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Section 2: Moot Court, Guantanamo Detainees & The Military Commissions Act

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II. MOOT COURT ARGUMENT:

The Guantanamo Detainees and the Military Commissions Act

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Boumediene v. Bush; Al Odah v. United States

(06-1195); (06-1196)

Ruling Below: (*Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert denied* 127 S.Ct. 1748, 167 L.Ed.2d 578, 75 USLW 3528 [2007], *cert granted* 127 S.Ct. 3078, 75 USLW 3644 [2007]).

Detainees at Guantanamo Bay filed habeas corpus petitions along with other non-habeas claims in federal court. The District Courts dismissed the habeas petitions, determining that no U.S. Court could grant habeas relief to the detainees. Congress responded to the situation by passing the Detainee Treatment Act (DTA), which effectively denied all U.S. Courts jurisdiction over Guantanamo detainees. In *Hamdan v. Rumsfeld*, the Supreme Court held that the DTA did not remove jurisdiction over habeas petitions filed before the enactment of the DTA. Congress again responded by passing the Military Commissions Act of 2006, revoking jurisdiction over cases still pending at the time of enactment, which the D.C. Circuit held applied to the original detainee cases (the *Odah* and *Boumediene* cases). The Supreme Court, on April 2, 2007, denied certiorari on the grounds that other remedies were not yet exhausted. On June 29, 2007, the Supreme Court changed its mind and granted certiorari to the consolidated *Odah* and *Boumediene* cases.

Question Presented: Whether the Military Commissions Act of 2006 (MCA) validly deprived the courts of jurisdiction to consider the habeas claims of Guantanamo Bay detainees and, if so, whether the MCA is constitutional.

Lakhdar BOUMEDIENE, Detainee, Camp Delta, et al., Appellants

v.

George W. BUSH, President of the United States, et al., Appellees

Khaled A.F. Al Odah, Next Friend of Fawzi Khalid Abdullah Fahad Al Odah et al.,

Appellees/Cross-Appellants

v.

United States of America, et al., Appellants/Cross-Appellees.

United States Court of Appeals
for the District of Columbia Circuit

Decided February 20, 2007

[Excerpt: Some footnotes and citations omitted]

RANDOLPH, Circuit Judge.

Do federal courts have jurisdiction over petitions for writs of habeas corpus filed by aliens captured abroad and detained as enemy combatants at the Guantanamo Bay Naval Base in Cuba? The question has been the

recurring subject of legislation and litigation. In these consolidated appeals, foreign nationals held at Guantanamo filed petitions for writs of habeas corpus alleging violations of the Constitution, treaties, statutes, regulations, the common law, and the law of nations. Some detainees also raised non-

habeas claims under the federal question statute, 28 U.S.C. § 1331, and the Alien Tort Act, *id.* § 1350. In the “*Al Odah*” cases (Nos. 05-5064, 05-5095 through 05-5116), which consist of eleven cases involving fifty-six detainees, Judge Green denied the government’s motion to dismiss with respect to the claims arising from alleged violations of the Fifth Amendment’s Due Process Clause and the Third Geneva Convention, but dismissed all other claims. After Judge Green certified the order for interlocutory appeal under 28 U.S.C. § 1292(b), the government appealed and the detainees cross-appealed. In the “*Boumediene*” cases (Nos. 05-5062 and 05-5063)—two cases involving seven detainees—Judge Leon granted the government’s motion and dismissed the cases in their entirety.

In the two years since the district court’s decisions the law has undergone several changes. As a result, we have had two oral arguments and four rounds of briefing in these cases during that period. The developments that have brought us to this point are as follows.

In *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), we affirmed the district court’s dismissal of various claims—habeas and non-habeas—raised by Guantanamo detainees. With respect to the habeas claims, we held that “no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees.” 321 F.3d at 1141. The habeas statute then stated that “Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.” 28 U.S.C. § 2241(a) (2004). Because Guantanamo Bay was not part of the sovereign territory of the United States, but rather land the United States leases from Cuba, we determined it was not within the

“respective jurisdictions” of the district court or any other court in the United States. We therefore held that § 2241 did not provide statutory jurisdiction to consider habeas relief for any alien—enemy or not—held at Guantanamo. Regarding the non-habeas claims, we noted that “‘the privilege of litigation’ does not extend to aliens in military custody who have no presence in ‘any territory over which the United States is sovereign,’” *id.* at 1144, and held that the district court properly dismissed those claims.

The Supreme Court reversed in *Rasul v. Bush*, 542 U.S. 466, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004), holding that the habeas statute extended to aliens at Guantanamo. Although the detainees themselves were beyond the district court’s jurisdiction, the Court determined that the district court’s jurisdiction over the detainees’ custodians was sufficient to provide subject-matter jurisdiction under § 2241. The Court further held that the district court had jurisdiction over the detainees’ non-habeas claims because nothing in the federal question statute or the Alien Tort Act categorically excluded aliens outside the United States from bringing such claims. The Court remanded the cases to us, and we remanded them to the district court.

In the meantime Congress responded with the Detainee Treatment Act of 2005, Pub.L. No. 109-148, 119 Stat. 2680 (2005) (DTA), which the President signed into law on December 30, 2005. The DTA added a subsection (e) to the habeas statute. This new provision stated that, “[e]xcept as provided in section 1005 of the [DTA], no court, justice, or judge” may exercise jurisdiction over

(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 . . . to have been properly detained as an enemy combatant.

DTA § 1005(e)(1) (internal quotation marks omitted). The “except as provided” referred to subsections (e)(2) and (e)(3) of section 1005 of the DTA, which provided for exclusive judicial review of Combatant Status Review Tribunal determinations and military commission decisions in the D.C. Circuit.

The following June, the Supreme Court decided *Hamdan v. Rumsfeld*, — U.S. —, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2006). Among other things, the Court held that the DTA did not strip federal courts of jurisdiction over habeas cases pending at the time of the DTA’s enactment. The Court pointed to a provision of the DTA stating that subsections (e)(2) and (e)(3) of section 1005 “shall apply with respect to any claim . . . that is pending on or after the date of the enactment of this Act.” DTA § 1005(h). In contrast, no provision of the DTA stated whether subsection (e)(1) applied to pending cases. Finding that Congress “chose not to so provide . . . after having been presented with the option,” the Court concluded “[t]he omission [wa]s an integral part of the statutory scheme.” *Hamdan*, 126 S.Ct. at 2769.

In response to *Hamdan*, Congress passed the Military Commissions Act of 2006, Pub.L. No. 109-366, 120 Stat. 2600 (2006)(MCA), which the President signed into law on October 17, 2006. Section 7 of the MCA is entitled “Habeas Corpus Matters.” In subsection (a), Congress again amended § 2241(e). The new amendment reads:

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

(2) Except as provided in [section 1005(e)(2) and (e)(3) of the DTA], no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

MCA § 7(a) (internal quotation marks omitted). Subsection (b) states:

The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to *all cases, without exception, pending on or after the date of the enactment* of this Act which relate to any aspect of the detention, transfer, treatment,

trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

MCA § 7(b) (emphasis added).

The first question is whether the MCA applies to the detainees' habeas petitions. If the MCA does apply, the second question is whether the statute is an unconstitutional suspension of the writ of habeas corpus.

I.

As to the application of the MCA to these lawsuits, section 7(b) states that the amendment to the habeas corpus statute, 28 U.S.C. § 2241(e), "shall apply to all cases, without exception, pending on or after the date of the enactment" that relate to certain subjects. The detainees' lawsuits fall within the subject matter covered by the amended § 2241(e); each case relates to an "aspect" of detention and each deals with the detention of an "alien" after September 11, 2001. The MCA brings all such "cases, without exception" within the new law.

Everyone who has followed the interaction between Congress and the Supreme Court knows full well that one of the primary purposes of the MCA was to overrule *Hamdan*. Everyone, that is, except the detainees. Their cases, they argue, are not covered. The arguments are creative but not cogent. To accept them would be to defy the will of Congress. Section 7(b) could not be clearer. It states that "the amendment made by subsection (a)"—which repeals habeas jurisdiction—applies to "all cases, without exception" relating to any aspect of detention. It is almost as if the proponents of these words were slamming their fists on the table shouting "When we say 'all,' we mean all—without exception!"

The detainees of course do not see it that way. They say Congress should have expressly stated in section 7(b) that habeas cases were included among "all cases, without exception, pending on or after" the MCA became law. Otherwise, the MCA does not represent an "unambiguous statutory directive[]" to repeal habeas corpus jurisdiction. *INS v. St. Cyr*, 533 U.S. 289, 299, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). This is nonsense. Section 7(b) specifies the effective date of section 7(a). The detainees' argument means that Congress, in amending the habeas statute (28 U.S.C. § 2241), specified an effective date only for non-habeas cases. Of course Congress did nothing of the sort. Habeas cases are simply a subset of cases dealing with detention. Congress did not have to say that "the amendment made by subsection (a)"—which already *expressly* includes habeas cases—shall take effect on the date of enactment and shall apply to "all cases, without exception, *including habeas cases*." The *St. Cyr* rule of interpretation the detainees invoke demands clarity, not redundancy.

The detainees also ask us to compare the language of section 7(b) to that of section 3 of the MCA. Section 3, entitled "Military Commissions," creates jurisdiction in the D.C. Circuit for review of military commission decisions, *see* 10 U.S.C. § 950g. It then adds 10 U.S.C. § 950j, which deals with the finality of military commission decisions. Section 950j strips federal courts of jurisdiction over any pending or future cases that would involve review of such decisions:

Except as otherwise provided in this chapter and notwithstanding any other provision of law (*including section 2241 of title 28 or any other habeas corpus provision*), no court, justice, or judge shall have jurisdiction to hear or consider any

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

10 U.S.C. § 950j(b) (emphasis added). The detainees maintain that § 950j calls into question Congress's intention to apply section 7(b) to pending habeas cases.

The argument goes nowhere. Section 7(b), read in conjunction with section 7(a), is no less explicit than § 950j. Section 7(a) strips jurisdiction over detainee cases, including habeas cases, and section 7(b) makes section 7(a) applicable to pending cases. Section 950j accomplishes the same thing, but in one sentence. A drafting decision to separate section 7 into two subsections—one addressing the scope of the jurisdictional bar, the other addressing how the bar applies to pending cases—makes no legal difference.

II.

This brings us to the constitutional issue: whether the MCA, in depriving the courts of jurisdiction over the detainees' habeas petitions, violates the Suspension Clause of the Constitution, which states that "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."

The Supreme Court has stated the Suspension Clause protects the writ "as it existed in 1789," when the first Judiciary Act created the federal courts and granted jurisdiction to

issue writs of habeas corpus. [The court looked at three common-law cases cited by the detainees to argue that the writ of habeas corpus should be extended to aliens outside the sovereign's territory. In none of those cases were the aliens outside the territory.]

* * *

[The court traced historical precedents from English law regarding writs of habeas corpus and concluded that in 1789, habeas corpus would not have been available to aliens without presence or property within the United States.]

. . . *Johnson v. Eisentrager*, 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950), ends any doubt about the scope of common law habeas. "We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes." *Id.* at 768, 70 S.Ct. 936. . . .

The detainees encounter another difficulty with their Suspension Clause claim. Precedent in this court and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States. As we explained in *Al Odah*, 321 F.3d at 1140-41, the controlling case is *Johnson v. Eisentrager*. There twenty-one German nationals confined in custody of the U.S. Army in Germany filed habeas corpus petitions. Although the German prisoners alleged they were civilian agents of the German government, a military commission convicted them of war crimes arising from military activity against the United States in China after Germany's surrender. They claimed their convictions and imprisonment

violated various constitutional provisions and the Geneva Conventions. The Supreme Court rejected the proposition “that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses,” 339 U.S. at 783, 70 S.Ct. 936. The Court continued: “If the Fifth Amendment confers its rights on all the world . . . [it] would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and ‘werewolves’ could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against ‘unreasonable’ searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.” *Id.* at 784, 70 S.Ct. 936. (Shortly before Germany’s surrender, the Nazis began training covert forces called “werewolves” to conduct terrorist activities during the Allied occupation. See http://www.archives.gov/iwg/declassified_records/oss_records_263_wilhelm_hoettl.html.)

Later Supreme Court decisions have followed *Eisentrager*. In 1990, for instance, the Court stated that *Eisentrager* “rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990). After describing the facts of *Eisentrager* and quoting from the opinion, the Court concluded that with respect to aliens, “our rejection of extraterritorial application of the Fifth Amendment was emphatic.” *Id.* By analogy, the Court held that the Fourth Amendment did not protect nonresident aliens against unreasonable searches or seizures conducted outside the sovereign territory of the United States. Citing *Eisentrager* again, the Court explained that to extend the Fourth Amendment to aliens

abroad “would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries,” particularly since the government “frequently employs Armed Forces outside this country,” *id.* at 273, 110 S.Ct. 1056. A decade after *Verdugo-Urquidez*, the Court—again citing *Eisentrager*—found it “well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.” *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001).

Any distinction between the naval base at Guantanamo Bay and the prison in Landsberg, Germany, where the petitioners in *Eisentrager* were held, is immaterial to the application of the Suspension Clause. The United States occupies the Guantanamo Bay Naval Base under an indefinite lease it entered into in 1903. The text of the lease and decisions of circuit courts and the Supreme Court all make clear that Cuba—not the United States—has sovereignty over Guantanamo Bay. . . .

The detainees cite the *Insular Cases* in which “fundamental personal rights” extended to U.S. territories. See *Balzac v. Porto Rico*, 258 U.S. 298, 312-13, 42 S.Ct. 343, 66 L.Ed. 627 (1922); *Dorr v. United States*, 195 U.S. 138, 148, 24 S.Ct. 808, 49 L.Ed. 128 (1904); see also *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977). But in each of those cases, Congress had exercised its power under Article IV, Section 3 of the Constitution to regulate “Territory or other Property belonging to the United States.” U.S. CONST., art. IV, § 3, cl. 2. These cases do not establish anything regarding the sort of *de facto* sovereignty the detainees say exists at Guantanamo. Here Congress and the President have specifically disclaimed the sort of territorial jurisdiction they asserted in Puerto Rico, the

Philippines, and Guam.

Precedent in this circuit also forecloses the detainees' claims to constitutional rights. In *Harbury v. Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2000), *rev'd on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002), we quoted extensively from *Verdugo-Urquidez* and held that the Court's description of *Eisentrager* was "firm and considered dicta that binds this court." Other decisions of this court are firmer still. Citing *Eisentrager*, we held in *Pauling v. McElroy*, 278 F.2d 252, 254 n. 3 (D.C. Cir. 1960) (per curiam), that "non-resident aliens . . . plainly cannot appeal to the protection of the Constitution or laws of the United States." The law of this circuit is that a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999).

[The court questioned the dissent's eagerness to distinguish the Suspension Clause from other rights afforded by the Bill of Rights. The court saw no fundamental difference between the right of habeas corpus and other individual rights.]

* * *

. . . The unstated assumption must be that the reasoning of our decisions and the Supreme Court's in denying constitutional rights to aliens outside the United States would not apply if a constitutional provision could be characterized as protecting something other than a "right." On this theory, for example, aliens outside the United States are entitled to the protection of the Separation of Powers because they have no individual rights under the Separation of Powers. Where the dissent

gets this strange idea is a mystery, as is the reasoning behind it.

III.

Federal courts have no jurisdiction in these cases. In supplemental briefing after enactment of the DTA, the government asked us not only to decide the habeas jurisdiction question, but also to review the merits of the detainees' designation as enemy combatants by their Combatant Status Review Tribunals. The detainees objected to converting their habeas appeals to appeals from their Tribunals. In briefs filed after the DTA became law and after the Supreme Court decided *Hamdan*, they argued that we were without authority to do so. Even if we have authority to convert the habeas appeals over the petitioners' objections, the record does not have sufficient information to perform the review the DTA allows. Our only recourse is to **VACATE** the district courts' decisions and **DISMISS** the cases for lack of jurisdiction.

So ordered.

ROGERS, *Circuit Judge, dissenting.*

I can join neither the reasoning of the court nor its conclusion that the federal courts lack power to consider the detainees' petitions. While I agree that Congress intended to withdraw federal jurisdiction through the Military Commissions Act of 2006, Pub.L. No. 109-366, 120 Stat. 2600 ("MCA"), the court's holding that the MCA is consistent with the Suspension Clause of Article I, section 9, of the Constitution does not withstand analysis. By concluding that this court must reject "the detainees' claims to constitutional rights," Op. at 992, the court fundamentally misconstrues the nature of suspension: Far from conferring an individual right that might pertain only to persons

substantially connected to the United States, the Suspension Clause is a limitation on the powers of Congress. Consequently, it is only by misreading the historical record and ignoring the Supreme Court's well-considered and binding dictum in *Rasul v. Bush*, 542 U.S. 466, 481-82, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004), that the writ at common law would have extended to the detainees, that the court can conclude that neither this court nor the district courts have jurisdiction to consider the detainees' habeas claims.

A review of the text and operation of the Suspension Clause shows that, by nature, it operates to constrain the powers of Congress. Prior to the enactment of the MCA, the Supreme Court acknowledged that the detainees held at Guantanamo had a statutory right to habeas corpus. *Rasul*, 542 U.S. at 483-84, 124 S.Ct. 2686. The MCA purports to withdraw that right but does so in a manner that offends the constitutional constraint on suspension. The Suspension Clause limits the removal of habeas corpus, at least as the writ was understood at common law, to times of rebellion or invasion unless Congress provides an adequate alternative remedy. The writ would have reached the detainees at common law, and Congress has neither provided an adequate alternative remedy, through the Detainee Treatment Act of 2005, Pub.L. No. 109-148, Div. A, tit. X, 119 Stat. 2680, 2739 ("DTA"), nor invoked the exception to the Clause by making the required findings to suspend the writ. The MCA is therefore void and does not deprive this court or the district courts of jurisdiction.

On the merits of the detainees' appeal in *Khalid v. Bush*, 355 F.Supp.2d 311 (D.D.C.2005) and the cross-appeals in *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443 (D.D.C.2005), I would affirm in part in *Guantanamo Detainee Cases* and reverse in

Khalid and remand the cases to the district courts.

I.

* * *

In this Part, I address the nature of the Suspension Clause, the retroactive effect of Congress's recent enactment on habeas corpus—the MCA—and conclude with an assessment of the effect of the MCA in light of the dictates of the Constitution.

A.

The court holds that Congress may suspend habeas corpus as to the detainees because they have no individual rights under the Constitution. It is unclear where the court finds that the limit on suspension of the writ of habeas corpus is an individual entitlement. . . .

The other provisions of Article I, section 9, indicate how to read the Suspension Clause. The clause immediately following provides that "[n]o Bill of Attainder or ex post facto Law shall be passed." The Supreme Court has construed the Attainder Clause as establishing a "category of Congressional actions which the Constitution barred." *United States v. Lovett*, 328 U.S. 303, 315, 106 Ct.Cl. 856, 66 S.Ct. 1073, 90 L.Ed. 1252 (1946). In *Lovett*, the Court dismissed the possibility that an Act of Congress in violation of the Attainder Clause was non-justiciable, remarking:

Our Constitution did not contemplate such a result. To quote Alexander Hamilton, * * * a limited constitution * * * [is] one which contains certain specified exceptions to the legislative authority; such, for instance, as that

it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; *whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void*. Without this, all the reservations of particular rights or privileges would amount to nothing.

Id. at 314, 66 S.Ct. 1073 (quoting The Federalist No. 78) (emphasis added) (alteration and omissions in original). So too, in *Weaver v. Graham*, 450 U.S. 24, 28-29 & n. 10, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), where the Court noted that the ban on *ex post facto* legislation “restricts governmental power by restraining arbitrary and potentially vindictive legislation” and acknowledged that the clause “confin[es] the legislature to penal decisions with prospective effect.” For like reasons, any act in violation of the Suspension Clause is void, *cf. Lovett*, 328 U.S. at 316, 66 S.Ct. 1073, and cannot operate to divest a court of jurisdiction.

The court dismisses the distinction between individual rights and limitations on Congress’s powers. It chooses to make no affirmative argument of its own, instead hoping to rebut the sizable body of conflicting authorities.

The court appears to believe that the Suspension Clause is just like the constitutional amendments that form the Bill of Rights. It is a truism, of course, that individual rights like those found in the first ten amendments work to limit Congress. However, individual rights are merely a subset of those matters that constrain the legislature. These two sets cannot be understood as coextensive unless the court is prepared to recognize such awkward

individual rights as Commerce Clause rights, or the personal right not to have a bill raising revenue that originates in the Senate.

That the Suspension Clause appears in Article I, section 9, is not happenstance. . . . It is implausible that the Framers would have viewed the Suspension Clause, as the court implies, as a budding Bill of Rights but would not have assigned the provision its own section of the Constitution, much as they did with the only crime specified in the document, treason, which appears alone in Article III, section 3. Instead, the court must treat the Suspension Clause’s placement in Article I, section 9, as a conscious determination of a limit on Congress’s powers. . . .

The court also alludes to the idea that the Suspension Clause cannot apply to foreign military conflicts because the exception extends only to cases of “Rebellion or Invasion.” *Op.* at 992 n. 11. The Framers understood that the privilege of the writ was of such great significance that its suspension should be strictly limited to circumstances where the peace and security of the Nation were jeopardized. . . .

* * *

B.

This court would have jurisdiction to address the detainees’ claims but for Congress’s enactment of the MCA. . . . After *Rasul*, Congress enacted the DTA, which purported to deprive the federal courts of habeas jurisdiction. DTA § 1005(e), 118 Stat. at 2741-43. The Supreme Court held in *Hamdan v. Rumsfeld*, — U.S. —, 126 S.Ct. 2749, 2764-69, 165 L.Ed.2d 723 (2006), however, that the DTA does not apply retroactively, and so it does not disturb this court’s jurisdiction over the instant appeals, which

were already pending when the DTA became law.

[Though not joining the majority's reasoning, the dissent concluded similarly that Congress intended to apply the MCA retroactively.]

* * *

C.

The question, then, is whether by attempting to eliminate all federal court jurisdiction to consider petitions for writs of habeas corpus, Congress has overstepped the boundary established by the Suspension Clause. The Supreme Court has stated on several occasions that "*at the absolute minimum*, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301, 121 S.Ct. 2271 (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996))(emphasis added). Therefore, at least insofar as habeas corpus exists and existed in 1789, Congress cannot suspend the writ without providing an adequate alternative except in the narrow exception specified in the Constitution. . . .

1.

Assessing the state of the law in 1789 is no trivial feat, and the court's analysis today demonstrates how quickly a few missteps can obscure history. . . .

* * *

To draw the ultimate conclusion as to whether the writ at common law would have extended to aliens under the control (if not within the sovereign territory) of the Crown requires piecing together the considerable circumstantial evidence, a step that the court is unwilling to take. Analysis of one of these cases, the 1759 English case of *Rex v.*

Schiever, shows just how small this final inference is. Barnard Schiever was the subject of a neutral nation (Sweden), who was detained by the Crown when England was at war with France. He claimed that his classification as a "prisoner of war" was factually inaccurate, because he "was desirous of entering into the service of the merchants of England" until he was seized on the high seas by a French privateer, which in turn was captured by the British Navy. In an affidavit, he swore that his French captor "detained him[] against his will and inclination . . . and treated him with so much severity[] that [his captor] would not suffer him to go on shore when in port . . . but closely confined him to duty [on board the ship]." *Id.* at 765-66, 97 Eng. Rep. at 551. The habeas court ultimately determined, on the basis of Schiever's own testimony, that he was properly categorized and thus lawfully detained.

The court discounts *Schiever* because, after England captured the French privateer while en route to Norway, it was carried into Liverpool, England, where Schiever was held in the town jail. *Id.*, 97 Eng. Rep. at 551. As such, the case did not involve "an alien outside the territory of the sovereign." *Op.* at 988-89. However, Schiever surely was not *voluntarily* brought into England, so his mere presence conferred no additional rights. As the Supreme Court observed in *Verdugo-Urquidez*, "involuntary [presence] is not the sort to indicate any substantial connection with our country." 494 U.S. at 271, 110 S.Ct. 1056. Any gap between *Schiever* and the detainees' detention at Guantanamo Bay is thus exceedingly narrow.

This court need not make the final inference. It has already been made for us. In *Rasul*, the Supreme Court stated that "[a]pplication of the habeas statute to persons detained at the [Guantanamo] base is consistent with the historical reach of the writ of habeas corpus."

542 U.S. at 481, 124 S.Ct. 2686. By reaching a contrary conclusion, the court ignores the settled principle that “carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.” *Sierra Club v. EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003)(quoting *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997))(internal quotation marks omitted). Even setting aside this principle, the court offers no convincing analysis to compel the contrary conclusion. The court makes three assertions: First, Lord Mansfield’s opinion in *Rex v. Cowle*, 2 Burr. 834, 97 Eng. Rep. 587 (K.B.1759), disavows the right claimed by the detainees. Second, it would have been impractical for English courts to extend the writ extraterritorially. Third, *Johnson v. Eisentrager*, 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950), is controlling. None of these assertions withstands scrutiny.

In *Cowle*, Lord Mansfield wrote that “[t]here is no doubt as to the power of this Court; where the place is under the subjection of the Crown of England; the only question is, as to the propriety.” 2 Burr. at 856, 97 Eng. Rep. at 599. He noted thereafter, by way of qualification, that the writ would not extend “[t]o foreign dominions, which belong to a prince who succeeds to the throne of England.” *Id.*, 97 Eng. Rep. at 599-600. [The dissent explained that “foreign dominions” in this context did not mean a foreign country, but instead a country that used to be under foreign control and now was under England’s sovereignty. It also noted that it had nothing to do with extraterritoriality, because habeas was unnecessary for territories controlled by princes in the line of succession, which had independent court systems.] In the modern-day parallel, where a suitable alternative for habeas exists, the writ need not extend. The relationship between England and principalities was the only instance where it

was “found necessary to restrict the scope of the writ.” 9 William Holdsworth, *A History of English Law* 124 (1938). *Cowle*, by its plain language, then, must be read as recognizing that the writ of habeas corpus ran even to places that were “no part of the realm,” where the Crown’s other writs did not run, nor did its laws apply. 2 Burr. at 835-36, 853-55, 97 Eng. Rep. at 587-88, 598-99. The Supreme Court has adopted this logical reading. *See Rasul*, 542 U.S. at 481-82, 124 S.Ct. 2686.

The court next disposes of *Cowle* and the historical record by suggesting that the “power” to issue the writ acknowledged by Lord Mansfield can be explained by the Habeas Corpus Act of 1679, 31 Car. 2, c. 2. *See Op.* at 989. The Supreme Court has stated that the Habeas Corpus Act “enforces the common law,” *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202, 7 L.Ed. 650 (1830), thus hardly suggesting that the “power” recognized by Lord Mansfield was statutory and not included within the 1789 scope of the common-law writ. To the extent that the court makes the curious argument that the Habeas Corpus Act would have made it too impractical to produce prisoners if applied extraterritorially because it imposed fines on jailers who did not quickly produce the body, *Op.* at 989-90, the court cites no precedent that suggests that “practical problems” eviscerate “the precious safeguard of personal liberty [for which] there is no higher duty than to maintain it unimpaired,” *Bowen v. Johnston*, 306 U.S. 19, 26, 59 S.Ct. 442, 83 L.Ed. 455 (1939). This line of reasoning employed by the court fails for two main reasons:

First, the Habeas Corpus Act of 1679 was expressly limited to those who “have been committed for criminall or supposed criminall Matters.” 31 Car. 2, c. 2, § 1. Hence, the burden of expediency imposed by the Act could scarcely have prevented common-law

courts from exercising habeas jurisdiction in non-criminal matters such as the petitions in these appeals. Statutory habeas in English courts did not extend to non-criminal detention until the Habeas Corpus Act of 1816, 56 Geo. 3, c. 100, although courts continued to exercise their common-law powers in the interim. See 2 Chambers, *supra*, at 11; 9 Holdsworth, *supra*, at 121.

Second, there is ample evidence that the writ did issue to faraway lands. . . .

Finally, the court reasons that *Eisentrager* requires the conclusion that there is no constitutional right to habeas for those in the detainees' posture. See Op. at 990-91. In *Eisentrager*, the detainees claimed that they were "entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*." 339 U.S. at 777, 70 S.Ct. 936. Thus *Eisentrager* presented a far different question than confronts this court. The detainees do not here contend that the Constitution accords them a positive right to the writ but rather that the Suspension Clause restricts Congress's power to eliminate a preexisting statutory right. To answer that question does not entail looking to the extent of the detainees' ties to the United States but rather requires understanding the scope of the writ of habeas corpus at common law in 1789. The court's reliance on *Eisentrager* is misplaced.

2.

This brings me to the question of whether, absent the writ, Congress has provided an adequate alternative procedure for challenging detention. If it so chooses, Congress may replace the privilege of habeas corpus with a commensurate procedure without overreaching its constitutional ambit. However, as the Supreme Court has cautioned, if a subject of Executive detention

"were subject to any substantial procedural hurdles which ma[k]e his remedy . . . less swift and imperative than federal habeas corpus, the gravest constitutional doubts would be engendered [under the Suspension Clause]." *Sanders v. United States*, 373 U.S. 1, 14, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963).

[The dissent looked at three occasions on which the Supreme Court held habeas corpus replacements to be adequate and determined that none helped the government's argument.]

* * *

These cases provide little cover for the government. As the Supreme Court has stated, "[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." *St. Cyr*, 533 U.S. at 301, 121 S.Ct. 2271. With this in mind, the government is mistaken in contending that the combatant status review tribunals ("CSRTs") established by the DTA suitably test the legitimacy of Executive detention. Far from merely adjusting the mechanism for vindicating the habeas right, the DTA imposes a series of hurdles while saddling each Guantanamo detainee with an assortment of handicaps that make the obstacles insurmountable.

At the core of the Great Writ is the ability to "inquire into illegal detention with a view to an order releasing the petitioner." *Preiser v. Rodriguez*, 411 U.S. 475, 484, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973)(internal quotation marks and alteration omitted). An examination of the CSRT procedure and this court's CSRT review powers reveals that these alternatives are neither adequate to test whether detention is unlawful nor directed toward releasing those who are unlawfully held.

“Petitioners in habeas corpus proceedings . . . are entitled to careful consideration and plenary processing of their claims including full opportunity for the presentation of the relevant facts.” *Harris v. Nelson*, 394 U.S. 286, 298, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969). The offerings of CSRTs fall far short of this mark. Under the common law, when a detainee files a habeas petition, the burden shifts to the government to justify the detention in its return of the writ. When not facing an imminent trial, the detainee then must be afforded an opportunity to traverse the writ, explaining why the grounds for detention are inadequate in fact or in law. A CSRT works quite differently. The detainee bears the burden of coming forward with evidence explaining why he should *not* be detained. The detainee need not be informed of the basis for his detention (which may be classified), need not be allowed to introduce rebuttal evidence (which is sometimes deemed by the CSRT too impractical to acquire), and must proceed without the benefit of his own counsel. Moreover, these proceedings occur before a board of military judges subject to command influence. Insofar as each of these practices impedes the process of determining the true facts underlying the lawfulness of the challenged detention, they are inimical to the nature of habeas review.

This court’s review of CSRT determinations is not designed to cure these inadequacies. This court may review only the record developed by the CSRT to assess whether the CSRT has complied with its own standards. Because a detainee still has no means to present evidence rebutting the government’s case—even assuming the detainee could learn of its contents—assessing whether the government has more evidence in its favor than the detainee is hardly the proper antidote. The fact that this court also may consider whether the CSRT process “is consistent with the Constitution and laws of the United

States,” DTA § 1005(e)(2)(C)(ii), 119 Stat. at 2742, does not obviate the need for habeas. Whereas a cognizable constitutional, statutory, or treaty violation could defeat the lawfulness of the government’s cause for detention, the writ issues whenever the Executive lacks a lawful justification for continued detention. The provisions of DTA § 1005(e)(2) cannot be reconciled with the purpose of habeas corpus, as they handcuff attempts to combat “the great engines of judicial despotism,” *The Federalist* No. 83, at 456 (Alexander Hamilton) (E.H. Scott ed. 1898).

Additionally, and more significant still, continued detention may be justified by a CSRT on the basis of evidence resulting from torture. Testimony procured by coercion is notoriously unreliable and unspeakably inhumane. . . . The DTA implicitly endorses holding detainees on the basis of such evidence by including an anti-torture provision that applies only to future CSRTs. DTA § 1005(b)(2), 119 Stat. at 2741. Even for these future proceedings, however, the Secretary of Defense is required only to develop procedures to assess whether evidence obtained by torture is probative, not to require its exclusion.

Even if the CSRT protocol were capable of assessing whether a detainee was unlawfully held and entitled to be released, it is not an adequate substitute for the habeas writ because this remedy is not guaranteed. Upon concluding that detention is unjustified, a habeas court “can only direct [the prisoner] to be discharged.” *Bollman*, 8 U.S. (4 Cranch) at 136; *see also* 2 STORY, *supra*, § 1339. But neither the DTA nor the MCA require this, and a recent report studying CSRT records shows that when at least three detainees were found by CSRTs not to be enemy combatants, they were subjected to a second, and in one case a third, CSRT proceeding until they were

finally found to be properly classified as enemy combatants.

3.

Therefore, because Congress in enacting the MCA has revoked the privilege of the writ of habeas corpus where it would have issued under the common law in 1789, without providing an adequate alternative, the MCA is void unless Congress's action fits within the exception in the Suspension Clause: Congress may suspend the writ "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. However, Congress has not invoked this power.

[The dissent noted the four rare occasions on which Congress saw fit to suspend the writ of habeas corpus.]

* * *

Because the MCA contains neither of these hallmarks of suspension, and because there is no indication that Congress sought to avail itself of the exception in the Suspension Clause, its attempt to revoke federal jurisdiction that the Supreme Court held to exist exceeds the powers of Congress. The MCA therefore has no effect on the jurisdiction of the federal courts to consider these petitions and their related appeals.

II.

In *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443 (D.D.C.2005), Judge Joyce Hens Green addressed eleven coordinated habeas cases involving 56 aliens being detained by the United States as "enemy combatants" at Guantanamo Bay, *id.* at 445. These detainees are citizens of friendly nations—Australia, Bahrain, Canada, Kuwait, Libya, Turkey, the United Kingdom, and

Yemen—who were seized in Afghanistan, Bosnia and Herzegovina, The Gambia, Pakistan, Thailand, and Zambia. Each detainee maintains that he was wrongly classified as an "enemy combatant." Denying in part the government's motion to dismiss the petitions, the district court ruled:

[T]he petitioners have stated valid claims under the Fifth Amendment to the United States Constitution and . . . the procedures implemented by the government to confirm that the petitioners are "enemy combatants" subject to indefinite detention violate the petitioners' rights to due process of law.

Id. at 445. The district court further ruled that the Taliban but not the al Qaeda detainees were entitled to the protections of the Third and Fourth Geneva Conventions. *Id.* at 478-80.

In *Khalid v. Bush*, 355 F.Supp.2d 311 (D.D.C.2005), Judge Richard J. Leon considered the habeas petitions of five Algerian-Bosnian citizens and one Algerian citizen with permanent Bosnian residency. They were arrested by Bosnian police in 2001 on suspicion of plotting to attack the United States and British embassies in Sarajevo. After the Supreme Court of the Federation of Bosnia and Herzegovina ordered the six men to be released in January 2002, they were seized by United States forces and transported to Guantanamo Bay. The *Khalid* decision also covers the separate case of a French citizen seized in Pakistan and transported to Guantanamo Bay. Rejecting the petitioners' claim that their detention is unjustified, the district court ruled that "no viable legal theory exists by which [the district court] could issue a writ of habeas corpus under" the circumstances presented, *id.* at 314, noting the

President's powers under Article II, Congress's Authorization for the Use of Military Force ("AUMF"), and the Order on Detention (Nov. 13, 2001), *see id.* at 317-20. The district court granted the government's motion and dismissed the petitions. *Id.* at 316.

The fundamental question presented by a petition for a writ of habeas corpus is whether Executive detention is lawful. A far more difficult question is what serves to justify Executive detention under the law. At the margin, the precise constitutional bounds of Executive authority are unclear, and the Executive detention at issue is the product of a unique situation in our history. Unlike the uniformed combat that is contemplated by the laws of war, the Geneva Conventions, and the Constitution, the United States confronts a stateless enemy in the war on terror that is difficult to identify and widely dispersed.

The parties recite in their several briefs the substantial competing interests of individual liberty and national security that are at stake, much as did the Supreme Court in *Hamdi*, 542 U.S. at 529-32, 124 S.Ct. 2633 (plurality opinion). In *Hamdi*, the plurality 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, 124 S.Ct. 2633. At the same time, it acknowledged that for Hamdi "detention could last for the rest of his life." *Id.* at 520, 124 S.Ct. 2633. Although Hamdi was a United States citizen, the premise underlying the conclusion that there is a role for the judiciary, *id.* at 532-33, 124 S.Ct. 2633, was that "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat," *id.* at 530, 124 S.Ct. 2633. In short, the nature of the conflict makes true enemies of the United States more

troublesome. At the same time, the risk of wrongful detention of mere bystanders is acute, particularly where, as here, the Executive detains individuals without trial.

Parsing the role of the judiciary in this context is arduous. The power of the President is at its zenith, after all, when the President acts in the conduct of foreign affairs with the support of Congress. Even assuming the AUMF and the Order on Detention provide such support for the detentions at issue, still the President's powers are not unlimited in wartime. . . . While judgments of military necessity are entitled to deference by the courts and while temporary custody during wartime may be justified in order properly to process those who have been captured, the Executive has had ample opportunity during the past five years during which the detainees have been held at Guantanamo Bay to determine who is being held and for what reason.

* * *

The government maintains that a series of World War II-era cases undercuts the proposition that habeas review of uncharged detainees requires a factual assessment. It cites several cases in which courts have refused to engage in factual review of the findings of military tribunals imposing sentences under the laws of war. There is good reason to treat differently a petition by an uncharged detainee—who could be held indefinitely without even the prospect of a trial or meaningful process—from that of a convicted war criminal. For example, in *Yamashita*, the prisoner petitioned for a writ of habeas corpus only after a trial before a military tribunal where his six attorneys defended against 286 government witnesses. 327 U.S. at 5, 66 S.Ct. 340. *Quirin* involved a military commission, *see* 317 U.S. at 18-19, 63 S.Ct. 2, where the government presented "overwhelming" proof that included

confessions from the German saboteurs. Pierce O'Donnell, *In Time of War* 152-53, 165-66, 189 (2005). In *Eisentrager*, 339 U.S. at 766, 70 S.Ct. 936, the military tribunal conducted a trial lasting months. By contrast, the detainees have been charged with no crimes, nor are charges pending. The robustness of the review they have received to date differs by orders of magnitude from that of the military tribunal cases.

The Supreme Court in *Rasul* did not address “whether and what further proceedings may become necessary after respondents make their responses to the merits of petitioners’ claims,” 542 U.S. at 485, 124 S.Ct. 2686. The detainees cannot rest on due process under the Fifth Amendment. Although the district court in *Guantanamo Detainee Cases*, 355 F.Supp.2d at 454, made a contrary ruling, the Supreme Court in *Eisentrager* held that the Constitution does not afford rights to aliens in this context. 339 U.S. at 770, 70 S.Ct. 936; accord *Verdugo-Urquidez*, 494 U.S. at 269, 110 S.Ct. 1056. Although in *Rasul* the Court cast doubt on the continuing vitality of *Eisentrager*, 542 U.S. at 475-79, 124 S.Ct. 2686, absent an explicit statement by the Court that it intended to overrule *Eisentrager*’s constitutional holding, that holding is binding on this court. Rather, the process that is due inheres in the nature of the writ and the inquiry it entails. The Court in *Rasul* held that federal court jurisdiction under 28 U.S.C. § 2241 is permitted for habeas petitions filed by detainees at Guantanamo, 542 U.S. at 485, 124 S.Ct. 2686; *id.* at 488, 124 S.Ct. 2686 (Kennedy, J., concurring in the judgment), and this result is undisturbed because the MCA is void. So long as the Executive can convince an independent Article III habeas judge that it has not acted unlawfully, it may continue to detain those alien enemy combatants who pose a continuing threat during the active engagement of the United States in the war on

terror. *See id.* at 488, 124 S.Ct. 2686 (Kennedy, J., concurring in the judgment); *cf. Hamdi*, 542 U.S. at 518-19, 124 S.Ct. 2633. But it must make that showing and the detainees must be allowed a meaningful opportunity to respond.

Therefore, I would hold that on remand the district courts shall follow the return and traverse procedures of 28 U.S.C. § 2241 *et seq.* In particular, upon application for a writ of habeas corpus, 28 U.S.C. § 2242, the district court shall issue an order to show cause, whereupon “[t]he person to whom the writ is or order is directed shall make a return certifying the true cause of the detention,” *id.* § 2243. So long as the government “puts forth credible evidence that the [detainee] meets the enemy-combatant criteria,” *Hamdi*, 542 U.S. at 533, 124 S.Ct. 2633, the district court must accept the return as true “if not traversed” by the person detained. *Id.* § 2248. The district court may take evidence “orally or by deposition, or, in the discretion of the judge, by affidavit.” *Id.* § 2246. The district court may conduct discovery. Thereafter, “[t]he [district] court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.” District courts are well able to adjust these proceedings in light of the government’s significant interests in guarding national security, as suggested in *Guantanamo Detainee Cases*, 355 F.Supp.2d at 467, by use of protective orders and *ex parte* and in camera review, *id.* at 471. The procedural mechanisms employed in that case, *see, e.g., id.* at 452 & n. 12, should be employed again, as district courts must assure the basic fairness of the habeas proceedings, *see generally id.* at 468-78.

Accordingly, I respectfully dissent from the judgment vacating the district courts’ decisions and dismissing these appeals for lack of jurisdiction.

“Justices to Weigh Detainee Rights”

The Washington Post

June 30, 2007

Robert Barnes

The Supreme Court yesterday reversed itself and agreed to consider whether detainees at Guantanamo Bay have been unfairly barred from the federal courts by the Bush administration and Congress, a move that may finally determine legal rights for foreign-born terrorism suspects.

The case, which could become one of the most important of the court's next term, will address whether subjecting the detainees to military commissions instead of allowing them access to federal courts violates the Constitution. In April, the court decided not to hear an appeal from the detainees.

Yesterday's decision to change course and hear the case was so unusual that lawyers and court experts went to the archives to try to find the last time it happened. The only consensus was that it had been decades.

“The Supreme Court is going to decide the simple question: Does the Constitution protect the detainees?” said Georgetown University law professor Neal K. Katyal, who successfully argued a detainee case that the court decided just a year ago. In that case, the justices said President Bush did not have authority to set up the military tribunals that the administration thought should hear the cases against the detainees.

In April, three justices—David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer—said they were eager to hear the appeals, which presented questions that “deserve this court's immediate attention.” It takes four justices to agree to take a case.

Justices John Paul Stevens and Anthony M. Kennedy said at the time that they would continue to monitor the legal proceedings involving the detainees. It takes five votes to rehear a denial, so perhaps the two justices concluded that they have seen enough. The court's order is silent on which justices agreed to hear the case.

The Bush administration had urged the court not to take the appeals. “The grant of a petition for rehearing from a denial of certiorari is an extraordinary remedy, warranted only where there have been ‘intervening circumstances of a substantial or controlling effect’ or ‘other substantial grounds not previously presented,’” Solicitor General Paul D. Clement told the court this month, adding that petitioners had shown neither.

David Remes, a lawyer for some of the detainees who brought the case, said the court did not have to make the decision to take the case now, “so what obviously happened is the justices decided to confront the issue sooner rather than later.”

Department of Justice spokesman Erik Ablin said, “We are disappointed with the decision, but are confident in our legal arguments and look forward to presenting them before the Court.”

The court's action comes as Congress and the White House are looking for ways to close the military prison at Guantanamo Bay, Cuba, and transfer the approximately 370 prisoners there to military prisons in the

United States.

Defense Secretary Robert M. Gates reiterated yesterday that he, Bush and members of Congress all seek to close the Cuba facility, which opened in January 2002. But he said legal obstacles stand in the way.

“The biggest challenge is finding a statutory basis for holding prisoners who should never be released and who may or may not be able to be put on trial” because, for example, evidence against them involves sensitive intelligence sources, Gates said at a Pentagon news briefing.

Gates, who has pressed for closing the facility since he came to office in December, said that “people are working harder on the problem.”

Rep. James P. Moran Jr. (D-Va.) said Democrats are considering a plan to cut Guantanamo’s budget by half, which would keep the prison afloat for several more months and give the administration time to transfer the detainees. Moran said there is concern among some lawmakers that an immediate shutdown would put into question the secure detention of the prison’s most dangerous inmates.

In a letter to Bush released yesterday, more than 140 House members joined Moran in calling for the facility’s closure and said detainees should be allowed to protest their detentions in federal courts through habeas corpus petitions.

The Supreme Court had twice ruled that Guantanamo detainees had access to federal courts to contest their incarcerations, but the court also made clear that Congress could

weigh in on the issue. Lawmakers did so last fall by approving the Military Commissions Act, which stripped habeas corpus rights and mandated special military trials for the detainees.

In February, the U.S. Court of Appeals for the District of Columbia Circuit upheld the habeas corpus provision of the act, and that case is what the court agreed to hear yesterday.

The appeals court is also considering how to handle the detainees’ challenge of the Combatant Status Review Tribunals, which determine whether they are to be held as enemy combatants.

The detainees’ lawyers say the panel’s use of mostly classified evidence makes it impossible for the suspects to defend themselves. The lawyers filed an affidavit last week with the court from an Army reserve officer and lawyer who said the tribunal’s members rely on vague information and are pressured into ruling against the suspects.

Remes, the lawyer in the habeas corpus case, said that the affidavit shows what a “sham the process is” and that he believes it played an important role in the justices’ decision to take the case now.

When the court hears the appeal sometime in the fall, it will be the first time that Chief Justice John G. Roberts Jr. participates in a case involving detainees. He recused himself from an earlier case because he had been involved in it while an appeals court judge.

The cases consolidated by the court are *Boumediene v. Bush* and *Al Odah v. U.S.*

“Justices Reject Appeals at Guantanamo—For Now”

USA TODAY

April 3, 2007

Joan Biskupic

The Supreme Court refused on Monday to hear appeals by Guantanamo prisoners held for more than five years, in the latest action in a long-running dispute over the Bush administration's handling of terrorism suspects and other foreign detainees.

Three dissenting justices, Stephen Breyer, David Souter and Ruth Bader Ginsburg, wrote that the dispute over whether the detainees have a basic right to challenge their detention deserves “immediate attention.”

Two other justices, John Paul Stevens and Anthony Kennedy, said in a separate statement that “despite the obvious importance of the issues raised in these cases” the court should not intervene until the detainees have finished other legal routes.

Monday's action ensures that the Pentagon will continue the ongoing round of special military trials, the first of their kind since World War II, for terrorism suspects picked up after the Sept. 11, 2001, attacks.

Last June, the Supreme Court struck down President Bush's plan for special military tribunals for foreign prisoners at the Guantanamo Bay Naval Base because it violated the Geneva Conventions and the U.S. Uniform Code of Military Justice.

Congress passed legislation in October to remedy the flaws, and new tribunals recently began in Cuba at the base long under U.S. control.

Monday's cases, *Boumediene v. Bush* and *Al Odah v. United States*, did not involve the merits of charges against any detainee or questions about the lawfulness of the military commission system as it has been reconstituted. The question Monday was whether Congress, in writing the new statute, had erased the right of Guantanamo prisoners to go before a U.S. judge to challenge their basic detention.

The U.S. Court of Appeals for the District of Columbia Circuit ruled in February that the writ of habeas corpus, long used by American prisoners to obtain a fair hearing, could not be invoked by the Guantanamo detainees. Agreeing with the Bush administration position, the lower court said the newly enacted Military Commissions Act had lifted U.S. judges' authority to hear such cases.

Two sets of Guantanamo detainees appealed, claiming that the lower court's ruling conflicted with a 2004 high-court decision that said foreigners at the base could challenge their detention before a U.S. judge.

In dissenting from Monday's order rejecting the appeals, Breyer, joined by Souter and Ginsburg, noted that the reasoning of the 2004 case could continue to apply. He noted that the court majority had said in the 2004 case of *Rasul v. Bush* that “application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus.” Breyer wrote that the D.C. Circuit disregarded that reasoning.

Stevens and Kennedy noted that the rejection of the cases Monday “does not constitute an expression of any opinion on the merits” of the detainees’ claims.

Sen. Chris Dodd, D-Conn., who has been a vocal critic of Bush administration policy at Guantanamo, called the court’s action “extremely regrettable” and said he would continue to push for legislation to restore a right of habeas corpus for the detainees.

Navy Cmdr. Jeffrey Gordon, a Defense

Department spokesman at Guantanamo, said officials were pleased with the court action and it will allow the current hearings “to proceed without further delay.”

Gordon said 385 prisoners are still at the base, which since January 2002 has been used to house foreigners picked up by U.S. military forces searching for al-Qaeda suspects. Fourteen of those men have been designated “high-value detainees” potentially facing terrorism charges.

“Risking Testy Justices and Faulty Justice”

The New York Times

March 5, 2007

Adam Liptak

What the Supreme Court says, goes. Usually.

But in a defiant decision two weeks ago, a federal appeals court in Washington conceded that it was ignoring parts of a 2004 Supreme Court decision on the rights of the men held at Guantanamo Bay, Cuba.

That can make the Supreme Court testy, and it may help the detainees. Their lawyers plan to ask the court today to hear the case.

The Supreme Court has already twice reversed decisions about Guantanamo from the same court, the United States Court of Appeals for the District of Columbia Circuit. Both times, the Supreme Court ruled for the detainees.

One more reversal will start to remind people of the Supreme Court’s cross relationship with another appeals court. The justices have repeatedly rebuked the United States Court of Appeals for the Fifth Circuit, which hears appeals from inmates on Texas’s death row, for dragging its feet in implementing Supreme Court decisions meant to limit the death penalty.

The Guantanamo cases are harder. On the one hand, the justices in the majority in the 2004 decision, *Rasul v. Bush*, certainly made statements indicating how they would decide a central issue in the new case, *Boumediene v. Bush*. But they made those statements in asides, in what lawyers call dicta.

They teach you in law school that only a

decision’s holdings count. Holdings are the narrow legal propositions on which decisions turn. Everything else—all the observations and footnotes and erudition—is dicta.

But the Supreme Court may be different, and judges on lower courts should probably listen to it with particular care. The court, after all, hears only a few cases, considers them thoroughly and, in painstaking and detailed decisions, often gives the lower courts broad guidance.

The dissenting appeals judge in the 2-to-1 decision in *Boumediene*, Judith W. Rogers, said her colleagues were thumbing their noses at the Supreme Court. She said they were “ignoring the Supreme Court’s well-considered and binding dictum” concerning the historical roots and geographical scope of the prisoners’ basic rights, and she cited a case from her own court that said that such statements “generally must be treated as authoritative.”

The question sounds academic, if not impenetrable, but it matters. The Guantanamo docket has been moving with geological speed. If another Supreme Court reversal is inevitable, and if the court has already signaled how it will rule in *Boumediene*, it does the detainees a profound disservice for appeals court judges not to anticipate what the justices will do.

Almost three years ago, the Supreme Court ruled in *Rasul* that the detainees possessed an ancient and fundamental right—the right to challenge the justness of their

confinement in court by filing petitions for writs of habeas corpus.

In the crucial aside in *Rasul*, Justice John Paul Stevens, writing for the majority, said this right was not just a result of a law passed by Congress but was grounded in the Constitution. "Application of the habeas statute to persons detained at the base," he wrote, "is consistent with the historical reach of the writ of habeas corpus."

If that is right, a new law pushed by the Bush administration, the Military Commissions Act, could not have cut off the detainees' rights to habeas corpus. In a footnote, the appeals court majority basically acknowledged that. But it ruled that the Supreme Court's historical analysis was wrong and that Justice Stevens's dictum could be ignored. It upheld the new law.

Instead of looking to *Rasul*, which was recent and concerned Guantanamo, the appeals court justified its decision by citing a 1950 Supreme Court decision, *Johnson v. Eisentrager*. That case involved German citizens convicted of war crimes in China and held at a prison in Germany. The court ruled that they had no right to habeas corpus.

The court's reliance on *Eisentrager* was curious. Both Justice Antonin Scalia, dissenting in *Rasul*, and John Yoo, an

architect of the Bush administration's post-9/11 legal strategy, have written that they understood *Rasul* to have overruled *Eisentrager*.

The *Eisentrager* court had, moreover, listed six factors supporting its conclusion that the German prisoners there had no habeas rights, among them that they were citizens of a country we had been at war with, that they had been tried and convicted by military tribunals and that they were imprisoned outside the United States.

All of these points, Justice Stevens wrote in *Rasul*, counted in favor of the Guantanamo detainees.

"They are not nationals of countries at war with the United States," Justice Stevens wrote, "and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control."

The detainees will ask the Supreme Court to put *Boumediene* on a fast track, and it may not be long until we hear from Justice Stevens again.