No. 05-184

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,
Petitioner,

v.

DONALD H. RUMSFELD,
United States Secretary of Defense, *et al*.,
Respondents.

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

BRIEF *AMICI CURIAE* OF MORE THAN 300 DETAINEES INCARCERATED AT U.S. NAVAL STATION, GUANTANAMO BAY, CUBA, AND THEIR FAMILY MEMBERS, IN SUPPORT OF PETITIONER AND IN SUPPORT OF JURISDICTION

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INTEREST OF *AMICI CURIAE*[1]

A. Amici

Amici Fawzi Khalid Abdullah Fahad Al Odah, Omar Rajab Amin, Khalid Abdullah Mishal Al Mutairi, Abdullah Kamal Abdullah Kamal Al Kandari, Fayiz Mohammed Ahmed Al Kandari, and Fouad Mahmoud Al Rabiah are Kuwaiti nationals (the "Kuwaiti Detainees") who have been detained by the United States at the U.S. Naval Station, Guantanamo Bay, Cuba for more than four years without being charged or tried.

The following *amici* are Kuwaiti nationals who are family members of the Kuwaiti Detainees: Khaled A.F. Al Odah, father of Fawzi Khalid Abdullah Fahad Al Odah; Mohammed R.M.R. Amin, brother of Omar Rajab Amin; Meshal A.M.T.H. Al Mutairi, brother of Khalid Abdullah Mishal Al Mutairi; Mansour K.A. Kamel, brother of Abdullah Kamal Abdullah Kamal Al Kandari; Mohammad A.J.M.H. Al Kandari, father of Fayiz Mohammed Ahmed Al Kandari; and Monzer M.H.A. Al Rabiah, brother of Fouad Mahmoud Al Rabiah.

The remaining *amici* are more than 300 detainees at Guantanamo who have filed petitions for habeas corpus that are pending in court. Their cases and counsel are listed in the Appendix.

B. Past and Pending Proceedings

The Kuwaiti Detainees were before this Court in *Al Odah v. United States*, No. 03-343, consolidated with *Rasul v. Bush*, No. 03-334. The Court held in those cases that detainees at Guantanamo, "no less than American citizens," are entitled to

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[1] In accordance with Supreme Court Rule 37.6, *amici curiae* state that counsel for *amici* authored this brief in its entirety. No person or entity other than *amici curiae* and their counsel made any monetary contribution to the preparation of this brief. Letters of consent to the filing of this brief from the parties have been filed with the Clerk of the Court.

invoke the federal courts' jurisdiction to challenge the lawfulness of their detentions under habeas corpus and other applicable statutes. *Rasul v. Bush*, 124 S. Ct. 2686, 2696-99 (2004). After the Court's decision in *Rasul*, petitioner and *amici* pursued separate claims in the district court. Petitioner's claims are now before this Court, while proceedings on *amici's* claims have been stayed pending cross interlocutory appeals from the district court's denial in part of the government's motion to dismiss. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), *cross-appeals pending sub nom. Al Odah v. United States*, Nos. 05-5064, 05-5095 through 05-5116 (D.C. Cir. oral argument held Sept. 8, 2005). *Amici* urge the Court to resolve the jurisdictional issue discussed below now, lest more years pass before the Court's mandate in *Rasul* is vindicated.[2]

C. The Detainee Treatment Act of 2005

Amici submit this brief to address a single issue—whether the Detainee Treatment Act of 2005, Pub. L. No. 109-148 (the "Act" or the "Detainee Act"), enacted December 30, 2005, divests this Court of jurisdiction over petitioner's claims. That Act requires the Secretary of Defense to issue new Combatant Status Review Tribunal ("CSRT") procedures for determining the status of detainees at Guantanamo and to report those procedures to the appropriate committees of Congress; it requires that, going forward, the determinations be made by a Designated Civilian Official

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[2] Because the Court is obligated to consider its own jurisdiction even though the issue was not (and could not have been) raised in the petition for certiorari, *see, e.g., Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp*., 510 U.S. 27, 33 (1993), the Court should follow its usual practice and resolve the applicability *vel non* of the Detainee Act to this case rather than remand it to the lower courts for consideration. *See Christianson v. Colt Indus. Operating Corp*., 484 U.S. 985 (1987) (directing parties to brief and argue jurisdiction); *Eisen v. Carlisle & Jacquelin*, 414 U.S. 908 (1973) (same).

who is answerable to Congress; it requires future CSRTs to assess whether statements from or related to the detainees were derived by coercion; it provides for exclusive judicial review by the United States Court of Appeals for the District of Columbia Circuit of final determinations made by these CSRTs conducted under the reported procedures; and it purports to remove federal court jurisdiction as of the date of enactment over all other claims, including habeas claims, related to the detentions at Guantanamo.

Neither petitioner nor the Kuwaiti Detainees have been afforded CSRT determinations under the new procedures meeting the standards of the Act. Rather, they were subjected to the old CSRT procedures that the Act requires be changed, and that the district court held did not comport with minimal due process requirements and were insufficient to afford the detainees the fair opportunity to challenge the government's factual basis for their detentions that is guaranteed by habeas. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 468-78.

SUMMARY OF THE ARGUMENT

The language and history of the Detainee Act establish that its jurisdiction-stripping provisions do not apply to claims pending at the time of its enactment, such as petitioner's claims, and, therefore, do not divest the Court of jurisdiction over this case. Construing those provisions to apply to pending claims would be contrary to canons of statutory construction long accepted by this Court and well understood by Congress. Moreover, construing the Act to strip the federal courts of jurisdiction over petitioner's claims would nullify the Court's landmark decision in *Rasul* and violate the Suspension Clause of the United States Constitution. The Court should construe the Act in accordance with the canons of statutory construction to avoid such grave constitutional problems.

ARGUMENT

I. THE DETAINEE ACT DOES NOT STRIP THE COURT OF JURISDICTION OVER THIS CASE.

A. Congress must use specific and unambiguous language to effect a repeal of federal court jurisdiction over pending claims.

The protections of the Great Writ of Habeas Corpus "have been strongest" in the context of judicial review of the legality of executive detention. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). It is precisely in that context that the issue of the applicability of the jurisdiction-stripping provisions of the Detainee Act to petitioner's claims arises and must be decided. Neither petitioner's nor *amici's* pending habeas petitions are collateral challenges to prior determinations; rather, they are basic challenges to the legality of the executive detentions imposed upon them. Consequently, to the extent the Detainee Act purports to strip the courts of jurisdiction over writs of habeas corpus filed by or on behalf of detainees at Guantanamo, "[i]mplications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal." *St. Cyr*, 533 U.S. at 299.

Furthermore, no statute may be applied retroactively to bar claims that were pending before the statute was enacted "absent a clear indication from Congress that it intended such a result." *St. Cyr*, 533 U.S. at 316. Cases where this Court has found that a statute with retroactive effect was properly authorized by Congress "have involved statutory language that was so clear that it could sustain only one interpretation." *Lindh v. Murphy*, 521 U.S. 320, 329 n.4 (1997). Congress enacted no such language in this case.

B. The language of the Act shows that its jurisdiction-stripping provisions do not apply to pending claims.

Nine days after this Court's decision in *Rasul*, and more than two and a half years after it had already transported the detainees to and incarcerated them at Guantanamo, the government hurriedly put in place a CSRT process to review their status. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 450. These CSRT procedures were not submitted to, reviewed, or approved by Congress. In fact, these CSRT procedures were not even issued by the Secretary of Defense. Instead, they were announced by the Deputy Secretary "solely to improve management within the Department of Defense concerning its detention of enemy combatants at Guantanamo Bay Naval Base." *See* Memorandum for the Secretary of the Navy, July 4, 2004, *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf. The announcement indicated that each of the detainees already had "been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense." *Id.; see also In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 450.[3]

[3] The CSRTs confirmed these undocumented determinations in almost 95% of the cases. In stark contrast, during the Gulf War, in accordance with U.S. Army Regulation 190-8, chapter 1-5, ¶ A (Oct. 1, 1997), the military held 1,196 individualized hearings in or near the field of operations to assess the status of captured persons. In 886 of those hearings, the detainees were found not to be combatants at all, but displaced civilians or refugees. Only 310, or about 25%, were found to be combatants, and all of those were determined to be "privileged" or legal combatants. *See* Department of Defense, *Report on the Conduct of the Persian Gulf War*, Final Report to Congress (April 1992), *cited in* David Cole, *Enemy Aliens* 42 n.69 (New Press 2003). The government simply ignored the existing military regulations with respect to the detainees now at Guantanamo and never gave them the individualized hearings prescribed by those regulations in the field near to the time and place where they were taken into custody.

On December 30, 2005, the Detainee Act became effective, marking the first effort by Congress to become involved in the treatment of detainees at Guantanamo. The Act, in relevant part, mandates new procedures to be adopted for the determination of the status of the detainees at Guantanamo. Section 1005(a)-(b) of the Act directs the Secretary of Defense to submit within six months to the appropriate committees of Congress a report setting forth the CSRT procedures for determining the status of detainees at Guantanamo.[4] The new procedures must include certain safeguards, including final review by a Designated Civilian Official appointed by the President, by and with the advice and consent of the Senate, and an assessment of whether any statement derived from or relating to a detainee was obtained as a result of coercion.

The Detainee Act confers exclusive jurisdiction upon the United States Court of Appeals for the District of Columbia Circuit over appeals from designated final decisions by the CSRTs and military commissions at Guantanamo conducted pursuant to the Act. Section 1005(e)(2) vests the D.C. Circuit with exclusive jurisdiction to review any final decision by a CSRT that an alien is properly detained as an enemy combatant, provided (i) the alien is detained at Guantanamo and (ii) the CSRT for that alien was "conducted pursuant to applicable procedures specified by the Secretary of Defense." Review under that section is limited to consideration of whether the CSRT's decision was consistent with the

[4] The Act also requires the Secretary to report the Administrative Review Board ("ARB") procedures for annually determining whether the detainees should continue to be detained at Guantanamo. The Defense Department created the ARBs to determine once a year whether the detainees still represent a threat or continue to have intelligence value. *See* Administrative Review Implementation Directive, Sept. 14, 2004, *available at* http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf. The government has not published any determinations by the ARBs.

standards and procedures specified by the Secretary of Defense for CSRTs and whether the use of those standards and procedures was consistent with applicable provisions of the Constitution and laws of the United States. Section 1005(e)(3) vests the D.C. Circuit with exclusive jurisdiction to determine, within the same limited scope of appellate review, the validity of any final decision made by a military commission pursuant to Military Commission Order No. 1, dated August 31, 2005.[5]

Section 1005(e)(1) amends the federal habeas corpus statute, 28 U.S.C. § 2241, by adding a new subsection (e) removing jurisdiction from the federal courts over applications for a writ of habeas corpus filed by or on behalf of detainees at Guantanamo and other actions against the United States or its agents relating to the detentions of aliens at Guantanamo. New subsection (e) provides that, except as stated in section 1005:

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

The key section for present purposes is section 1005(h)(1), setting forth the effective date of the Act. It provides: "IN

[5] Petitioner's military commission claims are not reviewable by the D.C. Circuit under section 1005(e)(3) because no final decision has been rendered against petitioner by the military commission appointed to try him.

GENERAL.—This [Act] shall take effect on the date of the enactment of this Act." By its plain terms, therefore, section 1005(h)(1) does not make the jurisdiction-stripping provisions in section 1005(e)(1) applicable to cases that were filed and pending before the date of enactment. That language certainly does not meet the demanding test set forth by this Court in *St. Cyr* of a "clear indication from Congress that it intended such a result." *St. Cyr*, 533 U.S. at 316. *See Lindh*, 521 U.S. at 329 n.4. To the contrary, as this Court has said: "A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date," and "the 'effective-upon-enactment' formula" is "an especially inapt way to reach pending cases." *Landgraf v. USI Film Products*, 511 U.S. 244, 257, 258 n.10 (1994). Congress presumably was aware of that observation when it enacted the Detainee Act, so that "its choice of language in [section 1005(h)(1)] would imply nonretroactivity." *Id*. at 258 n.10.

By its plain terms, therefore, the statute does not apply retroactively to strip the courts of jurisdiction over pending cases.

C. The legislative history confirms that the jurisdiction-stripping provisions do not apply to pending claims.

The legislative history of the Detainee Act confirms that the jurisdiction-stripping provisions in section 1005(e)(1) do not apply to pending claims. The original version of the Detainee Act was introduced on the Senate floor by Senator Graham on November 10, 2005, as proposed Amendment No. 2515 to the National Defense Authorization Act for Fiscal 2006, S. 1042, 109th Cong. (2005). *See* 151 *Cong. Rec.* S12, 655 (daily ed. Nov. 10, 2005). The proposed Graham amendment would have stripped the federal courts of jurisdiction to entertain habeas claims by aliens at Guantanamo and would have conferred exclusive jurisdiction in the District of

Columbia Circuit to determine, under a limited scope of review, the validity of a final CSRT decision that a detainee at Guantanamo was properly detained as an enemy combatant. *Id*.

Significantly, the proposed Graham amendment made both its habeas-stripping and judicial review provisions applicable to pending claims. It said: "The amendment made by paragraph (1) [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. Paragraph (2) [the judicial review provision] shall apply with respect to any claim regarding a decision covered by that paragraph that is pending on or after such date." 151 *Cong. Rec.* S12, 655 (daily ed. Nov. 10, 2005).

There was bi-partisan opposition in the Senate to the proposed Graham amendment, not in the least because neither the Senate Judiciary Committee nor the Senate Armed Services Committee had considered or held any public hearings about it. *See* 151 *Cong. Rec.* S12, 657-59, 664-65, 667 (daily ed. Nov. 10, 2005) (remarks of Senators Bingaman, Specter, and Levin). Nevertheless, the Senate approved the Graham amendment on November 10, 2005, by a vote of 49-42. *Id*. at 667-68.[6]

Even after the Senate approved the Graham amendment, it continued to generate controversy and opposition. *See* 151 *Cong. Rec.* S12, 727-33 (daily ed. Nov. 14, 2005) (remarks of and materials introduced by Senators Bingaman and Graham). On November 14, 2005, Senator Graham introduced Amendment No. 2524 on behalf of himself, Senator Levin, and Senator Kyl. *Id*. at 752-53.[7] Senator Graham explained

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[6] The amendment approved by the Senate actually was Amendment No. 2516, a version offered by Senator Graham whose relevant provisions were identical to Amendment No. 2515.

[7] That same day Senator Bingaman introduced an amendment that would have re-written the Graham amendment and conferred jurisdiction

that Senator Levin "made some very good points" during his debate with Senator Graham four days earlier, and Senator Graham, Senator Levin, Senator Kyl, and others had drafted a new amendment in which "we have addressed some of the weaknesses in my original amendment." *Id.* at 753.

Most importantly, the proposed Graham-Levin-Kyl amendment eliminated the language in the Graham amendment that would have made the habeas-stripping provision applicable to pending claims. Instead, it made the provisions of the Act effective upon enactment and specified that only the provisions for judicial review of final CSRT and military commission decisions would apply to pending claims. The proposed Graham-Levin-Kyl amendment said:

> (e) EFFECTIVE DATE.—
>
> (1) IN GENERAL.—Except as provided in paragraph (2), this section shall take effect on the day after the date of the enactment of this Act.
>
> (2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS.—Paragraphs (2) and (3) of subsection (d) 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.

151 *Cong. Rec.* S12, 753 (daily ed. Nov. 14, 2005).

On November 15, 2005, the Senate considered the proposed Graham-Levin-Kyl amendment. *See* 151 *Cong. Rec.* S12, 799-804 (daily ed. Nov. 15, 2005). Immediately prior to the Senate vote, Senator Levin took the floor to emphasize the importance of the change made by the proposed Graham-Levin-Kyl amendment to the original Graham amendment

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upon the D.C. Circuit to review pending and future habeas claims by Guantanamo detainees. 151 *Cong. Rec.* S12, 727 (daily ed. Nov. 14, 2005). This amendment was defeated. *See* 151 *Cong. Rec.* S12, 799-80 (daily ed. Nov. 15, 2005).

eliminating the language that would have made the habeas-stripping provisions applicable to pending claims, specifically mentioning petitioner's claims in this case. *See id.* at 802. Senator Levin said: "The habeas prohibition in the Graham amendment applied retroactively to all pending cases—this would have the effect of stripping Federal courts, including the Supreme Court, of jurisdiction over all pending cases, including the Hamdan case." *Id*. However, "[u]nder the Graham-Levin-Kyl amendment, the habeas prohibition would take effect on the date of enactment of the legislation. Thus, this prohibition would apply only to new habeas cases filed after the date of enactment." *Id*. In this manner, said Senator Levin, the proposed Graham-Levin-Kyl amendment "preserves comity between the judiciary and legislative branches. It avoids repeating the unfortunate precedent in *Ex parte McCardle* [74 U.S. (7 Wall. 506) (1869)], in which Congress intervened to strip the Supreme Court of jurisdiction over a case which was pending before that Court." *Id.* Senator Graham, who also spoke on the floor prior to the vote, said nothing to the contrary, and Senator Levin's explanation was echoed by Senator Reid. *Id.* at 800-03.

The Senate approved the Graham-Levin-Kyl amendment by a vote of 84-14. *See* 151 *Cong. Rec.* S12, 803 (daily ed. Nov. 15, 2005). The 70% increase in the number of Senators supporting Graham-Levin-Kyl, compared to the number supporting the original Graham amendment, plainly reflects widespread satisfaction with the changes made by Graham-Levin-Kyl, including the one specifically noted by Senator Levin prior to the vote that eliminated the language making the habeas-stripping provision applicable to pending cases.

Because the version of the National Defense Authorization Act for Fiscal 2006 passed by the House of Representatives (National Defense Authorization Act for Fiscal 2006, H.R. 1815, 109th Cong. (2005)) did not contain the Graham-Levin-Kyl amendment (and other provisions) of the Senate version, the two versions went to conference. The legislation that

emerged from conference, entitled the Detainee Treatment Act of 2005, differed in several respects from the Graham-Levin-Kyl amendment, including the addition of a provision stripping the federal courts of jurisdiction not only over habeas claims but also over other actions related to the detentions at Guantanamo. *See* H.R. Conf. Rep. No. 109-360, *printed in* 151 *Cong. Rec.* H12, 833-35 (daily ed. Dec. 18, 2005). Significantly, however, no material change was made to the effective date language. The legislation still provided, in section 1005(h)(1), that: "IN GENERAL. –" the Act "shall take effect on the date of enactment," and, in section 1005(h)(2), that only the judicial review provisions governed by sections 1005(e)(2) and (3) were applicable to pending claims. *Id*.

An identical version of this legislation emerged from conference as part of the Department of Defense Appropriations Act, 2006, H.R. 2863, 109th Cong. (2005). *See* H.R. Conf. Rep. No. 109-359, *printed in* 151 *Cong. Rec.* H12, 309-11 (daily ed. Dec. 18, 2005). Congress approved the conference reports for both the National Defense Authorization Act for Fiscal 2006 and the Department of Defense Appropriations Act 2006.[8] *See* 151 *Cong. Rec.* H12, 242 (daily ed. Dec. 18,

[8] Although committee reports are usually authoritative sources for finding Congress' intent (*see Garcia v. United States*, 469 U.S. 70, 76 (1984)), the are no committee reports for the Detainee Act, and these conference reports do not shed any light on its relevant provisions. The Joint Explanatory Statement in the conference report to the Appropriations Act simply states: "The conferees include a new title X concerning matters relating to detainees, the "Detainee Treatment Act of 2005." H.R. Conf. Rep. No. 109-359, *printed in* 151 *Cong. Rec.* H12, 610 (daily ed. Dec. 18, 2005). The Joint Explanatory Statement of the Committee of Conference in the conference report to the Authorization Act simply states: "Subsection (h) would establish the effective date of the provision." H.R. Conf. Rep. No. 109-360, *printed in* 151 *Cong. Rec.* H12, 112 (daily ed. Dec. 18, 2005). After the conference reports were submitted, Senators Graham and Kyl inserted into the record a long colloquy in which, among other things, they claimed that the jurisdiction-

2005) (House approval of Authorization Act); 151 *Cong. Rec.* H12, 269 (daily ed. Dec. 19, 2005) (House approval of Appropriations Act); 151 *Cong. Rec.* S14, 275 (daily ed. Dec. 21, 2005) (Senate approval of Authorization Act); 151 *Cong. Rec.* S14, 2254 (daily ed. Dec. 21, 2005) (Senate approval of Appropriations Act). The President signed the Department of Defense Appropriations Act 2006 on December 30, 2005. That is the effective date of the Detainee Act.

Thus, the legislative history of the Detainee Act confirms *amici's* construction of the Act. The Court often looks to changes in the language of an original bill and enacted legislation to help determine the meaning of that legislation. *See, e.g., F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2365-66 (2004); *Russello v. United States*, 464 U.S. 16, 23-24 (1983). Congress' deliberate elimination from the Detainee Act of language in the original bill that would have made the jurisdiction-stripping provisions of the Act applicable to pending claims confirms that those provisions do not apply to pending claims.

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stripping provisions of the Detainee Act do apply to pending cases. *See* 151 *Cong. Rec*. S14, 260-68 (daily ed. Dec. 21, 2005). The President said the same thing in his statement accompanying the signing of the Act. *See* Statement of President, Dec. 30, 2005, *available at* http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html). But these *post hoc* remarks provide no coherent explanation for the absence of any reference in section 1005(h) to the application of the jurisdiction-stripping provisions to pending claims, and they are not entitled to any weight. *See Weinberger v. Rossi*, 456 U.S. 25, 35 (1982). Furthermore, to the extent these remarks reflect a difference of opinion about the meaning of the Act, they underscore that Congress did not use the requisite clear and unambiguous language in the Act to effect a retroactive repeal of habeas and non-habeas jurisdiction. *See St. Cyr*, 533 U.S. at 299; *Lindh*, 521 U.S. at 328 n.4.

D. Any uncertainty about the application of the jurisdiction-stripping provisions should be resolved against applying them to pending claims.

If there were any uncertainty as to whether the jurisdiction-stripping provisions of the Detainee Act apply to pending claims, this Court's decision in *Lindh v. Murphy*, 521 U.S. 320 (1997), teaches that such uncertainty should be resolved against application of those provisions to pending claims. Indeed, the issue of statutory construction decided by the Court in *Lindh* is very similar to the issue in this case.

Lindh dealt with provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The AEDPA amended the habeas corpus statute at 28 U.S.C. § 2254(a) and provided that, on habeas applications by state court criminal defendants, relief shall not be granted with respect to any claim that was adjudicated on the merits in the state court proceedings unless that adjudication was unreasonable in specified ways. The question before the Court was whether this provision applied to habeas petitions pending at the time the AEDPA was enacted. Although there was uncertainty about some of the language of the AEDPA ("in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting"), the Court construed the amendments to the habeas corpus statute not to apply to pending claims. 521 U.S. at 336.

The Court gave two reasons for its decision in *Lindh*. First, the Court noted that the provision in the AEDPA amending § 2254(a) did not specify an effective date, while other provisions in the AEDPA expressly stated that they applied "to cases pending on the date of enactment." 521 U.S. at 326-27. The Court deduced that the amendments affecting § 2254(a) "were assumed and meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act." *Id*. at 327. Second, the other provisions of the AEDPA had substantive as well as pro-

cedural effects. Had they had only procedural effects, the expectation would have been that they would apply to pending cases. Because they went beyond procedural matters, the Court reasoned that Congress wanted to make sure they would apply to pending cases by explicitly saying so. 521 U.S. at 327. In contrast, Congress did not explicitly say so—indeed, it did not say so at all—with respect to the provisions affecting § 2254(a) which, as the Court noted, "govern[ ] standards affecting entitlement to relief" and have substantive effect. *Id*. The Court concluded that the different treatment accorded by Congress to the two sets of provisions "illustrates the familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted." *Id.* at 330.

For the same two reasons, any uncertainty about the application of the jurisdiction-stripping provisions of the Detainee Act should be resolved against the application of those provisions to pending claims. First, because section 1005(h)(1) makes the Act effective as of the date of its enactment, it may be assumed that its jurisdiction-stripping provisions were "meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act." *Lindh*, 521 U.S. at 327. Second, because those provisions affect the substantive rights of the detainees at Guantanamo by effectively denying them access to habeas corpus relief, Congress' failure to specify in section 1005(h)(1) that those provisions apply to pending claims, while at the same time specifying in section 1005(h)(2) that the judicial review provisions *do* apply to pending claims that are governed by those provisions, demonstrates that Congress intentionally and purposely legislated that the jurisdiction-stripping provisions would not apply to pending claims. *See KP Permanent Make-Up v. Lasting Impression I, Inc*., 125 S. Ct. 542, 548 (2004) ("[w]here Congress includes particular language in

one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (quoting *Russello*, 464 U.S. at 23)).

II. IF THE DETAINEE ACT DIVESTS THE COURT OF JURISDICTION OVER THIS CASE, THE ACT VIOLATES THE SUSPENSION CLAUSE AND IS UNCONSTITUTIONAL.

As *amici* have shown, the jurisdiction-stripping provisions of the Detainee Act do not apply to petitioner's claims. Were the Court to construe the Act to apply those provisions to petitioner's claims, however, the Act would be unconstitutional under the Suspension Clause.[9]

Article I, § 9, cl. 2, of the Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." This Court held in *Rasul* that the detainees at Guantanamo, "no less than American citizens," are entitled to the privilege of habeas corpus.[10] 124 S. Ct. at

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[9] *Amici* for the Center for National Security Studies and the Constitution Project, and *amici* for Professors of Law, have filed briefs addressing this and other serious constitutional problems the Court would be compelled to address if it construed the Detainee Act to divest it of jurisdiction over petitioner's pending claims. Present *amici* discuss only the Suspension Clause issue.

[10] Although the Court premised its conclusion on 28 U.S.C. § 2241, it pointed out that "[h]abeas corpus is . . . a writ antecedent to statute . . . throwing its root deep into the genius of our common law . . . [and it] became 'an integral part of our common law heritage' by the time the Colonies achieved independence." 124 S. Ct. at 2692. The Court further pointed out: "At common law, there was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown.' . . . Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.'" *Id.* at 2697.

2698. "[A]t the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789,'" and, as it existed in 1789, the writ unquestionably "served as a means of reviewing the legality of Executive detention." *St. Cyr*, 533 U.S. at 301. Importantly, historical precedents "contain no suggestion that habeas relief in cases involving Executive detention was only available for constitutional error." *Id*. at 302. Rather, such review encompasses the full range of detentions based on errors of law or fact. *Id*. Because Congress made no findings in the Detainee Act that the Nation is confronting a "Rebellion" or "Invasion" such that "the public Safety may require" the suspension of the Guantanamo detainees' right to the privilege of habeas corpus, the Act cannot constitutionally suspend that right.[11]

To be sure, "Congress could, without raising any constitutional questions, provide an adequate substitute [for habeas] through the courts of appeals." *St. Cyr*, 533 U.S. at 314 n.38. But the substitution of a collateral remedy for habeas comports with the Suspension Clause only if it is "neither inadequate nor ineffective to test the legality of a person's detention." *Swain v. Pressley*, 430 U.S. 372, 381 (1977). The Detainee Act provides neither an adequate nor an effective alternative to resolve and remedy petitioner's and *amici's* pending habeas claims.

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[11] When Senator Graham introduced the original amendment that became the Detainee Act, he did not mention any "Rebellion" or "Invasion" or suggest that the amendment was required for "the public Safety." *See* 151 *Cong. Rec*. S12, 655-57, 662-65, 667 (daily ed. Nov. 10, 2005). Nor did any other Senator who spoke in favor of the amendment mention or suggest that. *See id.* at S12, 659-60. Instead, Senator Graham said the amendment was needed because, among other things, he believed the habeas petitions filed in the wake of the Court's decision in *Rasul* were unduly burdening the federal courts and raising frivolous issues. *See id.* at S12, 656-57.

First, the limited judicial review provisions in section 1005(e)(2) and 1005(e)(3) do not confer on detainees the rights guaranteed by the habeas statutes and necessary to effectively challenge the legality of executive detention. For example, those provisions do not guarantee the detainees the right to a factual return "certifying the true cause of the detention," the opportunity to traverse the return, and the right to a "hearing," as provided by 28 U.S.C. § 2243. The Court has recognized that, at a minimum, "[p]etitioners in habeas corpus proceedings . . . are entitled to careful consideration and plenary processing of their claims including full opportunity for the presentation of the relevant facts." *Harris v. Nelson*, 394 U.S. 286, 298 (1969); *see also Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2644-49 (2004); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 112, 125 (1807) (Court sat for five days and fully examined and carefully considered the facts and testimony on which the habeas petitioners were imprisoned). Those provisions also do not authorize the detainees to develop evidence for the court in their defense, or to seek leave to engage in discovery, including discovery aimed at proving that evidence against them was obtained through torture or undue coercion. *See* 28 U.S.C. §§ 2246, 2247; Rules Governing Section 2254 Cases in the United States District Courts, at Rule 1(b) ("[t]he district court may apply any or all of these rules to a habeas corpus petition not covered by Rule 1(a)"), Rules 6-8 (discovery, expanding the record, and evidentiary hearings). *See generally Harris v. Nelson*.[12] Under the judicial review provisions the detainees

[12] The Kuwaiti Detainees have a motion pending in the district court for leave to engage in limited discovery for the production of FBI documents already publicly disclosed in redacted form that include eyewitness accounts by FBI agents of torture and coercive techniques used during the interrogation of detainees at Guantanamo. The disclosure of these and other documents led to Congress' adoption of the so-called McCain Amendment introduced by Senator McCain, prohibiting the use of such techniques against detainees. The McCain Amendment was enacted in sections 1002-1004 of the Detainee Act.

would not be authorized to litigate on the merits a facial challenge to the CSRTs or claims arising under the treaties of the United States, because those provisions authorize only as applied challenges to designated final CSRT determinations. The rights not authorized by the judicial review provisions are essential to *amici's* challenge to the lawfulness of their detentions.

Second, any review petitioner and *amici* could obtain under the judicial review provisions of the Act would be meaningless. As noted at the outset, neither petitioner nor *amici* were afforded CSRTs based on procedures specified by the Secretary of Defense that include the safeguards required by the Detainee Act, including the requirement that a duly appointed Designated Civilian Official have final review authority and that the CSRT assess whether any statement derived from or relating to the detainee was obtained through coercion. Instead, their CSRT determinations were based on pre-Act procedures that were not even issued by the Secretary of Defense. The district court has held that those procedures were patently deficient and denied the detainees minimal due process and a fair opportunity to challenge the lawfulness of their detentions as guaranteed by habeas because they "deprive[d] the detainees of sufficient notice of the factual bases for their detentions and den[ied] them a fair opportunity to challenge their incarceration," allowed for "reliance on statements possibly obtained through torture or other coercion," and employed a vague and overbroad definition of "enemy combatant." *In re Guantanamo Detainees*, 355 F. Supp. 2d at 468-78; *see also Hamdi*, 124 S. Ct. at 2660 (concurring and dissenting opinion of Souter, J.). Congress implicitly recognized the deficiencies of these pre-Act CSRT procedures by enacting sections 1005(a)-(b) which, going forward, require the Secretary of Defense to establish and to report to Congress new CSRT procedures containing safeguards missing from the pre-Act procedures.

Thus, even if petitioner and *amici* could obtain the limited review before the D.C. Circuit provided under section 1005(e)(2) of CSRT determinations based on those pre-Act procedures—and the plain language of section 1005(e)(2) requires that the CSRT for a detainee seeking such review must have been "conducted pursuant to applicable procedures specified by the Secretary of Defense"—such review would be essentially meaningless. This limited appellate-type review might be adequate following a hearing process that is itself sufficient to enable a petitioner to contest the factual accusation against him. It is clearly not adequate when the hearing process denied petitioner that opportunity, as did the CSRTs conducted in the past. The D.C. Circuit would be unable in those circumstances to provide a remedy.

Third, under section 1005(e)(2) and section 1005(e)(3) of the Detainee Act, judicial review may be obtained only of designated "final" decisions of the CSRTs and military commissions conducted pursuant to the procedures specified by the Secretary of Defense. The government, by postponing or refusing to make such "final" CSRT or military commission determinations with respect to petitioner and *amici*, could circumvent the judicial review provisions of sections 1005(e)(2) and 1005(e)(3) and deny petitioner and *amici* even the very limited access to the courts promised by the Detainee Act. Indeed, the Detainee Act does not require that the CSRTs ever render a "final" status determination with respect to a detainee. This omission is particularly significant for *amici*, who already have been the subject of the defective CSRT determinations prior to the enactment of the Detainee Act, and who could therefore languish indefinitely without ever being the subject of a CSRT under the procedures that meet the standards of the Act.

In sum, the provisions of the Detainee Act do not provide petitioner and *amici* with an adequate or effective alternative to habeas corpus. Therefore, if the Act's jurisdiction-stripping provisions were construed to apply to pending

claims, the Act would violate the Suspension Clause and be unconstitutional.

Where, as here, an interpretation of a statute would raise serious constitutional problems, the Court is "obligated to construe the statute to avoid such problems." *St. Cyr*, 533 U.S. at 300. By construing the Detainee Act so that its jurisdiction-stripping provisions do not apply to petitioner's pending claims, the Court would avoid the serious constitutional issue of whether the Act violates the Suspension Clause. For this additional reason the Court should hold that the jurisdiction-stripping provisions do not apply to petitioner's pending claims.

CONCLUSION

For the foregoing reasons, the Court should hold that the Detainee Act does not divest the Court of jurisdiction over petitioner's claims.

Respectfully submitted,

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