No. 05-5477

In the United States Court of Appeals *for the* District of Columbia Circuit

ABU BAKKER QASSIM and ADEL ABDU' AL-HAKIM,

Petitioners-Appellants,

v.

GEORGE W. BUSH, ET AL.,

Respondents-Appellees.

ON APPEAL FROM A FINAL JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF PETITIONERS-APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), undersigned counsel certifies as follows:

(A) Parties and *Amici*

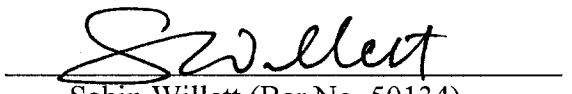
The parties, intervenors, and *amici* appearing before the district court and this Court in this action are Abu Bakker Qassim (Petitioner), Adel Abdu' Al-Hakim (Petitioner), George W. Bush (Respondent), Donald Rumsfeld (Respondent), Jay Hood (Respondent) and Brice Gyurisko (Respondent).

(B) Rulings Under Review

The ruling at issue in this Court is the district court's denial of a remedy to the Petitioners as part of its final order in *Qassim v. Bush*, No. 05-0497 (D.D.C. Dec. 22, 2005) (Robertson, J.). A copy of the district court's decision can be found in the Addendum at pages 01 - 12 and in the Joint Appendix at pages 0346 - 0358.

(C) Related Cases

This case has previously been before this Court in connection with the Respondents' motion to stay. *See Qassim v. Bush* (No. 05-5213), *Qassim v. Bush* (No. 05-5240), and *Qassim v. Bush* (No. 05-5249). There are no related cases.



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PRELIMINARY STATEMENT

In *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court held that aliens imprisoned at the Guantánamo Bay Naval Station ("Guantánamo") could challenge their captivity by *habeas corpus*. In March 2005, two Guantánamo prisoners, Petitioners-Appellants Abu Bakker Qassim and Adel Abdu' al-Hakim ("Petitioners"), filed a petition for writs of *habeas corpus*, alleging that they were not enemy combatants, and demanding that the government (the "Executive" or "Respondents") either release them or justify their continued incarceration.

In April 2005, the Executive obtained a stay of the *habeas* proceedings without informing either counsel or the district court that it had already determined that the Petitioners are not "enemy combatants." Petitioners' counsel repeatedly asked the Executive whether the Petitioners are enemy combatants, but the Executive remained silent. Petitioners' counsel only learned of their exoneration in July 2005, when finally permitted to visit Petitioners in isolation cells at Guantánamo. Counsel then moved for Petitioners' immediate release. Forced to concede that Petitioners are not enemy combatants, the Executive now claimed to imprison Petitioners pursuant to an asserted "power to wind up wartime detentions in an orderly fashion." On December 22, 2005, the district court correctly rejected this rationale, finding that "the detention of these petitioners has now become indefinite" and "is unlawful." The district court nonetheless denied relief to the Petitioners, concluding that "a federal court has no relief to offer" because of "obstacles [that] are constitutional and involve the separation of powers doctrine."

The district court erred as a matter of law in leaving Petitioners in legal limbo. No principle of law, including the "separation of powers doctrine" cited by the district court, deprives a federal court of all power to grant relief to persons indefinitely and

unlawfully imprisoned at Guantánamo. To the contrary, federal courts have a duty to remedy adjudicated wrongs, particularly in a *habeas* case involving lawless imprisonment by the Executive. The district court's denial of relief should be reversed.

JURISDICTION

The district court's final order (which expressly states that it "is a final, appealable order") was entered on December 22, 2005. *See* Addendum ("Add.") 13; Joint Appendix ("App.") 0358.[2] Petitioners' notice of appeal to this Court was filed on December 23, 2005, and was docketed on December 28, 2005. App. 0359. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether Petitioners, stateless persons seized by United States forces in Pakistan, removed against their will to Afghanistan and thence to Guantánamo, now in their fifth year of imprisonment by the Executive despite a determination by the Department of Defense that they are not "enemy combatants," may be imprisoned indefinitely by the Executive.

2. Whether the district court, having jurisdiction to hear Petitioners' *habeas corpus* petition, and having concluded their detention is illegal, erred in concluding that it is powerless to grant a remedy.

RELEVANT PROVISIONS OF LAW

The following provisions of constitutional, statutory, and international law are relevant to this appeal.

U.S. CONST. art. I, § 9, cl. 2 provides:

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[2] A copy of the district court's decision is included in the Addendum, as well as in the Joint Appendix.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

U.S. CONST. art. I, § 9, cl. 3 provides:

No Bill of Attainder or ex post facto Law shall be passed.

U.S. CONST. art. II, § 1, cl. 1 states, in pertinent part:

The executive Power shall be vested in a President of the United States of America.

U.S. CONST. art. III, § 2, cl. 1 provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . [and] to Controversies to which the United States shall be a Party . . . .

U.S. CONST. amend. V provides, in pertinent part:

No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

28 U.S.C. § 2241 states, in pertinent part:

(a) 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.

. . . .

(c) The writ of *habeas corpus* shall not extend to a prisoner unless —

> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> . . . .
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . .

28 U.S.C. § 2243 states, in pertinent part:

The [*habeas*] court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

A copy of The Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-44 (2005), is included in the Addendum at 14.

Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3322, 3324 ("Third Geneva Convention"), states:

> The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.
>
> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Third Geneva Convention art. 118, 6 U.S.T. 3406, states, in pertinent part:

> Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 132, Aug. 12, 1949, 6 U.S.T. 3606 ("Fourth Geneva Convention"), states, in pertinent part:

> Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.

STATEMENT OF THE CASE

A. The Underlying Facts

Petitioners are Uighurs, members of a Muslim minority native to the Xingjiang Uyghur Autonomous Region of far-western Communist China. Add. 01; App. 0346. The Uighurs have suffered under brutal communist rule. App. 0276. Both Petitioners have been interrogated and threatened by Chinese officials while imprisoned at Guantánamo. App. 0211. As the Executive acknowledges, the Petitioners cannot be

returned to China because they would likely be imprisoned, tortured or killed by the Communist Chinese government.[3] App. 0275-76. Thus, the Petitioners are stateless refugees.

On November 13, 2001, the President issued an order authorizing the use of military force. Add. 31. *(Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 13, 2001)).

In approximately December 2001, Petitioners, while present in Pakistan, were sold by bounty hunters to United States forces and transported to a military facility at Kandahar, Afghanistan. App. 0212. Petitioners were held in prison there until approximately June 2002. Add. 01; App. 0346. During his imprisonment in Kandahar, Petitioner Hakim was advised that United States forces knew that he had been taken "by mistake." App. 0212.

Petitioners have been held in prison at Guantánamo since June 2002. Add. 01; App. 0346. They were never charged with any wrongdoing nor designated for any military tribunal.

B. The Combatant Status Review Tribunals

On June 29, 2004, the Supreme Court issued its decision in *Rasul*. Nine days later, the Department of Defense issued an order establishing "Combatant Status Review Tribunals" ("CSRT") to determine whether detainees are properly held as enemy combatants. The order defined an "enemy combatant" as:

> an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States

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[3] "The [Chinese] Government used the international war on terror as a pretext for cracking down harshly on suspected Uighur separatists expressing peaceful political dissent and on independent Muslim religious leaders." App. 0142.

> or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Add. 21 (Memorandum from Deputy Secretary of Defense Paul Wolfowitz to Secretary of the Navy Gordon England, Order Establishing Combatant Status Review Tribunals at 1 (July 7, 2004) ("Wolfowitz Order")).

Paragraph g(12) of the Wolfowitz Order provides: "Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine in closed session by majority vote whether the detainee is properly detained as an enemy combatant." Add. 23 (Wolfowitz Order at 3). Paragraph i continues:

> *Non-Enemy Combatant Determination.* If the Tribunal determines that the detainee shall no longer be classified as an enemy combatant, the written report of its decision shall be forwarded directly to the Secretary of Defense or his designee. The Secretary or his designee shall so advise the Secretary of State, in order to permit the Secretary of State to coordinate the transfer of the detainee for release to the detainee's country of citizenship or other disposition consistent with the domestic and international obligations and the foreign policy of the United States.

Add. 23-24 (Wolfowitz Order at 3-4).[4]

C. The Petitioners' CSRT Hearings

Respondents have never disclosed the records of Petitioners' CSRT proceedings. Sometime in late 2004 or early 2005, Respondents are believed to have conducted separate CSRT hearings for each Petitioner. App. 0212. On July 29, 2005, Respondents conceded that "the CSRTs determined petitioners should no longer be classified as enemy combatants on March 26, 2005." App. 0218. From its finding that the Petitioners should

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[4] Following the hearing, the presiding officer must mark the following sentence appropriately: "The Tribunal has determined that he (is) (is not) designated as an enemy combatant . . . ." Add. 30 (Memorandum from Secretary of the Navy Gordon England to Deputy Secretary of Defense Paul Wolfowitz, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants at Enclosure (9) (July 29, 2004) ("England Procedures")).

no longer be classified as enemy combatants, the Executive tried to suggest that the Petitioners *once were* enemy combatants by referring to them as "*no longer* enemy combatants" or "NLECs." The district court called these semantics "Kafkaesque." Add. 05; App. 0350.[5] The definition of "enemy combatant" specifies that a person is an enemy combatant if he ever *was* affiliated with the Taliban or Al Qaeda. Thus, the finding that the Petitioners are not enemy combatants can only mean that they *never were* affiliated with the Taliban or al Qaeda.

D. The District Court Proceedings

Petitioners filed a petition for writs of *habeas corpus* on March 10, 2005. App. 0011. Four days later, the Executive moved to stay the case until this Court resolved appeals involving other Guantánamo prisoners. App. 0003. Petitioners' counsel asked the Executive whether it alleged that Petitioners were enemy combatants. Add. 02; App. 0347. The Executive never responded, and on March 29, 2005, advised the district court that "[a] factual record for a petitioner in a Guantánamo Bay detainee case typically has consisted of the record of proceedings before the Combatant Status Review Tribunal that confirmed petitioner's status as an enemy combatant properly subject to detention." App. 0104. When it filed that brief, the Executive already had determined that the Petitioners were not enemy combatants. App. 0218.

By this point, the Petitioners were in their fourth year of imprisonment by United States forces (in Kandahar and Guantánamo). Add. 03; App. 0348. They were permitted

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[5] As the district court correctly found, there is no evidence in the record that the Petitioners were *ever* lawfully detained. Add. 05-06; App. 0350-51. "[T]he government has not stated that these petitioners were ever suspected of having engaged in armed conflict against the United States. What we know of them is only that they were captured as they fled towards Pakistan after the inception of coalition bombing. The government's use of the Kafkaesque term 'no longer enemy combatants' deliberately begs the question of whether these petitioners ever were enemy combatants." Add. 05; App. 0350 (internal citations omitted).

no visitors, no contact with the outside world, no newspapers or news magazines. They had no word from their wives, parents, or children.

Misled as to Petitioners' combatant status, the district court granted the Executive's stay motion in April 2005. Add. 02; App. 0347. A month later, military authorities finally told each Petitioner that he had been determined not to be an enemy combatant. App. at 0343. No one told counsel or the district court, however, Add. 02; App. 0347, and Petitioners of course were held *incommunicado*.[6]

Counsel first met Petitioners on July 13 and 14, 2005, in separate meetings in small isolation cells at Guantánamo. Add. 0212. Petitioners were chained to the floor. In these meetings, counsel for the first time learned of the CSRT's noncombatant findings. App. 0212. On return from the base, counsel filed an Emergency Motion to Vacate Stay Order and Issue Writ Directing Immediate Release of Petitioners. App. 0208. On July 29, 2005, the Executive for the first time admitted that Petitioners are not enemy combatants, and that CSRT proceedings had so concluded four months earlier. App. 0218.[7]

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[6] The Executive also prevented Petitioners from getting word to their counsel or the district court. On June 11, 2005, Petitioners wrote a letter telling their counsel that they had been found to be non-enemy combatants. Petitioners' Motion for an Order Amending Access Procedures Pertaining to Non-Enemy Combatants at 7 n.7 (Nov. 4, 2005) (dkt. no. 42). The letter was not actually delivered to counsel until September 21, 2005, over 100 days after it was written. *Id.*

[7] The Executive refused to produce the records of Petitioners' CSRT determinations. The only evidence of the records is the concession in the July 29, 2005, brief filed by the Respondents. App. 0218. "Completion" of a CSRT happens long after the hearing, as it involves multiple levels of administrative review within the Department of Defense. *See* Add. 23 (Wolfowitz Order at 3). The Executive's long-standing, albeit unsuccessful, efforts to find a third country willing to accept the Uighurs as refugees strongly suggests that the Executive knew that Petitioners were not enemy combatants years before admitting it to the district court. *See*, *infra,* n.9.

At an August 1, 2005, hearing, the Executive advised the district court that the Petitioners continued to be held because they could not be returned to Communist China, where they would be subject to torture. App. 0275-76. The district court was assured, both on the record and in chambers, that the Executive was attempting to arrange a resettlement of the men. Add. 03; App. 0348. The court advised that it would permit the Executive some time to attempt to resolve the matter diplomatically. Add. 03; App. 0348.[8]

Two weeks later, Petitioners, along with other prisoners found to be noncombatants, were hastily moved to "Camp Iguana," a slightly lower-security prison. Ten or fewer men have been imprisoned there ever since. The isolation is intense. "We are completely cut off from the outside world. If we continue to be held here, it is going to drive us all crazy," said Petitioner Qassim in November 2005. App. 0344.

The district court held further hearings in late August and mid-December 2005 at which the Executive confirmed that it was not able to resettle Petitioners.[9] Because the Executive chooses to continue to jail Petitioners at Guantánamo rather than give them

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[8] In an effort to assist with this process, the Petitioners moved for access to United Nations representatives. App. 0008. Many western nations consider applications for political asylum only when referred by the United Nations High Commission for Refugees ("UNHCR"). App. 0231. The UNHCR generally must meet with a refugee before recommending him for asylum. App. 0231-32. The Executive strenuously opposed the motion and it was ultimately denied in December 2005. App. 0433.

[9] Although the Executive refused to give counsel or the court any specific information about its efforts to resettle the Petitioners, the available evidence suggests that prospects for resettlement are grim. Over a year and a half ago, on August 12, 2004, Secretary of State Colin Powell stated: "The Uighurs are a difficult problem," "and we are trying to resolve all issues with respect to all detainees at Guantanamo. The Uighurs are not going back to China." Petitioners' Reply in Support of Request for Rule 16 Conference and Other Procedural Relief at 3 (Apr. 5, 2005) (dkt. no. 12); *see also* App. 0129 ("United States military officials have concluded that at least half of the Uighurs [at Guantánamo] are eligible for release."); App. 0131 (discussing the government's "failed efforts to persuade European countries to accept [the Uighurs] as refugees").

refuge in this country, Petitioners urged the district court to order one of three remedies: (i) release the men into the civilian population of Guantánamo; (ii) produce the body of each Petitioner in court under the doctrine of *Baker v. Sard*, discussed *infra*, for the district court to then order a parole of each Petitioner pursuant to conditions of release pending an ultimate resettlement by the Executive; or (iii) outright release.

On December 22, 2005, the district court denied the *habeas* petition, ruling correctly that the Executive's indefinite imprisonment of Petitioners is unlawful, Add. 06; App. 0351, and incorrectly that the judicial branch is powerless to fashion a remedy against the Executive's lawless conduct. Add. 12; App. 0357.

STANDARD OF REVIEW

This Court reviews questions of law *de novo* and questions of fact for clear error. *United States v. Smith*, 374 F.3d 1240, 1246 (D.C. Cir. 2004). As there is no dispute concerning the material facts, this appeal presents pure questions of law.

SUMMARY OF ARGUMENT

The Detainee Treatment Act does not apply to this case. Its text, the presumption against retroactive applications, and the legislative history all show that Congress did not intend to strip *habeas* review of decided cases involving persons determined not to be enemy combatants. So to construe the Act would raise numerous constitutional problems. *Infra*, 11-24.

The district court erred in failing to grant release. It correctly ruled that the Petitioners' imprisonment is unlawful. The Executive articulated no lawful basis for imprisonment, and continued imprisonment after a non-combatant determination is contrary to the Constitution, 28 U.S.C. § 2243, the Treaties of the United States, and the past practices of the United States in wartime. *Infra,* 25-32.

The district court's ruling abdicated its duty. Under both *habeas* precedent and the constitutional scheme, a court finding unlawful Executive imprisonment must remedy it. No "separation of powers" doctrine supported the district court's ruling. To the contrary, separation of powers is offended when an Article Three judge fails to grant a remedy. The Supreme Court's precedents teach that even unlawful aliens may not be indefinitely detained. The district court erred by failing to employ, at a minimum, the parole power articulated in *Baker v. Sard. Infra,* 32-38.

The judgment should be reversed and the case remanded to the district court with instructions to hold a hearing to fashion appropriate terms of release.

ARGUMENT

A. The Detainee Treatment Act Of 2005 Does Not Affect The Jurisdiction Of This Court Or The District Court Over This Case.

The facts occurred, and the case was brought, prosecuted, and decided prior to the enactment of The Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-44 (2005) (the "Act"), which was signed into law by the President on December 30, 2005. Because the Executive has already argued that the Act deprives this Court of jurisdiction over this appeal (and the district court of jurisdiction over proceedings on remand),[10] Petitioners address the issue here. As discussed in briefs filed in this Court in other appeals, the Act has no application to any pending Guantánamo *habeas* case.[11] Moreover, whatever its application to the standard *habeas* case, the Act

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[10] *See* Opposition to Motion to Expedite Appeal at 5.

[11] Petitioners refer to and summarize the extensive analyses already provided in briefs submitted to this Court in other Guantánamo *habeas* cases, including the Supplemental Brief of Appellants Regarding Section 1005 of the Detainee Treatment Act of 2005, *Boumediene v. Bush* (D.C. Cir. Jan. 25, 2006) (No. 05-5062)("*Boumediene* Brief"), and Appellees-Cross-Appellants' Supplemental Brief Addressing the Effect of

plainly does not apply to cases in which the military has already determined that the *habeas* petitioner is not an enemy combatant.

1. The Act does not remove from the federal courts jurisdiction over any pending Guantánamo *habeas* case.

a. The plain text and structure of the Act demonstrate that the Act only applies prospectively.

In construing a statute, "[t]he starting point . . . is the existing statutory text." *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004). As this Court has explained, "when the meaning is clear, and the enactment is within the constitutional authority of Congress, the sole function of the courts is to enforce it according to its terms." *Higgins v. Marshall*, 584 F.2d 1035, 1038 (D.C. Cir. 1978) (internal quotation marks and citations omitted). The Supreme Court has also instructed that "[i]n expounding a statute, [courts] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law." *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (internal quotation marks and citations omitted); *see also Asiana Airlines v. F.A.A.*, 134 F.3d 393, 398 (D.C. Cir. 1998) ("A cardinal principle of interpretation requires us to construe a statute so that no provision is rendered inoperative or superfluous, void or insignificant.") (internal quotation marks and citations omitted).

Section 1005(e)(1) of the Act amends the federal *habeas corpus* statute, 28 U.S.C. § 2241, by adding to that statute a new subsection (e), which strips the federal courts of jurisdiction over applications for a writ of *habeas corpus* filed by aliens "detained by the Department of Defense at Guantánamo Bay, Cuba." Section 1005(e)(1) says nothing about its application to pending cases. Section 1005(h) of the Act (entitled "EFFECTIVE DATE") provides the "effective date" of the sub-parts of section 1005 as follows:

Section 1005 of the Detainee Treatment Act of 2005 on These Appeals, *Al Odah v. Bush* (D.C. Cir. Jan. 25, 2006) (Nos. 05-5064, 05-5095-116) ("*Al Odah* Brief").

(1) IN GENERAL - This section shall take effect on the date of the enactment of this Act.

(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS - Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

Thus "the existing statutory text" of sections 1005(e)(1) and 1005(h) does *not* state that the jurisdiction-stripping provision applies to pending *habeas* petitions. To the contrary, section 1005(h)(1) states: "[t]his section [1005] shall take effect on the date of the enactment of this Act." As the Supreme Court has made clear, "[a] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 257 (1994). The effective-upon-enactment formula is "an especially inapt way to reach pending cases." *Id.* at 258 n.10.

Section 1005(h)(2) provides a special effectiveness provision applicable only to parts of the Act. Subsections (e)(2) and (e)(3) apply to a narrow class of claims[12] "pending on or after the date of the enactment of this Act." Thus the Act contains one effective date for applying subsections (e)(2) and (e)(3) to a class of claims, and another for everything else. Congress must have meant for these different provisions to mean different things. *See, e.g.*, *Clay v. United States*, 537 U.S. 522, 528 (2003) ("When Congress includes particular language in one section of a statute but omits it in another section of the same Act . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks and citations omitted); *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (stating that it is "generally presumed that Congress acts intentionally" in the "disparate inclusion or

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[12] Those claims "whose review is governed by" subparagraph (e)(2) or (e)(3). Act § 1005(h)(2).

exclusion" of particular language). The only permissible construction is that the jurisdiction-stripping provision of section 1005(e)(1) "takes effect" for *habeas* petitions filed after December 30, 2005, and does not apply to *habeas* petitions which, like this one, were filed, pending, and decided before the date of enactment.

b. Construing section 1005(e)(1) to apply retroactively would offend the presumption against retroactive application.

Even if the text and structure were ambiguous, the well-established presumption against retroactive construction would foreclose application of this jurisdiction-stripping provision to *habeas* cases pending on the date of its enactment. As the Supreme Court has explained, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265. "[P]rospectivity remains the appropriate default rule," *id.* at 272, and, accordingly, "congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result," *id.* at 264 (internal citations omitted).

No statute may be applied retroactively to bar claims pending before the statute was enacted "absent a clear indication from Congress that it intended such a result." *INS v. St. Cyr*, 533 U.S. 289, 316 (2001). Cases holding that a statute with retroactive effect was properly authorized by Congress "have involved statutory language that was so clear that it could sustain only one interpretation." *See Lindh v. Murphy*, 521 U.S. 320, 329 n.4 (1997). In cases of congressional silence or ambiguity, statutes should be construed to apply only prospectively. *See Landgraf*, 511 U.S. at 267. There is no justification for abandoning this requirement here. The Supreme Court has admonished that the protections of the ancient writ of *habeas corpus* "have been strongest" where courts review detention by the Executive. *See St. Cyr*, 533 U.S. at 301. Thus, "[i]mplications

from statutory text or legislative history are not sufficient to repeal *habeas* jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal." *Id.* at 299.

c. The Act's legislative history demonstrates that Congress did not intend the jurisdiction-stripping provision of section 1005(e)(1) to apply to pending *habeas* cases.

As the *Al Odah* and *Boumediene* petitioners have shown, the legislative history reinforces what is plain from the text and the canons of statutory construction: Congress considered and rejected language that would have had retroactive effect, and otherwise expressed its intent that the jurisdiction-stripping provisions of the Act not apply to pending *habeas* cases. *See Boumediene* Brief at 6-8; *Al Odah* Brief at 5-8.

2. The Act does not apply to Guantánamo *habeas* cases that challenge the imprisonment of individuals whom the CSRT has determined are not enemy combatants.

Unlike any other appeal pending before the Court, this one involves petitioners whom the Executive has determined are not enemy combatants. Whatever else Congress may have intended, it did not intend the Act to apply retroactively to them. Rather, its intent was to replace the former CSRT and *habeas* regime for *combatants* with a new set of rules for future CSRTs, and a modified mechanism for their review. By expressly addressing judicial review of combatant determinations while saying nothing at all about non-combatant determinations, Congress demonstrated that it did not intend the jurisdiction-stripping provision of section 1005(e)(1) to apply here.

The Act's text and architecture compel this result. Sections 1001-1004 address the treatment of enemy combatants.[13] Section 1005 is entitled "Procedures for Status

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[13] Section 1001 contains the short title. Section 1002 addresses standards for interrogation. Section 1003 prohibits cruel, inhuman or degrading treatment or

Review of Detainees Outside the United States." Subsections (a) through (d) impose rulemaking and reporting requirements and address the probative value of coerced statements. Subsections (f) and (g) are definitional, and subsection (h) contains the Act's effective-date provisions. Only section 1005(e) addresses judicial review at all. And nothing in subsection (e) addresses the rights of persons determined *not* to be enemy combatants. To the contrary, section 1005(e)(2)(A) provides:

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

(emphasis supplied).

No such exclusive jurisdiction is conferred over decisions that an alien is *not* detained as an enemy combatant. Thus, the presumption against retroactive applicability applies with special force here, as Congress provided a jurisdiction-stripping provision only in future cases involving combatant determinations.[14]

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punishment. Section 1004 contains litigation defenses for government personnel. None of these sections address the treatment of non-combatants.

[14] Section 1005(e)(2)(C) purports to limit this Court's review of CSRTs to whether the status determination was consistent with the Secretary of Defense's rules, and whether the making of the CSRT's determination was consistent with the Constitution and laws of the United States. If the rules, laws and Constitution all supported a tribunal's non-combatant finding, is the prisoner's continued incarceration unreviewable? Under the canons of statutory construction discussed above, it cannot be presumed that Congress intended that result.

3. Retroactive application of the Act would be unconstitutional.

The Court should avoid a construction that raises serious constitutional questions. *See St. Cyr*, 533 U.S. at 300; *NLRB v. Catholic Bishop*, 440 U.S. 490, 508-09 (1979) (Brennan, J., dissenting). Construing the Act to remove federal court jurisdiction over this case would be unconstitutional.

a. Retroactive application of the Act would violate the Suspension Clause.

Under the Suspension Clause, "[t]he Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2; *see also Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1868) (Suspension Clause "absolutely prohibits the suspension of the writ, except under extraordinary exigencies"); *Al Odah* Brief at 11-15. The Suspension Clause applies to *habeas* petitions brought by aliens held within the territorial jurisdiction of the United States. *See St. Cyr*, 533 U.S. at 298, 300 (revoking a deportable alien's *habeas* rights would raise "substantial constitutional problems" under the Suspension Clause). The United States exercises "complete jurisdiction and control" over Guantánamo, and the detainees imprisoned therein are "within the territorial jurisdiction of the United States." *Rasul*, 542 U.S. at 480.

The writ has been suspended only four times, each time by express and limited authorization. *See Boumediene* Brief at 11 n.10. Each of the four suspensions involved an ongoing rebellion or invasion. *Id.* In passing the Act, Congress expressed no intent to suspend the writ and identified no predicate for suspension. Absent any such an express statement from Congress, this Court should not construe the Act retroactively, as that would implicate an improper suspension of the writ.

Absent a valid suspension, limits on the availability of the writ are acceptable only if the substitute remedy is both adequate and effective. *See Swain v. Pressley*, 430 U.S. 372, 381 (1977); *see also St. Cyr*, 533 U.S. at 305 (adequate substitute needed to avoid suspension problem); *Kuhali v. Reno*, 266 F.3d 93 (2d Cir. 2001) (statute that purports to strip courts of jurisdiction to review final orders of removal issued against certain non-citizens did not supplant *habeas* jurisdiction because "Congress has provided no . . . substitute remedy in this context"); *United States v. Hayman*, 342 U.S. 205, 219 (1952) (avoiding constitutional question by holding that section 2255 was as broad as *habeas corpus*). On its face, section 1005(e) lacks any text to secure what *habeas* secured at common law: the unfailing right of release from unlawful detention. Retroactively applied, the Act would not be adequate or effective. In short, the need to "answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that [*habeas*] review was barred entirely." *St. Cyr*, 533 U.S. at 301 & n.13.

b. Retroactive application of the Act would violate Petitioners' constitutional rights.

Once the CSRTs determined that they were not enemy combatants, Petitioners' legal status became that of aliens detained by the Executive *outside* the laws of war. As such, Petitioners unquestionably have constitutional rights that would be violated by retroactive application of the jurisdiction-stripping provision of section 1005(e)(1).

The debate that continues in this Court as to the scope of constitutional rights, *vel non*, of the Guantánamo prison population is irrelevant in this appeal.[15] Whether or not

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[15] While the Supreme Court expressly did not delineate the scope of the petitioners' entitlement to *habeas* in *Rasul v. Bush*, it did make clear that they had stated a claim for wrongful imprisonment "in violation of the Constitution or laws or treaties of the United States." *Rasul*, 542 U.S. at 483 n.15.

all Guantánamo prisoners have such rights, it is clear that an alien held at Guantánamo after determination by our military that he is not an enemy combatant must have constitutional rights. The Fifth Amendment applies to aliens (both lawful and illegal) held within the territorial jurisdiction of the United States. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("[W]e have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government."); *Matthews v. Diaz*, 426 U.S. 67, 77 (1976) ("Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to . . . constitutional protection."); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("[E]ven aliens shall not be . . . deprived of life, liberty, or property without due process of law."). Held as they are "within the territorial jurisdiction of the United States," *Rasul*, 542 U.S. at 480, and under its "complete jurisdiction and control," *id.*, Petitioners are like any other alien held by the Executive within United States territory. They have constitutional rights. Retroactive application of the Act would violate their rights in at least three ways.

i. Retroactive application of the Act would violate the Equal Protection Clause.

The Fourteenth Amendment's proscription against a State's denial to "any person within its jurisdiction [of] the equal protection of the laws" applies to the federal government under the Fifth Amendment, *Adarand Constr., Inc. v. Pena*, 515 U.S. 200, 213 (1995), and "the equal protection obligations imposed by the Fifth and the Fourteenth Amendments [are] indistinguishable." *Id.* at 218.

Section 1005(e)(1) provides:

(e) [N]o court, justice, or judge shall have jurisdiction to hear or consider –

(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba.

This section would strip the right of *habeas* from aliens held by the Defense Department at Guantánamo and leave it intact for aliens held anywhere else. The distinction between these two classes of aliens is ineffable. It is not based on terrorism; indeed, it is not based on any conduct at all. The Act does not distinguish between those held under the laws of war and those not. It draws no boundary between citizen and alien, or even between persons who choose to live in different places. It would not allocate rights based on status related to the war, immigration, or criminal law powers of the coordinate branches. Instead, it would make a person's most fundamental right—access to the Great Writ—depend on the address of the prison to which the Executive sends him.

The discretion the Act would sanction would be unfettered and unreviewable. It would encourage the Executive to view the territories of the United States as a chessboard and its prisoners pawns, whom it might move around the board at whim, with no purpose other than escaping judicial review. As broad as Executive authority is in matters involving aliens, it is not so broad as to subordinate legal rights to gamesmanship. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 101. (1976) ("We do not agree . . . that the federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject . . . aliens to different substantive rules from those applied to citizens."); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("[T]he very idea that one man may be compelled to hold . . . any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails.").

Thus, if retroactively applied here, the Act would offend the equal protection guarantee under *any* standard of scrutiny. *See City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (classification drawn by statute must be rationally related to a "legitimate state interest"). The alien Petitioners had nothing to say about where they were taken in chains. Their location remains today, as it was in 2002, subject to the fiat of the Secretary. This arbitrary classification could not be rationally related to any interest other than a desire to escape judicial review, and that is not a legitimate state interest. *See Gordon v. Lance*, 403 U.S. 1, 3 (1971) (finding the denial or dilution of voting power because of group characteristics, such as geographic location, that bears no valid relationship to the interest of those groups violates the equal protection clause); *see also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 92 (1973) ("[T]his Court has consistently recognized that where there is in fact discrimination against individual interests, the constitutional guarantee of equal protection of the laws is not inapplicable simply because the discrimination is based upon some group characteristic such as geographic location.") (Marshall, J., dissenting).

Indeed, the discriminatory treatment that retroactive application would create here would likely be subject to strict scrutiny, because it would erect high barriers to the fundamental right of equal access to the courts, and because *habeas itself* is so fundamental that courts carefully scrutinize laws limiting its availability. *See Tennessee v. Lane*, 541 U.S. 509, 522-23 (2004) (right of access to courts is fundamental); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (classifications affecting fundamental rights "are given the most exacting scrutiny"); *Coolidge v. New Hampshire*, 403 U.S. 443, 454 n.4 (1971) (*habeas corpus* among the rights "to be regarded as of the very essence of constitutional liberty"); *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (the right to *habeas corpus* "is shaped to guarantee the most fundamental of all rights"). That these innocent Petitioners

are now in their fifth year of imprisonment shows that overbroad application is not a professorial hypothetical. Whether considered under strict scrutiny or the rational-basis test, application of the Act to this case would so arbitrarily infringe a fundamental freedom that it could withstand no standard of equal protection review. This Court should avoid construing the effective date of the Act in a way that implicates that defect.

ii. Retroactive application of the Act would violate the Due Process Clause.

Habeas exists to protect the most fundamental of rights. *See Coolidge*, 403 U.S. at 454 n.4; *Carafas*, 391 U.S. at 238. Retroactive application of the Act would unconstitutionally deprive the Petitioners of the fundamental right to liberty guaranteed by the Fifth Amendment. *See Griffin v. Illinois*, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring).

The Due Process Clause guards against governmental interference with those rights "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937). "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690; *accord Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Even aliens are entitled to this fundamental liberty. *See Zadvydas*, 533 U.S. at 690 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem.").[16]

Legislation that creates substantial barriers to the exercise of a fundamental right is subject to searching scrutiny. *See Lane*, 541 U.S. at 522-23; *Jeter*, 486 U.S. at 461. Applied retroactively, the Act would be unconstitutional absent a demonstration by the

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[16] "Only the most perverse reading of the Constitution would deny detained aliens the right to bring constitutional challenges to the most basic conditions of their confinement." *Jean v. Nelson*, 472 U.S. 846, 874 (1985) (Marshall, J., dissenting).

Executive that its infringement of Petitioners' fundamental right to liberty is narrowly tailored to serve a compelling interest. *Reno v. Flores*, 507 U.S. 292, 302 (1993) ("[The] substantive component [of due process] . . . forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."). As the district court found, there is no such interest.

Because the Petitioners are not even notionally held under the laws of war, they fall within the jurisprudence of cases involving aliens held indefinitely. It is undisputed that such persons have constitutional rights. The Act's limits on the scope of appellate review, and its plain inapplicability to a non-combatant case, offend those rights because they do not satisfy the minimum requirements of procedural due process under the Fifth Amendment. *See Hampton*, 426 U.S. at 102-03 ("By reason of the Fifth Amendment . . . a deprivation [of liberty] must be accompanied by due process. It follows that some judicial scrutiny of the deprivation is mandated by the Constitution."); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 598 (1953) ("Although Congress may prescribe conditions for [an alien's] . . . expulsion and deportation, not even Congress may expel [an alien] . . . without allowing him a fair opportunity to be heard."). In sum, the Act could not be applied to this case without violating the Due Process Clause of the Fifth Amendment.

iii. Retroactive application of the Act would violate the Constitution's proscription against bills of attainder.

On December 22, 2005, a federal judge ruled that the President's imprisonment of these Petitioners was illegal. Eight days later, the President signed the Act—a statute that the Executive now argues eliminates their habeas remedy. If the Act indeed did such a thing, it would violate the Constitution's proscription against bills of attainder. *See* U.S. CONST. art. I, § 9, cl. 3. The Bill of Attainder Clause applies to aliens as well as citizens.

See Mendelsohn v. Meese, 695 F. Supp. 1474, 1488 n.24 (1988) (finding that "the Supreme Court's interpretations of [the Bill of Attainder Clause] has been expansive" and "there is little doubt that the ban applies to bills of attainder directed at non-citizens"); *see also Flemming v. Nestor*, 363 U.S. 603 (1960) (considering alien's bill of attainder claim regarding denial of social security benefits due to deportation); *Linnas v. INS*, 790 F.2d 1024 (2nd Cir. 1986) (considering whether exclusion of Nazi war criminals constituted bill of attainder).

"[L]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." *United States v. Lovett*, 328 U.S. 303, 315 (1946). The Act clearly applies to "easily ascertainable members of a group," as section 1005(e)(1) expressly states that it terms apply only to "alien[s] detained by the Department of Defense at Guantanamo." The elimination of a habeas remedy in order to perpetuate an unlawful imprisonment is punishment of the plainest kind. *See, e.g.*, *Cummings v. Missouri*, 71 U.S. 277, 320 (1866) (invalidating a loyalty oath that effectively denied to former Confederates the right to engage in their profession, noting that "the deprivation of any rights, civil or political . . . may be punishment," including "the privilege of appearing in the courts"); *see also Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 475-76 (1977) (punishment not limited to historical examples but includes new forms of punishment of which Congress may conceive).

The Court should avoid construction of the Act in a way that would render it an unenforceable bill of attainder.

B. The District Court Erred As A Matter Of Law In Denying Relief To The Petitioners.

Congress did not intend the Act to apply to this case, and the Act would offend the Constitution if it did. Accordingly, this appeal must be decided under pre-Act law. As the district court correctly noted, a *habeas* court must "dispose of the matter as law and justice require." 28 U.S.C. § 2243. The district court erred because law and justice require the judicial branch to fashion an end to the Executive's unlawful detention of the Petitioners, and the precedents of this Court afford a plain remedy.

1. The district court correctly ruled that the Executive's imprisonment of the Petitioners is unlawful.

The district court's stark conclusion that "[t]his indefinite imprisonment at Guantanamo Bay is unlawful," Add. 06; App. 0351, is correct. As the Petitioners have never been accused of any crime, only two bases in law might afford the Executive lawful grounds for imprisonment. Neither applies here.

First, limited periods of detention are permissible in connection with immigration matters. But Petitioners have now been imprisoned seven times longer than the six-month presumptive maximum period of indefinite confinement recognized in *Zadvydas.* In that case, the Supreme Court held that criminal, deportable aliens could not be held indefinitely, and fixed six months as the maximum period of indefinite detention that could be squared with the Constitution. *See* 533 U.S. at 701. *Zadvydas* was reaffirmed last year in *Clark v. Martinez*, 125 S. Ct. 716 (2005).

Second, prisoners might be held pursuant to the laws of war. The United States may prevent captured combatants from returning to the battlefield. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518-21 (2004). Wartime captivity is "solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war." Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 847 INT'L REV. RED CROSS

571, 572 (2002). But this power extends only to actual combatants, and only during the pendency of international armed conflict. The international laws of war—to which the United States subscribes under the Geneva Conventions and under Army Regulation 190-8—provide, *first*, that those who, like the Petitioners, were taken by mistake, must be promptly released, *see* Fourth Geneva Convention art. 132, 6 U.S.T. 3606 ("Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist."); Enemy Prisoners of War, Retained Personnel, civilian Internees and Other Detainees, Army Regulation 190-8, §3 (1997), and *second*, that even prisoners of war "shall be released and repatriated *without delay* after the cessation of active hostilities." Third Geneva Convention art. 118, 6 U.S.T. 3406 (emphasis supplied); *see also Hamdi*, 542 U.S. at 520-21.

Petitioners were seized in 2001. After *Rasul* was decided in June 2004, the Department of Defense hastily cobbled together a definition of "enemy combatant" and a process of secret military tribunals to determine whether those taken years earlier were indeed enemy combatants. This process has been roundly and rightly criticized, but whatever its merit, the district court rightly concluded that it was "the only handhold for the government's claim of executive authority to hold detainees at Guantanamo." App. 0275.

"Enemy combatant" is defined this way: "For purposes of this order, the term 'enemy combatant' shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." Add. 21 (Wolfowitz Order at 1). Following the hearing, the presiding officer must mark the following sentence appropriately: "The Tribunal has determined that he (is) (is not) designated as an enemy combatant." Add. 30 (England Procedures at Enclosure (9)).

The definition of "enemy combatant" uses the past tense. A person either *was* "part of or supporting" al Qaeda or the Taliban, or he was not. If one *did* support, one *is* to be designated by the presiding officer as an "enemy combatant."[17] The Executive refused to disclose any record of the Petitioners' CSRTs. All that we know with confidence is that the Petitioners' CSRT determined that they are "no longer classified as enemy combatants." App. 0215. If he is not today classified as an enemy combatant, then, by definition, each Petitioner was not "part of or supporting Taliban or al Qaeda forces, or associated forces." Add. 21 (Wolfowitz Order at 1). Despite the Executive's efforts to impugn the Petitioners with vague suggestions of associations with the Taliban, the CSRT itself determined that such associations are false. The Executive found that the Petitioners did not associate with Al Qaeda or the Taliban *ever*; they took up no arms, *ever*, against the United States or its coalition partners, were taken on no battlefield, and represented no threat, *ever*, to the United States or its coalition partners. On this record, there is no lawful basis for the continued imprisonment of the Petitioners.

2. There is no "wind-up power" that can justify Petitioners' continued detention.

In the district court, the Executive asserted a power to imprison the innocent indefinitely as a "wind up" to its claimed war powers.[18] The district court flatly rejected this claim. Add. 06; App. 0351. No such power is delineated in the Geneva Conventions, the Uniform Code of Military Justice, or Army Regulation 190-8. No judicial decision stands for the existence of such a power, and no such power could be

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[17] This conclusion also follows from the official CSRT cover sheet, which provides: "The Tribunal has determined that he (is) (is not) designated as an enemy combatant." Add. 30 (England Procedures at Enclosure (9)).

[18] The "wind-up power" exemplifies indefinite imprisonment: it lasts "as long as it takes," said the Executive's attorney last August. App. 0420.

squared with the many judicial decisions that hold indefinite imprisonment is illegal—even as to criminal aliens. *See, e.g.*, *Martinez*, 125 S. Ct. at 727. *See also Rasul*, 542 U.S. at 488 (indefinite detention "suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus") (Kennedy, J., concurring); *St. Cyr*, 533 U.S. at 301-03; *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 453 (1806).

In the district court, the Executive cited a single article as authority for its claimed "wind-up power." Christiane Shields Delessert, *Repatriation of Prisoners of War to the Soviet Union During World War II: A Question of Human Rights*, *in* WORLD IN TRANSITION: CHALLENGES TO HUMAN RIGHTS, DEVELOPMENT AND WORLD ORDER 80 (Henry H. Han ed., 1979). The prime example cited by Delessert for continued post-war detention is that of the Soviet Union under Stalin. *Id.* at 80-81. Moreover, as Petitioners demonstrated in the district court, and was undisputed below there, the "precedent" of the historical conduct of the United States in connection with armed conflict is to the contrary.

a. The Gulf War.

In the first Gulf War, "[e]xpeditious repatriation of EPWs [enemy prisoners of war] became a high Coalition priority when offensive operations were suspended." U.S. DEP'T OF DEF., FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR at 605 (Apr. 1992) ("Congressional Report"), *available at* http://www.ndu.edu/library/epubs/cpgw.pdf. A total of 1,196 tribunals were conducted. *Id.* at 663. Three hundred and ten persons were found to be POWs, while all the rest were determined to be displaced civilians and treated as refugees. *Id.* Offensive operations ceased at 8:00 a.m. on February 28, 1991. *Id.* at 338. Repatriation began on March 6, 1991. *Id.* at 671. By May 2, 1991, the last EPW had been transferred out of

United States custody. *Id.* at 672.[19]

b. World War II.

On September 29, 1943, the Badoglio government executed the instrument of Italian surrender with allied forces. Instrument of Surrender of Italy, Sept. 29, 1943, 61 Stat. 2742, 3 Bevans 775. Northern Italy remained under control of the German army, and the Germans had purported to place Benito Mussolini at the head of newly declared fascist "republic." Accordingly, in September 1943, the Italian peninsula remained in chaos and repatriation of Italians to Italy was impractical. The war against Germany would rage on for twenty months.

Nevertheless, Italian prisoners of war were granted substantial liberty. More than 45,000 Italian prisoners of war joined "Italian Service Units," located throughout the continental United States. *See* Camilla Calamandrei, *Italian POWs Held in America During WW II: Historical Narrative and Scholarly Analysis* (2000), *at* www.italianpow.com/history.html. These former enemy combatants were given increased freedom of movement among the civilian population: they held jobs and earned money. *Id.* In San Francisco, California, and Ogden, Utah, for example, Italian-American families could take Italian Service Unit members out of POW camps for picnics and outings. *Id.* Fraternization was common: after the war, a significant number of American women traveled to Italy to marry former Italian prisoners of war. *Id.*

Former prisoners of war were permitted to work for pay. App. 0267. They received liberty to go among the civilian population of the city. App. 0267-68. They

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[19] Many EPWs objected to return to Iraq and so were delivered to the custody of Saudi Arabia. On August 23, 1991, representatives of the International Committee of the Red Cross announced that repatriation efforts were complete. Congressional Report at 672.

would ride a ferry from Peddocks Island, where they were housed, to work at the Boston Port of Embarkation, where they were paid for work. App. 0268. This was not unique to Boston: The War Department stated that "these service units of Italian prisoners of war are being used in *all major ports of embarkation in the country*." App. 0268 (emphasis supplied).

On June 4, 1944, a group of Italians was taken to St. Leonard's Church in Boston's North End,[20] and thence to the Hatch Shell (an outdoor concert facility along Boston's Esplanade famous for its Fourth-of-July concerts). App. 0272. The Boston Globe reported:

> Following the church services, the men were conveyed by troop carriers down Prince St. in the North End. Crowds cheered them as they passed through Boston's closest facsimile to their beloved homeland. At the Hatch Memorial Shell on the Charles River Esplanada, they halted and sang a native song entitled, "A Bouquet of Flowers."

App. 0272. The men posed for pictures; they played bocci; they "feast[ed] on native dishes." App. 0272.

Similar experiences were reported from Alabama and Texas where Germans worked in agricultural jobs for pay. *See* Surreply of Petitioners at 10 (Aug. 11, 2005) (dkt. no. 31). They cooked their own meals, maintained gardens, engaged in organized sports, painted murals, built clocks, at some camps formed orchestras, had access to mimeograph machines, and distributed their own mail. *Id.* With earnings from day labor they bought food, ice cream, and fresh flowers. *Id.*

In sum, the so-called "wind-up power" conflicts with past practices in wartime, in which the United States has consistently ended imprisonment of prisoners of war

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[20] Then as now, the North End of Boston has been home to large numbers of Italian-Americans. It appears that the spirit of welcome among Uighur expatriates in the District of Columbia and its environs would be no less heartfelt.

promptly upon (i) determination that they are noncombatants, or (ii) cessation of hostilities. The district court's ruling that the Executive's imprisonment of the Appellants is unlawful is manifestly correct. This Court should affirm that ruling.

3. The district court's failure to order the Petitioners' release violates the Petitioners' rights under the Geneva Conventions.

Congress conferred on Petitioners an express authorization to challenge executive imprisonment in violation of treaties of the United States. 28 U.S.C. § 2241(c)(3). The Geneva Conventions are treaties ratified by and binding on the United States. *See* Third Geneva Convention art. 118, 6 U.S.T. 3316; Fourth Geneva Convention art. 132, 6 U.S.T. 3516. It is a violation of the Geneva Conventions to fail to release a detainee (whether a lawful or unlawful combatant), promptly upon the termination of hostilities, *see* Third Geneva Convention art. 118, 6 U.S.T. 3406, or upon determination that the detainee is not in fact a combatant, *see* Fourth Geneva Convention art. 132, 6 U.S.T. 3606. Accordingly, the Petitioners' continued imprisonment after their CSRT exoneration is a violation of a treaty that the Petitioners may and did raise under *habeas*, and that the district court was required to relieve.

To be sure, this Court ruled in *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 622 (2005), that Guantánamo prisoners have no standing to raise violations of the Geneva Conventions. Petitioners respectfully submit that the Court's decision was error. *See Mali v. Keeper of the Common Jail*, 120 U.S. 1 (1887), *aff'g In re Wildenhus*, 28 F. 924 (C.C.N.J. 1887); *United States v. Rauscher*, 119 U.S. 407 (1886). In *Wildenhus*, Belgian nationals claimed their imprisonment violated a treaty with Belgium. 28 F. at 925. While it rejected the claim on the merits (*i.e.*, it determined that the terms of the treaty in question did not bar their imprisonment), the Supreme Court concluded that the Belgians had the right, under the predecessor statute to section

2241(c)(3), to raise the claim under *habeas*. *Id.* at 926. In *Rauscher*, the Supreme Court considered an extradition treaty with Great Britain, and concluded that British subjects held for trial in the United States in violation of that treaty would have a remedy in *habeas*. 119 U.S. at 431. Because, as a practical matter, the United States rarely imprisons its own citizens under treaty (it has statutes for that), Congress's specific grant of a *habeas* remedy for imprisonment in violation of a treaty can only mean, as it so clearly meant in 1886 and 1887, that non-citizens would have a remedy in federal court to obtain relief when imprisoned in violation of a treaty. The remedial grant would be meaningless otherwise.

Even if the Petitioners lacked standing to make a direct *habeas* claim for violation of the Geneva Conventions, the peculiar circumstances of this case required the district court to resort to the Geneva Conventions in fashioning a remedy. The statute requires the district court to grant relief as "law and justice" requires. 28 U.S.C. § 2243. Treaties of the United States being the supreme law of the land, the district court should have concluded that the United States could not "justly" prolong an imprisonment that violates a treaty to which it is a party.

4. The district court's failure to order Petitioners' release constitutes an abdication of the core duty of the judiciary in *habeas* cases—to liberate unlawfully incarcerated prisoners.

a. Pursuant to 28 U.S.C. § 2243 and the Constitution, federal courts are both authorized and required to grant a remedy for an adjudicated wrong, particularly in *habeas* cases involving lawless imprisonment by the Executive.

In answering the central question in this appeal—"whether the law gives me the power to do what I believe justice requires," Add. 07; App. 0352—the district court abdicated its core duty in a *habeas* case: to order the release of an illegally detained prisoner. This abdication implicates the fundamental judicial responsibility to give a

remedy. Without the power and will to remedy adjudicated wrongs, the judicial branch is neutered, and the constitutional design is put in grave imbalance.

The federal judiciary "historically has been thought necessary to provide an important safeguard against abuses of legislative and executive power, as well as to ensure an independent judiciary." *Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60, 74 (1992). When the Executive has acted unlawfully, it is the constitutional duty of the judiciary to order the Executive to stop and the duty of the Executive to obey the judicial order. *See United States v. Nixon*, 418 U.S. 683, 703-05 (1974). There is no balance without a check.

Correcting a "fundamentally unjust incarceration" is a judicial "imperative." *Murray v. Carrier*, 477 U.S. 478, 505 (1986). *See also Engle v. Isaac*, 456 U.S. 107, 135 (1982); *Schlup v. Delo*, 513 U.S. 298, 320-21 (1995). Nowhere is this imperative more urgent than in cases in which courts review the legality of imprisonment by the Executive. *See Rasul*, 542 U.S. at 474; *Hamdi*, 542 U.S. at 525; *Zadvydas*, 533 U.S. at 699; *St. Cyr*, 533 U.S. at 301 ("At 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."); *Harris v. Nelson*, 394 U.S. 286, 292 (1969) ("There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of *habeas corpus* . . . ."); *Bowen v. Johnston*, 306 U.S. 19, 26 (1939) ("It must never be forgotten that the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired.").

Judicial recognition of the duty of the Executive to comply with court orders in *habeas* cases dates at least to the Civil War period. *See Ex parte Merryman*, 17 F. Cas. 144, 9 Am. Law Reg. 524 (C.C. Md. 1861). In *Merryman*, the Chief Justice, finding an

imprisonment to be unlawful, ordered the President to end it, and further, to fulfill his constitutional obligation to execute the laws faithfully. 17 F. Cas. at 149-53 (explaining that the President has the "duty to come in aid of the judicial authority" and that, in exercising the power of the office, "acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments"; that "[t]he government of the United States is one of delegated and limited powers; it derives it existence and authority altogether from the constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted"; and ordering the President, "in fulfillment of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced").

The Supreme Court recognized long ago that it is "a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist." *Kendall v. United States*, 37 U.S. 524, 624 (1838). *See also* 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (1783) ("[W]here there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."). The district court's contrary ruling in this case should be reversed.

b. No exception to these fundamental principles applies in this case.

In concluding that it was powerless to do what justice manifestly requires, the district court referred to an unspecified emanation from "the separation of powers doctrine." Add. 11; App. 0356. It cited no authority for such an emanation, and *Martinez* makes clear that there is none. The only material distinctions between the Petitioners and the petitioners in *Martinez* are that (1) the foreign nationals in *Martinez*

each had been convicted of serious crimes in the United States, whereas Petitioners have never even been charged with one; and (2) the foreign nationals in *Martinez* bore responsibility for their stateless plight because they chose to come to the United States voluntarily, whereas Petitioners were transported involuntarily to Guantánamo by bounty hunters and the United States military. *See Martinez*, 125 S. Ct. at 720-21.

But in one respect the *Martinez* petitioners were like the Petitioners here: *they were aliens who had never been admitted to the United States.* Under the law then effective, refugees from the Mariel boatlift were not lawful aliens, and were not "admitted," but rather "paroled" into the United States.[21] (Refugees could later adjust their status to that of lawful permanent resident unless they fell within statutory exclusions.) The *Martinez* petitioners committed serious crimes in the United States, and were excluded from admission. Therefore they were unlawful aliens who had never been admitted to the United States. The men were ordered deported, but because Cuba would not accept them, they were detained pursuant to statute. They brought *habeas corpus* petitions, and Supreme Court ordered that they must be released, even though they had never been lawful resident aliens. *Martinez*, 125 S. Ct. at 727; *see also Zadvydas*, 533 U.S. at 699-700 (adjudicated criminal aliens entitled to release).[22]

The district court's premise that it could not bring the Petitioners into the continental United States cannot be squared with *Martinez* in which unadmitted aliens were ordered freed. *Rasul* concluded that Guantánamo petitioners are *already within* the

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[21] The Attorney General has discretion to "parole" into the territory of the United States an alien who has never been admitted. 8 C.F.R. § 212.5(a) (2002).

[22] "In the first quarter of the 2006 fiscal year, nearly 60 percent of the illegal immigrants apprehended from countries other than Mexico were released on their own recognizance." Rachel L. Swarns, *Halliburton Subsidiary Gets Contract to Add Temporary Immigration Detention Centers*, N.Y. TIMES, Feb. 4, 2006, at A7.

"territorial jurisdiction" of the United States. *See* 542 U.S. at 480-81, 487 (finding that the United States "exercises 'complete jurisdiction and control' over the Guantánamo Bay Naval Base and that the *Rasul* petitioners were in a "place that belongs to the United States"). Accordingly, the district court clearly erred, as a matter of law, logic, and fact, in determining that bringing the Petitioners to the mainland would intrude on the affairs of immigration.§

5. A *habeas* court has the power to provide a remedy for lawless imprisonment by the Executive.

A remedy was and is available. Even if the prisoners' ultimate fate is akin to deportation—to be resettled in some other country—a *habeas* court has inherent power to order "parole"—that is, release on conditions. The power is included within *habeas* jurisdiction itself. *Baker v. Sard*, 420 F.2d 1342, 1343 (D.C. Cir. 1969) ("When an action pending in a United States court seeks release from what is claimed to be illegal detention, the court's jurisdiction to order release as a final disposition of the action *includes an inherent power* to grant relief *pendente lite*, to grant bail or release, pending determination of the merits.") (emphasis supplied); *see also Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001) (discussing possibility of parole for alien); *Whitfield v. Hanges*, 222 F. 745, 756 (8th Cir. 1915) ("[T]he court has ample power to admit the alien to bail or to take his own recognizance.").[23] In the district court, the Petitioners requested that the court order the Executive to produce the bodies under 28 U.S.C. § 2243 and consider reasonable conditions for parole. There is no lawful reason why this remedy should not

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[23] *See Chin Yow v. United States*, 208 U.S. 8, 13 (1908) (in a case involving disputed citizenship and denial of entry into the United States, the court ordered a *habeas* petitioner to be brought it for trial and thereafter issued a writ of *habeas corpus*).

have been afforded upon the filing of the petition in March 2005 or why the district court or this Court cannot order it now.[24]

In *Baker*, this Court confirmed that a district court has "*an inherent power* to grant relief pendente lite, to grant bail or release, pending determination of the merits," specifically stating "[r]elease is available in a habeas corpus action, which is a civil collateral attack." *Baker*, 420 F.2d at 1343 (emphasis supplied). The Second Circuit's decision in the factually similar case *Mapp v. Reno* cites *Baker* and is in accord with it.

Mapp involved a *habeas* petitioner who had been detained by the Immigration and Naturalization Service ("INS") pending deportation pursuant to a statute authorizing the INS to detain aliens. 241 F.3d at 228-29. The petitioner sought a writ of *habeas corpus* and asked the district court to release him from INS detention on bond pending resolution of the writ. *Id.* at 224. No statute authorized this. After closely reviewing the law addressing the question whether a federal district court in a *habeas* case has the inherent power to order interim release, the Second Circuit affirmed that "[a] district court has inherent power to enter an order affecting the custody of a habeas petitioner who is properly before it contesting the legality of his custody," and held that this principle applies, not simply to *habeas* challenges to criminal convictions, but also to cases involving immigration, alien status, and deportation. *Id.* at 226 (internal quotation marks and citation omitted). The Second Circuit concluded that the district court had the power to consider whether a *habeas* petitioner should be released on bail or conditions pending final resolution of the *habeas* petition, notwithstanding that the petitioner's detention was

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[24] Indeed, 28 U.S.C. § 2243 requires, among other things, that the person having custody of the detainee "shall make a return certifying the true cause of the detention" within three days of the court's issuance of the writ or an order to show cause, unless, for good cause, additional time not exceeding twenty days is allowed.

authorized by statute. *Id.* The Petitioners sought the same relief here. The district court's failure to provide that relief was error.

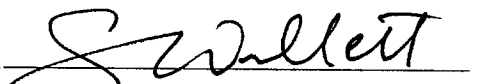
CONCLUSION

It has been said that "justice is but truth in action."[25] The district court found the truth but withheld action. In so doing, it abdicated its statutory and Article III duty to do what both justice and law require—order a remedy for an adjudicated wrong in a case within its jurisdiction.

For the reasons set forth herein, Petitioners respectfully request that the Court (1) affirm the district court's ruling that the Executive's continued detention of Petitioners is illegal; (2) reverse the district court's ruling denying a remedy to Petitioners; (3) remand the case to the district court with instructions that Petitioners should be released under appropriate conditions; and (4) grant such other, further relief as the Court deems just and proper.

Dated: February 10, 2006

Respectfully submitted,



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[25] OXFORD DICTIONARY OF QUOTATIONS 180 (2d ed. 1955) (attributing the quote to a speech by Benjamin Disraeli on February 11, 1851). The quote was later attributed to Louis Brandeis. LOUIS D. BRANDEIS, INTERLOCKING DIRECTORATES, IN LVII ANNALS OF AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 45 (Clyde L. King ed., 1915).

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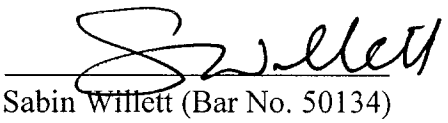

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No. 05-5477

In the
United States Court of Appeals
for the
District of Columbia Circuit

ABU BAKKER QASSIM and ADEL ABDU' AL-HAKIM,

Petitioners-Appellants,

v.

GEORGE W. BUSH, ET AL.,

Respondents-Appellees.

CERTIFICATE OF SERVICE

I certify that, on this 10th day of February, 2006, I served the foregoing Brief of Petitioners-Appellants on the Respondents' counsel of record by causing copies to be sent by Federal Express to Robert M. Loeb, Attorney, Appellate Staff, Civil Division, Room 7268, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

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