ORAL ARGUMENT SCHEDULED FOR MARCH 22, 2006

IN THE

United States Court Of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5062, and consolidated case 05-5063

LAKHDAR BOUMEDIENE, et al.,
Petitioners-Appellants,

v.

GEORGE W. BUSH, et al.,
Respondents-Appellees.

No. 05-5064, and consolidated cases 05-5095 through 05-5116

KHALED 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

BRIEF OF *AMICI CURIAE* SENATORS GRAHAM AND KYL IN SUPPORT OF GOVERNMENT RESPONDENTS-APPELLEES

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INTEREST OF *AMICI CURIAE*

The Court has requested supplemental briefing on the proper resolution of this controversy in light of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-06 (2005) ("DTA" or "the Act"), and in particular Subsections 1005(e)(1)-(3) of that Act, which were added as part of the "Graham-Levin-Kyl Amendment" to the DTA.[1] *Amici curiae* are Senator Lindsey Graham of South Carolina and Senator Jon Kyl of Arizona. Senators Graham and Kyl are both members of the Senate Judiciary Committee, and both were sponsors of the "Graham-Levin-Kyl Amendment" that eventually became Section 1005 of the DTA. As a result, Senators Graham and Kyl both have a strong interest in the proper application of those provisions and a unique familiarity with and understanding of their drafting history.

INTRODUCTION

Both Houses of Congress have twice passed the Detainee Treatment Act, and the President has now twice signed it into law. The DTA was incorporated into the final version of H.R. 2863, the Department of Defense Appropriations Act of 2006, passed by the Senate on December 21, 2005, and signed by the President December 30, 2005. *See* Pub. L. No. 109-148, §§ 1001-06. The DTA was also incorporated into the National Defense Authorization Act for Fiscal Year 2006, passed by the Senate on December 21, 2005, and signed by the President January 6, 2006. *See* Pub. L. No. 109-163, §§ 1401-06.

The DTA responded to the Supreme Court's 2004 decision in *Rasul v. Bush*, 542 U.S. 466 (2004), in two ways. *First*, it immediately rescinded the statutory grant of jurisdiction to the federal courts to entertain petitions for writs of habeas corpus filed by alien detainees held by the Department of Defense at the Guantanamo Bay U.S. Naval Station facility in Cuba

[1] Consistent with Circuit Rule 29, the *amici* have obtained consent to file this brief from the parties.

("Guantanamo"). The DTA declares that "no court, justice, or judge shall have jurisdiction to hear or consider" any habeas application or any other action that "relate[s] to any aspect of detention" of an alien held at Guantanamo. *See* DTA § 1005(e)(1).

Second, the DTA channels legal challenges by Guantanamo detainees through specific and tailored mechanisms. Enemy combatant determinations are made by Combatant Status Review Tribunals ("CSRTs"). Subsection 1005(e)(2) of the DTA provides that any "final decision" of those tribunals is subject to judicial review in this Court, which has "exclusive jurisdiction." DTA § 1005(e)(2)(A). Enemy combatants also may be tried and sentenced by Military Commissions ("MCs"). Subsection 1005(e)(3) of the DTA provides that such convictions and sentences likewise are subject to "exclusive" review in this Court. DTA § 1005(e)(3)(A). Finally, the DTA carefully regulates the scope of review. For example, when reviewing a CSRT's determination that a detainee is an enemy combatant, this Court's review is limited to whether that determination is consistent with the procedures and standards established by the Secretary of Defense and with any applicable constitutional requirements. DTA § 1005(e)(2)(C)(1). Congress expressly provided that the new review mechanisms and standards would apply to all cases "pending on or after the date of the enactment of this Act." DTA § 1005(h)(2).

On January 27, 2006, this Court issued an order directing the parties and any *amici* to file briefs that, "[w]hile not otherwise limited," address "the appropriate disposition of the conflicting district court judgments entered before enactment of the" DTA, assuming this Court "lacks jurisdiction over these cases by reason of" the DTA's "enactment." Jan. 27, 2006 Order at 2. As explained in detail below, the text, history, and purpose of the DTA all confirm that this Court indeed no longer has jurisdiction to review—and that the district courts no longer have

jurisdiction to enforce or otherwise act upon—the conflicting judgments in these cases. As a result, those judgments must be vacated. At the same time, this Court need not dismiss these cases for lack of jurisdiction. Congress, at the same time it eliminated this Court's jurisdiction under the habeas statute and other laws, established an alternative source of jurisdiction. Rather than go through the wasteful process of dismissing the current appeals and requiring them to be re-filed, the Court should allow the detainees who believe they can bring challenges under the DTA to file amended notices of appeal or petitions for review identifying the challenges they wish to raise under the DTA.

ARGUMENT

I. THE TEXT, HISTORY, AND PURPOSE OF THE DTA DEMONSTRATE THAT THIS COURT MAY EXERCISE JURISDICTION ONLY UNDER THE REVIEW MECHANISMS ESTABLISHED BY THE DTA ITSELF

A. The Statutory Text Makes Clear That This Court Has Jurisdiction To Review Pending Cases Only Under Subsection 1005(e)

The statutory text of the DTA says "what it means and means what it says." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). Subsection 1005(e)(1) in clear terms eliminates the jurisdiction of any court—including this Court and the district courts below—to adjudicate habeas and other claims brought by Guantanamo detainees. It declares that "no court, justice, or judge shall have jurisdiction to hear or consider" claims by Guantanamo detainees except as provided by Section 1005 itself. DTA § 1005(e)(1). That withdrawal of jurisdiction "take[s] effect on the date of . . . enactment." DTA § 1005(h)(1). At the same time, the DTA substitutes an *immediately applicable* alternative review mechanism for certain claims by Guantanamo detainees. Subsections 1005(e)(2) and (e)(3) of the DTA provide new mechanisms for judicial review of final status determinations and convictions and sentences; they provide new standards to govern that review; and they accord this Court exclusive jurisdiction to conduct

such review. Those new provisions and standards for review are, by their terms, made expressly applicable to all "pending cases." DTA § 1005(h)(2).

That statutory structure makes Congress's intent clear: No case is to proceed, and no court has jurisdiction to address, Guantanamo detainee claims under the habeas statute or any other source of jurisdiction other than the DTA itself. But pending claims need not necessarily be dismissed. Instead, to the extent they meet the DTA's requirements (*e.g.*, there is a final decision of a CSRT or Military Commission), this Court has jurisdiction under—and review must occur consistent with the standards established by—the DTA itself. To dismiss claims that meet the DTA's requirements would be inconsistent with Subsection 1005(h)(2)'s direction that the mechanisms for review and standards established by the DTA be applicable to all pending cases.

The claim that the detainees may proceed with claims under the habeas statute or other statutes, despite the DTA's express withdrawal of jurisdiction for such claims, does not withstand scrutiny. Subsection 1005(e)(1) does not, by its terms, limit its withdrawal of jurisdiction to cases filed after Section 1005's enactment. To the contrary, Subsection 1005(h) declares that all of Section 1005—which includes the withdrawal of jurisdiction contained in Subsection 1005(e)(1)—"take[s] effect on the date of . . . enactment." Even absent such language, it is well established that, when a jurisdictional provision "is repealed, it must be considered, except as to transactions closed, as if it never existed." *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 508 (1868). As the Supreme Court explained a century ago, cases in which Congress repeals the basis for jurisdiction "are by no means infrequent. . . . These cases fully establish the proposition that a repealing statute *which contains no saving clause operates as well upon pending cases* as upon those thereafter commenced." *Gwin v. United States*, 184 U.S. 669,

675 (1902) (emphasis added); *see, e.g.*, *Railroad Co. v. Grant*, 98 U.S. 398, 401 (1866) ("It is equally well settled that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law"); *Insurance Co. v. Ritchie*, 72 U.S. 541, 545 (1866) ("express prohibition on the exercise of jurisdiction" removes jurisdiction over pending cases where there is no "saving of such causes"); *Bruner v. United States*, 343 U.S. 112 (1952) (The rule that, "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law," has "been adhered to consistently by this Court.").

The contrary argument rests on an application of the *expressio unius* maxim. In particular, the detainees point out that the DTA provides that Subsection 1005(e)(2), which provides a mechanism and standards for review of CSRT enemy combatant determinations, and Subsection 1005(e)(3), which provides a mechanism and standards for review of Military Commission convictions and sentences, "shall apply" to cases "pending on or after the date of enactment," but that the DTA does not state that the withdrawal of jurisdiction for habeas and other claims in Subsection 1005(e)(1) applies to pending cases. *See* Br. of Cross-Appellants at 4-5 (citing DTA § 1005(h)(2)). But this Court has recognized that *expressio unius* is "too thin a reed" in a variety of contexts. *See, e.g.*, *Mobile Commc'ns Corp. of Am. v. FCC*, 77 F.3d 1399, 1405 (D.C. Cir. 1996); *In re Sealed Case*, 181 F.3d 128, 143 (D.C. Cir. 1999). Its invocation is particularly out of place here.

For one thing, Congress had good reason to single out Subsections 1005(e)(2) and (3). Those provisions specify a new review mechanism and new standards to be applied in such review. Because there is no clear presumption that laws creating new causes of action or imposing substantive standards of review in favor of the government will apply to pending cases, *see Lindh v. Murphy*, 521 U.S. 320, 327 (1997), Congress was well-advised to make it clear that

those new provisions should apply to pending cases. In contrast, changes to jurisdiction—like the change provided in Subsection 1005(e)(1)—are presumptively applicable to pending cases, as Congress was well aware. *See* 151 Cong. Rec. S14263 (daily ed. December 21, 2005) ("The courts' rule of construction" is that "legislation ousting the courts of jurisdiction is applied to pending cases.") (statement of Sen. Kyl). It was therefore sufficient for Congress to specify that Section 1005 in its entirety, including the withdrawal of jurisdiction for habeas actions, "take[s] effect on the date of . . . enactment." DTA § 1005(h)(1).

The structure identified by the detainees, moreover, reflects the drafters' effort to clarify that, with respect to pending cases, the courts were not being stripped of jurisdiction *entirely*. Rather, all pending cases may proceed under Section 1005. As Senators Graham and Kyl explained in an extensive colloquy (which appears in the Congressional Record prior to the Senate's adoption of the Conference Report), the statute "extinguish[es] one type of action—all of the actions now in the courts—and create[s] in their place a very limited judicial review of certain military administrative decisions." 151 Cong. Rec. S14263 (daily ed. December 21, 2005) (statement of Sen. Kyl). The special language in "paragraph (h)(2)" declaring that the new cause of action and substantive standards of the DTA shall "apply to pending cases" helps make it clear that, to the extent a case is already in the proper court and meets the statute's requirements, the claim need not be dismissed; instead, "that claim [can] go forward" as a "request for review of the detainee's CSRT pursuant to subsection (e)[(2)]." *Id.* (statement of Sen. Graham); *see also id.* ("No sense in kicking out a detainee's current habeas action in the D.C. Circuit just so that he has to re-file a section 1405 review request—it would be better to let the current case go forward as a 1405 review request.") (statement of Sen. Graham). If Congress had expressly declared that the *withdrawal of jurisdiction* in Section 1005(e)(1) must be applied

to "pending cases," that might have left the misimpression that such cases must be dismissed, when in fact they may proceed under the requirements and standards set forth by Subsection 1005(e)(2).

B. The DTA's Legislative History Confirms That This Court May Not Review Pending Cases Except As Provided By Subsection 1005(e) Itself

To the extent it is relevant, the legislative history of Section 1005 confirms that Congress intended *all* of Section 1005 to be immediately effective, governing pending cases and any newly filed lawsuits alike. The above-cited colloquy between Senators Graham and Kyl—two of the amendments' primary sponsors—makes that unmistakably clear. Because Senators Graham and Kyl were "sponsor[s] of the language ultimately enacted," their remarks serve as "an authoritative guide to the statute's construction." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982); *see also FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (such statements "deserv[e] to be accorded substantial weight"). The detainees' assertion that the colloquy is not probative of the meaning of the statute, Br. of Cross-Appellants, at p.8 n.3, lacks merit. The detainees cite nothing in the Congressional Record—which is conclusively presumed to reflect Congress's proceedings—indicating that the colloquy is anything less than a genuine expression of the Senators' understanding of, and intention regarding, the jurisdictional provisions of the DTA. *Id.* at 5-8; *see also* 151 Cong. Rec. E2341 (daily ed. Dec. 21, 2005) (noting that the Congressional Record reflects live debate *except* when the statements therein are followed by a bullet, indicating "statements or insertions which are not spoken by a Member of the Senate on the floor," or are underlined, indicating that they are "words inserted or appended, rather than spoken, by a Member of the House on the floor.") The colloquy, moreover, appears in the Congressional Record immediately before the Senate's adoption of the Conference Report,

and predates the President's signature.[2] *See* 151 Cong. Rec. S14260-68 (daily ed. Dec. 21, 2005) (Sen. Graham & Sen. Kyl colloquy); *id.* at S14275 (adopting conference report).[3]

In any event, well before that colloquy, Senator after Senator recognized that review under the DTA would immediately displace habeas for all cases, including those already filed. *See* 151 Cong. Rec. S12754 (daily ed. Nov. 14, 2005) ("Instead of having unlimited habeas corpus opportunities . . . we give every enemy combatant, all 500, a chance to go to Federal court, the Circuit Court of Appeals for the District of Columbia.") (statement of Sen. Graham); 151 Cong. Rec. S12796 (daily ed. Nov. 15, 2005) ("If it means what it says," even "the Supreme Court of the United States would not have jurisdiction" except under the review mechanism of Subsection 1005(e) itself) (statement of Sen. Specter); 151 Cong. Rec. S12799 (daily ed. Nov. 15, 2005) ("It applies retroactively, and therefore would also likely prevent the Supreme Court from ruling on the merits of the Hamdan case.") (statement of Sen. Durbin). While some Senators later asserted the opposite understanding, *see, e.g.,* 151 Cong. Rec. S14274 (daily ed. December 21, 2005), many of them (*e.g.*, Senators Leahy, Kennedy, Feingold, and Durbin), voted against the final amendment. The courts do "not usually accord much weight to the statements of a bill's opponents." *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 29 (1988). Indeed, according weight to a bill's opponents would provide them with an opportunity to disable, through a limiting construction in the legislative history, the very provisions they could not defeat by amendment or majority vote.

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[2] The President's understanding of the statute at the time that he signed it is also probative of the statute's meaning. *See, e.g., Thomas Paper Stock Co. v. Porter*, 328 U.S. 50, 54 (1946) (interpreting an amendment and according weight to the President's understanding of the amendment at the time the President signed it).

[3] Senator Kyl's reference to the "now completed" Defense Authorization Act cannot be read to mean that the Act had already been *passed.* It merely reflects Senator Kyl's understanding that the Act's drafting and the related fine-tuning had been completed and the bill was ready to be enacted.

Finally, it is not correct to assert that the drafting and amendment history of the DTA show that it was amended to permit pending cases to proceed as if the DTA had never been enacted. In fact, the amendment process the detainees rely upon addressed a wholly different issue—whether there would be review of not merely *enemy combatant determinations*, but also *convictions and sentences* issued by military courts. There is no dispute that, when it was adopted on November 10, 1995, the original Graham-Kyl amendment to the DTA removed habeas jurisdiction for future and pending cases alike. Under that amendment, Subsection 1005(e)(1) withdrew federal jurisdiction over the detainees' habeas claims, while Subsection 1005(e)(3) declared that such withdrawal of jurisdiction would "apply to any application or other action that is pending on or after the date of this Act." *See* 151 Cong. Rec. S12655 (daily ed. Nov. 10, 2005); *id.* at S12664 ("the language . . . is retroactive") (statement of Sen. Levin).

Even at that time, the amendment provided for review of CSRT enemy combatant determinations under what is now Subsection 1005(e)(2). But it lacked what is now Subsection 1005(e)(3), and thus did not provide any mechanism for judicial review of *convictions and sentences* issued by Military Commissions. For that reason, Senator Levin objected: "I hope it is inadvertent," he declared, but the amendment "eliminates court review of the sentences of enemy combatants before these commissions." 151 Cong. Rec. S12664 (daily ed. Nov. 10, 2005); *id.* ("If there is a conviction . . . is there any appeal under this language in the amendment? I am afraid there is not. . . . That is the problem here. There would be no appeal."); *id.* ("The *question is whether* there will be an appeal") (emphasis added).

It was in response to those concerns of Senator Levin that Subsection 1005(e) was substantially revamped. Congress added a whole new provision, now Subsection 1005(e)(3), to provide for review of final Military Commission decisions. *See* 151 Cong. Rec. S12753 (daily

ed. Nov. 14, 2005) (publishing amendment).[4] Congress made that review provision and its substantive standards, like those applicable to enemy combatant determinations, applicable to cases pending on direct review. *Id.* Senator Levin thus explained that, although he had voted against the amendment previously because "it did not provide for direct judicial review of convictions by military commissions," the new amendment "adds a direct appeal for convictions by military commissions." *Id.* at S12754.

Congress did at the same time also change the language of the "effective date" provision, but that change hardly "saved" pending cases from the effect of the DTA. The amendment expressly provided that the two judicial review provisions and their substantive standards—both for CSRT enemy combatant determinations, DTA § 1005(e)(2), and for military tribunal convictions and sentences, DTA § 1005(e)(3)—would apply to "pending" cases. *See* 151 Cong. Rec. S12753.[5] And the amendment changed the language of what is now Subsection 1005(h)(1) to establish that the rest of Section 1005, including the withdrawal of habeas jurisdiction, is effective "on the date of . . . enactment." *Id.* That change cannot be read as allowing former habeas claims to go forward under the now-withdrawn habeas jurisdiction. To the contrary, even the changed language makes clear that the withdrawal of jurisdiction is immediately effective. The change clarifies, however, that courts are not precluded from reviewing pending cases *to the extent* that the claims would be proper under the jurisdictional provisions and standards in Subsection 1005(e). For that reason, Senator Levin explained that the provision did not "strip[] all of the courts . . . *of jurisdiction* over pending *cases*," which would require pending cases to be dismissed. 151 Cong. Rec. S12755 (daily ed. Nov. 15, 2005) (emphasis added). Rather, this

[4] The provision allowing for review of Military Commission decisions then appeared as Subsection (d)(3).

[5] The effective date provision at that time appeared as Subsections 1005(e)(1) and (2).

Court would retain jurisdiction over the cases *under the new statute*.[6] "[W]hat the amendment does as soon as it is enacted and the enactment is effective, it provides that the standards set forth in our amendment will be the substantive standards which we would expect would be applied in all cases, including cases which are pending as of the effective date." *Id.* (statement of Sen. Levin). The legislative history thus confirms what the text makes clear: These cases can no longer proceed under habeas or other fonts of jurisdiction. But they can proceed as actions under, and subject to the standards and requirements set forth in, Section 1005 itself.

Furthermore, to construe the DTA as not applying to pending cases would completely eviscerate Congress's purpose in passing the statute. Congress made clear that Subsection 1005(e) was intended to stop the flood of habeas claims clogging the courts by providing an alternative process to review such claims. 151 Cong. Rec. S14263 (daily ed. December 21, 2005) (statements of Sen. Graham and Sen. Kyl). Because habeas petitions have already been filed on behalf of nearly all of the detainees in Guantanamo Bay,[7] to interpret the statute as inapplicable to pending claims would allow nearly every detainee to proceed with a habeas claim, leaving virtually no cases for the D.C. Circuit to review under the new DTA process and standards. That would be an absurd result, and clearly not the result envisioned by Congress. *Id.* (the DTA provisions are "really no different than transferring a case from one court to another. . . . [W]e extinguish[ed] these habeas and other actions in order to effect a transfer of jurisdiction

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[6] Indeed, Congress was well aware that each and every claimant before this Court had obtained a "final" enemy combatant determination and thus was entitled to seek review under the DTA in this Court. *See* J. Elsea & K. Thomas, *Guantanamo Detainees: Habeas Corpus Challenges in Federal Court* 5 (CRS Report for Congress Dec. 7, 2005).

[7] As the government points out, "[h]abeas petitions have been filed on behalf of a purported 600 detainees." Supp. Br. of Cross-Appellees at 12 n.8 (Jan. 18, 2005). Indeed, one petition purports to file habeas petitions on behalf of *every* detainee who has not already filed an action. *See id.* (citing Petition for Writ of Habeas Corpus, *John Does 1-570 v. Bush,* No. 05-00313 (CKK) (D.D.C. Feb. 10, 2005)).

over these cases to the D.C. Circuit Court and substantive legal change as well.") (statement of Sen. Graham); *id.* ("[T]his bill's provisions . . . extinguish one type of action—all of the actions now in the courts—and create in their place a very limited judicial review of certain military administrative decisions.") (statement of Sen. Kyl). This Court should thus construe the DTA consistent with its purpose and apply it to pending cases. To do otherwise would transform the DTA into a pointless piece of legislation with no practical effect. It is a "longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous." *Beck v. Prupis*, 529 U.S. 494, 506 (2000). By the same token, this Court should not construe an entire set of procedures as a meaningless gesture.

II. CONSTRUING THE DTA CONSISTENT WITH ITS TEXT, HISTORY, AND PURPOSE CREATES NO CONSTITUTIONAL ISSUES

Construing the DTA consistent with its natural meaning does not implicate the Suspension Clause of the Constitution, because it does not infringe on the *constitutional* right of habeas corpus. As the Supreme Court's decisions in *Rasul v. Bush* and *Johnson v. Eisentrager* make clear, the constitutional writ of habeas corpus does not extend to enemy aliens outside of the United States. *See Rasul,* 542 U.S. at 478-79; *Johnson v. Eisentrager*, 339 U.S. 763, 776-78 (1950). Aliens being detained in Guantanamo Bay have never had a constitutional right to the writ of habeas corpus. *See Eisentrager*, 339 U.S. at 776-78. That is the essential holding of *Eisentrager*: The Constitution does not give federal courts jurisdiction to hear habeas petitions filed by German enemy aliens captured in China and confined in the custody of the U.S. Army in Germany. *Id.* at 784-85. The Constitution likewise does not give federal courts jurisdiction to hear habeas petitions filed by foreign enemy aliens captured in the Middle East and confined in military custody in Guantanamo Bay, Cuba.

Rasul does not alter that holding. In *Rasul,* the Supreme Court held that federal courts have statutory jurisdiction to hear habeas petitions filed by non-resident aliens held in Guantanamo Bay. *Rasul*, 542 U.S. at 478-79. Importantly, the Court reasoned that the habeas *statutory* scheme, and not the Constitution, accorded Guantanamo Bay detainees a right to file habeas petitions. *Id.* The Court wrote that, while non-resident aliens did not have a *constitutional* right to habeas, the Constitution did not bar them from filing habeas petitions. The Supreme Court thus acknowledged that, at the time it decided *Eisentrager*, there was neither a constitutional nor statutory basis for non-resident aliens to file habeas petitions. But it reasoned that developments in habeas since that time had expanded the *statutory* grant of jurisdiction to encompass habeas petitions filed by detainees in Guantanamo Bay. *Id.* at 478 ("[B]ecause subsequent decisions of this Court have filled *the statutory gap* that had occasioned *Eisentrager's* resort to 'fundamentals,' persons detained outside the territorial jurisdiction of any federal district court no longer need rely on the Constitution as the source of their right to federal habeas review."). The Supreme Court thus invoked the distinction between the scope of statutory habeas and the scope of habeas required by the *Constitution* so as to adhere to *Eisentrager*'s constitutional holding. *Id.* at 478-79. With the enactment of the DTA, Congress did nothing more than return the habeas statute back to its pre-*Rasul* form. *See* 151 Cong. Rec. S14260 (daily ed. Dec. 21, 2005) (statement of Sen. Kyl).

Because the Constitution does not extend habeas to aliens detained abroad, the DTA—which applies solely to claims filed by aliens detained in Guantanamo Bay—does not violate the Suspension Clause. The Suspension Clause does not place any limits on Congress's expansion or contraction of statutory habeas jurisdiction so long as its scope exceeds the constitutional minimum. To apply the clause to invalidate statutory adjustments that do not intrude on the

constitutional minimum would create "a one-way ratchet that enshrines in the Constitution every grant of habeas jurisdiction." *I.N.S. v. St. Cyr*, 533 U.S. 289, 342 (2001) (Scalia, J., dissenting); G. Neuman, *The Habeas Corpus Suspension Clause After St. Cyr*, 33 Colum. Hum. Rts. L. Rev. 555, 590-91 (2002) (discussing the Suspension Clause generally and saying that "of course the Suspension Clause is not a ratchet perpetuating every statutory expansion that Congress enacts. Rather, it is contended that the Suspension Clause stands for a principle (or set of principles) that distinguish permissible statutory contractions from unconstitutional suspension.").

Here, there can be no claim that the DTA restricts habeas to less than the constitutional minimum. Whether the parameters of the constitutional writ are defined according to the writ as it existed in 1789, the writ as it existed after the 1867 Amendment, or the writ as it existed the day after *Eisentrager* was decided, *Rasul* and *Eisentrager* instruct that the *constitutional* writ does not include protecting enemy alien detainees who are being held in Guantanamo Bay. *See Rasul*, 542 U.S. at 478-79; *Eisentrager*, 339 U.S. at 784.[8] Construing the DTA in accord with its plain meaning and obvious intent therefore raises no serious constitutional issues for this Court.

III. THIS COURT SHOULD VACATE THE DISTRICT COURT JUDGMENTS AND REQUIRE THE DETAINEES TO FILE AMENDMENTS OR NOTICES IDENTIFYING THE CHALLENGES THEY INTEND TO RAISE UNDER THE DTA

This Court and the Supreme Court have, in other contexts, outlined the procedures to be followed where a challenge to a lower court judgment ceases to be justiciable during appeal. In *United States v. Munsingwear*, 340 U.S. 36, 39 (1950), for example, the Supreme Court explained that the "established practice" when "a civil case . . . has become moot" pending appeal is to (among other things) "reverse or vacate the judgment below." Vacating the decision

[8] The historical evidence also shows that, for centuries, the writ was never thought to be available to aliens not present in the United States. *See Rasul*, 542 U.S. at 503-04 (Scalia, J., dissenting).

below "clears the path for future litigation between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved." *Id.* at 40. This Court regularly follows that practice. *See, e.g.*, *Clarke v. United States*, 915 F.2d 699, 708 (D.C. Cir. 1990). In this case, the challenges to the judgments of the district courts ceased to be justiciable when Congress withdrew the district court's jurisdiction and this Court's jurisdiction under the habeas statutes. Consequently, here, as in the mootness context, the Court should "vacate the judgment[s] below" to "clear[] the path for future litigation" and "eliminate[] a judgment, review of which was prevented" by intervening legislation.

In the mootness context, this Court and the Supreme Court will also remand the case with "a direction to dismiss" *if* the entire controversy has become moot. *See Munsingwear*, 340 U.S. at 39. Where the intervening change does not eliminate the controversy entirely—where only the appeal is moot and non-justiciable—dismissal is not warranted. Instead, the courts generally will vacate the lower court judgment and remand the case with orders that the parties be given leave to amend. *See Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 482 (1990). In *Lewis*, for example, an out-of-state bank holding company brought a Commerce Clause challenge to a Florida state law that prohibited out-of-state holding companies from owning certain types of banks in Florida. *Id.* at 474-75. A critical issue in that case was whether the proposed bank subsidiary qualified as a "bank" under federal law. While the case was pending, Congress amended the definition of "bank" so that there was no question that the proposed bank qualified under the amended statute. *Id.* at 476. Recognizing that the change in law mooted the issue on appeal, the Supreme Court vacated the judgment below. *Id.* at 482. But it did not order that the case be dismissed. Instead, the Supreme Court explained that, "where the mootness is

attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully." *Id.* Once again, this Court has followed that same practice. *See Nat'l Kidney Patients v. Sullivan,* 902 F.2d 51, 55 (D.C. Cir. 1990) (applying *Lewis* where Congress had passed a law while appeal was pending that mooted the appeal but left other issues unresolved).

This case calls for an analogous (but not identical) course. Whether or not the district courts below correctly disposed of the claims before them is no longer a live issue; their jurisdiction over those actions has been lost. Consequently here, as in *Lewis*, the appeals are moot and the judgments below must be vacated. Here, as in *Lewis*, moreover, the controversy between the parties is not wholly moot. Rather, mootness arises from "a change in the legal framework governing the case," and the detainees "may have some residual claim under the new framework" established in the DTA. As a result, here, as in *Lewis*, the cases should not be dismissed. Rather, the detainees should be given the opportunity to pursue challenges to their detention by challenging their CSRT enemy combatant determinations as provided in the DTA Subsection 1005(e)(2). To that end, those detainees who are appealing lower court judgments should be given leave to amend their notices of appeal. Similarly, those detainees who initially prevailed in the district court and are appellees here should be allowed to file petitions for review or other notices identifying the issues they wish to raise under the DTA.

Notably, however, those notices and the opportunity to litigate further (unlike in *Lewis*) exists in *this* Court, not the court below. Congress gave this Court exclusive jurisdiction over challenges to status determinations, sentences, and convictions under the DTA. These cases are,

as a result, in the proper court, and there is no reason to remand them to a court that lacks jurisdiction. Where Congress establishes new causes of action or new requirements for jurisdiction at the same time that it repeals a former jurisdictional provision, courts will generally examine whether the pending claims meet the new requirements; they will not needlessly dismiss and require the plaintiff to go through the formality of re-filing under the new statute. *See The Assessors v. Osbornes*, 76 U.S. 567, 573 (1869) (examining whether a case should be dismissed where Congress had repealed the statute that had originally provided jurisdiction, but at the same time added, a new source of jurisdiction).[9]

The legislative history confirms that Congress intended this Court to follow precisely that procedure. *See* 151 Cong. Rec. S14263 (daily ed. Dec. 21, 2005) (claims can "go forward" as "request for review of the detainee's CSRT pursuant to subsection (e)[(2)]."") (statement of Sen. Graham); *id.* ("No sense in kicking out a detainee's current habeas action in the D.C. Circuit just so that he has to re-file a section 1405 review request—it would be better to let the current case go forward as a 1405 review request.") (statement of Sen. Graham); 151 Cong. Rec. S12755 (daily ed. Nov. 15, 2005) (no dismissal required but "the standards in the amendment [would] be applied in pending cases") (statement of Sen. Levin).

[9] Courts often recharacterize claims in the habeas context rather than go through the pointless process of requiring the petitioners to amend their pleadings or re-file their cases. *See, e.g.*, *Castro v. United States*, 540 U.S. 375, 381-82 (2003) ("Federal courts sometimes will ignore the legal label that a *pro se* litigant attaches to a motion and recharacterize the motion in order to place it within a different legal category . . . they may do so in order to avoid an unnecessary dismissal, . . . to avoid inappropriately stringent application of formal labeling requirements, . . . or to create a better correspondence between the substance of a *pro se* motion's claim and its underlying legal basis.").

CONCLUSION

For the foregoing reasons the Court should apply the DTA to all pending cases, vacate the lower court judgments, and allow the parties to file notices identifying the issues that they seek to pursue in this Court under the DTA.

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Respectfully submitted,

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