No. 05-184

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,
Petitioner,

v.

DONALD RUMSFELD, SECRETARY OF DEFENSE, ET AL.,
Respondent.

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

BRIEF OF SENATORS GRAHAM AND KYL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether this Court has (or should retain) jurisdiction over this case following the enactment of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Div. A, Tit. X, 119 Stat. 2739.

2. Whether federal courts should abstain from interfering with ongoing military commission proceedings.

3. Whether the military commission established by the President to try petitioner is duly authorized under Congress's Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224; the Uniform Code of Military Justice (UCMJ); some other statute; or the inherent powers of the President.

4. Whether petitioner, as an al Qaeda combatant, has judicially enforceable rights—or any rights—under the Geneva Convention.

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INTEREST OF *AMICI CURIAE*

Amici curiae are Senator Lindsey Graham of South Carolina and Senator Jon Kyl of Arizona. Senators Graham and Kyl are members of the Senate Judiciary Committee, and both were sponsors of the "Graham-Levin-Kyl Amendment" that eventually became Section 1005(e) of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-06 (2005) ("DTA" or "the Act").[1] One of the issues

[1] This amicus brief is filed with the consent of the parties. Petitioner has filed a letter with the Clerk of the Court consenting to the filing of amicus briefs, and respondent's letter of consent is being filed with the Clerk of the Court together with this brief, in accordance with

before this Court is how Section 1005(e) of that Act affects this Court's jurisdiction over, and the standards applicable to, this case. As sponsors of the Graham-Levin-Kyl Amendment that became Section 1005(e), and as members of the Senate Judiciary Committee, Senators Graham and Kyl both have a strong interest in the proper application of Section 1005 and a unique familiarity with and understanding of the provision's drafting history.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Senate and the House of Representatives have twice passed the Detainee Treatment Act, and the President has now twice signed it into law. The DTA was incorporated into the final version of H.R. 2863, the Department of Defense Appropriations Act of 2006, passed by the Senate on December 21, 2005, and signed by the President on December 30, 2005. Pub. L. No. 109-148, §§ 1001-1006. The DTA was also incorporated into the National Defense Authorization Act for Fiscal Year 2006, passed by the Senate on December 21, 2005, and signed by the President on January 6, 2006. Pub. L. No. 109-163, §§ 1401-1406.

The Detainee Treatment Act was passed in response to this Court's decision in *Rasul* v. *Bush*, 542 U.S. 466 (2004). It works two principle changes. *First*, the Act immediately rescinds the statutory grant of jurisdiction to the federal courts to entertain petitions for writs of habeas corpus or other actions filed by alien detainees held by the Department of Defense at the Guantanamo Bay U.S. Naval Station facility in Cuba ("Guantanamo"). The DTA declares that "no court, justice, or judge shall have jurisdiction to hear or consider" any habeas application or any other action that

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this Court's Rule 37.3(a). Pursuant to Rule 37.6, the *amici* submitting this brief and its counsel hereby represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

"relate[s] to any aspect of detention" of an alien held at Guantanamo. DTA § 1005(e)(1). That provision is designed to return the geographic scope of habeas under the federal statute to its pre-*Rasul* state. The withdrawal of jurisdiction, like all other provisions of the DTA, "take[s] effect on the date of [the DTA's] enactment." DTA § 1005(h)(1).

Second, the DTA establishes new, carefully tailored mechanisms for judicial review of challenges brought by Guantanamo detainees and channels all pending actions through those new mechanisms. Enemy combatant determinations are first made by Combatant Status Review Tribunals ("CSRTs") under standards established by the Secretary of Defense. DTA § 1005(a)(1).[2] Any "final decision" of a CSRT is, in turn, subject to judicial review in the United States Court of Appeals for the District of Columbia Circuit, which has "exclusive jurisdiction." *Id.* § 1005(e)(2). The DTA also regulates the scope of that review. The D.C. Circuit is empowered to review whether "the status determination of the [CSRT] * * * was consistent with the standards and procedures specified by the Secretary of Defense * * * (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence * * *)," and "whether the * * * standards and procedures" employed are "consistent with the Constitution and laws of the United States" (to the extent they apply). *Id.* § 1005(e)(2)(C).

The Detainee Treatment Act provides a separate mechanism for judicial review of final orders of conviction and sentences issued by military commissions pursuant to Military Commission Order No. 1 (Aug. 31, 2005) (or any successor order), including challenges to the standards and procedures employed. Section 1005(e)(3)(A) of the DTA provides that such convictions and sentences are, like

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[2] The Secretary of Defense must submit the standards to the Committee on Armed Services and the Committee on the Judiciary of both the House of Representatives and the Senate. *Ibid.*

enemy combatant determinations issued by CSRTs, subject to review "exclusively" in the D.C. Circuit. If the sentence exceeds 10 years or is capital, that review is available as a matter of right. In all other cases, review is available at the discretion of the D.C. Circuit. DTA § 1005(e)(3)(B). As with review of CSRT decisions, Congress regulated the scope of judicial review of military commission final orders. The D.C. Circuit is empowered to review only whether the conviction or sentence is "consistent with" Military Commission Order No. 1 (Aug. 31, 2005) or any successor military order, as well as the legality of the standards and procedures used under such military orders. DTA § 1005(e)(3)(D). Congress expressly provided that the new mechanisms for judicial review—both of final enemy combatant determinations by CSRTs under Section 1005(e)(2) and of final orders of conviction and sentencing by military commissions under Section 1005(e)(3)—will apply to all cases "pending on or after the date of the enactment of this Act." *Id.* § 1005(h)(2).

I. The text, history, and purpose of the Detainee Treatment Act confirm that Congress intended to withdraw federal-court jurisdiction to review the detention-related claims of Guantanamo detainees, except claims asserted under the DTA itself.

A. 1. Section 1005(e)(1) by its clear terms withdraws federal jurisdiction over Guantanamo detainee cases effective immediately, except those claims assertable under Section 1005(e) itself. This Court has long held that statutes conferring or ousting jurisdiction, as Section 1005(e)(1) does, apply to pending cases unless Congress provides an express reservation for pending cases. Congress provided no such reservation here.

The DTA, moreover, provides an exclusive and immediately applicable mechanism for judicial review, as well as substantive standards and procedures for such review. Those tailored mechanisms defer judicial review until *after*

final administrative determinations have been made by military officials. Channeling claims through administrative processes as a precondition to judicial review protects Executive Branch and military action in this particularly sensitive area from the potential for premature or "overly casual * * * judicial intervention," *Heckler* v. *Ringer*, 466 U.S. 602, 627 (1984); ensures that any controversy arises in the concrete context of an actual application of the challenged procedures; and promotes judicial economy by allowing the Secretary of Defense, CSRTs, and military commissions "to correct [their] own errors, to afford the parties and the courts the benefit of [their] experience and expertise, and to compile a record which is adequate for judicial review." *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975). This Court often infers that, when Congress expressly provides a tailored mechanism for after-the-fact review of agency decisions, it does not intend for private plaintiffs to bypass that mechanism in favor of pre-enforcement review. See, *e.g.*, *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994).

Congress, moreover, *expressly* made those new standards and procedures applicable to pending cases. DTA § 1005(h)(2). That decision would make little sense if, as petitioner contends, those pending cases can proceed in precisely the fashion they would have absent the DTA's enactment.

2. Petitioner errs in asserting that, because the DTA contains language expressly making Sections 1005(e)(2) and 1005(e)(3) applicable to pending cases, but does not include that language with respect to the withdrawal of jurisdiction in Section 1005(e)(1), Congress must have intended to reserve jurisdiction for pending cases. Congress had good reason to single out Subsections 1005(e)(2) and 1005(e)(3) for differential treatment, because those provisions specify a new review mechanism and new standards to be applied in such review. There is no presumption that laws creating

new causes of action or imposing new substantive standards of review that favor the government will apply to pending cases, and indeed the contrary presumption may exist. See *Lindh* v. *Murphy*, 521 U.S. 320, 327 (1997). Congress therefore was well advised to make it clear that those new provisions should apply to pending cases. In contrast, changes to jurisdiction—like the change provided in Section 1005(e)(1)—are presumptively applicable to pending cases, as Congress was well aware. 151 Cong. Rec. S14,263 (daily ed. Dec. 21, 2005) (statement of Sen. Kyl) ("The courts' rule of construction" is that "legislation ousting the courts of jurisdiction is applied to pending cases."). Congress's silence about whether Section 1005(e)(1) applies to pending cases thus does not evince an intent to render that provision inapplicable. Instead, it "merely" evidences Congress's "expectation that nothing more need[ed] [to] be said in order to effectuate the relevant legislative objective." *Burns* v. *United States*, 501 U.S. 129, 136 (1991).

For the same reason, petitioner errs in relying on *Lindh*. *Lindh* turned on two critical considerations: That the provisions there imposed new substantive standards of proof; and that *both* sets of provisions—the provisions expressly made applicable to pending cases and those that were not—addressed the same subject, the standard of proof. As a result, "[n]othing * * * but a different intent explain[ed] the different treatment" of the two sets of provisions. 521 U.S. at 130. Here, in contrast, the two provisions address different subjects—one eliminates jurisdiction under prior statutes, while the other establishes a new set of substantive standards and requirements for review under the new statute. That difference explains why Congress addressed them using different language.

Indeed, the differential language was necessary to make clear that the courts were not required to dismiss all pending lawsuits. Instead, the D.C. Circuit may retain jurisdiction over the many pending detainee challenges to

the extent the claims can be asserted and reviewed under the DTA. If Congress had made the withdrawal of jurisdiction expressly applicable to pending cases, that might have implied that the cases had to be dismissed. By specifying instead that the withdrawal of jurisdiction was immediately effective, but providing an alternative and expressly applicable mechanism under which pending claims may be heard, Congress made it clear that pending cases need not be dismissed and may proceed to the extent permitted and under the standards established by the DTA itself.

B. The legislative history confirms that Congress intended all pending claims to be governed by the DTA, and sought to prevent cases from proceeding under previously applicable statutes. In an extensive colloquy (which appears in the Congressional Record prior to the Senate's adoption of the Conference Report), Senators Graham and Kyl made it clear that the statute "extinguish[es] one type of action—all of the actions now in the courts—and create[s] in their place a very limited judicial review of certain military administrative decisions." 151 Cong. Rec. S14,263 (daily ed. Dec. 21, 2005) (statement of Sen. Kyl). The special language in "paragraph (h)(2)" declaring that the new cause of action and substantive standards created by the DTA shall "apply to pending cases" helps make it clear that, to the extent a case is already in the proper court and meets the DTA's requirements, the claim need not be dismissed; instead, "that claim [can] go forward" as a "request for review of the detainee's CSRT pursuant to Section (e)[(2)]." *Ibid.* (statement of Sen. Graham); 151 Cong. Rec. S12,755 (daily ed. Nov. 14, 2005) (statement of Sen. Levin) (no dismissal required but "the standards in the amendment [would] be applied in pending cases"). The notion that Congress specifically amended the DTA to make it inapplicable to pending cases is incorrect. It was revamped to provide for review of *military commission decisions* that otherwise would have been wholly unreview-

able. The provisions setting forth effective dates were also modified at the same time. But that modification merely clarified that pending cases could—indeed were required to—proceed under the standards established by Section 1005(e) itself and did not, to that extent, need to be dismissed entirely.

C. The argument that the myriad pending habeas cases may proceed unabated and unaffected despite the DTA's passage also defies common sense. Congress enacted the DTA to bring order to the chaos that resulted from the avalanche of anticipatory lawsuits under general statutes that were not suitably tailored to the circumstances. Allowing the current detainees—all of whom had pending actions when the DTA was enacted—to continue to pursue those actions would utterly defeat the DTA's purpose. It would, moreover, defeat Congress's purpose of channeling cases through the military administrative process as a condition precedent to judicial review, as it would perpetuate the resolution of important legal issues without the benefit of concrete determinations by the military and Executive Branch on a properly developed record.

II. A. Petitioner's invocation of a variety of canons of construction, such as the presumption against inferring that Congress has "deprive[d] the courts of habeas jurisdiction," Pet. Opp. to Gov't Motion to Dismiss 17, is also unpersuasive. The question here is not whether the DTA withdraws habeas jurisdiction. It unmistakably does, so any presumption on that issue is overcome. The only question is whether or not that withdrawal extends to pending cases.

Likewise, petitioner errs in invoking the doctrine of constitutional avoidance. Construing the DTA as inapplicable to pending cases would not prevent the DTA from raising the constitutional questions on which petitioner relies. To the contrary, precisely the same issues would arise on the DTA's application to cases filed after its enactment. Petitioner cannot invoke the doctrine of constitutional

doubt to promote a construction of the DTA that does not erase any of the constitutional doubts petitioner purports to raise.

B. Petitioner's claim that the DTA violates the Suspension Clause is also unpersuasive. In *Johnson* v. *Eisentrager*, 339 U.S. 763, 776-778 (1950), this Court recognized that the *Constitution* does not require the writ to be made available to aliens detained outside the United States. This Court again recognized that limit in *Rasul*, 542 U.S. at 478-479, but held that the habeas *statute* had, in light of recent developments, become applicable to aliens detained in Guantanamo. By enacting the DTA, Congress merely returned habeas corpus to its pre-*Rasul* state—*i.e.*, its scope under *Eisentrager*. Returning statutory habeas to its lawful scope under *Eisentrager* does not violate the Suspension Clause. To the contrary, the *Eisentrager* rule is wholly consistent with the writ's historical reach.

ARGUMENT

I. FEDERAL COURTS MAY EXERCISE JURISDICTION OVER SUITS LIKE THIS ONE ONLY UNDER THE REVIEW MECHANISMS ESTABLISHED BY THE DTA

A. The DTA's Text Makes Clear That This Court Has Jurisdiction To Review Pending Cases Only Under Section 1005(e)

The DTA's text says "what it means and means * * * what it says." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992). Section 1005(e)(1) by its express terms eliminates the jurisdiction of *any* court to adjudicate habeas and other claims brought by Guantanamo detainees, except actions brought under the DTA itself. It declares that "no court, justice, or judge shall have jurisdiction to hear or consider" claims by Guantanamo detainees except as provided by Section 1005. DTA § 1005(e)(1). That withdrawal of jurisdiction took "effect on the date of * * * enactment." *Id.* § 1005(h)(1).

At the same time, the DTA substitutes an *immediately applicable* alternative review mechanism for certain claims by Guantanamo detainees. Sections 1005(e)(2) and (e)(3) of the DTA provide new mechanisms for judicial review of final status determinations, convictions, and sentences. They provide new standards to govern that review. And they accord the D.C. Circuit exclusive jurisdiction to conduct that review in the first instance. Those new provisions and standards for review are, by their terms, made expressly applicable to all "pending cases." DTA § 1005(h)(2).

The DTA's text and structure make Congress's intent clear: As of the statute's enactment, no court has jurisdiction to address any claims that relate to any aspect of the detention of a Guantanamo detainee, unless those claims are brought within the framework of the DTA. That mandate flows not merely from the text of Section 1005(e)(1), which immediately withdraws jurisdiction over pending habeas claims like this one, but also from Congress's provision for a new, tailored, and exclusive mechanism for judicial review that defers review until *after* final action has been taken by a CSRT or a Military Commission.

1. Notwithstanding Section 1005(e)(1)'s unequivocal language, petitioner urges that its express withdrawal of jurisdiction does not apply to pending cases. That claim does not withstand scrutiny. As a textual matter, the withdrawal of jurisdiction is not limited to cases filed after Section 1005's enactment. Section 1005(h)(1) declares that all of Section 1005—which includes the withdrawal of jurisdiction contained in Section 1005(e)(1)—"take[s] effect on the date of * * * enactment." But even absent such language, it is well established that, when a jurisdictional provision "is repealed, it must be considered, except as to *transactions* * * * *closed*, as if it never existed." *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 508 (1868) (emphasis added). As this Court explained a century ago, cases in which Congress repeals the basis for jurisdiction "are by no means infre-

quent. * * * These cases fully establish the proposition that a repealing *statute which contains no saving clause operates as well upon pending cases* as upon those thereafter commenced." *Gwin* v. *United States*, 184 U.S. 669, 675 (1902) (emphasis added); see, *e.g.*, *Baltimore & P. R.R. Co.* v. *Grant*, 98 U.S. 398, 401 (1866) ("It is equally well settled that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law."); *Merchant's Ins. Co.* v. *Ritchie*, 72 U.S. 541, 544 (1878) ("express prohibition on the exercise of jurisdiction" removes jurisdiction over pending cases where there is no "saving of such causes"). It has long been clear that, "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law," and that principle has "been adhered to consistently by this Court." *Bruner* v. *United States*, 343 U.S. 112, 116-117 (1952).

Petitioner's argument also runs headlong into Sections 1005(e)(2) and 1005(e)(3), which establish exclusive mechanisms for judicial review of "final" CSRT enemy combatant decisions and military commission convictions, respectively. Those provisions by their express terms defer judicial review until *after* final administrative determinations have been made by military officials. DTA § 1005(e)(3) (C)(ii) (challenge to military commission proceedings may be brought only after a "final decision has been rendered"); *id.* § 1005(e)(2)(A) (providing for review of a "final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant"). Channeling claims through administrative processes before allowing judicial review serves important policy goals. First, it protects the activities of the Executive Branch and the military in this particularly sensitive area from the "potential for overly casual * * * judicial intervention." *Heckler* v. *Ringer*, 466 U.S. 602, 627 (1984); see *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975). Second, by requiring that challenges be brought in the context of a specific and final determination, the Act

ensures that "the scope of the controversy [will be] reduced to more manageable proportions, and its factual components fleshed out, by some concrete" determination "applying the regulation to the claimant's situation." *Lujan* v. *Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). Third, it promotes judicial economy: It allows the Secretary of Defense, CSRTs, and military commissions "to correct [their] own errors, to afford the parties and the courts the benefit of [their] experience and expertise, and to compile a record which is adequate for judicial review." *Salfi*, 422 U.S. at 765; see *Ringer*, 466 U.S. at 619 n.12.

This Court has often concluded that, where Congress provides an express and tailored mechanism for post-enforcement judicial review, claimants cannot bypass that mechanism by resort to more general causes of action for pre-enforcement review. See, *e.g.*, *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994) (no pre-enforcement review available where Congress provided exclusive jurisdiction in the court of appeals to review adverse agency determinations). Likewise here, petitioner cannot bypass the express mechanism for judicial review Congress has provided—a mechanism made expressly applicable to pending cases, see DTA § 1005(h)(2)—by seeking anticipatory judicial review under more general causes of action. Indeed, to allow that bypass would have this Court as well as others deciding important and sensitive issues in the abstract, without the concrete factual context of a particular determination, without the benefit of the military's decision, and without the record on which effective appellate review so often depends.

2. Petitioner's claim that he may pursue this action irrespective of the DTA rests on an application of the maxim *expressio unius est exclusio alterius*. Petitioner points out that Section 1005(e)(2), which provides for review of final CSRT enemy combatant determinations, and Section 1005(e)(3), which provides for review of final military commission convictions and sentences, are expressly made

applicable to cases "pending on or after the date of * * * enactment"; by contrast, the withdrawal of jurisdiction for habeas and other claims in Section 1005(e)(1) is not. See Pet. Opp. to Gov't Motion to Dismiss 7-8. But this Court has long recognized that the *expressio unius* maxim "just fails to work" in some situations, *Chevron U.S.A. Inc.* v. *Echazabal*, 536 U.S. 73, 84 (2002), because "[n]ot every silence is pregnant," *Burns* v. *United States*, 501 U.S. 129, 136 (1991) (quoting *Illinois Dep't of Pub. Aid* v. *Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983)). This is one of those situations.

For one thing, Congress had good reason to single out Sections 1005(e)(2) and 1005(e)(3). Those provisions specify a new review mechanism and new standards to be applied in such review. Because there is no clear presumption that laws creating new causes of action or imposing substantive standards of review in favor of the government will apply to pending cases, see *Lindh* v. *Murphy*, 521 U.S. 320, 327 (1997), Congress was well-advised to make it clear that those new provisions should apply to pending cases. In contrast, Congress was well aware that revocations of jurisdiction—like that provided in Section 1005(e)(1)—are presumptively applicable to pending cases. 151 Cong. Rec. S14,263 (daily ed. Dec. 21, 2005) (statement of Sen. Kyl) ("The courts' rule of construction" is that "legislation ousting the courts of jurisdiction is applied to pending cases."). It was therefore sufficient for Congress to specify that Section 1005 in its entirety, including the withdrawal of jurisdiction for habeas actions, "take[s] effect on the date of * * * enactment." DTA § 1005(h)(1). Congress's silence about whether Section 1005(e)(1) applies to pending cases thus does not evince an intent to render that provision inapplicable. Instead, it "merely" evidences Congress's "expectation that nothing more need be said in order to effectuate the legislative objective." *Burns*, 501 U.S. at 136.

The structure identified by the detainees, moreover, reflects the drafters' effort to clarify that, with respect to pending cases, the courts were not being stripped of jurisdiction *entirely*. Rather, the vast majority of pending cases may proceed, but they must proceed within the framework of Section 1005. As Senators Graham and Kyl explained in an extensive colloquy (which appears in the Congressional Record prior to the Senate's adoption of the Conference Report), the statute "extinguish[es] one type of action—all of the actions now in the courts—and create[s] in their place a very limited judicial review of certain military administrative decisions." 151 Cong. Rec. S14,263 (daily ed. Dec. 21, 2005) (statement of Sen. Kyl). The special language in Section 1005(h)(2) declaring that the DTA's new cause of action and substantive standards shall "apply to pending cases" helps make it clear that, to the extent a case is already in the proper court and meets the DTA's requirements, the case need not be dismissed; instead, "that claim [can] go forward" as a "request for review of the detainee's CSRT pursuant to" Section (e)(2). *Ibid.* (statement of Sen. Graham); see also *ibid.* (statement of Sen. Graham) ("No sense in kicking out a detainee's current habeas action in the D.C. Circuit just so that he has to re-file a section 1405 review request—it would be better to let the current case go forward as a 1405 review request."); 151 Cong. Rec. S12,755 (daily ed. Nov. 14, 2005) (statement of Sen. Levin) (no dismissal required but "the standards in the amendment [would] be applied in pending cases"). By contrast, if Congress had expressly declared that the *withdrawal of jurisdiction* in Section 1005(e)(1) must be applied to "pending cases," that might have left the misimpression that such cases must be dismissed, when in fact they may proceed under the requirements and standards set forth by Section 1005(e)(2).

For similar reasons, petitioner errs in relying on *Lindh*, *supra*. In *Lindh*, this Court noted that Congress had expressly declared that certain provisions should be appli-

cable to pending cases, but did not expressly so state with respect to others. But the provisions at issue there—both those made expressly applicable to pending cases and those that were not—"change[d] standards of proof and persuasion in a way favorable to a State." 521 U.S. at 327. The Court therefore inferred that Congress wanted the new substantive standards to apply to pending cases only where Congress had expressly so directed. Where Congress intended the DTA's changes to the standards of review to apply in pending cases, it likewise said so expressly in the DTA itself. See DTA §§ 1005(e)(2)(A), (e)(3)(A), (h)(2). But no such express statement is required for changes to federal court jurisdiction, which traditionally apply to all pending cases. See pp. 10-11, *supra*. More important, both sets of changes at issue in *Lindh* addressed the same subject—the standards of review and proof to be applied on habeas. 521 U.S. at 329. As a result, "[n]othing * * * but a different intent explain[ed] the different treatment" of the two sets of provisions. *Ibid.* Here, in contrast, the two provisions address different subjects—one eliminates jurisdiction under prior statutes, while the other establishes a new set of substantive standards and requirements for review under the new statute. This factor, absent in *Lindh*, explains the different treatment of the two sections.

In any event, petitioner's *expressio unius* argument ignores the exclusive review mechanisms provided by Sections 1005(e)(2) and 1005(e)(3), which are undeniably applicable to pending cases. Those provisions would be all but superfluous—there would be virtually no point in making them applicable to pending suits—if detainees pursuing those actions were free to disregard the limits that Sections 1005(e)(2) and 1005(e)(3) impose by continuing the actions under more general statutes as if nothing had changed. Given Congress's provision of a specific mechanism for review that requires the claimant to await the final judgment of the military commission, the notion that

Congress also intended pre-trial injunctive actions to continue unabated and unaffected is somewhat extravagant.

B. The DTA's History Confirms That This Court May Not Review Pending Cases Except As Provided By Section 1005(e) Itself

To the extent it is relevant, the legislative history of Section 1005 confirms that Congress intended *all* of Section 1005 to be immediately effective, governing pending cases and any newly filed lawsuits alike. The above-cited colloquy between Senators Graham and Kyl—two of the primary sponsors of the amendment—makes that unmistakably clear. See 151 Cong. Rec. S14,260-S14,268 (daily ed. Dec. 21, 2005). Because Senators Graham and Kyl were "sponsor[s] of the language ultimately enacted," their remarks serve as "an authoritative guide to the statute's construction." *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 526-527 (1982); see also *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (such statements "deserv[e] to be accorded substantial weight").

Petitioner's assertion that the colloquy is not probative of the statute's meaning, Pet. Opp. to Gov't Motion to Dismiss 10, lacks merit. Petitioner cites nothing in the Congressional Record—which is conclusively presumed to reflect Congress's proceedings—indicating that the colloquy is anything less than a genuine expression of the Senators' understanding of, and intention regarding, the jurisdictional provisions of the DTA. See 151 Cong. Rec. E2341 (daily ed. Dec. 21, 2005) (noting that the Congressional Record is presumed to reflect live debate *except* when the statements therein are followed by a bullet, indicating "statements or insertions which are not spoken by a Member of the Senate on the floor," or are underlined, indicating that they are "words inserted or appended, rather than spoken, by a Member of the House on the floor"). The colloquy, moreover, appears in the Congressional Record immediately before the Senate's adoption of the Conference

Report, and predates the President's signature.[3] See 151 Cong. Rec. S14,260-S14,268 (daily ed. Dec. 21, 2005) (Sen. Graham & Sen. Kyl colloquy); *id.* at S14,275 (adopting conference report).[4]

In any event, well before that colloquy, Senator after Senator recognized that review under the DTA would immediately displace habeas for all cases, including those already filed. See 151 Cong. Rec. S12,754 (daily ed. Nov. 14, 2005) (statement of Sen. Graham) ("Instead of having unlimited habeas corpus opportunities * * * we give every enemy combatant, all 500, a chance to go to Federal court, the Circuit Court of Appeals for the District of Columbia."); 151 Cong. Rec. S12,796 (daily ed. Nov. 15, 2005) (statement of Sen. Specter) ("If it means what it says," even "the Supreme Court of the United States would not have jurisdiction" except under the review mechanism of Section 1005(e) itself); 151 Cong. Rec. S12,799 (daily ed. Nov. 15, 2005) (statement of Sen. Durbin) ("It applies retroactively, and therefore would also likely prevent the Supreme Court from ruling on the merits of the Hamdan case."). While some Senators later asserted the opposite understanding, see, Pet. Opp. to Gov't Motion to Dismiss 11 n.8, 20 n.17, many of them (*e.g.*, Senators Leahy, Kennedy, Feingold, and Durbin), voted *against* the final amendment. 151 Cong.

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[3] The President's understanding of the statute at the time that he signed it is also probative of the statute's meaning. See, *e.g., Thomas Paper Stock Co.* v. *Porter*, 328 U.S. 50, 54 (1946) (interpreting an amendment and according weight to the President's understanding of the amendment at the time the President signed it).

[4] Senator Kyl's reference to the "now completed" Defense Authorization Act, 151 Cong. Rec. S14,260 (daily ed. Dec. 21, 2005), cannot be read to mean that the Act had already been *passed*. It merely reflects Senator Kyl's understanding that the Act's drafting and the related fine-tuning had been completed and the bill was ready to be enacted. See 151 Cong. Rec. S14,263 (daily ed. Dec. 21, 2005) (statement of Sen. Graham) ("I want our colleagues to know exactly what they *will* be agreeing to.") (emphasis added).

Rec. S12,803 (daily ed. Nov. 15, 2005). The courts do "not usually accord much weight to the statements of a bill's opponents." *Shell Oil Co.* v. *Iowa Dep't of Revenue*, 488 U.S. 19, 29 (1988). Indeed, according weight to the statements of a bill's opponents would provide them with an opportunity to disable, through a limiting construction in the legislative history, the very provisions they could not defeat by amendment or majority vote.

Finally, it is not correct to assert that the drafting and amendment history of the DTA show that it was amended to permit pending cases to proceed as if the DTA had never been enacted. See Pet. Opp. to Gov't Motion to Dismiss 8-11. In fact, the amendment process petitioner relies on addressed a wholly different issue—whether there would be review of not merely *enemy combatant determinations*, but also *convictions and sentences* issued by military commissions. There is no dispute that, when it was adopted on November 10, 1995, the original Graham amendment to the DTA removed habeas jurisdiction for future and pending cases alike. Under that amendment, Section 1005(e)(1) withdrew federal jurisdiction over the detainees' habeas claims, while Section 1005(e)(3) declared that such withdrawal of jurisdiction would "apply to any application or other action that is pending on or after the date of this Act." 151 Cong. Rec. S12,655 (daily ed. Nov. 10, 2005); *id.* at S12,664 (statement of Sen. Levin) ("the language * * * is retroactive").

At that time, the amendment provided for review of CSRT enemy combatant determinations under what is now Section 1005(e)(2). But it lacked what is now Section 1005(e)(3), and thus did not provide any mechanism for judicial review of *convictions and sentences* issued by military commissions. For that reason, Senator Levin objected: "I hope it is inadvertent," he declared, but the amendment "eliminates court review of the sentences of enemy combatants before these commissions." 151 Cong. Rec. S12,664

(daily ed. Nov. 10, 2005); *ibid.* ("If there is a conviction * * * is there any appeal under this language in the amendment? I am afraid there is not. * * * That is the problem here. There would be no appeal."); *ibid.* ("*The question is whether* there will be an appeal") (emphasis added).

It was in response to those concerns of Senator Levin that Section 1005(e) was substantially revamped. Congress added a whole new provision, now Section 1005(e)(3), to provide for review of final military commission decisions. See 151 Cong. Rec. S12,753 (daily ed. Nov. 14, 2005) (publishing amendment).[5] Congress made that review provision and its substantive standards, like those addressing enemy combatant determinations, applicable to cases pending on direct review. *Ibid.* Senator Levin thus explained that, although he had voted against the amendment previously because "it did not provide for direct judicial review of convictions by military commissions," the new amendment "adds a direct appeal for convictions by military commissions." *Id.* at S12,754.

Congress did, at the same time, change the language of the "effective date" provision, but that change hardly "saved" pending cases from the effect of the DTA. The amendment expressly provided that the two judicial review provisions and their substantive standards—both for CSRT enemy combatant determinations, DTA § 1005(e)(2), and for military tribunal convictions and sentences, DTA § 1005(e)(3)—would apply to "pending" cases. See 151 Cong. Rec. S12,753.[6] And the amendment changed the language of what is now Section 1005(h)(1) to establish that the rest of Section 1005, including the withdrawal of habeas jurisdiction, is effective on "the date of * * * enactment." *Ibid.* That change cannot be read as allowing former

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[5] The provision allowing for review of military commission decisions then appeared as Section (d)(3).

[6] The effective-date provision at that time appeared as Sections 1005(e)(1) and 1005(e)(2).

habeas claims to go forward under the now-withdrawn habeas jurisdiction. To the contrary, even the changed language makes clear that the withdrawal of jurisdiction is immediately effective. The change clarifies, however, that courts are not precluded from reviewing pending *cases* to the extent that the *claims* would be proper under the jurisdictional provisions and standards in Section 1005(e). For that reason, Senator Levin explained that the provision did not "strip[] all of the courts * * * *of jurisdiction* over pending *cases*," which would require those pending cases to be dismissed. 151 Cong. Rec. S12,755 (daily ed. Nov. 15, 2005) (emphasis added). Rather, the federal courts would retain jurisdiction over the *cases* to the extent they included *claims* that could be asserted under the new statute: "[W]hat [the] amendment does, as soon as it is enacted and the enactment is effective, it provides that the standards set forth in our amendment will be the substantive standards which we would expect would be applied in all cases, including cases which are pending as of the effective date." *Ibid.* (statement of Sen. Levin).[7] The legislative history thus confirms what the text makes clear: This case can no longer proceed under the habeas statute; petitioner's claims can only be asserted within the framework established in Section 1005.[8]

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[7] Indeed, Congress was well aware that each and every claimant before the D.C. Circuit had obtained a "final" enemy combatant determination and thus was entitled to seek review in that court under the DTA. See J. Elsea and K. Thomas, *Guantanamo Detainees: Habeas Corpus Challenges in Federal Court* 5 (CRS Report for Congress Dec. 7, 2005).

[8] Senators Graham, Kyl, and Levin appear to have disagreed on the specific application of the DTA to this case, and whether this Court would retain jurisdiction after the DTA's passage. Senators Graham and Kyl made it clear that they "anticipate[d]" that this Court would "dismiss [this case] for want of jurisdiction," precisely as it "did in *Ex Parte McCardle*." 151 Cong. Rec. S14,263-S14,264 (daily ed. Dec. 21, 2005). "I think that a majority of the [C]ourt will do the right

C. Petitioner's Construction Is At War With The DTA's Purpose

Finally, to construe the DTA as not applying to pending cases would eviscerate Congress's purpose in passing that statute. Congress made clear that Section 1005(e) was intended to restore order and rechannel the flood of habeas claims inundating the courts by providing an alternative process to review such claims. 151 Cong. Rec. S14,263 (daily ed. Dec. 21, 2005) (statements of Sen. Graham and Sen. Kyl). Because habeas petitions have already been filed on behalf of nearly all of the detainees in Guantanamo Bay,[9] interpreting the DTA as inapplicable to pending claims would render it a virtual nullity. Nearly every detainee would be permitted to proceed with his current habeas action, leaving few—if any—cases for the D.C. Circuit to review under the new DTA process and standards. That would be an absurd result, and is clearly not the result envisioned by Congress. As Senator Graham explained, Congress "extinguish[ed] these habeas and other actions in order to effect a transfer of jurisdiction over these cases to

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thing—to send Hamdan back to the military commission, and then allow him to appeal pursuant to section 1405 of this bill." *Id.* at S14,264 (statement of Sen. Kyl). Senator Levin, although he understood that all pending cases would be reviewable under the standards set forth in Sections 1005(e)(2) and 1005(e)(3), expressed the view that jurisdiction over this case would be unaffected. Senator Levin, however, appears to have overlooked either the fact that Sections 1005(e)(2) and 1005(e)(3) defer review until after final action by the military commission, or that petitioner has not yet obtained a final order of conviction or sentencing from a military commission.

[9] As the government points out, "[h]abeas petitions have been filed on behalf of a purported 600 detainees." Gov't Mot. to Dismiss 20 n.10. Indeed, one petition purports to file habeas petitions on behalf of *every* detainee who has not already filed an action. See *ibid.* (citing Petition for Writ of Habeas Corpus, *John Does 1-570* v. *Bush*, No. 05-00313 (CKK) (D.D.C. Feb. 10, 2005)).

the D.C. Circuit Court and [effect a] substantive legal change as well." 151 Cong. Rec. S14,263 (daily ed. Dec. 21, 2005) (statement of Sen. Graham); see *id.* (statement of Sen. Kyl) ("[T]his bill's provisions * * * extinguish one type of action—all of the actions now in the courts—and create in their place a very limited judicial review of certain military administrative decisions.").

Indeed, petitioner's construction would transform the DTA into a virtually pointless piece of legislation with no practical effect. The hundreds of habeas cases currently in the courts would continue unabated. Moreover, those cases would continue to be litigated, and important legal issues in this sensitive area would be resolved, by the courts in the abstract, before the administrative process has been completed, and without the benefit of concrete determinations on a properly developed record. That incomplete review is precisely the sort of litigation process that Congress, by channeling these issues first through the administrative process and then through judicial review, sought to avoid. It is a "longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous." *Beck* v. *Prupis*, 529 U.S. 494, 506 (2000). By the same token, this Court should not construe the enactment of an entire set of procedures as a meaningless gesture. This Court is entitled to, and should, "stand back and see what would be accomplished" under petitioner's proposed construction. *Neder* v. *United States*, 527 U.S. 1, 15 (1999).

II. CONSTRUING THE DTA CONSISTENT WITH ITS TEXT, HISTORY, AND PURPOSE CREATES NO ADDITIONAL CONSTITUTIONAL ISSUES

A. Petitioner's Presumptions And Avoidance Arguments Have No Application Here

Petitioner has also invoked a variety of "presumptions" to support his claim that the DTA allows the hundreds of already pending habeas and other claims to proceed unaf-

fected. Among others, petitioner invokes "the presumption against the withdrawal of federal court jurisdiction for constitutional claims," Pet. Opp. to Gov't Motion to Dismiss 16, the presumption against inferring that Congress has "deprive[d] the courts of habeas jurisdiction," *id.* at 17, and the principle of constitutional avoidance, *id.* at 32.

Those arguments, however, have no bearing on whether the DTA applies to pending cases. For example, if the DTA effects "a withdrawal of federal court jurisdiction for constitutional claims," it withdraws that jurisdiction whether it applies to pending cases or solely to future ones. The question is not whether or how much jurisdiction has been withdrawn. The only question is whether, however much jurisdiction has been withdrawn, the withdrawal applies to pending cases.

The same is true of petitioner's claim that the DTA violates the Suspension Clause and related constitutional avoidance arguments. Petitioner does not argue that the DTA should be read as inapplicable to future lawsuits. Petitioner instead argues that it should be read as inapplicable to pending ones. Thus, even if petitioner's construction were accepted, the claim that the DTA violates the Suspension Clause would persist. Petitioner cannot rely on the doctrine of constitutional avoidance when the construction he proposes does not eliminate the putative constitutional doubts on which he purports to rely.

B. The DTA Does Not Violate The Suspension Clause

Petitioner, in any event, errs in asserting that the DTA violates the Suspension Clause. As this Court made clear in *Rasul*, 542 U.S. at 478-479 & n.8, and *Johnson* v. *Eisentrager*, 339 U.S. 763, 776-778 (1950), the Constitution does not require that the writ of habeas corpus extend to enemy aliens outside of the United States. In *Eisentrager*, for example, the Court concluded that the Constitution does not give federal courts jurisdiction to hear habeas petitions

filed by German enemy aliens captured in China and confined in the custody of the U.S. Army in Germany. *Id.* at 768 ("Nothing in the * * * Constitution extends such a right"); see *Rasul*, 542 U.S. at 478-479 & n.8 (characterizing *Eisentrager* as addressing primarily whether the Constitution requires habeas to be available); *id.* at 493 (Scalia, J., dissenting) (urging that *Eisentrager* resolved both the constitutional and statutory questions). Likewise here, the Constitution does not give federal courts jurisdiction to hear habeas petitions filed by foreign enemy aliens captured in the Middle East and confined in military custody in Guantanamo Bay, Cuba.

Far from undermining that conclusion, *Rasul* reinforces it. In *Rasul*, this Court held that federal courts have statutory jurisdiction to hear habeas petitions filed by non-resident aliens held in Guantanamo Bay. *Rasul*, 542 U.S. at 478-479. Importantly, the Court reasoned that the *statutory* habeas scheme, and not the Constitution, established jurisdiction over the claims of Guantanamo Bay detainees. *Ibid.* The Court acknowledged that, at the time it decided *Eisentrager*, there was neither a constitutional nor statutory basis for non-resident aliens to file habeas petitions. But it reasoned that developments in habeas since that time had expanded the *statutory* grant of jurisdiction to encompass habeas petitions filed by detainees in Guantanamo Bay. *Id.* at 478 ("[B]ecause subsequent decisions of this Court have filled *the statutory gap* that had occasioned *Eisentrager's* resort to 'fundamentals,' persons detained outside the territorial jurisdiction of any federal district court no longer need rely on the *Constitution* as the source of their right to federal habeas review.") (emphasis added).

With the enactment of the DTA, Congress did nothing more than return the habeas *statute* back to its pre-*Rasul* state. 151 Cong. Rec. S14,264 (daily ed. Dec. 21, 2005) (statement of Sen. Kyl) ("*Eisentrager* was the law of the land for over 50 years * * * . Congress * * * restores

Eisentrager's role as the governing standard."); *id.* at S14,267 (statement of Sen. Kyl) ("[W]e legislatively overrule *Rasul* today."); *id.* at S14,268 (statement of Sen. Graham) ("And since the *Rasul* decision was based on the habeas statute in the U.S. Code, I am very comfortable amending that statute as a proper Congressional response to the Court's decision"). Unless the Constitution has changed meaning since *Eisentrager* was decided, there is no constitutional barrier to Congress returning the habeas statute to its pre-*Rasul*, post-*Eisentrager* state. To hold otherwise would turn the habeas statute into "a one-way ratchet that enshrines in the Constitution every grant of habeas jurisdiction." *I.N.S.* v. *St. Cyr*, 533 U.S. 289, 342 (2001) (Scalia, J., dissenting); G. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 Colum. Hum. Rts. L. Rev. 555, 590 (2002) ("[O]f course the Suspension Clause is not a ratchet perpetuating every statutory expansion that Congress enacts. Rather, it is contended that the Suspension Clause stands for a principle (or set of principles) that distinguish permissible statutory contractions from unconstitutional suspensions.").

Further, expanding the Suspension Clause to require habeas to be available to enemy combatants detained abroad would be inconsistent with centuries of historical practice. See *Eisentrager*, 339 U.S. at 776-778. There is no doubt that aliens physically present in the United States traditionally could file habeas petitions. See, *e.g.*, *United States* v. *Villato*, 2 Dall. 370, 370 (C.C. Pa. 1797) (alien detained in the United States released based on a habeas claim); *Ex parte D'Olivera*, 7 F. Cas. 853, 854 (C.C. Mass. 1813) (Portuguese seamen detained in a Boston jail released under grant of habeas); *Wilson* v. *Izard*, 30 F. Cas. 131, 131 (C.C.N.Y. 1815) (reviewing habeas petitions of alien soldiers who had enlisted in the United States Army but were stationed in New York City). Likewise, there is no doubt that, at times, habeas relief was made available to *citizens* detained by their own government abroad. See, *e.g.*, *Ex parte*

Mwenya, 3 W.L.R. 767, 767 (C.A. 1960) (involving a British citizen detained in Northern Rhodesia); *King* v. *Overton*, 82 Eng. Rep. 1173 (K.B. 1668); *King* v. *Salmon*, 84 Eng. Rep. 282 (K.B. 1669).

But the writ historically has not extended to enemy *aliens* held beyond the sovereign's own territory. Habeas corpus may have run "into all parts of the king's dominions," because "the king is at all times [e]ntitled to have an account, [of] why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted." *Rasul*, 542 U.S. at 482 n.13 (citing 3 Blackstone 131). But at the very least the location had to be "part of the king's dominion," and the detained person had to be one of the king's "subjects." See *Rasul*, 542 U.S. at 503-504 (Scalia, J., dissenting). Extending the *constitutionally required* scope of the writ to encompass enemy aliens, detained in the territory of another sovereign that is merely being leased for particular purposes, stretches the meaning of the words "dominion" and "subjects" beyond their ordinary limits. It is one thing to infer that the protections of habeas follow citizens wherever they go. *Ibid.* It is another to infer that those protections exist everywhere in the sovereign's realm. But it is a different thing altogether to assume the writ follows the military wherever it leases territory, sets up camps, and detains foreign combatants.

For that reason, the English courts have in comparable circumstances refused habeas relief to foreigners detained abroad. See, *e.g.*, *In re Ning Yi-Ching*, 56 T.L.R. 3 (Vacation Ct. 1939) (refusing to entertain habeas petitions by Chinese subjects detained in a British-controlled section of China). Indeed, the parallel between this case and *Ning Yi-Ching* could not be more striking. In that case, Britain had a lease that allowed it to exercise certain rights of administration and control in the territory in which the Chinese aliens were being detained. *Id.* at 4. But the English court held that habeas was unavailable because

ultimate sovereignty over the British-controlled section of China did not rest with Britain; it rested with China. *Ibid.* Likewise here, the United States may have certain rights under its lease for Guantanamo. But here, as in *Ning Yi-Ching*, ultimate sovereignty rests with a foreign power, not the United States. Consequently, here, as in *Ning Yi-Ching*, habeas is not available to a foreigner detained in a foreign land.

To the extent historical cases have extended habeas to a variety of locations, those cases all involve *citizens* or *subjects*. *Rasul*, 542 U.S. at 502-503 (Scalia, J., dissenting). They very often involve jurisdictions where, at most, the sovereign had delegated some of its sovereign power to local authorities (but was presumed not to have delegated away the prerogative writs). *Id.* at 502. And they often involve "territories that are 'dominions of'" the sovereign. *Ibid.* In other words, all involve "sovereign territory of the Crown: colonies, acquisitions, and conquests, and so on." *Ibid.* None involve land situated within the boundaries of a foreign sovereign that merely had been leased for specified purposes.

For similar reasons, petitioner's extensive reliance on *Yamashita* v. *Styer*, 327 U.S. 1 (1946), see Pet. Opp. to Gov't Motion to Dismiss 34-36, is misplaced. In that case, the claimant was tried and held in the Philippines. As the Court explained in *Eisentrager* when distinguishing *Yamashita*, the Philippines were then "insular possessions" of the United States. 339 U.S. at 780. The claimant, moreover, was being held and tried under a Presidential proclamation declaring that "enemy belligerents who, during time of war, *enter the United States, or any territory possession thereof*, and who violate the law of war, should be subject * * * to the jurisdiction of military tribunals." 327 U.S. at 10 (emphasis added). *Yamashita* thus at most addresses the availability of habeas relief for foreign nationals held in United States *territory*. It does

not address the availability of habeas relief in *foreign lands* being leased by the United States for particular purposes.

Finally, expansion of constitutional habeas to aliens detained abroad would open a Pandora's box of practical difficulties. Guantanamo Bay is a military base in a foreign country. If the Constitution requires detentions there to be subject to judicial scrutiny, it is difficult to imagine a detention that would not be subject to such scrutiny. The potentially disruptive effect on military operations is obvious. The military's mission of winning battles cannot be encumbered with a requirement that every enemy captured abroad be given a lawyer and a hearing.

Nor is the nature of U.S. control in Guantanamo sufficient to distinguish it from other theaters of military activity. See Fleur Johns, *Guantanamo Bay and the Annihilation of the Exception*, 16 Eur. J. Int'l L. 613, 616 (Sept. 2005). If the United States' lease for and control over Guantanamo by itself were sufficient to make habeas apply there, then habeas might have to be available in various portions of Afghanistan and Iraq as well. See *Rasul*, 542 U.S. at 501 (Scalia, J., dissenting). The fact that the United States has exercised control over Guantanamo for a long time hardly distinguishes it from many other military bases abroad. It, moreover, begs the question of when a military base or occupation is of sufficient duration that habeas should be made available. That is the sort of determination that should be made in the first instance by the Legislative and Executive Branches, not the judiciary.

CONCLUSION

For the foregoing reasons, the Court should dismiss the case for want of jurisdiction. In the alternative, the Court should vacate the judgment of the court of appeals and remand the case for a determination of whether any of petitioner's claims may properly be raised under the DTA. See *Lewis* v. *Cont'l Bank Corp.*, 494 U.S. 472, 482 (1990) (where Court loses jurisdiction because of "a change in the legal

framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully.").

Respectfully submitted.

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FEBRUARY 2006

STATUTORY APPENDIX

The Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, provides in relevant part:

An Act

Making appropriations for the Department of Defense for the fiscal year ending September 30, 2006, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DIVISION A

DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2006

* * * * *

TITLE X—MATTERS RELATING TO DETAINEES

SEC. 1001. SHORT TITLE

This title may be cited as the "Detainee Treatment Act of 2005".

* * * * *

SEC. 1005. PROCEDURES FOR STATUS REVIEW OF DETAINEES OUTSIDE THE UNITED STATES.

(a) SUBMITTAL OF PROCEDURES FOR STATUS REVIEW OF DETAINEES AT GUANTANAMO BAY, CUBA, AND IN AFGHANISTAN AND IRAQ.—

(1) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committee on Armed Services and the Committee on the Judiciary of the Senate and the Committee on Armed Services and the Committee on the Judiciary of the House of Representatives a report setting forth—

(A) the procedures of the Combatant Status Review Tribunals and the Administrative Review Boards established by direction of the Secretary of Defense that are in operation at Guantanamo Bay, Cuba, for determining the status of the detainees held at Guantanamo Bay or to provide an annual review to determine the need to continue to detain an alien who is a detainee; and

(B) the procedures in operation in Afghanistan and Iraq for a determination of the status of aliens detained in the custody or under the physical control of the Department of Defense in those countries.

(2) DESIGNATED CIVILIAN OFFICIAL.—The procedures submitted to Congress pursuant to paragraph (1)(A) shall ensure that the official of the Department of Defense who is designated by the President or Secretary of Defense to be the final review authority within the Department of Defense with respect to decisions of any such tribunal or board (referred to as the "Designated Civilian Official") shall be a civilian officer of the Department of Defense holding an office to which appointments are required by law to be made by the President, by and with the advice and consent of the Senate.

(3) CONSIDERATION OF NEW EVIDENCE.—The procedures submitted under paragraph (1)(A) shall provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee.

(b) CONSIDERATION OF STATEMENTS DERIVED WITH COERCION.—

(1) ASSESSMENT.—The procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative

tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess—

(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and

(B) the probative value (if any) of any such statement.

(2) APPLICABILITY.—Paragraph (1) applies with respect to any proceeding beginning on or after the date of the enactment of this Act.

(c) REPORT ON MODIFICATION OF PROCEDURES.—The Secretary of Defense shall submit to the committees specified in subsection (a)(1) a report on any modification of the procedures submitted under subsection (a). Any such report shall be submitted not later than 60 days before the date on which such modification goes into effect.

(d) ANNUAL REPORT.—

(1) REPORT REQUIRED.—The Secretary of Defense shall submit to Congress an annual report on the annual review process for aliens in the custody of the Department of Defense outside the United States. Each such report shall be submitted in unclassified form, with a classified annex, if necessary. The report shall be submitted not later than December 31 each year.

(2) ELEMENTS OF REPORT.—Each such report shall include the following with respect to the year covered by the report:

(A) The number of detainees whose status was reviewed.

(B) The procedures used at each location.

(e) JUDICIAL REVIEW OF DETENTION OF ENEMY COMBATANTS.—

(1) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by adding at the end the following:

"(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—

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

"(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

"(A) is currently in military custody; or

"(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.".

(2) REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION.—

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

(B) LIMITATION ON CLAIMS.—The jurisdiction of the United States Court of Appeals for the District of

Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien—

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

(D) TERMINATION ON RELEASE FROM CUSTODY.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release of such alien from the custody of the Department of Defense.

(3) REVIEW OF FINAL DECISIONS OF MILITARY COMMISSIONS.—

(A) IN GENERAL.—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).

(B) GRANT OF REVIEW.—Review under this paragraph—

(i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of 10 years or more, shall be as of right; or

(ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.

(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—

(i) who was, at the time of the proceedings pursuant to the military order referred to in subparagraph (A), detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a final decision has been rendered pursuant to such military order.

(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—

(i) whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.

(4) RESPONDENT.—The Secretary of Defense shall be the named respondent in any appeal to the United States Court of Appeals for the District of Columbia Circuit under this subsection.

(f) CONSTRUCTION.—Nothing in this section shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States.

(g) UNITED STATES DEFINED.—For purposes of this section, the term "United States", when used in a geographic sense, is as defined in section 101(a)(38) of the Immigration and Nationality Act and, in particular, does not include the United States Naval Station, Guantanamo Bay, Cuba.

(h) EFFECTIVE DATE.—

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

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

* * * * *