[ORAL ARGUMENT HELD OCTOBER 8, 2005]

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

Nos. 05-5064, and consolidated cases 05-5095 through 05-5116

KHALED A.F. AL ODAH, *et al.*,
Petitioners/Appellants/Cross-Appellees,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents/Appellees/Cross-Appellants.

No. 05-5062, and consolidated case 05-5063

LAKHDAR BOUMEDIENE, *et al.*,
Petitioners-Appellants,
v.
GEORGE W. BUSH, *et al.*,
Respondents-Appellees.

On Appeal from the United States District Court
for the District of Columbia

SUPPLEMENTAL BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF GOVERNMENT RESPONDENTS REGARDING EFFECT OF DETAINEE TREATMENT ACT OF 2005

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Dated: January 18, 2006

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. PARTIES AND *AMICI*

All parties and *amici curiae* appearing before the district court and/or in this Court are listed in the briefs for the Government Respondents.

B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the April 27, 2005 brief filed by the Government Respondents.

C. RELATED CASES

Cases related to this appeal are listed in the briefs for the Government Respondents. This case was before the Court on a prior occasion. *See Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd and remanded sub nom., Rasul v. Bush*, 124 S. Ct. 2686 (2004).

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Circuit Rule 29(b), Fed.R.App.P. 26.1, and Circuit Rule 26.1, the undersigned counsel states that *amicus curiae* Washington Legal Foundation is a non-profit corporation; it has no parent corporations, and no publicly-held company has a 10% or greater ownership interest.

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Richard A. Samp

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GLOSSARY

CSRT	Combatant Status Review Tribunal
DTA	Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, §§ 1001-1006 (2005)

INTERESTS OF *AMICI CURIAE*

The interests of the Washington Legal Foundation (WLF) are more fully set forth in the accompanying motion for leave to file this supplemental brief. WLF is a nonprofit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting America's security. To that end, WLF has appeared before this Court and other federal courts to ensure that the federal government possesses the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Rumsfeld v. Padilla,* 542 U.S. 426 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush,* 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir.), *cert. granted,* 126 S. Ct. 622 (2005). WLF also filed an *amicus curiae* brief in this case when it was before the Court in 2003 and an *amicus curiae* brief in April 2005 in connection with the initial round of briefing before this panel.

STATEMENT OF THE CASE

On December 30, 2005, the President signed into law the Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, §§ 1001-1006 (2005). Section 1005 of the DTA amends federal court jurisdiction over claims filed by aliens held by the U.S. Department of Defense (DoD) at Guantanamo Bay, Cuba. Petitioners in these cases are aliens who filed challenges in federal district

court to their detention by DoD at Guantanamo Bay. *Amicus curiae* Washington Legal Foundation (WLF) is filing this brief to express its views on the effect of § 1005 on those challenges.

SUMMARY OF ARGUMENT

Petitioners cannot seriously contest that the DTA removes federal court jurisdiction over the claims of Guantanamo Bay detainees. The only real issue is whether the DTA should be interpreted as applying to pending cases. The fairest reading is that Congress intended the DTA to apply to these cases; that reading is supported by the presumption that jurisdictional statutes (such as the DTA) should apply to pending cases when (as here) they do not affect substantive rights. Interpreting the DTA as applying to pending cases does not render § 1005 unconstitutional, under either the Suspension Clause or any other constitutional provision.

ARGUMENT

I. § 1005 ELIMINATES DISTRICT COURT HABEAS JURISDICTION OVER CLAIMS BY GUANTANAMO BAY DETAINEES AND CHANNELS ALL JUDICIAL REVIEW THROUGH THIS COURT

Using unmistakably clear language, Congress (through the DTA) has removed federal district courts jurisdiction over claims filed by Guantanamo Bay detainees regarding "any aspect" of their detention. Rather, detainees seeking

federal court review of such claims now must first raise their claims before a Combatant Status Review Tribunal (CSRT). They may then file an action in this Court contesting a final CSRT decision that they are properly detained as enemy combatants.

Section 1005(e)(1) of the DTA amends the federal habeas statute, 28 U.S.C. § 2241, by adding a new subsection (e). That subsection states that, except as provided in § 1005 of the DTA, "no court, justice, or judge shall have jurisdiction to hear or consider" either: (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by DoD at Guantanamo Bay; or (2) "any other action" relating to "any aspect" of such detention, whether filed by or on behalf of a current alien detainee or by or on behalf of an alien formerly detained at Guantanamo Bay and determined by this Court to have been properly detained.

WLF does not understand Petitioners to contest that they are aliens meeting the description of individuals identified in § 1005(e)(1). Petitioners are all individuals being detained by DoD at Guantanamo Bay. Section 1005(e)(1) effectively conveys clear congressional intent to eliminate federal court jurisdiction (except as provided in § 1005) over all claims regarding "any aspect" of the detention of aliens being detained by DoD at Guantanamo Bay.

That intent must be deemed to include jurisdiction over habeas corpus claims. In several recent cases, the Supreme Court has stated that "where a provision precluding review is claimed to bar habeas corpus review, the Court has required a particularly clear statement that such is Congress' intent." *DeMore v. Kim*, 538 U.S. 510, 517 (2003) (citing *INS v. St. Cyr*, 533 U.S. 289, 308-09 (2001)). In adopting the DTA, Congress has risen to the Supreme Court's challenge: it has included a "particularly clear statement" that it intended to eliminate all federal court jurisdiction over habeas corpus claims filed by aliens being held by DoD at Guantanamo Bay. It was absence of the specific words "habeas corpus" in the jurisdiction-limiting statutes at issue in *DeMore* and *St. Cyr* that caused the Court to conclude that Congress in those instances had not intended to eliminate habeas corpus jurisdiction. *See, e.g.*, *DeMore*, 538 U.S. at 517 ("[8 U.S.C.] Section 1226(e) contains no explicit provision barring habeas review."). By adding an explicit reference to "an application for a writ of habeas corpus" to the jurisdiction-limiting provision of 28 U.S.C. § 2241(e), § 1005(e)(1) of the DTA makes it unmistakably clear that Congress intended to foreclose challenges (other than those authorized by § 1005) to "any aspect" of Guantanamo Bay detentions, including habeas corpus challenges.

WLF does not mean to suggest that Congress has intended to strip the

federal courts of *all* jurisdiction over claims by aliens challenging their detention at Guantanamo Bay. To the contrary, § 1005(e)(2) permits detainees to seek review in this Court of the decision of a CSRT that "the alien is properly detained as an enemy combatant." DTA § 1005(e)(2)(A). In connection with any such review proceeding, this Court has jurisdiction to consider both whether CSRT's status determination "was consistent with the standards and procedures specified by the Secretary of Defense" for CSRTs, and whether the use of those standards and procedures is consistent with the Constitution and laws of the United States (to the extent the Constitution and laws of the United States are applicable). DTA § 1005(e)(2)(C). By so providing, Congress has not purported to strip federal courts of all jurisdiction over Guantanamo Bay detention issues but rather has channeled them in a manner that by-passes the federal district courts and provides for orderly judicial review at appropriate stages of the process. Such channeling of federal review as an alternative to district court habeas corpus jurisdiction has been a long-accepted congressional practice. *See, e.g., Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (by adopting 8 U.S.C. § 1252(g), Congress deferred federal court jurisdiction over certain aspects of the alien removal process until after the Attorney General has issued a final removal order, and provided for exclusive

review of such orders in the federal appeals courts).

In sum, § 1005(e)(1) is sufficiently specific in its elimination of federal court jurisdiction to preclude jurisdiction over any and all claims of Guantanamo Bay detainees, including habeas corpus claims.

II. BY ITS TERMS, THE DTA APPLIES TO ALL PENDING CASES

WLF understands that Petitioners will argue not that the DTA does not remove federal jurisdiction over habeas corpus claims, but that the DTA is inapplicable to suits (such as theirs) pending in federal court at the time the DTA was signed into law on December 30, 2005. Any such contention is without merit.

The language of the DTA makes clear that it applies to all pending litigation: § 1005(h)(1), entitled "Effective Date – In General," provides, "This section shall take effect on the date of the enactment of this Act." Thus, § 1005(e)(1)'s jurisdiction-limiting provision became fully effective on December 30, 2005 and bars any further assertion of jurisdiction by the district courts over Petitioners' claims.

WLF recognizes that individual Members of Congress introduced statements into the legislative history of the DTA on the question of the DTA's application to pending cases. Statements introduced by Democratic Members

generally said that the DTA is not applicable to pending cases, while statements introduced by Republican members generally said that the DTA *is* applicable to pending cases. *Compare, e.g.*, 151 Cong. Rec. at S14,252 (Senator 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."), *with, e.g.*, 151 Cong. Rec. at S14,263 (colloquy between Senators Graham and Kyl) (§ 1005(e) is applicable to all pending cases). WLF urges the Court to determine the meaning of § 1005 based on the language actually used in the statute passed by Congress and signed by the President, not on what individual Members may have said about the statute.

Petitioners may attempt to argue that § 1005(e)(1) is inapplicable to their cases by comparing the language of § 1005(h)(1) to the language of § 1005(h)(2). The latter subsection provides that § 1005(e)(2) (governing actions in this Court for review of a CSRT decision) and § 1005(e)(3) (governing actions in this Court for review of the final decision of a military commission) "shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act." Petitioners apparently argue as follows: (1) their claims are not governed by § 1005(h)(2) because they are not seeking review of a CSRT

decision or a military commission proceeding; (2) therefore, § 1005(h)(2)'s "claim . . . pending on or after the date of the enactment of this Act" language is inapplicable to them; and (3) therefore, because there is no "claim . . . pending" language included in the only transition provision applicable to them (§ (h)(1)), Congress could not have intended to apply § 1005(e)(1) to their claims.

Petitioners' argument is belied by the language of § 1005(h)(1), which states that § 1005(e)(1) (along with the remainder of § 1005) "shall take effect" on December 30, 2005. The most logical reading of § 1005(h)(1) is that federal courts are deprived of habeas jurisdiction over any claims by Guantanamo Bay detainees as of that date. Indeed, unless § 1005(h)(1) were interpreted in that manner, § 1005(h)(2) would lose all meaning – because it is well known that there are no suits that have been filed initially in this Court seeking review of a CSRT decision or a military commission decision,[1] nor were such suits authorized by any pre-existing statute. Congress must have had some "pending" claims in mind when it provided, in § 1005(h)(2), that §§ (e)(2) and (e)(3) would apply to claims "pending on or after" December 31, 2005 whose review is governed by either §§ (e)(2) or (e)(3). The most logical conclusion is that

[1] Indeed, since President Bush authorized the creation of military commissions in 2001, there have been no trials before a military commission and no final decisions from a military commission.

Congress had in mind Petitioners' claims as well as other claims initially filed in the United States District Court for the District of Columbia and which are the subject of appeals before this Court. Under that reading, §§ (h)(1) and (h)(2) – when read in conjunction – mean that § (e)(1) is applicable to all pending claims filed by Guantanamo Bay detainees (thereby requiring vacation of all orders issued by the district courts) but that detainees who have been determined (based on a final decision of a CSRT) to be properly detained as enemy combatants may proceed in this Court with a challenge to that final decision under the terms set forth in § (e)(2).

Even if the meaning of §§ (h)(1) and (h)(2) were ambiguous (which it is not), § (e)(1) should nonetheless be deemed applicable to Petitioners' claims based on the presumption that procedural changes mandated by statute, such as "intervening statutes that merely confer or oust jurisdiction," are to be applied to cases pending on the date the statute is enacted. *Republic of Austria v. Altmann*, 541 U.S. 677, 693 (2004) (internal quotations omitted). A contrary presumption exists when a new statute affects substantive rights. The Court has explained the presumption against retroactive application of statutes affecting substantive rights as follows:

[A]ntiretroactivity concerns are most pressing in cases involving "new

> provisions affecting contractual rights or property, matters in which predictability and stability are of prime importance." . . . The aim of the presumption [against retroactive application of statutes affecting substantive rights] is to avoid unnecessary *post hoc* changes to legal rules on which parties relied in shaping their primary conduct.

Id. at 693, 696 (quoting *Landsgraf v. USI Film Products*, 511 U.S. 244, 271 (1994)). None of those "antiretroactivity concerns" are present here. The DTA's jurisdictional provision does not affect any of Petitioners' contractual or property rights, nor can it be said to change any legal rules on which Petitioners "relied in shaping their primary conduct." Other than filing their initial claims in the district court, Petitioners have taken no actions in reliance on the pre-DTA version of 28 U.S.C. § 2241.

Admittedly, as *Altmann* recognized, it can sometimes be difficult to distinguish between statutes that affect only procedural rights (and thus are subject to the presumption of retroactive application) and those that affect substantive rights (and thus are subject to the presumption against retroactive application). *Altmann*, 541 U.S. at 694-95. The Court explained, for example, that "statutes that create jurisdiction where none otherwise exists speak not just to the power of a particular court but to the substantive rights of the parties as well." *Id.* at 695 (internal quotation omitted). This is particularly true where the jurisdictional statute is bound together with a statutory provision creating the

substantive right: "[w]hen a 'jurisdictional' limitation adheres to the cause of action in this fashion – when it applies by its terms regardless of where the claim is brought – the limitation is essentially substantive." *Id.* at 695 n.15.[2]

Bearing those considerations in mind, the jurisdiction-restricting provision of the DTA is more properly classified as a procedural statute than as a statute affecting substantive rights. In particular, the jurisdictional statute amended by § 1005(e)(1), 28 U.S.C. § 2241, does not confer any substantive rights on Petitioners, and thus the DTA's restrictions on habeas jurisdiction do not deny Petitioners the ability to enforce any substantive rights created by the habeas statute. Indeed, no court has ever issued a final judgment determining that any of the Petitioners possess *any* substantive rights that are enforceable in these proceedings. The Supreme Court certainly has never made any such determination: while determining that the federal district courts possessed jurisdiction (under the then-current version of § 2241) to hear Petitioners' claims, it expressly declined to address whether Petitioners possessed any substantive rights under the U.S. Constitution or federal law. *Rasul v. Bush*, 542 U.S. 466, 485 (2004) ("Whether and what further proceedings may become

[2] The same rule presumably applies when (as here) one is addressing changes to an existing statute *granting* jurisdiction instead of (as in *Altmann*) changes to a provision that limited jurisdiction.

necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now. What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing."). Moreover, § 1005(e)(2) continues to provide Petitioners with the ability to raise in federal court the principal claim that they have raised in their petitions: that they are innocent individuals being detained on the basis of an improper enemy combatant designation. Under those circumstances, and given the absence of any reliance by Petitioners on prior statutes, the DTA cannot be said to strip Petitioners of any substantive rights – and thus the presumption in favor of application of the DTA to pending cases comes into play. Moreover, as noted above: quite apart from any default presumption (which applies only in cases involving ambiguous statutes), the DTA most logically should be read as expressing a congressional intent that the DTA be fully applicable to these and other cases pending on December 30, 2005.

III. APPLYING THE DTA TO PENDING CASES DOES NOT RAISE ANY CONSTITUTIONAL CONCERNS

Amicus understands that Petitioners will argue that if the DTA were interpreted as applying to their cases, it would constitute an unconstitutional

effort to infringe the powers of the federal courts. Any such argument is without merit.

First, unlike the statute in cases such as *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995), the DTA does not constitute an effort to overturn a final judgment in a fully adjudicated case. No final judgment has been entered in favor of any of the Petitioners.

The DTA represents a rejection of *Rasul*'s interpretation of the statute conferring habeas corpus jurisdiction, but Congress is well within its rights in having the final say regarding how statutes should be interpreted. The Supreme Court in *Rasul* went out of its way to emphasize that its decision was based solely on statutory interpretation and was not based on its understanding of any constitutional right to habeas corpus review by nonresident aliens being held in federal detention. Indeed, in the course of explaining why *Johnson v. Eisentrager*, 339 U.S. 763 (1950), did not preclude the exercise of jurisdiction under § 2241, the Court stated that *Eisentrager* had accepted (without deciding) the parties' assumption that § 2241 did not provide jurisdiction and had proceeded from there to conclude that the *Constitution* did not require that the federal courts be opened to the claims of nonresident aliens challenging their federal detention. *Rasul*, 542 U.S. at 477-78. *Rasul* never suggested that

Eisentrager was incorrectly decided. Thus, nothing in *Rasul* suggests that the Constitution imposes limits on the power of Congress to restrict nonresident aliens' access to the federal courts.

Finally, there is no basis for asserting that the DTA is unconstitutional under the Suspension Clause.[3] The Supreme Court has explained that "at the absolute minimum, the Suspension Clause protects the writ as it existed in 1789." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). The constitutionality under the Suspension Clause of the DTA's limitation on habeas jurisdiction "therefore turns on whether the writ was generally available to those in [Petitioners'] position in 1789 (or, possibly, thereafter) to challenge detention." *DeMore v. Kim*, 538 U.S. at 538 (O'Connor, J., concurring in part and concurring in the judgment). A quick perusal of *Eisentrager* demonstrate the futility of any effort by Petitioners to raise a Suspension Clause challenge to the DTA. *Eisentrager* set forth a lengthy history of habeas jurisdiction in American courts to demonstrate that there was no tradition, either in 1789 or thereafter, of opening federal courts to the claims of nonresident aliens challenging their federal

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[3] *See* Article I, § 9, cl.2:

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

detention. *Rasul* reversed that tradition and held that the federal courts, beginning with the 1973 decision in *Braden v. 30th Judicial Court of Kentucky*, 410 U.S. 484 (1973), have been open to habeas claims of nonresident aliens who can establish jurisdiction over their custodians. But given that in 1789 and for nearly 200 years thereafter, no such federal court access was available to nonresident aliens, the Suspension Clause imposes no restriction on Congress's power to reverse a previous grant of statutory habeas jurisdiction.

CONCLUSION

Amicus curiae WLF respectfully requests that the Court determine that the DTA deprives the district courts of all jurisdiction over these cases, and vacate all district court orders entered to date.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* Washington Legal Foundation (WLF). Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point, proportionately spaced CG Times type, and is 15 pages long.

_____

Richard A. Samp

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of January, 2006, two copies of the foregoing Brief of Washington Legal Foundation, along with one copy of the motion for leave to file, were deposited in the U.S. Mail, first-class postage prepaid, and were also sent by email, addressed to the following:

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