No. 06-1169

In the Supreme Court of the United States

SALIM AHMED HAMDAN,
Petitioner
v.
ROBERT M. GATES, ET AL.,
Respondents

OMAR KHADR,
Petitioner
v.
GEORGE W. BUSH, ET AL.,
Respondents

On Petition for Writ of Certiorari and Writ of Certiorari Before Judgment to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF BRUCE A. ACKERMAN, JANET C. ALEXANDER, DAVID COLE, RONALD DWORKIN, FRANK MICHELMAN, MARTHA MINOW, JUDITH RESNIK, WILLIAM S. SESSIONS, and GEOFFREY R. STONE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

KATHLEEN M. SULLIVAN
Counsel of Record
DEREK L. SHAFFER
STANFORD CONSTITUTIONAL LAW CENTER
STANFORD LAW SCHOOL
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 725-9875
Counsel for Amici Curiae

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INTERESTS OF *AMICI CURIAE*[1]

Each *Amicus Curiae* appearing herein is a scholar of constitutional law, a scholar of federal courts, or a former government official. Each has special expertise in constitutional structure, history, and tradition and in the origins and principles of habeas corpus jurisdiction. While *Amici* have widely varying perspectives on many issues, *Amici* agree that the Petition in this case presents constitutional issues of exceptional importance and urgency warranting this Court's review through certiorari before judgment.

The institutional affiliations of *Amici Curiae*, for identification purposes only, are as follows: Bruce A. Ackerman, Sterling Professor of Law, Yale Law School; Janet Cooper Alexander, Frederick I. Richman Professor of Law, Stanford Law School; David Cole, Professor of Law, Georgetown University Law Center; Ronald Dworkin, Frank Henry Sommer Professor, New York University Law School; Frank I. Michelman, Robert Walmsley University Professor, Harvard Law School; Martha Minow, Jeremiah Smith, Jr. Professor of Law, Harvard Law School; Judith Resnik, Arthur Liman Professor of Law, Yale Law School; William S. Sessions, Former Director, FBI, 1987-1993, Former United States District Judge, Western District of Texas, 1974-1987, Chief Judge, 1981-1987; Geoffrey R. Stone, Harry Kalven, Jr. Distinguished Service Professor of Law and Former Dean, University of Chicago Law School, Former Provost of the University of Chicago.

[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. In accordance with Rule 37.6, *Amici* state that this brief was not written in whole or in part by counsel for any party, and no persons other than *Amici* have made a monetary contribution to the preparation or submission of this brief.

REASONS FOR GRANTING THE WRIT

Amici agree with Petitioners that the decisions below present constitutional questions of such exceptional importance that they warrant this Court's plenary consideration through certiorari before judgment. *See* Pet. at 7-11.[2] The Great Writ of Habeas Corpus has been fundamental to the Nation's constitutional tradition since the Founding, particularly for persons like Petitioners who face criminal process. The courts below incorrectly reconciled the Military Commissions Act ("MCA") with the Suspension Clause only by treating Petitioners as strangers to the Writ.

This was error, assuming that the habeas rights protected by the Suspension Clause are those originally defined by common law. The courts below treated habeas rights as limited by territorial boundaries and citizen status. The Writ, however, has long reached beyond sovereign soil to territory within the sovereign's practical control, particularly to fill a legal vacuum that would otherwise exist. The Writ has likewise reached aliens as well as citizens. The only categorical exception to the Writ that the Framers might have known was for nationals of avowed enemy nations captured in the battlefield during war, an exception not applicable here.

Even if the scope of habeas is defined by statute, the Suspension Clause prevents Congress from categorically excluding particular territories or classes of persons from habeas review, as previously conferred by statute, without satisfying constitutional strictures. Because Petitioners' pending petitions fell within preexisting habeas jurisdiction, *see Rasul v. Bush*, 542 U.S. 466, 483 (2004); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2769 (2006), Congress may not cancel that juris-

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[2] *Amici* likewise agree that certiorari is warranted, for related reasons, in *Boumediene, et al., v. Bush* (No. 06-1195), and *Al-Odah, et al., v. Bush* (No. 06-1196).

diction without satisfying the Suspension Clause. Finally, the MCA raises serious questions under the Exceptions Clause of Article III, because it imperils this Court's "essential functions" in construing substantive rights in a class of cases already pending in federal court.

I. THE GREAT WRIT WAS UNDERSTOOD AT THE FOUNDING TO ENCOMPASS NONENEMY ALIENS, EVEN IF DETAINED EXTRATERRITORIALLY

It is well established that the Suspension Clause protects habeas corpus *at least* as far as the Writ extended in 1789. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) (Marshall, C.J.).[3] Alien detainees in Petitioners' position were within the scope of the common-law Writ. Neither Petitioners' noncitizen status nor their location at Guantanamo precludes application of the Great Writ the Framers knew.

As this Court has recognized, "[i]n England prior to 1789, in the Colonies, and in this Nation during the formative years of our Government, the writ of habeas corpus was available to nonenemy aliens as well as to citizens." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (citations omitted). Historical authorities further demonstrate that the Writ ran to proximate territory under the sovereign's exclusive control. Courts were especially solicitous of habeas jurisdiction in

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[3] *See also Swain v. Pressley*, 430 U.S. 372, 384 (1977) (Burger, C.J., concurring) ("The sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted."); *Fay v. Noia*, 372 U.S. 391, 405-06 (1963) (overruled on other grounds); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201-02 (1830) (Marshall, C.J.); William F. Duker, *A Constitutional History of Habeas Corpus* 140 (1980); Henry J. Friendly, *Is Innocence Irrelevant?: Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 170 (1970).

areas where legal vacuums would otherwise exist.[4] The only possible qualification of the Writ's reach was for "enemy aliens," a circumscribed category that is inapplicable here.[5]

Petitioners are nationals of *friendly* nations. They complain that they have been designated and detained as "unlawful enemy combatants" without proper basis. They are being detained indefinitely, outside of hostilities, in a territory subject to the fixed and exclusive control of the United States. They would not have been denied access to the Writ under the common law at the time of the Founding and early Republic, nor should they be now. To expand the category of "enemy aliens" beyond those captured in wars with specified nations, finite in time and space, would be to distend the only exception to which the Writ might historically have admitted.

A. The Writ Ran Extraterritorially

English courts could issue the Great Writ as far as the outer limit of the Crown's territorial authority, limited only by pragmatic considerations—for instance, whether issuance would interfere with the operation of local courts or entail inordinate travel. Thus, Blackstone described habeas corpus as a "high prerogative writ . . . running into all parts of the King's dominions: for the King is at all times entitled to have an account, why the liberty of any of his subjects is re-

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[4] Notably, England sought to foreclose any such potential vacuum with the Habeas Corpus Act of 1679, 31 Car. 2, c. 2, which brought to an end the practice "of taking prisoners outside the jurisdiction to deprive them of the benefit of habeas corpus." R.J. Sharpe, *The Law of Habeas Corpus* 199 (2d ed. 1989).

[5] *See Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950) ("In the primary meaning of the words, . . . an alien enemy is the subject of a foreign state at war with the United States.").

strained, wherever that restraint may be inflicted."[6] Lord Mansfield's account was to the same effect: "There is no doubt as to the power of this Court; where the place is under the subjection of the Crown of England; the only question is, as to the propriety." *R. v. Cowle*, 97 Eng. Rep. 587, 599 (K.B. 1759). Beyond this, Lord Mansfield emphasized the importance of ensuring that no place would be "out of the protection of the law," thereby avoiding "a total failure of trial, and consequently, of justice." *Id.* at 602. In *Cowle*, therefore, Mansfield expressly accounted for the fact that the borough of Berwick, though not part of England, had "no other laws by which it [wa]s governed, but the laws of England." *Id.* at 601. In many other instances, English courts historically issued the Writ beyond England, particularly when no other court had such authority.[7]

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[6] 3 William Blackstone, *Commentaries* *131, *quoted in Leonard Watson's Case*, 112 Eng. Rep. 1389, 1393 (K.B. 1839); *see also* Sharpe, *supra*, at 188.

[7] *See, e.g.*, *R. v. White*, 20 Howell's State Trials 1376, 1377 (K.B. 1746) (providing habeas relief to impressed seaman who had "no other remedy"); *Alder v. Puisy*, 89 Eng. Rep. 10 (K.B. 1671) (issuing writ to Dover, formerly a Cinque Port town); *R. v. Salmon*, 84 Eng. Rep. 282 (K.B. 1669) (issuing writ to Channel Island of Jersey); *R. v. Overton*, 82 Eng. Rep. 1173 (K.B. 1668) (same); *Harrison's Case*, *sub nom. Jobson's Case*, 82 Eng. Rep. 325 (K.B. 1626) (issuing writ to Durham, formerly a County Palatine, and noting writs previously issued to Calais and Bordeaux as early as fourteenth century); *Bourn's Case*, 79 Eng. Rep. 465, 466 (K.B. 1619) (issuing writ to Dover because "it is agreeable to all persons and places"); *see also* Sir Matthew Hale, *The History of the Common Law of England* 187, 188 (3d ed. 1739) (stating writ runs to Channel Islands because "the King may demand, and must have an Account of the Cause of any of his Subjects Loss of Liberty" and acknowledging the islands are "Parcel of the Dominion of the Crown of England" but not "parcel of the Realm of England"); *R. v. Suddis*, 102 Eng. Rep. 119, 122 (1801) (granting habeas review to soldier tried by court-martial in Gibraltar).

The common-law Writ ran so far that Parliament was subsequently impelled to restrict it. As nineteenth-century innovations facilitated transportation and communication, the practical reach of the Writ expanded, until, in *Ex parte Anderson*, the Queen's Bench sent the Writ all the way to Canada. 121 Eng. Rep. 525 (1861); *see also* Sharpe, *supra*, at 182. Parliament responded by expressly curtailing the reach of the Writ in the Habeas Corpus Act of 1862, 25 & 26 Vict. c. 20, which then prevented the Writ from issuing "into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established court or courts" capable of issuing the Writ and effectuating its purpose. The unmistakable implication was that, where foreign courts were *not* competent, English courts could continue to enforce the Writ abroad even under the statute.[8]

B. The Writ Ran Extraterritorially To Aliens

English courts likewise exercised jurisdiction over extraterritorial injuries to aliens. Exertions of jurisdiction that might not otherwise be appropriate were deemed necessary if no other court was competent to address the injury, even if the complaining party was not a citizen.

The case of *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021 (K.B. 1774), is illustrative. There, a "native Minorquin" brought claims of trespass and false imprisonment against the governor of Minorca, "for such injury committed by him in Minorca." *Id.* at 1022. Noting the crime had taken place in a precinct "more immediately under the power of the governor; and that no Judge of the island can exercise jurisdiction there, without a special appointment from him," *id.* at 1027, Lord

[8] *See* Sharpe, *supra*, at 190 ("[A] case not expressly covered by the Act will fall within the common law rule stated in [*Anderson*].");
see also Ex parte Brown, 122 Eng. Rep. 835 (K.B. 1864) (confirming Writ's reach overseas following the 1862 Act).

Mansfield sustained the 3000£ verdict Fabrigas had won from an English jury. *Id.* at 1022, 1032.

Lord Mansfield noted that, if the governor were not accountable in his court, "he is accountable no where." He continued: "[T]o lay down in an English Court of Justice such a monstrous proposition, as that a governor acting by virtue of letters patent under the Great Seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect his Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained." *Id.* at 1029. Lord Mansfield emphasized the importance of avoiding a legal vacuum, citing several other cases in which "whatever injury had been done . . . would have been altogether without redress, if the objection of locality would have held." *Id.* at 1032. Such reasoning was equally applicable when it came to the Writ, which issued repeatedly on behalf of aliens.[9]

C. The Only Possible Qualification Of The Writ's Scope Was For Enemy Aliens

Although some qualification of the Writ's scope may have existed for "enemy aliens," that category included at most only nationals of enemy nations captured at war. The Enemy Alien Act of 1798 confirmed this understanding, defining "enemy aliens" as men over the age of fourteen who were citizens of foreign nations or governments with which the United States was at war or with which a conflict was imminent. *See* Act of July 6, 1798 (Enemy Alien Act), ch. 66, § 1, 1 Stat. 577, 577. Even those designated enemy aliens, however, retained habeas corpus rights to challenge their enemy designation. *See Lockington's Case* (Pa. 1813)

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[9] *See Case of the Hottentot Venus*, 104 Eng. Rep. 344 (K.B. 1810); *Three Spanish Sailors' Case*, 96 Eng. Rep. 775 (1779); *Somerset v. Stewart (Somerset's Case)*, 98 Eng. Rep. 499 (K.B. 1772); *Case of Du Castro*, 92 Eng. Rep. 816 (K.B. 1695).

(Tilghman, C.J.), *reprinted in* 5 Am. L.J. 92 (1814) (extending habeas to British merchant detained during War of 1812), *aff'd*, 5 Am. L.J. 301 (1814).

D. The Colonies Imported The Writ As Broadly Defined At Common Law

By 1776, the American colonies universally employed the Great Writ, as they knew it under the common law, to safeguard personal liberty.[10] For example, as events in the colonies accelerated towards the Declaration of Independence, a delegation approached the inhabitants of Quebec to explore possible alliance. *See* 1 *Journals of the Continental Congress, 1774-1789*, at 105-08 (Worthington Chauncey Ford ed., 1904). The invitation to independence included a description of five "invaluable rights" of the colonies' governments, among which was habeas corpus. *Id.* at 107-08.

In 1777, Pennsylvania Chief Justice Thomas McKean defended his decision to issue the Writ on behalf of twenty dissidents by similarly noting that the habeas corpus act had always been "justly esteemed the palladium of liberty" and was part of the laws of Pennsylvania.[11] Indeed, the Writ remained available as the Revolution progressed.[12]

In 1786, a committee of the Continental Congress recommended additional Articles of Confederation requiring that "trial of the fact by Jury shall ever be held sacred, and also the benefits of the writ of Habeas Corpus." 31 *Journals*

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[10] *See* Duker, *supra* note 3, at 115 (noting availability of Writ in all thirteen colonies and incorporation of procedural reforms of 1679 act in Virginia, North Carolina, South Carolina, and Georgia).

[11] Letter from Thomas McKean to John Adams (Sept. 19, 1777), *in* 5 *Papers of John Adams* 289 (Robert J. Taylor et al. eds., 1983).

[12] *See, e.g.*, Letter from Thomas McKean to William Atlee (June 12, 1780), *in* 15 *Letters of Delegates to Congress* 305 (Paul H. Smith ed., 1976) (noting availability of Writ).

of the Continental Congress, 1774-1789, at 497-98 (Roscoe R. Hill ed., 1936). Similarly, the 1787 Ordinance for the government of the territory North West of the river Ohio stipulated: "The Inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by Jury; . . . and of judicial proceedings according to the course of the common law . . . ." 32 *Journals of the Continental Congress, 1774-1789*, at 340.

This understanding of the Writ carried into the framing of the Constitution. In debates over the Suspension Clause, the only question was whether the Writ should be inviolable or subject to limited suspension. Of the few comments on the subject, the most noteworthy came from James Wilson of Pennsylvania, who "doubted whether in any case a suspension could be necessary, as the discretion now exists with judges, in most important cases, to keep in gaol or admit to bail." James Madison, *Notes of Debates in the Federal Convention of 1787*, at 541 (Ohio Univ. Press 1966). Others advocated limiting the period of any suspension to one year. *See id.* Significantly, there was no discussion of the scope of habeas jurisdiction, presumably because the Framers presupposed the availability of the Writ known at common law.[13] Certainly the Framers presupposed the general availability of habeas to aliens, for they contemplated limited occasion for

[13] The constitutional presupposition of the Great Writ as it existed at common law is no less reflected in the Suspension Clause than the presupposition of state sovereignty is in the Eleventh Amendment. *See, e.g.*, Badshah K. Mian, *American Habeas Corpus: Law, History, and Politics* 188 (1984) ("The prohibition contained in [the Suspension Clause] presupposed the jurisdiction of the federal courts to issue the writ."); *see also* Declaration of the Delegates of New York State, July 26, 1788, in 1 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 328 (Jonathan Elliot ed., 2d ed. 1876); J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 Geo. L.J. 463, 498-99 (2007).

suspending habeas specifically in the face of "*Invasion*" (as well as "Rebellion"), thereby bespeaking a concern with foreign "Invaders," who stood to be distinguished from aliens otherwise entitled to petition.

E. The First Judiciary Act Of 1789 Confirmed The Broad Scope Of The Writ

The First Congress, familiar with common-law authorities and consisting largely of those who had drafted and ratified the Constitution, gave expansive reach to habeas in the Judiciary Act of 1789.[14] The prescription of habeas jurisdiction in Section 14 of the Act spoke in broad terms, not limited by territory or citizenship. It is especially noteworthy that habeas jurisdiction thereby transcended United States territory, transcended United States citizenship, and extended even to those prisoners detained simply "by colour of the authority of the United States."[15] Judiciary Act of 1789 (First Judiciary Act), ch. 20, § 14, 1 Stat. 73, 81-82.

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[14] This Court has often looked to the First Judiciary Act as illuminating the original meaning of the Constitution and the Writ in particular, as understood by the Framers themselves. *See, e.g.*, *Felker v. Turpin*, 518 U.S. 651, 663 (1996); *Faretta v. California*, 422 U.S. 806, 812, 831 (1975); *Capital Traction Co. v. Hof*, 174 U.S. 1, 9-10 (1899).

[15] The full text of Section 14 of the First Judiciary Act reads:

> *And be it further enacted*, That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment.——*Provided*, That writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of

The Act placed no territorial limit on the Writ. Indeed, the only phrase that might connote any geographical constraint, "necessary for the exercise of their respective jurisdictions," was held inapplicable to the first part of the clause, which is what enables habeas jurisdiction. *See Ex parte Bollman*, 4 Cranch at 99 (Marshall, C.J.).

Congress likewise used broad language encompassing aliens alongside citizens. Specifically, Congress extended the Writ to *all* "prisoners." Act of 1789, § 14. This is particularly telling given that the Act elsewhere singled out "aliens" for differential treatment. *See, e.g.*, *id.* at §§ 9, 11, 12, 13; *cf. Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (applying Equal Protection Clause protections to aliens, reasoning that the term "person" in the Fourteenth Amendment "is not confined to the protection of citizens").

The absence of any debate over this jurisdiction confirms that the First Congress was codifying widely accepted common law notions about the broad scope of the Writ. *See* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 95 (1923) (noting only one minor change relating to writs of *scire facias* to the text of section 14 of the Act before passage).

F. Early National Practice Confirmed The Broad Scope Of The Writ

Finally, the practice of early federal courts confirmed that the broad scope of the Writ had carried forward from the common law. In the House debates of 1807, in response to the detention in New Orleans of Eric Bollman and others and their transportation to Washington, D.C. for trial, Representative John Randolph decried that men were being "transported without the color of law, nearly as far as across the Atlantic." 16 *Debates and Proceedings in the Congress of the United*

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the same, or are necessary to be brought into court to testify. First Judiciary Act, ch. 20, § 14, 1 Stat. 73, 81-82 (1789).

States 543-44 (J. Gales & W. Seaton eds., 1834). Although the Supreme Court ultimately rectified the unlawful detention in *Ex parte Bollman*, 8 U.S. 75, the underlying events sparked rounds of Congressional debate on the meaning of the Suspension Clause and the possible need for supplemental legislation protecting the Writ.

The same year that *Bollman* was decided, two judges in Pennsylvania invoked the Writ to discharge Hippolite Dumas, a French citizen being detained as a deserter. Noting that Dumas had come to the United States from Jamaica, where he had been stranded, Judges Tilghman and Smith ordered release regardless whether the laws of nations required the United States "to give up generally those seamen, who desert from foreign Ships of War within our Harbours." Tilghman & Smith, *Habeas Corpus Writ, Dumas Case*, 1 Gen. Corresp. Reel 9, James Madison Papers at the Library of Congress (July 20, 1807), *available at* http://hdl.loc.gov/loc.mss/mjm.09_0878_0880.

G. Guantanamo Is Within The Writ's Historical Reach

Like Gibraltar, Durham, Berwick, the Channel Islands, and other occupied territories to which the Writ historically issued from England, including on behalf of aliens, the United States Naval Base at Guantanamo Bay is territory under the "exclusive jurisdiction and control" of the United States. *Rasul*, 542 U.S. at 476. Absent recourse there to United States courts, there thus would exist a legal vacuum that the common law rightly eschewed.

Guantanamo is a territory defined by the United States' longstanding and exclusive occupation and control, within close proximity to the continental United States. The governing lease is perpetual and entitles the United States to "exercise complete jurisdiction and control" over Guantanamo, even while accepting "the continuance of the ultimate sovereignty of [Cuba] over [the territory]." Lease of Lands for

Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T. S. No. 418; Treaty Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, Art. III, 48 Stat. 1683, T. S. No. 866. Since 1903, American law has been the only law applied in Guantanamo.[16] Persons at Guantanamo are "amenable only to United States legislative enactments." Marion Emerson Murphy, *The History of Guantanamo Bay*, 8 (U.S. Naval Base, Dist. Publ'ns & Printing Office, Tenth Naval Dist. 1953).[17] Guantanamo is therefore akin to other extraterritorial settings to which the common-law Writ applied.

H. *Eisentrager* Is Not To The Contrary

Against these consistent lines of English and American authorities pointing to the availability of habeas for designated "unlawful enemy combatants" like Petitioners, the courts below have identified only one authority that supposedly points to the contrary: this Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950). But they misread *Eisentrager* as it applies here.

First, in *Eisentrager*, the prisoners were seized and held in China, a land over which the United States exercised neither jurisdiction nor control, let alone did so to the exclusion of Chinese courts. The United States was permitted to hold a military commission in Chinese territory only with the express and limited consent of the Chinese government. *See Eisentrager*, 339 U.S. at 766. In contrast, Guantanamo has

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[16] *See, e.g.*, *Huerta v. United* States, 548 F.2d 343, 344, 346 (Ct. Claims) (1977) (assuming that a court may judge breach of contract and takings clause claims by Cuban national for loss of property situated on Guantanamo), *cert. denied*, 434 U.S. 828 (1977).

[17] For example, the Office of Legal Counsel opined in 1982 that, because the Guantanamo lease affords the U.S. exclusive jurisdiction over the territory, Guantanamo is subject to the federal Anti-Slot Machine Act. *Installation of Slot Machs. On U.S. Naval Base, Guantanamo Bay*, 6 Op. Off. Legal Counsel 235, 237 (1982).

been within the United States' "exclusive jurisdiction and control" for an extended period of time under the terms of an indefinite lease agreement. *Rasul*, 542 U.S. at 476.

Second, the petitioners in *Eisentrager* qualified as "enemy alien[s]" in the classic sense. *Id.* at 777. In contrast, Petitioners are not "enemy aliens" within the meaning of *Eisentrager*—their nations are not hostile to, let alone at war with, the United States, and their status and affiliation beyond that are very much disputed at the threshold. *Cf. id.* at 771 (noting the impairment of an alien's protection "when his nation takes up arms against us"). Nor are Petitioners engaged in a finite war with any discrete endpoint. *Cf. id.* at 772 (noting that disabilities "are imposed temporarily as an incident of war and not as an alleged incident of alienage").

Third, even in *Eisentrager*, where the prisoners' status as enemy aliens could be taken for granted, this Court noted that layers of judicial review had been expeditiously afforded upon the cessation of hostilities between the United States and Germany. *See id*. at 781. Here, by contrast, more than five years after Petitioners were transported to Guantanamo, Petitioners have not been afforded even a threshold determination by the courts as to the *bona fides* of their detention, nor is any such determination in sight.

Finally, *Eisentrager* was predicated upon an assumption that no longer holds—namely, that affording habeas rights to enemy aliens would afford no reciprocal benefits for our own fighting forces if ever detained. *See id.* at 779. There is every reason to revisit that assumption here. International norms have shifted such that judicial review of detention is widely available around the world.[18] By not offering recip-

[18] *See, e.g.*, Advisory Opinion OC-8/87, Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Inter-Am. Court. H.R. (Ser. A) No. 8 ¶ 12 (Jan. 30, 1987)); *Askoy v. Turkey*, 23 Eur. H.R 553 ¶ 78 (1996) (Invalidating Turkey's detention of suspected terrorists for more than 14

rocal review of alleged enemy combatants' detention in Guantanamo, the United States is undermining international regard for habeas rights and respect for the rule of law.

II. CONGRESS MAY NOT CANCEL PREEXISTING STATUTORY ENTITLEMENT TO HABEAS ABSENT A VALID SUSPENSION OF THE WRIT

Even if the Suspension Clause does not codify and guarantee the Framers' understanding of the Writ at common law, then the Clause must at least protect the Writ as Congress has enabled it by statute. Anything less would deprive the Clause of all substantive force. The Petition therefore presents exceptionally important questions warranting this Court's review even if the Constitution is not construed as fixing a bedrock entitlement to habeas. Under the Suspension Clause, U.S. Const. art. I., § 9, cl. 2, Congress may not divest an entire class of persons of habeas rights it has previously conferred unless the Clause has been satisfied. Nor may Congress intrude upon an essential function of this Court under the Exceptions and Regulations Clause, U.S. Const. art III, § 2.

A. The MCA Exceeds Congress' Power Under The Suspension Clause

To "eliminate the 'Privilege of the Writ' . . . for a certain class or certain classes of individuals" who previously enjoyed it is a "distinct abuse of majority power" that the Framers had in mind when they drafted the Suspension Clause. *St. Cyr*, 533 U.S. at 337-38 (Scalia, J., dissenting). The MCA does just that. This Court has held that Petitioners' pending petitions fell within preexisting statutory habeas jurisdiction. *See Rasul*, 542 U.S. at 483; *see also Hamdan*, 126 S. Ct. at 2769. But the MCA categorically withdraws federal courts' jurisdiction to entertain any habeas petition

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days without bringing them before a court or allowing them to consult with a lawyer.).

from "any alien detained by the United States," including one still awaiting designation as an enemy combatant. Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, § 7(a)(1), 120 Stat. 2600, 2635-36. This retroactive excision of habeas rights for an entire class of persons is properly viewed as a suspension triggering the strictures of the Suspension Clause.[19]

B. The MCA Exceeds Congress' Powers Under The Exceptions Clause

While Congress possesses broad power under the Exceptions Clause to dictate the appellate jurisdiction of federal courts, that power is not without limit. Indeed, the very use of the word "exception" in the text of Article III, § 2 implies that the exceptions may not swallow the whole.[20] Neither may Congress use its power under the Exceptions Clause to violate another constitutional provision.[21] Here, the MCA's

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[19] Cases permitting Congress to make certain less categorical modifications or adjustments in statutory habeas are not to the contrary. Those statutory restrictions of habeas that have been upheld have always stopped short of preclusion of the ability to petition itself. *See, e.g.*, *Felker v. Turpin*, 518 U.S. 651 (1996) (permitting termination of this Court's review under AEDPA of circuit courts' "gatekeeping" determinations about the validity of *successive* habeas petitions); *Ex parte McCardle*, 74 U.S. 506 (1868) (dismissing appeal from denial of habeas petition sought under 1867 Act enabling such appeals after 1868 Act revoked that authority).

[20] *See* Lawrence G. Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 44 (1981) ("An 'exception' implies a minor deviation from a surviving norm; it is a nibble, not a bite."); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 Harv. C.R.-C.L. L. Rev. 129, 135 (1981).

[21] *See United States v. Bitty*, 208 U.S. 393, 399-400 (1908) (Holmes, J.) ("What such exceptions and regulations should be it is

jurisdiction stripping specifically violates the Suspension Clause, as explained in Part II.A.

This Court has often acknowledged Professor Henry Hart's thesis that Congress's power under the Exceptions Clause to withdraw jurisdiction does not extend so far as to threaten the "essential functions" of this Court under Article III. Professor Hart expressly included issuing the writ among those "essential" functions. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1365.[22] For example, the Court noted that applying the Detainee Treatment Act retroactively could "raise[] grave questions about Congress' authority to impinge upon this Court's appellate jurisdiction, particularly in habeas cases." *Hamdan*, 126 S. Ct. at 2764. And, in *Felker*, this Court held that, because AEDPA did not "repeal [the Court's] authority to entertain a petition for habeas corpus, there c[ould] be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2." 518 U.S. at 651. Justice Souter, joined by Justices Stevens and Breyer, concurred separately to note, "if it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question

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for Congress, in its wisdom, to establish, having, of course, due regard to all the provisions of the Constitution.").

[22] Professor Hart's thesis has gathered broad consensus. *See, e.g.*, Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 Stan L. Rev. 817, 835 (1994); *Sager, supra*, at 44; Tribe, *supra*, at 135; Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 190 U. Pa. L. Rev. 157, 160-167 (1960). For a view that "Article III gives Congress *no ability* to remove the Supreme Court's jurisdiction" see Laurence Claus, *The One Court that Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 Geo. L. J. (forthcoming 2007), *available at* http://ssrn.com/abstract=935368.

whether the statute exceeded Congress's Exceptions Clause power would be open." *Id.* at 667 (Souter, J., concurring).

The MCA, by contrast, would strip this Court *entirely* of its ability to review habeas petitions filed by alien detainees, who may await determination and/or adjudication of their status *indefinitely* without recourse to the courts.[23] Interpreted as Respondents urge, the MCA thus would threaten this Court's essential functions. By precluding judicial review of an entire category of cases raising critical questions about ongoing, indefinite detentions outside of the vicinity of armed conflict,[24] Congress improperly eliminated certain "disfavored constitutional claims with deep prejudice to judicially protected rights." Sager, *supra*, at 70.

Nor is the problem cured by judicial review of detainees' final military commission judgments in the D.C. Circuit. Such review is unavailing when a detainee is not brought to trial promptly—or, indeed, at all. The statute expressly precludes raising the very claims based on the Geneva Conventions that this Court previously sustained as to preexisting procedures. MCA § 8(a); MCA § 3, 10 U.S.C. § 948b(g). And no judicial review whatever—even in the D.C. Circuit—is permitted of claims relating to conditions of confinement, including torture or "extraordinary rendition" to countries practicing torture. *See* MCA § 7(a).

The problem is compounded to the extent Congress expressly targeted pending petitions such as Hamdan's that were otherwise ripe for judicial pronouncement. *See Boume-*

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[23] *See* MCA § 7(a) (amending the federal habeas statute to remove the jurisdiction of any "court, judge, or justice" over habeas petitions filed by aliens who are either detained as enemy combatants or are "awaiting such determination").

[24] *See* Ratner, *supra* note 22 at 201 ("[L]egislation that precludes Supreme Court review in every case involving a particular subject is an unconstitutional encroachment.").

diene v. Bush, 476 F.3d 981, 987 n.2 (D.C. Cir. 2007) (recounting statements by members of Congress evidencing an intent to target pending petitions in general and the *Hamdan* case in particular). Congress may not use its Exceptions power "to achieve particular desired answers to questions that fall within the judicial Power of the United States." Claus, *supra*, at 9.

For example, in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), this Court rejected an attempt at jurisdiction stripping as a violation of the Exceptions Clause, reasoning that it amounted to a congressional attempt to "prescribe rules of decision to the Judicial Department of the government in cases pending before it[.]" *Id.* at 146. At issue was Congress's attempt to prevent former Confederate supporters from obtaining benefits previously promised if they accepted a presidential pardon. "[O]f obvious importance to the *Klein* holding was the fact that Congress was attempting to decide the controversy at issue in the Government's own favor." *United States v. Sioux Nation of Indians*, 448 U.S. 371, 405 (1980). Here, as in *Klein*, Congress has withdrawn jurisdiction in an attempt to block an unfavorable outcome in pending cases. In so doing, Congress may well have "passed the limit which separates the legislative from the judicial power." *Klein*, 80 U.S. at 147.

CONCLUSION

The petition should be granted.

Respectfully submitted,

KATHLEEN M. SULLIVAN
Counsel of Record
DEREK L. SHAFFER
STANFORD CONSTITUTIONAL
LAW CENTER
STANFORD LAW SCHOOL
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 725-9875

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Counsel for Amici Curiae