NO. 05-184

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD, ET AL.,

Respondents.

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

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* ON BEHALF OF FORMER FEDERAL JUDGES SHIRLEY M. HUFSTEDLER AND WILLIAM A. NORRIS IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS FOR WANT OF JURISDICTION

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Amici curiae are former federal judges profoundly concerned about preservation of the role of the judiciary in our constitutional system and, in particular, with ensuring that this Court remain open to hear claims by individuals of unconstitutional action by the elected branches of Government, a final check put in place by the Framers to protect the individual from the otherwise unconstrained power of government. Hon. Shirley M. Hufstedler served as a Judge of the United States Court of Appeals for the Ninth Circuit from 1968 to 1980. She subsequently served as United States Secretary of Education and is now Senior of Counsel to Morrison & Foerster in Los Angeles. Hon. William A. Norris served as a Judge of the United States Court of Appeals for the Ninth Circuit from 1980 to 1997. He is now Senior Counsel to Akin Gump Strauss Hauer and Feld LLP in Los Angeles.

This Court granted certiorari in this case on November 7, 2005. On December 30, 2005, President Bush signed into law the Detainee Treatment Act of 2005 (the "DTA," the "Act," or the "statute"), Pub. L. No. 109-148, Div. A, Tit. X, 119 Stat. 2739. By its terms it does not affect the appellate jurisdiction of this Court, and its language, structure and history indicate that it has no application to pending cases. Nonetheless, on January 12, 2006, Respondents (the "Government") filed a motion seeking dismissal of the instant action under that statute for want of jurisdiction.

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[1] In compliance with Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part. No person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

Amici seek leave of this Court and submit this brief solely to aid this Court in ruling upon Respondents' motion to dismiss for want of jurisdiction. *Amici* have not and do not urge this Court to rule in any particular way on the merits of this appeal, nor do they seek to participate as *amici* on the merits. They believe, however, that it is of utmost importance to the continued role of this Court, to the separation of powers bequeathed to us by the Framers as a check on tyranny, to the very rule of law, that, having granted certiorari, this Court hear this appeal. In this sense they speak as friends of the Court, as *amici curiae*, in the literal sense.[2]

BRIEF *AMICI CURIAE*

INTRODUCTION

Properly construed, Title X of the Detainee Treatment Act of 2005 does not divest this Court of jurisdiction over this case. It has no effect on pending cases. And it does not affect the appellate jurisdiction of this Court on the facts of this case. If the statute were ambiguous, it should be construed to have no such application in order to avoid the grave constitutional questions that would be raised

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[2] The Rules of this Court are skeletal with respect to motions practice before it, see Robert L. Stern, et. al, Supreme Court Practice, §16.1, at 636 (8th Ed. 2002); see also id. (noting that ordinarily "motions . . . do not play an important part in Supreme Court practice"), and contain no provisions addressing the proper procedure for participation by *amici* on a motion like that now before the Court. The instant motion presents an unusual, perhaps unique, circumstance where a substantial legal question has been raised in a motion to dismiss for want of jurisdiction. Consequently, *amici* seek this Court's leave to file this brief. In the parallel circumstance in which the profoundly important questions presented by the DTA are now coming before the United States Court of Appeals for the District of Columbia Circuit that court has issued a blanket order to permit the participation of *amici curiae* at the motion stage. See *Boumediene v. Bush*, No. 05-5062, *sua sponte* Per Curiam Order (CADC January 27, 2006).

by a congressional attempt to strip this Court of jurisdiction over this case and the federal courts of jurisdiction over a broad range of federal constitutional claims. Finally, though, if the statute were construed to oust jurisdiction in this case the present motion would, nevertheless, have to be denied because if that is what it means, §1005 of the Act violates basic constitutional precepts and may not be enforced to prevent this Court from hearing the instant case. Four parts of the Constitution each independently require that this Court remain open to hear the claim of constitutional right brought here: The Suspension Clause of Art. I, Sec. 9; Article III; the Due Process Clause of the Fifth Amendment; and the Equal Protection Component of that Clause. It is these constitutional provisions with which this brief is primarily concerned.

ARGUMENT

I. THE ACT DOES NOT BY ITS TERMS DIVEST THIS COURT OF JURISDICTION OVER THIS CASE.

A. As Petitioner explains in his brief in opposition to the instant motion, the DTA does not deprive this Court of jurisdiction over this appeal. Its language and structure make clear that, though the Act "take[s] effect on the date of the enactment of the Act," it does not apply to most claims, including this one, pending on or after the date of enactment. See DTA §1005(h)(1),(2) (making clear that only certain provisions of §1005 apply to restrict only certain "claim[s] . . . pending on or after the date of the enactment of this Act").

Further, it is beyond peradventure that the language of the statute was chosen precisely to avoid an explicit statement that it would apply to pending cases. See, e.g., Wallach, "Graham Amendment and Guantanamo," New York Law Journal, Dec. 29, 2005 (describing removal from the Graham Amendment of language stating explicitly that it would apply to pending cases). Thus, even if the language that Congress used seemed *clearly* to imply that the statute applied to pending cases, given what is known of the reason

the language was chosen – to eliminate the explicit language applying the statute to pending cases – this Court would have an obligation to read it not to apply in this pending case. The *only* appropriate judicial role in statutory interpretation is to give effect to the will of Congress. In the face of the *knowledge* that the statute was indeed meant not explicitly to oust this Court's jurisdiction over this very case, it would be a grave miscarriage, indeed a usurpation of the legislative role, to interpret the statute to reach the contrary result. Cf. Stephen Breyer, Active Liberty 93-94 (2005). Indeed, this Court's doctrines accommodate such circumstances to assure that such a result never occurs. See, *e.g.*, *United States v. Ron Pair Enterprise*s, 489 U.S. 235, 242 (1989) (citation omitted) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'").

B. Dismissal for want of jurisdiction would, in any event, not be proper even were this Court to accept the Government's proposed construction of the statute's applicability to pending cases because this case is not pending in, and will not necessarily be returned to, the district court. By its terms, the statute *does not purport to eliminate this Court's appellate jurisdiction over this case*. This is, therefore, not a case like the deeply controversial *Ex Parte McArdle*, 74 U.S. 506 (1868), where Congress passed a law stating that so much of an earlier law "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, be, and the same is hereby repealed." See Act of March 27, 1868, 15 Stat. 44.

This statute applies only to courts exercising jurisdiction under 28 U.S.C. §2241, as the district court did, to "hear or consider" applications for a writ of habeas corpus. That court reached its final judgment before the date of enactment of the statute. It is uncontested that that court

was empowered to hear this case when it did so. Indeed, if the Government had not appealed, it would have no argument that the judicial decision of the district court in this case had been – or could be – reversed by the action of the Congress here. See *Plaut v. Spendthrift Farms*, 514 U.S. 211, 226-27 (1995) (Scalia, J.) (Article III forbids legislative interference with final judgments of federal courts). The Court of Appeals exercised jurisdiction under 28 U.S.C. §1291 and this Court now exercises jurisdiction under 28 U.S.C. §1254. Neither exercised jurisdiction under §2241. There can thus be no contention that either court's jurisdiction is affected by the terms of the statute. Nor does the statute purport to change the substantive law applicable to Petitioner's case. Dismissal for want of jurisdiction therefore would be inappropriate.

Were this case to require a remand to the district court for further proceedings, the Government is probably correct that, if its reading of the statute were accepted, dismissal would make sense. See Respondents' Motion at 13 n. 6. But a return for further proceedings in the district court is something that neither party has sought. The district court found for Petitioner and entered final judgment. The Court of Appeals reversed. If the judgment below is affirmed, as the Government urges, this Court will issue an order of affirmance and that will be the end of the case. And if the judgment below is reversed, the Court of Appeals will ultimately enter an order affirming the judgment of the district court and that will be the end of the case.

In either event, no court deprived of habeas jurisdiction by the terms of the Act, even on the Government's reading of the statute, will have this case before it on remand. Since this Court's jurisdiction is not affected by the statutory text, and since it is irrelevant whether the district court would have jurisdiction to hear the

case were it brought today, this Court should not and properly may not dismiss for want of jurisdiction.[3]

C. Finally, if there were doubt about whether the statute applied to eliminate this Court's jurisdiction, this Court would nonetheless be required to construe the statute not to apply to this case in order to avoid the grave constitutional questions that would be raised by such a statutory elimination of jurisdiction. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988); see also *Ex parte Endo*, 323 U.S. 283, 300 (1944).[4] The remainder of this brief will take up those questions and will demonstrate that if §1005 applied to eliminate this Court's jurisdiction in this case it would not merely raise grave constitutional questions, it would violate fundamental precepts enshrined in the

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[3] For related reasons, a remand to address the DTA – again unsought by Respondents – would not be appropriate. Only this Court can answer the question of the applicability of the statute to this Court's exercise in a pending case of its certiorari jurisdiction under 28 U.S.C. §1254. A remand also could unintentionally affect this Court's authority to address the merits of this case. It is conceivable, for example, that, while this appeal is, in fact, properly before this Court, on a remand, dismissal before a lower court might be proper. There would in such a case be no mechanism permitting this Court to review the merits of the case after remand, even though this case is properly before this Court, and it has granted certiorari on the merits question, now.

[4] The words from Sen. Kyl on the floor of the Senate quoted by the Government cannot change the meaning of the statute. See Respondents' Motion at 14 n. 7. In any event, at most they suggest that the compromise language was supported by some legislators precisely because it was thought ambiguous with respect to pending cases. That is, they were deliberately attempting to punt to this Court the question of the applicability of the statute to this case. Given the canons described in the text, any such ambiguity, too, would require this Court to construe the statute not to oust its jurisdiction.

Constitution. Therefore, whether on the basis of its text, of the doctrine of constitutional avoidance, or because the statute applies but the Constitution itself requires it, this Court should deny Respondents' motion to dismiss.

II. TO THE EXTENT IT DIVESTS COURTS OF HABEAS JURISDICTION, §1005 VIOLATES THE SUSPENSION CLAUSE.

To begin with, §1005 purports to divest every "court, justice, or judge" of "jurisdiction to hear or consider" any "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." See DTA §1005(e)(1). This applies to those few who will be tried by military commission as well as the hundreds of others subjected to indefinite detention there on the President's say-so. This statute marks the first time in over one hundred years that Congress has seen fit to suspend the writ of habeas corpus with respect to prisoners held by the federal government.

As an initial matter, this provision implicates the Suspension Clause. This Court has held that aliens held at the United States Naval Base at Guantanamo Bay, Cuba, are entitled to bring petitions for a writ of habeas corpus. *Rasul v. Bush*, 542 U.S. 466 (2004). This Court has not decided whether the Suspension Clause is implicated by suspensions of the writ only as it existed in 1789 or as it exists today. See *Swain v. Pressley*, 430 U.S. 372, 380 and n. 13 (1977) (citing Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments," 38 U. Chi. L. Rev. 142, 171 (1970)) (noting that "Judge Friendly observed that '[w]hat Congress has given, Congress can *partially* take away'" an observation "more cautious than the conclusion that Congress may *totally* repeal all post-18th century developments in this area of the law") (emphasis added by the Court); see also *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (assuming "that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789").

Although the implication of Judge Friendly's words is that "Suspension" refers to habeas corpus as the writ exists today, the writ sought here is within the scope of the writ as it existed in 1789. The petition in this case, brought by Petitioner, who is a federal prisoner, lies within the terms of the very first grant of habeas authority to the federal courts, the Judiciary Act of 1789, which provided that federal courts could grant writs of habeas corpus to prisoners "in custody, under or by colour of the authority of the United States." Act of Sept. 24, 1789, ch. 20, Sec. 14, 1 Stat. 82; see *Felker*, 518 U.S. at 659 (discussing the history of the scope of federal habeas corpus). The petition at issue here lies at the "historical core" of the writ, raising an objection to "the legality of Executive detention." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). "The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial." *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result). And, as the Court has explained, the writ was available to noncitizens as well as citizens:

> The writ of habeas corpus has always been available to review the legality of executive detention. See *Felker*, 518 U.S. at 663; [*Swain*], 430 U.S. at 380, n. 13; *id.* at 385-386 (Burger, C. J., concurring); [*Brown*], 344 U.S. at 533 (Jackson, J., concurring in result). . . . Before and after . . . 1875 . . . that jurisdiction was regularly invoked on behalf of noncitizens. . .

St. Cyr, 533 U.S. at 305. "At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm." *Rasul v. Bush*, 542 U.S. 466, 481 (2004) (citing *inter alia R. v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759) (reviewing, but denying, the habeas petition of an alien deemed a prisoner of war because he was captured aboard an enemy French privateer)).

The Court just two Terms ago concluded that the judicial power of the federal courts in habeas cases extends

to Guantanamo Bay. See *Rasul*, 542 U.S. 466 (2004); see also id. at 485-488 (Kennedy, J., concurring). *Johnson v. Eisentrager*, 339 U.S. 763 (1950), had held that certain aliens detained overseas by the United States were not entitled as a constitutional matter to habeas corpus in federal courts. This Court distinguished such aliens from those, like Petitioner, imprisoned in Guantanamo, *Rasul*, 542 U.S. at 476 (listing differences in facts "critical" to *Eisentrager*'s constitutional holding), and it concluded that Guantanamo is within the "territorial jurisdiction" of the United States. Id. at 480 (citing *Foley Bros., Inc. v, Filardo*, 336 U.S. 281, 285 (1949) (distinguishing lands within the "territorial jurisdiction" of the Untied States with those that are mere "possessions")). Indeed, this Court concluded that Guantanamo was "sovereign territory" of the United States in the sense that defined the "historical reach of the writ of habeas corpus" at common law. Id. at 481-482. Those at Guantanamo – ordinary prisoners held on suspicion of crime on the base, for example, as well as detainees in the situation of Petitioner – are entitled therefore to seek habeas relief from the federal courts under the Constitution. Accord *Hirota v. MacArthur*, 338 U.S. 197, 201-202 (1948) (Douglas, J., concurring) ("Habeas corpus is an historic writ and one of the basic safeguards of personal liberty. See *Bowen v. Johnston*, 306 U.S. 19, 26. There is no room for niggardly restrictions when questions relating to its availability are raised. . . . Today Japanese war lords appeal to the Court for application of American standards of justice. Tomorrow or next year an American citizen may stand condemned in Germany or Japan by a military court or commission. If no United States court can inquire into the lawfulness of his detention, the military have acquired, contrary to our traditions (see *Ex parte Quirin*, 317 U.S. 1; *In re Yamashita*, 327 U.S. 1), a new and alarming hold on us.").

Even more directly, Justice Kennedy distinguished *Eisentrager* while applying its framework to conclude that for Guantanamo detainees, unlike the detainees in

Eisentrager, there was, indeed, a constitutional entitlement to seek habeas relief. See id. at 486-488 (Kennedy, J., concurring in judgment). He relied first upon the fact that "Guantanamo Bay is in every practical respect a United States territory, and it is one far removed form any hostilities," id. at 487, and second upon the conclusion that the need for "continued detention to meet military exigencies" had weakened "as the period of detention stretches from months to years." Id. at 488. A petition for habeas from a Guantanamo detainee he concluded is "within the proper realm of the judicial power." Id. at 486. Thus, he concluded that, unlike the complaints brought by the German prisoners in *Eisentrager*, the complaints of the Guantanamo detainees do not "concer[n] matters within the exclusive province of the Executive, or the Executive and Congress, to determine." Id. He concluded Guantanamo detainees like Petitioner have a right under the Constitution to bring petitions for habeas corpus.

Thus, whether what the Suspension Clause protects is habeas as its scope was at the time of the Framing, or habeas as its scope is today, this statute implicates the Suspension Clause. Under that Clause, Congress lacks power to suspend the writ of habeas corpus with respect to such detainees "unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. Art. I. Sec. 9, cl. 2. "[W]here statutory jurisdiction to issue the writ obtains, but the privilege of it has been suspended in particular circumstances, the Court has declared itself ready to consider the validity of the suspension and, if it is found invalid, of the detention." Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 Harv. L. Rev. 1362, 1398 (1953) (hereinafter "Hart's *Dialogue*") (citing *Ex Parte Milligan*, 71 U.S. 2 (1866)).

Section 1005 violates the Suspension Clause for at least two reasons. To begin with, the war on terror under which detainees are being held at Guantanamo, grave though it is, involves neither "Rebellion" nor "Invasion" such that

Congress may suspend the writ. The seriousness of the war on terror and the seriousness of the threat posed by Al Qaeda cannot be gainsaid. And *amici* believe that the United States should, and under the Constitution does, have at its disposal all the tools necessary to fight and win the war on terror. But the Constitution contains no exception for wartime, and even the Suspension Clause is limited to the circumstances justifying its inclusion in the Constitution. "The Suspension Clause was by design a safety valve, the Constitution's only 'express provision for exercise of extraordinary authority because of a crisis.'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring)). As Justice Scalia wrote two years ago "Our Federal Constitution contains a provision explicitly permitting suspension, but limiting the situations in which it may be invoked." Id.

There can be no question that there is no "Rebellion" now taking place in the United States; we cannot imagine that the Government would contend otherwise. Nor are we faced today with any "Invasion" within the meaning of the Suspension Clause. The dastardly attacks of September 11 took place on American soil. But if they involved an "invasion" sufficient to warrant suspension of the writ, that invasion ended long ago. And if the threat of another such act is enough of a threat of invasion to permit suspension of the writ, then now, and for the rest of our lives, the writ may be suspended throughout the United States, though there are no ongoing hostilities and the civilian courts remain open. The dictionary defines invade to mean "to enter for conquest or plunder." Merriam Webster Online Dictionary available at http://www.m-w.com/dictionary/invade (first definition). No such invasion is going on now and there are no ongoing hostilities on American soil, the hallmarks of invasion.

Indeed, with its pairing of "rebellion" with "invasion," the structure of the Clause confirms this reading of the latter word. Both "rebellion" and "invasion" include

only situations when there is warfare here within the United States. While the war on terror poses grave threats, blessedly, at least at the moment, there is no such warfare.

Second, this Suspension is not "required" by the "public safety." To begin with, the statute's own terms make any such claim impossible: The Act does not purport to eliminate entirely federal court review of all claims even of the most dangerous Guantanamo detainees, those who will be tried by military commission and sentenced to death. See DTA §1005(e)(3) (providing for limited review as of right of this class of military tribunal convictions). Rather, this statute seeks to effect, with respect to *that* most serious class of cases, a rule of abstention, structuring, but not eliminating, judicial review.

While this may be an appropriate action for Congress to take with respect to other statutory causes of action, it may not do so with respect to habeas. It is authorized to suspend the writ only where public safety requires. But this kind of law, which actually leaves federal courts open in the most grave class of cases, renders implausible any argument that suspension is required for the public safety.

Finally, the statute fails the public safety bar in a second way. The Constitution's Suspension Clause envisions threats to public safety of the dimension associated with invasion or rebellion. And a congressional judgment that such a threat exists must certainly be granted broad latitude. But this does not leave this Court without a responsibility to exercise its judgment to determine that there is at least a plausible case to be made that public safety is in that serious way threatened by continued availability of the writ of habeas corpus.

Here, no such claim can plausibly be made. The circumstances under which Congress has acted to deny habeas relief to the prisoners at Guantanamo – to overrule this Court's decision in *Rasul* – prisoners held in a United States territory "far removed from any hostilities" and for such a long period of time that "the case for continued

detention to meet military exigencies" lacks force, *Rasul*, 542 U.S. at 487-488 (Kennedy, J., concurring), simply fails even to resemble the situation of a threat to public safety that could justify invocation of the Suspension Clause. And indeed, the Government never even asserts that the need to limit the rights of these individuals, held on a naval base on an island ninety miles away from Florida, is related to public safety at all.

III. TO THE EXTENT §1005 PROHIBITS THIS AND ALL OTHER FEDERAL COURTS FROM HEARING CONSTITUTIONAL CLAIMS OF GUANTANAMO DETAINEES, INCLUDING PETITIONER, IT VIOLATES ARTICLE III.

Section 1005 goes beyond stripping the federal courts of habeas jurisdiction. It purports further to bar "any other action against the United States or its agents relating to any aspect of the detention . . . of an alien at Guantanamo Bay, Cuba" who is in military custody or who is held as an "enemy combatant." §1005(e). This action, of course, was brought not merely as one seeking habeas relief, but as an action for mandamus as well, and that alternative basis for district court jurisdiction implicates this aspect of the statute.

The statute eliminates jurisdiction with respect to an entire class of cases, without regard for who the plaintiff is – be it the detainee, his or her next friend, or some third party injured by some aspect of the detention – and regardless of the cause of action under which suit might be brought, be it statutory, like the mandamus action here, see 28 U.S.C. §1361, or directly under the Constitution for equitable relief, see, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)*; Ex Parte Young*, 209 U.S. 123 (1908), or for damages, see *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). It eliminates federal court jurisdiction, and hence the possibility of bringing all claims under the federal constitution, including Due Process claims such as the one recognized in *Hamdi v. Rumsfeld*, 542 U.S. 507

(2004), for detention without process and Fifth Amendment claims alleging that a detainee's treatment violated Due Process. In fact, it eliminates for these many hundred detainees, and whatever other detainees the President orders transferred to Guantanamo, even claims for violation of the statutory prohibition of torture contained in the Detainee Treatment Act itself. See DTA §1003 ("No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman or degrading treatment or punishment").

Indeed, it purports to create a class of individuals housed in a geographical law-free zone, where they are subject to Executive whim without hope of judicial reprieve, a dangerous and unprecedented situation never countenanced by our courts, and one this Court again refused to permit as recently as *Rasul v. Bush*.

Petitioner himself is within this class, for although there is an exception to the jurisdictional bar permitting those sentenced by a military commission to death or to a sentence of ten years or more to bring an appeal as of right in the D.C. Circuit, which also was given discretionary jurisdiction over other convictions by military commission, see DTA §1005(e)(3), the jurisdictional bar as Respondents would have this Court construe it purports to extinguish the possibility of Petitioner obtaining federal judicial relief for the very constitutional violation alleged here: The violation wrought by forcing a man to stand trial and face life imprisonment before an unconstitutionally composed tribunal that is without authority *ab initio* so to try him. This is not a violation for which under our Constitution one may be made to wait for redress until after a tainted verdict has been announced. See, e.g., *Abney v. United States*, 431 U.S. 651, 659, 661-662 (1977) (internal quotation marks and citations omitted) (a constitutional claim "contesting the very authority of the Government to hale [the putative defendant] into court to face trial," there one under the Double Jeopardy

Clause, is a claim that government may not "subject[t] [that person] to embarrassment, expense and ordeal and compe[l] him to live in a continuing state of anxiety and insecurity;" consequently "if a criminal defendant is to . . . enjoy the full protection of the [Constitution], his . . . challenge . . . must be reviewable before that subsequent [trial].")

In stripping the federal courts of jurisdiction to hear any and all constitutional claims arising among detainees at Guantanamo, this unprecedented statute violates Article III of the Constitution in two ways.

First, if it is construed to limit this Court's jurisdiction, it violates the Article III principle articulated by Professor Hart in his landmark *Dialogue*. While the Congress has broad authority to regulate the jurisdiction of federal courts under the Exceptions Clause, U.S. Const. Art. III, Sec. 2,[5] that authority has a limit. As Professor Hart explained, Congress may not make exceptions to this Court's appellate jurisdiction "as will destroy the essential role of the Supreme Court in the constitutional plan." Hart's *Dialogue*, 66 Harv. L. Rev. at 1402; cf. *Felker*, 518 U.S. at 667 (Souter, J., concurring) (noting that it is an "open" question whether a law completely barring Supreme Court review, even of lower court determinations answering the nonconstitutional question whether a habeas petition is successive, exceeds Congress's Exception Clause power).

Second, if DTA §1005 is construed to apply to this case, this statute goes even further, raising, for the first time in the nation's history, the "'serious constitutional question'" this Court has always in the past avoided "that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988). This Court has avoided that question

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[5] "In all other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations, as the Congress shall make." U.S. Const. Art. III, Sec. 2.

in what might be called an aggressive manner. Indeed, in *Webster*, while Justice Scalia urged that "it is simply untenable that there must be a judicial remedy for every constitutional violation," id. at 613 (Scalia, J., dissenting), *not a single other Justice joined him*. This Court has never held that Congress may strip the Supreme Court of jurisdiction over certain constitutional claims without vesting authority in *some* federal court to hear those cases. And, given the conclusion reached in *Rasul* and *Hamdi* that the treatment of detainees on sovereign American territory many thousands of miles from the battlefield and months or years after their capture is not within the absolute discretion of the President in exercise of his commander-in-chief power, but is subject to constitutional challenge before the federal courts, the core Article III principle underlying that history must be applied equally here.

Whatever the scope of Congress's power over federal court jurisdiction, if the statute were read to oust federal courts from all jurisdiction to hear Petitioner's constitutional claims, such action would infringe on the irreducible minimum committed to this Court and the lower federal courts by the Constitution, the "judicial power of the United States" vested in them by Article III. This Court should, of course, construe the statute not to apply to this case in order to avoid this most grave constitutional question. But if it should find itself unable to do so, it must hold the statute unconstitutional as a violation of Article III.

IV. TO THE EXTENT §1005 EXTINGUISHES PETITIONER'S CONSTITUTIONAL CLAIMS, IT VIOLATES DUE PROCESS.

As Chief Justice John Marshall long ago observed, there can be no right without a remedy. "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison,* 5 U.S. 137,163 (1803) (Marshall, CJ.). Under this

principle, if §1005 is held to apply to this case it will, in unprecedented fashion, extinguish the constitutional rights of Petitioner and all other detainees held at Guantanamo, rights for the vindication of which this Court has determined they may invoke the jurisdiction of the federal courts. See *Rasul*, 542 U.S. at 484; id. at 483 n. 15. Because the Act would do so solely on the basis of these detainees' geographic location at Guantanamo Bay, it would do so arbitrarily and in violation of the Due Process Clause of the Fifth Amendment.

It is well-settled that, as a matter of Due Process, a legal claim may be denied only upon "a fair assessment of the facts and the law." See *M.L.B. v. S.L.J.*, 519 U.S. 102, 129 (1996) (Kennedy, J., concurring). Thus an individual may not be barred from prosecuting even an otherwise-available appeal from a paternity suit – a legal action that the Constitution does not require be provided in the first instance – solely on the basis that she has inadequate funds to pay to prepare the record. Id.; see also id. at 570 (opinion of the Court) (relying on both Due Process and Equal Protection). To extinguish her right on that basis would be arbitrary and would thus violate Due Process.

Similarly, this Court found that the mandatory dismissal of a discrimination claim based solely upon the actions of a government official in failing to hold a statutorily-required conference within a mandatory 120-day period violated the claimant's rights under the Due Process Clause. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). The Constitution does not permit a legal claim to be denied solely on such an arbitrary basis, but requires an opportunity to present one's case and to have it fairly judged on the merits. "[T]he State may not finally destroy a [constitutionally protected] interest without first giving the putative owner an opportunity to present his claim of entitlement." Id. at 433.

If it is construed to apply to this case, §1005 presents, in a far more serious context, precisely the situation described in *Logan* and *M.L.B.* The statute does not purport

to alter Petitioner's substantive rights. It "is a procedural limitation on the claimant's ability to assert his rights." *Logan*, 455 U.S. at 434. "[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." Id. at 433. Yet in this case, solely by reason of Petitioner's placement at Guantanamo Bay by the very Executive Branch whose actions are at issue here, the statute purports to extinguish his right to adjudication of his constitutional and other claims.

Here, the most fundamental rights recognized in our law are at stake. Petitioner seeks to avoid being put on trial for a grievous crime before what he alleges is an unconstitutionally composed tribunal. Among other things, he alleges that the unconstitutional composition of the tribunal inherently prevents it from rendering the fair and impartial verdict required by American law. He alleges that the Government may not put him through the "ordeal and compe[l] him to live in a continuing state of anxiety and insecurity." *Green v. United States*, 355 U.S. 184, 187 (1957). And this Court cannot ignore what is true: the implications of a guilty verdict rendered by such a tribunal will infect any and all subsequent proceedings in his case – in a way that may well cost him his freedom for the rest of his life. Cf. *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (order granting stay) (Scalia, J. concurring) (counting of presidential election ballots under a system alleged to be unlawful had to be stopped *ex ante* in order to avoid the taint of illegitimacy it might cast on the eventual victor).

The Due Process violation is even more troubling than similar ones that have confronted the Court, for the condition upon which a detainee's rights are extinguished – detention *at Guantanamo Bay* – is not fixed *ex ante*. Detainees are wholly within the power of the Executive Branch of Government and, absent some judicial action, completely at its mercy. They may be held at any location, literally anywhere in the world, and may be transferred from one location to another at the absolute discretion of

Executive Branch officials. Detainees who have been declared "enemy combatants" have, indeed, been held not only at Guantanamo, but at other locations throughout the world, including within the continental United States. See, e.g., *Hamdi*, 542 U.S. at 510 (detainee held in South Carolina). The troubling degree of Executive power thus conveyed by the statute to extinguish detainees' claims only exacerbates the Due Process violation involved.

V. TO THE EXTENT §1005 ELIMATES THIS COURT'S JURISDICTION OVER THE FEDERAL CLAIMS OF DETAINEES HELD AT GUANTANAMO BAY, IT VIOLATES EQUAL PROTECTION.

This Court has determined that detainees in Guantanamo are entitled to petition for writs of habeas corpus and to invoke the protection of the Constitution and laws of the United States. *Rasul*, 542 U.S. at 484. To the extent the DTA is read to eliminate for those held at Guantanamo Bay all federal court jurisdiction to hear their claims of violations of federal constitutional and statutory law, original and appellate, pending and yet-to-be filed, it violates the Equal Protection component of the Due Process Clause of the Fifth Amendment. See *Adarand Constructors v. Pena*, 515 U.S. 200, 217 (1995) ("the equal protection obligations imposed by the Fifth and the Fourteenth Amendments [are] indistinguishable").

As Chief Justice Marshall again explained for the Court, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. at 163.

A jurisdiction-stripping statute of the breadth claimed by the Respondents for §1005 would leave Petitioner with no protection of the laws. It would deny individuals placed at Guantanamo Bay by the Government equal protection of *all* the laws. No statute has ever been construed by this Court to

have such an effect upon individuals entitled to invoke the Constitution's protection. Indeed, this Court has observed that such a "disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in [this Court's] jurisprudence." *Romer v. Evans*, 517 U.S. 620, 632 (1996).

Such a blanket denial to those placed by the Administration in the prison camp at Guantanamo Bay would have "the peculiar property of imposing a broad and undifferentiated disability on a single named group." Id. at 632. This Court has ruled that this is "an exceptional and. . . invalid form of legislation," id., as of course it must be under a Constitution that guarantees Equal Protection to all "person[s]." U.S. Const. Amdt. XIV.

"It is not within our constitutional tradition to enact laws of this sort." *Romer*, 517 U.S. at 633. And even if some balancing were appropriate to determine whether such a law complied with the Constitution's command, the statute here could not survive. There is no compelling state interest that requires that detainees at Guantanamo be treated worse than detainees held elsewhere in the world. As this Court has already ruled, there can be no genuine claim of military necessity concerning the rules at Guantanamo so long as it remains "far removed from any hostilities" and the periods of detention have "stretched to months and years," well beyond the "matter of weeks" during which a claim of such necessity would have strength. See *Rasul*, 542 U.S. at 487-488 (Kennedy, J., concurring). Nor, indeed, is there even any rational basis for such a distinction so long as detention at Guantanamo, rather than any of the myriad other federal military detention facilities, remains solely a matter of Executive Branch discretion. See *supra* at 18-19.

CONCLUSION

It is essential that this Court not permit the Judicial Branch's authority to rule on questions of constitutional right to be ousted by statute, and that this Court's own doors remain open to appeals like the one in this case.

Respondents' motion should be denied and this Court should hear and address the merits of the case in due course.

Respectfully submitted,

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