[ORAL ARGUMENT SCHEDULED FOR MARCH 22, 2006]

Nos. 05-5062 & 05-5063

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAKHDAR BOUMEDIENE, *ET AL.*,
APPELLANTS,
V.
GEORGE W. BUSH, *ET AL.*,
APPELLEES.

RIDOUANE KHALID,
APPELLANT,
V.
GEORGE W. BUSH, *ET AL.*,
APPELLEES.

ON APPEAL FROM A DECISION OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF OF PETITIONERS BOUMEDIENE, ET AL., AND KHALID REGARDING SECTION 1005 OF THE DETAINEE TREATMENT ACT OF 2005

Attorneys for Lakhdar Boumediene, et al.

Stephen H. Oleskey
Robert C. Kirsch
Douglas F. Curtis (Practicing in N.Y., N.Y.)
Melissa A. Hoffer
Mark C. Fleming
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
(617) 526-6000

Attorneys for Ridouane Khalid

Wesley Powell
Hunton & Williams
200 Park Avenue
New York, NY 10166
(212) 309-1013

Julia Symon
James Hosking
Clifford Chance US LLP
31 W. 52nd Street
New York, NY 10019
(212) 878-8000

March 10, 2006

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici

Except for the following, all parties, intervenors, and amici appearing before this Court are listed in the Corrected Joint Brief of Appellants, dated May 3, 2005.

1. Brief Amici Curiae of British and American Habeas Scholars;

2. Brief of Amici Curiae, Legal and Historical Scholars, in Support of Petitioners Addressing the Detainee Treatment Act of 2005;

3. Brief Amicus Curiae of the National Institute of Military Justice in Support of the Guantanamo Detainees;

4. Amicus Curiae Brief of Federal Public Defenders Habeas Corpus Counsel in Support of Petitioners'/Appellants' Position on the Jurisdictional Impact of the Detainee Treatment Act of 2005;

5. Brief of Amicus Curiae Senator Carl Levin in Support of Petitioners Regarding Section 1005 of the Detainee Treatment Act of 2005; and

6. Second Supplemental Brief of Amicus Curiae of the World Organization for Human Rights USA in Support of Petitioners'/Appellants' Position on the Jurisdictional Impact of the Detainee Treatment Act Filed Pursuant to the Court Order of Jan. 27, 2006.

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

GLOSSARY xii

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

STATUTES AND REGULATIONS 4

STATEMENT OF FACTS 4

SUMMARY OF ARGUMENT 7

ARGUMENT 10

I. THE DETAINEE TREATMENT ACT DOES NOT AFFECT JURISDICTION OVER PETITIONERS' HABEAS PETITIONS 12

A. Section 1005(e)(1) Does Not Apply To Cases Pending On The Date Of Enactment 12

1. The Text And Structure Of Section 1005(e)(1) Foreclose Retroactive Application 12

2. The Presumption Against Retroactivity Applies Because Section 1005(e)(1) Would Eliminate The Habeas Cause Of Action Entirely, Not Transfer It To A Different Forum 15

3. The Drafting History Shows That Section 1005(e)(1) Is Not Retroactive 21

4. Section 1005(e)(1)'s Prospective Application Is Consistent With Congress's Purpose To Regulate Future Proceedings At Guantanamo 26

B. Section 1005(e)(2) Does Not Eliminate Habeas Jurisdiction 27

1. Section 1005(e)(2) Contains No "Clear Statement Of Congressional Intent To Repeal Habeas Jurisdiction" 27

2. Section 1005(e)(2) Does Not Apply To Petitioners' Habeas Petitions, Which Challenge Unlawful Detention, Not CSRT Decisions 30

II. THE COURT SHOULD CONSTRUE THE ACT TO PRESERVE JURISDICTION IN PENDING HABEAS CASES TO AVOID CONSTITUTIONAL DOUBT 33

A. Prisoners In Petitioners' Position In 1789 Could Invoke The Common Law Writ 35

B. The Suspension Clause Protects Petitioners' Access To The Writ Regardless Of Whether They Possess "Constitutional" Rights 38

C. Section 1005(e)(2) Does Not Provide An Adequate Substitute For Habeas 41

1. Section 1005(e)(2) Does Not Appear To Allow Petitioners To Contest The Government's Factual Assertions, Even If They Rest On Evidence Obtained Through Torture 42

2. Section 1005(e)(2) Does Not Appear To Permit This Court To Review Detention Decisions By ARBs Or The DCO 49

3. Section 1005(e)(2) Does Not Appear To Authorize This Court To Order A Prisoner's Release 51

4. Section 1005(e)(2) May Not Confer The Right To Effective Consultation With And Representation By Counsel 53

D. If Interpreted As The Government Contends, The Act Violates The Suspension Clause Because Congress Made No Clear Statement Of Intent To Suspend The Writ And Made No Finding That The Predicates For Suspension Were Present 55

III. THE COURT SHOULD NOT CONVERT THIS CASE IF THE COURT FINDS THAT THE ACT APPLIES 56

CONCLUSION 60

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE 61

CERTIFICATE OF SERVICE 62

TABLE OF AUTHORITIES

Federal Cases

Acree v. Iraq,
370 F.3d 41 (D.C. Cir. 2004) 21

Alvarez-Barajas v. Gonzales,
418 F.3d 1050 (9th Cir. 2005) 62

Assessors v. Osbornes,
76 U.S. (9 Wall.) 567 (1869) 18

Binot v. Gonzales,
403 F.3d 1094 (9th Cir. 2005) 49

Bonhometre v. Gonzales,
414 F.3d 442 (3d. Cir. 2005) 62

Bruner v. United States,
343 U.S. 112 (1952) 18

Cannon v. University of Chicago,
441 U.S. 677 (1979) 30

Christianson v. Colt Indus. Operating Corp.,
486 U.S. 800 (1988) 61

Clay v. United States,
537 U.S. 522 (2003) 13, 15

DeFunis v. Odegaard,
416 U.S. 312 (1971) 55

---

* Authorities upon which we chiefly rely are marked with an asterisk.

Duncan v. Kahanamoku,
327 U.S. 304 (1946) 59

* *Ex Parte Bollman*,
8 U.S. (4 Cranch) 75 (1807) 42, 43, 55

Ex Parte McCardle,
74 U.S. (7 Wall.) 506 (1868) 18, 23

Ex Parte Quirin,
317 U.S. 1 (1942) 49, 50

Ex Parte Yerger,
75 U.S. (8 Wall.) 85 (1868) 29, 60

FCC v. ITT World Communs., Inc.,
466 U.S. 463 (1984) 32

Felker v. Turpin,
518 U.S. 651 (1996) 37, 42

Fogg v. Ashcroft,
254 F.3d 103 (D.C. Cir. 2001) 24

Frank v. Mangum,
237 U.S. 309 (1915) 48

Gallardo v. Santini Fertilizer Co.,
275 U.S. 62 (1927) 18

Gittens v. Menifee,
428 F.3d 382 (2d Cir. 2005) (per curiam) 62

Hadjimehdigholi v. INS,
49 F.3d 642 (10th Cir. 1995) 49

Hallowell v. Commons,
239 U.S. 506 (1916) 17, 18, 19

Hamdan v. Rumsfeld,
415 F.3d 33 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 622 (2005) 7, 64

* *Hamdi v. Rumsfeld*,
542 U.S. 507 (2004) 3, 5, 46, 51, 52

Harris v. Nelson,
394 U.S. 286 (1969) 34, 45

* *Hughes Aircraft Co. v. United States ex rel. Schumer*,
520 U.S. 939 (1997) 17

In re Guantanamo Detainee Cases,
355 F. Supp. 2d 443(D.D.C. 2005) 46

* *INS v. St. Cyr*,
533 U.S. 289 (2001) ..... passim

Ishak v. Gonzales,
422 F.3d 22 (1st Cir. 2005) 62

Jackson v. Virginia,
443 U.S. 307 (1979) 47

Johnson v. Eisentrager,
339 U.S. 763 (1950) 39, 40, 58

Kaiser Aluminum & Chem. Corp. v. Bonjorno,
494 U.S. 827 (1990) 21

Kuhali v. Reno,
266 F.3d 93 (2d Cir. 2001) 45

LaFontant v. INS,
135 F.3d 158 (D.C. Cir. 1998) 19

* *Landgraf v. USI Film Prods.*,
511 U.S. 244 (1994) 13, 16, 17

Laing v. Ashcroft,
370 F.3d 994 (9th Cir. 2004) 31

* *Lindh v. Murphy*,
521 U.S. 320 (1997) 14, 15

Lopez v. Heinauer,
332 F.3d 507 (8th Cir. 2003) 31

Merchants' Ins. Co. v. Ritchie,
72 U.S. (5 Wall.) 541 (1866) 18

Mich. United Conservation Clubs v. Lujan,
949 F.2d 202 (6th Cir. 1991) 24

North Carolina v. Rice,
404 U.S. 244 (1971) 55

Pharmachemie B.V. v. Barr Labs., Inc.,
276 F.3d 627 (D.C. Cir. 2002) 60

Ramallo v. Reno,
114 F.3d 1210 (D.C. Cir. 1997) 61

* *Rasul v. Bush*,
542 U.S. 466 (2004) ..... passim

* *Republic of Austria v. Altmann*,
541 U.S. 677 (2004) 8, 17

Rosles v. BICE,
426 F.3d 733 (5th Cir. 2005) (per curiam) 62

Santos v. Territory of Guam,
No. 03-70472, 2005 WL 3579022 (9th Cir. Jan. 3, 2006) 18

Sherman v. Grinnell,
123 U.S. 679 (1887) 18

Smallwood v. Gallardo,
275 U.S. 56 (1927) 18

Stewart v. Overholser,
186 F.2d 339 (D.C. Cir. 1950) 34

* *Swain v. Pressley*,
430 U.S. 372 (1977) 44

Thunder Basin Coal Co. v. Reich,
510 U.S. 200 (1994) 32

Twenty Per Cent. Cases,
87 U.S. (20 Wall.) 179 (1873) 16

U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship,
513 U.S. 18 (1994) 61

United States v. Hayman,
342 U.S. 205 (1952) 59

United States v. Jauregui,
314 F.3d 961 (8th Cir. 2003) 49

United States v. The Schooner Peggy,
5 U.S. (1 Cranch) 103 (1801) 20, 21, 22

Weinberger v. Rossi,
456 U.S. 25 (1982) 24

Yamashita v. Styer,
327 U.S. 1 (1946) 49, 50, 58

English Cases

Bushell's Case,
(1670) 124 Eng. Rep. 1006 (C.P.) 43

Case of the Hottentot Venus,
(1810) 104 Eng. Rep. 344 (K.B.) 47

Case of the Three Spanish Sailors,
(1779) 96 Eng. Rep. 775 (C.P.) 47, 51

Ex Parte Mwenya,
[1960] 1 Q.B. 241 (C.A.) (Lord Evershed, M.R.) 38

Goldswain's Case,
(1778) 96 Eng. Rep. 711, (C.P.) 47

Hodges v. Humkin,

(1613) 80 Eng. Rep. 1015 (C.P.) 43

King v. Cowle,
97 Eng. Rep. 587 (K.B. 1759) 37

Opinion on the Writ of Habeas Corpus,
(1758) Eng. Rep. 29 (H.L.) 48

R. v. Schiever,
(1759) 97 Eng. Rep. 551 (K.B.) 51

Constitutional Provisions

U.S. Const. art. 1, § 9, cl. 2 ..... passim

Statutes

Act of Feb. 5, 1867, ch. 27, 14 Stat. 385 42

Act of Mar. 3, 1863, ch. 81, 12 Stat. 755 59

Act of Apr. 20, 1871, ch. 22, 17 Stat. 14-15 59

Act of July 1, 1902, ch. 1369, 32 Stat. 691 59

Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82 42

Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 ..... passim

28 U.S.C. § 2241 ..... passim

28 U.S.C. § 2243 ..... 2, 20 34

28 U.S.C. § 1291 1

28 U.S.C. § 1294 1

28 U.S.C. § 2253(a) 1

Legislative Materials

151 Cong. Rec. S12,667 (daily ed. Nov. 10, 2005 ..... 6, 23

151 Cong. Rec. S12,727-01 (daily ed. Nov. 14, 2005) 26

151 Cong. Rec. S12,777 (daily ed. Nov. 15, 2005) 7, 23, 24, 25, 26, 27, 52

151 Cong. Rec. S14,256 (daily ed. Dec. 21, 2005) 22, 24, 63

152 Cong. Rec. S970-973 (daily ed. Feb. 9, 2006) 24, 63

Rules

D.C. Cir. R. 41(d)(2) 63

Fed. R. App. P. 41(d)(2) 63, 64

Other Authorities

Gerald L. Neuman & Charlie F. Hobson, *John Marshall and The Enemy Alien: A Case Missing from the Canon,* 9 Green Bag 40 (2005) 43

Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered,* 70 Notre Dame L. Rev. 1079 (1995) 58

Dallin H. Oaks, *Legal History in the High Court-Habeas Corpus,* 64 Mich. L. Rev. 451 (1966) 49

Developments in the Law-Federal Habeas Corpus, 83 Harv. L. Rev. 1038 (1970) 48

The Federalist No. 48 (Alexander Hamilton) 12, 41

GLOSSARY

Combatant Status Review Tribunal ..... CSRT

Detainee Treatment Act of 2005, Pub. L. No. 109-148 ..... the Act

Administrative Review Board ..... ARB

Antiterrorism and Effective Death Penalty Act ..... AEDPA

Designated Civilian Official ..... DCO

STATEMENT OF JURISDICTION

Lakhdar Boumediene, Mohammed Nechla, Hadj Boudella, Belkacem Bensayah, Mustafa Ait Idir, Saber Lahmar (the Boumediene Petitioners) and Ridouane Khalid (together Petitioners) filed petitions for writs of habeas corpus in the United States District Court for the District of Columbia, challenging their indefinite detention without charge at the U.S. Naval Base at Guantanamo Bay, Cuba (Guantanamo).[1] The district court had jurisdiction under 28 U.S.C. § 2241(c)(1) and (3). Petitioners appealed after the district court dismissed their petitions. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291, 1294, and 2253(a).

STATEMENT OF THE ISSUES

In addition to the issues stated in Petitioners' briefs on the merits, this case presents the following questions.

1. Whether section 1005 of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (the Act) repeals the federal courts' jurisdiction over Petitioners' habeas corpus petitions.

2. Whether section 1005 of the Act should be construed to preserve jurisdiction to avoid constitutional difficulty or instead held to violate the Suspension Clause of the Constitution.

---

[1] Petitioner Khalid is no longer in U.S. custody at Guantanamo.

3. If the Court determines that the Act validly repealed the federal courts' jurisdiction over these habeas corpus petitions, whether this Court should dismiss the appeal, vacate the district court's order, and remand the case for dismissal for lack of jurisdiction, without prejudice to Petitioners' right to request review in this Court pursuant to section 1005(e)(2) of the Act.

STATEMENT OF THE CASE

The Boumediene Petitioners are citizens of friendly nations who have been imprisoned without charge since January 2002 at Guantanamo. Following the decision in *Rasul v. Bush*, 542 U.S. 466 (2004), Petitioners filed habeas corpus petitions in the district court pursuant to 28 U.S.C. § 2241. J.A. 64-81, 1109-1164. Petitioners claim that their indefinite detention is unsupported by any basis in law or fact and violates the Constitution, the Authorization for Use of Military Force, the International Covenant on Civil and Political Rights, and customary international law.

In an attempt to satisfy its obligations under the habeas statute to make a "return" to the petitions, *see* 28 U.S.C. § 2243, the Government assembled and filed the records of Combatant Status Review Tribunals (CSRTs) convened over two years after the Government imprisoned Petitioners. J.A. 330-562, 569-638, 1165-1206. Those CSRT proceedings, which commenced after these cases, purported to confirm that Petitioners were "enemy combatants" under a new

Government definition that was significantly broader than the previous Government definition accepted by the plurality in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

On January 19, 2005, the district court granted the Government's motion to dismiss, holding that Petitioners had no constitutional rights that could be vindicated on habeas and that the statutes of the United States (including 28 U.S.C. § 2241(c)(1), which codifies the common law writ of habeas corpus against arbitrary executive detention) afford Petitioners no rights. J.A. 999-1032. Petitioners timely appealed. The Court heard Petitioners' appeals on September 8, 2005, together with the Government's appeal in *Al Odah, et al. v. United States, et al.*, Nos. 05-5064, *et al.*, in which the district court held that similarly situated Guantanamo prisoners could vindicate constitutional and legal rights on habeas and that the Government's new definition of "enemy combatant" was overbroad.

On December 30, 2005, the President signed the Act. On January 4, 2006, the Court ordered supplemental briefing on the effect of the Act on these appeals and on *Al Odah*. On January 10, 2006, Petitioners moved to defer filing supplemental briefs or, in the alternative, to approve a proposed briefing schedule. On January 13, 2006, the Court denied the motion to defer, but approved a proposed briefing schedule. Pursuant to that schedule, the Government filed a brief on January 18, 2006. Petitioners filed a brief on January 25, 2006.

On January 27, 2006, the Court suspended the earlier briefing orders, scheduled oral argument, and ordered full briefing addressing the effect of the Act on this Court's jurisdiction and "[w]hile not otherwise limited," directed the parties to address the appropriate disposition of the conflicting district court judgments in the event that the Court concludes that it lacks jurisdiction.

STATUTES AND REGULATIONS

All applicable statutory provisions are included in the addenda to Petitioners' opening brief on the merits and to the Government's supplemental brief regarding the Act.

STATEMENT OF FACTS

In the pre-dawn hours of January 18, 2002, the U.S. Government illegally seized the Boumediene Petitioners in their home country of Bosnia and Herzegovina (Bosnia) and, in the following days, transported them to Guantanamo. J.A. 130.

At no time during their imprisonment by the United States have Petitioners been charged with any crime. On the contrary, although Bosnia arrested the Boumediene Petitioners under U.S. pressure in the Fall of 2001 on suspicion of plotting an attack on the U.S. Embassy in Sarajevo, Bosnian authorities conducted a thorough investigation of this allegation for over three months, after which the

Supreme Court of the Federation of Bosnia and Herzegovina ordered them released. J. A. 57-59, 130.

The Government's supplemental brief opens with several pages of vivid prose, virtually none of which applies to the Boumediene Petitioners. The Boumediene Petitioners are not "hostile fighters." Gov't Supp. Br. 6. They never waged war against the United States, nor were they captured on any battlefield.

After *Hamdi* made clear in 2004 that the Government did not have a "blank check" for arbitrary detention, *Hamdi*, 542 U.S. at 536 (plurality opinion), the Government hastily established and conducted CSRTs for more than 500 men already imprisoned at Guantanamo for years. The CSRTs denied Petitioners any review of classified information against them and denied them access to counsel. J.A. 1077-1087. In all respects, the CSRT procedure was a sham—and in the case of Petitioner Ait Idir, the very officials charged with conducting his CSRT themselves laughed at the absurdity of the process. J.A. 1079-80.

On June 15, 2005, in response to widespread criticism at home and abroad, including concerns about torture and abuse documented by the Federal Bureau of Investigation,[2] the Senate opened hearings regarding Guantanamo prisoners. *See* U.S. Senate Committee on the Judiciary, Notice of Committee Hearing (June 8,

---

[2] *See generally* FBI documents released under the Freedom of Information Act, *available at http://action.aclu.org/site/PageServer?pagename=torturefoia.*

2005), *available at http://judiciary.senate.gov/hearing.cfm?id=1542*. Six months later—almost four years after Petitioners arrived at Guantanamo—Congress passed the Act, which is the first legislation governing the treatment of Guantanamo prisoners. The President signed the Act into law on December 30, 2005.

One of the few aspects of the Act that was actively debated in the Senate was a provision that purported to repeal the statutory right of Guantanamo prisoners to seek habeas relief. An early version of the Act, proposed by Senator Graham, expressly repealed habeas jurisdiction in pending cases by stating that the repeal would "apply to any application or other action pending on or after the date of the enactment of this Act." 151 Cong. Rec. S12,667 (daily ed. Nov. 10, 2005) (Amendment 2516, § (d)(3)). On November 10, 2005, this provision passed the Senate by a narrow margin of 49-42, provoked significant bipartisan and public opposition, and led to a widespread public outcry.[3]

Five days after the vote on Senator Graham's proposal, Senator Levin joined Senator Graham to offer a version of the Act that purported to repeal habeas jurisdiction in future cases, but not in cases pending on the date of enactment. The new text, which remained in the final enacted law, provided only that the provision repealing habeas jurisdiction would "take effect on the date of the enactment of

---

[3] It also purported to strip the Supreme Court of jurisdiction to hear the pending case of *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *cert. granted,* 126 S. Ct. 622 (2005) (No. 05-184).

this Act." Section 1005(h)(1). During the debate on the amendment, Senator Levin stated that the restrictions on habeas petitions by Guantanamo prisoners "would apply only to new habeas cases filed after the date of enactment." 151 Cong. Rec. S12,802 (daily ed. Nov. 15, 2005) (statement of Senator Levin regarding amendment 2524). Senators Reid and Kerry echoed Senator Levin's statement, and no Senator rebutted it prior to the vote on the amendment. The new amendment passed by a margin of 84-14.

As Senator Levin made clear, the Act did not purport to remove Petitioners' recourse to the writ of habeas corpus. Although initially determined to abolish all habeas actions by Guantanamo prisoners, Congress retreated from that extreme position and preserved the writ for persons who, like Petitioners, already had invoked it before the federal courts.

SUMMARY OF ARGUMENT

Section 1005 of the Act does not alter the jurisdiction of this Court or of the district court over these petitions. The plain language and structure of the Act show that section 1005(e)(1) applies only to post-enactment petitions. Those elements are reinforced by the presumption against retroactivity, which applies to any legislation that seeks to abolish habeas jurisdiction "regardless of where the claim is brought." *Republic of Austria v. Altmann*, 541 U.S. 677, 695 n.15 (2004). While Congress at first considered making section 1005(e)(1) applicable to

pending cases, it ultimately deleted the express language that would have made it retroactive. The prospectivity of section 1005(e)(1) comports with other provisions in the Act, which demonstrate that Congress sought to regulate *future* proceedings at Guantanamo.

Section 1005(e)(2) does not separately repeal habeas corpus. The section lacks the requisite "clear statement of congressional intent to repeal habeas jurisdiction." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). Moreover, section 1005(e)(2) does not govern Petitioners' habeas petitions, which challenge their illegal confinement, not the "validity of any final decision of a [CSRT]." The CSRT decisions are merely the Government's affirmative defense to the habeas petitions; while a habeas court may consider the CSRT record in evaluating the legality of Petitioners' detention, the habeas inquiry sweeps far more broadly. By vesting this Court with jurisdiction over CSRT challenges, Congress did not alter Petitioners' rights to press their pre-enactment habeas petitions.

Even if the Act were ambiguous with respect to the prospectivity of section 1005(e)(1), this Court should construe the Act to avoid the substantial constitutional questions that would arise from a holding that Congress intended to eliminate Petitioners' habeas rights.

The Supreme Court in *Rasul* confirmed that the common law writ as of 1789—which is the core of the Suspension Clause—would have been available to

persons in Petitioners' position. Although the scope of section 1005(e)(2) has not yet been construed, it appears doubtful that it is an adequate substitute for habeas corpus. First, section 1005(e)(2), as construed by the Government, appears to preclude the searching review of facts and law available at common law in noncriminal habeas cases. Second, it does not appear to permit review of new evidence or factors relied on by either Administrative Review Boards (ARBs) or the Designated Civilian Official (DCO),[4] which the Government suggests might independently order "continued" detention. Third, section 1005(e)(2) does not appear to authorize this Court to order a prisoner's release, even after a successful challenge. Fourth, section 1005(e)(2) does not expressly allow for effective representation by counsel. To avoid serious constitutional questions, the Court should construe the Act to preserve habeas jurisdiction in these cases.

Should this Court nonetheless conclude that it lacks jurisdiction, it should dismiss the appeals, vacate the district court decision, and remand with instructions to dismiss the petitions for lack of jurisdiction, without prejudice to Petitioners' right to request review under section 1005(e)(2). The Act does not authorize this Court to "convert" an appeal into an original request for review. Even if the Court

[4] Although it is not clear, it appears that the DCO described in the Government's ARB procedures is a separate DCO from that referenced in the Act.

concludes otherwise, however, the Court should stay any proceedings under section 1005(e)(2) pending disposition of a petition for a writ of certiorari.

ARGUMENT

The Government asks this Court to turn the clock back to the early 1600s when the Executive could detain people without cause and without question. The Government's solution to our national shame is not to fix it, but to hide it, even at the expense of our common law traditions, our Constitution, and the freedom of innocent men who were living peacefully in Europe on September 11th.

Ironically, the Government casts itself as the victim. Gov't Supp. Br. 13. The Government complains that it has been "forced to reconfigure its operations," as though it were Petitioners' choice that the Government keeps them incarcerated on a distant island base never intended to function as a prison.[5] *Id.* The Government laments that litigation has "consumed enormous resources," as though Petitioners' right not to be deprived of their liberty indefinitely without a lawful basis were a trifling inconvenience. And the Government rebukes counsel for "hundreds of visits," as though it were counsel's doing that the Government has

[5] Notably, while the Government closely restricts visits by small numbers of lawyers, it regularly accommodates and entertains contingents of reporters at Guantanamo.

chosen to imprison over 600 men, without charging them with any crime, and has tortured many of them in violation of basic principles of humane treatment. *Id.*[6]

The Government's disappointment that its own misguided and unlawful actions have been exposed does not deserve this Court's sympathy. Nor does it warrant abandoning the fundamental principle of our Anglo-American legal system—that a civilian detained by the Executive may ask that a neutral judge examine the asserted legal and factual basis for his detention and, if it proves insufficient, order his release. The writ of habeas corpus exists precisely to ensure that the Executive does not capriciously cause people to disappear without explanation. Hamilton highlighted the importance of the writ when he adopted Blackstone's observation that "confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government." The Federalist No. 84 (Alexander Hamilton) (quoting 1 Blackstone, Commentaries 136).

Petitioners ask only that a judge examine their confinement in a habeas proceeding. Neither Congress nor our Constitution permits the Government to

---

[6] The Government also asserts that "habeas counsel have violated protective orders." Gov't Supp. Br. 13. This serious accusation is made without any record substantiation or support. The Government has never alleged any protective order violation by Petitioners' counsel.

deny them that opportunity. This Court should hold that the federal courts' jurisdiction over Petitioners' habeas cases continues unaltered.

I. THE DETAINEE TREATMENT ACT DOES NOT AFFECT JURISDICTION OVER PETITIONERS' HABEAS PETITIONS

The text and structure of section 1005, the presumption against retroactivity, and the drafting history of the Act show that it does not deprive federal courts of jurisdiction to hear habeas petitions pending since 2004.

A. Section 1005(e)(1) Does Not Apply To Cases Pending On The Date Of Enactment

1. The Text And Structure Of Section 1005(e)(1) Foreclose Retroactive Application

Section 1005(e)(1) provides, in relevant part, that "no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." Section 1005(e)(1) is silent about retroactivity, and section 1005(h) addresses the "effective date" of the subparts of section 1005(e):

> (1) IN GENERAL.--This section shall take effect on the date of the enactment of this Act.
>
> (2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS.--Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

§ 1005(h).

Section 1005(h)(1) states only that section 1005(e)(1) "shall take effect on the date of the enactment of this Act." "A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 257 (1994). In contrast, section 1005(h)(2) specifies that sections 1005(e)(2) and (e)(3) apply to claims "pending on or after the date of the enactment of this Act" provided that their "review is governed by" those paragraphs. By excluding section 1005(e)(1) from the provisions applicable to pending cases, Congress expressed its intention that section 1005(e)(1) should apply only to post-enactment petitions. *See, e.g., Clay v. United States*, 537 U.S. 522, 528 (2003) ("When Congress includes particular language in one section of a statute but omits it in another section of the same Act, . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (citations omitted)).

In *Lindh v. Murphy*, 521 U.S. 320 (1997), the Supreme Court considered whether amendments to chapter 153 of title 28, which limit the availability of federal habeas corpus in non-capital cases as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), should apply to cases pending on the date of AEDPA's enactment. Although AEDPA did not expressly address the temporal applicability of the amendments to chapter 153, the Court emphasized

that AEDPA did expressly provide that amendments to chapter 154 (governing habeas in capital cases) *would* apply to pending cases. *See id.* at 327. The Court concluded that AEDPA's language applying chapter 154 "to all cases pending at enactment . . . indicat[ed] implicitly that the amendments to chapter 153 were assumed and meant to apply to the general run of habeas cases *only when those cases had been filed after the date of the Act.*" *Id.* (emphasis added).

That reasoning applies equally here. "If . . . Congress was reasonably concerned to ensure that [sections 1005(e)(2) and (3)] be applied to pending cases, it should have been just as concerned about [section 1005(e)(1)], unless it had the different intent that the latter [section] not be applied to the general run of pending cases." *Id.* at 329. This interpretation is supported by "the familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted." *Id.* at 330. Such was the case when the Act was passed.

To avoid the negative presumption of *Lindh*, the Government speculates that Congress "might well" have viewed sections 1005(e)(2) and (3) as fundamentally different from (e)(1) and "could readily" have been more concerned about clarifying the applicability of (e)(2) and (3) to pending cases than (e)(1). Gov't Supp. Br. 39-40. Canons of statutory interpretation, such as the negative

implication applied in *Lindh* and *Clay*, are intended to avoid such unfounded guesswork when discerning Congressional intent. The negative implication arising from the different effective date provisions is even more persuasive here than it was in *Lindh*, since Congress actually deleted language from the Act that would have made section 1005(e)(1) expressly retroactive. *See infra* Part I.A.3. The suggestion that Congress meant to clarify the statute's purported retroactivity by removing language that expressly made section 1005(e)(1) retroactive "is too remote to displace the straightforward inference that [section 1005(e)(1)] was not meant to apply to pending cases." *Lindh*, 521 U.S. at 332.

2. *The Presumption Against Retroactivity Applies Because Section 1005(e)(1) Would Eliminate The Habeas Cause Of Action Entirely, Not Transfer It To A Different Forum*

Even if section 1005(e)(1) were ambiguous in its prospective application—and it is not—the presumption against retroactivity would foreclose the Government's interpretation. "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265. "'[C]ongressional enactments . . . will not be construed to have retroactive effect unless their language requires this result.'" *Id.*; *see also Twenty Per Cent. Cases*, 87 U.S. (20 Wall.) 179, 187 (1873) ("Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases

that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms."). The Act nowhere states that section 1005(e)(1) applies to pending cases. On the contrary, the disparate language used in sections 1005(h)(1) and (h)(2) compels the opposite conclusion.

The Government acknowledges the presumption against retroactivity applied in *Landgraf* and countless other cases, but argues that "a different rule" should apply to the Act. Gov't Supp. Br. 29. The Government builds on dicta in *Landgraf* regarding "statutes conferring or ousting jurisdiction," 511 U.S. at 274, from which it purports to draw a presumption *in favor* of retroactivity. But the Supreme Court has previously rejected the Government's position, noting that it "simply misread[s] our decision in *Landgraf*, for the only 'presumption' mentioned in that opinion is a general presumption *against* retroactivity." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 950 (1997). *Hughes* recognized that statutes that "affect only *where* a suit may be brought, not *whether* it may be brought at all," do not trigger the presumption against retroactivity, because they merely change the forum and not the ability to vindicate substantive rights. *Id.* at 951. But section 1005(e)(1) does not provide for an alternative forum for habeas petitions; rather, it purports to eliminate habeas jurisdiction altogether. It speaks "not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in 'jurisdictional' terms, is

as much subject to our presumption against retroactivity as any other." *Id.*; *see also Landgraf*, 511 U.S. at 274 (retroactive application of jurisdictional rule permissible only when it "'takes away no substantive right but simply changes the tribunal that is to hear the case'" (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916))). The Supreme Court recently reaffirmed this principle, noting that a limitation that applies "regardless of where the claim is brought" is "essentially substantive" and therefore subject to the presumption against retroactive application. *Republic of Austria v. Altmann*, 541 U.S. 677, 695 n.15 (2004).

In every case relied on by the Government, the statutes at issue changed where, not whether, a suit could be heard. *See, e.g.*, *Bruner v. United States*, 343 U.S. 112, 115-117 (1952) (statute stripping District Court jurisdiction, but retaining Court of Claims jurisdiction, "has not altered the nature or validity of petitioner's rights . . . but has simply reduced the number of tribunals authorized to hear and determine such rights").[7] Although the Government makes much of

---

[7] *See also Smallwood v. Gallardo*, 275 U.S. 56, 61-62 (1927) (statute forbade suits to enjoin tax collection; taxpayer retained the "power to resist an unlawful tax"); *Gallardo v. Santini Fertilizer Co.*, 275 U.S. 62 (1927) (similar); *Sherman v. Grinnell*, 123 U.S. 679, 679-680 (1887) (statute removed appellate jurisdiction in Supreme Court over remand orders; jurisdiction remained in circuit courts); *The Assessors v. Osbornes*, 76 U.S. (9 Wall.) 567, 574 (1869) (statute forbade federal suits absent diversity; suits could "be commenced in the State courts"); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 515 (1868) (repealed Supreme Court appellate jurisdiction under the Act of 1867; jurisdiction remained in the circuits, and appellate jurisdiction "previously exercised" under other provisions remained); *Merchants' Ins. Co. v. Ritchie*, 72 U.S. (5 Wall.) 541, 542 (1866) (repealed circuit court jurisdiction; redress still possible in state court); *Santos v. Territory of Guam*, No. 03-70472, 2005 WL 3579022, at *2 (9th Cir. Jan. 3, 2006)

decisions in which a statute assigned jurisdiction over a claim to a non-judicial official, retroactive application of such a statute still depends on the official's ability to decide the same claim as would have been decided in court, such that there is no change in the parties' substantive rights, but merely in the identity of the decisionmaker. Thus, in *Hallowell v. Commons*, 239 U.S. 506 (1916), the Supreme Court gave retroactive application to a statute that gave the Secretary of the Interior exclusive authority to decide whether the plaintiff was the sole heir to an allotment made to an Indian who died intestate, because the change in decisionmaker did not affect the plaintiff's ability to obtain a resolution of his case; the Secretary was empowered to hear his challenge in full. *See id.* at 508 (holding that the statute "takes away no substantive right, but simply changes the tribunal that is to hear *the case*" (emphasis added)). And in *LaFontant v. INS*, 135 F.3d 158 (D.C. Cir. 1998), this Court held that a statute removing judicial review of challenges to certain deportation orders could be applied retroactively because the Board of Immigration Appeals retained jurisdiction to decide the dispute. *See id.* at 162 ("[A] statute that takes away jurisdiction from the federal courts and vests exclusive authority in an executive agency to *resolve certain disputes* . . . is simply a change in the tribunal that is *to hear the case*." (Emphasis added)).

(stating that, just as the statute in *Bruner* preserved Court of Claims jurisdiction, the statute under consideration "preserve[d] jurisdiction over the same cases in the Guam court system and review by certiorari in the United States Supreme Court").

In contrast, the Government's interpretation of section 1005(e)(1) would completely extinguish the Petitioners' right to bring a habeas case in *any* forum.

Habeas is not a mere jurisdictional device. The right to habeas embodied in section 2241(c)(1) guarantees Petitioners' substantive right to challenge the legality of detention and to present evidence before a neutral decisionmaker to demonstrate that they are "wholly innocent of wrongdoing." *Rasul*, 542 U.S. at 485; *see generally* Brief of *Amici Curiae* British and American Habeas Scholars (Habeas Scholars' Br.). Contrary to the Government's contention, the limited judicial review of CSRTs that is apparently contemplated by section 1005(e)(2) is not commensurate with the habeas rights extended to petitioners in *Rasul*. In the habeas framework, the CSRT is not a substitute for the writ, but merely a version of respondent's reasons for the detention – at most, a "return" under 28 U.S.C. § 2243 – which Petitioners are entitled to rebut. *See infra* Part III.C.1.

Contrary to the Government's implication, *see* Gov't Supp. Br. 34, CSRTs and ARBs cannot issue writs of habeas corpus. Indeed, the Government's claim that the Act would "simply change the tribunal authorized to hear detention challenges," *id.*, is belied by the Government's own contention before this Court that, unlike a favorable decision by a habeas court, a favorable CSRT decision does not require the prisoner's release. *See* Gov. Opp. to Mot. to Expedite Appeal at 3, *Qassim v. Bush*, No. 05-5477 (Jan. 18, 2006) (attached at Addendum) (arguing that

even persons exonerated by CSRTs may nonetheless "remain detained" as "former enemy combatants" at the Executive's discretion).

The Government's reliance on *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), is misplaced. *Schooner Peggy* expressly recognized the presumption against retroactivity, but held that the presumption was overcome by the plain language of the treaty at issue. *See id.* at 110 (stating that "a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties"). As Justice Scalia has recognized, *Schooner Peggy* "stands for the proposition that when Congress *plainly says—contrary* to the ordinary presumption which courts will 'struggle hard' to apply—that current law rather than the pre-existing law governs the rights of the parties, then courts 'must apply' that current law. That is in no way different from the rule applied in the generality of cases . . . ." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 846-47 (1990) (Scalia, J., concurring). And in *Acree v. Iraq*, 370 F.3d 41 (D.C. Cir. 2004), the majority did not address retroactivity. *See id.* at 59-60. Then-Judge Roberts concurred on the ground that, because the plaintiffs had no valid cause of action, an intervening statute removing jurisdiction could be applied retroactively without affecting "the substantive rights of the parties." *Id.* at 65 (Roberts, J., concurring). Here, of course, Petitioners *do* have a valid cause of action. *See Rasul,* 542 U.S. at 483 n.15.

The Government remarkably suggests that *Schooner Peggy* and Judge Roberts' *Acree* concurrence create an exception to the presumption against retroactivity for "wartime claims against this country by aliens held as enemy combatants." Gov't Supp. Br. 34-36. But neither case involved claims against the United States by aliens, much less habeas petitions by prisoners of the Government. Rather, both were lawsuits by U.S. citizens seeking monetary recoveries against assets of foreign countries whose claims were abrogated by a Presidential determination protecting the relevant countries from such claims.[8]

3. *The Drafting History Shows That Section 1005(e)(1) Is Not Retroactive*

The language of section 1005 and the presumption against retroactivity obviate any need to rely on drafting history. That history, however, further refutes the Government's interpretation.

The language of section 1005(h) differs significantly from earlier versions, which would have applied section 1005(e)(1)'s jurisdiction-stripping language to pending cases. As Senator Levin stated, Congress adopted the final language of section 1005(h) in lieu of at least three alternative versions, each of which would have stripped jurisdiction over pending habeas cases. *See* 151 Cong. Rec. S14,257

---

[8] *See Schooner Peggy*, 5 U.S. (1 Cranch) at 109-10 (President signed a treaty with France prior to completion of condemnation proceeding regarding a captured French vessel); *Acree*, 370 F.3d at 46 (President restored Iraq's sovereign immunity in U.S. courts "to protect Iraqi assets from attachment, judgment, or other process").

– S14,258 (daily ed. Dec. 21, 2005). On November 10, 2005, the Senate passed a version that would have eliminated habeas jurisdiction for "any application or other action that is pending on or after the date of the enactment of this act." *Id.* at S12,667 (daily ed. Nov. 10, 2005) (Amendment 2516, § (d)(3)); *see also id.* at S12,655 (virtually identical language in proposed Amendment 2515).

On November 15, however, the Senate passed the Graham-Levin-Kyl Amendment, the direct predecessor of section 1005, which abandoned that retroactivity language. *See* 151 Cong. Rec. S12,803 (daily ed. Nov. 15, 2005) (vote on Amendment 2524). Before the November 15 vote on that Amendment, Senator Levin stated that the restrictions on habeas petitions by Guantanamo Bay prisoners "would apply only to new habeas cases filed after the date of enactment." *Id.* at S12,802. He stated that the Act would not deprive federal courts—including the Supreme Court—of jurisdiction over pending habeas cases, because Congress wanted to "avoid repeating the unfortunate precedent in *Ex Parte McCardle*, [74 U.S. (7 Wall.) 506 (1868)], in which Congress intervened to strip the Supreme Court of jurisdiction over a case which was pending before the Court." 151 Cong. Rec. S12,802 (daily ed. Nov. 15, 2005). No Senator offered a different view, and two senators who supported the new amendment agreed with Senator Levin's interpretation. *See id.* at S12,803 (statement of Senator Reid), S12,799 (statement of Senator Kerry).

The Government relies on statements made *after* the definitive November 15 Senate vote, including one statement made over a month after this Court ordered supplemental briefing regarding the Act. *See* Gov't Supp. Br. 41, 43 (citing 152 Cong. Rec. S970-973 (daily ed. Feb. 9, 2006) (statement of Senator Kyl) and 151 Cong. Rec. S14256, S14260-14268 (daily ed. Dec. 21, 2005) (statements of Senators Graham & Kyl)). Such statements offer no insight into the basis on which the Congress approved the amendment. *See Weinberger v. Rossi*, 456 U.S. 25, 35 (1982) (declining to accord weight to "post hoc" congressional statements); *Fogg v. Ashcroft*, 254 F.3d 103, 108-09 (D.C. Cir. 2001) (refusing to give weight to an interpretative memorandum submitted by a bill's sponsor after the bill was passed because "post-legislation legislative history" cannot "speak to the premises on which the statute passed"); *see also Mich. United Conservation Clubs v. Lujan*, 949 F.2d 202, 209 (6th Cir. 1991) ("[W]e decline to give significance to sponsors' private thoughts expressed subsequent to the enactment of a bill or an amendment."). Senator Levin's floor statement on November 15, explaining that section 1005(e)(1) would not apply to pending cases, was made during the debate on that provision and immediately before the definitive vote, and accordingly deserves greater weight.

The Government's efforts to avoid the clear import of the drafting history fail. First, the Government ventures that the 49 Senators who voted for the

November 10 amendment, which contained express retroactivity language, never would have supported a different version that did not apply retroactively. *See* Gov't Supp. Br. 42. The Government's confidence is misplaced given the immediate public outcry that followed that vote, criticizing the November 10 amendment.[9] The Senate was keenly aware of the public concern, which was discussed during debate on the November 15 amendment and memorialized in the Congressional Record. *See* 151 Cong. Rec. S12,777-02, S12,802 (daily ed. Nov. 15, 2005) (statement of Senator Leahy) (reprinting letter from deans of Harvard, Yale, Georgetown and Stanford law schools urging removal of habeas jurisdiction stripping provisions of Nov. 10 amendment); *id.* at S12,803 (statement of Senator Reid) (discussing editorial in Washington Post concerning Guantanamo prisoner who remains incarcerated despite military determination that he is innocent); 151 Cong. Rec. S12,727-01, S12,729 – S12,731 (daily ed. Nov. 14, 2005) (statement of Senator Bingaman) (reprinting letters from John D. Hutson, Dean of Franklin Pierce Law Center and former Navy JAG, Brennan Center for Justice at NYU School of Law, and nine former generals and admirals opposing Nov. 10 amendment). The Government also ignores the fact that Senators Graham and

---

[9] *See, e.g.*, Editorial, *Guantanamo detainees deserve access to courts*, Des Moines Register, Nov. 12, 2005, at 12A; David B. Rivkin Jr. & Lee A. Casey, *Don't cross the habeas corpus line*, L.A. Times, Nov. 10, 2005 at B11.

Kyl, who co-sponsored the November 15 amendment with Senator Levin, stood mute when Senator Levin explained in the clearest possible words that the November 15 amendment would *not* apply to pending habeas cases. The November 15 amendment still provided much for supporters of the original Graham amendment, notably a purported *prospective* repeal of habeas jurisdiction and creation of exclusive jurisdiction in this Court for review of CSRT decisions.

The Government conjectures that all 35 Senators who previously declined to vote for the November 10 amendment changed their minds solely because the November 15 amendment included judicial review for military commission convictions. *See* Gov't Supp. Br. 42-43. The record belies that speculation. Before the Senate voted on the November 15 amendment, three Senators explained their decision to support the November 15 amendment after opposing the November 10 amendment. All three expressly stated that their support rested on *both* its non-retroactivity *and* the new review of military commissions. *See* 151 Cong. Rec. S12,802 (daily ed. Nov. 15, 2005) (statement of Senator Levin) (stating that the restrictions on habeas petitions "would apply only to new habeas cases filed after the date of enactment"); *id.* at S12,799 (statement of Senator Kerry) (stating that the original amendment eliminated "virtually all judicial review of combatant detentions" and agreeing with Senator Levin that "this amendment will not strip courts of jurisdiction over [pending] cases"); *id.* at S12,803 (statement of

Senator Reid) (stating that Supreme Court jurisdiction in *Hamdan v. Rumsfeld* would be unaffected by the new amendment).

4. Section 1005(e)(1)'s Prospective Application Is Consistent With Congress's Purpose To Regulate Future Proceedings At Guantanamo

The Government erroneously suggests that applying the plain meaning of section 1005(e)(1) to avoid retroactivity would be inconsistent with the Act's purpose and would "eliminate[] any congressional response" to habeas petitions brought by Guantanamo prisoners. Gov't Supp. Br. 42. That is incorrect. As of November 15, 2005, individual habeas petitions had not been filed in a substantial number of cases and Congress was also aware of the possibility that *additional* prisoners would be incarcerated at Guantanamo in the future. It enacted procedures expressly made applicable only to those cases. *See, e.g.*, § 1005(b)(1) (Secretary of Defense's new procedures must ensure that CSRTs assess whether statements were "obtained as a result of coercion"); § 1005(b)(2) (provisions of § 1005(b)(1) apply to "any proceeding beginning on or after the date of the enactment of this Act"). The Government's assertion that the category of prisoners "who might someday be brought to Guantanamo Bay" is a "presently-null set" (Gov't. Supp. Br. 45) is a red herring. The category of persons "for whom a final decision has been rendered" by a military commission is also "presently null," yet Congress saw fit to enact provisions concerning such situations.

§ 1005(e)(3)(C)(ii). It is quite plausible for the Senate to have left present cases unaffected, as Senators Levin, Reid and Kerry expressly stated, while applying section 1005(e)(1) to future cases, just as it did with the new CSRT procedures and the new review procedure for persons convicted by military commissions.

B. Section 1005(e)(2) Does Not Eliminate Habeas Jurisdiction

The Government argues that section 1005(e)(2) separately repeals habeas jurisdiction. Gov't Supp. Br. 21-28. This contention fails for two reasons. First, because section 1005(e)(2) nowhere mentions habeas jurisdiction, the Supreme Court's rule that habeas jurisdiction cannot be repealed by implication forecloses the Government's interpretation. Second, even if section 1005(e)(2) could be viewed as removing habeas jurisdiction in cases to which it applied, it does not apply to Petitioners' habeas petitions, which challenge unlawful Executive detention, not the validity of CSRT decisions.

1. Section 1005(e)(2) Contains No "Clear Statement Of Congressional Intent To Repeal Habeas Jurisdiction"

The Supreme Court has recognized "the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). Implications, even those arising from the "statutory text," are "not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal." *Id.* at 299 (citing *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105 (1868)). As *St. Cyr* illustrates, this

standard is particularly exacting. In that case, a statutory section entitled "Elimination of Custody Review by Habeas Corpus" was nonetheless held insufficient because the actual *text* of the provision did not purport to repeal habeas jurisdiction. *Id.* at 308-10. Provisions referring to "judicial review" and "jurisdiction to review" were also held insufficient to repeal habeas jurisdiction, since neither mentioned habeas or referred expressly to the federal habeas statute, 28 U.S.C. § 2241. *Id.* at 311-12.

Section 1005(e)(2) nowhere mentions habeas, nor does it refer to section 2241. Its section headings refer to "review" and "claims," but—like the provisions held insufficient to repeal habeas in *St. Cyr*—do not refer to habeas. *See* § 1005(e)(2) (entitled "Review of Decisions of Combatant Status Review Tribunals of Propriety of Detention"); § 1005(e)(2)(B) (entitled "Limitation on Claims"); § 1005(e)(2)(C) (entitled "Scope of Review"). The text of the section never mentions habeas, but focuses instead on "jurisdiction to determine the validity" of CSRT decisions, § 1005(e)(2)(A), and "jurisdiction" over "claims," § 1005(e)(2)(B), (C). The same is true of section 1005(h)(2), which provides that section 1005(e)(2) applies to "any *claim* whose *review* is governed by" section 1005(e)(2). § 1005(h)(2) (emphasis added).

Congress's decision not to reference habeas in section 1005(e)(2) disposes of the Government's effort to invoke it as a separate provision repealing habeas

jurisdiction. In addition to the general presumption that Congress is aware of existing law, *see Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979), Congress complied with *St. Cyr*'s requirement of strict clarity when it drafted section 1005(e)(1), which *does* mention "habeas corpus" and prospectively amends section 2241. Congress's decision not to do likewise in section 1005(e)(2) makes clear that that subsection in no way affects habeas jurisdiction.

The Government attempts to infer a repeal of habeas jurisdiction by suggesting that "an exclusive-review scheme, where applicable, precludes the exercise of jurisdiction under more general grants of jurisdiction, including habeas corpus." Gov't Supp. Br. 22. This proposition cannot survive *St. Cyr*, which involved a review scheme no less "exclusive" than that of section 1005(e)(2). *See St. Cyr*, 533 U.S. at 311 (statute provided that judicial review "of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien . . . shall be available only in judicial review of a final order under this section"). Whatever the merit of the Government's position in other contexts—*see* Gov't Supp. Br. 22-23 (citing cases under the federal Mine Act, the Hobbs Act, the Tucker Act, and the telecommunications laws)—*St. Cyr* forecloses its application in these habeas cases.

The two habeas decisions the Government cites are not to the contrary. In *Lopez v. Heinauer*, 332 F.3d 507 (8th Cir. 2003), the Eighth Circuit dismissed a

habeas petition because there was an adequate non-habeas judicial forum authorized to hear the petitioner's challenge, but the court recognized that "habeas jurisdiction remains available to deportees who raise questions of law and who have no other available judicial forum." *Id.* at 510. Likewise, *Laing v. Ashcroft*, 370 F.3d 994 (9th Cir. 2004), stands for the unremarkable proposition that an alien must "exhaust his or her judicial remedies before filing a habeas petition." *Id.* at 997 n.4. In neither case did the Government argue that the judicial review scheme operated to *repeal* habeas jurisdiction altogether; the issue was simply whether the petitioner had exhausted other available judicial remedies first. Neither case controls here because no other judicial remedy was open to Petitioners at the time they filed their habeas petitions.[10]

2. *Section 1005(e)(2) Does Not Apply To Petitioners' Habeas Petitions, Which Challenge Unlawful Detention, Not CSRT Decisions*

Section 1005(e)(2) vests this Court with "exclusive jurisdiction to determine *the validity of any final decision* of a [CSRT] that an alien is properly detained as an enemy combatant." § 1005(e)(2)(A) (emphasis added). Section 1005(h)(2)

---

[10] Moreover, the Government's cases all involved suits filed notwithstanding a pre-existing review procedure, such that the court lacked jurisdiction when the suit was filed. *See, e.g., Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 204-05, 211 (1994) (review procedure was passed in 1977, and petitioner filed suit in 1990); *FCC v. ITT World Communs., Inc.*, 466 U.S. 463, 468 (1984) (exclusive review procedure in this Court existed when district court action was filed). By contract, the district court had jurisdiction over Petitioners' habeas petitions when they were filed. *See Rasul*, 542 U.S. at 484.

provides that section 1005(e)(2) "shall apply with respect to any claim *whose review is governed by* [section 1005(e)(2)] and that is pending on or after the date of the enactment of this Act." § 1005(h)(2) (emphasis added).[11] Accordingly, for section 1005(e)(2) and (h)(2) to have the effect the Government desires, Petitioners' habeas petitions must be "a claim whose review is governed by" section 1005(e)(2).

Petitioners' habeas petitions are not claims "whose review is governed by" section 1005(e)(2) for at least two reasons. First, as is shown in the brief of the Petitioner-Appellees in *Al Odah*, Nos. 05-5064, *et al.*, section 1005(e)(2) applies only to CSRT decisions rendered pursuant to the new procedures required by the Act. Because no CSRT has considered Petitioners' situation under the Act's new procedures, section 1005(e)(2) cannot apply to them.

Second, and more fundamentally, Petitioners' habeas cases do not challenge the validity of any decision of a CSRT; rather, they challenge unlawful detention. Petitioners had been imprisoned at Guantanamo for two and one-half years before their CSRTs began and well before any "final decision" by a CSRT was rendered. J.A. 64-81.

---

[11] The Government elides the words "whose review is governed by" in its quotation of section 1005(h)(2). *See* Gov't Supp. Br. 24.

The Government mistakenly argues that "in contending that their detention is unlawful, petitioners necessarily challenge the 'validity' of the CSRT decisions." Gov't Supp. Br. 21. That statement is incorrect. First, as discussed above, Petitioners' habeas petitions predate, and do not depend on, any CSRT decision. Second, the CSRT is relevant to this proceeding only because the Government created it and proffered its record as a purported defense – or "return" – to the petition. *See* 28 U.S.C. § 2243. The ultimate issue is not whether the Government's CSRT defense is "valid," but whether the Government can demonstrate to a *court* reviewing the habeas petition a sufficient basis in law and fact for keeping Petitioners in captivity. The CSRT record may be relevant to that inquiry, but it hardly exhausts it. Under the habeas procedures guaranteed by *Rasul*, petitioners are entitled to rebut or "traverse" the government's return, *see, e.g.*, 28 U.S.C. § 2243 ¶ 6, and present to the court facts outside of the government's return that would demonstrate that they are, in fact, "wholly innocent of wrongdoing." *Rasul*, 542 U.S. at 485. If substantial issues of fact are outstanding or if the court believes petitioners' claims have merit, they are entitled to a hearing. *See Harris v. Nelson*, 394 U.S. 286, 300 (1969); *Stewart v. Overholser*, 186 F.2d 339, 342 (D.C. Cir. 1950) ("When a factual issue is at the

core of a detention challenged by an application for the writ it ordinarily must be resolved by the hearing process.").[12]

Section 1005(e)(2) does precisely what it says: it creates *new* jurisdiction in this Court for Guantanamo prisoners who challenge the validity of CSRT decisions. Petitioners press no such claim. Rather, they challenge their unjustified imprisonment on any basis whatsoever. Section 1005(e)(2) is inapplicable on its own terms and cannot affect Petitioners' habeas cases.

II. THE COURT SHOULD CONSTRUE THE ACT TO PRESERVE JURISDICTION IN PENDING HABEAS CASES TO AVOID CONSTITUTIONAL DOUBT

Only by concluding that habeas jurisdiction remains unaffected by the Act can the Court avoid substantial constitutional questions in this case. *See St. Cyr*, 533 U.S. at 300, 326 (rejecting argument that AEDPA stripped federal habeas jurisdiction where such a construction "would give rise to substantial constitutional questions").

---

[12] As support for its attempt to apply section 1005(e)(2) to habeas claims that are clearly outside its scope, the Government invokes Senator Levin's statement that "the standards we set forth in our amendment will be the substantive standards which we would expect would be applied in all cases, including cases which are pending as of the effective date of this amendment." Gov't Supp. Br. 42 (quoting 151 Cong. Rec. S12755). This statement does not advance the Government's case. It is far from clear what Senator Levin meant by "substantive standards" in that context. The contrasting clarity of Senator Levin's statement opposing the November 10 amendment, which would have removed habeas jurisdiction retroactively, and the equal clarity of his statement before the November 15 vote (with Senators Reid and Kerry) that the November 15 amendment applied prospectively, refute the Government's effort to use one potentially ambiguous statement to trump a clear, contrary position.

The Government's position would require the Court to identify the extent of the protections afforded by the Suspension Clause, an issue that the Supreme Court has already identified as a "difficult question" that is "in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that [habeas] review was barred entirely." *St. Cyr*, 533 U.S. at 301 n.13. The Court need not reach this constitutional issue, however, since (as shown above) the Act lends itself readily to a statutory construction that avoids such constitutional doubt.

If this Court concludes that the Act cannot be construed in any way that permits the continued exercise of habeas jurisdiction in these cases, the Court should hold that the Act violates the Suspension Clause. *See* U.S. Const. art. I, § 9, cl. 2 ("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.").

Petitioners can invoke the Suspension Clause because the common law writ, as it existed in 1789, was available to persons imprisoned in a territory "under the sovereign's control." *Rasul*, 542 U.S. at 482. Moreover, the Government's attempt to portray review under section 1005(e)(2) as an adequate substitute for habeas fails because section 1005(e)(2) does not appear to allow Petitioners to contest the Government's factual assertions, even where they are based on evidence obtained through torture. Nor does it appear to allow the Court to

examine purported bases for imprisonment arising outside those advanced in the CSRT process, to release a prisoner, or to afford effective representation by counsel.

Congress has not found that the predicates to a valid suspension of the writ exist. The Act, if construed as the Government contends, should be held unconstitutional.

A. Prisoners In Petitioners' Position In 1789 Could Invoke The Common Law Writ

Although the Supreme Court has not identified the outer limits of the Suspension Clause, it is established—and the Government concedes—that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)); Gov't Supp. Br. 47.

The *Rasul* Court surveyed the application of common law writ as it existed before 1789 and determined it would have been available to Guantanamo prisoners. *Rasul*, 542 U.S. at 481-82. The Court's conclusion about the availability of the common law writ at the time of the Founding precludes the Government's argument that the Suspension Clause does not apply to Petitioners.

The Court made clear that recognizing the right of "persons detained at the [Guantanamo] base" to bring habeas petitions was "consistent with the historical reach of the writ of habeas corpus." *Id.* at 481. Quoting a 1759 decision by Lord

Mansfield, the Court noted 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 (quoting *King v. Cowle*, 97 Eng. Rep. 587, 598-99 (K.B. 1759)). The Supreme Court also recognized that, at common law, "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.* (quoting *Ex parte Mwenya*, [1960] 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M.R.)). *See also* Habeas Scholars' Br.

The Government sidesteps *Rasul's* meticulous analysis of the common law writ and instead asserts that Petitioners cannot invoke the common law writ, and by extension the Suspension Clause, by repeatedly incanting that they are "outside the sovereign territory of the United States" and are "aliens." Gov't Supp. Br. 45. But *Rasul* considered and rejected the argument that the availability of the common law writ turned on either of those factors—indeed, this was a major point of disagreement between the majority and the dissent. *See Rasul*, 542 U.S. at 502 (Scalia, J., dissenting) (contending the majority's common law authorities were inapposite because "Guantanamo Bay is not a sovereign dominion" and because "even if it were, jurisdiction would be limited to subjects"). The majority specifically rejected the dissent's claim, ineffectively resurrected here by the

Government, that "habeas corpus has been categorically unavailable to aliens held outside sovereign territory." *Rasul*, 542 U.S. at 482 n.14.

The Government cites no authority that even arguably contradicts *Rasul*'s conclusion on this point. This failure, together with the Government's concession that the Suspension Clause protects the common law writ as it existed in 1789, is fatal to the Government's Suspension Clause argument.

Johnson v. Eisentrager, 339 U.S. 763 (1950), is not to the contrary. As Petitioners demonstrated in their merits brief, the shared, temporary authority the United States exercised at the Landsberg prison in Germany differed materially from the long term total governing authority the Government exercises over Guantanamo. *See* Joint Reply Brief of Appellants at 7-10, *Boumediene v. Bush*, No. 05-5062 (June 8, 2005). The *Rasul* Court distinguished *Eisentrager* not only because *Eisentrager* did not focus on the availability of *statutory* jurisdiction, but also because Guantanamo prisoners are "differently situated from the *Eisentrager* detainees." *Rasul*, 542 U.S. at 476 ("Not only are petitioners differently situated from the *Eisentrager* detainees, but the Court in *Eisentrager* made quite clear that all six of the facts critical to its disposition were relevant only to the question of the prisoners' *constitutional* entitlement to habeas corpus." (Emphasis in original.)).

Indeed, Justice Kennedy, who disagreed with the majority's analysis of statutory jurisdiction and preferred to "follow the framework of *Eisentrager*," *id.* at

485 (Kennedy, J., concurring in the judgment), concluded that it was a "necessary corollary of *Eisentrager*" that the courts could "protect persons from unlawful detention even where military affairs are implicated," *id.* at 487. Justice Kennedy agreed that the situation of Guantanamo prisoners was "distinguishable from . . . *Eisentrager* in two critical ways": because Guantanamo is "in every practical respect a United States territory," and because the imprisonment was indefinite and lacked "any legal proceeding to determine their status." *Id.* at 487-88. Whatever *Eisentrager* says about the availability of the writ to persons in other circumstances, both the *Rasul* majority and Justice Kennedy in concurrence concluded that *Eisentrager* does not deprive Guantanamo prisoners of habeas rights.

B. The Suspension Clause Protects Petitioners' Access To The Writ Regardless Of Whether They Possess "Constitutional" Rights

The Government contends that Petitioners are not protected by the Suspension Clause because, it argues, Petitioners possess no Fifth Amendment rights. Gov't Supp. Br. 45-46. The Government's position relies on the same misconception of the common law writ that led the district court into error. *See* Dist. Ct. Op. at 21 n.17, J.A. 1019-20 (holding that 28 U.S.C. § 2241(c)(1), which codified the common law writ, did not give Petitioners "more rights than they would otherwise possess under the Constitution").

In 1789, the writ of habeas corpus was not limited to allegations that the detention violated a petitioner's constitutional rights. "Constitutional rights" by definition did not exist in England or Colonial America. When the Supreme Court surveyed cases from "England prior to 1789, in the Colonies, and in this Nation during the formative years of our Government," *St. Cyr,* 533 U.S. at 301, it concluded that "those early cases contain no suggestion that habeas relief in cases involving Executive detention was only available for constitutional error." *Id.* at 301-03. The Court also agreed that, in contrast to habeas review of a court judgment, "an attack on an executive order could raise all issues relating to the legality of the detention." *Id.* at 301 n.14.

Chief Justice Marshall's opinion in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), illustrates the breadth of the common law writ in cases of Executive imprisonment. The Court held that the petitioners, who were arrested by the military on suspicion of treason, could petition for a writ of habeas corpus. *See id.* at 100. The Court then evaluated whether there was "sufficient evidence of [their] levying war against the United States to justify [their] commitment on the charge of treason." *Id.* at 135. The Court found that "the crime with which the prisoners stand charged has not been committed" and concluded that the Court "can only

direct them to be discharged." *Id.* at 136. No constitutional violation was necessary for the Court to issue the writ.[13]

English cases before the Founding likewise show that habeas courts carefully analyzed the legal and factual basis for the detention and did not condition habeas on allegation of a specific statutory or "constitutional" violation. *See, e.g., Hodges v. Humkin*, (1613) 80 Eng. Rep. 1015, 1016 (C.P.) (opinion of Haughton, J.) (holding that a mayoral official's factual return to a writ of habeas corpus "ought to have shewed the certain cause of the prisoner being imprisoned by him, *so that the same cause ought to appear to the Court, whether the same was lawful and just or not*" (emphasis added)); *Bushell's Case*, (1670) 124 Eng. Rep. 1006, 1007 (C.P.) ("[T]he cause of the imprisonment ought, by the retorn, to appear as specifically and certainly to the Judges of the retorn, as it did appear to the Court or person authorized to commit . . . .").

The Government's argument that Petitioners possess no Fifth Amendment rights is irrelevant to the Suspension Clause analysis. The common law writ did not depend on a petitioner's ability to show "constitutional" violations. The Suspension Clause protects Petitioners' right to a judicial examination of the facts

---

[13] *See also* Gerald L. Neuman & Charlie F. Hobson, *John Marshall and The Enemy Alien: A Case Missing from the Canon*, 9 Green Bag 40, 41-42 (2005) (discussing the unreported case of *United States v. Williams* (Marshall, Circuit Justice, C.C.D. Va. Dec. 4, 1813) (reviewing on habeas the imprisonment of Thomas Williams,

and law that the Government contends permit their indefinite detention without charge; to the extent the Act is held to have abolished that right, it is unconstitutional.[14]

C. Section 1005(e)(2) Does Not Provide An Adequate Substitute For Habeas

Absent a valid suspension, limits on the availability of the writ are valid only if a substitute remedy is both adequate and effective to "test the legality of a person's detention." *Swain v. Pressley*, 430 U.S. 372, 381 (1977); *see also St. Cyr*, 533 U.S. at 305 ("a serious Suspension Clause issue would be presented" under the Government's view that federal habeas jurisdiction had been stripped without any adequate substitute); *Kuhali v. Reno*, 266 F.3d 93, 100 (2d Cir. 2001) (holding that habeas jurisdiction remained because "Congress has provided no . . . substitute remedy to challenge removal orders).

No court has construed section 1005(e)(2). Until that occurs, questions will remain whether the procedures it sets out adequately accommodate all of

---

charged as an enemy alien, determining that Williams' confinement was not authorized by the regulations "respecting alien enemies," and ordering Williams' release).

[14] Petitioners' imprisonment *also* violates the Constitution, laws, and treaties of the United States. *See Rasul*, 542 U.S. at 483 n.15 ("Petitioners' allegations . . . unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'" (quoting 28 U.S.C. § 2241(c)(3))); *id.* at 498-99 (Scalia, J., dissenting) (noting that "[f]rom this point forward, federal courts will entertain petitions from these prisoners" and protesting the lack of a "comforting assurance" that such petitions would be "easily resolved on the merits").

Petitioners' habeas claims. But the Government's submissions and the text of the Act suggest that section 1005(e)(2) is not an adequate habeas substitute for at least four reasons.

1. Section 1005(e)(2) Does Not Appear To Allow Petitioners To Contest The Government's Factual Assertions, Even If They Rest On Evidence Obtained Through Torture

At a minimum, "[p]etitioners in habeas corpus proceedings . . . are entitled to careful consideration and plenary processing of their claims including full opportunity for the presentation of the relevant facts." *Harris v. Nelson*, 394 U.S. 286, 298 (1969). Section 1005(e)(2) lacks any mechanism allowing Petitioners to probe and rebut the facts relied upon in imprisoning them. In contrast to a robust habeas review, section 1005(e)(2) appears to require this Court to accept the Government's CSRT record and to limit its review to whether (i) the CSRT complied with its own standards and procedures; (ii) Petitioners have certain rights; and (iii) the use of the CSRT standards and procedures comported with those rights. Such review presents a particularly ineffectual substitute where, unlike even a traditional appeal from an administrative decision, the CSRT proceeding to be reviewed is so utterly one-sided. The CSRT proceedings deprive detainees of the rights to counsel, to any meaningful opportunity to rebut the Government's evidence, and to exclude evidence obtained by torture. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 468-78 (D.D.C. 2005).

Section 1005(e)(2) review is not an adequate substitute for habeas review, which for centuries has secured the right to an individualized inquiry into the facts asserted by the detaining power. *See generally* Habeas Scholars' Br.; *see also Hamdi,* 542 U.S. at 538 (plurality opinion) (stating that, in reviewing the Government's proffered grounds for detention, a habeas court must "permit[] the alleged combatant to present his own factual case to rebut the Government's return").

The Government inaccurately states that, at common law, "the truth of the custodian's return could not be controverted" by prisoners in Petitioners' position. Gov't Supp. Br. 51. That may have been true for criminal convicts serving a court-imposed sentence, but it was not and is not accurate in cases of noncriminal prisoners such as Petitioners. On the contrary, common law courts frequently examined affidavits proffered to support a habeas petitioner. For instance, in a 1778 case in which a habeas petitioner was pressed into Admiralty service in apparent violation of an exemption issued by the Navy Board, the Court stated that it "could not wilfully shut their eyes against such facts as appeared on the affidavits, but which were not noticed on the return." *Goldswain's Case*, (1778) 96 Eng. Rep. 711, 712 (C.P.); *see also Case of the Hottentot Venus*, (1810) 104 Eng. Rep. 344, 344 (K.B.) (ordering an examination of a "native of South Africa" to determine whether she was confined against her will); *Case of Three Spanish*

Sailors, (1779) 96 Eng. Rep. 775, 775 (C.P.) (examining affidavits supporting petitioners' claim for release).

The Government fails to acknowledge that the statements it cites exclusively concerned petitioners who were collaterally attacking *convictions by criminal courts*. *See, e.g., Jackson v. Virginia*, 443 U.S. 307, 323 (1979) ("A judgment by a state appellate court rejecting a challenge to evidentiary sufficiency is of course entitled to deference by the federal courts, as is any judgment affirming a criminal conviction."). By contrast, Petitioners' habeas petitions are primary challenges to Executive detention, the precise circumstance in which the protections of habeas "have been strongest." *St. Cyr*, 533 U.S. at 301. The individual advisory opinion in *Opinion on the Writ of Habeas Corpus*, (1758) 107 Eng. Rep. 29 (H.L.) (opinion of Wilmot, J.), is also limited to the use of the writ "[i]n imprisonment for criminal offences," *id.* at 43, and specifically envisions that the petitioner will have the opportunity to rebut any false allegations of fact during a trial by jury on a criminal charge, *see id.* at 44 ("[A] traverse carries it to its proper manner of trial, a trial by jury.").

Similarly, the Government quotes a sentence from a law review article discussing the period "[f]rom 1789 to 1867," Gov't Supp. Br. 51 (quoting *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1113-14 (1970) [hereinafter *Developments*]), but neglects to note that the article

analyzed only federal habeas review of *state criminal convictions* and based its statement about the common law on the principle that "a showing in the return to a writ of habeas corpus *that the prisoner was held under final process based upon a judgment or decree of a court of competent jurisdiction* closed the inquiry." *Frank v. Mangum*, 237 U.S. 309, 330 (1915) (emphasis added), *cited in Developments*, *supra*, at 1113-14 nn.6, 8. Indeed, all the Government's sources discuss confinement pursuant to "the judgment and sentence of a court," Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 453 (1966), and one specifically recognizes that prisoners who were not convicted criminals could controvert the return at common law: "With respect to imprisonments other than for criminal matters, . . . it was 'impossible to specify those [noncriminal cases] in which it could not [be controverted],'" *id.* at 454 n.20 (quoting Hurd, The Writ of Habeas Corpus 271 (2d ed. 1876)).

The Government's reliance on immigration cases is unavailing. *See* Gov't Supp. Br. 53. Petitioners in immigration cases receive the very process Petitioners here seek—a meaningful opportunity to test the legal and factual bases of the Government's claims in a process providing notice of the Government's allegations, an opportunity to present evidence and witnesses, and the assistance of counsel. *See Binot v. Gonzales*, 403 F.3d 1094, 1099 (9th Cir. 2005); *United*

States v. Jauregui, 314 F.3d 961, 962-963 (8th Cir. 2003); *Hadjimehdigholi v. INS*, 49 F.3d 642, 649 (10th Cir. 1995).

Cases involving military commission trials likewise are inapposite. Gov't Supp. Br. 52 (citing *Yamashita v. Styer*, 327 U.S. 1 (1946), and *Ex parte Quirin*, 317 U.S. 1 (1942)). Those cases involved persons who were *concededly* "enemy combatants" as the common law understood the term, *i.e.*, citizens of a country at war with the United States or persons who actually levied war against the United States. *See Yamashita*, 327 U.S. at 343; *Quirin*, 317 U.S. at 23, 37-38 (holding that a U.S. citizen is an enemy belligerent when he joins the military of an enemy nation). Moreover, the petitioners in those cases had the benefit of trials that afforded them ample opportunity through counsel to controvert the facts alleged against them. *See Yamashita*, 327 U.S. at 342 (tribunal heard 286 witnesses and the petitioner was represented by 6 attorneys); *Quirin*, 317 U.S. at 23 (petitioners were represented by counsel at trial and had the opportunity to present evidence); *see also Rasul*, 542 U.S. at 476 (distinguishing *Eisentrager* on grounds that Guantanamo detainees "are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing").

Petitioners, on the other hand, are citizens of friendly nations (Bosnia, Algeria, and France) and never have been charged, let alone convicted, of any act of aggression against the United States or its allies. At a very minimum, therefore, they are entitled to controvert the Government's contention that they are "enemy aliens." *See, e.g., R. v. Schiever*, (1759) 97 Eng. Rep. 551, 552 (K.B.) (rejecting a habeas petition after consideration of affidavits submitted in support of an alien petitioner's habeas motion because "the Court thought this man, *upon his own showing*, clearly a prisoner of war" (emphasis added)); *Three Spanish Sailors*, 96 Eng. Rep. at 776 (similar).

The Act shifts material burdens to Petitioners and, the Government contends, imposes on the Court the obligation to treat deferentially the findings of the CSRTs. *See* Gov't Supp. Br. 52. In noncriminal habeas, the jailor receives no deference, and the Government has the burden to support the detention; such a burden is absent in the Act. Taken together, these shifts further demonstrate the Act's shortcomings when compared with habeas. *See Hamdi*, 542 U.S. at 575 (Scalia, J., dissenting) ("The Suspension Clause . . . would be a sham if it could be evaded by congressional prescription of requirements *other than the common-law requirement of committal for criminal prosecution* that render the writ, though available, unavailing.").

The Government also claims that the Act somehow "ratifies" the CSRTs' determinations of "enemy combatant" status and renders them "fully legitimate" under the plurality opinion in *Hamdi*. Gov't Supp. Br. 52. The Government cites no statutory text for this conclusion, which is directly contradicted by floor statements made immediately prior to the Senate's key vote on the Act's provisions on November 15. *See, e.g.*, 151 Cong. Rec. S12,777, S12,803 (daily ed. Nov. 15, 2005) (statement of Senator Reid) ("I do not understand this legislation to represent a congressional authorization of the military commissions unilaterally established by the executive branch at Guantanamo Bay. We would hardly authorize these commissions based upon a few hours of floor debate."); *id.* at S12,802 (statement of Senator Levin). The Government also ignores that the *Hamdi* plurality based its discussion of acceptable procedures on a definition of "enemy combatant" that does not apply to the Boumediene Petitioners. *See Hamdi*, 542 U.S. at 526 (plurality opinion). The CSRTs, by contrast, applied a considerably broader standard in considering Petitioners' status, a standard that the Government conceded would be satisfied by an innocent woman in Switzerland who gave money to a charity without knowing that the charity supported Al Qaeda. J.A. 750-751. Nothing in either *Hamdi* or the Act "ratifies" detention using such an overbroad definition.[15]

[15] Moreover, the *Hamdi* plurality's suggestion that procedures placing a burden of

Finally, the CSRT procedure permitted the tribunals to consider evidence based on torture, so long as the tribunal found that the coerced information was "relevant and helpful to resolution of the issue before it." J.A. 1209, ¶ 9. The Government has confirmed that the CSRTs were permitted to rely on evidence obtained by torture if deemed "reliable." J.A. 947 (Oral Argument Tr., Dec. 2, 2004, *Khalid v. Bush*, 04-CV-1142 (RJL); *Boumediene v. Bush*, 04-CV-1166 (RJL), at 84:7–84:22). The prohibition against relying on evidence obtained by torture has been a bedrock principle of our common law for half a millennium. *See* Habeas Scholars' Br. To the extent section 1005(e)(2) is construed to confirm the validity of a CSRT decision based on such evidence, it would be both unlawful and an inadequate substitute for habeas.

2. *Section 1005(e)(2) Does Not Appear To Permit This Court To Review Detention Decisions By ARBs Or The DCO*

Furthermore, section 1005(e)(2) is an inadequate substitute for habeas because it is apparently confined to review of CSRT procedures and does not address the possibility that the Government will assert that detention rests on grounds not considered by a CSRT. In its brief, the Government claims it may premise continued imprisonment not on CSRT decisions, but rather on

---

proof on the prisoner and giving a presumption in favor of the Government's evidence could be constitutional was mere dicta, which four Justices expressly refused to join. *See Hamdi*, 542 U.S. at 553-54 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment), 575 (Scalia, J., joined by Stevens, J., dissenting).

recommendations of ARBs and the DCO. Gov't Supp. Br. 9 (stating that the ARB recommends "whether detention should be continued" and the DCO "makes the final detention determination"). ARBs may base recommendations on factors and evidence not considered by the CSRTs, including "intelligence value," "law enforcement interest," and the catch-all category of other "factors that could form the basis for continued detention." Memorandum from the Department of Defense Designated Civilian Official Regarding Implementation of Administrative Review Procedures for Enemy Combatants ¶ 1.c (Sept. 14, 2004), *available at* *http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf*.

Section 1005(e)(2) does not permit this Court to evaluate the sufficiency of detention based on factors not set forth in the CSRT proceeding or even to review an ARB's reconsideration of the *same* factors considered by the CSRT. Congress was clearly aware of the distinction between CSRTs and ARBs. *See* § 1005(a)(1)(A) (discussing "the procedures of the Combatant Status Review Tribunals and the Administrative Review Boards"). Accordingly, a decision by this Court under section 1005(e)(2) apparently would not prevent the Government from continuing to detain a prisoner on the supposed basis of findings of the ARB or the DCO, even if those findings were manifestly illegal or insufficient. *See Hamdi*, 542 U.S. at 521 (plurality opinion) ("[I]ndefinite detention for the purpose of interrogation is not authorized."). Indeed, recent developments suggest that this

is exactly the Government's strategy: the Government has given several prisoners unclassified ARB information sheets setting forth allegations going beyond the record of the 2004 CSRT proceedings.[16] The Government will doubtless insist that the Court has no authority under section 1005(e)(2) to review detention based on such new allegations.

Section 1005(e)(2) review of a CSRT decision cannot be an adequate substitute for habeas if the Government can continue to detain prisoners based on unreviewable decisions of ARBs or the DCO. Indeed, in such a situation the review allowed under section 1005(e)(2) would require this Court to issue an advisory opinion in violation of Article III of the Constitution. *See, e.g., DeFunis v. Odegaard*, 416 U.S. 312, 316 (1971) ("[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." (Quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). Section 1005(e)(2) cannot be an adequate substitute for habeas if its use violates Article III.

3. *Section 1005(e)(2) Does Not Appear To Authorize This Court To Order A Prisoner's Release*

A further deficiency in section 1005(e)(2) is that it does not appear to authorize the Court to discharge a prisoner whose CSRT decision is held "invalid."

---

[16] The Government took this step after the district court's decision and the preparation of the Joint Appendix in this case. On request, Petitioners stand ready to submit such unclassified ARB documents to the Court.

In contrast, upon finding that imprisonment is unjustified, a habeas court "can only direct [the prisoner] to be discharged." *Bollman*, 8 U.S. (4 Cranch) at 136.

The Government tellingly ignores this shortcoming of section 1005(e)(2), which Petitioners raised in prior briefing. The Government's silence on this point signals recognition that section 1005(e)(2) does not permit this Court to order the release of a successful petitioner. Of course, such a view would be consistent with the Government's argument to this Court that section 1005 prohibits federal courts from ordering the release even of Guantanamo prisoners *exonerated by CSRTs*. *See* Gov't Opp. to Mot. to Expedite Appeal at 3, *Qassim v. Bush*, No. 05-5477 (Jan. 18, 2006) (attached at Addendum) (arguing that persons exonerated by CSRTs may nonetheless "remain detained" as "former enemy combatants" at the Executive's discretion). Even if this Court were to hold a prisoner's CSRT decision "invalid," the Government would contend that detention could continue and that nothing in section 1005(e)(2) would permit the prisoner to challenge, or this Court to review, such continuing imprisonment. *See id.* at 5 (contending that section 1005 bars any challenge to detention by persons exonerated by a CSRT).

If this Court cannot order release despite an "invalid" CSRT decision—as the Government argued in *Qassim*—this further demonstrates that section 1005(e)(2) is a moot procedure that violates Article III.

4. *Section 1005(e)(2) May Not Confer The Right To Effective Consultation With And Representation By Counsel*

The *Hamdi* plurality concluded that Hamdi "unquestionably ha[d] the right to access to counsel in connection with the [habeas petition] proceedings on remand to the district court." 542 U.S. at 539. The Government itself has argued in favor of representation for Guantanamo prisoners. *See* Resp. Mot. to Stay Proceedings Pending Related Appeals and for Coordination at 5-6, *In re Pro Se Guantanamo Bay Detainee Cases*, Nos. 05-CV-0877 (JR), *et al.* (D.D.C. June 3, 2005) (attached at Addendum) ("Petitioners, however, are likely unfamiliar with United States law and the American legal system, typically do not speak or write English, and have access to the Court only through mail and not the Court's electronic filing system. Given these factors, as well as the fact that petitioners are not permitted access to classified information supporting their detention, recruitment of volunteer counsel for petitioners who desire counsel may be appropriate."). The Department of Defense even participated in "discussions with an attorney organization regarding recruiting volunteer counsel for pro se petitioners." *See id.* at 6 n.9. To the extent section 1005(e)(2) is construed to preclude counsel access, that would afford an independent ground for holding the Act's procedures an inadequate substitute for habeas.

The common law long recognized the need for counsel in a habeas proceeding to ensure that the right to the writ was meaningful. The Act of 1679

(16 Car. I. c. 10) provided that "if any person be restrained of his liberty by order or decree of any illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council; he shall, *upon demand of his counsel*, have a writ of habeas corpus, to bring his body before the court of king's bench or common pleas. . . ." Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 Notre Dame L. Rev. 1079, 1099 (1995) (quoting 3 Blackstone, Commentaries *130-31) (emphasis added). Even conceded enemy soldiers have had access to counsel for purposes of bringing habeas petitions challenging military commission or tribunal determinations. *See, e.g., Eisentrager*, 339 U.S. at 765; *Yamashita,* 327 U.S. at 4.

This Court should clarify that, regardless of the Court's decision on the Act's applicability, Petitioners may continue to meet with their attorneys pursuant to the protective order now in force, in order that Petitioners may obtain the adequate and effective representation needed to present their cases meaningfully, whether on habeas or under section 1005(e)(2).

The only way that a retroactive repeal of habeas jurisdiction could be upheld in this case would be if this Court construed section 1005(e)(2) to provide the full scope of review and remedy available on habeas, including the right to controvert factual returns, the right to judicial review of all factors purportedly supporting detention (not simply those considered by CSRTs), and judicial authority to order

the release of prisoners whose claims are successful. Continued meetings and consultation between Petitioners and security-cleared counsel pursuant to the protective order are also essential. If section 1005(e)(2) review does not include these fundamental attributes, it cannot be an adequate substitute for habeas. *See United States v. Hayman*, 342 U.S. 205, 219 (1952) (avoiding constitutional doubt by holding that 28 U.S.C. § 2255 was as broad as habeas).

D. If Interpreted As The Government Contends, The Act Violates The Suspension Clause Because Congress Made No Clear Statement Of Intent To Suspend The Writ And Made No Finding That The Predicates For Suspension Were Present

The Government does not contend that the Act meets the requirements for a valid suspension of the writ under the Suspension Clause. Nor could it do so; Congress has suspended the writ on only four occasions, and each time Congress has expressly mentioned suspension and given it a limited temporal effect. [17] Moreover, Congress may suspend habeas only "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. 1, § 9, cl. 2; *see Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1868) (Suspension Clause "absolutely prohibits the suspension of the writ, except under extraordinary exigencies"). Each of the four occasions on which the writ was suspended involved an ongoing

---

[17] *See* Act of Mar. 3, 1863, ch. 81, 12 Stat. 755 (Civil War); Act of Apr. 20, 1871, ch. 22, 17 Stat. 14-15 (armed resistance to Reconstruction); Act of July 1, 1902, ch. 1369, 32 Stat. 691 (Philippine rebellion). The Governor of Hawaii also suspended habeas corpus immediately following Pearl Harbor. *See Duncan v. Kahanamoku*, 327 U.S. 304, 307-308 (1946).

rebellion or invasion that threatened the operation of civil institutions. Congress made no such finding here.

Because Congress has not validly suspended the writ of habeas corpus, a construction of the Act that repealed habeas jurisdiction in this case would render the Act unconstitutional. This Court should either construe the Act to avoid such a result or else conclude that the Act violates the Suspension Clause. In either case, the federal courts continue to have jurisdiction over Petitioners' habeas petitions.

III. THE COURT SHOULD NOT CONVERT THIS CASE IF THE COURT FINDS THAT THE ACT APPLIES

If this Court nonetheless determines that the federal courts lack jurisdiction over Petitioners' habeas claims, the Court should dismiss the appeals, vacate the district court decision, and remand with instructions to dismiss the petitions for lack of jurisdiction. *See Pharmachemie B.V. v. Barr Labs., Inc.*, 276 F.3d 627, 634 (D.C. Cir. 2002) (dismissing appeal for lack of jurisdiction, vacating district court decision, and remanding with instructions to dismiss the complaint because the district court also lacked jurisdiction).

Nothing in the Act authorizes the Court to "convert" Petitioners' notices of appeal of the district court's judgment into original petitions for review of CSRT decisions under section 1005(e)(2) of the Act. If Congress has indeed deprived all courts of jurisdiction over these habeas petitions, and that action is not unconstitutional, then this Court has no power to convert the habeas appeals into

petitions for CSRT review absent authority from Congress to do so. *See Christianson v. Colt Indus. Operating Corp*, 486 U.S. 800, 818 (1988) ("Courts created by statute have no jurisdiction but such as the statute confers." (Internal quotation marks omitted)). Accordingly, while the Court's disposition should be without prejudice to Petitioners' right to request review under section 1005(e)(2), the statute grants no authority to convert appeals from the district court into such petitions.

The Government draws a faulty analogy to the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (2005). *See* Gov't Supp. Br. 53-54. The REAL ID Act contained a provision specifically authorizing courts of appeals to treat habeas cases pending on the REAL ID Act's effective date as original petitions for review under the REAL ID Act. *See* REAL ID Act, § 106(c), 119 Stat. at 311 (directing the court of appeals to treat a habeas case transferred from the district court "as if it had been filed pursuant to a petition for review under" the REAL ID Act). Although the provision expressly referenced habeas cases pending before district courts, the text also encompassed cases on appeal because, as the First Circuit held, "until [the court of appeals] acted on the appeal, the case necessarily remained alive in the lower court although dormant." *Ishak v. Gonzales*, 422 F.3d 22, 30 (1st Cir. 2005). Other courts of appeals agreed that they possessed the authority to convert such habeas cases already on appeal. *See, e.g.*,

Gittens v. Menifee, 428 F.3d 382, 384-86 (2d Cir. 2005) (per curiam); *Rosles v. BICE*, 426 F.3d 733, 736 (5th Cir. 2005) (per curiam); *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1052-53 (9th Cir. 2005); *Bonhometre v. Gonzales*, 414 F.3d 442, 446 (3d Cir. 2005).

In contrast to the REAL ID Act, section 1005 contains no provision giving this Court the authority to convert appeals of habeas cases into other proceedings. Section 1005(e)(2) creates jurisdiction in this Court; it does not transfer pending cases from district courts or authorize treating such cases as though they were filed under section 1005(e)(2). Congress included just such language in the REAL ID Act in May 2005. Its failure to include similar language in the Act seven months later must be viewed as a deliberate choice to adopt a different system.

The Government relies on statements by Senators Graham and Kyl made long after the November 15, 2005, Senate vote on the Graham-Levin-Kyl Amendment. *See* Gov't Supp. Br. 54. The colloquy between Senators Kyl and Graham on December 21, 2005, concerned "the *now-completed* National Defense Authorization Act for fiscal year 2006." 151 Cong. Rec. S14,260 (daily ed. Dec. 21, 2005) (statement of Senator Kyl) (emphasis added); *see also* 152 Cong. Rec. S970 (daily ed. Feb. 9, 2006) (statement of Senator Kyl) ("I ordinarily would not comment on the meaning of legislation that already has been enacted into law."). The statements of bill sponsors after the legislation has been passed

deserve little weight. *See supra* Part I.A.3. Neither of the statements the Government cites demonstrates a congressional intent that this Court convert pending appeals into original petitions for review of CSRT decisions.

In the alternative, should the Court nonetheless convert these appeals into petitions under section 1005(e)(2), Petitioners respectfully ask that this Court stay any further proceedings in this Court to allow Petitioners to seek a writ of certiorari. Fed. R. App. P. 41(d)(2); D.C. Cir. R. 41(d)(2). A stay would be warranted because Petitioners' certiorari petition would present substantial questions regarding the interpretation of the Act and the Suspension Clause. Fed. R. App. P. 41(d)(2)(A). Indeed, similar legal issues arising in the context of military commission proceedings have already prompted Supreme Court review. *See Hamdan v. Rumsfeld*, 126 S. Ct. 622 (Nov. 7, 2005) (granting petition for writ of certiorari). Failure to grant a stay would force the Court and the parties to engage in further extensive briefing and review under section 1005(e)(2) while the Supreme Court is considering the meaning and constitutionality of the Act.

CONCLUSION

For the foregoing reasons, this Court should hold that the Act does not divest its jurisdiction to address Petitioners' pending appeals of the District Court's dismissal of their habeas claims.

Dated: March 10, 2006

Respectfully Submitted,

Stephen H. Oleskey /do

Stephen H. Oleskey
Robert C. Kirsch
Melissa A. Hoffer
Mark C. Fleming
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
Phone: (617) 526-6000
Fax: (617) 526-5000

Douglas F. Curtis
Wilmer Cutler Pickering Hale and Dorr LLP
339 Park Avenue
New York, NY 10022
Phone: (212) 230-8800
Fax: (212) 230-8888

Attorneys for Petitioners Lakhdar Boumediene, et al.

Respectfully Submitted,

Wesley R. Powell /do

Wesley R. Powell
Hunton & Williams
200 Park Avenue
New York, NY 10166
Phone: (212) 309-1000
Fax: (212) 309-1100

Julia Symon
James Hosking
Clifford Chance US LLP
31 W. 52nd Street
New York, NY 10019
(212) 878-8000

Attorneys for Appellant Ridouane Khalid

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief uses a proportionally spaced typeface of 11-point or larger. The brief is 13,982 words in length (which is within the 14,000 word limit set out in this Court's order of January 27, 2006).

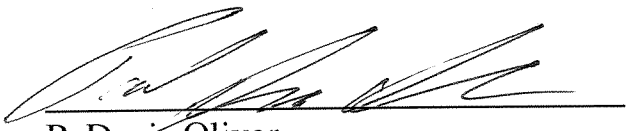
Melissa A. Hoffer /do

Melissa A. Hoffer

CERTIFICATE OF SERVICE

I, P. Davis Oliver, hereby certify that on March 10, 2006, I filed and served the foregoing brief by causing an original and fourteen copies to be delivered by hand to the Court and by causing a copy of the brief to be delivered to the following counsel by Email transmission and by overnight courier:

Robert M. Loeb, Esq.
Douglas N. Letter, Esq.
Eric D. Miller, Esq.
U.S. Department of Justice
(DOJ) Civil Division - Appellate Staff
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
Robert.Loeb@usdoj.gov
Douglas.Letter@usdoj.gov
Eric.Miller@usdoj.gov
Counsel for Government



P. Davis Oliver

ADDENDUM

[ORAL ARGUMENT NOT SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ABU BAKKER QASSIM, et al., Petitioners-Appellants	)	No. 05-5477
v.	)	
GEORGE W. BUSH, et al., Respondents-Appellees.	)	

OPPOSITION TO MOTION TO EXPEDITE APPEAL

For the reasons set forth below, the motion to expedite filed by petitioners in the above-captioned appeal should be denied at this time. In any event, as explained below, the highly expedited briefing suggested by petitioners is not warranted.

1. Petitioners, Abu Bakker Qassim and Adel Abdu Al-Hakim, are ethnic Uighurs and natives of China. Prior to September 11, 2001, they received weapons training in Afghanistan at a military training facility supplied by the Taliban. *See* Declaration of Brig. General Hood (Aug. 8, 2005) (attached). After the September 11 attack on the United States, Northern Alliance forces approached the military training camp, and petitioners fled with others to nearby caves. They then fled to Pakistan where they were captured by Pakistani forces and turned over to the United States military. *Ibid.*

Petitioners were deemed "enemy combatants" and sent to the U.S. Naval Base in Guantanamo Bay, Cuba. There, each petitioner was granted a hearing before a military Combatant Status Review Tribunal to determine whether the United States should continue to consider him as an enemy combatants. For the purposes of all CSRT proceedings, "enemy combatant" was defined as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." *See* July 7, 2004 Order Establishing the CSRTs. In March 2005, the CSRTs determined that petitioners no longer met the criteria to be considered enemy combatants. *See* Hood Dec., ¶ 2.

Thus, petitioners are no longer being held as enemy combatants. Rather, they are being detained by the military, pending the outcome of diplomatic efforts to transfer them to an appropriate country.[1] In the meantime, petitioners remain in the custody of the Department of Defense. They are housed at Guantanamo in "Camp Iguana," with other individuals determined no longer to be enemy combatants. In

---

[1] Typically, a detainee would be returned to his native country. It is the policy of the United States, however, not to return individuals to countries where it is more likely than not they will be tortured, *see* 8 U.S.C. § 1231 note ("United States Policy with Respect to the Involuntary Return of Persons in Danger of Subjection to Torture"), and the United States Government is currently not in a position to return petitioners to their home country over their objections.

Camp Iguana, petitioners have a communal living arrangement, with free access to all of the areas of the Camp, including the exercise/recreation yard, their own bunk house, activity room. Petitioners also have round-the-clock access to a television set with VCR and DVD capability, a stereo system, recreational items (such as soccer, volleyball, ping pong), unlimited access to a shower facility, air conditioning in all living areas (which they control), special food items, and library materials. *See* Hood Dec. at ¶ 6. Petitioners are, however, former enemy combatants and persons trained at a military training camp supplied by the Taliban, and they remain detained (albeit with greater privileges) pending their release.

2. Petitioners filed a habeas action in district court seeking their release from detention. After waiting several months while the United States pursued diplomatic efforts to place petitioners, the district court denied the petition.

The court asserted that it was "undisputed that the government cannot find, or has not yet found, another country that will accept the petitioners."[2] Slip op. 11. Thus, the court found that "the only way to comply with a release order would be to grant the petitioners entry into the United States." *Ibid.* The court held that it could not issue such relief, however. The court stated:

---

[2] In fact, the Government disputes the court's characterization to the extent it insinuates that diplomatic efforts are not ongoing. The Government offered to provide an in camera briefing to the district court on the current diplomatic efforts, but the court refused such briefing.

> These petitioners are Chinese nationals who received military training in Afghanistan under the Taliban. China is keenly interested in their return. An order requiring their release into the United States – even into some kind of parole "bubble," some legal-fictional status in which they would be here but would not have been "admitted" – would have national security and diplomatic implications beyond the competence or the authority of this Court.

Slip op. 11-12. Thus, the court found that it had "no relief to offer," *id.* at 12, and issued an order stating: "petitioners' petition for a writ of habeas corpus is denied."

3. The next day, on December 23, 2005, petitioners filed a notice of appeal to this Court. Petitioners did not seek expedition of the appeal at that time. Rather, they waited nearly three weeks before filing a motion seeking expedition. After failing to act for nearly three weeks, petitioners then propose a briefing schedule granting themselves more than two more weeks to file their opening brief, but granting the Government only one week to respond. *See* Motion to Expedite at 8.

4. This Court should not grant the motion to expedite at this time. As an initial matter, there is a substantial question of whether there is any jurisdiction over this case. On December 30, 2005, the Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1001-1006 (2005)), became law. Section 1005(e)(1) of the Act amends the habeas statute, 28 U.S.C. § 2241, to state that "no court, justice, or judge shall have jurisdiction to hear or consider" any habeas claim filed by an alien detainee held by the Department of Defense at Guantanamo Bay, Cuba. It further bars jurisdiction

over "any other action against the United States or its agents relating to any aspect of the detention," for certain detainees, including those currently in military custody.

On January 5, 2006, this Court ordered supplemental briefing on the impact of this new Act on the pending *Al Odah/Boumediene* detainee appeals (Nos. 05-5062, 05-5063, 05-5064, 05-5095 through 05-5116). This Court's resolution of the jurisdictional issue in those appeals will potentially be dispositive of the present appeals as well. While petitioners here are no longer deemed enemy combatants, they nonetheless fall with the scope of Section 1005 of the Detainee Treatment Act. The amendments to § 2241 withdraw jurisdiction over any "writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba," and further bar "jurisdiction over any other action * * * relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who * * * is currently in military custody." There is no question that petitioners are aliens being detained at Guantanamo Bay by the Department of Defense, and that they remain in military custody.

Because petitioners are encompassed within the scope of the Detainee Treatment Act, we submit that the Court and the parties would benefit from resolution of the construction of the Act in the *Al Odah/Boumediene* appeals before ordering any expedited briefing in the present case.

5. In any event, the highly expedited briefing schedule suggested by petitioners is not warranted.

a. Petitioners' almost three-week delay, and then suggested grant of two additional weeks to themselves to draft a brief, itself indicates that this is not a case warranting the type of extreme expedition sought (where the Government is granted only one week to file its appellee brief). *See Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995) ("[T]he failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury."). If the Court decides not to hold this appeal pending a ruling in *Al Odah/Boumediene* regarding the impact of Section 1005 of the Detainee Treatment Act, we obviously have no objection if petitioners wish to file their brief quickly. The Government, however, should still be given the 30 days it is allotted by rule to file its appellee brief.

b. The reasons cited by petitioners for extreme expedition do not support the grant of their motion. The primary reason cited is the "harm" of the alleged "constitutional conflict" caused by the denial of their habeas petition by the district court. Petitioners assert that a court must be able to grant habeas relief, even if such relief means releasing those formerly held as enemy combatants (with training from a Taliban-supplied military training facility) into a secure U.S. military facility abroad

or bringing them into the United States (notwithstanding that they have no immigration status or other right permitting them to enter this country). The district court's ruling is, however, clearly correct that such relief cannot be granted. In any event, that alleged institutional injury caused by this single district court ruling is not so severe as to deny the Government its full briefing time. Indeed, the complexity and gravity of the issues strongly counsels against constricting the ordinary briefing time on appeal.

c. Petitioners also argue that an alleged hunger strike by another detainee determined no longer to be an enemy combatant, Saddiq Turkestani -- who is not a petitioner in this case -- warrants expedited treatment for this case based on an alleged risk that the hunger strike could spread to petitioners. *See* Manning Declaration (attached to petitioners' motion). As an initial matter, the Court should not as a matter of principle respond to alleged emergencies created by detainees for purposes of manipulating the judicial system. *Cf. In re Sanchez*, 577 F. Supp. 7 (S.D.N.Y. 1983) (rejecting prisoner's attempt to use hunger strike to bring pressure on court to vacate contempt order). Furthermore, as noted above, Mr. Turkestani is *not* a party to this case or this appeal, and any alleged hunger strike he might have commenced is not relevant to the motion to expedite here. In any event, we are informed by officials at Guantanamo that there are *no* individuals determined no longer to be

enemy combatants at Guantanamo currently participating in a hunger strike.

d. Finally, petitioners cite the delay in their release. The district court, however, properly recognized that it could not order the military to set petitioners loose within a secure Naval Base in Cuba, and that equally it could not order individuals captured during an armed conflict abroad brought to this country. Petitioners will be released when a proper country of return is located. The United States continues to actively pursue all appropriate diplomatic options for the placement of petitioners. We can assure the Court that the United States Government has no interest in keeping petitioners in Guantanamo any longer than necessary.

In the meantime, petitioners have been granted substantial privileges while being detained at Guantanamo Bay. The delays being experienced by petitioners are obviously most unfortunate, but they are common during or at the end on an armed conflict, when trying to resettle those captured during the conflict. Historically, the United States and its allies have continued the detention of prisoners following the end of major conflicts to which the U.S. has been a party in order to properly resolve repatriation issues or effectuate resettlement where repatriation was not appropriate due to humanitarian or other concerns. For example, the United Nations Command continued to hold thousands of Chinese and North Korean prisoners of war following the end of the Korean War while it considered whether and how best to resettle them.

See Christiane Shields Delessert, REPATRIATION OF PRISONERS OF WAR TO THE SOVIET UNION DURING WORLD WAR II: A QUESTION OF HUMAN RIGHTS, IN WORLD IN TRANSITION: CHALLENGES TO HUMAN RIGHTS, DEVELOPMENT AND WORLD ORDER, 81 (Henry H. Han ed., 1979). And after the end of World War II, Allied Forces spent several years after the end of hostilities dealing with such issues with respect to prisoners of war they detained during the war. *See id.* at 80.[3]

---

[3] *See also* FINAL REPORT TO CONGRESS ON THE CONDUCT OF THE PERSIAN GULF WAR, Appendix O, at 708 (1992)(available at http://www.ndu.edu/library/epubs/cpgw.pdf) (explaining that the United States and its Coalition forces were dealing with such issues with respect to Iraqi prisoners for several months after the Persian Gulf War concluded in March of 1991).

CONCLUSION

For the foregoing reasons, this Court should deny the motion to expedite.

Respectfully submitted,

DOUGLAS N. LETTER
(202) 514-3602

ROBERT M. LOEB
(202) 514-4332
Attorneys, Appellate Staff
Civil Division, Room 7268
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

January 18, 2006

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2006, I served the foregoing "OPPOSITION TO MOTION TO EXPEDITE APPEAL" upon lead counsel of record by causing copies to be sent by first-class mail and by e-mail transmission:

Susan Baker Manning
BINGHAM McCUTCHEN LLP
1120 20th Street, NW
Suite 800
Washington, D.C. 20036-3406

P. Sabin Willett
Rheba Rutkowski
Neil McGaraghan
Jason Pinney
BINGHAM McCUTCHEN LLP
150 Federal Street
Boston, MA 02110-1726

_____

Robert M. Loeb,
Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

***In re PRO SE GUANTANAMO BAY DETAINEE CASES*:**

KHIALI-GUL v. GEORGE W. BUSH, *et al.*	Civil Action No. 05-CV-0877 (JR)
RAHMATTULLAH v. GEORGE W. BUSH, *et al.*	Civil Action No. 05-CV-0878 (CKK)
TAJ MOHAMMAD v. GEORGE W. BUSH, *et al.*	Civil Action No. 05-CV-0879 (RBW)
HAJI NASRAT v. GEORGE W. BUSH, *et al.*	Civil Action No. 05-CV-0880 (ESH)
MOHAMEDUO OULD SLAHI v. GEORGE W. BUSH, *et al.*	Civil Action No. 05-CV-0881(RWR)
FAZIL RAHMAN v. GEORGE W. BUSH, *et al.*	Civil Action No. 05-CV-0882 (GK)
KARIN BOSTAN v. GEORGE W. BUSH, *et al.*	Civil Action No. 05-CV-0883 (RBW)
MUHIBULLAH v. GEORGE W. BUSH, *et al.*	Civil Action No. 05-CV-0884 (RMC)
ALIF MOHAMMAD v. GEORGE W. BUSH, *et al.*	Civil Action No. 05-CV-0885 (GK)
ABDUL WAHAB v. GEORGE W. BUSH, *et al.*	Civil Action No. 05-CV-0886 (EGS)
CHAMAN v. GEORGE W. BUSH, *et al.*	Civil Action No. 05-CV-0887 (RWR)
NAZUL GUL v. GEORGE W. BUSH, *et al.*	Civil Action No. 05-CV-0888 (CKK)
YASIN MUHAMMED BASARDH v. GEORGE W. BUSH, *et al.*	Civil Action No. 05-CV-0889 (ESH)
SHARBAT KHAN v. GEORGE W. BUSH, *et al.*	Civil Action No. 05-CV-0890 (RMC)
NASRULLAH v. GEORGE W. BUSH, *et al.*	Civil Action No. 05-CV-0891 (RBW)
ALI HUSSIAN MOHAMMAD MUETY SHAABAN v. GEORGE W. BUSH, *et al.*	Civil Action No. 05-CV-0892 (CKK)
MOHAMMAD MUSTAFA SOHAIL v. GEORGE W. BUSH, *et al.*	Civil Action No. 05-CV-0993 (RMU)

KASIMBEKOV KOMOLIDDEN TOHIRJANOVICH v. GEORGE W. BUSH, *et al.*	)	Civil Action No. 05-CV-0994 (RCL)
MOHAMEDOU OULD SLAHI SLAHI v. GEORGE W. BUSH, *et al.*	)	Civil Action No. 05-CV-0995 (GK)
AKHTEYAR MOHAMMED v. GEORGE W. BUSH, *et al.*	)	Civil Action No. 05-CV-0996 (JR)
KHUDAIDAD v. GEORGE W. BUSH, *et al.*	)	Civil Action No. 05-CV-0997 (PLF)
ARKAN MOHAMMAD GHAFIL AL KARIN v. GEORGE W. BUSH, *et al.*	)	Civil Action No. 05-CV-0998 (RMU)
ASIM BEN THABIT AL KHALAQI v. GEORGE W. BUSH, *et al.*	)	Civil Action No. 05-CV-0999 (RBW)
ABIB SARAJUDDIN v. GEORGE W. BUSH, *et al.*	)	Civil Action No. 05-CV-1000 (PLF)
ABDULLAH MOHAMMED KAHN v. GEORGE W. BUSH, *et al.*	)	Civil Action No. 05-CV-1001 (ESH)
AKHTAR MOHAMMAD v. GEORGE W. BUSH, *et al.*	)	Civil Action No. 05-CV-1002 (EGS)
HABIBULLAH MANGUT v. GEORGE W. BUSH, *et al.*	)	Civil Action No. 05-CV-1008 (JDB)
ADEL HASSAN HAMAD v. GEORGE W. BUSH, *et al.*	)	Civil Action No., 05-CV-1009 (RCL)
MOHABAT KHAN v. GEORGE W. BUSH, *et al.*	)	Civil Action No. 05-CV-1010 (RJL)
ABDUL ZUHOOR v. GEORGE W. BUSH, *et al.*	)	Civil Action No. 05-CV-1011 (JR)
SYED MUHAMMAD ALI SHAH v. GEORGE W. BUSH, *et al.*	)	Civil Action No. 05-CV-1012 (ESH)
ABDUL SALAAM v. GEORGE W. BUSH, *et al.*	)	Civil Action No. 05-CV-1013 (JDB)

RESPONDENTS' MOTION TO STAY PROCEEDINGS PENDING RELATED APPEALS AND FOR COORDINATION

For the reasons explained below, respondents move for a coordinated stay of proceedings in the above-captioned *pro se* Guantanamo Bay detainee cases,[1] pending resolution of all appeals in two other Guantanamo Bay detainee cases, *Khalid et al. v. Bush*, No. 04-CV-1142 (RJL), 355 F. Supp.2d 311 (D.D.C. 2005), *appeals docketed*, Nos. 05-5062, 05-5063 (D.C. Cir. Mar. 2, 2005), and *In re Guantanamo Detainee Cases*, No. 02-CV-0299, *et al.*, 355 F. Supp.2d 443 (D.D.C. 2005), *appeal on petition for interlocutory appeal*, No. 05-5064 (D.C. Cir.). The pending appeals will address the core issues in the above-captioned cases and, thus, determine how the cases should proceed, if at all. As every Judge who has considered this issue has concluded, a stay of proceedings is therefore appropriate.[2]

BACKGROUND

The above-captioned cases are among more than 30 individual *pro se* cases filed by detainees at the United States Naval Base, Guantanamo Bay, Cuba ("Guantanamo Bay"). A total of approximately 92 cases have been filed by or on behalf of approximately 200 detainees at Guantanamo Bay and are pending in this Court. The above-captioned *pro se* cases were filed through mailings by detainees to the Court. So far several judges of the Court have issued orders

---

[1] Five of the above-captioned cases, *Rahmattulah v. Bush*, No. 05-CV-0878 (CKK); *Gul v. Bush*, No. 05-CV-0888 (CKK); *Shaaban v. Bush*, No. 05-CV-0892 (CKK); *Mangut v. Bush*, No. 05-CV-1008 (JDB); and *Salaam v. Bush*, No. 05-CV-1013 (JDB), have already been stayed. *See infra* note 3. This motion is being submitted in those cases only for purposes of seeking coordination and not for purposes of seeking a stay.

[2] Due to the extraordinary circumstances presented by these *pro se* cases, *see infra*, respondents' counsel did not confer with each of the *pro se* petitioners regarding this motion, but it is presumed that petitioners oppose the motion.

pertaining to certain *pro se* cases before them. Judges Kollar-Kotelly and Bates have already stayed cases before them pending the Court of Appeals resolution of the *Khalid* and *In re Guantanamo Detainee Cases* appeals.[3] Judge Roberts has set a schedule for respondents to file and serve "a statement showing why the Writ of *Habeas Corpus* should not issue."[4] And Judge Robertson has ordered respondents to "make a return certifying the true cause of petitioner's detention" in the cases before him.[5]

Almost three dozen non-*pro se* Guantanamo Bay detainee cases have been stayed pending the *Khalid* and *In re Guantanamo Detainee Cases* appeals; no Judge of the Court who so far has addressed the issue has refused to stay such a case.[6]

---

[3] *See* Order (May 18, 2005), *Rahmattulah v. Bush*, No. 05-CV-0878 (CKK) (staying case; requiring factual return after decision from Court of Appeals in *Khalid* and *In re Guantanamo Bay Detainee Cases*); Order (May 18, 2005), *Gul v. Bush*, No. 05-CV-0888 (CKK) (same); Order (May 18, 2005), *Shaaban v. Bush*, No. 05-CV-0892 (CKK) (same); Order (May 25, 2005), *Mangut v. Bush*, No. 05-CV-1008 (JDB)(staying case); Order (May 25, 2005), *Salaam v. Bush*, No. 05-CV-1013 (JDB) (same).

[4] *See* Order (May 11, 2005), *Slahi v. Bush*, No. 05-CV-0881 (RWR); Order (May 11, 2005), *Chaman v. Bush*, No. 05-CV-0887 (RWR).

[5] *See* Order (May 11, 2005), *Khiali-Gul v. Bush*, No. 05-CV-0877 (JR); Order (May 27, 2005), *Mohammad v. Bush*, No. 05-CV-0996 (JR); Order (May 27, 2005), *Zuhoor v. Bush*, No. 05-CV-1011 (JR) .

[6] *See, e.g.*, *El-Mashad v. Bush*, No. 05-CV-0270 (JR) (dkt. no. 29); *Al-Wazan v. Bush*, No. 05-CV-0329 (PLF) (dkt. no. 15); *Ameziane v. Bush*, No. 05-CV-0392 (ESH) (dkt. no.12); *Sliti v. Bush*, No. 05-CV-0429 (RJL) (dkt. no. 5); *Kabir v. Bush*, No. 05-CV-0431 (RJL) (dkt. no. 10); *Qayed v. Bush*, No. 05-CV-0454 (RMU) (dkt. no. 4); *Al Rashaidan v. Bush*, No. 05-CV-0586 (RWR) (dkt. no. 10); *Battayev v. Bush*, No. 05-CV-0714 (RBW) (dkt. no. 12).

ARGUMENT

A coordinated stay of these *pro se* cases is appropriate. The *Khalid* and *In re Guantanamo Detainee Cases* cases involve decisions of Judges Leon and Green, respectively, regarding the claims, if any, available to Guantanamo Bay detainees. The appeals of those cases thus will address the core issues in these *pro se* cases, including whether Guantanamo Bay detainees have judicially enforceable rights under the Constitution, statutes, or various international treaties. Those appeals, therefore, will determine how the Guantanamo Bay detainee cases, including these *pro se* cases, should proceed, if at all. It makes no sense for these cases to proceed in advance of resolution of the appeals; further proceedings would require the expenditure of judicial and other resources that may be avoided as a result of the appeals, and, in any event, such proceedings very likely would have to be revisited or relitigated when the Court of Appeals provides guidance regarding handling of the claims in these Guantanamo Bay detainee cases. Indeed, Judges Kollar-Kotelly and Bates have recognized these issues and stayed the *pro se* cases before them pending a decision from the Court of Appeals.[7]

---

[7] The Court has the authority to stay proceedings in habeas cases, even prior to the filing of a response. Pursuant to the Rules Governing Section 2254 Cases in the United States District Courts (the "2254 Rules"), which are applicable to petitions for writ of habeas corpus other than those arising under 28 U.S.C. § 2254, such as the petitions in these cases, *see* 2254 Rule 1(b), a court may extend the deadline for responses to habeas petitions beyond the time limits set forth in 28 U.S.C. § 2243 — the 2254 Rules do not indicate a fixed deadline for responding to habeas petitions, and they supersede the time limits set forth in 28 U.S.C. § 2243. Rule 4 provides that "the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order. . . ." *See Bleitner v. Welborn*, 15 F.3d 652, 653-54 (7th Cir. 1994) ("[T]he Rules Governing Section 2254 Cases in the United States District Courts, which have the force of a superseding statute, 28 U.S.C. § 2072(b) . . . loosened up the deadline for responses. Rule 4 leaves it up to the district court to fix the deadline."); *Castillo v. Pratt*, 162 F. Supp. 2d 575, 577 (N.D. Tex. 2001) (denying § 2241 petitioner's request for expedited consideration because "[t]he discretion afforded by Rule 4 of the 2254 Rules "prevails" over the strict time limits of 28 U.S.C. § 2243"). *See also Landis v. North American*

A coordinated stay should also include a stay on any requirement, including any requirement previously imposed by Court order, *see supra* notes 4 & 5, that respondents submit any kind of factual return or other return to the *pro se* petitions. Aside from the fact that the Court of Appeals, in *Khalid* and *In re Guantanamo Detainee Cases,* will be considering the proper scope of these habeas proceedings, including whether these cases can be dismissed without reference to specific factual returns for petitioners, little utility would be served by requiring respondents to submit factual returns at this time. In those detainee cases in which factual returns have been required and filed, such returns have typically consisted of records of proceedings before the Combatant Status Review Tribunal ("CSRT"), which the military uses to review and confirm detainees' ongoing status as enemy combatants subject to detention. Such returns include both classified and unclassified material, and often a full explanation of the reasons justifying the detention of a particular detainee necessarily involves classified or otherwise protected information that, pursuant to military rules and/or the Protective Orders entered in various detainee habeas cases, may not be shared with a detainee (whose detention was initiated because he was believed to pose a threat or danger to the security of the Nation and its troops or citizens).[8]

Co., 299 U.S. 248, 254-55 (1936) ("The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."); *id.* at 256 (noting propriety of stay in cases "of extraordinary public moment").

[8] A detainee's counsel may have access to classified and protected materials in a factual return pertaining to the detainee, but only after counsel obtains a security clearance and otherwise complies with the protective order made applicable in other Guantanamo Bay detainee cases, which prohibits the sharing of classified information with a detainee. *See* November 8, 2004 Amended Protective Order and Procedures for Counsel Access To Detainees at the United States Naval Base In Guantanamo Bay, Cuba, ¶ 30, *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004).

With respect to information supporting detention that can be shared with a detainee, each detainee has already had the opportunity to participate in the CSRT process, and during that process, an unclassified summary of the evidence supporting the detainee's classification as an enemy combatant was made available to the detainee in advance of the CSRT hearing. *See* Memorandum dated July 29, 2004 regarding Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba, Encl. (1) ¶¶ F(8), H(5) (available online at: www.defenselink.mil/news/Jul2004/d20040730comb.pdf). A detainee also would have been permitted to attend and testify in the open portions of the CSRT proceedings. *See id.* ¶ F(3). There would be little utility in requiring respondents to rehash in a return information the detainee already had the opportunity to learn, especially when proceedings in these cases otherwise should be stayed pending the appeals.

A coordinated stay, including a stay on any kind of return to the petition, would also be warranted to the extent it would be appropriate to attempt to find volunteer counsel for any of the *pro se* petitioners who desire such counsel. These *pro se* cases were presumably filed as a result of notifications provided by the Department of Defense ("DoD") informing detainees that they could seek review of their detention by petitioning the Court. Petitioners, however, are likely unfamiliar with United States law and the American legal system, typically do not speak or write English, and have access to the Court only through mail and not the Court's electronic filing system. Given these factors, as well as the fact that petitioners are not permitted access to classified information supporting their detention, recruitment of volunteer counsel for petitioners

who desire counsel may be appropriate.[9] A coordinated stay of the cases would permit any such efforts to go forward and promote efficiency in the cases.

CONCLUSION

For the foregoing reasons, the Court should stay further proceedings in these *pro se* cases, including any requirement for a return to the petitions, pending resolution of the appeals in *Khalid* and *In re Guantanamo Detainee Cases*.

Dated: June 3, 2005

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

DAVID B. SALMONS
Assistant to the Solicitor General

DOUGLAS N. LETTER
Terrorism Litigation Counsel

[9] For its part, DoD is in discussions with an attorney organization regarding recruiting volunteer counsel for *pro se* petitioners who may desire representation.

/s/ Terry M. Henry
JOSEPH H. HUNT
VINCENT M. GARVEY
TERRY M. HENRY
JAMES J. SCHWARTZ
PREEYA M. NORONHA
ROBERT J. KATERBERG
NICHOLAS J. PATTERSON
ANDREW I. WARDEN
EDWARD H. WHITE
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Tel: (202) 514-2000

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2005, I caused a copy of the foregoing Respondents' Motion to Stay Proceedings Pending Related Appeals and for Coordination to be served via U.S. Mail, First Class postage prepaid, on the petitioners in these cases at the following address:

Camp Delta; Guantanamo Bay
Washington, D.C. 20355

/s/ Terry M. Henry
TERRY M. HENRY
United States Department of Justice
Civil Division, Federal Programs Branch

One of the Attorneys for Respondents