[ORAL ARGUMENT SCHEDULED MAY 8, 2006]

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 THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici.

The petitioners-appellants are Abu Bakker Qassim and Adel Abdu' Al-Hakim. The respondents-appellees are George W. Bush, Donald Rumsfeld, Jay Hood, and Brice Gyurisko. Amicus curiae briefs have been filed by: the American Civil Liberties Union; the Uyghur American Association; and six former federal judges (Hon. John J. Gibbons, Hon. Shirley M. Hufstedler, Hon. Timothy K. Lewis, Hon. William A. Norris, Hon. H. Lee Sarokin, and Hon. William Sessions).

B. Rulings Under Review.

The ruling under review is the memorandum and order of the district court (Robertson, J.) denying the writs of habeas corpus and entering final judgment. The order is published, *see Qassim v. Bush*, 407 F. Supp. 2d 198 (D.D.C. 2005), and it is reprinted at J.A. 346-358.

C. Related Cases.

1. There are dozens of pending appeals and more than 200 district court cases in this Circuit involving claims brought by Guantanamo detainees, all of which maybe impacted by the resolution of the jurisdictional arguments (regarding the impact of the Detainee Treatment Act) presented in the present appeal. A list of the pending appeals is appended to this brief.

In the pending *Al Odah/Boumediene* detainee appeals (Nos. 05-5062, 05-5063, 05-5064, 05-5095 through 05-5116), this Court has ordered supplemental briefing and set oral argument (on March 22, 2006) to address the impact of the Detainee Treatment Act on the Court's jurisdiction. This Court's resolution of the jurisdictional issue in the *Al Odah/Boumediene* could potentially be dispositive of the present appeal, as well.

2. The impact of the Detainee Treatment Act over a court's jurisdiction in pending cases is also presented in a pending Supreme Court case, *Hamdan v. Rumsfeld*, No. 05-184. Oral argument is set before the Supreme Court in *Hamdan* on March 28, 2006.

3. There were three earlier interlocutory appeals taken in the present case from the district court's April 13, 2005 order staying "all proceedings applicable to petitioners including without limitation their release, repatriation, or rendition" until "further order of the Court." JA 200. Petitioners filed an appeal and also sought mandamus relief from this Court. Petitioners' appeal was docketed as No. 05-5240. Petitioners' mandamus petition was docketed as No. 05-5213. The Government also filed an appeal to this Court from the April 13 order. That appeal was docketed at No. 05-5249. After the district court subsequently entered final judgment, and after the present appeal was then filed by petitioners, this Court, on December 29, 2005,

asked the parties to file motions governing the interlocutory appeals (Nos. 05-5213, 05-5240 and 05-5249), in light of the district court's December 22 ruling. In their respective responses, the parties agreed that the prior appeals were now moot.

4. Counsel is not aware at this time of any other related cases within the meaning of D.C. Cir. Rule 28(a)(1)(C).

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GLOSSARY

Add. . . . . Addendum to Petitioners' Brief

AEDPA . . . . . Antiterrorism and Effective Death Penalty Act of 1996

AUMF . . . . . Authorization for Use of Military Force

CSRT . . . . . Combatant Status Review Tribunal

DTA . . . . . Detainee Treatment Act of 2005

INA . . . . . Immigration and Nationality Act

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POW . . . . . Prisoner of War

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLEES

STATEMENT OF JURISDICTION

Petitioners invoked the district court's jurisdiction under 28 U.S.C. §§ 2241, 1331, 1350, 1651, 2201 and 2202. JA 2. On December 22, 2005, the district court denied the petition for writs of habeas corpus and entered final judgment. JA 358. While the court's final opinion and order did not specifically address certain of petitioners' requests for declaratory and injunctive relief, we agree with petitioners

that the district court's rationale and its entry of a final judgment show a clear intent to dispose of the entire matter.[1]

Petitioners filed a notice of appeal on December 23, 2005, JA 359, which was timely under Federal Rule of Appellate Procedure 4(a)(1)(B). When this appeal was filed, this Court had appellate jurisdiction under 28 U.S.C. § 1291, but as we explain below (pp. 16-40), Congress has eliminated subject-matter jurisdiction over this case by enacting the Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2741.

STATEMENT OF THE ISSUES

1. Whether the Detainee Treatment Act of 2005 divests the courts of jurisdiction over this case.

2. Whether the district court properly dismissed the petition for habeas corpus brought by aliens captured during an armed conflict, where: a) petitioners are being detained at a secure military base while the Government seeks an appropriate country where petitioners can be released; and b) petitioners object to being returned to their native country, and have no immigration status or other

[1] The portion of the district court's ruling stating that petitioners' motion to vacate the stay order "is granted in part and denied in part" (JA 358) is properly read as granting their motion to vacate the district court's prior ruling holding the case in abeyance, and denying their request to maintain the prohibition on the Government transferring petitioners to another country.

right permitting them to enter the United States, and no other country has been identified that will accept them.

3. Whether the President is a proper respondent in this case.

STATEMENT OF THE CASE

Petitioners, Abu Bakker Qassim and Adel Abdu Al-Hakim, are ethnic Uighurs and natives of China. They received weapons training in Afghanistan at a military training facility supplied by the Taliban. After the September 11 attack on the United States, as the Northern Alliance forces approached the military training camp, petitioners fled to Pakistan where they were captured. Petitioners were initially determined to be enemy combatants and sent to the U.S. Naval Base in Guantanamo Bay, Cuba. There, each petitioner was granted a hearing before a military Combatant Status Review Tribunal ("CSRT") to review the enemy combatant designation. In March 2005, the CSRTs, after carefully examining all of the information provided by the detainees and the military, determined that petitioners should no longer be classified as enemy combatants. Petitioners filed a petition for writs of habeas corpus seeking their release from detention. On December 22, 2005, the district court denied the petition and entered final judgment. Petitioners then filed the present appeal to this Court.

PROVISIONS AT ISSUE

The relevant statutory provisions are set forth in an addendum to this brief.

STATEMENT OF FACTS

1. On September 11, 2001, the United States endured the most deadly and destructive foreign attack in its history. That morning, members of the al Qaeda terrorist network hijacked four commercial airliners and crashed three of them into targets in the Nation's financial center and its seat of government. The attacks killed almost 3,000 people, injured thousands more, destroyed billions of dollars in property, and exacted a heavy toll on the Nation's infrastructure and economy.

The President took immediate action to defend the country and prevent additional attacks, and Congress swiftly approved his use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF").

The President ordered U.S. Armed Forces to subdue both the al Qaeda terrorist network and the Taliban regime that had harbored it in Afghanistan. Although our troops have removed the Taliban from power and dealt al Qaeda forces a heavy blow, armed combat against these enemies unfortunately remains

ongoing. Many courageous Americans have been killed or wounded in combat, and many more continue to put themselves in harm's way in order to defeat al Qaeda and the Taliban, and to protect this Nation from further attacks.

During these conflicts, the United States has seized thousands of hostile fighters. Consistent with the law and settled practice of armed conflict, it has detained a small proportion of them as enemy combatants. Approximately 480 of these enemy combatants are now being held at the United States Naval Base at Guantanamo Bay, Cuba. Each of them was captured abroad and is an alien.

2. Each Guantanamo Bay detainee has received a formal adjudicatory hearing before a Combatant Status Review Tribunal. Those tribunals, established pursuant to written orders issued under the authority of the Secretary of Defense, were created specifically "to determine, in a fact-based proceeding, whether the individuals detained * * * at the U.S. Naval Base Guantanamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation." Addendum to Petitioners' Brief ("Add.") 25. Out of the 558 CSRT hearings conducted, 38 resulted in determinations that the detainee in question should no longer be classified as an enemy combatant. *See* CSRT Summary, http://www.defenselink.mil/news/Mar2005/d20050329csrt.pdf.

When a detainee is determined to "no longer be classified as an enemy combatant," the designated civilian official advises the "DoD Office of Detainee Affairs, the Secretary of State, and any other relevant U.S. Government agencies, in order to permit the Secretary of State to coordinate the transfer of the detainee with the representative's of the detainee's country of nationality for release or other disposition consistent with applicable laws." Add. 29. It is, however, the "policy of the United States, consistent with Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, not to repatriate or transfer individuals to other countries where it believes it is more likely than not that they will be tortured." JA 204.

3. Petitioners, Abu Bakker Qassim and Adel Abdu Al-Hakim, are ethnic Uighurs and natives of China. Prior to September 11, 2001, they received weapons training near Tora Bora, Afghanistan at a military training facility supplied by the Taliban. JA 233-234. After the September 11 attack on the United States, Northern Alliance forces approached the military training camp, and petitioners fled with others to the nearby Tora Bora caves. They then fled to Pakistan where they were captured by Pakistani forces and turned over to the United States military. *Ibid*.

Petitioners were initially screened by the Department of Defense, determined to be "enemy combatants," and sent to the U.S. Naval Base in Guantanamo Bay, Cuba. JA 233-234, 83. There, each petitioner was granted a hearing before a military Combatant Status Review Tribunal to determine whether the United States should continue to consider him as an enemy combatant. JA 233. For the purposes of the CSRT proceedings, "enemy combatant" was defined as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." Add. 21. "This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." *Ibid*. In March 2005, the CSRTs determined, after carefully examining all of the information provided by the detainees and the military, that petitioners should no longer be classified as enemy combatants. JA 233-234.

Typically, when there is a CSRT determination to no longer consider a detainee an enemy combatant, the detainee would be returned to his native country. Add. 29. Petitioners vigorously oppose, however, being sent to their native country.[2] Thus, they are being detained by the military, pending the outcome of diplomatic efforts to transfer them to an appropriate country. In the

[2] As noted above, it is the policy of the United States not to return individuals to countries where it is more likely than not they will be tortured (JA 204).

meantime, petitioners are housed by the Department of Defense at Guantanamo in "Camp Iguana," with other individuals determined no longer to be enemy combatants. In Camp Iguana, petitioners have a communal living arrangement, with free access to all of the areas of the Camp, including the exercise/recreation yard, their own bunk house, and activity room. Petitioners also have had access to a television set with VCR and DVD capability, a stereo system, and recreational items (such as soccer, volleyball, ping pong), and unlimited access to a shower facility, air conditioning in all living areas (which they control), special food items, and library materials. JA 235. Petitioners are, however, persons trained at a military training camp supplied by the Taliban, and they remain detained (albeit with greater privileges) pending their release.

4. a. Petitioners filed the present action in district court demanding their release from detention.

On April 13, 2005, the district court entered an order staying "all proceedings applicable to petitioners including without limitation their release, repatriation, or rendition" until "further order of the Court."[3]

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[3] Petitioners filed an appeal and also sought mandamus relief from this Court. Petitioners' appeal was docketed as No. 05-5240. Petitioners' mandamus petition was docketed as No. 05-5213. The Government also filed an appeal to this Court from the April 13 order because it barred petitioners' "release, repatriation, or rendition" until "further order of the Court." That appeal was docketed at No. 05-5249. As explained by the parties in their responses to this Court's December 29,

b. On July 21, 2005, petitioners filed a motion asking the district court to lift the stay and adjudicate their claims, but also asked the district court to leave in place the bar against the repatriation, transfer, or rendition of petitioners pending further order of the district court.

c. In response to that motion, the district court held a hearing and, on December 22, 2005, denied the habeas petition and entered final judgment. JA 346-368.

The district court noted that it was "undisputed that the government cannot find, or has not yet found, another country that will accept the petitioners." JA 356. Thus, the court found that "the only way to comply with a release order would be to grant the petitioners entry into the United States." *Ibid.* The court held that it could not issue such relief, however. The court stated:

> These petitioners are Chinese nationals who received military training in Afghanistan under the Taliban. China is keenly interested in their return. An order requiring their release into the United States – even into some kind of parole "bubble," some legal-fictional status in which they would be here but would not have been "admitted" – would have national security and diplomatic implications beyond the competence or the authority of this Court.

2005 order, those appeals are now moot given the district court's subsequent entry of final judgment and dismissal of the habeas petition.

JA 356-357. Thus, the court found that it had "no relief to offer," JA 357, and issued an order stating: "petitioners' petition for a writ of habeas corpus is denied," JA 358.

d. On December 23, 2005, petitioners filed a notice of appeal to this Court.

SUMMARY OF ARGUMENT

I. The district court properly dismissed petitioners' claims. As an initial matter, however this Court must first examine the effect of Section 1005 of the Detainee Treatment Act, which deprives the courts of jurisdiction over this case.

Section 1005(e)(1) of the Detainee Treatment Act amends the habeas statute, 28 U.S.C. § 2241, eliminating jurisdiction over any habeas claim filed by an alien detainee held by the Department of Defense at Guantanamo Bay, Cuba. It further bars jurisdiction over "any other action against the United States or its agents relating to any aspect of the detention," brought by or on behalf of, *inter alia,* Guantanamo detainees currently in military custody. There is no dispute that petitioners are aliens being detained at Guantanamo Bay by the Department of Defense. Thus, they clearly fall within the scope of the statute. Because the Section 1005 eliminates any basis for jurisdiction, this Court should vacate the district court ruling and order dismissal for lack of jurisdiction.

Petitioners argue that the withdrawal of district court jurisdiction was not intended to apply to pending cases. Notably, petitioners' argument is not limited to their case. Rather, they argue that Section 1005 has no effect on the more than over 200 pending district court cases. If, as petitioners argue, section 1005 does not apply to pending cases, it would mean that those detainees in the more than 200 pending cases could continue to challenge their detention as enemy combatants in district court. This Court's "exclusive" jurisdiction to review the enemy combatant determinations in the Guantanamo detainee cases under Section 1005 is, however, expressly applicable to pending cases. By its very nature, this scheme of "exclusive" review cannot be reconciled with petitioners' argument that the district courts continue to retain jurisdiction in all of the pending cases.

Moreover, contrary to petitioners' argument, applying Section 1005 to pending cases would be impermissibly retroactive. The Supreme Court has long held that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law." *Bruner v. United States,* 343 U.S. 112, 116-117 & n.8 (1952). Further, as we explain, the elimination of habeas review does not deprive petitioners of the right to any meaningful relief.

While petitioners claim they are losing a vested right to court review, the Supreme Court and this Court have held that when a statute that takes away

jurisdiction from the courts and vests exclusive authority in an executive agency to resolve certain disputes, it takes away no vested rights and is not deemed to be retroactive. That is the case here. While jurisdiction has been eliminated, petitioners can continue to seek redress -- *i.e.,* their release and placement in another country -- from the assigned Executive agencies.

In any event, whatever default rules of construction might apply in other contexts, the courts have not hesitated to give immediate effect to provisions, such as the one at issue here, bearing on critical matters of war and foreign relations.

Finally, petitioners also raise a host of claims that application of Section 1005 to them would be contrary to congressional intent and would violate their asserted constitutional rights. Those claims are fully rebutted below. The fact that petitioners are aliens outside the United States, however, is a sufficient ground for the rejection of all of their constitutional claims.

II. If this Court does reach the merits of the appeal, the district's judgment of dismissal should be affirmed.

A. The district court erroneously ruled that petitioners' continued detention was unlawful, but then went on to hold that no habeas relief could be granted in this context. This Court need not reach the latter issue because the military's

continued detention of petitioners, while seeking to place them in an appropriate country, is entirely lawful.

It is well within the scope of the military's authority to capture and detain persons, such as petitioners, who were trained at an enemy-supplied military training base and who were found fleeing that base during the armed conflict. Petitioners correctly observe that the CSRTs ultimately determined that petitioners should no longer be classified as enemy combatants, as that term was defined and implemented for the purposes of the CSRTs. That conclusion obviously does not mean that petitioners' original detention was inappropriate or unauthorized. Through a process unprecedented in the history of armed conflict, the CSRT procedures constituted a more rigorous examination of the detainees' enemy combatant status based on information available at the time of the review, including any new information gathered subsequent to the detainees' capture. The CSRT rulings regarding petitioners, under DOD instructions, mandate that petitioners no longer be detained as enemy combatants; the rulings do not, however, lead to the conclusion that the prior detention was unlawful.

In any event, the Executive's power to detain enemy combatants necessarily includes the authority to wind up that detention in an orderly fashion after a detainee has been determined to no longer be an enemy combatant. Typically,

when a CSRT finds that a detainee should no longer be classified as an enemy combatant, the detainee is then returned to his native country. Petitioners vigorously oppose, however, being sent to their native country, and the United States, consistent with its policy against returning an individual when it is more likely than not they will be tortured, cannot return them to their native country. Thus, they are being detained by the military, pending the outcome of extensive diplomatic efforts to transfer them to an appropriate country. Those efforts are ongoing and have been given high-priority by the Executive Branch. In the meantime, however, it is not unlawful to continue to detain petitioners, until they can be properly resettled. As detailed below, it is common practice to continue to detain prisoners or detainees, when they object to repatriation to their native country, as is the case here, pending relocation to an appropriate country.

Contrary to petitioners' arguments, *Zadvyadas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005), do not render their continued detention unlawful. In those cases, the Supreme Court construed an immigration statute, which has no application here. Moreover, in construing that immigration statute, the Supreme Court explained that its analysis would be very different for persons, like petitioners here, who are outside of the United States.

B. The district court correctly determined that it does not possess legal authority to order petitioners' release into the United States. Petitioners have no immigration status or other right permitting them to enter the United States. Thus, the district court properly rejected their demand for a court order permitting them to enter the United States.

An order requiring the Government to bring these non-resident alien petitioners to the United States not only would conflict with the specific provisions of the Immigration and Nationality Act, but also would be contrary to over a century of Supreme Court jurisprudence recognizing that the admission of aliens is a quintessential sovereign function reserved exclusively to the political branches of government.

III. Finally, with respect to the President, the denial of habeas relief should also affirmed on the alternative ground that the President is not a proper respondent.

STANDARD OF REVIEW

The district court's order rests on legal rulings subject to de novo review. *See, e.g.*, *United States v. Bookhardt*, 277 F.3d 558, 564 (D.C. Cir. 2002).

ARGUMENT

I. THE DETAINEE TREATMENT ACT OF 2005 DIVESTS THE COURTS OF JURISDICTION OVER THIS CASE.

A. Because Petitioners Fall Within The Scope Of Section 1005, The Courts Now Lack Jurisdiction Over Petitioners' Claims.

Jurisdiction over this case has been eliminated by Section 1005 of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2741 (December 30, 2005) ("DTA"). Section 1005(e)(1) of the Act amends the habeas statute, 28 U.S.C. § 2241, to state that "no court, justice, or judge shall have jurisdiction to hear or consider" any habeas claim filed by an alien detainee held by the Department of Defense at Guantanamo Bay, Cuba. It further bars jurisdiction over "any other action against the United States or its agents relating to any aspect of the detention," for certain detainees, including those currently in military custody. *Ibid.*

While the CSRTs have found that petitioners should no longer be classified as enemy combatants, petitioners nonetheless fall with the scope of Section 1005 of the Detainee Treatment Act. The amendments to Section 2241 withdraw jurisdiction over any "writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba," and further bar "jurisdiction over any other action * * * relating to any aspect of the detention

by the Department of Defense of an alien at Guantanamo Bay, Cuba, who * * * is currently in military custody." DTA, § 1005(e)(1). There is no dispute that the two petitioners in this case are aliens being detained at Guantanamo Bay by the Department of Defense, and that they remain in military custody. Thus, pursuant to Section 1005, there is now no jurisdiction over this action.

When jurisdiction ceases over a case, "the only function remaining to the Court is that of announcing the fact and dismissing the cause.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). Moreover, "[e]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.'" *Id*. at 95 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997)). Here, because the Section 1005 eliminates any further basis for the exercise of district court jurisdiction, this Court should vacate the district court's judgment and order dismissal of the petitioners' complaint for lack of jurisdiction. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950); *Ramallo v. Reno*, 114 F.3d 1210, 1213-1214 (D.C. Cir. 1997).

B. Section 1005 Applies To Pending Cases.

Petitioners argue that the withdrawal of district court jurisdiction over Guantanamo detainee claims was not intended to apply to pending cases. That argument is fully rebutted in the Government's recent supplemental brief filed in the *Boumediene/Al Odah* (Nos. 05-5062, 05-5063, 05-5064, 05-5095 through 05-5116). In those appeals, this Court ordered the parties to file full briefs on that jurisdictional issue, and it set oral argument for March 22, 2006. In this brief, we repeat, in a somewhat abbreviated fashion, many of the same arguments presented in our *Boumediene/Al Odah* supplemental brief.

As an initial matter, it is important to note that petitioners' argument that Section 1005 does not eliminate jurisdiction of the district courts in pending cases is not only an argument that the statute has no effect on their case, but also that it has no effect on the more than over 200 filed district court cases, purportedly on behalf of some 600 detainees.[4] The Detainee Treatment Act, however, plainly ousts the courts of jurisdiction in the pending Guantanamo detainee cases, except as provided in the Act itself. In independent but mutually reinforcing provisions, the Act removes preexisting sources of jurisdiction in two ways: by creating an

[4] There are currently only approximately 490 detainees. Some of these filings appear duplicative, and others name petitioners who cannot be matched with actual detainees. The number of actual detainees with pending petitions appears to be well over 300.

exclusive-review scheme under which the Guantanamo detainees may challenge their CSRT determinations directly in this Court; and by expressly eliminating all other sources of jurisdiction, including habeas corpus, in cases involving the Guantanamo detainees. The exclusive-review scheme is expressly applicable to pending cases, and the provision eliminating other sources of jurisdiction contains no reservation for pending cases. When these provisions are read together, there can be no doubt that the Section 1005 immediately eliminates district court jurisdiction over all of the pending detainee cases, including the present case.

1. The withdrawal of habeas jurisdiction in the present case is effected by Section 1005(e)(1), which states that "no court, justice, or judge shall have jurisdiction to hear or consider" any habeas claim filed by an alien detainee held by the Department of Defense at Guantanamo Bay, Cuba. That provision must be read together with Section 1005(e)(2), which states that this Court "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." § 1005(e)(2)(A). While that exclusive jurisdiction does not provide any remedy to petitioners in this case, it plainly covers the habeas actions filed by a vast majority of the remaining more than 200 other detainee cases and is highly relevant is deciding whether Section 1005 affects the pending district court cases.

If, as petitioners argue, section 1005 does not apply to pending cases, it would mean that those detainees in the more than 200 pending cases could continue to challenge their detention as enemy combatants, including the validity of the CSRT enemy combatant determinations, in district court. This Court's "exclusive" jurisdiction to review the enemy combatant determinations in the Guantanamo detainee cases under Section 1005 is, however, expressly applicable to pending cases: Section 1005(h)(2) states that Section 1005(e)(2) "shall apply with respect to any claim whose review is governed by" Section 1005(e)(2) "and that is pending on or after the date of the enactment of this Act." By its very nature, this scheme of "exclusive" review cannot be reconciled with petitioners' argument that the district courts continue to retain jurisdiction *in all of the pending detainee cases* to adjudicate the lawfulness of the detention.

2. Petitioners suggest (Br. 15) that Section 1005(e)(2) governs review only of CSRT decisions rendered *after* the date of its enactment. Section 1005(e)(2), however, encompasses review of "any final decision of a Combatant Status Review Tribunal," § 1005(e)(2)(A). Section 1005(h)(2) makes clear, however, this Court's exclusive jurisdiction to review challenges to CSRT decisions expressly applicable to "any claim * * * that is pending on or after the date of the enactment of this Act." That language extends Section 1005(e)(2) not only to

future challenges to future CSRT decisions, but also to present challenges to past CSRT decisions "pending on" the date of enactment. Petitioners' contrary construction, which would limit the Act to review of future CSRT decisions, would improperly deprive the "pending on" language of any meaningful effect. *See Beck v. Prupis*, 529 U.S. 494, 506 (2000).

3. Petitioners also cite *INS v. St. Cyr*, 533 U.S. 289 (2001), in arguing that the statute should not apply to pending cases. *St. Cyr*, however, permits the repeal of habeas jurisdiction as long as there is "a clear statement of congressional intent." *Id.* at 298. The statute here provides the required clear statement. Section 1005(e)(1) expressly amends the habeas statute to state that, except as provided for in the Act itself, "no court, justice, or judge shall have jurisdiction to hear or consider * * * an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay." The plain text of the statute, thus, repeals habeas jurisdiction for petitioners, who are "alien[s] detained by the Department of Defense at Guantanamo Bay." Moreover, Section 1005's withdrawal of habeas jurisdiction takes effect immediately, see § 1005(h)(1) ("This Section shall take effect on the date of the enactment of this Act."), and the statute makes no reservation for pending cases.

4. Petitioners argue that to apply Section 1005 to pending cases would be impermissibly retroactive. They further assert that a court should not construe the statute to operate retroactively absent clear evidence that Congress wished to reach pending cases.

A statute does not operate retroactively, however, "merely because it is applied in a case arising from conduct antedating the statute's enactment * * * or upsets expectations based in prior law." *Landgraf v. USI Film Products*, 511 U.S. 244, 269-270 (1994). Rather, a "court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Ibid*. In *Landgraf*, the Court held that, to avoid concerns about unfair retroactivity, statutes governing primary conduct are presumptively inapplicable to cases pending on the date of enactment. *See id.* at 265-73. Petitioners here do not, however, argue that Section 1005 is retroactive in the sense that they claim that they would have altered their past primary conduct. This is not a situation, for example, where Congress has imposed new or greater monetary liability based on prior conduct. Instead, Congress has enacted a new jurisdictional rule – ousting the jurisdiction of all courts over the Guantanamo detainee cases, and establishing a limited exclusive review mechanism for those detainees who wish to challenge their enemy combatant designation.

In *Landgraf*, the Court stressed that a different rule has always governed statutes addressing the jurisdiction of the courts: "We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." 511 U.S. at 274. "Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Id*. at 274 (quoting *Republic National Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)). Accordingly, the application of intervening statutes stripping a court of jurisdiction to pending cases is not retroactive at all. *See id.* at 293 (Scalia, J., concurring in the judgment) ("applying a jurisdiction-eliminating statute to undo past judicial action would be applying it retroactively; but applying it to prevent any judicial action after the statute takes effect is applying it prospectively").

Consistent with these principles, the Supreme Court in *Bruner v. United States,* 343 U.S. 112 (1952), stated, as a "rule * * * adhered to consistently," that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law." *Id.* at 116-117 & n.8. That rule applies no matter how far pending litigation has progressed. In *Bruner*, a statute eliminating district court jurisdiction over certain claims was enacted only after

the Supreme Court had granted certiorari. Nonetheless, the Court held that the case must be dismissed for lack of jurisdiction. *See id.* at 114, 117. The Court explained that, "[a]bsent such a reservation [as to pending cases]," the district court lacked jurisdiction, "even though [the court] had jurisdiction * * * when petitioner's action was brought." *Id.* at 115. Earlier decisions are to the same effect. *See, e.g., Gallardo v. Santini Fertilizer Co.,* 275 U.S. 62, 63 (1927) (Holmes, J.); *Hallowell v. Commons*, 239 U.S. 506, 508-509 (1916) (Holmes, J.); *Sherman v. Grinnell*, 123 U.S. 679, 680 (1887); *Assessors v. Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1869); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868).

Recent decisions continue to follow these settled rules. Two terms ago, in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), the Supreme Court reaffirmed "the application to all pending and future cases of 'intervening' statutes that merely 'confe[r] or ous[t] jurisdiction.'" *Id.* at 693 (quoting *Landgraf*, 511 U.S. at 274). This Court did the same in *LaFontant v. INS*, 135 F.3d 158 (D.C. Cir. 1998), in quoting *Landgraf* for the proposition that the Court has "'regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed.'" *Id.* at 161 (quoting 511 U.S. at 274). *See also Santos v. Territory of Guam*, 436 F.3d 1051, 1052-1053 (9th Cir. 2006).

5. The present case is unlike *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), where the Court declined to give immediate effect to False Claims Act amendments eliminating a defense to liability and creating a new cause of action. The *Hughes* Court explained that statutes "merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of the litigation and not the underlying primary conduct of the parties" – and thus are presumptively applicable to cases pending on the date of enactment. *Id*. at 951. In contrast, statutes addressing "*whether* [a suit] may be brought at all" are "substantive" ones presumptively inapplicable to such pending cases. *See ibid.*

For several reasons, *Hughes* does not help petitioners. First, the elimination of habeas review does not deprive petitioners of the right to any relief. As the district court here held (and as we further discuss below, *see* pp. 54-60), even when there was habeas jurisdiction, a court cannot properly order release of a person captured during an armed conflict (with training from a Taliban-supplied military training facility) into a secure U.S. military facility abroad or that they be brought to the United States (where they have no immigration status or other right permitting them to enter this country).

Second, petitioners can continue to seek redress -- *i.e.* their release and placement in another country -- from the assigned Executive agencies. The Supreme Court and this Court have held that when "a statute that takes away jurisdiction from the federal courts and vests exclusive authority in an executive agency to resolve certain disputes," as is the case here, it takes away no vested rights and is not deemed to be retroactive. *See LaFontant*, 135 F.3d at 164-65. Notably, in *Hallowell*, the Supreme Court gave immediate effect, in a case pending on the date of enactment, to a statute that divested the district courts of jurisdiction to review certain administrative determinations made by the Secretary of the Interior. *See* 239 U.S. at 507-08. Speaking unanimously through Justice Holmes, the Court concluded that the statute "takes away no substantive right," but, by making "final and conclusive" an Executive Branch determination, "simply changes the tribunal that is to hear the case." *Id.* at 508.

This Court applied exactly that reasoning in *LaFontant*, which gave immediate effect to a statute foreclosing any judicial review of certain deportation orders. *See* 135 F.3d at 164-165. This Court treated the statute as jurisdictional for purposes of retroactivity analysis. Applying *Hallowell*, and distinguishing *Hughes*, the Court held that a "jurisdictional change from an Article III court to an administrative decision maker is simply a change in the 'tribunal that is to hear the

case.'" *Id*. at 162 (quoting *Kolster v. INS*, 101 F.3d 785, 788 (1st Cir. 1996)). Accordingly, Section 1005(e)(1) is properly deemed jurisdictional for retroactivity purposes because its application simply and properly leaves the timing and location of petitioners' release from Guantanamo to the assigned Executive agencies.

Furthermore, whatever default rules of construction might apply in other contexts, the courts have not hesitated to give immediate effect to provisions bearing on critical matters of war and foreign relations. For example, in *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), the Supreme Court gave immediate effect to a treaty addressing wartime captures, which was enacted *after* the court of appeals had rendered its judgment. Although the treaty concededly affected substantive rights, the Court declined to frustrate war objectives by imposing a retroactivity-based clear statement rule. Speaking unanimously through Chief Justice Marshall, the Court explained: "in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns where individual rights, acquired by war, are sacrificed for national purposes, the contract, making the sacrifice, ought always to receive a construction conforming to its manifest import; and if the nation has

given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation." *Id*. at 110.

Similarly, in *Acree v. Iraq*, 370 F.3d 41 (D.C. Cir. 2004), Chief Justice (then Judge) Roberts, in addressing a point not reached by the panel majority, would have given immediate effect to a statute restoring the foreign sovereign immunity of Iraq with respect to claims by American servicemembers arising out of war crimes committed by the predecessor Iraqi regime. See *id*. at 64-65 (opinion concurring in the judgment). The statute restoring Iraq's foreign sovereign immunity would have left the servicemembers with neither a judicial nor an administrative tribunal in which to press their claims, but only with the possibility of future espousal of their claims by the Executive Branch. *See ibid*. Nonetheless, Judge Roberts would have applied the statute to the pending claims, based in part on his characterization of the statute as "jurisdictional" under *LaFontant* and in part on the heightened need for immediate Executive Branch action in the context of warmaking and foreign policy. *See ibid*. If such considerations can govern the retroactivity analysis of "vested rights" of American citizens (*Schooner Peggy*, 5 U.S. (1 Cranch) at 110), and of wartime claims by American citizens against a former adversary, then surely they can also govern the retroactivity analysis of a

statute addressed to the litigation of wartime claims against this country by aliens captured and held abroad during a time of armed conflict.

6. In arguing that Section 1005 does not affect the district court's jurisdiction, petitioners cite and contrast in the two "effective date" provisions in Section 1005(h). As noted above, one of them states that the schemes for exclusive review of CSRT and military commission decisions in this Court "shall apply with respect to any claim whose review is * * * pending on or after the date of the enactment of this Act," DTA, § 1005(h)(2). The other states only that the repeal of habeas and other jurisdiction (among other provisions) "shall take effect on the date of the enactment," DTA, § 1005(h)(1). From this, petitioners conclude that the repeal of habeas jurisdiction does not apply to cases pending on the date of enactment.

This argument ignores the background rule that a jurisdiction-ousting statute, such as Section 1005(e)(1), applies to pending cases absent any express reservation for pending cases. Therefore, Congress had no reason to state explicitly that Section 1005(e)(1) applies to pending cases, given this "predictable background rule against which to legislate." *See Landgraf*, 511 U.S. at 273. In contrast, Congress had very good reason to specify the temporal scope of Section 1005(e)(2) and Section 1005(e)(3). Those provisions create jurisdiction and

specify the governing scope of review. For that reason, the proper characterization of these provisions for retroactivity purposes, much like the proper characterization of burdens of proof, is far less obvious than is the proper characterization of Section 1005(e)(1), which does nothing besides oust jurisdiction. *See, e.g., Lindh v. Murphy*, 521 U.S. 320, 327 (1997) (while statute "chang[ing] standards of proof and persuasion" in the State's favor "might not have a true retroactive effect, neither [is] it clearly 'procedural'"); *Landgraf*, 511 U.S. at 268 ("deciding when a statute operates 'retroactively' is not always a simple or mechanical task"). The contrast between Section 1005(h)(1) and Section 1005(h)(2) thus cannot support any reasonable inference that Section 1005(e)(1) is inapplicable to pending cases (despite the default presumption to the contrary) and that Section 1005(e)(2) is inapplicable to pending cases (despite an express statement that it is).

For similar reasons, petitioners cannot claim support from *Lindh*. That case involved construction of the habeas provisions in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which amended Chapter 153 of Title 28 and created a new Chapter 154. Although the provisions governing both chapters address "standards affecting entitlement to relief," AEDPA made Chapter 154 expressly applicable to petitions pending on the date of its enactment, but

contained no parallel provision for its amendments to Chapter 153. *See* 521 U.S. at 329. Relying on a negative implication, the Court held Chapter 153 inapplicable to pending petitions because "[n]othing * * * but a different intent explains the different treatment" of otherwise parallel provisions. *Ibid.*

"The same negative inference does not arise," *Martin v. Hadix*, 527 U.S. 343, 356 (1999), however, where the provisions at issue lack the parallelism that was dispositive in *Lindh*. In *Hadix*, the Court rejected application of the *Lindh* inference because the two provisions at issue addressed different subject matter and served different purposes. *See id.* at 356-57. So too, here: the relevant provisions of the Act are not sufficiently similar to support any "negative inference," because Section 1005(e)(1) simply withdraws jurisdiction, whereas Section 1005(e)(2) creates jurisdiction and attaches a "limitation on claims," § 1005(e)(2)(B), and specifies a governing "scope of review," § 1005(e)(2)(C). In that respect, Section 1005(e)(2) and Section 1005(e)(3) are identical. *See* § 1005(e)(3)(C) ("limitation on appeals"); § 1005(e)(3)(D) ("scope of review"). Section 1005(e)(2) and Section 1005(e)(3) thus might well have been seen as addressing substantive issues, as *Lindh* itself suggests. *See* 521 U.S. at 327. In contrast, courts post-*Lindh* have consistently continued to apply the rule that jurisdiction-ousting provisions are presumptively applicable to pending cases.

See, e.g., Altmann, 541 U.S. at 692-93; *LaFontant*, 135 F.3d at 162-63 (distinguishing *Lindh*). Given the difference between the two context, Congress properly recognized the need to affirmatively ensure the immediate applicability of Sections 1005(e)(2) and (e)(3), but saw no similar need as to Section 1005(e)(1). Thus, the *Lindh* inference by its own terms inapposite.

Moreover, given the subject matter of the provisions at issue here, the *Lindh* inference is simply nonsensical. Petitioners effectively contend that Congress, in making an exclusive-review scheme expressly applicable to pending cases, somehow manifested an intent to preserve habeas jurisdiction over the same class of cases. To state that proposition is to refute it.

7. Finally, petitioners cite to the arguments from the detainee briefs in the *Boumediene/Al Odah* appeals discussing to the Act's legislative history. Br. 15. Because petitioners' brief here contains no actual argument on this point, we will rely upon the detailed rebuttal of that contention set out in the supplemental briefs filed by the Government in the *Boumediene/Al Odah* appeals. We note, however, that no amount of legislative history -- especially legislative history generated primarily by a single Senator -- can overcome the unambiguous result that follows from the text of Section 1005 (which designates an exclusive forum for review of the CSRT cases and expressly makes that exclusive review mechanism applicable

to pending cases) and the settled rule that jurisdiction-ousting provisions apply to pending cases absent a savings clause. Moreover, two of the bill's primary sponsors Senators Graham and Kyl were clear in their view that the Act's jurisdiction-removing provision applied to all pending cases.[5]

C. Section 1005 Does Not Violate Petitioners' Alleged Constitutional Rights.

1. Petitioners argue that if Section 1005 applies to pending cases, it would violate their alleged Fifth Amendment rights and the Suspension Clause, and would also be an unconstitutional bill of attainder. All of these arguments are fundamentally flawed in that aliens outside the sovereign territory of the United States cannot invoke rights under the United States Constitution.[6]

In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court squarely held that aliens detained outside the United States have no rights under the Suspension

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[5] *See, e.g.,* 151 Cong. Rec. S14,263 (daily ed. Dec. 21, 2005) (Sen. Kyl) ("The courts' rule of construction for these types of statutes is that legislation ousting the courts of jurisdiction is applied to pending cases. It has to. We're not just changing the law governing the action. We are eliminating the forum in which that action can be heard.").

[6] The issue of whether the Guantanamo detainees have constitutional rights is fully addressed in the Government's merits briefs filed in the *Boumediene/Al Odah* appeals.

Clause or the Fifth Amendment.[7] The Court explained that extending such constitutional rights to aliens captured during an armed conflict and held outside the United States would produce various untoward consequences (*id.* at 782-84), and is entirely unprecedented:

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it.

Id. at 784-85 (citation omitted). The *Eisentrager* Court also emphasized that recognizing such constitutional rights would interfere with the President's authority as Commander in Chief, which "has been deemed, throughout our

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[7] While the *Eisentrager* opinion does not specify the Suspension Clause by name, the Court's discussion clearly pertains to that Clause. The court of appeals' ruling in *Eisentrager* explicitly held that construing the habeas statute to be inapplicable to the petitioners in that case would violate the Suspension Clause. *See Eisentrager v. Forrestal*, 174 F.2d 961, 965-966 (D.C. Cir. 1949). The Supreme Court reversed that Suspension Clause holding. In Part II of the opinion, the Court clearly holds that the aliens in U.S. custody abroad were not "entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas." 339 U.S. at 777; *see also id.* at 781 ("no right to the writ of habeas corpus appears"). Indeed, the Court had to render such a constitutional holding to rule for the Government, because the *Eisentrager* petitioners had asserted habeas rights under both the statute and the Suspension Clause. The Court's Suspension Clause holding is entirely consistent with the rest of the opinion, which makes clear that the Constitution does not apply extraterritorially to aliens.

history, essential to war-time security." *Id*. at 774. In rejecting the invocation of the Suspension Clause, the Court explained, "[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Id*. at 779. "Nor is it unlikely," the Court continued, "that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States." *Ibid.*

Subsequent decisions have reaffirmed *Eisentrager*'s constitutional holdings. In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), in holding that the Fourth Amendment does not apply to searches of alien property conducted abroad, the Court reasoned in part that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States," and, *citing Eisentrager*, it described that rejection as "emphatic." *Id*. at 269. In *Zadvyadas v. Davis*, 533 U.S. 678 (2001), the Court cited both *Eisentrager* and *Verdugo* for the proposition that the "Fifth Amendment's protections do not extend to aliens outside the territorial boundaries" of the United States. *Id.* at 693. This Court has applied those principles in various contexts. *See, e.g., Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) ("The Supreme Court has long held that

non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections."); *32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (a "'foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise'") (quoting *People's Mojahedin Org. of Iran v. Department of State*, 182 F.3d 17, 22 (D.C. Cir. 1999)).

Moreover, in *Al Odah v. United States*, 321 F.3d 1134, 1140-1344 (D.C. Cir. 2003), this Court specifically concluded that the Fifth Amendment is inapplicable to aliens held at Guantanamo Bay, Cuba. Although the Supreme Court rejected this Court's broader holding that habeas jurisdiction was entirely unavailable, *see Rasul v. Bush*, 124 S. Ct. 2686, 2693-2698 (2004),[8] that Court expressly declined to address any Fifth Amendment or other substantive constitutional question, *see id.* at 2699. Thus, *Rasul* does not address or in any way alter *Eisentrager*'s constitutional holdings.

Moreover, petitioners cannot claim constitutional rights for an additional reason. At bottom, they are seeking an order of entry into the United States. It is

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[8] *Rasul* based its analysis on the phrase "within their respective jurisdiction" as used in 28 U.S.C. § 2241 and various decisions construing that provision. *See* 542 U.S. at 476-79. The Court expressly distinguished between the statutory and Suspension Clause holdings of *Eisentrager*, and limited its analysis to the former. *See id.* at 475-76.

well established, however, that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Thus, they cannot claim the denial of a habeas action where they are seeking an order of admission deprives them of any constitutional right.

2. Even if petitioners did have constitutional habeas rights under the Suspension Clause,[9] Section 1005 would not effect an unconstitutional suspension. The Supreme Court has held that Congress may freely repeal habeas jurisdiction, if it affords an adequate substitute remedy. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996); *Swain v. Pressley*, 430 U.S. 372, 381 (1977). Here, while petitioners have not been afforded a substitute judicial remedy, the denial of

[9] The Supreme Court has never decided whether the meaning of the Suspension Clause was fixed in 1789, or whether the Clause might evolve consistent with the expansion of statutory habeas over the course of American history. *See INS v. St. Cyr*, 533 U.S. at 304-305. In our judgment, the better view is that the meaning of the Clause was fixed in 1789, because it is "too absurd to be contemplated" that the Clause would operate as a "one-way ratchet that enshrines in the Constitution every grant of habeas jurisdiction" conferred by statute or judge-made common law, *see id.* at 341-42 (Scalia, J., dissenting), and because there are no apparent judicially manageable standards for determining how much the Suspension Clause might evolve between the historical standard of 1789 and contemporaneous statutory standards. There is significant, albeit not controlling, support for the historical view. *See ibid.*; *Swain v. Pressley*, 430 U.S. 372, 384-85 (1977) (Burger, C.J., concurring in part and concurring in the judgment); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 47 U. Chi. L. Rev. 142, 170 (1970).

habeas relief does not in fact effect a denial of any judicial relief. As the district court here recognized, even when it had habeas jurisdiction, it could not properly order release into the United States of petitioners, who were given weapons training at a military training base provided by the Taliban, where they object to being returned to their native country, and have no immigration status or other right permitting them to enter the United States, and where no other country has been identified that will accept them. Thus, Congress has not deprived petitioners of any meaningful habeas remedy and, even if petitioners could invoke the Suspension Clause, it would have no application here.[10]

3. Even if petitioners could invoke Fifth Amendment rights, Section 1005 does not create an unconstitutional classification, as petitioners contend (Br. 20-21). Petitioners argue that strict scrutiny should apply in this context because the right to habeas relief is fundamental. There is no fundamental right, however, for an alien outside the United States to be able to file a habeas petition in a U.S. court. While *Rasul* construed the habeas statute as providing habeas jurisdiction, as discussed above, it cannot be read to hold that aliens outside the United States have a constitutional right to file a habeas petition in a U.S. court. Indeed,

[10] For the same reasons, eliminating habeas review would not be an unconstitutional deprivation of liberty, even if petitioners could invoke the Fifth Amendment.

Eisentrager clearly held to the contrary, and that ruling remains binding law today. Congress has now reacted to *Rasul's* statutory ruling by clarifying that it does not intend to provide habeas jurisdiction over the claims of aliens held outside the United States at the Guantanamo Bay Naval Base. This statutory response to *Rasul* is at most subject to rational-basis review. *See FCC v. Beach Communications*, 508 U.S. 307 (1993), *Hedgepeth ex rel. Hedgepeth v. Washington Metropolitan Area Transit Authority*, 386 F.3d 1148, 1156 (D.C. Cir. 2003). The legislative clarification of the habeas statute after *Rasul* plainly satisfies that very deferential standard.

The fact that the statute is limited to aliens held by the Defense Department at Guantanamo is not a basis for subjecting the statute to greater scrutiny. *See Mathews v. Diaz*, 426 U.S. 67, 81-82 (1970) ("Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary."). It is well established that Congress may permissibly limit the rights of aliens outside the United States, especially here where they are in fact seeking a right of entry into this country. *See Narenji v. Civiletti,* 617 F.2d 745, 747 (D.C. Cir. 1980)

("Distinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive * * *. So long as such distinctions are not wholly irrational they must be sustained.").[11]

4. Section 1005 does not constitute a bill of attainder. A law must be punitive to qualify as a bill of attainder. *See Foretich v. United States*, 351 F.3d 1198, 1217-18 (D.C. Cir. 2003). As noted above, the Act claries the scope of the habeas statute, after the Court in *Rasul* for the first time read the statute to provide jurisdiction over the claims of aliens held outside the United States. The statutory response to *Rasul* can hardly be deemed punitive in nature.

II. THE DISTRICT COURT CORRECTLY DENIED A WRIT OF HABEAS CORPUS.

Petitioners argue that their "indefinite imprisonment" (Br. 25) is unlawful, and that the district court erred in failing to grant them relief from their continued detention. Specifically, they seek to be "released under appropriate conditions" (Br. 38) in the United States. This argument fails for two independent reasons. First, petitioners' detention is not unlawful. Rather, it represents an appropriate

[11] As noted above, aliens seeking an order of entry into the United States, petitioners have no constitutional claim, whatsoever. *Landon v. Plasencia*, 459 U.S. at 32. Even when an immigration classification can be challenged under the First Amendment, it must be upheld if based on a "facially legitimate and bona fide reason." *Kleindienst v. Mandel,* 408 U.S. 753 (1972).

exercise of the power to wind up the detention of individuals formerly classified as enemy combatants in an orderly fashion. Second, as the district court properly held, it could not order release of petitioners, where they object to being returned to their native country, and have no immigration status or other right permitting them to enter the United States, and where no other country has been identified that will accept them.

A. Petitioners' Detention Is Lawful.

The district court erroneously ruled that petitioners' continued detention was unlawful, but then went on to hold that no habeas relief could be granted in this context. This Court need not reach the latter issue because, as we explain below, the military's continued detention of petitioners, while seeking to place them in an appropriate country, is entirely lawful.

1. In this case, petitioners went to Afghanistan to receive weapons training at a military training facility supplied by the Taliban near Tora Bora. JA 233-234. They were receiving that training, but then, as Northern Alliance forces approached the military training camp, fled with others to the nearby Tora Bora caves. They then fled the Tora Bora caves to Pakistan where they were captured by Pakistani forces and turned over to the United States military. *Ibid*.

The Department of Defense screened those captured, determined that petitioners were enemy combatants, and sent them to be detained at the U.S. Naval Base at Guantanamo Bay. This was a reasonable determination given the circumstances of their capture. Petitioners' detention under that factual scenario was authorized by the President's constitutional authority and the AUMF. By its terms, Article II of the Constitution vests "[t]he executive Power" of the United States in the President (Art. II, § 1, cl. 1), whom it designates as the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States" (Art. II, § 2, cl. 1). Construing these provisions, the Supreme Court has long held that the President, as Commander in Chief, "is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effective to harass and conquer the enemy." *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850).

Unquestionably, the AUMF permits the use of military force against the Taliban, which harbored Osama bin Laden and al Qaeda military training camps. *See* Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on

September 11, 2001, *or harbored such organizations or persons*"). Moreover, the Supreme Court has, not surprisingly, held that the AUMF necessarily grants the power to detain enemies captured during our armed conflict with al Qaeda and the Taliban. *See Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640 (2004) (explaining that "[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war'" (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942))).

Thus, it was certainly well within the scope of the U.S. military's authority to capture and detain persons, such as petitioners, who sought and obtained weapons training at an Taliban-supplied military training base in enemy territory and who were found fleeing that base during the armed conflict. The unconventional nature of the conflict in Afghanistan in which the enemy purposefully blurred the distinction between combatants and non-combatants only increases the need for the military to be permitted to make such determinations in a theater of active combat operations.

Petitioners correctly observe that the CSRTs, after thoroughly examining all of the information provided by the military and the detainees, ultimately determined that petitioners should no longer be classified as enemy combatants, as that term was defined and implemented for the purposes of the CSRTs. That

conclusion obviously does not mean that petitioners' original detention was inappropriate or unauthorized. Through a process unprecedented in the history of armed conflict, the CSRT procedures constituted a more rigorous examination of the detainees' enemy combatant status based on information available at the time of the review, including any new information gathered subsequent to the detainees' capture. The CSRT rulings regarding petitioners, under DOD instructions, mandate that petitioners no longer be detained as enemy combatants; the rulings do not, however, lead to the conclusion that the prior detention was unlawful.

2. While petitioners are no longer being held at Guantanamo as enemy combatants, the Executive's power to detain enemy combatants necessarily includes the authority to wind up that detention in an orderly fashion after a detainee has been determined to no longer be an enemy combatant or after hostilities have ended. Typically, when a CSRT finds that a detainee should no longer be classified as an enemy combatant, he is then returned to his native country. Add. 29. Petitioners vigorously oppose, however, being sent to their native country, and the United States, consistent with its policy against returning an individual when it is more likely than not they will be tortured (JA 209), cannot return them to their native country. Thus, they are being detained by the U.S.

military, pending the outcome of the extensive diplomatic efforts to transfer them to an appropriate country. Those efforts are ongoing and have been given high-priority by the Executive Branch.[12] In the meantime, however, it is not unlawful to continue to detain petitioners, until they can be properly resettled.

The district court's conclusion that the United States lacks authority to continue to detain those captured during an armed conflict, where the individuals refuse to and cannot safely be sent back to their native country, while some other venue of relocation is found, is contrary to both history and logic. Historically, the United States armed forces, like the armed forces of our allies, has continued the detention of prisoners of war following the end of major conflicts when the prisoner objects to repatriation in his native country.[13] For example, at the end of the Korean War, approximately 100,000 Chinese and North Korean prisoners of war refused to return to their native countries, citing fears of execution, imprisonment, or mistreatment in their countries if returned. *See* Charmitz and

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[12] The Government offered to make a detailed *in camera, ex parte* report to the district court describing the ongoing resettlement efforts. JA 447. The court, however, declined the offer. *Ibid*.

[13] Even in the absence of such objections by the prisoner, there can often be substantial delays in effecting repatriation following the cessation of hostilities. *See, e.g.,* Howard S. Levie (ed,), DOCUMENTS ON PRISONERS OF WAR, 796 note (Naval War College Press, 1979) (noting that it took nearly two years after hostilities ceased between Pakistan and India in 1971, to repatriate prisoners of war).

Wit, *Repatriation or Prisoners of War and the 1949 Geneva Convention*, 62 Yale L.J. 391, 392 (1952-1953); Delessert, RELEASE AND REPATRIATION OF PRISONERS OF WAR AT THE END OF ACTIVE HOSTILITIES: A STUDY OF ARTICLE 118, PARAGRAPH 1, OF THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, 157-165 (Schulthess 1977). The United Nations Command continued to hold those 100,000 prisoners for more than one and one-half years while it considered whether and how best to resettle them. *See* Delessert, RELEASE AND REPATRIATION at 163-164. After World War II, Allied Forces spent several years at the end of hostilities dealing with such issues with respect to prisoners of war they detained during the war, including issues regarding thousands of prisoners who did not wish to return to their native countries. *See id.* at 145-156 & n.53 (citing, *inter alia*, the fact that as late as 1948 England held 24,000 German prisoners who did not wish to repatriate); Charmitz and Wit, *Repatriation or Prisoners of War*, 62 Yale L.J. at 401 nn.46 & 48, 404 n.70; 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). Similarly, thousands of Iraqis were held in continued detention by the United States and its allies after the end of combat in

the prior Gulf War because they refused to be repatriated in their native country. *See* FINAL REPORT TO CONGRESS ON THE CONDUCT OF THE PERSIAN GULF WAR, APPENDIX O, at 708 (April 1992) (http://www.ndu.edu/library/epubs/cpgw.pdf) (discussing the more than 13,000 Iraqi POWs who refused repatriation and remained in custody despite the end of hostilities).

Petitioners nevertheless cite to Article 118 of the Third Geneva Convention (Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316), which states that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities," and Article 132 of the Fourth Geneva Convention (Geneva Convention relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516), which provides, "[e]ach interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist," as mandating their release into the United States. As we explain below (pp. 52-53), the Geneva Conventions are not judicially enforceable.[14] In any event, these provisions presuppose that repatriation is possible. Significantly, the International Committee of the Red Cross commentaries explain that the term "without delay" does not speak to the situation where the prisoner refuses to return to their native country. *See*

[14] Moreover, petitioners do not even claim to be "prisoners of war" within the scope of the Third Geneva Convention.

INTERNATIONAL COMMITTEE OF THE RED CROSS: COMMENTARY TO THE CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, 541-550 (1960). As to such situations, "[e]ach case must * * * be dealt with individually." *Id.* at 548. The general requirement of return without delay does not "affect the practical arrangements which must be made so that repatriation may take place consistent with humanitarian rules." *Id.* at 550.

As we discussed above, in the context where the detainee objects to the return to his native country, there has often been extended custody so that persons can be properly placed, rather than forced against their will to return to a potentially dangerous environment. That detention power is obviously a necessary and inherent aspect of the recognized power to capture forces during an armed conflict. The exercise of that power is a matter firmly and traditionally committed to the Executive, and is not subject to judicial oversight. *See Hamdi*, 124 S. Ct. at 2647 ("Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them.").

3. In an effort to show that their continued detention is unlawful, petitioners, like the district court, rely on *Zadvyadas v. Davis*, *supra*, and *Clark v. Martinez*,

543 U.S. 371 (2005). In those cases, however, the Supreme Court construed an immigration statute, which has no application here.

In both *Zadvydas* and *Clark*, the Court interpreted 8 U.S.C. § 1231(a)(6), which provides that "[a]n alien ordered removed who is inadmissible under Section 1182 of this title, removable under Section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the [Secretary] to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period." *See Zadvydas*, 533 U.S. at 688-89; *Clark*, 543 U.S. at 722. In *Zadvydas*, the Court held that this statutory provision "limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States," 533 U.S. at 689, and that six-months after the removal order becomes final constitutes a presumptively reasonable period, *id.* at 701. *Zadvydas* considered only the case of aliens removable under Sections 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4), and *Clark* confirmed that this interpretation of the statute applies to the removal of inadmissible aliens being held within the United States. *See* 543 U.S. at 378.

The immigration statute at issue in *Zadvydas* and *Clark*, which speaks to detention of an alien in the United States pending the execution of an immigration removal order, is obviously inapplicable to petitioners here. Petitioners are *not*

being detained under that statute or any other immigration provision. Nor could they be so detained. The immigration statute only applies in the context where an alien has received an immigration removal order. There is no immigration removal order against petitioners. Indeed, they could not be subject to an immigration removal order because they are not in the United States. *See* 8 U.S.C. § 1101(a)(38) (defining the geographic scope of the United States for the purposes of the Immigration and Nationality Act ("INA")); DTA, § 1105(g) (same for purposes of the Detainee Treatment Act).

Even in *Zadvydas*, the Court specifically, stated that it was not announcing a rule that would necessarily apply to immigration cases in involving "terrorism or other special circumstances where * * * [there would be a need for] heightened deference to the judgments of the political branches with respect to matters of national security." 533 U.S. at 695. In *Clark*, the Court expanded upon that statement, explaining that the Court's interpretation of Section 1231(a)(6) would not affect the ability of the Government to detain aliens under other authority. 543 U.S. at 379 n.4. Given that petitioners here are not being held under that statute, the limitation on detention authority under Section 1231(a)(6) recognized in *Zadvydas* and *Clark* has no bearing on petitioners' case.

Moreover, in construing the immigration statute at issue there, the Court in *Zadvydas* relied upon a constitutional avoidance analysis that is inapplicable here. The Court noted that the indefinite detention of an alien within the United States would raise concerns under the Due Process Clause of the Fifth Amendment. *See* 533 U.S. at 690-92. But the Supreme Court explained that the analysis would be very different for persons, like petitioners here, who are outside of the United States, observing that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Id.* at 693. As we have explained, petitioners are aliens outside the United States and the Fifth Amendment—including its Due Process Clause—has no application to them.

The more relevant immigration case is *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206 (1953). There, an alien, Mr. Mezei, who had been a 25-year resident of the United States, left the country to visit his dying mother. The INS found that he could not legally re-enter. Mezei was stopped at the border and then held in detention in the United States because no other country would accept him. He contended that his detention was indefinite and unlawful. Nonetheless, the Court found that Mezei had no constitutional right to release, even though he had been detained more than two years and even though at the time there were no

prospects of another country accepting him. The Court held that he had no constitutional or statutory right to release.[15] The Court explained, "[w]hatever our individual estimate of [the policy decision not the release Mezei] and the fears on which it rests, respondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate." 345 U.S. at 216. The same rationale applies all the more so here where petitioners are aliens who have never been present in the United States and were captured during an armed conflict.

4. As noted above, petitioners also assert (Br. 31-32) that their detention violates the Third and Fourth Geneva Conventions. They acknowledge, however (Br. 31), that in *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir.), *cert. granted*, No. 05-184 (2005), this Court held that the Third Geneva Convention is not judicially enforceable, through habeas or otherwise. Although *Hamdan* did not address the Fourth Geneva Convention, petitioners have identified no reason why one would be judicially enforceable while the other is not.

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[15] Subsequently, the Court in *Clark v. Martinez*, *supra*, read amendments to the INA to limit the length of the detention after the receipt of a removal order. *See* 543 U.S. at 373-386. As we have explained, the statute at issue in *Clark*, regarding the length of detention after the receipt of a removal order, 8 U.S.C. § 1231 (a)(1)(A), has no bearing on petitioners here.

More generally, *Hamdan*'s reasoning undermines whatever claims petitioners might have under the Fourth Geneva Convention. *Hamdan* explained that "this country has traditionally negotiated treaties with the understanding that they do not create judicially enforceable individual rights." 415 F.3d at 38. That is because, "[a]s a general matter, a 'treaty is primarily a compact between independent nations,'" so "[i]f a treaty is violated, this 'becomes the subject of international negotiations and reclamation,' not the subject of a lawsuit." *Id.* at 38-39 (quoting *Head Money Cases*, 112 U.S. 580, 598 (1884)). Therefore, "'[i]nternational agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.'" *Id.* at 39 (quoting Restatement (Third) of the Foreign Relations Law of the United States § 907 cmt. a, at 395 (1987)). Petitioners have made no effort to overcome this presumption against judicial enforceability by individuals with respect to the Fourth Geneva Convention.

Even if the Geneva Conventions were judicially enforceable, petitioners' claims would fail on the merits. As we have explained above, pp. 47-48, these conventions does not require immediate release of detainees upon the cessation of active hostilities, especially where the detainees object to return to their native county. The reasons necessitating petitioners' detention are the inability of the

United States to find a country to which they can be repatriated, consistent with the policy against sending them to a country where it is more likely than not that they will be tortured. Since those reasons continue to exist, the Geneva Conventions do not prohibit petitioners' continued detention pending the ongoing diplomatic efforts to place them in an appropriate country.

B. The District Courts Correctly Held That It Could Not Order Petitioners' Release In this Context.

The district court correctly determined that it does not possess the legal authority to order petitioners' release. Petitioners demand their release, but they do not argue on appeal that they should be released into a secure United States Naval Base during a time of war. As discussed above, release typically would be to the detainee's native country. Petitioners, however, object to and cannot be sent to their native country, and they do they specify any other country in the world that has expressed a willingness to accept them. The diplomatic efforts to place them are on-going, but petitioners claim that they should not have to wait for the outcome of those efforts and instead have right to enter and live in the United States. Petitioners are, however, individuals who sought and were given weapons training at a military training camp supplied by the Taliban, and they obviously have no immigration status or other right permitting them to enter the United

States. Thus, their demand for a court order permitting them to enter the United States was properly rejected by the district court.

Petitioners are not currently in the United States. The Immigration and Nationality Act defines the "United States" to include only "the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States." *See* 8 U.S.C. § 1101(a)(38). Further, in the Detainee Treatment Act, Congress recognized that, for purposes of judicial review of claims brought by detainees at Guantanamo Bay, the geographic scope of the "United States" should be as defined in Section 101(a)(38) of the INA and "in particular, does not include the United States Naval Station, Guantanamo Bay, Cuba." DTA § 1005(g). In order to make a "lawful entry * * * into the United States," petitioners would have to be "admitted" to this country. 8 U.S.C. § 1101(a)(13)(A). A court does not have the power to order the admission of petitioners. *See Fok Yung Yo v. United States*, 185 U.S. 296, 305 (1902) ("Congressional action has placed the final determination of the right of admission in executive officers, without judicial intervention").

Petitioners argue that a court can order the Executive to parole an alien into this country from outside the United States. The cases they cite for that proposition (Br. 35), however, all deal with aliens who were already physically

present in the United States. Petitioners here are in Cuba. With limited exceptions not relevant here, the Immigration and Nationality Act provides that an alien outside the United States must have a visa in order to enter the country. *See* 8 U.S.C. § 1182(a)(7). Petitioners have no such visas and a court cannot order the Executive to issue them. Under the INA, the issuance of a visa is discretionary: a consular officer "may" issue an immigrant or nonimmigrant visa to an alien who has made a proper application for it. 8 U.S.C. § 1201(a)(1). This decision is not judicially reviewable. *See Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159-1160 (D.C. Cir. 1999) (discussing the doctrine of consular nonreviewability and explaining that, under that doctrine, "a consular official's decision to issue or withhold a visa is not subject to judicial review, at least unless Congress says otherwise"). As the Supreme Court has held, "[t]he authority to issue visas belongs solely to the consular officers of the United States," and "courts are without authority to displace the consular function in the issuance of visas." *City of New York v. Baker,* 878 F.2d 507, 512 (D.C. Cir. 1989). Accordingly, any "district court[] order that purports to direct the issuance of visas is without force and effect." *Ibid*.

Furthermore, a judicial order requiring the physical production of non-resident alien petitioners within the United States not only would conflict with the

specific provisions of the Immigration and Nationality Act, but also would be contrary to over a century of Supreme Court jurisprudence, recognizing that the admission of aliens is a quintessential sovereign function reserved exclusively to the political branches of government. As the Court explained in 1893, "[t]he power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government." *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893). It is "to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene." *Ibid; see also Lem Moon Sing v. United States*, 158 U.S. 538, 546-547 (1895).

Because there is no constitutional right to enter the United States or otherwise be present in this country, courts must honor Congress' prescriptions regarding the admission or exclusion of aliens. Indeed, for over a hundred years, the Supreme Court has faithfully refused to permit judicial intervention in this area when Congress has not provided for it. For example, in *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), an excluded alien filed a habeas corpus petition challenging the inspecting officer's determination not to admit her. Recognizing

the limits on its power, the Court held that, because Congress had provided only for administrative review and not judicial review of inspectors' exclusion determinations, the agency decision to deny admission to Nishimura Ekiu could not be disturbed by the courts.

Likewise, in *Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950), the Court again stated that the power to exclude aliens "is inherent in the executive power to control the foreign affairs of the nation," and that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *See also INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *Shaughnessy v. Mezei*, 345 U.S. at 210, 213; *Heikkila v. Barber*, 345 U.S. 229, 233-34 (1953). More recently, in *Fiallo v. Bell*, 430 U.S. 787 (1977), the Court reiterated that "[t]he conditions of entry for every alien * * * have been recognized as matters * * * wholly outside the power of [the courts] to control." Id. at 796 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 596-97 (1952) (Frankfurter, J., concurring)); *see also Brownell v. Tom We Shung*, 352 U.S. 180, 184 n.3 (1956) (allowing an alien physically present in the United States to contest the validity of an exclusion order by seeking a declaratory judgment, but cautioning that "[w]e do not suggest, of course, that an alien who has never presented himself at the border of this country

may avail himself of the declaratory judgment action by bringing the action from abroad").

Since a district court may not review and override a denial of admission, it follows *a fortiori* that a court may not arrogate the Executive's authority by ordering admission in the first instance. Nor could a court order that the Government "parole" petitioners, or temporarily admit them into the United States. Although the INA authorizes the parole of aliens who are applying for admission, 8 U.S.C. § 1182(d)(5), the decision to parole – like the decision to admit – is vested solely in the Executive Branch's unreviewable discretion. The INA states that the Secretary of Homeland Security "may * * * in his discretion" parole aliens into the United States if the Secretary finds urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A); *see also* 8 U.S.C. § 1103 (transferring various immigration functions to the Secretary of Homeland Security). Thus, the INA's bar on review of discretionary decisions precludes judicial review of agency parole determinations. *See* 8 U.S.C. § 1252(a)(2)(B)(ii). Aside from admission and parole, there is no way for petitioners to be lawfully present in the United States. Under 8 U.S.C. § 1182(a)(9), an alien who "is present in the United States without being admitted or paroled" is "unlawfully present." *See also* 8 U.S.C. § 1182(a)(6)(A) (aliens who have not been "admitted

or paroled" are inadmissible). Accordingly, the habeas statute did not give the district court the authority to order petitioners into this country, and the district court therefore properly denied relief to petitioners.

Last year, Congress clarified that this comprehensive preclusion of judicial review over discretionary decisions also encompasses habeas review. In the Real ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, Congress amended the INA to make explicit that no court has jurisdiction under 28 U.S.C. § 2241 or "any other habeas corpus provision" to review such discretionary decisions. *See* Real ID Act § 106(a); *see also id.* § 101(f)(2) (providing that there is no jurisdiction "regardless of whether the judgment, decision or action is made in removal proceedings"). The Real ID Act eliminates any doubt that the district court lacked jurisdiction to direct the Executive Branch to admit petitioners into the United States.

III. THE PRESIDENT IS NOT A PROPER HABEAS RESPONDENT

With respect to the President, the denial of habeas relief should be affirmed not only for the reasons set forth above, but also on the alternative ground that federal courts have "'no jurisdiction * * * to enjoin the President in the performance of his official duties'" or otherwise to compel the President to perform any official act. *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992)

(plurality opinion) (quoting *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866)). The district court did not reach this question, but, because the issue is jurisdictional, it may be considered here.

Although the Supreme Court has left open the question whether the President may be ordered to perform a purely "ministerial" duty, see *Franklin*, 505 U.S. at 802, the relief petitioners seek here—i.e., their release from custody and forced entry into the United States—is far from ministerial. Moreover, the President is not the immediate custodian of any detainee, and is thus an improper habeas respondent on that additional ground as well. *See, e.g., Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2720 (2004); *Rooney v. Secretary of the Army*, 405 F.3d 1029, 1032 (D.C. Cir. 2005).

Finally, the Detainee Treatment Act clarifies that, to the extent a detainee may seek judicial review under the Act's exclusive review mechanism, the proper respondent is the Secretary of Defense, not the President. *See DTA, §* 1005(e)(4).

CONCLUSION

The judgment of the district court should be vacated, and the case should be remanded with instructions to dismiss for want of jurisdiction. In the alternative, the judgment should be affirmed.

Respectfully submitted,

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I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 13,973 words (which does not exceed the applicable 14,000 word limit).

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2006, I caused copies of the foregoing brief to be served upon counsel of record by causing copies to be sent by first-class mail and by e-mail transmission to the following counsel of record:

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ADDENDUM

A. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2680, 2741

B. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)