

**[ORAL ARGUMENT HELD ON SEPTEMBER 8, 2005 AND MARCH 22, 2006]**

Nos. 05-5062, 05-5063 & 05-064, 05-095 through 05-5116

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

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LAKHDAR BOUMEDIENE, et al.,  
Appellants,  
v.  
GEORGE W. BUSH, President of the United States, et al.,  
Appellees.

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KHALED A. F. AL ODAH, et. al.,  
Appellees/Cross-Appellants,  
v.  
UNITED STATES OF AMERICA, et al.,  
Appellants/Cross-Appellees.

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**GOVERNMENT'S SUPPLEMENTAL REPLY BRIEF ADDRESSING  
THE MILITARY COMMISSIONS ACT**

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PAUL D. CLEMENT  
*Solicitor General*

PETER D. KEISLER  
*Assistant Attorney General*

GREGORY G. KATSAS  
*Principal Deputy Associate Attorney General*

DOUGLAS N. LETTER  
(202) 514-3602  
ROBERT M. LOEB  
(202) 514-4332  
SARANG V. DAMLE  
(202) 514-5735  
*Attorneys, Appellate Staff  
Civil Division, Room 7268  
U.S. Department of Justice  
950 Pennsylvania Ave., N.W.  
Washington, D.C. 20530-0001*

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Pursuant to this Court’s October 18, 2006 order, we address the significance of the Military Commissions Act of 2006, Pub. L. No. 109-366 (“MCA”), on the above-captioned appeals.

**SUMMARY OF ARGUMENT**

I. The Military Commissions Act unambiguously eliminates district court jurisdiction over these cases. The MCA expressly states that this amendment “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.” MCA, § 7(b). The statute’s plain language applies to these pending cases. Moreover, the context and legislative history uniformly demonstrate that the elimination of district court habeas jurisdiction applies to these pending cases. The exclusive review of petitioners’ challenges to their detention as enemy combatants now lies within this Court’s exclusive province.

II. Because there can now be no question that Congress has eliminated district court jurisdiction over petitioners’ claims, petitioners are left to arguing that the Act is unconstitutional. These arguments are all without merit. First, as we have explained at length in our previous filings, petitioners, who are all aliens outside the United States, have no constitutional habeas rights to assert, and, thus the elimination of the statutory right to seek habeas review does not implicate the Suspension Clause. Second, even if petitioners possessed constitutional habeas rights, given the review afforded, there is no suspension in this context because Congress has provided an adequate substitute. As set out in our prior briefs, the review afforded by Congress of the enemy combatant determinations by the Combatant Status Review Tribunals (“CSRTs”) is greater than that afforded in habeas for alien enemies facing military criminal proceedings. *Yamashita v. Styer*, 327 U.S. 1, 8 (1946) (military tribunals are “not subject to judicial review merely because they have made a wrong decision on

disputed facts.”). Even outside of the military context, under traditional habeas review, “other than the question whether there was some evidence to support the order, the courts generally did not review the factual determinations made by the Executive.” *See INS v. St. Cyr*, 533 U.S. 289, 305-06 (2001). Petitioners’ insistence that enemies captured during armed conflict, and detained by the military as enemy combatants have a right to *de novo* review of the ruling of the governing military tribunal is wholly unfounded, contrary to Supreme Court precedent, and would severely impair the military’s ability to defend this country. *See Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950) (proving such habeas review “would hamper the war effort and bring aid and comfort to the enemy”).

III. Section 5(a) of the MCA makes explicit that the Geneva Conventions are not judicially enforceable. The Act, therefore, supports the Government’s argument that petitioners’ treaty claims should be dismissed.

## ARGUMENT

### **I. THE MILITARY COMMISSIONS ACT ELIMINATES DISTRICT JURISDICTION OVER PETITIONERS' CLAIMS.**

The Military Commissions Act makes clear that the district courts no longer have jurisdiction over these cases, and that exclusive review of petitioners' challenges to their detention as enemy combatants lies within this Court's exclusive province.

A. Section 7 of the MCA unequivocally eliminates federal court jurisdiction over petitioners' claims and these appeals, except as provided in this Court under section 1005(e)(2) and (e)(3) of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-45 (2005) ("DTA"). Section 7(a) of the MCA amends 28 U.S.C. § 2241 to provide that "[n]o 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." In addition, section 7(a) eliminates federal court jurisdiction, except as provided by section 1005(e)(2) and (e)(3) of the DTA, over "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 to by the United States

to have been properly detained as an enemy combatant or is awaiting such determination.” MCA, § 7(a).

The MCA further provides that these amendments “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.” MCA, § 7(b).

B. The MCA is unambiguous. Under Section 7, petitioners’ avenue of review of their detention as enemy combatants lies not with the district courts, but rather exclusively with this Court. The MCA’s language leaves no room for dispute about this point. The elimination of jurisdiction (except that provided by the DTA) mandated by section 7(a), applies 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.” MCA, § 7(b) (emphasis added). Nonetheless, petitioners contend that this language applies only to non-habeas cases, and that, therefore jurisdiction has been preserved for their pending district court habeas cases. This argument, however, ignores the statute’s plain language, the context of the enactment of this provision, and the consistent legislative history, all demonstrating that the statute was intended to eliminate habeas jurisdiction over pending cases.

Finally, petitioners' suggestion that this Court should ignore the statute's plain meaning and history is not supported by their constitutional avoidance argument.

1. The scope of section 7(b) is clearly stated -- it applies to the amendment "made by subsection (a)." MCA § 7(b). Section 7(a) expressly includes the elimination of habeas claims brought by an "alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant." MCA, § 7(a).<sup>1</sup> There is no basis for reading, as petitioners suggest, section 7(b)'s clause, "all cases, without exception \* \* \* which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention," as not including the habeas cases addressed in section 7(a). The habeas cases are indisputably cases relating to "detention." Moreover, the district courts in those habeas cases have issued dozens of orders barring "transfer" of the detainees. Congress unambiguously

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<sup>1</sup> Asserting an argument that no party joins, one amicus brief erroneously suggests that the statute does not apply here because petitioners dispute whether they are "properly detained" as enemy combatants. *See* World Org. For Human Rights Supp. Br. 4-6. The statute, however, covers all detainees "*determined by the United States to have been properly detained as an enemy combatant.*" MCA, § 7(a) (emphasis added). The United States, through the CSRTs, has determined that petitioners are "properly detained" as enemy combatants. Thus, petitioners are plainly within the scope of the statute.

eliminated jurisdiction over “all cases, without exception,” of that nature, including these habeas cases.<sup>2</sup>

In addition, the sweeping language used in section 7(b) -- “all cases, without exception” -- is plainly broader than the more limited category of cases referenced in the second part of section 7(a). The first part of section 7(a) addresses habeas cases challenging the detainees’ detention. The second part of section 7(a) speaks to “any other action” relating to detention, or transfer, etc. The language used in 7(b) is not, however, limited to the category of “other actions.” Rather, in stating that section 7(a) applies to pending cases, Congress explicitly addressed, not just “other actions,” but “all cases, without exception” relating to detention, or transfer, etc. This statutory language plainly refers to “all” of the cases described in both parts of section 7(a). At bottom, there can be no question that the habeas cases here, challenging detention fall within the scope of “all cases, without exception,” relating to detention.

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<sup>2</sup> Petitioners attempt to contrast the language used in section 7 (speaking to “all cases, without exception”) to the language in section 3 of the MCA, (enacting 18 U.S.C. § 950j). In section 3, however, Congress used very similar language to that used in section 7, speaking to “any claim or cause of action” pending on the date of enactment. Just like section 7, the reference to habeas jurisdiction in section 3 is in the first clause regarding the scope of the bar on judicial review, and is not mentioned again in regard to the temporal reach of the provision. The language used in section 7 (“all cases, without exception”) is even broader than the lanaguage used in section 3 (“any claim or cause of action”). Thus, there is no “negative inference” to be drawn from section 3.

2. The context of the enactment of this provision also unambiguously demonstrates that the whole point of section 7 was to eliminate district court habeas jurisdiction over these pending cases. In the DTA, Congress attempted to eliminate district court habeas jurisdiction over these cases and to place exclusive jurisdiction in this Court. *See* DTA, § 1005(e)(1), (e)(2), (h)(1). The Supreme Court, however, held that the DTA was not clear that the elimination of district court habeas jurisdiction applied to pending cases, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). The *Hamdan* Court recognized that, under the DTA, this Court’s exclusive jurisdiction over enemy combatant determinations did apply to pending cases,<sup>3</sup> and it left open the question of whether the pending district court habeas challenges brought by the detainees to their detention as enemy combatants would have to be transferred to this Court’s exclusive jurisdiction. *Id.* at 2769 n.14.

Congress reacted swiftly to *Hamdan* by unambiguously extending the elimination of habeas jurisdiction to “all cases, without exception, pending” on the date of the MCA’s enactment. MCA, § 7(b). As Senator Sessions explained during the debate over the MCA: “Section 7 of the [MCA] fixes this feature of the DTA and ensures that there is no possibility of confusion in the future.” 152 Cong. Rec.

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<sup>3</sup> *Id.* at 2764 (“paragraphs (2) and (3) of subsection (e) are expressly made applicable to pending cases”); *id.* at 2769 (“Congress here expressly provided that subsections (e)(2) and (e)(3) applied to pending cases”).

S10404 (daily ed. Sept. 28, 2006). After quoting subsection (b), he stated, “I don’t see how there could be any confusion as to the effect of this act on the pending Guantanamo litigation. The MCA’s jurisdictional bar applies to that litigation ‘without exception.’” *Ibid.*

Nonetheless, petitioners would now have this Court misconstrue the MCA’s plain language to be redundant of the DTA (which, as *Hamdan* held, already eliminated that jurisdiction prospectively). That interpretation makes no sense and is contrary to the reality that Congress was clarifying the DTA, after *Hamdan*, to now expressly state that the elimination of jurisdiction over the habeas claims applies to all pending cases.

Petitioners also ignore the context created by the DTA. The DTA established not only the right to judicial review in this Court, but also expressly stated both that this Court’s jurisdiction is “exclusive” and that this exclusive jurisdiction applies to “pending cases.” DTA, § 1005(e)(2)(A), (h)(2). As we have explained in our prior briefs, even in the absence of the withdrawal of habeas jurisdiction, petitioners’ claims regarding their detention can only be heard pursuant to this Court’s exclusive jurisdiction and, thus, must be transferred to this Court. To the extent there was any doubt before, now, in the MCA, Congress has made clear that the district court retains no jurisdiction over the habeas and other claims asserted by petitioners, and that the claims challenging their detentions as enemy combatants can be heard only in this

Court. Petitioners' arguments that the district courts should adjudicate whether they are properly detained as enemy combatants flout both the plain language of the MCA, withdrawing that jurisdiction, and this Court's "exclusive" jurisdiction established by the DTA to adjudicate such pending claims.

3. The legislative debate over section 7 establishes that, without exception, both the proponents and opponents of the section understood the statute to eliminate habeas jurisdiction over the pending cases. *See, e.g.*, 152 Cong. Rec. S102262 (daily ed. Sept. 27, 2006) (Sen. Bingaman) (quoting a letter opposing section 7, "the provision \* \* \* would strip the federal courts of jurisdiction over even the pending habeas cases"); 152 Cong. Rec. S10357 (daily ed. Sept. 28, 2006) (Sen. Leahy) ("the bill goes far beyond what Congress did in the [DTA] \* \* \*. This new bill strips habeas jurisdiction retroactively, even for pending cases"); *Id.* at S10367 (Sen. Graham) ("The only reason we are here is because of the *Hamdan* decision. The *Hamdan* decision did not apply to the [DTA] retroactively, so we have about 200 and some habeas cases left unattended and we are going to attend to them now"); *Id.* at S10403 (Sen. Cornyn) ("once \* \* \* section 7 is effective, Congress will finally accomplish what it sought to do through the [DTA] last year. It will finally get the lawyers out of Guantanamo Bay. It will substitute the blizzard of litigation instigated by *Rasul v. Bush* with a narrow DC Circuit-only review of the Combatant Status Review Tribunal--CSRT--hearings"); *Id.* at S10404 (Sen. Sessions) ("It certainly was

not my intent, when I voted for the DTA, to exempt all of the pending Guantanamo lawsuits \* \* \*. Section 7 of the [MCA] fixes this feature of the DTA and ensures that there is no possibility of confusion in the future”); 152 Cong. Rec. H7938 (Rep. Hunter) (daily ed. Sept. 29, 2006) (“The practical effect of this amendment will be to eliminate the hundreds of detainee lawsuits that are pending in courts throughout the country and to consolidate all detainee treatment cases in the D.C. Circuit”); *Id.* at H7942 (Rep. Jackson-Lee) (“The habeas provisions in the legislation are contrary to congressional intent in the [DTA]. In that act, Congress did not intend to strip the courts of jurisdiction over the pending habeas”).

4. Finally, the unambiguous language cannot be ignored here, as petitioners suggest, based on a need to construe the statute to avoid “substantial constitutional questions.” The avoidance principle is inapplicable where, as here, the statute is unambiguous. *See, e.g., United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494 (2001) (“the canon of constitutional avoidance has no application in the absence of statutory ambiguity”). Moreover, the Suspension Clause issues raised by petitioners cannot in any event be avoided by petitioners’ countertextual reading of the statute. There is no dispute that the DTA and MCA eliminated habeas jurisdiction prospectively. Additional habeas claims have been brought since the enactment of the DTA. Thus, the federal courts will have to determine whether Congress may eliminate that district court habeas jurisdiction and instead provide

review through the DTA in this Court. That issue is unavoidable and the “avoidance” principle cited is, therefore, inapplicable.<sup>4</sup>

**II. THE MCA DOES NOT VIOLATE THE SUSPENSION CLAUSE BECAUSE PETITIONERS HAVE NO CONSTITUTIONAL RIGHTS AND BECAUSE THE MCA AND DTA PROVIDE AN UNPRECEDENTED LEVEL OF JUDICIAL REVIEW FOR THE CLAIMS OF ENEMY ALIENS.**

Given that the MCA clearly applies to petitioners’ cases, they are left to argue that section 7 of the MCA violates the Suspension Clause by eliminating habeas jurisdiction over their cases. That argument was fully addressed in the prior supplemental briefing addressing the DTA and was discussed at the March 22, 2006 oral argument. The Government argued that the DTA withdrew district court jurisdiction and made jurisdiction exclusive in this Court, and that Congress did not violate the Suspension Clause in enacting those DTA provisions. Petitioners responded by arguing both that the DTA did not eliminate district court jurisdiction over pending cases, but also that, if it did, the Act would amount to an unconstitutional suspension of their rights to seek habeas review. Those arguments were fully aired before this Court and will not be repeated in full here. As we explain below, none of petitioners’ arguments in the latest round of briefing supports their

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<sup>4</sup> It is also inapplicable because, as we explain below, petitioners’ constitutional arguments are insubstantial.

claim that the withdrawal of district court habeas jurisdiction, and the grant, instead, of exclusive review in this Court, amounts to a Suspension Clause violation.

A. Petitioners fundamentally err in simply assuming that aliens detained overseas as enemy combatants have constitutional habeas rights protected by the Suspension Clause.

1. Traditionally, there has been no constitutional right to seek habeas review over a military decision to hold an alien enemy as a prisoner during armed conflict.<sup>5</sup> *See Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (courts “will not even grant a habeas corpus in the case of a prisoner of war, because such a decision on this question is in another place, being part of the rights of sovereignty”). In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Supreme Court held the aliens, held as enemies outside the United States, are not “entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas.” *Id.* at 777; *see also id.* at 781 (“no right to the writ of habeas corpus appears”). The Court concluded that, because the petitioner in that case had no constitutional rights, the denial of habeas review did not violate either the Suspension Clause or the Fifth Amendment.<sup>6</sup> *Id.* at 777-779,

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<sup>5</sup> The detention of enemy combatants during an armed conflict is not punitive in nature. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518-19 (2004). Rather, it is a necessary attribute and by product of war. *Ibid.*

<sup>6</sup> The *Eisentrager* holding clearly pertains to the Suspension Clause. The court of appeals’ ruling in *Eisentrager* explicitly held that construing the habeas statute as

784-785. In rejecting the assertion of such a constitutional habeas right, the Court emphatically stated that such a constitutional entitlement “would hamper the war effort and bring aid and comfort to the enemy\* \* \*.” *Id.* at 779. The Court explained, “[i]t would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.” *Ibid.*

In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990), the Supreme Court reaffirmed *Eisentrager*’s constitutional holding that aliens outside the United States have no rights under the U.S. Constitution. *See id.* at 273 (“Not only are history and case law against [the alien], but as pointed out in [*Eisentrager*], the result of accepting this claim would have significant and deleterious consequences for the

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inapplicable to the petitioners in that case would violate the Suspension Clause. *See Eisentrager v. Forrestal*, 174 F.2d 961, 965-66 (D.C. Cir. 1949). The Supreme Court reversed that Suspension Clause holding, stating in Part II of its opinion that the aliens in U.S. custody abroad were not “entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas.” 339 U.S. at 777. Indeed, the Court was required to render such a constitutional holding to rule for the Government because in *Eisentrager* the petitioners had asserted habeas rights under both the applicable statute and the Suspension Clause. Moreover, the Court’s Suspension Clause holding is entirely consistent with the rest of the opinion, which makes clear that the Constitution does not apply extraterritorially to aliens. *See id.* at 784-85 (explaining that “extraterritorial application of organic law” to aliens would be inconceivable).

United States in conducting activities beyond its boundaries.”).<sup>7</sup> Following these precedents, this Court consistently has held that a “foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.” *32 County Sovereignty Comm. v. Department of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (citation omitted).

Thus, the holding of *Eisentrager* is controlling here. Petitioners are not “entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas.” 339 U.S. at 777. Thus, the withdrawal of habeas jurisdiction does not implicate the Suspension Clause.

2. Petitioners, in a footnote (Al Odah Br. 20 n.27), reiterate their argument that, even though they are aliens being held on Cuban sovereign territory, they should be treated as being within the United States. We have thoroughly addressed that contention in our prior merits briefs. CITES TO BRIEFS. What was critical in *Eisentrager* was the lack of sovereignty, and there can be no dispute that, as was true for the petitioner in *Eisentrager*, petitioners here are being held on foreign sovereign territory.

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<sup>7</sup> In their prior briefs, petitioners contend that *Rasul* limited the constitutional holding of *Eisentrager* to its facts. As we have explained, that claim is incorrect. CITES.

B. 1. Under *Eisentrager*, Congress could have simply withdrawn jurisdiction over these matters and left the decision whether to detain enemy aliens held abroad to the military, as has been the case traditionally. The MCA and DTA, however, take the extraordinary, and truly unprecedented additional step of granting enemy aliens held outside the United States the right to obtain juridical oversight of the enemy combatant tribunal determinations.

Section 1005(e)(2)(C) of the DTA specifies this Court's "scope of review" of the United States' enemy combatant determination. It provides that this Court's review "shall be limited to the consideration of \* \* \* whether the status determination of the [CSRT] with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs] (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)." DTA, § 1105(e)(2)(C). This Court shall also consider, "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." *Ibid.*

Thus, the MCA and DTA, while eliminating district court jurisdiction, affords petitioners an unprecedented level of judicial review for an enemy alien captured during an armed conflict. As part of that DTA review, petitioners can challenge the

lawfulness, under the U.S. Constitution and U.S. law, of any aspect the CSRT process. We have argued (and continue to argue) that petitioners have no constitutional rights in this context, but petitioners can plead their arguments to the contrary to this Court, and this Court can resolve that issue.

Even assuming petitioners have a constitutional habeas rights (contrary to the holding of *Eisentrager*), the Supreme Court has held that Congress may freely repeal habeas jurisdiction, if it affords an adequate and effective substitute remedy. *See Swain v. Pressley*, 430 U.S. 372, 381 (1977). As we explained in our prior supplemental briefs regarding the DTA, there is no possible Suspension Clause violation here because the statutory review for constitutional and other legal claims afforded under 1005(e)(2)(C)(ii) of the DTA provides petitioners with *greater rights* of judicial review than that traditionally afforded to those convicted of war crimes by a military commission. CITE TO BRIEFS. The Supreme Court has held that the habeas review afforded in that context does not examine the guilt or innocence of the defendant, nor does it examine the sufficiency of the evidence. Rather, it is limited to the question whether the military commission had jurisdiction over the charged offender and offense. *See Yamashita v. Styer*, 327 U.S. 1, 8 (1946) (“If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the

military authorities which are alone authorized to review their decisions”); *id.* at 17 (“We do not here appraise the evidence on which petitioner was convicted” because such a question is “within the peculiar competence of the military officers composing the commission and were for it to decide”); *Ex parte Quirin*, 317 U.S. 1, 25 (1942) (“We are not here concerned with any question of the guilt or innocence of petitioners”). *See also Eisentrager*, 339 U.S. at 786.

As noted above, the under the DTA petitioners are able to challenge the lawfulness, under “laws of the United States” and the U.S. Constitution, to the extent applicable. In their latest briefs, petitioners complain about the nature of the CSRT process, the enemy combatant definition used by the CSRTs, and the types of material submitted to the CSRTs. All of these issues can be asserted in this Court under the DTA. This Court can determine the nature of petitioners’ rights, if any, under “laws of the United States” and the U.S. Constitution, and can adjudicate whether the CSRT process violated any applicable rights. These legal arguments, regarding the CSRT process, have already been fully briefed in this case and should be decided forthwith by this Court in these cases under its exclusive DTA jurisdiction.

As noted above, under *Yamashita*, there was review only of the threshold, jurisdictional question whether the offense and offender were triable by military commission. There was no review of (1) other legal questions, (2) compliance with the military's own procedures, or (3) evidentiary sufficiency -- all of which the DTA

and MCA permit. *See* DTA, § 1005(e)(2)(C)(I) (permitting review of whether the CSRT, in reaching its decision, complied with its own procedures, “including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence”). Thus, the DTA review provided by Congress is not only far surpasses the type of review available under *Yamashita*, and it plainly affords an adequate and effective substitute remedy for any applicable habeas right. *See Swain*, 430 U.S. at 381.

As we explained in our supplemental DTA briefs (CITES), the review afforded under the DTA is also fully consistent with traditional habeas practice, outside the military tribunal context, where “pure questions of law” are generally reviewable, but, “other than the question whether there was some evidence to support the order, the courts generally did not review the factual determinations made by the Executive.” *St. Cyr*, 533 U.S. at 305-06. Thus, even if the non-military habeas authority is examined, the Suspension Clause arguments asserted by petitioners fail.

3. Petitioners erroneously contend that, because they have not been criminally convicted, habeas relief entitles them to a “searching factual inquiry” – including apparently discovery and a *de novo* judicial trial – into whether or not they are enemy combatants. In so arguing, petitioners ignore the reality that such *de novo* trials, reviewing military tribunal rulings that aliens captured abroad during an armed conflict are enemy combatants, “would hamper the war effort and bring aid and

comfort to the enemy.” *Eisentrager*, 339 U.S. at 779. Petitioners also ignore the controlling Supreme Court precedent cited above specifying the nature of habeas review of a military tribunal decision. The Supreme Court has repeatedly held that, even under habeas review of a military tribunal ruling regarding an enemy alien, a court may not examine the guilt or innocence of the defendant, or examine the sufficiency of the evidence.

Moreover, petitioners’ contention that they have a constitutional habeas right to a sweeping factual inquiry in district court cannot be reconciled with *Hamdi*. In that habeas action, the Supreme Court addressed the extent of process due to an American citizen held in this country as an enemy combatant. The controlling plurality opinion acknowledged the “weighty” and “sensitive” government interests in capturing and detaining enemy combatants. 542 U.S. at 531 (plurality). It further acknowledged that “core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them.” *Id.* at 531. Accordingly, the Supreme Court plurality explained that “an appropriately authorized and properly constituted military tribunal” could permissibly make enemy combatant determinations. *See id.* at 538.

In accord with *Hamdi* and *Yamashita*, the MCA and DTA were enacted to ensure that, that while each detainee is afforded his day in court, the substantive decision of whether to consider an alien captured during an armed conflict an enemy,

remains a military decision. *See* 152 Cong. Rec. S10266 (daily ed. Sept. 27, 2006) (Sen. Graham) (“[t]he role of the courts in a time of war is to pass muster and judgment over the process we create -- not substituting their judgment for the military”); *Id.* at S10404 (Sen. Cornyn) (“Weighing of the evidence is a function for the military when the question is whether someone is an enemy combatant. Courts simply lack the competence -- the knowledge of the battlefield and the nature of our foreign enemies -- to judge whether particular facts show someone is an enemy combatant”).

Petitioners contend that the military tribunal hearings at issue here do not fall under *Yamashita* or *Hamdi* because Congress did not create the CSRTs. The type of tribunals discussed in *Hamdi*, however, were tribunals established by regulation, not Congressional enactment. Further, there is no question that the Executive Branch has the authority to establish such tribunals to render such enemy combatant determinations. *See, e.g., Hamdi*, 542 U.S. at 518 (“The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war’” (*quoting Quirin*, 317 U.S. at 28)). Indeed, as noted above, *Hamdi* approved the use of such tribunals authorized by the Executive Branch.

Moreover, petitioners ignore the fact that the review afforded by Congress pursuant to the DTA (and referenced in the MCA), is expressly limited and

specifically geared to reviewing the final CSRT determinations. DTA, § 1005(e)(2). Thus, Congress in the DTA and MCA has recognized that these military tribunals, the CSRTs, provide the authoritative military adjudication of whether the detainees held at the Guantanamo Bay Naval Base should be treated as enemy combatants. Congress has authorized courts to review the legality of the CSRT process and whether the CSRT decision was consistent with the standards adopted by the Defense Department. To argue that, despite this congressional recognition of the CSRTs and the calibrated review scheme for the tribunal rulings, there should also be *de novo* district court review of the enemy combatant status, makes no sense. The limited *Yamashita* standard of review would apply in this context (if petitioners had any constitutional habeas rights), and the review afforded by the DTA is far more capacious than that standard.

C. Petitioners argue that under the common law habeas in existence at the time the Suspension Clause was enacted,<sup>8</sup> courts performed *de novo* fact review when claims were brought by aliens held as prisoners of war outside the country. Whether accurate or not, as pointed out above, the Supreme Court in *Eisentrager* expressly

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<sup>8</sup> As explained in the Government's supplemental DTA brief, the habeas rights covered by Suspension Clause are properly based on the rights recognized in 1789. CITE TO BRIEF. As we further explained, even under an evolutionary approach to the constitutional habeas rights protected by the Suspension Clause, petitioners' claim to a constitutional habeas right cannot be squared with Supreme Court precedent. CITE.

held that there is no constitutional habeas right for an enemy alien held outside the United States to challenge his detention. Thus, petitioners' historical argument based on common law habeas does not advance their Suspension Clause claim.

In any event, their claim is *not* historically accurate. See *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (courts “will not even grant a habeas corpus in the case of a prisoner of war, because such a decision on this question is in another place, being part of the rights of sovereignty”). The habeas cases cited by petitioners simply do not hold up to scrutiny. Three of the cases cited by petitioners do not involve aliens held as enemies. Rather, they involve challenges to eligibility for military impressment where the central questions had never been adjudicated by any body, judicial or otherwise.<sup>9</sup> Petitioners also cite *R. v. Schiever*, 97 Eng. Rep. 551 (K.B. 1750), and *Case of the Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779). In both cases, the court rejected the habeas claims asserted by aliens being held as prisoners of war on sovereign English territory. Thus, these rulings do not speak to the habeas rights of aliens held as enemies outside sovereign territory, which is the relevant class of petitioners and the class of petitioner addressed squarely in *Eisentrager*. Moreover, in rejecting the claim in *Three Spanish Sailors*, the court noted that the

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<sup>9</sup> See *State v. Clark*, 2 Del. Cas. 578 (Del. Chancery 1820); *Good's Case*, 96 Eng. Rep. 137 (K.B. 1760); *Goldswain's Case*, 96 Eng. Rep. 711 (C.P. 1778).

petitioners, as prisoners of war, were “not entitled to any of the privileges of Englishmen; much less to be set at liberty on habeas corpus.” 96 Eng. Rep. at 776.<sup>10</sup>

Petitioners also cite *Lockington’s Case*, Bright. (N.P.) 269 (Pa. 1813), where a British citizen held in U.S. sovereign territory was denied habeas relief. Given that the alien was present on U.S. sovereign territory, this case is plainly inapposite. Moreover, in *Lockington’s Case*, the government was not holding the alien as a prisoner of war, or as an enemy combatant. The state court made clear that if the petitioner had been held as a prisoner of war he would have *no habeas rights*. *Id.* at 276.<sup>11</sup>

Only one case petitioners cite involves review of the decision of a military tribunal, *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). Unlike petitioners here, however, the petitioner in *Milligan* was a U.S. citizen being held in sovereign U.S. territory. Thus, that decision is wholly inapposite and obviously does not diminish

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<sup>10</sup> Likewise, in *Scheiver*, the court rejected the habeas petition notwithstanding the petitioner’s claim that he was innocent and that he had been captured and forced to fight by enemy forces. 97 Eng. Rep. at 552.

<sup>11</sup> The petitioner in *Lockington’s Case* had been conducting business in the U.S. before the War of 1812. British citizens residing in this country were not deemed prisoners of war, but rather were categorized as enemy aliens and ordered to move away from certain areas. Lockington refused, and was held by a federal officer. He filed for habeas relief. The state court denied the petition, holding that his detention for failure to follow a lawful Presidential order was proper. *Id.* at 277-283. One of the Justices writing in this case further stated his view that the state court had no authority over the matter. *Id.* at 299-301.

the later controlling holding of *Eisentrager*. We note, however, that even in that case the Court did not “evaluate” exculpatory evidence presented by the petitioner, but relied entirely on facts that were not in dispute, namely, the residency of Milligan in a state where the Civil War had not been active and where the regular courts were operational. *Id.* at 118, 121-12. The *Milligan* Court certainly did not engage in or authorize any process approaching the sort of evidentiary hearing envisioned by petitioners here.<sup>12</sup>

D. 1. In challenging the adequacy of the DTA review provided by Congress, petitioners erroneously assert that petitioners’ counsel will not have access to classified material in the record. Although we have argued in *Bismullah v. Rumsfeld*, No. 06-1197 (D.C. Cir.), that petitioners and their counsel have no right to have access to classified material in a DTA review case, the Government has proposed a protective order that will in fact afford an attorney, whom the detainee authorizes as his representative, and who has obtained the necessary security clearances and agreed to the applicable security rules, access to both the unclassified record and the classified parts of the CSRT records, which the counsel has the requisite need to

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<sup>12</sup> Similarly, in *Goldswain’s Case*, cited by petitioners, the court held that, once a return had been made, habeas petitioners were not permitted to “controvert the truth of the return to a habeas corpus, or plead or suggest any matter repugnant to it.” 96 Eng. Rep. at 713.

know (the same standard applied to government officials working with classified material).<sup>13</sup> In any event, the nature of the protective order to be issued in the pending DTA cases is a matter currently pending before this Court in *Bismullah*, and thus cannot serve as a basis to invalidate the MCA here.

2. Petitioners also complain that the review afforded under the DTA does not authorize fact-finding by this Court, and they and their *amici* point to new material (from outside the CSRT records), which they claim is exculpatory in nature. From this, petitioners argue that the CSRT process and this Court's review is therefore inadequate.

We note that, while the DTA limits this Court to record review, there is a forum for detainees to submit new material that they deem relevant. Congress directed the Department of Defense to ensure that its already existing Administrative Review Board ("ARB") process for annual review of whether an individual should continue to be detained takes into consideration any relevant new information. *See* DTA § 1005(a)(1) & (3) (directing Secretary to promulgate procedures for the ARBs that, *inter alia*, "provide an annual review to determine the need to continue to detain an alien who is a detainee" and "provide for periodic review of any new evidence that

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<sup>13</sup> *See* Exec. Order 12,958, as amended by Exec. Order 13,292, § 4.1(a), 68 Fed. Reg. 15,315 (Mar. 25, 2003); *see also Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 401-02 (D.C. Cir. 1984).

may become available relating to the enemy combatant status of a detainee”). The Department has updated its regulations to include such procedures. *See* ARB Memo. and Procedures, Enc. 13 (July 14, 2006) (*See* [www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf](http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf)).<sup>14</sup> Thus, there is an administrative mechanism for the detainees to submit new evidence that bears upon whether their detention should be continued or not.

In any event, limiting this Court’s DTA review to the CSRT record does not render that review an inadequate substitute for habeas review (assuming that the detainees have constitutional habeas rights protected by the Suspension Clause). As noted above, in the context of military criminal commissions, the Supreme Court has repeatedly held that habeas review does *not* provide for fact review, and certainly no opportunity for counsel to build a new evidentiary record. *Yamashita*, 327 U.S. at 8, 17; *Ex parte Quirin*, 317 U.S. at 25. Even outside the military context, however,

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<sup>14</sup> The ARB procedures, in existence since 2004, provide for annual “consideration of all relevant and reasonably available information to determine whether the enemy combatant represents a continuing threat.” ARB Mem., § 1.c. In those proceedings, the detainee is allowed to “present information relevant to his continued detention, transfer, or release.” *Ibid.*; *Id.* encl. 3, § 3.a (detainee “shall be provided a meaningful opportunity to be heard and to present information to the ARB”). Under the present regulations, any new information relating to the enemy combatant status of a detainee that is presented to an ARB shall be brought to the attention of the Deputy Secretary of Defense as soon as practicable. The Deputy Secretary of Defense shall review the new evidence and decide whether to convene a new CSRT to reconsider the basis of the detainee’s enemy combatant status. *See* ARB Memo. and Procedures, Enc. 13.

there is no constitutional habeas right to factual re-examination of a court ruling on a periodic basis. *See, e.g., Felker v. Turpin*, 518 U.S. 651, 663-64 (1996) (restrictions on successive petitions do not violate Suspension Clause). Likewise, here, there is no constitutional right to successive CSRT decisions.

E. Petitioners also contend that the MCA is an invalid suspension of the writ of habeas corpus because there is no “rebellion or invasion” to justify elimination of the writ of habeas corpus. The MCA, however, does not effect a suspension of the writ. As explained above, there is no constitutional right to a writ possessed by aliens outside the United States. Thus, no actual habeas rights have been suspended. Moreover, because the MCA provides for review under section 1005(e)(2) and (e)(3) of the DTA, regardless of whether the MCA is viewed as eliminating habeas jurisdiction in favor of a substitute remedy – review of a final decision of a CSRT under the DTA – or simply restricting habeas jurisdiction to that provided under the DTA, the MCA does not constitute a suspension of the writ. *See Felker*, 518 U.S. at 664 (upholding significant restrictions imposed by AEDPA on the writ of habeas corpus); *Swain v. Pressley*, 430 U.S. at 381 (repeal of habeas jurisdiction is constitutional so long as adequate and effective substitute remedy is afforded).

### **III. THE MCA PROVISION ESTABLISHING THAT THE GENEVA CONVENTIONS ARE NOT JUDICIALLY ENFORCEABLE IS FULLY CONSISTENT WITH CONGRESS'S LEGISLATIVE AUTHORITY UNDER THE CONSTITUTION.**

Petitioners assert that the MCA is unconstitutional insofar as it clarifies that the Geneva Conventions are not judicially enforceable by private parties. As we have explained in our briefing to this Court, the Geneva Conventions never provided any judicially enforceable rights to petitioners here. CITE TO BRIEFS. Thus, section 5(a) of the MCA effects only a clarification, not a change in the law. In any event, there cannot possibly be any constitutional impediment to Congress limiting enforcement of a treaty to diplomatic processes. Indeed, that is the norm for treaties. *See, e.g., Holmes v. Laird*, 459 F.2d 1211, 1220-22 (D.C. Cir. 1972).

### **IV. PETITIONERS' ARGUMENTS RELATING TO THE ABILITY TO CHALLENGE MILITARY COMMISSIONS ARE NOT BEFORE THIS COURT AND ARE WITHOUT MERIT.**

Petitioners argue that the MCA deprives them of their ability to challenge the lawfulness of any military commission proceeding that might be instituted against them. The district court rulings on appeal here, however, do not address the lawfulness of military commissions. Thus, that issue is not now before this Court.

Moreover, there currently are no pending military commission cases. When such proceedings do commence, a detainee will be able to challenge the lawfulness of any aspect of the commission process in this Court, once the decision of the

commission is finalized. DTA, § 1005(e)(3). Petitioners' argument that they must be able to assert such challenges now is obviously without merit. As this Court has recognized, the timing of such challenges is a legislative choice. CITES.

## CONCLUSION

For the foregoing reasons, this Court should order dismissal of the underlying district court cases for want of jurisdiction, dismiss the appeals for want of jurisdiction, except to the limited extent that they may be converted into petitions for review under subsection (e)(2), exercise jurisdiction over these claims under that subsection, and proceed to decide the legal issues presented therein, and within the scope of subsection (e)(2)(c)(ii), forthwith.

Respectfully submitted,

PAUL D. CLEMENT  
*Solicitor General*

PETER D. KEISLER  
*Assistant Attorney General*

GREGORY G. KATSAS  
*Principal Deputy Associate Attorney General*

DOUGLAS N. LETTER  
(202) 514-3602

ROBERT M. LOEB  
(202) 514-4332

SARANG V. DAMLE  
(202) 514-5735

*Attorneys, Appellate Staff  
Civil Division, Room 7268  
U.S. Department of Justice  
950 Pennsylvania Ave., N.W.  
Washington, D.C. 20530-0001*

## **CERTIFICATE OF SERVICE**

I hereby certify that I have on this 13th day of November 2006, served a copy of the foregoing supplemental reply brief on the following counsel by causing a copy to be sent by electronic mail and by first class mail, postage prepaid to:

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Robert M. Loeb