Qaida, but we already did that one.

Recorder: It was statement that preceded the first point.

Detainee: If it is the same point, but I do not want to repeat myself. These accusations, my answer to all of them is I did not do these things. But I do not have anything to prove this. The only thing is the citizenship. I can tell you where I was and I had the papers to prove so. But to tell me I planned to bomb, I can only tell you that I did not plan.

Tribunal President: Mustafa, does that conclude your statement?

Detainee: This is it, but I was hoping you had evidence that you can give me. If I was in your place—and I apologize in advance for these words—but if a supervisor came to me and showed me accusations like these, I would take these accusations and I would hit him in the face with them. Sorry about that. [Everyone in the Tribunal room laughs.]

Tribunal President: We had to laugh, but it is okay.

Detainee: Why? Because these are accusations that I can't even answer. I am not able to answer them. You tell me I am from Al Qaida, but I am not an Al Qaida. I don't have any proof to give you except to ask you to catch Bin Laden and ask him if I am a part of Al Qaida. To tell me that I thought, I'll just tell you that I did not. I don't have proof regarding this. What should be done is you should give me evidence regarding these accusations because I am not able to give you any evidence. I can just tell you no, and that is it.

* * * *

APPENDIX E

STATUTORY PROVISIONS

1. 28 U.S.C. § 2241 provides in relevant part:

> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> > (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
> >
> > * * * *
> >
> > (3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]

2. The Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), provides in relevant part:

> Sec. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.
>
> > (a) IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

3. The Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, provides in relevant part:

> Sec. 1005(e)(2) REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION.—

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

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

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

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

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

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review

> Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and
>
> (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.
>
> (D) TERMINATION ON RELEASE FROM CUSTODY.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release of such alien from the custody of the Department of Defense.

4. The Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, provides in relevant part:

> SEC. 7 HABEAS CORPUS MATTERS.
>
> (a) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by . . . inserting the following new subsection (e):
>
> "(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

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

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