Inn of Court

November 21, 2006
Group 2 Presentation

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"GITMO DETAINEES AT THE COURTHOUSE DOOR…will anyone hear them knocking?"

Group 2 members Peter Glazer, Christine Tracey and Geoff Wren reenacted a CSRT hearing, the procedure currently used to classify a detainee. Judge Anna Brown gave a short discussion of the history of Habeas, and it's uncertain future; Tom Johnson and Barry Sheldahl gave a look into the life of a current GITMO detainee through the eyes of someone that has been there, coupled with the government's position on how we and why got there including the history of Military Commissions. The program concluded with a presentation "Colbert" style by Shawn Lindsey and Stacia Baker on the arguments for and against detaining prisoners at GITMO.

[ORAL ARGUMENT HELD ON SEPTEMBER 8, 2005 AND MARCH 22, 2006]

Nos. 05-5062, 05-5063 & 05-064, 05-095 through 05-5116

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

LAKHDAR BOUMEDIENE, et al.,
Appellants,
v.
GEORGE W. BUSH, President of the United States, et al.,
Appellees.

KHALED A. F. AL ODAH, et. al.,
Appellees/Cross-Appellants,

v.
UNITED STATES OF AMERICA, et al.,
Appellants/Cross-Appellees.

GOVERNMENT'S SUPPLEMENTAL BRIEF ADDRESSING THE MILITARY COMMISSIONS ACT

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GLOSSARY

ARB ..... Administrative Review Board

CSRT ..... Combatant Status Review Tribunal

DTA ..... Detainee Treatment Act

MCA ..... Military Commissions Act

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GOVERNMENT'S SUPPLEMENTAL BRIEF ADDRESSING THE MILITARY COMMISSIONS ACT

Pursuant to this Court's October 18, 2006 order, we address the significance of the Military Commissions Act of 2006, Pub. L. No. 109-366 ("MCA"), on the above-captioned appeals.

SUMMARY OF ARGUMENT

I. The Military Commissions Act unambiguously eliminates district court jurisdiction over these cases. The MCA expressly states that this amendment "shall apply to all cases, without exception, pending on or after the date of the enactment

of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." MCA, § 7(b). The statute's plain language applies to these pending cases. Moreover, the context and legislative history uniformly demonstrate that the elimination of district court habeas jurisdiction applies to these pending cases. Review of petitioners' challenges to their detention as enemy combatants now lies within this Court's exclusive province.

II. Because there can now be no question that Congress has eliminated district court jurisdiction over petitioners' claims, petitioners are left to arguing that the Act is unconstitutional. These arguments are without merit. First, as we have explained at length in our previous filings, petitioners, who are all aliens outside the United States, have no constitutional habeas rights to assert, and, thus the elimination of the statutory right to seek habeas review does not implicate the Suspension Clause. Second, even if petitioners possessed constitutional habeas rights, given the review afforded, there is no suspension in this context because Congress has provided an adequate substitute. As set out in our prior briefs, the review afforded by Congress of the enemy combatant determinations by the Combatant Status Review Tribunals ("CSRTs") is greater than that afforded in habeas for alien enemies facing military criminal proceedings. *Yamashita v. Styer*, 327 U.S. 1, 8 (1946) (military tribunals are "not subject to judicial review merely because they have made a wrong decision on

disputed facts."). Even outside of the military context, under traditional habeas review, "other than the question whether there was some evidence to support the order, the courts generally did not review the factual determinations made by the Executive." *See INS* v. *St. Cyr*, 533 U.S. 289, 305-06 (2001). Petitioners' insistence that enemies captured during armed conflict, and detained by the military as enemy combatants have a right to *de novo* review of the ruling of the governing military tribunal is wholly unfounded, contrary to Supreme Court precedent, and would severely impair the military's ability to defend this country. *See Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950) (proving such habeas review "would hamper the war effort and bring aid and comfort to the enemy").

III. Section 5(a) of the MCA makes explicit that the Geneva Conventions are not judicially enforceable. The Act, therefore, supports the Government's argument that petitioners' treaty claims should be dismissed.

IV. Finally, petitioners' arguments relating to the ability to challenge military commissions are not before this Court and are without merit.

ARGUMENT

I. THE MILITARY COMMISSIONS ACT ELIMINATES DISTRICT COURT JURISDICTION OVER PETITIONERS' CLAIMS.

The Military Commissions Act makes clear that the district courts no longer have jurisdiction over these cases, and that exclusive review of petitioners' challenges to their detention as enemy combatants lies within this Court's exclusive province.

A. Section 7 of the MCA unequivocally eliminates federal court jurisdiction over petitioners' claims and these appeals, except as provided in this Court under section 1005(e)(2) and (e)(3) of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-45 (2005) ("DTA"). Section 7(a) of the MCA amends 28 U.S.C. § 2241 to provide that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." In addition, section 7(a) eliminates federal court jurisdiction, except as provided by section 1005(e)(2) and (e)(3) of the DTA, over "any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined to by the United States

to have been properly detained as an enemy combatant or is awaiting such determination." MCA, § 7(a).

The MCA further provides that these amendments "shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act, which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." MCA, § 7(b).

B. The MCA is unambiguous. Under Section 7, petitioners' avenue of review of their detention as enemy combatants lies not with the district courts, but rather exclusively with this Court. The MCA's language leaves no room for dispute about this point. While petitioners invoke the proposition that Congress must give a "clear statement" in order to "repeal habeas jurisdiction," *INS v. St. Cyr*, 533 U.S. 289, 299 (2001), section 7(a) expressly refers to the elimination of "habeas" jurisdiction. It also amends the habeas statute, 28 U.S.C. § 2241. Thus, there is no lack of a clear statement of congressional intent to eliminate habeas jurisdiction.

The elimination of jurisdiction (except that provided by the DTA) mandated by section 7(a), applies to "*all cases, without exception*, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." MCA, § 7(b) (emphasis added). Nonetheless, petitioners

contend that this language applies only to non-habeas cases, and that, therefore jurisdiction has been preserved for their pending district court habeas cases. This argument, however, ignores the statute's plain language, the context of the enactment of this provision, and the consistent legislative history, all demonstrating that the statute was intended to eliminate habeas jurisdiction over pending cases. Finally, petitioners' suggestion that this Court should ignore the statute's plain meaning and history is not supported by their constitutional avoidance argument.

1. The scope of section 7(b) is clearly stated -- it applies to the amendment "made by subsection (a)." MCA § 7(b). Section 7(a) expressly includes the elimination of habeas claims brought by an "alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant." MCA, § 7(a).[1] There is no basis for reading, as petitioners suggest, section 7(b)'s clause, "all cases, without exception * * * which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention," as not including the habeas cases addressed in section 7(a). The habeas cases are indisputably cases

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[1] Asserting an argument that no party joins, one amicus brief erroneously suggests that the statute does not apply here because petitioners dispute whether they are "properly detained" as enemy combatants. *See* World Org. For Human Rights Supp. Br. 4-6. The statute, however, covers all detainees "*determined by the United States* to have been properly detained as an enemy combatant." MCA, § 7(a) (emphasis added). The United States, through the CSRTs, has determined that petitioners are "properly detained" as enemy combatants. Thus, petitioners are plainly within the scope of the statute.

relating to "detention." *See Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) ("the essence of habeas corpus is an attack by a person in custody on the legality of that custody").[2] Congress unambiguously eliminated jurisdiction over "all cases, without exception," of that nature, including these habeas cases.[3]

In addition, the sweeping language used in section 7(b) -- "all cases, without exception" -- is plainly broader than the more limited category of cases referenced in the second part of section 7(a). The first part of section 7(a) addresses habeas cases challenging the detainees' detention. The second part of section 7(a) speaks to "any other action" relating to detention, or transfer, etc. The language used in 7(b) is not, however, limited to the category of "other actions." Rather, in stating that section 7(a) applies to pending cases, Congress explicitly addressed, not just "other actions,"

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[2] Moreover, the pending habeas cases are also the source of the "transfer" matters targeted by section 7. The district courts in the pending Guantanamo habeas cases have issued dozens of orders barring "transfer" of the detainees. There are currently more than forty pending appeals in this Court regarding such orders issued in the habeas cases.

[3] Petitioners attempt to contrast the language used in section 7 (speaking to "all cases, without exception") to the language in section 3 of the MCA, (enacting 18 U.S.C. § 950j). In section 3, however, Congress used very similar language to that used in section 7, speaking to "any claim or cause of action" pending on the date of enactment. Just like section 7, the reference to habeas jurisdiction in section 3 is in the first clause regarding the scope of the bar on judicial review, and is not mentioned again in regard to the temporal reach of the provision. The language used in section 7 ("all cases, without exception") is even broader than the lanaguage used in section 3 ("any claim or cause of action"). Thus, there is no "negative inference" to be drawn from section 3.

but "all cases, without exception" relating to detention, or transfer, etc. This statutory language plainly refers to "all" of the cases described in both parts of section 7(a). At bottom, there can be no question that the habeas cases here, challenging detention fall within the scope of "all cases, without exception," relating to detention.

2. The context of the enactment of this provision also unambiguously demonstrates that the whole point of section 7 was to eliminate district court habeas jurisdiction over these pending cases. In the DTA, Congress attempted to eliminate district court habeas jurisdiction over these cases and to place exclusive jurisdiction in this Court. *See* DTA, § 1005(e)(1), (e)(2), (h)(1). The Supreme Court, however, held that the DTA was not clear that the elimination of district court habeas jurisdiction applied to pending cases, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). The *Hamdan* Court recognized that, under the DTA, this Court's exclusive jurisdiction over enemy combatant determinations did apply to pending cases,[4] and it left open the question of whether the pending district court habeas challenges brought by the detainees to their detention as enemy combatants would have to be transferred to this Court's exclusive jurisdiction. *Id.* at 2769 n.14.

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[4] *Id.* at 2764 ("paragraphs (2) and (3) of subsection (e) are expressly made applicable to pending cases"); *id.* at 2769 ("Congress here expressly provided that subsections (e)(2) and (e)(3) applied to pending cases").

Congress reacted swiftly to *Hamdan* by unambiguously extending the elimination of habeas jurisdiction to "all cases, without exception, pending" on the date of the MCA's enactment. MCA, § 7(b). As Senator Sessions explained during the debate over the MCA: "Section 7 of the [MCA] fixes this feature of the DTA and ensures that there is no possibility of confusion in the future." 152 Cong. Rec. S10404 (daily ed. Sept. 28, 2006). After quoting subsection (b), he stated, "I don't see how there could be any confusion as to the effect of this act on the pending Guantanamo litigation. The MCA's jurisdictional bar applies to that litigation 'without exception.'" *Ibid.*

Nonetheless, petitioners would now have this Court misconstrue the MCA's plain language to be redundant of the DTA (which, as *Hamdan* held, already eliminated that jurisdiction prospectively). That interpretation makes no sense and is contrary to the reality that Congress was clarifying the DTA, after *Hamdan*, to now expressly state that the elimination of jurisdiction over the habeas claims applies to all pending cases.

Petitioners also ignore the context created by the DTA. The DTA established not only the right to judicial review in this Court, but also expressly stated both that this Court's jurisdiction is "exclusive" and that this exclusive jurisdiction applies to "pending cases." DTA, § 1005(e)(2)(A), (h)(2). As we have explained in our prior briefs, even in the absence of the withdrawal of habeas jurisdiction, petitioners'

claims regarding their detention can only be heard pursuant to this Court's exclusive jurisdiction and, thus, must be transferred to this Court. To the extent there was any doubt before, now, in the MCA, Congress has made clear that the district courts retain no jurisdiction over the habeas and other claims asserted by petitioners, and that the claims challenging their detentions as enemy combatants can be heard only in this Court. Petitioners' arguments that the district courts should adjudicate whether they are properly detained as enemy combatants flout both the plain language of the MCA, withdrawing that jurisdiction, and this Court's "exclusive" jurisdiction established by the DTA to adjudicate such pending claims.

3. The legislative debate over section 7 establishes that, without exception, both the proponents and opponents of the section understood the statute to eliminate habeas jurisdiction over the pending cases. *See, e.g.*, 152 Cong Rec. S10262 (daily ed. Sept. 27, 2006) (Sen. Bingaman) (quoting a letter opposing section 7, "the provision * * * would strip the federal courts of jurisdiction over even the pending habeas cases"); 152 Cong. Rec. S10357 (daily ed. Sept. 28, 2006) (Sen. Leahy) ("the bill goes far beyond what Congress did in the [DTA] * * *. This new bill strips habeas jurisdiction retroactively, even for pending cases"); *id.* at S10367 (Sen. Graham) ("The only reason we are here is because of the *Hamdan* decision. The *Hamdan* decision did not apply to the [DTA] retroactively, so we have about 200 and some habeas cases left unattended and we are going to attend to them now"); *id.* at

S10403 (Sen. Cornyn) ("once * * * section 7 is effective, Congress will finally accomplish what it sought to do through the [DTA] last year. It will finally get the lawyers out of Guantanamo Bay. It will substitute the blizzard of litigation instigated by *Rasul v. Bush* with a narrow DC Circuit-only review of the Combatant Status Review Tribunal--CSRT--hearings"); *id.* at S10404 (Sen. Sessions) ("It certainly was not my intent, when I voted for the DTA, to exempt all of the pending Guantanamo lawsuits * * *. Section 7 of the [MCA] fixes this feature of the DTA and ensures that there is no possibility of confusion in the future"); 152 Cong. Rec. H7938 (Rep. Hunter) (daily ed. Sept. 29, 2006) ("The practical effect of this amendment will be to eliminate the hundreds of detainee lawsuits that are pending in courts throughout the country and to consolidate all detainee treatment cases in the D.C. Circuit"); *id.* at H7942 (Rep. Jackson-Lee) ("The habeas provisions in the legislation are contrary to congressional intent in the [DTA]. In that act, Congress did not intend to strip the courts of jurisdiction over the pending habeas").

4. Finally, the unambiguous language cannot be ignored here, as petitioners suggest, based on a need to construe the statute to avoid "substantial constitutional questions." The avoidance principle is inapplicable where, as here, the statute is unambiguous. *See, e.g., United States v. Oakland Cannabis Buyers' Cooperative,* 532 U.S. 483, 494 (2001) ("the canon of constitutional avoidance has no application in the absence of statutory ambiguity"). Moreover, the Suspension Clause issues raised

by petitioners cannot in any event be avoided by petitioners' countertextual reading of the statute as to not apply to pending habeas cases. There is no textual dispute that, if constitutional, the DTA and MCA eliminate habeas jurisdiction prospectively. Additional habeas claims have been brought since the enactment of the DTA. In those cases, petitioners are arguing that the elimination of jurisdiction is unconstitutional. Thus, even under petitioners' construction, the federal courts will have to determine whether Congress may eliminate that district courts' habeas jurisdiction and instead provide review through the DTA in this Court. That issue is unavoidable and the "avoidance" principle cited is, therefore, inapplicable.[5]

II. THE MCA DOES NOT VIOLATE THE SUSPENSION CLAUSE BECAUSE PETITIONERS HAVE NO CONSTITUTIONAL RIGHTS AND BECAUSE THE MCA AND DTA PROVIDE AN UNPRECEDENTED LEVEL OF JUDICIAL REVIEW FOR THE CLAIMS OF THE ENEMY ALIENS HELD AT GUANTANAMO.

Given that the MCA clearly applies to petitioners' cases, they are left to argue that section 7 of the MCA violates the Suspension Clause by eliminating habeas jurisdiction over their cases. That argument was fully addressed in the prior supplemental briefing addressing the DTA and was discussed at the March 22, 2006 oral argument. The Government argued that the DTA withdrew district courts' jurisdiction and made jurisdiction exclusive in this Court, and that Congress did not

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[5] It is also inapplicable because, as we explain below, petitioners' constitutional arguments are insubstantial.

violate the Suspension Clause in enacting those DTA provisions. Petitioners responded by arguing both that the DTA did not eliminate district courts' jurisdiction over pending cases, but also that, if it did, the Act would amount to an unconstitutional suspension of their rights to seek habeas review. Those arguments were fully aired before this Court and will not be repeated in full here. As we explain below, none of petitioners' arguments in the latest round of briefing supports their claim that the withdrawal of district court habeas jurisdiction, and the grant, instead, of exclusive review in this Court, amounts to a Suspension Clause violation.

A. Petitioners fundamentally err in simply assuming that aliens detained overseas as enemy combatants have constitutional habeas rights protected by the Suspension Clause.

1. Traditionally, there has been no constitutional right to seek habeas review over a military decision to hold an alien enemy as a prisoner during armed conflict.[6] *See Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (courts "will not even grant a habeas corpus in the case of a prisoner of war, because such a decision on this question is in another place, being part of the rights of sovereignty"). In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Supreme Court held that aliens, detained as

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[6] The detention of enemy combatants during an armed conflict is not punitive in nature. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518-19 (2004). Rather, it is a necessary attribute and by-product of war. *Ibid.*

enemies outside the United States, are not "entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas." *Id.* at 777; *see also id.* at 781 ("no right to the writ of habeas corpus appears"). The Court concluded that, because the petitioner in that case had no constitutional rights, the denial of habeas review did not violate either the Suspension Clause or the Fifth Amendment.[7] *Id.* at 777-779, 784-785. In rejecting the assertion of such a constitutional habeas right, the Court emphatically stated that such a constitutional entitlement "would hamper the war effort and bring aid and comfort to the enemy* * *." *Id.* at 779. The Court explained, "[i]t would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Ibid.*

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[7] The *Eisentrager* holding clearly pertains to the Suspension Clause. This Court's ruling in *Eisentrager* explicitly held that construing the habeas statute as inapplicable to the petitioners in that case would violate the Suspension Clause. *See Eisentrager v. Forrestal*, 174 F.2d 961, 965-66 (D.C. Cir. 1949). The Supreme Court reversed that portion of this Court's holding, stating in Part II of its opinion that the aliens in U.S. custody abroad were not "entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas." 339 U.S. at 777. Moreover, the Court's Suspension Clause holding is entirely consistent with the rest of the opinion, which makes clear that the Constitution does not apply extraterritorially to aliens. *See id.* at 784-85 (explaining that "extraterritorial application of organic law" to aliens would be inconceivable).

In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990), the Supreme Court reaffirmed *Eisentrager*'s constitutional holding that aliens outside the United States have no rights under the U.S. Constitution. *See id.* at 273 ("Not only are history and case law against [the alien], but as pointed out in [*Eisentrager*], the result of accepting this claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries.").[8] Following these precedents, this Court consistently has held that a "'foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.'" *32 County Sovereignty Comm. v. Department of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (citation omitted).

Thus, the holding of *Eisentrager* is controlling here. Petitioners are not "entitled, as a constitutional right, to sue in some court of the United States for a writ

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[8] In their prior briefs, petitioners contend that *Rasul v. Bush*, 542 U.S. 466 (2004) overruled or limited the constitutional holding of *Eisentrager*. As we have explained, that claim is incorrect. *See* US Merits Cross-Appellee Reply Br., *Al Odah*, 8-14; US Merits Appellee Br., *Boumediene*, 21-24. In *Rasul*, the Court held that the "statutory predicate" for the Court's holding in *Eisentrager* was "overruled" by the Court's decision in *Braden v. 30th Judicial Circuit County of Kentucky*, 410 U.S. 484 (1973). *Rasul*, 542 U.S. at 479; *see id.* at 475 ("The question now before us is whether the *habeas statute* confers a right to judicial review of the legality of Executive detention of aliens [at Guantanamo]."). The Court did not, however, cast any doubt on *Eisentrager's* ruling that the *Constitution* does not guarantee aliens held abroad a right to habeas corpus. *See id.* at 478.

of habeas." 339 U.S. at 777. Thus, the withdrawal of habeas jurisdiction does not implicate the Suspension Clause.

2. Petitioners, in a footnote (Al Odah Br. 20 n.27), reiterate their argument that, even though they are aliens being held on Cuban sovereign territory, they should be treated as being within the United States. We have thoroughly addressed that contention in our prior merits briefs. *See* US Opening Merits Br., *Al Odah*, 18-21;US Merits Cross-Appellee Reply Br., *Al Odah*, 8-14; US Merits Appellee Br., *Boumediene*, 21-24. What was critical in *Eisentrager* was the lack of sovereignty, and there can be no dispute that, as was true for the petitioner in *Eisentrager*, petitioners here are being held on foreign sovereign territory.

B. 1. Under *Eisentrager*, Congress could have simply withdrawn jurisdiction over these matters and left the decision of whether to detain enemy aliens held abroad to the military, as has been the case traditionally. The MCA and DTA, however, take the extraordinary and unprecedented additional step of granting these petitioners – enemy aliens held outside the United States – the right to obtain judicial review of the enemy combatant tribunal determinations.

Section 1005(e)(2)(C) of the DTA specifies this Court's "scope of review" of the United States' enemy combatant determination. It provides that this Court's review "shall be limited to the consideration of * * * whether the status determination of the [CSRT] with regard to such alien was consistent with the standards and

procedures specified by the Secretary of Defense for [CSRTs] (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence)." DTA, § 1105(e)(2)(C). This Court shall also consider, "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." *Ibid.*

Thus, the MCA and DTA, while eliminating district court jurisdiction, afford petitioners here an unprecedented level of judicial review for an enemy alien captured during an armed conflict. As part of that DTA review, petitioners can challenge the lawfulness, under the U.S. Constitution and U.S. law, of any aspect of the CSRT process. We have argued (and continue to argue) that petitioners have no constitutional rights in this context, but petitioners can plead their arguments to the contrary to this Court, and this Court can resolve that issue.

Even assuming petitioners have constitutional habeas rights (contrary to the holding of *Eisentrager*), the Supreme Court has held that Congress may freely repeal habeas jurisdiction, if it affords an adequate and effective substitute remedy. *See Swain v. Pressley*, 430 U.S. 372, 381 (1977). As we explained in our prior supplemental briefs regarding the DTA, there is no possible Suspension Clause violation here because the statutory review for constitutional and other legal claims

afforded under 1005(e)(2)(C)(ii) of the DTA provides these petitioners with *greater rights* of judicial review than that traditionally afforded to those convicted of war crimes by a military commission. *See* US DTA Br. 49-53.; US DTA Reply Br. 23-24. The Supreme Court has held that the habeas review afforded in that context does not examine the guilt or innocence of the defendant, nor does it examine the sufficiency of the evidence. Rather, it is limited to the question whether the military commission had jurisdiction over the charged offender and offense. *See Yamashita v. Styer*, 327 U.S. 1, 8 (1946) ("If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions"); *id.* at 17 ("We do not here appraise the evidence on which petitioner was convicted" because such a question is "within the peculiar competence of the military officers composing the commission and were for it to decide"); *Ex parte Quirin*, 317 U.S. 1, 25 (1942) ("We are not here concerned with any question of the guilt or innocence of petitioners"). *See also Eisentrager*, 339 U.S. at 786.

Under *Yamashita*, there was review only of the threshold jurisdictional question whether the offense and offender were triable by military commission. There was no review of other legal questions, compliance with the military's own procedures, or evidentiary sufficiency -- all of which the DTA and MCA permit. *See*

DTA, § 1005(e)(2)(C)(i) (permitting review of whether the CSRT, in reaching its decision, complied with its own procedures, "including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence"). Thus, the DTA review provided by Congress far surpasses the type of review available under *Yamashita*, and it plainly affords an adequate and effective substitute remedy for any applicable habeas right. *See Swain*, 430 U.S. at 381.

Furthermore, as we explained in our supplemental DTA briefs (*see* US DTA Br. 49-53.; US DTA Reply Br. 23-24.), the review provided under the DTA is not only greater than that afforded under *Yamashita*, it is also fully consistent with traditional habeas practice outside the military tribunal context. In *INS* v. *St. Cyr*, the Supreme Court explained that under traditional habeas review, "pure questions of law" are generally reviewable, but, "other than the question whether there was some evidence to support the order, the courts generally did not review the factual determinations made by the Executive." *St. Cyr*, 533 U.S. at 305-06. The DTA review fully satisfies that standard. Thus, even if the non-military habeas authority is examined, the Suspension Clause arguments asserted by petitioners fail.

In arguing that the DTA review would be inadequate in their latest briefs, petitioners complain about the nature of the CSRT process, the enemy combatant definition used by the CSRTs, and the types of material submitted to the CSRTs. All of these issues, however, can be asserted in this Court under the DTA. This Court can

determine the nature of petitioners' rights, if any, under "laws of the United States" and the U.S. Constitution, and can adjudicate whether the CSRT process violated any applicable rights. *See* DTA, § 1005(e)(2). These legal arguments, regarding the CSRT process, have already been fully briefed in this case and should be decided forthwith by this Court in these cases under its exclusive DTA jurisdiction.

3. Petitioners erroneously contend that, because they have not been criminally convicted, habeas relief entitles them to a "searching factual inquiry" – including apparently discovery and a *de novo* judicial trial – into whether or not they are enemy combatants. In so arguing, petitioners ignore the reality that such *de novo* trials, reviewing military tribunal rulings that aliens captured abroad during an armed conflict are enemy combatants, "would hamper the war effort and bring aid and comfort to the enemy." *Eisentrager*, 339 U.S. at 779. Petitioners also ignore the controlling Supreme Court precedent specifying the nature of habeas review of a military tribunal decision. As discussed above, the Supreme Court has repeatedly held that, even under habeas review of a military tribunal ruling regarding an enemy alien, a court may not examine the guilt or innocence of the defendant, or the sufficiency of the evidence. *See Yamashita*, 327 U.S. at 8, 17; *Ex parte Quirin*, 317 U.S. at 25.

Moreover, petitioners' contention that they have a constitutional habeas right to a sweeping factual inquiry in district court cannot be reconciled with *Hamdi*. In

that habeas action, the Supreme Court addressed the extent of process due to an American citizen held in this country as an enemy combatant. The controlling plurality opinion acknowledged the "weighty" and "sensitive" government interests in capturing and detaining enemy combatants. 542 U.S. at 531 (plurality). It further acknowledged that "core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." *Id.* at 531. Accordingly, the Supreme Court plurality explained that "an appropriately authorized and properly constituted military tribunal" could permissibly make enemy combatant determinations. *See id.* at 538.

In accord with *Hamdi* and *Yamashita*, the MCA and DTA were enacted to ensure that, while each detainee is afforded his day in court, the substantive decision of whether to consider an alien captured during an armed conflict an enemy remains a military decision. *See* 152 Cong. Rec. S10266 (daily ed. Sept. 27, 2006) (Sen. Graham) ("[t]he role of the courts in a time of war is to pass muster and judgment over the processes we create -- not substituting their judgment for the military"); *id.* at S10403 (Sen. Cornyn) ("Weighing of the evidence is a function for the military when the question is whether someone is an enemy combatant. Courts simply lack the competence -- the knowledge of the battlefield and the nature of our foreign enemies -- to judge whether particular facts show that someone is an enemy combatant").

Petitioners contend that the military tribunal hearings at issue here do not fall under *Yamashita* or *Hamdi* because Congress did not create the CSRTs. The type of tribunals discussed in *Hamdi*, however, were tribunals established by regulation, not Congressional enactment. Further, there is no question that the Executive Branch has the authority to establish such tribunals to render such enemy combatant determinations. *See, e.g.*, *Hamdi*, 542 U.S. at 518 ("The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war'" (*quoting Quirin*, 317 U.S. at 28)). Indeed, as noted above, *Hamdi* approved the use of such tribunals authorized by the Executive Branch.

Moreover, petitioners ignore the fact that the review afforded by Congress pursuant to the DTA (and referenced in the MCA), is expressly limited and specifically geared to reviewing the final CSRT determinations. DTA, § 1005(e)(2). Thus, Congress in the DTA and MCA has recognized that these military tribunals, the CSRTs, provide the authoritative military adjudication of whether the detainees held at the Guantanamo Bay Naval Base should be treated as enemy combatants. Congress has authorized courts to review the legality of the CSRT process and whether the CSRT decision was consistent with the standards adopted by the Defense Department. To argue that, despite this congressional recognition of the CSRTs and the calibrated review scheme for the tribunal rulings, there should also be *de novo*

district court review of the enemy combatant status, makes no sense. The limited *Yamashita* standard of review would apply in this context (if petitioners had any constitutional habeas rights), and the review afforded by the DTA is far more capacious than that standard.

C. Petitioners argue that under the common law habeas in existence at the time the Suspension Clause was enacted,[9] courts performed *de novo* fact review when claims were brought by aliens held as prisoners of war outside the country. Whether accurate or not, as pointed out above, the Supreme Court in *Eisentrager* expressly held that there is no constitutional habeas right for an enemy alien held outside the United States to challenge his detention. Thus, petitioners' historical argument based on common law habeas does not advance their Suspension Clause claim.

In any event, their claim is *not* historically accurate. *See Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (courts "will not even grant a habeas corpus in the case of a prisoner of war, because such a decision on this question is in another place, being part of the rights of sovereignty"). The habeas cases cited by petitioners simply do not hold up to scrutiny. Three of the cases cited do not involve aliens held as

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[9] As explained in the Government's supplemental DTA brief, the habeas rights covered by Suspension Clause are properly based on the rights recognized in 1789. *See* US DTA Br. 47-48. As we further explained, even under an evolutionary approach to the constitutional habeas rights protected by the Suspension Clause, petitioners' claim to a constitutional habeas right cannot be squared with Supreme Court precedent. *Ibid.*

enemies. Rather, they involve challenges to eligibility for military impressment where the central questions had never been adjudicated by any body, judicial or otherwise.[10] Petitioners also cite *R. v. Schiever*, 97 Eng. Rep. 551 (K.B. 1750), and *Case of the Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779). In both cases, the court rejected the habeas claims asserted by aliens being held as prisoners of war on sovereign English territory. Thus, these rulings do not speak to the habeas rights of aliens held as enemies outside sovereign territory, which is the relevant class of petitioners and the class of petitioners addressed squarely in *Eisentrager*. Moreover, in rejecting the claim in *Three Spanish Sailors*, the court noted that the petitioners, as prisoners of war, were "not entitled to any of the privileges of Englishmen; much less to be set at liberty on habeas corpus." 96 Eng. Rep. at 776.[11]

Petitioners also cite *Lockington's Case*, Bright. (N.P.) 269 (Pa. 1813), where a British citizen held in U.S. sovereign territory was denied habeas relief. Given that the alien was present on U.S. sovereign territory, this case is plainly inapposite. Moreover, in *Lockington's Case*, the government was not holding the alien as a prisoner of war, or as an enemy combatant. The state court made clear that if the

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[10] *See State v. Clark*, 2 Del. Cas. 578 (Del. Chancery 1820); *Good's Case*, 96 Eng. Rep. 137 (K.B. 1760); *Goldswain's Case*, 96 Eng. Rep. 711 (C.P. 1778).

[11] Likewise, in *Scheiver*, the court rejected the habeas petition notwithstanding the petitioner's claim that he was innocent and that he had been captured and forced to fight by enemy forces. 97 Eng. Rep. at 552.

petitioner had been held as a prisoner of war he would have *no habeas rights*. *Id.* at 276.[12]

Only one case petitioners cite involves review of the decision of a military tribunal, *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). Unlike petitioners here, however, the petitioner in *Milligan* was a U.S. citizen being held in sovereign U.S. territory. Thus, that decision is wholly inapposite and obviously does not diminish the later controlling holding of *Eisentrager*. We note, however, that even in that case the Court did not "evaluate" exculpatory evidence presented by the petitioner, but relied entirely on facts that were not in dispute, namely, the residency of Milligan in a state where the Civil War had not been active and where the regular courts were operational. *Id.* at 118, 121-12. The *Milligan* Court certainly did not engage in or authorize any process approaching the sort of evidentiary hearing envisioned by petitioners here.[13]

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[12] The petitioner in *Lockington's Case* had been conducting business in the U.S. before the War of 1812. British citizens residing in this country were not deemed prisoners of war, but rather were categorized as enemy aliens and ordered to move away from certain areas. Lockington refused, and was held by a federal officer. He filed for habeas relief. The state court denied the petition, holding that his detention for failure to follow a lawful Presidential order was proper. *Id.* at 277-283. One of the Justices writing in this case further stated his view that the state court had no authority over the matter. *Id.* at 299-301.

[13] Similarly, in *Goldswain's Case*, cited by petitioners, the court held that, once a return had been made, habeas petitioners were not permitted to "controvert the truth of the return to a habeas corpus, or plead or suggest any matter repugnant to it." 96

D. 1. In challenging the adequacy of the DTA review provided by Congress, petitioners erroneously assert that petitioners' counsel will not have access to classified material in the record. Although we have argued in *Bismullah v. Rumsfeld*, No. 06-1197 (D.C. Cir.), that petitioners and their counsel have no right to have access to classified material in a DTA review case, the Government has proposed a protective order that will in fact afford an attorney, whom the detainee authorizes as his representative, and who has obtained the necessary security clearances and agreed to the applicable security rules, access to both the unclassified record and the classified parts of the CSRT records, to the extent the counsel has the requisite need to know (the same standard applies to government officials working with classified material).[14] In any event, the nature of the protective order to be issued in the pending DTA cases is a matter currently pending before this Court in *Bismullah*, and thus cannot serve as a basis to invalidate the MCA here.

2. Petitioners also complain that the review afforded under the DTA does not authorize fact-finding by this Court, and they and their *amici* point to new material (from outside the CSRT records), which they claim is exculpatory in nature. From

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Eng. Rep. at 713.

[14] *See* Exec. Order 12,958, as amended by Exec. Order 13,292, § 4.1(a), 68 Fed. Reg. 15,315 (Mar. 25, 2003); *see also Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 401-02 (D.C. Cir. 1984).

this, petitioners argue that the CSRT process and this Court's review is therefore inadequate.

We note that, while the DTA limits this Court to record review, there is a forum for detainees held at the Guantanamo Naval Base to submit new material that they deem relevant. Congress directed the Department of Defense to ensure that its already existing Administrative Review Board ("ARB") process for annual review of whether an individual should continue to be detained takes into consideration any relevant new information. *See* DTA § 1005(a)(1) & (3) (directing Secretary to promulgate procedures for the ARBs that, *inter alia*, "provide an annual review to determine the need to continue to detain an alien who is a detainee" and "provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee"). The Department has updated its regulations to include such procedures. *See* ARB Memo. and Procedures, Enc. 13 (July 14, 2006) (*See* www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf).[15] Thus, there is an administrative mechanism for these detainees to submit new evidence that bears upon whether their detention should be continued or not. Under

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[15] The ARB procedures, in existence since 2004, provide for annual "consideration of all relevant and reasonably available information to determine whether the enemy combatant represents a continuing threat." ARB Mem., § 1.c. In those proceedings, the detainee is allowed to "present information relevant to his continued detention, transfer, or release." *Ibid.*; *Id.* encl. 3, § 3.a (detainee "shall be provided a meaningful opportunity to be heard and to present information to the ARB").

the present regulations, any new information relating to the enemy combatant status of these detainees that is presented to an ARB shall be brought to the attention of the Deputy Secretary of Defense as soon as practicable. The Deputy Secretary of Defense shall review the new evidence and decide whether to convene a new CSRT to reconsider the basis of the detainee's enemy combatant status. *See* ARB Memo. and Procedures, Enc. 13. The detainee would then be able to seek review of any adverse CSRT ruling. Thus, there is a route for the consideration of relevant new material.

In any event, limiting this Court's DTA review to the CSRT record does not render that review an inadequate substitute for habeas review (assuming that the detainees have constitutional habeas rights protected by the Suspension Clause). As noted above, in the context of military criminal commissions, the Supreme Court has repeatedly held that habeas review does *not* provide for fact review, and certainly no opportunity for counsel to build a new evidentiary record. *Yamashita*, 327 U.S. at 8, 17; *Ex parte Quirin*, 317 U.S. at 25. Even outside the military context, however, there is no constitutional habeas right to factual re-examination of a court ruling on a periodic basis. *See, e.g., Felker v. Turpin*, 518 U.S. 651, 663-64 (1996) (restrictions on successive petitions do not violate Suspension Clause). Likewise, here, there is no constitutional right to successive CSRT decisions.

E. Petitioners also contend that the MCA is an invalid suspension of the writ of habeas corpus because there is no "rebellion or invasion" to justify elimination of the writ of habeas corpus. The MCA, however, does not effect a suspension of the writ. As explained above, aliens outside the United States possess no constitutional right to a writ. Thus, no actual habeas rights have been suspended. Moreover, because the MCA provides for review under section 1005(e)(2) and (e)(3) of the DTA, regardless of whether the MCA is viewed as eliminating habeas jurisdiction in favor of a substitute remedy – review of a final decision of a CSRT under the DTA – or simply restricting habeas jurisdiction to that provided under the DTA, the MCA does not constitute a suspension of the writ. *See Felker*, 518 U.S. at 664 (upholding significant restrictions imposed by AEDPA on the writ of habeas corpus); *Swain v. Pressley*, 430 U.S. at 381 (repeal of habeas jurisdiction is constitutional so long as adequate and effective substitute remedy is afforded).

III. THE MCA PROVISION ESTABLISHING THAT THE GENEVA CONVENTIONS ARE NOT JUDICIALLY ENFORCEABLE IS FULLY CONSISTENT WITH CONGRESS'S LEGISLATIVE AUTHORITY UNDER THE CONSTITUTION.

Petitioners assert that the MCA is unconstitutional insofar as it clarifies that the Geneva Conventions are not judicially enforceable by private parties. *See* MCA, § 5(a). As we have explained in our briefing to this Court, the Geneva Conventions never provided any judicially enforceable rights to petitioners here. *See* US Merits

Cross-Appellee Reply Br., *Al Odah*, 48-50; US Merits Appellee Br., *Boumediene*, 57-58. Thus, section 5(a) of the MCA effects only a clarification, not a change in the law. In any event, there cannot possibly be any constitutional impediment to Congress limiting enforcement of a treaty to diplomatic and non-judicial processes. Indeed, that is the norm for treaties. *See, e.g., Holmes v. Laird*, 459 F.2d 1211, 1220-22 (D.C. Cir. 1972).

IV. PETITIONERS' ARGUMENTS RELATING TO THE ABILITY TO CHALLENGE MILITARY COMMISSIONS ARE NOT BEFORE THIS COURT AND ARE WITHOUT MERIT.

Petitioners argue that the MCA deprives them of their ability to challenge the lawfulness of any military commission proceeding that might be instituted against them. The district court rulings on appeal here, however, do not address the lawfulness of military commissions. Thus, that issue is not now before this Court.

Moreover, there currently are no pending military commission cases. When such proceedings do commence, a detainee will be able to challenge the lawfulness of any aspect of the commission process in this Court, once the decision of the commission is finalized. DTA, § 1005(e)(3). Petitioners' argument that they must be able to assert such challenges now is obviously without merit. While courts have limited equitable discretion whether to abstain absent a clear legislative rule, *see, e.g., Schlesinger v. Councilman*, 420 U.S. 738 (1975), Congress can, as it has here, jurisdictionally bar a detainee's claims until the commission ruling becomes final.

See McCarthy v. Madigan, 503 U.S. 140, 144 (1992); *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001). In *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994), the Court explained, "[w]hether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history." In the MCA, the intent of Congress is clear to eliminate jurisdiction over the charged detainees' claims, except as they may be asserted in this Court under Section 1005(e)(3) of the DTA. *See* MCA, § 7(a) (barring habeas claims and any claims relating to, *inter alia*, "trial", except as provided by § 1005(e) of the DTA).

CONCLUSION

For the foregoing reasons, this Court should order dismissal of the underlying district court cases for want of jurisdiction, dismiss the appeals for want of jurisdiction, except to the limited extent that they may be converted into petitions for review under section 1005(e)(2) of the DTA, exercise jurisdiction over these claims under that subsection, and proceed to decide the legal issues presented therein, and within the scope of section 1005(e)(2)(c)(ii) of the DTA, forthwith.

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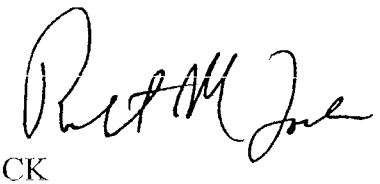
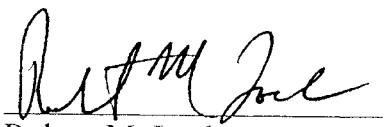


CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 7,788 words (which does not exceed the applicable 10,000 word limit set by this Court's order).



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CERTIFICATE OF SERVICE

I hereby certify that I have on this 13th day of November 2006, served a copy of the foregoing supplemental brief on the following counsel by causing a copy to delivered to lead counsel , via Federal Express (or hand delivery, as specified) and e-mail transmission, and to the remaining listed counsel by regular mail and e-mail transmission to the remaining counsel:

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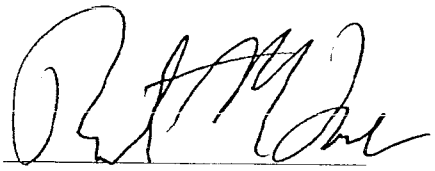

Robert M. Loeb

[ORAL ARGUMENT HELD SEPTEMBER 8, 2005 AND MARCH 22, 2006]

Nos. 05-5062 & 05-5063

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

LAKHDAR BOUMEDIENE, *ET AL.*,
APPELLANTS,
V.
GEORGE W. BUSH, *ET AL.*,
APPELLEES.

RIDOUANE KHALID,
APPELLANT,
V.
GEORGE W. BUSH, *ET AL.*,
APPELLEES.

ON APPEAL FROM A DECISION OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF OF PETITIONERS BOUMEDIENE, ET AL., AND KHALID REGARDING THE MILITARY COMMISSIONS ACT OF 2006

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November 1, 2006

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici

Except for the following, all parties, intervenors, and amici appearing before this Court are listed in the Corrected Joint Brief of Appellants, dated May 3, 2005.

1. Supplemental Amicus Curiae Brief Of The Oregon Federal Public Defender Habeas Corpus Counsel In Support Of Petitioners'/Appellants' Position On The Significance Of The Military Commissions Act Of 2006; and

2. Brief Of Amici Curiae Retired Federal Judges In Support Of Petitioners' Supplemental Brief Regarding The Military Commissions Act Of 2006.

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TABLE OF AUTHORITIES

CASES

* Authorities upon which we chiefly rely are marked with an asterisk.

CONSTITUTIONAL AND STATUTORY PROVISIONS

INTERNATIONAL AUTHORITIES

OTHER AUTHORITIES

GLOSSARY

AUMF	Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)
Boumediene Merits Br.	Corrected Joint Brief of Appellants (May 3, 2005)
Boumediene DTA Br	Corrected Supplemental Brief of Petitioners Boumediene, et al., and Khalid Regarding Section 1005 of the Detainee Treatment Act of 2005 (Mar. 15, 2006)
CSRT	Combatant Status Review Tribunal
DTA	Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680
Gov't DTA Br.	Supplemental Brief of the Federal Parties Addressing the Detainee Treatment Act of 2005 (Feb. 17, 2006)
Habeas Scholars' Br.	Supplemental Brief Amici Curiae of British and American Habeas Scholars in Support of Petitioners Addressing Section 1005 of the Detainee Treatment Act of 2005 (Mar. 10, 2006)
MCA	Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600
3/22/06 Tr. [page]:[line]	Transcript of Oral Argument (Mar. 22, 2006)

Petitioners Boumediene, Nechla, Boudella, Bensayah, Ait Idir, Lahmar (the Boumediene Petitioners) and Khalid (together Petitioners) submit this brief pursuant to this Court's October 18, 2006 order.

STATUTES AND REGULATIONS

The relevant provisions of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (MCA), are set forth in the addendum to this brief. Other relevant statutory provisions are set forth in the addenda to the Boumediene Petitioners' corrected brief on the merits and the Government's supplemental brief regarding the DTA.

SUMMARY OF ARGUMENT

The MCA does not affect Petitioners' appeal with respect to either jurisdiction or merits. MCA section 7(b) lacks the requisite "clear statement" to repeal jurisdiction in pending *habeas* cases. *See infra* Part I.

If the MCA repealed habeas, it would violate the Suspension Clause because its only substitute for habeas is review of CSRT decisions in this Court under section 1005(e)(2) of the Detainee Treatment Act of 2005 (DTA), a procedure that (as construed by the Government) is manifestly inadequate when compared to the core protections that habeas corpus provided in 1789. *See infra* Part II.

The Government lacks statutory authority to imprison the Boumediene Petitioners indefinitely. They have not been charged with any offense triable by

any military commission, court martial, or court. The MCA does not grant authority to detain persons indefinitely without charge. *See infra* Part III.[1]

ARGUMENT

Although this brief discusses the "Military Commissions Act," this case does *not* involve military commissions. The Government claims the right to imprison the Boumediene Petitioners indefinitely *without ever charging or trying them*. For centuries, the writ of habeas corpus has shielded individuals against such arbitrary detention by requiring the Government to establish the legal and factual basis for confinement before a neutral judicial decision-maker.

The Framers were only too familiar with government attempts to hide unjust imprisonment and mistreatment from public view. They therefore directed that, except in circumstances not present here, persons imprisoned without charge must retain the right to obtain a court inquiry into the factual and legal bases for their imprisonment. The Government seeks nothing less than to replace habeas with a review process that places the Court wholly at the mercy of a "record" constructed by the Government and precludes the Boumediene Petitioners from presenting evidence demonstrating the unlawfulness of their imprisonment. No common law court before 1789, and certainly not the Framers, would have countenanced such a procedure in the case of a person imprisoned by the King without charge. And

[1] Petitioners incorporate by reference the arguments made in the brief of Petitioner-Appellees Al Odah, *et al.*, in Nos. 05-5064, 05-5095 through 05-5116.

neither the MCA nor the Suspension Clause permits this Court to ignore the merits of Petitioners' appeal.

I. THE MCA DOES NOT REPEAL HABEAS JURISDICTION IN PENDING CASES

Longstanding rules of construction dictate that the MCA does not repeal habeas jurisdiction in pending cases. First, "Congress must articulate specific and unambiguous statutory directives to effect a repeal" of habeas jurisdiction. *INS v. St. Cyr*, 533 U.S. 289, 299 (2001); *cf. Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764 (2006) (stating that a statute will not be held to revoke the Supreme Court's habeas jurisdiction "absent *an unmistakably clear statement* to the contrary" (emphasis added)). Second, "a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." *Hamdan*, 126 S. Ct. at 2765. Third, a statute that would retroactively alter a party's rights in a pending case "does not govern absent clear congressional intent favoring such a result." *Id.* (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)). And fourth, the Court should avoid construing the MCA in a manner that would give rise to "substantial constitutional questions." *St. Cyr*, 533 U.S. at 300, *see also id.* at 326.

Section 7(a) purports to strip jurisdiction over two distinct categories of cases: (1) "an application for a writ of habeas corpus" filed by or on behalf of certain aliens, 28 U.S.C. § 2241(e)(1); and (2) "any other action against the United

States or its agents *relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement*" of such an alien, *id.* § 2241(e)(2) (emphasis added).

Section 7(b), which sets out the "effective date" of section 7(a), provides only that section 7(a) applies to pending cases that are in the *second* category—cases "which *relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention* of an alien detained by the United States since September 11, 2001." MCA § 7(b) (emphasis added). The MCA does not provide—much less contain an "unmistakably clear statement"—that section 7(a) repeals jurisdiction in *habeas* cases pending on the date of enactment.[2]

St. Cyr disposes of any argument that the MCA repealed jurisdiction over pending habeas cases. *St. Cyr* confirmed that Congress must express itself with clarity and precision to repeal habeas jurisdiction, and that habeas jurisdiction must remain in "'any cases not *plainly* excepted by law.'" *St. Cyr*, 533 U.S. at 298 (quoting *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102 (1869)) (emphasis added). There, a section entitled "Elimination of Custody Review by Habeas Corpus" did not repeal habeas jurisdiction because the operative text of the statute did not specifically mention habeas. *Id.* at 308-310. Section 7(b), which likewise does not

[2] The fact that section 7(b) states that section 7(a) "shall take effect on the date of the enactment of this Act" has no bearing on whether the MCA applies retroactively. *See Landgraf*, 511 U.S. at 257 ("A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.").

reference habeas and addresses only the category of "other action[s]" included in new 28 U.S.C. § 2241(e)(2), does not satisfy *St. Cyr*.

Section 7(b) contrasts with section 3(a) of the MCA, which addresses habeas petitions brought by persons convicted by military commission. Section 3(a) added 10 U.S.C. § 950j, which provides that "notwithstanding any other provision of law (*including section 2241 of title 28 or any other habeas corpus provision*), no court, justice, or judge shall have jurisdiction to hear or consider *any claim or cause of action whatsoever . . . pending on . . . the date of the enactment of the [MCA]*, relating to the prosecution, trial, or judgment of a military commission under this chapter . . . ." 10 U.S.C. § 950j(b) (emphasis added). That section explicitly states that the jurisdiction-stripping provision applies to *habeas* cases pending on the date of enactment. Section 7(b) lacks similar language, and *St. Cyr* forecloses extending it to pending habeas cases by implication. *See St. Cyr*, 533 U.S. at 299 ("Implications from statutory text . . . are not sufficient to repeal habeas jurisdiction . . . ."). "[A] negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." *Hamdan*, 126 S. Ct. at 2765. This Court must give effect to the difference between MCA §§ 3(a) and 7.

The MCA additionally fails to overcome the presumption against retroactive statutes. *See Hamdan*, 126 S. Ct. at 2764-2765. Because section 7(b) does *not*

purport to reach the habeas applications described in § 2241(e)(1) and makes no specific mention of habeas at all, the MCA does not contain the "unequivocal terms" required to affect habeas cases that arose prior to the MCA's enactment. *Twenty Per Cent. Cases*, 87 U.S. (20 Wall.) 179, 187 (1873).

A conclusion that the MCA does not affect jurisdiction in Petitioners' cases avoids substantial constitutional questions. *See St. Cyr*, 533 U.S. at 300; *see also id.* at 326 (rejecting habeas stripping where such a construction "would give rise to substantial constitutional questions"); *see infra* Part II. Indeed, the mere need to determine the extent of the Suspension Clause guarantee is "in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that [habeas] review was barred entirely." *Id.* at 301 n.13. When "an alternative interpretation of the statute is 'fairly possible,'" the Court is "obligated to construe the statute to avoid such problems." *Id.* at 300 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

II. THE MCA VIOLATES THE SUSPENSION CLAUSE

Construing the MCA to remove habeas jurisdiction here would violate the Suspension Clause.[3] "[A]t the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301 (quoting *Felker v. Turpin*,

[3] "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2.

518 U.S. 651, 663-664 (1996)). Because the United States holds absolute control over Guantanamo, persons imprisoned in 1789 under like circumstances would have been able to invoke the common law writ. *See Rasul v. Bush*, 542 U.S. 466, 481-482 (2004); Boumediene DTA Br. 35-38; Habeas Scholars' Br. 4-7.

A. The MCA Does Not Provide An Adequate Substitute For Habeas

Absent a valid suspension, limits on the availability of the writ are valid only if a substitute remedy is both adequate and effective to "test the legality of a person's detention." *Swain v. Pressley*, 430 U.S. 372, 381 (1977) (quotation omitted); *see also St. Cyr*, 533 U.S. at 305 ("a serious Suspension Clause issue would be presented" absent an adequate habeas substitute). If construed to repeal habeas in this case, the MCA would afford Petitioners only the procedure provided in "paragraph[ ] (2) . . . of section 1005(e) of the Detainee Treatment Act of 2005." MCA § 7(a) (adding 28 U.S.C. § 2241(e)(2)).

Review under DTA § 1005(e)(2) falls short of the core protections secured by the Suspension Clause. *See* Boumediene DTA Br. 41-55. Moreover, since the March 2006 argument regarding the DTA, the Government has consistently advanced constructions of § 1005(e)(2) review which confirm the inadequacy of that review as a habeas substitute.

1. *A Habeas Petitioner May Offer Evidence Outside The Return, Which The Government Asserts Is Forbidden By The DTA*

"Petitioners in habeas corpus proceedings . . . are entitled to careful consideration and *plenary processing* of their claims including *full opportunity for the presentation of the relevant facts*." *Harris v. Nelson*, 394 U.S. 286, 298 (1969) (emphases added); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (plurality opinion) (habeas "permits the alleged combatant to present his own factual case to rebut the Government's return").

These holdings echo the common law, which likewise permitted habeas petitioners to offer evidence supporting release. For example, in *Goldswain's Case*, (1778) 96 Eng. Rep. 711 (C.P.), a habeas petitioner was pressed into Admiralty service. The Admiralty's return failed to mention an exemption issued by the Navy Board, which the petitioner's counsel substantiated through affidavits. *See id.* The court relied on the affidavits, noting that they included information omitted from the return. *See id.* at 712.[4] Early American courts adopted the same practice. *See, e.g., State v. Clark*, 2 Del. Cas. 578, 1820 WL 245, at *2 (Del. Ch. Aug. 6, 1820) (discharging a minor from the custody of the U.S. Army based on the minor's "suggestions . . . made against [the custodian's] return" and the

[4] *See also, e.g., Case of the Hottentot Venus*, (1810) 104 Eng. Rep. 344, 344 (K.B.) (ordering an examination of a "native of South Africa" to determine whether she was confined against her will); *Case of Three Spanish Sailors*, (1779) 96 Eng. Rep. 775, 775 (C.P.) (examining affidavits supporting petitioners' claim for release); *see generally* Habeas Scholars' Br. 8-9.

testimony of his father, who was "sworn as a witness for him"). Aliens accused of being enemy soldiers had the same right to judicial consideration of their own evidence. *See, e.g., R. v. Schiever*, (1750) 97 Eng. Rep. 551, 552 (K.B.) (considering affidavits submitted in support of an alien petitioner's habeas motion and concluding that "the Court thought this man, *upon his own showing*, clearly a prisoner of war" (emphasis added)); *Case of Three Spanish Sailors*, (1779) 96 Eng. Rep. 775, 776 (C.P.) (similar); Habeas Scholars' Br. 9.

Yet the Government contends that the DTA "limit[s] this Court's review to the record before the CSRT." Response in Opposition to Motion to Compel at 14, *Bismullah v. Rumsfeld* (No. 06-1197) (Aug. 2006) (attached as Annex 1) ("Gov't Response in *Bismullah*"). The Government similarly contends that this Court may not review CSRT decisions to exclude materials from the CSRT record. *See id.* at 18. On that interpretation, this Court would never hear evidence from petitioners that could mean the difference between freedom and lifelong imprisonment.

This is not a hypothetical concern. The Boumediene Petitioners sought to include in the CSRT record specific documents and testimony from specific witnesses, yet their CSRT records are devoid of both despite the ready availability of that evidence. *See* Boumediene Merits Br. 46. Petitioner Boudella asked his CSRT panel to consider the January 2002 order of the Supreme Court of the Federation of Bosnia and Herzegovina ordering him released due to lack of

evidence. J.A. 0576, 0582. That Tribunal concluded that the court decision was "not reasonably available" (J.A. 0582), even though the decision had been *filed in the district court and served on counsel for the Government* months before Mr. Boudella's CSRT convened.[5]

Mr. Boudella also requested as evidence a copy of the judgment of the Human Rights Chamber for Bosnia and Herzegovina, which confirmed that Mr. Boudella was ordered released by the Supreme Court and also held that Bosnia and Herzegovina had violated Bosnian law and the European Convention on Human Rights, which is binding on Bosnia and Herzegovina, by handing Mr. Boudella over to the United States. J.A. 0576, 0582.[6] His CSRT recited that this decision was "not reasonably available" (J.A. 0582), even though it was available on the Internet[7] and Mr. Boudella testified that he had actually seen the decision while at Guantanamo (J.A. 0582).

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[5] *See* Pets.' Opp. to Resp. Motion for a Joint Case Management Conference, Entry of Coordination Order and Request for Expedition, Ex. B, *Boumediene v. Bush*, No. 1:04-cv-01166-RJL (D.D.C. Aug. 16, 2004) (Dkt. 13). Saber Lahmar also requested that the Bosnian Supreme Court's order be considered. J.A. 0401. His CSRT also deemed it "not reasonably available" on the ground that "[t]he Bosnian government was unable to provide any such document." *Id.*

[6] Mr. Boudella's request for the judgment of the Human Rights Chamber appears to have been mistranslated as a request for "a copy of 'Humanity of the People.'" J.A. 0576.

[7] *See* Memorandum in Support of Motion for Order Enjoining Appellees From Transferring Petitioners to Algeria Without Providing Counsel for Petitioners and the Court With 30 Days' Advance Notice, Ex. A2, p. 18 (Sept. 21, 2005).

Petitioner Nechla sought the testimony of Mr. Mohmoud Sayed Yousef, his supervisor in the Bosnian office of the Red Crescent of the United Arab Emirates. J.A. 0520. His CSRT concluded that Mr. Yousef was not reasonably available. *See id.* Counsel easily located Mr. Yousef in January 2005 by calling the Red Crescent telephone number listed in the Sarajevo phone book.

Information that was potentially exculpatory was provided to Mr. Lahmar's Tribunal only *after* his CSRT hearing. *See* Boumediene Merits Br. 48-50. That information was *never* provided to any of the CSRTs of the other Boumediene Petitioners, even though their alleged "association" with Mr. Lahmar formed part of the basis for the CSRT decisions in their cases. *See id.* Under the Government's view of this Court's review procedure under the MCA and DTA, Petitioners would be forbidden from providing the Court with this crucial evidence.

[TEXT EXCERPTED HERE]

Bosnian authorities have since dropped the investigation into the alleged terrorist plot. J.A. 0704-0705. Yet under the Government's view of the DTA, this Court would be forbidden from considering any of this evidence.

These examples demonstrate why any alternative that does not permit this Court to review all evidence offered by a petitioner would not be an adequate substitute for habeas. The Government would prohibit this Court from considering

any of this evidence and limit this Court to only a meaningless review of a hastily assembled CSRT record. A statute requiring that this Court "wilfully shut [its] eyes" to important evidence is inconsistent with the common law writ, *Goldswain's Case*, 96 Eng. Rep. at 712, and violates the Suspension Clause.

2. According To The Government, The DTA Requires This Court To Defer To The CSRT Decision, Again Contrary To The Writ As Of 1789

In stark contrast to habeas, the Government proposes a highly restrictive standard of review, essentially requiring affirmance unless there was *no* evidence supporting detention. *See* Gov't Response in *Bismullah* at 13 (arguing that the DTA limits this Court's role to "at most" a determination that the CSRT decision "is supported by substantial evidence"). Under that approach, the DTA would not permit the Court to assess the relative weight of the evidence; as long as some evidence supported detention, this Court would be constrained to uphold the imprisonment. Common law habeas rejected such deference to the Government's judgment; as one court put it, "our judgment ought to be grounded upon our own inferences and understandings, and not upon theirs." *Bushell's Case*, (1670) 124 Eng. Rep. 1006, 1007 (C.P.); *see generally* Boumediene DTA Br. 47.

The Government advocates a deferential standard of review by drawing an analogy between section 1005(e)(2) of the DTA and "substantial evidence" review of agency adjudications under the Administrative Procedure Act, 5 U.S.C.

§ 706(2)(E) (APA). *See* Gov't Response in *Bismullah* at 10-13 (citing *Florida Light & Power Co. v. Lorion*, 470 U.S. 729 (1985)).[8] The Suspension Clause's guarantee of habeas corpus is in no way affected by Congress's authorization of a more limited standard of review for agency decisions regarding the licensing of nuclear reactors. Except in cases of invasion or rebellion, the Suspension Clause prevents Congress from diminishing the core protections of the writ (including a full factual review) in cases of imprisonment without charge. *See, e.g.*, *Hamdi*, 542 U.S. at 575 (Scalia, J., dissenting) ("The Suspension Clause . . . would be a sham if it could be evaded by congressional prescription of requirements *other than the common-law requirement of committal for criminal prosecution* that render the writ, though available, unavailing." (emphasis in original)).

Even under the APA, a proceeding as defective as the CSRT would likely not be reviewable for substantial evidence, since that standard only applies to review of formal adjudications under sections 556 and 557 of the APA and to cases on the record of "an agency hearing provided by statute." 5 U.S.C. § 706(2)(E).

[8] The Court made a similar suggestion during oral argument. *See* 3/22/06 Tr. 27:13-16.

No statute provides for a CSRT hearing.[9] And the CSRTs fail abysmally to meet the APA's criteria for a formal adjudication, because the prisoner has no meaningful opportunity to "submit rebuttal evidence" or "to conduct such cross-examination as may be required for a full and true disclosure of the facts." *Id.* § 556(d). Nor did the CSRT allow petitioners to be "accompanied, represented, and advised by counsel," an entitlement that the APA gives to every "person compelled to appear in person before an agency." 5 U.S.C. § 555(b).[10]

3. The Suspension Clause Does Not Permit Cancellation Of The Writ's Core Protections

At oral argument regarding the DTA, this Court asked whether the restrictive review allowed under section 1005(e)(2) could be characterized as simply "modifying" habeas, similar to modern provisions eliminating the requirement to "produce the body" or limiting the filing of second or successive

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[9] The CSRTs were established by order of the Deputy Secretary of Defense and do not find facts, but merely purport to confirm "enemy combatant" designations *already* reached "through multiple levels of review by officers of the Department of Defense." J.A. 1207. Nothing in the MCA (or in the DTA before it) remotely authorized such a procedure, particularly not against citizens of a friendly nation abducted from their home country in peacetime.

[10] Indeed, the only APA standard of review that arguably could apply to review of a CSRT would be a "trial de novo by the reviewing court," *id.* § 706(2)(F), which is the appropriate standard when "the agency factfinding procedures are inadequate." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971); *see also National Org. for Women v. Social Sec. Admin.*, 736 F.2d 727, 746 (D.C. Cir. 1984) (indicating that procedures that are "closed, unfair, or otherwise inadequate to the task of developing a factual record" would warrant *de novo* review under the APA).

petitions. 3/22/06 Tr. 46:6-7, 46:17-22, 47:16-23.[11] The MCA's serious limitations on this Court's review of the CSRT process are in no way comparable to these minor alterations that leave the core protections of habeas undiminished.

The requirement that a custodian "produce the body" was—even in 1789—a vestigial procedural relic rather than a central substantive concern of the Great Writ.[12] By the time of the Founding, the production of the body was merely a means by which common law courts could "extend their jurisdiction by bringing the body of the petitioner . . . before them." William F. Duker, *A Constitutional History of Habeas Corpus* 29-30 (1980); *see also* R.J. Sharpe, *The Law of Habeas*

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[11] The Court's suggestion that the DTA modified, rather than abolished, habeas corpus had an arguable textual basis due to the particular phrasing of 28 U.S.C. § 2241(e)(1), as added by section 1005(e)(1) of the DTA. *See* 3/22/06 Tr. 57:23-58:9. Section 7(a) of the MCA repealed that language, however, and enacted a new section 2241(e). The new section makes a clear distinction between habeas corpus, which is treated in new section 2241(e)(1), and "other action[s]" including review under section 1005(e)(2) of the DTA, which are treated in new section 2241(e)(2). *See* MCA § 7(a).

[12] What we now refer to as habeas corpus was originally "an aggregation of two existing writs: habeas corpus, and a writ questioning the cause of a prisoner's custody." William F. Duker, *A Constitutional History of Habeas Corpus* 25 (1980). Habeas corpus proper was simply a writ that compelled the appearance of an individual before a court—typically, in its origins, to "secure the appearance of an unwilling defendant." *Id.* at 18; *see also* R.J. Sharpe, *The Law of Habeas Corpus* 1-4 (2d ed. 1989). The procedural writ of habeas corpus later became firmly attached to other substantive writs designed to test the judgment of another court—a practice that developed primarily because a court's jurisdiction frequently depended on the physical presence of the person who was the subject of the dispute. *See* Duker, *supra*, at 27-40; Badshah K. Mian, *English Habeas Corpus: Law, History, and Politics* 18-21 (1984).

Corpus 4 (2d ed. 1989) (habeas corpus "brought matter of the imprisonment fully before the court" since it was "important to be able to exert physical control over the parties in civil litigation").[13] Similarly, the federal statute's modern restriction of second and successive petitions poses no Suspension Clause concerns because it simply codified and systematized the common law principle of "abuse of the writ," pursuant to which English courts have always had the power to deny dilatory or abusive habeas petitions. *See, e.g., McCleskey v. Zant*, 499 U.S. 467, 494 (1991).[14]

These modern variations in habeas procedure did not affect the courts' basic ability to "review[] the legality of Executive detention." *Rasul*, 542 U.S. at 474 (citation omitted); *see also Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) ("[T]he great object of [the writ of habeas corpus] is the *liberation* of those who

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[13] The requirement of "producing the body"—formerly a technical prerequisite to the habeas court's ability to grant relief—has been replaced by an adequate substitute, namely, court jurisdiction over the *custodian* and power to order him to release the prisoner. *See, e.g., Rumsfeld v. Padilla*, 542 U.S. 426, 434-435 (2004).

[14] "Every English Court of Justice is, and from time immemorial has been, invested with inherent jurisdiction . . . to dismiss, or stay, or otherwise nullify all actions or proceedings which are shewn to its satisfaction to be vexatious or oppressive, or to constitute an abuse of its process." Alexander Kingcome Turner, *The Doctrine of Res Judicata* 407 (2d ed. 1969). Thus, under English jurisprudence, "it never was [the case] that an applicant for habeas corpus may in term apply successively to every judge of the High Court." R.F.V. Heuston, *Habeas Corpus Procedure*, 66 L.Q. Rev. 79 (1950); *see also* David W. Raack, *A History of Injunctions in England Before 1700*, 61 Ind. L.J. 539, 568-570 (1985-1986) (noting the well-established "practice of enjoining [common law] proceedings where the legal process was being abused").

may be imprisoned without sufficient cause."). The MCA, through which the Government would replace habeas corpus with a deferential review of an incomplete "record," essentially eliminate that fundamental substantive attribute of habeas and therefore works an unlawful suspension.[15]

B. Habeas Procedures In Cases Of Military Commissions, Collateral Attacks On Prior Judgments, And Pre-Trial Detention Are Inapposite

At prior oral argument, the Court suggested that the Boumediene Petitioners were being detained "preliminary to full trial before a Military Commission." 3/22/06 Tr. 42:6-7. With respect, the Court was mistaken. It must be emphasized that *none of the Boumediene Petitioners have been charged with any crime triable by military commission.* The CSRTs are not preliminary to a further procedure; rather, the Government treats them as sufficient in themselves to justify indefinite detention. The Government has recently stated that, although approximately 435 men remain imprisoned indefinitely at Guantanamo, only 60 to 80 are expected to be tried by military commission. *See* Craig Whitlock, *U.S. Faces Obstacles to*

[15] Previously identified defects in the DTA review scheme, including apparently barring court review of detention decisions by bodies other than a CSRT, not authorizing release of a successful petitioner, and interfering with the right to counsel, are not cured in the MCA. *See* Boumediene DTA Br. 49-55.

Freeing Detainees From Guantanamo, Wash. Post, Oct. 17, 2006, at A1 (reporting statement of John B. Bellinger III, Legal Adviser, U.S. Department of State).[16]

The Government repeatedly has sought to confuse certain issues in this case by citing to the historical scope of habeas in *criminal* cases, specifically collateral attacks on prior convictions. *See, e.g.*, Gov't DTA Br. 51. Such sources are irrelevant, since the Boumediene Petitioners have been neither charged nor convicted of any crime. Their imprisonment without charge is precisely the circumstance in which the protections of habeas "have been strongest." *St. Cyr*, 533 U.S. at 301.

The common law accorded persons who—like Petitioners—had no reasonable prospect of a trial a significantly broader inquiry on habeas than was available to persons awaiting trial on a criminal charge. Of course, even persons in pretrial detention generally had the right to present their own evidence on habeas. *See, e.g.*, Habeas Scholars' Br. 10 n.5. Although some decisions suggest that persons in pretrial detention could not controvert the return, those statements are based on the common law right to a speedy trial, where the prisoner has a right to present his own evidence to a jury. *See, e.g.*, *Bushell's Case*, 124 Eng. Rep. at 1010 (noting that, while a person held "upon a general commitment" for a felony

[16] Moreover, even conceded enemy soldiers tried by military commission receive more procedural protections than the Boumediene Petitioners did before the CSRTs. *See* Boumediene Merits Br. 20 & n.19.

could not present his own evidence during a habeas proceeding, he "may press for his tryal, which ought not to be denied or delayed," whereas a person imprisoned without charge is permitted to traverse the return).

The decision in *United States ex rel. Kassin v. Mulligan*, 295 U.S. 396 (1935), which the Court cited during oral argument, is consistent with this common law tradition. *See* 3/22/06 Tr. 24-28. In *Kassin*, the petitioner was indicted in Florida but apprehended in New York. He filed a habeas petition challenging an order—issued after a further evidentiary hearing on probable cause—extraditing him so that he could be tried on the Florida indictment. *Kassin* is explicitly premised on the fact that an "order of removal adjudges nothing affecting the merits of the case and *amounts to no more than a finding that the accused may be brought to trial.*" 295 U.S. at 401 (emphasis added). Moreover, the habeas procedure observed in *Kassin* appears to have been more in the nature of a collateral attack on the post-indictment extradition hearing, during which the petitioner had introduced depositions of five persons in support of his release. *See id.* at 398-399; *see also id.* at 401-402 ("He was entitled to introduce evidence to prove the absence of probable cause and to have the Commissioner judicially consider it. We have held that exclusion of competent evidence is a denial of right . . . ."). The petitioner in *Kassin* did not seek to supplement the record on habeas, and the Supreme Court did not address whether he could have done so. *See id.* at

401.[17] Moreover, the ultimate order was that the petitioner would have a full trial on the indictment, not indefinite detention without charge. *See id.* at 402.

Unlike the petitioner in *Kassin*, the Boumediene Petitioners' detention—now approaching five years in duration—has never been in anticipation of any criminal proceeding. Nor have Petitioners had the opportunity to present to *anyone* the evidence that they believe would compel their release. *See supra* Part II.A.1. Common law habeas has always required a searching judicial examination of the factual and legal bases for detention in cases such as this.

Because Congress has not purported to suspend the writ of habeas corpus, let alone validly done so,[18] a construction of the MCA that repealed habeas jurisdiction in this case would render the MCA unconstitutional.

III. THE MCA DOES NOT AUTHORIZE PETITIONERS' INDEFINITE DETENTION

Petitioners have previously shown that the Government has no authority, under the AUMF or otherwise, to kidnap citizens of friendly nations far from any

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[17] Petitioners respectfully submit that this Court was mistaken in suggesting at oral argument that *Kassin* held that that a petitioner could not submit evidence during a habeas proceeding. 3/22/06 Tr. 25:24 to 26:6, 28:6-7. The question did not arise in *Kassin*—probably because the Petitioner previously had a full opportunity to submit his evidence—and the opinion does not suggest that the petitioner sought to submit anything further. Importantly, the Supreme Court approvingly noted that the district court "considered the evidence in detail" and admonished the court of appeals for "declin[ing] to examine the evidence" itself. 295 U.S. at 402.

[18] The MCA, like the DTA before it, does not meet the Constitution's requirements for a valid suspension of the writ. *See* Boumediene DTA Br. 55-56.

battlefield, especially after the investigative authorities of that country concluded that there was no evidence to hold them. *See* Boumediene Merits Br. 20-27. The MCA does not alter this analysis. Accordingly, the Court should reverse the judgment of the district court.

First, the MCA nowhere authorizes the Executive to jail persons situated similarly to the Boumediene Petitioners. The MCA creates a bipartite system for trying purported "combatants": "lawful enemy combatants" may be tried through traditional courts martial, and "unlawful enemy combatants" may be tried through the MCA's military commissions upon the filing of charges and specifications. *See* 10 U.S.C. §§ 948d, 948q (added by MCA § 3(a)). The MCA does not create or sanction a detention system for persons such as Petitioners, who have not been charged with any offense, let alone designated for trial by court martial or military commission. *See United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2002) ("In construing a statute, the court begins with the plain language of the statute. Where the language is clear, that is the end of judicial inquiry in all but the most extraordinary circumstances." (internal citations and quotation omitted)).

Second, construing the MCA to authorize detention of uncharged persons such as Petitioners would violate the law of nations (including the laws of war) and is therefore a construction that must be avoided "if any other possible construction

remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *cf. Hamdi*, 542 U.S. at 521 (construing the AUMF "based on longstanding law-of-war principles"); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (holding that international law "is part of our law").

The laws of war do not authorize imprisonment of citizens of a friendly nation, captured far from any battlefield, and taken into custody by the U.S. Government despite a court order mandating their release. *See* Boumediene Merits Br. 24; *see also Johnson v. Eisentrager*, 339 U.S. 763, 769 & n.2 (1950) ("[T]hroughout the civilized world . . . an alien friend is the subject of a foreign state at peace with the United States; an alien enemy is the subject of a foreign state at war with the United States." (internal quotation and citations omitted)). Construing the MCA to authorize indefinite detention—without trial or court martial—would also violate other U.S. treaty and customary international law obligations. *See, e.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966, (entered into force for United States on Sept. 8, 1992), 58 Fed. Reg. 45, 934 (Aug. 31, 1993), 999 U.N.T.S. 171, arts. 9.1, 9.2, 9.4 (mandating that "[n]o one shall be subjected to arbitrary arrest or detention," "[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him," and "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a

court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful") (full text of ICCPR in addendum to Boumediene Merits Br. at 11a-15a); *see also* Boumediene Merits Br. 34-39.

Third, if the MCA authorized the detention of the Boumediene Petitioners, it would exceed the power of Congress under Article I and constitute an improper open-ended grant of detention power to the President. Congress's war power[19] is not unlimited: "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit." *United States v. Robel*, 389 U.S. 258, 263 (1967) (holding statute prohibiting members of certain "Communist-action organizations" from working at defense facilities exceeded congressional war power and impermissibly infringed associational rights); *cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (President exceeded executive war power in seizure of steel mills). Although Congress authorized the Executive to detain persons in a manner consistent with the laws of war by passing the AUMF, *see Hamdi*, 542 U.S. at 518-519 (plurality opinion), the situation of the Boumediene Petitioners falls outside the rationale for detention "based on longstanding law-of-war principles," because

[19] Congress holds the power "[t]o declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." U.S. Const. art. I, § 8, cl. 11.

they have neither "tak[en] up arms" nor been captured on a "field of battle." *See id.* at 518, 521. Congress's war power cannot authorize the kidnapping and indefinite detention of civilian citizens of an allied country at peace with the United States. *See Robel*, 389 U.S. at 264 ("[T]his concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart.").

Even if Congress's powers theoretically allowed it to legislate such seizures and detentions, such powers could not be transferred to the Executive without effective standards or limits. Empowering the President to detain indefinitely any person he deems supports "hostilities" against the United States, anywhere in the world, would constitute an extraordinary delegation, unimaginable to the Framers.

Accordingly, this Court should hold that the imprisonment of the Boumediene Petitioners is unlawful.

CONCLUSION

For the foregoing reasons, the MCA does not affect this Court's jurisdiction over Petitioners' appeal or the district court's jurisdiction over their habeas petitions. To the extent the Court interprets the statute otherwise, the MCA is unconstitutional. The judgment of the district court dismissing Petitioners' habeas petitions should be reversed.

Respectfully submitted,

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Dated: November 1, 2006

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(A)(7)(C)

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief uses a proportionally spaced typeface of 11-point or larger. The brief is 7,280 words in length, which is within the 10,000 word limit set out in this Court's order of October 18, 2006.

_____

Melissa A. Hoffer

CERTIFICATE OF SERVICE

I, Dawn Canady, hereby certify that on November 1, 2006, I filed and served the foregoing brief by causing an original and seventeen copies to be delivered by hand to the Court Security Office for filing with the Court and service on the following counsel:

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RELEVANT STATUTORY PROVISIONS

Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600

SEC. 3 MILITARY COMMISSIONS.

(a) MILITARY COMMISSIONS.—

(1) IN GENERAL.—Subtitle A of title 10, United States Code, is amended by inserting after chapter 47 the following new chapter:

...

"§ 948d. Jurisdiction of military commissions

"(a) JURISDICTION.—A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.

"(b) LAWFUL ENEMY COMBATANTS.—Military commissions under this chapter shall not have jurisdiction over lawful enemy combatants. Lawful enemy combatants who violate the law of war are subject to chapter 47 of this title. Courts-martial established under that chapter shall have jurisdiction to try a lawful enemy combatant for any offense made punishable under this chapter.

...

"§ 948q. Charges and specifications

"(a) CHARGES AND SPECIFICATIONS.—Charges and specifications against an accused in a military commission under this chapter shall be signed by a person subject to chapter 47 of this title under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state--

"(1) that the signer has personal knowledge of, or reason to believe, the matters set forth therein; and

"(2) that they are true in fact to the best of the signer's knowledge and belief.

"(b) NOTICE TO ACCUSED.—Upon the swearing of the charges and specifications in accordance with subsection (a), the accused shall be informed of the charges against him as soon as practicable.

...

"§ 950j. Finality or [*sic*] proceedings, findings, and sentences

...

"(b) PROVISIONS OF CHAPTER SOLE BASIS FOR REVIEW OF MILITARY COMMISSION PROCEDURES AND ACTIONS.—Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear

or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.
...".

SEC. 7 HABEAS CORPUS MATTERS.

(a) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by striking both the subsection (e) added by section 1005(e)(1) of Public Law 109-148 (119 Stat. 2742) and the subsection (e) added by added by [*sic*] section 1405(e)(1) of Public Law 109-163 (119 Stat. 3477) and inserting the following new subsection (e):

"(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

"(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no 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, transfer, treatment, trial, 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.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

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The Military Commissions Act of 2006: A Short Primer
Part One of a Two-Part Series
By JOANNE MARINER

Monday, Oct. 09, 2006

Ten days ago, by a vote of 65 to 34, Congress passed the Military Commissions Act of 2006 (MCA). To facilitate the prosecution of detainees that the Bush Administration "disappeared" into secret CIA custody for several years, Congress created a system of justice that is far inferior to that of the federal courts and courts-martial. And not only did Congress give the Administration much of what sought in terms of substandard justice, it also allowed the Administration to pack the bill with a grab-bag of unnecessary and abusive measures.

With ten separate sections, a few hundred provisions, and thirty-eight pages of fine print, the military commissions bill is complicated and, in a few areas, unclear. Its concrete impact will be assessed in what will no doubt be a long series of court cases that will end up in the Supreme Court.

What follows is a first stab at interpreting the scope and meaning of this exceedingly harmful bill.

What the MCA Does *Not* Do

A number of commentators have criticized the MCA for authorizing the indefinite detention of people deemed to be "unlawful enemy combatants." Yet, unlike the Administration's initial proposals, the bill does not explicitly address detention. While it does nothing to stop the Administration from holding people indefinitely on Guantanamo and elsewhere, the bill does not explicitly sanction the practice. And, according to the bill's text, its definition of "unlawful enemy combatant" only specifically applies to its rules on military commissions.

It is nonetheless utterly predictable that the Administration will seek to use the law for the purpose of justifying its detention practices. In light of the Supreme Court's ruling in *Hamdi v. Rumsfeld* (which recognized the government's power to detain enemy combatants for the duration of wartime hostilities), the Administration will claim that the MCA implicitly grants authority to the government to detain those who fall within the bill's ridiculously overbroad definition of "unlawful enemy combatant."

The courts should emphatically reject this argument. Without a clear statement of congressional intent to authorize the indefinite detention of such a broad category of people, such a position

should not lightly be presumed. Any court faced with the question should be guided by the long line of Supreme Court decisions that have held that explicit congressional authorization is required when restrictions on basic rights are imposed.

Definition of "Unlawful Enemy Combatant"

With a bill as pernicious as this one, it is difficult to settle on a single worst provision. The restrictions on the right of habeas corpus probably qualify, but the bill's overbroad definition of "unlawful enemy combatant" runs a close second.

Column continues below ↓

Under the first prong of the provision, an "unlawful enemy combatant" is defined as a person "who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents," and who is not a lawful combatant. It would cover someone who provided funds to al Qaeda or the Taliban knowing that the funds would be used to fight against the U.S. (including, given the bill's apparent understanding of terrorism as a form of hostilities, funds that are used for terrorist attacks in the U.S.).

The material support element of the first prong of the definition - which covers people who have purposefully and materially supported hostilities - exceeds the traditionally-accepted legal definition of combatant. Under international humanitarian law - the laws of war - combatants are people who directly participate in hostilities. People who merely support hostilities - such as cafeteria workers at a military base - are considered civilians. Unlike combatants, they cannot be deliberately targeted for attack.

The first prong of the bill's definition is unjustifiably broad. But the second prong of the definition is far worse. It appears to delegate to the President or Secretary of Defense unrestricted power to deem anyone an unlawful enemy combatant. All it requires is that a "competent tribunal" like a Combatant Status Review Tribunal (CSRT) make the determination. (CSRTs are the administrative boards that review detentions at Guantanamo.) The bill itself says nothing about the substance of the criteria that the tribunal should apply.

The definition as a whole is thus so radically overbroad that one is tempted to attribute its breadth to a drafting error (perhaps it was originally written as a two-part test, not two independent prongs). At any rate, as written, the provision should be struck down as a blatantly unconstitutional delegation of power. And note, in assessing the provision's scope, that the definition of "unlawful enemy combatant" is not limited to aliens (even though U.S. citizens cannot be tried by military commissions, and are not covered by the bill's habeas-stripping provisions).

Military Commission Proceedings

The bill provides that alien unlawful enemy combatants (but not U.S. citizens) are subject to trial by military commission. As the text of the bill explains, the military commissions that it authorizes are regularly constituted courts, "affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions." That is, if saying so is enough to make it so.

The bill's different treatment of citizens and aliens reflects political calculations, not legal ones. As the U.K. House of Lords found in 2004 in ruling against indefinite detention, such a distinction cannot be justified under international law.

Military commissions consist of at least five commissioned military officers, and are presided over by a military judge. In cases in which death is a possible penalty, the commissions must include at least twelve officers.

The defendant is presumed innocent and his guilt must be proven beyond a reasonable doubt. Convictions require a two-thirds affirmative vote of those commission members present at the time of the vote. Sentences of more than ten years require a three-quarters affirmative vote. The imposition of the death penalty requires a unanimous vote.

The defendant has the right to represent himself. Otherwise, he will have military counsel and, if he chooses, civilian counsel as well. Civilian counsel must be U.S. citizens eligible for access to classified information deemed Secret.

Rules of evidence and procedure

The Secretary of Defense is authorized to prescribe procedures and rules of evidence beyond those that are set out in the bill. These procedures/rules can vary from their courts-martial equivalents as long as the Secretary finds that it is impracticable to abide by courts-martial standards.

Statements obtained under torture are inadmissible as evidence. Yet statements obtained under coercion (including cruel treatment) are admissible under certain circumstances.

Different rules apply for statements obtained pre- and post- December 30, 2005 (the date of the enactment of the Detainee Treatment Act (DTA)). If a coerced statement was obtained before the DTA was enacted, it is admissible if the judge finds it to be "reliable and possessing sufficient probative value," and if he believes that its admission would serve the interests of justice. Coerced statements taken after the DTA was enacted are, in addition, not admissible if the interrogation methods used to obtain them violate the DTA.

In an important improvement upon the rules that the Administration originally sought, the defendant must be allowed to examine and respond to any evidence seen by the commission. If classified information that the government does not want to reveal to the defendant is needed for prosecution, an unclassified summary can be used. But, in addition, although the defendant's general right to exculpatory evidence is acknowledged, he is only granted an "adequate substitute" for classified exculpatory information.

Hearsay is admissible as long as the judge finds it to be reliable and the defendant gets advance warning. Evidence obtained without a search warrant is also admissible.

Protecting "Sources, Methods, or Activities"

The bill includes a number of provisions that protect classified "sources, methods, or activities" against being revealed. The likely impact of such provisions is to bar any inquiry into the CIA's

abusive interrogation practices. (For sources, substitute "disappeared" detainees; for methods, substitute torture, and for activities, substitute water-boarding, stress positions, and days without sleep.)

The bill specifies, for example, that during the discovery phase, the judge may protect classified "sources, methods, or activities" from disclosure. It also provides that reliable evidence obtained via classified "sources, methods, or activities" is admissible, even though the sources/methods/activities themselves are protected from disclosure. Finally, it states that the public may be excluded from proceedings in order to protect information whose disclosure would damage national security, including information on "intelligence or bill enforcement sources, methods, or activities."

Appeals

Guilty verdicts are automatically referred to a Court of Military Commission Review (each panel of which consists of at least three appellate military judges).

The Court of Appeals for the D.C. Circuit has exclusive appellate jurisdiction over the military commission process. The court's review is limited to examining: 1) whether the decision complied with the procedures, etc., set out in the bill, and 2) whether, "to the extent [they are] applicable," the decision is consistent with the U.S. Constitution and laws.

"To the extent [they are] applicable" - that's another kicker.

Crimes Triable by Military Commission

The MCA states that it does not create any new crimes, but simply codifies offenses "that have traditionally been triable by military commissions." This provision is meant to convince the courts that there are no ex post facto problems with the offenses that the bill lists. In *Hamdan v. Rumsfeld*, however, a plurality of the Supreme Court (four justices) found that conspiracy--one of the offenses enumerated in the MCA--was not a crime triable by military commission. The bill's statement that conspiracy is a traditional war crime, does not, by legislative fiat, make it so.

Section 950v of the MCA names and defines 28 specific crimes that are triable by military commission. Besides conspiracy, they include murder of protected persons, murder in violation of the bill of war, hostage-taking, torture, cruel or inhuman treatment, mutilation or maiming, rape, sexual abuse or assault, hijacking, terrorism, providing material support for terrorism, and spying.

Notably, the crime of "murder by an unprivileged belligerent" is not listed, although a number of Guantanamo detainees were charged with that offense during earlier military commission proceedings, and the offense was included in the draft military commissions bill that the Administration circulated in July. Murder by an unprivileged belligerent--in other words, murder committed by someone who does not have the right under international humanitarian law to participate in hostilities--has never been a criminal offense under international law, so Congress was wise not to include it as an offense in the new bill.

The Rest

Unfortunately, the military commissions bill doesn't end there. In my next column, I'll describe provisions that attempt to render the Geneva Conventions unenforceable in court, immunize CIA personnel for past abuses, and bar detainees from asserting their right to habeas corpus. Among other things ...

Joanne Mariner is a human rights attorney. Her previous columns on the detainee cases and the "war on terror" are available in FindLaw's archive.

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The Military Commissions Act of 2006: A Short Primer

Part Two of a Two-Part Series

By JOANNE MARINER

Wednesday, Oct. 25, 2006

In the final run-up to the midterm elections, the Republicans are looking to national security to save them from a rout. Exploiting Americans' fears of terrorism, they accuse Democratic candidates of hindering counterterrorism efforts and exposing the public to the threat of further attacks.

Under the heading "America Weakly," the website of the Republican National Committee trumpets the fact that "162 House Democrats voted against authorizing military tribunals for dangerous terrorist suspects, including alleged 9/11 mastermind Khalid Sheikh Mohammad."

The legislation at issue is the Military Commissions Act of 2006 (MCA), a law that even some Republicans have criticized as unconstitutional. Besides authorizing substandard military trials for suspected terrorists, the new law immunizes CIA personnel for past abuses, bars detainees from asserting their right to habeas corpus, and attempts to render the Geneva Conventions unenforceable in court.

In the immediate wake of September 11, when the Patriot Act passed without opposition, a traumatized American public might have been apt to mistake abusive counterterrorism policies for effective ones. But five years later, objective indicators now show that the Bush Administration's response to terrorism has been, in myriad ways, counterproductive. The recently declassified National Intelligence Estimate confirms that U.S. policies have spawned deep-seated Muslim resentment, and that terrorists are using this resentment to draw recruits.

Rather than marking a new approach, the MCA provides congressional sanction for many of the Administration's most short-sighted and dangerous counterterrorism policies. While it does not explicitly legitimate torture or arbitrary detention, it places formidable legal obstacles in the way of detainees who would challenge such abuses. Below, following on a column posted two weeks ago, I discuss some of the worst elements of the new law.

CIA Abuses

The MCA was passed in the wake of the Supreme Court's landmark decision in *Hamdan v. Rumsfeld*, a ruling that called into question the legality of the Administration's secret CIA detention program. *Hamdan* made it clear that abusive interrogation techniques used by the CIA violated international

law, and that CIA operatives could be held criminally liable for such abuses.

Reacting to *Hamdan*, the Bush Administration first pushed to redefine the scope of U.S. obligations under the Geneva Conventions, in particular Common Article 3, the provision at issue in *Hamdan*. After opposition from within the Republican Party to such an overt repudiation of universally-accepted international norms, the Administration took a different approach. While the MCA does not explicitly rewrite the Common Article 3, it opens the door to the provision's effective redefinition. It does so by specifying that the War Crimes Act, as amended, satisfies the U.S. obligation to criminalize grave breaches of Common Article 3, and that the president may issue authoritative interpretations of the remainder of the provision.

The law also nullifies the legal impact of the Conventions in domestic courts. Section 5 of the law provides that the Geneva Conventions and related treaties are unenforceable in court in civil cases involving the U.S. government or its agents. It states, specifically, that they may not be invoked "in any habeas corpus or any other civil action or proceeding . . . as a source of rights in any [U.S. or state] court." And another provision of the law bars persons deemed unlawful enemy combatants from invoking these treaties as a source of rights.

Column continues below ↓

Notably, the legislation narrows the scope of the War Crimes Act, decriminalizing certain past acts. Previously, the War Crimes Act criminalized all violations of Common Article 3 of the Geneva Conventions, as well as grave breaches of the Geneva Conventions. Anyone responsible for any Common Article 3 violation, including the cruel, humiliating or degrading treatment of detainees, could be prosecuted under the law.

The MCA revises this portion of the War Crimes Act, replacing the blanket criminalization of Common Article 3 violations with a list of "grave breaches" of Common Article 3, which are specified and defined in the legislation. And the law is amended retroactively to November 26, 1997, meaning that perpetrators of several categories of what were war crimes at the time they were committed, can no longer be punished under U.S. law.

Now, under the MCA, torture and cruel and inhuman treatment qualify as "grave breaches," but degrading or humiliating treatment does not. The MCA also eliminates as a war crime the passing of sentences by a court that does not meet international fair trial standards.

A twist in the new legislation is that it includes two separate definitions of cruel and inhuman treatment, one that applies to abuses that occurred prior to the MCA's passage, and another that applies to future conduct. If committed after the passage of the MCA, cruel and inhuman treatment only requires a finding of serious and non-fleeting mental pain or suffering. But for abuses committed prior to the law's passage, the perpetrator can only be penalized if the pain or suffering is "prolonged."

This provision may immunize from prosecution CIA interrogators who have previously employed abusive interrogation techniques such as waterboarding and extended sleep deprivation -- techniques that cause time-limited but severe mental anguish.

Habeas-Stripping

The most-criticized provision of the legislation bars aliens held as enemy combatants from filing suit via the writ of habeas corpus to challenge the legality of their detention or to raise claims of torture and other mistreatment.

This provision covers all non-citizens, including longtime legal residents of the United States, and it applies even if they are held inside the United States. Moreover, the prohibition applies even after detainees have been released. As a result, detainees who have been tortured or otherwise mistreated are forever barred from going to a U.S. court to seek redress and to air what has

happened to them.

The habeas-stripping provision raises a host of legal questions. The first is whether enemy combatants enjoy a constitutional right to habeas corpus (not just a statutory right to it), a question left unanswered by the Supreme Court's 2004 opinion in *Rasul v. Bush*. Note that the constitutional claim will probably be deemed stronger for Qatari student Ali Saleh al-Marri, held as an enemy combatant in the territorial United States, than for the Guantanamo detainees. It is likely to be deemed weakest of all for detainees held in Afghanistan and elsewhere abroad.

A second question with regard to Guantanamo detainees is whether the narrow federal court review of administrative proceeding held on Guantanamo allowed under a 2005 law should be considered an "adequate substitute" for habeas. And courts may also end up assessing whether the right to habeas can legitimately be suspended when a person has been deemed an enemy combatant.

Repeal

A post-election Congress should take a hard second look at the new law. While the courts are likely to strike down some of the MCA's worst provisions, a responsible Congress would repeal the law first. The goal of a fair, tough, and effective approach to counterterrorism requires it.

Joanne Mariner is a human rights attorney. Her previous columns on Guantanamo, the detainee cases, and U.S. counterterrorism policy are available in FindLaw's archive.

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The Military Commissions Act of 2006: Examining the Relationship between the International Law of Armed Conflict and US Law

By John Cerone

In *Hamdan v. Rumsfeld*,[1] the US Supreme Court held that the military commission prosecuting Salim Ahmed Hamdan, an alleged Al-Qaeda affiliate captured during the US invasion of Afghanistan, lacked power to proceed.[2] The Court based its decision in part on its finding that the establishment of the commission and rules governing commission proceedings violated relevant provisions of US law. In so doing, the Court found the international law of armed conflict – including the standards of Common Article 3 of the 1949 Geneva Conventions – to be judicially cognizable in US courts, at least insofar as the Court construed it to be incorporated by reference in an Act of Congress.

In the wake of this decision, the Office of the US Secretary of Defense issued a memorandum noting that "[t]he Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with Al Qaeda," and requesting Defense Department leadership to take steps to ensure compliance by all personnel. Shortly thereafter, the Bush Administration stated its intention to go to the US Congress to seek authorization to reconstitute the impugned commissions in light of the Court's decision.[3]

Its efforts resulted in the enactment of the Military Commissions Act of 2006 (MCA),[4] which was signed into law by President Bush on October 17, 2006. This Insight focuses on the international legal dimensions of that Act.

Summary of Provisions

The MCA encompasses a wide range of measures, including provisions:

-authorizing the President to establish military commissions for the prosecution of certain offenses committed by alien unlawful combatants;

-prescribing the procedure and substantive law to be applied by the commissions;

-amending the US War Crimes Act to specify criminal violations of Common Article 3;

-retroactively eliminating the right of habeas corpus for alien enemy combatants[5] detained by the US;

-extending the prohibition under US law on cruel, inhuman, or degrading treatment or punishment to encompass all those in the custody or under the physical control of the United States,[6] regardless of nationality or physical location;

-limiting the ability of individuals to invoke the Geneva Conventions as a source of rights in certain proceedings; and

-purporting to authoritatively interpret the Geneva Conventions and to delegate further interpretive authority to the US Executive.

Many of these measures address directly or indirectly the status of the international law of armed conflict within the US legal system.[7]

The "Law of War" as US Law

The MCA makes several references to the "law of war," a phrase which is not defined in the Act. The meaning of the term within the US legal system, and within the context of the MCA in particular, is unclear. First, it may refer to the international law of armed conflict, also known as international humanitarian law or the *jus in bello*. Second, it could refer to this same body of international law as it is understood within the US legal system (i.e. as interpreted by those empowered under US law to do so**[8]**). Or, third, it could refer to the second category as supplemented or modified by other related US law, including common law, legislation, and other legal instruments. This third category would include the MCA itself.

At a minimum, the "law of war" was understood by the *Hamdan* Court to include the 1949 Geneva Conventions. The Supreme Court read the Geneva Conventions into the reference to the "law of war" in Article 21 of the Uniform Code of Military Justice (UCMJ). The UCMJ is a federal statute. The Supreme Court did not, however, find that the Geneva Conventions were self-executing or otherwise part of US law beyond the confines of that Article.

The MCA does not directly address the status of the Conventions as US law. It does, however, preclude any "alien unlawful enemy combatant" from "invok[ing] the Geneva Conventions as a source of rights" in prosecutions before the military commissions envisioned by the MCA.**[9]** It also says that no person may invoke the Conventions in any habeas corpus proceeding or other civil action as a source of rights against the US government or those acting on its behalf.**[10]**

The Act also appears to limit the power of US courts to interpret the Geneva Conventions. The MCA confers upon the President "the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations...."**[11]** These interpretations are to be issued in the form of Executive Orders and shall be authoritative as a matter of US law, in the same manner as other administrative regulations. To the extent this authority is used by the President, it might restrict the scope of interpretation otherwise afforded to the judicial branch.**[12]** This part of the Act, however, expressly recognizes the constitutional functions of the judicial branch.**[13]** Article III of the Constitution vests the judicial power of the United States in the Supreme Court and lower federal courts, and says that the judicial power extends to treaties of the United States.

The MCA also appears to stipulate certain interpretations.**[14]** For example, the Act states that "[a] military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions."**[15]** This attempts to preclude the possibility of a US court finding that the newly authorized commissions were not such "regularly constituted" courts, as the Supreme Court did with respect to the earlier commissions in *Hamdan*. The Supreme Court might hold that it is still able to make such findings under its constitutional power.

Another stipulated interpretation appears in the Section of the MCA that amends the US War Crimes Act by criminalizing certain serious violations of Common Article 3. The Act provides that this criminalization "fully satisf[ies] the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character."**[16]** It then further limits the ability of US courts to interpret the crimes by stating that "[n]o foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated..."**[17]**

Notably, however, the MCA does not state that the Geneva Conventions do not form part of US law. In addition, the US Supreme Court's *Charming Betsy* canon will apply to interpretation of the MCA.**[18]** According to this canon, an Act of Congress ought never to be interpreted to conflict with the international obligations of the United States so long as another reasonable construction is possible. Thus, the MCA would presumably be interpreted in such a way as to be consistent with the Geneva Conventions except where it clearly and irreconcilably departs.

The Content of the Law of Armed Conflict as Reflected in the MCA

The MCA authorizes the President to create military commissions to prosecute alien unlawful enemy combatants and elaborates a code of crimes within the commissions' subject matter

jurisdiction. In defining unlawful enemy combatants as well as the various enumerated crimes, the Act draws heavily on the language of the Geneva Conventions. At the same time, it does so selectively, at times omitting certain provisions or omitting phrases within otherwise incorporated provisions. For example, the definition of a lawful combatant is drawn from the definition of prisoners of war in Article 4 of the Third Geneva Convention. However, it narrows that definition, conversely expanding the definition of an unlawful combatant, by excluding certain categories of individuals.[19]

The code of offenses also illustrates a broader tension within the US understanding of the law of armed conflict. Many of the enumerated crimes are composites of rules drawn from the law of international armed conflict and the law of non-international armed conflict. While these two bodies of law have converged to a degree, significant differences remain.[20] Thus, any attempt to blend these bodies of law must be undertaken with great care, particularly when prescribing criminal liability for their violation.

In some cases, the code criminalizes[21] conduct traditionally understood as violating the law of international armed conflict. However, because the US views the conflict with Al-Qaeda as a non-international armed conflict, many of the enumerated crimes would not qualify as war crimes as traditionally understood given the narrower scope of rules applicable in such conflicts under common Article 3 of the Geneva Conventions.

The definitions of some of the crimes include an express reference to "the law of war." For example, the MCA criminalizes the "intentional killing of one or more persons, including lawful combatants, in violation of the law of war." As the killing of lawful combatants who are placed *hors de combat* is addressed elsewhere in the MCA, it would seem that this provision is meant to include the killing of lawful combatants who are still taking part in the hostilities. Such killing is not of itself a violation of the law of non-international armed conflict. Certainly, international law provides no privilege to kill in a non-international armed conflict; however, this simply means that the person could be held criminally responsible under ordinary domestic law, not the law of armed conflict.[22]

Thus, the phrase "in violation of the law of war" in this context seems to impose as an additional element the violation of a rule of that body of law relating to the methods and means of battlefield killings. For example, it is possible that this provision could be construed to criminalize violations of the Hague Regulations, including, for example, the employment of prohibited weapons, to the extent this body of law has evolved through custom to apply in non-international armed conflicts. [23]

While the US is free to legislate new crimes under US law,[24] it could not prosecute new crimes on the basis of acts committed prior to the MCA's entry into force. Conscious of this issue, the MCA asserts that the crimes contained therein are "declarative of existing law" – an across-the-board assertion likely to be met with doubt by many international law authorities.[25]

A similar discord is found in the section of the MCA amending the US War Crimes Act. The impetus to amend the War Crimes Act was presumably provided by the Supreme Court's finding that Common Article 3 (which was incorporated by reference in the Act) regulated the treatment of Hamdan. As has been noted above, the Defense Department has applied the Court's ruling to the conflict with Al-Qaeda in general. The War Crimes Act previously prohibited violations of Common Article 3 in very general terms. The MCA amends the War Crimes Act to prohibit violations of Common Article 3 only if they amount to "grave breaches," and then specifically defines the crimes that constitute "grave breaches" of Common Article 3.

As noted above, the MCA stipulates that its criminalization of these violations of Common Article 3 "fully satisf[ies] the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3..." The relevant part of Article 129 of that Convention reads:

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.[26]

However, the "following Article," Article 130 of the Third Geneva Convention, makes no reference

to Common Article 3. Indeed, the International Criminal Tribunal for the former Yugoslavia and the Statute of the International Criminal Court recognize the existence of "grave breaches" only in the context of international armed conflicts. Thus, one could not sensibly speak of "grave breaches" of Common Article 3, in the sense of Article 129.

Finally, in enumerating the various "grave breaches" of Common Article 3, the MCA omits two prohibitions contained within Common Article 3 — the prohibition of "[o]utrages upon personal dignity, in particular, humiliating and degrading treatment" and of "[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."**[27]**

According to a number of US officials, the prohibition of "outrages upon personal dignity" was too vague to serve as a basis for prosecution. Nonetheless, outrages upon personal dignity have been prosecuted as such by the International Criminal Tribunals for the former Yugoslavia and Rwanda, and are included in the subject matter jurisdiction of the International Criminal Court. **[28]** In its place, the War Crimes Act now expressly criminalizes rape and sexual assault or abuse.

The omission of any reference to "judicial guarantees which are recognized as indispensable by civilized peoples" is significant as well. Four Justices of the US Supreme Court in the *Hamdan* case found that the military commission the President had established to prosecute Hamdan failed to meet that standard. Nothing in the Act has taken its place.

The MCA does state, however, that "The definitions in this subsection are intended only to define the grave breaches of common Article 3 and not the full scope of United States obligations under that Article." This tacitly acknowledges that the US is still obliged to comply with all of the prohibitions contained in Common Article 3, even though it does not regard itself as obliged to hold criminally accountable individuals who violate these prohibitions.

Implications

Under US law, the US legislature is free to deviate from the understanding of the law of armed conflict held by others. However, if it does so, it risks placing the US in default of its international obligations. Also, to the extent it purports to create criminal liability for conduct that was not prohibited under international law or US law at the time it occurred, it risks running afoul of the principle against ex post facto criminalization, as recognized in international law**[29]** well as US constitutional law.**[30]** Finally, the extent to which the Act purports to limit the power of US courts to interpret the international law of armed conflict, including by stipulating certain interpretations, may raise separation-of-powers concerns. All of these issues are likely to arise in the ongoing litigation over the detainees at Guantanamo Bay.

About the author

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Footnotes

[1] 126 S.Ct. 2749 (2006).
[2] See the July 2006 Insight "Status of Detainees in Non-International Armed Conflict, and their Protection in the Course of Criminal Proceedings: The Case of *Hamdan v. Rumsfeld*."
[3] International law, when recognized as part of the law applicable in US courts, has the status of, at most, ordinary federal law. This is particularly true with respect to the *Hamdan* Court's reading of Common Article 3, as this provision was deemed applicable as incorporated into a federal statute. Thus, it can be overridden by an Act of Congress.
[4] Public Law 109-366, 120 Stat. 2600 (Oct. 17, 2006).
[5] This provision applies to all alien enemy combatants, lawful or unlawful.
[6] This would include individuals in the custody or otherwise under the control of the CIA.
[7] Many of the law's provisions also potentially raise issues under human rights law, including the International Covenant on Civil and Political Rights, to which the US is a party. With respect

to the treatment of individuals outside US territory, this raises the issue of whether the ICCPR applies extraterritorially. See the October 2005 Insight, "The Application of Regional Human Rights Law Beyond Regional Frontiers: The Inter-American Commission on Human Rights and US Activities in Iraq," and the February 2006 Insight, "Alleged Secret Detentions of Terrorism Suspects."

[8] The MCA itself delegates substantial interpretive authority to the US Executive as explained *infra*.

[9] MCA Section 3(a).

[10] MCA Section 5(a).

[11] MCA Section 6(a)(3)(A).

[12] While it is not unusual to confer interpretive authority on the Executive, the context here is quite different from the granting of authority to interpret US legislation. The Executive is here given the power under US law to authoritatively interpret legal instruments (i.e. the Geneva Conventions) that the US is without power to change unilaterally under international law.

[13] MCA Section 6(a)(3)(D).

[14] These stipulations may raise separation-of-powers concerns.

[15] MCA Section 3(a)(1).

[16] MCA Section 6(a)(2).

[17] The inclusion of this provision illustrates a tension in the White House attitude toward the jurisprudence of international courts. The September 2006 White House Fact Sheet explaining the President's proposed legislation sought to demonstrate the acceptability of the commission's proposed evidentiary rules by noting that similar rules have been adopted by international tribunals.

[18] See The Charming Betsy, 6 US (2 Cranch) 64, 117-118 (1804).

[19] It excludes, for example, individuals participating in a *levée en masse* (a spontaneous resort to arms in resistance to invading forces), codified in article 4(6) of the Third Convention. Similarly, it omits the phrase "or an authority" in its incorporation of article 4(3), which gives prisoner-of-war status to captured "Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power."

[20] *Hamdan* Insight, *supra* note 1.

[21] The term "criminalizes" is here used to denote codification as a crime for prosecution by the envisioned military commissions.

[22] In certain circumstances, particularly when a conflict is internal within a single State, a killer could be held criminally responsible under ordinary domestic law. The MCA is likely to lead to difficulties of interpretation and application because it fails to account for the implications of removing Common Article 3 from the context of an internal armed conflict and applying it to a transnational armed conflict with a non-state group.

[23] It should be noted, however, that the Act elsewhere specifically criminalizes "using treachery or perfidy," "denying quarter," and "employing poison or similar weapons." Notably, the Act does not criminalize the use of incendiary weapons.

[24] The US would likely be able to invoke the protective principle (allowing a State to prohibit and prosecute conduct outside its territory that is directed against its security or other vital interests) or passive personality principle (allowing, in limited circumstances, a State to prohibit and prosecute conduct harmful to its citizens even outside its own territory).

[25] In the section of the MCA asserting that it does not establish new crimes, but rather codifies already-existing crimes traditionally triable by military commissions, it indicates that some of the crimes "incorporate definitions in other provisions of law." 47A US Code § 950p (added by MCA Section 3). While this phrase is unclear, it seems to imply that those crimes that may not be violations of the law of war are drawn from analogous offenses under ordinary criminal law. This raises the question of how far analogy can be extended under the principle that no one shall be held guilty of an offense that did not constitute a crime, under national or international law, at the time when it was committed. It may also raise questions regarding the extraterritorial reach of domestic criminal law as they relate to this issue.

[26] Parallel language is found in each of the four Geneva Conventions. While a subsequent paragraph of Article 129 requires states parties to suppress "other breaches" of the Convention (i.e. other than "grave breaches"), that paragraph makes no mention of "effective penal sanctions."

[27] The stipulation that the MCA's criminalization of the specified violations satisfies the obligation to provide effective penal sanctions is presumably designed to prevent courts from importing these prohibitions into the War Crimes Act through a strained reading of Article 129 of the Third Geneva Convention.

[28] Article 8(2)(c) of the ICC Statute criminalizes "serious violations of article 3 common to the four Geneva Conventions of 12 August 1949" and includes almost verbatim the list of acts prohibited under Common Article 3.

[29] International Covenant on Civil and Political Rights, art. 15.

[30] US Constitution, art. 1, sections 9 & 10.

Domenici	Lautenberg	Santorum
Ensign	Lieberman	Sessions
Enzi	Lott	Shelby
Frist	Lugar	Smith
Graham	Martinez	Specter
Grassley	McCain	Stabenow
Gregg	McConnell	Stevens
Hagel	Menendez	Sununu
Hatch	Murkowski	Talent
Hutchison	Nelson (FL)	Thomas
Inhofe	Nelson (NE)	Thune
Isakson	Pryor	Vitter
Johnson	Roberts	Voinovich
Kyl	Rockefeller	Warner
Landrieu	Salazar	

NAYS—34

Akaka	Dodd	Levin
Bancus	Dorgan	Lincoln
Bayh	Durbin	Mikulski
Biden	Feingold	Murray
Bingaman	Feinstein	Obama
Boxer	Harkin	Reed
Byrd	Inouye	Reid
Cantwell	Jeffords	Sarbanes
Chafee	Kennedy	Schumer
Clinton	Kerry	Wyden
Conrad	Kohl	
Dayton	Leahy	

NOT VOTING—1

Snowe

The bill (S. 3930), as amended, was passed, as follows:

S. 3930

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Military Commissions Act of 2006".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

SEC. 2. CONSTRUCTION OF PRESIDENTIAL AUTHORITY TO ESTABLISH MILITARY COMMISSIONS.

The authority to establish military commissions under chapter 47A of title 10, United States Code, as added by section 3(a), may not be construed to alter or limit the authority of the President under the Constitution of the United States and laws of the United States to establish military commissions for areas declared to be under martial law or in occupied territories should circumstances so require.

SEC. 3. MILITARY COMMISSIONS.

(a) MILITARY COMMISSIONS.—

(1) IN GENERAL.—Subtitle A of title 10, United States Code, is amended by inserting after chapter 47 the following new chapter:

"CHAPTER 47A—MILITARY COMMISSIONS

"SUBCHAPTER I—GENERAL PROVISIONS

"§ 948a. Definitions

"In this chapter:

"(1) UNLAWFUL ENEMY COMBATANT.—(A) The term 'unlawful enemy combatant' means—

"(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

"(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

"(B) CO-BELLIGERENT.—In this paragraph, the term 'co-belligerent', with respect to the United States, means any State or armed force joining and directly engaged with the United States in hostilities or directly supporting hostilities against a common enemy.

"(2) LAWFUL ENEMY COMBATANT.—The term 'lawful enemy combatant' means a person who is—

"(A) a member of the regular forces of a State party engaged in hostilities against the United States;

"(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or

"(C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

"(3) ALIEN.—The term 'alien' means a person who is not a citizen of the United States.

"(4) CLASSIFIED INFORMATION.—The term 'classified information' means the following:

"(A) Any information or material that has been determined by the United States Government pursuant to statute, Executive order, or regulation to require protection against unauthorized disclosure for reasons of national security.

"(B) Any restricted data, as that term is defined in section 11 y. of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).

"(5) GENEVA CONVENTIONS.—The term 'Geneva Conventions' means the international conventions signed at Geneva on August 12, 1949.

"§ 948b. Military commissions generally

"(a) PURPOSE.—This chapter establishes procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission.

"(b) AUTHORITY FOR MILITARY COMMISSIONS UNDER THIS CHAPTER.—The President is authorized to establish military commissions under this chapter for offenses triable by

YEAS—65

Alexander	Burns	Collins
Allard	Burr	Cornyn
Allen	Carper	Craig
Bennett	Chambliss	Crapo
Bond	Coburn	DeMint
Brownback	Cochran	DeWine
Bunning	Coleman	Dole

military commission as provided in this chapter.

"(c) CONSTRUCTION OF PROVISIONS.—The procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under chapter 47 of this title (the Uniform Code of Military Justice). Chapter 47 of this title does not, by its terms, apply to trial by military commission except as specifically provided in this chapter. The judicial construction and application of that chapter are not binding on military commissions established under this chapter.

"(d) INAPPLICABILITY OF CERTAIN PROVISIONS.—(1) The following provisions of this title shall not apply to trial by military commission under this chapter:

"(A) Section 810 (article 10 of the Uniform Code of Military Justice), relating to speedy trial, including any rule of courts-martial relating to speedy trial.

"(B) Sections 831(a), (b), and (d) (articles 31(a), (b), and (d) of the Uniform Code of Military Justice), relating to compulsory self-incrimination.

"(C) Section 832 (article 32 of the Uniform Code of Military Justice), relating to pretrial investigation.

"(2) Other provisions of chapter 47 of this title shall apply to trial by military commission under this chapter only to the extent provided by this chapter.

"(e) TREATMENT OF RULINGS AND PRECEDENTS.—The findings, holdings, interpretations, and other precedents of military commissions under this chapter may not be introduced or considered in any hearing, trial, or other proceeding of a court-martial convened under chapter 47 of this title. The findings, holdings, interpretations, and other precedents of military commissions under this chapter may not form the basis of any holding, decision, or other determination of a court-martial convened under that chapter.

"(f) STATUS OF COMMISSIONS UNDER COMMON ARTICLE 3.—A military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions.

"(g) GENEVA CONVENTIONS NOT ESTABLISHING SOURCE OF RIGHTS.—No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.

"§ 948c. Persons subject to military commissions

"Any alien unlawful enemy combatant is subject to trial by military commission under this chapter.

"§ 948d. Jurisdiction of military commissions

"(a) JURISDICTION.—A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.

"(b) LAWFUL ENEMY COMBATANTS.—Military commissions under this chapter shall not have jurisdiction over lawful enemy combatants. Lawful enemy combatants who violate the law of war are subject to chapter 47 of this title. Courts-martial established under that chapter shall have jurisdiction to try a lawful enemy combatant for any offense made punishable under this chapter.

"(c) DETERMINATION OF UNLAWFUL ENEMY COMBATANT STATUS DISPOSITIVE.—A finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006, by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter.

"(d) PUNISHMENTS.—A military commission under this chapter may, under such limitations as the Secretary of Defense may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when authorized under this chapter or the law of war.

"§ 948e. Annual report to congressional committees

"(a) ANNUAL REPORT REQUIRED.—Not later than December 31 each year, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report on any trials conducted by military commissions under this chapter during such year.

"(b) FORM.—Each report under this section shall be submitted in unclassified form, but may include a classified annex.

"SUBCHAPTER II—COMPOSITION OF MILITARY COMMISSIONS

"Sec.

"948h. Who may convene military commissions.

"948i. Who may serve on military commissions.

"948j. Military judge of a military commission.

"948k. Detail of trial counsel and defense counsel.

"948l. Detail or employment of reporters and interpreters.

"948m. Number of members; excuse of members; absent and additional members.

"§ 948h. Who may convene military commissions

"Military commissions under this chapter may be convened by the Secretary of Defense or by any officer or official of the United States designated by the Secretary for that purpose.

"§ 948i. Who may serve on military commissions

"(a) IN GENERAL.—Any commissioned officer of the armed forces on active duty is eligible to serve on a military commission under this chapter.

"(b) DETAIL OF MEMBERS.—When convening a military commission under this chapter, the convening authority shall detail as members of the commission such members of the armed forces eligible under subsection (a), as in the opinion of the convening authority, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a military commission when such member is the accuser or a witness for the prosecution or has acted as an investigator or counsel in the same case.

"(c) EXCUSE OF MEMBERS.—Before a military commission under this chapter is assembled for the trial of a case, the convening authority may excuse a member from participating in the case.

"§ 948j. Military judge of a military commission

"(a) DETAIL OF MILITARY JUDGE.—A military judge shall be detailed to each military commission under this chapter. The Secretary of Defense shall prescribe regulations providing for the manner in which military judges are so detailed to military commissions. The military judge shall preside over each military commission to which he has been detailed.

"(b) QUALIFICATIONS.—A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court, or a member of the bar of the highest court of a State, and who is certified to be qualified for duty under section 826 of this title (article 26 of the Uniform Code of Military Justice) as a military judge in general courts-martial by the Judge Advocate General of the armed force of which such military judge is a member.

"(c) INELIGIBILITY OF CERTAIN INDIVIDUALS.—No person is eligible to act as military judge in a case of a military commission under this chapter if he is the accuser or a witness or has acted as investigator or a counsel in the same case.

"(d) CONSULTATION WITH MEMBERS; INELIGIBILITY TO VOTE.—A military judge detailed to a military commission under this chapter may not consult with the members of the commission except in the presence of the accused (except as otherwise provided in section 949d of this title), trial counsel, and defense counsel, nor may he vote with the members of the commission.

"(e) OTHER DUTIES.—A commissioned officer who is certified to be qualified for duty as a military judge of a military commission under this chapter may perform such other duties as are assigned to him by or with the approval of the Judge Advocate General of the armed force of which such officer is a member or the designee of such Judge Advocate General.

"(f) PROHIBITION ON EVALUATION OF FITNESS BY CONVENING AUTHORITY.—The convening authority of a military commission under this chapter shall not prepare or review any report concerning the effectiveness, fitness, or efficiency of a military judge detailed to the military commission which relates to his performance of duty as a military judge on the military commission.

"§ 948k. Detail of trial counsel and defense counsel

"(a) DETAIL OF COUNSEL GENERALLY.—(1) Trial counsel and military defense counsel shall be detailed for each military commission under this chapter.

"(2) Assistant trial counsel and assistant and associate defense counsel may be detailed for a military commission under this chapter.

"(3) Military defense counsel for a military commission under this chapter shall be detailed as soon as practicable after the swearing of charges against the accused.

"(4) The Secretary of Defense shall prescribe regulations providing for the manner in which trial counsel and military defense counsel are detailed for military commissions under this chapter and for the persons who are authorized to detail such counsel for such commissions.

"(b) TRIAL COUNSEL.—Subject to subsection (e), trial counsel detailed for a military commission under this chapter must be—

"(1) a judge advocate (as that term is defined in section 801 of this title (article 1 of the Uniform Code of Military Justice) who—

"(A) is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; and

"(B) is certified as competent to perform duties as trial counsel before general courts-martial by the Judge Advocate General of the armed force of which he is a member; or

"(2) a civilian who—

"(A) is a member of the bar of a Federal court or of the highest court of a State; and

"(B) is otherwise qualified to practice before the military commission pursuant to regulations prescribed by the Secretary of Defense.

"(c) MILITARY DEFENSE COUNSEL.—Subject to subsection (e), military defense counsel detailed for a military commission under

this chapter must be a judge advocate (as so defined) who is—

"(1) a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; and

"(2) certified as competent to perform duties as defense counsel before general courts-martial by the Judge Advocate General of the armed force of which he is a member.

"(d) CHIEF PROSECUTOR; CHIEF DEFENSE COUNSEL.—(1) The Chief Prosecutor in a military commission under this chapter shall meet the requirements set forth in subsection (b)(1).

"(2) The Chief Defense Counsel in a military commission under this chapter shall meet the requirements set forth in subsection (c)(1).

"(e) INELIGIBILITY OF CERTAIN INDIVIDUALS.—No person who has acted as an investigator, military judge, or member of a military commission under this chapter in any case may act later as trial counsel or military defense counsel in the same case. No person who has acted for the prosecution before a military commission under this chapter may act later in the same case for the defense, nor may any person who has acted for the defense before a military commission under this chapter act later in the same case for the prosecution.

"§ 948l. Detail or employment of reporters and interpreters

"(a) COURT REPORTERS.—Under such regulations as the Secretary of Defense may prescribe, the convening authority of a military commission under this chapter shall detail to or employ for the commission qualified court reporters, who shall make a verbatim recording of the proceedings of and testimony taken before the commission.

"(b) INTERPRETERS.—Under such regulations as the Secretary of Defense may prescribe, the convening authority of a military commission under this chapter may detail to or employ for the military commission interpreters who shall interpret for the commission and, as necessary, for trial counsel and defense counsel and for the accused.

"(c) TRANSCRIPT; RECORD.—The transcript of a military commission under this chapter shall be under the control of the convening authority of the commission, who shall also be responsible for preparing the record of the proceedings.

"§ 948m. Number of members; excuse of members; absent and additional members

"(a) NUMBER OF MEMBERS.—(1) A military commission under this chapter shall, except as provided in paragraph (2), have at least five members.

"(2) In a case in which the accused before a military commission under this chapter may be sentenced to a penalty of death, the military commission shall have the number of members prescribed by section 949m(c) of this title.

"(b) EXCUSE OF MEMBERS.—No member of a military commission under this chapter may be absent or excused after the military commission has been assembled for the trial of a case unless excused—

"(1) as a result of challenge;

"(2) by the military judge for physical disability or other good cause; or

"(3) by order of the convening authority for good cause.

"(c) ABSENT AND ADDITIONAL MEMBERS.—Whenever a military commission under this chapter is reduced below the number of members required by subsection (a), the trial may not proceed unless the convening authority details new members sufficient to provide not less than such number. The trial may proceed with the new members present after the recorded evidence previously introduced before the members has been read to the military commission in the presence of the military judge, the accused (except as provided in section 949d of this title), and counsel for both sides.

"SUBCHAPTER III—PRE-TRIAL PROCEDURE

"§ 948q. Charges and specifications

"(a) CHARGES AND SPECIFICATIONS.—Charges and specifications against an accused in a military commission under this chapter shall be signed by a person subject to chapter 47 of this title under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state—

"(1) that the signer has personal knowledge of, or reason to believe, the matters set forth therein; and

"(2) that they are true in fact to the best of the signer's knowledge and belief.

"(b) NOTICE TO ACCUSED.—Upon the swearing of the charges and specifications in accordance with subsection (a), the accused shall be informed of the charges against him as soon as practicable.

"§ 948r. Compulsory self-incrimination prohibited; treatment of statements obtained by torture and other statements

"(a) IN GENERAL.—No person shall be required to testify against himself at a proceeding of a military commission under this chapter.

"(b) EXCLUSION OF STATEMENTS OBTAINED BY TORTURE.—A statement obtained by use of torture shall not be admissible in a military commission under this chapter, except against a person accused of torture as evidence that the statement was made.

"(c) STATEMENTS OBTAINED BEFORE ENACTMENT OF DETAINEE TREATMENT ACT OF 2005.—A statement obtained before December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that—

"(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

"(2) the interests of justice would best be served by admission of the statement into evidence.

"(d) STATEMENTS OBTAINED AFTER ENACTMENT OF DETAINEE TREATMENT ACT OF 2005.—A statement obtained on or after December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that—

"(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value;

"(2) the interests of justice would best be served by admission of the statement into evidence; and

"(3) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005.

"§ 948s. Service of charges

"The trial counsel assigned to a case before a military commission under this chapter shall cause to be served upon the accused and military defense counsel a copy of the charges upon which trial is to be had. Such charges shall be served in English and, if appropriate, in another language that the accused understands. Such service shall be made sufficiently in advance of trial to prepare a defense.

"SUBCHAPTER IV—TRIAL PROCEDURE

"§ 949a. Rules

"(a) PROCEDURES AND RULES OF EVIDENCE.—Pretrial, trial, and post-trial procedures, including elements and modes of proof, for cases triable by military commission under this chapter may be prescribed by the Secretary of Defense, in consultation with the Attorney General. Such procedures shall, so far as the Secretary considers practicable or consistent with military or intelligence activities, apply the principles of law and the rules of evidence in trial by general courts-martial. Such procedures and rules of evidence may not be contrary to or inconsistent with this chapter.

"(b) RULES FOR MILITARY COMMISSION.—(1) Notwithstanding any departures from the law and the rules of evidence in trial by general courts-martial authorized by subsection (a), the procedures and rules of evidence in trials by military commission under this chapter shall include the following:

"(A) The accused shall be permitted to present evidence in his defense, to cross-examine the witnesses who testify against him, and to examine and respond to evidence admitted against him on the issue of guilt or innocence and for sentencing, as provided for by this chapter.

"(B) The accused shall be present at all sessions of the military commission (other than those for deliberations or voting), except when excluded under section 949d of this title.

"(C) The accused shall receive the assistance of counsel as provided for by section 948k.

"(D) The accused shall be permitted to represent himself, as provided for by paragraph (3).

"(2) In establishing procedures and rules of evidence for military commission proceedings, the Secretary of Defense may prescribe the following provisions:

"(A) Evidence shall be admissible if the military judge determines that the evidence would have probative value to a reasonable person.

"(B) Evidence shall not be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant or other authorization.

"(C) A statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r of this title.

"(D) Evidence shall be admitted as authentic so long as—

"(i) the military judge of the military commission determines that there is sufficient basis to find that the evidence is what it is claimed to be; and

"(II) the military judge instructs the members that they may consider any issue as to authentication or identification of evidence in determining the weight, if any, to be given to the evidence.

"(E)(i) Except as provided in clause (ii), hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission if the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the intention of the proponent to offer the evidence, and the particulars of the evidence (including information on the general circumstances under which the evidence was obtained). The disclosure of evidence under the preceding sentence is subject to the requirements and limitations applicable to the disclosure of classified information in section 949j(c) of this title.

"(ii) Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial shall not be admitted in a trial by military commission if the party opposing the admission of the evidence demonstrates that the evidence is unreliable or lacking in probative value.

"(F) The military judge shall exclude any evidence the probative value of which is substantially outweighed—

"(i) by the danger of unfair prejudice, confusion of the issues, or misleading the commission; or

"(ii) by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

"(3)(A) The accused in a military commission under this chapter who exercises the right to self-representation under paragraph (1)(D) shall conform his deportment and the conduct of the defense to the rules of evidence, procedure, and decorum applicable to trials by military commission.

"(B) Failure of the accused to conform to the rules described in subparagraph (A) may result in a partial or total revocation by the military judge of the right of self-representation under paragraph (1)(D). In such case, the detailed defense counsel of the accused or an appropriately authorized civilian counsel shall perform the functions necessary for the defense.

"(c) DELEGATION OF AUTHORITY TO PRESCRIBE REGULATIONS.—The Secretary of Defense may delegate the authority of the Secretary to prescribe regulations under this chapter.

"(d) NOTIFICATION TO CONGRESSIONAL COMMITTEES OF CHANGES TO PROCEDURES.—Not later than 60 days before the date on which any proposed modification of the procedures in effect for military commissions under this chapter goes into effect, the Secretary of Defense shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a report describing the modification.

"§ 949b. Unlawfully influencing action of military commission

"(a) IN GENERAL.—(1) No authority convening a military commission under this chapter may censure, reprimand, or admonish the military commission, or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the military commission, or with respect to any other exercises of its or his functions in the conduct of the proceedings.

"(2) No person may attempt to coerce or, by any unauthorized means, influence—

"(A) the action of a military commission under this chapter, or any member thereof, in reaching the findings or sentence in any case;

"(B) the action of any convening, approving, or reviewing authority with respect to his judicial acts; or

"(C) the exercise of professional judgment by trial counsel or defense counsel.

"(3) Paragraphs (1) and (2) do not apply with respect to—

"(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions; or

"(B) statements and instructions given in open proceedings by a military judge or counsel.

"(b) PROHIBITION ON CONSIDERATION OF ACTIONS ON COMMISSION IN EVALUATION OF FITNESS.—In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a commissioned officer of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of any such officer or whether any such officer should be retained on active duty, no person may—

"(1) consider or evaluate the performance of duty of any member of a military commission under this chapter; or

"(2) give a less favorable rating or evaluation to any commissioned officer because of the zeal with which such officer, in acting as counsel, represented any accused before a military commission under this chapter.

"§ 949c. Duties of trial counsel and defense counsel

"(a) TRIAL COUNSEL.—The trial counsel of a military commission under this chapter shall prosecute in the name of the United States.

"(b) DEFENSE COUNSEL.—(1) The accused shall be represented in his defense before a military commission under this chapter as provided in this subsection.

"(2) The accused shall be represented by military counsel detailed under section 948k of this title.

"(3) The accused may be represented by civilian counsel if retained by the accused, but only if such civilian counsel—

"(A) is a United States citizen;

"(B) is admitted to the practice of law in a State, district, or possession of the United States or before a Federal court;

"(C) has not been the subject of any sanction of disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct;

"(D) has been determined to be eligible for access to classified information that is classified at the level Secret or higher; and

"(E) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the proceedings.

"(4) Civilian defense counsel shall protect any classified information received during the course of representation of the accused in accordance with all applicable law governing the protection of classified information and may not divulge such information to any person not authorized to receive it.

"(5) If the accused is represented by civilian counsel, detailed military counsel shall act as associate counsel.

"(6) The accused is not entitled to be represented by more than one military counsel. However, the person authorized under regulations prescribed under section 948k of this title to detail counsel, in that person's sole discretion, may detail additional military counsel to represent the accused.

"(7) Defense counsel may cross-examine each witness for the prosecution who testifies before a military commission under this chapter.

"§ 949d. Sessions

"(a) SESSIONS WITHOUT PRESENCE OF MEMBERS.—(1) At any time after the service of charges which have been referred for trial by military commission under this chapter, the military judge may call the military commission into session without the presence of the members for the purpose of—

"(A) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

"(B) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members;

"(C) if permitted by regulations prescribed by the Secretary of Defense, receiving the pleas of the accused; and

"(D) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 949a of this title and which does not require the presence of the members.

"(2) Except as provided in subsections (c) and (e), any proceedings under paragraph (1) shall—

"(A) be conducted in the presence of the accused, defense counsel, and trial counsel; and

"(B) be made part of the record.

"(b) PROCEEDINGS IN PRESENCE OF ACCUSED.—Except as provided in subsections (c) and (e), all proceedings of a military commission under this chapter, including any consultation of the members with the military judge or counsel, shall—

"(1) be in the presence of the accused, defense counsel, and trial counsel; and

"(2) be made a part of the record.

"(c) DELIBERATION OR VOTE OF MEMBERS.—When the members of a military commission under this chapter deliberate or vote, only the members may be present.

"(d) CLOSURE OF PROCEEDINGS.—(1) The military judge may close to the public all or part of the proceedings of a military commission under this chapter, but only in accordance with this subsection.

"(2) The military judge may close to the public all or a portion of the proceedings under paragraph (1) only upon making a specific finding that such closure is necessary to—

"(A) protect information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities; or

"(B) ensure the physical safety of individuals.

"(3) A finding under paragraph (2) may be based upon a presentation, including a presentation ex parte or in camera, by either trial counsel or defense counsel.

"(e) EXCLUSION OF ACCUSED FROM CERTAIN PROCEEDINGS.—The military judge may exclude the accused from any portion of a proceeding upon a determination that, after being warned by the military judge, the accused persists in conduct that justifies exclusion from the courtroom—

"(1) to ensure the physical safety of individuals; or

"(2) to prevent disruption of the proceedings by the accused.

"(f) PROTECTION OF CLASSIFIED INFORMATION.—

"(1) NATIONAL SECURITY PRIVILEGE.—(A) Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security. The rule in the preceding sentence applies to all stages of the proceedings of military commissions under this chapter.

"(B) The privilege referred to in subparagraph (A) may be claimed by the head of the executive or military department or government agency concerned based on a finding by the head of that department or agency that—

"(i) the information is properly classified; and

"(ii) disclosure of the information would be detrimental to the national security.

"(C) A person who may claim the privilege referred to in subparagraph (A) may authorize a representative, witness, or trial counsel to claim the privilege and make the finding described in subparagraph (B) on behalf of such person. The authority of the representative, witness, or trial counsel to do so is presumed in the absence of evidence to the contrary.

"(2) INTRODUCTION OF CLASSIFIED INFORMATION.—

"(A) ALTERNATIVES TO DISCLOSURE.—To protect classified information from disclosure, the military judge, upon motion of trial counsel, shall authorize, to the extent practicable—

"(i) the deletion of specified items of classified information from documents to be introduced as evidence before the military commission;

"(ii) the substitution of a portion or summary of the information for such classified documents; or

"(iii) the substitution of a statement of relevant facts that the classified information would tend to prove.

"(B) PROTECTION OF SOURCES, METHODS, OR ACTIVITIES.—The military judge, upon motion of trial counsel, shall permit trial counsel to introduce otherwise admissible evidence before the military commission, while protecting from disclosure the sources, methods, or activities by which the United States acquired the evidence if the military judge finds that (i) the sources, methods, or activities by which the United States acquired the evidence are classified, and (ii) the evidence is reliable. The military judge may require trial counsel to present to the military commission and the defense, to the extent practicable and consistent with national security, an unclassified summary of the sources, methods, or activities by which the United States acquired the evidence.

"(C) ASSERTION OF NATIONAL SECURITY PRIVILEGE AT TRIAL.—During the examination of any witness, trial counsel may object to any question, line of inquiry, or motion to admit evidence that would require the disclosure of classified information. Following such an objection, the military judge shall take suitable action to safeguard such classified information. Such action may include the review of trial counsel's claim of privilege by the military judge in camera and on an ex parte basis, and the delay of proceedings to permit trial counsel to consult with the department or agency concerned as to whether the national security privilege should be asserted.

"(3) CONSIDERATION OF PRIVILEGE AND RELATED MATERIALS.—A claim of privilege under this subsection, and any materials submitted in support thereof, shall, upon request of the Government, be considered by the military judge in camera and shall not be disclosed to the accused.

"(4) ADDITIONAL REGULATIONS.—The Secretary of Defense may prescribe additional regulations, consistent with this subsection, for the use and protection of classified information during proceedings of military commissions under this chapter. A report on any regulations so prescribed, or modified, shall be submitted to the Committees on Armed Services of the Senate and the House of Representatives not later than 60 days before the date on which such regulations or modifications, as the case may be, go into effect.

"§ 949e. Continuances

"The military judge in a military commission under this chapter may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just.

"§ 949f. Challenges

"(a) CHALLENGES AUTHORIZED.—The military judge and members of a military commission under this chapter may be challenged by the accused or trial counsel for cause stated to the commission. The military judge shall determine the relevance and validity of challenges for cause. The military judge may not receive a challenge to more than one person at a time. Challenges by trial counsel shall ordinarily be presented and decided before those by the accused are offered.

"(b) PEREMPTORY CHALLENGES.—Each accused and the trial counsel are entitled to one peremptory challenge. The military judge may not be challenged except for cause.

"(c) CHALLENGES AGAINST ADDITIONAL MEMBERS.—Whenever additional members are detailed to a military commission under this chapter, and after any challenges for cause against such additional members are presented and decided, each accused and the trial counsel are entitled to one peremptory challenge against members not previously subject to peremptory challenge.

"§ 949g. Oaths

"(a) IN GENERAL.—(1) Before performing their respective duties in a military commission under this chapter, military judges, members, trial counsel, defense counsel, reporters, and interpreters shall take an oath to perform their duties faithfully.

"(2) The form of the oath required by paragraph (1), the time and place of the taking thereof, the manner of recording the same, and whether the oath shall be taken for all cases in which duties are to be performed or for a particular case, shall be as prescribed in regulations of the Secretary of Defense. Those regulations may provide that—

"(A) an oath to perform faithfully duties as a military judge, trial counsel, or defense counsel may be taken at any time by any judge advocate or other person certified to be qualified or competent for the duty; and

"(B) if such an oath is taken, such oath need not again be taken at the time the judge advocate or other person is detailed to that duty.

"(b) WITNESSES.—Each witness before a military commission under this chapter shall be examined on oath.

"§ 949h. Former jeopardy

"(a) IN GENERAL.—No person may, without his consent, be tried by a military commission under this chapter a second time for the same offense.

"(b) SCOPE OF TRIAL.—No proceeding in which the accused has been found guilty by military commission under this chapter upon any charge or specification is a trial in the sense of this section until the finding of guilty has become final after review of the case has been fully completed.

"§ 949i. Pleas of the accused

"(a) ENTRY OF PLEA OF NOT GUILTY.—If an accused in a military commission under this chapter after a plea of guilty sets up matter inconsistent with the plea, or if it appears that the accused has entered the plea of guilty through lack of understanding of its meaning and effect, or if the accused fails or refuses to plead, a plea of not guilty shall be entered in the record, and the military commission shall proceed as though the accused had pleaded not guilty.

"(b) FINDING OF GUILT AFTER GUILTY PLEA.—With respect to any charge or specification to which a plea of guilty has been made by the accused in a military commission under this chapter and accepted by the military judge, a finding of guilty of the charge or specification may be entered immediately without a vote. The finding shall constitute the finding of the commission unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

"§ 949j. Opportunity to obtain witnesses and other evidence

"(a) RIGHT OF DEFENSE COUNSEL.—Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.

"(b) PROCESS FOR COMPULSION.—Process issued in a military commission under this chapter to compel witnesses to appear and testify and to compel the production of other evidence—

"(1) shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue; and

"(2) shall run to any place where the United States shall have jurisdiction thereof.

"(c) PROTECTION OF CLASSIFIED INFORMATION.—(1) With respect to the discovery obligations of trial counsel under this section, the military judge, upon motion of trial counsel, shall authorize, to the extent practicable—

"(A) the deletion of specified items of classified information from documents to be made available to the accused;

"(B) the substitution of a portion or summary of the information for such classified documents; or

"(C) the substitution of a statement admitting relevant facts that the classified information would tend to prove.

"(2) The military judge, upon motion of trial counsel, shall authorize trial counsel, in the course of complying with discovery obligations under this section, to protect from disclosure the sources, methods, or activities by which the United States acquired evidence if the military judge finds that the sources, methods, or activities by which the United States acquired such evidence are classified. The military judge may require trial counsel to provide, to the extent practicable, an unclassified summary of the sources, methods, or activities by which the United States acquired such evidence.

"(d) EXCULPATORY EVIDENCE.—(1) As soon as practicable, trial counsel shall disclose to the defense the existence of any evidence known to trial counsel that reasonably tends to exculpate the accused. Where exculpatory evidence is classified, the accused shall be provided with an adequate substitute in accordance with the procedures under subsection (c).

"(2) In this subsection, the term 'evidence known to trial counsel', in the case of exculpatory evidence, means exculpatory evidence that the prosecution would be required to disclose in a trial by general court-martial under chapter 47 of this title.

"§ 949k. Defense of lack of mental responsibility

"(a) AFFIRMATIVE DEFENSE.—It is an affirmative defense in a trial by military commission under this chapter that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.

"(b) BURDEN OF PROOF.—The accused in a military commission under this chapter has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

"(c) FINDINGS FOLLOWING ASSERTION OF DEFENSE.—Whenever lack of mental responsibility of the accused with respect to an offense is properly at issue in a military commission under this chapter, the military judge shall instruct the members of the commission as to the defense of lack of mental responsibility under this section and shall charge them to find the accused—

"(1) guilty;

"(2) not guilty; or

"(3) subject to subsection (d), not guilty by reason of lack of mental responsibility.

"(d) MAJORITY VOTE REQUIRED FOR FINDING.—The accused shall be found not guilty by reason of lack of mental responsibility under subsection (c)(3) only if a majority of the members present at the time the vote is taken determines that the defense of lack of mental responsibility has been established.

"§ 949l. Voting and rulings

"(a) VOTE BY SECRET WRITTEN BALLOT.—Voting by members of a military commission under this chapter on the findings and on the sentence shall be by secret written ballot.

"(b) RULINGS.—(1) The military judge in a military commission under this chapter shall rule upon all questions of law, including the admissibility of evidence and all interlocutory questions arising during the proceedings.

"(2) Any ruling made by the military judge upon a question of law or an interlocutory question (other than the factual issue of mental responsibility of the accused) is conclusive and constitutes the ruling of the military commission. However, a military judge may change his ruling at any time during the trial.

"(c) INSTRUCTIONS PRIOR TO VOTE.—Before a vote is taken of the findings of a military commission under this chapter, the military judge shall, in the presence of the accused and counsel, instruct the members as to the elements of the offense and charge the members—

"(1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt;

"(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted;

"(3) that, if there is reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and

"(4) that the burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the United States.

"§ 949m. Number of votes required

"(a) CONVICTION.—No person may be convicted by a military commission under this chapter of any offense, except as provided in section 949i(b) of this title or by concurrence of two-thirds of the members present at the time the vote is taken.

"(b) SENTENCES.—(1) No person may be sentenced by a military commission to suffer death, except insofar as—

"(A) the penalty of death is expressly authorized under this chapter or the law of war for an offense of which the accused has been found guilty;

"(B) trial counsel expressly sought the penalty of death by filing an appropriate notice in advance of trial;

"(C) the accused is convicted of the offense by the concurrence of all the members present at the time the vote is taken; and

"(D) all the members present at the time the vote is taken concur in the sentence of death.

"(2) No person may be sentenced to life imprisonment, or to confinement for more than 10 years, by a military commission under this chapter except by the concurrence of three-fourths of the members present at the time the vote is taken.

"(3) All other sentences shall be determined by a military commission by the concurrence of two-thirds of the members present at the time the vote is taken.

"(c) NUMBER OF MEMBERS REQUIRED FOR PENALTY OF DEATH.—(1) Except as provided in paragraph (2), in a case in which the penalty of death is sought, the number of members of the military commission under this chapter shall be not less than 12.

"(2) In any case described in paragraph (1) in which 12 members are not reasonably available because of physical conditions or military exigencies, the convening authority shall specify a lesser number of members for the military commission (but not fewer than 9 members), and the military commission may be assembled, and the trial held, with not fewer than the number of members so specified. In such a case, the convening authority shall make a detailed written statement, to be appended to the record, stating why a greater number of members were not reasonably available.

"§ 949n. Military commission to announce action

"A military commission under this chapter shall announce its findings and sentence to the parties as soon as determined.

"§ 949o. Record of trial

"(a) RECORD; AUTHENTICATION.—Each military commission under this chapter shall keep a separate, verbatim, record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the military judge. If the record cannot be authenticated by the military judge by reason of his death, disability, or absence, it shall be authenticated by the signature of the trial counsel or by a member of the commission if the trial counsel is unable to authenticate it by reason of his death, disability, or absence. Where appropriate, and as provided in regulations prescribed by the Secretary of Defense, the record of a military commission under this chapter may contain a classified annex.

"(b) COMPLETE RECORD REQUIRED.—A complete record of the proceedings and testimony shall be prepared in every military commission under this chapter.

"(c) PROVISION OF COPY TO ACCUSED.—A copy of the record of the proceedings of the military commission under this chapter shall be given the accused as soon as it is authenticated. If the record contains classified information, or a classified annex, the accused shall be given a redacted version of the record consistent with the requirements of section 949d of this title. Defense counsel shall have access to the unredacted record, as provided in regulations prescribed by the Secretary of Defense.

"SUBCHAPTER V—SENTENCES

"§ 949s. Cruel or unusual punishments prohibited

"Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a military commission under this chapter or inflicted under this chapter upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited under this chapter.

"§ 949t. Maximum limits

"The punishment which a military commission under this chapter may direct for an offense may not exceed such limits as the President or Secretary of Defense may prescribe for that offense.

"§ 949u. Execution of confinement

"(a) IN GENERAL.—Under such regulations as the Secretary of Defense may prescribe, a sentence of confinement adjudged by a military commission under this chapter may be carried into execution by confinement—

"(1) in any place of confinement under the control of any of the armed forces; or

"(2) in any penal or correctional institution under the control of the United States or its allies, or which the United States may be allowed to use.

"(b) TREATMENT DURING CONFINEMENT BY OTHER THAN THE ARMED FORCES.—Persons confined under subsection (a)(2) in a penal or correctional institution not under the control of an armed force are subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, District of Columbia, or place in which the institution is situated.

"SUBCHAPTER VI—POST-TRIAL PROCEDURE AND REVIEW OF MILITARY COMMISSIONS

"§ 950a. Error of law; lesser included offense

"(a) ERROR OF LAW.—A finding or sentence of a military commission under this chapter may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

"(b) LESSER INCLUDED OFFENSE.—Any reviewing authority with the power to approve or affirm a finding of guilty by a military commission under this chapter may approve or affirm, instead, so much of the finding as includes a lesser included offense.

"§ 950b. Review by the convening authority

"(a) NOTICE TO CONVENING AUTHORITY OF FINDINGS AND SENTENCE.—The findings and sentence of a military commission under this chapter shall be reported in writing promptly to the convening authority after the announcement of the sentence.

"(b) SUBMITTAL OF MATTERS BY ACCUSED TO CONVENING AUTHORITY.—(1) The accused may submit to the convening authority matters for consideration by the convening authority with respect to the findings and the sentence of the military commission under this chapter.

"(2)(A) Except as provided in subparagraph (B), a submittal under paragraph (1) shall be made in writing within 20 days after the accused has been given an authenticated record of trial under section 949o(c) of this title.

"(B) If the accused shows that additional time is required for the accused to make a

submittal under paragraph (1), the convening authority may, for good cause, extend the applicable period under subparagraph (A) for not more than an additional 20 days.

"(3) The accused may waive his right to make a submittal to the convening authority under paragraph (1). Such a waiver shall be made in writing and may not be revoked. For the purposes of subsection (c)(2), the time within which the accused may make a submittal under this subsection shall be deemed to have expired upon the submittal of a waiver under this paragraph to the convening authority.

"(c) ACTION BY CONVENING AUTHORITY.—(1) The authority under this subsection to modify the findings and sentence of a military commission under this chapter is a matter of the sole discretion and prerogative of the convening authority.

"(2)(A) The convening authority shall take action on the sentence of a military commission under this chapter.

"(B) Subject to regulations prescribed by the Secretary of Defense, action on the sentence under this paragraph may be taken only after consideration of any matters submitted by the accused under subsection (b) or after the time for submitting such matters expires, whichever is earlier.

"(C) In taking action under this paragraph, the convening authority may, in his sole discretion, approve, disapprove, commute, or suspend the sentence in whole or in part. The convening authority may not increase a sentence beyond that which is found by the military commission.

"(3) The convening authority is not required to take action on the findings of a military commission under this chapter. If the convening authority takes action on the findings, the convening authority may, in his sole discretion, may—

"(A) dismiss any charge or specification by setting aside a finding of guilty thereto; or

"(B) change a finding of guilty to a charge to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge.

"(4) The convening authority shall serve on the accused or on defense counsel notice of any action taken by the convening authority under this subsection.

"(d) ORDER OF REVISION OR REHEARING.—(1) Subject to paragraphs (2) and (3), the convening authority of a military commission under this chapter may, in his sole discretion, order a proceeding in revision or a rehearing.

"(2)(A) Except as provided in subparagraph (B), a proceeding in revision may be ordered by the convening authority if—

"(i) there is an apparent error or omission in the record; or

"(ii) the record shows improper or inconsistent action by the military commission with respect to the findings or sentence that can be rectified without material prejudice to the substantial rights of the accused.

"(B) In no case may a proceeding in revision—

"(i) reconsider a finding of not guilty of a specification or a ruling which amounts to a finding of not guilty;

"(ii) reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation; or

"(iii) increase the severity of the sentence unless the sentence prescribed for the offense is mandatory.

"(3) A rehearing may be ordered by the convening authority if the convening authority disapproves the findings and sentence and states the reasons for disapproval of the findings. If the convening authority disapproves the finding and sentence and does not order a rehearing, the convening authority shall dismiss the charges. A rehearing as to the findings may not be ordered by the convening authority when there is a lack of sufficient evidence in the record to support the findings. A rehearing as to the sentence may be ordered by the convening authority if the convening authority disapproves the sentence.

"§ 950c. Appellate referral; waiver or withdrawal of appeal

"(a) AUTOMATIC REFERRAL FOR APPELLATE REVIEW.—Except as provided under subsection (b), in each case in which the final decision of a military commission (as approved by the convening authority) includes a finding of guilty, the convening authority shall refer the case to the Court of Military Commission Review. Any such referral shall be made in accordance with procedures prescribed under regulations of the Secretary.

"(b) WAIVER OF RIGHT OF REVIEW.—(1) In each case subject to appellate review under section 950f of this title, except a case in which the sentence as approved under section 950b of this title extends to death, the accused may file with the convening authority a statement expressly waiving the right of the accused to such review.

"(2) A waiver under paragraph (1) shall be signed by both the accused and a defense counsel.

"(3) A waiver under paragraph (1) must be filed, if at all, within 10 days after notice on the action is served on the accused or on defense counsel under section 950b(c)(4) of this title. The convening authority, for good cause, may extend the period for such filing by not more than 30 days.

"(c) WITHDRAWAL OF APPEAL.—Except in a case in which the sentence as approved under section 950b of this title extends to death, the accused may withdraw an appeal at any time.

"(d) EFFECT OF WAIVER OR WITHDRAWAL.—A waiver of the right to appellate review or the withdrawal of an appeal under this section bars review under section 950f of this title.

"§ 950d. Appeal by the United States

"(a) INTERLOCUTORY APPEAL.—(1) Except as provided in paragraph (2), in a trial by military commission under this chapter, the United States may take an interlocutory appeal to the Court of Military Commission Review of any order or ruling of the military judge that—

"(A) terminates proceedings of the military commission with respect to a charge or specification;

"(B) excludes evidence that is substantial proof of a fact material in the proceeding; or

"(C) relates to a matter under subsection (d), (e), or (f) of section 949d of this title or section 949j(c) of this title.

"(2) The United States may not appeal under paragraph (1) an order or ruling that is, or amounts to, a finding of not guilty by the military commission with respect to a charge or specification.

"(b) NOTICE OF APPEAL.—The United States shall take an appeal of an order or ruling under subsection (a) by filing a notice of appeal with the military judge within five days after the date of such order or ruling.

"(c) APPEAL.—An appeal under this section shall be forwarded, by means specified in regulations prescribed the Secretary of Defense, directly to the Court of Military Commission Review. In ruling on an appeal under this section, the Court may act only with respect to matters of law.

"(d) APPEAL FROM ADVERSE RULING.—The United States may appeal an adverse ruling on an appeal under subsection (c) to the United States Court of Appeals for the District of Columbia Circuit by filing a petition for review in the Court of Appeals within 10 days after the date of such ruling. Review under this subsection shall be at the discretion of the Court of Appeals.

"§ 950e. Rehearings

"(a) COMPOSITION OF MILITARY COMMISSION FOR REHEARING.—Each rehearing under this chapter shall take place before a military commission under this chapter composed of members who were not members of the military commission which first heard the case.

"(b) SCOPE OF REHEARING.—(1) Upon a rehearing—

"(A) the accused may not be tried for any offense of which he was found not guilty by the first military commission; and

"(B) no sentence in excess of or more than the original sentence may be imposed unless—

"(i) the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings; or

"(ii) the sentence prescribed for the offense is mandatory.

"(2) Upon a rehearing, if the sentence approved after the first military commission was in accordance with a pretrial agreement and the accused at the rehearing changes his plea with respect to the charges or specifications upon which the pretrial agreement was based, or otherwise does not comply with pretrial agreement, the sentence as to those charges or specifications may include any punishment not in excess of that lawfully adjudged at the first military commission.

"§ 950f. Review by Court of Military Commission Review

"(a) ESTABLISHMENT.—The Secretary of Defense shall establish a Court of Military Commission Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing military commission decisions under this chapter, the court may sit in panels or as a whole in accordance with rules prescribed by the Secretary.

"(b) APPELLATE MILITARY JUDGES.—The Secretary shall assign appellate military judges to a Court of Military Commission Review. Each appellate military judge shall meet the qualifications for military judges prescribed by section 948j(b) of this title or shall be a civilian with comparable qualifications. No person may be serve as an appellate military judge in any case in which that person acted as a military judge, counsel, or reviewing official.

"(c) CASES TO BE REVIEWED.—The Court of Military Commission Review, in accordance with procedures prescribed under regulations of the Secretary, shall review the record in each case that is referred to the Court by the convening authority under section 950c of this title with respect to any matter of law raised by the accused.

"(d) SCOPE OF REVIEW.—In a case reviewed by the Court of Military Commission Review under this section, the Court may act only with respect to matters of law.

"§ 950g. Review by the United States Court of Appeals for the District of Columbia Circuit and the Supreme Court

"(a) EXCLUSIVE APPELLATE JURISDICTION.—(1)(A) Except as provided in subparagraph (B), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority) under this chapter.

"(B) The Court of Appeals may not review the final judgment until all other appeals under this chapter have been waived or exhausted.

"(2) A petition for review must be filed by the accused in the Court of Appeals not later than 20 days after the date on which—

"(A) written notice of the final decision of the Court of Military Commission Review is served on the accused or on defense counsel; or

"(B) the accused submits, in the form prescribed by section 950c of this title, a written notice waiving the right of the accused to review by the Court of Military Commission Review under section 950f of this title.

"(b) STANDARD FOR REVIEW.—In a case reviewed by it under this section, the Court of Appeals may act only with respect to matters of law.

"(c) SCOPE OF REVIEW.—The jurisdiction of the Court of Appeals on an appeal under subsection (a) shall be limited to the consideration of—

"(1) whether the final decision was consistent with the standards and procedures specified in this chapter; and

"(2) to the extent applicable, the Constitution and the laws of the United States.

"(d) SUPREME COURT.—The Supreme Court may review by writ of certiorari the final judgment of the Court of Appeals pursuant to section 1257 of title 28.

"§ 950h. Appellate counsel

"(a) APPOINTMENT.—The Secretary of Defense shall, by regulation, establish procedures for the appointment of appellate counsel for the United States and for the accused in military commissions under this chapter. Appellate counsel shall meet the qualifications for counsel appearing before military commissions under this chapter.

"(b) REPRESENTATION OF UNITED STATES.—Appellate counsel appointed under subsection (a)—

"(1) shall represent the United States in any appeal or review proceeding under this chapter before the Court of Military Commission Review; and

"(2) may, when requested to do so by the Attorney General in a case arising under this chapter, represent the United States before the United States Court of Appeals for the District of Columbia Circuit or the Supreme Court.

"(c) REPRESENTATION OF ACCUSED.—The accused shall be represented by appellate counsel appointed under subsection (a) before the Court of Military Commission Review, the United States Court of Appeals for the District of Columbia Circuit, and the Supreme Court, and by civilian counsel if retained by the accused. Any such civilian counsel shall meet the qualifications under paragraph (3) of section 949c(b) of this title for civilian counsel appearing before military commissions under this chapter and shall be subject to the requirements of paragraph (4) of that section.

"§ 950i. Execution of sentence; procedures for execution of sentence of death

"(a) IN GENERAL.—The Secretary of Defense is authorized to carry out a sentence imposed by a military commission under this chapter in accordance with such procedures as the Secretary may prescribe.

"(b) EXECUTION OF SENTENCE OF DEATH ONLY UPON APPROVAL BY THE PRESIDENT.—If the sentence of a military commission under this chapter extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit.

"(c) EXECUTION OF SENTENCE OF DEATH ONLY UPON FINAL JUDGMENT OF LEGALITY OF PROCEEDINGS.—(1) If the sentence of a military commission under this chapter extends to death, the sentence may not be executed until there is a final judgment as to the legality of the proceedings (and with respect to death, approval under subsection (b)).

"(2) A judgment as to legality of proceedings is final for purposes of paragraph (1) when—

"(A) the time for the accused to file a petition for review by the Court of Appeals for the District of Columbia Circuit has expired and the accused has not filed a timely petition for such review and the case is not otherwise under review by that Court; or

"(B) review is completed in accordance with the judgment of the United States Court of Appeals for the District of Columbia Circuit and—

"(i) a petition for a writ of certiorari is not timely filed;

"(ii) such a petition is denied by the Supreme Court; or

"(iii) review is otherwise completed in accordance with the judgment of the Supreme Court.

"(d) SUSPENSION OF SENTENCE.—The Secretary of the Defense, or the convening authority acting on the case (if other than the Secretary), may suspend the execution of any sentence or part thereof in the case, except a sentence of death.

"§ 950j. Finality or proceedings, findings, and sentences

"(a) FINALITY.—The appellate review of records of trial provided by this chapter, and the proceedings, findings, and sentences of military commissions as approved, reviewed, or affirmed as required by this chapter, are final and conclusive. Orders publishing the proceedings of military commissions under this chapter are binding upon all departments, courts, agencies, and officers of the United States, except as otherwise provided by the President.

"(b) PROVISIONS OF CHAPTER SOLE BASIS FOR REVIEW OF MILITARY COMMISSION PROCEDURES AND ACTIONS.—Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

"SUBCHAPTER VII—PUNITIVE MATTERS

"§ 950p. Statement of substantive offenses

"(a) PURPOSE.—The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.

"(b) EFFECT.—Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.

"§ 950q. Principals

"Any person is punishable as a principal under this chapter who—

"(1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission;

"(2) causes an act to be done which if directly performed by him would be punishable by this chapter; or

"(3) is a superior commander who, with regard to acts punishable under this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

"§ 950r. Accessory after the fact

"Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a military commission under this chapter may direct.

"§ 950s. Conviction of lesser included offense

"An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an attempt to commit either the offense charged or an offense necessarily included therein.

"§ 950t. Attempts

"(a) IN GENERAL.—Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a military commission under this chapter may direct.

"(b) SCOPE OF OFFENSE.—An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

"(c) EFFECT OF CONSUMMATION.—Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

"§ 950u. Solicitation

"Any person subject to this chapter who solicits or advises another or others to commit one or more substantive offenses triable by military commission under this chapter shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, he shall be punished as a military commission under this chapter may direct.

"§ 950v. Crimes triable by military commissions

"(a) DEFINITIONS AND CONSTRUCTION.—In this section:

"(1) MILITARY OBJECTIVE.—The term 'military objective' means—

"(A) combatants; and

"(B) those objects during an armed conflict—

"(i) which, by their nature, location, purpose, or use, effectively contribute to the opposing force's war-fighting or war-sustaining capability; and

"(ii) the total or partial destruction, capture, or neutralization of which would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.

"(2) PROTECTED PERSON.—The term 'protected person' means any person entitled to protection under one or more of the Geneva Conventions, including—

"(A) civilians not taking an active part in hostilities;

"(B) military personnel placed hors de combat by sickness, wounds, or detention; and

"(C) military medical or religious personnel.

"(3) PROTECTED PROPERTY.—The term 'protected property' means property specifically protected by the law of war (such as buildings dedicated to religion, education, art,

science or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected), if such property is not being used for military purposes or is not otherwise a military objective. Such term includes objects properly identified by one of the distinctive emblems of the Geneva Conventions, but does not include civilian property that is a military objective.

"(4) CONSTRUCTION.—The intent specified for an offense under paragraph (1), (2), (3), (4), or (12) of subsection (b) precludes the applicability of such offense with regard to—

"(A) collateral damage; or

"(B) death, damage, or injury incident to a lawful attack.

"(b) OFFENSES.—The following offenses shall be triable by military commission under this chapter at any time without limitation:

"(1) MURDER OF PROTECTED PERSONS.—Any person subject to this chapter who intentionally kills one or more protected persons shall be punished by death or such other punishment as a military commission under this chapter may direct.

"(2) ATTACKING CIVILIANS.—Any person subject to this chapter who intentionally engages in an attack upon a civilian population as such, or individual civilians not taking active part in hostilities, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

"(3) ATTACKING CIVILIAN OBJECTS.—Any person subject to this chapter who intentionally engages in an attack upon a civilian object that is not a military objective shall be punished as a military commission under this chapter may direct.

"(4) ATTACKING PROTECTED PROPERTY.—Any person subject to this chapter who intentionally engages in an attack upon protected property shall be punished as a military commission under this chapter may direct.

"(5) PILLAGING.—Any person subject to this chapter who intentionally and in the absence of military necessity appropriates or seizes property for private or personal use, without the consent of a person with authority to permit such appropriation or seizure, shall be punished as a military commission under this chapter may direct.

"(6) DENYING QUARTER.—Any person subject to this chapter who, with effective command or control over subordinate groups, declares, orders, or otherwise indicates to those groups that there shall be no survivors or surrender accepted, with the intent to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted, shall be punished as a military commission under this chapter may direct.

"(7) TAKING HOSTAGES.—Any person subject to this chapter who, having knowingly seized or detained one or more persons, threatens to kill, injure, or continue to detain such person or persons with the intent of compelling any nation, person other than the hostage, or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

"(8) EMPLOYING POISON OR SIMILAR WEAPONS.—Any person subject to this chapter who intentionally, as a method of warfare, employs a substance or weapon that releases a substance that causes death or serious and lasting damage to health in the ordinary course of events, through its asphyxiating, bacteriological, or toxic properties, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

"(9) USING PROTECTED PERSONS AS A SHIELD.—Any person subject to this chapter who positions, or otherwise takes advantage of, a protected person with the intent to shield a military objective from attack, or to shield, favor, or impede military operations, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

"(10) USING PROTECTED PROPERTY AS A SHIELD.—Any person subject to this chapter who positions, or otherwise takes advantage of the location of, protected property with the intent to shield a military objective from attack, or to shield, favor, or impede military operations, shall be punished as a military commission under this chapter may direct.

"(11) TORTURE.—

"(A) OFFENSE.—Any person subject to this chapter who commits an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

"(B) SEVERE MENTAL PAIN OR SUFFERING DEFINED.—In this section, the term 'severe mental pain or suffering' has the meaning given that term in section 2340(2) of title 18.

"(12) CRUEL OR INHUMAN TREATMENT.—

"(A) OFFENSE.—Any person subject to this chapter who commits an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control shall be punished, if death results to the victim, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to the victim, by such punishment, other than death, as a military commission under this chapter may direct.

"(B) DEFINITIONS.—In this paragraph:

"(i) The term 'serious physical pain or suffering' means bodily injury that involves—

"(I) a substantial risk of death;

"(II) extreme physical pain;

"(III) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or

"(IV) significant loss or impairment of the function of a bodily member, organ, or mental faculty.

"(ii) The term 'severe mental pain or suffering' has the meaning given that term in section 2340(2) of title 18.

"(iii) The term 'serious mental pain or suffering' has the meaning given the term 'severe mental pain or suffering' in section 2340(2) of title 18, except that—

"(I) the term 'serious' shall replace the term 'severe' where it appears; and

"(II) as to conduct occurring after the date of the enactment of the Military Commissions Act of 2006, the term 'serious and nontransitory mental harm (which need not be prolonged)' shall replace the term 'prolonged mental harm' where it appears.

"(13) INTENTIONALLY CAUSING SERIOUS BODILY INJURY.—

"(A) OFFENSE.—Any person subject to this chapter who intentionally causes serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

"(B) SERIOUS BODILY INJURY DEFINED.—In this paragraph, the term 'serious bodily injury' means bodily injury which involves—

"(i) a substantial risk of death;

"(ii) extreme physical pain;

"(iii) protracted and obvious disfigurement; or

"(iv) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

"(14) MUTILATING OR MAIMING.—Any person subject to this chapter who intentionally injures one or more protected persons by disfiguring the person or persons by any mutilation of the person or persons, or by permanently disabling any member, limb, or organ of the body of the person or persons, without any legitimate medical or dental purpose, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

"(15) MURDER IN VIOLATION OF THE LAW OF WAR.—Any person subject to this chapter who intentionally kills one or more persons, including lawful combatants, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct.

"(16) DESTRUCTION OF PROPERTY IN VIOLATION OF THE LAW OF WAR.—Any person subject to this chapter who intentionally destroys property belonging to another person in violation of the law of war shall punished as a military commission under this chapter may direct.

"(17) USING TREACHERY OR PERFIDY.—Any person subject to this chapter who, after inviting the confidence or belief of one or more persons that they were entitled to, or obliged to accord, protection under the law of war, intentionally makes use of that confidence or belief in killing, injuring, or capturing such person or persons shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

"(18) IMPROPERLY USING A FLAG OF TRUCE.—Any person subject to this chapter who uses a flag of truce to feign an intention to negotiate, surrender, or otherwise suspend hostilities when there is no such intention shall be punished as a military commission under this chapter may direct.

"(19) IMPROPERLY USING A DISTINCTIVE EMBLEM.—Any person subject to this chapter who intentionally uses a distinctive emblem

recognized by the law of war for combatant purposes in a manner prohibited by the law of war shall be punished as a military commission under this chapter may direct.

"(20) INTENTIONALLY MISTREATING A DEAD BODY.—Any person subject to this chapter who intentionally mistreats the body of a dead person, without justification by legitimate military necessity, shall be punished as a military commission under this chapter may direct.

"(21) RAPE.—Any person subject to this chapter who forcibly or with coercion or threat of force wrongfully invades the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused, or with any foreign object, shall be punished as a military commission under this chapter may direct.

"(22) SEXUAL ASSAULT OR ABUSE.—Any person subject to this chapter who forcibly or with coercion or threat of force engages in sexual contact with one or more persons, or causes one or more persons to engage in sexual contact, shall be punished as a military commission under this chapter may direct.

"(23) HIJACKING OR HAZARDING A VESSEL OR AIRCRAFT.—Any person subject to this chapter who intentionally seizes, exercises unauthorized control over, or endangers the safe navigation of a vessel or aircraft that is not a legitimate military objective shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

"(24) TERRORISM.—Any person subject to this chapter who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

"(25) PROVIDING MATERIAL SUPPORT FOR TERRORISM.—

"(A) OFFENSE.—Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.

"(B) MATERIAL SUPPORT OR RESOURCES DEFINED.—In this paragraph, the term 'material support or resources' has the meaning given that term in section 2339A(b) of title 18.

"(26) WRONGFULLY AIDING THE ENEMY.—Any person subject to this chapter who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished as a military commission under this chapter may direct.

"(27) SPYING.—Any person subject to this chapter who with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign power, collects or attempts to collect information by clandestine means or while acting under false pretenses, for the purpose of conveying such information to an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished by death or such other punishment as a military commission under this chapter may direct.

"(28) CONSPIRACY.—Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

"§ 950w. Perjury and obstruction of justice; contempt

"(a) PERJURY AND OBSTRUCTION OF JUSTICE.—A military commission under this chapter may try offenses and impose such punishment as the military commission may direct for perjury, false testimony, or obstruction of justice related to military commissions under this chapter.

"(b) CONTEMPT.—A military commission under this chapter may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder.".

(2) TABLES OF CHAPTERS AMENDMENTS.—The tables of chapters at the beginning of subtitle A, and at the beginning of part II of subtitle A, of title 10, United States Code, are each amended by inserting after the item relating to chapter 47 the following new item:

"47A. Military Commissions ..... 948a".

(b) SUBMITTAL OF PROCEDURES TO CONGRESS.—Not later than 90 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report setting forth the procedures for military commissions prescribed under chapter 47A of title 10, United States Code (as added by subsection (a)).

SEC. 4. AMENDMENTS TO UNIFORM CODE OF MILITARY JUSTICE.

(a) CONFORMING AMENDMENTS.—Chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended as follows:

(1) APPLICABILITY TO LAWFUL ENEMY COMBATANTS.—Section 802(a) (article 2(a)) is amended by adding at the end the following new paragraph:

"(13) Lawful enemy combatants (as that term is defined in section 948a(2) of this title) who violate the law of war.".

(2) EXCLUSION OF APPLICABILITY TO CHAPTER 47A COMMISSIONS.—Sections 821, 828, 848, 850(a), 904, and 906 (articles 21, 28, 48, 50(a), 104, and 106) are amended by adding at the end the following new sentence: "This section does not apply to a military commission established under chapter 47A of this title.".

(3) INAPPLICABILITY OF REQUIREMENTS RELATING TO REGULATIONS.—Section 836 (article 36) is amended—

(A) in subsection (a), by inserting ", except as provided in chapter 47A of this title," after "but which may not"; and

(B) in subsection (b), by inserting before the period at the end ", except insofar as applicable to military commissions established under chapter 47A of this title".

(b) PUNITIVE ARTICLE OF CONSPIRACY.—Section 881 of title 10, United States Code (article 81 of the Uniform Code of Military Justice), is amended—

(1) by inserting "(a)" before "Any person"; and

(2) by adding at the end the following new subsection:

"(b) Any person subject to this chapter who conspires with any other person to commit an offense under the law of war, and who knowingly does an overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a court-martial or military commission may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a court-martial or military commission may direct.".

SEC. 5. TREATY OBLIGATIONS NOT ESTABLISHING GROUNDS FOR CERTAIN CLAIMS.

(a) IN GENERAL.—No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.

(b) GENEVA CONVENTIONS DEFINED.—In this section, the term "Geneva Conventions" means—

(1) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, done at Geneva August 12, 1949 (6 UST 3114);

(2) the Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, done at Geneva August 12, 1949 (6 UST 3217);

(3) the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316); and

(4) the Convention Relative to the Protection of Civilian Persons in Time of War, done at Geneva August 12, 1949 (6 UST 3516).

SEC. 6. IMPLEMENTATION OF TREATY OBLIGATIONS.

(a) IMPLEMENTATION OF TREATY OBLIGATIONS.—

(1) IN GENERAL.—The acts enumerated in subsection (d) of section 2441 of title 18, United States Code, as added by subsection (b) of this section, and in subsection (c) of this section, constitute violations of common Article 3 of the Geneva Conventions prohibited by United States law.

(2) PROHIBITION ON GRAVE BREACHES.—The provisions of section 2441 of title 18, United States Code, as amended by this section, fully satisfy the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character. No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of such section 2441.

(3) INTERPRETATION BY THE PRESIDENT.—

(A) As provided by the Constitution and by this section, the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.

(B) The President shall issue interpretations described by subparagraph (A) by Executive Order published in the Federal Register.

(C) Any Executive Order published under this paragraph shall be authoritative (except

as to grave breaches of common Article 3) as a matter of United States law, in the same manner as other administrative regulations.

(D) Nothing in this section shall be construed to affect the constitutional functions and responsibilities of Congress and the judicial branch of the United States.

(4) DEFINITIONS.—In this subsection:

(A) GENEVA CONVENTIONS.—The term "Geneva Conventions" means—

(i) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, done at Geneva August 12, 1949 (6 UST 3217);

(ii) the Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, done at Geneva August 12, 1949 (6 UST 3217);

(iii) the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316); and

(iv) the Convention Relative to the Protection of Civilian Persons in Time of War, done at Geneva August 12, 1949 (6 UST 3516).

(B) THIRD GENEVA CONVENTION.—The term "Third Geneva Convention" means the international convention referred to in subparagraph (A)(iii).

(b) REVISION TO WAR CRIMES OFFENSE UNDER FEDERAL CRIMINAL CODE.—

(1) IN GENERAL.—Section 2441 of title 18, United States Code, is amended—

(A) in subsection (c), by striking paragraph (3) and inserting the following new paragraph (3):

"(3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character; or"; and

(B) by adding at the end the following new subsection:

"(d) COMMON ARTICLE 3 VIOLATIONS.—

"(1) PROHIBITED CONDUCT.—In subsection (c)(3), the term 'grave breach of common Article 3' means any conduct (such conduct constituting a grave breach of common Article 3 of the international conventions done at Geneva August 12, 1949), as follows:

"(A) TORTURE.—The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.

"(B) CRUEL OR INHUMAN TREATMENT.—The act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control.

"(C) PERFORMING BIOLOGICAL EXPERIMENTS.—The act of a person who subjects, or conspires or attempts to subject, one or more persons within his custody or physical control to biological experiments without a legitimate medical or dental purpose and in so doing endangers the body or health of such person or persons.

"(D) MURDER.—The act of a person who intentionally kills, or conspires or attempts to kill, or kills whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.

"(E) MUTILATION OR MAIMING.—The act of a person who intentionally injures, or conspires or attempts to injure, or injures whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause, by disfiguring the person or persons by any mutilation thereof or by permanently disabling any member, limb, or organ of his body, without any legitimate medical or dental purpose.

"(F) INTENTIONALLY CAUSING SERIOUS BODILY INJURY.—The act of a person who intentionally causes, or conspires or attempts to cause, serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war.

"(G) RAPE.—The act of a person who forcibly or with coercion or threat of force wrongfully invades, or conspires or attempts to invade, the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused, or with any foreign object.

"(H) SEXUAL ASSAULT OR ABUSE.—The act of a person who forcibly or with coercion or threat of force engages, or conspires or attempts to engage, in sexual contact with one or more persons, or causes, or conspires or attempts to cause, one or more persons to engage in sexual contact.

"(I) TAKING HOSTAGES.—The act of a person who, having knowingly seized or detained one or more persons, threatens to kill, injure, or continue to detain such person or persons with the intent of compelling any nation, person other than the hostage, or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons.

"(2) DEFINITIONS.—In the case of an offense under subsection (a) by reason of subsection (c)(3)—

"(A) the term 'severe mental pain or suffering' shall be applied for purposes of paragraphs (1)(A) and (1)(B) in accordance with the meaning given that term in section 2340(2) of this title;

"(B) the term 'serious bodily injury' shall be applied for purposes of paragraph (1)(F) in accordance with the meaning given that term in section 113(b)(2) of this title;

"(C) the term 'sexual contact' shall be applied for purposes of paragraph (1)(G) in accordance with the meaning given that term in section 2246(3) of this title;

"(D) the term 'serious physical pain or suffering' shall be applied for purposes of paragraph (1)(B) as meaning bodily injury that involves—

"(i) a substantial risk of death;

"(ii) extreme physical pain;

"(iii) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or

"(iv) significant loss or impairment of the function of a bodily member, organ, or mental faculty; and

"(E) the term 'serious mental pain or suffering' shall be applied for purposes of paragraph (1)(B) in accordance with the meaning given the term 'severe mental pain or suffering' (as defined in section 2340(2) of this title), except that—

"(i) the term 'serious' shall replace the term 'severe' where it appears; and

"(ii) as to conduct occurring after the date of the enactment of the Military Commissions Act of 2006, the term 'serious and nontransitory mental harm (which need not be prolonged)' shall replace the term 'prolonged mental harm' where it appears.

"(3) INAPPLICABILITY OF CERTAIN PROVISIONS WITH RESPECT TO COLLATERAL DAMAGE OR INCIDENT OF LAWFUL ATTACK.—The intent specified for the conduct stated in subparagraphs (D), (E), and (F) or paragraph (1) precludes the applicability of those subparagraphs to an offense under subsection (a) by reasons of subsection (c)(3) with respect to—

"(A) collateral damage; or

"(B) death, damage, or injury incident to a lawful attack.

"(4) INAPPLICABILITY OF TAKING HOSTAGES TO PRISONER EXCHANGE.—Paragraph (1)(I) does not apply to an offense under subsection (a) by reason of subsection (c)(3) in the case of a prisoner exchange during wartime.

"(5) DEFINITION OF GRAVE BREACHES.—The definitions in this subsection are intended only to define the grave breaches of common Article 3 and not the full scope of United States obligations under that Article.".

(2) RETROACTIVE APPLICABILITY.—The amendments made by this subsection, except as specified in subsection (d)(2)(E) of section 2441 of title 18, United States Code, shall take effect as of November 26, 1997, as if enacted immediately after the amendments made by section 583 of Public Law 105-118 (as amended by section 4002(e)(7) of Public Law 107-273).

(c) ADDITIONAL PROHIBITION ON CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT.—

(1) IN GENERAL.—No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

(2) CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT DEFINED.—In this subsection, the term "cruel, inhuman, or degrading treatment or punishment" means cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

(3) COMPLIANCE.—The President shall take action to ensure compliance with this subsection, including through the establishment of administrative rules and procedures.

SEC. 7. HABEAS CORPUS MATTERS.

(a) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by striking both the subsection (e) added by section 1005(e)(1) of Public Law 109-148 (119 Stat. 2742) and the subsection (e) added by added by section 1405(e)(1) of Public Law 109-163 (119 Stat. 3477) and inserting the following new subsection (e):

"(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

"(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no 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, transfer, treatment, trial, 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.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and

shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

SEC. 8. REVISIONS TO DETAINEE TREATMENT ACT OF 2005 RELATING TO PROTECTION OF CERTAIN UNITED STATES GOVERNMENT PERSONNEL.

(a) COUNSEL AND INVESTIGATIONS.—Section 1004(b) of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd–1(b)) is amended—

(1) by striking "may provide" and inserting "shall provide";

(2) by inserting "or investigation" after "criminal prosecution"; and

(3) by inserting "whether before United States courts or agencies, foreign courts or agencies, or international courts or agencies," after "described in that subsection".

(b) PROTECTION OF PERSONNEL.—Section 1004 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd–1) shall apply with respect to any criminal prosecution that—

(1) relates to the detention and interrogation of aliens described in such section;

(2) is grounded in section 2441(c)(3) of title 18, United States Code; and

(3) relates to actions occurring between September 11, 2001, and December 30, 2005.

SEC. 9. REVIEW OF JUDGMENTS OF MILITARY COMMISSIONS.

Section 1005(e)(3) of the Detainee Treatment Act of 2005 (title X of Public Law 109–148; 119 Stat. 2740; 10 U.S.C. 801 note) is amended—

(1) in subparagraph (A), by striking "pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order)" and inserting "by a military commission under chapter 47A of title 10, United States Code";

(2) by striking subparagraph (B) and inserting the following new subparagraph (B):

"(B) GRANT OF REVIEW.—Review under this paragraph shall be as of right.";

(3) in subparagraph (C)—

(A) in clause (i)—

(i) by striking "pursuant to the military order" and inserting "by a military commission"; and

(ii) by striking "at Guantanamo Bay, Cuba"; and

(B) in clause (ii), by striking "pursuant to such military order" and inserting "by the military commission"; and

(4) in subparagraph (D)(i), by striking "specified in the military order" and inserting "specified for a military commission".

SEC. 10. DETENTION COVERED BY REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION.

Section 1005(e)(2)(B)(i) of the Detainee Treatment Act of 2005 (title X of Public Law 109–148; 119 Stat. 2742; 10 U.S.C. 801 note) is amended by striking "the Department of Defense at Guantanamo Bay, Cuba" and inserting "the United States".

Mr. WARNER. Mr. President, I move

tion as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith." *Id.* Once the district court has "considered the amount and nature of damages awarded, the court may lawfully award low fees or no fees without reciting the 12 factors bearing on reasonableness ... or multiplying the number of hours reasonably expended by a reasonable hourly rate." *Farrar,* 506 U.S. at 115, 113 S.Ct. 566 (internal citations and quotation omitted).

If consideration of the amount and nature of damages awarded does not yield a clear fee determination, "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley,* 461 U.S. at 433, 103 S.Ct. 1933. The district court may then "adjust the fee upward or downward" on the basis of "other considerations" including results obtained. *Id.* at 434, 103 S.Ct. 1933. Results obtained can be measured by examining: "First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" *Id.* Additional factors may include the time and labor required; the novelty and difficulty of the questions involved; the skill requisite to perform the legal service properly; the preclusion of other employment by the attorney due to acceptance of the case; the customary fee; whether the fee is fixed or contingent; time limitations imposed by the client or the circumstances; the experience, reputation and ability of the attorneys; the undesirability of the case; the nature and length of the professional relationship with the client and awards in similar cases. *Id.* at 434 & n. 9, 103 S.Ct. 1933; *see also Morales v. City of San Rafael,* 96 F.3d 359, 363–64 & n. 8 (9th Cir.1996).

As the Supreme Court held in *Hensley v. Eckerhart:*

> Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained. On remand the District Court should determine the proper amount of the attorney's fee award in light of these standards.

Hensley, 461 U.S. at 440, 103 S.Ct. 1933.

Dewan PURI, Petitioner–Appellant,

v.

Alberto R. GONZALES, Attorney General; Michael Chertoff, Secretary of Homeland Security; A. Neil Clark, Department of Homeland Security Immigration and Customs Enforcement Seattle Field Office Director, Respondents–Appellees.

No. 05–36182.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted June 7, 2006.

Filed Sept. 28, 2006.

Background: Alien filed petition for writ of habeas corpus, challenging deportation

order. The United States District Court for the Western District of Washington, Thomas S. Zilly, J., dismissed petition for lack of jurisdiction, and alien appealed.

Holdings: The Court of Appeals, Tashima, Circuit Judge, held that:

(1) district court lacked jurisdiction to entertain alien's petition for writ of habeas corpus challenging deportation order;

(2) Suspension Clause was not violated; and

(3) transfer of case in the interest of justice was not warranted.

Affirmed.

1. Aliens, Immigration, and Citizenship ⇐385

District court lacked jurisdiction to entertain alien's petition for writ of habeas corpus challenging deportation order, since alien filed petition three months after the effective date of the REAL ID Act, which eliminated district court habeas corpus jurisdiction over orders of removal and vested jurisdiction to review such orders exclusively in the courts of appeals. Immigration and Nationality Act, § 242(a)(5), 8 U.S.C.A. § 1252(a)(5).

2. Aliens, Immigration, and Citizenship ⇐384

Habeas Corpus ⇐912

The Suspension Clause did not require an evidentiary hearing before a federal court in lieu of judicial review of administrative deportation proceedings before Board of Immigration Appeals, and thus, Congress provided an adequate substitute for habeas proceedings, as required under Suspension Clause, in provision in REAL ID Act that eliminated district court habeas corpus jurisdiction over orders of removal and made a petition for review filed with court of appeals the sole and exclusive means for judicial review of a removal order. U.S.C.A. Const. Art. 1, § 9, cl. 2; Immigration and Nationality Act, § 242(a)(5), 8 U.S.C.A. § 1252(a)(5).

3. Aliens, Immigration, and Citizenship ⇐384

Habeas Corpus ⇐652

Transfer in the interest of justice from district court to court of appeals of alien's petition for writ of habeas corpus challenging removal order was not warranted, since alien was aware of proper procedure for filing petition for review with court of appeals, and did file such a petition within a few days of filing his habeas petition. 28 U.S.C.A. § 1631.

4. Aliens, Immigration, and Citizenship ⇐384

Federal Courts ⇐1158

An immigration case is transferable when the following three conditions are met: (1) the transferee court would have been able to exercise its jurisdiction on the date the action was misfiled; (2) the transferor court lacks jurisdiction; and (3) the transfer serves the interest of justice. 28 U.S.C.A. § 1631.

Daniel M. Kowalski, Austin, TX, for the petitioner-appellant.

Christopher L. Pickrell, Assistant United States Attorney, Seattle, WA, for the respondents-appellees.

Appeal from the United States District Court for the Western District of Washington; Thomas S. Zilly, District Judge, Presiding. D.C. No. CV 05–01361 TSZ.

Before THOMPSON, TASHIMA, and CALLAHAN, Circuit Judges.

TASHIMA, Circuit Judge.

Dewan Puri ("Puri"), a native and citizen of India, filed a petition for a writ of habeas corpus (his second) in the district court, challenging a January 15, 1997, order of deportation, which ordered Puri deported to India. The district court dismissed Puri's petition for lack of jurisdiction pursuant to the REAL ID Act and Puri filed a timely notice of appeal.

We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), and we affirm. We review *de novo* a district court's decision to dismiss a habeas corpus petition for lack of subject matter jurisdiction. *See Taniguchi v. Schultz*, 303 F.3d 950, 955 (9th Cir. 2002).

I. PROCEDURAL HISTORY

Puri lawfully entered the United States with an immigrant visa in 1984. He is married to a United States citizen and has two United States citizen children. Following convictions for child molestation and indecent liberties,[1] Puri was placed in deportation proceedings before an immigration judge ("IJ") and ordered deported to India. After a complicated series of appeals and procedural rulings, Puri was ultimately granted a waiver of deportation pursuant to § 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c) (repealed 1996). The government appealed that decision to the Board of Immigration Appeals ("BIA"), which reversed the IJ's grant of § 212(c) relief and reinstated Puri's deportation order.

Puri then filed his first habeas petition, challenging his order of deportation as invalid because it was issued by the BIA, and not an IJ. *See Noriega–Lopez v. Ashcroft*, 335 F.3d 874 (9th Cir.2003) (holding that an IJ may order an alien deported or removed, but the BIA may not, because "it is the IJs who are to issue administrative orders of removal in the first instance"). The government agreed and moved to remand Puri's proceedings back to the Immigration Court so that the IJ could issue the deportation order, as required by *Noriega–Lopez*. On remand, the IJ issued a ministerial order for Puri's deportation to India. Puri then filed a motion for reconsideration, raising new evidence of rehabilitation in the form of a psychological evaluation, which was denied by the IJ. Puri appealed the denial of reconsideration to the BIA, which denied relief.

Puri filed the instant second habeas petition on August 4, 2005. In it, he alleges that: (1) the BIA violated his due process rights when it reversed the IJ's grant of § 212(c) relief; (2) the REAL ID Act violates the Suspension Clause because it strips the district court of jurisdiction to entertain Puri's habeas petition and fails to provide an adequate substitute through the court of appeals; and, in the alternative, (3) the district court should have transferred his habeas petition to this court pursuant to 28 U.S.C. § 1631. On August 8, 2005, Puri also filed a petition for review of the order of deportation and a motion for stay of deportation with this court, raising the same arguments as in his second habeas petition.[2] *See Puri v. Gonzales*, No. 05–74615 (9th Cir.2005).

The government moved to dismiss Puri's second habeas petition on the ground that the district court lacked jurisdiction pursuant to the then recently-enacted REAL ID

1. Puri pleaded guilty to one count of child molestation in 1990, and one count of indecent liberties in 1991.

2. On February 24, 2006, after full briefing, that petition for review was dismissed for lack of jurisdiction because it was not filed within the 30–day period required by INA § 242(b)(1), 8 U.S.C. § 1252(b)(1).

Act. The district court agreed and dismissed the petition with prejudice on December 12, 2005. It did not rule on Puri's transfer request under § 1631.

II. DISCUSSION

A. The REAL ID Act

[1] The REAL ID Act, Pub.L. No. 109–13, Div. B., 119 Stat. 231 (May 11, 2005), which became effective on May 11, 2005, eliminated district court habeas corpus jurisdiction over orders of removal and vested jurisdiction to review such orders exclusively in the courts of appeals. *See Martinez–Rosas v. Gonzales*, 424 F.3d 926, 928–29 (9th Cir.2005). As amended by § 106(a) of the REAL ID Act, § 1252(a)(5) now provides:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e).

8 U.S.C. § 1252(a)(5).

Thus, when Puri filed the instant habeas petition, on August 4, 2005—almost three months after the effective date of the REAL ID Act—the district court was without jurisdiction to entertain it. In fact, as explained above, after May 11, 2005, the only means for judicial review of Puri's removal order was a petition for review in this court. *See Medellin–Reyes v. Gonzales*, 435 F.3d 721, 723–24 (7th Cir.2006) ("Collateral proceedings filed on or after May 11, [2005,] however, will be dismissed outright; the window for belated judicial review has closed."). Accordingly, we conclude that the district court did not err in dismissing Puri's habeas petition for lack of jurisdiction.

B. The Suspension Clause

[2] Puri also brings a direct constitutional challenge to the REAL ID Act, arguing that it violates the Suspension Clause because it strips the district court of habeas corpus jurisdiction without providing an adequate substitute through the court of appeals. The district court adopted the magistrate judge's report and recommendation and concluded that it lacked jurisdiction over the Suspension Clause claim because Puri could "obtain constitutionally adequate review of his claims through his pending petition for review with the Ninth Circuit Court of Appeals." We read the REAL ID Act's jurisdiction-stripping provisions more narrowly than did the district court and conclude that it does not apply to Puri's Suspension Clause claim because that claim is not a direct challenge to an order of removal. Nonetheless, we agree with the district court's ultimate conclusion that this claim must fail because Congress has provided an adequate substitute for habeas proceedings.

"The scope of habeas review extends to both constitutional and statutory questions." *Magana–Pizano v. INS*, 200 F.3d 603, 609 (9th Cir.1999); *see also* 28 U.S.C. § 2241(c)(3). The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. The Supreme Court has held, however, that "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." *Swain v. Pressley*, 430 U.S.

372, 381, 97 S.Ct. 1224, 51 L.Ed.2d 411 (1977). The Court has also instructed that if a substitute remedy provides the same scope of review as a habeas remedy, it is adequate and effective. *Id.* at 381–82, 97 S.Ct. 1224; *INS v. St. Cyr*, 533 U.S. 289, 314 n. 38, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) ("Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals.").

Puri contends that § 106(a)(1)(B)(5) provides an inadequate substitute because a court of appeals is not allowed to consider new evidence, whereas a district court may order an evidentiary hearing. Specifically, Puri argues that 28 U.S.C. § 2243 allows an alien to proffer evidence at an evidentiary hearing, thus enabling the judge to make factual findings, while § 106(a)(1)(B)(5) restricts the court to "decide the petition only on the administrative record on which the order of removal is based." *See* 8 U.S.C. § 1252(b)(4)(A).

Here, Puri contends in his habeas petition that the BIA violated his due process rights by ignoring its own precedents and by failing to consider additional evidence regarding his rehabilitation.[3] We hold that the Suspension Clause is not violated by judicial review by this court of Puri's constitutional challenges to his removal order because the Suspension Clause does not demand an evidentiary hearing before an Article III court in lieu of judicial review of the administrative proceeding. The agency is the fact-finding body and this court's review of the administrative proceeding is an adequate substitute for district court habeas corpus jurisdiction. *See St. Cyr*, 533 U.S. at 314 n. 38, 121 S.Ct. 2271.

Moreover, as the First Circuit has held, where, as here, an underlying case presents only pure questions of law, review by a court of appeals provides an adequate substitute because it "encompasses at least the same review and the same relief [to a petitioner] as were available under prior habeas law." *Enwonwu v. Gonzales*, 438 F.3d 22, 33 (1st Cir.2006) (citing *St. Cyr*, 533 U.S. at 314 n. 38, 121 S.Ct. 2271).

C. Transfer under § 1631

[3] Finally, Puri argues that the district court erred by not acting on his alternative request that his habeas petition be transferred to this court "in the interest of justice," pursuant to 28 U.S.C. § 1631. In dismissing Puri's habeas petition, the district court did not address his alternative transfer request made under § 1631. Where a district court does not weigh whether it is in the interest of justice to transfer a petition, but instead simply dismisses the action for want of jurisdiction, we review *de novo* whether the petition should have been transferred. *See Kolek v. Engen*, 869 F.2d 1281, 1283–84 (9th Cir. 1989); *Harris v. McCauley (In re McCauley)*, 814 F.2d 1350, 1351–52 (9th Cir.1987).

[4] Section 1631 provides that, in a civil action, if there is a want of jurisdiction, "the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed."[4] 28 U.S.C. § 1631. An

3. We note that we need not decide the merits of Puri's underlying claims, but need only determine whether an adequate review of such claims would require additional fact-finding.

4. The statute provides in its entirety:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action

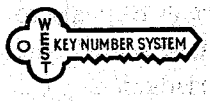
immigration case is "transferable" when the following three conditions are met: (1) the transferee court would have been able to exercise its jurisdiction on the date the action was misfiled; (2) the transferor court lacks jurisdiction; and (3) the transfer serves the interest of justice. *Chaves Baeta v. Sonchik*, 273 F.3d 1261, 1264 (9th Cir.2001); *Rodriguez–Roman v. INS*, 98 F.3d 416, 424 (9th Cir.1996). The only issue here is the third factor—whether the transfer would be "in the interest of justice."

We conclude that this case is not the type of case that merits a § 1631 transfer in the "interest of justice." Puri was aware of the proper procedure for review, as evidenced by the fact that he also filed a petition for review with this court. Thus, this case is unlike the usual case in which we have found a transfer to be in the interest of justice because the litigant was unaware of or confused about the proper forum in which to file his action. *See, e.g., Kolek*, 869 F.2d at 1284 (holding that transfer of improperly filed petition to court of appeals was "in the interests of justice" because petitioner's "errant filing was caused in part by his pro se status, lack of fluency in English, and inability to access legal research materials in prison"); *Paul v. INS*, 348 F.3d 43, 47 (2d Cir.2003) (concluding that transfer of petition to court of appeals was in the interest of justice because § 1631 was intended to aid litigants who were confused as to the proper forum for review and "there [was] no evidence in this case that [petitioner] filed with the district court in bad faith").

Here, within a few days of filing his habeas petition, Puri, as noted earlier, filed a petition for review in this court. In fact, the magistrate judge expressly noted in her report and recommendation that Puri had a "pending petition for review" in this court. That fact was reason enough not to grant a transfer of this action. It is true that that petition for review was subsequently dismissed. Thus, it appears that the real reason that Puri requests a § 1631 transfer of this action is so that he can circumvent our earlier order of dismissal. We do not believe, however, that a § 1631 transfer was intended to serve such a function. We thus conclude that the "interest of justice" would not be served by transferring Puri's petition. Further, because all of the considerations relevant to this determination are within our plain view, *see In re McCauley*, 814 F.2d at 1352 (declining to remand because "it appears from the record that all the considerations relevant to 'the interest of justice' are within our plain view"), we deny Puri's § 1631 transfer request.

III. CONCLUSION

For the foregoing reasons, the district court's dismissal of Puri's petition for a writ of habeas corpus and its implicit denial of his § 1631 transfer request are **AFFIRMED.**



or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.
28 U.S.C. § 1631.