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

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

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

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

Plaintiffs-Petitioners-Appellees/Cross-Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Respondents-Appellants/Cross-Appellees.

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

THE GUANTANAMO DETAINEES' SUPPLEMENTAL BRIEF ADDRESSING THE MILITARY COMMISSIONS ACT OF 2006

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CERTIFICATE AS TO PARTIES, AMICI, RULINGS, AND RELATED CASES

Petitioners do not have a list of the *amici* appearing on behalf of the Federal Parties in this Court, and the previous supplemental briefs of the Federal Parties did not contain such a list.

Otherwise, all parties and *amici* who previously appeared in the district court and in this Court are listed in the Opening Brief for the United States *et al* as well as the Guantanamo Detainees' Corrected Second Supplemental Brief Addressing the Effect of the Detainee Treatment Act of 2005 on this Court's Jurisdiction Over the Pending Appeals (March 10, 2006), except:

- Brief of *Amici Curiae* Retired Federal Jurists in Support of Petitioners' Supplemental Brief Regarding the Military Commissions Act of 2006.
- 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 Commission Act of 2006.

References to the rulings at issue appear in the Opening Brief for the United States *et al.* A statement indicating which of the cases on review were previously before this Court and the names and numbers of related cases currently pending in this Court or the district court appears in the Opening Brief for the United States *et al.*

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INTRODUCTION AND SUMMARY

On October 17, 2006, the President signed into law the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (the "MCA"). The government contends that the MCA strips this Court and the district court of jurisdiction over petitioners' pending habeas cases.[1] This Court, however, need not decide the profound constitutional questions that would arise if the government were correct because the MCA, by its terms, does not revoke jurisdiction over applications for habeas corpus that were pending in court when the statute was enacted.

As the government has pointed out,[2] the MCA distinguishes between two categories of cases: (1) "application[s] for a writ of habeas corpus" and (2) "other action[s]" that relate "to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of aliens determined by the United States to have been properly detained as enemy combatants. The MCA applies its jurisdiction-stripping provision only to pending cases in the latter category. Accordingly, the MCA does not affect the Court's jurisdiction to hear and decide the present habeas cases, all of which were pending when the MCA was enacted. The Court should promptly affirm Judge Green's denial of the government's motion to dismiss these cases and, at long last, allow the district court to decide "the merits of petitioners' claims" as mandated by the Supreme Court. *Rasul v. Bush*, 542 U.S. 466, 485 (2004).

A contrary reading of the MCA would render the statute unconstitutional. Congress may suspend the privilege of the writ of habeas corpus only in cases of "rebellion" or "invasion." U.S. Const. art. I, § 9, cl. 2. Congress is otherwise simply without power to do so. Congress may substitute another remedy for habeas but only if that substitute is "commensurate" in scope

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[1] *See* Letter from Counsel for Respondents to the Court, dated October 17, 2006, submitted pursuant to Fed. R. App. P. 28(j).

[2] *Id.*

with habeas and "is neither inadequate nor ineffective to test the legality of a person's detention." *Swain v. Pressley*, 430 U.S. 372, 381, 384 (1977).

In these circumstances of pure executive detention – where petitioners are not attacking a prior conviction pursuant to judicial process and have no prospect of a prompt trial – common law habeas required a searching judicial inquiry into the factual and legal bases for the detention.[3] If the government had conducted some prior process to justify the detentions, the court would not defer to that process but would first determine whether it was fair and adequate and "more than an empty shell."[4] The court would conduct its own inquiry into the legality of the detention; it would allow the petitioner to traverse the government's return and to present exculpatory evidence, and it would resolve disputed facts. It would not limit itself to reviewing only evidence presented by the government but would consider all the facts, including whether any of the evidence was obtained through torture or coercion. Following such an inquiry, a common law habeas court would order the petitioners' release if it found inadequate justification for the detention.

The substitute remedy for habeas allowed by the MCA – namely, review in this Court under the Detainee Treatment Act of 2005 ("DTA") of determinations by the Combatant Status Review Tribunals ("CSRTs") that petitioners have been properly detained as enemy combatants – does not come close to being the equivalent of this searching habeas inquiry. As construed by the government, the DTA limits this Court to determining whether the CSRTs followed their

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[3] *See* Guantanamo Detainees' Corrected Second Supplemental Brief Addressing the Effect of the Detainee Treatment Act of 2005 on this Court's Jurisdiction Over the Pending Appeals (March 10, 2006) ("Mar. 10, 2006 Br.") at 37-38; Supplemental Brief Amici Curiae of British and American Habeas Scholars in Support of Petitioners Addressing Section 1005 of the Detainee Treatment Act ("Br. of British and American Habeas Scholars") at 12.

[4] *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J. dissenting). Justice Holmes' opinion became the law of the land in *Moore v. Dempsey*, 261 U.S. 86, 92 (1923), where the Supreme Court emphasized that the independent judicial review that is the essence of habeas corpus does not "allow a Judge of the United States to escape the duty of examining the facts for himself."

own standards and procedures. The Court would be precluded from examining whether the procedures themselves were a sham. It would also be restricted to reviewing only evidence presented to the CSRTs by the government, and precluded from examining all the evidence, including exculpatory evidence presented by petitioners. The Court would have no authority to order a petitioner's release, even if it found that his detention was unjustified. Thus, the MCA clearly does not provide an adequate or effective substitute for habeas, and it therefore violates the Suspension Clause.

ARGUMENT

I. THE MCA DOES NOT STRIP JURISDICTION OVER PETITIONERS' PENDING HABEAS CASES.

Beginning with its plain text, and applying "[o]rdinary principles of statutory construction," the Supreme Court in *Hamdan* concluded that the DTA did not divest federal courts of jurisdiction over cases pending on the date of its enactment. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2765-69 (2006). The same analysis compels the conclusion that the MCA also does not, by its terms, divest federal courts of jurisdiction over pending habeas cases.

Section 7(a) of the MCA amends 28 U.S.C. § 2241 (as amended by the DTA) by adding a new subsection (e), which provides:

> (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.

MCA § 7(a) (emphasis added). Section 7(b) provides:

> 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.

MCA § 7(b) (emphasis added). Section 7(b) does not refer to habeas cases pending on the date of enactment. The bolded phrase is virtually identical to the phrase used in new subsection (e)(2), which encompasses all cases "other" than the cases – habeas cases – described in new subsection (e)(1). By its plain terms, therefore, § 7 does not strip courts of jurisdiction over pending habeas cases.

Section 7(b) also stands in stark contrast to section 3(a) of the MCA, adding 10 U.S.C. § 950j, where Congress explicitly refers to habeas corpus in purporting to eliminate jurisdiction over *pending* actions relating to the prosecution, trial, or judgment of a military commission:

> 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 enactment** of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter . . . .

MCA § 3(a), 10 U.S.C. § 950j(b) (emphasis added).[5] When Congress intended to strip habeas corpus jurisdiction in pending cases, it said so explicitly. Because section 7(b) contains no such explicit provision, it cannot be construed to apply to pending habeas cases.

The "[o]rdinary principles" of construction that the Supreme Court applied in *Hamdan* confirm this reading of MCA § 7. **First**, "[a] negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the

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[5] Petitioners do not concede that section 3(a) strips the courts of habeas jurisdiction in petitioners Hicks's and Khadr's actions relating to military commissions, and maintain that if so applied it would be unconstitutional.

same statute." *Hamdan*, 126 S. Ct. at 2765 (citations omitted). Section 3(a) states that its jurisdiction-stripping provision applies to habeas cases pending on the date of enactment. A "negative inference" may be drawn from the exclusion of similar language from section 7(b). Moreover, because § 7(b) uses the language of (e)(2) and not the language of (e)(1), a "negative inference" may be drawn that § 7(b) does not apply to pending habeas cases.

Second, § 7(b) can be read to apply to pending habeas cases only if habeas cases are included within the category of cases "which relate to any aspect of the detention, transfer, treatment, trial or conditions of detention." But if habeas cases are already included within that category, there would have been no reason for Congress to add a new subsection (e)(1) dealing separately with habeas cases. Such a reading of § 7(b) would render new subsection (e)(1) superfluous and would violate the principle that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (citation omitted). Subsection (e)(1) can have independent meaning only if § 7(b) does *not* encompass habeas cases; and if § 7(b) does not encompass habeas cases, then (e)(1) does not apply to *pending* habeas cases. *Cf. Hamdan,* 126 S.Ct. at 2769 (finding "nothing absurd" about DTA scheme in which pending habeas actions, but not other pending actions, are preserved).

Third, to read § 7 to apply to pending habeas cases would violate the presumption against retroactive application of statutes. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 272 (1994) (statutes "will not be construed to have retroactive effect unless their language requires this result") (citation omitted). As in *Hamdan*, the exception to that presumption for retroactive application of jurisdiction-stripping statutes does not apply here because application of (e)(1) to pending cases would deprive petitioners of substantive rights. *See Hamdan*, 126 S. Ct. at 2765.

"Such a statute, even though phrased in 'jurisdictional' terms, is as much subject to our presumption against retroactivity as any other." *Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939, 950 (1997).

Fourth, to construe § 7 to strip jurisdiction over pending habeas cases would violate "the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *INS v. St. Cyr,* 533 U.S. 289, 298 (2001). "Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous *statutory directives* to effect a repeal." *Id.* at 299 (emphasis added). *See Ex parte Yerger*, 75 U.S. 85, 102, 104 (1868) (the courts "are not at liberty to except from [habeas jurisdiction] any cases not plainly excepted by law" and may not read a statue repealing habeas jurisdiction "to have any further effect than that plainly apparent from its terms"). The MCA by its terms does not revoke jurisdiction over pending habeas actions, and this Court may not read language into the statute that Congress chose not to include.

Finally, to read § 7 to apply to pending habeas corpus cases would require this Court to decide whether the MCA violates the Suspension Clause. If at all possible, the Court should construe the statute to avoid such a substantial constitutional issue. *See St. Cyr*, 533 U.S. at 299-300.

II. IF READ TO STRIP THE COURTS OF JURISDICTION OVER PENDING HABEAS CASES, THE MCA VIOLATES THE SUSPENSION CLAUSE.

A. Petitioners' Right to Habeas Is Protected by the Suspension Clause.

The Supreme Court held in *Rasul* that these petitioners have the right to habeas corpus. *Rasul,* 542 U.S. at 466. Significantly, in addition to finding that they have that right under the statute, *Rasul* confirmed that they were entitled to the writ under the common law, and would have been entitled to the writ as of 1789 when the Constitution was adopted. *Id.* at 479-82.

Because "at an absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789,'" *St. Cyr*, 533 U.S. at 301,[6] petitioners' right to the writ as of 1789 is protected by the Suspension Clause.[7]

This Court clearly has the judicial power to invalidate a statute that violates the Suspension Clause. The Suspension Clause is a plain, direct, and explicit limit imposed by Article I of the Constitution on the power of Congress. It does not give particular individuals a "right." It provides, rather, that Congress may not suspend access to the writ of habeas corpus except in cases of "rebellion" or "invasion." If those circumstances do not exist, Congress cannot suspend the writ, and the courts cannot allow the suspension to stand.[8] *See United States v. Klein*, 80 U.S. 128, 147 (1872) (invalidating a statute that unconstitutionally stripped the Supreme Court of jurisdiction in violation of separation of powers); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("[A]n act of the legislature, repugnant to the constitution, is void").

B. Congress May Not Substitute Another Remedy for Habeas Unless the Substitute Remedy is Adequate and Effective to Test the Lawfulness of a Prisoner's Detention.

In *Swain v. Pressley*, 430 U.S. 372 (1977), the Supreme Court set forth the test under which a court is to determine whether a statute that substitutes another remedy for habeas violates the Suspension Clause. In *Swain* the Court rejected a Suspension Clause challenge because the statute in question expressly authorized resort to habeas if the substitute remedy

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[6] The Suspension Clause may protect the substantive scope of the writ as it exists today, not merely as it existed in 1789. *See Felker v. Turpin*, 518 U.S. 651, 663-64 (1996).

[7] *See* Mar. 10, 2006 Br. at 30-33; Br. of British and American Habeas at 3-6 (demonstrating that, historically, habeas was available anywhere the Crown exercised power and control, extending to both aliens and citizens alike in those territories).

[8] As Alexander Hamilton explained: "[A] limited Constitution ...[is] one which contains certain specified exceptions to the Legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." THE FEDERALIST NO. 78, at 426 (Alexander Hamilton).

proved inadequate or ineffective to test the legality of the prisoner's detention, and because the Court found that the substitute was "commensurate" in scope with habeas and was "neither inadequate nor ineffective to test the legality" of the detention. *Id.* at 381, 384.

The statute in *Swain*, which is modeled on 28 U.S.C. § 2255, provides a collateral remedy for prisoners in custody under sentence of the Superior Court of the District of Columbia. The statute allows such prisoners to move in the Superior Court for release on the ground that the sentence is unconstitutional or unlawful. Unless it appears that the prisoner is entitled to *no* relief, the Superior Court is required to serve notice of the motion on the government, grant a prompt hearing, determine the issues, make findings of fact and conclusions of law, and, if the prisoner's claims are sustained, vacate the sentence and order the prisoner's release or other appropriate relief. The D.C. statute provides that no court may entertain an application for habeas by a prisoner who could have moved for relief under the law but did not do so, or whose motion for relief under the D.C. statute was denied.

The Supreme Court cited three factors in upholding the statute against Suspension Clause challenge. *First*, the Court cited the statute's "savings clause" allowing a federal district court to entertain an application for habeas if it appears that the statute's remedy is "inadequate or ineffective" to test the legality of the prisoner's detention. 430 U.S. at 381. The Court said this clause "avoids any serious question about the constitutionality of the statute." *Id. Second*, as construed by the Court, the statute's remedy is the same as that provided to federal prisoners by 28 U.S.C. § 2255, which contains a similar "savings clause." *Id. Third*, the because the Court had previously held that the remedy provided by § 2255 is the "exact equivalent of the pre-existing habeas corpus remedy," it found that the remedy provided by the D.C. statute "is also

commensurate with habeas corpus in all respects," except that it is administered by non-Article III judges, a factor the Court did not regard as consequential. *Id.* at 381-83.

The Supreme Court said in *Swain* that it had "no occasion to consider what kind of showing would be required to demonstrate that the . . . remedy [provided by the D.C. statute] is inadequate or ineffective in a particular case." 430 U.S. at 383 n.20. This Court and other courts of appeals, however, have held that §2255 is inadequate and ineffective to test the legality of a prisoner's detention when, for example, its prohibition against successive motions would bar claims of actual innocence or claims newly permitted under an intervening Supreme Court decision.[9] On the basis of the "savings clause" of §2255 – which is similar to the "savings clause" of the D.C. statute – courts have allowed prisoners to file applications for habeas corpus under 28 U.S.C. § 2241 to make such claims.[10] Without the "savings clause," §2255 would have been vulnerable to attack under the Suspension Clause. *See United States v. Hayman*, 342 U.S. 205, 223 (1952) ("In a case where the Section 2255 procedure is shown to be 'inadequate or ineffective,' the Section provides that the habeas corpus remedy shall remain open to afford the necessary hearing. Under such circumstances, we do not reach the constitutional question"); *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998) (Posner, J.).

The MCA does not have a "savings clause" allowing resort to habeas if the remedy provided by the DTA is inadequate or ineffective to test the legality of petitioners' detentions. Under *Swain* and its progeny, the absence of such a "savings clause" in itself may render the MCA unconstitutional under the Suspension Clause. But even if it does not, the MCA cannot

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[9] *See In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002); *Reyes-Requena v. United States*, 243 F.3d 893, 900-06 (5th Cir. 2001); *In re Jones*, 226 F.3d 328, 333-34 (4th Cir. 2000); *Wofford v. Scott*, 177 F.3d 1236, 1244 & n.3 (11th Cir. 1999); *United States v. Barrett*, 178 F.3d 34, 49-53 (1st Cir. 1999); *In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998); *Triestman v. United States*, 124 F.2d 361, 377 (2d Cir. 1997); *In re Dorsainvil*, 119 F.3d 245, 248-52 (3rd Cir. 1997).

[10] *Id.*

survive Suspension Clause challenge because, as discussed below, the review it provides is not commensurate with habeas. *Swain*, 430 U.S. at 382.

C. The Review Allowed Under the MCA is Not Commensurate With Habeas

The government previously argued that the judicial review provided by the DTA, which is the only review allowed to petitioners by the MCA, is an adequate and effective substitute for habeas. *See* Supp'l Br. of Fed. Parties On Effect Of DTA (Feb. 17, 2006), at 50-53.[11] However, in a recent filing in *Bismullah v. Rumsfeld*, D.C. Cir. No. 06-1197 – in which a Guantanamo prisoner seeks review in this Court under the DTA – the government set forth its view of the scope of the review this Court may conduct under the MCA and the DTA. *See* Response in Opp. to Mot. to Compel (Aug. 31, 2006) ("*Bismullah* Opp."). The government's submission makes crystal clear that review by this Court under the DTA plainly is not commensurate with the searching inquiry demanded by common law habeas.

First, according to the government, the DTA does not permit this Court to engage in a factual inquiry into the bases for petitioners' detentions or to engage in any fact-finding at all. *Bismullah* Opp. at 15. Rather, according to the government, this Court is limited to reviewing the CSRT "record," *id.* at 14, which consists exclusively of the evidence that the government itself chose to put before the CSRT. The government says that a CSRT record "is entitled to the strongest sort of presumption of regularity." *Id.* at 19. In the government's view, the Court may examine the CSRT record only to determine "whether the CSRT followed appropriate procedures." *Id.* at 12-13. And although DTA § 1005(e)(2)(C)(i) instructs this Court to determine whether a CSRT's conclusion that a prisoner is "properly detained" as an enemy

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[11] As petitioners have previously pointed out, the CSRTs to which they were subject were not conducted in accordance with the new safeguards the DTA requires. *See* Mar. 10, 2006 Br. at 16-22, 38-41. Petitioners take no position on whether DTA review would be an inadequate substitute for habeas, and therefore violate the Constitution, in future cases.

combatant is consistent with "the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence," the government claims "this provision limits review to the question of whether the CSRT followed appropriate procedures and rendered a decision supported by *sufficient* evidence." *Id.* at 12 (emphasis added). According to the government, "sufficient" evidence means, "at most," the same thing as "substantial" evidence, which is "simply such relevant evidence as a reasonable person might accept as proof of a conclusion." *Id.* at 13.

Second, the government contends that, under the DTA, petitioners may not introduce and this Court may not consider extrinsic evidence to controvert the government's evidence, including evidence of "actual innocence" or evidence that statements used against petitioners were obtained through torture. *Bismullah* Opp. at 16-17; Transcript of March 22, 2006 Oral Argument ("Mar. 22 Tr.") at 53.[12] According to the government, "the DTA does not authorize the submission of new evidence to this Court." *Bismullah* Opp. at 16. The government goes so far as to say that petitioners may not even introduce evidence showing that the military official (the "recorder") responsible for compiling the "record" considered by the CSRT failed to discharge his or her duties consistent with CSRT procedures. *Id.* at 17-20.

Third, the government maintains that, although the factual bases for petitioners' detentions may be classified, neither petitioners nor their counsel are entitled under the DTA to have access to such relevant but classified information. *Bismullah* Opp. at 7-10. Indeed, the government maintains that neither petitioners nor their counsel are entitled to *any* evidence

[12] The Court directly asked government counsel during the March 22 argument whether petitioner, or the moving party, would be able to produce factual evidence in a review under the DTA, to which the government responded "No." *Id.*

relevant to petitioners' detentions that is outside the "record" compiled by the government for petitioners' CSRTs. *Id.* at 10-12, 17-20.

Fourth, although DTA § 1005(e)(2)(C)(ii) authorizes this Court to consider "whether the use of [the CSRT] standards and procedures to make the determination [of enemy combatant status] is consistent with the Constitution and laws of the United States" – at least "to the extent the Constitution and laws of the United States are applicable" – the government continues to argue that there is not a single constitutional protection, including fundamental due process, that petitioners may invoke. *Bismullah* Opp. at 6 n.5 & 7. Thus, under the government's interpretation, § 1005(e)(2)(C)(ii) of the DTA is meaningless.

Finally, the government has made clear its view that the DTA gives the Court no authority to order petitioners' release if the Court determines that the CSRT procedures, and thus the determinations pursuant to those procedures, were unlawful or unfair.[13] Rather, according to the government, the only remedy the Court may order in that event is a new CSRT.[14]

D. In Cases of Executive Detention, Common Law Habeas Demands a Far More Searching and Extensive Review Than the Limited DTA Review Espoused by the Government.

Petitioners, facing the fifth anniversary of their incarceration at Guantanamo, are imprisoned not under sentence of any court, but by the sheer might of the Executive. In these circumstances of pure executive detention, habeas at common law would require a searching judicial inquiry into the factual and legal basis for the detention, including the opportunity for the petitioner to traverse the government's return, to present exculpatory evidence, and to obtain a determination by the court of disputed issues of fact.

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[13] Mar. 22 Tr. at 7.

[14] *Id.*

The common law drew a distinction between habeas petitions challenging a prior conviction pursuant to judicial process and those challenging executive detentions. Courts prohibited a petitioner from introducing extrinsic evidence and limited their review of the underlying facts in cases where the petitioner was challenging a criminal conviction by a duly constituted court of "competent jurisdiction."[15] That was never the case, however, with respect to executive detentions. As the Supreme Court has emphasized: "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest." *St. Cyr,* 533 U.S. at 301.

In such cases of non-judicial detention, where there had been no safeguard of trial by jury and there was no risk of offending a court of parallel competence and jurisdiction, the common law required a searching judicial examination into the bases for detention.[16] The government

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[15] *See, e.g., Ex parte Watkins,* 28 U.S. (3 Pet.) 193, 207-09 (1830); *Carus Wilson's Case*, 7 Q.B. 984, 115 Engl. Rep. 759 (1845) ("our form of writ does not apply where a party is in execution under the judgment of a competent court"); *Brenan's Case*, 116 Eng. Rep. 188, 192 (1847) (habeas court will not review judgment of "court having competent jurisdiction to try and punish the offense . . . We are bound to assume prima facie, that the unreversed sentence of a Court of competent jurisdiction is correct, otherwise we should, in effect be constituting ourselves a Court of appeal without power to reverse the judgment"); *Ex parte Toney*, 11 Mo. 661, 661-62 (1842) ("this court nor no other court nor officer can investigate the legality of a judgment of a court of competent jurisdiction by writ of habeas corpus. . . . The party must resort to his writ of error or other direct remedy to reverse or set aside the judgment, for in all collateral proceedings it will be held to be conclusive"). *See generally* R.J. SHARPE, THE LAW OF HABEAS CORPUS 51 (1989) ("trial by common law was thought to provide the subject with adequate protection, and the possibility of allowing a convicted person some method of challenging the correctness of a conviction by habeas corpus was viewed with considerable misgiving").

[16] This distinction is reflected in *Bushell's Case*, which involved a habeas petition before the Court of Common Pleas brought by a juror imprisoned for contempt pursuant to a quasi-judicial determination of the London Court of Sessions, based on his alleged refusal to convict a criminal defendant against the asserted weight of the evidence. *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670). The habeas court, per Chief Justice Vaughan, undertook a very broad scope of factual and legal review of the quality of the evidence, concluding that the government's return itself failed to specify the evidence demonstrating the alleged contempt "whereby the [court] could judge, whether it were a cause for commitment or not." *Id.* at 1008. Chief Justice Vaughan recognized that review had to be more searching than in a petition challenging a conviction for "treason or felony," where a general return stating that there had been a valid conviction for those offenses by a court of competent jurisdiction would have been sufficient to end habeas review. "The cases are not alike," the court explained,

was required to file a return specifying its asserted legal and factual justifications for the detention. The court, however, would not simply accept the government's return and consider only the reasons and evidence presented by the government.[17] Rather, the petitioner was entitled to controvert the return and to present evidence, and the court would review all the evidence and order petitioner's release if it concluded that the evidence as a whole was insufficient to justify the detention.

In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the Supreme Court, and the district court before it, reviewed the habeas petition of a citizen of Indiana and concluded that a military commission had no legal authority to try him. In answering this broad legal question, the court evaluated the evidence, including extrinsic "facts stated in Milligan's petition, and the exhibits [he] filed" in support of it, in order to decide the ultimate questions of lawful authority.

In *Goldswain's Case*, 96 Eng. Rep. 711, 712 (C.P. 1778), the court rejected the claim that "either the Court or the party are concluded by the [government's] return of a habeas corpus" petition, and affirmed that a petitioner may present evidence and "may plead to it any special matter necessary to regain his liberty." Goldswain submitted evidence controverting the return and explaining the circumstances surrounding his impressment as a sailor. The court agreed that the petitioner had raised facts to which the court "could not willfully shut its eyes," and on consideration of those facts, ordered his release. Similarly, in *Good's Case*, 96 Eng. Rep. 137 (K.B. 1760), the court examined and accepted petitioner's affidavit testimony that he was a ship-

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because in the case of a criminal conviction a prisoner would have had an "indictment and trial" which would reveal the particulars justifying the commitment, while in the case at hand there was no full factual and legal record established by jury trial and the prisoner was subject to detention indefinitely without trial. *Id.* at 1010.

[17] *See* Br. of British and American Habeas Scholars at 8 ("Common law courts did not simply accept the government's return to a prisoner's habeas petition; instead, they routinely probed the return and examined additional evidence submitted by both sides . . .").

carpenter and thus entitled to an exemption from service to the Admiralty, and ordered him released on that basis.

In *State v. Joseph Clark*, 2 Del. Cas. 578 (Del. Chancery 1820), the court discharged Jacob Calloway from his obligation of enlistment. It did so after reviewing an affidavit he submitted in contravention of the government's return, which stated that he had been intoxicated and under 21 when he enlisted, and after hearing live testimony from Calloway's father stating that he never consented to his son's enlistment.[18]

Habeas review, including the opportunity to present evidence, was also available at common law to allow aliens detained during wartime to challenge whether they were properly detained by the executive as enemy aliens. *See, e.g., Lockington's Case,* Bright (N.P. 269, 298-99) (Pa. 1813); *Case of the Three Spanish Sailors,* 96 Eng. Rep. 775, 776 (C.P. 1779); *R. v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759).

Moreover, the courts' thorough review of the evidence was not restricted only to cases of executive detention.[19] The courts regularly went beyond the government's return to examine

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[18] *See also Commonwealth v. Cushing*, 11 Mass. 67 (1814) (successfully challenging restraint of liberty imposed by military enlistment contract); *Matter of Carleton*, 7 Cow. 471 (N.Y. Sup. Ct. 1827) (same); *Commonwealth v. Gamble*, 11 S. & R. 93 (Pa. 1824) (same); *Mann v. Parke,* 57 Va. 443 (1864) (same). *See also* ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 27-28 & nn. 55-56 (2001) (discussing a number of similar evidentiary hearings held by federal district courts).

[19] Common law courts also admitted and considered extrinsic evidence in cases where the petitioner's liberty was restrained by a third party, often conducting in-court factual inquiries on their own initiative. For example, in *R. v. Turlington*, 97 Eng. Rep. 741 (K.B. 1761), the court discharged a woman from the custody of an asylum after examining doctors' affidavits and then conducting its own examination of the petitioner's mental condition. *See also Matter of Oakes*, 8 Monthly L. Rep. 122 (Sup. Jud. Ct. Mass. 1845) (court denied a habeas petition brought by a "lunatic" seeking release from an insane asylum after conducting a two-day evidentiary hearing which convinced the court that the restraint of her liberty was proper as a matter of law); *King v. Lee*, 83 Eng. Rep. 482 (K.B. 1676) (conducting factual hearing on petitioner's claim that she should not be subject to her husband's custody on the grounds of "ill usage, imprisonment and danger of [the wife's] life"). Habeas was also used as a means to review claims of unlawful enslavement. The writ would be issued and a full factual hearing held, and the court would then either order the petitioner discharged as a free man or remanded to his custodian. *See United States ex rel. Wheeler v. Williamson,* 28 F. Cas. 682, 685 (E.D. Pa. 1855) (No. 16, 725) (finding after hearing that return to writ, which denied custody over claimed slaves, was

extrinsic evidence even in cases where petitioners were detained pending a forthcoming trial, normally pursuant to orders by magistrates or justices of the peace.[20]

It is also clear that, if the Executive had undertaken some prior process of its own to justify the detention, a habeas court would not be bound by that process, or restricted simply to reviewing whether the Executive had abided by its own rules in conducting that process. Indeed, the Habeas Corpus Act of 1640 was passed by Parliament largely to prevent judicial deference to such internal processes employed by the King and his Proxy Council – including the infamous Star Chamber – and to require independent judicial review of the bases for the detention so that the court can "examine and determine whether the cause of commitment . . . be just and legal or not." 16 Car. 1 (1640). *See* R.J. SHARPE, THE LAW OF HABEAS CORPUS 7-16 (2d ed. 1989).

In *Bushell's Case,* the court emphasized, in an opinion by Chief Justice Vaughan, that it was a habeas court's obligation to look behind the proffered conclusion even of the London Court of Sessions and to evaluate the underlying evidence and the legal rationale itself: "[Our] judgment ought to be grounded upon our own inferences and understandings, and not upon

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"evasive, if not false"); *Arabas v. Ivers*, 1 Conn. 92 (1784); *State v. Raborg*, 5 N.J.L. 642 (1819); *Commonwealth v. Holloway*, 6 Binn. 213 (Pa. 1814); *see also Sommersett's Case*, 20 Howell's State Trials 1 (K.B. 1772) (Mansfield, C.J.).

[20] *See, e.g., Ex parte Bollman,* 8 U.S. (4 Cranch) 75, 125 (1807) (Supreme Court "fully examined and attentively considered" the evidence contained in written depositions, concluded that no crime of treason had been committed, and ordered petitioners released); *United States v. Hamilton,* 3 U.S. 17 (1795) (where prisoner was admitted to bail after court considered "affidavits of several of the most respected inhabitants of the western countries"); *Ex parte Bennett,* 3 F. Cas. 204 (C.C.D.D.C. 1825) (No. 1,311) (examining anew at habeas corpus hearing witnesses who had appeared before committing magistrate); *United States v. Johns,* 4 Dall. 412, 413 (Cir. Ct. 1806) (taking oral testimony to evaluate habeas petition alleging unlawful pre-trial detention); *R. v. Greenwood,* 93 Eng. Rep. 1086 (K.B. 1739) (accepting and considering affidavits of eight "credible persons" introduced after indictment but before trial of a man accused of highway robbery); *Barney's Case,* 87 Eng. Rep. 683 (K.B. 1701) (bailing woman indicted for killing her husband after allowing her to introduce affidavits of fact showing that it was a malicious prosecution); *Rex v. Dalton,* 93 Eng. Rep. 936 (K.B. 1731); *Lord Mohun's Case,* 91 Eng. Rep. 96 (1692) (bailing prisoners after examining deposition testimony).

theirs." 124 Eng. Rep. at 1007.[21] That was essentially the point famously made by Justice Holmes:

> [H]abeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from outside, not in subordination to the [prior] proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell.[22]

In addition, at any common law habeas hearing, a petitioner would be notified of the accusations against him - not just those the government decided to reveal - and would have the opportunity to determine whether any of those accusations were obtained through torture or coercion. There is no doubt under the common law that any coerced statements would have been excluded as inherently unreliable. *A. v. Secretary of State,* [2005] UKHL 71, ¶ 11, ¶ 51. (An appeal taken from Eng.) ("[T]he common law has regarded torture and its fruits with abhorrence for over 500 years").[23]

Finally, it is beyond dispute that habeas review, both at common law and under modern practice, contemplates but one remedy should the court determine that the detention is unlawful: release. As this Court recognized at oral argument, release is "one of the two essential elements with habeas corpus."[24] Any alternate process that does not contemplate release falls far short of the common law requirements.

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[21] *See also R. v. Whistler,* K.B. 215 (1702) (Holt, C.J.) (justifying searching review by King's Bench of prior summary judicial proceedings where "a penalty is inflicted, and a different manner of trial from magna carta instituted, and the party offending, instead of being openly tried by his neighbors in a court of justice, shall be convicted by a single justice of the peace in a private chamber").

[22] *Frank v. Mangum,* 237 U.S at 346. *See Moore v. Dempsey*, 261 U.S. at 92 (habeas corpus does not "allow a Judge of the United States to escape the duty of examining the facts for himself").

[23] By contrast, according to the government, the coercive interrogation techniques it employed on Mohammed al Qahtani at Guantanamo caused him to implicate not only himself, but 30 other detainees at Guantanamo as well. Under the government's CSRT procedures, none of those men would be allowed to know the identity of their accuser, or that Mr. al Qahtani made those accusations under coercion. *See* Mar. 10, 2006 Br. at 39-40.

[24] Mar. 22 Tr. at 5 ("the two essential elements with habeas corpus are number one, a judicial determination of the legality of executive detention. And number two, if upon a determination that the

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Accordingly, it is plain that at common law, particularly in cases of executive detention such as these, courts undertook a searching factual and legal review into the causes of the detention, ordering release where detention was unjustified. To the extent the government had conducted some prior process to justify the detention, the courts could not be restricted to determining only whether the government had followed its own rules, but would have had the duty to determine whether the rules were fair and adequate, and to review the underlying facts themselves to determine whether there was a reasonable basis for detention. In doing so, the courts did not restrict themselves to the return submitted by the government, but considered all the evidence, including extrinsic evidence submitted by the petitioner.[25] They were not and could not be precluded from inquiring into whether any of the evidence was obtained through torture and coercion. Because the DTA, at least as construed by the government, fails to provide this kind of searching inquiry commensurate with the habeas review available at common law, it violates the Suspension Clause.

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individual is being held illegally, to order the individual released"). *See also Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody"); 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765) 132-133. Once a habeas court concluded that an executive detention was without sufficient cause, it would order release, not remand to the executive to try again. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 576 (2004) (Scalia, J., dissenting) (explaining that at common law, "the role of habeas corpus is to determine the legality of the executive detention, not to supply the omitted process necessary to make it legal. . . . It is not the habeas court's function to make illegal detention legal by supplying a process that the government could have provided but chose not to").

[25] In a famous instance in English history, following the temporary suspension of the writ in 1689 in response to threats of rebellion, the English courts "held the applicable law up to every prisoner and asked whether law or fear had been the reason for imprisonment," and considered the "facts as well as law in habeas hearings, going well beyond the simple matter contained in the official return to the writ" and conducting a "searching inquiry." Paul Halliday, *Suspending and Using Habeas Corpus: The View from 1689*, Jurist Legal News & Research, at http://jurist.law.pitt.edu/forumy/2006/10/suspending-and-using-habeas-corpus.php. The English courts' commitment to a full and fair inquiry went beyond policy or rhetoric; of the nearly three hundred persons detained during the crisis, the courts ordered 82% released. *Id.*

E. As Congress Provided, the Court Must, at a Minimum, Examine the Fairness of the CSRT Procedures Under the Due Process Clause.

During the second oral argument on March 22, 2006, the Court intimated that it might construe the DTA to provide a remedy equivalent to habeas and, therefore, avoid a violation of the Suspension Clause.[26] It is not evident to petitioners how that could be done, particularly in light of the government's construction of the DTA. As petitioners demonstrated above, it is absolutely clear, as a starting point, that no review can be commensurate with habeas that restricts the Court to considering whether the CSRTs followed their own procedures. The Court itself must determine whether the procedures were a sham.

The DTA does, in section 1005(e)(2)(C)(ii), authorize this Court to measure the fairness of the CSRTs against the standard of the Due Process Clause. That section authorizes the Court to consider "whether the use of [the CSRT] standards and procedures to make the determination [of enemy combatant status] is consistent with the Constitution and laws of the United States," at least "to the extent the Constitution and laws of the United States are applicable." In enacting this section, Congress expressed its apparent concern with the validity of those CSRT standards and procedures, although it recognized that the courts are the final arbiters of the application of the Constitution.

The Court should exercise its authority under section 1005(e)(2)(C)(ii) to examine the fairness of the CSRT procedures under the Due Process Clause, and it should affirm Judge Green's holding that those procedures violated the detainee petitioners' due process rights under the Fifth Amendment. In that event, the government's argument that the DTA and MCA somehow oust the federal courts of jurisdiction over the pending habeas cases would necessarily fail because there would be no CSRT status determinations left for this Court to review under

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[26] Mar. 22 Tr. at 5.

section 1005(e)(2)(C)(i) of the DTA. The DTA and MCA could not be said, in these circumstances, to provide any substitute for habeas at all, much less the adequate and effective substitute required by *Swain* under the Suspension Clause. Of course, independent of the scope of the common law writ, if this Court holds that petitioners are entitled to due process protections under the Fifth Amendment,[27] the government's underlying motion to dismiss for failure to state a claim necessarily would fail as well.

III. ELIMINATION OF HABEAS CHALLENGES TO PETITIONERS' ALLEGED STATUS AS ENEMY COMBATANTS DEPRIVES THEM OF A CRITICAL JURISDICTIONAL CHALLENGE TO MILITARY COMMISSIONS.

Under the MCA, the CSRT findings do more than subject petitioners to indefinite detention. The Act specifically provides that a CSRT finding "that a person is an unlawful enemy combatant is dispositive for the purposes of jurisdiction for trial by military commission under this chapter." MCA §3(a)(1) (adding 10 U.S.C. § 948d(c)). Thus, although the MCA does not require that detainees be charged and subjected to trial by military commission, and in fact most detainees have not been charged and will not be charged,[28] it potentially subjects all detainees who have been through a CSRT to criminal convictions and sentences, including the death penalty. In the case of the detainees that have been charged, including two of these

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[27] As petitioners have consistently argued, and as Judge Green expressly held, these petitioners – held in U.S. custody within the territorial jurisdiction of the United States – are entitled to fundamental constitutional protections of due process. *See In re Guantanamo Detainee Cases,* 355 F. Supp. 2d 443, 464 (D.D.C. 2005); Br. for the Guantanamo Detainees (May 27, 2005) at 22-28; Reply Br. for the Guantanamo Detainees (June 28, 2005) at 5-6.

[28] The government has recently stated that, it expects only, only 60 to 80 of the indefinitely detained prisoners ever to be tried by military commission. See Craig Whitlock, U.S. Faces Obstacles to Freeing Detainees, Wash. Post at A1 (Oct. 17, 2006) (reporting statement of John B. Bellinger III, Legal Adviser, U.S. Department of State). To date, only ten of the remaining 435 persons in detention have been charged.

petitioners – Hicks and Khadr[29] – the MCA presents immediate and potentially irremediable collateral consequences.

Under the MCA, the military commission itself is not permitted to consider whether it lacks jurisdiction over the detainee on the basis that the unlawful enemy combatant decision was erroneous. Even assuming that petitioners may challenge this aspect of the Act on review of a conviction by a military commission, that remedy would be far too little and too late. As this Court and the Supreme Court have made clear, petitioners have a right to challenge—in a fair proceeding—the jurisdiction of the military tribunal *before* trial. This Court explained in its decision in *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), that an essential aspect of habeas corpus is the right of a civilian to challenge the military's basis for exercise of penal jurisdiction over him. The Court noted that historically, the writ of habeas corpus has been used to litigate jurisdictional challenges to military tribunals before being subject to trial by those tribunals. *See id.* at 36 ("*Ex Parte Quirin* . . . provides a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions"). The Supreme Court agreed. *Hamdan*, 126 S. Ct. at 2772 (2006). This Court also acknowledged in *Hamdan* that in order to be meaningful, such review must take place before trial. 415 F.3d at 36 ("[S]etting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction"). Accordingly, in *Hamdan*, this Court reached the merits of Hamdan's jurisdictional challenge to his military commission, an approach that was ultimately validated by the Supreme Court. And

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[29] The government has never moved to withdraw or dismiss the charges against Hicks or Khadr, or the Presidential "reason to believe" determination issued pursuant to the President's Military Order (PMO) of November 13, 2001. Indeed, Petitioners' charges remain posted on the Department of Defense (DoD) Military Commissions website at http://www.defenselink.mil/news/commissions.html. Lastly, the DoD apparatus for conducting military commissions (including the Offices of the Appointing Authority, Chief Prosecutor, and Chief Defense Counsel) has remained in place notwithstanding the Supreme Court's decision in *Hamdan*.

in the case of David Hicks, the District Court recognized the importance of a pre-commission habeas challenge. *Hicks v. Bush*, 397 F. Supp. 2d 36, 41 (D.D.C. 2005) ("An injunction in this case is necessary in order for this Court to maintain its jurisdiction over Petitioner's claim that a military commission lacks jurisdiction to try him, a claim which Petitioner is *entitled to have adjudicated by this Court prior to trial* before a military commission" (emphasis added)); *id.* (noting "established right to pre-commission review of jurisdictional issues"); *id.* at 42 (noting the irreparable injury caused by being "tried by a tribunal without any authority to adjudicate the charges against him in the first place, potentially subjecting him to a second trial before a different tribunal").

Thus, if the MCA were valid, it would strip two of these petitioners of the right to pursue challenges that are now properly being asserted in their pending habeas petitions, and subject all of these petitioners to the threat of designation for trial by military commission, and therefore possible life imprisonment or death, without any opportunity to challenge that designation.

IV. THE MCA DOES NOT PRECLUDE HABEAS RELIEF FOR PETITIONERS' CLAIMS UNDER THE GENEVA CONVENTIONS.

Section 5(a) of the MCA purports to preclude individuals from seeking judicial enforcement of rights guaranteed by the Geneva Conventions:

> (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.

This provision does not extinguish petitioners' claims under the Geneva Conventions or its protocols. First, the provision does not by its terms apply retroactively. It also raises a serious Suspension Clause issue to the extent that it applies to habeas. Second, MCA § 5(a)

unconstitutionally bars the assertion of otherwise valid habeas claims. It does not, however, bar the assertion of claims under any other source of law.[30]

A. Section 5(a) Does Not Apply To Pending Claims.

The provision of the MCA prohibiting invocation of the Geneva Conventions possesses no indicia of retroactive intent and thus cannot be given retroactive effect. On its face, MCA § 5(a) does not purport to apply to pending actions, and the presumption against retroactive application applies. *See Landgraf*, 511 U.S. at 272.

B. Section 5(a) Unconstitutionally Bars The Assertion Of Otherwise Valid Habeas Claims.

Section 5 of the MCA unconstitutionally bars habeas review of otherwise valid non-constitutional claims. Congress may not, without raising serious constitutional questions, bar habeas review of Geneva Conventions-based claims that would otherwise support habeas relief unless Congress abrogates or supersedes the Conventions so as to deprive them of their status as U.S. law.

The Geneva Conventions have the status of supreme federal law as a "treat[y] of the United States" within the meaning of Article VI of the Constitution and 28 U.S.C. § 2241(c)(3), and therefore provide a substantive source of rights that may be vindicated on habeas. Although Congress has the constitutional authority to abrogate or supersede treaties by later statute, the courts have refused to construe statutes as doing so absent a clear statement from Congress of its

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[30] The arguments applicable to Section 5(a) are also applicable to subsection (g) of new section 948, title 10 (added by MCA § 3), which provides:

> (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.

intent to abrogate or supersede. *Cook v. United States*, 288 U.S. 102, 120 (1933). *See also Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). There is no such clear statement in the MCA. Indeed, the statutory language indicates Congress's intention to implement U.S. obligations under the Conventions. MCA § 6 ("Implementation of Treaty Obligations").

Given the lack of a clear Congressional abrogation, the MCA does not alter the status of the Geneva Conventions in U.S. law, and petitioners may seek habeas relief for any treaty violations that result in a "miscarriage of justice" or constitute a departure from the "rudimentary demands of fair procedures." *Hill v. United States*, 368 U.S. 424, 428 (1962) (defining the appropriate scope of habeas review for non-constitutional claims). Any other reading would raise serious "due process," Suspension Clause, and Article III problems. *See, e.g.*, *Henderson v. INS*, 157 F.3d 106, 119-22 (2d Cir. 1998); *Saint Fort v. Ashcroft*, 329 F.3d 191, 201-02 (1st Cir. 2002).[31]

MCA § 5(a), in any case, does not preclude the invocation of the rules embodied in the Conventions where the "source of right" is established by other laws. In *Hamdan*, the Supreme Court held that habeas relief was available under Common Article 3 of the Geneva Conventions, as incorporated by Article 21 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 821, *irrespective* of whether the Conventions constitute an "independent source of law . . . furnishing

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[31] In *Hamdan*, the Supreme Court characterized as not "persuasive" this Court's holding that the Geneva Conventions are not judicially enforceable, 126 S. Ct. at 2793, and called into question, *id.* at 2794 n.58, this Court's statement in its previous opinion that "treaty-based individual rights" could not be enforced by habeas. *See Hamdan*, 415 F.3d at 40. The rights guaranteed by the Geneva Conventions are rights of individuals and *exist* to be enforced by individuals. *See Hamdan*, 126 S. Ct. at 2754 n.57 ("the 1949 Geneva Conventions were written 'first and foremost to protect individuals, and not to serve State interests'" (citing 4 Int'l Comm. of Red Cross, *Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 21 (1958)).

petitioner with any enforceable right," because the relevant statute conditions congressional authorization on compliance with the laws of war, including the Conventions. *See Hamdan*, 126 S. Ct. at 2794. Thus, petitioners may use the habeas vehicle to invoke the protections of the Conventions, notwithstanding Section 5(a), under the "consistency with U.S. law" review preserved under the Detainee Treatment Act. DTA § 1005(e)(2)–(3); *see also Brownell v. We Shung*, 352 U.S. 180, 182 n. 1 (1956).[32]

[32] Similarly, Petitioners may enforce rights guaranteed by the Geneva Conventions to the extent that those same rights are independently guaranteed by any other source of law – such as the Alien Tort Statute, 28 U.S.C. § 1350, the law of nations, and customary international law. *See Rasul*, 542 U.S. at 484-85; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732-33 (2004); see also *United States v. Paquete Habana*, 175 U.S. 677, 711 (1900).

CONCLUSION

For these reasons and the reasons given in petitioners' previous briefs, the Court should affirm Judge Green's denial in part of the government's motion to dismiss and reverse Judge Green's grant in part of the government's motion to dismiss.

Respectfully submitted,

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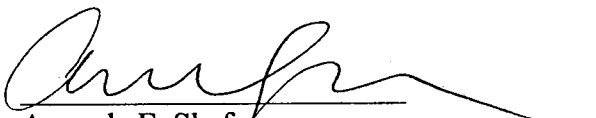
CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE AND CIRCUIT RULE 32(a)

I certify that, in accordance with Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), the foregoing Guantanamo Detainees' Supplemental Brief Addressing the Military Commissions Act of 2006 is proportionately spaced with a font size of 11 point or greater, and contains 9,190 words, which is within the word count authorized by this Court in its Order of October 18, 2006.



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CERTIFICATE OF SERVICE

I certify that today, November 1st, 2006, I served the foregoing Guantanamo Detainees' Supplemental Brief Addressing the Military Commissions Act of 2006 on the government by causing copies to be sent, via the Court Security Officer, to the following counsel of record for the government:

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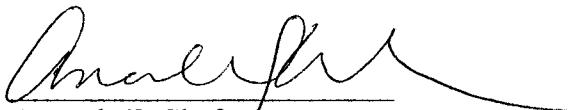

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