No. _____

IN THE
Supreme Court of the United States

ABDUL RAHIM ABDUL RAZAK AL JANKO, *PETITIONER*,

V.

ROBERT M. GATES, ET AL., *RESPONDENTS*.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether section 7(e)(2) of the Military Commissions Act, 28 U.S.C. § 2241(e)(2), unconstitutionally strips Article III courts of jurisdiction to hear constitutional claims of individuals detained by the United States that a habeas court has determined were never properly detained?

II.

Whether the D.C. Circuit correctly held that the use of the term "United States" in section 7(e)(2) of the Military Commissions Act, 28 U.S.C. § 2241(e)(2), refers solely to the executive branch, in light of this Court's precedent stating that the plain statutory meaning of the term "United States" is "the sovereign composed of the three branches"?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- Petitioner is Abdul Rahim Abdul Razak Al Janko, an individual, who was the plaintiff in the trial court and appellant in the court of appeal.

- Respondents are Robert M. Gates, Donald Rumsfeld, Paul Wolfowitz, Gordon England, Rear Adm. James M. Mcgarrah, Richard B. Myers, Peter Pace, Michael Glenn "Mike" Mullen, Gary Speer, James T. Hill, Bantz Craddock, James G. Stavridis, Maj. Gen. Geoffrey D. Miller, Brig. Gen. Jay Hood, Rear Adm. Harry B. Harris, Jr., Mark H. Buzby, David Thomas, Thomas H. Copeman III, Adolph McQueen, Brig. Gen. Nelson J. Cannon, Col. Michael Bumgarner, Col. Wade Dennis, Esteban Rodriguez, Paul Rester Daniel McNeill, Frank Wiercinski, and Does 1-100 (unknown additional defendants).

All were defendants in the trial court and appellees in the court of appeal.

No corporations are involved in this proceeding.

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INTRODUCTION

This case presents issues of national importance about separation of powers between the three branches and about statutory interpretation. Both the District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit interpreted section 7(e)(2) of the Military Commissions Act ("MCA") in a manner that raises serious constitutional issues regarding separation of powers.

The D.C. Circuit found that federal courts were prohibited by the MCA from hearing the constitutional and other statutory claims of Petitioner Abdul Rahim Abdul Razak Al Janko. A federal court had

previously found that Mr. Janko was never properly detained as he was not an enemy combatant when he was initially detained in Afghanistan and then held for seven years in Guantanamo. The decision below conflicts with this Court's precedent and fundamentally restricts the courts' Article III power to hear and remedy constitutional violations.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395 (1971), this Court recognized its own authority under the Constitution to provide for judicial remedies for violations of the Constitution. This independent judicial power is an essential element in our system of checks and balances, ensuring constitutional compliance on the part of federal officials.

Furthermore, both the district court and the D.C. Circuit dismissed Petitioner's constitutional claims by holding that 7(e)(2) of the Military Commissions Act, 28 U.S.C. § 2241(e)(2), bars any U.S. court from hearing non-habeas claims brought by aliens who have been determined by the executive branch to have been properly detained as enemy combatants, regardless of any subsequent judicial decision. The lower courts reasoned that the term "United States" refers solely to the executive branch. However, this narrow interpretation of "United States" conflicts with this Court's precedent stating that, absent contrary language, the statutory term "United States" plainly means all three branches of our government. *United States v. Providence Journal Co.*, 485 U.S. 693, 701 (1988) (quoting *United States v. Nixon*, 418 U.S. 683, 696 (1974)). If left standing, the lower courts' contrary interpretation of "United States" – a commonly-used statutory term – will foster unpredictability for courts and legislators both

in interpreting existing statutes and in drafting future ones.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, *Janko v. Gates*, is reported as 741 F.3d 136, 138 (D.C. Cir. 2014) (App. A). That court's order denying Petitioner's timely petition for rehearing (App. C) was entered July 3, 2009, as was the order denying Petitioner's petition for rehearing *en banc* (App. D). The opinion of the district court (App. B) is reported at 831 F. Supp. 2d 272 (2001)).

JURISDICTION

Petitioner seeks review of a final decision of the court of appeals entered on January 17, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1). Petitioner's petition for rehearing was denied on July 3, 2009. On September 22, 2014, Petitioner's application to extend the time to file the petition for a writ of certiorari was granted and the time was extended to November 26, 2014.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. § 2241(e)(2) (set forth in full at App. E).

U.S. Const. art. III (set forth in full at App. E).

STATEMENT OF THE CASE

This case raises questions of national importance about the rights of a man wrongfully detained and subjected to torture and ill-treatment for almost eight years – abuses from which he continues to struggle to recover. Petitioner travelled to Afghanistan in January of 2008. Soon after his arrival in Afghanistan, the Taliban detained and tortured him for refusing to fight on behalf of their terrorist organization. JA 34, First Amended Complaint ("FAC") ¶¶ 54-55. Through horrific and inhumane treatment, the Taliban coerced Petitioner into making a false confession that he was an American and Israeli spy. JA 34–35, FAC ¶¶ 56-57; Pet. App. 3a. Petitioner's confession was videotaped and broadcast on United Arab Emirates national television, where his family and friends first learned that he was in prison. JA 34, FAC ¶¶ 56.

Based on Petitioner's forced confession, the Taliban sentenced him to 25 years in prison. JA 35, FAC ¶¶ 58. He spent eighteen months imprisoned and tortured at the notorious Sarpusa Prison in Kandahar. JA 35, FAC ¶¶ 58. After the Taliban fled Kandahar in December of 2001, Petitioner lacked resources to leave the country and remained in the prison to avoid the turmoil in Kandahar. JA 36, FAC ¶¶ 59-60. In January of 2002, Mr. Janko met with U.S. officials at Sarpusa prison and offered to act as a material witness to Taliban atrocities. JA 37, FAC ¶ 63. Petitioner was then taken to Kandahar Airforce Base. *Id*.

Despite the absence of any evidence that Petitioner was an enemy combatant, and the abundance of evidence that he had been detained and tortured

by the Taliban, the U.S. military detained Mr. Janko and began to use abusive interrogation techniques against him while he was at Kandahar. JA 38, FAC ¶ 66; Pet App. 32. These techniques included striking his forehead, sleep deprivation, exposure to very cold temperatures, exercise to exhaustion, stress positions for hours at a time, various forms of humiliation, and force-feeding. JA 38, FAC ¶ 67.

In May of 2002, U.S. forces transferred Petitioner to the military detention facility at Guantanamo Bay ("Guantanamo"). JA 39–40, FAC ¶ 69. The U.S. incarcerated him at Guantanamo without charge or trial for seven years, during which he was regularly subjected to torture and inhumane treatment. JA 40–45; FAC ¶¶ 72-89. This treatment again included force feeding; being restrained to a bed or chair and denied access to a restroom; prolonged periods of solitary confinement; severe beatings; exposure to cold temperatures; being urinated upon; denial of adequate medical and psychological treatment; sleep deprivation; and many other abuses. *Id.*; Pet. App. 37a. Because of this horrific and humiliating treatment, Petitioner attempted suicide at least seventeen times. JA 40–45; FAC ¶¶ 74, 78; Pet. App. 37a.

While Petitioner was detained at Guantanamo, two Combatant Status Review Tribunals (CSRTs), along with two Administrative Review Boards (ARBs), convened to review his status as an enemy combatant. In the first CSRT hearing, conducted in October of 2004, Petitioner was represented by a nurse rather than a lawyer and he was not allowed to review the evidence against him prior to the beginning of the hearing. The CSRT relied on coerced "confessions" made after he was tortured by the Taliban and the U.S. military, respectively. The

CSRT determined that Petitioner was an enemy combatant, and an Administrative Review Board upheld that determination based on the same false evidence. JA 47–48; FAC ¶ 96.

This Court's decision in *Rasul v. Bush*, 542 U.S. 466, 473 (2004) extending statutory habeas jurisdiction to Guantanamo detainees made it possible for Petitioner to file a petition for writ of habeas corpus in the District Court for the District of Columbia in June of 2005. JA 36, FAC ¶ 99. Mr. Janko filed a habeas petition on June 30, 2005. JA 36; FAC ¶ 99.

In 2008, prior to any action on Mr. Janko's habeas petition, the military convened a second CSRT. JA 47, FAC ¶ 96. The second CSRT panel relied upon the same flawed reasoning as the first CSRT and subsequent ARB panels in reaching the same determination that Petitioner was an "enemy combatant." JA 47, FAC ¶ 96.

In June of 2008, this Court held that Guantanamo Bay detainees have the constitutional right of habeas corpus, and that MCA §7 unconstitutionally suspends the writ. *Boumediene v. Bush*, 553 U.S. 724, 793 (2008). As a result of *Boumediene*, on June 22, 2009, almost four years after Petitioner filed his initial request for habeas relief, the district court granted his petition, determining that Petitioner was never "lawfully detainable as an enemy combatant." *Al Ginco v. Obama*, 626 F. Supp. 2d 123, 128 (D.D.C. 2009). Going further, the district court stated that it "defie[d] common sense" that Petitioner was ever designated as an enemy combatant in the first place. *Id.* at 128. Judge Leon reasoned it was "inescapable" that Petitioner belonged to neither al-Qaeda nor the Taliban. *Id.* at 130. He was thus not lawfully de-

tainable as an enemy combatant at the time U.S. forces took him into custody. *Id.* Consequently, Judge Leon ordered Petitioner's release. *Id.* However, even after the district court determined that he was never an enemy combatant and, therefore, never properly detained, the military continued to detain and mistreat him for several months. JA 49, FAC ¶¶ 99–100. Petitioner was finally released from U.S. custody on October 7, 2009. *Id.* ¶ 100.

PROCEDURAL HISTORY

Subsequent to his release, Petitioner filed a complaint against the United States and twenty-six individual federal officials for his unlawful detention, torture, and inhumane treatment. The district court dismissed the case for lack of subject matter jurisdiction, holding that "the jurisdiction stripping provision in §7 of the MCA [codified at 28 U.S.C. §2241(e)] applies to damages claims by aliens who have been released from Guantanamo pursuant to a successful habeas petition." *Al Janko v. Gates*, 831 F. Supp. 2d 272, 278 (D.D.C 2011) (Pet. App. 38a). Based on its interpretation of the MCA, the district court found that "Congress stripped this [and any other] Court of jurisdiction to hear *any* of plaintiff's allegations." *Id.* at 278 (Pet. App. 39a). §2241(e)(2) states:

> [N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to *any aspect* of the detention, . . . treatment, . . . or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United

> States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> 28 U.S.C. §2241(e)(2) (emphasis added).

The district court interpreted the legislature's use of the term "United States" in § 2241(e)(2) to refer solely "to the Executive Branch, not the Judicial Branch." *Al Janko*, 831 F.Supp.2d at 279. Accordingly, the district court held the MCA bars Plaintiff's constitutional claims against the individual Defendants as well as the U.S. Government. *Al Janko*, 831 F. Supp. 2d at 280-81 (Pet. App. 43a–44a). The district court also held in the alternative that Plaintiff's FTCA and *Bivens* claims would fail as a matter of law.

Petitioner appealed, and a three-judge panel on the D.C. Circuit affirmed the district court's dismissal solely on the grounds of the MCA's jurisdictional bar. *Janko v. Gates*, 741 F.3d 136 (2014) (App. A). The D.C. Circuit did not reach the question of whether Petitioner had FTCA or *Bivens* claims, holding only that it had no jurisdiction to consider such questions. Pet. App. 24a ("The Congress has communicated its directive in unmistakable language and we must obey."). The panel held that 28 U.S.C. §2241(e) barred Petitioner's claims because two CSRT hearings classified him as an enemy combatant, despite the subsequent habeas determination that he was never properly detained because there was no evidence that he was an enemy combatant. Pet. App. 21a.

The D.C. Circuit determined that Congress intended to bar claims brought by individuals who had *at one point* been determined to be enemy combat-

ants by the Executive, even if this determination was later found by the Judiciary to be erroneous. *Id*. The court further held that Congress has the constitutional authority to bar federal courts from hearing Petitioner's constitutional claims, despite the fact that it is "rough justice" to deny recovery "based solely on the unreviewed decision of a tribunal the Supreme Court has labeled 'closed and accusatorial.'" Pet. App. 24a.

Petitioner filed a petition for rehearing and rehearing en banc, which was denied on July 3, 2014. This Court granted Petitioner an extension on the deadline for this petition to November 26, 2014.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS GOVERNING SEPARATION OF POWERS AND RAISES ISSUES OF PROFOUND NATIONAL IMPORTANCE.

The decisions below strike a blow at the heart of our fundamental scheme of separation of powers. The federal judiciary has jurisdiction over all cases "arising under . . . the Laws of the United States . . . ." U.S. Const. art. III, § 2, cl. 1. As scholars have explained, "if Congress may single out a class of cases for exclusion from lower federal courts because of disagreement with judicial results, there is no principled way to brake this power short of permitting removal of all constitutional issues from those courts." Theodore Eisenberg, *Congressional Authori-*

ty to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498, 530 (Jan. 1974) (hereinafter "Eisenberg, *Congressional Authority*"). This case starkly presents the question of the constitutional limits of the political branches' control of federal court jurisdiction over constitutional claims.

A. The D.C. Circuit Decision Raises The Question of The Power of Congress to Strip Federal Court Jurisdiction Over Constitutional Claims.

A federal forum must exist for the adjudication of federal claims. *See Martin v. Hunter's Lessee*, 14 U.S. 304, 328–29 (1816). Numerous decisions by this Court have solidified this principle, holding that federal statutes may not deny the enforcement of federal constitutional rights. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) ("[S]erious constitutional questions would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."); *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986) ("[All] agree that Congress cannot bar all remedies for enforcing federal constitutional rights."). The MCA as interpreted by the D.C. Circuit in the decision below contradicts this basic principle.

Congress is not given plenary power to limit Article III jurisdiction over constitutional claims under our Constitution. Some core of jurisdiction must be left to the courts, and that core jurisdiction is widely recognized by scholars to be the ability to hear constitutional claims. Robert Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741, 750 (1984). Stripping the courts of

jurisdiction over constitutional claims is "beyond Congress's power under the Exceptions and Regulations Clause." Janet C. Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 Calif. L. Rev. 1193, 1208 (2007); *see also* Akhil R. Amar, *A Neo-Federalist View of Aricle III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205, 261–62 (1985); *cf.* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2063 (2007) ("[T]otal preclusion of judicial review of challenges to conditions of confinement is unconstitutional."). If Congress did have the license to curtail the review of constitutional claims, it could effectively "eliminate [the] judicial power to say what the law is" altogether. Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 Va. L. Rev. 1043, 1101 (2010).

Inherent in the Judiciary's jurisdiction over constitutional claims is the authority to grant appropriate remedies to correct constitutional violations. This authority is well-settled by over a century of Supreme Court precedent holding that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946) (citing *Dooley v. U.S.*, 182 U.S. 222 (1901)). Just as a serious constitutional question of separation of powers arises when "a federal statute [is] construed to deny any judicial forum for a colorable constitutional claim," *Webster*, 486 U.S. at 603, a serious constitutional question also arises when a federal statute prevents federal courts from using "any available remedy" to correct constitutional violations. *See Bell*, 327 U.S. at 684.

The text of Article III and the allocation of powers between the branches support finding that the MCA unconstitutionally infringes on the Judiciary's power. Section 1 establishes the "judicial Power" using affirmative language ("shall be vested"), indicating that some forum—whether the Supreme Court, lower federal courts created pursuant to Section 1, or state courts—must exercise the judicial power at all times. U.S. Const. art. III, § 1.

The Court utilized its Article III jurisdiction to redress constitutional violations in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395 (1971). In *Bivens*, the Court held that "'it is * * * well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Id.* at 396. Because the Fourth Amendment must have a remedy, federal courts have the inherent power to enforce the Constitution. *Id.* at 397 (citing *Marbury v. Madison*, 5 U.S. 137, 163 (1803)). The federal courts have the power to exercise a "principled discretion" in "inferring a right of action for damages directly from the Constitution." *Carlson v. Green*, 446 U.S. 14, 26, (1980) (Powell, J. concurring).

The Judiciary can decline to exercise its Article III power to hear and redress constitutional claims, just as the executive and legislative branches can decline to exercise their constitutional powers under Article I and Article II, respectively. A federal court can decline to hear an individual's constitutional claims if an equally effective remedial mechanism exists or special factors counsel hesitation. *Bivens*, 403 U.S. at 395. But the political branches cannot

strip the judicial branch of its right to choose or decline to hear constitutional claims. As it would be unconstitutional for the legislative branch to strip the executive branch of its Article II powers, so too is it unconstitutional for the legislative branch to strip the judicial branch of its Article III jurisdiction to hear and redress constitutional violations.

In this case, the D.C. Circuit construed section 7(e)(2) of the MCA to bar all claims related to Petitioner's detention, treatment, and the condition of his confinement not cognizable on habeas. It held that it could not reach the question of whether it should decline to exercise its jurisdiction in this case, because Congress had stripped it of jurisdiction over that question.

This decision allows Congress to unconstitutionally strip the judicial branch of its Article III jurisdiction to redress constitutional violations. *See Bivens,* 403 U.S. at 397; *see also Bell*, 327 U.S. at 684. The decision has implications not just for detainees but for all people with constitutional claims; it makes it possible for Congress to strip the court of jurisdiction over the constitutional claims of different classes of individuals in varying situations. In the past, legislative proposals have contemplated stripping the federal courts of jurisdiction in a variety of cases, including cases involving voting rights, desegregation, and obscenity. Eisenberg, *Congressional Authority* at 499 & n. 11. Thus, the D.C. Circuit's opinion directly conflicts with Supreme Court precedent which affirms the Judiciary's jurisdiction over *all* constitutional claims under Article III. *See id.* at 397; *see also Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982);

Commodity Futures Trading Com'n v. Schor, 478 U.S. 833, 850 (1986).

The judicial branch has the inherent authority to determine whether Petitioner is entitled to damages under *Bivens* for his constitutional claims. Furthermore, it has the *responsibility* to vindicate individual rights "in the face of the popular will as expressed in legislative majorities." *Bivens,* 403 U.S. at 407 (Harlan, J., concurring). This responsibility requires that the judicial branch have absolute Article III jurisdiction to redress constitutional violations. The Court should grant this petition for writ of certiorari to restore the federal judiciary's Article III jurisdiction to provide *Bivens* remedies.

B. The D.C. Circuit Decision Raises the Question of What Congress Can Constitutionally Delegate to an Administrative Tribunal and Contradicts This Court's Past Precedent Requiring that Judicial Review Be Preserved.

Under the D.C. Circuit interpretation of the MCA, Congress would be justified in delegating to the executive branch the crucial function of regulating the jurisdiction of the federal courts, without judicial review of that decision in each case. By doing this, Congress would be essentially granting the executive branch the unfettered ability to choose which of its own actions federal courts may review. This concentration of powers in one branch violates the most fundamental principles of our constitution.

This Court, recognizing the national importance of preserving the separation of powers, has consistently defended its Article III jurisdiction, holding

that Article III necessarily bars "congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts." *Commodity Futures Trading Com'n v. Schor*, 478 U.S. at 850 (quoting *National Insurance Co. v. Tidewater Co.*, 337 U.S. 582, 664 (1949) (Vinson, C.J., dissenting).

This Court has affirmed the principle that administrative tribunals and the executive branch may not simply determine their own jurisdiction. In *Crowell*, the court held that the court had the power to adjudicate facts in order to determine its own jurisdiction and the jurisdiction of administrative tribunals. *Crowell v. Benson*, 285 U.S. 22, 54 (1932).

An "independent forum for the adjudication of [their constitutional claims]" is essential to ensuring the political branches' constitutional compliance. *Bartlett v. Bowen*, 816 F.2d 695, 703 (D.C. Cir. 1987). The judiciary's Article III jurisdiction to hear constitutional claims is therefore required "to maintain the checks and balances of the constitutional structure." *Northern Pipeline Construction Co. v. Marathon Pipe Line Company*, 458 U.S. 50, 58 (1982).

The executive and legislative branches can participate in actions traditionally left to the judicial branch of government so long as the action invoked is not generally assumed to be within the judiciary's constitutional field of action. *W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928). Allowing the executive and legislative branches to preclude the judiciary from performing its core functions—such as the adjudication of constitutional claims—would "sap the judicial power as it exists under the Constitution" and amount to a fundamental violation

of separation of powers. *Id*. This Court reinforced the *Crowell* principle in *Northern Pipeline*, holding that bankruptcy courts established by the Bankruptcy Act of 1978 encroached upon the Article III courts' authority to determine jurisdictional facts by encompassing "not only traditional matters of bankruptcy, but also 'all civil proceedings arising under title 11 or arising in or *related to* cases under title 11.'" 458 U.S. at 85 (quoting 28 U.S.C. §1471(c) (1976 ed., Supp.IV)).

Section 7(e)(2) bars claims against the United States brought by any alien who "has been determined by the United States to have been properly detained as an enemy combatant . . . ." 28 U.S.C. §2241(e)(2). The statute as interpreted by the D.C. Circuit allows the Executive to determine when its unconstitutional actions may be reviewed by the judiciary, regardless of the outcome of later habeas proceedings. Pet. App. 24a. In effect, this makes any retrospective relief for and deterrence of unconstitutional actions outside the purview of the courts to redress.

Just as in *I.N.S. v. Chadha*, 462 U.S. 919, 946 (1983), where the Court found that Congress needed to make decisions with two chambers rather than delegating case by case authority to one house of Congress, so here, Congress cannot delegate the case by case power to regulate the jurisdiction of the courts to an executive agency. Just as it is unconstitutional for Congress to "to reassign powers vested by the Constitution in either the Judicial Branch or the Executive Branch," *Mistretta v. U.S.*, 109 S.Ct. 647 (1989), it is unconstitutional for Congress to delegate to the executive branch the power to determine without judicial review whether in each case

jurisdiction should be stripped from the federal courts to hear constitutional claims. In making the power to obtain redress for fundamental constitutional violations by the Executive subject in each case to determinations by an executive agency without regard to whether a court later finds such determinations to be valid, Congress strips any meaningful check from executive power.

The facts of this case make plain that not even judicial review is required for the case-by-case determination that plaintiff is an enemy combatant with no ability to bring damages claims against the Executive. In this case, the habeas court plainly found on reviewing the evidence and the CSRT proceedings that there was *never* any basis for detaining Plaintiff or considering him an enemy combatant. Nonetheless, the D.C. Circuit determined that *only* the executive decision that Plaintiff was an enemy combatant was relevant for purposes of stripping jurisdiction over Plaintiff's claims. Any subsequent judicial review was irrelevant. Congress has thus created an unconstitutional scheme where the executive can declare itself immune from judicial review of constitutional claims.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE CIRCUIT OPINION CONFLICTS WITH THIS COURT'S PRIOR PRECEDENTS ON THE DEFINITION OF "UNITED STATES" IN FEDERAL STATUTES.

A. The Decision Below Creates an Inconsistent and Incoherent Definition Of The Term "United States."

The D.C. Circuit here interpreted the term "United States" to include only the executive branch. The circuit held that judicial determinations were not determinations of the United States within the meaning of the statute. Certiorari should be granted because the statutory interpretation by the D.C. Circuit Court of Appeals contradicts the plain meaning of the statute and creates uncertainty about the meaning of the term "United States". The D.C. Circuit's opinion strips federal courts of jurisdiction over Petitioner's constitutional claims because section 7(e)(2) of the MCA bars federal court jurisdiction over claims by anyone who "has been determined by the *United States* to have been properly detained as an enemy combatant." 28 U.S.C. §2241(e)(2) (emphasis added). Petitioner's CSRT hearings, which were later found flawed and erroneous, determined he was properly detained as an enemy combatant. However, Petitioner's habeas proceeding found that he was *never* properly detained as an enemy combatant. In interpreting the MCA, the D.C. Circuit incorrectly determined that the term "United States" refers solely to the executive branch, not the Judiciary, thereby barring Petitioner's claim because he was at one point, in a hearing devoid of even a semblance of due process, determined to be an "enemy combatant". As this court had previously found that Congress understands the term "United States" to refer to all branches of the U.S. government, this interpretation is of national importance.

A determination that "United States" refers solely to the executive branch complicates the interpreta-

tion of the term in other federal statutes and creates confusion in the writing process for future laws by creating unpredictability in interpretation and forcing Congress to refer to the "United States" in different, and perhaps less precise ways. Courts have routinely interpreted the term "United States" to mean "the entire United States government and all the agencies thereof." *Margalli-Olivera v. I.N.S.*, 43 F.3d 345, 352 (8th Cir. 1994). The Eighth Circuit called a previous attempt to narrow the interpretation of the term "United States" to refer to one governmental office within the executive branch "disingenuous." *Id*. In *United States v. Providence Journal Co.*, 485 U.S. 693, 701 (1988) (quotation omitted), in response to the Solicitor General's argument that the term "United States" referred solely to the executive branch, the Court said it was "startling" to believe that the "United States" could refer to "something other than the sovereign composed of the three branches." Indeed, Congress is "familiar enough with the language of separation of powers that we shall not assume it intended, without saying so, to exclude the Judicial Branch when it referred to the . . . United States." *Id.*

In cases that hinge on statutory interpretation, indeterminacy "undermines the legitimacy of the common law to the extent that interpretation in a particular case seems arbitrary or worse—biased and partisan." Barbara K. Bucholtz, *The Interpretive Project and the Problem of Legitimacy*, 11 Tex. Wesleyan L. Rev. 377, 378 (2005). By interpreting "United States" to mean solely the executive branch, not only does the D.C. Circuit create indeterminacy, it patently contradicts the commonly held notion among legislators (and this Court) that United

States refers to all three branches of government. *Providence Journal Co.*, 485 U.S. at 701. Congressional legislators may not have sufficient guidance to pass laws that clearly state what they mean if conflicting definitions exist. In *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43-45 (1989), the Court held that Congress intended for critical terms in statutes to have "uniform federal definitions," unless contrary congressional intent is clearly defined. In *Taylor v. United States*, 495 U.S. 575, 591 (1990), the Supreme Court recognized the need for consistent definitions in federal criminal statutes, and held that the term "burglary" must have a "uniform [federal] definition."

Here, "United States" is an extremely common term in federal statutes, and its interpretation is critical to the understanding of many existing statutes, and the writing of new ones. This Court should grant certiorari and reaffirm the uniform statutory definition of the term "United States" set by its prior precedent in order to ensure accurate drafting and interpretation of federal statutes.

B. This Court Need Not Reach the Fundamental Questions Regarding Jurisdiction-Stripping in this Case if It Finds that The D.C. Circuit Improperly Interpreted the term "United States."

By interpreting the meaning of the "United States" within the statute as referring to all three branches and holding that the judicial ruling governs this case, this Court can find that Petitioner was not "determined by the United States to have been properly detained." The Court thus need not pass

upon the constitutional questions which would be presented if the "United States" refers only to the executive branch. The plain text of the statute does not bar Petitioner's claims and the Court is "'obligated to construe the statute to avoid [constitutional] problems' if it is 'fairly possible' to do so." *Boumediene* 553 U.S. at 787 (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001)).

By construing the term "United States" in accordance with its plain meaning, this Court can resolve Mr. Janko's case without reaching the serious constitutional issues §2241(e)(2) otherwise presents. Even if the plain meaning of the "United States" were ambiguous within the statute, the canon of constitutional avoidance allows this Court to interpret the statute in a way that does not raise serious constitutional issues. *See Clark v. Martinez*, 543 U.S. 371, 385 (2005).

This construction would also be in accord with the principle that statutes setting out powers of administrative agencies should generally be interpreted to allow for judicial review. *Abbot Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). This Court has held that "when constitutional questions are in issue, the availability of judicial review is presumed." *Califano v. Sanders*, 430 U.S. 99, 109 (1977). As Congress did not explicitly say that judicial review was not part of the determination by the United States, this court should not hold that the language "the United States" precludes the Judiciary.

The D.C. Circuit based its opinion on the fact that Congress explicitly precluded habeas review, thus finding that the judiciary must be not part of the intended term "United States." But at the time, even

pre-*Boumediene*, the statutory scheme did allow for judicial review by the D.C. Circuit Court of Appeals. *Boumediene*, 553 U.S. at 778. Nor does interpreting the United States as meaning all three branches conflict with the use of the term "United States" in other parts of the statute. Thus, there is no contextual support for the D.C. Circuit's narrow interpretation of the "United States." The way that the D.C. Circuit interpreted that term raises issues of national importance about the proper separation of powers under the Constitution.

CONCLUSION

For all of the foregoing reasons, this petition should be granted.

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Respectfully submitted,

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