Hearing Before the House Committee on Armed Services

Re: Upholding the Principle of Habeas Corpus for Detainees.

July 26, 2007

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Chairman Skelton, Ranking Member Hunter, and Members of the Committee, I appreciate the opportunity to address the matters before the Committee today. Both the detention and trial of enemy combatants are critical functions for the Nation's conduct of the continuing armed conflict against al Qaeda and associated terrorist forces. The procedural rights that Congress grants to enemy combatants to challenge their detention and trial are vitally important both because they can critically affect the success of the military mission at hand and they also play a role in reflecting America's commitment to fairness and the rule of law.

I gained significant expertise with respect to both the legal aspects of the detention of enemy combatants and military commissions during my service at the Department of Justice from 2001 to 2005. My duties both as a Deputy Assistant Attorney General in the Office of Legal Counsel and, subsequently, as an Associate Deputy Attorney General involved providing advice on many issues related to military commissions, the detention of enemy combatants at Guantanamo Bay, and the creation of the military's procedures for reviewing detentions through both Combatant Status Review Tribunals and annual Administrative Review Boards. Since my return to the private sector, I have continued to follow the developments in this area with interest.

Although almost six years have passed since the attack on the World Trade Center in 2001, al Qaeda continues to pose a grave threat to the Nation. The most recent National

Intelligence Estimate, released just this month, contains chilling details regarding the strength of al Qaeda even now:

> Al-Qa'ida is and will remain the most serious terrorist threat to the Homeland, as its central leadership continues to plan high-impact plots, while pushing others in extremist Sunni communities to mimic its efforts and to supplement its capabilities. We assess the group has protected or regenerated key elements of its Homeland attack capability, including: a safehaven in the Pakistan Federally Administered Tribal Areas (FATA), operational lieutenants, and its top leadership. Although we have discovered only a handful of individuals in the United States with ties to al-Qa'ida senior leadership since 9/11, we judge that al-Qa'ida will intensify its efforts to put operatives here.[1]

These operatives, of course, will plan to wreak maximum destruction through tactics that utterly disregard the laws of war: they will operate disguised as noncombatant civilians and will deliberately attack civilian targets.

Even in the face of such a threat, the United States has exceeded its obligations toward detainees in the conflict with al Qaeda under both our Constitution and under international law. The political branches, through recent legislation, have crafted a system that provides unprecedented levels of review and access to civilian courts for combatants detained by the United States in the midst of an ongoing armed conflict. The courts are only now beginning to give shape to the scope of their review under that statutory system and to interpret the authority Congress has given them. Just last Friday, in *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. July 20, 2007), the D.C. Circuit clarified the robust scope of its power to review the determinations of Combatant Status Review Tribunals (CSRTs) and confirmed that counsel for detainees would receive access to classified information that might assist them in their representation. As that

[1] National Intelligence Estimate, July 2007, *available at* http://media.npr.org/documents/2007/jul/20070717_nie.pdf.

decision shows, the system Congress has already crafted through the Detainee Treatment Act ("DTA") and the Military Commissions Act of 2006 ("MCA") will continue to be refined as it is applied by the courts. It is already clear, moreover, that by providing for judicial review of the sufficiency of evidence of CSRT determinations, Congress has provided for more expansive review than would have existed in the past even where habeas jurisdiction might have applied.

In this context of continued judicial development of a new statutory system that already exceeds the scope of review traditionally available in habeas for military decisions, I believe it is unnecessary and would be unwise to reintroduce a duplicative level of federal court review through writs of habeas corpus. And it would be particularly unwise to enact a statutory provision suggesting a special authority in habeas courts to hear challenges to decisions to transfer detainees — without any particular indication of the standards to govern such challenges — when transfers are inherently political affairs that require flexible and sensitive negotiation between the Executive Branch and foreign governments.

BACKGROUND

The current debate about amendments to the MCA can be fully understood only in the context of the history — including the series of Supreme Court decisions and congressional responses — that led to the passage of the MCA in 2006. A brief synopsis of that history is thus warranted.

In 2001, the President determined that the attacks of September 11 had created a state of armed conflict between the United States and al Qaeda and associated terrorist forces. As part of the military response to those attacks, the United States exercised the long-established right under the laws of war to detain combatants who are a part of enemy forces.

In November 2001, the President also determined that military commissions should be convened to try enemy combatants captured in the conflict with al Qaeda for violations of the laws of war. As administration officials explained to Congress at the time, multiple considerations made military commissions rather than our domestic criminal justice system the most appropriate forum for prosecuting enemy combatants. In part, using military commissions, which are the standard mechanism the Executive has always used for war crimes trials, acknowledged the fundamental fact that the struggle with al Qaeda was not simply a matter a of criminal law enforcement — it had risen to the level of an armed conflict to which the laws of war would apply.

In addition, the circumstances of war-fighting in which enemy combatants are captured and interrogated and in which documents and computers are seized are not remotely adapted to satisfying the strict requirements of the Constitution in later bringing a criminal prosecution in an Article III court. For example, enemy combatants are properly interrogated without a lawyer present, but would that mean that under *Miranda* their statements could not be used? Statements made by other enemy combatants might be useful in the trial of a different accused, but would a record of those statements be barred by hearsay rules? Soldiers raiding an al Qaeda hideout will seize for intelligence purposes materials that might later become "evidence," but they are not concerned (nor should they be) with establishing a chain of custody as FBI agents at a crime scene would. And there was a concern that classified information could not adequately be protected in regular criminal trials. Precisely because the circumstances in fighting a war are always different from those in investigating a crime in our domestic system, military commissions have always been the standard mechanism used for prosecuting war crimes. Thousands of commissions were convened in Europe and the Far East after World War II, and

(to give just one example) the orders convening those commissions routinely called for flexible evidentiary rules, permitting the admission of "such evidence as in [the commission's] opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man."[2] That practice reflected what the Supreme Court later acknowledged was one of the characteristics of military commissions; namely, that their procedure "has been adapted in each instance to the need that called it forth." *Madsen v. Kinsella*, 343 U.S. 341, 347-48 (1952).

In early 2002, the Department of Defense began detaining enemy combatants seized overseas in operations in Afghanistan at the Naval Base at Guantanamo Bay, Cuba. In addition to the ideal attributes Guantanamo provided from a security perspective and other reasons, the decision to use Guantanamo was based, in part, on reliance on a clear-cut decision from the Supreme Court handed down shortly after World War II holding that aliens seized and detained outside the United States had no right to file habeas corpus petitions in United States courts. That decision was *Johnson v. Eisentrager*, 339 U.S. 763 (1950). When detainees at Guantanamo began to file habeas petitions in federal court, therefore, the Government relied on *Eisentrager* to argue that no federal court had jurisdiction to entertain the petitions.

The Supreme Court ultimately disagreed with that position and in *Rasul v. Bush*, 542 U.S. 466 (2004), concluded that the habeas statute, 28 U.S.C. § 2441, extended jurisdiction to habeas petitions filed by detainees held at Guantanamo. The Court made clear, however, that its holding was based on an interpretation of the habeas statute – not upon the Constitution. *See, e.g.*, *Rasul*, 542 U.S. at 484 ("We therefore hold that § 2241 confers on the District Court jurisdiction to hear

[2] Regulations Governing the Trial of War Criminals, General Headquarters, United States Army Forces, Pacific, 24 September 1945.

petitioners' habeas corpus challenges to the legality of their detention at Guantanamo Bay Naval Base.").

At the same time the Court decided *Rasul*, it also decided *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), a decision relevant here primarily for one thing: in it, the plurality outlined the type of procedures that, in keeping with the Due Process Clause of the Constitution, the military could employ to determine to detain an *American citizen* as an enemy combatant in the United States.

The Government responded to these decisions in several ways. The Department of Defense soon promulgated a new procedure – a Combatant Status Review Tribunal or "CSRT" – that would review the determination of enemy combatant status for every detainee at Guantanamo. The CSRTs were modeled in part on the hearings used to determine POW status of captured combatants under the Geneva Conventions, which are conducted under Army Regulation ("AR") 190-8, "Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees." But they provided greater procedural protections than the existing army regulation. CSRTs were also designed to meet the procedural requirements that the Supreme Court in *Hamdi* had suggested would be sufficient to provide due process to a U.S. citizen held in the United States, even though such procedures were not required for the aliens held at Guantanamo. In addition, prior to these decisions, DOD had recently announced another mechanism for reviewing the detention of those at Guantanamo – the Administrative Review Board or "ARB." The ARBs provide a yearly review of the detention of every enemy combatant and, by assessing the threat each continues to pose, provide a determination of whether continued detention is warranted for each combatant.

Congress also responded to the *Rasul* decision by passing the Detainee Treatment Act of 2005 ("DTA"). In addition to defining standards for treatment of detainees, the DTA eliminated

habeas jurisdiction for petitions filed by detainees at Guantanamo. In its place, it provided for judicial review in the United States Court of Appeals for the District of Columbia Circuit for both the decisions of CSRTs and the decisions of military commissions.[3] Providing such review in regular civilian courts for the decisions of military tribunals was an unprecedented move. Particularly with respect to CSRTs it bears emphasis that the military's determination to detain an alien overseas as an enemy combatant in an armed conflict has never been reviewable in civilian court, and certainly not under the scope of review provided by the DTA, which allows the D.C. Circuit to review whether the CSRT's determination was supported by a preponderance of the evidence and to hear all legal claims under the Constitution and laws of the United States. DTA § 1005(e)(2)(C).

Despite the elimination of habeas jurisdiction in the DTA, the Supreme Court concluded in 2006 that habeas jurisdiction still existed over cases pending when the DTA was passed, and in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), struck down the procedures the military had promulgated for conducting military commissions. Once again, the Court's decision was based on statutory, not constitutional grounds, and rested primarily on the conclusion that procedures for the military commissions violated provisions of the UCMJ.

In response, Congress passed the MCA of 2006. In it, Congress closed the jurisdictional loophole that had allowed the *Hamdan* case to proceed by making clear that the elimination of habeas jurisdiction for detainees at Guantanamo applied to *all* cases, including those pending on the date of enactment. In addition, Congress responded to problems the Supreme Court had

[3] Although the DTA originally made review in the D.C. Circuit of some military commission decisions discretionary, the MCA has since changed that provision and now makes all final military commission decisions reviewable in the D.C. Circuit as of right.

identified by establishing in statute a detailed procedural framework for the conduct of trials by military commission.

The latter was an extraordinary step, but probably a necessary one to ensure that military commissions would finally begin to dispense justice to some of the enemy combatants detained at Guantanamo. Although military commissions have been used almost since the Founding of the Republic, they have traditionally been created, and their procedures determined, wholly by the Executive. As the Supreme Court explained in *Madsen v Kinsella*, 343 U.S. 341, 346-48 (1952), "[s]ince our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent government responsibilities related to war. They have been called our common law war courts. . . . Neither their procedure nor their jurisdiction has been prescribed by statute," but instead, "it has been adapted in each instance to the need that called it forth." The creation of a detailed set of statutory procedures for the military commissions was thus a measure without precedent in the Nation's history.

Congress was also careful in the MCA to remedy each of the defects identified by the Court (and even by justices not forming a majority) in *Hamdan*. By providing military commissions a statutory basis, the MCA ensures that the commissions are "regularly constituted courts" for purposes of Common Article 3 of the Geneva Conventions, *cf. Hamdan*, 126 S. Ct. at 2796-97, and, among other protections, it also ensures that the accused will have the right to be present at all proceedings and hear all evidence presented against him, *cf. Hamdan*, 126 S. Ct. at 2797-98 (Opinion of Stevens, J, joined by Souter, Ginsburg, and Breyer, JJ.).

As a result of this whole series of events, the unlawful enemy combatants detained at Guantanamo Bay, Cuba currently have available to them an array of procedural protections unprecedented in the history of warfare. Each has his status as an enemy combatant reviewed by

a panel of officers in a CSRT according to procedures that were designed to meet the due process requirements that would be necessary for detaining a U.S. citizen as an enemy combatant in the United States. The detainee may appear before a board of officers; he may examine unclassified evidence to be considered by the board; he has the assistance of a Personal Representative to help him make his case; and he may call witnesses that are reasonably available. The CSRT's decision is then subject to review in the D.C. Circuit. The D.C. Circuit has just made clear, in *Bismullah*, that its review of the CSRT decision will include all information available to the Government, not just that presented to the CSRT, and that counsel for the detainees will be granted access to classified information. In addition, each detainee has his detention reviewed once a year by an ARB, which assesses the extent to which the detainee continues to pose a threat and should be detained. Detainees who are charged before a military commission have a complete set of statutory procedures for their trials that – again in an unprecedented departure from past practice – include review by an Article III court.

One fundamental point that I would like to make to the Committee today is that, given this unprecedented set of procedures, and the amount of time and delay it has already taken to get to this point, the wise choice for Congress now is to let the MCA work. Absent some compelling need for a change that is demanded by the Constitution or obligations under international law, there is no need to make further modifications to the Act. Changes at this point will only further postpone the day when military commissions can begin to deliver justice.

I. The Current Framework of Review Mechanisms for the Detention and Trial of Enemy Combatants Exceeds the United States' Obligations Under Our Constitution and International Law.

One possible justification for Congress to act now to add to the review mechanisms provided for enemy combatant detainees would be a need to remedy some legal infirmity in the

current procedures. But, as explained below, the procedures currently in place provide an unprecedented level of review (and, in particular, unprecedented access to the civilian courts) that actually provides unlawful enemy combatants fighting for al Qaeda *greater* procedural protections than would be provided for *lawful* combatants entitled to POW status under the Geneva Conventions. There is thus certainly no need to provide additional review mechanisms to remedy any legal defect in the current system. And in particular, there is no need, as a legal matter, to provide detainees the particular form of review allowed by the writ of habeas corpus.

A. Decisions to Detain: CSRT and ARB Process

The logical beginning of the inquiry is the Combatant Status Review Tribunal or "CSRT," a mechanism the Department of Defense created to review the determination of enemy combatant status for every detainee at Guantanamo. This procedure, which is unprecedented in the history of warfare, addresses the risk that a detainee might in fact have been erroneously detained. The CSRTs were modeled in part on the hearings used to determine POW status of captured combatants under Army Regulation (AR) 190-8, which the Army uses to comply with the requirement of Article 5 of the Third Geneva Convention that a detainee's status be determined by a "competent tribunal." In a CSRT, a board of three officers reviews evidence regarding the status of the detainee. These CSRT board members must be officers in no way involved in the detainee's prior apprehension or interrogation. The detainee is allowed to make a case concerning his status, and is given the right to call witnesses reasonably available.

In a number of key respects, the CSRTs grant detainees *more* protections than AR 190-8, and thus *exceed* the requirements that even the Geneva Conventions would demand for lawful combatants entitled to POW status. To begin with, each detainee is provided with a Personal Representative to assist him in presenting his case. The Personal Representative reviews the

evidence that will be presented to the CSRT Tribunal and meets with the detainee in advance to explain the CSRT process. The detainee is also given access in advance of the Tribunal to a written summary of the unclassified evidence that will be used against him. And, most significantly, the CSRT determination is subject to judicial review in a civilian court — the D.C. Circuit. Under normal circumstances, a detention and status decision made during wartime pursuant to a regulation such as AR 190-8 would not be reviewable in civilian court at all. And it certainly would not be reviewable under the scope of review provided by the DTA, which allows the D.C. Circuit to review whether the CSRT's determination was supported by a preponderance of the evidence and to hear all legal claims under the Constitution and laws of the United States. DTA § 1005(e)(2)(C).

In a decision issued just last Friday, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. July 20, 2007), the D.C. Circuit made clear that it is taking seriously its responsibility to review CSRT detention decisions. In *Bismullah*, the Court ruled that "[i]n order to review a Tribunal's determination that, based upon a preponderance of the evidence, a detainee is an enemy combatant, the court must have access to all the information *available* to the Tribunal," and not just to information on which the Tribunal actively relied. Slip Op. at 2-3 (emphasis added). The Court also held that even classified information must be shared with counsel representing the detainee, although the Court indicated that "certain highly sensitive information" could be withheld from counsel as long as it was provided to the Court ex parte and in camera.

In addition to judicial review, the Department of Defense has established a procedure by which a new CSRT can be held if new evidence bearing upon a detainee's enemy combatant status becomes available. Dept. of Defense, OARDEC Instruction 5421.1, May 7, 2007. Such evidence can be submitted in virtually any form, including "photographs, affidavits, videotaped

witness statements or other supporting exhibits," and may be submitted either by the detainee himself or by any person acting lawfully on his behalf. *Id.* ¶¶ 4-5.

Beyond the CSRTs, another safeguard in the detention process is provided by the Administrative Review Board or "ARB." The ARBs provide a yearly review of the detention of every enemy combatant and, by assessing the threat each continues to pose, provide a determination of whether continued detention is warranted for each combatant. The detainee again receives access to the unclassified information that will be used at the hearing and the assistance of a representative.

The elaborate process of CSRT and ARB hearings that the United States has established is not only unprecedented in the history of warfare, but was also designed specifically to satisfy the requirements of due process that the Supreme Court outlined in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), in describing the process due to a *U.S. citizen* held as an enemy combatant *in the United States*. A plurality of the Court in *Hamdi* explained that the basic elements for such a process consisted of "notice of the factual basis for [the individual's] classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." 542 U.S. at 533. The plurality made clear, moreover, that "the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal." *Id.* at 538. Indeed, the Court specifically noted that AR 190-8 "already provide[s] for such process," *id.*, in the context of POW-status determinations. The CSRTs are thus tailor-made to comply with the dictates of due process that the Supreme Court outlined.

It is true that the CSRT is not a full-blown adversarial proceeding involving representation by counsel. But there is no need for such a process in the context of detention of

enemy combatants during an armed conflict. The touchstone for comparison here should not be the procedures we use as part of the criminal law in deciding upon the detention of an individual. That paradigm provides the wrong frame of reference. Adversarial hearings have never been required for detaining enemy combatants under the law of war until the end of a conflict. And as the Supreme Court itself pointed out in *Hamdi*, even where the detention of a U.S. citizen is concerned, "the exigencies of the circumstances may demand that . . . enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at the time of ongoing military conflict." 542 U.S. at 533 (plurality).

The record of CSRT and ARB hearings to date shows that they are more than mere formalities. CSRT hearings have resulted in over thirty determinations that the detainee in question should no longer be detained as an enemy combatant. Meanwhile, annual ARB determinations have resulted in the issuance of approval for release or transfer to another country of more than 150 detainees. These figures should be weighed against the criticisms many level against the current process. And while some urge Congress to make further modifications to the system to ensure the lowest possible risk of an erroneous detention, Congress also has a responsibility to weigh the risks that attend erroneously releasing dangerous combatants. Of those detainees who have been transferred or released from U.S. control, at least 30 have subsequently rejoined the fight and have been recaptured or killed on the battlefield. *See* http://www.defenselink.mil/news/d20070712formergtmo.pdf. Every such erroneous release places the lives of Americans — both servicemembers overseas and potentially civilians here at home — at risk.

B. Punitive Decisions: Review of Military Commission Decisions

The system Congress established in the MCA for trials by military commission also exceeds relevant constitutional and international law standards.

In the MCA, Congress crafted a set of procedures for military commissions that is both unprecedented in its detail and fully adequate to satisfy all legal requirements, including those specified by the Supreme Court in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). Indeed, Congress was careful in the MCA to remedy each of the defects identified by the Court (and even by justices not forming a majority) in *Hamdan*. By providing military commissions a statutory basis, the MCA ensures that the commissions are "regularly constituted courts" for purposes of Common Article 3 of the Geneva Conventions, *cf. Hamdan*, 126 S. Ct. at 2796-97, and, among other protections, it also ensures that the accused will have the right to be present at all proceedings and hear all evidence presented against him, *cf. Hamdan*, 126 S. Ct. at 2797-98 (Opinion of Stevens, J, joined by Souter, Ginsburg, and Breyer, JJ.). As a result, under the MCA, military commissions are finally poised to proceed more than five years after the President originally issued the order providing for their creation.

Again, Congress went far beyond what has traditionally been required under the law for military commissions by empowering a civilian court, the D.C. Circuit, to review judgments from the military commissions. One can expect that the D.C. Circuit will attend to this task with the same seriousness that it has already demonstrated in its role as reviewer of CSRT decisions.

C. The Constitution Does Not Require that Enemy Combatants Detained Outside the United States Be Provided Habeas Corpus Review.

One of the primary arguments advanced in favor of amending the DTA and MCA to add federal habeas corpus review to the unprecedented bundle of review rights already granted to detainees is the assertion that these statutes unconstitutionally stripped away a *right* to habeas

review. In my view, such arguments rest on a false premise. Granting federal courts habeas jurisdiction over claims brought by aliens held at Guantanamo Bay simply is not required by the Suspension Clause. That 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, sect. 9, cl. 2. That prohibition does not require any change to the MCA or the DTA for at least two reasons.

First, aliens detained outside the United States have no rights under the Constitution, including under the Suspension Clause. As the Supreme Court made clear more than fifty years ago in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), if the Constitution conferred rights on aliens detained overseas as enemy combatants, "enemy elements . . . could require the American Judiciary to assure them freedom of speech, press, and assembly as in the First Amendment, the right to bear arms as in the Second, security against 'unreasonable searches and seizures' as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments." 339 U.S. at 784. The Court explained that "[s]uch extraterritorial application of organic law would have been so significant an innovation in the practice of governments . . . that it could scarcely have failed to excite contemporary comment." *Id.* But there is nothing in the records of the constitutional convention or contemporary practice to suggest that the Founders intended such a novel approach. Nothing in the Supreme Court's decisions since *Eisentrager* — including the recent decisions in *Rasul* and *Hamdan* — has disturbed these fundamental principles. To the contrary, in ruling in 1990 that the Fourth Amendment did not protect aliens outside our borders, the Court resoundingly reaffirmed the teaching of *Eisentrager*, stressing that in *Eisentrager* "our rejection of extraterritorial application of the Fifth Amendment was emphatic." *United States v. Verdugo-*

Urquidez, 494 U.S. 259, 269 (1990); *see also Zadvydas v. Davis*, 553 U.S. 678, 693 (2001). [4] The same reasoning that the Supreme Court applied in *Eisentrager* (and reaffirmed in cases such as *Verdugo-Urquidez*) to conclude that aliens overseas do not have rights under the Fifth Amendment applies equally to the Suspension Clause. If it did not, and aliens overseas did have a constitutional right to habeas review, there is no immediately apparent reason why the same right would not apply to aliens held in Iraq or in Baghram, Afghanistan (or to aliens held anywhere in the world any future war). Congress should be reluctant to adopt such a novel and extraordinarily expansive notion of constitutional rights.

Second, even if aliens at Guantanamo had some rights under the Suspension Clause, the procedures provided in the DTA for judicial review of detentions (after a CSRT decision) fully satisfy any rights they may have. The purpose of the writ of habeas corpus is to provide judicial review for executive detention. As long as Congress provides some mechanism for securing that judicial review, the demands of the Suspension Clause are satisfied, whether or not the procedure is labeled a "habeas" proceeding. As the Supreme Court has explained, "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 (1977). Indeed, the Court has specifically noted that "Congress could, without raising any constitutional questions, provide an adequate substitute through the court of appeals." *INS v. St. Cyr*, 533 U.S. 289, 314 n.38 (2001). Congress has provided precisely such an adequate

[4] The same rule, following the Supreme Court's teaching, has been consistently applied in the courts of appeal. *See, e.g., People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) ("A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.").

substitute here by providing for review in the D.C. Circuit of both the determinations of CSRTs and the final decisions of military commissions.

In fact, the DTA and the MCA provide even greater review than what has been available historically upon habeas challenges to a military tribunal decision in cases where habeas was available. In cases involving military commissions in World War II, the Supreme Court made clear that the function of habeas corpus was simply to test the jurisdiction of the tribunal to issue a decision, not to examine the correctness of its decision. *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 decision."); *see also Ex parte Quirin*, 317 U.S. 1, 25 (1942). In providing for review of constitutional and other claims, including the legal claim of insufficiency of evidence, the DTA and MCA actually provide the detainees at Guantanamo with far more judicial review than has traditionally been provided through habeas to those convicted by a military commission. The MCA thus certainly provides an adequate substitute for any constitutional right to habeas that the detainees could be found to have.

Not surprisingly, given this precedent, the Court of Appeals for the District of Columbia Circuit has recently rejected the claim that the MCA's elimination of habeas review for Guantanamo violates any constitutional provision. *See Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007). Following the longstanding precedent outlined above, the court ruled that the detainees have no constitutional rights under the Suspension Clause. *See id.* at 988-94. To be sure, the Supreme Court has now granted certiorari to review the D.C. Circuit's decision. But there is no need for Congress to intervene to amend the MCA now when the courts are still in the

midst of their review and the latest indication from the Court of Appeals is that the statute's habeas provisions suffer from no constitutional infirmity. Should the Supreme Court disagree with the Court of Appeals, its opinion will also likely indicate what further modifications would be necessary to convert the judicial review already provided for CSRT and military commission decisions into an adequate substitute for habeas corpus. Acting now, in an attempt to guess what the Supreme Court might say, would be premature.

II. Adding a Duplicative Layer of Habeas Review Would Give Rise to Major Policy Disadvantages with No Concrete Benefit.

Once one recognizes that there is no *legal defect* in the current mechanisms Congress has provided for reviewing the detention and trial of enemy combatants, it becomes clear that the amendments being proposed to the MCA and DTA must be evaluated solely as *policy* choices for Congress to make. For a number of reasons, it would make little sense to re-establish habeas jurisdiction over Guantanamo and to open the possibility for habeas review of decisions to detain enemy combatants at other bases as well.

In its current form, H.R. 2826 would clear the way for courts to assert jurisdiction over habeas corpus petitions from detainees held at Guantanamo Bay. It does this by creating a new exception to the DTA and MCA provisions which established that D.C. Circuit review of CSRT and military commission decisions would be the exclusive means of federal court review. On top of such D.C. Circuit review, H.R. 2826 also would permit jurisdiction over "application[s] for a writ of habeas corpus, including an application challenging transfer" or "any action solely for prospective injunctive relief against transfer." *See* H.R. 2826 § 1.

Re-establishing habeas jurisdiction over Guantanamo at this point would simply generate confusion and wasteful litigation by creating a parallel avenue for legal challenges, but without clear standards to govern them. The Supreme Court recognized long ago the practical dangers

that would be posed by permitting enemy combatants detained overseas free access to our courts to file petitions for habeas corpus. As the Court explained in *Eisentrager*, permitting such petitions "would hamper the war effort and bring aid and comfort to the enemy. . . . It 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. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to the enemies of the United States." 339 U.S. at 779. The initial rounds of habeas litigation on behalf of detainees at Guantanamo, culminating in the *Rasul* decision, proved that Justice Jackson's fears in *Eisentrager* were well founded. Detainees used habeas litigation to urge federal courts to dictate conditions at the Naval Base at Guantanamo ranging from the speed of Internet access to the extent of mail deliveries.

After *Rasul*, however, Congress wisely alleviated the worst of these problems by providing orderly judicial review mechanisms that would proceed only after military decisions had been completed through military processes. Thus, it made the enemy combatant status determination of a CSRT reviewable in the D.C. Circuit and the final decision of a military commission reviewable in the same court. Opening the field up once again to unrestricted challenges under the general habeas statute will only generate a flood of litigation that will unnecessarily divert the resources of the military and the Department of Justice and eliminate the very advantages of an orderly process that Congress sought to achieve through the DTA and MCA. It would do so, moreover, without providing any clear guidance as to any *substantive* change in detainees' rights. To the contrary, presumably no substantive change in rights would be intended. But it would take years of litigation to establish that result.

It is also unclear what effect the bill would have in expanding habeas jurisdiction beyond Guantanamo to bases in Afghanistan or elsewhere. Proponents of the bill undoubtedly will claim that it will not permit judicial interference in such areas because it expressly bars jurisdiction over an action brought by an alien "who is in the custody or under the effective control of the United States, *in a zone of active combat involving the United States Armed Forces*, and where the United States is implementing Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees, United States Army Regulation 190-8 (1997), or any successor regulation, as determined by the President." H..R. 2826, § 7 (emphasis added). But that provision should hardly provide the military any peace of mind that it will not have to deal with a flood of increased litigation and potential judicial interference at additional bases overseas, because it is entirely unclear what areas would qualify under the undefined term "zone of active combat." The meaning of that phrase would likely be determined only through lengthy and contentious litigation.

There is a significant danger, moreover, that courts might ultimately find that phrase far less restrictive than its proponents may think, given the law-of-war backdrop in which it is used. Under the Third Geneva Convention, Prisoners of War must be "evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger." GPW, Art. 19. *See also* GPW, Art. 23 ("No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone . . . ."). Although that provision for POWs does not apply to unlawful combatants in the conflict with al Qaeda, a roughly comparable requirement could arguably be considered part of the customary laws of war — a detaining power is responsible for the safety of those whom it detains and for removing them from the danger of combat. It also makes practical sense for the detaining power

to move detainees to a more stable area — removed from combat — to detain them securely. Thus, it might be argued that, for customary law-of-war purposes, the United States has an obligation to move those whom it detains at least far enough from the "combat zone" "for them to be out of danger." But that in itself will provide clever lawyers with an argument that, if the United States is adhering to its obligations, the detainees are not in a "zone of active combat" for purposes of the restriction on habeas jurisdiction. In short, this provision promises nothing but endless litigation and little assurance that it will accomplish its apparent objective of preventing the expansion of habeas jurisdiction to areas like Afghanistan.

The practical disadvantages of re-establishing habeas jurisdiction over Guantanamo (and perhaps extending it elsewhere) must, of course, be weighed against any benefits habeas jurisdiction might bring. But those would be very small. To begin with, there is little reason to believe that re-establishing habeas review would mollify international critics of the United States. Such critics take issue not with the presence or absence of habeas review (which to most foreigners is even more arcane than to average American citizens), but rather with the entire policy of detaining al Qaeda combatants for the duration of hostilities. No amount of procedural rights would be sufficient to put an end to that criticism.

In addition, there is little reason to think that simply adding habeas review on top of the review mechanisms already provided would reduce the rate of erroneous detention in the present system. Habeas review of factual questions has traditionally been very deferential, and there is every reason to expect that the courts would apply the same deferential standards for habeas petitions resulting from CSRT or military commission decisions. *See Jackson v. Virginia*, 443 U.S. 307, 320-24 (1979); *St. Cyr*, 533 U.S. at 27 (noting that the traditional rule on habeas corpus review of non-criminal executive detentions was that "the courts generally did not review the

factual determinations made by the executive"). In addition, as explained above, the present system has already demonstrated an ability to identify instances of erroneous detention, as well as to order release or transfer when a given individual's detention is no longer necessary.

Some will doubtless say there are flaws in the way the CSRTs and Military Commissions are structured. But simply adding undefined habeas review on top of the system Congress has already established is not a panacea for all ills. Indeed, it provides no specific solution to perceived shortcomings at all. In addition, it bears noting that the present statutory system has only recently become fully operational and will continue to evolve as the D.C. Circuit gains experience reviewing more cases. As the *Bismullah* decision shows, the D.C. Circuit's decisions shaping the statutory review process may provide answers to many criticisms. That process should be allowed to work before Congress rushes to pass additional legislation.

Beyond authorizing jurisdiction for habeas petitions from detainees at Guantanamo Bay, H.R. 2826 also clears the way for exercise of jurisdiction that would otherwise be proper over actions "for prospective injunctive relief against transfer." This step would be unprecedented and unwise because it would insert the confusion and uncertainty associated with judicial review into an Executive process that involves delicate negotiations with foreign powers.

Detainees are transferred from Guantanamo to other countries under a variety of circumstances. In some instances, continued detention is no longer deemed necessary; in others, the receiving country has a legitimate interest in possible detention, investigation, and prosecution and is willing to accept responsibility for ensuring that the detainee will no longer pose a threat to the United States. In all cases, transfer occurs only after the Department of Defense negotiates with the receiving government and obtains assurances appropriate for the specific case in question. In addition, if the Department of Defense deems a transfer to be in

order, it is customary for the Department of State also to contact the receiving government to obtain assurances regarding the detainees' treatment and in particular assurances that the detainees will not be subjected to torture.

As that description demonstrates, transfer decisions are inherently political affairs involving delicate, flexible negotiations between the United States and foreign governments. Such matters of prisoner transfers in armed conflict have always been matters entrusted wholly to the Executive. Especially given the need for confidentiality and high-level inter-government negotiations, inserting the courts into this process would be extremely disruptive. In the words of one of the Supreme Court's decisions regarding the separation of powers, such involvement would likely be marked by "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government" and by "the potentiality of embarrassment." *Baker v. Carr*, 369 U.S. 186, 217 (1962). In any event, departing from the standard terms of the habeas statute to insert additional language extending jurisdiction expressly to transfer decisions — without providing any guidance on the standards that courts are to apply to such decisions — does not make good policy sense. It will only introduce the confusion and delay attendant on litigation into a process that revolves around sensitive Executive negotiations.

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Thank you, Mr. Chairman, for the opportunity to address the Committee. I would be happy to address any questions the Committee may have.