[ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 17, 2007]

NO. 06-1038

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

Saifullah Paracha,

Petitioner,

v.

Robert M. Gates, Secretary of Defense,

Respondent.

ORIGINAL ACTION UNDER DETAINEE TREATMENT ACT OF 2005

BRIEF FOR PETITIONER SUPPORTING INVALIDATION OF FINAL DECISION OF COMBATANT STATUS REVIEW TRIBUNAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Petitioner is Saifullah Paracha.

Respondent is Robert M. Gates, Secretary of Defense.

No persons have appeared as amici curiae.

B. Rulings Under Review

Final decision of Combatant Status Review Tribunal ("CSRT") Panel 24, dated December 8, 2004, that Petitioner is properly designated as an enemy combatant. (App. 1.)

Order of Director, CSRTs, dated December 21, 2004, concurring in the decision of the CSRT and certifying that decision is final. (App. 68.)

C. Related Cases

This case has not previously been before this Court other than for disposition of procedural motions. The cases described below present the same issues as, or issues similar to, the issues in this case, and the government is a party to all of the cases. Petitioner is a party only in this case and the case described in paragraph 1.

Petitioner's habeas action. On November 17, 2004, Petitioner filed a petition for a writ of habeas corpus in the U.S. District Court for the District of Columbia. *Paracha v. Bush*, No. 1-04-civ.-02022 (PLF) (D.D.C.). Petitioner and his wife filed an amended petition on December 10, 2004. Petitioner and his wife filed two appeals from orders of the District Court, D.C. Cir. 05-5194 and 05-5333.

On April 9, 2007, a panel of this Court remanded the appeals to the district court with instructions to dismiss the petitions for lack of jurisdiction based on the panel decision in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 2007 WL 1854132 (U.S. June 29, 2007). Petitioner and his wife expect to file a petition for certiorari in the Supreme Court seeking review of the panel's order of April 9, 2007. Petitioner's certiorari petition is due August 7, 2007.

Other Detainee Habeas Actions. Numerous other Guantánamo detainees have filed habeas corpus actions in U.S. District Court for the District of Columbia. Judge Richard Le**o**n granted the government's motion to dismiss two of these actions, *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005), and Senior Judge Joyce Hens Green denied in material part the government's motion to dismiss eleven other habeas actions, *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005). A divided panel of this Court dismissed the actions for want of jurisdiction under the Military Commissions Act of 2006 ("MCA") in *Boumediene*, now under review in the Supreme Court. An original habeas action raising similar issues is pending in the Supreme Court, *In re Ali*, No. 06-1194 (filed Mar. 6, 2007).

Detainee DTA Actions. Numerous other Guantánamo detainees have filed original actions under the Detainee Treatment Act of 2005 ("DTA"). In *Bismullah v. Gates*, No. 06-1197, and *Parhat v. Gates*, No. 06-1397, a panel of this Court will

address DTA scope-of-review and protective-order issues. The panel heard argument on May 15, 2007.

Hamdan. The Guantánamo detainee in this habeas action challenges the constitutionality of the military commissions established by the MCA and MCA provisions (1) purporting to eliminate habeas actions by Guantánamo detainees and claims by such detainees under the Geneva Conventions, and (2) limiting the detainees to review under the DTA. The district court dismissed the petitioner's action for lack of jurisdiction under the MCA, *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9 (D.D.C. 2006). Pending in this Court is the petitioner's suggestion of initial en banc hearing, filed June 6, 2007, *Hamdan v. Gates*, Case No. 07-5042 (D.C. Cir.). Pending in the Supreme Court are petitioner's petition for certiorari before judgment, and motions aimed at securing a grant of the petition, filed on July 9, 2007, *Hamdan v. Gates*, Case No. 07-15 (S. Ct.).

Al-Marri. The detainee in this habeas action is a permanent lawful resident alien who challenges his detention as an enemy combatant in the Consolidated Naval Brig in South Carolina. The district court dismissed the petitioner's action, *Al-Marri ex rel. Berman v. Wright*, 443 F. Supp. 2d 774 (D.S.C. 2006), and a divided panel of the Fourth Circuit reversed, *Al-Marri v. Wright*, 481 F.3d 160 (4th Cir. 2007). The government filed a suggestion of *en banc* rehearing on June 27, 2007.

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TABLE OF AUTHORITIES[1]

CASES

[1] Cases primarily relied upon are marked with asterisks.

STATUTES AND TREATIES

MISCELLANEOUS

GLOSSARY

App.	Appendix
AUMF	Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)
CSRT	Combatant Status Review Tribunal
DTA	Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005)
LPR	Lawful permanent resident
MCA	Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006)
PR	Personal Representative

JURISDICTIONAL STATEMENT

Insofar as Rule 28(a)(4)(A) may be applicable, the "subject-matter jurisdiction" of the CSRT and that of the Director, CSRT, rests on an order of the Deputy Secretary of Defense dated July 7, 2004. The Order cites no statutory authority. This Court has jurisdiction under DTA § 1005(e)(2).

CONSTITUTIONAL, STATUTORY, AND TREATY PROVISIONS

The addendum contains pertinent portions of the U.S. Constitution; the DTA; the MCA; the AUMF; Geneva Conventions (III) and (IV) Relative to the Treatment of Prisoners of War, art. 3 (Common Article 3); and U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the government must provide habeas relief or an equivalent remedy before it may detain Saifullah Paracha, a lawful permanent resident of the United States, indefinitely at the U.S. Naval Station Guantánamo Bay as an enemy combatant.

2. Whether precluding Paracha from raising claims under the Geneva Conventions in this action would violate the Suspension Clause and the doctrine of *Ex parte Klein*, which forbids the courts from ignoring applicable laws.

3. Whether Paracha's CSRT, conducted before Respondent or his predecessor adopted the standards and procedures required by the DTA, violated the

Constitution and laws of the United States and the standards and procedures required by the DTA.

4. Whether Paracha's CSRT violated the Constitution and laws of the United States as well as procedures under which it was conducted because the CSRT staff failed to collect all relevant evidence and submit exculpatory evidence, and because the CSRT failed to review the reliability of secret hearsay evidence used against Paracha which in all likelihood was obtained by torture or coercion.

STATEMENT OF FACTS

D. Introduction

In the wake of the September 11, 2001 terror attacks, the United States took into custody thousands of foreign nationals all over the world. Beginning in January 2002, the U.S. transported more than 800 of these foreign nationals to detention facilities at U.S. Naval Station Guantánamo Bay, Cuba. About 360 detainees are held there today. The United States kidnapped Petitioner, Saifullah Paracha, in Bangkok, Thailand, in July 2003; spirited him from Bangkok to prisons in Afghanistan; and finally brought him to Guantánamo in September 2004.

Virtually all of the Guantánamo detainees, including Paracha, are held based on their designation by the government as "enemy combatants." But contrary to repeated statements by high government officials that the detainees are "the worst of the worst" and "vicious killers," the CIA in August 2002 concluded that most of

the Guantánamo detainees "didn't belong there."[2] In January 2005, Major General Jay Hood, then commander at the prison, admitted that "sometimes we just didn't get the right folks," and that these "folks" were still in Guantánamo because "[n]obody wants to be the one to sign the release papers. . . . There's no muscle in the system."[3] There was enough "muscle in the system," however, to designate nearly 500 of the 535 detainees who had CSRT hearings as "enemy combatants."[4]

E. Petitioner

Saifullah Paracha, nearly 60, is a citizen of Pakistan.[5] He suffers from heart disease, diabetes, high blood pressure, skin disorder, and gout.[6]

In 1971, Paracha came to the United States, where he lived in Queens and attended the New York Institute of Technology.[7] In 1980, Paracha was granted a permanent resident visa – known as a "green card" – which entitled him to live in the United States permanently.[8] While in the United States, Paracha established Third World Broadcasting, a weekly 90-minute program on WNJU, New Jersey

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[2] Jane Mayer, *The Hidden Power* 44, The New Yorker (July 3, 2006).

[3] Christopher Cooper, *Detention Plan: In Guantanamo, Prisoners Languish in a Sea of Red Tape*, Wall Street Journal (Jan. 26, 2005).

[4] *Status of All Guantanamo Detainees Reviewed; 38 To Be Released* (Mar. 31, 2005), *available at* http://usinfo.state.gov/dhr/Archive/2005/Apr/01-23233.html.

[5] CSRT Decision Report Exhibit D-b at 1, App. 57.

[6] Saifullah Aff. (Dec. 8, 2004), App.57.

[7] Pet'r's Ans. to Resps.' Mot. to Dismiss and for J. as a Matter of Law, Ex. 1 ("Aff. of Farhat Paracha") ¶¶ 2, 4, *Paracha v. Bush*, No. 04-2022 (PLF) (D.D.C. filed Feb. 9, 2005), App. 69; CSRT Decision Report Exhibit D-b at 1, App. 57.

[8] Aff. of Farhat Paracha Ex. A, App. 71.

that broadcast Pakistani television programs in Urdu for the local Pakistani community.[9] Paracha also bought Globe Travel Services (Pakistan) Ltd., a New York corporation located at Rockefeller Center, and established Sana Travel, Inc., located on Fifth Avenue, in New York. The travel agencies facilitated travel between the United States and Pakistan.[10]

In 1977, Paracha's wife, Farhat, who is also a citizen of Pakistan, came to the United States, where she earned a master's degree at NYU and met Paracha; the couple married in 1979 and have four children.[11] Paracha's wife also holds a green card,[12] as do his four children.[13] Four of Paracha's brothers and sisters live in the United States; two hold green cards, and two are naturalized citizens; another with a green card died recently.[14] Paracha also has many nieces and nephews living in the United States who are American citizens by birth or naturalization.[15]

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9 Aff. of Saifullah Paracha (Jul. 7, 2007), App. 83; Summarized Sworn Detainee Statement, CSRT Panel 24 (Dec. 8, 2004) ("Summarized Paracha Sattement"), App. 10-11, 14.

10 *Id.*, App. 83-84.

11 *Id.*, App. 83. Aff. of Farhat Parach, App. 69.

12 *Id.*, Ex. B, App.72.

13 Aff. of Saifullah Paracha, App. 83.

14 Pet'r's Ans. to Resps.' Mot. to Dismiss and for J. as a Matter of Law, Ex. 4 ("Aff. of Mohammad Paracha") ¶¶ 2, 4, *Paracha v. Bush*, No. 04-2022 (PLF) (D.D.C. filed Feb. 9, 2005), App. 76.

15 Aff. of Mohammad Paracha ¶¶ 4-7, App. 76-77.

According to a nephew's sworn statement, "in terms of family connections, Saifullah Paracha is as much or more American than Pakistani."[16]

In 1986, Paracha moved back to Pakistan with his family.[17] Paracha returned to Pakistan to oversee the Pakistani operations of his U.S. travel agencies.[18] Thereafter, Paracha and Charles Anteby, an American partner, established an export-import business, which did business under the name of Chanco Buying Agents in the United States and International Merchandise (Pvt.) Ltd. in Pakistan.[19] The business acted as a buying agent in Pakistan for American retailers, such as Wal-Mart and K-Mart, placing orders for garments and other merchandise made in Pakistan.[20] Paracha oversaw factory operations in Pakistan; Anteby lined up buyers in the United States.[21] While in Pakistan, Paracha also set up a television production company, Universal Broadcasting. The company produced plays and programs designed to minimize hostilities caused by religious antagonism.[22]

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16 *Id.* ¶ 8, App. 77.

17 Aff. of Farhat Paracha ¶ 5, App. 70.

18 Aff. of Saifullah Paracha, App. 83-84.

19 Summarized Paracha Statement, App. 13; Pet'r's Ans. to Resps.' Mot. to Dismiss and for J. as a Matter of Law, Ex. 2 ("Aff. of Syed Abdul Mahasin") ¶¶ 3-8, *Paracha v. Bush*, No. 04-2022 (PLF) (D.D.C. filed Feb. 9, 2005), App. 73-75; Aff. of Saifullah Paracha ¶ 7, App. 84.

20 Summarized Paracha Statement, App. 13; Aff. of Syed Abdul Mahasin ¶¶ 4-7, App. 74; Aff. of Saifullah Paracha ¶ 7, App. 84.

21 Aff. of Saifullah Paracha ¶ 7, App. 84.

22 CSRT Decision Report Exhibit R-3 at 3, App. 26.

Between 1986 and 1999, Paracha visited the United States about once a year with his wife to superintend his business interests here and visit his brothers and sisters, their children, and other relatives.[23] In 1995 and 1996, the couple lived with relatives in Connecticut and New York while Paracha's wife underwent medical treatment.[24] On each of their visits to the United States, Paracha and his wife entered on their permanent resident visas.[25] Paracha and his wife intend to spend their retirement in the United States, close to their large extended family.

In July 2003, Paracha traveled to Bangkok to meet with individuals he had been led to believe were buyers from K-Mart.[26] On his arrival, Paracha was seized, blindfolded, hand-cuffed, leg-cuffed, and thrown into a waiting car.[27] He was then transported to the American military base at Bagram, Afghanistan. There, Paracha was forced to endure solitary confinement for fifteen months "under extremely bad conditions." Then, in September 2004, Paracha was transferred to Guantánamo. Since his arrival, he has been in solitary confinement.[28] The gov-

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[23] Aff. of Farhat Paracha ¶ 6, App. 70.

[24] Aff. of Farhat Paracha ¶ 8, App. 70; *see also* Pet'r's Ans. to Resps.' Mot. to Dismiss and for J. as a Matter of Law, Ex. 3 ("Aff. of Maria Khan") ¶¶ 1-3, *Paracha v. Bush*, No. 04-2022 (PLF) (D.D.C. filed Feb. 9, 2005), App. 78.

[25] Aff. of Farhat Paracha ¶ 6, App. 70.

[26] Pet'r's Mot. for TRO. or Prelim. Inj., Ex. 1 ("Aff. of G.T. Hunt") ¶ 1, *Paracha v. Bush*, No. 04-2022 (PLF) (D.D.C. filed Nov. 17, 2004), App. 35.

[27] CSRT Procedures Enclosure (3), App. 6; CSRT Decision Report Exhibit D-b at 1, App. 57; Saifullah Aff. (Dec. 8, 2007), App. 58.

[28] *Id.*

ernment refused to acknowledge to Paracha's lawyer in the United States that Paracha was being held at Guantánamo until November 2004.[29]

F. Petitioner's CSRT Hearing.

On November 26, 2004, Combatant Status Review Tribunal (CSRT) Panel 24 was convened to determine whether Paracha was an "enemy combatant."[30] For purposes of the CSRT proceedings, an "enemy combatant" was defined as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." *Id.*[31] CSRT rules characterize CSRT proceedings as "non-adversarial."[32] Inasmuch as the CSRT rules make it impossible for a detainee to rebut the government's allegations against him and otherwise defend himself, the government's characterization of the CSRT proceedings as "non-adversarial" is all too apt.

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[29] Letters from G.T. Hunt to Rear Adm. McGarrah (Oct. 21, 2004 and Oct. 26, 2004), App. 39-40.

[30] CSRT Decision Report Cover Sheet, App. 1.[30] Under the Deputy Secretary's order ("Wolfowitz Order"), a CSRT was to be a panel composed of three military officers that would review a detainee's status as an "enemy combatant." *Id.* § a. T

[31] Paul Wolfowitz, *Order Establishing Combatant Status Review Tribunal* (July 7, 2004) ("Wolfowitz Order"), www.defenselink.mil/news/Jul2004/d20040707 review.pdf.

[32] CSRT Procedures Enclosure (1) § B ("CSRT Process").

The CSRT rules deny detainees counsel or any other advocate.[33] Instead, the rules provide a Personal Representative to "assist the detainee."[34] The PR is not an advocate for the detainee; the detainee's communications with the PR are not confidential; and the PR may disclose anything Paracha told him to the CSRT.[35] Paracha was assigned a PR, who met with him on December 2, 2004.[36] During the meeting, which occurred six days before the CSRT hearing, the PR read the government's allegations to Paracha and explained her limited role.[37]

The government rested its claim that Paracha was properly designated as an "enemy combatant" on twelve allegations:

> 3.a. The Detainee supported the Taliban and al Qaida against the United Statement and its coalition partners.
>
> 3.a-1. The Detainee was involved in an al Qaida plan to smuggle explosives into the United States.
>
> 3.a-2. The Detainee "held for safekeeping" large amounts pf al Quaida money given to him by known al Quaida operatives.
>
> 3.a-3. The Detainee, at the request of an al Quida operative, researched offshore companies for investment possibilities.
>
> 3.a-4. The Detainee associated with known high-level al Quaida operatives.

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33 CSRT Procedures Enclosure (3) § D; *see also* Mark Denbeaux and Joshua Denbeaux, *No-Hearing Hearings* at 15, *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

34 CSRT Process § C.2-5.

35 *Id.*; CSRT Procedures Enclosure (3) § D.

36 CSRT Decision Report Exhibit D-a, App. 56.

37 *Id.*; CSRT Procedures Enclosure (3) § D; Aff. of Saifullah Paracha (Dec. 8, 2004), App. 58.

> 3.a-5. The Detainee recommended to an al Qaida operative that nuclear weapons should be used against U.S. troops and suggested where these weapons might be obtained.
>
> 3.a-6. The Detainee assisted al Quida in locating houses for al Quaida members and their families.
>
> 3.a-7. The Detainee offered to al Quida his media facilities for Urdu translation of extremist materials, including statements from Usama Bin Laden.
>
> 3.a-8. Al Qaida invested money in a company owned by the Detainee.
>
> 3.a-9. The Detainee had a discussion with a high level al Qauida facilitator about getting chemicals and explosives into a coalition partner's national boundaries.
>
> 3.a-10. The Detainee met with Usama Bin Laden n 1999 and 2000, two times.
>
> 3.a-11. The Detainee met with two high level al Qauida officials and knew they were "wanted men."[38]

The evidence on which the government relied as support for these allegations was classified.[39] Paracha therefore did not know the basis for the government's allegations and could not rebut the evidence on which the government relied.[40] He could only respond to nine of the allegations (3.a, 3.a-1, 3.a-2, 3.a-3, 3.a-4, 3.a-5, 3.a-8, 3.a-9, 3.a-11) with general denials, equivalent to answers to a complaint, before evidence has been offered. He was able to respond to three of

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[38] CSRT Decision Report Exhibit R-1, App. 27-28.

[39] CSRT Decision Report Enclosure (1) at 2, App. 3.

[40] Paracha was given an "Unclassified Summary of Evidence," which his CSRT later found was "not persuasive in that it provid[ed] conclusory statements without supporting unclassified evidence." In this summary, the government asserted that Paracha "supported the Taliban and al Qaida against the United States and its coalition partners."

the allegations (3.a-6, 3.a-7, 3.a-10) more concretely, and his responses were plausible on their face.[41] But Paracha was in no position to obtain evidence to support his responses, and he could not rebut the evidence on which the government relied to counter his responses. Despite the fact that Paracha lacked counsel and had only six days' notice of his CSRT hearing, Paracha prepared and submitted to his CSRT a handwritten statement answering each of the government's allegations.[42]

At his meeting with the PR, Paracha had requested that letters he had written to U.S. officials before his capture be provided to the CSRT; Paracha believed the letters showed he did not sympathize with terrorists.[43] One was a letter to President Bush and other government officials proposing a solution to the festering problems that led to the September 11, 2001, terror attacks[44]; the other was a letter to the U.S. Ambassador to Pakistan, expressing his willingness to address issues relating to criminal charges against his son, Uzair.[45] The CSRT deemed these letters to be irrelevant and did not seek to obtain them, even though an FBI agent aat Guantánamo evidently had a copy of Paracha's letter to President Bush.[46] The CSRT did allow the introduction into the record of affidavits attestion to Paracha's

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41 CSRT Hearing Tr., App. 8-9; *id.* at 10-14; Saifullah Aff. (Dec. 8, 2004), App. 57-64; *see also* App. 3-4.

42 CSRT Decision Report Exhibit D-b at 3-4, App. 59-60.

43 *Id.*, Enc. (1) at 2, App. 3.

44 Aff. of Saifullah Paracha (Dec. 8, 2004), App. 61.

45 CSRT Decision Report, App. 66, CSRT Hearing Tr., App. 7.

46 CSRT Hearing Tr., App. 16.

character and denying that Paracha could have supported terrorists in any way.[47] But when Paracha asked what law applied to him and what law governed his CSRT hearing, the Panel's head responded:

> Let me clarify that; you do understand that this is an administrative hearing, and this is not a legal proceeding. I do know you had some questions about the legality of your detention. That would be referred to other organizations of the governmnet, but you will be receiving mnore specific instructions shortly of how to bring your question to U.S. courts.[48]

In a further exchange shortly thereafter, Paracha renewed his request for clarification of the legal basis for his detention:

> Detainee: Your honor, my question is [whether] your Executive Order [is] applicable around the earth.
>
> Tribunal President: It is a global war on terrorism.
>
> Detainee: I know sir, but you are not the master of the earth, sir.

After Paracha finished testifying, he was escorted out of the room and the CSRT reviewed the Government Evidence in closed session; the government secret evidence was all secret hearsay evidence.[49] The CSRT operated under a presumption that the Government Evidence (which does not include exculpatory evidence) was "genuine and accurate," as required by the CSRT Procedures.[50] Later

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47 App. 20-26, 39-40.

48 CSRT Hearing Tr., App. 15.

49 CSRT Decision Report Enclosure (3) at 12, App. 17.

50 CSRT Procedures Enclosure (1) § 11.

that same day, the CSRT determined, purportedly "by a preponderance of the evidence," that Paracha was "affiliated with al Qaida" and therefore was properly detained as an enemy combatant.[51] The Recorder prepared a record of the proceedings that did not include Government Information not presented to the Tribunal.[52] The PR reviewed that record five days later and offered no comments.[53] A week after that, the Legal Advisor conducted a "legal sufficiency" review and found that the CSRT had "substantially complied" with the Wolfowitz Order and CSRT Procedures.[54] On December 21, Admiral McGarrah, as Director of the CSRTs, concurred in the CSRT's decision.[55]

There is no indication that the government enabled the CSRT to assess the quality of the evidence against Paracha. Was evidence obtained by coercion or torture or through proffered blandishments? Was the evidence obtained from a trusted source? Did the source have a selfish motive for incriminating the accused? How could the CSRT's determinations be meaningful if it had to assume to

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51 CSRT Decision Report Cover Sheet, App. 1.

52 CSRT Procedures Enclosure (2) § C.8. The Recorder is a commissioned officer with TOP SECRET security clearance, who was to gather and present to the CSRT panel "all relevant evidence." CSRT Process § C.2.

53 CSRT Decision Report Enclosure (5), App. 64.

54 Legal Advisor, *Legal Sufficiency Review of Combatant Status Review Tribunal for Detainee ISN #* [*redacted*] (Dec. 20, 2004), at 1, App. 66. The Legal Advisor was responsible for "reviewing each Tribunal decision for legal sufficiency." CSRT Process § C.2.

55 App. 68.

be true every datum presented to it by the government? Raw intelligence is worthless intelligence. The adage "garbage in, garbage out" has special resonance here.

In addition, the CSRT also did not have before it exculpatory statements made in a criminal case involving Paracha's son, Uzair. In that case, the government submitted unclassified summaries of expected testimony by Majid Khan and Ammar al Baluchi. The CSRT asked Saifullah Paracha about those individuals during his testimony.[56] At the time of Paracha's CSRT, Khan and al Baluchi were secretly held in CIA custody, where they likely were subjected to "harsh" interrogation measures.[57] According to the summaries in Uzair's case, Khan stated that al Qaeda did *not* invest in Saifullah Paracha's business ventures, contradicting one of the key accusations made in Paracha's CSRT.[58] Moreover, al Baluchi stated that Paracha had *never* been "tasked by al Qaeda" to do anything for the group, that Paracha did *not* know that "Uzair" (Khalid Sheikh Mohammad) was part of al Qaeda, and that that Paracha had "no relation to" al Qaeda.[59] On the contrary, ac-

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[56] *United States v. Paracha*, No. 03-CR-1197 (SHS), 2006 WL 12768, at *11-13 (S.D.N.Y. Jan. 3, 2006); Unclassified Transcript of CSRT Proceeding.

[57] Brian Ross and Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC News (Nov. 18, 2005), *available at* http://abcnews.go.com/WNT/Investigation/story?id=1322866; *see* http://www.odni.gov/announcements/content/DetaineeBiographies.pdf.

[58] App. 18.

[59] App. 19.

cording to al Baluchi, Paracha was simply an unwitting businessman.[60] The government did not provide these summaries to Paracha's CSRT, so they are not part of the government's proposed record.

G. Judicial Proceedings

On November 17, 2004, Paracha filed a habeas petition the U.S. District Court for the District of Columbia.[61] The petition alleged that Paracha was being detained at Guantánamo in violation of the Constitution, laws, and treaties of the United States. Citing Paracha's status as a lawful permanent resident of the United States, the petition alleged that his detention violated his rights under the Due Process Clause.

The government moved to dismiss Paracha's petition. The government argued that Paracha could not claim the protections of the Due Process Clause because (the government claimed) Paracha had abandoned his lawful permanent resident status by moving to Pakistan in 1986 and remaining in residence there. The government further argued that even if Paracha retained his lawful permanent resident status, his CSRT proceeding afforded him all the process he was due. Finally, the government moved to stay Paracha's case pending this Court's resolution of

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60 *Id.*

61 *Paracha v. Bush*, No. 04-2022 (PLF).

certain threshold issues in *Khalid/Boumediene v. Bush* and *Al Odah v. United States*.

On March 23, 2005, the district court granted the stay motion. Paracha appealed the district court's stay order. (D.C. Cir. No. 05-5194.) Paracha argued, among other things, that, because he is a lawful permanent resident, he stood on a different footing than the detainees in *Khalid/Boumediene* and *Al Odah*, and this Court's resolution of those cases would not control his action. Paracha also appealed an order of the district court denying his motion for release from solitary confinement. (D.C. Cir. No. 05-5333.)

While Paracha's appeals were pending, Congress enacted the DTA. The DTA purported to strip the courts of jurisdiction over any habeas or other actions made by aliens determined to be properly detained at Guantánamo as enemy combatants. In lieu of habeas actions, the DTA provided for judicial review of CSRT determinations in the D.C. Circuit. On January 14, 2006, two weeks after the DTA became law, Paracha brought this DTA action in this Court. On April 19, 2006, the Court ordered that Paracha's appeals be held in abeyance pending the resolution of the *Khalid/Boumediene* and *Al Odah* appeals.

On June 29, 2006, the Supreme Court held in *Hamdan v. Rumsfeld* that the jurisdiction-stripping provision of the DTA did not apply to cases (like Paracha's) that were pending on the date of enactment. 126 S. Ct. 2749, 2762-69 (2006). The

Court also found that Article 3 of the Geneva Conventions was judicially enforceable case even though al Qaeda is not a signatory to the Conventions. *Id*. at 2795. On October 17, 2006, the President signed into law the MCA. MCA § 7(a) stripped the courts of jurisdiction over habeas actions brought by aliens held anywhere by the United States. Section 5(a) of the MCA barred Guantánamo detainees from challenging their detention as violative of the Geneva Conventions.

On February 20, 2007, this Court issued its decision in *Boumediene*, 476 F.3d 981. The Court held that the MCA had stripped federal courts of jurisdiction to entertain pending habeas actions brought by Guantánamo detainees. The Court further held that Guantánamo detainees lacked standing to challenge MCA § 7(a) as violative of the Due Process and Suspension Clauses because, as aliens held outside the sovereign territory of the United States, the detainees lacked any constitutional rights. *Id*. at 988-94. The detainees then petitioned for certiorari, which this Court initially denied, on April 2, 2007, but granted, on July 29, 2007.

On April 9, 2007, citing its decision in *Boumediene*, this Court vacated Paracha's appeals for lack of jurisdiction and ordered the District Court to dismiss his habeas action. The Court's mandate issued on June 27, 2007. Paracha moved to recall the mandate on July 2, 2007. Paracha expects to petition the Supreme Court for certiorari to review the Court's ruling. His petition is due August 7, 2007.

On March 8, 2006, Paracha moved in his DTA action to strike classified documents from the record before this Court or, in the alternative, to permit him and his counsel to review them in unredacted form. That same day, he moved to consolidate this case with the appeals from his habeas case and moved to produce Majid Khan, Ammar Al-Baluchi, and Khalid Sheikh Mohammad for testimony. On March 21, 2006, he filed a dispositive motion seeking a ruling that he is not an "enemy combatant" as a matter of law. The Court has ruled only on Paracha's dispositive motion, denying it on Apr. 9, 2007, without prejudice to his subsequent claims in this case.

SUMMARY OF ARGUMENT

Although the Supreme Court has under review this Court's decision in *Boumediene*, and although this Court has been asked to reconsider that decision *en banc* in *Hamdan*, the Court should reach the merits and decide this case now because Paracha stands on a different legal footing than the Guantánamo detainees in those cases. Unlike those detainees, Paracha is a lawful permanent resident of the United States. He therefore enjoys the same constitutional rights as a citizen. Because this Court's decision in *Boumediene* hinged on the fact that the detainees in those cases were aliens, pure and simple, the Court's rationale for its decision is inapplicable here. Because Paracha unquestionably has constitutional rights, the Court must address the merits of his Suspension Clause claims.

The Suspension Clause prohibits Congress from suspending the privilege of the writ of habeas corpus, except in conditions of invasion or rebellion, unless it provides an adequate substitute for habeas. The Supreme Court has held that an adequate substitute for habeas is one that provides relief equivalent to habeas. The only relief available to Paracha under MCA § 7 is the judicial review provided by DTA § 1005(e)(2). Neither MCA § 7 nor DTA § 1005(e)(2) can survive Suspension Clause challenge unless DTA review provides relief equivalent to habeas. Under the government's construction, MCA § 7 and DTA § 1005(e)(2) cannot survive Suspension Clause challenge because, thus construed, DTA § 1005(e)(2) makes this Court little more than a rubber-stamp for final decisions of a CSRT, and the CSRT process is stacked against the detainee.

Nor did the government follow its own procedures in this case. The DTA requires the Court to determine whether the CSRT's decision is "supported by a preponderance of the evidence." DTA § 1005(e)(2)(C)(i). The Recorder did not present the Court with all of the evidence in the government's possession bearing on the allegations against Paracha. The DTA also requires the Court to determine whether the detainee has been afforded a fair opportunity to rebut "the presumption in favor of the government's evidence." *Id.* A detainee who was denied access to all adverse evidence before the CSRT has not had a fair opportunity to rebut that presumption.

DTA § 1005(e)(2) requires, at a minimum, that (1) the Court review all evidence in the government's possession that may be relevant to a decision "that an alien is properly detained as an enemy combatant;" (2) the detainee be afforded access to all such evidence in order to rebut, if possible, the "presumption in favor of the Government's evidence;" and (3) the detainee be afforded an opportunity, with the assistance of counsel, to present evidence in his favor. Any more limited construction of DTA review – and any review more limited than habeas review – would render the statute unconstitutional. Unless the Court construes DTA § 1005(e)(2) to authorize plenary and *de novo* review of the CSRT's decision in this case, DTA § 1005(e)(2) and MCA § 7 cannot survive Suspension Clause challenge.

STANDARD OF REVIEW

This Court's review of issues of law is *de novo*. The Court does not have occasion to review facts in this case, because the CSRT process was constitutionally deficient; but to provide an adequate substitute for habeas, any review of the facts in this case must also be de novo and plenary. *Harris v. Nelson*, 394 U.S. 286, 298 (1969) ("petitioners in habeas corpus proceedings … are entitled to careful consideration and plenary processing of their claims including full presentation of the relevant facts"); *Hawk v. Olson*, 326 U.S. 271, 274 (1945).

ARGUMENT

I. THE MCA'S ELIMINATION OF HABEAS JURISDICTION VIOLATES THE SUSPENSION CLAUSE.

Absent a construction of DTA § 1005(e)(2) that would provide relief equivalent to habeas, MCA § 7 violates the Suspension Clause.

A. Petitioner Has Standing To Claim Suspension Clause Violations.

1. As a lawful permanent resident of the United States, Petitioner has rights protected by the Suspension Clause.

a) Petitioner is a lawful permanent resident.

The government asserted in its briefs below that Paracha stands on the same legal footing as the Guantánamo detainees in *Boumediene* because he has abandoned his status as a lawful permanent resident of the United States. The government asserts that he abandoned his LPR status by moving to Pakistan in 1986. The government argues that his long stay in Pakistan establishes abandonment as a matter of law. The government is mistaken. As discussed below, the length of an LPR's time abroad is not dispositive. Whether an alien has abandoned his LPR status is a question of fact to be determined after notice and hearing. Abandonment cannot be established by counsel's assertions in a party's brief.

As discussed above, Paracha returned to Pakistan to supervise the Pakistan end of his U.S.-Pakistan travel agency business; later, he also supervised the Pakistan end of his U.S.-Pakistan export-import business; he and his wife, who also is also a LPR, maintain a large extended family in the United States and intend to

move back to the United States, close to their extended family, when Paracha retires. *See supra* at 5. Paracha has more than a colorable claim that he continues to be a lawful permanent resident of the United States.

The Immigration and Nationality Act ("INA") provides that an alien with lawful permanent resident status has been "lawfully accorded the privileges of residing permanently in the United States as an immigrant in accordance with the immigration laws." 8 U.S.C. § 1101(a)(20). At least in the case of an alien who has not disclaimed his LPR status, LPR status cannot be revoked absent a formal hearing. *See Kwong Hai Chew v. Colding*, 344 U.S. 590, 597 (1953) (revocation of LPR status and exclusion from United States without a hearing violative of due process); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 213 (1953) ("temporary absence from our shores cannot constitutionally deprive a returning lawfully resident alien of his right to be heard").

During such a hearing, the government must prove to a neutral factfinder by "clear, unequivocal and convincing evidence" that the alien LPR has abandoned his LPR status. In the case of an LPR who has left the country, the factfinder must determine whether the LPR was on a "temporary" visit abroad from which he *intended* to return:

> Some of the factors that could be used to determine whether an alien harbored a continuous, uninterrupted intention to return in addition to the alien's testimony include the alien's family ties, property holdings, and business affiliations within the United States, the duration of the

> alien's residence in the United States, and the alien's family, property and business ties in the foreign country.

Chavez-Ramirez v. INS, 792 F.2d 932 (9th Cir. 1986); *see also Woodby v. INS*, 385 U.S. 276, 286 (1996); *see also Singh v. Reno*, 113 F.3d 1512, 1514 (9th Cir. 1997) ("When an applicant has a colorable claim to returning resident status . . . the INS has the burden of proving he is not eligible for admission to the United States.").

Neither the district court nor a competent administrative agency has reviewed Paracha's status as an LPR. Nor has he voluntarily informed the INS of an intent to abandon his status. Indeed, before the instant litigation, the government never challenged Paracha's immigration status at all. Accordingly, he presumptively remains a lawful permanent resident of the United States as a matter of both constitutional and immigration law.

b) Lawful permanent residents are protected by habeas corpus and the Due Process Clause.

Legal permanent resident aliens who have been admitted to the United States enjoy full rights under the Constitution, including the right to due process of law in connection with deprivations of life, liberty or property. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). When Paracha became a lawful permanent resident, he became "invested with the rights guaranteed by the Constitution to all people within our borders." *United States v. Verdugo-Uriquidez*, 494 U.S. 259, 271 (1990); *see also id.* at 265 (the Constitution's "people" includes those who have

"developed sufficient connection with this country to be considered part of that community."); *Plyler v. Doe*, 457 U.S. 202, 210, (1982); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

LPRs also enjoy the same protections against unlawful detention guaranteed by the Great Writ as do citizens. *See Campos v. INS*, 961 F.2d 309, 316 (1st Cir. 1992) ("lawful permanent resident aliens . . . enjoy, of course, the full protection of the United States Constitution"); *Saint Fort v. Ashcroft*, 329 F.3d 191, 197 (1st Cir. 2003) ("[t]he writ of habeas corpus has been employed by non-citizens for centuries in both the United States and Britain"); *Tineo v. Ashcroft*, 350 F.3d 382, 389 (3d Cir. 2003) (entertaining habeas petition from LPR under 28 U.S.C. § 1441); *Singh*, 113 F.3d at 1514 (same); *Jean-Baptiste v. Reno*, 144 F.3d 212, 219 (2d Cir. 1998) ("Without the ability to seek a writ of habeas corpus under § 2241, certain lawful permanent residents . . . would have no opportunity to address serious constitutional issues."). Since their constitutional rights attach as a result of their status and ties to the United States, rather than the locus of their arrest or detention, the Writ's due process protections also reach those citizens and LPRs held abroad. *Reid v. Covert*, 354 U.S. 1, 6 (1957) (plurality opinion) ("When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.").

As an LPR, Paracha enjoys the full panoply of constitutional protections that the Due Process Clause and Great Writ provide. To that extent, this Court's decision in *Boumediene* has no bearing on the dispositive issue raised in this case: whether the Detainee Treatment Act provides a valid substitute for the writ to habeas corpus for a lawful permanent resident who enjoys full constitutional rights. *Boumediene*'s constitutional holding addressed only habeas cases brought by "foreign nationals" who were "without property or presence within the United States." *Boumediene*, 476 F.3d at 984, 990–91.

2. Even if not an LPR, Petitioner has rights protected by the Suspension Clause.

Even absent his LPR status, Paracha may assert that the MCA violated the Suspension Clause by revoking his right to habeas review. *Boumediene* held otherwise, but the issue is under review by the Supreme Court in that case, and Paracha will also seek initial hearing *en banc*.

a) Habeas has historically been available to all who are not citizens of a country at war with the United States.

The Suspension Clause bars the MCA's incursion on the writ of habeas corpus. "[A]t the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)). The writ, as it existed in 1789, empowered the courts to inquire into the basis of the detention of any person other than an en-

emy alien, regardless of whether the person was an alien or alleged to be a prisoner of war. *Rasul*, 542 U.S. at 480; *Ex parte Milligan*, 71 U.S. 2, 130-31 (1866); *King v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759); *see also Case of the Hottentot Venus*, 104 Eng. Rep. 344 (K.B. 1810) (detention of a South African national); *Somersett v. Stewart*, 20 How. St. Tr. 1 (K.B. 1772) (detention of an African slave purchased in Virginia); *United States v. Villato*, 2 U.S. 370, 1 (C.C. Pa. 1797) (detention of a Spanish national). In *Milligan*, the Court addressed a detainee's challenge to the government's assertion that he was a prisoner of war and found that the detainee was entitled to trial in a civilian court because he was not such a prisoner. 71 U.S. at 131. Similarly, in *Schiever*, a Swedish citizen was permitted to seek habeas relief from his detention by the British Navy, even though he was a foreign citizen and was alleged to be a prisoner of war. 97 Eng. Rep. 551.

Paracha is not an enemy alien but instead is a citizen of a country with which the United States is at peace. *See* 50 U.S.C. § 21 (an enemy alien is a citizen of a foreign nation against whom the United States has declared war). Paracha is not even alleged to be a prisoner of war. Paracha therefore has at least the same right to seek judicial inquiry through habeas into his detention as did Milligan and Scheiver.

b) Habeas has historically been available at places within a nation's exclusive control.

The historical reach of habeas extended to places like Guantánamo. In *Rasul*, the Supreme Court explained that "the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.'" 542 U.S. at 482 (quoting *Ex parte Mwenya*, [1960] 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M.R.)). In England, the courts extended the writ to places that, while outside the formal jurisdiction of the Crown, were under the Crown's control. *See Bourn's Case*, Cro. Jac. 543, 79 Enq. Rep. 465 (K.B. 1619) (writ of habeas corpus extended to detainees held in the Cinque Ports, a confederation of cities exempted from the ordinary jurisdiction of the courts); Sir Matthew Hale, *The History of the Common Law of England* 121 (C. Gray Ed. 1971) (describing reach of habeas to Duchy of Normandy, outside of the Realm of England); *Rex v. Mitter*, 1 Indian Dec. 210 (1775) (writ of habeas corpus extended to India even when it was not under formal sovereignty of Great Britain). Although in *Rasul* the Supreme Court only found that the habeas statute reached Guantánamo, the writ would have extended there without any statute, because Guantánamo is territory under the "exclusive jurisdiction and control" of the United States. *Rasul*, 542 U.S. at 476. Accordingly, the Suspension Clause ensures Guantánamo detainees' ability to invoke the writ. *St. Cyr*, 533 U.S. at 301.

c) The Suspension Clause is not an individual right but instead limits government action.

Further, as Judge Rogers recognized in her *Boumediene* dissent, the Suspension Clause does not merely confer an individual right but is a structural limitation on the power of Congress. *See* 476 F.3d at 996-97. Thus, unlike the Fourth and Fifth Amendments, which secure rights of "the people" or "persons," the Suspension Clause secures a remedy for unjustified Executive detention: "[T]he great object of [the writ] is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment." *See, e.g.*, *Ex parte Watkins*, 28 U.S. 193, 202 (1830).

The writ of habeas corpus is "a writ antecedent to statute, . . . throwing its root deep into the genius of our common law." *Rasul*, 542 U.S. at 473 (quoting *Williams v. Kaise*r, 323 U.S. 471, 484 n.2 (1945)). At common law, even though detainees lacked individual rights, the writ of habeas corpus required the detainee's custodian to offer a legal and factual basis for the detention. See 1 William Blackstone, *Commentaries* 132-33 (1765). The court was not required to take the Executive at its word, but would engage in a searching review of the factual and legal validity of the custodian's return. *See, e.g.*, *Goldswain's Case*, 96 Eng. Rep. 711 (1778); *Rex v. Turlington*, 97 Eng. Rep. 741 (1761); *Bushell's Case*, 124 Eng. Rep. 1006 (1670); *Hodges v. Humkin*, 80 Eng. Rep. 1015 (1613); *Gardner's Case*, 78 Eng. Rep. 1048 (1600). If the court did not find sufficient justification for the de-

tention, it would order the prisoner released. See 1 William Blackstone, *supra*. It is the lack of legal and factual justification for the detention, rather than the violation of any rights granted by positive law, that is the heart of habeas corpus review. Thus, as the Court held in *Rasul*, the Guantánamo detainees have the "right to judicial review of the legality of Executive detention." *Rasul*, 542 U.S. at 475.

d) Guantánamo detainees have fundamental rights that the government cannot deny.

In *Rasul*, the Supreme Court recognized that Guantánamo detainees have rights that habeas can vindicate. 542 U.S. at 484 n.15 ("Petitioners' allegations . . . unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'") (citing *Verdugo*, 494 U.S. at 277-78 (1990) (Kennedy, J., concurring) and cases cited therein). The Court has previously acknowledged that although an alien may not be entitled to all of the protections that the Constitution provides, certain fundamental rights may be so inviolable as to apply to all who come under the power of the United States. *Reid v. Covert*, 354 U.S. 1, 8-9 (1957) (plurality opinion); *Downes v. Bidwell*, 182 U.S. 244, 282-83 (1901).

It is difficult to conceive a right more "fundamental" than the right not to be deprived of personal liberty except in accordance with law. *See Magna Carta*, 1215, at ¶ 39 ("No freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land"); *Groppi v. Leslie*, 404 U.S.

496, 502 (1971); *Hamdi*, 542 U.S. at 529. Failure to recognize this fundamental right for Guantánamo detainees would leave Guantánamo a legal black hole – a land without law – where the Executive can rule arbitrarily and absolutely. Such a result would be "anomalous," to say the least. *See Reid*, 354 U.S. at 75 (Harlan, J., concurring).

B. Under the Government's Construction of DTA § 1005(e)(2), Congress Has Unlawfully Suspended Habeas Without Providing An Adequate Substitute.

1. CSRT proceedings are an inadequate substitute for habeas.

Because the Constitution affords Paracha, as an LPR and as a detainee held at Guantánamo, the same right to the writ of habeas corpus as that afforded to a citizen, if Congress withdraws his right to petition for the writ, it must provide a judicial forum that will grant him an effective opportunity to litigate the legality of his detention. *Swain v. Pressley*, 430 U.S. 372, 381 (1977) (Congress must not withdraw the writ unless it provides an "adequate and effective" alternative remedy to "test the legality of a person's detention."). The government does not claim that Congress's withdrawal of the writ via the Military Commissions Act constituted a suspension "in Cases of Rebellion or Invasion" consistent with the Suspension Clause, see U.S. Const. art. I § 9, Cl. 2. The issue is whether the alternative remedy Congress has granted Paracha to challenge his unlawful detention under the Detainee Treatment Act is "adequate and effective." The government's construc-

tion of this remedy, however—a CSRT proceeding that denies him notice of the factual basis for the CSRT's decision, a fair opportunity to respond to the government's assertions, or a neutral decisionmaker to determine his innocence or guilt, followed by narrow, inadequate judicial review of that proceeding's decision in an appellate court—fails to comply with the demanding standard that suspension of the writ requires.

At the heart of the Great Writ is the ability to "inquire into illegal detention with a view to an order releasing the petitioner," *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (internal citation omitted), and a petitioner is thereby "entitled to [a] full opportunity for the presentation of the relevant facts" related to his detention. *Harris v. Nelson*, 394 U.S. 286, 298 (1969). Due process also requires "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Hamdi*, 542 U.S. at 533; *see also Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 617 (1993) (citation omitted) (due process requires a "neutral and detached judge in the first instance").

The CSRT Procedures fall far short of these constitutionally-mandated marks. Paracha was deprived of a "fair opportunity to rebut the Government's factual assertions" or confront witnesses against him or present witnesses or evidence on his behalf. The "PR" provided to Paracha to assist in his hearing under the CSRT Procedures was not a lawyer, and was not required to have any relevant

training. CSRT Procedures Enclosure (3) § C.3. The CSRT Procedures also specifically forbade Paracha's PR from serving as his "advocate," and during their single 35-minute meeting less than a week prior to the CSRT hearing, the PR informed Paracha that "[n]one of the information [provided by Paracha to the Representative] shall be held in confidence." *Id.* § 3. Nor was Paracha able develop the factual record through discovery, or to review or meaningfully contest the evidence the Tribunal relied upon for its finding of combatant status. Much of that secret evidence was hearsay that likely was obtained by coercion or torture.

These bars to meaningful representation and rebuttal flout the procedural protections the common law has historically granted to citizens detained by the state. *See Crawford v. Washington*, 541 U.S. 36, 49 (2004) ("It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine."). The CSRT panels themselves, composed of unidentified members of the military beholden to the chain of command and denied access to exculpatory evidence, were operating under a preponderance of the evidence standard, and procedurally predisposed to a finding of guilt.

2. DTA Review is an inadequate substitute for habeas.

Under the government's view, the DTA contemplates an impermissibly narrow role for Article III courts in reviewing Paracha's detention. According to the government, this Court, the sole forum where Paracha may seek judicial review of his CSRT determination, can only ask two questions when reviewing a CSRT decision: (1) whether the CSRT's determination was consistent with CSRT procedures set out by the Department of Defense, see DTA, § 1005(e)(2)(i), and (2) whether the "use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." *Id*. at § 1005(e)(2)(ii). This Court has begun, in *Bismullah* and *Parhat*, to consider the procedures it will follow in processing DTA claims. The government's argument in those cases, however, demonstrates the irreparable flaws that would result if it prevails in those cases.

The writ requires meaningful judicial review of a "full presentation of the relevant facts." *See Harris*, 394 U.S. at 298. Under the government's own view, however, the review provided to Paracha under the DTA is inherently inadequate. In its Bismullah briefing, the government told that court that the habeas regime that the district court found governed Paracha's claims "is not appropriate to this Court's limited review under the DTA," and that the "review here is administrative in nature and is on the record of the CSRT. Accordingly, factual development at Guantanamo"—even development of the "relevant facts," *see Harris, supra*—

"will not be necessary in pursuing this action." Resps.' Br. Addressing Prelim. Mots. 32, *Bismullah*. Thus, if this Court follows the government's interpretation of the DTA, it will be unable to consider facts outside of the record of the CSRT concerning Paracha's detention, including, inter alia, potentially exculpatory evidence. Without a full factual record, this Court's judicial review of CSRT proceedings will therefore be by definition inconsistent with Paracha's due process rights and will effectively suspend his right to seek the writ of habeas corpus.

II. THE MCA'S ELIMINATION OF GENEVA CONVENTIONS CLAIMS VIOLATES THE SUSPENSION CLAUSE AND *EX PARTE KLEIN*.

A. Stripping Habeas Courts of the Power to Consider Valid Legal Claims Related to the Legality of Detention Violates the Suspension Clause.

Section 5(a) of the MCA bars Guantanamo detainees from seeking habeas relief on the ground that their detention violates the Geneva Conventions. *See* MCA § 5(a).[62] However, in cases of executive detention, detainees must be able to raise "all issues relating to the legality of detention," including non-constitutional claims. *INS v. St. Cyr*, 533 U.S. 289, 302-03 & n.14 (2001) (emphasis added).

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[62] The section reads:

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

Courts have recognized "a long history of use of habeas of aliens to challenge confinement in violation of treaty obligations," and "American courts have exercised habeas review over claims of aliens based on treaty obligations since the earliest days of the republic." *Saint Fort*, 329 F.3d at 201-02; *Wang v. Ashcroft*, 320 F.3d 130, 141 n.16 (2d Cir. 2003).

Claims of violations of the Geneva Conventions fall into this category. The Conventions have the status of supreme federal law, are a "treat[y] of the United States" within the meaning of 28 U.S.C. § 2241(c)(3), and therefore provide a substantive source of rights that may be vindicated via habeas. As long as the Conventions remain in force, the Executive must comply with them in order to render a detention legal, and individuals detained in contravention of this obligation must have access to habeas relief. *St. Cyr*, 533 U.S. at 303 n.14; *Hamdan v. Rumsfeld*, 126 S. Ct. at 2794 ("[i]t should be possible . . . for the rules of the Convention to be evoked before an appropriate national court by the protected person who has suffered a violation."). Because the Supreme Court in Hamdan found that the Conventions were judicially enforceable as laws of war, Congress cannot not alter the Conventions' enforceability without abrogating the Conventions themselves, which the MCA does not attempt to do.[63] Section 5(a), therefore, strips courts of

[63] Congress has the constitutional authority to abrogate or supersede treaties by later statute; however, courts have refused to so construe statutes absent a clear (continued…)

the power to grant habeas relief based on valid treaty claims in violation of the Suspension Clause.

B. Section 5(a)'s Limitation on the Applicable Law Courts May Consider in Petitioner's Pending Habeas Case Violates *Klein*.

Congress unconstitutionally violates the separation of powers when it directs federal courts to decide pending cases in contravention of the law. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1872). The legislature has substantial power to structure the jurisdiction of the federal courts, but *Klein* requires that "so long at least as Congress feels impelled to invoke the assistance of courts, the supremacy of law in their decisions is assured." Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1383 (1953).

The *Klein* rule does not apply when Congress merely "amend[s] applicable law," but it restricts Congress from dictating to courts a rule of decision. *Plaut v. Spendthrift Farm*, 514 U.S. 211, 218 (1995). Since Section 5(a) does not affect the Geneva Conventions' vitality or enforceability, but instead directs courts to ignore

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statement from Congress of its intent to abrogate or supersede. *Cook v. United States*, 288 U.S. 102, 120 (1933) (neither a treaty nor an executive agreement is "abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."). There is no such clear statement in the MCA. Indeed, to the contrary, the MCA's language indicates Congress's intention to implement U.S. obligations under the Conventions. *See* MCA § 6 ("Implementation of Treaty Obligations").

the Conventions in deciding a subset of pending cases—including those of detainees such as Paracha—the MCA dictates a rule of decision in violation of *Klein*.

III. THE MCA AND DTA VIOLATE THE BILL OF ATTAINDER CLAUSE AND THE FIFTH AMENDMENT'S GUARANTEE OF EQUAL PROTECTION.

A. The MCA and DTA Are Classic Bills of Attainder.

As construed by the government, the MCA and DTA are Bills of Attainder prohibited by Article I, § 9, clause 3, of the Constitution ("No Bill of Attainder ... shall be passed."), because they deny of habeas corpus relief to a small, distinct, and unpopular group. The Bill of Attainder clause prohibits this type of "deprivation of any rights, civil or political," including "the privilege of appearing in courts," when imposed on an otherwise disfavored minority. *Cummings v. Missouri*, 71 U.S. 277, 320 (1866); *United States v. Brown*, 381 U.S. 437, 445-47 (1965).

To qualify as a Bill of Attainder, a legislative enactment must (1) apply with specificity to an identified individual or group, and (2) impose punishment. *Foretich v. United States*, 351 F.3d 1198, 1217 (D.C. Cir. 2003). The DTA and MCA as construed by the government meet this standard. First, the bills in question apply to "easily ascertainable members of a group." *United States v. Lovett*, 328 U.S. 303, 315 (1946). By referring only to aliens held as enemy combatants by the U.S. government, DTA § 1005(e)(1), MCA § 7, they refer to a discretely identified

group that the Executive purports to have the sole freedom to define. These laws easily meet the specificity criterion for classification as a Bill of Attainder.

Determination of the punitive aspect of legislation subject to Bill of Attainder Clause analysis includes consideration of three factors: "(1) whether the challenged statute fails within the historical meaning of punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a congressional intent to punish.'" *Foretich*, 351 F.3d at 1218 (quoting *Selective Service System v. Minnesota Public Interest Group*, 468 U.S. 841, 852 (1984)). A statute need not satisfy all three factors to be a Bill of Attainder; they are merely factors to be considered. *Selective Service Sys.*, 468 U.S. at 852. The test is a functional one not dependent on labeling by the legislature. *Cummings*, 71 U.S. at 325 ("The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name.").

Denial of equal access to the courts meets the historic definition of punishment. This is especially true under the government's analysis of the MCA and DTA, which it construes to deprive Guantánamo detainees of the ability to attack the constitutional legitimacy of their confinement and to destroy any opportunity they might otherwise have had in habeas litigation to develop facts to counter the one-sided record created in the CSRT. Consequently, as construed by the govern-

ment, the MCA and DTA ensure that the petitioners' detention will be prolonged and indefinite based only on the military tribunal's review, a state of affairs which the *Cummings* court listed as an historically-recognized form of punishment. 71 U.S. at 321 (quoting William Blackstone, 4 Commentaries). *See also Lynce v. Mathis*, 519 U.S. 433, 442 (1997) (discussing constitutional bases of prohibitions on retroactive action and removal of eligibility for a benefit as punishment).

The punitive aspects of the MCA and DTA, as a practical matter, are extreme. Imprisonment itself is punitive—whether brief or prolonged and regardless of the conditions. *Brown*, 381 U.S. at 458 (imprisonment regardless of its purpose is punishment). Here, Paracha has been in onerous custody, virtually incommunicado, for over four years. The indefinite duration of the custody that the government has imposed on him places it at the apex of punitive measures. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

The nonpunitive purposes of the DTA and MCA are negligible compared to the punitive consequences. The protective order entered in the district court maintained control over the government's security interests without depriving Paracha of the essential means of challenging his determination. Under the government's construction, the DTA and MCA's sole purpose is to deprive aliens held as enemy combatants, and only that group, of the meaningful judicial review that habeas corpus provides. They are therefore unconstitutional.

B. The MCA and DTA As Construed by the Government Violate Equal Protection.

In *Rasul*, the Supreme Court found that 28 U.S.C. § 2241, the habeas statute, applied equally to U.S. citizens and to aliens held at Guantánamo. 542 U.S. at 481 ("there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship"). Responding to *Rasul*, Congress passed the DTA in an effort to strip jurisdiction over actions brought by aliens held at Guantánamo; however, the Supreme Court found in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), that the DTA did not strip jurisdiction over pending habeas actions. Congress responded three weeks later, passing the MCA. The MCA specifically precluded aliens detained as enemy combatants from seeking habeas relief. MCA § 7(a). Instead, it forced them to contest their detention through the DTA, *id.*, a review that the government construes as extremely limited.

This classification is subject to strict scrutiny. The Fifth Amendment to the Constitution precludes the government from denying citizens and non-citizens the equal protection of the laws. *Bolling v. Sharpe*, 347 U.S. 497, 498-500 (1954). When the government denies fundamental rights, such as access to the courts, to an unpopular class of individuals, its actions are subject to strict scrutiny. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (laws withdrawing access to fundamental rights are subject to strict scrutiny); *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (discrimination in providing access to courts violates equal protection). Aliens are one of these

unpopular classes; indeed, they "are a prime example of a 'discrete and insular minority.'" *Graham v. Richardson*, 403 U.S. 365, 372 (1971). And the discrimination here deprives aliens of the most fundamental right of all—the right to habeas review. *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (habeas is "shaped to guarantee the most fundamental of all rights").

The government cannot show that there is a compelling government interest in denying only aliens the right to seek habeas relief. Even assuming that withdrawing such rights is necessary to save American lives here and at home, there is no rational reason that Congress would provide citizen enemy combatants with the full panoply of habeas rights while forcing alien enemy combatants into a narrow "some evidence" review of a non-adversarial military tribunal's decision, with indefinite imprisonment the result if their challenge fails. See *Hamdi*, 542 U.S. at 519 (an enemy combatant citizen, "if released, would pose the same threat of returning to the front during the ongoing conflict"). This distinction between citizens and aliens is arbitrary, made based on a categorization that permitted the government to punish only a disfavored class without meaningful judicial review. *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) ("the conclusion cannot be resisted that no reason for [the distinction] exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified.") Under the Fifth Amendment, this categorization cannot stand.

IV. THE GOVERNMENT'S INDEFINITE IMPRISONMENT OF PARACHA, A LAWFUL PERMANENT RESIDENT ABDUCTED FROM THAILAND, AS AN ENEMY COMBATANT VIOLATES THE AUMF.

The AUMF authorized the President to wage war against the nations, persons, or organizations who planned, authorized, committed, or aided the September 11 terrorist attacks, or who harbored such persons. Pub. L. 107-40, §§ 1-2, 115 Stat. 224 (2001). It did not authorize the President to sweep up and indefinitely detain accused "affiliates of al Qaeda" who were thousands of miles from the battlefield.

The government's position that Paracha is an enemy combatant whose detention is authorized by the AUMF contradicts that statute, which must be interpreted consistent with longstanding principles of the law of war. *Hamdi*, 542 U.S. at 521. These longstanding principles do not provide for an interpretation that makes Paracha, abducted from the Bangkok airport, an enemy combatant. The distinction between Paracha and combatants captured on the battlefield is set forth in *Ex parte Milligan*, 71 U.S. 2 (1866). Milligan, a citizen of Indiana, had allegedly "conspired with bad men to assist the enemy," *id.* at 129, plotting to seize arsenals of the United States government and liberate prisoners of war, *id.* at 17. The government asserted that he was a combatant and that it could thus subject him to a military trial. *Id.* at 131. The Court disagreed, finding that Milligan was entitled to a civilian trial because he had not engaged in hostilities. *Id.* at 131.

In *Hamdi*, the Court found that the AUMF permitted the government to detain an American citizen seized on the battlefield in Afghanistan as an enemy combatant. 542 U.S. at 521. In its holding, however, the Court distinguished *Milligan*, stating that Milligan was arrested far from the battlefield, which led to the conclusion that he was not an enemy combatant. *Id.* at 522. Had Milligan been seized on a Confederate battlefield carrying a rifle, the Court noted, the government may have had the authority to detain him for the duration of the conflict as an enemy combatant. *Id.* *Milligan*, not *Hamdi*, is the proper analogue to Paracha's case.

Further, international law, which is part of the law of war under which the AUMF is interpreted, precludes Paracha's indefinite detention. First, the Geneva Conventions, which govern the U.S. conflict with al Qaeda in Afghanistan, *Hamdan v. Rumsfeld*, 127 S.Ct. 2749, 2795 (2006), provide clear rules for distinguishing prisoners of war from civilians and do not provide for an amorphous "enemy combatant" category that can be manipulated as the detaining government sees fit. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) arts. 2, 4, 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Moreover, under Common Article 3 of the Conventions, which applies to the U.S. conflict with al Qaeda, *Hamdan*, 127 S.Ct. at 2796, a captor cannot sentence a

civilian without a trial before a "regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Fourth Geneva Convention, art. 3. Yet the government claims the authority to hold Paracha in solitary confinement for the duration of an indefinite war because it has not attempted to try him, but instead has provided him only with a proceeding in which he did not have counsel, a chance to rebut the evidence, or a fair chance to present exculpatory evidence. The AUMF does not provide this authority.

Second, international law does not recognize detention for the duration of a war on an idea ("terror") or an ideology ("Islamofascism") that the government argues justifies its indefinite detention of Paracha. Although international law recognizes that the capture on the battlefield and temporary detention of enemy combatants is a regular incident of war, *see Hamdi*, 542 U.S. at 518-19, "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities," *id.* at 520-21. In other words, international law anticipates that armed conflict will end, at which any point detention must also end. On the other hand, here, Paracha faces detention for the rest of his life given that the underpinnings of the "war on terror" are "broad and malleable" and "the current conflict is unlikely to end with a formal cease-fire agreement." *Hamdi*, 542 U.S. at 520. Paracha's indefinite detention pursuant to a war on an idea therefore violates international law.

Because Congress did not make an affirmative statement of intent to violate these principles of international law when it passed the AUMF, the AUMF does not permit Paracha's detention. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains").

V. THE PROCEDURES UNDER WHICH PARACHA'S CSRT WAS CONDUCTED DID NOT COMPLY WITH THE DTA'S REQUIRED STANDARDS AND PROCEDURES.

A. Paracha's CSRT Was Not Conducted Under the Standards That the DTA Contemplates and Was Therefore Invalid Per Se.

Because it was conducted before the DTA became law, Paracha's CSRT was conducted under the Wolfowitz Order and CSRT Procedures, not under the standards and procedures that the DTA requires the Secretary of Defense to specify and submit to Congress for review. DTA §§ 1005(a), 1005(e)(2)(C)(i). Therefore, as a matter of law, Paracha's CSRT determination was not consistent with those standards and procedures or with the DTA itself, and must be overturned for that reason alone. DTA § 1005(e)(2)(C)(i).

B. Paracha's CSRT Failed to Provide Safeguards Required by the DTA.

Moreover, the DTA stated that the procedures submitted for the CSRTs had to include certain safeguards, including review of CSRT determinations by a designated civilian officer, a procedure for the review of new evidence, and a requirement that a CSRT consider whether the government had obtained statements

derived from or relating to a detainee by coercion. DTA § 1005(a).

The Wolfowitz Order and CSRT Procedures did not include these safeguards, which guarantee due process. First, they did not provide for review of new evidence and new CSRTs. Second, Paracha's CSRT failed to consider whether statements derived from or related to him were obtained by coercion, a serious flaw that Congress sought to remedy by passing the DTA. *See In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 473 (2004) ("At a minimum, . . . due process requires a thorough inquiry into the accuracy and reliability of statements alleged to have been obtained through torture.") Indeed, there is sufficient ground to suspect that those statements were indeed obtained by coercion. *See* Part VI.D., *infra*. Third, no civilian officer reviewed the results of Paracha's CSRT, even though such review is substantially different from final review by a military official who does not hold a position at the consent of the Senate and who may inherently be biased toward the military. The status determination of Paracha's CSRT violated both the DTA and the Constitutional guarantee of due process because it lacked these necessary safeguards as provided in the DTA.

C. The CSRT Procedures As Applied Do Not Provide A Basis For Determining Under the DTA Whether the CSRT's Decision Was Supported By A Preponderance Of The Evidence.

Under the DTA, this Court evaluates whether the conclusion of the CSRT was supported by a "preponderance of the evidence." DTA § 1005(2)(C)(ii). The

government's proposed scope of review does not permit the Court to make this evaluation. The CSRT Procedures, which created the minimal record before the Court, provide no basis for evaluating whether a "preponderance of the evidence" supported the CSRT's determination, because the evidence that was or should have been collected goes far beyond that record. As the declarations submitted in Bismullah show, the Recorder failed to collect all relevant information, failed to review it, and failed to present exculpatory evidence. The CSRT abdicated its duty to consider the reliability of the government's hearsay evidence. Discovery is necessary to discern exactly what the evidence should have been, on both the government's side and on Paracha's side, and then balance that evidence. If Paracha is granted no such discovery, review of the CSRT under the DTA is impossible without violating the DTA and the due process rights to which he, a lawful permanent resident, is entitled.

D. The CSRT Procedures As Applied Violated The DTA's Requirement That A Detainee Be Given An Opportunity To Rebut The Presumption In Favor Of The Government's Evidence.

Under the DTA, the Court should evaluate whether the CSRT's determination was consistent with a rebuttable presumption in favor of the government's evidence. DTA § 1005(2)(C)(ii). The CSRT Procedures provided for a presumption in favor of the government's evidence, but there was no rebuttal allowed. The function of rebuttal evidence is to "contradict, impeach or defuse the impact of the

evidence offered by an adverse party." *United States v. Grintjes*, 237 F.3d 876, 879 (7th Cir. 2001) (quoting *United States v. Papia*, 560 F.2d 827, 848 (7th Cir. 1977)) (quotations omitted). Paracha had no means of contradicting, impeaching, or defusing the government's evidence because he never saw it. Instead, he saw only a conclusory summary of it that completely lacked any supporting proof. He had no counsel or advocate to help him rebut the secret evidence used against him. He had no ability to cross-examine witnesses or show that their statements were unreliable. This procedure was inherently unfair. *Guantánamo Detainee Cases*, 355 F. Supp. at 469.

Even now, his security-cleared counsel has only been permitted to see a heavily redacted version of the government's evidence, and the government seeks to preclude counsel from gathering any more information for this case aside from the evidence submitted to the CSRT. The government thus asks the Court to adopt in toto the CSRT's failure to provide Paracha with a meaningful opportunity to rebut the evidence against him. As a result of this interpretation, the "rebuttable presumption" provided by the DTA will become an unrebuttable presumption in favor of the government's evidence, violating both the DTA and due process.

The Court must therefore consider evidence from outside the CSRT record, and should permit the discovery necessary to supplement that record. Paracha needs access to the full set of Government Information that was or should have

been collected by the Recorder and the Team, including records of the FBI's investigation of his business's shipments and the results of any polygraph tests. He needs access to the Government Evidence in unredacted form. He needs discovery of exculpatory information, including the letters he wrote to the U.S. government, and any records that would show that the evidence against him was obtained by torture or coercion.

If the *Bismullah* and *Parhat* court rules that such evidence is indeed pertinent in DTA proceedings, Paracha will then file a motion seeking this evidence. [64] If the Court preemptively acts without it and denies Paracha's claim for relief, however, it will fail to conduct the review required by the DTA and will deny Paracha the due process that this proceeding, his presence in the territorial jurisdiction of the United States, and his permanent resident status entitle him to receive.

VI. PARACHA'S CSRT WAS INVALID BECAUSE IT FAILED TO COMPLY WITH THE WOLFOWITZ ORDER, CSRT PROCEDURES AND THE CONSTITUTION AND LAWS OF THE UNITED STATES.

Even if a CSRT conducted under the Wolfowitz Order and CSRT Procedures could be valid with regard to Paracha, a citizen of a friendly nation who was abducted far from the battlefield, the determination that Paracha was an enemy

[64] Paracha has sought discovery in his cases for over a year. Mot. to Allow and Accelerate Discovery, *Paracha v. Bush*, No. 04-2022 (PLF) (D.D.C. filed Oct. 3, 2005).

combatant is invalid for a number of reasons.

A. Paracha Did Not Meet the Definition of Enemy Combatant in the Wolfowitz Order.

Under the Wolfowitz Order, to be an enemy combatant, an individual had to be part of or supporting al Qaeda or Taliban forces. Wolfowitz Order § a. The term "includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." Id. This definition does not include a citizen of Pakistan, accused of no hostile act, who the government abducted in a Thailand airport thousands of miles from its battlefield with al Qaeda and the Taliban.[65] *See Hamdi v. Rumsfeld*, 542 U.S. at 518 ("The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again."). DTA § 1005(e)(2)(C)(i) therefore invalidates the CSRT's determination.

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[65] This issue was also briefed in Paracha's dispositive motion, filed March 21, 2006 and denied without prejudice to his claims in this case. The recent ruling of a panel in the Fourth Circuit in *Al-Marri v. Wright*, 481 F.3d 160 (4th Cir. 2007), *petition for rehearing en banc pending*, supports Paracha's position that he is not a combatant, enemy or otherwise. "[E]nemy combatant status rests on an individual's affiliation during wartime with the 'military arm of the enemy government.' *Quirin*, 317 U.S. at 37-38; *Hamdi*, 542 U.S. at 519; *see also Padilla*, 423 F.3d at 391." *Al Marri*. Detaining a person who has never been on the battlefield does not serve the purpose of preventing enemy combatants from returning to the battlefield. *Id*. The Fourth Circuit also noted: "Common Article 3 and other Geneva Convention provisions applying to non-international conflicts (in contrast to those applying to international conflicts, such as that with Afghanistan's Taliban government) simply do not recognize the 'legal category' of enemy combatant. *See* Third Geneva Convention, art. 3, 6 U.S.T. at 3318." *Id.* at 52.

Moreover, the finding that Paracha was an enemy combatant even though the Wolfowitz Order did not provide for such a finding was inconsistent with the Constitution and the rule of law in this country, meaning that DTA § 1005(e)(2)(C)(ii) also invalidates that determination. When the government fails to follow its own standards and regulations in making a determination with regard to an individual, that failure violates the individual's due process rights, rendering the determination invalid. *See Service v. Dulles*, 354 U.S. 363, 388 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). As the Court found in *Accardi*, aliens are protected from actions taken by the government that contradict its own regulations. 347 U.S. at 268. Here, the military defined the term enemy combatant for the CSRTs, protecting individuals who were not subject to that definition from indefinite detention for the duration of the war on terror—but only if the definition was applied correctly in the individual CSRTs. By failing to follow that definition, Paracha's CSRT denied him due process and violated the rule of law.

B. The CSRT and Its Staff Failed to Comply with the CSRT Procedures, Resulting in a Finding that Paracha Was an Enemy Combatant Based on Evidence That Likely Was Obtained by Torture or Coercion.

Under the CSRT Procedures, the Recorder, a commissioned officer with TOP SECRET security clearance, was supposed to obtain and examine the reasonably available information in the government's possession bearing on Paracha's

status (the "Government Information"), and then to present all exculpatory information. CSRT Procedures Enclosure (1) §§ E. and H.4; Enclosure (2) § C.1. The Recorder failed in these duties. First, the Recorder abdicated responsibility to a poorly trained document collection Team that gathered some, but not all, of the Government Information and then discarded materials collected without reason. Abraham Decl. ¶¶ 7, 16. The Team failed to obtain other information due to its own lack of knowledge and withholding by other government agencies, even without a certification that the information withheld was not exculpatory. Abraham Decl. ¶¶ 10-12, 17.

Second, the Recorder did not gather and present all exculpatory information for a number of reasons. Recalcitrant agencies withheld evidence and refused to certify that none of it was exculpatory, as the CSRT Procedures required. Abraham Decl. ¶¶ 12-15. The Recorder and the Team withheld exculpatory evidence from the CSRT based on ill-founded determinations that it was "marginally relevant." Abraham Decl. ¶ 17; *see also* McGarrah Decl. ¶ 13. The government would decide not to present allegations related to a certain activity and would then withhold all evidence related to that activity, including exculpatory evidence. McGarrah Decl. ¶ 13.

In Paracha's case, the only exculpatory evidence provided to the CSRT was that submitted by Paracha's counsel, who did not even know his client was held at

Guantanamo at the time. The Recorder did not present a single exculpatory document, despite the statements by Khan and al Baluchi that the government revealed during the trial of Paracha's son and the letters that Paracha wrote to the U.S. government (which the CSRT President deemed irrelevant despite the possibility that they would exculpate Paracha).

These failures alone are sufficient to invalidate Paracha's CSRT. One failure of Paracha's CSRT, however, was particularly egregious. The CSRT and its staff completely ignored whether the secret hearsay evidence used against Paracha was obtained by torture or coercion. The Team and Recorder apparently failed to collect any documents relating to the circumstances under which the evidence was obtained, because otherwise they would have been compelled to submit it. The CSRT did not inquire into those circumstances, as the Wolfowitz Order required it to do to evaluate the reliability of the hearsay evidence. Wolfowitz Order § g.9. Indeed, the Army Field Manual recognizes that information obtained by the use of "[a]cts of violence or intimidation, including physical or mental torture, or exposure to inhumane treatment" is of "questionable value."[66]

Although counsel can only guess at the sources of the evidence used against Paracha because the government refuses to reveal those sources, it is extremely

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[66] Headquarters, Dep't of the Army, *FM 2-22.3, Human Intelligence Collector Operations*, at 5-26 (September 2006), *available at* http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf.

likely that the evidence was of such "questionable value" if it was obtained at Guantánamo, Bagram, or in CIA secret prisons. In December 2002, then-Secretary of Defense Donald Rumsfeld approved a set of interrogation techniques for Guantánamo prisoners that were harsher than those approved by the Army Field Manual.[67] At Guantánamo, the government extracted information from at least one prisoner under extreme conditions that rendered him incoherent and potentially insane, as a secret interrogation log reveals.[68] Even an internal Army investigation of the interrogation found that it constituted abusive treatment.[69]

In response to the Secretary of the Navy's concerns, on January 12, 2003, Secretary Rumsfeld revoked his order approving the use of these techniques at Guantánamo.[70] At Guantánamo, however, interrogations continued to include tactics such as isolation, sleep "adjustment," and intimidation.[71]

Furthermore, the practices approved in December 2002 migrated to Bagram,

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67 *See* Action Memo from William J. Haynes II, General Counsel, DOD, to Secretary of Defense (Nov. 27, 2002), *available at* http://www.defenselink.mil/news/Jun2004/d20040622doc5.pdf; A.T. Church III, Review of Dep't of Defense Detention Operations and Detainee Interrogation Techniques at 116-117 (Mar. 11, 2005), *available at* http://www.aclu.org/images/torture/asset_upload_file625_26068.pdf.

68 Adam Zagorin and Michael Duffy, *Inside the Interrogation of Detainee 063*, Time (Jun. 12, 2005).

69 *Army Regulation 15-6: Final Report, Investigation of FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba Detention Facility* at 20, available at http://www.defenselink.mil/news/Jul2005/d20050714report.pdf.

70 Church, *supra*, at 120.

71 *Id.* at 138-140.

where commanding officers disapproved only a select number of them during the time that the government held Paracha there.[72] Further, personnel at Bagram improperly read the rules for interrogations to include stress positions and sleep "adjustment."[73] Paracha has stated that he was held in "extremely severe bad conditions" and "in isolation" during his fifteen months at Bagram.[74]

Finally, the CIA subjected high-value detainees held in secret prisons to "enhanced interrogation techniques" including mock executions through waterboarding, physical abuse, and forced standing.[75] Among these high-value detainees were Majid Khan, Ammar al Baluchi, and Khalid Sheikh Mohammad,[76] who were named in Paracha's son's case, *Paracha*, No. 03-CR-1197, 2006 WL 12768, at *11, and were discussed at Paracha's CSRT.[77] It is a near certainty that they were subjected to the CIA's "enhanced" techniques.[78] Indeed, in their CSRT pro-

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72 *Id.* at 196-197.

73 *Id.* at 196-197 and 237.

74 CSRT Decision Report Exhibit D-b at 2, App. 58.

75 Ross and Esposito, *supra*.

76 *See* http://www.defenselink.mil/news/Combatant_Tribunals.html; http://www.odni.gov/announcements/content/DetaineeBiographies.pdf.

77 CSRT Decision Report Enclosure (3) at 11, App. 16; Unclassified Recording of CSRT Proceeding.

78 Khaled al-Masri, who like Khan was detained in the CIA's "Salt Pit" in Afghanistan, has described the techniques, including sodomization and mock execution, to which he was subjected there. Mot. for Access to Counsel Ex. E, Khan v. Bush, No. 06-1690 (RBW) (D.D.C. filed Nov. 4, 2006). Mohammad was also subjected to a mock execution. Walter Pincus, *Waterboarding Historically Controversial*, Washington Post (Oct. 5, 2006).

ceedings, Khan and Mohammad described their torture at the hands of the government, but those descriptions are redacted from the transcripts released to the public.[79]

The CSRT's ruling, which ignored the very real possibility that evidence used against Paracha was obtained by these tactics, is therefore invalid because it violated the Wolfowitz Order. If that evidence was indeed obtained by torture or coercion, the use of that evidence would violate the Fifth and Eighth Amendments to the Constitution, DTA § 1003, Common Article 3 of the Geneva Conventions, Article 15 of the U.N. Convention Against Torture,[80] and the law of nations under the Alien Tort Statute, 28 U.S.C. § 1350. The government may argue that Paracha cannot show that the evidence against him was definitely obtained by such tactics, but this is a textbook Catch-22. Paracha's counsel cannot transform this possibility into a certainty without discovery of the identity of the sources, which the government has withheld to date, and discovery of interrogation logs and other documents reflecting tactics used to obtain information from those sources. If the CSRT's ruling is affirmed at face value without that discovery, Paracha's rights to any mean-

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[79] Verbatim Transcript of CSRT Hearing for ISN 10020 at 28, *available at* http://www.defenselink.mil/news/transcript_ISN10020.pdf; Verbatim Transcript of CSRT Hearing for ISN 10024 at 14, *available at* http://www.defenselink.mil/news/transcript_ISN10024.pdf.

[80] The U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 15, opened for signature Dec. 10, 1984, G.A. Res. 39146, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984)

ingful review of that ruling will be effectively denied.

CONCLUSION

The orders of the CSRT and Director should be vacated and the Court should order Paracha's unconditional release to Pakistan. In the alternative, the Court should permit discovery and supplemental briefing to give Paracha a full opportunity to present the relevant facts.

Respectfully submitted,

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