

ORAL ARGUMENT SCHEDULED FOR MARCH 22, 2006

Nos. 05-5062, 05-5064, 05-5095 through 05-5116

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

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ABDULLAH FAHAD AL ODAH, et. al.,
LAKHDAR BOUMEDIENE, Detainee, Camp Delta, et. al.,
Petitioners/Appellants

v.

George W. BUSH, President of the United States of America, et. al.,
UNITED STATES OF AMERICA, et. al.,
Respondents/Appellees

ON ORDER FROM THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**SECOND SUPPLEMENTAL BRIEF AMICUS CURIAE
OF THE WORLD ORGANIZATION FOR HUMAN RIGHTS USA
IN SUPPORT OF PETITIONERS'/APPELLANTS' POSITION ON THE
JURISDICTIONAL IMPACT OF THE DETAINEE TREATMENT ACT
FILED PURSUANT TO THE COURT ORDER OF JAN. 27, 2006**

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. STANDARDS

CERTIFICATE OF SERVICE

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The following information is provided pursuant to Circuit Rule 26.1:

Amicus World Organization for Human Rights USA is a not for profit 501(c)(3) human rights organization, incorporated in the State of Maryland and with its principle place of business in Washington, D.C. We are the U.S. affiliate of a worldwide network of over 200 human rights organizations operating in different countries of the world as part of the World Organization Against Torture (l'Organisation Mondiale Contre La Torture or OMCT) international network, whose secretariat located in Geneva, Switzerland. Neither the international network, the secretariat, nor any other affiliate groups of the network exercise any control or controlling interest in the World Organization for Human Rights USA, nor does any other entity in the U.S. or elsewhere exercise such an interest. OMCT has joined with us in helping to prepare this amicus submission, and is so recognized on the signatory page of this brief.

We are not affiliated with, and do not represent any party in this case or any of the other amici that have indicated an interest in filing amicus briefs in this case. The views and analyses provided in this brief are our own, and have not been contributed to nor influenced in any way by any of the parties or any of the other amici.

Law students from New York University Law School, the University of California Hastings College of the Law, Georgetown University Law Center and Yale Law School made substantial contributions to the legal research and writing for this brief, as did the staff of our international secretariat (OMCT) in Geneva. Although we work with volunteer attorneys from a number of law firms in the Washington, D.C. area on other cases and issues who assist us on a pro bono basis, none of these volunteer lawyers or law firms assisted us in the preparation of this brief.

Signed and certified to this 10th day of March, 2006 in Washington, D.C. by:

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STATEMENT OF INTEREST OF AMICUS CURIAE

The World Organization for Human Rights USA (hereinafter Human Rights USA) has previously been designated as amicus by this Court in these proceedings, and filed an amicus brief with this Court on the merits of Al Odah, et. al. v. United States, et. al., CV Nos. 05-5064, 05-5095-5116, as well as a previous Supplemental Brief on the jurisdictional issues posed by the Detainee Treatment Act filed on January 25, 2006. We serve as a non-profit, public interest human rights organization dedicated to monitoring and reporting on U.S. compliance with international human rights standards, and are heavily engaged in litigation in U.S. courts for this purpose. Human Rights USA has been extensively involved in litigation in the immigration courts and in the federal courts aimed at protecting refugees and victims of torture from being returned to situations of persecution and abuse in their home countries through the application of international and domestic legal standards prohibiting torture and being returned to situations of torture.

Human Rights USA served as amicus with the Federal District Court in Illinois, the U.S. Court of Appeals for the Seventh Circuit, and most recently the U.S. Supreme Court, in a case involving a U.S. resident unlawfully detained as an enemy combatant in a South Carolina naval brig (Al-Marri v. Bush, 274 F. Supp. 2d 1003 (C.D. Ill. 2003), and Al-Marri v. Rumsfeld, 360 F.3d 707 (7th Cir. 2004)).

We also have been heavily involved in cases challenging the practice of “rendition to torture,” or the “extraordinary rendition” of suspected terrorists to foreign countries for interrogation purposes. Human Rights USA served as lead counsel and counsel of record in the rendition to torture case of Ahmed Abu Ali, an American citizen detained in Saudi Arabia for 20 months due to an U.S. investigation prompted by the war against terrorism. Human Rights USA filed a petition on behalf of his parents in the District Court for the District of Columbia in

August of 2004, and received a favorable jurisdictional decision in the case from Judge John Bates on December 16, 2004 (350 F.Supp.2d 28), that resulted in the Government returning Mr. Abu Ali to the United States shortly thereafter.

Most recently, Human Rights USA has been involved in litigation challenging the habeas-stripping provisions of the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106 which eliminates habeas jurisdiction over the claims of aliens seeking review of their immigration or deportation proceedings. We have challenged these provisions as violative of the Suspension Clause, as having unconstitutional retroactive impacts, and because they are at variance with judicial precedents prohibiting restrictions on access to the writ of habeas corpus for the purposes of challenging unlawful executive actions. We have presented U.S. courts with these arguments as counsel of record in Mancho v. Ridge, CV No. 04-0450 in the U.S. District Court for the District of Columbia, in Malm v. Gonzales, CV No. 04-1678 in the U.S. Court of Appeals for the Fourth Circuit, and as co-counsel in Enwonwu v. Chertoff, CV No. 05-2053 in the U.S. Court of Appeals for the First Circuit. We provided oral argument before the First Circuit on the Suspension Clause issues inherent in habeas-stripping on January 11, 2005.

Due to our experience with the constitutional issues associated with habeas-stripping legislation in the immigration context, and our litigation efforts in other habeas cases filed by alleged “enemy combatant” detainees, and suspected terrorists subjected to the policy of “rendition,” Human Rights USA is uniquely qualified to offer this Court important legal analysis concerning Suspension and retroactivity standards that attach to the habeas claims of Guantanamo Bay detainees in the context of the newly enacted Detainee Treatment Act.

This brief is being filed in response to the Court’s most recent Order of January 27, 2006 requesting detailed submissions from the Parties and Amici on the jurisdictional questions and issues posed by § 1005 of the Detainee Treatment Act.

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ISSUES PRESENTED

1. Do the habeas restriction provisions of the Detainee Treatment Act (the DTA) apply retroactively to habeas cases filed and pending prior to the enactment of the statute?

2. What are the legal consequences of a decision by this Court that the DTA does apply to the present cases, including whether such retroactive applications would be Constitutional? (Based on the Question posed by the Court in its January 27 Order.)

SUMMARY OF THE ARGUMENT

Provisions of the Detainee Treatment Act of 2005 that purport to eliminate habeas jurisdiction over the claims of Guantanamo Bay detainees challenging their prolonged and arbitrary detention and other aspects of their treatment cannot be applied retroactively to habeas proceedings already pending on the date of enactment of the statute without raising serious Constitutional concerns under well established retroactivity and Suspension Clause standards. The fact that retroactive application to pending habeas cases was not intended or mandated by Congress is indicated most clearly by the language and legislative history of the DTA statute, and a comparison with how Congress specifically used different language and procedures to accomplish the retroactive application of similar habeas restriction provisions in the REAL ID Act just a few months earlier.

The most immediate consequence of a determination that Congress did intend to apply the habeas restriction provisions of the DTA retroactively, thereby removing the jurisdiction of this Court over pending cases, would be that it would then become necessary to reach the dual Constitutional issues of whether this result would have Constitutionally prohibited retroactive effects under the Supreme Court's Landgraf v. USI Film Products (511 U.S. 244, 270 (1994)) standard, and whether the alternative form of judicial review set out in the DTA to replace habeas meets the "adequate, effective and equivalent" test for restricting the availability of habeas corpus under the Suspension Clause, pursuant to the Supreme Court's Swain v. Pressley (430 U.S. 372,

381 (1977)) standard. The only way for this Court to avoid having to address these major Constitutional concerns would be to rule that the DTA does not apply to habeas cases pending on the date of enactment of the DTA.

It is Amicus' view that if it becomes necessary to address these Constitutional concerns, it is inescapable, especially in comparison with approach taken by Congress to the retroactivity and alternative judicial review issue just a few months ago in the REAL ID Act, that the DTA improperly and unconstitutionally "burdens" substantial interests of the Petitioners on a retroactive basis, and does not provide an "adequate, effective and equivalent" alternative form of judicial review as the Constitution requires, in violation of prevailing non-retroactivity and Suspension Clause standards.

The only way that these important Constitutional issues can be avoided in these proceedings is for this Court to determine that the habeas restriction provisions of the DTA do not apply to pending habeas cases that were instituted before the statute became law. A determination that the DTA eliminates the jurisdiction of this Court in the present cases requires these underlying Constitutional issues to be addressed.

Alternatively, this Court could determine that section 1005 of the DTA, in requiring the adoption of new procedures and standards for the CSRT and Military Tribunal processes, intended the habeas restrictions and the alternative form of appellate procedures set out in subsections e(2) and e(3) to apply only to challenges concerning the new administrative structures that were to be set in place, and not to pending cases dealing with claims under the old CSRT and Military Tribunal processes. This

approach also would avoid potential Constitutional concerns, and the anomalous situation of potentially leaving detainees in pending habeas cases arising under the old rules without any form of judicial review whatsoever, a result that would raise additional Constitutional issues, and that would be inconsistent with the Supreme Court's recognition of the availability of habeas remedies for the Petitioners in the present cases in Rasul v. Bush, 542 U.S. 466 (2004).

Finally, the judgment as to the appropriateness and legality of placing restrictions on availability to habeas corpus in the context of the present cases rests with the courts, not with Congress as the Government contends. Nor is the exercise of this responsibility precluded by the Government's claim that Congress established a "comprehensive enforcement and administrative review" scheme that supersedes any more general form of judicial review, including habeas. The "comprehensive enforcement and review" mechanism argument has no applicability where fundamental interests are affected that are not adequately addressed by a Congressionally established enforcement approach.

ARGUMENT

I. A COMPARISON OF HOW CONGRESS HANDLED THE HABEAS RESTRICTIONS IMPOSED UNDER THE REAL ID ACT WITH ITS TREATMENT OF SIMILAR PROVISIONS IN THE DETAINEE TREATMENT ACT CONFIRMS THAT RETROACTIVE APPLICATION TO PENDING CASES WAS NOT INTENDED OR MANDATED IN THE DTA.

Our prior Supplementary Brief on Jurisdictional Issues submitted in these case on January 25, 2006 discussed how the legislative history and language of the DTA made clear that a retroactive effect was not contemplated, and not mandated in the explicit terms that the courts require. Congress' intent to not apply the DTA habeas restriction provisions retroactively is most graphically demonstrated by a simple comparison between how Congress treated the habeas restriction language and implementation procedures for the DTA, and what was done just a few months earlier under the REAL ID Act, where retroactive effect was specifically intended and mandated.

Congress did two things in its treatment of the habeas restriction provisions of the REAL ID Act that it did not do in the DTA that conclusively demonstrates its intention to not apply the DTA on a retroactive basis to pending habeas cases. First, it did not include the same type of explicit language in DTA, as it did just a few months earlier in the REAL ID Act, specifying in no uncertain terms that the statute should be applied to pending as well as to newly instituted habeas petitions. It is noteworthy, for example, that in REAL ID Congress was careful to specify that in addition to the statute "take[ing] effect on the date of enactment," that certain provisions applied to cases

instituted “on or after” the date of enactment, while other provisions applied on a retroactive basis “to all cases in which the final administrative removal order is or was issued before, on, or after such date.” (REAL ID section 101 (h)). Similar very specific language as to retroactivity is provided in the section of REAL ID eliminating habeas corpus, where Congress specified that not only shall the statute “take effect upon the date of the enactment,” but that these particular provisions “shall apply to cases in which the final administrative order of removal . . . was issued before, on, or after the date of enactment . . .” *Id.*, section 106(b). The DTA, by way of comparison, contains only the general “take effect” language, without explicitly specifying retroactive application.

Second, in REAL ID Congress set out a number of very explicit provisions explaining how pending habeas petition cases should be treated given the retroactive effect of the law, namely that any pending habeas cases should be “transferred” and converted into “petition for review” proceedings before the appropriate U.S. Court of Appeals. *Id.*, section 106(c) dealing with “Transfer of Cases,” and (d) dealing with “Transitional Rule Cases.” No such “transfer” or “conversion” provisions were included in DTA, even though the REAL ID model for handling these retroactive applications had been adopted by Congress for dealing with similar habeas restriction issues only six months before. It strains credulity to suggest that Congress anticipated and intended similar retroactive effects under the DTA, and similar transfers of pending cases, but neglected to specify some type of transfer or conversion procedure for habeas

cases pending when the DTA was enacted, just as had been done in very explicit terms in the REAL ID Act.

II. TO INTERPRET THE HABEAS RESTRICTION PROVISIONS OF THE DETAINEE TREATMENT ACT AS APPLYING TO PENDING CASES WOULD RAISE TWO TYPES OF SERIOUS CONSTITUTIONAL CONCERNS.

In addition to the legislative history of the Detainee Treatment Act, and the simple and direct meaning of the language of the statute, that both indicate that retroactive application of the habeas restriction provisions could not have been intended or contemplated by Congress, two types of serious Constitutional concerns would be raised by attempting to apply these provisions to habeas corpus cases that were pending at the time the legislation was passed.

Court precedent specifically prohibits retroactive applications of laws absent very explicit language indicating the clear intent of Congress to produce this result, or in circumstances (such as those presented by these cases) where substantial interests are affected or “burdened” as a result of retroactive application.

The Supreme Court has historically and consistently made clear that statutes can not be given retroactive effect, even with a clear and explicit mandate from Congress to do so, where the statutes in question negatively affect fundamental interests. Landgraf v. USI Film Products, 511 U.S. 244, 270 (1994) (“Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent [to do so].”)

As Justice Scalia indicated in his concurrence in Landgraf:

When a case implicates a federal statute enacted after the events in the suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute ... would impair rights a party possessed when he acted ... If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result. Id. at 280.

Accordingly, "congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result," in the clearest and most explicit terms. Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988)."

Even if retroactivity is intended and specifically mandated by a Congressional enactment, Courts have established a clear presumption against retroactivity where substantial interests are affected or "burdened" as a result. In the present cases, the elimination of the availability of habeas corpus would substantially affect and materially burden the interests of the Petitioners in a number of important respects, including their access to the common law protections of habeas itself, which the Supreme Court has confirmed in Rasul, and their ability to secure proper and impartial judicial consideration of a number of basic liberty and security interests. As the Supreme Court noted in Rasul, these core protections apply to aliens outside the U.S., not just to U.S. citizens, by virtue of the exercise over them of the jurisdiction and control of the U.S. government in ways that affect their fundamental interests.

In addition, and with equal and consistent force and authority over the years, the Supreme Court has recognized that absent Congressionally recognized “rebellion or invasion” under the Suspension Clause of the Constitution, Congress may not restrict or limit the availability of habeas corpus without providing at least some form of alternative judicial review mechanism that in essence provides an “adequate, effective and equivalent” alternative to the form and substance of judicial review that habeas provides.

A. Eliminating Habeas Retroactively In These Cases Would “Burden” Fundamental Interests of the Habeas Petitioners, and Would Therefore Pose Serious Constitutional Concerns.

The long-standing rule of statutory construction regarding the retroactive application of Congressional legislation is that even where Congress clearly intends to apply a statute retroactively, retroactive impact is impermissible where fundamental interests are negatively affected, because Constitutional problems and due process considerations otherwise would be raised. The habeas restriction provisions of the DTA must be considered subject to this rule, as substantive and not procedural or jurisdictional in nature, because it affects or “burdens” a number of core, fundamental interests of habeas petitioners.

1. The DTA is Substantive Not Jurisdictional in Nature. The Government in its Supplemental Brief argues that the habeas restriction provisions of the DTA should be considered as implementing no more than simple procedural or jurisdictional changes, so as to take them out from under the well-established non-retroactive rule of

statutory construction. But there is no way of getting around the reality, both as a matter of fact and law, that the DTA provisions go a great way beyond making simple procedural or jurisdictional changes. Eliminating the availability of habeas for Guantanamo Bay detainees would by definition “burden” and adversely affect their fundamental interests.

Contrary to the Government’s claim, these rules of statutory construction are equally in force when applied to jurisdictional statutes where fundamental interests, including the availability of habeas corpus itself, are at stake. Statutes affecting “whether [a suit] may be brought at all . . . [are] as much subject to our presumption against retroactivity as any other” precisely because they affect the substantive rights of parties. Hughes Aircraft Co. v. U.S. ex rel. Schumer, 520 U.S. 939, 950-51 (1997). The Government in its brief purposefully mischaracterizes the Hughes holding, which, contrary to the Government’s claims expressly disavows a presumption in favor of retroactivity for jurisdictional statutes where, as here, the statute in question:

... does not merely allocate jurisdiction” [but affects] the substantive rights of the parties as well. Such as statute, even though phrased in ‘jurisdictional terms,’ is as much subject to our presumption against retroactivity as any other. 520 U.S. at 951.

In the Hughes Aircraft case the Supreme Court specifically rejected the Government’s approach, citing its decision in Bruner v. U.S., 343 U.S. 112 (1952):

[R]espondent contends that the 1986 amendment is jurisdictional, and hence that it is an exception to the general *Landgraf* presumption against retroactivity. Indeed, the Ninth Circuit went further, holding that, absent a clear statement of congressional intent, there is a strong presumption in favor of retroactivity for

jurisdictional statutes. The Ninth Circuit simply misread our decision in *Landgraf*, for the only “presumption” mentioned in that opinion is a general presumption *against* retroactivity. The fact that courts often apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain limited circumstances failing to meet the conditions for our generally applicable presumption against retroactivity, not an exception to the rule itself. Hughes Aircraft Co. v. U.S. ex rel. Schumer, 520 U.S. 939, 950-51 (1997).

To be classified solely as making a “jurisdictional” change that does not affect substantive interests, a statute must be seen as “tak[ing] away no substantive right but simply *chang[ing]* the tribunal that is to hear the case.” Hughes Aircraft, *supra*, at 951, quoting Landgraf, *supra* at 274 (internal quotation marks omitted) (emphasis in original). Accordingly, even if a statute is “phrased in ‘jurisdictional’ terms,” if it “speaks to the substantive rights of the parties as well ... [it] is as much subject to our presumption against retroactivity as any other [statute].” Id.

This Court in LaFontant v. INS, came to a similar conclusion, finding that:

“... [i]n order to determine whether a statute applies to a case that was filed prior to passage of the statute, courts must determine whether the statute is ‘procedural’ in nature, or whether it affects ‘substantive entitlement to relief.’ ... Does the statute speak ‘just to the power of a particular court’ or does it speak to ‘the substantive rights of the parties as well’?” 135 F.3d 158, 163 (D.C.Cir. 1998) (quoted citations omitted)

The DTA fits this description exactly. Though it is framed in jurisdictional terms, it speaks to and damages fundamental interests in a number of very concrete ways. It prohibits detainees from seeking habeas relief for any reason, or from using any other form of judicial review, except for the very limited form and scope of review procedures set out in the DTA itself. In essence, it denies judicial relief entirely to certain

categories of detainees, and to a wide variety of claims, including issues related to detention and possible torture abuses. In this respect, the DTA speaks not simply to where a claim can be brought, but to whether it can be brought at all. See, e.g. Hughes Aircraft Co. v. U.S. ex rel. Shumer, 520 U.S. 939, 950 (1997).

The cases that the Government cites in support of its claim that the habeas restriction provisions of the DTA are no more than jurisdictional in nature are not applicable for two reasons. In many of the cases cited by the government the statutes involved did not have any substantive impact, but merely changed the venue for hearing the case from one judicial or administrative body to another, changing only the venue of where claims could be raised from one court to another without affecting or limiting the issues or causes of action that could be addressed. In Assessors v. Osbornes, for example, Congress eliminated the ability for certain causes of action to be heard by federal courts, but the same action could still be brought in state courts. 76 U.S. 567, 573-74 (1869). Similarly, in Ex Parte McCardle, 74 U.S. 506 (1868), Congress eliminated the Supreme Court's appellate jurisdiction in habeas cases, but left intact the lower court's ability to hear these habeas claims in the first instance, leaving the substantive interests of the habeas petitioners unaffected.

A second group of cases cited by the Government (notably Hallowell v. Commons, 239 U.S. 506 (1916)) involve situations where jurisdiction was transferred to a decision-making body other than a court under circumstances where the interests of the affected parties still could receive an adequate hearing.

The same can not be said about the effects of the DTA, which totally eliminates certain causes of action, including challenges regarding detention, and severely limits the scope of judicial review that is available through the alternative appeal procedure designated in section 1005 (e)(2).

2. *The Essential Nature of Habeas Itself Addresses Fundamental Due Process Interests.* Even in its common law form, long before it became embodied into statutory format, the core nature of the petition for habeas corpus has always been historically recognized as the principle legal means for challenging government excesses that (in the words of Landgraf, supra) “burden” fundamental interests of habeas petitioners. This suggests that more than just procedural or jurisdictional matters are affected in the present cases if access to habeas were eliminated on a retroactive basis. Habeas has been recognized on a long-standing basis under common law as fundamentally associated with the protection and preservation of core interests from unlawful and excessive action by the Government, and most specifically by the Executive Branch. See, e.g., Ex parte Bollman, 4 Cranch 75, 94 (1807). Eliminating or severely restricting access to habeas by Guantanamo Bay detainees can not help but affect their substantive interests.

3. *Habeas as A Remedy for Unlawful Detention.* Among the very specific and fundamental interests that would be “burdened” or restricted by the retroactive elimination of habeas in the present cases is the core interest of being free from arbitrary and unlawful restraints on freedom, i.e., subjected to arbitrary or indefinite detention.

See, e.g., Jacobs v. Carmel, 869 P.2d 207,209 (Colo. 1994); Walker v. Wainwright, 390 U.S. 335, 336 (1968) (“the great and central office of the writ of habeas corpus is to test the legality of a prisoner’s current detention”); Fay v. Noia, 372 U.S. 391, 430 (1963) (“Habeas lies to enforce the right of personal liberty.”). As the Supreme Court has explained,

“the writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action,” and “there is no higher duty of a court, under our constitutional system, that the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law.” Harris v. Nelson, 394 U.S. 286, 290-91 (1969).

Protection through habeas thus is inevitably linked to the writ’s “root principle that in a civilized society government must always be accountable to the judiciary for a man’s imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of the law, the individual is entitled to his immediate release.” Fay v. Noia, 372 U.S. 391, 402 (1963). As the Supreme Court noted in Foucha v. Louisiana, 504 U.S. 71, 80 (1992), “[f]reedom from bodily restraint has always been at the core of the liberty protected...from arbitrary government action . . .”

Claims of arbitrary and indefinite detention are core elements of the habeas petitions now before this Court on appeal. One key aspect of the pending cases now under review by this Court is the question of whether the habeas petitioners have been detained on a legally defensible basis. In Rasul v. Bush, 542 U.S. 466, 483-84 (2004),

the Supreme Court held that Guantanamo Bay detainees have the right, through habeas, to question the legality of their detention by the Government. To apply the DTA so as to retroactively eliminate access to habeas proceedings that have already been initiated pursuant to the mandate in Rasul to challenge the lawfulness of these detentions would, in essence, overturn the holding in Rasul, and eliminate the access to judicial review of the Guantanamo Bay detention issues that the Supreme Court has so recently affirmed.

As the specific provisions of the DTA mandate, without the present habeas proceedings being allowed to continue there would be no judicial forum that would be permitted to consider the question of the legality of the Petitioners' detention by the U.S. Government, since the DTA specifically excludes detention issues as not subject to even the limited, alternative form of review that is made available under subsections 1005e(2) and e(3) of the statute. Nor would the DTA allow detainees to challenge conditions of their detention, including the length of the detention, claims of torture, access to proper medical care, or even access to proper legal representation of their own choice.

Indeed, in singling out Guantanamo Bay detainees for the elimination of access to these core habeas corpus remedies, and to the fundamental liberty protections that they protect, the DTA could well be said to operate in the nature of a Bill of Attainder, prohibited under Article I, Section 3 of the Constitution, in that it applies only to a specified group of individuals in a way that inflicts punishment upon them without judicial trial. See, e.g., Nixon v. Administrator of General Services,

433 U.S. 425 (1977). Deprivation of legal protections, such as the writ of habeas corpus, has been recognized historically as a possible basis for a Bill of Attainder.

Cummings v. Missouri, 71 U.S. 277 (1867).

4. The Status of the Detainees as Aliens Does Not Preclude Habeas Consideration of Unlawful Government Actions That Adversely Affect Their Fundamental Interests and Compromises Their Liberty.

Courts have recognized that the Government does not have unfettered authority to act in a way that adversely affects fundamental interests, such as life or liberty, even in situations where those being subject to this treatment are aliens, not otherwise subject to the jurisdiction of U.S. courts. As Justice Stevens reasoned in his concurring opinion in U.S. v. Verdugo-Urquidez:

Respondent is entitled to the protections of the Fourth Amendment because our Government, by investigating him and attempting to hold him accountable under United States criminal laws, has treated him as a member of our community for purposes of enforcing our laws. He has become, quite literally, one of the governed. 494 U.S. 259, 284 (1990).

Similarly, as the Supreme Court noted in Rasul, “the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him.” 542 U.S. at 478. In the same vein, Justice Kennedy in a concurring opinion in Verdugo-Urquidez noted that “the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic.” 494 U.S. at 277.

Courts have expressed particular concern about treatment of aliens by the U.S. Government where their lives or liberty interests are at risk. In Rodriguez-Fernandez v. Wilkinson, for example, the Government was held to not be free to execute or to

indefinitely detain an “excludable” alien who was legally considered to be outside of the U.S., and not normally able to invoke the protection of U.S. laws. 505 F.Supp. 787 (D.C. Kansas, 1980, aff’d. 654 F.2d 1382, 1386-87 (10th Cir. 1981). The Supreme Court, in Zadvydas v. Davis, 533 U.S. 678,690 (2001) and Clark v. Martinez, 543 U.S. 371 (2005) applied a similar standard, holding that to indefinitely detain “excludable” aliens, who otherwise are not considered to have enforceable rights, would violate due process standards, since “freedom from imprisonment – from government custody, detention or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects.” Zadvydas, 533 U.S. at 690. These protections apply to everyone coming under the custody of the U.S. even if they are aliens not considered to be within U.S. territory. The legal status of the Petitioners closely resembles that of the “excludable” aliens in the Rodriguez-Fernandez, Zadvydas and Martinez cases, in that they are subject to U.S. control and jurisdiction in the Guantanamo Bay detention facilities, though located outside of the geographical borders of the U.S.

B. Retroactive Application of the DTA Also Would Raise Serious Constitutional Concerns Where, As Is Certainly True In These Cases, An “Adequate, Effective and Equivalent” Form of Judicial Review Has Not Been Provided In Place of Habeas.

At the core of the Government’s position is the argument that the provisions of the Detainee Treatment Act can not be characterized as limiting or restricting habeas, and thereby violating the Suspension Clause, because Congress was careful to provide an alternative form of judicial review (appeal to the US Circuit Court of Appeals for the

DC Circuit) that provides an adequate alternative to the habeas review that is being eliminated. This is critical to both the Swain v. Pressley Suspension Clause issue, and to the analysis of whether the DTA has only jurisdictional as opposed to substantive effects. In fact, the provisions of the Detainee Treatment Act do not provide the type of “adequate, effective and equivalent” alternative to the scope and form of judicial review previously available through habeas that a number of Supreme Court precedents require.

Under Swain v. Pressley, 430 U.S. 372 (1977), restrictions on habeas review satisfy Suspension Clause requirements only where “the scope of the remedy provided by [the new judicial forum] . . . is the same as that provided [under habeas].” Id. at 382. In Davis v. U.S., 417 U.S. 333 (1974) the Supreme Court made clear that any proposed alternative to habeas jurisdiction must provide a remedy “identical in scope to federal habeas corpus” in order to not run afoul of Suspension Clause problems. Id. at 343 (emphasis added). Similarly, in U.S. v. Hayman, 342 U.S. 205 (1952) the Supreme Court stressed that the alternative mechanism for relief must afford “the same right in another and more convenient forum.” Id. at 223. In U.S. v. Anselmi, 207 F.2d 312 (3rd Cir. 1953) the standard was indicated to be that the alternative remedy must be “the substantial equivalent” to what is provided under “the conventional writ of habeas corpus.” Id. at 314.

While courts have recognized that some limits in the exercise of habeas jurisdiction may be imposed by Congress, changes in habeas jurisdiction are considered to raise Suspension Clause concerns where no “adequate or equivalent” alternative form

of judicial review is provided as a substitute for habeas. See, e.g., the acknowledgment of the U.S. Court of Appeals for the Second Circuit that elimination of habeas jurisdiction by the REAL ID Act in immigration cases “might give rise to Suspension Clause problems if the remedy made available ... is not an adequate substitute for traditional habeas review.” Gittens v. U.S., 428 F.3d 382, 387 n5 (2nd Cir. 2005).

Indeed, the Government has acknowledged key differences between the form and scope of relief available under habeas and through the DTA review process. For example, the Government, in its Brief to the Supreme Court on Detainee Treatment Act jurisdictional issues in support of its Motion to Dismiss in the case of Hamdan v. Rumsfeld, in essence acknowledged the fact that the review provided by the Act is not “equivalent” to what would have been available under habeas, when it told the Supreme Court that “the Act ... plainly divests the courts of jurisdiction to ‘hear or consider’ the [type of] instant pre-trial challenge” through habeas to the legitimacy of the Military Tribunal proceeding he was being subjected to in that case. (Rspdt’s Brief, p. 2). A similar admission was made to this Court in the Government’s Supplemental Brief on Jurisdictional Issues in the present case, when it was suggested that the habeas petitions be converted into petitions for review under 1005(e)(2), but that such review, if granted, would have to be *strictly limited “by the scope-of-review provision within section 1005(e)(2),”* and therefore would not, for example, include authority “to review petitioners’ *claims relating to any aspect of petitioners’ detention.*” (Id. at 2, emphasis added).

Especially compared with Congress' recent changes in habeas jurisdiction under the REAL ID Act for refugee and immigration cases, § 1005 of the Detainee Treatment Act does not provide anything close to an "adequate and equivalent" form of judicial review. The alternative review provided through the U.S. Court of Appeals for the District of Columbia under the Act is severely restricted, in terms of the class of detainees who can file appeals, the types of issues that can be addressed, and the scope of judicial review that is made available. These extensive limitations present a far cry from the Petition for Review process made available under the REAL ID Act to replace habeas in deportation cases, though even the alternatives provided in REAL ID may be considered deficient in a number of significant respects as well.

Some of the key differences between habeas and the alternative form of review provided under the DTA focus on the categories of Petitioners and types of legal issues specifically excluded from coverage under the limited forms of review provided under Sections 1005(e)(2) and (e)(3). The DTA eliminates relief previously available under habeas for an entire class of petitioners (those without a final decision from a CSRT or Military Tribunal), and for a broad variety of legal and substantive issues currently subject to habeas proceedings. It also precludes judicial review entirely until revised rules for the CSRT and Military Tribunal proceedings can be issued, prolonging for an undermined period the time of detention that can be imposed without access to the courts. The procedures called for under the REAL ID Act, on the other hand,

specifically preserve availability of habeas to deal with a number of basic legal issues, including those related to detention.

The scope of review provided under the DTA is much more limited than previously was available under habeas, being restricted to questions of whether the procedures followed were consistent with the standards and procedures specified, and whether these standards and procedures are consistent with the Constitution and laws of the United States. Detainee Treatment Act §§ 1005(e)(2)(C), (e)(3)(D).

Perhaps even more troubling, the Act provides no judicial review whatsoever for a detainee who has been found not to be an unlawful enemy combatant by a CSRT, but continues to be detained by the government nevertheless. That is the case, for example with a number of Muslim Uighurs from China who remain in detention in Guantanamo Bay despite being clear as suspected terrorists because the Government can not repatriate them due to the threat of torture they would face in their home country as alleged separatists and terrorists. Similarly, for prisoners sentenced by a Military Commission, Section 1005(e)(3) provides no judicial review as of right to those sentenced to less than ten years imprisonment, and very limited review to those subjected to higher sentences, including execution.

Questions also must be raised as to the adequacy of the type of judicial review available through the Court of Appeals through the DTA procedure as opposed to the type of more complete factual inquiry available in the District Courts through habeas. Section (e)(2)(C) of the Act does not permit the same type of de novo review of the

facts that is available under habeas, and in general the Courts of Appeals can not provide the type of fact-finding that is such a critical aspect of habeas proceedings, since they are severely limited in their fact-finding capabilities, and lack the “fact finding and record-developing capabilities of a federal district court.” McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 497 (1991)(where the Court concluded that “restricting judicial review to the courts of appeals ... is the practical equivalent of a total denial of judicial review on generic statutory and constitutional claims.”)

III. CONTRARY TO THE POSITION URGED UPON THIS COURT BY THE GOVERNMENT, THE JUDICIAL BRANCH, NOT CONGRESS, HAS THE ULTIMATE AUTHORITY TO DETERMINE THE SCOPE, MEANING, AND CONSTITUTIONALITY, OF THE DTA.

In its Supplementary Brief (p. 22) the Government suggests that it should be left up to the Congress, not the courts, to decide on limitations to the courts’ jurisdiction, especially where Congress has adopted what they refer to as an “exclusive review” scheme, such as the one incorporated in the DTA, that is designed to preclude “the exercise of jurisdiction under more general grants of jurisdiction, including habeas corpus.” Despite the limits placed on judicial review in the DTA it remains the prerogative and responsibility of the courts to determine whether the new procedures set out by Congress meet basic Constitutional requirements, and the principle of separation of powers precludes undue governmental and Congressional interference with this fundamentally judicial function. Ultimately, whether a statute (or a portion of a statute) is Constitutional is a decision that can be made only by the courts. INS v. Chadha, 462

U.S. 919, 942 (1983).

A. The Courts, Not Congress, Are Solely Responsible for Evaluating the Constitutionality of Government Actions, Including Congressional Statutes.

While Congress most certainly has the authority to determine the jurisdiction of the federal courts, this does not mean that it has total discretion in the exercise of this power, or that it can be used to supercede the core responsibility of the judicial branch to determine whether governmental acts exceed basic legal and constitutional standards. Congress can not strip the federal courts of jurisdiction when serious constitutional claims are at stake, or would be adversely affected. See, e.g., Webster v. Doe, 486 U.S. 1592 (1988), requiring a heightened showing by Congress of an intent to preclude judicial review of constitutional claims, especially where the result would be denying “any judicial forum for a colorable constitutional claim,” *Id.* at 603, and Johnson v. Robeson, 415 U.S. 361 (1974), holding that a statute that sought to make decisions of the Veterans Administration final and unreviewable did not preclude constitutional challenges in the courts, since such a restriction would itself raise serious constitutional concerns. *Id.* at 366-67.

B. Congress Is Not Permitted to Use Its Power Over the Jurisdiction of the Courts to Limit or Control the Results of Specific Decisions It Would Like to Overturn.

Courts are careful to evaluate whether jurisdiction stripping statutes have been passed for constitutionally impermissible purposes, especially where the intention is to overturn or limit the impact of specific court decisions that Congress may not like. Put

another way, Congress is not permitted to exercise its power over the courts' jurisdiction in a way that violates the doctrine of separation of powers, or "destroys the essential role of the [courts] in the constitutional plan."¹

In the present situation, the Supreme Court has decided that Guantanamo Bay detainees have the ability to file habeas corpus petitions with federal courts to challenge basic aspects of their status and detention in the Rasul v. Bush and Hamdan v. Rumsfeld cases, leading to the filing of the habeas proceedings now before this Court. Congress' action to eliminate the exercise of habeas by Guantanamo Bay detainees could well be seen as an effort by Congress to overturn the judgment that went against the Government in the Rasul and Hamdan cases.

The Supreme Court has made clear that Congress can not improperly interfere with the judicial decision-making process by using its power over the jurisdiction of the courts to achieve a particular outcome in a pending case. In United States v. Klein, 80 U.S. 128 (1872) the Court held that Congress could not "prescribe rules ... to the Judicial Department of the government" in order to influence the outcome of "cases pending before it." *Id.* at 146.

¹ Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts*, 66 Harv.L.Rev. 1362, 1363 (1953). See also, *Abusing the Exceptions and Regulations Clause: Legislative Attempts to Divest the Supreme Court of Appellate Jurisdiction*, 32 Am.U.L.Rev. 497, 502 (1983), and *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U.Pa.L.Rev. 157 (1960).

IV. WHAT ARE THE LEGAL CONSEQUENCES, INCLUDING POSSIBLE IMPACTS ON THE DISTRICT COURT DECISIONS BELOW, OF A DETERMINATION THAT THE DTA DEPRIVES THIS COURT OF JURISDICTION TO CONSIDER THESE CASES?

In its court order of January 27 requesting supplementary briefing on the DTA jurisdictional issues, the Court posed the specific question as to the legal consequences, including the effect on the District Court decisions below, of a determination that the DTA precludes the exercise of jurisdiction by this Court in the present proceedings. At the outset, Amicus stresses that the DTA should not be interpreted as applying to the present proceedings before this Court, and therefore does not affect the exercise of this Court's jurisdiction in the present habeas cases. The reasons for this position have been set out previously in this brief, and in the previous Supplemental Brief on Jurisdictional Issues filed by Amicus on January 25. They are, in summary, that the DTA was not intended by Congress to apply retroactively to pending habeas cases, and did not incorporate the type of specific statutory language and procedural instructions, comparable to those provided in the REAL ID Act for example, that would be necessary to accomplish this purpose.

But if this Court nevertheless takes the position that the DTA habeas restriction provisions do in fact apply retroactively to the jurisdiction of this Court in the present cases, the inevitable legal consequence of this determination in the first instance, even before reaching the question of its impact on the decisions below, is that this Court is then obliged to address the broader Constitutional issues posed by the retroactive

application of the statute under the Landgraf standards, as well as related Constitutional concerns associated with the Suspension Clause, including the “adequacy, effectiveness and equivalency” of the alternative review procedures provided for under the DTA in place of habeas. As indicated above in this brief, that inquiry must result in the conclusion that the DTA raises significant Constitutional concerns under both the Landgraf and Suspension Clause standards.

Consequently, the preferred answer to the question posed by this Court, consistent with the principles of judicial restraint and Constitutional avoidance, would be that the DTA does not apply to the pending cases. Alternatively, if the Court believes that the DTA does apply to the present cases, then the answer must be that the habeas restriction provisions of the DTA, as applied to cases pending prior to enactment of the statute (such as the cases at bar), do not pass Constitutional muster, and therefore have no effect either on the continued exercise of jurisdiction over these cases by this Court, or on the decisions of the District Court below.

There is an alternative approach that also has the virtue of avoiding the Constitutional problems, and that would leave intact the jurisdiction over these cases by this Court. That is based on the language of section 1005 of the DTA that calls for the adoption of new administrative standards for the carrying out of CSRT and Military Tribunal proceedings, and that suggests that the provisions of subsections 1005 (e)(2) and (e)(3) providing for a new type of appeal process apply only to challenges arising under the new administrative procedures. This would leave unaffected, and still subject

to the exercise of habeas jurisdiction, all cases filed prior to the enactment of the DTA or that relate to the old administrative CSRT and Military Tribunal procedures that were in effect before the law was changed.

There is considerable logic and consistency in this approach. Not only would it avoid the necessity of having to reach potential Constitutional concerns, it also would avoid the troubling anomaly that otherwise would result whereby detainees who have been subject to the old CSRT and Military Tribunal procedures would either be left entirely without any legal remedy whatsoever (since they do not come under the provisions of section 1005) or would be placed in the position of dealing with restrictions on appeal that did not exist at the time their CSRT and Military Tribunal proceedings took place, raising additional potentially unconstitutional retroactivity concerns. Especially if they are considered to have been left without any form of judicial review, this would directly contradict the Supreme Court's mandate in Rasul.

This same anomalous result, in direct contravention of the Supreme Court's decision in Rasul, would arise from any decision of this Court voiding the decisions of the District Courts below on DTA jurisdictional grounds, since this would leave the Petitioners in pending cases arising under pre-DTA CSRT or Military Tribunal proceedings without any legal forum where they could present their claims, and without any effective legal review mechanism. This could not have been the result contemplated by the Supreme Court in Rasul.

To decide otherwise, and to deny jurisdiction under the DTA by accepting the

Government's argument that the DTA should be applied retroactively, will make it necessary to reach the Constitutional issues, and to decide in explicit terms whether eliminating habeas in this way "burdens" the substantive interests of the Petitioners as prohibited in Landgraf, and whether the alternative form of judicial review specified in the DTA meets the "adequate, effective and equivalent" test for restricting the availability of habeas under the Swain v. Pressley standards.

Respectfully submitted this 10th day of March, 2006 by:

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**CERTIFICATE OF COMPLIANCE
WITH FEDERAL RULES OF APPELLATE PROCEDURE STANDARDS**

This is to certify, under penalty of perjury, that the accompanying Amicus Brief and related submissions comply in all respects to the best of our understanding with the Court Order of January 27, 2006, and with the requirements for this type of submission set out in Rules 29 and 32 of the Federal Rules of Appellate Procedure, including specifically Rule 32(a)(7)(B) regarding the type volume limitation. The narrative portion of this Brief consists of 28 pages of narrative text printed in Times New Roman 14 font, consisting of 6992 words, and is accompanied by all the required certifications and disclosure forms.

Signed and certified to this 10th day of March , 2006 by:

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CERTIFICATE OF SERVICE

This is to certify, under penalty of perjury, that a true and complete copy of this *amicus curiae* submission to the Court in the above-captioned case was served on Parties' counsel by hand delivery as mandated by the January 27 Court Order, by electronic means (pursuant to their request), and additionally by U.S. Postal Service first class mail on all parties as indicated below:

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