

Nos. 05-5062, 05-5064, 05-5095 through 05-5116

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

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KHALED A. F. AL ODAH, Next Friend of FAWZI KHALID,  
ABDULLAH FAHAD AL ODAH, et al.,  
LAKHDAR BOUMEDIENE, Detainee, Camp Delta, et al.,

Petitioners/Appellants

v.

GEORGE W. BUSH, President of the United States of America, et al.,  
UNITED STATES OF AMERICA, et al.,

Respondents/Appellees

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CORRECTED AMICUS CURIAE BRIEF OF  
FEDERAL PUBLIC DEFENDER HABEAS CORPUS COUNSEL  
IN SUPPORT OF PETITIONERS'/APPELLANTS'  
POSITION ON THE JURISDICTIONAL  
IMPACT OF THE DETAINEE TREATMENT ACT OF 2005

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## Identity of Amicus Curiae and Statement Of Interest

In *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court determined that the federal district courts have authority, under 28 U.S.C. § 2241, to entertain petitions for writs of habeas corpus brought by individuals held in military custody at Guantánamo Bay, Cuba, for the purpose of determining the “legality” of their “potentially indefinite detention.” Following *Rasul*, the government notified the Guantánamo detainees of their right to petition the court for relief.<sup>1</sup> In reliance on *Rasul*, many Guantánamo Bay detainees sent handwritten petitions for help to the United States District Court for the District of Columbia seeking a judicial determination of the legitimacy of their confinement.<sup>2</sup> The detainees’ handwritten requests were filed as petitions for habeas corpus.

The District Court for the District of Columbia appointed Federal Defender Offices to represent approximately 39 of these petitioners, each of whom asserts he is neither an enemy combatant nor a threat to the United States and its allies. Two months after the assignment of the Federal Public Defenders, the Executive Branch and Congress compromised over anti-torture legislation sought by Senator McCain and included habeas corpus jurisdiction-stripping legislation in the Detainee Treatment Act of 2005 (DTA).<sup>3</sup>

The government contends that the Detainee Treatment Act of 2005 retroactively strips all federal courts of jurisdiction to grant habeas corpus relief to the Guantánamo Bay detainees. The

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<sup>1</sup> *Timeline Of Legal And Judicial Events Related To Guantánamo Bay*, MIAMI HERALD, November 11, 2005 (available at [http://www.miami.com/mld/miamiherald/news/special\\_packages/archive/11276706.htm](http://www.miami.com/mld/miamiherald/news/special_packages/archive/11276706.htm)).

<sup>2</sup> These handwritten petitions bear a poignant resemblance to the handwritten petition for a writ of certiorari submitted by Clarence Earl Gideon. *Gideon v. Wainwright*, 372 U.S. 335, 337 (1963).

<sup>3</sup> The Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1001-1006, 119 Stat. 2680, 2739-45 (2005).

Federal Public Defenders file this brief in opposition to the government's efforts to revoke or limit § 2241 jurisdiction. The Federal Public Defenders' interest derives from their representation of detainees in the United States District Court for the District of Columbia whose cases will be materially affected by the outcome in these consolidated appeals.

The source of the amicus authority to file pursuant to Rule 29(a) of the Circuit Rules for the United State Court of Appeals for the District of Columbia is the consent of all of the parties.

### **Summary of Argument**

The government's effort to remove the habeas corpus jurisdiction confirmed in the First Session of the First Congress from a discrete group defined by alienage and confinement in a military detention facility raises profound constitutional questions. The core question presented by this case is clear: Can the government indefinitely detain persons who are not enemy combatants, and who pose no threat to this country and its allies, without meaningful recourse to the courts? The answer dictated by our Constitution's text and heritage is "No."

The Federal Public Defender amici believe that the DTA is unconstitutional for the reasons set forth below. However, this Court need not address those weighty issues because, under the rules of statutory construction and the doctrine of constitutional avoidance, the statute is to be applied prospectively only and any textual ambiguity as to the prospective application of the statute must be resolved in favor of the petitioners.

The Detainee Treatment Act, as construed by the government, is unconstitutional because:

- 1) it violates the prohibition against bills of attainder;
- 2) it discriminates based on alienage, national origin, and religion in violation of the detainees' right to equal protection of the laws;
- 3) it violates the detainee's right to substantive due process with respect to freedom from indefinite detention and unredressable torture;

- 4) the effort to overturn the Supreme Court's decision in *Rasul* violates the separation of powers.

The DTA, as construed by the government, violates the constitution's prohibition against bills of attainder because it targets with specificity an identified group, those aliens detained by the Department of Defense at Guantánamo Bay, Cuba. The DTA satisfies the punitive aspect of a bill of attainder because the deprivation of access to the courts constitutes punishment and the effect of the DTA is to prolong the period of incarceration. These arguments are set forth in point I of this brief.

In point II of the brief amici argue that the DTA, as construed by the government, violates the Due Process Clause of the Fifth Amendment in several respects. First, the DTA establishes a legislative distinction based on alienage, in violation of the equal protection component protection of the Due Process Clause. This distinction must be subjected to strict scrutiny because discrimination based on alienage is inherently suspect and because the discrimination worked by the DTA involves the fundamental right of access to the courts.

The DTA, as construed by the government, also violates the petitioners' right to substantive due process because it significantly increases the potential for indefinite detention and the imposition of torture on the detainees without any possibility of judicial redress.

Finally, the DTA, as construed by the government, violates the petitioners' right to procedural due process because it eliminates the right of access to the courts for redress of grievances.

In point III of the brief amici address the manner in which the government's construction of the DTA violates the separation of powers. The DTA purports to overturn the decision of the United States Supreme Court in *Rasul* by redefining the United States in subsection 1005(g). Such a

redefinition is ineffective to overrule the Supreme Court's decision in the absence of an express statement by Congress of its intent to abrogate the treaties on which the Supreme Court relied.

In point IV of the brief amici argue that, as construed by the government, the DTA works an unconstitutional suspension of the writ of habeas corpus. The writ of habeas corpus has antecedents to, and an existence, independent of the constitution. As a result, even if repeal of the habeas corpus provisions of 28 U.S.C. § 2241 with respect to persons detained in Guantánamo can be sustained for other reasons, it is, nonetheless, ineffective to withdraw habeas corpus jurisdiction from the United States district courts.

In point V of the brief amici argue that while the DTA, as construed by the government, is unconstitutional, the Court need not reach those issues for several reasons. First, on its face, the DTA is unambiguously prospective. The government's brief misapplies the rules of statutory construction discussed by the Supreme Court in *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001), and *Lindh v. Murphy*, 521 U.S. 320 (1997). Moreover, if the Court finds any ambiguity in the statute, the doctrine of constitutional avoidance requires the court to construe the statute in a manner that avoids the substantial constitutional questions discussed in the first four sections of the brief.

Finally, in the last section of the brief, amici argue that should this Court determine that it lacks jurisdiction over these cases as appeals from the previously filed habeas corpus petitions, in order to avoid the substantial constitutional questions discussed in points 1 through IV of the brief, the scope of review permitted this Court under the DTA must be defined as including full legal and factual development of the petitioner's claims.

## ARGUMENT

### **I. As Construed By The Government, The DTA Violates The Constitution's Prohibition Against Bills Of Attainder.**

The DTA's amendment to § 2241, customized to deny habeas and other court access to a small, distinct, and unpopular group, is a classic Bill of Attainder prohibited by Article I, § 9, clause 3, of the Constitution ("No Bill of Attainder . . . shall be passed."). It is precisely this type of "deprivation of any rights, civil or political," including "the privilege of appearing in courts," when imposed on an otherwise disfavored minority that has been condemned by the Supreme Court. *Cummings v. Missouri*, 71 U.S. 277, 320 (1866); *United States v. Brown*, 381 U.S. 437, 445-47 (1965).

To qualify as a Bill of Attainder, a legislative enactment must (1) apply with specificity to an identified individual or group, and (2) impose punishment. *Foretich v. United States*, 351 F.3d 1198, 1217 (D.C. Cir. 2003). The element of specificity is satisfied if a statute singles out a person or class by name or applies to "easily ascertainable members of a group." *United States v. Lovett*, 328 U.S. 303, 315 (1946).

The target group of the DTA is any "alien detained by the Department of Defense at Guantánamo Bay, Cuba." § 1005(e)(1). These individuals could not be more discretely identified: the only persons detained at the detention camp are those whom the Executive Branch puts there. The individuals to whom the DTA applies are the named persons who have petitioned for habeas relief, the as yet unnamed John Doe detainees at Guantánamo Bay, and any others held at the Guantánamo Bay prison. The DTA easily meets the specificity criterion for classification as a Bill of Attainder.

From the time of Chief Justice Marshall, the scope of forbidden punishment falling within the attainder prohibition has included banishment, deprivation of the right to vote, corruption of blood, and confiscation of property. *Foretich*, 351 F.3d at 1217. Following the Civil War, Congress and the States enacted legislation aimed at persons who had rebelled against the United States, barring practice of certain professions without an expurgatory oath of loyalty. In *Cummings*, the Court freed a priest who ministered without swearing the oath, stating:

*The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.* Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, *or from the privilege of appearing in the courts*, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment.

71 U.S. at 320 (emphasis added). Similarly, in *Ex parte Garland*, 71 U.S. 333 (1866), loyalty oath legislation that barred an attorney from the courtroom was held to constitute a Bill of Attainder:

As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct.

71 U.S. at 377. The Civil War cases make clear that Congress cannot legislate to the detriment of a group – irrespective of size – that is defined by the status of its members so as to permanently exclude them, on the basis of that status, from civil liberties ordinarily available to all.<sup>4</sup>

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<sup>4</sup> In *Brown*, the Court found that the Bill of Attainder prohibition stemmed from separation of powers concerns:

[T]he Bill of Attainder Clause not only was intended as one implementation of the general principle of formalized power, but also reflected the Framers’ belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness, of, and levying appropriate punishments on, specific persons.

*Brown*, 381 U.S. at 445.

Determination of the punitive aspect of legislation subject to Bill of Attainder Clause analysis has included consideration of three factors: “(1) whether the challenged statute falls within the historical meaning of punishment; (2) whether the statute, ‘viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes’; and (3) whether the legislative record ‘evinces a congressional intent to punish.’” *Foretich*, 351 F.3d at 1218 (quoting *Selective Service System v. Minnesota Public Interest Group*, 468 U.S. 841, 852 (1984)). A statute need not satisfy all three factors to be a Bill of Attainder; they are merely factors to be considered. *Selective Service System*, 468 U.S. at 852. “Our treatment of the scope of the Clause has never precluded the possibility that new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee.” *Nixon v. Administrator of General Services*, 433 U.S. 425, 475 (1977). The test is functional rather than dependent upon legislative labeling. *Cummings*, 71 U.S. at 325 (“The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name.”).

Denial of equal access to the courts meets the historic definition of punishment. If exclusion from vocations constitutes punishment – including “appearing in the courts” as in *Cummings* – barring a prisoner from bringing a claim for habeas relief before the district court can only be an even more punitive measure. This is especially true because the DTA’s exclusion cripples the ability of Guantánamo detainees to attack the constitutional legitimacy of their confinement and destroys any opportunity they might otherwise have had in habeas litigation to develop facts to counter the one-sided record created in the Combatant Status Review Tribunal (CSRT) hearings. Consequently, as construed by the government, the DTA ensures that the petitioners’ detention will be prolonged and indefinite; a state of affairs which the *Cummings* court – citing to Blackstone – listed as an historically-recognized form of punishment. 71 U.S. at 321 (quoting William Blackstone, 4

Commentaries \*377). *See also Lynce v. Mathis*, 519 U.S. 433, 442 (1997) (discussing constitutional bases of prohibitions on retroactive action and removal of eligibility for a benefit as punishment).<sup>5</sup>

The punitive aspects of the DTA, as a practical matter, are extreme. Imprisonment itself is punitive – whether brief or prolonged and regardless of the conditions. *Brown*, 381 U.S. at 458 (imprisonment regardless of its purpose is punishment). Here, the detainees have been in onerous custody, virtually incommunicado, for up to five years. They have been, and continue to be, aggressively interrogated. The indefinite duration of the custody imposed on the detainees places it at the apex of punitive measures. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

Denial of access to the court also fosters conditions in which the risk of torture or other inhuman and degrading treatment is increased. Despite the reference to banning torture in the DTA, the government argues that the DTA “by its own terms prevents this Court from reviewing any claim, including a claim under § 1003 [the torture ban], relating to any aspect of the petitioner’s detention.” Respondents’ Opposition to Petitioner’s Emergency Motion for Injunction Against Further Torture of Mohammed Bawazir at p. 19, *Al-Adahi v. Bush*, No. 05-280 (GK) (D.D.C. March 1, 2006). Recent history teaches that the torture concerns are starkly real. The United Nations has expressed concern, *Situation of Detainees at Guantánamo Bay* (U.N. Comm. Human Rights, Feb. 15, 2006), and a former government interrogator in Iraq has revealed that techniques falling within any reasonable definition of torture were developed at Guantánamo Bay (Anthony Lagouranis, *Tortured Logic*, N.Y. TIMES, Feb. 28, 2006) (available at <http://www.nytimes.com/2006/02/28/opinion/28lagouranis.html>).

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<sup>5</sup> The discussion in *Lynce* suggests that the punitive aspect of the DTA also implicates the Ex Post Facto Clause of Article I, Section 9. *Lynce*, 519 U.S. at 440, n.12.

The punitive reality of the DTA accords with the animus toward the detainees that has been expressed by some members of both the Legislative and Executive branches. The detainees have been repeatedly prejudged and characterized as terrorists. This animus is especially anomalous in light of indications from the declassified CSRT proceedings that only a minority are alleged to have taken up arms against the United States and very few belong to al Qaeda. Mark Denbeaux, *Report on Guantánamo Detainees: A Profile of 517 Detainees Through Analysis of Dept. of Defense Data*, Seton Hall University of Law, Feb. 2006.

Historically, members of political groups believed to present a threat to national security have been the “targets of the overwhelming majority of English and early American bills of attainder.” *Brown*, 381 U.S. at 453; see *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137-38 (1810) (“it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed.”). Politically-suspect groups are most likely to draw the fire of legislative censure and condemnation. For a statute to be declared a Bill of Attainder, all that is necessary “is that the legislative process and the law it produces indicate a congressional purpose to behave like a court and to censure and condemn.” *Foretich*, 351 F.3d at 1226. That is what has happened with the DTA.

The nonpunitive purposes of the DTA are negligible compared to the punitive consequences. The statutory text lacks any formal statement of purpose or findings regarding § 1005. To the extent the government’s briefing expresses concern regarding litigation and national security, the District Court has demonstrated complete and orderly control of the Guantánamo Bay litigation. The Federal Defenders, within the context of stayed proceedings, have engaged in appropriate litigation regarding

meaningful access to clients and protection of client rights. The Guantánamo Bay detainee litigation raises critical questions which address the very heart of the meaning of our Constitution. The District Court, with its protective order and enforcement mechanisms, has skillfully balanced the needs of national security and the petitioners' claims of innocence in allowing these questions to be heard. The "litigation crisis" suggested by the government is a myth.

The writ of habeas corpus, "[a]t its historical core, . . . has served as a means of reviewing the legality of Executive detention, and it is in that context that the protections have been strongest." *I.N.S. v. St. Cyr*, 533 U.S. 289, 302 (2001). Permanent denial of access to the writ of habeas corpus for the Guantánamo Bay detainees is unprecedented and violates the Bill of Attainder Clause. The extreme measures of the DTA are disproportionate to the security interests at stake because other measures, such as those set out in the protective orders, can continue to protect sensitive information and guard national security.

## **II. As Construed By The Government, The DTA Violates The Due Process Clause Of The Fifth Amendment.**

The Due Process Clause of the Fifth Amendment provides that "no person shall be . . . deprived of life, liberty, or property, without due process of law." This clause includes both procedural and substantive protections and requires equal protection of the laws. The government's interpretation of the DTA runs afoul of these concepts.

### **A. Legislation Based On Alienage Violates The Detainees' Right To Equal Protection Of The Laws.**

The Fifth Amendment's guarantee of due process incorporates the Fourteenth Amendment's equal protection clause. *Bolling v. Sharp*, 347 U.S. 497, 498-500 (1954). Although the government retains the power to classify, particularly in the area of economics and social welfare, classifications "based on alienage . . . are subject to close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365,

372 (1971). In *Rasul*, the Court found that § 2241 applied equally to United States citizens and to aliens held at Guantánamo Bay: “Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee’s citizenship.” 542 U.S. at 481.

The DTA, by its express terms, strips aliens detained in Guantánamo of access to the courts, while maintaining the rights of United States citizens to such access (“ . . . an application for a writ of habeas corpus filed by or on behalf of an *alien* . . . or . . . any other action . . . relating to any aspect of the detention of an *alien* . . .”). § 1005(e)(1) (emphasis added). The DTA’s new statutory distinction based on alienage, regardless of legal status, violates the guarantee of equal protection under law.

The restriction on access to the courts based on national origin requires strict scrutiny for two reasons. First, discrimination based on alienage is inherently suspect. Disparate treatment of persons based on their alienage, without respect to legal status, is generally prohibited as a classification based on national origin. *Plyler v. Doe*, 457 U.S. 202, 214 (1982) (Fourteenth Amendment’s phrase “person within its jurisdiction” “sought expressly to ensure that the equal protection of the laws was provided to the alien population”); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (“The fourteenth amendment to the constitution is not confined to the protection of citizens. . . . [Its] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.”). By limiting the habeas-stripping provisions to aliens, the DTA recognized the court’s continued § 2241 jurisdiction over United States citizens at Guantánamo Bay.

Second, discrimination regarding a fundamental right, such as access to the courts, triggers heightened protections. *Tennessee v. Lane*, 541 U.S. 509, 528 (2004) (right of access to the courts “call[s] for a standard of review at least as searching, and in some cases more searching, than the standard that applies to sex-based classifications”); *Romer v. Evans*, 517 U.S. 620, 633 (1996) (“Central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.”). Constitutional and statutory prohibitions on arbitrary detention and torture mean little without a judicial remedy.<sup>6</sup>

Congressional hostility to the Guantánamo Bay detainees and prejudgment of the merits of their claims does not provide a rational basis for discrimination against them. “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

**B. Indefinite Detention And Unredressable Torture Violate Substantive Due Process.**

In considering the constitutionality of the authorization for detention contained in 8 U.S.C. § 1231(a)(6) (1994), the Supreme Court stated in *Zadvydas*:

A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment’s Due Process Clause forbids the Government to ‘depriv[e] any ‘person . . . of . . . liberty . . . without due process of law.’ Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that clause protects.

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<sup>6</sup> Strict scrutiny is also required because the target group of aliens is de facto Muslim, which implicates equal protection as well as First Amendment concerns. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 542 (1993).

533 U.S. at 690. The Court ultimately resolved the case by interpreting the statute to forbid indefinite detention. Identical concerns arising out of the substantive liberty component of the Due Process Clause apply here. Should the Court accept the government's interpretation of the statute, it would be required to address the due process question raised but avoided in *Zadvydas* and *Clark v. Martinez*, 543 U.S. 371 (2005).

The substantive due process issues are even more acute because of the detainees' claims of torture and mistreatment. The moral identity of our Republic, as well as its prestige abroad, is compromised by the government's contention that the DTA bans torture while at the same time depriving torture victims of meaningful access to the courts.

**C. The DTA's Limitations On Judicial Review Violate Procedural Due Process.**

The DTA offers no other substantive procedural protections than those found to be constitutionally inadequate by the district court in *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 468 (D.D.C. 2005). Without judicial oversight, the deficiencies of the CSRT process are magnified.

In reliance on *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the district court found that the failure of the CSRT process to provide detainees access to the material evidence upon which the CSRT affirmed "enemy combatant" status and the failure to permit the assistance of counsel were general procedural defects rendering the proceedings unconstitutional. *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d at 465-72. The recently published transcripts of 360 CSRT and ARB proceedings illustrate the systemic inadequacies of the process.

The district court also found that reliance on coerced statements and a vague and overly broad definition of "enemy combatant" were specific defects of the process. With the exception for use

of coerced evidence, the DTA does not address, much less overcome these deficiencies. The only “improvement” in the CSRT process purportedly provided by the DTA requires consideration of the “probative value” of coerced statement. §1005(b)(1). However, the DTA prohibits reconsideration of any past determination of “enemy combatant” status derived from coerced statements. §1005(b)(2).<sup>7</sup> Consequently, the “improvement” purportedly provided by Section 1005 is illusory. Where, as here, the established procedures are unconstitutional, judicial oversight through habeas corpus is even more critically important. The DTA’s limitation on judicial review fails to satisfy due process.

### **III. As Construed By The Government, Congress’s Effort To Overturn Supreme Court Action In *Rasul* Violates The Separation Of Powers.**

In *Rasul*, the Court addressed the lease agreements and treaty with Cuba and concluded that Guantánamo Bay is “a territory over which the United States exercises plenary and exclusive jurisdiction, but not ‘ultimate sovereignty.’” *Rasul*, 542 U.S. at 475. “By the express terms of its agreements with Cuba, the United States exercises ‘complete jurisdiction and control’ over the Guantánamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.” *Rasul*, 542 U.S. at 480. The Court concluded that, for aliens detained at Guantánamo Bay, the courts had jurisdiction to review the actions of custodians over whom “no party question[ed] the District Court’s jurisdiction.” *Rasul*, 542 U.S. at 483.

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<sup>7</sup> The due process inadequacies of the DTA are in stark contrast to the rules of procedure established in the Alien Terrorist Removal Court of the United States. There, suspected terrorists are afforded a myriad of procedural due process rights before they may be removed from the United States, including neutral judicial involvement, access through appointed counsel to classified evidence, discovery, proof by a preponderance of terrorist status, and significantly, appeal rights. 8 U.S.C. §1531 *et seq.* Alleged terrorists facing removal are further entitled to consideration for release pending removal, and review of detention at least every six months.

In the absence of any change in the relevant agreements and treaty, Congress purported to overrule *Rasul's* jurisdictional ruling by redefining the geography of the United States: “For purposes of this section, the term ‘United States’, when used in a geographic sense, is as defined in section 101(a)(38) of the Immigration and Nationality Act and, in particular, does not include the United States Naval Station, Guantánamo Bay, Cuba.” § 1005(g). This section of the DTA creates separation of powers problems because it seeks to reverse *Rasul* by adopting the *Rasul* district court analysis.

The *Rasul* district court denied relief based on its conclusion that the military base at Guantánamo Bay, Cuba, is outside the sovereign territory of the United States. *Rasul v. Bush*, 215 F. Supp. 2d 55, 68-70 (D.D.C. 2002). The Supreme Court’s reversal, however, was premised on the effect of our Nation’s agreements and treaties with Cuba, not on whether Guantánamo Bay is geographically part of the United States. *Rasul*, 542 U.S. at 480-81. Because the *Rasul* decision is based on the Supreme Court’s interpretation of a treaty, and the DTA does not contain “an affirmative expression of congressional intent to abrogate the United States’ international obligations,” the congressional enactment does not overturn this aspect of *Rasul*. See *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982).

The DTA abrogates other treaties without an affirmative expression of congressional intent. For example, in 1992, the Senate ratified the International Covenant on Civil and Political Rights (ICCPR). 138 CONG. REC. S4781-84 (April 2, 1992). Article 9 of the ICCPR provides that “[n]o one shall be subjected to arbitrary arrest or detention.” G.A. Res. 2200A (XXI), 21 U.N. GOAR Supp. (no. 16) at 52, U.N. Doc. A/6316 (1966). The result of the DTA is to abrogate these treaty obligations. See *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 178 (1993).

#### **IV. As Construed By The Government, The DTA Works An Unconstitutional Suspension Of The Writ Of Habeas Corpus.**

The briefs of petitioners, and other amici, argue that the DTA works an unconstitutional suspension of the writ of habeas corpus and that, if the DTA is construed to abrogate jurisdiction under 28 U.S.C. § 2241, review remains available in the district courts under the common law writ of habeas corpus. The Federal Public Defender amici agree with those arguments and add only the following.

In *Rasul*, the Court discussed at length *Johnson v. Eisentrager*, 339 U.S. 763 (1950). *Rasul*, 542 U.S. at 475-480. In *Eisentrager*, the six factors that militated against a right to the writ related “only to the question of the prisoners’ *constitutional* entitlement to habeas corpus.” *Rasul*, 542 U.S. at 476. The Court observed that the Court of Appeals in *Eisentrager* had found a constitutional right to the writ protected by the Suspension Clause. 542 U.S. at 477. “In essence, the Court of Appeals concluded that the habeas statute, as construed in *Ahrens*, had created an unconstitutional gap that had to be filled by reference to fundamentals.” 542 U.S. 477. Nowhere in the Court’s discussion is there any indication that a “fundamental” non-statutory (*i.e.* constitutional) right to petition for habeas relief does not exist. The Supreme Court noted the constitutional basis for seeking habeas relief in *St. Cyr*:

In sum, even assuming that the Suspension Clause only protects the writ as it existed in 1789, there is substantial evidence to support the proposition that pure questions of law like the one raised by the respondent in this case could have been answered in 1789 by a common-law judge with power to issue the writ of habeas corpus.

533 U.S. at 304-05. The Court expressly rejected the government’s position that habeas can be eliminated by statute: “[A] serious Suspension Clause issue would be presented if we were to accept the INS’s submission that the 1996 statutes have withdrawn that power from federal judges and provided no adequate substitute for its exercise.” *St. Cyr*, 533 U.S. at 305; *see also Ex parte Yerger*,

75 U.S. (8 Wall.) 85, 96 (1868). (“It would have been, indeed, a remarkable anomaly if this court, ordained by the Constitution for the exercise, in the United States, of the most important powers in civil cases of all the highest courts of England, had been denied, under a constitution which absolutely prohibits the suspension of the writ, except under extraordinary exigencies, that power in case of alleged unlawful restraint, which the Habeas Corpus Act of Charles II expressly declares those courts to possess.”).

The inherent power of the judiciary under Article III, the common law history of the writ imported into the Constitution in the Suspension Clause, and the checks on judiciary power given to Congress in Article I, provide a sound basis for recognition of a right to habeas review that cannot be nullified by the legislature. *See* Chrisman, *Article III Goes to War: A Case for a Separate Federal Circuit for Enemy Combatant Cases*, 21 JOURNAL OF LAW AND POLITICS 31 (Winter 2005).

**V. The DTA Is Unambiguously Prospective And Does Not Deprive Federal Courts of § 2241 Jurisdiction And The Doctrine Of Constitutional Avoidance Supports Interpreting The Statute To Apply Only Prospectively.**

While the Federal Public Defender amici submit that the DTA is unconstitutional for the reasons set forth above, the Court can avoid addressing those weighty issues for two reasons. First, under the plain language and the presumption against retroactivity, the DTA does not retrospectively deprive federal courts of jurisdiction under 28 U.S.C. § 2241. Second, if the Court is not convinced that the statute is unambiguously prospective, the doctrine of constitutional avoidance applies.

**A. The DTA Is Unambiguously Prospective And Does Not Retrospectively Deprive Federal Courts Of § 2241 Jurisdiction.**

The Federal Public Defender amici agree with the arguments of petitioners and other amici that the plain language of the DTA does not retrospectively deprive federal courts of jurisdiction

under 28 U.S.C. § 2241. We only assert that the government mistakenly relies on a view of retroactivity law that the Supreme Court has rejected.

The government notes only in passing that Supreme Court authority, such as *St. Cyr*, 533 U.S. 289, and *Lindh v Murphy*, 521 U.S. 320 (1997), that requires, in the habeas context, a strong presumption against retroactivity. Instead, the government focuses on cases involving commercial and other litigation wholly inapplicable in the habeas context. The presumption against retroactivity, especially where liberty is at issue, “is deeply rooted in our jurisprudence, and embodies a legal doctrine that is older than our Republic.” *Lynce*, 519 U.S. at 440 & n.12 (quoting *Landgraf v. USI Film Products*, 511 U.S.244, 265 (1994)). The *Landgraf* court explained that a statute repealing jurisdiction generally will only have retroactive effect when it “‘takes away no substantive right but simply changes the tribunal that is to hear the case.’” 511 U.S. at 274 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)); see *Republic of Austria v. Altmann*, 541 U.S. 677, 693 (2004) (reiterating the principle that statutes affecting substantive rights, even if cast as jurisdictional, do not apply to pending cases). Section (e)(1) eliminates a substantive right of access to the courts. Hence, the DTA “goes beyond ‘mere’ procedure to affect substantive entitlement to relief.” *Lindh*, 521 U.S. at 327.

In *Lindh*, the Court applied the *Landgraf* “vested rights” test to hold that an amendment to the rules for habeas petitioners was substantive and, therefore, would not apply to pending cases unless there was a clear statement to the contrary. In *St. Cyr*, the Court affirmed the *Landgraf* rule to hold that, in the absence of a clear statement that habeas jurisdiction should be stripped retroactively, the statute could not apply to pending cases. 533 U.S. at 316. The DTA’s habeas-stripping provision falls squarely within the vested rights rule of *Landgraf* and its progeny, which requires prospective application only.

The government’s argument is premised on a view of retroactivity law rejected in *Landgraf*. Primarily relying on concurring opinions in *Landgraf*, the government argues that all jurisdictional statutes presumptively apply to pending cases unless there is a savings clause. Supplemental Brief at pp. 30-31. However, the *Landgraf* majority defined a prohibited retrospective law as one that “takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.” *Landgraf*, 511 U.S. at 269 (quoting *Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (No. 13, 156) (CCNH 1814)). Because the Supreme Court has adopted the “vested rights” test, the analysis advocated by the government is not applicable. For the same reasons, their reliance on the concurrence in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C.C. 2004), is misplaced.

**B. Under The Doctrine Of Constitutional Avoidance, The DTA Is To Be Interpreted To Apply Prospectively Only.**

The doctrine of constitutional avoidance provides that, “if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ [courts] are obligated to construe the statute to avoid such problems.” *St. Cyr*, 533 U.S. at 299-300 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

The canon [of constitutional avoidance] is not a method of adjudicating constitutional questions by other means . . . . Indeed, one of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.

*Martinez*, 543 U.S. at 381.

If the Court does not conclude that the DTA is unambiguously prospective, the doctrine of constitutional avoidance applies. Under that doctrine, as elaborated in *Martinez*, the Court must determine if the statute is amenable to a “plausible” construction that would avoid the necessity for

deciding the constitutional questions. 543 U.S. at 380-81. There should be no question but that the arguments regarding prospective application are, at the very least, a “plausible” competing interpretation of the statutory text. If the Court concludes that the statute is ambiguous regarding retroactivity, it should give Congress and the Executive credit for not intending to enact legislation that is as destructive of constitutional rights as that to which the government’s interpretation of the DTA would lead.

**VI. Assuming This Court Determines That It Lacks Jurisdiction Over These Cases As Appeals From The Previously Filed Habeas Corpus Petitions, The Court Should Hold That The DTA Can Only Pass Constitutional Muster If It Allows For Substantive Law Challenges, Fact Development, And Meaningful Consideration Of Those Facts In The Course Of Circuit Court Review.**

In response to the Court’s specific question in its January 27, 2006, order, the Federal Defender amici submit that interpreting the scope of review provisions of §1005 (e)(2)(c) as limited to consideration of whether the CSRT procedures were followed would present serious constitutional questions that must be avoided. *Zadvydas*, 533 U.S. at 696-99. In order to render the DTA’s review provisions constitutional, the DTA must be interpreted to require this Court to engage in a full legal and factual review of the bases for the petitioners’ detentions. In the absence of a construction requiring such review, the DTA would leave the petitioners with no meaningful review of the executive detention to which they are being subjected.

Interpretation of the scope of the DTA review provisions absent the procedural and substantive protections described above would violate the Bill of Attainder prohibition, the equal protection and due process clauses, the Suspension Clause and the separation of powers. The Supreme Court’s recent implementation of congressional intent in the remedial portion of the decision in *United States v. Booker*, 543 U.S. 220 (2005), provides the framework for the

jurisprudential analysis of the DTA which this Court should employ. *See Zadvydas*, 533 U.S. at 699 (reading a six month limitation on detention into the statute).

### CONCLUSION

In *Rasul*, the Supreme Court held that the detainees at Guantánamo Bay, “no less than American citizens,” are entitled to test the legality of their prolonged detention by means of habeas corpus. 542 U.S. at 481. In reliance on *Rasul*’s recognition that § 2241 provides a forum to determine the legality of their detention, the petitioners filed the claims now pending before the courts. The government’s construction of the DTA as terminating jurisdiction violates the constitutional prohibitions against Bills of Attainder and suspension of the writ and the constitutional guarantees of equal protection and due process. It also runs counter to the vision and understanding of the American people, and of the peoples of the world, with respect to this Nation’s commitment to the rule of law. This Court should reject the government’s position either on the merits or through application of the rules of statutory construction or in accordance with the doctrine of constitutional avoidance.

Respectfully submitted March 17, 2006.

/s/ Steven T. Wax

Steven T. Wax  
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/s/ Stephen R. Sady

Stephen R. Sady  
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**CERTIFICATE OF COMPLIANCE UNDER FED. R. APP. 32(a)(7)**

I, Steven T. Wax, hereby certify that, based upon the word and line count of the word processing system used to prepare this brief, the brief contains 6544 words.

/s/ Steven T. Wax  
Steven T. Wax

## APPENDIX A

The following Federal Public Defenders and Community Defenders request that the Court reject the government's position that the Detainee Treatment Act of 2005 (DTA) retroactively strips all federal courts of jurisdiction to grant habeas corpus relief to these detainees:

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Heather R. Rogers, Assistant Federal Public Defender  
Zaki Zehawi, Assistant Federal Public Defender  
*Mohabat Khan v. Bush, et al.*, Case No. CV 05-1010  
*Ghaleb Nassar Al Bihani v. Bush, et al.*, Case No. CV 05-1312  
*Asim Ben Thabit Al-Khalagi v. Bush, et al.*, Case No. CV 05-999

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*Abib Sarajuddin v. Bush, et al.*, Case No. CV 05-1000  
*Abdul Baqi v. Bush, et al.*, Case No. CV 05-1235  
*Ehsan Ullah v. Bush, et al.*, Case No. CV 05-1311

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*Khiali-Gul v. Bush, et al.*, Case No. CV 05-877  
*Khudaidad v. Bush, et al.*, Case No. CV 05-997

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*Ali Adel Motaleb Aweid Al Khaiy v. Bush, et al.*, Case No. CV 05-1239  
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*Ali Hussian Mohammad Muety Shaaban v. Bush, et al.*, Case No. CV 05-892  
*Adel Hassan Hamad v. Bush, et al.*, Case No. CV 05-1009  
*Chaman v. Bush, et al.*, Case No. CV 05-887  
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*Habibullah Mangut v. Bush, et al.*, Case No. CV 05-1008

*Abdul Salaam v. Bush, et al.*, Case No. CV 05-1013

*Hajji Ghalib v. Bush, et al.*, Case No. CV 05-1238

## CERTIFICATE OF SERVICE

I certify that on this 10<sup>th</sup> day of March, 2006, I served the following AMICUS CURIAE BRIEF OF THE FEDERAL PUBLIC DEFENDERS IN SUPPORT OF PETITIONERS'/APPELLANTS' POSITION ON THE JURISDICTIONAL IMPACT OF THE DETAINEE TREATMENT ACT OF 2005 on the below listed counsel via email and by causing copies to be sent by U.S. Postal Service, first class mail, to:

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