No. 05-184

In the Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Brief of *Amici Curiae* Norman Dorsen, Frank Michelman, Burt Neuborne, Judith Resnik, and David Shapiro in Support of Petitioner [Supreme Court Appellate Jurisdiction]

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INTRODUCTION

Pursuant to Supreme Court Rule 37, the undersigned Professors of Law respectfully submit this brief *amici curiae* in support of petitioner.[1]

INTEREST OF AMICI

This is the first case since *Ex parte McCardle* to involve a possible attempt by Congress to abolish retroactively the Supreme Court's jurisdiction over a pending appeal. Because any such attempt would raise questions that go to the heart of our constitutional structure, and would in this case imperil an essential function of the Supreme Court, *amici,* professors of law who have devoted much of their careers to the study of the Constitution and the federal courts, respectfully submit this brief in support of the Court's continuing jurisdiction over this appeal.

SUMMARY OF ARGUMENT

This Court has repeatedly ruled that the text of any statute purportedly eliminating the appellate jurisdiction of this Court, especially over a pending appeal, must speak in explicit, unmistakable terms. Accordingly, since the text of Section 1005(e) and (h) of the Detainee Treatment Act of 2005 (also known as the Graham-Levin amendment) does not directly refer to this Court's appellate jurisdiction, the Court ought not to construe it as an attempt – the first in almost 150 years – to eliminate this Court's appellate jurisdiction over a pending appeal.

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[1] The parties have consented in writing to the participation of *amici* herein. Their written consents have been filed with the Clerk of the Court. No party in this case authored the brief in whole or in part, or made any monetary contribution to its preparation and submission.

A textual analysis of the relevant sections makes plain that the appellate jurisdiction of this Court over this case has not been affected by the passage of this Act. Specifically, section 1005(e), which limits the jurisdiction of Article III courts over legal claims by detainees at Guantanamo Bay, consists of three paragraphs – (e)(1), (e)(2), and (e)(3). Paragraphs (e)(2) and (e)(3), which defer judicial review of decisions by Combatant Status Review Boards and military commissions until the issuance of a "final decision," are explicitly limited by paragraphs (e)(2)(C), and (e)(3)(D), respectively, to appeals from a military commission's day-to-day operational rulings. Thus, neither (e)(2) nor (e)(3) govern this appeal.

Rather, jurisdiction over this appeal, challenging the President's power to establish the military commissions in the first place, is governed by paragraph (e)(1), which applies to legal challenges falling outside the narrow scope of Section 1005(e)(3)(D). Paragraph (e)(1) makes no mention of this Court's appellate jurisdiction. Instead, it applies solely to lower court jurisdiction over habeas corpus petitions and over other "actions" commenced in those courts.

Moreover, while (e)(2) and (e)(3) explicitly apply to pending cases, (e)(1) explicitly does not. Section 1005(h)(1) provides that (e)(1) "shall take effect on the date of the enactment of this Act." Section 1005(h)(2) provides that (e)(2) and (e)(3) shall apply to "claims" governed by (e)(3)(D) "pending on or after the date of the enactment of this Act." If (h)(1) is read to apply (e)(1) to pending cases, (h)(2) would be rendered superfluous. In sum, the words of the statute dictate the result: this appeal is jurisdictionally proper.

If, despite the text and applicable canons of construction, the Graham-Levin amendment is read to strip this Court of its jurisdiction in this pending appeal, the amendment would vio-

late the constitutional guarantees of separation of powers by eroding an essential function of the Supreme Court and of due process of law.

On the merits, the use of military commissions operating under *ad hoc* rules of procedure to prosecute what would otherwise be criminal activity punishable by court martial or criminal trial is a dramatic deviation from settled constitutional practice. In the absence of an immediate combat emergency, and in settings removed in space and time from active combat, such deviations by the Executive can be constitutional, if at all, only with explicit authorization from Congress. Neither the Authorization for the use of Military Force in Afghanistan (AUMF), nor any provision of the Uniform Code of Military Justice, provide such explicit authorization.

STATEMENT OF THE CASE

Relying on his authority as Commander-in-Chief[2] and Congress's passage of an Authorization for the Use of Military Force (AUMF) in Afghanistan,[3] the President claims the

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[2] Article II, section 2 of the Constitution provides, in relevant part:

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States * * * .

[3] Congress's Authorization for the Use of Force (AUMF) in Afghanistan provides, in relevant part:

> [T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons that he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11,

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powers of a battlefield commander to: (1) impose military preventive detention on persons denominated as "enemy combatants" in the war against terror;[4] (2) prosecute alien-detainees at Guantanamo Bay accused of serious terrorist-related war crimes against the United States before military commissions empowered to mete out long prison sentences, even death; and (3) conduct warrantless wiretaps and email searches of international communications to and from the United States as a means of gathering "battlefield intelligence" for use against terrorists.[5]

Petitioner, a national of Yemen, has been detained at Guantanamo Bay since 2002 as an "enemy combatant." On November 7, 2005, this Court granted a writ of certiorari to review petitioner's challenge to the President's legal authority to prosecute him before a military commission for alleged terrorist activities. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir.), *cert. granted*, 125 S. Ct. 622 (2005).[6]

> 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Pub. L. No. 107-40, 115 Stat. 224 (2001).

[4] Given the unconventional nature of the "war," the President has argued that, in detaining "enemy combatants," he is not bound by the Geneva Conventions governing the treatment of prisoners of war. *Hamdi v. Rumsfeld*, 542 U.S. 507, 548-51 (2004) (Souter, J., joined by Justice Ginsburg, concurring in part, dissenting in part, and concurring in the judgment).

[5] James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1.

[6] The President has formally charged petitioner with a single count of conspiracy to engage in terrorist activities. The latest ver-

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Two weeks earlier, on October 25, 2005, a second petitioner, Jose Padilla, an American citizen taken into custody in the United States, had petitioned this Court for a writ of certiorari to review the constitutionality of his prolonged military detention without trial. *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), *petition for cert. filed*, October 25, 2005 (Docket No. 05-553). With the grant of certiorari in *Hamdan*, and the pendency of the certiorari petition in *Padilla,* this Court appeared poised to review the constitutionality of the Executive's assertion of power to detain, interrogate and prosecute accused terrorists outside the usual course of military or civilian justice. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Faced with the prospect of imminent Supreme Court review, the Executive branch appears to have engaged in a concerted effort to block this Court from reviewing the *Padilla* and *Hamdan* appeals. On November 22, 2005, after holding Padilla in military custody for 42 months on a shifting series of factual justifications, the United States unsealed a criminal indictment in an apparent effort to moot Padilla's pending appeal to this Court. *United States v. Hassoun et al.*, No 04-60001-CR-Cooke (S.D. Fla.) (filed Nov. 17, 2005) (unsealed Nov. 22, 2005). The United States then filed a suggestion of mootness in this Court, as well as a motion in the 4th Circuit seeking to vacate the opinion below before this Court had an

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sion of the DOD order governing Guantanamo military commissions, dated August 31, 2005, is available at http://www.defenselink.mil/news/sep2005/d20050902order.pdf (last visited Jan. 4, 2006).

opportunity to consider Padilla's pending certiorari petition. On December 21, 2005, the 4th Circuit panel denied the government's motion for leave to transfer Padilla to civilian custody, and rebuffed the suggestion of mootness. Order, *Padilla v. Hanft*, No. 05-6396 (4th Cir. Dec. 21, 2005). Padilla's certiorari petition remains pending before this Court.

In an effort to prevent Supreme Court review in this case, the Executive turned to Congress, seeking to condition the Executive's acceptance of a proposed Congressional ban on extreme, physically coercive interrogation of detainees – a ban sponsored by Senator John McCain – on the elimination of Article III jurisdiction over Guantanamo Bay detainees.[7] Congress balked at such extreme action, substituting Section 1005(e), which establishes a special procedure to review "final orders" of Guantanamo military commissions, and prospectively limits the jurisdiction of the lower courts over habeas corpus petitions and other "actions," but makes no mention of the appellate jurisdiction of this Court.

[7] *See Statement of President*, Dec. 30, 2005, *available at* http://www.whitehouse.gov/news/releases/2005/2005/12/20051230-8.html (last visited January 4, 2006).

ARGUMENT

I. THE GRAHAM-LEVIN AMENDMENT DOES NOT STRIP THE SUPREME COURT OF JURISDICTION TO DECIDE THE MERITS OF THIS APPEAL

A. The Text of 1005(e) is Inapplicable to This Pending Appeal

The Graham-Levin amendment, codified as Section 1005(e) of the Detainee Treatment Act of 2005, includes three relevant textual components:

(1) Sections 1005(e)(2) and (e)(3) establish exclusive jurisdiction in the D.C. Circuit to review "final decisions" of Guantanamo Bay military tribunals[8] in order to assure compliance with the "standards and procedures" established by Military Order #1, and to assure that "use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States."[9]

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[8] Two categories of military tribunals are in operation at the Guantanamo Bay detention facility: Combatant Status Review Boards, designed to pass on challenges to a detainee's designation as an "enemy combatant;" and Military Commissions, designed to try accused terrorists for serious crimes. The Graham-Levin amendment treats Combatant Status Review Boards in 1005(e)(2), and Military Commissions in 1005(e)(3). The treatment is virtually identical. Section 1005(e)(2) is not pertinent to this appeal.

[9] 1005(e)(3) provides, in relevant part:

> (A)* * * the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order)

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(2) Section 1005(e)(1) purports to eliminate habeas corpus and other forms of Article III trial court jurisdiction over "actions" filed by or on behalf of aliens detained by the military at Guantanamo Bay challenging aspects of their detention (such as alleged torture or the failure to grant release after being cleared by a Combatant Status Review Board) that fall outside the narrow scope of (e)(2) and (e)(3).[10]

> (C) The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to an appeal brought by or on behalf of an alien * * * (ii) for whom a final decision has been rendered pursuant to such military order.
>
> (D) The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an appeal of a final decision with respect to an alien under this paragraph shall be limited to the consideration of – (i) whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph A; and (ii) * * * whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.

[10] 1005(e)(1) provides, in relevant part:

> * * * no court, justice or judge shall have jurisdiction to hear or consider (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba, or (2) any action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who (A) is currently in military custody; or (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in Section 1005(e) * * * to have been properly detained as an enemy combatant.

(3) Sections 1005(h)(1) and (2) establish the effective dates of the relevant provisions – (h)(1) provides that the trial court jurisdictional limitations imposed by (e)(1) become effective "on the date of the enactment of this Act;" while (h)(2) provides that the final order/exhaustion requirements of (e)(2) and (e)(3) regarding appeals from "final decisions" "shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act." [11]

The plain meaning of the three textual components imposes a "final decision/exhaustion" requirement on appeals from the day-to-day rulings of a military commission, but imposes no restrictions on this Court's appellate jurisdiction to resolve this pending challenge to the constitutionality of the commissions themselves.

The circuit court below, in an opinion issued prior to the enactment of 1005(e), held that petitioner was not obliged to submit to the jurisdiction of a military commission before seeking judicial review of the tribunal's legal right to try him in the first place, *Hamdan*, 415 F.3d at 35-37. In reaching this conclusion, the Court of Appeals applied settled Supreme Court precedent recognizing a distinction between a challenge to the day-to-day operations of a tribunal, and a challenge to the tribunal's power to try the litigant at all. *Abney v. United States*, 431 U.S. 651 (1977) (immediate consideration of double jeopardy defense).[12]

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[11] The text of 1005(h) is set forth *infra* at n.13.

[12] In deferring consideration of whether military commissions violate Article 3 of the Geneva Convention, the D.C. Circuit apparently confused petitioner's argument that military commissions lack fundamental guaranties of fairness required to satisfy the Ge-

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Not surprisingly, Congress, in enacting the Graham-Levin amendment, incorporated just such a distinction between appeals from a Guantanamo tribunal's day-to-day operations (which must be deferred until the tribunal's entry of a final decision), and challenges to the President's power to try petitioner before a military commission at all (which are omitted from the final decision/exhaustion requirement).

Section 1005 (e)(3)(A), (B) and (C) vests exclusive jurisdiction in the D.C. Circuit to review "final decisions" of Guantanamo Bay Military Commissions. Under (e)(3)(D), however, appeals to the D.C. Circuit from such a "final decision" are explicitly limited to claims that the military commission failed to follow applicable DOD "standards and procedures," or that "the use of such standards and procedures to reach the final decision" violated the Constitution or laws of the United States. Accordingly, while (e)(3) imposes a final decision/exhaustion requirement on appeals to the D.C. Circuit from a military commission's day-to-day operations, (e)(3) is silent about a detainee's challenge to the President's

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neva Convention's substantive requirements of jurisdiction with an attack on the commission's day-to-day rulings. Under the reasoning of the Circuit, Article 3 issues are properly before this Court because they implicate the President's power to create the tribunals in the first instance. *See Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (immediate consideration of Presidential immunity); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (immediate consideration of sovereign immunity); *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (immediate consideration of Attorney General's immunity); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. *139* (1993) (immediate consideration of 11th Amendment immunity)*; Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995) (immediate consideration of qualified immunity).

authority to try alleged terrorists before military commissions in the first place.

Since the scope of a "claim whose review is governed by" (e)(2) and (e)(3) is explicitly limited in subparagraph (e)(3)(D) to:

> "consideration of whether the final decision was consistent with the standards and procedures specified in [Military Order No. 1, dated August 31, 2005 (or any successor military order)]; and * * * whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States,"

the text of 1005(e) tracks the very distinction recognized by the Court of Appeals below – all pending and future judicial challenges to the day-to-day rulings of a Guantanamo military commission must follow the final decision/exhaustion route set forth in paragraph (e)(3),[13] but challenges to the legality a Guantanamo Bay military commission's very existence fall outside the restrictive appeals structure established by (e)(3) and are governed by the prospective restrictions imposed by (e)(1).

In fact, a detainee's broad challenge to Presidential authority falls, not under the narrowly defined scope of (e)(2) or (e)(3), but under the provisions of (e)(1). The jurisdictional

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[13] Each of Hamdan's challenges questions the jurisdiction of a military commission to proceed at all, either as a matter of the Constitution, or under governing principles of international law, and, therefore, fall within this Court's appellate jurisdiction. *See* n. 12, *supra.*

aspect of a challenge to the President's authority to establish the Guantanamo Bay military tribunals is, therefore, governed by the interplay between Sections 1005(e)(1) and 1005(h)(1).

Unlike settings like *McCardle,* where Congress explicitly referred to this Court's appellate jurisdiction, Congress does not mention this Court's appellate jurisdiction in (e)(1), referring solely to habeas corpus and to "actions," a term of art associated with the trial court (*See* Rule 3, Federal Rules of Civil Procedure). In the absence of any explicit reference to this Court's appellate jurisdiction, (e)(1) should not be read to eliminate it. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868) (statutes limiting Supreme Court appellate jurisdiction to be narrowly construed); *Felker v. Turpin*, 518 U.S. 651 (1996) (same); *INS v. St. Cyr*, 533 U.S. 289 (2001) (same).

Moreover, when the text of (h)(1) is compared to the text of (h)(2), it is clear that Congress intended any jurisdictional limitation established by (e)(1) to be prospective. Subparagraph (h)(1) provides that jurisdictional restrictions imposed by (e)(1) on the power of Article III trial courts to entertain "actions" by alien detainees "shall take effect on the date of enactment of the Act." Subparagraph (h)(2), on the other hand, provides that the final decision/exhaustion requirements of (e)(2) and (e)(3) apply to claims "whose review is governed by" paragraphs (e)(2) and (e)(3) that are "pending on or after the date of the enactment of" 1005(e).[14]

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[14] Section 1005 (h)(1) and (2) provide:

> (1) This section shall take effect on the date of the enactment of this Act.
>
> (2) Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one

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The textual difference between (h)(1) and (h)(2) is stark and unmistakable – (h)(1), mindful of the risk of retroactive abolition of habeas corpus jurisdiction (*see Lindh v. Murphy*, 521 U.S. 320 (1997)), provides for the prospective application of (e)(1); while (h)(2), concerned with immediately shielding the day-to-day rulings of the Guantanamo tribunals from judicial interference, imposes a final order/exhaustion requirement on any appeal "whose review is governed by" (e)(2) or (e)(3) that is "pending on or after the date of the enactment" of Graham-Levin. If (h)(1) were read to apply to pending cases, it would render (h)(2) superfluous.

The interplay between (e)(1) and (h)(1) renders the jurisdictional limitations imposed by (e)(1) inapplicable to habeas corpus petitions and other "actions" *filed* in the trial courts prior to the passage of the Graham-Levin amendment. *Lindh v. Murphy*, 521 U.S. 320 (1997). Any other reading would render (h)(2) superfluous. At a minimum, (e)(1) can have no effect on this Court's appellate jurisdiction because the text of (e)(1) omits any reference to this Court's jurisdiction, and because jurisdiction over habeas corpus petitions actually *decided* prior to the amendment cannot be retroactively eliminated. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). *See generally Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995) (invalidating effort by Congress to re-open completed case).[15] Since the lower courts' rulings on petitions for habeas

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of such paragraphs and that is pending on or after the date of the enactment of this Act.

[15] The usual rule of *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), that Congress may revise the governing rules during an appeal, may not be applied retroactively to eliminate habeas corpus jurisdiction over filed or decided cases without ef-

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corpus in *Hamdan* were issued prior to the enactment of 1005(e), (e)(1) has no effect on this Court's appellate jurisdiction.

Accordingly, since neither (e)(1), (e)(2) nor (e)(3) interferes with this Court's exercise of 28 U.S.C. 1254(1) jurisdiction, Senator Levin, co-author of the amendment, was correct when he assured his Senate colleagues that 1005(e) does not impair the Supreme Court's jurisdiction over this appeal.[16]

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fecting an unconstitutional suspension of the writ. *See Lindh v. Murphy*, 521 U.S. 320 (1997).

[16] Numerous Senators expressed confidence that, given the text, the amendment would not strip this Court of jurisdiction to hear the Hamdan appeal. *See* 151 Cong. Rec. S14,165, S14,170 (Dec. 20, 2005) (Senator Kennedy: "Section 1405 * * * leaves completely undisturbed a challenge to the military commission process now pending in the Supreme Court in Hamdan v. Rumsfeld. The sponsors of the original amendment made it clear on the floor of the Senate that the provision has prospective application only, which is what my colleagues and I understood to be the drafters' intent."); 151 Cong. Rec. S14,241, S14,245 (Dec. 21, 2005) (Senator Leahy: "Since the Graham-Levin amendment would not retroactively apply to pending cases, the Supreme Court will still have the opportunity to determine the legitimacy of the military commissions, as being litigated in the case of Hamdan v. Rumsfeld."); 151 Cong. Rec. at S14,252 (Senator Durbin: "A critical feature of this legislation is that it is forward looking. A law purporting to require a Federal court to give up its jurisdiction over a case that is submitted and awaiting decision would raise grave constitutional questions. The amendment's jurisdiction-stripping provisions clearly do not apply to pending cases, including the Hamdan v. Rumsfeld case, which is currently pending before the Supreme Court."); 151 Cong. Rec. at S14,253 (Senator Feingold: "The provision on judicial review of military commissions covers only 'final decisions' of military commissions, and only governs challenges brought under that provision * * * Therefore, it is my understanding that this provision would not affect the ongoing litiga-

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B. Section 1005(e) Contains No Clear Statement of a Congressional Design to Deprive This Court of Appellate Jurisdiction Over This Appeal

Despite the text of Subsections 1005(e) and (h), the Executive may argue that the Graham-Levin amendment strips

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tion in Hamdan v. Rumsfeld before the Supreme Court * * * ."); 151 Cong. Rec. S14,256, S14,257-58 (Dec. 21, 2005) (Senator Levin: "A House proposal during the conference contained language stating that the habeas stripping provision 'shall apply to any application or other action that is pending on or after the date of the enactment of this Act.' We objected to this language and it was not included in the conference report. Rather, the conference report states that the provision 'shall take effect on the date of the enactment of this Act.'. These words have their ordinary meaning – that the provision is prospective in its application, and does not apply to pending cases. By taking the position, we preserve comity between the judicial and legislative branches and avoid repeating the unfortunate precedent in Ex parte McCardle, in which Congress intervened to strip the Supreme Court of jurisdiction over a case which was pending before that Court."); 151 Cong. Rec. at S14,275 (Senator Reid: "* * * I am pleased that Senator Graham's original language was altered so that the Supreme Court would not be divested of jurisdiction to hear the pending case of Hamden v. Rumsfeld * * * I believe that this act has no impact on the Supreme Court's ability to consider Hamdan's challenge at this preconviction stage of the military commission proceedings). *See also* 151 Cong. Rec. at S14,272 (Senator Kerry). *But see* 151 Cong Rec. at S14,263 (colloquy between Senators Graham and Kyl noting the retroactive application of 1005(e)). President Bush, in signing the Act, asserted its retroactive application to pending cases. *See Statement of President*, Dec. 30, 2005, *available at* http://www.whitehouse.gov/news/releases/2005/2005/12/20051230-8.html (last visited January 4, 2006). Of course, staged colloquies and self-serving Presidential declarations cannot override the plain meaning of the text.

this Court of jurisdiction to consider Hamdan's pending appeal.

The Executive may argue that petitioner's pending challenge to the President's authority to try him before a military commission falls within Section 1005(e)(3), requiring deferral of this appeal until the eventual issuance of a "final decision" by the military commission. Alternatively, the Executive may acknowledge that a challenge to the President's authority to try petitioner before a military commission is not encompassed within a fair reading of the exclusive jurisdiction established in Section 1005(e)(3), and argue more broadly that since Section 1005(e)(1) prevents the issue from being raised at the trial level, the Graham-Levin amendment operates to strip the Article III courts of jurisdiction to review the President's authority in any forum, restricting Guantanamo detainees to the limited issues permitted by Section 1005(e)(3)(D).

The government's effort to shoehorn Hamdan's challenge into the "final decision/exhaustion" procedure established by 1005(e)(3) would fail on two levels.

First, reading (e)(3) as governing a challenge to the President's power to try petitioner before a military commission at all is implausible. The text of (e)(3)(D) explicitly limits (e)(3) appeals to questions of whether the final decision of a commission violated specific 'standards and procedures' imposed by Military Order #1, and whether the 'use of such standards and procedures' to reach a 'final decision' violated 'the Constitution and laws of the United States.' Nothing in the text of (e)(3) suggests that it is intended to authorize a broad challenge to the President's power to establish military commissions in the first place.

In fact, the text of (e)(3)(A) and (D) limits review to compliance with "Military Order No. 1, dated August 31, 2005 (or any successor military order)" (establishing procedures for the military commissions), but omits any mention of the President's order establishing the commissions in the first place. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, at § 1(e) (Nov. 13, 2001). Thus, the plain meaning of the text of (e)(3) simply cannot support a dramatic interference with this Court's appellate jurisdiction.[17]

Second, if contrary to the text, either (e)(3) or (e)(1) were deemed ambiguous, this Court has repeatedly held that statutes will not be read to strip this Court of appellate jurisdiction in the absence of an explicit textual expression of Congressional will.[18] *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868) (statutes limiting Supreme Court appellate jurisdiction to be narrowly construed); *Felker v. Turpin*, 518 U.S. 651 (1996) (same); *INS v. St. Cyr*, 533 U.S. 289 (2001) (same). *See also Webster v. Doe*, 486 U.S. 592 (1988) (statutes limit-

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[17] *See* n. 18, *infra*, setting forth the specific language used in *Ex parte McCardle*.

[18] The absence of any provisions in 1005(e) explicitly limiting this Court's appellate jurisdiction should be contrasted with the specific language of the statute involved in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 508 (1868):

> * * * so much of the act approved February 5, 1867 * * * as authorized an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court, on appeals which have been, or may hereafter be taken * * * is hereby repealed.

ing judicial review construed to avoid constitutional issue); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.2 (1986) (same); *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974) (same).

C. The Constitution Bars Congress From Depriving This Court of Appellate Jurisdiction Over This Appeal

Finally, if, despite the text and applicable canons of construction, 1005(e)(3) is read to require petitioner to defer his constitutional challenge until after an adverse "final decision" by the commission, 1005(e) would violate the Constitution. Coupled with the purported prospective elimination in (e)(1) of habeas corpus and other trial court jurisdiction over "actions" filed by Guantanamo detainees, reading 1005(e) to require petitioner to defer his challenge until after the commission enters a "final decision" would empower the Executive to prevent the legal issue from ever reaching this Court by the simple expedient of delaying or prolonging Hamdan's trial.

If this appeal is dismissed, the keys to the courthouse will be placed in the exclusive control of the Executive. Under such a construction, the Executive could: (a) avoid review indefinitely by never proceeding to a "final decision;" (b) claim power to confine petitioner indefinitely because of the serious accusations against him; and (c) deny the existence of Article III jurisdiction to inquire into the conditions of that confinement, or into the reasons why a "final decision" has not been rendered. Deferred access to the courts under such circumstances is the functional equivalent of the formal ban discussed below.

The government's alternative argument that 1005(e) formally strips the Article III judiciary of jurisdiction to consider the President's power to try petitioner before a military com-

mission also renders the Graham-Levin amendment unconstitutional. *INS v. St. Cyr*, 533 U.S. 289 (2001); *Zadvydas v. Davis*, 533 U.S. 678 (2001).

"Internal" constraints imposed by Article III, and "external" constraints imposed by the Suspension, Equal Protection, Due Process and Bill of Attainder Clauses deprive Congress of power to oust the Supreme Court of appellate jurisdiction over appeals by aliens detained by the military at the Guantanamo Bay detention facility, especially where, as here, Congress has also purported to strip the lower federal courts of jurisdiction to review the challenged activity. *See United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). *See also* Akhil R. Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. Pa. L. Rev. 1499 (1990).

No case has ever countenanced an effort to strip both this Court and the lower federal courts of original and appellate jurisdiction to pass on the constitutionality of Executive action in derogation of personal liberty. To do so would place the very structure of the Constitution at risk by attacking an "essential function" of the Supreme Court and the Article III judiciary. *See* Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1364-65 (1953).

In *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868), this Court upheld a statute explicitly eliminating expedited appellate jurisdiction over a pending appeal, but noted that the issue posed by the appeal was reviewable by the Court pursuant to an alternative appellate route. 74 U.S. at 515. Indeed, in *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868), the Court ruled that

it possessed an alternative basis of jurisdiction to rule on the issues posed in *McCardle*.[19]

In *Felker v. Turpin*, 518 U.S. 651 (1996), Congress withdrew certiorari jurisdiction to review refusals by the courts of appeal to authorize a "successive" habeas corpus petition in a capital case. This Court sustained the limitation on its certiorari jurisdiction, but only after noting an alternative basis of jurisdiction pursuant to the Court's power to issue habeas corpus writs in defense of its appellate jurisdiction.[20]

Finally, in *INS v. St. Cyr*, 533 U.S. 289 (2001), Congress expanded the category of deportable aliens ineligible for discretionary suspension of deportation. The Attorney General

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[19] In an action redolent of its current efforts to avoid judicial view in *Padilla*, the Executive ordered Yerger released from military custody, thereby mooting his habeas corpus challenge to military Reconstruction. *See* Warren, *The Supreme Court of the United States*, 496-97 (rev. ed. 1935). Under modern conceptions of mootness, this Court would be empowered to rule on the merits of Yerger's claim. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000) ("voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice"). *See also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) (same).

[20] Since the text of 1005(e)(1) purports to deprive a "justice" of the power to issue a writ of habeas corpus on behalf of an alien detained at Guantanamo Bay, it is possible that the residual habeas corpus jurisdiction invoked in *Yerger*, *Felker* and *St Cyr* would be unavailable in this case. There is, however, no need in this case to resort to habeas corpus jurisdiction in aid of appellate jurisdiction because Congress has made no effort to limit the Court's appellate jurisdiction under 28 U.S.C. 1254(1). In the absence of a textual effort to limit this Court's appellate jurisdiction, this case poses an even stronger argument for the continued exercise of appellate jurisdiction than in *Yerger, Felker* and *St. Cyr*.

read the complex statute broadly to eliminate power to consider discretionary suspension in connection with activity occurring prior to the statute's effective date. When affected aliens challenged that reading in the courts, the Attorney General argued that Congress had abolished the jurisdiction of the Article III courts to review the Attorney General's construction of the statute. This Court, invoking the canon of constitutional avoidance, especially in the context of efforts to preclude judicial review in settings implicating personal liberty, construed the statute narrowly to preserve habeas corpus jurisdiction to review the legality of the Executive branch's reading of the statute.

If, despite the foregoing arguments and precedents, this Court views Subsection 1005(e) as a direct or indirect jurisdictional bar to this appeal, the Court will be confronted with issues of enormous constitutional importance, including: (1) the power of Congress to threaten an "essential function" of the Supreme Court by stripping it of jurisdiction over a pending constitutional appeal in an effort to insulate gross deprivations of liberty by the Executive from judicial review; (2) the power of Congress to eliminate all access to judicial review by detainees; and (3) the power of Congress to single out alien detainees at Guantanamo Bay and deny them access to Article III courts.

The Executive's claim of power to create a legal "black hole" at Guantanamo Bay into which aliens suspected of terrorist activities may be dropped ultimately rests on the continued assertion that aliens detained at Guantanamo Bay are not within the United States, and, thus, have no right of access to an Article III court. *Johnson v. Eisentrager*, 339 U.S. 763 (1950). *See* Section 1005(g) (purporting to exclude Guan-

tanamo Bay from United States for the purposes of the Graham-Levin amendment).

Given *Rasul v. Bush*, 542 U.S. 466 (2004), however, the argument cannot be advanced in connection with claims by aliens detained at Guantanamo Bay. In *Rasul*, this Court concluded that the military base at Guantanamo Bay had been ceded to the United States "in perpetuity" by treaty and was, therefore, an integral part of the United States for the purpose of assessing judicial responsibility for assuring the rule of law. 542 U.S. at 480-84. Section 1005(g) cannot override *Rasul*'s holding that Guantanamo Bay is an integral part of the United States for the purpose of access to the courts. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating effort by Congress to overturn Supreme Court construction of First Amendment); *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995) (invalidating effort by Congress to re-open completed case). *See also United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

Thus, if Congress were to seek to eliminate: (a) the appellate jurisdiction of this Court in this case; (b) habeas corpus jurisdiction in the trial courts; and (c) all other "actions" by aliens detained at Guantanamo Bay, the result would be the legal equivalent of incommunicado detention of Japanese aliens in a relocation camp in Idaho.[21] If Section 1005(e) is read to cut off the pending appeal in this case, and to prevent all future access to the Article III courts by Guantanamo detainees raising claims of personal liberty falling outside the

[21] Under the Executive's theory of jurisdiction, Congress could have eliminated all Article III review over the military's decision to confine Japanese aliens to relocation camps during WW II. *Ex parte Endo*, 323 U.S. 283 (1944).

narrow scope of (e)(2) and (e)(3), this Court would be confronted with precisely the nightmare scenario described by Justice Stevens in *St Cyr* – a scenario involving an Executive bent on detaining aliens in the United States with no possibility of judicial review of the legality of their detentions.[22] Such an unprecedented assertion of unreviewable Executive authority contradicts fundamental principles of separation of powers and due process of law.

Whether one characterizes such an unreviewable deprivation of liberty by the Executive as a violation of the constitutional right to habeas corpus implied by the Suspension clause, a deprivation of procedural due process of law in violation of the 5th Amendment, or an interference with the essential function of the judiciary under the doctrine of separation of powers, the result is the same – an unconstitutional interference with access to the courts and an attack of the fundamental structure of the Constitution.

Finally, Section 1005(e) imposes unprecedented restrictions on access to courts upon aliens – and only aliens confined at Guantanamo – while permitting unrestricted access to identically situated aliens confined at other facilities, and permitting citizens at Guantanamo unrestricted access to courts.[23]

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[22] Not even German saboteurs landed from a German military submarine in full uniform in the midst of a formally declared war with Germany were denied access to a Court. *Ex parte Quirin*, 317 U.S. 1 (1942).

[23] 1005(e)(1) does not purport to be based on Congressional power to suspend the writ of habeas corpus in the event of rebellion or invasion, but only on the unacceptable conclusion (as noted above) that the detention facility at Guantanamo Bay is not an in-

(continued)

Such an irrationally discriminatory allocation of access to the courts violates the Equal Protection clause. One need not argue that the substantive rights of citizens and aliens are identical in order to reject such a discriminatory refusal to permit aliens access to a court to seek to vindicate a substantive right. *See Graham v. Richardson*, 403 U.S. 365 (1971); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Bernal v. Fainter*, 467 U.S. 216 (1984). While alienage may be a relevant basis for determining membership in a political community (*Foley v. Connelie*, 435 U.S. 291 (1978), or for allocating scarce entitlements (*Matthews v. Diaz*, 426 U.S. 67 (1976), it is not a permissible basis for determining access to an Article III court in an effort to protect an alien's personal liberty. *In re Griffiths*, 413 U.S. 717 (1973); *Plyler v. Doe*, 457 U.S. 202 (1982). *A fortiori*, the physical location of an alien's detention cannot be the determining factor in granting or denying access to a court, especially when the alien is detained in the United States.

II. CONGRESS HAS NOT AUTHORIZED THE PRESIDENT TO TRY PETITIONER BEFORE A MILITARY COMMISSION

The Executive argues that the United States is engaged in an unconventional war, with the territorial United States part of a world-wide battlefield. In the President's view, accused terrorists captured on the world-wide battlefield are "enemy

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tegral part of the United States. Thus, this Court need not explore whether a decision to suspend the writ on the grounds specified in the Constitution is subject to judicial review. Viewed as an effort to invoke the Suspension clause, 1005(e) is plainly ineffective since it makes no effort to make the necessary Congressional findings.

combatants" operating outside the rules of war, subject to prosecution before military commissions operating under extremely relaxed standards of evidence, procedure and proof, empowered to mete out severe sentences, even death.

Petitioner denies behaving unlawfully. He asserts the right to defend himself before a tribunal more consistent with settled constitutional practice, and challenges the power of the political branches to subject him to a battlefield tribunal long after his capture, especially when the tribunal's procedures violate the Geneva Convention.

Amici believe that it is unnecessary in this case to choose between these polar positions. At a minimum, the uniform practice of this Court, shaped initially by Chief Justice Marshall, has been to demand explicit Congressional authorization before permitting the Executive to depart dramatically from settled constitutional practice in pursuit of wartime security. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653-54 (1952) (Jackson, J. concurring). While this Court has read Congressional authorizations of force broadly when necessary to provide the Executive with the conventional tools of battlefield combat, *see Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion), the Court has consistently demanded a clear statement of Congressional intent whenever the Executive seeks to depart from international law or from settled constitutional practice outside the exigencies of combat.

For example, in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), the literal language of the Non-Intercourse Act, which forbade "American citizens" from carrying on maritime trade with France and subjected their vessels used in such forbidden trade to military seizure, was construed narrowly by the Chief Justice to exclude maritime

commerce with France carried on by American citizens residing abroad who had pledged allegiance to a foreign sovereign. If, reasoned Chief Justice Marshall, Congress wished to impose military sanctions on such non-resident citizens in violation of international law, it must do so explicitly.[24]

Similarly, in *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), Chief Justice Marshall ruled that Congress's declaration of war against Great Britain, and the corresponding Authorization for the Use of Military Force, failed to provide implied authority to seize the property of enemy aliens residing in the United States during the War of 1812. If such a "disreputable" departure from the "modern law of nations" was to occur, Chief Justice Marshall demanded explicit Congressional authorization.

In the two centuries since Chief Justice Marshall's pioneering decisions, this Court has repeatedly adhered to his wise counsel that, even in times of national emergency, neither constitutional values, nor international law may be displaced by military authority in the absence of an explicit Congressional command that satisfies the doctrine of clear statement. *See, e.g.*, *The Prize Cases*, 67 U.S. (2 Black) 635 (1862) (noting express Congressional ratification of military seizure of ships seeking to run the blockade of Confederate ports; four Justices refuse to recognize retroactive Congressional authorization); *Ex parte Milligan*, 71 U.S. (4 Wall) 2, 137 (1866) (four Justices note lack of Congressional authori-

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[24] Similarly, in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), Chief Justice Marshall narrowly construed a provision of the Non-Intercourse Act authorizing military seizure of a vessel sailing *to* a French port as failing to authorize military seizure of a ship sailing *from* a French port.

zation for military trial of alleged participant in conspiracy to oppose Union by force); *Ex parte Endo*, 323 U.S. 283 (1944) (applying doctrine of clear statement to construe Congressional statute authorizing military detention of Japanese-Americans as requiring individualized hearings on issue of loyalty); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (applying doctrine of clear statement to reject claimed statutory authorization for military trials of civilians in Hawaii); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952) (requiring explicit Congressional authorization for military seizure of steel mills idled by strikes during Korean War); *Oestereich v. Selective Ser. Sys.*, 393 U.S. 233 (1968) (construing Congressional statute as permitting pre-induction review of punitive draft classification in the absence of explicit prohibition). *See also Kent v. Dulles*, 357 U.S. 116 (1958) (requiring explicit Congressional authorization for denial of passports to Communist Party members on political grounds); and *United States v. New York Times*, 403 U.S. 713 (1971) (construing Espionage Act as failing to authorize prior restraints).[25]

Amici believe that the following widely-accepted structural principles emerge from the cases.

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[25] The principal authority offered by the United States, *Ex parte Quirin*, 317 U.S. 1 (1942), is clearly distinguishable, since it involved the use of a military commission to prosecute German military personnel, landed in full military uniform from a German military vessel, bent on sabotage during a formally declared war with Germany. If *Quirin* is read as authorizing the general use of military commissions to try terrorists whose activities are indistinguishable from crimes, the line between military and criminal jurisdiction will cease to exist.

1. When both Congress and the President deem it necessary to suspend settled constitutional practice and/or international law in order to deal with an imminent military threat, Article III courts are reluctant to overturn the combined judgment of the political branches, although they retain responsibility for enforcing the Constitution even against the combined wishes of the political branches in order to prevent a recurrence of abuses similar to *Korematsu v. United States*, 323 U.S. 214, 242, (1944) (Jackson, J. dissenting). *See also Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

2. When Congress has failed to approve such an approach, Article III courts will not permit the Executive to act unilaterally in defiance of Congress's judgment. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653-54 (1952) (Jackson, J. concurring).

3. In the absence of an immediate combat emergency, the Executive is, at a minimum, required to secure Congressional assent before suspending settled constitutional practices or ignoring international law. *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814).

4. In determining whether Congress has granted the necessary assent, silence is not the equivalent of Congressional action. *Ex parte Endo*, 323 U.S. 283 (1944).

5. In times of emergency, this Court has, on occasion, broadly construed statutes authorizing activities directly related to the exigencies of actual combat *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800).

6. When, however, Executive action suspends settled constitutional practice and violates international law, and is removed in space and time from active combat, explicit Con-

gressional authorization is required. *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). *See Hamdi*, 542 U.S. at 539-54 (opinion of Justice Souter, joined by Justice Ginsburg, concurring in part, dissenting in part, and concurring in the judgment).

When the above-described structural principles are applied to this case, neither the general language of the AUMF for Afghanistan, which speaks only of the use of "force," nor the general authorization of the use of military commissions in proper settings in the Uniform Code of Military Justice, attains level of specificity required by a doctrine of clear statement. *See Quern v. Jordan*, 440 U.S. 332 (1979); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *Gregory v. Ashcroft*, 501 U.S. 452 (1991). In the absence of such a clear statement, Hamdan should be remitted to an appropriate alternative tribunal for prosecution.[26]

[26] The government may argue that Section 1005(e) is itself an implied Congressional authorization of the use of military commissions. However, not a single member of Congress suggested that by providing for judicial review over the commissions, Congress was impliedly authorizing them. In fact, Section 1005(e) is exactly the type of equivocal, back-door statutory activity that cannot satisfy a clear statement rule.

CONCLUSION

For the above-stated reasons, this Court should continue to exercise appellate jurisdiction over this appeal, and should reverse the decision below.

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