[ORAL ARGUMENT HELD SEPTEMBER 8, 2005 AND 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 REPLY BRIEF OF PETITIONERS BOUMEDIENE, ET AL., AND KHALID REGARDING THE MILITARY COMMISSIONS ACT OF 2006

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November 20, 2006

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY PROVISIONS

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

GLOSSARY

ARB	Administrative Review Board
AUMF	Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)
Boumediene DTA Br.	Corrected Supplemental Brief of Petitioners Boumediene, et al., and Khalid Regarding Section 1005 of the Detainee Treatment Act of 2005 (Mar. 15, 2006)
Boumediene MCA Br.	Supplemental Brief of Petitioners Boumediene, et al., and Khalid Regarding the Military Commissions Act of 2006 (Nov. 1, 2006)
Boumediene Merits Br.	Corrected Joint Brief of Appellants (May 3, 2005)
Boumediene Merits Reply	Joint Reply Brief of Appellants (June 8, 2005)
CSRT	Combatant Status Review Tribunal
DTA	Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680
Gov't MCA Br.	Government's Supplemental Brief Addressing the Military Commissions Act (Nov. 13, 2006)
MCA	Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600

SUMMARY OF ARGUMENT

The MCA does not eliminate habeas jurisdiction in this case. Congress's failure to mention habeas in section 7(b), viewed in light of the express habeas-repealing language in section 3(a) and drafting history indicating that it rejected such language for section 7(b), dooms the Government's contention that the MCA strips habeas jurisdiction over pending cases. *See infra* Part I.

The MCA, as interpreted by the Government, violates the Suspension Clause. The Government's reliance on *Eisentrager* is misplaced, as the Supreme Court established in *Rasul*. And the Government's attempt to equate CSRTs and military commission proceedings fails given that Petitioners have not been charged with any crime triable by commission, let alone received a fair trial. The scope of the habeas review due to Petitioners is far greater than that due to an adjudicated war criminal who mounts a collateral attack on a conviction after a full military commission proceeding. The limited review under the DTA of an unfair CSRT procedure is not an adequate substitute for the searching habeas review that the common law gave to persons who—like Petitioners—were imprisoned by the Executive without charge. *See infra* Part II.

ARGUMENT

I. THE MCA DOES NOT APPLY TO PENDING HABEAS CASES

The Government's arguments cannot be reconciled with the text and structure of the MCA or established canons of interpretation.

1. Congress must employ "specific and unambiguous statutory directives to effect a repeal" of habeas in pending cases. *INS v. St. Cyr*, 533 U.S. 289, 299, 300 (2001); *see also id.* at 327 (Scalia, J., dissenting) (describing the *St. Cyr* test as "a superclear statement" rule "unparalleled in any other area of our jurisprudence"). Although MCA § 7(a) purports to repeal habeas, it nowhere states that it applies retroactively to pending cases. The fact that the new 28 U.S.C. § 2241(e)(1) (added by MCA § 7(a)) refers to "habeas" (Gov't MCA Br. 5) is insufficient; the analogous DTA section also referenced "habeas," but it did not apply retroactively. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2762-2769 (2006).

The Government claims that section 7(b), which expressly applies only to cases "which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001," applies not only to the category of cases described by substantially identical language in 28 U.S.C. § 2241(e)(2), but also to habeas cases described in section 2241(e)(1). Gov't MCA Br. 6-7. But section 7(b) nowhere mentions

habeas cases—as *St. Cyr* requires—and that interpretation would render much of section 7(b) superfluous.

If Congress had intended that section 7(b) apply to "'all' of the cases described in both parts of section 7(a)" (Gov't MCA Br. 8), it simply would have provided that "the amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act." But Congress added a "which" clause containing 27 words that closely track the category of cases mentioned in section 2241(e)(2), without any reference to the habeas cases mentioned in section 2241(e)(1). The only way to give meaning to those words—which account for nearly half of section 7(b)—is to limit the MCA's retroactive effect to the cases referenced in section 2241(e)(2). *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute." (citation and internal quotation marks omitted)).[1]

[1] The doctrine of constitutional avoidance also favors this reading. Contrary to the Government's argument (MCA Br. 11-12), the judicial interest in avoiding premature decision of difficult constitutional issues is not diminished by the possibility that the issues might arise in later cases. *See United States v. Raines*, 362 U.S. 17, 21 (1960) ("This Court . . . has rigidly adhered [to the rule] never to anticipate a question of constitutional law in advance of the necessity of deciding it.").

2. Congress knew how to make explicit reference to pending habeas cases in the MCA—it did so in section 3(a), which added new 10 U.S.C. § 950j.[2] The Government contends section 3(a) is "[j]ust like section 7" (MCA Br. 7 n.3), but section 3(a) differs dramatically in the only respect that matters: it expressly precludes jurisdiction over pending cases brought under "section 2241 of title 28 or any other habeas corpus provision," MCA § 3(a) (adding 10 U.S.C. § 950j(b)). By contrast, the retroactivity language in section 7(b) is not merely in a different "clause" from the reference to habeas in section 7(a) (Gov't MCA Br. 7 n.3), but in a different *sentence* in a different *subsection*. The Government's concession that sections 3 and 7 otherwise "use very similar language" implicitly confesses that the conspicuous difference between the sections must be given effect. *See Hamdan*, 126 S. Ct. at 2765 ("[A] negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.").

3. Lacking textual support, the Government relies primarily on speeches on the House and Senate floor. But "[i]mplications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction." *St. Cyr*, 533 U.S. at 299;

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[2] *See* 10 U.S.C. § 950j ("[N]otwithstanding any other provision of law (*including section 2241 of title 28 or any other habeas corpus provision*), no court, justice, or judge shall have jurisdiction to hear or consider *any claim or cause of action whatsoever . . . pending on . . . the date of the enactment of the [MCA]*, relating to the prosecution, trial, or judgment of a military commission under this chapter[.]" (emphasis added)), added by MCA § 3(a).

see also Castaneda-Gonzalez v. INS, 564 F.2d 417, 424 (D.C. Cir. 1977) ("Statements by individual legislators should generally be given little weight when searching for the intent of the entire legislative body."). Moreover, Congress rejected two earlier versions of the MCA that contained express language and would have repealed jurisdiction. A bill reported from the House Judiciary Committee stated that "no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action, *including an application for a writ of habeas corpus, pending on . . . the date of enactment* of the [MCA]." H.R. 6054, 109th Cong. § 5 (2006) (emphasis added). Effectively identical language was proposed in the Senate. *See* S. 3886, 109th Cong. § 5 (2006) ("[N]o court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action, *including an application for a writ of habeas corpus, pending on . . . the date of enactment* of this Act." (emphasis added)). That Congress failed to enact this language—while enacting precisely such language in section 3(a)—confirms that section 7 of the MCA does not affect these preexisting habeas cases. "Congress' rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation." *Hamdan*, 126 S. Ct. at 2766.[3]

[3] The MCA's forward-looking habeas stripping is not "redundant of the DTA." Gov't MCA Br. 9. The DTA applied only to aliens "detained . . . at Guantanamo Bay." DTA § 1005(e)(1). The MCA extends to aliens "detained by

II. THE MCA VIOLATES THE SUSPENSION CLAUSE

The Government again ignores both the Supreme Court's recognition of the special status of Guantanamo and the patent unfairness of the CSRT process. The Suspension Clause applies, the DTA review procedure is not an adequate substitute for habeas, and—as the Government proposes to apply it—the MCA is unconstitutional.

A. *Eisentrager* Is Inapplicable To Guantanamo Prisoners

Recycling its familiar misinterpretation of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Government ignores *Rasul*'s conclusion that Guantanamo prisoners differ materially from the *Eisentrager* petitioners.

1. *Rasul* held that *Eisentrager*'s constitutional conclusion was based on "six critical facts" that were not all present in the case of Guantanamo prisoners. *Rasul v. Bush*, 542 U.S. 466, 475 (2004); *see also id.* at 476 ("all six of the facts" were "critical to [*Eisentrager*'s] disposition"). The Court distinguished *Eisentrager*:

> "Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned

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the United States." MCA § 7(a). The Government itself has relied on this difference in the habeas case of a prisoner held in the United States. *See* Respondent-Appellee's Motion to Dismiss for Lack of Jurisdiction and Proposed Briefing Schedule 3, *Al-Marri v. Wright* (4th Cir. Nov. 13, 2006) (No. 06-7427).

> in territory over which the United States exercises exclusive jurisdiction and control."

Id. at 476; *see also* Boumediene Merits Br. 15-20; Boumediene Merits Reply 7-10. While the Court noted a further distinction based on statutory habeas jurisdiction, *see id.* at 476-479, that discussion further supported the Court's initial conclusion that *Eisentrager* was inapplicable on its terms. *See id.* at 476 ("*Not only* are petitioners differently situated from the *Eisentrager* detainees . . . ." (emphasis added)). Whatever consequences the MCA may have for the *Rasul* Court's second (statutory) basis for distinguishing *Eisentrager*, it in no way affected the first (constitutional) basis of distinction.[4]

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[4] As the Boumediene Petitioners have shown, *Rasul* confirmed that Guantanamo prisoners may vindicate rights under the Constitution. *See* 542 U.S. at 484 n.15; Boumediene Merits Br. 4-13. The Court cited Justice Kennedy's concurrence in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and "cases cited therein." *Rasul*, 542 U.S. at 484 n.15. Those cases show that the availability of constitutional rights outside the United States depends not on citizenship, but on the Government's relationship to the territory. *See, e.g.*, *Downes v. Bidwell*, 182 U.S. 244, 282-283 (1901) ("Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property."). Fundamental rights apply to Petitioners imprisoned at Guantanamo—a territory under exclusive United States control—because "[i]t is the locality that is determinative of the application of the Constitution . . . and not the status of the people who live in it." *Ralpho v. Bell*, 569 F.2d 607, 619 & n.65 (D.C. Cir. 1977) (citation and internal quotation marks omitted). The Suspension Clause protects habeas as one of the "greate[st] securities to liberty and republicanism." Federalist No. 84 (Hamilton). The Boumediene Petitioners are therefore protected by the Suspension Clause.

2. The Government ignores Justice Kennedy's analysis of *Eisentrager*, which also noted that the facts at Guantanamo are "distinguishable from those in *Eisentrager*." *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring in the judgment).

Justice Kennedy reasoned that the United States' absolute control over Guantanamo "*extend[s] the 'implied protection' of the United States to it.*" *Id.* (quoting *Eisentrager*, 339 U.S. at 777-778) (emphasis added). *Eisentrager* used the words "implied protection" to describe the basis for an alien's "privilege of litigation" in U.S. courts. *Eisentrager*, 339 U.S. at 777-778. By using those same words, Justice Kennedy concluded that prisoners at Guantanamo are, for constitutional purposes, differently situated from the *Eisentrager* prisoners.

Justice Kennedy also noted that *Eisentrager* involved "proven enemy aliens," *Rasul*, 542 U.S. at 486 (Kennedy, J., concurring in the judgment), who had been "tried and convicted by a military commission of violating the laws of war and were sentenced to prison terms," *id.* at 488.[5] Petitioners, by contrast, are being held under a system that "allows friends and foes alike to remain in detention," which presents a "weaker case of military necessity and much greater alignment with the traditional function of habeas corpus." *Id.* at 488.

3. The Suspension Clause applies because habeas was available to prisoners in Petitioners' situation in 1789, whereas it would not have been available to the

[5] *See also Eisentrager*, 339 U.S. at 778 (stating that the *Eisentrager* prisoners "were actual enemies, active in the hostile service of an enemy power").

Eisentrager petitioners. *See Rasul*, 542 U.S. at 482 ("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.'" (quoting *Ex parte Mwenya*, (1960) 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M.R.))). *Rasul* decisively rejected the assertion that Petitioners could not have invoked the writ at common law because they are "aliens outside the United States" (Gov't MCA Br. 15). *See Rasul*, 542 U.S. at 482 n.14 (rejecting the dissent's claim that "habeas corpus has been categorically unavailable to aliens held outside sovereign territory").

Upholding habeas jurisdiction for Petitioners is "consistent with the historical reach of the writ of habeas corpus," *id.* at 481, and "remains true to the reasoning of *Eisentrager*," *id.* at 486 (Kennedy, J., concurring in the judgment).[6]

B. The MCA Does Not Provide An Adequate Substitute For Habeas

Petitioners have demonstrated that DTA § 1005(e)(2) review, as construed by the Government, is inadequate when compared to habeas, not least because the

[6] The Government (MCA Br. 15) cites two additional cases that do not involve habeas jurisdiction and thus are even less relevant than *Eisentrager*. *See Verdugo-Urquidez*, 494 U.S. at 261 (determining the applicability of the Fourth Amendment to search and seizure carried out in Mexico); *32 County Sovereignty Comm. v. Department of State*, 292 F.3d 797, 798-799 (D.C. Cir. 2002) (determining the nature of the process due to Irish entities designated as terrorist organizations under 8 U.S.C. § 1189). Those cases cannot overcome the clear conclusion of six Justices in *Rasul* that *Eisentrager* does not cut off habeas relief for persons imprisoned without charge at a location over which the United States exercises exclusive jurisdiction and control.

Government selectively assembled the CSRT record itself and now contends that the DTA compels near-complete deference to the Executive's resulting conclusions. *See* Boumediene MCA Br. 7-19.

The Government cites no law suggesting that such a procedure could adequately substitute for habeas where Petitioners have been imprisoned indefinitely without charge. The Suspension Clause does not abide the stacked deck of DTA § 1005(e)(2) review as a substitute for habeas.

1. The Government's effort to constrict the scope of habeas review incorrectly focuses on cases involving persons "convicted of war crimes by a military commission." Gov't MCA Br. 18 (citing *Yamashita v. Styer*, 327 U.S. 1 (1946); *Ex parte Quirin*, 317 U.S. 1 (1942); and *Eisentrager*, 339 U.S. at 786)).[7] The Government never disputes that the Boumediene Petitioners have not been charged with any crime or offense, let alone one triable by commission. Accordingly, such cases are not an appropriate reference point in determining

[7] The Government's contention (MCA Br. 20) that there is "controlling Supreme Court precedent specifying the nature of habeas review of a military tribunal decision" obscures the fact that it cites only military *commission* decisions involving cases of *admitted* enemy fighters charged with *war crimes*. Not one case addresses persons like Petitioners: not tried by commission, not admitted enemy fighters, and not charged with any crime.

whether the DTA procedure provides the same protections as common law habeas. *See* Boumediene DTA Br. 46; Boumediene MCA Br. 23.[8]

The habeas rights of persons imprisoned without charge have always been broader than those of persons convicted after full criminal proceedings. Criminal defendants, including those charged with war crimes, have the right to be notified of charges, to be represented by competent counsel, to confront accusers, and to present evidence—rights denied to Petitioners before the CSRT. The military commission in *Yamashita* heard 286 witnesses and the petitioner was represented by six attorneys. *See Yamashita*, 327 U.S. at 5; *see also Eisentrager*, 339 U.S. at 786 (prisoners were "formally accused of violating the laws of war and fully informed of particulars of these charges"); *Quirin*, 317 U.S. at 23 (petitioners were represented by counsel and had the opportunity to present evidence).[9]

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[8] Nor do the CSRTs meet the *Hamdi* plurality's discussion of acceptable procedures; *Hamdi* rested on the AUMF's definition of "enemy combatant," which was far narrower than that used by the CSRTs and did not encompass the Boumediene Petitioners. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 526 (2004). *Hamdi* also required a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker and representation by counsel—neither of which was afforded by the CSRTs. *See id.* at 533-539; Boumediene Merits Br. 43-51.

[9] The Government incorrectly asserts that habeas review in those (readily distinguishable) cases was "limited to the question whether the military commission had jurisdiction over the charged offender and offense" and excluded review of "other legal questions." Gov't MCA Br. 18. In fact, the Supreme Court also considered legal challenges to specific military commission procedures as inadequate under U.S. law. *See Yamashita*, 327 U.S. at 18-19 (considering on the merits challenge to prosecution's use of deposition testimony as well as other

The Department of Defense recently admitted that the CSRT "is not a criminal trial and is not intended to determine guilt or innocence." Ben Fox, *Report: Gitmo Detainees Denied Witnesses*, Associated Press (Nov. 16, 2006) (reporting statement of spokesman Navy Cmdr. Jeffrey Gordon).[10] Petitioners' indefinite imprisonment without charge is precisely the situation in which the traditional protections of habeas "have been strongest." *St. Cyr*, 533 U.S. at 301.[11]

2. Habeas practice at common law (like today) allows a person imprisoned without charge "to present his own factual case to rebut the Government's return." *Hamdi*, 542 U.S. at 538. The Government does not contest that early English and American courts permitted habeas petitioners—including alleged prisoners of war—to present evidence controverting the return. *See* Boumediene MCA Br. 8-9 (citing cases).

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hearsay and opinion evidence); *Quirin*, 317 U.S. at 38-40 (considering on the merits challenge to lack of presentment by a grand jury and trial by jury).

[10] *Available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/11/16/AR2006111601285.html.

[11] The Government inaccurately cites *St. Cyr* for the proposition that "traditional habeas review" was confined to review of legal issues and "'the question whether there was some evidence to support the order.'" Gov't MCA Br. 19 (quoting *St. Cyr*, 533 U.S. at 306). That passage of *St. Cyr* did not discuss "traditional habeas review" at all, but rather habeas to "test the legality of his or her *deportation order*." *St. Cyr*, 533 U.S. at 306 (emphasis added). But, an alien who has been found deportable from this country—unlike Petitioners—has enjoyed "all opportunity to be heard upon the questions involving his right to be and remain in the United States." *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903).

Instead, the Government insists—again misapplying *Eisentrager*—that those cases are inapposite because they do not involve aliens held "outside sovereign territory." Gov't MCA Br. 24. However, Petitioners' cases are precisely apposite because Guantanamo is "in every practical respect a United States territory." *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring in the judgment).

Persons detained in sovereign territory (or territory that is "in every practical respect" sovereign) were entitled to present evidence at common law habeas. *See, e.g., Goldswain's Case*, (1778) 96 Eng. Rep. 711, 712 (C.P.). The Government suggests (MCA Br. 24) that in *Goldswain*, in which the prisoner was pressed into military service under a warrant of the Board of Admiralty, the issue reviewed on habeas had not been "adjudicated." But the CSRTs provide no more meaningful "adjudication" than the Board of Admiralty, which was essentially an executive agency serving the King. Like Goldswain, the Boumediene Petitioners—who have

had no meaningful hearing despite nearly five years in prison—are entitled to present their case on habeas.[12]

Nor do the Government's claims that Petitioners are "enemy aliens" matter, because Petitioners vigorously dispute that characterization. The Government does not dispute that English habeas decisions allowed prisoners to present their own evidence demonstrating that they were not alien enemies. *See R. v. Schiever*, (1750) 97 Eng. Rep. 551, 551 (K.B.) (habeas motion grounded on an affidavit and supported by the sworn testimony of another witness); *Case of Three Spanish Sailors*, (1779) 96 Eng. Rep. 775, 775 (C.P.) (the application was supported by "[a]n affidavit made in Spanish, but translated and sworn to be a just translation"). The Government asserts (MCA Br. 24 & n.11) that those petitions were denied, but fails to note that those denials were *on the merits*—petitioners' own evidence demonstrated they were lawfully detained prisoners of war. *See Schiever*, 97 Eng. Rep. at 552 ("[T]he Court thought this man, upon his own shewing, clearly a

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[12] Referring to *Goldswain's Case*, the Government incorrectly states (MCA Br. 25 n.13) that "the court held" that a petitioner could not controvert the jailor's return. In fact, the quoted language is not from any judicial opinion, but is a comment in a footnote by the case reporter. *See* 96 Eng. Rep. at 713 n.(e). Moreover, the reporter's tentative statement pertains to attacks on judgments of courts of competent jurisdiction, not to executive detentions. This is made clear by the court's actual decision: "they declared, that they could not wilfully shut their eyes against such facts as appeared on the affidavits, but which were not noticed on the return." *Id.* at 712; *see also* R.J. Sharpe, *The Law of Habeas Corpus* 66 (2d ed. 1989) (noting that "courts were especially ready to consider the facts in cases of impressment").

prisoner of war, and lawfully detained as such."); *Spanish Sailors*, 96 Eng. Rep. at 776 ("[T]hese men, upon their own shewing, are alien enemies and prisoners of war.").

Chief Justice Marshall *granted* a habeas petition brought on behalf of an enemy alien. *See* Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon*, 9 Green Bag 2d 39, 41-42 (2005) (reporting *United States v. Williams* (Marshall, Circuit Justice, C.C.D. Va. Dec. 4, 1813) (cited at Boumediene DTA Br. 40 n.13). In that case, Chief Justice Marshall ordered the enemy alien discharged from custody not because of any constitutional or statutory violation, but because the alien's confinement was not authorized by applicable regulations. *See id.* The decision demonstrates both that habeas was available to enemy aliens and that it included review of all challenges to the detention, regardless whether the alien could claim constitutional or statutory rights.[13]

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[13] The Government twice quotes *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9,895), an admiralty case that has nothing to do with habeas. *Moxon* held that British shipowners could not invoke U.S. admiralty jurisdiction to recover a ship taken as a prize by the French in the territorial waters of the United States. In dicta and without support or elaboration, the court wrote that English courts would not "grant a habeas corpus in the case of a prisoner of war." *Id.* at 947. This statement, perhaps correct with respect to *admitted* prisoners of war, is plainly wrong with respect to those disputing their status. *See generally Schiever*, 97 Eng. Rep. at 552; *Spanish Sailors*, 96 Eng. Rep. at 776; *see also* Sharpe, *supra*, at 116 (stating that habeas courts investigate whether a prisoner "is both in fact and in law" a prisoner of war).

3. The Government's reliance on the ARB procedure as a "route for the consideration of relevant new material" is misplaced. Gov't MCA Br. 27-28. No statute authorizes this Court to review an ARB decision or record. *See* Boumediene DTA Br. 49-51. The inadequacy of the DTA review procedure as a habeas substitute cannot be remedied by a separate military procedure that is unreviewable under the DTA or otherwise.

The ARBs have also proven incapable of considering new evidence submitted to them. The Boumediene Petitioners made detailed ARB submissions in early 2005 identifying exculpatory evidence learned though counsel's investigation.[14] Not one of the 2005 ARB summaries of unclassified evidence for any of the six Boumediene Petitioners even mentions that evidence. The ARBs ignored those submissions altogether; a habeas court would not have done so.

The Government asserts (MCA Br. 27-28) that new ARB evidence could trigger a new CSRT proceeding. However, any decision to hold a new CSRT appears to rest in the sole (potentially unreviewable) discretion of the Deputy Secretary of Defense, who has every incentive to prevent Petitioners from expanding the one-sided record created by the original CSRT. *See* 2006 ARB

[14] Counsel's ARB submissions were previously filed with the Court. *See* Memorandum in Support of Motion for Order Enjoining Appellees From Transferring Petitioners to Algeria Without Providing Counsel for Petitioners and the Court With 30 Days' Advance Notice, Ex. A (Sept. 21, 2005).

Procedures (Encl. 13).[15] Unsurprisingly, the detailed ARB submissions made by counsel for the Boumediene Petitioners have not moved the Deputy Secretary to convene new CSRTs.

4. The Government's remaining arguments are without merit. The claim that there is "no constitutional habeas right to factual re-examination of a court ruling" (Gov't MCA Br. 28) is irrelevant; the Petitioners have not had even a first court ruling regarding their imprisonment. Nor did recent limitations on successive criminal habeas petitions amount to "significant restrictions . . . on the writ of habeas corpus." *Id.* at 29. The very case the Government cites demonstrates that those restrictions fall well within the historical doctrine of "abuse of the writ." *Felker v. Turpin*, 518 U.S. 651, 664 (1996).[16]

Finally, the assertions that a habeas hearing for the Boumediene Petitioners would "'hamper the war effort'" (Gov't MCA Br. 20 (quoting *Eisentrager*, 339 U.S. at 779)) are unsupported and wrong. The Boumediene Petitioners, citizens of

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[15] *Available at* http://www.defenselink.mil/news/Aug2006/d20060809 ARBProceduresMemo.pdf.

[16] Like the elimination of the requirement of "producing the body," imposing conditions on second or successive habeas petitions in the criminal context does not infringe the right to an independent examination of Executive detention without charge, which is the "historical core" of habeas. *See St. Cyr*, 533 U.S. at 301; *see also* Boumediene MCA Br. 19-22. The MCA triggers the Suspension Clause because—if interpreted to apply retroactively—it will abolish *all* habeas review of Petitioners' uncharged detention. The Government does not suggest otherwise.

an allied nation that has requested their return, have been imprisoned for nearly five years without charge, under harsh conditions. They have endured violent abuse, lack adequate medical care, have been isolated from their families, and are suffering serious physical and mental deterioration due to the apparent hopelessness of their situation. The Boumediene Petitioners were taken into U.S. custody in a peaceful country—far from any war zone—and transported to a prison that is under complete U.S. control thousands of miles from any battlefield. The Government's pleas of supposed "military exigencies" requiring such treatment ring hollow. *Rasul*, 542 U.S. at 488 (Kennedy, J., concurring in the judgment).[17]

[17] The Government has not contested the Boumediene Petitioners' position that the MCA does not authorize their detention. *See* Boumediene MCA Br. 25-29.

CONCLUSION

For the foregoing reasons and those stated in prior briefing, jurisdiction in this case continues unaffected, and the judgment of the district court dismissing Petitioners' habeas petitions should be reversed.

Respectfully submitted,

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Dated: November 20, 2006

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(A)(7)(C)

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 4,530 words in length, which is within the 5,000 word limit set out in this Court's order of October 18, 2006.

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CERTIFICATE OF SERVICE

I, Russell Davis, hereby certify that on November 20, 2006, I filed and served the foregoing brief by causing an original and seventeen copies to be delivered by hand to the Court Security Office for filing with the Court and service on the following counsel:

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