[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 BRIEF OF PETITIONERS BOUMEDIENE, ET AL., AND KHALID REGARDING THE MILITARY COMMISSIONS ACT OF 2006

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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. Supplemental Amicus Curiae Brief Of The Oregon Federal Public Defender Habeas Corpus Counsel In Support Of Petitioners'/Appellants' Position On The Significance Of The Military Commissions Act Of 2006; and

2. Brief Of Amici Curiae Retired Federal Judges In Support Of Petitioners' Supplemental Brief Regarding The Military Commissions Act Of 2006.

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GLOSSARY

AUMF	Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)
Boumediene Merits Br.	Corrected Joint Brief of Appellants (May 3, 2005)
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)
CSRT	Combatant Status Review Tribunal
DTA	Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680
Gov't DTA Br.	Supplemental Brief of the Federal Parties Addressing the Detainee Treatment Act of 2005 (Feb. 17, 2006)
Habeas Scholars' Br.	Supplemental Brief Amici Curiae of British and American Habeas Scholars in Support of Petitioners Addressing Section 1005 of the Detainee Treatment Act of 2005 (Mar. 10, 2006)
MCA	Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600
3/22/06 Tr. [page]:[line]	Transcript of Oral Argument (Mar. 22, 2006)

Petitioners Boumediene, Nechla, Boudella, Bensayah, Ait Idir, Lahmar (the Boumediene Petitioners) and Khalid (together Petitioners) submit this brief pursuant to this Court's October 18, 2006 order.

STATUTES AND REGULATIONS

The relevant provisions of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (MCA), are set forth in the addendum to this brief. Other relevant statutory provisions are set forth in the addenda to the Boumediene Petitioners' corrected brief on the merits and the Government's supplemental brief regarding the DTA.

SUMMARY OF ARGUMENT

The MCA does not affect Petitioners' appeal with respect to either jurisdiction or merits. MCA section 7(b) lacks the requisite "clear statement" to repeal jurisdiction in pending *habeas* cases. *See infra* Part I.

If the MCA repealed habeas, it would violate the Suspension Clause because its only substitute for habeas is review of CSRT decisions in this Court under section 1005(e)(2) of the Detainee Treatment Act of 2005 (DTA), a procedure that (as construed by the Government) is manifestly inadequate when compared to the core protections that habeas corpus provided in 1789. *See infra* Part II.

The Government lacks statutory authority to imprison the Boumediene Petitioners indefinitely. They have not been charged with any offense triable by

any military commission, court martial, or court. The MCA does not grant authority to detain persons indefinitely without charge. *See infra* Part III.[1]

ARGUMENT

Although this brief discusses the "Military Commissions Act," this case does *not* involve military commissions. The Government claims the right to imprison the Boumediene Petitioners indefinitely *without ever charging or trying them*. For centuries, the writ of habeas corpus has shielded individuals against such arbitrary detention by requiring the Government to establish the legal and factual basis for confinement before a neutral judicial decision-maker.

The Framers were only too familiar with government attempts to hide unjust imprisonment and mistreatment from public view. They therefore directed that, except in circumstances not present here, persons imprisoned without charge must retain the right to obtain a court inquiry into the factual and legal bases for their imprisonment. The Government seeks nothing less than to replace habeas with a review process that places the Court wholly at the mercy of a "record" constructed by the Government and precludes the Boumediene Petitioners from presenting evidence demonstrating the unlawfulness of their imprisonment. No common law court before 1789, and certainly not the Framers, would have countenanced such a procedure in the case of a person imprisoned by the King without charge. And

[1] Petitioners incorporate by reference the arguments made in the brief of Petitioner-Appellees Al Odah, *et al.*, in Nos. 05-5064, 05-5095 through 05-5116.

neither the MCA nor the Suspension Clause permits this Court to ignore the merits of Petitioners' appeal.

I. THE MCA DOES NOT REPEAL HABEAS JURISDICTION IN PENDING CASES

Longstanding rules of construction dictate that the MCA does not repeal habeas jurisdiction in pending cases. First, "Congress must articulate specific and unambiguous statutory directives to effect a repeal" of habeas jurisdiction. *INS v. St. Cyr*, 533 U.S. 289, 299 (2001); *cf. Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764 (2006) (stating that a statute will not be held to revoke the Supreme Court's habeas jurisdiction "absent *an unmistakably clear statement* to the contrary" (emphasis added)). Second, "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." *Hamdan*, 126 S. Ct. at 2765. Third, a statute that would retroactively alter a party's rights in a pending case "does not govern absent clear congressional intent favoring such a result." *Id.* (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)). And fourth, the Court should avoid construing the MCA in a manner that would give rise to "substantial constitutional questions." *St. Cyr*, 533 U.S. at 300, *see also id.* at 326.

Section 7(a) purports to strip jurisdiction over two distinct categories of cases: (1) "an application for a writ of habeas corpus" filed by or on behalf of certain aliens, 28 U.S.C. § 2241(e)(1); and (2) "any other action against the United

States or its agents *relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement*" of such an alien, *id.* § 2241(e)(2) (emphasis added).

Section 7(b), which sets out the "effective date" of section 7(a), provides only that section 7(a) applies to pending cases that are in the *second* category—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." MCA § 7(b) (emphasis added). The MCA does not provide—much less contain an "unmistakably clear statement"—that section 7(a) repeals jurisdiction in *habeas* cases pending on the date of enactment.[2]

St. Cyr disposes of any argument that the MCA repealed jurisdiction over pending habeas cases. *St. Cyr* confirmed that Congress must express itself with clarity and precision to repeal habeas jurisdiction, and that habeas jurisdiction must remain in "'any cases not *plainly* excepted by law.'" *St. Cyr*, 533 U.S. at 298 (quoting *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102 (1869)) (emphasis added). There, a section entitled "Elimination of Custody Review by Habeas Corpus" did not repeal habeas jurisdiction because the operative text of the statute did not specifically mention habeas. *Id*. at 308-310. Section 7(b), which likewise does not

[2] The fact that section 7(b) states that section 7(a) "shall take effect on the date of the enactment of this Act" has no bearing on whether the MCA applies retroactively. *See Landgraf*, 511 U.S. at 257 ("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.").

reference habeas and addresses only the category of "other action[s]" included in new 28 U.S.C. § 2241(e)(2), does not satisfy *St. Cyr*.

Section 7(b) contrasts with section 3(a) of the MCA, which addresses habeas petitions brought by persons convicted by military commission. Section 3(a) added 10 U.S.C. § 950j, which provides that "notwithstanding any other provision of law (*including section 2241 of title 28 or any other habeas corpus provision*), no court, justice, or judge shall have jurisdiction to hear or consider *any claim or cause of action whatsoever . . . pending on . . . the date of the enactment of the [MCA]*, relating to the prosecution, trial, or judgment of a military commission under this chapter . . . ." 10 U.S.C. § 950j(b) (emphasis added). That section explicitly states that the jurisdiction-stripping provision applies to *habeas* cases pending on the date of enactment. Section 7(b) lacks similar language, and *St. Cyr* forecloses extending it to pending habeas cases by implication. *See St. Cyr*, 533 U.S. at 299 ("Implications from statutory text . . . are not sufficient to repeal habeas jurisdiction . . . ."). "[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." *Hamdan*, 126 S. Ct. at 2765. This Court must give effect to the difference between MCA §§ 3(a) and 7.

The MCA additionally fails to overcome the presumption against retroactive statutes. *See Hamdan*, 126 S. Ct. at 2764-2765. Because section 7(b) does *not*

purport to reach the habeas applications described in § 2241(e)(1) and makes no specific mention of habeas at all, the MCA does not contain the "unequivocal terms" required to affect habeas cases that arose prior to the MCA's enactment. *Twenty Per Cent. Cases*, 87 U.S. (20 Wall.) 179, 187 (1873).

A conclusion that the MCA does not affect jurisdiction in Petitioners' cases avoids substantial constitutional questions. *See St. Cyr*, 533 U.S. at 300; *see also id.* at 326 (rejecting habeas stripping where such a construction "would give rise to substantial constitutional questions"); *see infra* Part II. Indeed, the mere need to determine the extent of the Suspension Clause guarantee 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." *Id.* at 301 n.13. When "an alternative interpretation of the statute is 'fairly possible,'" the Court is "obligated to construe the statute to avoid such problems." *Id.* at 300 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

II. THE MCA VIOLATES THE SUSPENSION CLAUSE

Construing the MCA to remove habeas jurisdiction here would violate the Suspension Clause.[3] "[A]t 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*,

[3] "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." U.S. Const. art. I, § 9, cl. 2.

518 U.S. 651, 663-664 (1996)). Because the United States holds absolute control over Guantanamo, persons imprisoned in 1789 under like circumstances would have been able to invoke the common law writ. *See Rasul v. Bush*, 542 U.S. 466, 481-482 (2004); Boumediene DTA Br. 35-38; Habeas Scholars' Br. 4-7.

A. The MCA 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) (quotation omitted); *see also St. Cyr*, 533 U.S. at 305 ("a serious Suspension Clause issue would be presented" absent an adequate habeas substitute). If construed to repeal habeas in this case, the MCA would afford Petitioners only the procedure provided in "paragraph[ ] (2) . . . of section 1005(e) of the Detainee Treatment Act of 2005." MCA § 7(a) (adding 28 U.S.C. § 2241(e)(2)).

Review under DTA § 1005(e)(2) falls short of the core protections secured by the Suspension Clause. *See* Boumediene DTA Br. 41-55. Moreover, since the March 2006 argument regarding the DTA, the Government has consistently advanced constructions of § 1005(e)(2) review which confirm the inadequacy of that review as a habeas substitute.

1. A Habeas Petitioner May Offer Evidence Outside The Return, Which The Government Asserts Is Forbidden By The DTA

"Petitioners in habeas corpus proceedings . . . are entitled to careful consideration and *plenary processing* of their claims including *full opportunity for the presentation of the relevant facts*." *Harris v. Nelson*, 394 U.S. 286, 298 (1969) (emphases added); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (plurality opinion) (habeas "permits the alleged combatant to present his own factual case to rebut the Government's return").

These holdings echo the common law, which likewise permitted habeas petitioners to offer evidence supporting release. For example, in *Goldswain's Case*, (1778) 96 Eng. Rep. 711 (C.P.), a habeas petitioner was pressed into Admiralty service. The Admiralty's return failed to mention an exemption issued by the Navy Board, which the petitioner's counsel substantiated through affidavits. *See id.* The court relied on the affidavits, noting that they included information omitted from the return. *See id.* at 712.[4] Early American courts adopted the same practice. *See, e.g.*, *State v. Clark*, 2 Del. Cas. 578, 1820 WL 245, at *2 (Del. Ch. Aug. 6, 1820) (discharging a minor from the custody of the U.S. Army based on the minor's "suggestions . . . made against [the custodian's] return" and the

[4] *See also, e.g.*, *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); *see generally* Habeas Scholars' Br. 8-9.

testimony of his father, who was "sworn as a witness for him"). Aliens accused of being enemy soldiers had the same right to judicial consideration of their own evidence. *See, e.g.*, *R. v. Schiever*, (1750) 97 Eng. Rep. 551, 552 (K.B.) (considering affidavits submitted in support of an alien petitioner's habeas motion and concluding that "the Court thought this man, *upon his own showing*, clearly a prisoner of war" (emphasis added)); *Case of Three Spanish Sailors*, (1779) 96 Eng. Rep. 775, 776 (C.P.) (similar); Habeas Scholars' Br. 9.

Yet the Government contends that the DTA "limit[s] this Court's review to the record before the CSRT." Response in Opposition to Motion to Compel at 14, *Bismullah v. Rumsfeld* (No. 06-1197) (Aug. 2006) (attached as Annex 1) ("Gov't Response in *Bismullah*"). The Government similarly contends that this Court may not review CSRT decisions to exclude materials from the CSRT record. *See id.* at 18. On that interpretation, this Court would never hear evidence from petitioners that could mean the difference between freedom and lifelong imprisonment.

This is not a hypothetical concern. The Boumediene Petitioners sought to include in the CSRT record specific documents and testimony from specific witnesses, yet their CSRT records are devoid of both despite the ready availability of that evidence. *See* Boumediene Merits Br. 46. Petitioner Boudella asked his CSRT panel to consider the January 2002 order of the Supreme Court of the Federation of Bosnia and Herzegovina ordering him released due to lack of

evidence. J.A. 0576, 0582. That Tribunal concluded that the court decision was "not reasonably available" (J.A. 0582), even though the decision had been *filed in the district court and served on counsel for the Government* months before Mr. Boudella's CSRT convened.[5]

Mr. Boudella also requested as evidence a copy of the judgment of the Human Rights Chamber for Bosnia and Herzegovina, which confirmed that Mr. Boudella was ordered released by the Supreme Court and also held that Bosnia and Herzegovina had violated Bosnian law and the European Convention on Human Rights, which is binding on Bosnia and Herzegovina, by handing Mr. Boudella over to the United States. J.A. 0576, 0582.[6] His CSRT recited that this decision was "not reasonably available" (J.A. 0582), even though it was available on the Internet[7] and Mr. Boudella testified that he had actually seen the decision while at Guantanamo (J.A. 0582).

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[5] *See* Pets.' Opp. to Resp. Motion for a Joint Case Management Conference, Entry of Coordination Order and Request for Expedition, Ex. B, *Boumediene v. Bush*, No. 1:04-cv-01166-RJL (D.D.C. Aug. 16, 2004) (Dkt. 13). Saber Lahmar also requested that the Bosnian Supreme Court's order be considered. J.A. 0401. His CSRT also deemed it "not reasonably available" on the ground that "[t]he Bosnian government was unable to provide any such document." *Id*.

[6] Mr. Boudella's request for the judgment of the Human Rights Chamber appears to have been mistranslated as a request for "a copy of 'Humanity of the People.'" J.A. 0576.

[7] *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. A2, p. 18 (Sept. 21, 2005).

Petitioner Nechla sought the testimony of Mr. Mohmoud Sayed Yousef, his supervisor in the Bosnian office of the Red Crescent of the United Arab Emirates. J.A. 0520. His CSRT concluded that Mr. Yousef was not reasonably available. *See id.* Counsel easily located Mr. Yousef in January 2005 by calling the Red Crescent telephone number listed in the Sarajevo phone book.

Information that was potentially exculpatory was provided to Mr. Lahmar's Tribunal only *after* his CSRT hearing. *See* Boumediene Merits Br. 48-50. That information was *never* provided to any of the CSRTs of the other Boumediene Petitioners, even though their alleged "association" with Mr. Lahmar formed part of the basis for the CSRT decisions in their cases. *See id.* Under the Government's view of this Court's review procedure under the MCA and DTA, Petitioners would be forbidden from providing the Court with this crucial evidence.

[TEXT EXCERPTED HERE]

Bosnian authorities have since dropped the investigation into the alleged terrorist plot. J.A. 0704-0705. Yet under the Government's view of the DTA, this Court would be forbidden from considering any of this evidence.

These examples demonstrate why any alternative that does not permit this Court to review all evidence offered by a petitioner would not be an adequate substitute for habeas. The Government would prohibit this Court from considering

any of this evidence and limit this Court to only a meaningless review of a hastily assembled CSRT record. A statute requiring that this Court "wilfully shut [its] eyes" to important evidence is inconsistent with the common law writ, *Goldswain's Case*, 96 Eng. Rep. at 712, and violates the Suspension Clause.

2. According To The Government, The DTA Requires This Court To Defer To The CSRT Decision, Again Contrary To The Writ As Of 1789

In stark contrast to habeas, the Government proposes a highly restrictive standard of review, essentially requiring affirmance unless there was *no* evidence supporting detention. *See* Gov't Response in *Bismullah* at 13 (arguing that the DTA limits this Court's role to "at most" a determination that the CSRT decision "is supported by substantial evidence"). Under that approach, the DTA would not permit the Court to assess the relative weight of the evidence; as long as some evidence supported detention, this Court would be constrained to uphold the imprisonment. Common law habeas rejected such deference to the Government's judgment; as one court put it, "our judgment ought to be grounded upon our own inferences and understandings, and not upon theirs." *Bushell's Case*, (1670) 124 Eng. Rep. 1006, 1007 (C.P.); *see generally* Boumediene DTA Br. 47.

The Government advocates a deferential standard of review by drawing an analogy between section 1005(e)(2) of the DTA and "substantial evidence" review of agency adjudications under the Administrative Procedure Act, 5 U.S.C.

§ 706(2)(E) (APA). *See* Gov't Response in *Bismullah* at 10-13 (citing *Florida Light & Power Co. v. Lorion*, 470 U.S. 729 (1985)).[8] The Suspension Clause's guarantee of habeas corpus is in no way affected by Congress's authorization of a more limited standard of review for agency decisions regarding the licensing of nuclear reactors. Except in cases of invasion or rebellion, the Suspension Clause prevents Congress from diminishing the core protections of the writ (including a full factual review) in cases of imprisonment without charge. *See, e.g., 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." (emphasis in original)).

Even under the APA, a proceeding as defective as the CSRT would likely not be reviewable for substantial evidence, since that standard only applies to review of formal adjudications under sections 556 and 557 of the APA and to cases on the record of "an agency hearing provided by statute." 5 U.S.C. § 706(2)(E).

[8] The Court made a similar suggestion during oral argument. *See* 3/22/06 Tr. 27:13-16.

No statute provides for a CSRT hearing.[9] And the CSRTs fail abysmally to meet the APA's criteria for a formal adjudication, because the prisoner has no meaningful opportunity to "submit rebuttal evidence" or "to conduct such cross-examination as may be required for a full and true disclosure of the facts." *Id.* § 556(d). Nor did the CSRT allow petitioners to be "accompanied, represented, and advised by counsel," an entitlement that the APA gives to every "person compelled to appear in person before an agency." 5 U.S.C. § 555(b).[10]

3. The Suspension Clause Does Not Permit Cancellation Of The Writ's Core Protections

At oral argument regarding the DTA, this Court asked whether the restrictive review allowed under section 1005(e)(2) could be characterized as simply "modifying" habeas, similar to modern provisions eliminating the requirement to "produce the body" or limiting the filing of second or successive

[9] The CSRTs were established by order of the Deputy Secretary of Defense and do not find facts, but merely purport to confirm "enemy combatant" designations *already* reached "through multiple levels of review by officers of the Department of Defense." J.A. 1207. Nothing in the MCA (or in the DTA before it) remotely authorized such a procedure, particularly not against citizens of a friendly nation abducted from their home country in peacetime.

[10] Indeed, the only APA standard of review that arguably could apply to review of a CSRT would be a "trial de novo by the reviewing court," *id.* § 706(2)(F), which is the appropriate standard when "the agency factfinding procedures are inadequate." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971); *see also National Org. for Women v. Social Sec. Admin.*, 736 F.2d 727, 746 (D.C. Cir. 1984) (indicating that procedures that are "closed, unfair, or otherwise inadequate to the task of developing a factual record" would warrant *de novo* review under the APA).

petitions. 3/22/06 Tr. 46:6-7, 46:17-22, 47:16-23.[11] The MCA's serious limitations on this Court's review of the CSRT process are in no way comparable to these minor alterations that leave the core protections of habeas undiminished.

The requirement that a custodian "produce the body" was—even in 1789—a vestigial procedural relic rather than a central substantive concern of the Great Writ.[12] By the time of the Founding, the production of the body was merely a means by which common law courts could "extend their jurisdiction by bringing the body of the petitioner . . . before them." William F. Duker, *A Constitutional History of Habeas Corpus* 29-30 (1980); *see also* R.J. Sharpe, *The Law of Habeas*

[11] The Court's suggestion that the DTA modified, rather than abolished, habeas corpus had an arguable textual basis due to the particular phrasing of 28 U.S.C. § 2241(e)(1), as added by section 1005(e)(1) of the DTA. *See* 3/22/06 Tr. 57:23-58:9. Section 7(a) of the MCA repealed that language, however, and enacted a new section 2241(e). The new section makes a clear distinction between habeas corpus, which is treated in new section 2241(e)(1), and "other action[s]" including review under section 1005(e)(2) of the DTA, which are treated in new section 2241(e)(2). *See* MCA § 7(a).

[12] What we now refer to as habeas corpus was originally "an aggregation of two existing writs: habeas corpus, and a writ questioning the cause of a prisoner's custody." William F. Duker, *A Constitutional History of Habeas Corpus* 25 (1980). Habeas corpus proper was simply a writ that compelled the appearance of an individual before a court—typically, in its origins, to "secure the appearance of an unwilling defendant." *Id.* at 18; *see also* R.J. Sharpe, *The Law of Habeas Corpus* 1-4 (2d ed. 1989). The procedural writ of habeas corpus later became firmly attached to other substantive writs designed to test the judgment of another court—a practice that developed primarily because a court's jurisdiction frequently depended on the physical presence of the person who was the subject of the dispute. *See* Duker, *supra*, at 27-40; Badshah K. Mian, *English Habeas Corpus*: *Law, History, and Politics* 18-21 (1984).

Corpus 4 (2d ed. 1989) (habeas corpus "brought matter of the imprisonment fully before the court" since it was "important to be able to exert physical control over the parties in civil litigation").[13] Similarly, the federal statute's modern restriction of second and successive petitions poses no Suspension Clause concerns because it simply codified and systematized the common law principle of "abuse of the writ," pursuant to which English courts have always had the power to deny dilatory or abusive habeas petitions. *See, e.g.*, *McCleskey v. Zant*, 499 U.S. 467, 494 (1991).[14]

These modern variations in habeas procedure did not affect the courts' basic ability to "review[] the legality of Executive detention." *Rasul*, 542 U.S. at 474 (citation omitted); *see also Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) ("[T]he great object of [the writ of habeas corpus] is the *liberation* of those who

[13] The requirement of "producing the body"—formerly a technical prerequisite to the habeas court's ability to grant relief—has been replaced by an adequate substitute, namely, court jurisdiction over the *custodian* and power to order him to release the prisoner. *See, e.g.*, *Rumsfeld v. Padilla*, 542 U.S. 426, 434-435 (2004).

[14] "Every English Court of Justice is, and from time immemorial has been, invested with inherent jurisdiction . . . to dismiss, or stay, or otherwise nullify all actions or proceedings which are shewn to its satisfaction to be vexatious or oppressive, or to constitute an abuse of its process." Alexander Kingcome Turner, *The Doctrine of Res Judicata* 407 (2d ed. 1969). Thus, under English jurisprudence, "it never was [the case] that an applicant for habeas corpus may in term apply successively to every judge of the High Court." R.F.V. Heuston, *Habeas Corpus Procedure*, 66 L.Q. Rev. 79 (1950); *see also* David W. Raack, *A History of Injunctions in England Before 1700*, 61 Ind. L.J. 539, 568-570 (1985-1986) (noting the well-established "practice of enjoining [common law] proceedings where the legal process was being abused").

may be imprisoned without sufficient cause."). The MCA, through which the Government would replace habeas corpus with a deferential review of an incomplete "record," essentially eliminate that fundamental substantive attribute of habeas and therefore works an unlawful suspension.[15]

B. Habeas Procedures In Cases Of Military Commissions, Collateral Attacks On Prior Judgments, And Pre-Trial Detention Are Inapposite

At prior oral argument, the Court suggested that the Boumediene Petitioners were being detained "preliminary to full trial before a Military Commission." 3/22/06 Tr. 42:6-7. With respect, the Court was mistaken. It must be emphasized that *none of the Boumediene Petitioners have been charged with any crime triable by military commission.* The CSRTs are not preliminary to a further procedure; rather, the Government treats them as sufficient in themselves to justify indefinite detention. The Government has recently stated that, although approximately 435 men remain imprisoned indefinitely at Guantanamo, only 60 to 80 are expected to be tried by military commission. *See* Craig Whitlock, *U.S. Faces Obstacles to*

[15] Previously identified defects in the DTA review scheme, including apparently barring court review of detention decisions by bodies other than a CSRT, not authorizing release of a successful petitioner, and interfering with the right to counsel, are not cured in the MCA. *See* Boumediene DTA Br. 49-55.

Freeing Detainees From Guantanamo, Wash. Post, Oct. 17, 2006, at A1 (reporting statement of John B. Bellinger III, Legal Adviser, U.S. Department of State).[16]

The Government repeatedly has sought to confuse certain issues in this case by citing to the historical scope of habeas in *criminal* cases, specifically collateral attacks on prior convictions. *See, e.g.*, Gov't DTA Br. 51. Such sources are irrelevant, since the Boumediene Petitioners have been neither charged nor convicted of any crime. Their imprisonment without charge is precisely the circumstance in which the protections of habeas "have been strongest." *St. Cyr*, 533 U.S. at 301.

The common law accorded persons who—like Petitioners—had no reasonable prospect of a trial a significantly broader inquiry on habeas than was available to persons awaiting trial on a criminal charge. Of course, even persons in pretrial detention generally had the right to present their own evidence on habeas. *See, e.g.*, Habeas Scholars' Br. 10 n.5. Although some decisions suggest that persons in pretrial detention could not controvert the return, those statements are based on the common law right to a speedy trial, where the prisoner has a right to present his own evidence to a jury. *See, e.g.*, *Bushell's Case*, 124 Eng. Rep. at 1010 (noting that, while a person held "upon a general commitment" for a felony

[16] Moreover, even conceded enemy soldiers tried by military commission receive more procedural protections than the Boumediene Petitioners did before the CSRTs. *See* Boumediene Merits Br. 20 & n.19.

could not present his own evidence during a habeas proceeding, he "may press for his tryal, which ought not to be denied or delayed," whereas a person imprisoned without charge is permitted to traverse the return).

The decision in *United States ex rel. Kassin v. Mulligan*, 295 U.S. 396 (1935), which the Court cited during oral argument, is consistent with this common law tradition. *See* 3/22/06 Tr. 24-28. In *Kassin*, the petitioner was indicted in Florida but apprehended in New York. He filed a habeas petition challenging an order—issued after a further evidentiary hearing on probable cause—extraditing him so that he could be tried on the Florida indictment. *Kassin* is explicitly premised on the fact that an "order of removal adjudges nothing affecting the merits of the case and *amounts to no more than a finding that the accused may be brought to trial*." 295 U.S. at 401 (emphasis added). Moreover, the habeas procedure observed in *Kassin* appears to have been more in the nature of a collateral attack on the post-indictment extradition hearing, during which the petitioner had introduced depositions of five persons in support of his release. *See id.* at 398-399; *see also id*. at 401-402 ("He was entitled to introduce evidence to prove the absence of probable cause and to have the Commissioner judicially consider it. We have held that exclusion of competent evidence is a denial of right . . . ."). The petitioner in *Kassin* did not seek to supplement the record on habeas, and the Supreme Court did not address whether he could have done so. *See id.* at

401.[17] Moreover, the ultimate order was that the petitioner would have a full trial on the indictment, not indefinite detention without charge. *See id.* at 402.

Unlike the petitioner in *Kassin*, the Boumediene Petitioners' detention—now approaching five years in duration—has never been in anticipation of any criminal proceeding. Nor have Petitioners had the opportunity to present to *anyone* the evidence that they believe would compel their release. *See supra* Part II.A.1. Common law habeas has always required a searching judicial examination of the factual and legal bases for detention in cases such as this.

Because Congress has not purported to suspend the writ of habeas corpus, let alone validly done so,[18] a construction of the MCA that repealed habeas jurisdiction in this case would render the MCA unconstitutional.

III. THE MCA DOES NOT AUTHORIZE PETITIONERS' INDEFINITE DETENTION

Petitioners have previously shown that the Government has no authority, under the AUMF or otherwise, to kidnap citizens of friendly nations far from any

[17] Petitioners respectfully submit that this Court was mistaken in suggesting at oral argument that *Kassin* held that that a petitioner could not submit evidence during a habeas proceeding. 3/22/06 Tr. 25:24 to 26:6, 28:6-7. The question did not arise in *Kassin*—probably because the Petitioner previously had a full opportunity to submit his evidence—and the opinion does not suggest that the petitioner sought to submit anything further. Importantly, the Supreme Court approvingly noted that the district court "considered the evidence in detail" and admonished the court of appeals for "declin[ing] to examine the evidence" itself. 295 U.S. at 402.

[18] The MCA, like the DTA before it, does not meet the Constitution's requirements for a valid suspension of the writ. *See* Boumediene DTA Br. 55-56.

battlefield, especially after the investigative authorities of that country concluded that there was no evidence to hold them. *See* Boumediene Merits Br. 20-27. The MCA does not alter this analysis. Accordingly, the Court should reverse the judgment of the district court.

First, the MCA nowhere authorizes the Executive to jail persons situated similarly to the Boumediene Petitioners. The MCA creates a bipartite system for trying purported "combatants": "lawful enemy combatants" may be tried through traditional courts martial, and "unlawful enemy combatants" may be tried through the MCA's military commissions upon the filing of charges and specifications. *See* 10 U.S.C. §§ 948d, 948q (added by MCA § 3(a)). The MCA does not create or sanction a detention system for persons such as Petitioners, who have not been charged with any offense, let alone designated for trial by court martial or military commission. *See United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2002) ("In construing a statute, the court begins with the plain language of the statute. Where the language is clear, that is the end of judicial inquiry in all but the most extraordinary circumstances." (internal citations and quotation omitted)).

Second, construing the MCA to authorize detention of uncharged persons such as Petitioners would violate the law of nations (including the laws of war) and is therefore a construction that must be avoided "if any other possible construction

remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *cf. Hamdi*, 542 U.S. at 521 (construing the AUMF "based on longstanding law-of-war principles"); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (holding that international law "is part of our law").

The laws of war do not authorize imprisonment of citizens of a friendly nation, captured far from any battlefield, and taken into custody by the U.S. Government despite a court order mandating their release. *See* Boumediene Merits Br. 24; *see also Johnson v. Eisentrager*, 339 U.S. 763, 769 & n.2 (1950) ("[T]hroughout the civilized world . . . an alien friend is the subject of a foreign state at peace with the United States; an alien enemy is the subject of a foreign state at war with the United States." (internal quotation and citations omitted)). Construing the MCA to authorize indefinite detention—without trial or court martial—would also violate other U.S. treaty and customary international law obligations. *See, e.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966, (entered into force for United States on Sept. 8, 1992), 58 Fed. Reg. 45, 934 (Aug. 31, 1993), 999 U.N.T.S. 171, arts. 9.1, 9.2, 9.4 (mandating that "[n]o one shall be subjected to arbitrary arrest or detention," "[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him," and "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a

court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful") (full text of ICCPR in addendum to Boumediene Merits Br. at 11a-15a); *see also* Boumediene Merits Br. 34-39.

Third, if the MCA authorized the detention of the Boumediene Petitioners, it would exceed the power of Congress under Article I and constitute an improper open-ended grant of detention power to the President. Congress's war power[19] is not unlimited: "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit." *United States v. Robel*, 389 U.S. 258, 263 (1967) (holding statute prohibiting members of certain "Communist-action organizations" from working at defense facilities exceeded congressional war power and impermissibly infringed associational rights); *cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (President exceeded executive war power in seizure of steel mills). Although Congress authorized the Executive to detain persons in a manner consistent with the laws of war by passing the AUMF, *see Hamdi*, 542 U.S. at 518-519 (plurality opinion), the situation of the Boumediene Petitioners falls outside the rationale for detention "based on longstanding law-of-war principles," because

[19] Congress holds the power "[t]o declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." U.S. Const. art. I, § 8, cl. 11.

they have neither "tak[en] up arms" nor been captured on a "field of battle." *See id.* at 518, 521. Congress's war power cannot authorize the kidnapping and indefinite detention of civilian citizens of an allied country at peace with the United States. *See Robel*, 389 U.S. at 264 ("[T]his concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart.").

Even if Congress's powers theoretically allowed it to legislate such seizures and detentions, such powers could not be transferred to the Executive without effective standards or limits. Empowering the President to detain indefinitely any person he deems supports "hostilities" against the United States, anywhere in the world, would constitute an extraordinary delegation, unimaginable to the Framers.

Accordingly, this Court should hold that the imprisonment of the Boumediene Petitioners is unlawful.

CONCLUSION

For the foregoing reasons, the MCA does not affect this Court's jurisdiction over Petitioners' appeal or the district court's jurisdiction over their habeas petitions. To the extent the Court interprets the statute otherwise, the MCA is unconstitutional. The judgment of the district court dismissing Petitioners' habeas petitions should be reversed.

Respectfully submitted,

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Dated: November 1, 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 7,280 words in length, which is within the 10,000 word limit set out in this Court's order of October 18, 2006.

_____
Melissa A. Hoffer

CERTIFICATE OF SERVICE

I, Dawn Canady, hereby certify that on November 1, 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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RELEVANT STATUTORY PROVISIONS

Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600

SEC. 3 MILITARY COMMISSIONS.

(a) MILITARY COMMISSIONS.—

(1) IN GENERAL.—Subtitle A of title 10, United States Code, is amended by inserting after chapter 47 the following new chapter:

…

"**§ 948d. Jurisdiction of military commissions**

"(a) JURISDICTION.—A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.

"(b) LAWFUL ENEMY COMBATANTS.—Military commissions under this chapter shall not have jurisdiction over lawful enemy combatants. Lawful enemy combatants who violate the law of war are subject to chapter 47 of this title. Courts-martial established under that chapter shall have jurisdiction to try a lawful enemy combatant for any offense made punishable under this chapter.

…

"§ 948q. Charges and specifications

"(a) CHARGES AND SPECIFICATIONS.—Charges and specifications against an accused in a military commission under this chapter shall be signed by a person subject to chapter 47 of this title under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state--

"(1) that the signer has personal knowledge of, or reason to believe, the matters set forth therein; and

"(2) that they are true in fact to the best of the signer's knowledge and belief.

"(b) NOTICE TO ACCUSED.—Upon the swearing of the charges and specifications in accordance with subsection (a), the accused shall be informed of the charges against him as soon as practicable.

…

"**§ 950j. Finality or** [*sic*] **proceedings, findings, and sentences**

…

"(b) PROVISIONS OF CHAPTER SOLE BASIS FOR REVIEW OF MILITARY COMMISSION PROCEDURES AND ACTIONS.—Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear

or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

…".

SEC. 7 HABEAS CORPUS MATTERS.

(a) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by striking both the subsection (e) added by section 1005(e)(1) of Public Law 109-148 (119 Stat. 2742) and the subsection (e) added by added by [*sic*] section 1405(e)(1) of Public Law 109-163 (119 Stat. 3477) and inserting the following new subsection (e):

"(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

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

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