No. 05-184

IN THE
# Supreme Court of the United States

SALIM AHMED HAMDAN,
*Petitioner,*

v.

DONALD RUMSFELD ET AL.,
*Respondents.*

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

## PETITIONER'S SURREPLY REGARDING RESPONDENTS' MOTION TO DISMISS


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The government contends that this Court must construe the Detainee Treatment Act (DTA) [1] to strip this Court of jurisdiction to decide a pending case of enormous national and international significance, even though the Act says nothing about this Court's jurisdiction and specifically provides for retroactive application of its other provisions. Every relevant statutory canon counsels against the government's conclusion. Critically, the government has yet to deny that the obvious effect of its interpretation would be to deprive not only this Court, but *any* court, from deciding the questions upon which certiorari has been granted. That consequence not only renders the statute retroactive within the meaning of *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), it also provides a compelling reason to reject the government's interpretation and avoid grave constitutional questions. Thus, rather than dismiss this case a few short weeks before the scheduled oral argument, this Court should deny the motion or, at the very least, defer its resolution until the hearing on the merits.[2]

1. Section 1005(e)(1) does not apply to this case. Although all of the DTA's provisions applied to pending cases in the first draft of the bill, the bill was amended to exclude (e)(1) from that rule. The government's contrary position cannot be reconciled with elementary canons of construction: It reads sections 1005(h)(1) and (2) to have the same meaning despite their very different language (Pet. Opp. 6-7); it reads into the DTA an effective-date provision Congress eliminated (Pet. Opp. 8-12); and it strips this Court of

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[1] The text of the DTA is attached in Appendix A. The appendix was inadvertently omitted from Hamdan's opposition.

[2] Missing from the government's filings is any answer to the simple conclusion that it's reading of the DTA gives the President the power to block *any* federal court review by leaving the final decision on his desk. The two current court-martial death-penalty cases have awaited final decisions by the President for ten years and five years, respectively. *See Amicus Br. of Chief Defense Counsel in Support of Cert.* 2, 14. Even those cases have already been reviewed by the Court of Appeals for the Armed Forces and this Court on certiorari. If the DTA permits the President to follow such a course *before* this Court's review, and in an *ad hoc* untested system, it would raise deep constitutional concerns.

jurisdiction over a pending case and raises constitutional questions, without a clear statement of intent to do so (Pet. Opp. 13-17).

a. Under *Lindh v. Murphy*, 521 U.S. 320 (1997), to determine whether a statute applies to pending cases, this Court first employs ordinary tools of statutory construction to determine Congress's intent. Only if these efforts fail does the Court rely on default rules of the type upon which the government's Motion entirely depends. Congress made its intent not to apply the DTA's jurisdiction-stripping provision to pending cases plain by deliberately amending the bill to provide that sections (e)(2) and (e)(3), but not (e)(1), *shall* apply to pending cases. The government—which still has no explanation whatsoever for that change—attempts to evade the problem by reframing the interpretive question as whether Congress had "reason to add special language to ensure the application of Section 1005(e)(1) to pending cases." Reply 4-5. But the question is not whether Congress would have had to add such language, but why it *removed* language that made the jurisdiction-stripping provision retroactive, if not for the reason that it intended only prospective application.[3] The government has no answer.

In its Reply, the government for the first time relies on *Martin v. Hadix*, 527 U.S. 343, 356 (1999), for the proposition that no inference arises under *Lindh* when provisions address "wholly different subject matters." Reply 5. While

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[3] The legislative history confirms that the reason for the change in language was the desire to avoid interfering with this Court's jurisdiction in this very case. Opp. 8-12; App. 21a-23a, 28a-29a. The government attacks that extensive history as a "one-sided account" "largely generated by a single Senator." Reply 7-8. To the extent the legislative history is "one-sided," that is simply because Senator Levin was the *only* one of the Act's authors who said *anything* before passage about pending cases. The only other cosponsor statement was that of Senator Reid, who explicitly, repeatedly, and publicly agreed with Senator Levin. *See* 151 Cong. Rec. S12840 (Nov. 15, 2005) (stating that Sen. Reid was cosponsor); Pet. Opp. 9 n.4, 11 & n.8. The government's assertion to the contrary is not supported by its citations, which consist of nothing more than statements explaining that detainees will be allowed to bring post-conviction challenges to the particular results of their commission adjudications. See Reply 8 n.7. That view is completely consistent with those of Senators Levin and Reid.

*Hadix* may apply to section 1005(b)(2)—which prospectively *adds* rights to prevent coerced testimony in CSRTs—the case has no relevance to section 1005(e)(1). Section 1005(e)(1) is integrally related to, rather than "wholly different" from (e)(2) and (3). The government itself states that (e)(1) effectuates the exclusive jurisdiction created by (e)(2) and (e)(3), Reply 3, *and* that (e)(3) ousts jurisdiction, Reply 7, 13. These provisions are at least as related to one another as those in *Lindh*. In this case, Congress considered all three subsections together and applied only the latter to pending cases.

The government further argues that Hamdan's interpretation would give him greater appeal rights than the pre-DTA system. Reply 7. That claim is wholly contradicted by the government's own assurances that the old system guaranteed full federal jurisdiction after conviction. [4] Hamdan, moreover, does not seek review of the "final decision" Congress reserved to the D.C. Circuit, but rather review of the fundamental legality of the Commission itself—a question the government conspicuously declines to place within the D.C. Circuit's jurisdiction. Reply 10 n.8.

b. Unable to argue that the DTA's plain text manifests Congress' intent to strip this Court of its jurisdiction, the government resorts to a default rule which, it says, requires this Court to assume that Congress intended to interfere with this Court's jurisdiction over a pending case unless Congress clearly indicated a contrary intent. See Reply 5. But this Court has never dictated to Congress that it must impose an express "savings clause" to avoid the withdrawal of access to the Great Writ, particularly in light of the

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[4] See J.A. 184 (district court); J.A. 261 (Court of Appeals, "There's no question at the end of the day, at the end of commission proceedings, if Mr. Hamdan is convicted, he will have the opportunity to file a habeas petition and advance and have resolved whatever cognizable claims he chooses to make."). The DTA restricts those rights by requiring a "final decision," and not simply a "convict[ion]," before federal court review.

The government is also wrong to say that Hamdan's interpretation means the DTA has no effect on the dozens of pending detainee actions, Reply 2, for those with final decisions—which the government contends is nearly all of them—may be streamlined under the DTA. Pet. Opp. 22-23.

constitutional difficulties such a rule would engender.

Rather, the government now seemingly concedes, as it must, that *Bruner v. United States*, 343 U.S. 112 (1952), and similar decisions involve statutes that "affect only *where* a suit may be brought, not *whether* it may be brought at all," *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997). Thus, in *Hallowell v. Commons*, 239 U.S. 506, 508 (1916), the legislation preserved the plaintiff's claim entirely but held that it must be presented to a confirmed statutory Executive-Branch official instead, which took "away no substantive right, but simply change[d] the tribunal that is to hear the case." Because such statutes do not eliminate previously conferred rights (much less constitutional rights Congress is not at liberty to dispense),[5] they do not give rise to a presumption against retroactivity.[6] The DTA, however, is different, for it eliminates entirely the ability to ever bring an array of claims. See Pet. Opp. 13-16. As noted in Hamdan's Response, to suggest that this case is of a piece with *Hallowell* is to fundamentally misconstrue the issues at stake and the nature of the post-conviction review of the DTA.

c. While the government's brief includes a footnote maintaining that petitioner will be able "to advance

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[5] Nothing in *Hallowell* suggests that the repealing statute foreclosed constitutional or systemic challenges to Indian land allotments. To the contrary, there is every reason to believe that had Hallowell sought to bring claims analogous to Hamdan's, he could have brought a common-law mandamus action. Indeed, just four months after *Hallowell*, this Court expressly *refused* to decide whether there was also no longer an available mandamus claim if the Secretary of the Interior abused his discretion or otherwise acted without jurisdiction. *See Lane v. United States ex rel. Mickadiet*, 241 U.S. 201, 209-10 (1916); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004) (summarizing pre-APA mandamus practice).

[6] The government's new claim that Congress would have known that the jurisdiction-stripping provisions did not trigger a presumption against retroactivity, such that it was unnecessary to specify that section 1005(e)(1) applies to pending cases, rests on the implausible supposition that Congress followed two concurring opinions and two dissenting opinions of members of this Court. Reply 9-10. The notion that those opinions state the law, and that Congress in turn relied on them, is even more strained as a canon of statutory construction than as a theory of jurisprudence.

constitutional and statutory challenges to his military commission in the event he is convicted," Reply 10 n.8, that carefully worded statement avoids taking a position on the central question upon which its reliance on *Bruner* depends: whether Hamdan would be permitted to bring his *present* claims in the D.C. Circuit. As Hamdan has stated, Pet. Opp. 14-16, and as the government never contradicts, the DTA precludes the two questions upon which certiorari was granted.[7] Until the government favors this Court with a straightforward answer otherwise, there is no basis for accepting its vague suggestions that the DTA only transfers jurisdiction instead of destroying his claims altogether.

The Reply, moreover, is internally inconsistent. It maintains that Congress "presumably" specified that sections 1005(e)(2) and (3) apply to pending cases "to *reinforce* the jurisdiction-removing effect of Section 1005(h)(1)." Reply 6. But on the government's reading of *Bruner*, it was entirely unnecessary to "reinforce" this point, and there certainly was no more reason to "reinforce" it with respect to sections 1005(e)(2) and (3) than (e)(1).[8] Rather, the government seeks to restore the effective-date language of the original Act that the Senate explicitly abandoned. The "plain" language of the enacted law is most fairly read as not applying to this case, or at the very least is ambiguous. To argue that it manifests Congress's "clear intention" to foreclose Article III review of Hamdan's claims is to turn statutory-construction jurisprudence on its head.[9]

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[7] The government has argued that the DTA did "more than remove jurisdiction, but…also limit[ed] the scope of cognizable claims." Mo. Dis. 19 n.9; i*d.* 8 (Act "further confines the District of Columbia Circuit's jurisdiction"); *id*. 19 (acknowledging "some eliminated claims").

[8] Indeed, the government has offered no explanation for how a case could possibly be "pending" under (h)(2) when its own reading of (h)(1) wipes all cases out and totally precludes them from "pending," Pet. Opp. 7.

[9] At the very least, there is no reason to conclude that Congress would have assumed, on the basis of this Court's past decisions, that section (e)(1) would apply to pending cases in the absence of a clear statement. The point is well-illustrated by the fact that to support its interpretation of its default rule, the government is forced to rely repeatedly on concurring and dissenting opinions from this Court. Reply 9-10. (Some of those

2. Even if section (e)(1) applied to pending cases, the government does not even attempt to respond to Hamdan's two independent reasons why the district court nonetheless retains jurisdiction over this case. *First*, Hamdan argued that the DTA bars the district court only from "hear[ing] or consider[ing]" specified original actions, but not *carrying out* an order of this Court. Pet. Opp. 30-31. Congress was well aware of this Court's grant of certiorari in this case, and its jurisdiction under 28 U.S.C. 1254(1), but it expressly repealed neither this Court's, nor all of the district court's, jurisdiction. *Amicus Br. of Former Judges Hufstedler & Norris* 4-5. The cases cited by the government beg the question—which is whether the DTA repeals all of the district court's jurisdiction—as the laws at issue in those precedents did.[10]

*Second*, nothing in the government's lengthy reply brief responds to Hamdan's compelling argument that the DTA does not deprive the district court of jurisdiction over his mandamus claims under 28 U.S.C. 1361. Pet. Opp. 28-29; *Amicus Br. of Arthur Miller* 6-7. Accordingly, the Court is free to reach the merits and remand to the district court (should a remand even be necessary, Pet. Opp. 30 n.30) to issue a writ of mandamus. Not only does Hamdan's mandamus petition allow this Court to avoid *any* constitutional question about the DTA, Pet. Opp. 29, it also sidesteps the government's fear that this Court would be deluged by Guantanamo litigation. Reply 16. Lawsuits that challenge conditions of confinement would end, but not this case.

3. The government also wrongly argues that Hamdan's claims are precluded by section (e)(3)'s "exclusive" review scheme. Nothing in *Thunder Basin Coal Co. v. Reich*, 510 U.S.

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opinions, such as Justice Scalia's *Landgraf* concurrence, favor Hamdan by freezing into place the district court opinion. Pet. Opp. 26)

[10] The statute in *Bruner*, for example, stated: "The district courts *shall not have jurisdiction under this section of....[a]ny civil action* to recover fees, salary, or compensation for official services of officers or employees of the United States." 343 U.S. at 113 & n.2 (emphasis added). The statutes in *Hallowell* (Act of June 25, 1910, ch. 431, 36 Stat. 855), and *Gallardo v. Santini Fertilizer Co.*, 275 U.S. 62 (1927) (Act of Mar. 4, 1927, ch. 503, § 48) also eliminated all district court jurisdiction. The DTA, in contrast, only bars district courts from "hear[ing] or consider[ing]" certain actions, and targets their original jurisdiction, not their post-1254(1) activity.

200 (1994), supports that conclusion. Besides the numerous distinctions between the Mine Act and the DTA, Pet. Opp. 20-21, *Thunder Basin* was unequivocal that constitutional claims outside of the agency's expertise, and claims "wholly collateral" to the "comprehensive [] structure" *could* be raised in pre-enforcement proceedings. Pet. Opp. 20-21. The government responds that Hamdan's claims are ones "with which the military is undeniably well-versed." Reply 14. But Hamdan's claims turn on federal statutes, treaties, and constitutional provisions about presidential authority – questions within this Court's, not a commission's, expertise. *Pub. Util. Comm'n v. United States*, 355 U.S. 534, 540 (1958).

Even assuming that Hamdan (1) has no *Abney*-like right to pretrial review (a claim rejected below);[11] and (2) will receive post-final decision review (for which there is no guarantee), the government has yet to contradict Hamdan's contention that the DTA forbids the claims on which certiorari was granted.[12] Without a clear statement, it is impossible to conclude that Congress meant not only to deprive Hamdan of his day in Court *now*, but potentially *forever*.

4. The government further asserts that the DTA "codified" prior abstention doctrine; but that doctrine, as both courts below have found, is inapplicable to structural challenges such as those before this Court. Pet. Opp. 22 (citing sources).[13] The questions presented do not involve

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[11] Nor does the government respond to this argument, save for the unsupported assertion that "petitioner will not suffer irreparable harm" (Reply 14). But Hamdan will suffer a harm comparable to that suffered in both *Abney* and *Schlesinger*. Pet. App. 4a. Moreover, Hamdan does not seek immunity from military trial. Pet. Br. 8.

[12] The APA's rejection of judicial supervision is meant only to foreclose Article III *supervisory* or *corrective* review. *See, e.g.*, *Hiatt v. Brown*, 339 U.S. 103, 111 (1950); *Ex parte Vallandigham*, 68 U.S. 243 (1864). Hamdan raises no such claim, and no court has *ever* suggested that the comprehensiveness of the military justice system forecloses Article III review of the underlying legality and constitutionality of *ad hoc* tribunals. Both *Quirin* and *Schlesinger* stand decisively to the contrary. Pet. Opp. 14.

[13] Indeed, this Court has made clear that it "did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented. Moreover, it appeared especially unfair to

some minor, collateral challenge that can be dealt with later, but the most basic and foundational questions of all: Is the system that will try this man and potentially impose life imprisonment authorized, and does a defendant have *any* rights under the Constitution, treaties, and laws of the United States?[14] If anything, the fact that the DTA does not guarantee Hamdan any federal court review after conviction, should he never receive a "final decision" or be sentenced to less than ten years, takes this case further outside *Schlesinger*.

5. The fact that the government's interpretation raises so many deep constitutional questions is reason enough to reject it—particularly when a fair interpretation avoids them. Pet. Opp. 32; *Ex parte Burford*, 7 U.S. 448, 449 (1806).

a. The government's sole answer to the Exceptions Clause problem is to suggest that this Court may vacate the judgment below. If the government is reading the DTA to direct the Court to do that, the DTA would prescribe a rule of decision in violation of *United States v. Klein*, 80 U.S. 128 (1872). In any event, vacatur does not solve the problem, which arises from the fact that the government's reading of the DTA bars federal courts altogether from hearing the questions presented in this case—questions that go to the heart of our constitutional order.[15] Pet. Opp. 16 n.13, 25-26.

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require exhaustion of military remedies when the complainants raised substantial arguments denying the right of the military to try them at all." *Noyd v. Bond*, 395 U.S. 683, 696 n.8 (1969). To extend abstention to *ad hoc* commissions would, as both courts below found, extend it far past any current use of the doctrine. There is no indication Congress intended that.

[14] The fact that the Court had already answered those questions in the court-martial context made *Schlesinger v. Councilman*, 420 U.S. 738 (1975) possible. So, too, was *Johnson v. Eisentrager*, 339 U.S. 763 (1950), made easier by resolution of the threshold questions in *Quirin* and *Yamashita*.

Indeed, the government's abstention claim here simply repeats its argument on the merits, Gov't Br. Opp. Cert. i (proposing it as a question to be added), *id.* 10-16, 21-22, and should be considered alongside them.

[15] This Court has repeatedly explained why monetary precedents such as *Bruner* and *Hallowell* are inapplicable, stating that unlike admiralty, "when fundamental rights are in question, this Court has repeatedly emphasized 'the difference in security of judicial over administrative action'" and that "this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided."

b. With respect to the Suspension Clause, the government first contends that DTA review is an adequate habeas substitute. But the DTA does not permit the questions presented in this case to be raised on post-final decision review, particularly claims based on a treaty. *See Amicus Br. of Center for Nat'l Security Studies* 21-26.

The government next argues that Hamdan has no constitutional rights because he is "detained outside of the United States." Reply 18. This claim disregards this Court's square holding in *Rasul v. Bush*, 542 U.S. 466, 475 (2004), that Guantanamo is within the territorial jurisdiction of the United States and that detainees appear to have rights protected by habeas, *id.* at 484 n.15. Indeed, Justice Kennedy concluded that the detainees had a constitutional right, unlike the petitioners in *Eisentrager*, to bring habeas petitions. *Id.* at 487-88 (Kennedy, J., concurring in the judgment).[16] Hamdan's claim to habeas is stronger than that in *Rasul*, for he is subject to trial and potentially lifetime imprisonment, and the Court's comparative competence is far stronger when assessing the lawfulness of a trial system.

Accordingly, *Eisentrager* is easily distinguished, both because Hamdan is being held in U.S.-controlled territory and because Hamdan contends he is not an enemy alien. Hamdan, a citizen of Yemen (a country not at war with the U.S.), does not resemble the *Eisentrager* petitioners—all twenty-one of whom were citizens of Germany, a country which was in a declared war against our nation. Pet. Opp. 36.

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*Crowell v. Benson*, 285 U.S. 22, 60-62 (1932) (citations and footnote omitted). The principle of *Crowell*, manifested in later cases like *CFTC v. Schor*, 478 U.S. 833 (1986), is that there is a set of Article III values that cannot be divested and given to commissions.

16 *Rasul* confirms that whether Hamdan has full constitutional protections is beside the point, since he is entitled to the protection of "fundamental rights" such as the Suspension Clause under the *Insular Cases,* including *Downes v. Bidwell,* 182 U.S. 244, 283 (1901). *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990); *id.* at 277 (Kennedy, J., concurring); *Reid v. Covert*, 354 U.S. 1, 9-14 (1957) (plurality). That petitioner has been in prolonged detention only bolsters his claim. *See Demore v. Kim*, 538 U.S. 510, 528 (2003); *id*. at 532 (Kennedy, J., concurring); *Verdugo-Urquidez*, 494 U.S. at 271-72; *Heikkila v. Barber*, 345 U.S. 229, 234-35 (1953).

*Eisentrager* nonetheless permitted habeas actions to determine whether a state of war existed and whether the individual truly was an enemy alien barred from federal courts under the Enemy Alien Act. 339 U.S. at 775. Hamdan's claims similarly challenge these jurisdictional elements. *E.g.*, Pet. Br. 30-36.[17]

Moreover, while Hamdan may not be protected by the Fourth Amendment abroad, *Verdugo-Urquidez*, 494 U.S. at 269, the government cites no authority to support its assertion that individuals held within *U.S. territory* have no rights under the Suspension Clause or Fifth Amendments. See *Amici Certain Former Federal Judges* 2-12 & n.5.[18]

c. Finally, the government does not contest that, if applicable, equal protection is violated by the irrational distinctions drawn under the DTA between aliens held in Guantanamo and elsewhere, and between those held by the Department of Defense and other agencies. Pet. Opp. 38-39. The fact that the government's interpretation would even force the Court to grapple with this unusual issue, as well as many other constitutional questions—from Bill of Attainder to the Exceptions Clause—strongly counsels against its reading. This Court requires a clear legislative statement—if not a "superclear statement," *INS v. St. Cyr*, 533 U.S. 289, 327 (Scalia, J., dissenting)—before such rights could be altered. *Cf. Lonchar v. Thomas*, 517 U.S. 314, 324 (1995).

## CONCLUSION

The motion to dismiss should be denied or, in the alternative, held over for consideration alongside the merits.

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[17] The government's ripeness claim is similarly unavailing. The grant of certiorari, over the government's strenuous claims that this case was interlocutory and that no harm would befall petitioner, itself underscores the gravity and timeliness of the questions presented. This ripeness calculus has not been altered by the DTA. If anything, its denuded review procedures only militate *in favor* of immediate review.

[18] The government's claim – that individuals at Guantanamo are unprotected by the Constitution, despite the textual distinction between the "people" in the Fourth Amendment and the Suspension Clause, merely restates its argument on the merits. E.g., Gov't C.A. Rep. Br. at 4-5; Gov't C.A. Br. 21.

Respectfully submitted,

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