Nos. 06-1195 and 06-1196

In the Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL., PETITIONERS

v.

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

KHALED A.F. AL ODAH, NEXT FRIEND OF
FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, removes federal court jurisdiction over habeas petitions filed by aliens detained as enemy combatants at Guantanamo Bay, Cuba.

2. Whether aliens detained as enemy combatants at Guantanamo Bay have rights under the Suspension Clause of Article I, Section 9, of the Constitution.

3. Whether, if aliens detained at Guantanamo Bay have such rights, the MCA violates the Suspension Clause.

4. Whether petitioners may challenge the adequacy of the judicial review available under the MCA and the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Tit. X, 119 Stat. 2739, before they have sought to invoke, much less exhaust, such review.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 476 F.3d 981.[1] The opinions of the district courts are reported at 355 F. Supp. 2d 311 (Pet. App.

[1] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and appendix filed in No. 06-1195.

51a-79a) and 355 F. Supp. 2d 443 (06-1196 Pet. App. 61-127).

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2007. The petitions for a writ of certiorari were filed on March 5, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are aliens detained by the Department of Defense at the Naval Base at Guantanamo Bay, Cuba. Their detention is based on individualized determinations by military Combatant Status Review Tribunals (CSRTs) that they are enemy combatants in the ongoing armed conflict against the al Qaeda terrorist organization and its supporters. Under the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Tit. X, 119 Stat. 2739, those determinations are subject to review in the United States Court of Appeals for the District of Columbia Circuit. Challenges to the scope of review provided by the DTA may also be presented to the D.C. Circuit. Petitioners, unlike other detainees at Guantanamo Bay, have not availed themselves of the review provided by the DTA. The court of appeals held that the district court lacked jurisdiction under the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, to consider their habeas challenges filed outside of the exclusive review procedure established by the DTA.

1. In *Rasul* v. *Bush*, 542 U.S. 466 (2004), this Court held that district courts had jurisdiction under 28 U.S.C. 2241 to consider habeas petitions filed by detainees at Guantanamo Bay. The D.C. Circuit had relied on *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), for the proposi-

tion that habeas jurisdiction does not extend to aliens held outside the sovereign territory of the United States. See *Al Odah* v. *United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003), rev'd *sub nom. Rasul* v. *Bush*, 542 U.S. 466 (2004). This Court reversed. The Court reasoned that, on the question of "statutory jurisdiction" under 28 U.S.C. 2241, *Eisentrager* had implicitly rested on the narrow construction of the habeas statute adopted in *Ahrens* v. *Clark*, 335 U.S. 188 (1948), which did not survive the Court's decision in *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973). See *Rasul*, 542 U.S. at 477-479. Accordingly, this Court had no occasion to revisit *Eisentrager*'s constitutional holding and instead concluded, as a statutory matter, that Section 2241 "confer[red] * * * jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base." *Id.* at 484. The Court emphasized that it had decided "only whether the federal courts have jurisdiction," and it expressly declined to address "the merits of petitioners' claims." *Id.* at 485.

2. After the remand in *Rasul*, numerous Guantanamo Bay detainees filed habeas petitions. Their actions include 13 cases, involving more than 60 detainees, which were coordinated in the district court for limited procedural purposes, but assigned to two different district judges. Respondents moved to dismiss the claims of each detainee. One district court, acting on eleven of the cases, granted the motions in part and denied them in part, concluding that Due Process Clause of the Fifth Amendment applies extraterritorially to aliens held at Guantanamo Bay, and that the CSRT procedures are constitutionally deficient. 06-1196 Pet. App. 61a-128a. Another district court, acting on two cases,

granted the motions to dismiss in full, holding that the petitioners' detention was authorized by the congressional Authorization for Use of Military Force (AUMF), Pub. L. 107-40, 115 Stat. 224, and that the Constitution does not protect aliens outside sovereign United States territory, including at Guantanamo Bay. Pet. App. 51a-79a. Both decisions were appealed.

3. Recognizing that litigation over habeas filings by other detainees was consuming enormous resources and disrupting the day-to-day operation of the Guantanamo Bay Naval Base, Congress enacted the DTA. Section 1005(e)(1) of that Act amended the federal habeas corpus statute to provide that "no court, justice, or judge shall have jurisdiction" to consider habeas petitions filed by aliens detained at Guantanamo Bay. DTA § 1005(e)(1), 119 Stat. 2742.

Section 1005(e)(2) of the Act provides that the 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." DTA § 1005(e)(2)(A), 119 Stat. 2742. The DTA specifies that the court of appeals may determine whether a final CSRT decision "was consistent with the standards and procedures specified by the Secretary of Defense," and "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." DTA § 1005(e)(2)(C), 119 Stat. 2742. Section 1005(e)(3) creates a parallel exclusive-review mechanism for Guantanamo Bay detainees seeking to challenge final criminal convictions issued by military commissions. DTA § 1005(e)(3)(A), 119 Stat. 2743.

4. While these appeals were pending, this Court decided *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006). In *Hamdan*, the Court held that Section 1005(e)(1), the jurisdiction-removing provision of the DTA, does not apply to habeas claims filed before the DTA was enacted. See *id.* at 2762-2769. In reaching that conclusion, the Court observed that the statute made the exclusive-review provisions in Sections 1005(e)(2) and 1005(e)(3) of the DTA "expressly * * * applicable to pending cases." *Id.* at 2764 (citing DTA § 1005(h)(2), 119 Stat. 2743). The Court noted the absence of such language regarding Section 1005(e)(1), and therefore drew a "negative inference" as to Congress' intent to apply Section 1005(e)(1) to pending cases. *Id.* at 2766.

5. In the wake of this Court's decision in *Hamdan*, Congress enacted the MCA. Section 7(a) of the MCA amends 28 U.S.C. 2241 to provide that "[n]o 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." Section 7(a) also eliminates federal court jurisdiction, except as provided by Sections 1005(e)(2) and (3) of the DTA, over "any other action against the Untied States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of such an alien. MCA § 7(a), 120 Stat. 2636. The MCA further provides that these amendments "shall take effect on the date of the enactment of this Act," and that they "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. 2636.

6. On February 20, 2007, the court of appeals dismissed these cases for lack of jurisdiction.

a. The court held that the MCA applies to petitioners' pending habeas cases—each of which "relates to an 'aspect' of detention and * * * deals with the detention of an 'alien' after September 11, 2001," Pet. App. 6a—and thus eliminates federal court jurisdiction over their petitions, *id.* at 6a-9a. The court rejected petitioners' argument that Section 7(b)'s effective-date provision applies only to non-habeas detention-related cases specified in Section 7(a) (28 U.S.C. 2241(e)(2)). The court explained that Section 7(b) specifies the effective date of Section 7(a), which eliminates federal jurisdiction over *both* habeas and all other detention-related claims in "all cases, without exception." *Id.* at 9a.

The court of appeals further held that the MCA is consistent with the Suspension Clause, for two independent reasons. First, as aliens outside the sovereign territory of the United States, petitioners have no constitutional rights under that clause. Pet. App. 14a (citing, *e.g.*, *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950)). Second, even if petitioners had constitutional rights under the Suspension Clause, the clause would not protect a right to the writ in these circumstances. As the court explained, "the Suspension Clause protects the writ 'as it existed in 1789,'" *id.* at 10a, but "the history of the writ in England prior to the founding" shows that "habeas corpus would not have been available in 1789 to aliens without presence or property within the United States." *Id.* at 12a-13a.

The court further explained that this Court's decision in *Eisentrager* "ends any doubt about the scope of com-

mon law habeas." Pet. App. 13a. In *Eisentrager*, this Court stated that it was aware of "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." *Ibid.* (quoting *Eisentrager*, 339 U.S. at 768).

The court of appeals held that petitioners' reliance on this Court's decision in *Rasul* was misplaced. Pet. App. 13a. The court explained that *Rasul* interpreted only the statutory right to habeas, so it "could not possibly have affected the constitutional holding of *Eisentrager*," *id.* at 15a n.10, in which the Court explicitly held that aliens detained outside the sovereign territory of the United States do not have a constitutionally protected right to the writ, see 339 U.S. at 781.

Having concluded that the MCA eliminates jurisdiction in petitioners' cases, the court vacated the district courts' decisions and dismissed the cases for want of jurisdiction. Pet. App. 19a-20a.

b. Judge Rogers dissented. She agreed that Congress intended the MCA to withdraw federal jurisdiction over the detainees' claims, but she found the statute to be inconsistent with the Suspension Clause, because "Congress has neither provided an adequate alternative remedy * * * nor invoked the exception to the Clause by making the required findings to suspend the writ." Pet. App. 21a-22a.

ARGUMENT

The scope of judicial review afforded to aliens detained at Guantanamo Bay who have been determined to

be enemy combatants is important, but the issues raised by the petitions do not warrant this Court's review at this time. In the DTA, Congress has provided a means by which petitioners can obtain judicial review of the validity of their detention. Petitioners contend that this review mechanism is deficient in various respects, but their claims are not ripe because petitioners have not even attempted to pursue review under the DTA. An effort to seek DTA review would not only allow petitioners to challenge the scope of review available under the DTA but also give concrete guidance as to the extent of that review. There is no need for this Court to assess the adequacy of DTA review before it has taken place, and certainly none that warrants the extraordinary expedition requested by petitioners.

Furthermore, the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The court's holding that the MCA eliminates jurisdiction over petitioners' habeas actions is compelled by the plain language of the statute. Relying on the settled precedent of this Court, the court of appeals also correctly held that the MCA does not violate the Suspension Clause. As aliens outside the sovereign territory of the United States, petitioners have no rights under the Suspension Clause, and, in any event, the habeas rights protected by that provision would not extend to aliens detained at Guantanamo Bay as enemy combatants.

Congress has afforded petitioners—all aliens detained at Guantanamo Bay as confirmed enemy combatants in the ongoing armed conflict against the al Qaida terrorist organization and its supporters—an unprecedented degree of access to our courts in wartime. No other captured enemy combatants in the history of this

country, or any other, have enjoyed such privileges. The court of appeals has correctly concluded that petitioners must exercise their statutory right of judicial review through the procedures established by Congress. Petitioners have failed to demonstrate a sufficiently compelling basis for this Court to review the court of appeals' decision before petitioners have even attempted to invoke the procedures that Congress has afforded. And, in any event, any review in this Court of the questions presented should await a case in which a detainee has actually invoked his right of judicial review under the DTA, and in which this Court may consider the judicial review available under the DTA on a developed and concrete record, rather than in the abstract.

1. The court of appeals correctly held that the MCA removes federal jurisdiction over petitioners' pending habeas petitions. Section 7 of the MCA unequivocally eliminates federal court jurisdiction over petitioners' claims, except as provided by Section 1005(e)(2) and (3) of the DTA. Section 7(a) of the MCA amends 28 U.S.C. 2241 to provide that "[n]o 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 as an enemy combatant. In addition, Section 7(a) eliminates federal jurisdiction over "any other action * * * relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of such an alien. MCA § 7(a), 120 Stat. 2636. The statute further provides that both of these amendments "shall take effect on the date of the enactment of this Act," and that they "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. 2636.

As the court of appeals explained, "[t]he detainees' lawsuits fall within the subject matter covered by the amended [Section] 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." Pet. App. 6a. The court of appeals' conclusion that the MCA applies to these cases is unassailable and provides no basis for further review. Indeed, though Judge Rogers dissented on other issues, she agreed with the majority that "Congress intended to withdraw federal jurisdiction" through the MCA. *Id.* at 21a.

Petitioners contend (Pet. 13; 06-1196 Pet. 25-26) that Section 7(b)'s effective-date provision does not apply to the elimination of jurisdiction over habeas cases in Section 7(a) (28 U.S.C. 2241(e)(1)), and that jurisdiction over their pending habeas cases is therefore preserved. That claim is contrary to both the statutory language and the underlying legislative intent. The scope of Section 7(b) is unambiguous—it applies to the amendment "made by subsection (a)," MCA § 7(b), 120 Stat. 2636, which expressly includes the elimination of jurisdiction over habeas claims brought by aliens detained as enemy combatants. MCA § 7(a), 120 Stat. 2635. Thus, there is no basis for reading Section 7(b), which applies to "all cases, without exception * * * which relate to any aspect of the detention, transfer treatment, trial, or conditions of detention," to exclude the habeas cases addressed in Section 7(a). As the court of appeals explained, "[h]abeas cases are simply a subset of cases dealing with detention." Pet. App. 7a-8a; see *Preiser* v. *Rodriguez*, 411 U.S. 475, 484 (1973) ("the essence of ha-

beas corpus is an attack by a person in custody on the legality of that custody").

The court of appeals properly rejected petitioners' argument that the MCA does not satisfy the requirement that a statute contain a "clear statement" in order to "repeal habeas jurisdiction," *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001). Section 7(a) expressly refers to the elimination of "habeas" jurisdiction. It also amends the habeas statute, 28 U.S.C. 2241. And the effective-date provision of Section 7(b), stating that the amendment "shall apply to all cases, without exception, pending on or after the date of the enactment of this Act," makes clear that the repeal of habeas jurisdiction applies to pending cases. Indeed, Congress "could not [have been] clearer." Pet. App. 7a. "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!**'" *Ibid.* This is more than sufficient to satisfy *St. Cyr*, which, as the court of appeals explained, "demands clarity, not redundancy." *Id.* at 8a.

The context in which the MCA was enacted underscores that Section 7 was intended to remove district-court jurisdiction over these cases and to do so clearly. In the DTA, Congress had attempted to accomplish that result and to place exclusive jurisdiction in the D.C. Circuit. See DTA § 1005(e)(1) and (2), (h)(1), 119 Stat. 2742, 2743. This Court, however, held that the DTA failed to make sufficiently clear that the elimination of district-court jurisdiction applied to pending cases. See *Hamdan*, 126 S. Ct. at 2769. Congress reacted swiftly to *Hamdan* by extending the elimination of habeas jurisdiction to "all cases, without exception, pending" on the date of the MCA's enactment. MCA § 7(b), 120 Stat. 2636. Indeed, as the court of appeals explained,

"[e]veryone who has followed the interaction between Congress and the Supreme Court knows full well" that the MCA was passed in response to *Hamdan*. Pet. App. 6a; see *id.* at 6a n.2 (discussing legislative history).[2]

2. As explained below, aliens held outside the sovereign territory of the United States do not enjoy the protections of the Suspension Clause. In any event, even in contexts to which the Suspension Clause is fully applicable, this Court has held that Congress may withdraw habeas jurisdiction if it provides an adequate alternative remedy. See *Swain* v. *Pressley*, 430 U.S. 372, 381 (1977); *St. Cyr*, 533 U.S. at 314 n.38. Here, the DTA and the MCA satisfy that requirement by giving petitioners the right to obtain judicial review of the military's determination that they are properly classified as enemy combatants. At the very least, the availability of judicial review through the DTA underscores that consideration of petitioners' claims would be premature because they have not yet exhausted their remedies under the DTA. Pursuing that avenue would afford this Court the oppor-

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[2] Petitioners suggest (Pet. 13 n.10; 06-1196 Pet. 25-26) that Section 3(a) of the MCA compels a negative inference that Section 7(b) does not repeal jurisdiction over pending habeas cases. That argument lacks merit. Section 3(a)(1) enacts 10 U.S.C. 950j, which removes federal jurisdiction to review final military-commission decisions, except as otherwise provided in the statute. As the court of appeals explained, "Section 7(b), read in conjunction with [S]ection 7(a), is no less explicit than § 950j." Pet. App. 9a. Indeed, Congress used very similar language in Sections 3 and 7. Both sections refer explicitly to the habeas statute. And Section 7, referring to "all cases, without exception," is even broader than Section 3, referring to "any claim or cause of action." In contrast to the statutory provisions addressed in *Hamdan*, therefore, there is no basis for drawing a "negative inference" from Section 3 that Congress did not intend Section 7 to repeal habeas jurisdiction.

tunity to assess the adequacy of the DTA's alternative in a concrete context, rather than in the abstract. It also would show proper regard to Congress's considered judgment that that alternative is appropriate for alien military detainees in the current conflict.

a. Section 1005(e)(2)(C) of the DTA specifies the D.C. Circuit's "[s]cope of review" of the CSRT's enemy-combatant determination. The court must consider "whether the status determination of the [CSRT] with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs] (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)." DTA § 1005(e)(2)(C)(i), 119 Stat. 2742. The court also must consider, "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." *Id.* § 1005(e)(2)(C)(ii), 119 Stat. 2742. Thus, the statute allows for ample judicial review both of the procedures used by the CSRTs and of the evidentiary sufficiency of their determinations.

All but one of the petitioners (who has been charged with a military-commission offense) are being detained for non-punitive reasons during the ongoing conflict. See *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 518-524 (2004) (plurality opinion). The level of review afforded under the DTA, however, gives petitioners greater rights of judicial review than traditionally provided to those held for punishment pursuant to the judgment of a military tribunal. This Court has held that the habeas review afforded in that context does not examine the guilt or

innocence of the defendant, nor does it examine the sufficiency of the evidence. Rather, it is limited to the question whether the military tribunal had jurisdiction. See *In re Yamashita*, 327 U.S. 1, 8 (1946); *Ex parte Quirin*, 317 U.S. 1, 25 (1942); see also *Eisentrager*, 339 U.S. at 786; *id.* at 797 (Black, J. dissenting) (extent of review "is of most limited scope"); cf. *Hamdi*, 542 U.S. at 535 (plurality opinion) (recognizing that "the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting").

Under *Yamashita*, there was review only of the threshold jurisdictional question whether the offense and offender were triable by military commission. There was no review of other legal questions, compliance with the military's own procedures, or evidentiary sufficiency—all of which the DTA and MCA permit. See DTA § 1005(e)(2)(C)(i), 119 Stat. 2742. Thus, the review provided by Congress in the DTA far surpasses the type of review available under *Yamashita*—a level of review deemed adequate for an alien enemy convicted by a military commission and sentenced to death—and it affords an adequate and effective substitute remedy for any applicable habeas right. See *Pressley*, 430 U.S. at 381.

The review provided under the DTA is not only greater than that afforded under *Yamashita*, it also is fully consistent with traditional habeas practice even outside the particularly deferential military context. This Court has explained that under traditional habeas review, "pure questions of law" are generally reviewable, but, "other than the question whether there was some evidence to support the order, the courts generally did not review the factual determinations made by the Executive." *St. Cyr*, 533 U.S. at 305-306 (footnote

omitted); cf. *Herrera* v. *Collins*, 506 U.S. 390, 400 (1993) ("[H]abeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact."); 28 U.S.C. 2254(e). DTA review fully satisfies even that standard for conventional habeas petitions (putting aside the extraordinary nature of the petitions here). Thus, even if precedent developed in the non-military context were to be applied, petitioners' Suspension Clause arguments would fail because Congress has provided an adequate alternative remedy.

b. The settled rule is that federal courts will decline to consider a habeas petition in circumstances where other judicial or administrative remedies have not been exhausted. See *Rose* v. *Lundy*, 455 U.S. 509, 515-516 (1982). This requirement is most commonly applied in cases where the available remedies are in state-court proceedings, see 28 U.S.C. 2254(b)(1), but it also applies to federal proceedings, see, *e.g.*, *United States* v. *Hayman*, 342 U.S. 205, 223 (1952), including those conducted by military tribunals, see *Clinton* v. *Goldsmith*, 526 U.S. 529, 537 n.11 (1999); *Noyd* v. *Bond*, 395 U.S. 683, 693-699 (1969); cf. *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975). The comity considerations that underlie the exhaustion requirement are especially pressing here, given that petitioners seek to challenge the concurrent judgment of Congress and the President regarding the conduct of an ongoing war. See *Hamdi*, 542 U.S. at 531 (plurality opinion); *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring in the judgment) ("[T]here is a realm of political authority over military affairs where the judicial power may not enter.").

To be sure, in *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006), this Court declined to require exhaustion of the military-commission process before considering a chal-

lenge to the system of military commissions unilaterally established by the President. The Court emphasized that, while courts ordinarily "should respect the balance that Congress struck," *id.* at 2770, the military commissions were not established by Congress and did not provide for "independent review," *id.* at 2771. The contrast between this case and *Hamdan*, however, is striking. Congress enacted the statute at issue here in direct response to *Hamdan*. Moreover, the DTA and the MCA expressly recognize and affirm the CSRT process. See DTA § 1005, 119 Stat. 2740; MCA § 3(a)(1), 120 Stat. 2603 (to be codified at 10 U.S.C. 948d(c)). Under the DTA and the MCA, petitioners will enjoy "independent review" of the CSRT determinations in the D.C. Circuit. This Court should now "respect the balance that Congress struck" and allow that review process to run its course under the traditional rule that a habeas petitioner must first exhaust his remedies before challenging the scope of review.[3]

c. Exhaustion is also appropriate because it could resolve many of petitioners' specific objections to the DTA process, and at a minimum it would allow this Court to consider those objections in a more concrete setting. Petitioners complain (Pet. 18-21) about various aspects of the CSRT procedural rules. These objections lack merit, because the CSRTs provide detainees with

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[3] That is particularly true given that the *Al Odah* petitioners represented to the Court in *Rasul* that they sought only a military tribunal process to determine the validity of their detention, and "have never sought to have Article III courts make *any* individualized determinations of petitioners' alleged status as enemies or to second-guess military determinations as to which aliens pose a threat to the United States." Al Odah Reply Br. at 13, *Rasul*, *supra* (No. 03-334); see Tr. of Oral Arg. 9-10, 15, 18-19, *Rasul*, *supra* (No. 03-334).

procedural protections exceeding even those that this Court in *Hamdi* held would be sufficient for American citizens held in the United States. See 542 U.S. at 533 (plurality opinion). More to the point, petitioners' objections can be asserted in the D.C. Circuit under the DTA. That court can determine the nature of petitioners' rights, if any, under "laws of the United States" and the U.S. Constitution, and can decide whether the CSRT process violated any applicable rights. See DTA § 1005(e)(2), 119 Stat. 2742. Likewise, any claim that the CSRT misapplied the applicable standards and procedures is subject to review in the D.C. Circuit under the DTA. See DTA § 1005(e)(2)(C), 119 Stat. 2742. Petitioners therefore will have adequate opportunity to raise such grievances in their petitions for review in that court.

Petitioners assert that the review afforded under the DTA is insufficient because it does not authorize fact-finding by the court of appeals, and it prohibits them from submitting new exculpatory material. In fact, the DTA contains a provision requiring that such new evidence be considered by the Department of Defense. DTA § 1005(a)(3), 119 Stat. 2741 (directing the Secretary to "provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee"). In accordance with that requirement, the Defense Department will administratively review new evidence that a petitioner submits to determine whether it warrants reconsideration of the CSRT's enemy combatant determination.[4] Thus, con-

[4] In addition to the CSRT review process, the Department of Defense also conducts an annual administrative examination of whether it is appropriate to release or repatriate an enemy combatant. The 328 administrative reviews conducted in 2006 resulted in determinations

trary to petitioners' assertion, there is an administrative mechanism for these detainees to submit new evidence that may bear on their detention.

In any event, limiting the D.C. Circuit's DTA review to the CSRT record does not make the DTA a constitutionally inadequate substitute for habeas review. As noted above, in the context of the decisions of military tribunals, this Court has repeatedly held that habeas does not provide for factual review, and certainly does not provide an opportunity for counsel to build a new evidentiary record. *Yamashita*, 327 U.S. at 8, 17; *Quirin*, 317 U.S. at 25. Even outside the military context, there is no right to factual re-examination of a judgment. See, *e.g.*, *Felker* v. *Turpin*, 518 U.S. 651, 663-664 (1996) (restrictions on successive petitions do not violate Suspension Clause). Likewise, for the confirmed alien enemy combatants here, there is no constitutional right to successive CSRT decisions.

Moreover, it is not yet established how, in practice, DTA review will be conducted. Those detainees who have pursued their DTA remedies have argued strenuously for an exhaustive scope of review, including wide-ranging discovery and fact-finding by the court of appeals—a level of review far exceeding that traditionally available in habeas. See, *e.g.*, Emer. Mot. for Order Setting Procedures at 9-10, *Parhat* v. *Gates*, No. 06-1397 (D.C. Cir. filed Dec. 22, 2006) (petitioners "are entitled

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that 55 detainees (roughly 17 percent) should no longer be detained at Guantanamo Bay. See Department of Defense, *Annual Administrative Review Boards for Enemy Combatants Held at Guantanamo Attributable to Senior Defense Officials* (Mar. 6, 2007) <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3902>. Since 2002, approximately 390 detainees have been transferred or released. See *ibid.*

to a hearing and limited discovery" of "all evidence relevant to petitioners' enemy combatant determination"); Mot. to Compel at 19, *Bismullah* v. *Gates*, No. 06-1197 (D.C. Cir. filed Aug. 7, 2006) (arguing that the "DTA must be construed to permit Bismullah to adduce new evidence in support of his claim that he is not and never has been an 'enemy combatant'"). The government has opposed those arguments, but the D.C. Circuit has not yet resolved them.[5] Conventional principles against avoiding important constitutional questions before it is necessary to decide them counsel strongly against jumping to determine, at this early juncture, the adequacy of DTA review before the D.C. Circuit has even had an opportunity to determine what that review entails in a concrete setting and issued a decision adverse to an enemy combatant.[6]

3. The court of appeals correctly held that petitioners do not enjoy rights under the Suspension Clause.

a. As the court of appeals recognized, this Court's precedent—including the constitutional holding of *Eisentrager*—"holds that the Constitution does not confer rights on aliens without property or presence within

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[5] The D.C. Circuit has ordered expedited briefing and argument in *Parhat* and *Bismullah* to consider the nature of review under the DTA and issues relating to the entry of a proposed protective order addressing, among other things, counsel access to classified information. Oral argument will be held on May 15.

[6] Petitioners further contend (Pet. 20) that the DTA does not expressly authorize the court of appeals to order a detainee's release. In fact, all of the detainees who were determined by CSRTs not to be enemy combatants have been released from United States custody. See Notice of Transfer at 3, *Kiyemba* v. *Bush*, No. 05-5487 (D.C. Cir. filed Nov. 21, 2006). And, in any event, petitioners may direct to the D.C. Circuit any arguments about the appropriate relief under the DTA in the case (if any) in which such a detainee is not released.

the United States." Pet. App. 14a. As to any alleged rights under the Suspension Clause in particular, this Court's decision in *Eisentrager* is "controlling." *Ibid.*

In *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), this Court held that aliens detained as enemies outside the United States are not "entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*." *Id.* at 777. The Court concluded that, because the petitioner in that case had no constitutional rights, the denial of habeas review did not violate either the Suspension Clause or the Fifth Amendment. *Id.* at 777-779, 784-785. In rejecting the assertion of a constitutional habeas right, the Court emphatically stated that such an entitlement "would hamper the war effort." *Id.* at 779. The Court explained that "[i]t would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Ibid.*

This Court has repeatedly reaffirmed *Eisentrager*'s holding that aliens outside the United States have no rights under the Constitution. See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 273 (1990) ("Not only are history and case law against [the alien], but as pointed out in [*Eisentrager*], the result of accepting his claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries."); *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001) (citing *Eisentrager* and *Verdugo-Urquidez* for the proposition that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders").

Likewise, the courts of appeals have consistently applied these precedents in various contexts. See, *e.g.*, *People's Mojahedin Org. of Iran* v. *Department of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) (a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause *or otherwise*") (emphasis added), cert. denied, 529 U.S. 1104 (2000). With respect to Guantanamo Bay specifically, the Eleventh Circuit has held that aliens there "have no First Amendment or Fifth Amendment rights." *Cuban Am. Bar Ass'n* v. *Christopher*, 43 F.3d 1412, 1428, cert. denied, 515 U.S. 1142 and 516 U.S. 913 (1995); see also *id.* at 1425 ("We disagree that 'control and jurisdiction' is equivalent to sovereignty.").[7]

Petitioners contend (Pet. 17; 06-1196 Pet. 14-15) that *Eisentrager* is no longer good law in the wake of this Court's decision in *Rasul*. Petitioners misread *Rasul*. *Rasul* held that the "statutory predicate" for the Court's holding in *Eisentrager* had been overruled, and it therefore rejected the D.C. Circuit's broad holding, based on *Eisentrager*, that habeas jurisdiction was entirely unavailable to aliens at Guantanamo Bay. See *Rasul*, 542 U.S. at 475, 479. It did not, however, cast any doubt on *Eisentrager*'s holding—or the holdings of subsequent cases relying on *Eisentrager*—that aliens held abroad do not have a *constitutionally* guaranteed right to habeas corpus. See *id.* at 478. *Rasul* addressed only the extent to which the habeas *statute* applies

[7] Petitioners argue (Pet. 17-18) that it does not matter whether they enjoy constitutional rights, because the Suspension Clause is "a limitation on congressional power." But so too is the Fifth Amendment. In any event, however the Suspension Clause is described, *Eisentrager* establishes that it does not apply to aliens held outside sovereign United States territory. Cf. Pet. App. 17a-19a.

extraterritorially, and it expressly reserved all constitutional questions. See *id.* at 485. Nothing in *Rasul* suggests that the Court implicitly overruled *Eisentrager* or the many other precedents governing that question.

Petitioners' reliance on a concurrence in *Rasul* (Pet. 17; 06-1196 Pet. 20) is likewise misplaced. Justice Kennedy stated that the detainees at Guantanamo Bay are distinguishable from the petitioner in *Eisentrager* in two ways, from which he would have concluded that there was jurisdiction under the federal habeas statute. *Rasul*, 542 U.S. at 487-488 (Kennedy, J., concurring in the judgment). First, he stated, "Guantanamo Bay is in every practical respect a United States territory." *Id.* at 487. Second, "the detainees at Guantanamo Bay are being held indefinitely, and without benefit of *any legal proceeding to determine their status*." *Id.* at 487-488 (emphasis added). The latter observation cannot extend to this case. Since this Court's decision in *Rasul*, all of petitioners have had CSRTs, which have issued individualized decisions determining that each is properly being detained as an enemy combatant. Further, Congress has not only recognized the CSRT process but provided for review of those CSRT determinations in the D.C. Circuit. Thus, there is an established statutory mechanism for the detainees to challenge their status determination.

The other "critical" fact Justice Kennedy cited—that, in construing the habeas statute, Guantanamo Bay should be treated as sovereign territory of the United States—was rejected by the majority in *Rasul*, which held that the United States exercises control, but "not 'ultimate sovereignty,'" over the leased area. See 542 U.S. at 475. And although the Court concluded that such control was sufficient to establish *statutory* habeas

jurisdiction even as to aliens, it focused on the distinctive language of the habeas statute, see *id.* at 481, as well as the "'extraordinary territorial ambit' of the writ at common law," *id.* at 482 n.12 (citation omitted). Indeed, the very fact that the Court was addressing the territorial reach of the writ underscores that Guantanamo Bay—a part of the sovereign territory of Cuba—lies *outside* the sovereign territory of the United States.

In any event, the status of Guantanamo Bay for purposes of the habeas statute is no longer a relevant consideration. The DTA makes clear that detainees at Guantanamo Bay have an avenue to challenge their detention in the court of appeals and that that new statutory remedy is exclusive. Accordingly, the question now before the Court is the constitutionality of this new statute. As to that question, *Eisentrager* controls: petitioners, as aliens outside the United States, are not "entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas*." 339 U.S. at 777.

Petitioners nevertheless contend that, even though they are aliens held on Cuban sovereign territory, they should be treated as being within the United States since the United States has control over the Naval Base at Guantanamo Bay. What was critical to the constitutional holding in *Eisentrager*, however, was sovereignty, not control. In *Eisentrager*, the petitioners were aliens imprisoned at a United States military base in Germany, which was controlled by the United States Army. See 339 U.S. at 766. Despite that control, this Court stressed that the aliens "at no relevant time were within any territory over which the United States is *sovereign*," *id.* at 778 (emphasis added), and, on that basis, it held that application of the Fifth Amendment would be

impermissibly "extraterritorial" (*id.* at 784). The United States is not sovereign over Guantanamo Bay; it operates a naval base there under written agreements with Cuba that expressly recognize Cuban sovereignty.[8]

Even if Guantanamo Bay were somehow treated as sovereign United States territory (contrary to *Rasul*), petitioners still would not have any constitutional rights. In *Verdugo-Urquidez*, this Court held that aliens "receive constitutional protections when they have come within the territory of the United States *and* developed *substantial* connections with this country." 494 U.S. at 271 (emphases added); see *People's Mojahedin*, 182 F.3d at 22. The Court further held that "lawful but involuntary" presence in the United States "is not of the sort to indicate any substantial connection with our country" for constitutional purposes. *Verdugo-Urquidez*, 494 U.S. at 271. Applying that rule, this Court denied Fourth Amendment protection to an alien who was being detained *in the United States* against his will, but who had "no previous significant *voluntary* connection with the United States." *Ibid.* (emphasis added). Similarly, here, petitioners' presence at Guantanamo Bay is, as the

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[8] See Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, T.S. No. 418 (Lease); Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, T.S. No. 426 (Supp. Lease); Treaty on Relations with Cuba, May 29, 1934, U.S.-Cuba, 48 Stat. 1682. Under those agreements, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba" over the leased area, and "Cuba consents" to United States control over that area, but only "during the period" of the lease. Lease art. III. The lease permits the United States to "do any and all things necessary to fit the premises for use as coaling or naval stations only, and for no other purpose." Lease art. II. The United States may not, for example, allow civilian settlement at Guantanamo Bay, or establish "commercial" or "industrial" enterprises there. Supp. Lease art. III.

petitions underscore, involuntary, and the detainees lack significant voluntary connections with this country.[9]

b. Even if alien enemy combatants detained outside the United States do possess some measure of constitutional rights, the court of appeals correctly held that the protections of the Suspension Clause do not extend "to aliens held at an overseas military base leased from a foreign government." Pet. App. 14a.

As the court of appeals explained, the Suspension Clause protects the common law writ of habeas corpus, "as it existed in 1789." Pet. App. 10a (quoting *St. Cyr*, 533 U.S. at 301). The court further noted that petitioners were unable to identify any cases "showing that the English common law writ of habeas corpus extended to aliens beyond the Crown's dominions." Pet. App. 11a. And the court, in undertaking its own review, found the contrary: "[e]very territory * * * cited as a jurisdiction to which the writ extended * * * was a sovereign territory of the Crown," but when "the Crown detained prisoners outside the Crown's dominions, it was understood that they were outside the jurisdiction of the writ." *Id.* at 12a. As the court stated, "[t]he 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." *Id.* at 12a-13a.

The court's conclusion is correct. Numerous contemporary treatises support its understanding of the scope

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[9] Even if Guantanamo Bay were treated as sovereign United States territory, and even if petitioners had a substantial connection to the United States, petitioners would face an additional barrier to their assertion of constitutional rights: their failure to effect an "entry" into the United States. See *Zadvydas*, 533 U.S. at 693; *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 215 (1953).

of the writ at common law. See Pet. App. 11a (citing, *inter alia*, 3 William Blackstone, *Commentaries* *131; 2 Robert Chambers, *A Course of Lectures on the English Law: Delivered at Oxford, 1767-1773*, at 7-8 (Thomas M. Curley ed., 1986)). Moreover, no cases to the contrary have been identified. The cases upon which petitioners rely are inapposite, as the court of appeals explained, Pet. App. 10a-11a, because they all involved petitions by aliens held *within* sovereign territory.[10] Nor do the cases cited by the dissent (*id.* at 33a-36a) cast any doubt on the court of appeals' holding.[11]

In any event, as the court of appeals further explained, this Court's decision in *Eisentrager* "ends any doubt about the scope of common law habeas." Pet. App. 13a. In *Eisentrager*, this Court observed that no court has ever issued a writ on behalf of an alien enemy that was not within the court's jurisdiction at any time

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[10] See *Lockington's Case*, Brightly 269 (Pa. 1813) (denying habeas petition of enemy alien found in Philadelphia); *The Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779) (declining to review detention of sailors held within English sovereign territory 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"); *Rex* v. *Schiever*, 97 Eng. Rep. 551 (K.B. 1759) (denying habeas to Swedish citizen held in Liverpool because there was ample evidence that he was a prisoner of war).

[11] See *Rex* v. *Cowle*, 97 Eng. Rep. 587, 599 (K.B. 1759) (holding King's Bench had power to issue writ to Berwick, an English borough, after determining that Berwick was part of sovereign English territory); *Rex* v. *Mitter*, 1 Indian Dec. 1008 (Calcutta S.C. 1781) (local court in India, specifically authorized by the British Parliament pursuant to the East India Company Regulation Act of 1773, held that it lacked power to issue writ); *Rex* v. *Hastings*, 1 Indian Dec. 1005 (Calcutta S.C. 1775) (same).

during his captivity. See 339 U.S. at 768. Petitioners provide no reason for revisiting that conclusion here.

Petitioners contend (Pet. 15-16; 06-1196 Pet. 18) that the court of appeals' reliance on *Eisentrager* ignored this Court's more recent decision in *Rasul*. That is incorrect. *Rasul* was limited to a construction of the federal habeas statute; it studiously avoided addressing the constitutional right to habeas. See pp. 21-22, *supra*.

Insofar as the Court discussed common-law habeas rights in *Rasul*, it did not conclude that habeas jurisdiction would have extended to aliens outside the sovereign territory of England. Instead, it stated that, "[a]t common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called 'exempt jurisdictions,' where ordinary writs did not run, and all other dominions under the sovereign's control." 542 U.S. at 481-482 (footnotes omitted). The cited cases involving "persons" outside the "sovereign territory of the realm" all involved *British subjects*. See *id*. at 481-482 nn.12-13. In stating that "[a]pplication of the habeas statute to *persons* detained at the base is consistent with the historical reach of the writ," *id*. at 481 (emphasis added), the Court thus rested not on the historic availability of habeas to aliens abroad, but on its historic availability to *citizens* abroad in controlled territories, combined with the fact that the habeas "statute draws no distinction between Americans and aliens." See *id*. at 481-82. The DTA, of course, draws just such a distinction, and so aliens outside the realm to whom the writ was historically *unavailable* have no basis to piggyback on the availability of the writ to citizens outside the realm. For that reason, *Rasul* in

no way undermines *Eisentrager*'s holding as to the scope of the writ protected by the Suspension Clause.[12]

4. Finally, petitioners raise various objections to the merits of their detention. Those arguments have not been considered by the court of appeals, so they do not provide a basis for review here. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984). They should instead be presented to the D.C. Circuit in the context of DTA review of petitioners' CSRT determinations. If petitioners are dissatisfied with the outcome of the proceedings in the D.C. Circuit, they may seek further review in this Court at that time.

In any event, petitioners' objections lack merit. Petitioners contend (Pet. 25) that the definition of "enemy combatant" as applied to them is inconsistent with the AUMF and Executive authority. That is incorrect. The AUMF authorizes the President to take action against all "organizations" that "planned, authorized, committed, or aided" the September 11 attacks. 115 Stat. 224. Al Qaida is undeniably such an organization, and the CSRTs determined that petitioners were "part of or supporting * * * al Qaida forces or associated forces that are engaged in hostilities against the United States." Pet. App. 81a. Petitioners' claim that *Hamdi* limits the Executive's authority under the AUMF is without basis. In *Hamdi*, the plurality looked to the text of the AUMF and traditional laws of war in upholding

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[12] Petitioners assert that the Suspension Clause may extend beyond the writ "as it existed in 1789." Pet. 14 (citing *St. Cyr*, 533 U.S. at 301). Whatever the merits of "[a]n evolving interpretation of the Suspension Clause"; Pet. 15 n.12, that issue is not presented in this case. Petitioners cannot show any historical practice, either before or after 1789, of extending habeas corpus to alien enemies detained outside of sovereign territory.

the President's authority to detain individuals who were "part of or supporting forces hostile to the United States" and who had themselves "engaged in an armed conflict against the United States." 542 U.S. at 516-521; see also *id.* at 586-588 (Thomas, J., dissenting). Nothing in *Hamdi* even remotely suggests, however, that the AUMF encompasses *only* those individuals.

The suggestion (Pet. 28), that petitioners are being improperly detained because they are akin to "little old lad[ies] in Switzerland" who unwittingly lend financial support to al Qaida activities, is absurd. After individualized hearings, petitioners were each found to be enemy combatants based on their substantial connections with, or provision of support to, al Qaida or associated forces—a terrorist network that has already inflicted the deadliest foreign attack ever on American soil and has repeatedly vowed to strike America and its allies again. The records of those CSRT proceedings contain ample evidence supporting those findings.[13]

[13] While classified information reinforces many of the CSRT determinations and cannot be addressed in a public filing, the unclassified summaries and other unclassified material in the record provide a much different perspective on these enemy combatants than suggested by the petitions. The lead habeas petitioners in the various cases for which petitions have been filed who remain in detention are indicative: Al Odah went to Afghanistan shortly before September 11, used an AK-47 at a training camp, and carried a weapon through the Tora Bora mountains during the US campaign in the region. Unclassified CSRT Decision Report (Al Odah), encl. 1, at 1. (The CSRT Decision Reports were included in the factual returns to the habeas petitions and are part of the district court record.) Boumediene traveled to conflict hotspots throughout the 1990s and provided assistance on several occasions to a known al Qaida operative. Unclassified CSRT Decision Report (Boumediene), encl. 1, at 1; *id.* exh. R1. David Hicks trained with al Qaida, collected intelligence on the U.S. Embassy in Afghanistan, and fought on the front lines against the United States in Afghanistan.

Petitioners are free to challenge those enemy-combatant determinations. And under the DTA, the D.C. Circuit can review the record evidence to ensure that the CSRTs properly adhered to the applicable standards and procedures and that their determinations are supported by a preponderance of the evidence. See DTA § 1005(e)(2)(C), 119 Stat. 2742. At a minimum, any consideration by this Court of the questions presented by this case should await the outcome of such proceedings.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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Unclassified CSRT Decision Report (Hicks), encl. 1, at 1. Falen Gherebi was an al Qaida operative in Kabul who fled Afghanistan in November 2001; his name was also on a list of individuals who trained at an al Qaida camp. Unclassified CSRT Decision Report (Gherebi), encl. 1, at 1; *id.* exh. R1. Zohair Al-Shorabi went to Afghanistan for weapons training and fought on the front lines. CSRT Decision Report, encl. 1, at 1. Jamil El-Banna met with and aided an al Qaida operative, Abu Qatada, while he was in hiding from British police. *Al Odah* C.A. Supp. J.A. 1806. Ali Abdullah Almurbati voluntarily traveled from Bahrain to Afghanistan in November 2001 to get training and "fight the Jihad." Unclassified CSRT Decision Report (Almurbati), encl. 1, at 1.