No. _____

In the Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENTS.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the D.C. Circuit err in relying again on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), to dismiss these petitions and to hold that petitioners have no common law right to habeas protected by the Suspension Clause and no constitutional rights whatsoever, despite this Court's ruling in *Rasul v. Bush*, 542 U.S. 466 (2004), that these petitioners are in a fundamentally different position from those in *Eisentrager*, that their access to the writ is consistent with the historical reach of the writ at common law, and that they are confined within the territorial jurisdiction of the United States?

2. Given that the Court in *Rasul* concluded that the writ at common law would have extended to persons detained at Guantanamo, did the D.C. Circuit err in holding that petitioners' right to the writ was not protected by the Suspension Clause because they supposedly would not have been entitled to the writ at common law?

3. Are petitioners, who have been detained without charge or trial for more than five years in the exclusive custody of the United States at Guantanamo, a territory under the plenary and exclusive jurisdiction of the United States, entitled to the protection of the Fifth Amendment right not to be deprived of liberty without due process of law and of the Geneva Conventions?

4. Should section 7(b) of the Military Commissions Act of 2006, which does not explicitly mention habeas corpus, be construed to eliminate the courts' jurisdiction over petitioners' pending habeas cases, thereby creating serious constitutional issues?

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

1. Petitioner in *Hicks (Rasul) v. Bush*, No. 02-CV-0299-CKK (D.D.C.), is David Hicks. Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Gordon R. England, Secretary of the Navy; John D. Altenburg, Jr., Appointing Authority for Military Commissions; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Brice A. Gyurisko, Commander, Joint Detention Operations Group.

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

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

3. Petitioners in *Habib v. Bush*, No. 02-CV-1130-CKK (D.D.C.), are Mamdouh Habib and his next friend Maha

LIST OF ALL PARTIES—continued

Habib. Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Gen. Rick Baccus, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Lt. Col. William Cline, Commander, Camp Delta.

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

5. Petitioners in *Begg v. Bush*, No. 04-CV-1137-RMC (D.D.C.), are Moazzam Begg and Feroz Ali Abbasi, and their next friends Sally Begg and Zumrati Zaitun Juma. Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

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

7. Petitioners in *Gherebi v. Bush*, No. 04-CV-1164-RBW (D.D.C.), are Falen Gherebi (also known as Salim Gherebi) and his next friend Belaid Gherebi. Respondents include the following individuals or their successors in office: George

LIST OF ALL PARTIES—continued

W. Bush, President; Donald Rumsfeld, Secretary of Defense; and "1,000 Unknown Named United States Military Personnel and Government Officers and/or Officials."

8. Petitioners in *Anam v. Bush*, No. 04-CV-1194-HHK (D.D.C.), are Suhail Abdu Anam, Fahmi Abdullah Ubad Al-Tawlaqi (also known as Fahmi Abdullah Ahmed), Bisher-Naser Ali Almarwalh (also known as BashirNaser Ali Almarwalh and Bashir Nasir Ali Al-Marwala), Musaab Omar Al-Madhwani (also known as Musa'ab Omar Madhwani), Abdulkhaliq Al-Baidhani (also known as Abdul Khaleq Ahmed Al-Baidandi), Ali Ahmed Mohammed Al Razehi, Saeed Ahmed Al-Sarim, Imad Abdullah Hassan, Jalal Salim Bin Amer, Ali Yahya Mahdi (also known as Ali Yahaya Mahdi Al-Rimi), Atag Ali Abdoh (also known as Atag Ali Abdoh Al Hag), Khalid Ahmed Kassim, Fahmi Abdullah Ahmed Abdualaziz Abdoh Al Swidi (also known as Abdualaziz Abdoh Alsswidi), and Ali Hussin Al-Tis, and their next friends Mohamed Abdu Anam, Huissen Naser Ali Almarwalh, Ali Omar Madhwani, Khalid Al-Baidhani, Abdullah Ahmed Mohammed Al Razehi, Samir Ahmed Al-Sarim, Amro Abdullah Hassan, Faez Bin Amer, Mohamed Yahya Mahdi, Atag Ali Abdoh Al Hag, Fadhle Ahmed Kassim, Abdullah Ahmed Ubad Al-Tawlaqi, Kmal Abdullah Ahmed, Adnan Abdoh Alswidi, and Hadi Hussin Al-Tis.

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

9. Petitioners in *Almurbati v. Bush*, No. 04-CV-1227-RBW (D.D.C.), are Isa Ali Abdulla Almurbati, Adel Kamel Abdulla Hajee, Salah Abdul Rasool Al Bloushi, Abdullah Majed Sayyah Hasan Alnoaimi, Salman Bin Ibrahim Bin Mohammed Bin Ali Al-Kalifa, and Jum'ah Mohammed Ab-

LIST OF ALL PARTIES—continued

dullatif Aldossari, and their next friends Mohamed Ali Abdulla Almurbati, Abdullah Kamel Abdulla Hajee, Abdul Rasool Ali Al Bloushi, Majed Sayah Alnoaimi, Ibrahim Bin Mohammed Bin Ali Al-Khalifa, and Khalid Mohammed Abdullatif Aldossari.

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

10. Petitioners in *Abdah v. Bush*, No. 04-CV-1254-HHK (D.D.C.), are Mahmoad Abdah, Majid Mahmoud Ahmed (also known as Majed Mohmood, and Majid M. Abdu Ahmed), Abdulmalik Abdulwahhab Al-Rahabi, Makhtar Yahia Naji Al-Wrafie, Aref Abd II Rheem, Yasein Khasem Mohammad Esmail, Adnan Farhan Abdul Latif, Jamal Mar'i, Othman Abdulraheem Mohammad, Adil Saeed El Haj Obaid, Mohamed Mohamed Hassan Odaini, Sadeq Mohammed Said, Farouk Ali Ahmed Saif, and Salman Yahaldi Hsan Mohammed Saud, and their next friends Mahmoad Abdah Ahmed, Mahmoud Ahmed, Ahmed Abdulwahhab, Foade Yahla Naji Al-Wrafie, Aref Abd Al Rahjm, Jamel Khasem Mohammad, Mohamed Farhan Abdul Latif, Nabil Mokamed Mar'I, Araf Abdulraheem Mohammad, Nazem Saeed El Haj Obaid, Bashir Mohamed Hassan Odaini, Abd Alsalam Mohammed Saeed, Sheab Al Mohamedi, and Yahiva Hsane Mohammed Saud Al-Rewaye.

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

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OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (Appendix ("App.") D, 61-128) is reported at 355 F. Supp. 2d 443 (D.D.C. 2005). The opinion of the United States Court of Appeals for the District of Columbia Circuit (App. A, 1-54) is not yet reported.

JURISDICTION

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

APPLICABLE PROVISIONS

United States Constitution, art. I, § 9, cl. 2 and amend. V; Authorization for Use of Military Force ("AUMF"), 115 Stat. 224 (2001); Military Commissions Act of 2006 ("MCA") §§ 3(a) (adding 10 U.S.C. § 950j(b)), 7, Pub. L. No. 109-366, 120 Stat. 2600; Detainee Treatment Act of 2005 ("DTA") § 1005, Pub. L. No. 109-148, 119 Stat. 2740, 10 U.S.C. § 801 note; Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal, dated July 7, 2004; Memorandum of the Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba, dated July 29, 2004; Deputy Secretary of Defense Order OSD 06942-04, dated May 11, 2004. These provisions are reprinted at App. E-L, 129-203.

STATEMENT OF THE CASE

Petitioners are 39 prisoners held by the United States at the U.S. Naval Base at Guantanamo Bay.[1] Most have been in U.S. custody for more than five years. None is a citizen of a nation at war with the United States.[2] All maintain that they have never engaged in combat against the United States and are wholly innocent of wrongdoing. They seek a single remedy: a fair and impartial hearing before a neutral decision maker to determine whether there is a reasonable basis in law and fact for detaining them. They have never received such a hearing, although this Court ruled almost three years ago that they were entitled to one. *See Rasul v. Bush*, 542 U.S. 466 (2004).

A. The Guantanamo Detainees

Nearly 400 prisoners remain at Guantanamo. Only 15 have been designated as persons the government "has reason to believe" supported terrorism, and, after more than five years, only ten have ever been charged.[3] None has been tried. If those charged are ever convicted, they may be sentenced to terms in prison. Meanwhile, the other approximately 380 detainees have already served terms as long as five years without charge, without trial, and without any fair hearing – and with no end in sight. And Department of De-

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[1] Petitioners also include next friends of the prisoners who filed petitions on their behalf as well as prisoners who have been repatriated but whose cases were not dismissed as a result by the district court. Thirteen of the petitioners were before this Court in *Rasul v. Bush*, 542 U.S. 466 (2004).

[2] Petitioners in these cases are citizens of Afghanistan, Australia, Bahrain, Jordan, Iraq, Kuwait, Libya, Turkey, and Yemen.

[3] *See* Department of Defense News Release, *President Determines Enemy Combatants Subject to His Military Order*, July 3, 2003, http://www.defenselink.mil/releases/2003/nr20030703-0173.html; Department of Defense News Release, *Presidential Military Order Applied to Nine more Combatants*, July 7, 2004, http://www.defenselink.mil/releases/2004/nr20040707-0987.html.

fense Officials have indicated that those charged may continue to be detained even if they are acquitted.[4]

Who are these prisoners? According to Defense Department documents, only 5% were captured by U.S. forces; 86% were taken into custody by Pakistani or Northern Alliance forces at a time when the United States was offering large financial bounties for the capture of any suspected Arab terrorist; the large majority never participated in any combat against the United States on a battlefield; only 8% have been classified as al Qaeda fighters.[5]

Some of the prisoners, including a number of the petitioners in these cases, were picked up thousands of miles from the conflict in Afghanistan. Most, however, were rounded up in Afghanistan and the areas of Pakistan bordering on Afghanistan in the months immediately following 9/11. At that time, Afghanistan was suffering "the worst humanitarian crisis in the world" after enduring twenty-three years of civil war and three consecutive years of severe drought.[6] Charitable organizations and individual volunteers, mostly from the Middle East, had flocked to the area to provide humanitarian aid.[7] Following the September 11

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[4] *See* Department of Defense News Briefing, Presentation by Secretary of Defense Donald Rumsfeld, March 28, 2002, http://www.defenselink.mil/transcripts/2002/t03282002_t0328sd.html.

[5] Mark Denbeaux *et al*., Seton Hall University School of Law, *Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data* 2-4 (2006) ("Seton Hall Report"), App. 221-23.

[6] *United Nations Development Program/United Nations Office for the Coordination of Humanitarian Affairs*, Assistance for Afghanistan Weekly Update, Issue No. 429, September 12, 2001, *available at* http://www.reliefweb.int/rw/rwb.nsf/db900SID/OCHA-64DHQ4.

[7] RAND National Defense Research Institute, *Aid During Conflict: Interaction Between Military and Civil Assistance Providers in Afghanistan, September 2001-June 2002* 26-37, Prepared for the Office of the Secretary of Defense and the United States Agency for International De-

attacks, they were at great risk. The U.S. government offered substantial financial bounties for "any Arab terrorist" turned in to U.S. forces.[8] In response, numerous Arabs in the area were swept up and turned over by Pakistani and Northern Alliance forces.[9]

The U.S. military has well-established procedures for culling out people detained by mistake. Army Regulation 190-8 requires hearings to be held promptly in the field close to the time and place of capture if there is any doubt about a captive's status.[10] That regulation and its predecessors had been followed in every previous conflict since Vietnam. During the Gulf War, for example, the military held 1,196 of these hearings and, in 886 of those cases – almost 75% of the time – the detainees were found not to be combatants,

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velopment (2004), http://www.rand.org/pubs/monographs/2004/RAND_MG212.sum.pdf.

[8] Leaflet distributed by U.S. Forces in Afghanistan, Seton Hall Report, App. 236.

[9] Seton Hall Report, App. 205-06, 221-24. The bounties offered ranged from $5,000 to $25,000. These sums were paid to residents of countries where the average annual income per capita is less than $200. *See* The World Bank Group, Press Release, *World Bank Increases Support For Public Administration* (Jan. 27, 2005), *available at* http://www.reliefweb.int/rw/RWB.NSF/db900SID/KHII-6932QV. The leaflets correctly proclaimed that the bounties offered were sufficient "to take care of [a] family . . . for the rest of your life." App. 236. Any Arab in the area was therefore an extremely valuable commodity.

[10] *Enemy Prisoners of War; Retained Personnel, Civilian Internees and Other Detainees*, U.S. Army Regulation 190-8, applicable to the Departments of the Army, the Navy, the Air Force, and the Marine Corps, Washington, D.C. (1 Oct. 1997), Chapter 1-5, para. a ("All persons taken into custody by U.S. forces will be provided with the protections of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War ("GPW") until some legal status is determined by a competent authority."); *id.* at 1-6 para. b ("a competent tribunal shall determine the status of any person . . . concerning whom any doubt . . . exists").

but innocent civilians, and released.[11] Inexplicably, the government did not provide the hearings required by that regulation before shipping captives to Guantanamo.[12]

It is now clear that the government selected Guantanamo as its prison site specifically to avoid judicial review of the legality of its actions. It sought a location beyond the reach of both U.S. and foreign courts. As John Yoo, the Deputy Assistant Attorney General at the time, has recounted: "[N]o location was perfect," but Guantanamo "seemed to fit the bill."[13]

Uncertainty about the true nature of the prisoners at Guantanamo – a concern that, in many instances, the U.S. simply got the wrong guy – has pervaded the highest echelons of the military at Guantanamo. On October 6, 2004, Brigadier General Martin Lucenti, Jr., the deputy commander at Guantanamo, said: "I would say most of [the prisoners], the majority of them, will either be released or transferred to their own countries . . . Most of these guys weren't fighting. They were running."[14] In January 2005 Major General Jay Hood, commander at Guantanamo, ac-

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[11] *See Report on the Conduct of the Persian Gulf War*, Final Report to Congress by the Department of Defense (April 1992), *cited in* David Cole, *Enemy Aliens*, 42 n.69 (2003).

[12] Reportedly, military officials intended to hold these hearings, as they had in previous conflicts, but civilian officials in Washington stopped them. *See* Jane Mayer, *The Hidden Power: The Legal Mind Behind the White House's War on Terror*, THE NEW YORKER, July 3, 2006.

[13] John Yoo, *War By Other Means: An Insider's Account of the War on Terror* 142-43 (2006). *See also* Patrick F. Philbin and John C. Yoo, Memorandum for William J. Haynes, II, General Counsel, Department of Defense, Re: Possible Habeas Jurisdiction over Aliens Held at Guantanamo Bay, Cuba, Dec. 28, 2001, *reprinted in* Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* 29 (2005); Col. Daniel F. McCallum, *Why GTMO?* (2003), http://www.ndu.edu/library/n4/n035603g.pdf.

[14] John Mintz, *Most at Guantanamo to be Freed or Sent Home, Officer Says*, THE WASHINGTON POST, Oct. 6, 2004, at A16.

knowledged that: "Sometimes we just didn't get the right folks," and that the reason those "folks" were still in Guantanamo was that "[n]obody wants to be the one to sign the release papers . . . . There's no muscle in the system."[15] We now know that, in August 2002 – more than four and a half years ago – the CIA sent a confidential report to Washington reporting that most of the Guantanamo detainees "didn't belong there."[16]

B. Summary of Proceedings Below

The history of this litigation was outlined by Judge Green in her opinion below. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 448-52 (D.D.C. 2005). The first case was filed more than five years ago, on February 19, 2002, *Rasul v. Bush*, D.D.C., No. 02-CV-0299 (CKK), styled as a petition for the writ of habeas corpus. *Rasul* was soon followed by *Al Odah v. United States*, D.D.C., No. 02-CV-0828, styled as a complaint, but asserting a cause of action for violation of the habeas statute and seeking, most importantly, an impartial hearing to determine if there was a reasonable basis for the detentions.[17]

The government never filed a return or answer in *Rasul* or *Al Odah*. Instead, it moved to dismiss both for lack of jurisdiction. The district court granted the motion, and the D.C. Circuit affirmed. Relying principally on this Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the D.C. Circuit held that, because Guantanamo is outside the technical sovereignty of the United States, petitioners had no rights under the Constitution and therefore no access to the

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

[16] That report was brought to the attention of White House officials and ignored. *See* Mayer, *supra*.

[17] Formal applications for the writ of habeas corpus were filed in *Al Odah* on July 27, 2004.

U.S. courts through the writ of habeas corpus or otherwise. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

In *Rasul*, this Court reversed. It found that the Guantanamo petitioners differ from the *Eisentrager* detainees in "important respects." 542 U.S. at 476. Most significantly, the Court emphasized that, unlike the convicted prisoners in *Eisentrager* who were incarcerated in Germany, the Guantanamo petitioners are imprisoned "within 'the territorial jurisdiction' of the United States" in an area "over which the United States exercises exclusive jurisdiction and control." *Id*. at 476, 480. The Court held that aliens at Guantanamo, "no less than American citizens," have the right to challenge the legality of their detention in the U.S. courts through the writ of habeas corpus. *Id*. at 481. Notably, in addition to holding that the petitioners were entitled to the writ under the federal habeas statute, the Court concluded that application of the writ to them was "consistent with the historical reach of the writ of habeas corpus" at common law. *Id*. It observed that "[h]abeas corpus is . . . 'a writ antecedent to statute,'" and at common law the writ extended to persons detained not only "within sovereign territory of the realm," but in "all other dominions under the sovereign's control." *Rasul*, 542 U.S. at 473, 481-82. The Court also noted that the Guantanamo petitioners' claims "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'" *Id.* at 484 n.15. The Court remanded to the district court with instructions "to consider in the first instance the merits of petitioners' claims." *Id.* at 485.

Despite that ruling, almost three years later, not a single habeas hearing has been held.

Nine days after this Court's decision, the Deputy Secretary of Defense suddenly announced, as a matter of internal department "management," a new, so-called Combatant

Status Review Tribunal ("CSRT") process at Guantanamo.[18] That process did not even purport to provide *de novo* determinations of whether the detainees were properly detained. Rather, according to the announcement, it provided a process to review the determinations that had already been made "through multiple levels of review by officers of the Department of Defense" that the detainees were "enemy combatants." The detainees were not allowed counsel. They were not allowed to see or rebut the key accusations against them, which the government considered classified, and they were given no meaningful opportunity to present exculpatory evidence. In short, the detainees had the burden of proving themselves innocent of charges that, for the most part, they were not entitled to see, let alone examine or rebut. Predictably, in over 90% of the cases, the tribunals confirmed the decisions previously made by higher ups that the detainees were properly detained as enemy combatants.[19]

On October 4, 2004, while it was conducting these internal CSRT proceedings at Guantanamo, the government moved in court to dismiss these cases as a matter of law. It argued again that, because petitioners are being detained outside sovereign U.S. territory, they have no constitutional rights and therefore no right to obtain relief.

Judge Richard Leon agreed with respondents and granted their motion to dismiss in two of the cases that were then pending. *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005). The judges in the other 11 pending cases transferred those cases for decision to Judge Joyce Hens Green, who

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[18] Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal, dated July 7, 2004, App. I, 141-46.

[19] Mark Denbeaux *et al*., Seton Hall University School of Law, *No Hearing Hearings: An Analysis of the Proceedings of the Government's Combatant Status Review Tribunals at Guantánamo* 39 (2006), http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

denied the government's motion in large part. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005).

Judge Green rejected the government's contention that it had effectively deprived the petitioners of constitutional rights by placing them in Guantanamo, an area outside technical U.S. sovereignty. Judge Green held that "the right not to be deprived of liberty without due process of law – is one of the most fundamental rights recognized by the U.S. Constitution," and that, in light of the decision in *Rasul*, "it is clear that Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply." *Id.* at 464. Judge Green also rejected the government's alternative argument that the CSRT proceedings afforded petitioners the equivalent of constitutional due process. *Id*. at 465-78. She found that the CSRT procedures "deprive[d] the detainees of sufficient notice of the factual bases for their detention and den[ied] them a fair opportunity to challenge their incarceration," and also improperly allowed for reliance on statements obtained through torture and coercion. *Id*. at 468, 472. Finally, Judge Green sustained the Geneva Conventions claims of those detainees who the government claimed were connected to the Taliban but dismissed the Geneva Conventions claims of those detainees who the government claimed were connected to al Qaeda. *Id*. at 478-81.

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

C. The DTA and the MCA

On December 30, 2005, after the cases had been briefed and argued before the D.C. Circuit, the President signed the

Detainee Treatment Act of 2005 (the "DTA") into law.[20] Section 1005(e) of the DTA purported to strip the courts of jurisdiction over habeas petitions filed by Guantanamo detainees.[21] This Court held in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764-69 (2006), that the DTA did not deprive the courts of jurisdiction over habeas cases pending in court when the legislation was enacted.

On October 17, 2006, the President signed the Military Commissions Act of 2006 (the "MCA").[22] Section 7(a) of the MCA struck the amendment to 28 U.S.C. § 2241 made by the DTA and added a new paragraph (e) stripping the courts of jurisdiction over two categories of cases: (1) "application[s] for a writ of habeas corpus" and (2) "other action[s]" that relate "to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of aliens determined by the United States to have been properly detained as enemy combatants. Section 7(b) provides that the amendments made by section 7(a) shall take effect upon enactment of the MCA and shall apply "to all cases, without exception, pending on or after the date of enactment . . . which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention."

D. Court of Appeals Opinion

The D.C. Circuit held that the MCA eliminated the courts' jurisdiction over petitioners' pending habeas cases. App. 6-10.[23] The majority (Randolph & Sentelle, JJ.,

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[20] The DTA was enacted twice in identical form, first on December 30, 2005, as part of the Defense Appropriations Act, 2006, Pub. L. No. 109-148, 119 Stat. 2739, and second on January 6, 2006, as part of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3474. *See* 10 U.S.C. § 801 note.

[21] App. G, 132-38.

[22] App. H, 139-40.

[23] The D.C. Circuit opinions, majority and dissent, are reproduced as Appendix A, App. 1-54.

Rogers, J. dissenting) also held that the elimination of habeas did not violate the Suspension Clause of the U.S. Constitution, relying on *Eisentrager* as the "controlling" decision. App. 14-22.

First, citing *INS v. St. Cyr*, 533 U.S. 289, 301 (2001), the majority asserted that the Suspension Clause "protects the writ 'as it existed in 1789.'" App. 10-11. The majority said that its own research and analysis of the cases confirmed that "habeas corpus would not have been available in 1789 to aliens without presence or property within the United States." App. 11-14. It said that *Eisentrager* "ends any doubt about the scope of common law habeas." App. 14. The majority acknowledged that this Court in *Rasul* had examined the "'historical reach of the writ'" but relied instead on Justice Scalia's contrary analysis in his dissenting opinion. App. 14-15.

Second, the majority held that, in any event, petitioners could not claim the protections of the Suspension Clause because, under *Eisentrager*, "the Constitution does not confer rights on aliens without property or presence within the United States." App. 15. The majority concluded that "[a]ny distinction between the naval base at Guantanamo Bay and the prison in Landsberg, Germany . . . is immaterial to the application of the Suspension Clause." App. 17.

Judge Rogers dissented. She observed at the outset that the majority "fundamentally misconstrues" the nature of the Suspension Clause, which "is a limitation on the powers of Congress," and that "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." App. 23.

Judge Rogers noted that this Court has stated on several occasions that "*at the absolute minimum*, the Suspension Clause protects the writ 'as it existed in 1789.'" App. 32. She further pointed out that this Court already had determined in *Rasul* that application of the writ "'to persons detained at the [Guantanamo] base is consistent with the historical reach of the writ of habeas corpus." App. 36. Thus, in Judge Rogers' view, "[t]o the extent the court relies on *Eisentrager* as proof of its historical theory, the Supreme Court rejected that approach in *Rasul*." App. 40 n.8.

Judge Rogers analyzed whether Congress had provided an adequate substitute for habeas in the MCA (*see Swain v. Pressley*, 430 U.S. 372 (1977)), and concluded that it had not. App. 40-46. She found that the MCA's "alternatives are neither adequate to test whether detention is unlawful nor directed toward releasing those who are unlawfully held." [24] App. 41.

REASONS FOR GRANTING THE PETITION

Two years and eight months have passed since this Court held in *Rasul* that the courts have jurisdiction "to determine

[24] Among the deficiencies Judge Rogers found in the underlying CSRT proceedings were: (i) the detainee bears the burden of proving why he should not be detained; (ii) the detainee need not be informed of the basis for his detention or be allowed to introduce rebuttal evidence; (iii) the detainee must proceed without the benefit of his own counsel; and (iv) the CSRT proceedings are before a military panel subject to command influence. App. 42-43. Judge Rogers found that "each of these practices impedes the process of determining the true facts underlying the lawfulness of the challenged detention," and therefore "are inimical to the nature of habeas review." App. 43. Judge Rogers also found that judicial review would not cure these deficiencies because: (i) the D.C. Circuit can review only the record developed by the CSRT and determine if the CSRT followed its own standards; (ii) the detainee cannot present rebuttal evidence to the court; and (iii) continued detention could be justified by the CSRT on the basis of evidence obtained through torture. App. 43-44. Beyond that, Judge Rogers pointed out that, unlike a habeas court, the reviewing court could not guarantee the remedy of discharge. App. 44.

the legality of the Executive's potentially indefinite detention" of petitioners at Guantanamo and ordered the district court "to consider in the first instance the merits of petitioners' claims." 542 U.S. at 485. Yet, to date, the district court has not considered the merits of *any* of petitioners' habeas claims.

While at the time of *Rasul* there was a statutory basis for habeas, all of the predicates for the Court's ruling in that case also establish a common law right to habeas that Congress could not suspend without meeting the requirements of the Suspension Clause. Thus, Congress' passage of the MCA following *Rasul* does nothing to alter the Court's conclusion that the detainees have a right to habeas.

Petitioners agree with Judge Rogers that it is only by "ignoring" *Rasul* that the D.C. Circuit was able to dismiss petitioners' pending habeas cases. App. 23. Beginning with its reliance on Justice Scalia's dissent instead of the Court's analysis in *Rasul* on the historical reach of the writ and continuing through its repeated invocation of *Eisentrager* as the foundation for its decision, the D.C. Circuit seems to have decided the issues before it as if *Rasul* did not exist. The majority opinion, upholding Congress' purported elimination of the courts' jurisdiction over petitioners' habeas cases and denying petitioners' entitlement to the very right this Court previously proclaimed that petitioners, "no less than American citizens, are entitled to invoke," 542 U.S. at 481, effectively renders *Rasul* meaningless. Moreover, it raises questions that go to the essential meaning and purpose of habeas and the Suspension Clause, and of the constitutional separation of powers established by our Founders.

Those important constitutional questions can be decided only by this Court. They should be decided now; petitioners have entered their sixth year of imprisonment without being charged or afforded their day in court, and the denial of those basic hallmarks of American justice and fair dealing to the

prisoners at Guantanamo has become a matter of national and international debate. The Court should grant the petition and decide these important issues.[25]

1. The Decision Ignores *Rasul*

The D.C. Circuit's decision is remarkable. Approximately four years ago the D.C. Circuit affirmed the dismissal of the *Rasul* and *Al Odah* petitions, holding that *Eisentrager* compelled the dismissal of habeas petitions filed by aliens detained outside the technical "sovereignty" of the United States. *Al Odah v. United States*, 321 F.3d 1134.

On June 24, 2004, this Court reversed, pointing out that these cases are fundamentally different from *Eisentrager* – the petitioners here are not enemy aliens, they deny that they have ever engaged in or supported hostilities against the United States, they have never been charged or convicted of any wrongdoing, and they are "imprisoned in territory over which the United States exercises exclusive jurisdiction and control." *Rasul*, 542 U.S. at 476. The Court rejected in every respect the D.C. Circuit's reliance on *Eisentrager*, and the theory that the Guantanamo detainees' rights depended on notions of "ultimate sovereignty." *Id.* at 475-79, 484-85. The Court found that the Guantanamo detainees are being detained "within 'the territorial jurisdiction' of the United States," that they have the right to habeas under the federal habeas statute, and that application of the statute to them is "consistent with the historic reach of the writ" at common law. *Id.* at 480-81.

Yet, two weeks ago, the D.C. Circuit again dismissed these habeas petitions and, again, it relied principally on *Eis-*

[25] This petition is being filed contemporaneously with the petition in *Boumediene v. Bush, et al.*, Nos. 05-5062 and 05-5063, which seeks review of the same judgment of the Court of Appeals with respect to *In re Guantanamo Detainee Cases*. Because of the overlap in issues between the two petitions, the Court may wish to consider granting both petitions.

entrager to do so. It characterized as "immaterial" the distinctions this Court drew in *Rasul* between Guantanamo and the German prison in *Eisentrager*, and it ruled that, under *Eisentrager*, the right to habeas, to which this Court held petitioners were entitled, was not protected by the Suspension Clause. App. 14-22. Based on *Eisentrager*, it held that these petitioners would not have had access to the writ at common law (*Eisentrager*, it said, "ends any doubt about the scope of common law habeas"), and that they have no constitutional rights whatsoever. App. 14-15.

To the majority below, it as if *Rasul* never happened. Indeed, to the extent the D.C. Circuit paid any regard to *Rasul*, it chose to elevate Justice Scalia's dissenting analysis and conclusions regarding the historic reach of the writ at common law over those of the Court. *See* App. 15. Whatever authority Congress may have to override the decisions of this Court – and on matters involving the constitutional limits on its authority, it is questionable whether it has any – the lower federal courts certainly have none.

2. The Decision Misconceives and Misapplies The Suspension Clause

This Court also should grant review to clarify the scope of the Suspension Clause of the Constitution. Article I, Section 9, Clause 2 of the Constitution provides: "The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Unlike the Fourth, Fifth, and Sixth Amendments, this Clause does not itself confer rights on individuals. Rather, it provides constitutional protection to a preexisting right founded in the common law; the right to obtain independent judicial review of a detention to ensure that no person is deprived of liberty by the Executive without reasonable basis in law and fact. The Founders considered that right essential; as Alexander Hamilton explained: "the practice of arbitrary imprisonments, [has] been, in all ages, the

favorite and most formidable instruments of tyranny," and habeas corpus is the "remedy for this fatal evil." Federalist No. 84.

The Suspension Clause protects that fundamental right from intrusion by the legislature in times of political crisis. It is a direct, plain, and explicit limit on the power of Congress. That is why the Framers placed it in Article I of the Constitution. It permits Congress to suspend the writ only in certain, narrowly defined circumstances, and no others. Unless those circumstances exist – and they clearly do not – Congress may not suspend the writ. Congress may no more suspend the writ in the absence of "Rebellion" or "Invasion" consistently with Article I, Section 9, Clause 2 of the Constitution than it may tax exports consistently with Article I, Section 9, Clause 4. It could not impose an export tax on a foreign national abroad any more than it could impose one on a U.S. citizen at home. It is simply without power to do so.

Congress has authorized suspension of the Great Writ only four times, and each occurred during times of indisputable, and congressionally declared, rebellion or invasion.[26] There are no congressional findings of rebellion or invasion in the MCA. Thus, Congress has no power to suspend the writ.

This Court has not yet resolved whether the protections of the Suspension Clause encompass all of the evolutions the writ has undergone since 1789. The Court has emphasized, however, that, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301. Therefore, to determine if petitioners' right to habeas is protected by the Suspension Clause, the initial inquiry to be made is whether they would have had a right to the writ "as it existed in 1789."

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[26] *See* William F. Duker, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 149, 178 n.190 (1980).

As Judge Rogers pointed out, this Court answered that question in the affirmative in *Rasul*. The Court concluded that "[a]pplication of the habeas statute to persons detained at the [Guantanamo Bay naval] base is consistent with the historical reach of the writ of habeas corpus." *Rasul*, 542 U.S. at 481. The Court pointed out that "[a]t common law, courts exercised habeas jurisdiction [not only] over the claims of aliens detained within sovereign territory of the realm [but also over] 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." *Id*. at 481-82 (footnotes omitted). The Court cited Lord Mansfield, who wrote in 1759 that, "even if a territory was 'no part of the realm,' there was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown.'" *Id*. at 482.

The Court thus found that the common law writ of habeas corpus, as of 1759, applied to aliens detained outside the realm but in territories under the subjection of the Crown. The Court also noted that "[l]ater cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.'" *Id*. at 482.[27] Given those findings, it was not only unnecessary, but also improper for the D.C. Circuit to determine for itself whether the writ would have been available to petitioners at common law. This Court had already answered that question.

[27] Congress has long recognized the applicability of that Clause in U.S. controlled territories outside the United States. For example, in 1902, during a rebellion against U.S. authority in the Philippines, Congress authorized the suspension of the writ for the duration of any "rebellion, insurrection, or invasion," and the writ was thereafter suspended in two rebellious provinces in the Philippines. *See* Act of July 1, 1902, ch. 1369, 32 Stat. 691; *Fisher v. Baker*, 203 U.S. 174, 179 (1906).

Nonetheless, the D.C. Circuit engaged in its own inquiry on the matter. App. 10-14. And, rather than paying heed to this Court's analysis and conclusion, it instead favored Justice Scalia's dissent in *Rasul*, which disagreed with the Court's analysis and conclusion. App. 14-15. This was plain error. The Court was well aware of Justice Scalia's dissenting views and rejected them. *Rasul*, 542 U.S. at 482 n.14. The D.C. Circuit was bound to follow the Court's analysis in *Rasul*, not the dissent, and hold accordingly that, because habeas would have been available to petitioners at common law, petitioners' right to habeas is protected by the Suspension Clause.

As Judge Rogers pointed out, the relevant question is not whether a particular case existed as of 1789 that is on all fours with the present petitions. The question is whether these petitions fall within the core of what habeas was intended to safeguard under the common law. As challenges to the legality of indefinite detention by the Executive, they fall directly within that core. As the Court has emphasized: "At 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.

This Court has never failed to accord habeas a scope appropriate to the writ's "grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones v. Cunningham*, 371 U.S. 236, 243 (1963). As the Court noted in *Rasul*, at common law, the right to habeas to challenge executive detention turned not on technical notions of sovereignty, but on the degree of control over the territory and the power to enforce the writ. *Rasul*, 542 U.S. at 481-82. At common law, the executive could not bypass habeas review of its actions by deliberately housing prisoners in a leased territory, such as Guantanamo, where it exercised complete and total control if not *de jure* sovereignty. Such attempts to establish lawless en-

claves are contrary to the essential purpose of habeas at common law, as a check on illegal executive imprisonment.

The government may avoid neither petitioners' right to habeas nor the Suspension Clause's protection of that right by placing these petitioners at Guantanamo. This Court should confirm that the Suspension Clause protects petitioners' fundamental right, founded in the common law, to obtain habeas review of their detentions.

3. The Decision Impermissibly Denies Petitioners the Fundamental Protections of the Constitution

The D.C. Circuit held that petitioners have no rights under any part of the Constitution and therefore cannot claim protection under the Suspension Clause. App. 15-21. It relied on *Eisentrager* for this holding, again ignoring the distinctions between that case and these. Petitioners agree with Judge Rogers that their right to habeas corpus is protected under the Suspension Clause even if they have no other protections under the Constitution. Petitioners submit, however, that as prisoners held in U.S. custody at Guantanamo, an area within the complete jurisdiction and control of the United States, they are entitled "no less than American citizens" to the fundamental protections of the Constitution, including due process of law, before being locked up forever at the Executive's behest. The Court should decide that issue now, before these petitioners are forced to endure many more months and years deprived of their liberty without fair process.

This Court has already decided the issues that are central to holding that petitioners are entitled to fundamental constitutional protections. Most importantly, the Court found in *Rasul* that Guantanamo, where petitioners are incarcerated, is "a territory over which the United States exercises plenary and exclusive jurisdiction" and that it is "within 'the territorial jurisdiction' of the United States." 542 U.S. at 475. That finding distinguishes the present case not only from

Eisentrager, but also from *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), where this Court declined to apply the warrant requirement of the Fourth Amendment to a search of the Mexican residence of a Mexican national. As Justice Kennedy explained in his concurrence in *Verdugo*, "the differing . . . conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does here." 494 U.S. at 278. But there is no such potential for conflict or need for cooperation with foreign sovereigns at Guantanamo. No other sovereign exercises jurisdiction there. The United States exercises complete jurisdiction and control at Guantanamo.

As Justice Kennedy pointed out in his concurrence in *Rasul*: "Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities . . . . From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." 542 U.S. at 487.[28]

It was on this basis that Judge Green concluded that "Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply." *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 464. In fact, this Court has long held that constitutional protections from arbitrary government action apply to aliens as well as to U.S. citizens in foreign territories controlled by the United States. In one of the early *Insular Cases*, this Court recognized the importance of preserving fundamental constitutional protections for alien inhabitants of territories

[28] As the U.S. Navy's own website says, Guantanamo, "for all practical purposes, is American territory," and "the United States . . . exercise[s] the essential elements of sovereignty over this territory." Rear Admiral M.E. Murphy, 1 *The History of Guantanamo Bay*, ch. 3 (1953), http://www.nsgtmo.navy.mil/history/gtmohistorymurphyvol1ch3.htm.

held and controlled by the United States, observing that fundamental and "personal" constitutional protections undoubtedly apply to aliens in such territories. *Downes v. Bidwell*, 182 U.S. 244 (1901) ("[e]ven if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property.").

Application of core constitutional protections to aliens outside of the United States, but in territories controlled by the United States, was again affirmed by this Court in *Balzac v. Porto Rico*, 258 U.S. 298 (1922). The Court explained that, although particular rights such as trial by jury might not apply, there was no question that other core constitutional protections applied to both citizens and aliens in a U.S.-controlled territory: "The guaranties of certain fundamental personal rights declared in the Constitution, *as for instance that no person could be deprived of life, liberty or property without due process of law*, had from the beginning full application in the Philippines and Porto Rico . . . ." *Id.* at 312-13 (emphasis added).

In *Rasul*, this Court explicitly rejected the proposition that petitioners' rights depend on whether the United States has technical "'sovereignty'" over Guantanamo. 542 U.S. at 475. With regard to the writ of habeas corpus, the Court noted with approval that the reach of the writ at common law "depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.'" *Id*. at 482. The reason, very simply, was to prevent the sovereign from avoiding court review of its actions simply by taking its prisoners outside the territory. Wherever the sovereign acted, and certainly whenever it acted within areas under its exclusive jurisdiction and control, it could not avoid the law.

The same should be true with respect to fundamental constitutional protections. Making the reach of those protec-

tions turn on technical sovereignty would allow the Executive to define the limits of the Constitution and avoid constitutional restraints on its authority simply by electing to detain people beyond our formal sovereign borders. It would permit the Executive to create law-free zones, negotiating leases for prisons abroad over which it exercised complete jurisdiction and control without acquiring technical sovereignty. It would grant the government a blank check to establish prisons outside the United States that are wholly outside the law.

Even the D.C. Circuit implicitly recognized that, if petitioners had been brought to the United States — if their U.S. captors had decided, upon reaching the eastern coastline of the United States, to turn the plane right and fly the detainees to a military facility in Virginia, rather than left, to the U.S. Naval Base at Guantanamo — they would have been entitled to invoke the protections afforded to detained persons by the Constitution, including those available under the Due Process Clause and the Suspension Clause. *See* App. 17-18 (noting that Guantanamo is not a "Territory or other Property belonging to the United States" and that "presence" in the United States is the criteria by which an alien's constitutional rights are determined). The Executive should not be granted the authority to create a constitutional loophole – or more accurately, a constitutional "black hole." Application of the Constitution should not depend on whether the government decides to turn the plane "left" or "right."[29]

[29] One of the petitioners, David Hicks, was removed from U.S. sovereign territory, where he was first detained, so that the government could detain him at Guantanamo. Mr. Hicks was initially brought to and detained on a U.S. naval vessel for over a month before being transferred to Guantanamo. A naval vessel indisputably is sovereign U.S. territory, as this Court has recognized for more than a century. *See United States v. Rogers*, 50 U.S. 249, 260 (1893); *United States v. Flores*, 289 U.S. 137, 159 (1933); *Lauritzen v. Larsen*, 345 U.S. 571, 585 (1953). Courts have long addressed the merits of habeas claims brought by those detained on vessels, including one of the cases cited by the D.C. Circuit as an exam-

This is not a hypothetical issue. As mentioned, John Yoo, the former Deputy Assistant Attorney General in the Office of Legal Counsel of the Department of Justice, who played a key role in orchestrating the Administration's Guantanamo policy, bluntly admitted that the government chose Guantanamo precisely to avoid legal review of its actions:

> No location was perfect, but the U.S. Naval Station at Guantanamo Bay, Cuba, seemed to fit the bill. . . . [T]he federal courts probably wouldn't consider Gitmo as falling within their habeas jurisdiction . . .[30]

Petitioners submit that they cannot be held indefinitely in an area under exclusive U.S. jurisdiction and control without being afforded core constitutional protections, including protections under the Due Process Clause and the Suspension Clause. Petitioners are not asking the Court to engage in a novel analysis regarding what constitutional standards should apply. In *Hamdi v. Rumsfeld*, 542 U.S. 507, 533-35 (2004), the Court decided that a citizen detained following capture on the battlefield in the conflict in Afghanistan is entitled to basic due process protections, including the right to

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ple of a habeas claim brought in sovereign territory. *See The Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (1865). Therefore, although petitioners dispute the D.C. Circuit's opinion that the reach of fundamental constitutional protections turns on notions of technical sovereignty, even under that opinion Mr. Hicks undoubtedly was held as a captive within U.S. sovereign territory and is entitled to invoke the protections afforded to detained persons by the Due Process Clause and the Suspension Clause. Respondents cannot void those protections by removing Mr. Hicks to Guantanamo.

[30] *See generally* John Yoo, *War By Other Means: An Insider's Account of the War on Terror* (2006) at 142. Yoo explains that, from the beginning, Guantanamo was intended to provide U.S. officials with a place where they could interrogate detainees without having to worry whether either the detention or the interrogation tactics employed were lawful. *Id*. at 151.

receive notice of the factual basis for the detention, a fair opportunity to rebut the government's assertions, and the right to be heard before a neutral decision-maker "at a meaningful time and in a meaningful manner."

Those basic due process safeguards are also the minimum that justice requires for the prisoners held within U.S. jurisdiction at Guantanamo. As Justice Jackson stated over 50 years ago in the midst of the hysteria sweeping the nation over the spread of communism:

> Under the best tradition of Anglo-American law, courts will not deny hearing to an unconvicted prisoner just because he is an alien whose keep, in legal theory, is just outside our gates. . . . [A]n alien who has come within our jurisdiction . . . must meet a fair hearing with fair notice of the charges. It is inconceivable to me that this measure of simple justice and fair dealing would menace the security of this country. No one can make me believe that we are that far gone.[31]

What ultimately is at stake here is America's commitment to its core values and the rule of law. That commitment requires that the D.C. Circuit's decision be reversed and that this Court make clear that our government cannot evade the core constitutional limits on its authority – and the fundamental values of fairness for which our country is known – simply by placing its prisoners in areas beyond our technical sovereignty.

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[31] *Shaughnessy v. United States*, 345 U.S. 206, 219, 228 (1953) (Jackson, J., dissenting). Justice Jackson further cautioned: "Let it not be overlooked that due process of law is not for the sole benefit of the accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to appear on *ex parte* consideration." *Id.* at 224-25.

4. The MCA Does Not Clearly and Explicitly Revoke Habeas Jurisdiction Over These Pending Cases.

The Court can avoid the serious constitutional issues described above by construing the MCA, as it is drafted, as not revoking habeas jurisdiction over these pending cases. The Court has emphasized that there is a "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). "Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous *statutory directives* to effect a repeal." *Id.* at 299 (emphasis added). *See Ex parte Yerger*, 75 U.S. 85, 102, 104 (1868) (the courts "are not at liberty to except from [habeas jurisdiction] any cases not plainly excepted by law," and may not read a statute repealing habeas jurisdiction "to have any further effect than that plainly apparent from its terms").

The MCA by its terms does not revoke jurisdiction over pending habeas actions. As the government has pointed out, section 7(a) of the MCA purports to revoke jurisdiction over two distinct categories of cases: (1) "application[s] for a writ of habeas corpus" and (2) "other action[s]" that relate "to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of aliens determined by the United Sates to have properly detained as enemy combatants. The effective date provisions in subsection 7(b) of the MCA, however, apply the jurisdiction-stripping provision only to *pending* cases in the latter category—that is, those relating to "any aspect of the detention, transfer, treatment, trial, or conditions of detention."

Section 7(b) also stands in stark contrast to section 3(a) of the MCA, adding 10 U.S.C. § 950j, where Congress explicitly refers to habeas corpus in purporting to eliminate jurisdiction over *pending* actions relating to the prosecution, trial, or judgment of a military commission:

> 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 enactment** of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter . . .

MCA § 3(a), 10 U.S.C. § 950j(b) (emphasis added). The D.C. Circuit paid scant attention to the difference between the language of the two sections. But it is significant. Congress withdrew jurisdiction over pending cases in two sections of the MCA: in one – section 3(a) – it expressly included habeas cases, and in the other – section 7(b) – it did not. By including habeas cases in section 3(a) and omitting mention of them in section 7(b), Congress indicated that section 7(b) should not apply to pending habeas cases.[32]

5. Most Of Petitioners' Treaty-Based Habeas Claims Were Improperly Dismissed

Finally, this case presents the issue of whether petitioners may enforce applicable treaty-based claims through habeas. Judge Green correctly held that the Geneva Conventions are self-executing and enforceable through habeas by petitioners allegedly connected to the Taliban. 355 F. Supp. 2d at 478-79. However, she erroneously dismissed the Geneva Conventions claims of those petitioners allegedly connected to al Qaeda on the ground that al Qaeda was not a "High Contracting Party" to the Conventions. *Id*. at 479.

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[32] *See, e.g.*, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2765 (2006); *BPF v. RTC*, 511 U.S. 531, 537 (1994) ("[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another") (quoting *Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338 (1994)).

Judge Green's decision runs afoul of this Court's ruling in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). First, the Court in *Hamdan* reversed as "erroneous" the D.C. Circuit's conclusion that the Geneva Conventions cannot be enforced through habeas by an individual alleged to be connected to al Qaeda, holding that Hamdan, a Guantanamo detainee alleged to be connected to al Qaeda, could enforce through habeas claims that the government violated Common Article 3 of the Conventions. 126 S. Ct. at 2795-96. Second, the Court in *Hamdan* implicitly endorsed the independent enforceability of Geneva Conventions rights and held that law-of-war constraints in treaties that are incorporated in legislation and imposed by Congress on the President's war powers are enforceable through habeas. *Id*.

Therefore, petitioners, including those allegedly connected to al Qaeda, may enforce through habeas the Geneva Conventions as well as other law-of-war constraints incorporated in the AUMF, which is the source of the President's power to detain them.[33] *See Hamdi v. Rumsfeld*, 542 U.S. 507, 517-18 (2004) (plurality opinion). It is important that the Court review and reverse the lower court's contrary ruling even though the D.C. Circuit did not address this issue. Given the long delay since *Rasul*, and the clarity of the Court's decision on this point in *Hamdan*, it would be unfair and unjust not to address this issue now.

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[33] Although section 5(a) of the MCA purports to bar the invocation of the Geneva Conventions as a "source of rights," it does not preclude the invocation of the rules embodied in the Conventions where the "source of right" is established by legislation. Moreover, Congress could not, without raising serious constitutional questions, bar habeas review of Geneva Conventions claims that otherwise would support habeas relief unless it abrogated or superseded the Conventions so as to deprive them of their status as U.S. law. *See, e.g.*, *Henderson v. INS*, 157 F.3d 106, 119-22 (2d Cir. 1998). In any event, section 5(a) does not even purport to apply to pending actions and presumptively does not apply to petitioners' cases. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 272 (1994).

CONCLUSION

The Court should grant this petition for a writ of *certiorari* to the Court of Appeals.

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