No. 05-184

IN THE
Supreme Court of the United States

SALIM AHMED HAMDAN,
Petitioner,
v.

DONALD RUMSFELD, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

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January 31, 2006

INTRODUCTION

This case addresses the lawfulness of the military commissions created by the President to try alien detainees held at Guantanamo Bay, Cuba. On December 30, 2005, the President signed into law the Detainee Treatment Act (DTA), Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739 (2005), which in certain respects restricts the ability of such detainees to seek relief from Article III courts.

The section of the DTA relevant here, § 1005(e)(1), "takes effect on the date of the enactment." § 1005(h)(1). In § 1005(e)(1), Congress eliminated federal jurisdiction to consider "an application for a writ of habeas corpus" or "any other action…relating to any aspect of the detention." In §§ 1005(e)(2) and (3), Congress conferred limited federal court jurisdiction to review "final decisions" of military commissions and Combatant Status Review Tribunals (CSRTs).

With respect to military commissions, those sentenced to a term of imprisonment of ten years or more may appeal as a matter of right; those sentenced to shorter terms may appeal only if the D.C. Circuit exercises its discretion to consider the case. § 1005(e)(3)(B). No judicial review is available under the DTA until the entry of a final decision, which cannot take place until review by a military appeals board and personal review by the President or Secretary of Defense. *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, § 4(c)(8), 66 Fed. Reg. 57833, 57835 (Nov. 13, 2001). If a final decision is not entered, the individual is without any remedy whatsoever.

Assuming a final decision is entered, appellate review is limited to (1) whether commission rulings leading to the final decision were consistent with the standards and procedures specified in DOD Order No. 1, 32 C.F.R. § 9 (Aug. 31, 2005), or its successors and, to the extent applicable, (2) whether "the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States." § 1005(e)(3)(D). Thus, for example, if Hamdan were permitted only to proceed in federal court under the procedures specified by the DTA, no court would have jurisdiction to consider his

principal claims that the President's Nov. 13, 2001 order establishing his commission lacks legislative authorization (Question 1 on which certiorari was granted) or that his commission violates the Geneva Conventions (Question 2).

Congress was aware that these questions were pending before this Court in this case when it enacted the DTA. The earlier versions of the legislation specifically provided that the jurisdiction-stripping provision applied to all pending cases. Substantial opposition arose because of the implications of such language for this case. Congress accordingly provided that its jurisdictional limitations only would apply prospectively. Thus, §§ 1005(e)(2) and (3)—*not* § 1005(e)(1)—"shall apply to any claim…*pending on or after the date of enactment of this Act*." § 1005(h)(2) (emphasis added).

SUMMARY OF ARGUMENT

The government suggests that Congress intended to strip forever the power of the federal courts to adjudicate the lawfulness of the military commissions unilaterally established by the President. Thus, at stake is not merely *when* judicial review of the President's assertion of power will take place, but *whether* such review will take place at all. On the government's view, all pending suits by Guantanamo Bay detainees must be dismissed, and only a very limited class of claims may later be brought when (if ever) final decisions are entered by the commissions. Most of the foundational challenges to the commissions could never be brought at all. That contention should be rejected.

I. The text, drafting history, and legislative history of the DTA demonstrate that Congress intended to preserve jurisdiction over pending actions, including particularly this case, that will determine the fundamental question of the lawfulness *vel non* of the commissions. The jurisdiction-stripping provision of the Act, by design, only reaches later-filed actions that challenge the ongoing administration of the commission process after this Court resolves in this case the basic legality of the commissions and their lawful scope, legal issues that go to the core of our constitutional order. By declining to strip this Court of jurisdiction over this appeal, Congress promoted inter-branch comity and ensured that

this Court will clarify the law at the earliest possible time, just as this Court did in *Ex parte Quirin*, 317 U.S. 1, 19 (1942).

The statutory text is decisive. Congress provided that provisions of the DTA conferring on the D.C. Circuit jurisdiction over challenges to CSRT and commission judgments applied to pending cases. But Congress conspicuously did not so provide with respect to the provision on which the Motion rests: Section 1005(e)(1), which purports to withdraw habeas jurisdiction. The necessary inference is that Congress did not intend to take the extraordinary step of stripping the federal courts—and this Court in particular—of jurisdiction over seminal pending cases. *See Lindh v. Murphy*, 521 U.S. 320 (1997).

The drafting and legislative history confirm what the statutory text already makes plain. Congress specifically revised the Act to exclude section 1005(e)(1) from application to pending cases. The author of the amended provision explained the purpose of the change on the floor of the Senate at the time. Many members made clear that they supported the legislation only in light of this change.

The contrary authorities cited by the Solicitor General are inapposite. The decisions in which this Court has presumed that jurisdiction-stripping provisions apply to pending cases, such as *Bruner v. United States*, 343 U.S. 112 (1952), are properly distinguished on two grounds. First, the statutes in those cases did not provide any indication that Congress intended the courts to retain their jurisdiction over pending suits. Second, those statutes merely shifted jurisdiction from one federal forum to another, rather than interfering with the vindication of previously conferred rights. The text and history of the DTA, by contrast, demonstrate that Congress did not intend to strip the federal courts of their power to adjudicate pending cases. On the government's reading, the DTA would forever prohibit Guantanamo Bay detainees from vindicating their challenges to the President's authority to subject them to the commissions he has unilaterally established. Moreover, what the government neglects to note is this Court's repeated insistence upon a clear statement by Congress before a statute like the DTA can have the effect advanced by the government. Therefore,

even if the text is only ambiguous, that ambiguity compels the conclusion that the DTA does not apply.

II. Even if the jurisdiction-stripping provision applied to pending cases, this Court would retain jurisdiction over this case. Congress conferred jurisdiction over this case in 28 U.S.C. 1254, a provision that the DTA does not affect. In fact, Congress left the appellate jurisdiction of this Court standing, unlike in *Ex parte McCardle*, 74 U.S. 506 (1869) or *Felker v. Turpin*, 518 U.S. 651 (1996). A contrary conclusion would be in severe tension with the text of the Constitution and the unique role of this Court. Moreover, the DTA leaves intact the district court's jurisdiction to provide Hamdan the relief he seeks through a writ of mandamus, a constitutionally based writ of habeas corpus, and/or an order effectuating this Court's judgment.

III. A contrary reading of the DTA would raise grave constitutional questions. As construed by the government, the statute unconstitutionally suspends the writ of habeas corpus. It is settled that habeas extends to aliens held by the military in U.S. territory. That right, protected by the Constitution, guarantees individuals the ability to challenge the jurisdiction of a criminal tribunal. That is precisely the type of claim raised by petitioner. And it is precisely the type of claim that, as the government construes the DTA, would never be adjudicated by the federal courts.

As construed by the government, the DTA also contravenes equal protection guarantees. By carving out aliens held by the military at Guantanamo Bay from all but the most narrow access to federal courts, the DTA grants the Executive the power to determine the detainees' rights merely by changing their situs of detention.

This Court has never had to face the outer boundaries of Congress' power over its jurisdiction because it has appropriately concluded in past cases that Congress has not entirely closed the courthouse door. *See Demore v. Kim*, 538 U.S. 510 (2003); *INS v. St. Cyr*, 533 U.S. 289 (2001); *Lindh*, *supra*; *Felker*, *supra*. If the Court accepts the government's reading here, it will be required to confront complex and monumental constitutional questions that it has steadfastly avoided since the earliest moments of the Republic, and, in

so doing, open the door to any number of legislative attempts in other areas to repeal jurisdiction *sotto voce*, generating further litigation and undermining this Court's constitutional role as head of a coordinate branch.

As Chief Justice Marshall wrote, "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). Instead, this Court should conclude that the DTA does not disturb its jurisdiction, and reach the important merits of Hamdan's case.[1]

ARGUMENT

I. The Detainee Treatment Act Does Not Strip This Court's Jurisdiction Over A Pending Case

This Court has required a clear legislative statement (1) to apply a statute like the DTA retroactively; (2) to foreclose judicial review of constitutional claims; and (3) to strip courts of habeas jurisdiction. *See St. Cyr*, 533 U.S. at 298-300. Nothing in the DTA remotely satisfies these requirements. To the contrary, the text, structure, and history of the Act bolster the conclusion that must otherwise follow from the statute's ambiguity—that it does not apply to this case.

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[1] The Government does not seek vacatur of the decision below under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950); instead, the Government appears to argue that the decision below should remain intact. Should the Government later switch position and seek vacatur as it did in *Padilla* v. *Hanft*, No. 05-533, additional briefing would be necessary. The Government also does not seek a remand to examine the questions presented by its Motion, evidently recognizing that its Motion presents questions unique to the jurisdiction of this Court. Indeed, even in cases with far less at stake, this Court has frequently granted certiorari to consider the retroactive application of a statute. *E.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004); *St. Cyr*, 533 U.S. at 289; *Martin v. Hadix*, 527 U.S. 343 (1999); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997); *Lindh*, 521 U.S. at 320; *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). This analysis is particularly important when "retrospective operation" would "alter the pre-existing situation of the parties, or will affect or interfere with their antecedent rights." *United States v. Heth*, 7 U.S. 399, 413 (1806) (Paterson, J.).

A. Section 1005(e)(1) Does Not Apply to Cases Pending at the Time of the DTA's Enactment

In determining whether Congress intends for a statute to apply to pending cases, this Court first employs its normal rules of statutory construction. *Lindh*, 521 U.S. at 326. "[C]onstruction rules" may "remove even the possibility of retroactivity." *Id*. *See also Landgraf,* 511 U.S. at 280.

Section 1005(h)(1) provides that the jurisdiction-stripping provision, § 1005(e)(1), shall "take effect on the date of the enactment of this Act." Of course, "[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." Indeed, "the 'effective-upon-enactment' formula" is "an especially inapt way to reach pending cases." *Landgraf,* 511 U.S. at 257 & n.10; *see also id.* at 288 (Scalia, J., concurring in the judgment).

Other aspects of the text and structure of an act, moreover, may demonstrate Congress' intent to exclude pending cases from the application of a statute. Such was the case in *Lindh*, where this Court held that amendments to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, did not apply to pending cases because Congress' intent was discernable through ordinary statutory interpretation. *Lindh* relied heavily on the fact that Congress had specified that a parallel chapter of AEDPA "shall apply to cases pending on or after the date of enactment of this Act." AEDPA § 107(c). Congress' explicit directive to apply one chapter of AEDPA to pending cases, but not the chapter before the Court, "indicat[ed] implicitly" that the amendments at issue "were assumed and meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act." *Lindh*, 521 U.S. at 327. The Court reasoned that "[n]othing, indeed, but a different intent explains the different treatment" of the two AEDPA chapters. *Id*. at 329.

This Court recognized that had the amendments to the two chapters "evolved separately in the congressional process, only to be passed together at the last minute," there might be a "real possibility" that Congress had intended that

both chapters would be applied in the same way. *Id.* at 329. This would be so if in the "rough-and-tumble no one had thought of being careful" to insert a provision about application to pending cases to one chapter, but "someone else happened to think" of doing so for the other. *Id.* But that was clearly "not the circumstance[] here," *id.* at 330, because it was only after two AEDPA chapters "had been joined together and introduced as a single bill" that the language had been added specifically applying one chapter, but not the other, to pending cases. *Id.*

1. The text and structure of the DTA parallel the provisions of AEDPA in *Lindh*. In both cases, Congress specifically made only one portion of the statute applicable to pending cases—in this instance only "Paragraphs (2) and (3) of subsection (e)," governing final decisions by a CSRT or military commission. DTA § 1005(h)(2). As in *Lindh*, this conscious decision can lead to only one conclusion: Section 1005(e)(1) applies only to subsequently filed habeas petitions.[2] *See Amicus Br. of the Center for National Security Studies et al.* at 5-6 ("*Natl. Security Ctr. Br.*").

The government's contrary reading renders 1005(h)(2) superfluous. Had Congress intended section 1005(e) in its entirety to apply to all pending cases, there would have been no reason to define the effective dates of the various subsections separately and in such dramatically different terms. In particular, if § 1005(h)(1) made the jurisdiction-stripping provision applicable to pending cases, there would have been no need for Congress to address the application of subsections (e)(2) and (3) to cases "pending on or after" the date of enactment—all such claims would have been dismissed under (e)(1) and could not "pen[d]"—leaving no question of the applicability of (e)(2) or (3) to those suits.

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[2] Thus, the government's claim that "Congress is presumed to be aware of [this Court's decisions], and 'expects its statutes to be read in conformity with th[e] Court's precedents,'" Mo. Dis. 2-3 (quoting *United States* v. *Wells*, 519 U.S. 482, 495 (1997)), supports Hamdan's interpretation. Congress would have known from this Court's recent decision in *Lindh* that the structure it adopted in the DTA would establish that § 1005(e)(1) did not apply to pending cases. *See infra* pp. 9-12 (legislative history citing *Lindh*).

As in *Lindh*, the language of § 1005(h)(2) demonstrates that Congress knew perfectly well how to apply the provisions of the DTA to pending cases. *See also infra* p.13 (discussing *Ex parte McCardle*, 74 U.S. 506 (1869)). Moreover, Congress' simultaneous consideration of the effective dates for all the DTA precludes any suggestion that the difference in treatment was an unintended mistake or redundancy.

2. The drafting history confirms what the plain text and structure demonstrate: Congress did not intend § 1005(e)(1) to apply to pending cases. The earliest version of the Act—the Graham-Kyl-Chambliss Amendment—had two provisions: (1) It eliminated habeas jurisdiction for Guantanamo detainees, and (2) it prescribed to the D.C. Circuit "exclusive jurisdiction" to review CSRTs. 151 Cong. Rec. S12655 (Nov. 10, 2005) (S. Amdt. 2515). The bill specified that *both* provisions applied to any action "pending on or after the date of the enactment of this Act." *Id.* Despite an immediate objection from Senator Levin that it would "eliminate the jurisdiction already accepted by the Supreme Court in *Hamdan*," 151 Cong. Rec. S12664 (Nov. 10, 2005), the Senate passed that language by a 49-42 vote on November 10, 2005.

That effort to apply the habeas restrictions to pending cases was short-lived. Senator Levin explained on the floor that he was introducing a substitute bill that addressed the "problem…with the first Graham amendment": namely, that it "would have stripped all the courts, including the Supreme Court, of jurisdiction over pending cases." 151 Cong. Rec. S12755 (Nov. 14, 2005). Senator Levin stated that the substitute "amendment will not strip the courts of jurisdiction over those cases. For instance, the Supreme Court jurisdiction in *Hamdan* is not affected." *Id.*[3] The next day, Senator Levin again explained the change:

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[3] Instead of resting on the Solicitor General's contention that it was "well settled" that jurisdictional alterations apply to pending cases, Mo. Dis. 9, Respondents launched a concerted effort when Graham-Levin-Kyl was introduced to persuade the Senate to return to the original pending-case formulation. That effort failed. Press Release, *Levin Statement on the Department of Justice Motion to Dismiss the Hamdan Case in the Supreme Court* (Jan. 12, 2006), at App. 21a-23a ("Levin Public Statement").

> The habeas prohibition in the Graham amendment 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 case, including the *Hamdan* case. The Graham-Levin-Kyl amendment would not apply the habeas prohibition in paragraph (1) to pending cases….The approach in this amendment preserves comity between the judiciary and legislative branches. It avoids repeating the unfortunate precedent in *Ex parte McCardle*, in which Congress intervened to strip the Supreme Court of jurisdiction over a case which was pending before that Court.[4]

151 Cong. Rec. S12802 (Nov. 15, 2005).

That same day, November 15, 2005, the Senate adopted the substitute measure, known as the Graham-Levin-Kyl Amendment, which was the direct predecessor to the DTA. 151 Cong. Rec. S12753 (Nov. 14, 2005) (S. Amdt. 2524). This version dramatically changed the effective date language. This bill provided that the act as a whole "shall take effect on the day after the date of the enactment of this Act." *Id.* § (e)(1). But it limited the language from the predecessor bill applying the DTA's provisions to pending cases *only* to provisions governing review of final decisions of commissions and CSRTs. The revised bill then passed by 84-14.

The bill then proceeded to Conference, and once again, the Administration tried to alter the language to return to the original formulation. 151 Cong. Rec. S14258 (Dec. 21, 2005); Levin Public Statement at App. 23a. A House proposal attempted the same thing. 151 Cong. Rec. S14258. But the Conference rejected that language.[5]

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[4] Evidence of reliance on Senator Levin's statement was immediate. *E.g., id.* at S12803 (remarks of Sen. Reid) (Nov. 15, 2005) ("I agree with Senator Levin that his amendment does not divest the Supreme Court of jurisdiction to hear the pending case of *Hamdan v. Rumsfeld*. I believe the effective date provision of the amendment is properly understood to leave pending Supreme Court cases unaffected. It would be highly irregular for the Congress to interfere in the work of the Supreme Court in this fashion, and the amendment should not be read to do so.").

[5] Again, Senator Levin publicly announced days before the votes:

The case for the grandfathering of existing claims is far stronger here than in *Lindh*, for the DTA's "drafting history" shows that "Congress cut out the very language in the bill that would have authorized" the application of § 1005(e)(1) to pending cases. *Doe v. Chao,* 540 U.S. 614, 622 (2004). This "deletion…[can be] fairly seen" as a "deliberate elimination of any [contrary] possibility." *Id*. at 623.[6] In *Lindh*, that conclusion followed only by inference.

3. In response to Senator Levin's explicit and public statements that § 1005(e)(1) would not reach pending cases, and this case specifically, the government points to contrary statements made by Senator Kyl. That legislative history is entirely *post hoc*, consisting of a single scripted colloquy that *never actually took place*, but was instead inserted into the record *after* the legislation passed. *See* 151 Cong. Rec. S14260

> The jurisdiction-stripping provision in the Graham amendment initially approved by the Senate over my objections would have applied retroactively to all pending cases in federal court—stripping the courts of jurisdiction to consider pending cases, including the *Hamdan* case now pending in the Supreme Court. The revised amendment…does not apply to or alter any habeas case pending in the courts at the time of enactment. The conference report retains the same effective date as the Senate bill, thereby adopting the Senate position that this provision will not strip the courts of jurisdiction in pending cases.

Press Release, *Levin Statement on Conference Agreement on Treatment of Detainees*, Dec. 16, 2005, at *http://levin.senate.gov/newsroom/release.cfm?id=249898.*

[6] The Court relied on similar drafting history in *Landgraf,* observing that while the enacted statute resembled a predecessor bill "in many other respects, the [prior] bill differed in that it contained language expressly calling for the application of many of its provisions…to cases arising before its (expected) enactment." 511 U.S. at 255. Thus, "[t]he absence of comparable language in the [prior] Act cannot realistically be attributed to oversight or to unawareness of the retroactivity issue." *Id.* at 256.

As in *Landgraf,* it "seems likely that one of the compromises that made it possible to enact the [final] version [of the bill] was an agreement *not* to include the kind of explicit retroactivity command found" in the original proposal. *Id.* After all, the language pertaining to the DTA's effective date changed completely—from applying to "*any application or other action that is pending on or after* the date of the enactment of this Act" to "tak[ing] effect on the day after the date of the enactment of this Act." *Compare* S. Amdt. 2515, *with* S. Amdt. 2524 (emphasis added).

(Dec. 21, 2005) (remarks of Senator Kyl) ("*Comments on Final Passage*. Mr. Kyl. I would like to say a few words about the *now-completed* National Defense Authorization Act…") (emphasis added). In contrast, Senator Levin repeatedly and publicly explained for over a month before the bill was passed that the Act's jurisdiction-stripping provisions grandfathered existing challenges.[7] Many legislators relied on these views.[8] It is indeed telling that neither Senator Kyl

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[7] With respect to comments placed in the Congressional Record, they overwhelmingly favor Petitioner. For example, on December 21, Senator Levin explained that he opposed the Graham-Kyl-Chambliss Amendment because "it would have applied retroactively to all pending cases in Federal court…including the *Hamdan* case now pending in the Supreme Court." 151 Cong. Rec. S14257. Specifically citing *Lindh*, Senator Levin noted that "the fact that Congress has chosen not to apply the habeas-stripping provision to pending cases means that the courts retain jurisdiction to consider these appeals…the Senate voted affirmatively to remove language from the original Graham amendment that would have applied this provision to pending cases." *Id.* at S14258. *See also infra* n. 8.

[8] *See* 151 Cong. Rec. S14245 (Dec. 21, 2005) (Sen. Leahy) ("Since the Graham-Levin amendment would not retroactively apply to pending cases, the Supreme Court will still have the opportunity to determine the legitimacy of the military commissions, as being litigated in case of *Hamdan v. Rumsfeld*."); *id.* at S14252, S14274 (Sen. Durbin) ("A critical feature of this legislation is that it is forward looking.…The amendment's jurisdiction-stripping provisions clearly do not apply to pending cases, including the *Hamdan v. Rumsfeld* case."); *id.* at S14253 (Sen. Feingold) ("[I]t is my understanding that this provision would not affect the ongoing litigation in *Hamdan v. Rumsfeld*."); *id.* at S14275 (Sen. Reid) ("Senator Graham's original language was altered so that the Supreme Court would not be divested of jurisdiction to hear the pending case of *Hamdan* v. *Rumsfeld*."); *id.* at S14170 (Dec. 20, 2005) (Sen. Kennedy).

Senator Levin's views also proved influential in the House. As the ranking member on the Armed Services Committee and Conference leader explained in his floor statement before the vote:

> [A]s Senator LEVIN has emphasized, the Graham-Levin amendment provisions do not apply to or alter pending habeas cases. The Senate voted to remove language from the original Graham amendment that would have applied the habeas-stripping provision to pending cases, affirming that it did not intend such application. Further, under the Supreme Court's ruling in *Lindh v. Murphy*, 521 U.S. 320 (1997), the fact that Congress chose not to explicitly apply the habeas-stripping provision to pending cases means that the courts retain jurisdiction to consider these appeals. Finally, the effective date language in the original Graham-Levin amendment…was retained in the final negotiated language for the

nor Senator Graham contradicted Senator Levin's remarks during this entire time—over the nearly forty days from start to finish while the legislation was being considered.

Senator Kyl's *post-hoc* colloquy, like the President's statements upon signing the bill, is simply an effort to achieve after passage of the Act precisely what he failed to achieve in the legislative process.[9] The fact that both waited until the ink was dry before conveying their "jurisdictional" reading of the effective-date provision speaks volumes—particularly given that the Administration spent those forty days trying to return to the November 10 language.

B. The Government's Reliance on Cases Involving Transfer of Jurisdiction from One Tribunal to Another is Unavailing

The government principally rests its argument on the premise that this Court has held that any provision withdrawing jurisdiction from a court must apply to pending cases. This assertion is wrong for several reasons.

1. Clear congressional intent obviates the use of default rules to determine the retroactive application of a statute. Thus, in *Lindh*, this Court rejected the dissent's assertion that the AEDPA provision at issue applied to pending cases because it ousted the courts of jurisdiction by speaking "'to the power of the court rather than to the rights or obligations of the parties.'" 521 U.S. at 343 (Rehnquist, C.J., dissenting) (quoting *Landgraf*, 511 U.S. at 274). The same result is required in this case. Even if jurisdiction-stripping statutes comparable to the DTA were *normally* presumed to apply to pending cases, Congress' intent to depart from that

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> Conference Report, thereby adopting the Senate position that the habeas-stripping provision does not strip the courts of jurisdiction in pending cases.

151 Cong. Rec. H12202 (Dec. 18, 2005) (remarks of Rep. Skelton). Unlike the government, which cannot attribute even one member's vote to the "jurisdictional" claim of Senator Kyl, numerous legislators relied on Senator Levin's public statements and the drafting history. *E.g.*, 151 Cong. Rec. S14272 (Dec. 21, 2005) (remarks of Sen. Kerry).

[9] *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 118 & n.13 (1980) (statements after enactment lack "strong indicia of reliability"); *Doe*, 540 U.S. at 626-67; *Weinberger v. Rossi,* 456 U.S. 25, 35 (1982).

alleged rule here is manifest and must be respected.

2. The cases the government relies upon are in any event inapposite. Those cases address statutes that simply transferred jurisdiction over a case from one tribunal to another. In this case, however, the DTA purports to strip jurisdiction from *any* court to consider Hamdan's claim, a situation that calls for the opposite rule of construction.[10]

The DTA does not simply delay consideration of the questions presented in this case, but precludes any court from ever considering them at all. In many cases, the Act provides absolutely *no* right to judicial review, much less a right to review in a timely and meaningful manner. By permitting review only after a final judgment, the statute precludes entirely any claim that a prisoner is being held unlawfully without trial, a claim at the core of the right to habeas and of no small significance in light of the powers asserted by the President. *See*, *e.g.*, *Rasul*, 542 U.S. at 473; *Hamdi*, 542 U.S. at 525; *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). By the same token, the DTA provides no review for a person who is allegedly being held for trial, but is never given one. Moreover, even if a trial is held, review is not guaranteed unless the inmate receives a sentence of more than ten years' imprisonment, § 1005(e)(3)(B), thereby permitting the

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[10] The government relies heavily upon *McCardle*'s statement that "[j]urisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Mo. Dis. 2 (quoting 74 U.S. at 514). But that undisputed proposition simply begs the question of whether jurisdiction over pending cases has, in fact, been withdrawn. *McCardle* sheds no light on that question; the statute in that case unambiguously applied to cases pending in this Court. *See* Act of Mar. 27, 1868, 15 Stat. 44 (foreclosing "the exercise of any such jurisdiction [under a specific Act] by said Supreme Court on appeals which have been or may hereafter be taken").

McCardle is also inapposite, of course, because alternative relief was available in the form of an "original" habeas petition. *See Felker*, 518 U.S. at 658-62. Indeed, *McCardle* only underscores the requirement of a clear statement before jurisdiction is withdrawn, warning that even the limited 1868 Act was "unusual and hardly to be justified except upon some imperious public exigency." *Id.* at 104. "[I]t is *not to be presumed* that an Act, passed under such circumstances, was intended to have any further effect than that plainly apparent from its terms." *Id.* (emphasis added).

exclusion of any judicial review for defendants with lesser sentences. In addition, the Executive may unilaterally suspend the right to review of a conviction indefinitely in any case by refusing to approve a verdict, thereby precluding it from being "final." Nov. 13, 2001 Mil. Order, § 4(c)(8).

Even in cases where review is eventually provided, precluding all pretrial judicial review of claims challenging the very jurisdiction and legitimacy of the Commissions is, in itself, a substantial departure from habeas tradition. *See, e.g.*, *Quirin*, 317 U.S. at 19 (convening special session to hear pretrial challenge to jurisdiction of commission "without any avoidable delay" due to the "public importance of the questions raised" and the Court's "duty"). This departure raises serious constitutional questions, discussed below.[11]

All review under the DTA is severely constrained, precluding numerous constitutional and other claims that could otherwise be made in a traditional habeas petition, including the very claims this Court has granted certiorari to decide. Although this Court has undertaken to decide whether the commissions are lawfully constituted and

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[11] In the very case the government cites for abstention, this Court confirmed that a petitioner who has "raised substantial arguments denying the right of the military to try him at all" need not exhaust the remedies afforded him by the military before filing a habeas petition. *Schlesinger v. Councilman*, 420 U.S. 738, 763 (1975 (citing *Noyd v. Bond*, 395 U.S. 683, 696 n.8 (1969)); *accord. United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Parisi v. Davidson*, 405 U.S. 34, 41-42 (1972) (rejecting abstention from a habeas claim since "the relief the petitioner seeks—discharge as a conscientious objector" was not "available to him with reasonable promptness and certainty through the machinery of the military judicial system"); *cf. Duro v. Reina*, 495 U.S. 676 (1990) (granting pretrial habeas petition by Native American prosecuted by another tribe). *See infra* pp. 22.

Precisely because the abstention question is integrally bound up with the merits of Hamdan's challenge, the Motion cannot be assessed apart from the merits. If Hamdan's challenge is like *Abney v. United States,* 431 U.S. 651, 662 (1977), as the courts below both held, any legislative alteration of his right to bring it obviously affects substantive rights. Once an Act of Congress alters rights, it is not subject to the general "jurisdictional" presumptions Respondents invoke. At the very least, the Court should consider the Motion alongside the merits. Doing so will provide context that will inform the Court's judgment as to the Motion.

comply with the terms of the Geneva Convention, the DTA permits the D.C. Circuit to determine only "whether the final decision was consistent with the standards and procedures specified" in a DOD military order that itself explicitly guarantees no rights (Pet. Br. 3), and "whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States." § 1005(e)(3)(D). Nothing in this language authorizes the court of appeals to determine whether the tribunals are lawfully constituted, whether petitioner falls within their jurisdiction, or whether the commission is consistent with an international treaty. And although the Government argues in general terms that the DTA provides an adequate substitute for review by habeas or mandamus, *see* Mo. Dis. 22, it also asserts that the provisions of the Act "do more than remove jurisdiction, but…also limit the scope of cognizable claims," *id*. at 19 n.9, all the while taking pains to avoid stating that petitioner's claims would fall within the scope of review afforded under that statute. The limited scope of review only further supports the argument that Congress did not intend to apply the DTA's jurisdiction-stripping provisions to this case. Otherwise, Congress not only would have foreclosed this Court's jurisdiction to hear Hamdan's claims, but it would have forever prejudged the merits of the questions on which this Court granted certiorari, an unlikely proposition in the abstract, and a wholly unwarranted conclusion in light of the absence of *any* clear congressional intent to that effect.

The cases relied upon by the government bear not even a passing resemblance to the DTA in this respect. All involved "[s]tatutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action" since "[s]uch statutes affect only *where* a suit may be brought, not *whether* it may be brought at all." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997) (internal citations omitted). Such statutes "usually 'take[] away no substantive right but simply change[] the tribunal that is to hear the case.'" *Id.* (quoting *Landgraf*, 511 U.S. at 274).[12] Thus,

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[12] The government, ignoring the distinction drawn in *Hughes Aircraft*,

the last time the Court applied this principle, a half-century ago, "Congress ha[d] not altered the nature or validity of petitioner's rights or the Government's liability but ha[d] simply reduced the number of tribunals authorized to hear and determine such rights and liabilities." *Bruner*, 343 U.S. at 117. The issue was not whether Congress could bar a class of claims, but whether it could remove concurrent jurisdiction between district courts and the Court of Claims.

3. If any presumptions apply to this case they are the presumption against the withdrawal of federal court jurisdiction for constitutional claims and the presumption against retroactive application of substantive changes in the law. *Demore*, 538 U.S. at 517 ("[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." (quoting *Webster v. Doe*, 486 U.S. 592 (1988)); *St. Cyr*, 533 U.S. at 300 (reading a statute to "entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions").[13]

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cites *Republic of Austria v. Altmann*, 541 U.S. 677, 693 (2004). But *Altmann* did nothing more than discuss *Landgraf* and *Hughes Aircraft*, *see id*. at 693-95, and did not purport to extinguish the distinction central to both cases.

The government also cites *Hallowell v. Commons*, 239 U.S. 506 (1916), and *Santos v. People of the Territory of Guam*, No. 03-70472, 2006 WL 118375 (9th Cir. Jan. 3, 2006). Like *Bruner*, however, both concerned a reallocation of jurisdiction, and not the divestiture thereof. *See Hallowell*, 239 U.S. at 508 ("[T]he reference of the matter to the Secretary, unlike the changes with regard to suits upon bonds, takes away no substantive right, but simply changes the tribunal that is to hear the case."); *Santos*, 2006 WL 118375, at *2; *id*. at *5 (Wallace, J., concurring); *see also Merchants' Ins. Co. v. Ritchie*, 72 U.S. 541, 542 (1867) (making clear that a state-court forum existed notwithstanding the congressional repeal of federal jurisdiction).

Here, by contrast, the government's reading would forever extinguish any judicial review of Hamdan's right not to be tried by an unlawful tribunal, and would therefore reduce to *zero* "the number of tribunals authorized to hear and determine such rights," *Bruner*, 343 U.S. at 117. *See also infra* pp. 32, 38 n.38 (discussing habeas as a "right"). None of the government's cited cases confronted such a statute.

[13]As Henry Hart reaffirmed shortly after *Bruner*, "where constitutional rights are at stake the courts are properly astute, in construing statutes, to avoid the conclusion that Congress intended to use the privilege of immunity, or of withdrawing jurisdiction, in order to defeat them." Henry Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An*

This Court has long presumed prospective application of statutes that, like this one, affect substantive rights. *See Lindh*, 521 U.S. at 327-28; *Landgraf*, 511 U.S. at 280; *Hadix*, 527 U.S. at 352. In addition, when Congress attempts to deprive courts of habeas jurisdiction, this Court has repeatedly relied on

> the strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction. 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.
>
> In this case, the plain statement rule draws additional reinforcement from other canons of statutory construction. First, as a general matter, when a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. Second, if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is "fairly possible," we are obligated to construe the statute to avoid such problems.

St. Cyr, 533 U.S. at 299-300 (citations and footnotes omitted). *See also infra* pp. 32-39.[14] This default rule has particular

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Exercise in Dialectic, 66 HARV. L. REV. 1362, 1371 & n.35 (1953). "Habeas corpus aside, I'd hesitate to say that Congress couldn't effect an unconstitutional withdrawal of jurisdiction—that is, a withdrawal to effectuate unconstitutional purposes—if it really wanted to. But the Court should use every possible resource of construction to avoid the conclusion that it did want to." *Id.* at 1398-99. Respondents' motion violates every one of Professor Hart's fundamental precepts, from his view that limitations on jurisdiction should be narrowly construed when defendants invoke it to block a criminal action, *id.* at 1371-72, 1375, 1386-87; to his claim that advance challenges to the structure of a body should be entertained when they would avoid an enforcement proceeding altogether, *id.* at 1374.

[14] The statutes in place have governed Hamdan's conduct in an extreme way unlike *Bruner*'s and *Hallowell*'s monetary contexts. Over two years ago, Hamdan was given military counsel for the limited purpose of negotiating a plea. By refusing to enter a plea and deciding to contest the commission system, Hamdan has now waited—well over two years—for

force here due to the President's veto power, because an interpretive error by a court in his favor will be difficult for Congress to correct due to the supermajority rule. Pet. 17 n.13.

Thus, even if the text of the DTA were ambiguous, the absence of a clear statement of congressional intent to apply the statute to this case compels the conclusion that it does not apply. Put simply, the absence of a clear statement is fatal to the government's, not Hamdan's, position.

4. The government hypothesizes that Congress specified that sections 1005(e)(2) and (3) applied to pending cases because those are "procedural provisions" with respect to which "the presumption against retroactivity" is "less clear." Mo. Dis. 18. This is the basis on which the government attempts to distinguish *Lindh*. *Id.* at 19 n.9.

That is an interesting story, but it is not one that is told by the statute's drafting history. The relevant question is why Congress changed the statute so as to exclude section 1005(e)(1) from the provisions that apply to pending cases. The government simply has no explanation at all for that change. There is moreover no indication that Congress had a concern with the possible retroactivity of sections 1005(e)(2) and (3); this argument is pure *post hoc* rationalization. Any legislator sophisticated enough to recognize such a claimed nuance in retroactivity doctrine would equally realize that applying *only* those provisions to pending cases would, under *Lindh,* give rise to the obvious inference that section 1005(e)(1) does *not* apply to pending cases.[15]

The government maintains that Congress took the

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this Court to hear his case, with the threat of a trial looming over his head. Had the government's interpretation of the DTA been the law in late 2003, a plea may have been his only option, starting his sentencing clock and, perhaps (if the President approved it) allowing him to come into federal court. Hamdan has—in the most extreme way possible—had his conduct affected by the "jurisdictional" rule. He has been incarcerated for two years, as a criminal *defendant* (with the opprobrium, stigma, and uncertainty attached to that status) to await the judgment of this Court.

[15] Moreover, (e)(2) and (e)(3) employ the same "jurisdictional" language as (e)(1)—invoking the phrase "jurisdiction" *seven* times. *See* 151 Cong. Rec. E2655 (Dec. 30, 2005) (Rep. Conyers). Sections (e)(2) and (e)(3) speak to the power of courts in precisely the same way as (e)(1).

dramatic step of repealing the jurisdiction of the Supreme Court in a pending important case (for the first time in a half-century, at least) by relying on a "canon," but also believes that Congress was simultaneously so concerned about (e)(3)'s procedural aspects that it took the trouble of specifying its retroactivity. This explanation, dubious on its face, is rendered even more so when one considers that the Court's pronouncements in habeas cases such as *Lindh, St. Cyr,* and *Felker* have all gone the other way. And it loses all plausibility when placed in context: The government is arguing that the Act's authors were concerned about the "procedural" aspects of (e)(3) under Supreme Court precedent, and not statements by the main co-sponsor and author of the November 15 legislation, Senator Levin, who repeatedly and publicly stated that (e)(1) was not retroactive.

5. The government in passing contends that Congress stripped this Court of jurisdiction through "the exclusive review provision," which it contends governs all "challenges to military commission proceedings." Mo. Dis. 16-17 (citing DTA § 1005(e)(3)). This claim does not purport to be based on the text of the DTA. Indeed, that text explicitly forecloses it by unmistakably and repeatedly making clear that the jurisdictional limitations of subsection (e)(3) *only* apply to challenges brought under that provision.[16] As described above, the point of the different effective-date provisions in subsection (h) was to ensure that the structural challenges

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16 See DTA § 1005(e)(3)(C) ("LIMITATION ON APPEALS—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit *under this paragraph* shall be limited to an appeal brought by or on behalf of an alien") (emphasis added); *id.* § (e)(3)(D) ("SCOPE OF REVIEW—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an appeal of a final decision with respect to an alien *under this paragraph* shall be limited to the consideration of" specified issues) (emphasis added); *id.* § (e)(3)(B) (same).

Moreover, § 1005(h)(2) confirms this understanding. That section provides that paragraphs (e)(2) and (e)(3) "shall apply with respect to any claim *whose review is governed by one of such paragraphs*…" DTA § 1005(h)(2) (emphasis added). The government's reading of (e)(3) as displacing other sources of jurisdiction over all claims brought by detainees would render the emphasized language entirely superfluous.

would go forward in this very case and be decided, and that there would later be a provision for day-to-day appeals after a final decision. *See Amicus Br. of Norman Dorsen et al.* 9-12. In fact, the legislative history is explicit on this point.[17]

The government cites three sources, none of which remotely support its proposition. Its principal case—*Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994)—is easily distinguished. Unlike the Mine Act, the DTA has none of the "comprehensive enforcement structure" central to *Thunder Basin*'s reliance on the administrative process.[18] *Id*. at 215 n.20 ("This case…does not present the 'serious constitutional question' that would arise if an agency statute were construed to preclude all judicial review of a constitutional claim.").

Indeed, Hamdan raises the type of constitutional claim that *Thunder Basin* suggested was *not* subject to exclusive post-enforcement review. Unlike those presented in *Thunder*

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[17] "[T]his act has no impact on the Supreme Court's ability to consider Hamdan's challenge at this pre-conviction stage of the military commission proceedings. As the DC Circuit held in *Hamdan* earlier this year, *Ex Parte Quirin* is a compelling historical precedent for the power of civilian courts to entertain challenges that are raised during a military commission process. Nothing in these sections requires the courts to abstain at this point in the litigation. Paragraph 3 of subsection 1005(e) governs challenges to 'final decisions' of the military commissions and does not impact challenges like Hamdan's other cases not brought under that paragraph." 151 Cong. Rec. S14275 (Dec. 21, 2005) (Sen. Reid). *See also* 151 Cong. Rec. S14252 (Dec. 21, 2005) (Sen. Durbin) ("The amendment also does not legislate an exhaustion requirement for those who have already filed military commission challenges. As such, nothing in the legislation alters or impacts the jurisdiction or merits of the Hamdan case."); 151 Cong. Rec. E2654-55 (Dec. 30, 2005) (Rep. Conyers) (similar).

[18] *Thunder Basin*'s exhaustive recounting of the Mine Act's comprehensiveness shows that it differs in every respect from the DTA: (1) The Mine "Act establishes a detailed structure for reviewing violations"; (2) A "mine operator has 30 days to challenge before the Commission any citation issued"; (3) "Timely challenges are heard before an administrative law judge (ALJ), with possible Commission review"); (4) "the Commission reviews all proposed civil penalties *de novo* according to six criteria"; (5) it "may grant temporary relief pending review of most orders, and must expedite review where necessary"; and (6) "Any ALJ decision not granted review by the Commission within 40 days becomes a 'final decision of the Commission.'" 510 U.S. at 207-08 & nn.9-10 (citations omitted).

Basin, Hamdan's claims are *both* "'wholly collateral' to [DTA's] review provisions and outside the agency's expertise." *Id.* at 212. The adequacy of post-enforcement review, vital to *Thunder Basin*, is lacking. *See supra* pp. 1-2, 13-15. And lack of pre-enforcement review subjects Hamdan to irreparable harm, as the lower courts here have emphasized (unlike *Thunder Basin*). Finally, were the government's contention about "exclusive" jurisdiction correct, it would completely eliminate this Court's jurisdiction.[19]

The government also cites *FCC v. ITT World Com.,* 466 U.S. 463 (1984), and 5 U.S.C. § 703, part of the Administrative Procedure Act. Neither authority is relevant.[20]

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[19] The government neglects to note that the statute at issue in *Thunder Basin* explicitly conferred jurisdiction upon this Court: "[T]he jurisdiction of the [court of appeals] shall be exclusive and its judgment and de[c]ree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of Title 28." 30 U.S.C. § 816(a)(1). Therefore, Congress' intent to allow for one post-enforcement shot at review was reinforced by the express reference in the Mine Act to this Court's certiorari jurisdiction, and it was far more natural to read into the statutory scheme an intent to preclude pre-enforcement review. The DTA, in contrast, says *nothing* about this Court's review, suggesting that it either doesn't affect this Court's jurisdiction either pre- or post-conviction, or it does and wipes out this Court's § 1254 power altogether (and thereby raises severe constitutional problems).

[20] *ITT* had nothing to do with pre-enforcement review; it held only that ITT could not seek review in the district court of a claim when that claim was *already* explicitly reviewable in the court of appeals. Hamdan's claims in this case, however, are not currently reviewable in the court of appeals, and may never be under the government's interpretation of the DTA.

Section 703 of the APA is similarly immaterial. Even if the DTA would have otherwise triggered § 703 by providing for *adequate* direct review in the court of appeals, which it most emphatically does not, the APA expressly does not apply to the review of "courts martial and military commissions," which are not "agencies" within the meaning of the APA. 5 U.S.C. § 701(b)(1)(F); *see McKinney v. White*, 291 F.3d 851, 853 (D.C. Cir. 2002). The APA exclusion further undermines the government's reliance on *Thunder Basin* and *ITT*, for they were, on their faces, applying APA-specific doctrine—the *APA-based* "presumption favoring judicial review of administrative action." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984). As *Thunder Basin* itself emphasized, the Court will find that "Congress has allocated initial review to an administrative body" "[i]n cases involving delayed judicial review of final *agency* actions." 510 U.S. at

The government's contrary argument is that the DTA somehow "codified the principle of judicial abstention from military proceedings." Mo. Dis. 16. To the extent that Congress codified abstention, they codified the doctrine as applied by the court of appeals in holding that the federal courts are available to adjudicate threshold challenges to the lawfulness of the commission process. Pet. App. 3a-4a. As discussed in several briefs, *e.g.*, Pet. 28-30, Pet. Reply 1-6; Pet. Br. 49-50; *Amicus Br. of Richard Rosen et al.* 1-25; *Amicus Br. of Arthur Miller* 1-5, Hamdan's challenge is exempt from the doctrine (and abstention would be futile in any event). Far from waiting until even one commission trial had concluded, the Court convened a Special Term just to hear *Quirin*. *See supra* p. 14. The DTA never took issue with this exception.

6. The government argues finally that petitioner's reading of the DTA should be rejected as contrary to Congress' purpose in enacting the statute. The government baldly asserts—citing to nothing at all—that the DTA "evinces Congress's intent in the wake of this Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004), strictly to limit the judicial review available to aliens detained at Guantanamo Bay during the ongoing conflict." Mo. Dis. 20.

But in enacting the DTA, Congress did not have one purpose. "Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal." *Landgraf*, 511 U.S. at 286. Congress wanted to curtail jurisdiction over Guantanamo, but also wanted to preserve jurisdiction over pending cases. A reasonable inference is that the Administration did not want to give up streamlining future cases in exchange for watered-down legislation that included pending cases. After all, under the government's theory, the DTA makes it possible for the thousands of detainees in custody to be brought to Guantanamo where they could not file habeas petitions.

Another reasonable inference is that for those cases with final decisions, Congress wanted them channeled into the

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207 (emphasis added) (footnote omitted). In short, because the APA does not apply to commissions, *Thunder Basin*, *ITT*, and § 703 are not relevant.

(e)(2) and (e)(3) review process—giving the government some incentive to provide final decisions in pending cases. It may even be that some or all of the hundreds of detainees have received "final decisions" from CSRTs and fall under (e)(2) now for their CSRT challenges. *See* U.S. Supp. Br., *Al Odah v. United States*, No. 05-5064, at 2, 12-14 (D.C. Cir. Jan. 18, 2006) (asking to convert all CSRT claims into (e)(2) challenges). Fortunately, this case does not require answering these questions—no "final decision" has been reached, so (e)(3) is inapplicable.[21] The only thing that the Court need note is the multiple ways to read the statute consistent with the government's self-described congressional "purpose" of eliminating many claims, though not Hamdan's.

Moreover, this Court will not create a "hodgepodge," Mo. Dis. 20, by refusing to abandon its grant of certiorari; on the contrary, adjudicating the constitutionality of commissions and compliance with the Geneva Conventions will facilitate future judicial review. Once this Court announces its decision in this case, courts below will be able to dispose of those cases quickly, accurately, and homogenously.

II. Even If It Applies To This Case, The DTA Does Not Strip This Court Of Its Appellate Jurisdiction

Even if it applies to pending cases, the DTA, by its terms, does not affect this Court's appellate jurisdiction to review the decision below. Nor does the DTA withdraw the jurisdiction of federal courts to entertain a constitutionally (as opposed to statutorily) based habeas claim, or petitioner's pending request for mandamus and other appropriate relief.

A. The DTA Does Not Withdraw This Court's Appellate Jurisdiction To Review A Lower Court Decision Through Certiorari

Although the government asks this Court to dismiss

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[21] Likewise not before the Court is whether Hamdan or others could obtain habeas relief after the DTA on challenges to their detention as enemy combatants. For numerous reasons, those claims present weaker, though plausible, arguments; challenges to detention implicate prospective war powers, not retrospective justice where courts have greater expertise. *See Amicus Br. of Military Attorneys Assigned to the Defense*, No. 03-343, *Al Odah v. United States* ("*Odah* Amicus Br.").

Hamdan's appeal, it does not, and cannot, seriously contend that this Court lacks jurisdiction, for nothing in the DTA restricts this Court's traditional certiorari jurisdiction.

1. This Court has long required that if Congress intends to exercise its power under Article III to make exceptions to this Court's appellate jurisdiction, it must do so with unmistakable clarity. *See*, *e.g.*, *Ex parte Yerger*, 75 U.S. 85, 106 (1869) (declining to conclude that Court's appellate jurisdiction had been repealed "without the expression of such intent, and by mere implication"). Moreover, this Court narrowly construes any statute that purports to restrict its appellate jurisdiction, retaining the power to issue any writ not expressly precluded. *Utah v. Evans*, 536 U.S. 452, 463 (2002) ("We read limitations on our jurisdiction to review narrowly. We do not normally read into a statute an unexpressed congressional intent to bar jurisdiction that we have previously exercised.") (citations omitted).

Indeed, this Court has been especially hesitant to read a statute to withdraw the Court's authority to review decisions in habeas cases. Thus, *Ex parte Yerger* found it

> too plain for argument that the denial to this court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ…and seriously hinder the establishment of that uniformity in deciding upon *questions of personal rights* which can only be attained through appellate jurisdiction….We are obliged to hold, therefore, that *in all cases* where a Circuit Court…caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, this court, in the exercise of its appellate jurisdiction, may, by the writ of *habeas corpus*, aided by the writ of certiorari, revise the decision of the Circuit Court, and if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded.

75 U.S. at 102-03 (emphasis added).

This Court should not lightly attribute to Congress an intent to interfere with the Court's constitutional role in

enforcing limitations on other branches' authority.[22]

Reading the Act to preclude this Court from reviewing the decision below would raise grave constitutional questions. For example, this Court has *never* held that Congress' power to make "Exceptions" to this Court's appellate jurisdiction is plenary. U.S. CONST. art. III, § 2, cl. 2. To the contrary, every time this Court has upheld a congressional limitation, it has gone out of its way to confirm that an alternative avenue of *contemporaneous* appellate review was available. *Felker*, 518 U.S. at 661-62; *id*. at 667 (Souter, J., concurring) ("if it should later turn out that statutory avenues other than certiorari for reviewing [a lower court's habeas denial] were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open"); *Yerger*, 75 U.S. at 105-06; *McCardle*, 74 U.S. at 515.

Moreover, Congress may *not* use its power under the Exceptions Clause "to withhold appellate jurisdiction…as a means to an end." *United States v. Klein*, 80 U.S. 128, 145 (1872).[23] As Professor Hart wrote a half-century ago, in light of *Klein* and the constitutional structure that ordains only one Supreme Court, Congress' exercise of its Exceptions power must not "destroy the essential role of the Supreme Court in the constitutional plan." Hart, *supra*, at 1365.[24] Yet

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[22] "Such a far-reaching jurisdiction strip could present serious constitutional questions concerning the supremacy of the Supreme Court." James Pfander, *Jurisdiction-Stripping and the Supreme Court's Power To Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1500 (2000) (citing *Felker*, 518 U.S. at 665-66 (Stevens, J., concurring)).

[23] "[I]t has become something of a time-honored tradition for the Supreme Court and lower federal courts to find that Congress did not intend to preclude altogether judicial review of constitutional claims.…" *Bartlett v. Bowen*, 816 F.2d 695, 699 (D.C. Cir. 1987); *cf. Battaglia v. Gen. Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948).

[24] "[T]he Supreme Court's precedential authority over inferior federal courts…makes little practical sense unless combined with wide-ranging jurisdiction over federal law questions. Congress might shrink the Court's appellate jurisdiction, but the Exceptions Clause does not empower it to deprive the judiciary of the Court's basic leadership." Evan Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 835 (1994). "[T]he Court's supremacy gives it authority to supervise the work of inferior federal tribunals through the exercise of its power to

the government seeks that result in arguing that the DTA precludes this Court from exercising its jurisdiction to reverse a lower court's rejection of a constitutional challenge to executive action in this pending case.

In fact, the government contends that dismissal of this Petition, and not *Munsingwear* vacatur, is appropriate. It claims that "a change in jurisdiction that takes effect after an action has been filed should be understood, not as undoing past judicial action in the case, but regulating the courts' authority to act prospectively in the case." Mo. Dis. 14. If the government is serious about freezing this case at its current point, that point is the district court's current order barring his commission trial. While the government announced it would seek a stay of that ruling, it never did (nor has the mandate of the court of appeals issued). Only the government, not Hamdan, now seeks to alter the status quo. *See Landsgraf*, 511 U.S. at 292-93 (Scalia, J., concurring in judgment). This is a classic problem with jurisdiction-stripping statutes. *E.g.*, Herbert Wechsler, *The Courts and The Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965) ("The jurisdictional withdrawal thus might work to freeze the very doctrines that had prompted its enactment…"). If this appeal is dismissed, the Court should make clear that all courts are without power "to act prospectively in the case," Mo. Dis. 14, and leave the district court order in place.[25]

2. On its face, the DTA has no effect on this Court's appellate jurisdiction. The Act withdraws only the authority to "hear or consider" (1) "an application for a writ of habeas corpus" and (2) "any other action against the United States or its agents relating to any aspect of the detention." When it

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issue discretionary writs, such as mandamus, habeas corpus, and prohibition." Pfander, *supra*, at 1441.

[25] Nor is it at all clear that Petitioner requires prospective relief at any point. A declaratory judgment that it was illegal to subject Hamdan to the President's November 13, 2001 order will provide sufficient remedy, as would an affirmance of the district court order or any number of other avenues of relief. *See* JOHN HART ELY, WAR AND RESPONSIBILITY 56 (1993) (stating that in war powers arena declaratory judgments are the appropriate vehicle, not injunctions). In any event, the Court has "all writs" power to fashion any relief in aid of its jurisdiction it deems proper.

so desires, Congress knows how to expressly divest this Court of its appellate jurisdiction. *E.g.*, 28 U.S.C. 2244(b)(3)(E); *Yerger*, 75 U.S. at 105 (quoting statute). A "Congress concerned enough to bar [this Court's] jurisdiction in one instance would have been just as explicit in denying it in the other, were that its intention." *Hohn v. United States*, 524 U.S. 236, 250 (1998).

Thus, it is unsurprising that even the legislative history cited by the government (Br. 13-14 n. 7) makes clear that this Court's appellate jurisdiction is unaffected by the DTA:

> Supreme Court review is implicit, or rather, *authorized elsewhere* in statute, *for all judicial decisions*. It is rarely mentioned expressly. *In fact, when it is mentioned, it is sometimes to preempt Supreme Court review*….The clear implication of these provisions is that *Supreme Court review is implicitly allowed except where expressly barred*, and thus since it is not barred here, it is allowed.[26]

Indeed, the government acknowledges that the DTA does not remove this Court's "certiorari jurisdiction to review a decision of the District of Columbia Circuit concerning the validity of a final decision of a military commission." Mo. Dis. 15-16 n.8. But nothing in the DTA distinguishes between this Court's jurisdiction over such decisions and its appellate jurisdiction in this case. The Act is silent as to both, and leaves this appeal undisturbed.

B. The DTA's Effect On The District Court Does Not Deprive This Court Of Jurisdiction

Unable to establish that the DTA has any effect on the statutes providing for this Court's appellate jurisdiction, the government asserts instead that this Court has lost jurisdiction over this case because the district court no

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[26] 151 Cong. Rec. S14268 (Dec. 21, 2005) (Senator Kyl) (emphasis added). To be sure, Senator Kyl earlier in this colloquy did suggest that the DTA removed jurisdiction over *Hamdan*. 151 Cong. Rec. S14264. The fact that even this *post-hoc* and scripted set of remarks could not present a coherent view of why the Court is deprived of jurisdiction, of course, is yet another reason counseling in favor of reading this vague statute not to remove this Court's traditional jurisdiction, as surely members of Congress thought.

longer retains jurisdiction to consider Hamdan's claims. This argument fails in both its premise and in its conclusion.

1. Nothing in the DTA validly withdraws the district court's authority to decide Hamdan's claims on the merits.

First, as discussed *infra* pp. 32-38, the DTA does not validly suspend Hamdan's right to a writ of habeas corpus.

Second, nothing in the Act limits the district court's jurisdiction under 28 U.S.C. 1361 to hear, in a case such as this, an "action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."[27] As Professor Arthur Miller explains, the DTA "speaks only to actions 'relating to [an] aspect of the detention.' To be sure, the military is holding Petitioner in detention at Guantanamo. But Petitioner does not challenge either the fact of his detention or the conditions of his confinement" before the Supreme Court. *Amicus Br. of Arthur Miller* 6-7. *See also* DTA, § 1005(e)(1) (stating only that "Section 2241… is amended"); *Yerger*, 75 U.S. at 105 (construing statute modifying only "February 5, 1867" Act not to repeal other

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[27] Petitioner's original petition for relief in the district court invoked this jurisdiction, requesting writs of both habeas corpus and mandamus. J.A. 37-45. In the absence of habeas corpus, there is little question that the petition states a viable cause of action under the Mandamus and Venue Act. *See id.* at 45 n.1 (discussing how Petition is effectively a writ of prohibition). Judge Posner has aptly described mandamus as "a last resort, a safety hatch where no other vehicle for obtaining judicial relief is available." *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 159 F.3d 1016, 1019 (7th Cir. 1998); *see also Marbury v. Madison*, 5 U.S. 137, 152 (1803) ("It is a general principle that mandamus lies if there be no other adequate, specific, legal remedy.").

Further, government officials have violated a "clear nondiscretionary duty" when, acting in a ministerial capacity, they deprive plaintiffs of constitutional rights. *See Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1235 (10th Cir. 2005); *Louisiana v. Texas*, 176 U.S. 1, 25-26 (1900) (Harlan, J., concurring); Pet. Merits Br. 41 (mandamus for treaty rights).

The government's contention that this action sounds only in habeas, Mo. Dis. 9 n.3, is belied by its own theory that it has the authority to hold Hamdan *without* trial, underscoring that trial is not an "aspect" of the detention. Because Hamdan challenges his unlawful trial, *Preiser v. Rodriguez*, 411 U.S. 475, 487-88 (1973), and its progeny are not implicated. *E.g., Coleman v. Dretke*, 409 F.3d 665, 670 (5th Cir. 2005) (per curiam).

Acts because "[r]epeals by implication are not favored").[28]

This reading of the statute is compelled not only by the plain text of the provisions, but also by the longstanding judicial reluctance to read a statute to preclude all judicial review of constitutional claims or all challenges to executive action. *See supra* p. 17. In this case, under the government's argument, unless the DTA is construed to permit Hamdan's petition for mandamus, there will be no avenue for judicial review of petitioner's serious constitutional claims. To avoid such consequences, this Court has repeatedly read similar statutes narrowly to preserve an avenue for judicial review of legal challenges to executive action both by this Court and by trial courts. *See*, *e.g.*, *St. Cyr*, 533 U.S. at 300-14 (construing provisions withdrawing right to judicial review of immigration orders not to affect right to challenge orders through habeas); *Felker*, 518 U.S. at 661-62 (withdrawal of certiorari jurisdiction read not to preclude review by original writ of habeas corpus); *McCardle*, 74 U.S. at 515 (withdrawal of right of appeal read not to affect Court's jurisdiction to review habeas decision by writ of certiorari).

If Congress intended the DTA to "invoke[] the outer limits of [its] power," it had an obligation to make that intention manifestly clear. *St. Cyr*, 533 U.S. at 299. It did not do so in this case. Congress knows how to write a statute that excludes jurisdiction to consider a petition for a writ of mandamus under 28 U.S.C. 1361, or the All Writs Act, 28 U.S.C. 1651. Indeed, the very Congress that enacted the DTA recently did so when it passed the REAL ID Act of 2005.[29]

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[28] The legislative history similarly supports the view that the DTA was not intended to preclude Hamdan's petition for mandamus. *See*, *e.g.*, 151 Cong. Rec. S14253 (Dec. 21, 2005) (Sen. Feingold) ("In addition, the language in Section 1405(e)(2) that prohibits 'any other action against the United States' applies only to suits brought relating to an 'aspect of detention by the Department of Defense.' Therefore, it is my understanding that this provision would not affect the ongoing litigation in *Hamdan v. Rumsfeld* before the Supreme Court because that case involves a challenge to trial by military commission, not to an aspect of a detention, and of course was not brought under this provision."). No Senator or Representative disagreed.

[29] Pub. L. No. 109-13, 119 Stat. 231. That Act, like the DTA, provided for

2. In any event, even if the lower courts now lack jurisdiction to "hear or consider" Hamdan's claims, that does not deprive this Court of jurisdiction to decide the questions the Court granted certiorari to resolve.

There is no question that jurisdiction was proper in the lower courts at each stage of the litigation, and that Hamdan's petition *was* a case "in the court of appeals" under 28 U.S.C. 1254 when certiorari was sought and granted. That the lower courts may have *subsequently* lost jurisdiction over the matter does not deprive this Court of jurisdiction to review the decision made while jurisdiction was present. *See Hohn*, 524 U.S. at 248 (stating that precedents "foreclose the proposition that the failure to satisfy a threshold prerequisite for court of appeals jurisdiction" prevents this Court from exercising jurisdiction to review the decision).

Nor does the DTA preclude this Court's review through its effect on the lower courts' jurisdiction over future proceedings in this case on remand. No party asks this Court to send the case back to the lower courts to "hear or decide," 28 U.S.C. 2241(e)(1), Hamdan's claims. Both the district court and the court of appeals have already heard and decided Hamdan's petition—the district court granted habeas relief and the court of appeals ordered the petition dismissed. The parties simply ask this Court to decide which resolution was correct, at which point no further proceedings will be necessary. If the court of appeals' decision is affirmed, the case will be dismissed. If this Court reverses that court, the district court's order will be affirmed and its present final judgment will stand.[30] In neither case

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judicial review of executive action against aliens. But unlike the DTA, Congress withdrew jurisdiction "*[n]otwithstanding* any other provision of law *(statutory or nonstatutory)*, *including* section 2241 of title 28, United States Code, or *any other* habeas corpus provision, *and sections 1361 and 1651 of such title*." 8 U.S.C. § 1252(a)(5) (emphasis added). *See also, e.g.*, 8 U.S.C. 1201(i) ("There shall be no means of judicial review (including review pursuant to section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title)").

[30] Even if further proceedings in the district court were needed to implement this Court's judgment, that would not constitute "hear[ing] or consider[ing]" Hamdan's claims within the meaning of the DTA, as his claims would have been resolved by this Court in the exercise of its

will there be any further proceedings in the lower courts implicating the DTA's withdrawal of jurisdiction.

Finally, this Court has ample authority to effectuate its judgment under the All Writs Act, 28 U.S.C. § 1651. Originally part of section 14 of the Judiciary Act of 1789, the Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions…."[31] Although the Act has been read as not conferring an alternative basis for jurisdiction, *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 31-33 (2002), it *has* been read as conferring broad authority upon federal courts "to fashion extraordinary remedies when the need arises," *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985).

Thus, the government's reliance on *Bruner* and similar cases is misplaced. None of those decisions involved the unique circumstances arising in this case, in which (1) a final judgment on the merits was issued prior to the withdrawal of jurisdiction; (2) there was no question of the lower courts' jurisdiction at the time this Court granted certiorari; and (3) the new legislation affects only the lower court's authority to "hear or consider" a claim and not its authority to

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unaffected appellate jurisdiction. In any event, this Court has the power to issue such orders as are necessary to effectuate its exercise of appellate jurisdiction, and the foreclosure of other means by which petitioner can obtain review constitutes an extraordinary circumstance. *See e.g., Martin v. Hunter's Lessee*, 14 U.S. 304, 362 (1816) (Supreme Court may directly affirm decision of trial court); *Stanley v. Schwalby*, 162 U.S. 255, 283 (1896) (Supreme Court may directly order trial court to dismiss case); *Tyler v. Magwire*, 84 U.S. 253 (1873) (Supreme Court may order entry of judgment in party's favor in trial court); *NAACP v. Alabama*, 377 U.S. 288, 310 (1964) (Supreme Court has authority to formulate decree for entry by trial court).

[31] The 1789 Act specified that "All the . . . courts of the United States, shall have power to issue writs of *scire facias, habeas corpus*, and *all other writs not specifically provided for by statute*." § 14 of the Judiciary Act of 1789, 1 Stat. 81-82 (emphasis added). In 1948, in what is now 28 U.S.C. § 1651, Congress replaced "all other writs not specifically provided for by statute" with "all writs." This suggests that while a specific statute might have limited writs under the 1789 Act, the new act eliminates those limits – permitting the court to even issue a writ of habeas corpus in an appropriate case. Indeed, Congress expanded the Act to permit courts to issue not only "necessary" writs, but instead "necessary or appropriate" ones, a change that suggests § 1651 was intended to broaden the Act.

implement a decision entered at a time when the court had authority to hear and consider the petition for relief.

III. To the Extent that the DTA Deprives this Court of Jurisdiction, It Is Unconstitutional

To read the DTA as the government proposes would render it unconstitutional. Even "[t]he fact that this Court would be required to *answer* the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely." *St. Cyr*, 533 U.S. at 301 n.13.[32]

A. Congress Did Not Constitutionally Suspend Hamdan's Right To Petition For Habeas Corpus

The DTA cannot deprive Hamdan of his constitutional right to habeas corpus. "Habeas corpus is…a writ antecedent to statute,…throwing its root deep into the genius of our common law….The writ appeared in English law several centuries ago [and] became an integral part of our common-law heritage by the time the Colonies achieved independence." *Rasul*, 542 U.S. at 473-74 (citations omitted).

Our Founders took care to ensure that the availability of habeas was not dependent upon executive or legislative grace. *See*, *e.g.*, *St. Cyr*, 533 U.S. 304 n.24 (noting Suspension Clause protects against loss of right to pursue habeas claim by "either the inaction or the action of Congress"). Thus, the Constitution's right to habeas relief exists even in the absence of statutory authorization, and may be suspended only by explicit congressional action and only under limited conditions. *See Johnson v. Eisentrager*, 39 U.S. 763, 767-68

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[32] It might be argued that the government's reading of the DTA is preferable because it allows courts to avoid adjudicating the legality of commissions. Such reasoning is foreclosed by the many cases that require clear statements for jurisdictional repeals, even where constitutional challenges to *statutes* are at issue. *See St. Cyr*, 533 U.S. at 299. It is also in tension with *Quirin*—and for good reason. Petitioner is not a plaintiff seeking money damages. He is a defendant in a proceeding where the government seeks to deprive him of all the liberty he has for the rest of his life. The remedy for an Executive that seeks to avoid adjudication of a particular constitutional question is to forgo the prosecution in the specific tribunal. *See United States v. Nixon*, 418 U.S. 683, 694-96 (1974).

(1950) (assuming that, in the absence of statutory right of habeas, petitioners could bring claim directly under Constitution to the extent their claims fell within the scope of habeas protected by the Suspension Clause); *Rasul*, 542 U.S. at 473-78. Because Congress has not invoked its Suspension power, and because any such attempt in these circumstances would be invalid, the district court retains jurisdiction to consider Hamdan's habeas petition even if Congress has withdrawn access to habeas previously authorized by statute.

1. If Congress intends to implement its Suspension Clause power, it must do so with unmistakable clarity. *See St. Cyr*, 533 U.S. at 298-99. Nothing here meets that requirement.[33]

Congress has only suspended the writ four times; in each, Congress invoked its Suspension power, each time using the verb "suspend." *See Natl. Security Ctr. Br.* 26-30. Simply withdrawing a statutory basis for habeas is not a sufficient indication of Congress' intent. *Cf. St. Cyr*, 533 U.S. at 298-300.

2. The DTA should not be read as an attempted exercise of the Suspension Clause power for the additional reason that any such attempt clearly would be invalid. Congress lacks *carte blanche* power to suspend the writ at will, even in times of open war. Instead, the Constitution permits a suspension only when in "Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. In enacting the DTA, Congress made no such finding.

In addition, even during actual "Rebellion or Invasion," this Court has required that congressional suspension be limited in scope and duration in ways that the DTA is not. First, Congress must tailor its suspension geographically to jurisdictions in rebellion or facing imminent invasion. Thus, in *Milligan*, this Court considered the Act of March 3d, 1863, which suspended habeas in rebelling territories. Because Milligan was a resident of Indiana, a State not in rebellion, his right to habeas was protected. *Id.* at 126.[34] Like Indiana,

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[33] "No one contends that the congressional Authorization for Use of Military Force…is an implementation of the Suspension Clause." *Hamdi*, 542 U.S. at 554 (Scalia, J. dissenting).

[34] The Court reached this conclusion even though Congress had authorized a broader suspension. *See* Act of Mar. 3, 1863, 12 Stat. 755

"Guantanamo Bay…is…far removed from any hostilities." *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring). Thus, the DTA could not, even if intended to do so, constitutionally suspend petitioner's right to a writ of habeas corpus.

Moreover, Congress may suspend the writ only for a limited time. *See* U.S. CONST., art. I, § 9, cl. 2. The DTA, however, has no terminal date and indefinitely denies statutory access to habeas corpus.

3. The scope of the right protected from suspension is defined by the historic purposes and applications of the writ. *See St. Cyr*, 533 U.S. at 300-01. "Consistent with the historic purpose of the writ, this Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace," including petitions of "admitted enemy aliens convicted of war crimes during a declared war and held in the United States, *Ex parte Quirin*…and its insular possessions, *In re Yamashita*." *Rasul*, 542 U.S. at 474 (citations omitted).[35]

(authorizing the President to "suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof").

[35] It makes no constitutional difference that petitioner is a non-citizen accused of being an enemy of the United States. Aliens have been able to file habeas petitions to challenge detention at least since the 17th century. *See St. Cyr*, 533 U.S. at 305-06 (from founding, habeas "jurisdiction was regularly invoked on behalf of noncitizens"); *id*. at 301-02 (collecting cases); see also *Amicus Br. for the Bar Human Rights Committee of the Bar of England and Wales and the Commonwealth Lawyers Association* (*Commonwealth Lawyers Br.*) at 5. Both the Habeas Corpus Act of 1641, 16 Car. 1, and the Habeas Corpus Act of 1679, 31 Car. 2, granted "any person" the right to file a petition. *See generally Amicus Br. of Legal Historians, Rasul v. Bush*, No. 03-334 (original conception of habeas permitted challenges by enemy aliens).

Moreover, the Great Writ has long been available to challenge the military's treatment of alleged enemies. *See Rasul*, 542 U.S at 474-75. For example, English courts heard habeas claims from alleged foreign enemy combatants challenging their status in the Eighteenth Century. *See*, *e.g.*, *Three Spanish Sailors' Case*, 96 Eng. Rep. 775, 776 (C.P. 1779) (Spanish sailors challenging detention as alleged prisoners of war); *Rex v. Schiever*, 97 Eng. Rep. 51 (K.B. 1759) (Swedish sailor captured aboard enemy ship); *Commonwealth Lawyers Br.* 6-8 & n.9 (collecting cases). Similarly, U.S. courts heard enemy aliens' habeas petitions from the War of 1812, *Lockington* v. *Smith*, 15 F. Cas. 758 (C.C.D. Pa. 1817), through the Second World War, *Quirin*, 317 U.S. at 1.

Thus, *Yamashita* entertained a habeas petition similar to Hamdan's, asking whether there was legal authority for the establishment of a commission and whether the petitioner fell within its jurisdiction. 327 U.S. at 9-18.[36] Although the petitioner was able to rely on the statutory provisions authorizing habeas, this Court explained that the result would have been no different had there been no statutory habeas, as Congress and the Executive "could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus." *Id.* at 9. *See also Quirin*, 317 U.S. at 25 ("neither the [Presidential Proclamation subjecting enemy aliens to commissions] nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.").

Eisentrager does not support a different result. The petitioners in that case were captured, held, and tried by a commission sitting in China and "at no relevant time and in no stage of [their] captivity, ha[d] been within [U.S.] territorial jurisdiction." 339 U.S. at 768.[37] The qualification

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[36] The writ has traditionally been available to challenge the jurisdiction of a committing tribunal, including a military commission. *E.g.*, *Quirin*, 317 U.S. at 19; *Milligan*, 71 U.S. at 118; Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 HARV. L. REV. 441, 475 (1963) ("The classical function of the writ of habeas corpus was to assure the liberty of subjects against detention by the executive or the military."); *St. Cyr*, 533 U.S. at 302 n.19 ("impressment into the British Navy").

[37] Thus, the Court explained that each Petitioner

> (a) [was] an enemy alien; (b) [had] *never been or resided in* the United States; (c) was captured *outside* of our territory and there held in military custody…; (d) was tried and convicted by a Military Commission sitting *outside* the United States; (e) for offenses against laws of war committed *outside* the United States; (f) and [was] at all times imprisoned *outside* the United States.

339 U.S. at 777 (emphasis added). It was based on this lack of connection to territory within U.S. control that the Court distinguished *Quirin* and *Yamashita*. *Id*. at 779-80. The Court explained that a nexus with a territory under U.S. control, like the Philippines then or Guantanamo now, was sufficient to invoke the right to habeas. *Id*. at 780. Moreover, the *Eisentrager* Petitioners did *not* invoke 28 U.S.C. 2241(c)(3), violation of the Constitution and laws of the United States, so the Court had no occasion to reach the specific issue. *See Odah* Amicus Br., at 11-13.

was essential, for the writ has long been extended to alleged enemy aliens held or tried within English and U.S. territory. *E.g.*, *Rasul*, 542 U.S. at 482 ("As Lord Mansfield wrote in 1759,…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.'") (citation omitted); *id*. at 480-82 & nn.11-14 (collecting cases); 3 W. Blackstone, Commentaries on the Laws of England 131 (1766) (observing that "[t]his is a high prerogative writ,…running into all parts of the king's dominions…wherever that restraint may be inflicted.").

Thus, *Eisentrager* acknowledged that the judiciary retained the obligation to inquire into the "jurisdictional elements" of the detention of an enemy alien with a sufficient connection to U.S. territory. 339 U.S. at 775. In these and other habeas cases, the Court explained, "it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act," *id*. at 771, for "their presence in the country implied protection," *id*. at 777-78.

Moreover, Hamdan's standing to seek the writ is even greater than that of petitioners in *Quirin*, *Yamashita*, and *Eisentrager*, all cases involving *admitted* enemy aliens. Hamdan is a citizen of Yemen, a nation *not* at war with the U.S., and he *denies* ever engaging in hostilities directed at the U.S. In *Eisentrager*, this Court stated that it would entertain habeas petitions from aliens to at least (1) "ascertain the existence of a state of war," and (2) ascertain "whether [petitioner] is an enemy alien." 339 U.S. at 775. Both questions are at issue in this case, as Hamdan challenges whether the AUMF truly declared a general "war on terrorism," and disputes that he is an enemy of this country.

While the majority in *Rasul* held that the *Eisentrager* considerations required interpreting the habeas statute to encompass the petitioners' claims—and therefore did not

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As this Court concluded in *Rasul*, individuals detained in Guantanamo Bay are within the "territorial jurisdiction" of the United States. 542 U.S. at 480. *See also id*. at 487 (Kennedy, J., concurring in judgment) ("Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities."). Hamdan's petition thus falls within "the historical reach of the writ of habeas corpus," *id*. at 481, and within the protection of the Suspension Clause under *Eisentrager*.

reach any constitutional question—the same considerations lead inexorably to the conclusion that the petitioners in that case, and in this one, are also entitled to bring habeas claims directly under the Constitution. *See id*. at 486-88 (Kennedy, J., concurring in judgment) (rejecting majority's distinction between statutory and constitutional right to habeas and, applying *Eisentrager* constitutional analysis, concluding that habeas was available to the petitioners).

In this case, there has been no attempted suspension of the Great Writ. The courts retain the "duty and power" to hear Hamdan's claims. *Yamashita*, 327 U.S. at 9.

Nor can the government establish any other compelling reason why, contrary to this historical tradition, the protection of the Suspension Clause should not extend to the limited challenges raised by Hamdan. Hamdan does not ask the courts to second guess the factual determinations of a tribunal, but rather to exercise the quintessential legal (not military) judgment of whether the commissions are lawfully constituted and whether he falls within their jurisdiction, determinations this Court has repeatedly made even in the midst of a declared war without ever suggesting that doing so would impermissibly interfere "in the conduct of military affairs." *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring in judgment). *See Quirin*, 317 U.S. at 24-48; *Yamashita,* 327 U.S. at 9-25; *see also Hamdi*, 542 U.S. at 534 (plurality) (rejecting view that limited judicial review "will have the dire impact on the central functions of warmaking that the Government forecasts"). Nor does Hamdan's petition challenge the military's authority to detain temporarily combatants in a zone of hostilities in light of military necessities. To the contrary, Hamdan challenges a proceeding that metes out retrospective punishment, not one that disables combatants in an ongoing conflict. These factors "suggest[] a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus." *Rasul*, 542 U.S. at 488 (Kennedy, J., concurring in judgment).

4. Had Congress provided an adequate substitute to habeas, this would be a different case. *See St. Cyr,* 533 U.S. at 305. But the limited judicial review in the DTA is wholly inadequate. *See supra* pp.1-2, 13-15; *Commonwealth Lawyers*

Br. 6-15 (expeditious review has historically been, and remains, at the core of the habeas writ); *In re Bonner*, 151 U.S. 242, 259 (1894) (holding that when a "prisoner is ordered to be confined in [a facility] where the law does not allow the court to send him for a single hour…[t]o deny the writ of habeas corpus in such a case is a virtual suspension of it").

B. The DTA Violates Equal Protection Guarantees

If the DTA precludes petitioner from pursuing his present claims for relief, it is only because he is an alien (rather than a citizen) being detained by the Department of Defense (rather than the Central Intelligence Agency, Department of Justice, or any other agency) at a facility in Guantanamo Bay (rather than in a brig in Norfolk, Virginia or any other place). Legislation that deprives individuals of access to the protections of the Great Writ based on such an arbitrary collage of distinctions—and at the exclusive discretion of the Executive—violates the Fifth Amendment.

The Fifth Amendment protects aliens within U.S. territory as well as U.S. citizens. *See*, *e.g., Wong Wing v. United States*, 163 U.S. 228 (1896); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (all "aliens within the *jurisdiction* of the United States" are protected) (emphasis added); *Galvan v. Press*, 347 U.S. 522, 530 (1954). As *Rasul*, 542 U.S. at 480, noted, "the United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base." Accordingly, Hamdan is protected by the Fifth Amendment.

Legislation that enacts substantial discriminatory barriers to the exercise of fundamental rights is subject to strict scrutiny. *See*, *e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Access to courts is such a fundamental right. *See Tennessee* v. *Lane*, 541 U.S. 509, 522-23 (2004); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas* v. *California*, 372 U.S. 353 (1963). The right of access to habeas is particularly fundamental, and is indeed so important to our constitutional tradition that it is singled out for constitutional protection. U.S. Const. art. I, § 9, cl. 2.[38]

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[38] *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (declaring that the right to habeas corpus is "shaped to guarantee the most fundamental of all rights"); *Coolidge v. New Hampshire*, 403 U.S. 443, 454 n.4 (1971) (listing the right to the writ of habeas corpus among rights that are "to be regarded as

In any event, the DTA fails even rational-basis scrutiny. It withdraws habeas only from non-citizens detained by the military in Guantanamo, while preserving the writ for individuals identically situated in everything but citizenship, custodian, or location of detention. There is no rational basis for withdrawing habeas rights only from those held by the Defense Department. Likewise there is no rational justification for withdrawing habeas access from only those aliens housed in Guantanamo Bay, but not those held elsewhere.

"[T]his Court has consistently recognized that where there is in fact discrimination against individual interests, the constitutional guarantee of equal protection of the laws is not inapplicable simply because the discrimination is based upon some group characteristic such as geographic location." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 92 (1973) (Marshall, J., dissenting). The government has offered no justification for the distinctions drawn by the DTA and none is apparent. The discrimination here is surely more corrosive than, for example, conditioning access to habeas on a filing fee. *Smith v. Bennett*, 365 U.S. 708 (1961). It offends the very essence of equal justice under law. It is targeted at a population who cannot vote, and concerns not government benefits, but the touchstone issue of who can come into court to protect his liberty.[39]

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of the very essence of constitutional liberty") (citation omitted).

[39] The government's reading of the DTA raises several other constitutional problems as well. The Article III Exceptions Clause violation is discussed *supra* pp. 24-26. It would also run afoul of the Bill of Attainder Clause. U.S. CONST., art. I, sec. 9, cl. 9. A law is an unlawful attainder if (1) it applies to easily ascertainable members of a group, and (2) inflicts punishment. *United States v. Lovett*, 328 U.S. 303, 315 (1946). The Act, as read by respondents, satisfies both prongs. The DTA's plain language applies only to "alien[s] detained by the Department of Defense at Guantanamo." § 1005(e)(1). And the Act constitutes punishment under respondents' interpretation. The extended detention, and in Hamdan's case the denial of his right to challenge the jurisdiction and legality of the commission itself, is at least as punitive as the denial of the right to engage in a particular profession. *See Ex parte Garland*, 4 Wall. 333 (1867) (denial of right to practice law is an attainder); *cf.* 151 Cong. Rec. S12664 ("If you want to give terrorists habeas corpus rights as if they were American citizens, that they are not part of an outfit trying to wage war

CONCLUSION

There is no reason to read into the DTA a clear statement that is not there; rather, there is every reason not to do so, and to hold that the DTA has no effect on this Court's jurisdiction.[40] Accordingly, the Motion to Dismiss should be denied. In the event that the Court sees any merit to the Motion, petitioner respectfully requests that any ruling on it be deferred until after the oral argument. *Cf. Oregon v. Guzek*, No. 04-928 (Order of Nov. 23, 2005).

Respectfully submitted,

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January 31, 2006

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on us, fine, vote against me.") (Nov. 10, 2005) (remarks of Sen. Graham).

[40] The DTA is a sober reminder that a sense of proportion is essential in assessing the merits of petitioner's claims and that Congress stands ready to react to this Court's rulings. All that is at stake in this case is the default rule about the legality of military commissions without further congressional action. If this Court rules for petitioner, Congress can then authorize commissions or some other trial system. The government's representations should not mislead the Court into thinking that more is at stake in ruling for Petitioner than actually is *Cf.* U.S. Br., *Rasul v. Bush*, Nos. 03-334, at 12-13 ("Exercising jurisdiction over claims filed on behalf of aliens held at Guantanamo would…require U.S. soldiers to divert their attention from the combat operations overseas…[and] intrude on Congress's ability to delineate the subject-matter jurisdiction of the federal courts.").