BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

TESTIMONY OF BRADFORD A. BERENSON

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Chairman Nadler, Congressman Franks, and Members of the Committee, I appreciate the opportunity to testify before you today. My comments this afternoon address certain legal and policy issues associated with judicial review of military detentions in our ongoing war on militant Islamists. In particular, I will address some recent developments relating to enemy combatant detentions and the proposal to amend the Military Commissions Act of 2006 ("the MCA") to grant plenary habeas corpus rights to suspected aliens terrorists detained abroad by the United States.

My perspective on these issues is informed by my experience as Associate Counsel to President Bush from January, 2001 through January, 2003. As a member of the President's staff during the immediate post-9/11 period, I was one of the lawyers initially began to grapple with these complex questions, which seemed new at the time but which we quickly discovered are in fact very old. I assisted in the legal and policy research and analysis that resulted in the President's Military Order of November 13, 2001, which initially authorized the Secretary of Defense to establish a system of military commissions to try suspected terrorists. Since leaving the White House, I have returned to my private practice in Washington, D.C., but I continue to follow closely the developments in this area of law and to contribute in whatever way I can to the ongoing public debate.

My testimony this afternoon will consist of two basic parts. First, I will bring the Committee up to date on certain developments that have occurred since Congress resolved these issues in the MCA. Then, I will discuss recent proposals to amend the MCA to provide foreign terrorists greater rights of access to our domestic court system. My basic view on these issues is that it would inadvisable to enact any such amendment until we have collectively had an opportunity to see how the system so recently adopted in the MCA works in practice. And in

substance, the advantages of granting further legal rights to militant Islamic terrorists whom we capture would likely be outweighed by the significant costs and disadvantages of doing so.

History of the habeas corpus provisions in the Military Commissions Act

In September, 2006, when Congress was considering passage of the Military Commissions Act, I had the privilege of testifying before the Senate Judiciary Committee on the legal issues surrounding the habeas corpus rights of alien enemy combatants held abroad by the United States military. At that time, Congress was considering passing a provision that would channel judicial review of the status determinations by the Combatant Status Review Tribunals and the verdicts of military commissions to a unified appellate process in the District of Columbia Circuit. That provision eventually became law.

Critics suggested that this provision would amount to an unconstitutional suspension of the writ of habeas corpus. I advised the Senate that, in my opinion, such a provision was likely constitutional and did not amount to a suspension of the writ. Among other reasons I cited was that alien enemies held abroad by our military have never been regarded as entitled to the protections of our Constitution, including the Suspension Clause. After all, if our Constitution protected our enemies in arms, we could not shoot or bomb them without first affording them due process, and we could not destroy their property, including their weapons, without providing them just compensation. Instead, alien enemy combatants, including unlawful combatants such as organized transnational terrorist groups, have always derived their legal rights primarily from international law: specifically, international humanitarian law, otherwise known as the law of armed conflict. In this framework, lawful soldiers who fight according to the rules for protecting civilians accepted by civilized nations are protected by, among other things, the Geneva Conventions, while saboteurs, terrorists, guerrillas, and other irregulars whose

conduct poses special danger to innocents receive a lower level of protection derived primarily from peremptory norms of customary international law.

I advised the Senate that the international law of armed conflict has never been interpreted to require that alien enemies held outside the territory of the detaining power be given access to its domestic court system to challenge their detentions while the war is ongoing. No country in history has ever done such a thing, by habeas corpus or otherwise. Thus, from a legal perspective, empowering our enemies to sue our commanders and inviting civilian courts to override military and intelligence decisions regarding the danger posed by particular detainees was unprecedented. I acknowledged that there might be good policy reasons to extend some sort of judicial review to the military detentions occurring in our struggle with al Qaeda and affiliated entities, especially in light of some of the unusual aspects of this conflict. But I told the Senate that the Suspension Clause did not, in my judgment, significantly constrain the policy choices available to Congress. Congress appeared to accept that view and enacted the Military Commissions Act with the limitations on judicial review included. The judgment that this was not an unconstitutional suspension of the writ has since been endorsed by a decision of the United States Court of Appeals, which I will describe shortly.

My testimony before the Senate outlined some of the history of this issue in the current conflict. Since that history constitutes useful background to the issues before the Committee today, I will briefly repeat some of it.

Rasul v. Bush: the Supreme Court recognizes statutory habeas corpus rights for Guantanamo detainees. From the beginning of the war, the Bush Administration consistently took the position, relying on decisions of the Supreme Court such as *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that suspected al Qaeda terrorists or Taliban fighters captured on the global

battlefield and held at the Naval Base in Guantanamo Bay, Cuba had no right of access to U.S. courts. In *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court rejected this position, holding that suspected terrorists detained at Guantanamo had a statutory right to pursue habeas corpus relief in the federal courts.

The Supreme Court's decision in *Rasul* was, to my knowledge, the first time in recorded history that any court of a nation at war had held that those whom its military had determined to be enemies had a right of access to its domestic courts and could sue the Commander-in-Chief to challenge their detentions. During World War II, for example, the United States detained hundreds of thousands of German and Japanese enemy combatants. Many of those detainees were held here in the United States. Many also had plausible claims to having been captured or held in error or to having no enmity against the United States. Yet those prisoners were not outfitted with lawyers and invited to sue our commanders during the conflict. The federal courts were not swamped with requests to order the release of prisoners held in military custody while our troops were in the field.

Rasul changed all that. It allowed a floodtide of litigation in federal district court against U.S. commanders by the militant Islamists being held at Guantanamo. Virtually all detainees then at Guantanamo – which, no matter what you believe about the error rate in Guantanamo detentions, included hundreds of our nation's most vicious enemies – sued the President, the Secretary of Defense, and other military commanders seeking to force the military to release them back into the world.

Congress's first attempted solution: the Detainee Treatment Act. Because the Supreme Court's decision in *Rasul* was based only on an interpretation of section 2241 and not the Constitution, Congress was free to address the serious problems caused by the *Rasul* decision

with a legislative solution. The Congress immediately sought to overrule the *Rasul* decision, at least partially. While unwilling to subscribe to the traditional rule relied on by the Administration that no habeas corpus review at all would be available to enemy combatants held outside our shores, Congress sought to strike a sensible compromise and to circumscribe detainee litigation within some reasonable limits.

In the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005) ("the DTA"), Congress established a process of formal administrative review of enemy combatant status for those detained at Guantanamo. The Combatant Status Review Tribunals (CSRTs) were charged with conducting reviews of each detainee's status and making an on-the-record determination of the basis for continued detention. Congress then provided for judicial review, akin to judicial review of administrative action, in the United States Court of Appeals for the District of Columbia Circuit. In each case, the DTA permitted the D.C. Circuit to consider whether continued detention was consistent with the Constitution and laws of the United States. This standard was meant to permit judicial review of the lawfulness of the fact of detention but to eliminate judicial review of some of the more tenuous conditions-of-confinement type claims the detainees had begun to assert.

It is fairly clear to me that these formal procedural rights were not meant to be in addition to the existing habeas litigation but rather were intended to be a substitute for it. Indeed, a review of the congressional debate suggests that a desire to eliminate the unwieldy flood of detainee litigation and to channel it into a more orderly and manageable process was a principal reason the DTA was passed in the wake of *Rasul*. Thus, in section 1005(h) of the DTA, the Congress enacted a provision that I believe most Members understood to mean that the new standards and procedures of the DTA would apply to all suspected terrorists in U.S. custody at

Guantanamo, present or future, and would provide the exclusive judicial remedies for those individuals, whether or not they had already brought habeas corpus proceedings in federal district court. The problem of detainee litigation was thus brought under congressional supervision and control and the interests of the detainees had been balanced, as a matter of policy, against the interests of the United States to produce a fair and moderate mechanism.

The problem returns: Hamdan v. Rumsfeld. Unfortunately, the Supreme Court proved resistant to the policy choice made by Congress. In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), seizing on an arguable ambiguity in the language of section 1005 of the DTA, the Supreme Court strained to preserve its own jurisdiction to hear Hamdan's challenge to the military commission structure by concluding that the DTA did not apply to any of the actions pending on the date of its enactment, notwithstanding the fact that those actions had been a major reason for its passage. Instead, the Supreme Court held that the DTA would apply only prospectively, so that all of the existing litigation in the federal district courts could continue apace. And it did.

Congress's second attempted solution: the Military Commissions Act of 2006. The *Hamdan* decision was the major impetus for the enactment of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006) ("the MCA"). As it relates to judicial review of military detentions, the MCA essentially amounts to a statement by Congress that "We mean it." In essence, the MCA reaffirmed Congress's original policy choice in the DTA and ensured that the DTA procedural mechanism for orderly and fair judicial review would be consistently applied to all alien detainees, regardless of the date on which they originally filed legal actions.

In the MCA, Congress eliminated the ambiguity seized on by the Supreme Court in *Hamdan* to hold that the DTA's judicial review procedures applied only prospectively. *See* MCA § 7(b) (providing that the MCA's judicial review provisions "shall apply to all cases, without exception, pending on or after the date of the enactment of this Act"). It then substituted new language that made clear that the D.C. Circuit review of the legality of detentions provided for in DTA sections 1005(e)(2) and (3) would be the only such review afforded in courts. *See id.* § 7(a). It did this first by stating clearly that the courts would have no jurisdiction to entertain traditional habeas corpus applications by "an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." *Id.* Then, as to those same individuals, the MCA stated that appeals to the D.C. Circuit pursuant to DTA sections 1005(e)(2) and (3) were the only legal actions by such individuals over which U.S. courts would have jurisdiction.

The new MCA judicial review provision preserves the basic policy choice originally adopted by Congress in the DTA, providing orderly review by a single, well-respected federal court of appeals to assess the constitutionality and legality of all enemy combatant status determinations and military commission verdicts.[1] In addition, the substitute language made

[1] Section 7(a) of the MCA provides that judicial review of any and all matters "relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of any alien enemy combatant are governed by section 1005(e)(2) of the DTA, which relates to review of the decisions of CSRTs regarding combatant status, and section 1005(e)(3) of the DTA, which relates to review of the decisions of military commissions in war crimes trials. Detainees who have not been charged with war crimes and tried before a military commission but who are instead merely being detained for the duration of the conflict to keep them *hors de combat* have rights of administrative review within the military system of the factual basis for their detention – *i.e.,* the conclusion that they are enemy combatants fighting against the United States on behalf of militant Islamist terrorist elements. These rights include review of their detentions by the Combatant Status Review Tribunals (CSRTs) and then periodic review and revisitation of the enemy combatant determination by Administrative Review Boards (ARBs). Section 1005(e)(2) of the DTA provides that the D.C. Circuit has exclusive jurisdiction over detainee appeals from "the final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." The scope of review embraces claims that the CSRT's status determination was inconsistent with the standards and procedures for CSRT proceedings promulgated by the Secretary of Defense or that such standards and procedures are inconsistent with the U.S. Constitution or laws. This portion of the DTA specifically provides that the D.C. Circuit may review the sufficiency of the evidence to ensure that a preponderance of the evidence supports detention. With respect to

certain technical changes, some of which limited the scope of these provisions and others of which broadened them. In particular, the MCA narrows the scope of these provisions by eliminating previous language that would have applied them to any alien at Guantanamo "currently in military custody," regardless of status determination. Under the MCA, only those who have had or are awaiting CSRT determinations and who have been found by the military to be enemy combatants are be subject to the unified judicial review process. The MCA expands the DTA's limited coverage beyond Guantanamo and also makes clear that those "awaiting" status determinations are similarly constrained to abide by the MCA's judicial review mechanism. These changes ensure that the courts will not be flooded with lawsuits brought on behalf of detainees in military or CIA custody in parts of the world other than Cuba and also closed a loophole in the DTA that would have allowed suspected alien terrorists brought to Guantanamo to sue in federal district court in the 90 days or so before a CSRT had been convened to consider their status.

Though rarely acknowledged by the press or critics, the Military Commissions Act provides literally unprecedented access to our courts for the suspected terrorist fighters we are holding around the world. I am of course aware of the constant barrage of criticism directed at the MCA by the army of lawyers and human rights activists who now act on behalf of the militant Islamists we have captured. But although the MCA does not provide the traditional

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military commissions, section 1005(e)(3) of the DTA also empowers the United States Court of Appeals for the District of Columbia Circuit to determine "the final validity of any judgment of a military commission." There is an appeal as of right for any detainee in a capital case or who has received a sentence of 10 years or greater; the Court of Appeals has discretionary jurisdiction over the remainder of the cases. Presumably that discretion will be guided by an assessment of how substantial the legal issues are that the detainee raises in his petition for review. When reviewing a final decision of a military commission, section 1005(e)(3) of the DTA authorizes the D.C. Circuit to consider "whether the final decision was consistent with the standards and procedures" governing the commission trials and "whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States," which likely also includes some deferential sufficiency-of-the-evidence review. For both ordinary detainees and those tried for war crimes before military commissions, following a decision by the D.C. Circuit, discretionary review by certiorari is thereafter available in the Supreme Court of the United States.

habeas corpus remedy available to U.S. citizens, the MCA provides an adequate substitute. And even though military commission trials do not afford the full panoply of rights given to an American accused of a crime, they provide so many of those familiar protections to our enemies that, to most ordinary Americans, the differences would be difficult to distinguish.

In so doing, the MCA provides our enemies in the current conflict far more legal process than has ever been afforded by any country to its adversaries in armed conflict. The CSRTs convened for each suspected terrorist fighter are demonstrably more robust than even the Article V hearings to which *lawful* combatants – honorable soldiers in the organized military of a foreign nation – would be entitled under the Geneva Conventions. And full judicial review of CSRT determinations and military commission verdicts for compliance with the Constitution and laws of the United States by what is commonly regarded as the second most powerful court in the country, with the possibility of later review by the Supreme Court itself, is unprecedented.

The situation of a captured enemy fighter, in this or any war, is rarely an enviable one. That is one of the many hazards to life, limb, and liberty that an individual risks when he takes up arms against a foreign country, whether ours or any other. I have no illusions that detention at Guantanamo or elsewhere is anything but unpleasant, stressful, and demoralizing to the enemies we hold there. On a human level, it is possible to sympathize with their plight, much as we might sympathize with the pain they suffer when we wound them on the battlefield. But from the perspective of legal process, it is vital to recognize that, despite past errors in detainee treatment, Congress has now established a system that is not only humane but generous by the historical standards of wartime detention. The likely duration of this conflict and the difficulty of accurately distinguishing friend from foe when our adversaries deliberately disguise themselves as civilians as a tactic of asymmetric warfare probably justify this extra measure of

process and protection. But do not be fooled: when measured against the proper baseline of warfare, rather than criminal justice, the current regime embodied in the MCA provides more, not less, process than either international law or our Constitution requires.

The issue of judicial review for alien enemy combatants in the current conflict was fully debated and resolved by the Congress just last fall when it passed the MCA. Although the MCA passed the House and the Senate by large margins – votes of 250-170 and 65-34, respectively – an amendment was offered at the time in the Senate to strip the bill of the provisions regulating judicial review of the claims of enemy combatant detainees. *See* 152 Cong. Rec. S10263 (daily ed. Sept. 27, 2006) (Amendment No. 5087) (amendment "to strike the provision regarding habeas review"). After extended debate concerning the constitutional requirements of Article I, Section 9 as applied to noncitizens, the meaning of several relevant Supreme Court precedents, and various policy considerations relating to extension of habeas review, this amendment was rejected by a vote of 51-48. *See id.* at S10263-75.

Boumediene v. Bush: **the courts affirm the constitutionality of the MCA**

Since passage of the MCA, the most significant legal development has been the D.C. Circuit's consideration of the very question that consumed so much of Congress's attention when it debated the MCA: whether section 7 of the MCA constitutes a suspension of the writ of habeas corpus. In *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), the court of appeals was asked to determine whether the Military Commissions Act applied to the habeas petitions of two aliens captured outside the United States and detained as enemy combatants at the Guantanamo Bay Naval Base in Cuba. The court unanimously held that the MCA stripped federal courts of the statutory habeas jurisdiction that the Supreme Court had recognized in *Rasul v. Bush*. *Id*. at

986-88. Congress had made clear that provisions in the MCA repealing habeas jurisdiction applied "to all cases, without exception" relating to any aspect of such detention. *Id.* at 987.

The court of appeals then confronted the question that was the subject of so much Senate debate: whether withdrawal of jurisdiction over habeas petitions by aliens detained abroad as enemy combatants eliminated a constitutionally protected aspect of the writ. As I had predicted at the time of my Senate testimony, the court held that the MCA's deprivation of jurisdiction over the detainees' habeas petitions did not violate the Suspension Clause. This constitutional holding was based on three related determinations. First, the court of appeals held that the Constitution only protects the habeas right recognized at common law as it existed immediately following ratification, "when the first Judiciary Act created the federal courts and granted jurisdiction to issue writs of habeas corpus." *Id.* at 988 (citing *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)). Second, the D.C. Circuit held that "habeas corpus would not have been available in 1789 to aliens without presence or property within the United States," including aliens held by the government outside the sovereign's territory. *Id.* at 990. Finally, the court concluded that because Guantanamo is merely leased from Cuba and is not formally subject to U.S. sovereignty, it is outside the territorial scope of the common law writ circa 1789 and lies beyond the confines of the United States for constitutional purposes. *Id.* at 992 (citing *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 381 (1948)). The heart of the majority's reasoning was the proposition that aliens held outside the United States with no other connection to this country than their determination to destroy it are not entitled to the protections of the Constitution, including the Suspension Clause. Relying on *Eisentrager* and other precedents, the court stated plainly "that the Constitution does not confer rights on aliens without property or presence within the United States." *Id.* at 991.

Following the D.C. Circuit decision, the detainees' lawyers attempted to convince the Supreme Court to review the decision. The Supreme Court denied certiorari. In denying certiorari and allowing the D.C. Circuit's decision to stand, Justices Kennedy and Stevens pointed to the Supreme Court's "practice of requiring the exhaustion of available remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus." *Boumediene v. Bush*, 127 S. Ct. 1478, 1479 (2007) (Kennedy and Stevens, J.J. concurring). Implicit in the Kennedy and Stevens concurrence in the denial of certiorari is the notion that legislation has now established a functioning system of judicial procedures for dealing with enemy combatants, and that this system should be allowed to run its course before further review.[2] This will enable later decisions to be informed by a developed record of how this system works in practice, which should greatly clarify the legal issues and equities at stake. The concurring Justices held open the possibility of later Supreme Court review, especially if it could be shown that "the Government has unreasonably delayed proceedings under the Detainee Treatment Act." *Id.* at 1479.

Thus, the legal issue at the heart of the debate over the habeas provisions of the MCA is no longer the exclusive domain of academic debate among outside experts. It has been resolved by the inside experts who possess the constitutional authority to decide these questions. At present, the highest court to consider the issue has held clearly that the habeas provisions of the Military Commissions Act and the Detainee Treatment Act fully comport with constitutional requirements. To be sure, there remains the possibility – and indeed the probability – of later Supreme Court review, but at the present time, the legal system has come to rest on the notion that the legislation's habeas corpus and judicial review provisions are constitutional, that no legal

[2] As of the date of this testimony, there remain pending before the Supreme Court a petition for rehearing of the denial of certiorari, as well as a motion to delay issuance of the D.C. Circuit mandate. It would be exceedingly unusual, however, for the Supreme Court to grant any such petition or motion.

injury is being inflicted on the detainees by virtue of their operation, and that the system should be allowed to function and demonstrate its virtues (or flaws) in practice before these questions are revisited.

The present path: allowing MCA review procedures to function

At this moment in time, the extensive system of detainee review carefully crafted by Congress, signed by the President, and affirmed by the courts, is finally starting to function as designed. The procedural mechanisms that Members of this Committee helped establish for judicial review of enemy combatant detentions were set in motion just months ago and are only now beginning to operate as Congress intended. We will soon see how the system will function in practice to afford detainees the avenues of appeal that Congress determined would best serve our national interest and the competing policy goals of procedural fairness to detainees and effective warfighting efforts.

The early results have already been interesting. Just weeks ago, in two separate cases, military commissions dismissed charges against detainees who had been designated as "enemy combatants" but not, to the tribunals' satisfaction, as "*unlawful* enemy combatants." In the first case, Omar Khadr, a Canadian accused of throwing a grenade during a firefight in Afghanistan in 2002, was designated as an "enemy combatant" in 2004. Colonel Peter Brownback dismissed without prejudice all charges against Khadr for want of jurisdiction, essentially concluding that a CSRT must first officially declare Khadr an "alien unlawful enemy combatant" before the commission may exercise jurisdiction. Later the same day another judge, Captain Keith J. Allred, reached a similar conclusion with regard to Salim Ahmed Hamdan, Osama bin Laden's personal driver and bodyguard who was captured during the invasion of Afghanistan.

These dismissals do not indicate any fundamental flaw with the MCA, but they do identify a technical problem. This problem can be fixed in one of several ways, and the Department of Defense is currently pursuing remedies. For example, some commentators have criticized the conclusion that the "alien unlawful enemy combatant" determination must be made by a CSRT. The MCA envisions two potential paths to establishing the jurisdictional predicate of "unlawful enemy combatant" status – either a formal CSRT finding to that effect or a factual showing that the defendant is "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)." 10 U.S.C. § 948a(1)(A)(i) (2006). In short, the MCA seems to contemplate that the "unlawful enemy combatant" determination can be made not only by a CSRT, but also by the military commission itself. Alternatively, individuals whom the government wishes to charge with war crimes could have their cases resubmitted to the CSRTs for a formal finding regarding the lawfulness of their combatancy. In the case of al Qaeda terrorists and Taliban irregulars, this will be short and easy work: there is no respectable argument that individuals such as Khadr or Hamdan are privileged or lawful belligerents. Thus, regardless of the precise procedure employed, Khadr and Hamdan will soon be tried before military commissions, as, in all probability, will the 9/11 conspirators, led by Khalid Sheikh Mohammed.

Likewise, the MCA is in the process of being applied in the D.C. district court to dismiss pending habeas corpus provisions and channel review to the D.C. Circuit. Although decisions have not yet been rendered by the lower courts that will definitively determine the path this will take, it is reasonable to expect that within the next year, a variety of legal challenges to the CSRTs, their processes, and their determinations will be brought before the D.C. Circuit. In

the course of deciding those appeals, the D.C. Circuit will clarify a great deal about the nature and scope of judicial review afforded under the MCA to enemy combatants and will render opinions on the blizzard of legal claims being developed by the detainees' advocates.

Thus, we now stand at the threshold of a process that will show us how both the military commissions and the MCA's judicial review provisions operate in practice. And we stand here at this moment with the courts having already ruled that the constitutional privilege of the writ of habeas corpus does not extend to enemy fighters our military detains abroad. Detainees such as Khadr and Hamdan are already availing themselves of the legal rights afforded to them under the MCA – with some success. And large numbers of detainees will shortly have the opportunity to present their legal and factual arguments to the D.C. Circuit. As these cases make their way through the commissions and the courts, we will all learn a great deal, and the Administration and the courts will supply answers to numerous open questions.

H.R. 1416

After years of discussion, debate, political activism, and constructive compromise, we are finally in a position to see how the procedural system agreed to by the two political branches of government actually works in practice. Yet I understand the Committee is now considering H.R. 1416, The Habeas Corpus Restoration Act of 2007. This bill would fundamentally alter and undermine the existing procedural scheme before it has even had a chance to prove itself. It thus strikes me as precipitous and premature. Moreover, in substance, I believe it proceeds from faulty legal premises and represents bad national policy. I urge the Committee not to adopt it, or, at a minimum, to delay consideration of the bill for a period of time, so that a more informed legislative exercise can be undertaken after we have had some experience with the MCA regime.

Effect of H.R. 1416. In substance, H.R. 1416 does two things. First, it repeals section 7 of the MCA, plus the related provision in Title 10 relating to military commissions, that channels all judicial review of CSRT and military commission decisions to the D.C. Circuit. At first blush, the bill would thus appear to abandon the careful compromise arrived at in the MCA by both political parties and the President and restore the chaotic situation that prevailed in our courts prior to its passage. But the bill is actually worse than that. It leaves the DTA judicial review mechanisms in place and does not repeal them. Thus, the bill would expand our terrorist enemies' litigation options beyond even those they enjoyed *before* Congress acted to bring some order to the chaotic and damaging situation produced by the *Rasul* decision. If this bill became law, not only would the al Qaeda terrorists and Taliban fighters at Guantanamo have access to our federal district courts to file habeas corpus petitions, but they would *also* have the special statutory review provisions enacted in the MCA available to them to challenge the legality of the CSRT and military commission proceedings. Not only will we again see vexatious habeas corpus litigation challenging every aspect of their detention, confinement, treatment, and transfer, but we will also see the D.C. Circuit burdened with overlapping and duplicative direct appeals from the CSRTs and military commissions, with no statutory means for resolving or regulating these jurisdictional conflicts.

This would represent a 180 degree turn in policy toward judicial review of enemy combatants' claims. These individuals, whom our military has determined to be violent enemies of the United States, will be among the most privileged litigants in the very court system they would like to replace wholesale with shari'a religious courts. They will have greater and more robust litigation options than even loyal American citizens convicted of federal crimes, who are typically confined to at most a single round of habeas corpus review.

But the bill does not stop at multiplying the judicial fora available to the militant Islamists our military and intelligence services have captured and are holding abroad. It also multiplies the legal claims they can bring in those fora. The second change proposed by H.R. 1416 is to repeal section 5 of the MCA, which had made clear that our enemies could not bring claims under the Geneva Conventions against our country, its officers, or employees. Prior to the wave of post-9/11 detainee litigation, it had always been understood that the Geneva Conventions were non-self-executing, and thus did not confer private rights of action that could be asserted by individual litigants in the domestic courts of a signatory nation. *See, e.g., Huynh Thi Anh v. Levi,* 586 F.2d 625, 629 (6th Cir. 1978). Instead, the Conventions imposed duties and created rights between sovereigns, and their enforcement was left to state-to-state negotiation informed by the International Committee of the Red Cross. But as with so many other traditional understandings that have been caught in the legal crossfire following 9/11, this one was attacked by the detainees and their advocates, and Congress had to act to restore it. If H.R. 1416 were to pass, some courts may regard it as evidence that Congress wishes to create private rights of action in favor of our enemies under the Geneva Conventions. After all, if that were not the case, what would be the reason for repealing section 5 of the MCA at all? In that event, not only will the suspected terrorists we have detained have unprecedented access to our courts, they will have unprecedented claims to bring in their court actions.

Flawed legal assumptions underlying H.R. 1416. I do not believe that the proponents of H.R. 1416 are motivated by a desire to help a deadly enemy or to create chaos in our courts. Rather, I believe the proponents of the bill are well-intentioned and feel that enactment of the bill is somehow necessary for us to live up to our ideals, principles, and legal traditions as Americans. In particular, proponents appear to assume that the constitutional core

of the habeas corpus right includes alien enemy fighters captured and held abroad, and that failure to repeal the judicial review provisions of the MCA will result in a violation of basic principles of procedural fairness embodied in our Constitution. In my view, this is a central and deeply flawed assumption.

The clearest and most important reason is that, to the extent the Suspension Clause itself requires any habeas corpus remedy for those in federal custody,[3] the scope of the writ does not cover alien enemies of the United States, captured during an armed conflict, and held abroad. Nothing in the Constitution confers rights of access to our courts for alien enemy combatants being detained in the ordinary course of an armed conflict. The Supreme Court, in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), held specifically that the Suspension Clause does not give aliens held abroad any constitutional right to habeas corpus relief. The Court recognized an essential distinction between our country's defenders and her foes, declining "to invest these enemy aliens, resident, captured, and imprisoned abroad, with standing to demand access to our courts," and refusing to "g[i]ve our Constitution an extraterritorial application to embrace our enemies in arms." *Eisentrager*, 339 U.S. at 777, 781. In recent cases such as *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), the Court has reaffirmed that constitutional rights simply do not attach to aliens outside our country. And most recently, in the context of the present dispute, the D.C. Circuit in

[3] There is a respectable argument, based on the original understanding of the Suspension Clause, that the Constitution itself creates no habeas corpus right *at all* for prisoners of *any* type in federal custody and that all such rights are entirely a creature of the Congress. No less a critic of the Administration than Professor Erwin Chemerinsky has explained that, "[a]lthough the Constitution prohibits Congress from suspending the writ of habeas corpus except during times of rebellion or invasion, this provision was probably meant to keep Congress from suspending the writ and preventing *state* courts from releasing individuals who were wrongfully imprisoned. The constitutional provision does not create a right to habeas corpus; rather, federal statutes [do so]." E. Chemerinsky, *Federal Jurisdiction* 679 (1989) (emphasis in original); *see also id.* at 683 ("the Constitutional Convention prevented Congress from obstructing the state courts' ability to grant the writ, but did not try to create a federal constitutional right to habeas corpus"); W. Duker, *A Constitutional History of Habeas Corpus* 135-136 (1980). After all, if the Suspension Clause itself were an affirmative grant of procedural rights to those held in federal custody, there would have been little need for the first Congress to enact, as it did, habeas corpus protections in the Judiciary Act of 1789. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

Boumediene confirmed that the MCA did not suspend the constitutional habeas corpus rights of the Guantanamo detainees because they never had any to begin with. Thus, the premise built into the very title and description of H.R. 1416 – that it is a bill to "*restore"* constitutional habeas corpus rights previously enjoyed by our enemies – is incorrect.

There is a second and independent reason why the MCA's judicial review provisions do not violate the Suspension Clause: even if the scope of the writ did cover alien enemy combatants, the MCA procedures are a sufficient substitute for the traditional habeas corpus remedy available to those in military custody to satisfy any constitutional requirement. Put simply, the MCA/DTA regime respects whatever constitutional habeas rights a foreign fighter could be thought to have. The Supreme Court has indicated that "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." *Swain v. Pressley*, 430 U.S. 372, 381 (1977). And the Court has specifically noted that "Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals." *INS v. St. Cyr*, 533 U.S. 289, 314 & n.38 (2001).[4] The MCA provides for meaningful judicial review of the legality of the Guantanamo detentions in a federal court of appeals. Habeas corpus is not suspended by these provisions; if anything, it is extended. As noted previously, the rights of judicial review afforded by the MCA to those whom we have captured are in fact considerably

[4] To be sure, the DTA review in the D.C. Circuit does not entail de novo evidentiary hearings or judicial fact finding. But neither do many habeas corpus proceedings in federal district court. In the ordinary habeas context, even as applied to U.S. citizens convicted of crime in a state court, review of factual sufficiency is highly deferential. *Jackson v. Virginia*, 443 U.S. 307, 320-24 (1979). Indeed, the traditional rule on habeas corpus review of non-criminal executive detentions was that "the courts did generally did not review the factual determinations made by the executive." *St. Cyr*, 533 U.S. at 27. Most petitions for collateral relief by federal prisoners under 28 U.S.C. § 2255 are resolved without any form of evidentiary hearing. And in the context of military detentions and trials, the established rules currently recognized by the Supreme Court are even more limited, providing for judicial review of legal issues and commission jurisdiction but no review at all of factual questions of guilt or innocence. *See, e.g., Ex parte Quirin*, 317 U.S. 1, 25 (1942); *Yamashita v. Styer*, 327 U.S. 1 (1946). The kind of quasi-administrative record review provided for by the DTA has ample precedent in contexts as diverse as habeas corpus review of selective service and immigration decisions. *See, e.g., St. Cyr*, 533 U.S. at 305-06; *Cox v. United States*, 332 U.S. 442, 448-49 (1947); *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 312 (1946).

more generous than anything we or any other nation in the history of the world has previously afforded to our military adversaries.

Thus, I believe H.R. 1416 proceeds from the erroneous legal premise that Anglo-American legal traditions require more access to domestic courts for alien enemy combatants than are afforded by the MCA. This erroneous premise partakes of an even deeper and more serious misunderstanding that led the Fourth Circuit astray recently in *Ali Saleh Kahlah Al-Marri v. Wright*, 2007 U.S. App. LEXIS 13642 (4th Cir. 2007). Both the bill and the *Al-Marri* decision assume that foreign terrorists, because they masquerade as civilians, must be treated as such by the legal system. This is not so. As a legal matter, we are free to treat them as what they are and have declared themselves to be: enemy soldiers waging a holy war against the United States with aims that include our complete destruction.

Al-Marri is a member of al Qaeda who trained at a terrorist camp in Afghanistan, met personally with Khalid Sheik Mohammed and Osama Bin Laden, and volunteered for a "martyr mission" to the U.S. during which he would serve as a "sleeper agent" facilitating terrorist attacks. *Id.* at *11. After arriving in the United States on September 10, 2001, Al-Mari received funding from al Qaeda sources to gather technical information about poisonous chemicals and to develop methods for disrupting the country's financial system as part of what the government believes was an intended second round of terror attacks. *Id.* Following his arrest, officials found information about jihad, the 9/11 attacks, and Bin Laden on his laptop computer, together with information about poisonous chemicals. *Id.* at *12. Without disputing any of these facts, the Fourth Circuit panel held that, notwithstanding President Bush's written order determining that Al-Marri is an enemy combatant waging war against America, he is in reality a "civilian" who must be treated as an ordinary criminal. *Id.* at *8-9, 34, 57.

Failing to recognize the realities of the global terrorist threat we now face, the court took upon itself the responsibility to apply what it described as "law of war principles" to determine who fits within the legal category of enemy combatant. *Id.* at 60. The court distinguished the Supreme Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (U.S. 2004), by noting that unlike Yaser Hamdi, Al-Mari was not found "fighting against the United States on the battlefield," and he "bore no arms with the army of an enemy nation." *Id.* at *51, 60. The court likewise avoided an obvious analogy with *Ex parte Quirin*, 317 U.S. 1 (U.S. 1942), where the Supreme Court upheld the treatment as enemy combatants of Nazi terrorists who snuck ashore during World War II for the purpose of committing terrorist acts inside the United States and destroying American war industries. *Id.* at *55. It instead adopted a rule that "enemy combatant status rests on an individual's affiliation during wartime with the 'military arm of the enemy government,'" categorically excluding members of transnational terrorist groups unaffiliated with a nation-state, such as al Qaeda, from the reach of American military power, at least once they reach our soil. *Id.* at *56 (quoting *Quirin*, 317 U.S. at 37-38). The court ruled that in such circumstances individual terrorists can only be treated as civilians and that "our Constitution does not permit the Government to subject civilians within the United States to military jurisdiction." *Id.* at *57.

A comprehensive critique of this decision and its pernicious practical and legal consequences is beyond the scope of my testimony today.[5] For present purposes, it will suffice to note that the heart of its holding – that terrorists unaffiliated with a state and not caught in a

[5] Among other things, the court usurped the President's power as Commander-in-Chief to determine who poses a military threat to the United States, seriously misapplied international law and domestic law concerning the scope of the law of war, gave applicable Supreme Court precedents far too narrow a reading, created a zone of relative legal safety for our adversaries on U.S. soil – precisely the place where they pose the greatest danger to us, and hamstrung our ability to use vital powers not available to civilian law enforcement to detect, detain, and interrogate terrorists who might have information vital to preventing further attacks. For these and other reasons, it seems difficult to believe that the decision will stand.

zone of active combat bearing arms can only be treated as civilians for legal purposes – is directly contrary to traditional understandings under the laws of armed conflict. Both domestic law and international law clearly recognize that such forces may pose a military threat and may be dealt with as such. Thus, the baseline against which to measure the rights afforded to them under the MCA is not our ordinary criminal justice system but rather the law of armed conflict. As we have seen, when measured against those standards, the MCA is generous and humane.

Under precedents and standards in both U.S. law and the international law, non-state actors perpetrating intense and organized violence with political aims – such as the attacks on our centers of military, political, and financial power on 9/11 – may trigger the President's war powers and the legal regime associated with the use of those powers. The President in fact expressly so found in the immediate aftermath of 9/11. *See* Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 16, 2001) (9/11 attacks "ha[ve] created a state of armed conflict that requires the use of the United States Armed Forces"). Traditionally, his determinations on such matters have received near-total deference from the courts. *See, e.g., The Prize Cases*, 67 U.S. (2 Black) 635, 666, 670 (1862) (determining whether a state of war exists and whom to treat as belligerents are presidential prerogatives). And in this case, Congress expressly agreed with the President's determination: the congressional Authorization for the Use of Military Force plainly recognized that we were involved in an armed conflict with al Qaeda, as it was naturally and specifically directed at individuals such as those who had flown the planes and mounted the attacks on 9/11 itself – individuals functionally indistinguishable from Al-Marri and who would have failed the Fourth Circuit's test for combatancy. *See* Pub. L. No. 107-40, § 2(a), 115 Stat. at

224 (authorizing the use of military force against organizations and individuals that "planned, authorized, committed, [and] aided" the September 11 attacks).

These presidential and congressional determinations were fully consistent with the applicable norms of law concerning armed conflict. A state of war does not depend on formalities such as a declaration by Congress. *See* U.S. Army Field Manual, *The Law of Land Warfare*, FM 27-10, ch. 1, ¶ 9 (1956) ("[A] declaration of war is not an essential condition of the application of this body of law"). Nor is war limited to a conflict between two nation-states. *See, e.g., The Prize Cases*, 67 U.S. (2 Black) 635, 666 (1862) (holding, in the context of a naval blockade of the Southern states claimed as an exercise of President Lincoln's war powers, that "it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign states"). For example, the irregular warfare carried on against bands of Indians on the western frontier during the nineteenth century was recognized as having the legal status of war, notwithstanding the fact that the Indians were not independent, sovereign nations under classical international law. *See*, *e.g., Montoya v. United States,* 180 U.S. 261 (1901); The Modoc Indian Prisoners, 14 Op. Att'y Gen. 249 (1873); Unlawful Traffic with Indians, 13 Op. Att'y Gen. 470 (1871). American presidents have also used their war powers and employed the legal regime applicable to armed conflict, rather than civilian law enforcement, in the case of such irregulars as Pancho Villa's band on the southern border, the Barbary pirates, and the conspirators responsible for the Lincoln assassination, who were Maryland citizens living in the Union where civilian courts were open and functioning.[6]

International law likewise recognizes the general principle that non-state actors may engage in war and must therefore be bound by the laws of war. *See, e.g.*, Respect for

[6] *See, e.g., Military Commissions*, 11 Op. Att'y Gen. 297 (1865); *Ex parte Mudd*, 17 F. Cas. 954 (S.D. Fla. 1868); *Mudd v. Caldera*, 134 F. Supp. 2d 138 (D.D.C. 2001).

Human Rights in Armed Conflict, G.A. Res. 2444, U.N. GAOR, 23d Sess., U.N. Doc. A/7433 (1968) (minimal standards of conduct set forth in common article 3 of the Geneva Conventions apply not only to governmental actors but also to "other authorities" responsible for "action in armed conflict"); *Prosecutor v. Tadic,* 35 I.L.M. at 54 (laws of war apply to "protracted armed violence between governmental authorities and organized armed groups"). And with specific reference to 9/11, important international law sources, too, recognized that the attacks were of a military character and had brought about a state of armed conflict between the United States and those who had planned and carried out those attacks. For the first time in its history, NATO invoked the mutual defense provision of Article 5 of the North Atlantic Treaty, which provides that an "armed attack against one or more of [the parties] shall be considered an attack against them all." North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 34 U.N.T.S. 243, 246.

If further proof were needed that the rights of individuals such as those at Guantanamo are to be measured against the baseline of the law of war, rather than domestic criminal law, the history of Protocol I to the Geneva Conventions provides it. In 1977, an additional protocol to the Geneva Conventions was drafted, which became quite controversial. Known as Protocol I, this measure was specifically intended to address the legal rights of non-state actors such as transnational terrorist groups and guerrillas. It was controversial precisely because it would have afforded such groups greater legal rights than were previously afforded to people in this category under the laws of war, where they occupied the lowest rung of the rights ladder and were entitled to only minimal protections.[7] This protocol was never ratified by the

[7] Traditionally, such unlawful combatants – *i.e.,* those who do not fight according to the laws of war, which are designed in large measure to minimize the inevitable risks and injuries to civilians that war occasions – have been regarded as *hostes humani generis*, or "enemies of all mankind," because their failure to follow the customs and usages of war renders their violence particularly dangerous to non-combatants. Unlawful combatants have traditionally been afforded fewer substantive or procedural rights than lawful combatants, in part to create incentives to fight according to civilized norms and thereby protect civilians. *See generally Ex parte Quirin*, 317 U.S. at 31-32 & n. 10; *United States v. The Cargo of Brig Malek Adhel*, 43 U.S. 210, 232 (1844); *Colepaugh v. Looney*, 235 F.2d

United States, under either Republican or Democratic administrations, because our leaders objected on a bipartisan basis to affording any greater legal protections to individuals and groups whose unlawful means of waging war, such as hiding in civilian populations and refusing to bear arms openly, deliberately magnified the risks and dangers of war to civilian populations.[8] The history of the 1977 protocols and the debates over whether to ratify them makes clear that there was (and is) a universal understanding that fighters in these disfavored categories are not, as the Fourth Circuit would have it, civilians who must be treated as mere criminals but rather are the most dangerous kind of enemy combatants who are properly subject to the law of war. After all, Protocol I was proposed, and was controversial, precisely because it would have afforded transnational terrorist groups and guerrillas *more*, not fewer, legal rights. The opposite would have been true if the Fourth Circuit were correct.

H.R. 1416 appears to share this fundamental conceptual misunderstanding with the majority in *Al-Marri.* The baseline for fair, appropriate, and lawful treatment of al Qaeda terrorists is not the treatment we afford to criminal defendants in the civilian justice system. It is not even the treatment we afford to honorable soldiers of an enemy nation, who wear uniforms, bear arms openly, and obey the laws of war. It is instead the relatively low level of protection afforded to especially dangerous and pernicious unlawful combatants – the kind of people who wage war by flying airplanes loaded with jet fuel into civilian office buildings. Forbidding military detention, as the Fourth Circuit majority did, or granting the full complement of habeas corpus rights, as H.R. 1416 would do, confuses the categories horribly. It reduces the incentives

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429, 432 (10th Cir. 1959); William Winthrop, *Military Law and Precedents* 783 (2000); *Military Commissions*, 11 Op. Att'y Gen. 297 (1865); Ingrid Detter, *The Law of War* 144 (2d ed. 2000).

[8] As President Reagan explained in transmitting a later Protocol to the Senate for ratification, the United States could not support Protocol I because "we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law." S. Treaty Doc. No. 100-2, at iv (Jan. 29, 1987). The nation's leading newspapers, including the Washington Post and the New York Times, editorialized in favor of this position. *See generally* John Cornyn, *In Defense of Alberto R. Gonzales and the 1949 Geneva Conventions*, 9 TEX. REV. L. & POL. 213, 220-21 (2005).

that exist in the laws of armed conflict to fight honorably and the penalties for failing to do so. And it fails to recognize that treating terrorists like civilians essentially dignifies and validates the very disguises that make them so dangerous to society.

Policy implications of H.R. 1416. Once the legal misconceptions are dispelled, H.R. 1416 appears as it should: as a straightforward policy decision. Are we as a nation better off affording our captured enemies more access to our domestic courts than the MCA now provides? Should Congress, as a matter of choice, allow foreign terrorists and enemy fighters to sue our military commanders on an almost unlimited array of claims in federal district court, trigger evidentiary hearings and trial-type proceedings, and invite the courts to engage in de novo second-guessing of the judgments of our military commanders concerning who presents a danger to our population?

I believe the answer is no. Enactment of H.R. 1416 would place the United States in much the same position we found ourselves immediately after *Rasul*, with hundreds of our nation's most vicious enemies suing our military and civilian commanders in federal district court seeking writs of habeas corpus. Now that Khalid Sheikh Mohammed, the al Qaeda mastermind of 9/11, has been transferred to Guantanamo, along with approximately a dozen other high-value detainees previously held by the CIA, enactment of H.R. 1416 would directly benefit the 9/11 conspirators themselves, and not merely those with some claim, however implausible, to being mere shepherds or religious students caught by mistake in Afghanistan. The resulting litigation would distract military commanders from their primary duties, cause innumerable difficulties in running the detention facility at Guantanamo, and soak up enormous resources at the Department of Justice. It would also allow al Qaeda leaders such as Khalid

Sheikh Mohammed and Ramzi Binalshibh an extraordinary propaganda platform in the midst of the conflict. The potency of such a platform is already a matter of record.

The potential harm that could result from such litigation has already been recognized by the Supreme Court. As Justice Robert Jackson observed in *Eisentrager*, furnishing habeas corpus rights to enemy combatants abroad "would hamper the war effort and bring aid and comfort to the enemy. [Habeas proceedings] would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. 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 enemies of the United States." 339 U.S. at 779. The wisdom of the Supreme Court's pronouncement in 1950 has been amply borne out by our experience with the Guantanamo litigation. Unfortunately, the old common sense and practical appreciation for the imperatives of wartime that informed the Supreme Court's views in 1950 seem increasingly difficult to come by.

Litigation and warfare do not mix well. A nation that wishes to preserve itself will strive to ensure that the latter remains largely unencumbered by the former. Oversight and accountability in wartime should generally be provided by means other than lawsuits. As the Supreme Court recently observed, accepting the claim that aliens abroad enjoy federal constitutional protections "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries." *Verdugo-Urquidez*, 494 U.S. at 273. The values of civilization and human rights are not served by affording court access and rights under

the U.S. Constitution to our enemies; those values are served by vigorously and effectively defending our society and our liberties against those who would destroy both.

What, then, are the advantages of H.R. 1416? I can think of only two. First, it is possible that providing more robust court access to detainees would dampen the criticism directed at us by foreign governments, NGOs, and opinion leaders across the globe. Mollifying our critics abroad does have value. Retaining the moral high ground in the eyes of the rest of world not only makes Americans feel better about themselves and helps our citizenry remain supportive of the war effort but also pays concrete security dividends in the form of intelligence cooperation from foreign countries. It can also help deprive our enemies of popular support in the communities where they operate.

However, I doubt that these advantages would meaningfully accrue to us from enacting H.R. 1416. The impact of enacting H.R. 1416 on world opinion will be marginal at best. It may even be negative in the long run, as the propaganda platform provided by the litigation provides greater and fuller opportunities for accusations of misconduct or malfeasance, no matter how unfounded, to be broadcast across the globe. It is simply not realistic to believe that the world's disapproval of our current efforts stems from the absence of full habeas corpus rights in federal district court. After all, such rights are absolutely unknown in most of the world, and especially in many parts of the world where criticism of us is most severe. This is only one item (and not a very prominent one at that) in a long list of grievances about which our critics profess to be upset. I believe H.R. 1416 would do little, if anything, to placate global elites or the Arab street, who are more focused on the fact of the Guantanamo detentions themselves, the war in Iraq, historical wrongs such as the detainee abuse at Abu Ghraib, and the perception that defending ourselves against militant Islamists entails disapproval of Islam.

In evaluating measures like H.R. 1416, we need to be clear-eyed and realistic: our critics across the globe have their own agendas, and they are largely implacable. However wrongheaded these attitudes may be, many of our critics genuinely fear American power more than they fear militant Islam. They are more determined to constrain our ability to act in defense of liberal values across the globe than they are to defeat the forces of fanatical, religiously-inspired totalitarianism that wish to shed innocent blood in their streets. In my opinion, almost nothing short of wholly abandoning the effort to defend ourselves militarily will satisfy the critics. At bottom, they want a return to pre-9/11 sleepwalking, where military threats were dealt with as law enforcement matters.

Even in the context of the debates over the legal rights of detainees, it is apparent that there is no simple way to mollify our critics. At first they claimed that all they wanted were Article V status hearings under the Geneva Conventions. When they got CSRTs, which are vastly superior to Article V hearings, they then complained that it was unfair for the Administration to unilaterally set the rules of detention: what they really wanted, they said, was congressional review of the issues and the enactment of legislation. When they got that, they immediately began claiming that the resulting statute, the MCA, was unconstitutional in a variety of respects. And now many of the critics are even seeking to impose criminal justice-style adversary procedures on the CSRTs themselves, contrary to every known principle of combatant status review. Thus, I believe expectations about the public relations or world opinion advantages of H.R. 1416 are largely or wholly illusory.

Moreover, even if enacting the bill would meaningfully satisfy our harshest critics, we would have to weigh very carefully whether that advantage would be sufficient to outweigh the very real disadvantages we would suffer in our ongoing effort to incapacitate

extremely dangerous individuals. The record is already clear that the existing level of process afforded at Guantanamo has resulted in several dozen erroneous releases. Employing procedures the critics contend are wholly inadequate, we have released significant numbers of detainees based upon a conclusion that they were not, or did not remain, enemy combatants. Yet we know now that in many instances we were duped: there are now numerous documented instances where individuals we had in custody have returned to the battlefield and continued to attack our soldiers and others. Where the effect of an erroneous release could be to unleash future Mohammed Attas and increase the risk of another 9/11, we should think long and hard before adopting policies that will undoubtedly increase the instances of such errors.

This leads to the second possible advantage of enacting H.R. 1416: allowing full judicial process might reduce the error rate in our detentions. Any fair-minded person must acknowledge that our military does not successfully distinguish friend from foe 100% of the time. Just as we have released some bona fide terrorists and enemy fighters, we also undoubtedly have detained some people who genuinely represented no threat to us. More robust judicial review should have a tendency to reduce such errors and to result in the release of more individuals who do not belong in military custody. This is a genuine advantage. Every erroneous detention is deeply regrettable. Our commanders do everything within their power to prevent them, and our government plainly has no interest in holding innocents.

However, fair-minded people must also acknowledge that the balance of risks is radically different in wartime than when we are at peace. When the lives of thousands of American civilians could be destroyed, and the lives of their families shattered, by a single additional terrorist attack enabled by missteps on the global battlefield, and when the safety and security of our nation and our system of laws are themselves at stake, we take risks with the lives

and liberties of innocents that would be wholly unacceptable under other circumstances. Every time a shot is fired or a bomb is dropped, we risk making catastrophic mistakes and harming individuals who deserve no harm and to whom we intend none. Yet we fire shots and drop bombs anyway, without any due process or court hearings beforehand. We do it because we have to in order to ensure that we prevail in a conflict where we represent the values of humanity and classical liberalism against adversaries who wish to impose a medieval, religious tyranny. As much as more robust judicial review may reduce the rate of erroneous detentions, and thus help some individual innocents caught up in our military system, it will also increase the rate of erroneous releases, and thus increase the danger to our soldiers and civilians.

It is extremely difficult to conclude that the benefit to innocents of the first effect will outweigh the risks to innocents of the second. After all, our civilian justice system is built on the notion that it is better to release ten guilty people than to see one innocent person wrongfully imprisoned. But in wartime, where the risks to civilians and the larger society are so much greater from an erroneous release, neither we nor any other nation in history has adopted a similar philosophy. All military operations present at least some risk of error that might be reduced by judicial review. Yet in war, decisionmaking with potentially dramatic consequences for innocents caught in the crossfire is traditionally and almost totally unreviewable by the courts.

At a minimum, consideration of a step as momentous as granting unprecedented habeas corpus rights to those our military has captured on the global battlefield should await further factual and legal developments as the MCA is allowed to work. Whatever one believes about the policy merits of H.R. 1416, it would be premature to pass it now.

At present, the law represents a sensible compromise between competing policy considerations, arrived at after full and careful debate by the last Congress. By historical law of war standards, the MCA affords generous procedural rights to detainees. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which addressed the extent of the due process to which an *American citizen* detained militarily in the current war was entitled, the Supreme Court noted that "the exigencies of the circumstances may demand that," aside from core rights to notice and a meaningful opportunity to contest the factual basis for detentions before a neutral decisionmaker, "enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." *Id.* at 533. In the context of global terrorist networks threatening our homeland, the MCA provides robust procedures for a federal court of appeals to review executive branch determinations that the suspected terrorists at Guantanamo are enemy combatants subject to detention under the laws of armed conflict. The court is specifically empowered to ensure that the applicable administrative procedures and standards for combatant status review have been followed and that those procedures and standards comport with federal constitutional and statutory norms. The court is also directed to ensure that the executive determinations are supported by a preponderance of the evidence. This is meaningful review of the legality of detention. It would be prudent to let the system work for a while – to allow the careful compromises of the MCA to take their course. If untoward practical consequences emerge, or unexpected or problematic legal developments arise, there will be plenty of opportunity for informed adjustments in due course.

As noted before, this seems to be the current view of the Supreme Court. The D.C. Circuit has already held that MCA does not violate any constitutional habeas corpus rights of the detainees. The Supreme Court decided to let that decision stand and to wait and see how

the judicial review mechanisms function in practice before reviewing the MCA. Further legislative action at this moment in time is equally inadvisable. It would throw a system that is just now approaching a tentative equilibrium into chaos. None of us has yet had a meaningful opportunity to see how MCA review really works in practice. And we will all undoubtedly learn many things as it does. Indeed, the jurisdictional loophole identified by the military judges presiding over the Khadr and Hamdan military commission trials may be but the first of several unexpected issues that emerge from the MCA's operation. If Congress is going to legislate on this subject again, it would be far better to do so after the system has had an opportunity to function, so that such issues can be identified and clarified. Allowing the system to function will also produce a more complete legislative record on which to base important policy judgments about what rights of access to our domestic courts foreign enemy jihadists should enjoy.

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In closing, I wish to thank the Committee for the opportunity to address this important issue. I would be glad to answer any questions you may have.