[ORAL ARGUMENT HELD SEPTEMBER 8, 2005]

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

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

KHALED A.F. AL ODAH, et al.,

Plaintiffs-Petitioners-Appellees/Cross-Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Respondents-Appellants/Cross-Appellees.

ON CONSOLIDATED APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THE GUANTANAMO DETAINEES' SUPPLEMENTAL BRIEF ADDRESSING THE EFFECT OF SECTION 1005 OF THE DETAINEE TREATMENT ACT OF 2005 ON THESE APPEALS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

*Authorities chiefly relied upon

INTRODUCTION AND SUMMARY

The government argues that section 1005(e)(1) of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (the "Act" or the "Detainee Act"), which removes jurisdiction from the federal courts to hear and consider habeas petitions filed by detainees at Guantanamo, divests this Court of jurisdiction over the pending consolidated appeals. Although the Act says it became effective "on" December 30, 2005, and there is a strong presumption against the retroactive application of statutes, the government argues that section 1005(e)(1) applies to the pre-Act habeas petitions filed by appellants-cross-appellees (the "*Al Odah* petitioners") because it is "jurisdictional" in nature and "jurisdictional" statutes apply to cases filed before the statutes were enacted.

The government's argument rests on a false premise. As a unanimous Supreme Court held in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997), a statute that affects *whether* a suit may be brought rather than *where* it may be brought, "speaks not just to the power of a particular court but to the substantive rights of the parties as well." Accordingly, "[s]uch a statute, even though phrased in 'jurisdictional' terms, is as much subject to our presumption against retroactivity as any other." *Id.*; *see LaFontant v. INS*, 135 F.3d 158, 163 (D.C. Cir. 1998) ("in determining retroactivity, jurisdictional statutes are to be evaluated in the same manner as any other statute"). Section 1005(e)(1), which affects whether habeas petitions may be brought *at all* by Guantanamo detainees, plainly speaks to the substantive rights of the *Al Odah* petitioners and is subject to the presumption against retroactive application to petitions filed before section 1005(e)(1) was enacted.

The Supreme Court has made clear that no statute may be applied retroactively to bar habeas claims that were pending before the statute was enacted unless Congress has "articulate[d] specific and unambiguous statutory directives to effect a repeal" and given "a clear indication . . . that it intended such a result." *INS v. St. Cyr*, 533 U.S. 289, 299, 316 (2001). Congress articulated no such specific statutory directive in the Detainee Act. To the contrary, section 1005(h)(1) says the Act takes effect on the "date of [its] enactment." Effective-upon-enactment terminology "does not even arguably suggest" that the statute

applies to cases filed before the statute was enacted. *Landgraf v. USI Film Products,* 511 U.S. 244, 257, 258 n.10 (1994).

The drafting history of the Detainee Act confirms that section 1005(e)(1) does not apply to pending habeas cases. The original version of the Act contained language expressly making the habeas-stripping provision now in section 1005(e)(1) applicable to pending cases. That language was deliberately dropped from the final version.

Construing the Act to deprive the *Al Odah* petitioners of the right to obtain habeas relief, as guaranteed to them by the Supreme Court in *Rasul v. Bush*, 542 U.S. 466 (2004), would raise serious questions as to whether the habeas-stripping provision in section 1005(e)(1) violates the Suspension Clause of the Constitution. The Court should construe that section in accordance with accepted canons of statutory construction to avoid such a grave constitutional problem.

In that regard, and contrary to the government's contention, the Act does not provide the *Al Odah* petitioners with an effective alternative to habeas review. It is at best uncertain whether the alternative proposed by the government, namely, review in this Court under section 1005(e)(2) of the Act, even applies to the *Al Odah* petitioners. Section 1005(e)(2) confers jurisdiction on this Court to review the validity of designated final decisions by Combatant Status Review Tribunals ("CSRTs"), provided they operated under procedures mandated by the Act. The *Al Odah* petitioners, however, were not subject to CSRT proceedings conducted under the procedures mandated by the Act. Rather, they were subjected to CSRT procedures that never were reported to Congress, that did not contain any of the safeguards mandated by the Act, and that the court below found did not provide them a fair opportunity to challenge the factual bases for their detentions and allowed for reliance on statements obtained by torture.

Moreover, the judicial review sought by the *Al Odah* petitioners is not based on CSRT decisions; the *Al Odah* petitioners are entitled under *Rasul* and have sought in their petitions a searching judicial inquiry into the lawfulness of their detentions. The CSRTs were created by the government nine days after *Rasul* in a failed effort to provide the detainees with some process *ex post facto*. Especially in light of the patently deficient procedures under which they were conducted, the CSRTs are no substitute for the

searching judicial inquiry required by habeas and the *Al Odah* petitioners do not accept their legitimacy. Even if limited appellate review were available to the *Al Odah* petitioners under section 1005(e)(2), it would be wholly inadequate because it could not remedy the inherent defects in the pre-Act CSRT proceedings or enable the *Al Odah* petitioners effectively to challenge the factual and legal bases for their detentions, as guaranteed by habeas.[1]

ARGUMENT

I. The Language And Drafting History Of The Detainee Act Demonstrate That Section 1005(e)(1) Does Not Apply To Pending Cases

A. The Text of the Act

The Detainee Act marks the first enactment by Congress of legislation relating to the treatment of detainees at Guantanamo. Section 1005(a)(1) of the Act directs the Secretary of Defense to submit within six months to the appropriate committees of Congress a report setting forth new procedures by which CSRTs shall determine the status of detainees at Guantanamo. The procedures specified by the Secretary must include certain safeguards. Section 1005(a)(2) requires that the procedures "ensure" that the "final review authority" with respect to CSRT decisions be a "Designated Civilian Official" appointed by the President, by and with the advice and consent of the Senate. Section 1005(a)(3) requires that the procedures "shall provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee." Section 1005(b), which applies "with respect to any proceeding beginning on or after the date of the enactment of this Act," requires that the procedures "ensure" that the CSRTs assess "whether any statement derived from or relating to such detainee was obtained as a result of coercion."

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[1] Two of the *Al Odah* petitioners, David Hicks and O.K., have also challenged through habeas petitions the legality of the military commission proceedings that have been initiated against them. Because the present appeals do not encompass military commission issues, and because the habeas-stripping provisions of the Detainee Act are not identical with respect to CSRTs and military commissions, the Court's ruling on the application of the Detainee Act to the present appeals will not necessarily decide the military commission issues raised by Hicks and O.K.

Section 1005(e)(2)(A) of the Act confers exclusive jurisdiction upon this Court "to determine the validity of any final decision of a [CSRT] that an alien is properly detained as an enemy combatant." However, under section 1005(e)(2)(B), this jurisdiction "shall be limited to claims brought by or on behalf of an alien – (i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and (ii) for whom a [CSRT] has been conducted, pursuant to applicable procedures specified by the Secretary of Defense." The scope of review also is limited under section 1005(e)(2)(C) to consideration of whether the CSRT's decision was consistent with the standards and procedures specified by the Secretary of Defense and whether their use was consistent with applicable provisions of the Constitution and laws of the United States. Section 1005(e)(3) vests this Court with jurisdiction to determine, within the same scope of review, the validity of any final decision made by a military commission pursuant to Military Commission Order No. 1, dated August 31, 2005.

Section 1005(e)(1) amends 28 U.S.C. § 2241 by adding a new subsection (e), removing authority from the federal courts to hear and consider habeas petitions by detainees at Guantanamo and other actions against the United States or its agents relating to the detentions 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.

Finally, section 1005(h) sets forth the effective date of the Act. It says that, "[i]n general," the Act "shall take effect on the date of the enactment of this Act." Section 1005(h)(2) adds that section 1005(e)(2) and section 1005(e)(3), which provide for judicial review of designated CSRT and military commission decisions, "shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act."

By specifying in section 1005(h)(1) that the Act "shall take effect on the date of [its] enactment," Congress has directed that section 1005(e)(1) does not apply to habeas petitions that were filed and pending in court *before* the date of enactment. As the Supreme Court noted in *Landgraf*: "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." 511 U.S. at 257, 258 n.10. 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. Accordingly, section 1005(e)(1) by its terms does not divest the Court of jurisdiction over the pending appeals.

B. The Drafting History

The drafting history of the Detainee Act confirms what a simple reading of the unadorned text of section 1005(e)(1) already discloses: that section 1005(e)(1) does not apply to petitions filed before the Act was enacted. 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 over habeas claims by detainees 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 was properly detained as an enemy combatant. *Id.*

The proposed Graham amendment made *both* its habeas-stripping *and* its 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." *Id.* The Senate approved the Graham amendment on November 10, 2005, by a vote of 49-42. *Id.* at 667-68.[2]

The Graham amendment generated controversy and opposition. *See* 151 *Cong. Rec.* S12, 727-33 (daily ed. Nov. 14, 2005). On November 14, 2005, Senator Graham introduced Amendment No. 2524 on behalf of himself, Senator Levin, and Senator Kyl. *Id.* at 752-53. Senator Graham explained that in the new amendment "we have addressed some of the weaknesses in my original amendment." *Id.* at 753. Significantly, 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.

Id.

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 one of the important changes made by the proposed Graham-Levin-Kyl amendment to the original Graham amendment, namely, the elimination of the language that would have made the habeas-stripping provisions applicable to pending claims. *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 the Federal courts, including the Supreme Court, of jurisdiction over all

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[2] 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.

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." *Id.* Senator Graham, who also spoke on the floor prior to the vote, said nothing to the contrary, while Senator Reid echoed Senator Levin's remarks. *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.

The National Defense Authorization Act for Fiscal 2006, to which the Graham-Levin-Kyl amendment was attached, went to conference. The version of the amendment that emerged from conference, entitled the Detainee Treatment Act of 2005, differed in several respects from the Graham-Levin-Kyl amendment. *See* H.R. Conf. Rep. No. 109-360, *printed in* 151 *Cong. Rec.* H12, 833-35 (daily ed. Dec. 18, 2005). But no material change was made to the effective date language. It still said, in section 1005(h)(1), that: "[i]n general," the Act "shall take effect on the date of the 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). The President signed the Department of Defense Appropriations Act 2006, on December 30, 2005.[3]

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[3] There are no committee reports for the Detainee Act because the legislation was not introduced in any committee or ventilated in any committee hearings, and the conference reports do not shed any light on the 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

The courts often look to differences between the language of an original bill and enacted legislation to help determine the meaning of that legislation. *See, e.g., 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 section 1005(e)(1) applicable to petitions filed before the Act was enacted confirms the plain meaning of the statute – that section 1005(e)(1) does not apply to petitions filed and pending before the date of enactment. *Accord, Lindh v. Murphy*, 521 U.S. 320 (1997) (amendments to habeas corpus statute affecting noncapital cases do not apply to pending cases because Congress inserted language making amendments affecting capital cases applicable to pending cases and simultaneously omitted such language with respect to amendments affecting noncapital cases). *See KP Permanent Make-Up v. Lasting Impressions I, Inc.*, 543 U.S. 111, 119 (2004) ("'where 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'").

C. Any Ambiguity Should be Resolved Against Retroactive Repeal of Habeas

Even if the language in section 1005(h)(1) were ambiguous as to whether section 1005(e)(1) applied to habeas petitions filed before the Act was enacted, such ambiguity would have to be resolved against the retroactive application of section 1005(e)(1) to those petitions. As the Supreme Court has emphasized, the protections of the Great Writ of Habeas Corpus "have been strongest" in the context of judicial review of the legality of executive detention. *St. Cyr*, 533 U.S. at 301. It is in that context that

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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.* H13, 112 (daily ed. Dec. 18, 2005). The government cites a long colloquy that Senators Graham and Kyl inserted into the record *after* the conference reports were issued in which, among other things, they claimed that section 1005(e)(1) of the Detainee Act does apply to pending cases. *See* 151 *Cong. Rec.* S14, 260-68 (daily ed. Dec. 21, 2005). But these *post hoc* remarks provide no coherent explanation for the elimination of the prior proposed language making section 1005(e)(1) applicable 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 the absence of any clear and unambiguous intent to effect a retroactive repeal of habeas and non-habeas jurisdiction. *See St. Cyr*, 533 U.S. at 299, 316.

the issue of the applicability of section 1005(e)(1) to the *Al Odah* petitioners' pre-Act habeas petitions arises and must be decided.

The *Al Odah* petitioners' habeas petitions are not collateral challenges to prior determinations; rather, they are basic challenges to the legality of the executive detentions imposed upon the *Al Odah* petitioners. Consequently, any repeal of the *Al Odah* petitioners' right to challenge those detentions in habeas cannot be based on ambiguous statutory language. As the Supreme Court said in *St. Cyr*: "[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" and give "a clear indication" that it intended such a result. 533 U.S. at 299, 316. The Supreme Court has found that a statute with retroactive effect was properly authorized by Congress only in cases that "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 the Detainee Act. Whatever ambiguity may exist in the Act concerning the temporal reach of section 1005(e)(1) – and the *Al Odah* petitioners see none – must be resolved against the retroactive repeal of the *Al Odah* petitioners' right to habeas corpus relief.

II. There Is A Strong Presumption Against The Retroactive Application Of Section 1005(e)(1) To Habeas Petitions Filed Before The Detainee Act Was Enacted

As the Supreme Court has observed, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265. Congress' "responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Id.* at 266. "Requiring clear intent" to overcome the "default rule" of "prospectivity" assures that "Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Id.* at 272-73. "Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations." *Id.* at 272.

The government argues, however, that this normal presumption against retroactivity is displaced here because section 1005(e)(1) is a "jurisdictional" statute, and such statutes generally apply to suits arising before the statute was enacted, even absent specific legislative authorization. *See* Respondents' Supplemental Brief Addressing Section 1005 of the Detainee Treatment Act of 2005 ("Gov't Supp. Br.") at 5-12. That argument has no merit.

The reason the courts generally apply jurisdictional statutes to suits arising before the statutes were enacted is that, in general, jurisdictional statutes do not speak to or truncate the rights or obligations of the parties. *Landgraf*, 511 U.S. at 274. Thus, "[a]pplication of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" *Id.* (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). The Supreme Court has recognized, however, that when statutes addressing jurisdiction *do* create or take away substantive rights, they should not be construed to apply to suits filed before the statutes were enacted, absent express legislative direction. In the words of this Court: "[T]he Supreme Court has clearly established the principle that in determining retroactivity, jurisdictional statutes are to be evaluated in the same manner as any other statute. Thus, in order to determine whether a statute applies to a case that was filed prior to passage of the statute, courts must determine whether the statute is 'procedural' in nature, or whether it affects 'substantive entitlement to relief.'" *LaFontant*, 135 F.3d at 163.

In *Hughes Aircraft*, the Supreme Court explained that "[s]tatutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties." 520 U.S. at 950. "Such statutes affect only *where* a suit may be brought, not *whether* it may be brought at all." *Id.* In *Hughes Aircraft*, however, the Supreme Court found that the statute before it "does not merely allocate jurisdiction among forums. Rather, it *creates* jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well." *Id.* The Supreme Court unanimously concluded that "[s]uch a statute, even though phrased in 'jurisdictional' terms, is as much subject to our presumption against retroactivity as any other." *Id. Accord, Republic of*

Austria v. Altmann, 541 U.S. 677, 695 n.15 (2004) ("[w]hen a 'jurisdictional' limitation adheres to the cause of action in this fashion – when it applies by its terms regardless of where the claim is brought – the limitation is essentially substantive"). The reasons weighing against retroactive application of a statute that creates jurisdiction weigh equally strongly against retroactive application of a statute that ousts jurisdiction: in both cases the balance of settled substantive rights between the parties is upended.

Section 1005(e)(1) prohibits habeas claims by Guantanamo detainees "regardless of where the claim is brought." It thus speaks to the "substantive rights" of the *Al Odah* petitioners, and is as much subject to the presumption against retroactivity as any other statute. Therefore, because the Act does not contain any express language applying section 1005(e)(1) to habeas petitions filed before the Act was enacted, it does not.

III. If Section 1005(e)(1) Were Construed To Apply To Habeas Petitions Filed Before The Detainee Act Was Enacted, It Violates The Suspension Clause And Is Unconstitutional

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." The Supreme Court held in *Rasul* that the detainees at Guantanamo, "no less than American citizens," are entitled to the privilege of habeas corpus. 542 U.S. at 481. "[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.

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 the *Al Odah* petitioners' pending habeas claims.

First, there is substantial doubt whether the *Al Odah* petitioners may obtain judicial review under section 1005(e)(2) of the validity of any final CSRT decision that they are properly detained as enemy combatants. Section 1005(e)(2)(B) expressly limits the jurisdiction of this Court under section 1005(e)(2) to claims filed by detainees "for whom a [CSRT] has been conducted, pursuant to applicable procedures specified by the Secretary of Defense." The "applicable procedures specified by the Secretary of Defense" are those mandated by the Detainee Act. Indeed, one of those procedures, that this Court is required to review under section 1005(e)(2)(C), requires the CSRT to consider whether any statement derived from or related to the detainee was obtained as a result of coercion. That requirement applies under section 1005(b)(2) only "with respect to any proceeding *beginning on or after the date of the enactment of the Act* (emphasis added)." Section 1005(e)(2)(C) similarly requires this Court to consider whether the status determination by the CSRT "was consistent with the standards and procedures specified by the Secretary of Defense." Because the Secretary of Defense has not yet issued the procedures mandated by the Detainee Act, the *Al Odah* petitioners have not been subjected to CSRTs conducted under those procedures. Accordingly, judicial review of CSRT decisions under section 1005(e)(2) does not appear to be available to them.[4]

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[4] Although section 1005(h)(2) of the Act provides that section 1005(e)(2) and section 1005(e)(3) shall apply to claims "pending on or after the date of the enactment of this Act," it limits that to claims "whose review is governed" by those sections. Thus, judicial review of a final CSRT decision under section 1005(e)(2) is permissible only if the detainee *both* was afforded a CSRT proceeding that was conducted under the procedures mandated by the Act *and* his claim for review was pending on or after December 30, 2005. Congress, unable to predict the exact date that the Act would be passed by both Houses and signed by the President, rationally could have supposed that some CSRT claims would meet these criteria between the time it drafted the Act and the time it became effective. This is especially so given that it took the Defense Department only *nine days* after the Supreme Court decided *Rasul* to issue the pre-Act CSRT procedures and only *two weeks* to open 150 CSRT proceedings and decide 21 of them. In any event, whatever uncertainty there may be about the words "pending on" in section 1005(h)(2) does not affect the

Second, even if judicial review under section 1005(e)(2) were available to the *Al Odah* petitioners, section 1005(e)(2) does not confer on the *Al Odah* petitioners the rights guaranteed by the habeas statutes that are necessary to challenge the legality of executive detention effectively. In claiming that section 1005(e)(2) is an adequate substitute for plenary adjudication of the *Al Odah* petitions, the government reveals its fundamental misunderstanding of habeas. The CSRTs were designed, *post hoc*, to avoid the habeas review to which the Supreme Court in *Rasul* held the detainees were entitled. They could not replace the substantive guarantees of habeas to challenge executive detention in the first instance and could never represent more than the government's "return" to the writ. Therefore, for example, the limited review provided by section 1005(e)(2) does not guarantee the *Al Odah* petitioners the opportunity to "traverse" the return or the right to a hearing, as provided by 28 U.S.C. §§ 2243, 2248. *See also Hamdi v. Rumsfeld*, 542 U.S. 507, 537-39 (plurality opinion) & 553 (2004) (concurring and dissenting opinion of Souter, J.) (describing outline of statutory procedures federal courts must follow in evaluating merits of habeas petitions filed under 28 U.S.C. § 2241). 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); *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).

Section 1005(e)(2) also does not authorize the *Al Odah* petitioners 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

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absence in section 1005(h)(1) of any language making section 1005(e)(1) applicable to pending cases. The absence of such language directing retroactive application is dispositive.

(discovery, expanding the record, and evidentiary hearings). *See generally Harris,* 394 U.S. 286.[5] The rights not authorized by the judicial review provisions are essential to the *Al Odah* petitioners' challenges to the lawfulness of their detentions.[6]

Third, any review the *Al Odah* petitioners could obtain under section 1005(e)(2) would not be meaningful. As noted at the outset, none of the *Al Odah* petitioners was afforded CSRTs based on procedures mandated by the Detainee Act. Instead, they were subjected to CSRTs that used procedures the court below held "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 443, 468-78 (D.D.C. 2005), *appeals pending*. The limited appellate review provided under section 1005(e)(2) might be adequate following a hearing process if that process were itself sufficient to enable a petitioner to contest the factual accusations against him. It is clearly not adequate when the CSRT hearing process to which the *Al Odah* petitioners were subject denied them that opportunity.

Fourth, under section 1005(e)(2) judicial review may be obtained only of designated "final" decisions of the CSRTs. The government, by postponing or refusing to make "final" CSRT determinations with respect to the *Al Odah* petitioners, could circumvent indefinitely the judicial review provisions of section 1005(e)(2) and deny the *Al Odah* petitioners 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 the *Al Odah* petitioners, who already have been the subject of CSRT determinations prior to the

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[5] 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.

[6] For the same reasons, judicial review under section 1005(e)(2) also is not an adequate substitute for habeas review under the doctrine of primary jurisdiction, as the government contends. *See* Gov't Supp. Br. at 3-5.

enactment of the Detainee Act and who the government therefore could leave to languish without ever being the subject of a CSRT under the procedures that meet the standards of the Act.

In sum, if section 1005(e)(1) were construed to apply to the *Al Odah* petitioners' pre-Act habeas petitions, it 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. For this additional reason, the Court should hold that section 1005(e)(1) does not apply to the *Al Odah* petitioners' habeas petitions and does not divest the Court of jurisdiction over the pending appeals.

CONCLUSION

Section 1005(e)(1) of the Detainee Act does not divest the Court of jurisdiction over the pending consolidated appeals.[7]

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[7] The government argues that construing the Act to allow the *Al Odah* petitioners to continue to litigate their habeas claims in the district court and simultaneously proceed under section 1005(e)(2) in this Court would be a "nonsensical result" and leave for review under section 1005(e)(2) a "virtually null set of habeas or other actions that Guantanamo detainees might file in the future." Gov't Supp. Br. at 11-12. But the *Al Odah* petitioners do not suggest such a construction. Rather, the *Al Odah* petitioners contend that Congress, recognizing the impossibility of curing the pre-Act CSRT proceedings, preserved habeas review only for the Guantanamo detainees who were subject to those deficient proceedings and filed habeas petitions prior to the enactment of the Act, and intended the judicial review under section 1005(e)(2) to be available only to Guantanamo detainees who are afforded CSRT proceedings conducted under the new procedures mandated by the Act that include specified safeguards. The *Al Odah* petitioners do not concede, of course, that the deprivation of habeas rights for this second group of Guantanamo detainees comports with the Suspension Clause.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OS APPELLATE PROCEDURE AND CIRCUIT RULE 32(a)

I certify that, in accordance with Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), the foregoing Guantanamo Detainees' Supplemental Brief Addressing the Effect of Section 1005 of the Detainee Treatment Act of 2005 on these Appeals is proportionally spaced and has a typeface of 11 point. This brief is 15 pages long (which is within the page limit authorized by this Court in its Order of January 4, 2006).

Neil H. Koslowe
Attorney.

CERTIFICATE OF SERVICE

I certify that today, January 25, 2006, I served the foregoing Guantanamo Detainees' Supplemental Brief Addressing the Effect of Section 1005 of the Detainee Treatment Act of 2005 on these Appeals on the government by causing copies to be sent by both first-class mail and email to the following counsel of record for the government:

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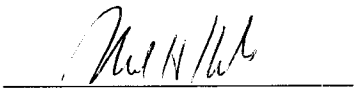

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