[ORAL ARGUMENT HELD SEPTEMBER 8, 2005]

Nos. 05-5062 & 05-5063

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

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

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

ON APPEAL FROM A DECISION OF THE
U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF OF PETITIONERS REGARDING SECTION 1005 OF THE DETAINEE TREATMENT ACT OF 2005

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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Lakhdar Boumediene, et al., and Ridouane Khalid ("Petitioners") submit this brief pursuant to this Court's January 4 and January 13, 2006 orders.[1]

SUMMARY OF ARGUMENT

Section 1005 of the Detainee Treatment Act of 2005, Pub. L. No. 109-148 ("the Act"), does not alter the jurisdiction of this Court or the district court over Petitioners' petitions. The plain language and structure of the Act show that § 1005(e)(1) applies only to post-enactment petitions. Those elements are reinforced by the presumption against retroactivity, which applies to any attempt to abolish *habeas* jurisdiction "regardless of where the claim is brought." *Republic of Austria v. Altmann*, 541 U.S. 677, 695 n.15 (2004). Finally, Congress expressly considered making § 1005(e)(1) applicable retroactively, but then made it prospective only.

Section 1005(e)(2) has no bearing on this *habeas* proceeding. Section 1005(e)(2) grants this Court jurisdiction to hear challenges to the "validity of any final decision of a Combatant Status Review Tribunal (CSRT)." Petitioners challenge not their 2004 CSRT decisions, but rather their illegal confinement by the Executive since 2002. *See* 28 U.S.C. § 2241(c)(1), (3); *Rasul v. Bush*, 542 U.S. 466, 124 S.Ct. 2686 (2004). By vesting this Court with jurisdiction over CSRT challenges, Congress did not alter Petitioners' rights to continue to adjudicate their pre-enactment *habeas* petitions.

Even if it finds the Act ambiguous with respect to the prospectivity of § 1005(e)(1), this Court should construe the Act to avoid the constitutional infirmities that would arise if Congress sought to eliminate Petitioners' right to seek federal *habeas* relief.

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[1] Petitioners incorporate by reference the arguments of Petitioners/Appellants/Cross-Appellees in the supplemental brief filed in *Al Odah, et al. v. Bush, et al.*, Nos. 05-5064, 05-5095 through 05-5116.

ARGUMENT

I. SECTION 1005(E)(1) IS PROSPECTIVE AND DOES NOT AFFECT JURISDICTION OVER PETITIONERS' *HABEAS* PETITIONS

The text and structure of § 1005, the presumption against retroactivity, and the drafting history of the Act show that the government's contention is wrong, and that § 1005(e)(1) applies only prospectively. Section 1005(e)(1) does not deprive federal courts of jurisdiction to hear *habeas* petitions filed in 2004 by Guantanamo Bay prisoners.

A. The Text and Structure of Section 1005 Support Prospective 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 its application to pending cases, but § 1005(h) addresses the "effective date" of the sub-parts of § 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.

Section 1005(h)(1) states only that § 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, § 1005(h)(2) specifies that §§ 1005(e)(2) and (e)(3) apply to any claims "pending on or after the date of the enactment of this Act" "governed by" those paragraphs. By excluding § 1005(e)(1) from the provisions

applicable to pending cases, Congress expressed its intention that § 1005(e)(1) should apply only to post-enactment petitions.[2]

In *Lindh v. Murphy*, 521 U.S. 320 (1997), the Supreme Court considered an analogous statutory scheme. At issue there was whether amendments to chapter 153 of Title 28 imposing new limitations on the availability of federal *habeas corpus* in non-capital cases, enacted 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 the relevant provisions of AEDPA did not expressly address the temporal applicability of the amendments to chapter 153, the Court emphasized that AEDPA had also amended chapter 154 of Title 28 by imposing limitations on *habeas corpus* in capital cases and had expressly provided that those amendments *would* apply to pending cases. *Lindh*, 521 U.S. at 327. The Court concluded that AEDPA's express application of 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).

The same reasoning applies here. "If Congress was reasonably concerned to ensure that [§§ 1005(e)(2) and (3)] be applied to pending cases, it should have been just as concerned about [§ 1005(e)(1)], unless it had the different intent that the latter [section] not be applied to the general run of pending cases." 521 U.S. 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.

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[2] *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)).

Section 1005(h)(2) expressly applies only §§ (e)(2) and (e)(3) to pending cases, plainly indicating Congress's intent that § (e)(1) not strip Petitioners' *habeas* rights.

B. The Presumption Against Retroactivity Applies Because Section 1005(e)(1) Would Eliminate All *Habeas* Jurisdiction, Not Transfer It To A Different Forum

The language and structure of § 1005 show § (e)(1) applies only prospectively. Even were that section ambiguous, 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. "[P]rospectivity remains the appropriate default rule . . . [b]ecause it accords with widely held intuitions about how statutes ordinarily operate[.]" *Id.* at 272. Accordingly, "'congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result.'" *Id.* Nothing in § 1005(e)(1) suggests this Court should override the presumption against retroactivity. The disparate language used in §§ 1005(h)(1) and (h)(2) supports the opposite conclusion.

Although statutes that "affect only *where* a suit may be brought, not *whether* it may be brought at all," may not trigger the presumption against retroactivity, § 1005(e)(1) is not such a statute. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997) (emphasis in original). Rather, 1005(e)(1) 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'"). 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).

When it held in *Al Odah v. United States* that federal courts lacked jurisdiction over *habeas* claims of Guantanamo prisoners because the men had no constitutional rights, this Court recognized the inseparable nature of *habeas* jurisdiction and substantive *habeas* rights. *See* 321 F.3d 1134, 1141 (D.C. Cir. 2003), *rev'd, Rasul v. Bush*, 542 U.S. 466 (2004). *Rasul* confirmed that the right to a hearing to test the legal and factual basis for imprisonment attaches to *habeas* jurisdiction. *See Rasul*, 542 U.S. at 483, 485 ("We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' *habeas corpus* challenges to the legality of their detention at the Guantanamo Bay Naval Base. . . . We reverse the judgment of the Court of Appeals and remand for the District Court to consider in the first instance the merits of petitioners' claims."). Here, stripping *habeas* jurisdiction would condemn Petitioners to suffer the very fate *habeas* was created to avoid: indefinite executive imprisonment, without charge, with no chance to test the asserted basis for imprisonment. *Cf., INS v. St. Cyr*, 533 U.S. 289, 311 (2001) ("judicial review" has historically meant something different from *habeas* review).

The government urges an interpretation of § 1005, framed through the prism of *Landgraf* dicta about "statutes conferring or ousting jurisdiction," 511 U.S. at 274, and presses for a new rule—that statutes "removing jurisdiction" (not statutes transferring jurisdiction) "presumptively apply to pending cases." Gov. Supp. Br. 6. But the Supreme Court rejected this argument in *Hughes Aircraft*, noting that it "simply misread[s] our decision in *Landgraf*, for the only 'presumption' mentioned in that opinion is a general presumption *against* retroactivity." 520 U.S. at 950 (emphasis in original). Indeed, the government's own citations show a "jurisdictional" statute applies retroactively only if it changes where, not whether, a party may

bring a claim. *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"). *Id.* at 117.[3]

Section 1005(e)(1) does not simply transfer *habeas* cases between forums. Rather, it purports to bar *habeas* claims, "regardless of where the claim is brought." *Altmann*, 541 U.S. at 695 n.15. Applied retroactively, that section would deprive Petitioners of both the right to have a court review the legal and factual basis for their imprisonment, and the remedy of *habeas* release from that unlawful detention. The presumption against retroactivity applies here; § 1005(e)(1) is prospective. *See Hughes Aircraft*, 520 U.S. at 951.

C. Congress Intended That Section 1005(e)(1) Apply Prospectively

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

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

Statutes transferring jurisdiction from courts to non-judicial officials have been applied to pending cases when the official was empowered to decide all of the claims raised in court. None were *habeas* cases. *See, e.g., Hallowell v. Commons*, 239 U.S. 506, 507-508 (1916) (statute allowed Interior Secretary to decide whether plaintiff was heir to Indian's estate); *LaFontant v. INS*, 135 F.3d 158, 165 (D.C. Cir. 1998) (removing appellate jurisdiction over certain deportation orders gave "agency proceedings greater finality" over claims that would have been appealed). In contrast, § 1005(e)(1) would deprive Petitioners of all *habeas* claims.

The language of § 1005(h) differs significantly from earlier versions, which would have applied § 1005(e)(1)'s jurisdiction-stripping language to pending cases. As Senator Levin explained on the floor, Congress adopted the final language of § 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 – S14,258 (daily ed. Dec. 21, 2005). A version which passed the Senate on November 10, 2005, 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." *See 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).

The Graham-Levin-Kyl Amendment, the direct predecessor of § 1005, changed the retroactive language. *See* 151 Cong. Rec. S12,803 (daily ed. Nov. 15, 2005) (vote on Amendment 2524). During the debate 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. No Senator offered a different view.[4] When the Senate voted on the final version of the Act, which retained the relevant Graham-Levin-Kyl language, Senator Levin, again, expressed his understanding 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

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[4] Statements made in the Senate—*after* the definitive December 21 Senate vote on the Graham-Levin-Kyl Amendment, which became § 1005—suggest that some Senators advocated that § 1005(e)(1) apply to pending cases. *See* 151 Cong. Rec. S14,263 – S14,268 (daily ed. Dec. 21, 2005) (statements of Sen. Kyl and Sen. Graham). By contrast, Senator Levin's floor statement explaining that § (e)(1) would not apply to pending cases, was made during the debate on that Amendment, and immediately before that definitive vote. Senator Levin's statement is more probative of the meaning of that Amendment. *Cf. Weinberger v. Rossi*, 456 U.S. 25, 35 (1982) (declining to accord weight to "post hoc" congressional statements).

Court of jurisdiction over a case which was pending before the Court." 151 Cong. Rec. S14,257 – S14,258 (daily ed. Dec. 21, 2005).[5]

II. PETITIONERS' *HABEAS* CHALLENGES ARE NOT "GOVERNED BY" § 1005(E)(2)

That § 1005(e)(2) grants this Court original jurisdiction to hear a new category of claims does not alter the federal courts' jurisdiction to hear Petitioners' *habeas* petitions under 28 U.S.C. § 2241. Section 1005(e)(2) does not apply to the matter *sub judice*. *See* § 1005(h)(2) (providing that §§ 1005(e)(2) and (3) apply only to pending and future claims that are "governed by" those paragraphs).

A. Petitioners Challenge Their Unlawful Detention, Not A CSRT Decision.

Section 1005(e)(2) invests 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." Section 1005(e)(2)(A) (emphasis added). Petitioners filed *habeas* petitions before any "final decision" by a CSRT. J.A. 0064-0081.[6] Petitioners had been imprisoned at Guantanamo for two and one-half years before any CSRT existed.

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[5] The prospective nature of § 1005(e)(1) comports with the overall prospective character of § 1005. The first subsections of § 1005 impose several obligations on the Secretary of Defense regarding procedures for the treatment of persons held at Guantanamo. Those requirements are prospective and ensure that future procedures at Guantanamo will be subject to legislative as well as judicial oversight. Provisions regarding judicial access for persons held under those new procedures, *see* § 1005(e), are part of this new scheme. *See, e.g.*, § 1005(a)(1) (Secretary to report to Congress, within 180 days, the procedures he has established for CSRTs); § 1005(a)(2) (Secretary's procedures must include final review by a "Designated Civilian Official"); § 1005(a)(3) (Secretary's procedures must provide for "periodic review of any new evidence"); § 1005(b)(1) (Secretary's procedures must ensure that CSRTs assess whether statements were "obtained as a result of coercion"); § 1005(b)(2) (provisions of § 1005(b)(1) apply "any proceeding beginning on or after the date of the enactment of this Act"); § 1005(c) (Secretary to notify Congress of any modification to reported procedures); § 1005(d) (Secretary to submit annual reports to Congress).

[6] Amended petitions were filed for the Boumediene Petitioners on August 20, 2004. J.A. 0006. Their final CSRT decisions are dated between October 11 and October 28, 2004. J.A. 0335, 0354, 0394, 0454, 0511, 0575. Appellant Khalid's petition was filed on July 6, 2004. J.A. 1109. It was never amended. Mr. Khalid's final CSRT decision is dated October 15, 2004. J.A. 1170.

Had Congress wished to apply the procedures of § 1005(e)(2) to Petitioners' pending *habeas* cases, it easily could have done so. Section 1005(e)(1), which eliminates federal jurisdiction prospectively, applies to "an application for a writ of *habeas corpus*" and "any other action . . . relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay." Section 1005(e)(1). Congress chose narrower language in granting jurisdiction to this Court under § 1005(e)(2). That section permits challenges to the "validity of any final [CSRT] decision." Congress' use of disparate language in consecutive sections demonstrates that Petitioners' *habeas* petitions do not fall under § 1005(e)(2).[7]

The government's interpretation of § 1005(e)(2) would render § 1005(e)(1) meaningless. If § 1005(e)(2) "governs" all *habeas* petitions filed by Guantanamo detainees, there would have been no need to remove jurisdiction over post-enactment petitions in § 1005(e)(1). It is precisely because jurisdiction under § 1005(e)(2) does *not* govern traditional *habeas* claims that Congress sought to strip prospective *habeas* jurisdiction.[8]

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[7] Amicus Washington Legal Foundation's (WLF) assertion that the language of § 1005(h)(2) constitutes a Congressional finding that claims "governed by" §§ 1005(e)(2) and (3) must have been pending on the date of enactment is nonsense. *See* WLF Amicus Br. 8. Section 1005(h)(2) also applies to § 1005(e)(3), and there were no "final decisions" of military commissions pending on the date of enactment. Section 1005 (h)(2) simply means that it applies to any claim, pending or future, that falls within its terms. Whether claims are "governed by" § 1005(e)(2) must be ascertained by reference to the language of § 1005(e)(2), not by reference to the "effective date" in § 1005(h)(2).

[8] The government's argument that "an exclusive review mechanism forecloses courts from asserting jurisdiction over the matter under more general grants of jurisdiction" (Gov. Br. 3), is irrelevant. First, the principle applies where the specific and general grants cover the same challenges. As set forth *infra* at Section III.C, *habeas* challenges require a searching review of the legal and factual bases for Executive detention, while, on its face, § 1005(e)(2) addresses only the validity of CSRT decisions. Second, the cases the government cites involved suits filed notwithstanding a pre-existing review procedure, such that the court lacked jurisdiction when the suit was filed. *See, e.g.*, *FCC v. ITT World Communs., Inc.*, 466 U.S. 463, 466 (1984) (exclusive review procedure in this Court existed when district court action was filed); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 205, 211 (1994) (review procedure was passed in 1977, and petitioner filed suit in 1990). Here, the district court had jurisdiction over Petitioners' *habeas* petitions when they were filed. *See Rasul*, 542 U.S. at 484.

III. THE COURT SHOULD CONSTRUE SECTION 1005(E)(1) TO APPLY PROSPECTIVELY TO AVOID SERIOUS CONSTITUTIONAL QUESTIONS

Even if this Court finds the language of the Act respecting section 1005(e)(1)'s applicability ambiguous, it should avoid a construction raising serious constitutional questions. *See NLRB v. Catholic Bishop*, 440 U.S. 490 (1979); *St. Cyr*, 533 U.S. at 300, 326 (rejecting argument that the AEDPA stripped federal *habeas* jurisdiction over challenge to Attorney General's determination that alien petitioner was not eligible for discretionary relief, where such a construction "would give rise to substantial constitutional questions").[9]

A construction of § 1005(e)(1) precluding judicial review of Petitioners' *habeas* claims would violate the Suspension Clause. Congress expressed no intent to suspend the writ and said nothing about any constitutional predicate for suspension. The review procedure afforded by § 1005(e)(2) likely is neither an adequate nor an effective substitute for *habeas*. As the Supreme Court noted in *St. Cyr*, the fact that it (like this Court here) would be required to "answer the difficult question of what the Suspension Clause protects 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.

A. Congress Made No Clear Statement Of Intent To Suspend The Writ

Article I, § 9, cl. 2, of the Constitution provides: "The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Congress has suspended the writ on only four occasions. Each time, it

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[9] Congress may not freely suspend the writ as to "nonresident aliens." *Cf.* WLF Supp. Br. 14. The Suspension Clause applies to *habeas* for aliens held within the territorial jurisdiction of the United States, regardless of their status as residents. *See, e.g., St. Cyr*, 533 U.S. at 298, 300 (revoking alien's right to bring a *habeas* petition would raise "substantial constitutional problems" under the Suspension Clause, where alien conceded he was deportable and had no legal right to reside in the United States). The Supreme Court has held that Guantanamo Bay is United States territory for *habeas* purposes. *See Rasul*, 542 U.S. at 483-484; *see also id.* at 487 (Kennedy, J., concurring).

expressly authorized suspension.[10] Each suspension was limited in time. Absent any such express statement from Congress, this Court should not construe the Act as suspending the writ by implication.

B. Congress Made No Finding That The Predicates For Suspension Were Present

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 either an ongoing rebellion or invasion that threatened the operation of civil institutions. Because Congress found no such circumstance here, suspension would be unconstitutional.

C. There is Serious Doubt That Section 1005(e)(2) Provides An Adequate Substitute For *Habeas*

At minimum, the Suspension Clause protects the writ "as it existed in 1789." *St. Cyr*, 533 U.S. at 301 (citing *Felker*). The Supreme Court repeatedly has observed that "[a]t its historical core, the writ of *habeas corpus* has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *Rasul*, 542

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[10] *See* Act of Mar. 3, 1863, ch. 81, 12 Stat. 755 (Civil War) ("That, during the present rebellion, the President of the United States, whenever in his judgment the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof."); Act of Apr. 20, 1871, ch. 22, 17 Stat. 14-15 (armed resistance to Reconstruction) ("[W]henever in any State, . . . shall be organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or set at defiance the constituted authorities of such State, . . . and the preservation of the public safety shall become in such district impracticable, in every such case such combination shall be deemed a rebellion against the government of the United States, and during the continuance of such rebellion, . . . it shall be lawful for the President of the United States, when in his judgment the public safety shall require it, to suspend the privilege of the writ of habeas corpus . . . ."); Act of July 1, 1902, ch. 1369, 32 Stat. 691 (Philippine rebellion) ("[t]hat the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it"). The Governor of Hawaii also suspended *habeas corpus* immediately following Pearl Harbor pursuant to Section 67 of the Hawaiian Organic Act, which authorized suspension "in case of rebellion or invasion or imminent danger thereof, when the public safety requires it." *Duncan v. Kahanamoku*, 327 U.S. 304, 307-308 (1946).

U.S. at 474 (citing *St. Cyr*, 533 U.S. at 310); *Swain v. Pressley*, 430 U.S. 372, 380 (1977); *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J. concurring). Historically, *habeas* challenges have included not only challenges to a custodian's jurisdiction, but challenges to "detentions based on errors of law, including the erroneous application or interpretation of statutes." *St. Cyr*, 533 U.S. at 302 & n.18. *Habeas* guarantees judicial review of constitutional questions and questions of law, including, importantly, the application of laws to facts. *See Ogbudimpka v. Ashcroft*, 342 F.3d 207, 222 (3d Cir. 2003); *Wang v. Ashcroft*, 320 F.3d 130, 143 (2d Cir. 2003).

Absent a valid suspension, limits on the availability of the writ are accepted only if a substitute remedy is both adequate and effective to "test the legality of a person's detention." *Swain*, 430 U.S. at 381; *see also St. Cyr*, 533 U.S. at 305 (observing that "a serious Suspension Clause issue would be presented" under the government's view that federal *habeas* jurisdiction had been stripped without any adequate substitute for its exercise); *Kuhali v. Reno*, 266 F.3d 93 (2d Cir. 2001) (statute which purports to strip courts of jurisdiction to review final orders of removal issued against certain non-citizens did not supplant *habeas* jurisdiction because "Congress has provided no . . . substitute remedy in this context"); *United States v. Hayman*, 342 U.S. 205, 219 (1952) (avoiding constitutional question by holding that § 2255 was as broad as *habeas corpus*).

No court has construed, much less applied, § 1005(e)(2). Until that occurs, it is not established whether those procedures accommodate full review of all of Petitioners' *habeas* claims.[11] But even if § 1005(e)(2) allowed this Court to address all challenges to Petitioners' imprisonment presented in this appeal, § 1005(e)(2) does not provide for a searching *habeas* review of the government's claimed factual support.

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[11] The government surfaces here briefly its future argument that "review is more limited in this Court under section 1005" than under traditional *habeas*. Gov. Supp. Br. 9.

At 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). On its face, § 1005(e)(2) lacks any mechanism for Petitioners to probe and rebut any facts purportedly relied upon by the Executive when it decided to imprison them at Guantanamo. In contrast to a robust *habeas* review, § 1005(e)(2) appears to require this Court to accept the government's factual return (*i.e.*, the 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) use of the CSRT standards and procedures comported with those rights (if any). *Cf.* 28 U.S.C. § 2243 (providing right to a factual return "certifying the true cause of the detention," the opportunity to traverse the return, and the right to a "hearing"). Such a review is not an adequate substitute for *habeas* review, which for centuries has protected those unlawfully imprisoned by the Executive by securing the right to an individualized inquiry into the facts asserted to justify detention. *See* Br. of Amici Curiae British and American Habeas Scholars. That the government alleges Petitioners are enemy aliens does not alter their right to such review. *See id.*[12]

The government's reliance on cases construing the REAL ID Act of 2005 is unavailing. *See* Gov. Br. 13. Those petitioners had received the process Petitioners here seek in *habeas*—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.

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[12] *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) (citing *United States v. Thomas Williams*, U.S. Cir. Ct. for Dist. of Va. 1813) (Marshall, C.J., on circuit). Chief Justice Marshall reviewed the petition of Thomas Williams, charged as an enemy alien, to determine whether his imprisonment was lawful pursuant to regulations "respecting enemy aliens." Finding the regulations did not authorize Williams' confinement, Marshall ordered his release.

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).

Moreover, § 1005(e)(2) does not expressly grant this Court authority to provide a remedy if a CSRT decision is held "invalid." This is particularly significant here, where the government contends that § 1005 prohibits federal courts from ordering the release even of Guantanamo detainees *exonerated by CSRT decisions*. The government, remarkably, contends that persons exonerated by CSRTs may nonetheless "remain detained" as "former enemy combatants" at the Executive's discretion. Gov. Opp. to Mot. to Expedite Appeal 3, *Qassim v. Bush*, No. 05-5477 (filed Jan. 18, 2006) (attached at Addendum). Petitioners anticipate that the Government will also contend that such imprisonment may continue, even absent a CSRT finding of "enemy combatant" status, and that nothing in § 1005(e)(2) permits prisoners to challenge, or this Court to review, such continuing detention. *See id.* at 5 (contending § 1005 bars any challenge to detention by persons exonerated by a CSRT). Plainly, § 1005(e) cannot be an adequate substitute for *habeas* if it provides no means to command a prisoner's release.

This Court should construe § 1005(e)(1) to apply prospectively and reject the government's invitation to adopt a construction that would raise serious constitutional questions. *See St. Cyr*, 533 U.S. at 314; *Demore v. Kim*, 538 U.S. 510, 538 (2003) (O'Connor, J., concurring in part and concurring in the judgment).[13]

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[13] If this Court finds that § 1005(e)(1) retroactively repeals *habeas corpus*, the doctrine of constitutional avoidance warrants construing the scope of review afforded by § 1005(e)(2) broadly to include all review available on *habeas*, and to authorize this Court to order the release of detainees whose claims are successful.

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: January 25, 2006

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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 face of 11-point or larger. The brief is 15 pages (which is within the page limit set out in this Court's January 5, 2006 order.)

Stephen H. Oleskey/do

Stephen H. Oleskey

CERTIFICATE OF SERVICE

I, Stephen H. Oleskey, hereby certify that on January 25, 2006, I served a copy of this motion by first class mail and by email transmission upon counsel of record in this case at the following addresses:

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ADDENDUM

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UNITED STATES PUBLIC LAWS
109th Congress - First Session
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PL 109-148 (HR 2863)
December 30, 2005
DEPARTMENT OF DEFENSE, EMERGENCY SUPPLEMENTAL APPROPRIATIONS TO ADDRESS HURRICANES IN THE GULF OF MEXICO, AND PANDEMIC INFLUENZA ACT, 2006

An Act Making appropriations for the Department of Defense for the fiscal year ending September 30, 2006, and for other purposes.

TITLE X--MATTERS RELATING TO DETAINEES
<< 42 USCA § 2000dd NOTE >>

SEC. 1001. SHORT TITLE.

This title may be cited as the "Detainee Treatment Act of 2005".

<< 10 USCA § 801 NOTE >>

SEC. 1002. UNIFORM STANDARDS FOR THE INTERROGATION OF PERSONS UNDER THE DETENTION OF THE DEPARTMENT OF DEFENSE.

(a) IN GENERAL.--No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.

(b) APPLICABILITY.--Subsection (a) shall not apply with respect to any person in the custody or under the effective control of the Department of Defense pursuant to a criminal law or immigration law of the United States.

(c) CONSTRUCTION.--Nothing in this section shall be construed to affect the rights under the United States Constitution of any person in the custody or under the physical jurisdiction of the United States.

<< 42 USCA § 2000dd >>

SEC. 1003. PROHIBITION ON CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT OF PERSONS UNDER CUSTODY OR CONTROL OF THE UNITED STATES GOVERNMENT.

(a) IN GENERAL.--No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

(b) CONSTRUCTIO.n--Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section.

(c) LIMITATION ON SUPERSEDURE.--The provisions of this section shall not be superseded, except by a provision of law enacted after the date of the enactment of this Act which specifically repeals, modifies, or supersedes the provisions of this section.

***2740**
(d) CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT DEFINED.--In this section, the term "cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

<< 42 USCA § 2000dd NOTE >>

SEC. 1004. PROTECTION OF UNITED STATES GOVERNMENT PERSONNEL ENGAGED IN

AUTHORIZED INTERROGATIONS.

(a) PROTECTION OF UNITED STATES GOVERNMENT PERSONNEL.--In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent's engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful. Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available to any person or entity from suit, civil or criminal liability, or damages, or to provide immunity from prosecution for any criminal offense by the proper authorities.

(b) COUNSEL.--The United States Government may provide or employ counsel, and pay counsel fees, court costs, bail, and other expenses incident to the representation of an officer, employee, member of the Armed Forces, or other agent described in subsection (a), with respect to any civil action or criminal prosecution arising out of practices described in that subsection, under the same conditions, and to the same extent, to which such services and payments are authorized under section 1037 of title 10, United States Code.

<< 10 USCA § 801 NOTE >>

SEC. 1005. PROCEDURES FOR STATUS REVIEW OF DETAINEES OUTSIDE THE UNITED STATES.

(a) SUBMITTAL OF PROCEDURES FOR STATUS REVIEW OF DETAINEES AT GUANTANAMO BAY, CUBA, AND IN AFGHANISTAN AND IRAQ.--

(1) IN GENERAL.--Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committee on Armed Services and the Committee on the Judiciary of the Senate and the Committee on Armed Services and the Committee on the Judiciary of the House of Representatives a report setting forth--

(A) the procedures of the Combatant Status Review Tribunals and the Administrative Review Boards established by direction of the Secretary of Defense that are ***2741** in operation at Guantanamo Bay, Cuba, for determining the status of the detainees held at Guantanamo Bay or to provide an annual review to determine the need to continue to detain an alien who is a detainee; and

(B) the procedures in operation in Afghanistan and Iraq for a determination of the status of aliens detained in the custody or under the physical control of the Department of Defense in those countries.

(2) DESIGNATED CIVILIAN OFFICIAL.--The procedures submitted to Congress pursuant to paragraph (1)(A) shall ensure that the official of the Department of Defense who is designated by the President or Secretary of Defense to be the final review authority within the Department of Defense with respect to decisions of any such tribunal or board (referred to as the "Designated Civilian Official") shall be a civilian officer of the Department of Defense holding an office to which appointments are required by law to be made by the President, by and with the advice and consent of the Senate.

(3) CONSIDERATION OF NEW EVIDENCE.--The procedures submitted under paragraph (1)(A) shall provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee.

(b) CONSIDERATION OF STATEMENTS DERIVED WITH COERCION.--

(1) ASSESSMENT.--The procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess--

(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and

(B) the probative value (if any) of any such statement.

(2) APPLICABILITY.--Paragraph (1) applies with respect to any proceeding beginning on or after the date of the enactment of this Act.

(c) REPORT ON MODIFICATION OF PROCEDURES.--The Secretary of Defense shall submit to the committees specified in subsection (a)(1) a report on any modification of the procedures submitted under subsection (a). Any such report shall be submitted not later than 60 days before the date on which such modification goes into effect.

(d) ANNUAL REPORT.--

(1) REPORT REQUIRED.--The Secretary of Defense shall submit to Congress an annual report on the annual review process for aliens in the custody of the Department of Defense outside the United States. Each such report shall be submitted in unclassified form, with a classified annex, if necessary. The report shall be submitted not later than December 31 each year.

(2) ELEMENTS OF REPORT.--Each such report shall include the following with respect to the year covered by the report:

(A) The number of detainees whose status was reviewed.

(B) The procedures used at each location.

(e) JUDICIAL REVIEW OF DETENTION OF ENEMY COMBATANTS.--

***2742**

<< 28 USCA § 2241 >>

(1) IN GENERAL.--Section 2241 of title 28, United States Code, is amended by adding at the end the following:

"(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider--

"(1) 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; or

"(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who--

"(A) is currently in military custody; or

"(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.".

(2) REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION.--

(A) IN GENERAL.--Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

(B) LIMITATION ON CLAIMS.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien--

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of--

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

(D) TERMINATION ON RELEASE FROM CUSTODY.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the ***2743** release of such alien from the custody of the Department of Defense.

(3) REVIEW OF FINAL DECISIONS OF MILITARY COMMISSIONS.--

(A) IN GENERAL.--Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).

(B) GRANT OF REVIEW.--Review under this paragraph--

(i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of

10 years or more, shall be as of right; or

(ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.

(C) LIMITATION ON APPEALS.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to an appeal brought by or on behalf of an alien--

(i) who was, at the time of the proceedings pursuant to the military order referred to in subparagraph (A), detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a final decision has been rendered pursuant to such military order.

(D) SCOPE OF REVIEW.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an appeal of a final decision with respect to an alien under this paragraph shall be limited to the consideration of--

(i) whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.

(4) RESPONDENT.--The Secretary of Defense shall be the named respondent in any appeal to the United States Court of Appeals for the District of Columbia Circuit under this subsection.

(f) CONSTRUCTION.--Nothing in this section shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States.

(g) UNITED STATES DEFINED.--For purposes of this section, the term "United States", when used in a geographic sense, is as defined in section 101(a)(38) of the Immigration and Nationality Act and, in particular, does not include the United States Naval Station, Guantanamo Bay, Cuba.

(h) EFFECTIVE DATE.--

(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 ***2744** (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.

<< 10 USCA § 801 NOTE >>

SEC. 1006. TRAINING OF IRAQI FORCES REGARDING TREATMENT OF DETAINEES.

(a) REQUIRED POLICIES.--

(1) IN GENERAL.--The Secretary of Defense shall ensure that policies are prescribed regarding procedures for military and civilian personnel of the Department of Defense and contractor personnel of the Department of Defense in Iraq that are intended to ensure that members of the Armed Forces, and all

persons acting on behalf of the Armed Forces or within facilities of the Armed Forces, ensure that all personnel of Iraqi military forces who are trained by Department of Defense personnel and contractor personnel of the Department of Defense receive training regarding the international obligations and laws applicable to the humane detention of detainees, including protections afforded under the Geneva Conventions and the Convention Against Torture.

(2) ACKNOWLEDGMENT OF TRAINING.--The Secretary shall ensure that, for all personnel of the Iraqi Security Forces who are provided training referred to in paragraph (1), there is documented acknowledgment of such training having been provided.

(3) DEADLINE FOR POLICIES TO BE PRESCRIBED.--The policies required by paragraph (1) shall be prescribed not later than 180 days after the date of the enactment of this Act.

(b) ARMY FIELD MANUAL.--

(1) TRANSLATION.--The Secretary of Defense shall provide for the United States Army Field Manual on Intelligence Interrogation to be translated into arabic and any other language the Secretary determines appropriate for use by members of the Iraqi military forces.

(2) DISTRIBUTION.--The Secretary of Defense shall provide for such manual, as translated, to be provided to each unit of the Iraqi military forces trained by Department of Defense personnel or contractor personnel of the Department of Defense.

(c) TRANSMITTAL OF REGULATIONS.--Not less than 30 days after the date on which regulations, policies, and orders are first prescribed under subsection (a), the Secretary of Defense shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives copies of such regulations, policies, or orders, together with a report on steps taken to the date of the report to implement this section.

(d) ANNUAL REPORT.--Not less than one year after the date of the enactment of this Act, and annually thereafter, the Secretary of Defense shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a report on the implementation of this section.

This division may be cited as the "Department of Defense Appropriations Act, 2006".

[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:

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[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]

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[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,

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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:

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