[ORAL ARGUMENT SCHEDULED FOR MARCH 22, 2006]

Nos. 05-5064, 05-5095 through 05-5116

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

KHALED A.F. AL ODAH, et al.,

Plaintiffs-Petitioners-Appellees/Cross-Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Respondents-Appellants/Cross-Appellees.

ON CONSOLIDATED APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THE GUANTANAMO DETAINEES' SECOND SUPPLEMENTAL BRIEF ADDRESSING THE EFFECT OF THE DETAINEE TREATMENT ACT OF 2005 ON THIS COURT'S JURISDICTION OVER THE PENDING APPEALS

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CERTIFICATE AS TO PARTIES, AMICI, RULINGS, AND RELATED CASES

The Supplemental Brief of the Federal Parties did not list the *amici* appearing on their behalf in this Court, and petitioners do not have such a list.

Otherwise, all parties and *amici* who previously appeared in the district court and in this Court are listed in the Opening Brief for the United States *et al*, except:

- Supplemental Brief *Amici Curiae* of British and American Habeas Scholars Listed Herein In Support of Petitioners Addressing Section 1005 of the Detainee Treatment Act of 2005
- Brief *Amicus Curiae* of Senator Carl Levin In Support of the Guantanamo Detainees
- Brief *Amicus Curiae* of The National Institute of Military Justice In Support of the Guantanamo Detainees
- Second Supplemental Brief *Amicus Curiae* of the World Organization For Human Rights USA In Support of Petitioners'/Appellants' Position On The Jurisdictional Impact of the Detainee Treatment Act Filed Pursuant To The Court Order Of Jan. 27, 2006
- *Amicus Curiae* Brief of Federal Public Defender Habeas Corpus Counsel In Support of Petitioners'/Appellants' Position On The Jurisdictional Impact of the Detainee Treatment Act Of 2005.
- Brief Of *Amici Curiae*, Legal And Historical Scholars, In Support of Petitioners Addressing the Detainee Treatment Act of 2005

References to the rulings at issue appear in the Opening Brief for the United States *et al.* A statement indicating which of the cases on review were previously before this Court and the names and numbers of other related cases currently pending in this Court or the district court appears in the Opening Brief for the United States *et al.*

GLOSSARY

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

ARB ..... Administrative Review Board

CSRT ..... Combatant Status Review Tribunal

JA ..... Joint Appendix

ISSUES PRESENTED

1. Whether the Detainee Treatment Act of 2005 revokes the right to habeas corpus to which the Supreme Court held these petitioners are entitled?

2. If so, what further action should the Court take in these cases?

STATEMENT OF FACTS

A. The Chaotic Circumstances Surrounding Petitioners' Transfer to Guantanamo.

According to Defense Department documents, only 5% of the detainees at Guantanamo were captured by U.S. forces; 86% were taken into custody by Pakistani or Northern Alliance forces at a time when the United States was offering large financial bounties for the capture of any suspected Arab terrorist; the large majority never participated in any combat against the United States on a battlefield; only 8% have been classified as al Qaeda fighters.[1]

Although some of the Guantanamo detainees were picked up at places such as Gambia and Bosnia, the great majority were rounded up in Afghanistan and the areas of Pakistan bordering on Afghanistan in the months immediately following 9/11. At that time, Afghanistan was enduring "the worst humanitarian crisis in the world."[2] After 23 years of civil war and three consecutive years of severe drought, between six and seven million people, including one million internally displaced people and countless more who were too weak or poor to leave their villages

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[1] Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data, by Mark Denbeaux *et al.*, Seton Hall University School of Law (2006) ("Defense Department Data"), *available at* http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf, at 2-4.

[2] *United Nations Development Program/United Nations Office for the Coordination of Humanitarian Affairs*, Assistance for Afghanistan Weekly Update, Issue No. 429, September 12, 2001, *available at* http://www.pcpafg.org/news/weeklyupdate2001_Issues/update2001_09_12_429.shtml.

or homes, were extremely vulnerable.[3] International government and non-government organizations, private charities, and individual volunteers – including, as they allege, many petitioners – had flocked to Afghanistan in an attempt to provide humanitarian aid.[4] Political instabilities, shifting alliances, and religious suspicions made the aid effort difficult and dangerous.[5] Many aid agencies found it too difficult to work in Afghanistan.[6] The agencies and individuals who continued to work in Afghanistan to relieve the suffering of the people there tended to be affiliated with charities from the Middle East.[7]

The attacks of September 11 made the area even more dangerous. On September 20, 2001, President Bush announced in his speech to the Nation that "any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime."[8] This message was directed not only to the Taliban regime in Afghanistan, which was giving sanctuary to al Qaeda, but also to Pakistan, which had been the Taliban's staunchest ally and military

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3 *Id.*; *Aid During Conflict: Interaction Between Military and Civil Assistance Providers in Afghanistan, September 2001-June 2002*, prepared by RAND National Defense Research Institute for the Office of the Secretary of Defense and U.S. Agency for International Development (2004), *available at* http://www.rand.org/pubs/monographs/2004/RAND_MG212.pdf ("RAND Report"), at 24.

4 RAND Report, at 26-36.

5 *Id.*

6 *Id.* at 27, 33-37.

7 *Id.* at 37.

8 Address by President George W. Bush to a Joint Session of Congress and the American People, September 20, 2001, *available at* http://www.whitehouse.gov/news/releases/2001/09/print/20010920-8.html.

supporter for seven years.[9] The United States pressured Pakistan to sever its ties with the Taliban and roundup as many terrorists as possible or face the consequences.[10] Pakistani President Musharraf made a swift policy reversal and pledged full cooperation in the effort to locate and apprehend terrorists.[11] There were reasons to suspect the accuracy of Pakistan's effort, however. Pakistan's intelligence service had been closely allied with the Taliban, and there were reports that al Qaeda fighters were evacuated from the area by Pakistani aircraft in the company of Pakistani military officials.[12]

As of January 7, 2002, U.S. officials had not decided how to handle the numerous detainees swept up and turned over by Pakistani and the Northern Alliance forces.[13] A military spokesperson said: "A big part of the focus now is what the secretary refers to as 'baskets'... Which kinds of people go in which 'baskets?' What are the guidelines or criteria used ... to determine who goes into what category?"[14]

There were well established guidelines, but the government did not follow them. U.S. Army Regulation 190-8, chapter 1-5, ¶ A (Oct. 1, 1997) (J.A. 1424-1435), requires hearings to be held promptly in the field to determine the status of any detainee if there is any doubt. That

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9 Final Report of the National Commission on Terrorist Attacks Upon the United States, Official Government Edition (July 22, 2004) ("9/11 Report"), *available at* http://www.gpoaccess.gov/911/index.html., at 63-65; RAND Report, at 28-29, 115.

10 9/11 Report, at 331.

11 *Id.*

12 *Id.*, p. 4, n.11.

13 *U.S. Aircraft Hit 4 Afghan Targets; Guantanamo Work Begins*, January 7, 2002, American Forces Information Service, *available at* http://www.defenselink.mil/news/Jan2002/n01072002_200201071.html.

14 *Id.*

regulation and its predecessors had been followed in every previous conflict since Vietnam. During the Gulf War, for example, the military held 1,196 of these individualized hearings in or near the field of operations to determine the status of detainees. In 886 of those hearings, the detainees were found not to be combatants, but displaced civilians or refugees. Only 310, or about 25%, were found to be combatants, and all of those were determined to be "privileged" or legal combatants.[15] Inexplicably, the government did not provide the individualized hearings required by Army Regulation 190-8 before shipping the detainees to Guantanamo.

Uncertainty about the true nature of the detainees at Guantanamo – a concern that, in many instances, the U.S. simply got the wrong guy – has pervaded the highest echelons of the military at Guantanamo. On October 6, 2004, Brigadier General Martin Lucenti, Jr., the deputy commander at Guantanamo, said: "Of the 550 [detainees] that we have, I would say most of them, the majority of them, will either be released or transferred to their own countries... Most of these guys weren't fighting. They were running."[16] In January 2005 Major General Jay Hood, commander at Guantanamo, acknowledged that: "Sometimes we just didn't get the right folks, and that the reason those "folks" were still in Guantanamo was that "[n]obody wants to be the one to sign the release papers . . . . There's no muscle in the system."[17] General Hood added that there were "significant numbers of men here" who he expected would be transferred to their

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15 *See Report on the Conduct of the Persian Gulf War*, Final Report to Congress by the Department of Defense (April 1992), *cited in* David Cole, *Enemy Aliens*, at 42 n.69 (New Press 2003).

16 *Most at Guantanamo to be Freed or Sent Home, Officer Says*, The Washington Post, Oct. 6, 2004, at A16, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A9626-2004Oct5?language=printer.

17 *Detention Plan: In Guantanamo, Prisoners Languish in Sea of Red Tape*, The Wall Street Journal, Jan. 26, 2005, available at http//online.wsj.com/public/us.

home governments or released, and that "[i]f that doesn't happen, I'm going to be doing some yelling."[18]

B. This Litigation.

The history of this litigation was outlined by the court below. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 448-52 (D.D.C. 2005). The first case was filed more than four years ago, on February 19, 2002, *Rasul v. Bush*, D.D.C., No. 02-CV-0299 (CKK), styled as a petition for the writ of habeas corpus. *Rasul* was soon followed by *Al Odah v. United States*, D.D.C., No. 02-CV-0828, styled as a complaint but asserting a cause of action for violation of the habeas statute and treated by the district court as a petition for the writ of habeas corpus.[19]

The government never filed a return or answer in *Rasul* and *Al Odah*. Instead, it moved to dismiss both for lack of jurisdiction, relying on *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950). The district court granted the motion, this Court affirmed, but the Supreme Court reversed. *Rasul v. Bush*, 542 U.S. 466 (2004). The Supreme Court remanded the cases to the district court with instructions "to consider in the first instance the merits of petitioners' claims." *Id.* at 2699.

Immediately, counsel sought approval to travel to Guantanamo to meet with their clients and develop the merits of their claims. *See* Transcript of Proceedings, June 29, 2004 (J.A. 1525-1542). The government objected. The matter was not resolved until October 20, 2004, when Judge Kollar-Kotelly ruled that the detainees had a right to counsel and a right to unmonitored communications with counsel. *Al Odah v. United States*, 346 F. Supp. 2d 1, 5, 9 (D.D.C. 2004).

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[18] Id.

[19] Formal applications for the writ of habeas corpus were filed in *Al Odah* on July 27, 2004.

By then, new petitions for habeas corpus had been filed by or on behalf of other Guantanamo detainees, and the district court appointed Judge Joyce Hens Green to coordinate and manage all the Guantanamo cases. 355 F. Supp. 2d at 451. The government demanded the entry of a protective order governing counsel access to Guantanamo, and Judge Green entered such an order on November 8, 2004. J.A. 166-196. After that, and after obtaining requisite secret-level security clearances, petitioners' counsel were finally able to begin traveling to Guantanamo to meet their clients.

At the same time the government was objecting to counsel access in court, it was acting in Guantanamo. On July 7, 2004, only nine days after the *Rasul* decision, Deputy Secretary of Defense Paul Wolfowitz issued a Memorandum announcing, as a matter of internal Department "management," the creation of "Combatant Status Review Tribunals" ("CSRTs") at Guantanamo to review the determinations that had already been made "through multiple levels of review by officers of the Department of Defense" that the detainees at Guantanamo were "enemy combatants." J.A. 53-56. Counsel were not permitted to participate in the CSRT proceedings.

On September 20, 2004, Judge Green ordered the government to file "factual returns" identifying the reasons for the detentions, as well as responsive pleadings showing cause why writs of habeas corpus should not be granted. J.A. 72-80. The government did not file responsive pleadings; instead it filed, as its "factual returns" to the petitions, a portion of the records from petitioners' CSRT proceedings, and it did so on a rolling basis through December 30, 2004. 355 F. Supp. 2d at 451. At the same time, on October 4, 2004, it moved to dismiss all the petitions as a matter of law, arguing that petitioners had no substantive constitutional rights that could be enforced by habeas. The government objected to discovery by petitioners' counsel,

arguing that any factual discovery was premature until after the motion to dismiss had been decided.[20]

Judge Green denied in part and granted in part the government's motion with respect to eleven pending cases. Judge Richard Leon, who retained two of the Guantanamo cases, granted the government's motion to dismiss in those cases. The present appeals and cross-appeals are taken from those conflicting judgments.

C. The Detainee Treatment Act of 2005.

The original version of the Act was introduced on the Senate floor by Senator Graham on November 10, 2005, as proposed Amendment No. 2515 to the National Defense Authorization Act for Fiscal 2006, S. 1042, 109th Cong. (2005). *See* 151 *Cong. Rec.* S12, 655 (daily ed. Nov. 10, 2005). That amendment would have stripped the federal courts of jurisdiction over habeas claims by detainees at Guantanamo and conferred exclusive jurisdiction in this Court to determine, under a limited scope of review, the validity of a final CSRT decision that a detainee was properly detained as an enemy combatant. *Id.*

The Graham amendment made *both* its habeas-stripping *and* its judicial review provisions applicable to pending claims. It said: "The amendment made by paragraph (1) [the habeas-stripping provision] shall apply to any application or other action that is pending on or after the date of the enactment of this Act. Paragraph (2) [the judicial review provision] shall apply with respect to any claim regarding a decision covered by that paragraph that is pending on

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[20] As a result, the District Court never ruled on petitioners' motion for discovery. It is still pending before the district court.

or after such date." *Id.* The Senate approved the Graham amendment on November 10, 2005, by a vote of 49-42. *Id.* at 667-68.[21]

On November 14, 2005 Senator Graham introduced a new compromise amendment on behalf of himself, Senator Levin, and Senator Kyl. *See* 151 *Cong. Rec.* S12, 752-53 (daily ed. Nov. 14, 2005). *Id.* at 752-53. He explained that in the new amendment "we have addressed some of the weaknesses in my original amendment." *Id.* at 753. The proposed Graham-Levin-Kyl amendment eliminated the language in the prior amendment that would have made the habeas-stripping provision applicable to pending claims. Instead, it made its provisions effective upon enactment and specified that only the provisions for judicial review of final CSRT and military commission decisions would apply to pending claims. It said:

> (e) EFFECTIVE DATE. –
>
> (1) IN GENERAL. – Except as provided in paragraph (2), this section shall take effect on the day after the date of the enactment of this Act.
>
> (2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS. – Paragraphs (2) and (3) of subsection (d) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

On November 15, 2005, the Senate considered the proposed compromise amendment. *See* 151 *Cong. Rec.* S12, 799-804 (daily ed. Nov. 15, 2005). Immediately prior to the Senate vote, Senator Levin took the floor to emphasize one of the important changes made by the proposed compromise amendment to the original Graham amendment, namely, the elimination of the language that would have made the habeas-stripping provisions applicable to pending claims. *See id.* at 802. Senator Levin said: "The habeas prohibition in the Graham amendment

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[21] The amendment approved by the Senate actually was Amendment No. 2516, a version offered by Senator Graham whose relevant provisions were identical to Amendment No. 2515.

applied retroactively to all pending cases – this would have the effect of stripping the Federal courts, including the Supreme Court, of jurisdiction over all pending cases, including the Hamdan case." *Id.* However, "[u]nder the Graham-Levin-Kyl amendment, the habeas prohibition would take effect on the date of enactment of the legislation. Thus, this prohibition would apply only to new habeas cases filed after the date of enactment." *Id.* In this manner, said Senator Levin, the proposed Graham-Levin-Kyl amendment "preserves comity between the judiciary and legislative branches." *Id.* Senator Graham, who also spoke on the floor prior to the vote, said nothing to the contrary, while Senator Reid echoed Senator Levin's remarks. *Id.* at 800-03. *See* Brief *Amicus Curiae* of Senator Levin.

The Senate approved the Graham-Levin-Kyl amendment by a vote of 84-14. *See* 151 *Cong. Rec.* S12, 803 (daily ed. Nov. 15, 2005). The 70% increase in the number of Senators supporting Graham-Levin-Kyl, compared to the number supporting the original Graham amendment, reflected widespread satisfaction with the changes made by Graham-Levin-Kyl.

The National Defense Authorization Act for Fiscal 2006, to which the Graham-Levin-Kyl amendment was attached, went to conference. The version of the amendment that emerged from conference, entitled the Detainee Treatment Act of 2005, differed in several respects from the Graham-Levin-Kyl amendment. *See* H.R. Conf. Rep. No. 109-360, *printed in* 151 *Cong. Rec.* H12, 833-35 (daily ed. Dec. 18, 2005). But no material change was made to the effective date language. It still said, in section 1005(h)(1), that: "[i]n general," the Act "shall take effect on the date of the enactment," and, in section 1005(h)(2), that only the judicial review provisions governed by sections 1005(e)(2) and (3) were applicable to pending claims. *Id.* An identical version of this legislation emerged from conference as part of the Department of Defense Appropriations Act, 2006, H.R. 2863, 109th Cong. (2005). *See* H.R. Conf.

Rep. No. 109-359, *printed in* 151 *Cong. Rec.* H12, 309-11 (daily ed. Dec. 18, 2005).

On December 30, 2005, the President signed the Department of Defense Appropriations Act of 2006.[22] That Act contained the DTA, whose provisions are now before this Court.

ARGUMENT

> *"Why are we proud? We are proud, first of all, because from the beginning of this Nation, a man can walk upright, no matter who he is, or who she is. He can walk upright and meet his friend – or his enemy; and he does not fear that because that enemy may be in a position of great power that he can be suddenly thrown in jail to rot there without charges and with no recourse to justice. We have the habeas corpus act, and we respect it."*
>
> - President Eisenhower, Receiving America's Democratic Legacy Award at the 40th Anniversary dinner of the B'nai B'rith Anti-Defamation League (Nov. 23, 1953).

I. SUMMARY

On June 28, 2004, the Supreme Court in *Rasul* confirmed that the petitioners in these cases have the right to pursue their pending claims for habeas corpus in the federal courts. On its face, the Act contains no clear statement that Congress intended to revoke that right to which the Supreme Court held they were entitled, or to revoke jurisdiction over other habeas petitions

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[22] There are no committee reports for the DTA because the legislation was not introduced in any committee or ventilated in any committee hearings, and the conference reports do not shed any light on the relevant provisions. See H.R. Conf. Rep. No. 109-359, *printed in* 151 *Cong. Rec.* H12, 610 (daily ed. Dec. 18, 2005); H.R. Conf. Rep. No. 109-360, *printed in* 151 *Cong. Rec.* H13, 112 (daily ed. Dec. 18, 2005). There is a lengthy colloquy that Senators Graham and Kyl inserted into the record on December 21, 2005, *after* the conference reports were issued, in which they claimed that section 1005(e)(1) of the DTA does apply to pending cases. *See* 151 *Cong. Rec.* S14, 260-68 (daily ed. Dec. 21, 2005). The C-Span videotape of the congressional deliberations on that date reveals that this colloquy did not take place on the floor of the Senate, so that it could have been considered by the Senate when it voted on the conference reports. In any event, such *post hoc* remarks provide no coherent explanation for the elimination of the prior proposed language making section 1005(e)(1) applicable to pending claims. *See Weinberger v. Rossi*, 456 U.S. 25, 35 (1982).

pending when the statute was enacted. There was such a clear statement in the original bill introduced by Senator Graham, but it was eliminated from the final version. Absent a clear statement applying the jurisdiction stripping provision of the Act to pending habeas petitions, the normal rule applies that a provision that a statute "'shall take effect upon enactment' is presumed to mean 'shall have prospective effect upon enactment.'" *Landgraf v. USI Films*, 511 U.S. 244, 288 (1994) (Scalia J., concurring).

The government argues in effect that the judicial review provisions in section 1005(e)(2) substitute for such a clear statement. They do not; those provisions do not even apply to these petitioners who are challenging not the CSRT decisions but the basic legality of their detentions and who were not provided CSRTs under the new procedures with the new safeguards mandated by the Act. In any event, even if those provisions did apply, they would not operate to revoke jurisdiction over pending habeas claims. Only a clear statement in the statute could do that. Absent such a clear statement, the statute operates prospectively.

That plain meaning rule is reinforced by other well established presumptions and canons of statutory construction:

First, there is a strong presumption that legislation affecting substantive rights does not apply retroactively. That presumption clearly applies here where the government's interpretation of the statute would deprive petitioners of their right to habeas corpus, one of the most fundamental of substantive rights developed under the common law.

Second, the government's argument runs counter to the rule that the courts "are not at liberty to except from [habeas jurisdiction] any cases not plainly excepted by law." *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102 (1868).

Third, if at all possible, courts must construe legislation to avoid confronting serious constitutional problems. Interpreting the Act to revoke these petitioners' right to habeas corpus would violate the Suspension Clause. Absent clear language to the contrary, the Court must construe the Act to avoid the conclusion that Congress intended such a result.

II. ABSENT A CLEAR STATEMENT, THE ACT DOES NOT APPLY TO REVOKE JURISDICTION OVER PENDING HABEAS PETITIONS.

A. The Act Contains No Clear Statement Revoking Jurisdiction Over Pending Cases.

For a statute to apply to cases pending in court before its enactment, there must be "statutory language [] so clear that it could sustain only one interpretation." *Lindh v. Murphy*, 521 U.S. 320, 329 n.4 (1997). The clear statement rule is particularly ironclad in the context of a congressional attempt to repeal habeas jurisdiction, where "implications from statutory text or legislative history are not sufficient ... instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal." *INS v. St. Cyr*, 533 U.S. 289, 299 (2001).

Here, there is no "clear statement" in the text of the statute indicating that Congress intended the jurisdiction stripping provision in the Act to apply to cases pending before enactment. The government argues that, because section 1005(h)(1) states that it "shall take effect on the date of the enactment," Congress intended the Act, including the jurisdiction stripping provision in section 1005(e)(1), to take effect immediately and apply to all pending cases. Gov't Br. at 29. But the Supreme Court has stated clearly that "[a] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date," and that the "'effective upon enactment formula'" is "an especially inapt way to reach pending cases." *Landgraf*, 511 U.S. at 258 n.10.

In the absence of any clear statement, the government argues that the Court should imply from the wording of other sections of the statute that the Act was intended to revoke jurisdiction over pending cases. More specifically, it contends that the inclusion of language covering "pending" cases in section 1005(h)(2) would make no sense if pending habeas claims could still be maintained in court and, therefore, the Court should infer that Congress' intent in providing that the Act would take effect "on the date of enactment" was to make it apply immediately to pending habeas cases.[23] The Supreme Court confronted a similar argument in *Landgraf.* As Justice Scalia pointed out in his concurrence in that case: "The short response to this refined and subtle argument is that refinement and subtlety are no substitute for clear statement. '[S]hall take effect upon enactment' is presumed to mean 'shall have prospective effect upon enactment,' and that presumption is too strong to be overcome by any negative inference drawn from [language in other sections of the statute]." *Id.* at 288.

As the government has pointed out, Congress is presumed to be aware of the Supreme Court's precedents in drafting statutes and "expects its statutes to be read in conformity" with those precedents. *See* Gov't Supp. Br. of January 18, 2006 at 8. Indeed, Senator Graham appears to have been well aware of the requirement that removing habeas jurisdiction over pending habeas cases would require an explicit statement in the Act. The bill he originally

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[23] Of course, just the opposite could be inferred: that Congress, in specifically mentioning "pending" cases in Section 1005(h)(2), purposely excluded those cases from Section 1005(h)(1), which provides the effective date for removal of jurisdiction. *See Lindh,* 521 U.S. at 327; *St. Cyr*, 533 U.S. at 318-20. That, in fact, is what happened. S*ee* 151 *Cong. Rec.* S12, 802 (daily ed. Nov. 15, 2005) (floor statement of Senator Levin). In any event, in the words of the Supreme Court: "at most," this argument "introduces additional statutory ambiguity, but ambiguity does not help the [government] in this case. As we noted above, only the clearest statement of Congressional intent will support the [government's] position." *St. Cyr*, 533 U.S. at 313 n.35.

introduced expressly provided that the habeas-stripping provision "shall apply to any application or other action that is *pending on or after* the date of the enactment of this Act." *See* 151 *Cong. Rec.* S12, 655 (daily ed. Nov. 10, 2005) (emphasis added). That language was eliminated from the final compromise version of the bill passed by the Senate and eventually by Congress.[24] *See id.* at S12, 802 (floor statement of Senator Levin prior to the November 15, 2005 Senate vote noting that, while the original Graham Bill would have stripped courts "of jurisdiction over all pending cases," the new bill "would take effect on the date of enactment of the legislation. Thus, this prohibition would apply only to new habeas cases filed after the date of enactment.").

Congress has also demonstrated that it is well aware of the need for a clear statement in the statutory text to bring pending cases within the reach of a statute. For example, when it passed the Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (Division B), it expressly applied the statute to pending cases. The statute provided that the provisions of the Act insulating decisions of the immigration courts regarding removal proceedings from federal court review, including habeas review, "shall take effect on the date of the enactment . . . and shall apply to *all cases pending* before any court *on or after* such date." 8 U.S.C. § 1252(a)(2)(B) (emphasis added). Clearly, Congress understands what language to use when it wants to apply new legislation to pending cases. It used no such language in the DTA.

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[24] The drafting history here closely parallels that in *Landgraf*, where the Court reasoned that the existence of the prior, ultimately unsuccessful version of the bill with controversial retroactivity language indicated that the new version of the bill - lacking exactly that language – was probably the result of a decision not to include such language. *See Landgraf*, 511 U.S. at 256; *Russello v. United States*, 464 U.S. 16, 23-24 (1983).

B. Section 1005(e)(2) by Its Terms Does Not Apply to These Petitioners and Cannot Substitute for the Clear Statement Required to Deprive the Courts of Jurisdiction over Pending Habeas Claims.

Section 1005(e)(2)(A) of the DTA confers jurisdiction on this Court to determine the validity of final CSRT decisions that an alien is properly detained as an "enemy combatant," subject to the limitations in subsections (B), (C), and (D). The limitation in subsection (B) is that the CSRT to be reviewed must have been "conducted, pursuant to applicable procedures specified by the Secretary of Defense." Similarly, the limitation in subsection (C) is that the scope of judicial review is restricted to consideration of whether the CSRT's determination "was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals," and "whether the use of such standards and procedures to make the determination is consistent with [applicable provisions of] the Constitution and laws of the United States." The DTA directs the Secretary of Defense to submit standards and procedures for the CSRTs to Congress within 180 days of enactment, and it prescribes three safeguards that did not exist in the CSRTs to which petitioners were subjected, including the requirement that the CSRTs assess whether evidence against the detainee was obtained through coercion. The Secretary has not yet submitted standards and procedures meeting these statutory criteria to Congress and no CSRTs have been conducted pursuant to them. Therefore, section 1005(e)(2) does not apply to petitioners.

Nevertheless, although none of the petitioners challenged any CSRT decisions in their petitions – indeed, the CSRT decisions were filed by the government as "factual returns" to those petitions – the government argues that section 1005(e)(2) provides the sole means by which petitioners may seek judicial relief from their detentions and that, independent of section 1005(e)(1)'s habeas-stripping provision, section 1005(e)(2) precludes the exercise of habeas

jurisdiction over petitioners' claims. Gov't Br. at 21-28. The two premises of this argument are that section 1005(e)(2) does apply to petitioners and that this section is an "exclusive-review scheme" which "precludes the exercise of jurisdiction under more general grants of jurisdiction, including habeas corpus." *Id.* at 21-22.

Neither premises has merit. First, the plain words of subsections (B) and (C) establish that section 1005(e)(2) does not apply to petitioners. The government writes these words out of the DTA, and it has no legislative license to do so. Moreover, the effect of the government's rewrite of the statute is to insulate from judicial review determinations by the CSRTs to which petitioners were subject that were based on evidence obtained through torture. That is contrary to one of the important purposes of the DTA. Second, the Supreme Court held in *St. Cyr* that a review provision such as section 1005(e)(2), standing alone, cannot eliminate habeas jurisdiction absent a clear congressional statement to that effect. There is no such statement in section 1005(e)(2). Therefore, the government's argument fails.

1. Section 1005(e)(2) Does Not Apply to Petitioners.

The plain words of subsections 1005(e)(2)(B)(ii) and 1005(e)(2)(C) – limiting judicial review of final CSRT decisions to CSRTs conducted pursuant to standards and procedures the Secretary of Defense is required to but has not yet issued – establish that such review is not available to petitioners. These petitioners were subjected to CSRTs that were conducted pursuant to the Deputy Secretary of Defense's Memorandum of July 7, 2004, not the forthcoming standards and procedures to be issued by the Secretary. Consequently, section 1005(e)(2) does not apply to petitioners.

The government makes three arguments against this: **First**, it contends that limiting judicial review under section 1005(e)(2) to final decisions of CSRTs conducted pursuant to the

procedures the Secretary will issue in the future is "inconsistent" with section 1005(h)(2) of the DTA. Gov't Br. at 24. The government quotes that section to say that section 1005(e)(2) applies to "'any claim * * * that is pending on or after the date of the enactment of this Act.'" *Id.* That would encompass, says the government, not only "future challenges to future CSRT decisions" but also "present challenges to past CSRT decisions 'pending on' the date of enactment." *Id.*

However, the government has used ellipses to conceal ten words that refute its contention. The full text of section 1005(h)(2) is: "REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS. – Paragraphs (2) and (3) of subsection (e) shall apply *with respect to any claim whose review is governed by one of such paragraphs and* that is pending on or after the date of the enactment of the Act (emphasis added)." Thus, section 1005(h)(2) makes clear that judicial review of final CSRT decisions is available with respect to any claim that is "pending on or after the date of the enactment of this Act" ***and*** whose review "is governed by" section 1005(e)(2). In accordance with the limitation in subsections (B) and (C), the only CSRT decisions "governed by" section 1005(e)(2) are those conducted pursuant to the standards and procedures the Secretary is required to submit, but has not yet submitted, to Congress. Therefore, limiting judicial review under section 1005(e)(2) to final decisions of CSRTs conducted pursuant to those forthcoming standards and procedures is entirely consistent with section 1005(h)(2).[25]

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[25] The government argues that Petitioners' submission on this point deprives the "pending on" language in section 1005(h)(2) "of any meaningful effect." Gov't Br. at 24. As an initial matter, Petitioners' submission, unlike the government's, is true to the text. Beyond that, however, the "pending on" language in section 1005(h)(2) covers not only judicial review of designated CSRTs decisions, as authorized by section 1005(e)(2), but also judicial review of designated Military Commission decisions, as authorized by section 1005(e)(3). There were Military Commission proceedings pending when the Detainee Act was enacted, and the "pending on" language in section 1005(h)(2) has

Second, the government argues that, because the past CSRTs were conducted pursuant to the Deputy Secretary's Memorandum and the Secretary made a general delegation of authority to the Deputy Secretary, those CSRTs were conducted in accordance with the "standards and procedures" referred to in subsections 1005(e)(2)(B)(ii) and 1005(e)(2)(C). Gov't Br. at 25-26. Consequently, the government maintains that petitioners may obtain judicial review of their past CSRTs decisions under section 1005(e)(2). *Id.*

However, by this argument the government effectively writes the limitations in subsections (B) and (C) out of section 1005(e)(2). Had Congress not enacted those subsections, judicial review would have been available under subsection (A) "to determine the validity of *any* final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant" (emphasis added). The word "any" would have embraced past as well as future CSRT decisions. However, Congress expressly made subsection (A) "[s]ubject to" subsections (B) and (C). Those subsections have meaning only if they limit judicial review to final decisions of CSRTs conducted pursuant to the standards and procedures the Secretary will issue in the future. The government's argument impermissibly renders subsections (B) and (C) meaningless and superfluous. *See Beck v. Prupis*, 529 U.S. 494, 506 (2000).

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meaning with respect to designated military orders issued in those proceedings. Furthermore, Congress, unable to predict the exact date the Detainee Act would be passed by both Houses and signed by the President, rationally could have contemplated that the Secretary of Defense would have issued standards and procedures for CSRTs in accordance with the Act, and that some final decisions would have been rendered in CSRTs conducted pursuant to such standards and procedures, between the time it drafted the Act and the time it became effective after enactment. This is especially so given that it took the Deputy Secretary only *nine days* after the *Rasul* decision by the Supreme Court to issue his Memorandum for the initial CSRTs, and the Defense Department took only *two weeks* to open 150 CSRT proceedings and decide 21 of them. The "pending on" language in section 1005(h)(2) would have applied to final decisions in CSRTs conducted pursuant to such standards and procedures.

In addition, the government's argument eviscerates one of the principal purposes of the DTA. Senator Graham, who introduced the legislation that became the DTA, emphasized that it was intended to prohibit reliance on evidence obtained through coercion. *See* 151 *Cong. Rec.* S12, 655 (daily ed. Nov. 10, 2005) ("My amendment prohibits the use of undue coerced statements to detain somebody as an enemy combatant"). The court below held that reliance by past CSRTs on evidence obtained through torture was one of their cardinal flaws. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d. 443, 472-74 (D.D.C. 2005). Section 1005(b)(1) provides that the procedures the Secretary must submit to Congress shall ensure that the CSRTs assess whether any statement derived from or relating to the detainee "was obtained as a result of coercion" and has probative value. But section 1005(b)(2) makes this provision applicable only "with respect to any proceeding beginning on or after the date of the enactment of the Act." Consequently, under the government's argument, the judicial review that petitioners could obtain of past CSRTs could not examine whether the detention was based on evidence obtained through torture. Moreover, under the government's argument that section 1005(e)(2) precludes petitioners' habeas claims, petitioners cannot obtain ***any*** review of reliance by their past CSRTs on evidence obtained through torture.

The government's construction of section 1005(e)(2) is manifestly contrary to the language and purpose of the DTA. The interlocking provisions of the DTA make the most sense if the DTA is viewed, in part, as a congressional response to the alleged use of torture by the military at Guantanamo. *See* §§ 1002, 1003 (the "McCain Amendment") (prohibiting interrogation not authorized by the U.S. Army Field Manual and prohibiting "cruel, inhuman, and degrading treatment or punishment" of detainees). It is perfectly logical to assume that, with respect to the past, Congress left undisturbed petitioners' right to obtain habeas review of CSRT

reliance on evidence obtained through coercion by making the habeas-stripping provision of section 1005(e)(1) prospective only, while with respect to the future, Congress provided for judicial review of such reliance in section 1005(e)(2). In contrast, it is neither logical nor supportable to assume that Congress intended to immunize from judicial review past CSRT reliance on evidence obtained through coercion.

Third, the government characterizes the safeguards Congress mandated for inclusion in future CSRT procedures as requiring "only small adjustments" to past CSRT procedures to which petitioners were subject. Gov't Br. at 26. The government says it is "absurd" to believe Congress would have "exempted" from judicial review under section 1005(e)(2) final decisions of past CSRTs that were conducted without these "small adjustments." *Id.*

The safeguards Congress mandated for inclusion in future CSRT standards and procedures the Secretary must submit to Congress are anything but "small." First, Congress mandated in section 1005(a)(2) that the official of the Defense Department who has "final review authority" with respect to CSRT decisions "shall be a civilian officer" whose appointment is made by the President, by and with the advice and consent of the Senate. The government concedes that, under past CSRT procedures, the official with this final review authority was a "military officer." Gov't Br. at 27. There is all the difference in the world between final review authority of a military CSRT decision by a *military* official, who has a natural affiliation with and likely bias in favor of the military, and final review authority of a military CSRT decision by a *civilian* official, who holds office only with the approval of a co-equal branch of the government.

Second, Congress mandated in section 1005(a)(3) that the CSRT standards and procedures must provide for "periodic review of any new evidence that may become available

relating to the enemy combatant status of a detainee." The government concedes there is no equivalent provision in past CSRT procedures, but claims that "[e]xisting ARB procedures afford analogous review." Gov't Br. at 27. That claim is preposterous. As the military's Administrative Review Implementation Directive provides,[26] the ARB process has nothing to do with the "enemy combatant status of a detainee." Rather, its purpose relates only to whether a detainee previously determined to be an "enemy combatant" continues to pose a threat to the United States and its allies or has intelligence value.[27] In addition, ARB determinations, unlike past and future CSRT status determinations, need not be made in accordance with the "preponderance of the evidence" standard, but on whatever basis the ARB panel deems appropriate.[28] Furthermore, section 1005(a)(3) requires that standards and procedures for future CSRTs (not the procedures for some collateral proceeding such as the ARB) provide for periodic review of any new evidence relating to a detainee's "enemy combatant" status. Thus, the absence of any provision in past CSRT procedures for periodic review of new evidence is a serious flaw.

Finally and most significantly, Congress mandated in section 1005(b) that the standards and procedures for future CSRTs must "ensure" that the CSRTs, in making their status determinations, "shall, to the extent practicable, assess – (A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and (B) the probative value (if any) of any such statement." As noted above, this is a vital provision of the DTA. The government concedes that, although the past CSRTs purportedly considered the "reliability" of

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26 *Available at* http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf.

27 *Id.*

28 *Id.*

the evidence against detainees, they were not required to assess whether it was obtained as a result of coercion. Gov't Br. at 27. The court below concluded that one of the serious defects in past CSRT procedures was that the CSRTs did not properly consider, and were not required to consider, that evidence against petitioners was obtained as a result of torture. 355 F. Supp. 2d at 472-74. The absence of a provision compelling past CSRTs to assess whether evidence relied upon for status determinations was obtained through coercion is another critical flaw.

Accordingly, it is not "absurd" to apply section 1005(e)(2) *as it is written*, and to limit judicial review to CSRTs conducted pursuant to procedures that will contain the mandated safeguards absent from the CSRTs already rendered with respect to petitioners. By its terms, section 1005(e)(2) does not apply to petitioners.

2. Even were it applicable to petitioners, section 1005(e)(2) cannot substitute for the clear statement required to preclude petitioners' habeas claims.

Even if the judicial review provision in section 1005(e)(2) applies to petitioners, the government's argument (Gov't Br. at 22-23) that this section independently precludes the exercise of habeas jurisdiction over petitioners' claims because it is an "exclusive-review scheme" that supersedes more general grants of jurisdiction, including habeas corpus, is groundless. The Supreme Court rejected a virtually identical argument in *St. Cyr*, a decision the government does not even mention in this section of its brief.

The Supreme Court reiterated in *St. Cyr* "the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." 533 U.S. at 298. Whether or not such a clear statement of congressional intent is required under principles of administrative law for a specific grant of jurisdiction to supersede a more general grant of jurisdiction, *St. Cyr* ruled that

it *is* definitely required when the second statute confers habeas jurisdiction. *Id.*[29] "Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal." *Id.* at 299. There is no such specific and unambiguous statutory directive here, and the provisions of the statute dealing with "judicial review" do not operate independently to revoke "habeas" jurisdiction.

III. THE PLAIN MEANING RULE IS REINFORCED BY OTHER WELL ESTABLISHED PRESUMPTIONS AND CANONS OF STATUTORY CONSTRUCTION.

A. Construing the Statute to Revoke Petitioners' Right to Habeas Corpus Would Violate the Strong Presumption that Legislation Affecting Substantive Rights Does Not Apply Retroactively.

As the Supreme Court has observed, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265. "Requiring clear intent" to overcome the "default rule of prospectivity" assures that "Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the

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[29] The government cites *United States v. Erika, Inc.*, 456 U.S. 201, 205-08 (1982) for the proposition that the specific Medicare review scheme precludes exercise of more general Tucker Act jurisdiction. Gov't Br. at 23. But the government fails to mention that four years later, in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-78 (1986), the Supreme Court rejected the precise argument made here by the government. It ruled that, notwithstanding *Erika's* holding, the specific Medicare scheme did *not* preclude exercise of the more general federal question jurisdiction under 28 U.S.C. § 1331 over challenges to the validity of Medicare regulations. The government also cites two cases, *Laing v. Ashcroft*, 370 F.3d 994, 997-1001 (9th Cir. 2004) and *Lopez v. Heinauer*, 332 F.3d 507 (8th Cir. 2003), to support its contention that a specific review provision supersedes a general grant of habeas jurisdiction. Gov't Br. at 22-23. But in neither of those cases did the courts hold that habeas jurisdiction was categorically unavailable. Instead, they held that habeas was unavailable because the petitioners had failed to exhaust their administrative remedies.

countervailing benefits." *Id.* at 272-73. "Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations." *Id.* at 272. "[T]here exists a judicial presumption, of great antiquity, that a legislative enactment affecting substantive rights does not apply retroactively absent *clear statement* to the contrary." *Id.* at 286 (Scalia, J. concurring). "A statute may not be applied retroactively . . . absent a clear indication from Congress that it intended such a result . . . [and] [t]he standard for finding such an unambiguous direction is a demanding one." *St. Cyr*, 533 U.S. at 316.

The government argues, however, that this normal presumption against retroactivity is displaced here because section 1005(e)(1) is a "jurisdictional" statute, and such statutes generally apply to pending cases even absent specific legislative authorization. *See* Gov't Br. at 29. That contention has been squarely rejected by both the Supreme Court and this Court.[30] The issue is not whether the newly passed legislation speaks in terms of jurisdiction; rather, the court must look behind the legislation to determine if it affects substantive rights.

In *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), the Supreme Court explained that "a statute, even though phrased in 'jurisdictional' terms, is as much subject to our presumption against retroactivity as any other" when it governs not only *where* a suit may be brought but also *whether* it may be brought at all, because such a statute "speaks not just to the power of a particular court but to the substantive rights of the parties as well." *Id.; accord, Austria v. Altmann*, 541 U.S. 677, 695 n.15 (2004) ("[w]hen a 'jurisdictional'

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[30] As the Supreme Court has noted, "[s]uch categorical arguments" that certain statute always operate prospectively "are not particularly helpful" to the analysis. *St. Cyr*, 533 U.S. at 324.

limitation adheres to the cause of action . . . when it applies by its terms regardless of where the claim is brought – the limitation is essentially substantive").

In the words of this Court: "[T]he Supreme Court has clearly established the principle that in determining retroactivity, jurisdictional statutes are to be evaluated in the same manner as any other statute. Thus, in order to determine whether a statute applies to a case that was filed prior to passage of the statute, courts must determine whether the statute is 'procedural' in nature, or whether it affects 'substantive entitlement to relief.' . . . Does the statute speak 'just to the power of a particular court' or does it speak to 'the substantive rights of the parties as well'?" *LaFontant v. INS*, 135 F.3d 158, 163 (1998).

Section 1005(e)(1) prohibits habeas claims by Guantanamo detainees "regardless of where the claim is brought." *Republic of Austria,* 541 U.S. at 695 n.15. It thus speaks to the "substantive rights" of the petitioners, and is as much subject to the presumption against retroactivity as any other statute. *See In Re Minarik,* 166 F.3d 591, 601 (3d Cir. 1999) ("If a habeas petitioner had a right to initiate federal proceedings to secure release from confinement prior to [the statute], and had no such rights thereafter, then [the statute] has altered substantive rights and thereby attached new legal consequences to pre-enactment conduct"); *see also United States v. Ortiz,* 136 F.3d 161, 166 (D.C. Cir. 1998). Therefore, because the DTA contains no express language applying section 1005(e)(1) to habeas petitions filed before the Act was enacted, it cannot be applied to those petitions.

The government cites a number of cases to support its contention that jurisdictional statutes apply immediately to pending cases. *See* Gov't Br. at 30-32. Most were decided long before *Landgraf* and *Hughes*. None affected the substantive rights of the parties; in all the cases the plaintiff could still bring the underlying cause of action in another forum.

For example, the government cites to the Ninth Circuit's recent decision in *Santos v. Guam*, 436 F.3d 1051, 1053 (9th Cir. 2006). The court there found that Congress had simply "amended the distribution of appellate jurisdiction" by repealing jurisdiction granted to the Ninth Circuit to review final decisions of Guam's highest court. The court characterized the amendment as a "jurisdiction-withdrawing statute...that does not 'alter[] the nature or validity of' rights or liabilities but 'simply reduce[s] the number of tribunals authorized to hear and determine such rights and liabilities.'" *Id.*

The government relies heavily on this Court's decision in *LaFontant*. *See* Gov't Br. at 34. That reliance is misplaced. The statute at issue in that case, the Antiterrorism and Effective Death Penalty Act ("AEDPA"), divested the circuit courts of jurisdiction to review certain deportation orders after the underlying cases had been decided in the immigration courts. Deportation proceedings had been instituted against the plaintiff based on his multiple criminal convictions. The Immigration Judge issued a decision finding the plaintiff to be deportable after a hearing at which the plaintiff was represented by counsel and given the full opportunity to contest deportation and to present evidence to support his claims. Following that decision, the plaintiff appealed to the Board of Immigration Appeals, where plaintiff was again given the opportunity to present his case. After weighing the factors for and against, the Board concluded that the plaintiff was not entitled to relief. On April 24, 1996, while the plaintiff's appeal was still pending before the Board, section 440 of the AEDPA was enacted divesting the circuit courts of authority to review final orders of deportation issued by the Board of Immigration Appeals. On August 30, four months *after* the statute was passed, the plaintiff filed for review with this Court.

First, unlike this case, *LaFontant* did not involve the question of the application of a statute to cases filed and pending before its enactment. As the INS pointed out, the plaintiff's petition for review in court was not filed until four months *after* the act was enacted. *LaFontant*, 135 F.3d at 161. No question of retroactive application to pending court cases was presented.

Second, although the act took away the plaintiff's right to appeal the immigration court's decision to the circuit court, the Court found that it was "not impermissibly retroactive because it does not attach new *substantive* legal consequences to those proceedings. It does not create new legal liabilities, deprive a party of a legal defense he would otherwise have had, or otherwise affect the substantive rights of the parties . . .". *Id.* at 165. The plaintiff still had the right to fully contest his deportability in a hearing before the Immigration Judge with full procedural protections, and to appeal that decision to the Board of Immigration Appeals. The proceedings before those immigration courts cannot even arguably be compared to the CSRT proceedings to which these petitioners were subjected, where they were not represented by counsel, not allowed to see or rebut much of the evidence against them, and effectively prevented from presenting evidence on their own behalf. *See infra* at 37-40.

Third, and critically, *LaFontant* was not a habeas proceeding. As the Supreme Court subsequently clarified in *St. Cyr*, even if the AEDPA revoked a plaintiff's right to seek "judicial review" of deportation orders in the circuit courts, it definitely did not take away the fundamental right to habeas. No matter how one might characterize the right to appeal decisions from the immigration courts, the Court made clear that the right to habeas is a substantive right preserved in the Constitution. Indeed, it is the most fundamental of substantive rights, providing the

essential protection developed under the common law against arbitrary executive detention.[31] In the absence of a clear legislative statement, a petitioner cannot be prevented from filing a habeas petition.

In summary, the decision in *LaFontant*, particularly in light of the Supreme Court's subsequent decision in *St. Cyr*, provides no support for the government's argument. Applying the DTA to revoke jurisdiction over pending habeas cases would clearly have retroactive effect and deprive petitioners of substantive rights. Absent a clear statement in the statute, this Court must presume that Congress did not intend that result.

B. Congress Must Act Explicitly to Except Any Cases from Habeas Jurisdiction.

Beyond the presumption against retroactivity, there is a "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *St. Cyr*, 533 U.S. at 298. The Supreme Court has emphasized that the protections of the Great Writ of Habeas Corpus "have been strongest" in the context of judicial review of the legality of executive detention. *Id.* at 301. It is precisely in that context that the issue of the applicability of the jurisdiction-stripping provisions of the DTA to petitioner's claims arises and must be decided. Petitioners' pending habeas petitions are not collateral challenges to prior determinations; rather, they are basic challenges to the legality of the executive detentions imposed upon them. Consequently, to the extent the Act purports to strip the courts of jurisdiction over their pending petitions,

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[31] The Court has pointed out that habeas is a "a writ antecedent to statute, and throwing its root deep into the genius of our common law. . . It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I." *Williams v. Kaiser*, 323 U.S. 471, 484 n.2 (1945) (quoting *Secretary of State For Home Affairs v. O'Brien*, A.C. 603, 609 (1923)).

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

The government argues that section 1005(e)(1) does plainly revoke habeas jurisdiction. Gov't Br. at 28-29. But neither that nor any other section of the Act plainly revokes habeas jurisdiction over pending cases. Congress must act explicitly to repeal habeas jurisdiction over any cases. As the Supreme Court has stated, because of the fundamental nature of habeas within our constitutional system, courts may not read a statute repealing habeas jurisdiction "to have any further effect than that plainly apparent from its terms." *Ex parte Yerger*, 75 U.S. 85, 104 (1868). In *Yerger*, the Court specifically rejected a reading that would have eliminated appellate review of habeas determinations, stating: "We are not at liberty to except from [habeas jurisdiction] any cases not plainly excepted by law...". *Id.* at 102.

Because Congress did not explicitly repeal habeas jurisdiction in pending cases, the courts retain jurisdiction over those cases.

C. Construing the Act to Revoke Petitioners' Right to Habeas Corpus Would Violate the Suspension Clause of the Constitution.

Another important canon of statutory construction is directly applicable. If at all possible, the Court must interpret legislation to avoid serious constitutional questions.[32] Construing the DTA to revoke the right of habeas corpus to which the Supreme Court held these petitioners are entitled would violate the Suspension Clause. The Court must construe the statute to avoid that result.

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[32] *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[T]his cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in *Murray v. The Charming Betsy*, (6 U.S. (2 Cranch) 64, 118 (1804), and has for so long been applied by this Court that it is beyond debate.").

1. Denying These Petitioners Access to the Writ Would Be a Clear Violation of the Suspension Clause.

Article I, § 9, cl. 2 of the Constitution provides: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." The Supreme Court in *Rasul* confirmed that these petitioners have the right to habeas corpus. Notably, in addition to finding that they have that right under the statute, *Rasul* confirmed that they were entitled to the writ under the common law. The Court pointed out that "[h]abeas corpus is ... a writ antecedent to statute," and that "the historical reach of the writ" at common law extended to such persons detained not only "within sovereign territory of the realm," but in "all other dominions under the sovereign's control." *Rasul*, 542 U.S. at 473, 481-82.

To the extent the DTA now purports to deny these petitioners access to the writ, it violates the plain terms of the Suspension Clause, which is an explicit limit on the power of Congress. Congress may suspend the writ only in cases of "Rebellion" or "Invasion." There is no rebellion or invasion, and no one in Congress suggested there was. Congress therefore cannot suspend the writ without violating the Constitution.

Nowhere in its brief does the government dispute that analysis. Rather, it argues that even if there is a facial violation of the Suspension Clause, the Court need pay no attention to it because "petitioners have no constitutional rights under the Suspension Clause." Gov't Br. at 45. But that argument misunderstands the nature of both the Suspension Clause and the question of statutory interpretation now before the Court.

The government has always argued that petitioners, as aliens outside sovereign U.S. territory, have no Fifth Amendment rights. Having made that argument about the Fifth

Amendment, the government now extends it to the Suspension Clause. But that extension does not work. Even were the government correct that petitioners have no Fifth Amendment rights (and it is most definitely not correct on that point),[33] that conclusion would have nothing to do with whether the Suspension Clause is violated. The Suspension Clause is a direct, plain and explicit limit on the power of Congress. That is why it was placed in Article I of the Constitution. Unlike the Fifth Amendment, it does not give particular individuals a "right." It provides that Congress may suspend the writ under certain conditions, but not others. Unless those conditions exist – and they clearly do not – Congress may not suspend the writ. That is the beginning and end of the inquiry. Congress can no more suspend the writ in the absence of "Rebellion" or "Invasion" consistently with Article I, Section 9, Clause 2 of the Constitution than it can tax exports consistently with Article I, Section 9, Clause 4. It could not impose an export tax on foreign nationals abroad anymore than it could impose one on U.S. citizens at home. It is simply without power to do so.

The question before the Court is not whether these individuals have the right to habeas corpus; the Supreme Court has already answered that question. The question is whether the interpretation of the DTA advanced by one of the parties would result in a violation of the Constitution, or at least raise serious questions of such a violation. The government's argument – in effect, that there may be a violation but these petitioners cannot raise it – is simply irrelevant to that question. There is no doubt that revoking the "Privilege of the Writ of Habeas Corpus" for these petitioners in the absence of a "Rebellion" or "Invasion" would be inconsistent with the plain terms of Suspension Clause. Regardless whether the petitioners have individual rights to

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[33] As pointed out in the briefs on the merits, petitioners are entitled to fundamental protections under the Fifth Amendment. *See* Brief for the Guantanamo Detainees at 22.

assert, this Court should not interpret the statute in a way that places Congress in violation of the structural limitations on its authority under the Constitution. Congress could not have intended that result, and such an interpretation should be avoided if at all possible.

Additionally, the government's argument that petitioners have no rights to assert is clearly wrong. It simply ignores the Supreme Court's explicit findings in *Rasul*.

First, relying on *Eisentrager*, the government argues that petitioners have no constitutional right to habeas. But *Rasul* made clear that petitioners in this case are in a fundamentally different position from those in *Eisentrager*. The Court pointed out that the *Rasul* petitioners "differ from the *Eisentrager* detainees in important respects" as to the facts that were "critical" to the *Eisentrager* petitioners' constitutional claims. *Rasul*, 542 U.S. at 476. Unlike the petitioners in *Eisentrager*, the petitioners here are "imprisoned in territory over which the United States exercises exclusive jurisdiction and control." *Id.* And unlike the *Eisentrager* petitioners, the petitioners here "are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against this country." *Id.* In other words, the petitioners here are imprisoned in a territory under exclusive U.S. jurisdiction and control, and they are not alien enemies but rather alien friends who seek the writ precisely to challenge whether they are enemies. *Eisentrager* never dealt with that situation. But *Rasul* did; it found that these petitioners have the right to challenge the lawfulness of their detentions through the writ of habeas corpus.

Second, *Rasul* found that these petitioners are entitled to the writ not only under statute, but also under the common law. The Court stated:

> Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign

> territory of the realm, as well as the claims of persons detained in the so-called 'exempt jurisdictions,' where ordinary writs did not run, and all other dominions under the sovereign's control. As Lord Mansfield wrote in 1759, even if a territory was 'no part of the realm,' there was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown.'

Id. at 481-82. The Court thus found that the common law of writ of habeas corpus, as of 1759, applied to aliens detained outside the realm but in territories under the subjection of the Crown. There is no other way to read that passage (which the government does not even mention) than to say that, before the Constitution was adopted and at the time of the framing, these petitioners would have been entitled to petition for the writ.[34]

The government concedes (Gov't Br. at 47), as it must, that, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301.[35] And, as *Rasul* found, in 1789, these petitioners unquestionably would have been entitled to petition for the writ. Therefore, petitioners have standing to invoke the Suspension Clause because they are within the "zone of interests" the Clause is designed to protect and the threatened deprivation of their right to habeas would cause them "injury in fact" that can be redressed by this Court. *E.g.*, *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004). Petitioners' entitlement to the writ cannot be revoked absent a valid suspension under that Clause.

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[34] *See also* Supplemental Brief *Amici Curiae* of British and American Habeas Scholars Listed Herein In Support of Petitioners Addressing Section 1005 of the Detainee Treatment Act of 2005 at 3-6, 14-16.

[35] *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) (where the Court expressed the view that the Suspension Clause went beyond that and "refers to the writ as it exists today, rather than as it existed in 1789").

2. At Least for Petitioners in These Pending Cases, the DTA Provides No Adequate Substitute for Habeas Corpus.

The substitution of a collateral remedy for habeas comports with the Suspension Clause only if it is "neither inadequate nor ineffective to test the legality of a person's detention." *Swain v. Pressley*, 430 U.S. 372, 381 (1977). The DTA provides neither an adequate nor an effective alternative to resolve and remedy these petitioners' pending habeas claims.

In the first place, there is at least substantial doubt whether these petitioners may obtain review under section 1005(e)(2). That section, by its terms, does not apply to their claims. See, *supra at* 16-22. Moreover, review may be obtained only of designated "final" decisions of the CSRTs. The government, by postponing or refusing to make "final" CSRT determinations under the Act, could circumvent the judicial review provisions indefinitely and deny petitioners even the very limited court review provided under the Act.

Most importantly, even if petitioners could obtain the limited review provided under section 1005(e)(2), that review would be essentially meaningless. The limited appellate review permitted under that section, on top of the clearly inadequate CSRT procedures to which these petitioners were subjected, would deprive petitioners of any opportunity to test the legitimacy of the factual basis for their detentions, including the opportunity to determine whether any of the accusations against them were obtained through torture. Petitioners clearly would have that opportunity in a habeas proceeding, under both the common law and the statute. If applied to them, the DTA would deprive them of that critical right.[36]

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[36] Petitioners take no position as to whether the limited appellate review provided under section 1005(e)(2) might be an adequate substitute for habeas following new CSRT procedures adopted by the Department under the Act and approved by Congress. The new procedures mandated by the Act have not yet been announced. It is unknown at this point what procedures will be adopted and also whether they will work in tandem with

Indeed, although section 1005(b)(2) of the Act requires future CSRTs to consider whether any statements relating to a detainee were obtained through coercion, it applies that requirement only to proceedings "beginning on or after the date of the enactment of the Act." The prior CSRTs to which these petitioners were subjected, and which would be reviewed by this Court, are exempted from that requirement.

a. Petitioners' Claims Do Not Depend on the Fifth Amendment.

The government's argument that review under section 1005(e) provides an adequate substitute for habeas is based on the same fundamental misunderstanding of habeas that the government has displayed throughout the case. It has consistently argued that the only question before the Court is whether petitioners have Fifth Amendment rights and that, unless they can demonstrate that they are entitled to those rights, they cannot obtain habeas relief.[37] Based on that premise, the government now argues that review under section 1005(e)(2) provides an adequate substitute for habeas because it allows petitioners to argue that they have constitutional rights and that those rights have been violated. *See* Gov't Br. at 19, 50.

But the government's argument itself proves why review under section 1005(e)(2) would be inadequate; while it might give petitioners the right to argue that they have Fifth Amendment

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existing Army Regulation 190-8, requiring field hearings close in time and place to capture. It could well be that the Secretary will adopt robust procedures for future CSRTs which, in combination with 190-8 hearings, could provide detainees with an adequate opportunity to test the factual bases for their detentions, and that those hearings, in combination with the limited appellate review provided under Section 1005(e)(2), could provide an adequate substitute for habeas. Whether they will provide an adequate substitute is unknown at this point. What is absolutely clear now, however, is that the limited judicial review provided under the Act of the inadequate CSRT procedures to which these petitioners were subjected would not provide an adequate substitute for habeas.

37 *See, e.g.* Reply/Cross-Appellee Brief for the United States, et al. at 3; Supplemental Brief for the United States, et al. at 4.

rights, it would deprive them of the ability to challenge what is really at issue in these cases – the legitimacy of the government's factual basis for detaining them. Whether or not petitioners have Fifth Amendment rights, they clearly have the right to habeas corpus, which means they have the right to challenge the factual bases for their detentions. The basic common law writ was preserved in the Suspension Clause and ratified by the States more than two years before the Fifth Amendment was adopted. Even if petitioners had no Fifth Amendment rights, the question would still remain – as it would had they filed their habeas petitions in 1789 – whether they are detained under lawful authority of the United States.

The question of lawful authority, in turn, is both a legal question (what is the scope of the legal authority to detain?) and a factual question (do these individuals fit within it?). There are, to be sure, legal questions regarding the scope of the government's authority to detain. Petitioners' essential claim, however, has always been factual: assuming that the government has authority to detain "enemy combatants," no matter how one defines that term, these petitioners do not fit within it. As they have asserted from the outset, they are wholly innocent of wrongdoing and detained by mistake. Although the government may have lawful authority to detain enemy combatants, it does not have the authority to detain innocent shepherds, teachers, tourists or other persons who had nothing to do with the conflict.

What petitioners have sought from the outset is a fair hearing to challenge the government's factual basis for detaining them. That is the fundamental right guaranteed by the Great Writ of Habeas Corpus. The Supreme Court confirmed that petitioners have that right, and it remanded for the district court "to consider in the first instance the merits of petitioners' claims" that they are "wholly innocent of wrongdoing." *Rasul*, 542 U.S. at 485.

b. Habeas Guarantees Petitioners a Searching Judicial Inquiry into the Factual Bases for Their Detentions.

The Supplemental Brief *Amici Curiae* of British and American Habeas details the factual inquiry required under habeas at the common law. As it points out:

> "The very essence of habeas – its substance – was a searching inquiry by neutral judges into the factual and legal validity of the proffered justification for the detention. In cases where an individual was detained without trial, especially in cases of executive detention, the habeas court itself supplied common law process by undertaking a factual inquiry into the basis of detention in the first instance. And, to the extent that the lawfulness of the detention turned upon disputed issues of fact, the courts conducted adversary hearings in which the parties presented evidence for courtroom examination. It was these broad equitable features, not the technicalities of pleading, that made the Great Writ of Liberty great."[38]

Chief Justice Marshall's opinion in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), provides an example of the searching factual inquiry required in a common law habeas proceeding challenging executive detention. Petitioners in that case were detained on charges of treason. After holding that they had the right to petition for the writ of habeas corpus, the Court defined the question before it not as whether any constitutional violation had occurred, but whether there was "sufficient evidence of his levying war against the United States to justify his commitment on the charge of treason." *Id.* at 135. The Court sat for five days and "fully examined and attentively considered" on an item-by-item basis "the testimony on which [the petitioners] were committed." *Id.* at 125. Finding the government's factual proffer insufficient, the Court ordered the prisoners discharged. *Id.* at 136-37.

At common law, the executive could always seek to prevent the granting of the writ by submitting a return explaining the legal and factual basis for the detention. *See, e.g.*, Habeas

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[38] Supplemental Brief *Amici Curiae* of British and American Habeas Scholars ("Br. of Habeas Scholars") Listed Herein In Support of Petitioners Addressing Section 1005 of the Detainee Treatment Act of 2005 at 12.

Corpus Act of 1640 § VI; 1 William Blackstone Commentaries 132-33 (1765). A court could not simply take the government at its word, however, but engaged in a searching review of the factual and legal validity of the return. *See, e.g., Goldswain's Case*, 96 Eng. Rep. 711 (1778); *Rex v. Turlington*, 97 Eng. Rep. 741 (1761); *Bushell's Case*, 124 Eng. Rep. 1006 (1670); *Hodges v. Humkin*, 80 Eng. Rep. 1015 (1613); *Gardener's Case*, 78 Eng. Rep. 1048 (1600); *see also* Brief of Habeas Scholars at 7-12.[39]

c. The CSRTs to Which These Petitioners Were Subjected Deprived Them of the Rights Guaranteed by Habeas.

Today, more than four years after they were deprived of their liberty and almost two years after the Supreme Court ruled that they had the right to habeas review, petitioners still have not obtained a fair hearing to test the factual bases of their detention. The CSRTs clearly did not provide them with that or anything approaching the fair factual inquiry required under habeas. The CSRT procedures, as discussed, were hurriedly cobbled together and announced by the Deputy Secretary of Defense just nine days after the Supreme Court decision in *Rasul* "solely to improve management within the Department of Defense." J.A. 1309-12. Their purpose was not to make an initial determination – such as the determinations made in the field hearings under Army Regulations 190-8 close to the time and place of capture – whether there was a basis for detaining them and, if so, what their proper status should be. Rather, those questions had already been predetermined without any hearings by the time the CSRTs took place almost three years

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[39] The government's contention that common law habeas entailed only a perfunctory review of the facts and required the court to accept the validity of the government's factual return on its face is simply incorrect. It is inconsistent on its face with the actions of the Supreme Court in *Bollman*. *See also Ford v. Wainwright*, 477 U.S. 399, 416, 423, 429-30 (1986). The government relies on post-conviction habeas cases and on a minority opinion regarding a statute that was not enacted. This contention was never valid in the context of executive detentions. *See* Br. of Habeas Scholars at 9-10.

later. As the memorandum announcing the CSRTs emphasized, each of the detainees had already "been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense." *Id.* The actual question before the CSRTs was whether the detainee could rebut the internal determinations already made by unidentified Department of Defense officials that he should be detained.

Petitioners were given no real opportunity to contest those pre-set determinations. They were not permitted the assistance of lawyers, something they would clearly be entitled to under habeas, and they were not even shown, let alone given the chance to rebut, much of the information that allegedly formed the basis for their detentions. The information was deemed "classified" by the government, and petitioners were not permitted to challenge that designation or given adequate summaries of the information withheld. Yet, there was a presumption in favor of all the government's "evidence" and its prior behind-closed-door determinations. As the court below held, the CSRT procedures to which these petitioners were subjected "deprive[d] the detainees of sufficient notice of the factual bases for their detention and den[ied] them a fair opportunity to challenge their incarceration." *In re Guantanamo Detainees* 355 F. Supp. 2d at 468.

The court also found that those procedures allowed for reliance on statements obtained through torture and coercion. *Id.* at 472. In fact, documents released since the lower court's decision prove exactly that. Recently, a government interrogation log detailing the treatment of detainee Mohammed Al Qahtani was posted on the internet.[40] It reveals in gruesome detail how Mr. Al Qahtani was subjected to humiliating physical and psychological abuse over an extended

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[40] *See* Interrogation Log: Detainee 063, *available at* http://www.time.com/time/2006/log/log.pdf.

period of time. Significantly, according to the government, that abuse resulted in statements by Mr. Al Qahtani implicating not only himself, *but thirty other detainees at Guantanamo as well.*[41] Under the CSRT procedures that were applied, none of those thirty implicated men was allowed to know the identity of his accuser, or to learn that Qahtani had made these accusations against him under coercion. Under those past CSRT procedures, no inquiry was made into whether statements were obtained as a result of coercion. Although the statute makes that a requirement for *future* CSRTs, it locks in place the procedures for the *past* which did not require that inquiry. *See* section 1005(e)(2).

As a result, under the past procedures, detainees had – and will have – no opportunity to test whether the accusations against them were obtained by torture or coercion, an opportunity that would clearly have been available to them in a common law habeas proceeding. At common law, there was a clear prohibition against the use of evidence obtained by torture, "not simply because of its 'inherent unreliability' but also because 'it degraded all those who lent themselves to the practice.'" *A v. Secretary of State*, [2005] UKHL 71, ¶ 11, ¶ 51 (appeal taken from Eng.) ("the common law has regarded torture and its fruits with abhorrence for over 500 years"). At a common law habeas hearing, a petitioner would be notified of the allegations against him and given the opportunity to test how they were made, that is, whether they were obtained through torture or coercion. Under the CSRT procedures to which they were subjected, petitioners were denied that opportunity.

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[41] Press Release No. 592-05, U.S. Department of Defense, Guantanamo Provides Valuable Intelligence Information (June 12, 2005), *available at* http:/www.defenselink.mil/releases/2005/nr20050612-3661.html.

The past CSRTs, must be recognized for what they were – a *post hoc* attempt by the government to avoid the habeas review to which the Supreme Court held in *Rasul* petitioners are entitled. They could not replace the substantive guarantees of habeas to challenge the factual basis for executive detention in the first instance and could never represent more than the government's "return" to the writ. In fact, that is exactly how the government treated them. Petitioners must have the right to controvert that return to effectively challenge the factual bases for their detentions. Whatever weight a habeas court might choose to give the prior CSRTs – and because of their fundamental inadequacy and unfairness, they should be accorded no presumptive weight whatsoever – a habeas court could not accept them as a basis for detention without providing the petitioner an opportunity to rebut, or traverse, the return. Petitioners have never had the opportunity to do so, and the limited judicial review provided under the DTA, if applied to them, would effectively deny them that opportunity forever.

d. Judicial Review Restricted to Determining Whether the Past CSRTs Followed Their Own Inadequate Procedures Does Not Provide an Adequate Substitute for Habeas.

Under section 1005(e)(2), the Court would be limited to determining whether the CSRT panels followed their own rules in confirming the prior Department of Defense determinations that petitioners were enemy combatants. Those, of course, are the same rules that Judge Green found were wholly inadequate to provide a fair hearing to test the sufficiency of the government's evidence. The limited appellate review provided under section 1005(e)(2) might be adequate following a hearing process that was itself sufficient to enable a petitioner fairly to contest the factual accusations against him. It is clearly not adequate where the hearing process itself was so woefully inadequate and denied them that opportunity.

The Supreme Court has noted that "'judicial review' and 'habeas corpus' have historically distinct meanings . . ." *St. Cyr*, 533 at U.S. 311. The distinction is abundantly clear here, where the judicial review standards preclude any factual inquiry and, if applied to petitioners, would effectively lock in place procedures that were themselves wholly inadequate to provide such an inquiry. Applying the limited judicial review procedure in the DTA to these petitioners would effectively deny them the opportunity ever to have a fair hearing to test the factual validity of the government's evidence.[42] It would allow the government to hold them indefinitely, with or without evidence, by effectively denying them a forum to test the evidence against them.

In sum, if section 1005(e)(1) were construed to apply to these pre-Act habeas petitions, it would violate the Suspension Clause. The Court is "obligated to construe the statute to avoid such problems." *St. Cyr*, 533 U.S. at 300. For this important reason alone, the Court should hold that section 1005(e)(1) does not apply to these habeas petitions and does not divest the Court of jurisdiction over the pending appeals.

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[42] For example, section 1005(e)(2) would not allow petitioners to "traverse" the return or to obtain a hearing, as provided by 28 U.S.C. §§ 2243, 2248. *See also Hamdi v. Rumsfeld*, 542 U.S. 507, 537-39 (plurality opinion) & 553 (2004) (concurring and dissenting opinion of Souter, J.) (describing outline of statutory procedures federal courts must follow in evaluating merits of habeas petitions filed under 28 U.S.C. § 2241). It also would not allow them to develop evidence for the court in their defense, or to seek leave to engage in discovery, including discovery aimed at proving that evidence against them was obtained through torture or undue coercion. *See* 28 U.S.C. §§ 2246, 2247; Rules Governing Section 2254 Cases in the United States District Courts, at Rule 1(b) ("[t]he district court may apply any or all of these rules to a habeas corpus petition not covered by Rule 1(a)"), Rules 6-8 (discovery, expanding the record, and evidentiary hearings). *See generally Harris v. Nelson,* 394 U.S. 286 (2001). The rights not authorized by the judicial review provisions are essential to the petitioners' challenges to the lawfulness of their detentions.

The government argues that construing the Act to allow petitioners to continue to litigate their pending habeas claims would be a "nonsensical result" and leave for review under section 1005(e)(2) a "virtually null set of habeas or other actions that Guantanamo detainees might file in the future." Gov't Br. at 12. But petitioners do not suggest such a construction. Rather, petitioners contend that Congress, recognizing the impossibility of curing the pre-Act CSRT proceedings, preserved habeas review only for the Guantanamo detainees who were subject to those deficient proceedings and filed habeas petitions prior to the enactment of the Act, and intended judicial review under section 1005(e)(2) to be available for Guantanamo detainees who are afforded CSRT proceedings conducted under the new procedures mandated by the Act that include specified safeguards. That interpretation not only makes sense; it is required to avoid the conclusion that Congress intended to violate the Suspension Clause and exceed the limits of its constitution authority.

IV. IF THIS COURT CONCLUDES THAT IT LACKS JURISDICTION, THESE CASES SHOULD BE DISMISSED.

Should this Court conclude that it lacks jurisdiction despite the foregoing arguments, it should dismiss the appeals, vacate the district court decision, and remand with instructions to dismiss the petitions for lack of jurisdiction without prejudice to Petitioners' filing a request for review under section 1005(e)(2). The Court should not, however, vacate lower court decisions that were not pending on appeal, such as the Protective Order issued by Judge Green or the order issued by Judge Kollar-Kotelly regarding access to counsel, as these decisions would become final by virtue of the removal of jurisdiction in these cases.

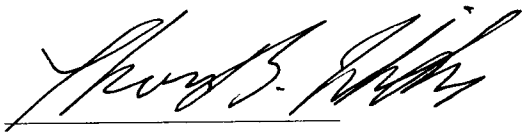
In any event, this court should not convert these petitions into petitions for review under the DTA as the government suggests. The government analogizes this statute to the REAL ID

Act, under which several courts have found conversion of habeas petitions to be appropriate. This analogy does not hold. Whereas in the Real ID Act, Congress explicitly stated that habeas petitions pending before the district courts should be converted to petitions for review and transferred to the circuit courts, here there is simply no such language. Absent such language, the Court has no authority to convert these habeas petitions to petitions for review under the DTA on its own initiative. Even were this Court to conclude otherwise, it should stay any proceedings under section 1005(e)(2) pending disposition of a petition for a writ of certiorari given the nature of the issues involved.

CONCLUSION

For the foregoing reasons, the Court has jurisdiction over these appeals.

Respectfully submitted,



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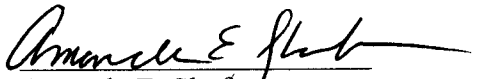
CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE AND CIRCUIT RULE 32(a)

I certify that, in accordance with Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), the foregoing Guantanamo Detainees' Second Supplemental Brief Addressing the Effect of the Detainee Act of 2005 on this Court's Jurisdiction Over the Pending Appeals is proportionally spaced and has a typeface of 11 point font or larger. This brief is 13865 words long (which is within the 14,000 word limit authorized by this Court in its Order of January 27, 2006).



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CERTIFICATE OF SERVICE

I certify that today, March 10, 2006, I served the foregoing Guantanamo Detainees' Second Supplemental Brief Addressing the Effect of the Detainee Act of 2005 on this Court's Jurisdiction Over the Pending Appeals on the government by causing copies to be sent by both first class mail and email to the following counsel of record for the government:

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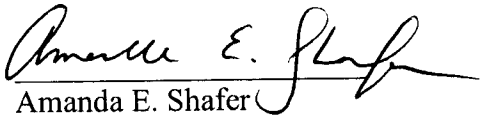

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