UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD, United States Secretary of Defense; JOHN D. ALTENBURG, Jr., Appointing Authority for Military Commissions, Department of Defense; Brigadier General THOMAS L. HEMINGWAY, Legal Advisor to the Appointing Authority for Military Commissions; Brigadier General JAY HOOD, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; GEORGE W. BUSH, President of the United States,

Respondents.

CIVIL ACTION NO. 1:04-cv-01519-JR

PETITIONER'S OPPOSITION TO MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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I. PRELIMINARY STATEMENT

The issue presented by the Government's motion is whether Congress has removed the Court's jurisdiction over Salim Hamdan's petition for a writ of habeas corpus following his successful challenge in the Supreme Court of the United States. Mr. Hamdan has been in U.S. military custody for five years, a charge sheet asserting a conspiracy charge against him has not been revoked, and he now faces the prospect of renewed charges before a military commission.

Mr. Hamdan's habeas petition challenges (1) the legality of his detention as an alleged enemy combatant, and (2) the jurisdiction and authority of a military commission to try him as a war criminal. The latter issue was litigated to the Supreme Court, which in June 2006 ruled that the commission established to try Mr. Hamdan violated both the Uniform Code of Military Justice ("UCMJ") and the Geneva Conventions. In reaching that conclusion, the Supreme Court rejected an argument quite similar to the one advanced by the Government here, *i.e.*, that an act of Congress passed during the pendency of this litigation stripped the Court of jurisdiction over the case. The Supreme Court relied on ordinary cannons of statutory construction to conclude that the Detainee Treatment Act of 2005 ("DTA") did not revoke jurisdiction over Mr. Hamdan's habeas petition. The preeminent status of the Great Writ, and its venerable role in the preservation of liberty within our constitutional order, informed the Court's statutory interpretation.

The Government now contends that the Military Commissions Act of 2006 ("MCA") strips this Court of habeas jurisdiction. However, that contention is refuted by the plain language of the statute, interpreted in light of the Supreme Court's analysis of the DTA earlier in this case. The drafting history of the MCA also demonstrates that Congress did not intend to strip federal courts of jurisdiction over pending habeas cases such as this one.

However, if the MCA is deemed to revoke the Court's habeas jurisdiction, then the statute violates the Suspension Clause of the Constitution. This is because the narrow judicial review afforded under the MCA fails to provide an adequate substitute for habeas. The MCA's

deficiencies with respect to detention as an enemy combatant include: (1) the possibility of no judicial review at all, as the MCA only makes final decisions of Combatant Status Review Tribunals ("CSRTs") reviewable, but denies review to those "awaiting" a status determination; (2) no opportunity for the flexible and plenary factual inquiry that has long been available under habeas, which must be tailored to the circumstances to prevent a sham process from producing a miscarriage of justice; (3) no judicial ability to ensure that Executive detentions are not grounded on coercion, torture, or degrading treatment; and (4) no ability to present legitimate defenses founded on the Geneva Conventions, which have the status of domestic law. No federal court would permit such truncated review, or give license to such irregularities, in a habeas proceeding.

The MCA suffers from other grave constitutional flaws as well. It violates separation of powers principles by directing courts to ignore a holding of the Supreme Court in this very case, *i.e.*, that the Geneva Conventions apply and afford protections to this Petitioner. This, combined with the manipulation of the Court's jurisdiction, is "a means to an end" designed to simply decide the controversy in the Government's favor. As such, it trespasses upon the judicial function. If applied as the Government urges, the MCA would also effectively nullify the November 2004 Order of this Court, and preclude the possibility of enforcing that injunction, or the Supreme Court decision, should it become necessary to do so. Given the existing charge sheet against Mr. Hamdan, as well as the announcement of further impending charges against him, and his pre-commission detention in which he is currently held (facts that distinguish him from almost all other Guantanamo detainees at this time) it is imperative that this Court retain jurisdiction to enforce these rulings. The fact that the government has not yet charged Mr. Hamdan in their new *ex post* scheme not only underscores the weakness of the MCA's habeas "substitute" – which after all is entirely dependent on the government's decision to institute charges and bring a case to trial – it also highlights the need for this Court's

continuing jurisdiction over its November 8, 2004 order.[1] *See infra* page 27, note 19 (discussing voluntary cessation doctrine).

The MCA's deficiencies with respect to challenges to a military commission include: (1) no ability to adequately challenge the jurisdiction of the military commission, as the statute provides that the CSRT's jurisdictional determinations are "dispositive"; (2) no ability to obtain a pretrial ruling on the legitimacy of the tribunal, as the Supreme Court has provided in this case and others; (3) no ability to raise defenses based on the Geneva Conventions; and (4) the possibility of no judicial review at all, as, once again, the MCA only makes final decisions of military commissions reviewable, while imposing no requirement on the Executive of reaching finality.

In addition, the MCA is an unconstitutional Bill of Attainder, imposing punishment on a readily identifiable group by legislative fiat. Finally, the statute violates Equal Protection guarantees by relegating aliens (even lawful resident aliens) to an inferior brand of justice, thereby stripping them of fundamental rights. The MCA cannot withstand the strict scrutiny that is called for under these circumstances.

II. FACTUAL BACKGROUND

A. Procedural Posture

In June 2006, the U.S. Supreme Court ruled that Hamdan could not be tried by a military commission, as the Executive's action in establishing that commission and subjecting him to its jurisdiction violated the UCMJ and the Geneva Conventions. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). The Court held that the laws of war, applicable by virtue of the statute defining the jurisdiction of military commissions (10 U.S.C. § 821), incorporated the Geneva Conventions, and that the commission violated Common Article 3 of the Conventions. The

[1] Indeed, under the Government's reading of the MCA, this Court would be powerless to prevent Mr. Hamdan from being tried under the President's November 13, 2001 Military Order – despite the fact that the Supreme Court has explicitly barred it. At best, his only legal right would occur years down the road, once the government decided to take the steps of a) charging him; b) trying him; and c) rendering a final judgment approved by the convening authority – and even then it would only be the most truncated form of review.

Court determined that Common Article 3 applied in the armed conflict in which Petitioner was captured, and among other things, entitled him to trial by "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.* at 2797-98.

Despite that ruling, Petitioner remains subject to a July 2003 Presidential determination that he is a war criminal subject to trial by military commission. Petitioner still has a detailed military defense counsel, and DoD and DoJ prosecutors have been communicating with Petitioner's counsel concerning discovery and pretrial issues. Declaration of Lt. Commander Charles Swift ("Swift Decl.") ¶ 26. Since the Supreme Court's June 29, 2006 opinion, no documents have revoked the July 13, 2004, Charge Sheet, which prefers a single charge of "Conspiracy" against Petitioner. *Id.* ¶ 12, Ex. 5. While a new military commission has not yet been convened, the Chief Prosecutor at Guantanamo has stated that "he's teeing up charges against 20 Guantanamo prisoners–the 10 defendants charged under the old system, and 10 additional ones"; Petitioner in this case is one of the defendants charged under "the old system," which was struck down by the Supreme Court in June 2006. *See* Jess Bravin, *Head of Military Commissions Quits*, Wall St. J. Washington Wire, Nov. 15, 2006, available at http://wsj.com/washwire.

In short, Petitioner is currently being held in pre-commission detention at Guantanamo in the same posture as when this action commenced in April 2004. At that time, Petitioner had detailed defense counsel, but no charges had been preferred. Swift Decl. ¶¶ 9-11. The impending activity before a new military commission, plus the existence of final rulings on certain matters by the Supreme Court, raises issues in this case that are not present in the cases of other detainees currently before the D.C. Circuit. Indeed, Mr. Hamdan stands in a unique position because the issues his challenge raises include whether this Court has jurisdiction to enforce and/or modify its November 8, 2004 Order.

B. The Military Commissions Act of 2006

On October 17, 2006, the President signed into law the MCA. Pub. L. No. 109-366,

120 Stat. 2600. Section 7 of the Act amends the federal habeas statute by inserting a new section (e), as follows:

> (a) IN GENERAL. – Section 2241 of title 28, United States Code, is amended…by inserting the following new subsection (e):
>
> (e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
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> (2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
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> (b) EFFECTIVE DATE. – The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

In addition, section 3(a) of the MCA addresses jurisdiction specifically in connection with military commissions:

> Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter.

MCA § 3(a) (adding 10 U.S.C. § 950j(b)). Respondents have suggested that these provisions strip this Court of subject-matter jurisdiction over Petitioner's claims. However, as explained below, MCA §§ 3(a) and 7 do not alter this Court's jurisdiction, and if they were read to do so, they would then be unconstitutional on multiple grounds. For these reasons, the Court's

subject-matter jurisdiction over Petitioner's claims remains unaffected by that statute.

III. ARGUMENT

A. Petitioner Has Properly Invoked the Habeas Jurisdiction of This Court

The writ of habeas corpus has been described by the Supreme Court as the "highest safeguard of liberty" within our legal tradition, *Smith v. Bennett*, 365 U.S. 708, 712 (1961), providing a judicial remedy that "has been for centuries esteemed the best and only sufficient defense of personal freedom." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (citation omitted). "Its province, shaped to guarantee the most fundamental of all rights, is to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person." *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968). "[T]he writ is available, not only to determine points of jurisdiction, *stricti juris*, and constitutional questions; but whenever else resort to it is necessary to prevent a complete miscarriage of justice." *United States ex rel. Kulick v. Kennedy*, 157 F.2d 811, 813 (2d Cir. 1946) (L. Hand, J.). "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

In this case, Petitioner's claims fall squarely within the historical core of habeas review. Petitioner challenges two different forms of Executive detention: (1) continuing detention as an enemy combatant, where Petitioner has been denied "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker," *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004), and (2) detention for trial before a military commission that lacks jurisdiction over him.

With respect to Petitioner's first claim, the Supreme Court has held that alleged enemy combatants detained at the Guantanamo Bay Naval Station have the right to challenge their detention in habeas actions:

> Consistent with the historic purpose of the writ, this Court has recognized the federal courts' power to review applications for habeas

> relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace. . . . Application of the habeas statute to persons detained at the [Guantanamo] base is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons within the so-called "exempt jurisdictions," where ordinary writs did not run, and all other dominions under the sovereign's control. As Lord Mansfield wrote in 1759, even if a territory was "no part of the realm," there was "no doubt" as to the court's power to issue writs of habeas corpus if the territory was "under the subjection of the Crown."

Rasul v. Bush, 542 U.S. 466, 474, 481-82 (2004).

Thus, the Court's jurisdiction to issue the writ in a case such as this is a function not only of the federal habeas statute, but of the common law, as recognized and protected by the Suspension Clause of the U.S. Constitution. "Habeas corpus is…a writ antecedent to statute,…throwing its roots deep into the genius of our common law… The writ appeared in English law several centuries ago [and] became an integral part of our common law heritage by the time the Colonies achieved independence." *Id.* at 473-74 (citations omitted). The Founders ensured that the availability of the writ was not dependent upon executive or legislative grace. *See St. Cyr*, 533 U.S. at 304 n.24 (the Suspension Clause "was intended to preclude any possibility that the privilege itself would be lost by either the inaction or the action of Congress"). Thus, the constitutional right to habeas relief exists even in the absence of statutory authorization, and may be suspended only by explicit congressional action under strictly limited conditions.[2] *See Johnson v. Eisentrager*, 339 U.S. 763, 767-68 (1950) (assuming that, in absence of a statutory right of habeas, petitioners could seek the writ directly under the Constitution to the extent their claims fell within the scope of habeas protected by the Suspension Clause). As the Supreme Court has suggested, the Guantanamo Bay Naval Station is a place where fundamental rights are protected by American courts. *Rasul*, 542 U.S. at 484 n.15 ("Petitioners' allegations …unquestionably describe 'custody in violation of the

[2] *Scaggs v. Larsen*, 396 U.S. 1206, 1208 (1969) (Douglas, J.) ("[Section] 2241 is not a measure of the constitutional scope of the guarantee [of habeas]….").

Constitution or laws or treaties of the United States.'").[3] Because Congress has not invoked its stated powers under the Suspension Clause, and because any such attempt under present circumstances would be invalid, this Court retains jurisdiction to consider Petitioner's habeas petition even if Congress were deemed to have withdrawn access to habeas previously authorized by statute.

With respect to Petitioner's second claim, the power and duty of the federal courts to inquire into the authority of a military commission has long been recognized as within the scope of habeas review. *Yamashita v. Styer*, 327 U.S. 1, 9 (1946) ("the Executive branch of the government could not, unless there was a suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus."); *Ex parte Quirin*, 317 U.S. 1 (1942). In this very case, the federal courts at every level addressed Petitioner's challenge to the previous version of the military commission, recognizing it as squarely within the scope of a habeas inquiry. Indeed, both the Supreme Court and the Court of Appeals recognized that habeas jurisdiction was appropriate, noting that "*Quirin* 'provides a compelling historical precedent for the power of civilian courts to entertain [habeas] challenges that seek to interrupt the processes of military commissions.'" *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2772 (2006) (quoting *Hamdan*, 415 F.3d 33, 36 (2005)).

Accordingly, there is no doubt about the power and scope of the writ as a fundamental instrument for the preservation of liberty. Likewise, there is no doubt that in this case – at least until the passage of the MCA – this Court had jurisdiction under the federal habeas statute, 28 U.S.C. § 2241, to review Petitioner's claims, and that exercise of jurisdiction was fully

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[3] The *Rasul* Court supported this conclusion by citing to Justice Kennedy's concurrence in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring) and the cases cited in that concurrence. *All* of those cases addressed claims under the Constitution, not statutes or treaties. Indeed, Justice Kennedy's opinion emphasized that *Verdugo-Urquidez* did not repudiate the long-established principle that "the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic…The question before us then becomes *what* constitutional standards apply when the Government acts, in reference to an alien, within its sphere of foreign operations." *Verdugo-Urquidez, Id.* at 277 (Kennedy, J., concurring). *See also* Amicus Br. of Former Federal Judges, *Hamdan v. Rumsfeld*, No. 05-184 (2006), at 2-9 (discussing *Rasul* and *Verdugo-Urquidez*).

"consistent with the historical reach of the writ of habeas corpus." *Rasul*, 542 U.S. at 481.

B. Congress Has Not Suspended the Writ of Habeas Corpus

The Suspension Clause of the U.S. Constitution provides: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Art. I, § 9, cl. 2. The Clause protects the essential role of the courts in the preservation of liberty, and imposes clear limits on the powers of Congress to interfere with that role. *Hamdi*, 542 U.S. at 536 ("[U]nless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining [the] delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions."). Any suspension of the writ in the absence of rebellion or invasion, or when the public safety does not require it, breaches constitutional limitations on the powers of Congress, and should be struck down.

Here, there can be no credible contention that Congress, through the enactment of the MCA, invoked the predicate grounds for habeas suspension. The constitutional prerequisites of suspension – rebellion or invasion – are not present. "Congress may not suspend the great writ of habeas corpus and limit the checks and balances whenever it wants to. Congress may do so only in cases of rebellion and invasion, neither of which is present today." (152 Cong. Rec. H7548 (Statement of Rep. Lofgren) (Sept. 27, 2006)). "Only in the rarest of circumstances has Congress seen fit to suspend the writ. At all other times, it has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law." *Hamdi*, 542 U.S. at 525 (citations omitted). Congress has authorized a suspension of the writ on only four occasions in American history, in each case during a period of actual insurrection or invasion, and in each case with a clear statement of its intent to suspend, and a clear statement that the suspension could continue only so long as the immediate threat to civil authority existed. William F. Duker, *A Constitutional History of Habeas Corpus* 149, 178 n.190 (1980). Given the role of the Great Writ in the American constitutional order, past historical practice, and the absence of an express statement that Congress intended to suspend the writ, the Court

should not conclude that it has done so with the passage of the MCA. *St. Cyr*, 533 U.S. at 299 ("[W]hen a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."); *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) ("In traditionally sensitive areas, . . . the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.").

C. The MCA Does Not Strip This Court of Jurisdiction Over Petitioner's Pending Habeas Action

Earlier in this case, the Supreme Court applied "[o]rdinary principles of statutory construction," to conclude that the Detainee Treatment Act of 2005 ("DTA") did not divest the federal courts of jurisdiction over this matter. *Hamdan*, 126 S. Ct. at 2765-69. Because the jurisdictional provision of the MCA (§ 7) follows the same pattern seen in the DTA, those principles of statutory construction lead to the same result when applied to the MCA.

Section 7(a) adds a new subsection (e) to the federal habeas statute. Subsection (e) is divided into two subparts. Subpart (1) divests courts of jurisdiction over habeas applications filed by aliens determined to be enemy combatants, or awaiting such determination. Subpart (2) divests courts of jurisdiction, except as preserved in the DTA, over any other actions "relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien" determined to be an enemy combatant, or awaiting such determination.

Section 7(b) of the MCA provides that § 7(a) takes effect on the date of enactment (which was October 17, 2006) and applies to "all cases, without exception, pending on or after the date of enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien detained by the United States since September 11, 2001." MCA § 7(b).

Significantly, subsection 7(b) does not expressly refer to habeas cases pending on the date of enactment. Instead, the language of § 7(b) tracks, virtually word for word, the language used in (e)(2) to refer to "other actions" relating to detention, transfer, treatment, et cetera. In

determining that similar jurisdictional provisions of the DTA did not apply to this case because it was pending on the date of enactment of the DTA, the Supreme Court relied on a "negative inference [that] may be drawn from the exclusion of language from one statutory provision [when that language] is included in other provisions of the same statute." *Hamdan*, 126 S. Ct. 2765 (citations omitted). Here, the same negative inference may be drawn from the absence of any express reference to a pending habeas application in § 7(b), in contrast to § 7(b)'s use of exactly the same terms as (e)(2) to identify the cases to which it applies. This indicates that the pending cases to which the new statute is intended to apply are precisely those described in (e)(2).[4]

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[4] Another negative inference may be drawn from the express reference to habeas actions in MCA § 950j, which expressly mentions habeas in the course of divesting courts of jurisdiction over actions "relating to the prosecution, trial, or judgment of a military commission under this chapter." To be sure, the combined effect of MCA § 7(a)(2) and 7(b) is to bar some challenges to military commissions, such as those day-to-day ones that are best handled after the trial is completed. But 7(b) does *not* bar a habeas challenge to a military commission in a pending case, it only attempts to extend its prohibition retroactively to the § 7(a)(2) provision by its very terms. And it is quite clear that a challenge to the legality of the military commission itself is not a challenge "relat[ing] to any aspect of the…trial." MCA 7(b). Such challenges do not go to procedural rulings by the commission, they challenge the commission itself. They relate not to an "aspect" of them, but to their entirety. For similar reasons, Section 3(a), which attempts to bar jurisdiction of claims "relating to the prosecution, trial, or judgment of a military commission under this chapter" does not bar this Court's jurisdiction to consider structural legal challenges to military commissions. As its title makes clear, this section means that the "Provisions of [the] Chapter [are the] Sole Basis for Review of Military Commission *Procedures* and *Actions*." That language might, absent Suspension Clause problems, bar day-to-day challenges to particular decisions made by a military commission, but does not bar challenges to the military commission itself. Finally, even if MCA § 950j does not suspend the writ, Petitioner's habeas action also includes a separate challenge to his detention as an enemy combatant, which is not affected by MCA § 950j.

Additional support for this reading is found in *Hamdan* itself, where the Supreme Court held that DTA §§ 1005(e) and (h) did not strip the federal courts of jurisdiction to hear Hamdan's challenge to the validity of the military commissions. The Court found that the DTA distinguished between, on the one hand, pending cases that challenged the validity of the military commissions and, on the other hand, "more routine" challenges to the final orders of commissions and combatant status review tribunals. *Id.* at 2769. The DTA, said the Court, only stripped the lower courts of jurisdiction to hear the latter type of cases. *Id.* In finding that the DTA created this "hybrid" system for reviewing different types of challenges to the military commissions, the Court stated that Congress may have had "good reason" to preserve jurisdiction for those cases that "challenge the very legitimacy of the tribunals whose judgments Congress would like to have reviewed," while "channel[ing] to a particular court and through a particular lens of review" those "more routine challenges to final decisions rendered by those tribunals." *Id.*; *see also id.* at 2768-69 ("[S]ubsections (e)(2) and (e)(3) [of the DTA] grant jurisdiction only over actions to 'determine the validity of any final decision' of a CSRT or commission. Because Hamdan, at least, is not contesting any 'final decision' of a CSRT or military commission [but rather is contesting the very legitimacy of the commissions], his action does not fall within the scope of subsection (e)(2) or (e)(3)."). This distinction applies equally to the hybrid system of review devised by Congress in the MCA.

In addition, § 7(b) applies to pending habeas cases only if habeas actions are included within the category of cases "which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention." But if habeas cases are included in that language of § 7(b), there would have been no reason for Congress to add a new subsection (e)(1) dealing separately with habeas cases – the language of subsection (e)(2) would have covered them. Thus, construing § 7(b) to include habeas cases renders subsection (e)(1) superfluous, in violation of the principle that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (citation omitted). Subsection (e)(1) is necessary and has independent meaning only if § 7(b) does not refer to habeas cases. But if § 7(b) does not refer to habeas cases, then the jurisdictional strip in (e)(1) does not apply to pending habeas cases such as this one. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 272 (1994) (statutes "will not be construed to have retroactive effect unless their language requires this result").

The Supreme Court's "longstanding rule requiring a clear statement of congressional intent to repeal habeas," *St. Cyr*, 533 U.S. at 298, also militates strongly against an interpretation of the MCA that strips the court of jurisdiction over this case. "Implications from

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This Court recognized that Hamdan was challenging not only the procedures that would be used to try him, but also the very jurisdiction of the commission itself. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d. 152, 157 (D.D.C. 2004). The Court of Appeals for the D.C. Circuit corroborated this reasoning, noting that under its precedents "'a person need not exhaust remedies in a military tribunal if the military court has no jurisdiction over him,'" *Hamdan v. Rumsfeld*, 415 F.3d 33, 36 (D.C. Cir. 2005) (quoting *New v. Cohen*, 129 F.3d 639, 644 (D.C. Cir. 1997), and that jurisdictional challenges to the military commissions must therefore be allowed to proceed so long as they are "not insubstantial," *id.* at 37. The Supreme Court likewise held that abstention was inappropriate in Hamdan's case. 126 S. Ct. at 2772 (quoting *Ex parte Quirin*, 317 U.S. 1, 19 (1942)). "Hamdan and the Government," the Court observed, "both have a compelling interest in knowing in advance whether Hamdan may be tried by a military commission that arguably is without any basis in law and operates free from many of the procedural rules prescribed by Congress for courts-martial." *Id.* at 2772. In each of these instances, the courts refused to apply *Councilman* abstention because they recognized that challenges to the very legitimacy of a military commission are qualitatively different from challenges to particular aspects of a commission. The DTA respected this distinction by refraining from stripping jurisdiction over pending habeas cases—cases which, by definition, would challenge the validity of the military commissions. The MCA has now done the same. In both statutes, Congress, like the courts, made allowance for the fact that certain fundamental claims must be allowed to proceed so as to assure the constitutionality of the very scheme Congress has authorized. This reading does not render the MCA redundant of the DTA. The significance of Section 7 of the MCA is not that it strips habeas jurisdiction in pending cases, but that it expands the territorial reach of the withdrawal of habeas jurisdiction to detainees held anywhere in the world instead of simply to Guantanamo.

statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal." *Id.* at 299. In this case, no such specific and unambiguous directive has been provided. The Supreme Court noted earlier in this case – in rejecting the government's argument that jurisdiction-stripping statutes should be presumed to apply to pending habeas actions – that removing jurisdiction without providing it in another court would deprive the affected detainees of fundamental rights. *See Hamdan*, 126 S. Ct. at 2765. The only cases in which the Supreme Court has ever found a statute to have retroactive effect have involved statutory language "so clear that it could sustain only one interpretation." *St. Cyr*, 533 U.S. at 316 (citing *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997)). Section 7 of the MCA falls far short of achieving such a high level of clarity.[5]

The requirement of a clear statement of congressional intent to remove habeas jurisdiction applies with more force in this case than it did with respect to the DTA in *Hamdan*. At the time of enactment of the MCA, Congress certainly was aware of the Supreme Court's decision in *Hamdan* which declined to apply a jurisdiction-stripping provision in the DTA to pending habeas cases because the statute did not specifically list habeas corpus cases among the pending cases to which the statute applied. *See Hamdan*, 126 S. Ct. at 2765. It is therefore reasonable to conclude that Congress knew that it had to specifically identify pending habeas corpus cases if it wanted courts to apply the MCA's jurisdiction-stripping provisions to such cases. This Court should not read language into the MCA that Congress chose not to include. That is particularly true here, where, given the Supreme Court's ruling on the DTA, Congress must have known that the only way to guarantee this reading of the provision would be to use this formula. That it didn't do so cannot plausibly be considered an oversight; at best it was an

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[5] Indeed, in *St. Cyr*, the Court held that a statutory provision entitled "Elimination of Custody Review by Habeas Corpus" did not repeal habeas jurisdiction because the operative text of the statute did not specifically mention habeas corpus, 533 U.S. at 308-10, just as Section 7(b) of the MCA does not mention habeas corpus. "Elimination of Custody Review by Habeas Corpus" is certainly a much more suggestive title than MCA § 7's title of "Habeas Corpus Matters" with regard to jurisdiction-stripping, which implies that the MCA is even more deficient in meeting the clear statement requirement than the statute at issue in *St. Cyr*.

intentional ambiguity – which all the relevant canons of construction and judicial precedents indicate must be read against finding a repeal of pending habeas cases here.

Moreover, as in *St. Cyr*, this clear statement requirement is reinforced by an additional canon of construction, namely, the principle that "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, [the court is] obligated to construe the statute to avoid such problems." 533 U.S. at 299-300. Here, the Government's contention that the MCA strips the Court of habeas jurisdiction raises serious constitutional problems (see *infra*, sections D through G), which can easily be avoided by the same rules of statutory construction employed by the Supreme Court earlier in this case. *Hamdan*, 126 S. Ct. at 2765-69.

Finally, the drafting history of the MCA confirms the meaning evident from the statutory text. In the course of its consideration of the legislation that became the MCA, Congress declined to enact two versions of MCA § 7 that would have expressly stripped the courts of jurisdiction over pending habeas cases. Representative Duncan Hunter, Chairman of the House Armed Services Committee, proposed the following language in House Resolution 6054:

> Except as provided for in this subsection, and notwithstanding any other law, no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action, *including an application for a writ of habeas corpus*, pending on or filed after the date of the enactment of the Military Commissions Act of 2006, against the United States or its agents, brought by or on behalf of any alien detained by the United States as an unlawful enemy combatant, relating to any aspect of the alien's detention, transfer, treatment, or conditions of confinement.

H.R. 6054, 109th Cong. § 5 (2006) (emphasis added). Congressman Hunter's proposed legislation also specifically provided for retroactive applicability of the jurisdiction-stripping provisions, stating that: "This Act shall take effect on the date of the enactment of this Act and shall apply retroactively, including . . . to any claim or cause of action pending on or after the date of the enactment of this Act." *Id.* § 8.

Senators Bill Frist and Mitch McConnell proposed similar language:

> Except as provided for in this subsection, and notwithstanding any other law, no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action, *including an application for a writ of habeas corpus*, pending on or filed after the date of enactment of this subsection, against the United States or its agents, brought by or on behalf of any alien detained by the United States as an unlawful enemy combatant, relating to any aspect of the alien's detention, transfer, treatment, or conditions of confinement.

S. 3886, 109th Cong. § 105 (2006) (emphasis added). This proposal also contained an explicit retroactivity provision in § 109 ("This title shall take effect and shall apply retroactively[.]"). Congress, however, enacted the MCA without expressly divesting courts of jurisdiction over pending habeas cases *and* without an explicit retroactivity provision. "Congress' rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation." *Hamdan*, 126 S. Ct. at 2766.

D. If Interpreted to Strip This Court's Habeas Jurisdiction, Then the MCA Violates the Suspension Clause Because It Does Not Provide an Adequate Substitute for Habeas

If the MCA is read to strip the Court of habeas jurisdiction in this case, then the statute unconstitutionally suspends the Great Writ, because the narrow review preserved by the MCA is not commensurate with a habeas inquiry protected by the Suspension Clause.

The writ of habeas corpus provides for a flexible and plenary inquiry into the legal and factual bases for Executive detention, and into the jurisdiction of any tribunal or agency that would deprive an individual of his or her liberty. "[Habeas corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose – the protection of the individual against erosion of their rights to be free from wrongful restraints upon their liberty." *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

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

Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). "[T]he writ has evolved into an instrument that now demands not only conviction by a court of competent jurisdiction,

but also application of basic constitutional doctrines of fairness." *Lonchar*, 517 U.S. at 322 (citations omitted).

"[A]t the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 664 (1996)).[6] In 1789, "the issuance of the writ was not limited to the jurisdiction of the custodian, but encompassed detentions based on errors of law, including the erroneous application or interpretations of statutes." *Id.* at 302.

> [P]ure questions of law…could have been answered in 1789 by a common law judge with the power to issue the writ of habeas corpus. It necessarily follows that a serious Suspension Clause issue would be presented if we were to accept the [Government's position] that the [statutes at issue] have withdrawn that power from federal judges and provided no adequate substitute for its exercise.

Id. at 305. Likewise, inquiry into the constitutionality of a statute under which a prisoner is held has long been recognized as within the scope of habeas review:

> [A]s the laws of congress are only valid when they are within the constitutional power of that body, the validity of the statute under which a prisoner is held in custody may be inquired into under a writ of habeas corpus as affecting the jurisdiction of the court which ordered his imprisonment. And if their want of power appears on the face of the record of his condemnation, whether in the indictment or elsewhere, the court which has authority to issue the writ is bound to release him.

Ex parte Coy, 127 U.S. 731, 758 (1888). In addition, given the status of treaties as domestic law and the role of the judiciary in enforcing treaty-based rights, the writ has long been available in federal courts to protect against detentions in violation of treaties of the United States. *Saint Fort v. Ashcroft*, 329 F.3d 191, 201 (1st Cir. 2003) ("American courts have exercised habeas review over claims of aliens based on treaty obligations since the earliest days of the republic"); *Mali v. Keeper of the Common Jail*, 120 U.S. 1 (1887) (granting habeas petition based on consular agreement between the United States and Belgium).

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[6] In *Felker*, the Court assumed, for purposes of that decision, that "the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789." *Felker*, 518 U.S. at 663-64.

Respondents may argue that the MCA does not effect an unconstitutional suspension of the writ because it provides for judicial review following final decisions of CSRTs concerning detention, and final decisions of military commissions concerning criminal matters. MCA § 7(a). But the Supreme Court has made clear that "'judicial review' and 'habeas corpus' have historically distinct meanings." *St. Cyr*, 533 U.S. at 311. Any statutory substitute for the writ of habeas corpus, in order to avoid violating the Suspension Clause, must provide an "adequate and effective" means to test the legality of the detention, in a process "commensurate" with habeas corpus. *Swain v. Pressley*, 430 U.S. 372, 381 (1977). In this case, the narrow judicial review afforded by the MCA does not come close to providing an adequate substitute for habeas review, and accordingly, the MCA violates the Suspension Clause.

1. The MCA does not provide an adequate substitute for a habeas challenge to detention as an alleged enemy combatant.

The MCA provides that the only review available for detainees challenging their detention as enemy combatants is that set forth in section 1005(e)(2) of the DTA. MCA § 7(a). The scope of review is as follows:

> (C) SCOPE OF REVIEW. — The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of—
>
> > (i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and
> >
> > (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States

DTA § 1005(e)(2). This review is limited to "any *final decision* of a [CSRT]." DTA § 1005(e)(2)(A) (emphasis added). Thus, the challenge to detention as an enemy combatant boils down to a challenge to the adequacy of a CSRT.

First, it must be noted that section 7(a) of the MCA purports to strip habeas review not only for those "determined by the United States to have been properly detained as an enemy combatant," but also for those "awaiting such determination." MCA § 7(a). The only substitute for habeas provided by the MCA is the limited review of final CSRT decisions described in § 1005(e)(2) of the DTA, quoted above. But this review does not allow for any judicial inquiry or relief for those "awaiting such determination." In other words, all the Government need do to preclude any judicial review for a detainee is assert that the detainee is "awaiting [a] determination" by the United States of whether he or she is in fact an enemy combatant. The DTA and MCA impose no limits whatsoever on the amount of time the Government has to make such a determination, and presumably would include any person, seized anywhere for any reason. *See generally* Swift Decl. ¶ 31, Ex. 6 (July, 14, 2006, Department of Defense Memorandum Implementing Combatant Status Review Tribunals). Thus, as a practical matter, the DTA and MCA may afford no judicial review at all. This clearly is not commensurate with the speedy inquiry into the legality of a detention afforded by habeas corpus. *Strait v. Laird*, 406 U.S. 341, 351, 92 S. Ct. 1693, 1698 (1972) ("Habeas corpus is a powerful remedy to be wielded *promptly* in cases where restrictions on individual liberty are substantial") (emphasis added); *see also In re Bonner*, 151 U.S. 242, 259 (1894) (when a "prisoner is ordered to be confined…where the law does not allow the court to send him for a single hour…[t]o deny the writ of habeas corpus in such a case is a virtual suspension of it").[7]

This contrasts markedly with *Swain*, where the Court rested its decision in large part on the fact that the statute contained a safety valve that "allows the District Court to entertain a habeas corpus application if it 'appears that the remedy by motion is inadequate or ineffective to test the legality of (the applicant's) detention.'" 430 U.S. at 381. Moreover, the Court noted that the scope of this collateral remedy was *the same* as that provided under 28 U.S.C. §2255, which in turn is "also commensurate with habeas corpus in all respects[.]" *Id.* at 382 (citing

[7] For further discussion of the speedy inquiry afforded by habeas, *see* Amicus Br. of Commonwealth Lawyers Ass'n., *Hamdan v. Rumsfeld*, No. 05-184 (2006) at 6-8 & n.9 (collecting cases).

Hill v. United States, 368 U.S. 424 (1962)). Neither can be said in this case. Indeed, the MCA's judicial review is entirely dependent on the government's decision to institute – and render final – proceedings against a detainee. By permitting review only after a final decision, the statute effectively precludes any claim that a prisoner is being held unlawfully without adequate process, a claim at the core of the right to habeas and of no small significance in light of the powers asserted by the President. *See, e.g.*, *Rasul*, 542 U.S. at 556; *Hamdi*, 542 U.S. at 525; *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

Second, even if the Government promptly conducts a CSRT to make a status determination, the DTA does not permit the Court to engage in the sort of factual inquiry that has long been available via habeas. Section 1005(e)(2) does not allow petitioners to engage in discovery (including discovery into whether evidence against them was obtained by coercion), "traverse" the return, or obtain a hearing, as provided by 28 U.S.C. §§ 2243 – 2248. In an August 21, 2006, filing in the District of Columbia Circuit, the Government asserts that under the DTA, the Court is limited to reviewing the CSRT "record," which as a practical matter consists only of the evidence that the Government itself chooses to put before that administrative panel. The Government asserts that the DTA "does not authorize fact-finding," "cannot fairly be construed as providing discovery and *de novo* review," "does not authorize the submission of new evidence," is "properly read as limiting this Court's review to the record before the CSRT" for mere "evidentiary sufficiency of the CSRT decision." Moreover, CSRT procedures are "entitled to the strongest sort of presumption of regularity," with, as the DTA expressly states, "a rebuttable presumption in favor of the Government's evidence." Swift Decl. ¶ 32, Ex. 7 (Response in Opposition to Motion to Compel, filed August 21, 2006, by the Government in *Bismullah v. Rumsfeld*, D.C. Cir. No. 06-1197, at 14-17, 19-20.).

This perfunctory review is not remotely an adequate substitute for the flexible, *de novo*, plenary, factual inquiry that has long been available under habeas corpus. In cases of Executive detention where, as here, a petitioner is not under sentence by any court, common law habeas allows a petitioner to traverse the Government's return, present exculpatory

evidence, and obtain a determination by the court of disputed issues of fact. For example, in *Goldswain's Case*, 96 Eng. Rep. 711, 712 (C.P. 1778), the court considered evidence submitted by an impressed sailor, which was not in the return, and in light of that evidence ordered his release. The court stated that the petitioner "may plead to it any special matter necessary to regain his liberty," and declared that [it] "could not wilfully shut [its] eyes against such facts as appeared on the affidavits, but which were not noticed on the return."[8] Likewise, aliens detained by the Executive in wartime were able to submit evidence in habeas proceedings to challenge their status as alleged enemies of the Crown. *See, e.g., Case of the Three Spanish Sailors*, 96 Eng. Rep. 775, 776 (C.P. 1779) (examining affidavits from alleged alien enemies supporting their claims for release); *Rex v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759) (same).

American courts have likewise reviewed new evidence as part of a searching factual inquiry into the legality of detentions, even where the prisoner was being held for eventual trial.[9] In particular, jurisdictional facts have long been the subject of careful scrutiny by courts considering habeas petitions. This is illustrated by the landmark *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), where the Supreme Court, and the district court before it, carefully evaluated the "facts stated in Milligan's petition, and the exhibits [he] filed" in support of it, in the course of deciding that the military commission that convicted him was without jurisdiction to do so. These cases demonstrate that the DTA's failure to allow for discovery and the introduction of new evidence to challenge CSRT decisions make it a wholly inadequate substitute for habeas.

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[8] *See* discussion of the case in R.J. Sharpe, *The Law of Habeas Corpus* 66 n.15 (2d ed. 1989); *see also Good's Case*, 96 Eng. Rep. 137 (K.B. 1760) (releasing petitioner after examining affidavit showing that as a ship's carpenter he was exempt from impressment); *Rex v. Greenwood*, 93 Eng. Rep. 1086 (K.B. 1739) (considering affidavits of eight "credible persons" introduced after indictment but prior to trial of accused robber); *Barney's Case*, 87 Eng. Rep. 683 (K.B. 1701) (bailing accused murderer after considering affidavits showing that it was a malicious prosecution).

[9] For example, in *United States v. Johns*, 4 Dall. 412, 413 (Cir. Ct. 1806), the court heard oral testimony to evaluate a habeas petition alleging unlawful pre-trial detention. In *Ex parte Bennett*, 3 F.Cas. 204 (C.C.D.D.C. 1825) (No. 1,311), the court at the habeas hearing re-examined a witness who had previously appeared before the committing magistrate; *see also State v. Joseph Clark*, 2 Del. Cas. 578 (Del. Chancery 1820) (releasing habeas petitioner from military enlistment after reviewing his affidavit traversing the return, and hearing live testimony from his father).

Nor does habeas entail the limited, highly deferential review that the Government insists is the extent of judicial inquiry available under the DTA. On the contrary, the habeas inquiry must be flexible and robust enough to allow for a fair assessment of the legality of the detention. This point was emphasized by Chief Justice Vaughan in *Bushell's Case*. In that celebrated 1670 case, the court stated that it was obliged on petition for a writ of habeas corpus to look behind the conclusions of an inferior tribunal and evaluate the underlying evidence and legal rationale advanced in support of prisoner's confinement: "[Our] judgment ought to be grounded upon our own inferences and understandings, and not upon theirs." 124 Eng. Rep. 1006, 1007 (C.P. 1670) (granting the petition and ordering release of the prisoner).[10] This was also illustrated in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 125 (1807). In that case, the U.S. Supreme Court "fully examined and attentively considered" written depositions to determine for itself whether there was "sufficient evidence of [petitioner] levying war against the United States to justify his commitment on the charge of treason." *Id.* at 135. After exhaustively reviewing the evidence over the course of five days, the Court concluded that the evidence was insufficient, and ordered the prisoners released. *Id.* at 136-37. Indeed, even where the prisoner has the benefit of a trial, a thorough factual inquiry is available under habeas to assess whether the process by which a prisoner is denied his liberty is fundamentally fair. *Moore v. Dempsey*, 261 U.S. 86, 92 (1923) (habeas corpus does not "allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they would make the trial absolutely void") (reversing dismissal of a habeas petition).

In short, the CSRT procedures are not designed to fully test the legal or factual bases for detention, and the limited review under the DTA does not supply the extra process to cure that deficit.[11] The question before the CSRTs is whether a detainee could persuade a panel of

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[10] Already by 1670 habeas corpus was recognized as "the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it." 124 Eng. Rep. at 1007 (Vaughan, C.J.).

[11] The Supreme Court's decision in *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), is instructive on this point. While not a habeas action, that case did involve jurisdiction-stripping provisions of a federal statute in the context of a constitutional challenge to an administrative status determination involving

military officers that a determination that had already been made by unidentified Department of Defense personnel should be reversed. The detainees are not permitted legal counsel (which they certainly would have been entitled to in a habeas proceeding), and they were not even shown, much less given a fair opportunity to rebut, "classified" evidence that often formed the sole basis for their detention. *In re Guantanamo Detainees*, 355 F. Supp. 2d 443, 468, 471-72 (D.D.C. 2005). These facts led this Court to conclude that the CSRT procedures "deprive[d] the detainees of sufficient notice of the factual bases for their detention and den[ied] them a fair opportunity to challenge their incarceration." *Id*. at 472. The lack of an opportunity for sufficient development of the factual record in the CSRTs, and the narrow review of CSRT decisions afforded by the DTA, fails to provide an adequate substitute for habeas review. Accordingly, the MCA effects an unconstitutional suspension of the writ.

Third, there are credible allegations that the CSRTs relied on evidence extracted through coercion and/or torture.[12] Such evidence is not only inherently unreliable,[13] but allowing detentions based on such evidence corrupts the judicial process and violates the Fifth Amendment of the U.S. Constitution. *See, e.g., Miller v. Fenton*, 474 U.S. 104, 109 (1985). Coerced confessions gravely "offend the community's sense of fair play and decency…. [T]o sanction [such] brutal conduct…would be to afford brutality the cloak of law. Nothing would

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aliens. The Court affirmed the decision of the court of appeals that the jurisdiction-stripping provisions of the Immigration Reform and Control Act of 1986 ("Reform Act") would not prevent federal courts from considering the plaintiffs' challenge. The judicial review provided under the Reform Act was limited to review after an administrative status determination had occurred, but only if it resulted in an order of exclusion or deportation. *Id.* at 486 n.6. In addition, the scope of the review was to "be based solely upon the administrative record" under an "abuse of discretion" standard. *Id.* The Court allowed the plaintiffs' challenges to proceed despite the jurisdiction-stripping language of the Reform Act, in part because "the [administrative] procedures [did] not allow applicants to assemble adequate records," and the courts, if and when they did obtain jurisdiction under the Reform Act, would "have no complete or meaningful basis upon which to review application determinations." *Id.* at 496. In addition, the Court took exception to the fact that under the Reform Act, judicial review would only be available if deportation procedures were initiated because as a practical matter, that could be "tantamount to a complete denial of judicial review." *Id.* at 496-97.

[12] This Court found that CSRT procedures allowed for reliance on statements obtained through coercion or torture. See *In re Guantanamo Detainees*, 355 F. Supp. 2d at 472. *See also* 11/1/06 Amicus Brief of Retired Federal Jurists in *Al Odah v. Bush*, D.C. Cir. Case No. 05-5064 at 5-10.

[13] *See, e.g., Jackson v. Denno*, 378 U.S. 368, 385-86 (1964).

be more calculated to discredit law and thereby to brutalize the temper of a society." *Rochin v. California*, 342 U.S. 165, 173-74 (1952). Long before the drafting of the U.S. Constitution, the common law unequivocally condemned torture and banned judicial reliance on coerced testimony. *See, e.g.*, *A. v. Secretary of State*, [2005] UKHL 71, ¶ 11, ¶ 51 (appeal taken from Eng.) ("[T]he English common law has regarded torture and its fruits with abhorrence for over 500 years."). But the Executive has maintained that it was not "the CSRT's role" to investigate allegations of torture, and it was permissible for CSRTs to rely on evidence "obtained through a non-traditional means, even torture" to make status determinations.[14]

There can be no doubt that in a habeas inquiry, a federal court would absolutely prohibit consideration of evidence obtained by coercion. *Miller*, 474 U.S. at 109 (abusive interrogation techniques "are so offensive to a civilized system of justice that they must be condemned"). Yet, under the narrow review permitted by the DTA, the court must extend "a rebuttable presumption in favor of the Government's evidence." DTA § 1005(e)(2)(C)(i).[15] Clearly, a presumption in favor of evidence extracted by the Executive through coercion or torture is utterly incompatible with the purposes of the Great Writ, and any such procedure is a grossly inadequate substitute for the habeas inquiry protected by the Suspension Clause.

Fourth, the MCA effects a suspension of the writ because it denies a detainee the right to invoke the protection of the Geneva Conventions in any habeas proceeding – and, presumably, would even attempt to bar this Court from enforcing its November 8, 2004 Order. MCA § 5(a) provides:

> (a) IN GENERAL.— No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer,

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[14] Transcript of 12/2/04 oral argument at 83-87, *Boumediene v. Bush*, Civ. No. 04-1166 (RJL) (D.D.C.). Swift Decl. ¶ 33, Ex. 8.

[15] While the DTA required the Department of Defense to revise its procedures so that future CSRTs would, "to the extent practicable, assess whether any statement derived from or relating to such detainee was obtained as a result of coercion; and the probative value (if any) of any such statement," DTA § 1005(b), the MCA explicitly states that the determination of enemy combatant status by CSRTs pre-dating the DTA is final, at least for purposes of eligibility for trial by a military commission. MCA § 948a(1)(ii).

> 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.

The Geneva Conventions have the status of federal law as "treaties of the United States" under Article VI of the Constitution, and therefore provide a source of rights enforceable in a habeas action. *See* 28 U.S.C. § 2241(c)(3); *Mali*, 120 U.S. at 17-18; *Saint Fort*, 329 F.3d at 201 (citing Duker, *supra* n.2, at 200-01).[16]

While Congress has the authority to abrogate treaties by later statute, a clear statement of congressional intent is required to effect such an abrogation. *Cook v. United States*, 288 U.S. 102, 120 (1933). In this case, Congress did not intend to abrogate the Geneva Conventions. Rather, the MCA indicates that it was Congress's intention to fully comply with and implement U.S. obligations under the Geneva Conventions. *See* MCA § 6 ("Implementation of Treaty Obligations"). It follows, then, that the Geneva Conventions retain their status as domestic law, and violation of those treaties provides a basis for habeas relief.

Federal courts have noted that any interpretation of a statute that denied aliens the right to obtain judicial review of "a pure question of law" in a habeas proceeding would raise serious Suspension Clause, due process, and separation of powers issues. *See, e.g.*, *St. Cyr*, 533 U.S. at 300 ("A construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions."); *Henderson v. INS*, 157 F.3d 106, 119-22 (2d Cir. 1998); *Saint Fort*, 329 F.3d at 201-02. In this case, the MCA explicitly precludes consideration of Geneva Convention claims, which are questions of law and of the application of that law to Petitioner under the current circumstances. By denying judicial review of these claims, the MCA poses the constitutional questions that other courts have been able to avoid through statutory interpretation. But if the MCA's jurisdictional strip (§ 7) applies in this case, then those questions cannot be avoided. If

[16] Duker notes that enforcement of treaty rights via habeas was regarded by the Supreme Court as a "special circumstance" requiring immediate federal intervention, one which justified waiving exhaustion of remedies requirements that were beginning to emerge in 19th century jurisprudence. Duker, *op.cit.* at 200.

forced to address the Suspension Clause issue, the Court should hold that the MCA unconstitutionally suspends the writ of habeas corpus by preventing review of treaty-based claims that have historically been part of the habeas inquiry.

The Government has argued elsewhere that because Guantanamo detainees are enemy aliens detained at an off-shore location, they have no constitutional rights, and hence, no habeas rights protected by the Suspension Clause.[17] The Government relies on *Eisentrager*, a case involving admitted enemy aliens tried by an American military commission in China in the immediate aftermath of the Japanese surrender in World War II. 339 U.S. at 765-66, 784. In that case, the Court held that the petitioners, who "at no relevant time and in no stage of [their] captivity ha[d] been within [U.S.] territorial jurisdiction," were not entitled to a writ of habeas corpus. *Id.* at 768, 781. Notably, the Court considered their application for the writ on the merits ("the doors of our courts have not been summarily closed upon these prisoners"), but concluded that no basis for issuing the writ appeared. *Id.* at 780-81. To the extent that the decision was based on a lack of jurisdiction, that disability arose from factors not present in this case, as established by *Rasul* when it distinguished *Eisentrager*:

> Petitioners in these cases differ from the *Eisentrager* detainees in important respects. They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Rasul, 542 U.S. at 476. Justice Kennedy concurred, finding that detainee habeas actions were "consistent with the historical reach of the writ of habeas corpus[.]" *Id.* at 481 (Kennedy, J., concurring). Thus, any reliance by the Government on *Eisentrager* is misplaced, and any characterization of that case as standing for the proposition that alleged enemy aliens have no

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[17] See Government's Supplemental Brief Addressing the Military Commissions Act, in *Boumediene et al. v. Bush* and *Al-Odah et al. v. United States*, Court of Appeals for the District of Columbia Circuit, Nos. 05-5062, 05-5063-64, 05-095 through 05-5116 (November 13, 2006) at 12-16, 23.

habeas rights is grossly inaccurate. Indeed, the Court noted that the *Eisentrager* petitioners were afforded "the same preliminary hearing as to sufficiency of [their habeas] application that was extended in *Quirin* [and] *Yamashita*. . . ." 339 U.S. at 781.

2. The MCA does not provide an adequate substitute for a habeas challenge to the jurisdiction of a military commission.

Military commissions under the MCA "have jurisdiction to try any offense made punishable by [the MCA] or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001." MCA § 948d(a). In this case, Petitioner contends that a military commission convened under the MCA has no jurisdiction over him, and hence, no authority to hold him for trial.

It has long been the function of habeas corpus to inquire into the jurisdiction of inferior tribunals, including military commissions. *See, e.g.*, *Milligan*, 71 U.S. at 118; *Yamashita*, 327 U.S. at 8 (investigating "the lawful power of the commission to try the petitioner for the offense charged"); *Quirin*, 317 U.S. at 24-25 (halting commission proceedings to consider habeas petition, and rejecting the Government's contention that the prisoners must be denied access to the courts as enemy aliens: "neither the [Executive] Proclamation nor the fact that [petitioners] are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States…forbid their trial by military commission").

In this case, however, a finding of unlawful enemy combatant status by a CSRT "is dispositive for the purposes of jurisdiction for trial by military commission under this chapter." MCA § 948d(c). Thus, under the MCA, the jurisdictional inquiry that has been central to the habeas process for centuries is foreclosed. *Eisentrager* stated that it would entertain habeas petitions from enemy aliens to at least (1) "ascertain the existence of a state of war," and (2) ascertain "whether [petitioner] is an enemy alien." 339 U.S. at 775. But in this case, the commission is not permitted to consider whether it lacks jurisdiction over Petitioner based on an erroneous CSRT determination, and courts likewise would be precluded by § 948d(c) from

investigating the jurisdictional facts concerning unlawful enemy combatant status.[18]

Even if Petitioner were permitted to assert a jurisdictional challenge under DTA § 1005(e)(3) or MCA § 950g(a) after a conviction by a military commission, such a *post-hoc* inquiry is a woefully inadequate substitute for habeas review. *See supra* note 4. This is because, as both the Court of Appeals and Supreme Court made clear in this very case, Petitioner has the right in a habeas proceeding to challenge the jurisdiction of the military commission before trial.[19] The Court of Appeals noted that "*Ex parte Quirin* provides a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions," and held that "setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction." *Hamdan*, 415 F.3d at 36. The Supreme Court agreed, holding that "Hamdan and the Government both have a compelling interest in knowing in advance whether Hamdan may be tried by a military commission that arguably is without any basis in law." *Hamdan*, 126 S. Ct. at 2772. Accordingly, the post-conviction review that may be available to Petitioner under the DTA/MCA is an inadequate substitute for habeas, and for

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[18] Despite Hamdan's detention for more than five years, no court has passed on the question of whether "active hostilities" with al Qaeda are currently under way, which is the fundamental predicate of any war-time detention and, per *Eisentrager*, within the scope of a habeas inquiry. *Hamdi*, 542 U.S. at 520 ("It is a clearly established principle of the law of war that detention may last no longer than active hostilities.").

[19] Dismissal now and post-trial review later is particularly inadequate in Mr. Hamdan's case, because Hamdan must preserve his ability to enforce this Court's November 8 Order as affirmed by the Supreme Court. The fact that the government has not yet charged Mr. Hamdan does not weigh against the exercise of continuing jurisdiction, as controversy over the jurisdiction and legality of the military commission presently exists in this case. The Supreme Court has repeatedly warned that other jurisdictional doctrines, such as mootness, do not permit a party to benefit from delaying challenged conduct. A "defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1981). Otherwise, a defendant would be "free to return to his old ways." *United States v. W.T. Grant*, 345 U.S. 629, 632 (1953). A key rationale for the voluntary cessation doctrine is to avoid procedural manipulations to deprive a court of jurisdiction. For that reason, a case will be dismissed only "if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968). As Justice Scalia has warned, courts should be "skeptical" that "cessation of violation means cessation of live controversy." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 214 (2000) (Scalia, J., dissenting). *See also Erie v. Pap's A.M.*, 529 U.S. 277, 287-88 (2000).

that reason constitutes an unconstitutional suspension of the writ.[20]

There are compelling reasons why post-trial review does not suffice. To force Mr. Hamdan to endure a trial whose legitimacy is not finally resolved will give the prosecution a preview of Mr. Hamdan's trial defense, vitiating his rights. *See Rafeedie v. INS*, 880 F.2d 506, 518 (D.C. Cir. 1989) (pointing to the "substantial practical litigation disadvantage" from forcing Rafeedie to go through a summary exclusion proceeding because "if he presents his defense in [the summary] proceeding, and a court later finds that section inapplicable to him, the INS will nevertheless know his defense in advance of any subsequent [plenary] proceeding; if, however, he does not present his factual defense now, he risks foresaking his only opportunity to present a factual defense").

In addition, as noted above, the MCA purports to preclude Petitioner from seeking judicial enforcement of rights protected by the Geneva Conventions, which are claims Petitioner has asserted in this case. This limitation on the rights that can be invoked in the military commission (MCA § 948b(g)), and in any federal or state court (MCA § 5(a)), risks placing this country in default of its obligations under these treaties, and makes the judicial inquiry authorized by the MCA an inferior process to that which has historically been available through habeas. For this reason also, the MCA violates the Suspension Clause.

Finally, because the judicial review afforded under the MCA/DTA is limited to review of a "final decision" of a military commission, DTA § 1005(e)(3), it appears possible that judicial review can be precluded altogether by the failure of the Executive to finalize commission judgments. There is nothing in the MCA requiring finality within any particular time frame. Instead, the statute provides that finality is only established after approval of a

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[20] Likewise, in *Hicks v. Bush*, 397 F. Supp. 2d 36 (D.D.C. 2005), this Court issued an injunction halting a military commission in order "to maintain its jurisdiction over Petitioner's claim that a military commission lacks jurisdiction to try him, a claim which Petitioner is entitled to have adjudicated by this Court *prior to trial* before a military commission." *Id.* at 41 (emphasis added). In *Hicks*, this Court noted both "the established right to pre-commission review of jurisdictional issues," and the irreparable injury that would result from being "tried by a tribunal without authority to adjudicate the charges against him in the first place, potentially subjecting him to a second trial before a second tribunal." *Id.* at 41-42.

sentence by the convening authority. MCA §§ 950b, 950c. While the statute requires the convening authority to "take action on the sentence" and refer the case to the Court of Military Commission Review, the referral is to be made "in accordance with procedures prescribed under regulations of the Secretary [of Defense]." MCA § 950c(a). Those regulations have not yet been promulgated, and it remains to be seen whether they will include reasonable time limits, or any time limits at all, for exhaustion of the process that must occur prior to review by an Article III court. In short, there is no assurance under the MCA that judicial review of a final decision of the military commission will occur within a meaningful time frame.[21] Under these circumstances, the process is clearly an inadequate substitute for the prompt inquiry required by habeas.

E. The MCA Unconstitutionally Interferes with Core Functions of the Judiciary

The jurisdictional provisions of the MCA are unconstitutional for the additional reason that they offend separation of powers principles as articulated in *United States v. Klein*, 80 U.S. 128 (1871). As applied to Hamdan, the provisions are particularly problematic because they attempt to interfere with the ability of this Court to enforce its November 8, 2004 Order in light of the Supreme Court's decision in this very case.

In *Klein*, Congress passed a law providing that "no pardon or amnesty granted by the President…shall be admissible in evidence on the part of any claimant in the Court of Claims in support of any claim against the United States" and that "in all cases where judgment shall have been heretofore rendered in the Court of Claims in favor of any claimant [where a prerequisite to recovery – proof of loyalty – was based on a Presidential pardon], this court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction." *Id.* at 133-34. The Court acknowledged that "[u]ndoubtedly the legislature has complete

[21] The MCA attempts to codify the Executive's ability to conduct interminable trials (or to conduct none at all) by removing from commissions speedy trial rights provided under the UCMJ. *See* MCA§ 948b(d)(A) (identifying 10 U.S.C. § 810 "relating to speedy trial, including any rule of courts-martial relating to speedy trial" as a provision of the UCMJ that "shall not apply to trial by military commission under [the MCA]").

control over the organization and existence of that court and may confer or withhold the right of appeal from its decisions." *Id.* at 145. But, the Court said, the language of the statute "shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end…. The proviso declares that pardons shall not be considered by this court on appeal. We had already decided that it was our duty to consider them and give them effect, in cases like the present, as equivalent to proof of loyalty." *Id.*

The Court concluded that this tendentious manipulation of its jurisdiction was not a proper exercise of legislative authority, but invaded the judicial function. With respect to the jurisdictional strip triggered by the claimant's reliance on a pardon, the Court asked: "What is this but to prescribe a rule for the decision of a cause in a particular way?… We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to…the claimants. Can we do so without allowing one party to a controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it? We think not." *Id*. at 146.

The MCA operates in a similar fashion. The MCA prescribes "rules of decision to the Judicial Department" within the meaning of *Klein* by providing that "[n]o alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Convention as a source of rights." MCA § 948b(g). This is directly analogous to the statute at issue in *Klein,* which attempted to prevent courts from giving effect to a presidential pardon. (In that case, the Court complained that it was "forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and [was instead] directed to give it an effect precisely contrary." *Klein*, 80 U.S. at 147.) As in *Klein,* the MCA's prohibition on giving effect to Geneva Convention rights may well be tantamount to "allowing one party to a controversy to decide it in its own favor." And the MCA does so here with respect to a judicial decision of this Court that has been affirmed in large part by the Supreme Court of the United States, which finally resolved the question of whether Common Article 3 of the Geneva

Conventions applies in this case.

There are a number of other ways in which the MCA attempts to dictate a judicial decision. Consider, for example, the MCA's definition of "unlawful enemy combatant," which is a jurisdictional prerequisite for a military commission and simultaneously, a prejudgment of guilt (since unlawful combatants are not "privileged" to engage in combat and by doing so become criminals). Giving effect to this definition implicates the court in violating the Third Geneva Convention ("GPW"). Under the MCA, an "unlawful enemy combatant" is defined as one who (1) "is not a lawful enemy combatant," or (2) "has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal." MCA § 948a(1)(A). But the MCA's definition of "lawful enemy combatant" includes only three of six categories of persons identified under Article 4 of the GPW as persons entitled to prisoner of war ("POW") status. *Compare* MCA § 948a(2) and GPW, Art. 4. POWs are lawful enemy combatants. By refusing to recognize as lawful combatants persons entitled to POW status under the GPW, the MCA not only violates the GPW (in failing to afford POWs the protections of the Convention, including the right to be tried by the "same courts, according to the same procedures" as would be used to try members of the Detaining Power's armed forces), GPW, Art. 102, it also completely decides the controversy in favor of the prosecution in the military commission trial (every bit as much as in *Klein*) because the only defendants before the commissions are those who have already been determined to be "unlawful combatants." Without "combatant immunity" they are guilty by definition (just as in *Klein* those who had accepted a Presidential pardon were defined by the statute as guilty of disloyalty, and penalized rather than allowed the immunity conferred by the pardon).[22]

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[22] It should also be noted that the definition of "unlawful enemy combatant" in the MCA includes "a person who is part of the Taliban, al Qaeda, or associated forces." MCA § 948a(1)(A)(i). The Taliban were the armed forces of a sovereign state, Afghanistan, when American military personnel invaded that country in the fall of 2001. This is a legislative decree that strips members of that military force of protections and immunities that, at the very least, may be afforded to them under the laws of war. As such, it is a Bill of Attainder. By stripping the courts of jurisdiction over habeas claims filed by members of the Taliban "or associated forces" held at Guantanamo, the MCA "prescribe[s] a rule for the decision of a cause in a particular way" every bit as much as the jurisdictional strip in *Klein*. It is an unconstitutional "means to an end" because the Taliban and "associated

The alternative definition of "unlawful enemy combatant" in the MCA is a person who "has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal." MCA § 948a(1)(A). This definition is, of course, completely circular. It is devoid of any standards or criteria by which a reviewing court could determine that the detainee is not an unlawful enemy combatant, and hence, that the military commission was without jurisdiction to try him. While the DTA may allow for judicial review of whether the standards used by the CSRT to make the status determination are "consistent with the Constitution and laws of the United States," this formulation pointedly excludes "treaties." When combined with MCA § 5 (prohibiting any person from invoking the Geneva Conventions as a source of rights in any American court) the effect of the habeas strip in MCA § 7 and the inadequate substitute provided by the statute is to "decide the controversy" against any detainee who might have a defense based on Geneva Convention rights. This is a particularly egregious invasion of the judicial function in this case, where the Supreme Court has already ruled that Petitioner has rights under the Geneva Conventions that must be respected. *Hamdan*, 126 S.Ct. at 2796 ("Common Article 3…is applicable here…and requires that Hamdan be tried by a regularly constituted court") (citing 6 U.S.T. 3320); *see also Plaut v. Spendthrift Farm, Inc*., 514 U.S. 211, 227 (1995) ("Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was."). In sum, both the substantive and jurisdictional provisions of the MCA operate as a "means to an end" in the manner of the unconstitutional statute at issue in *Klein*. Because this "passe[s] the limit which separates the legislative from the judicial power," the MCA's jurisdictional strip should deemed constitutionally invalid. *Klein*, 80 U.S. at 147.

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forces" are *defined* as unlawful combatants, *i.e.*, as criminals, and the courts are directed that that determination is "dispositive." MCA § 948d(c), § 948a(1)(A)(ii). Indeed, even if there were a subsequent judicial review under MCA § 7 (and there is no assurance that there would be, as that section purports to strip habeas jurisdiction for anyone "awaiting" an enemy combatant status determination), MCA § 5 provides that Geneva Convention rights – concerning combatant immunity as a POW, for example – cannot be invoked. This is directly analogous to the situation in *Klein*, where, for example, "the court [was] forbidden to give the effect to evidence which, in its own judgment, such evidence should have." *Klein*, 80 U.S. at 147.

F. The MCA Is An Unlawful Bill of Attainder.

In addition to the constitutional infirmities discussed above, Section 7 and § 950j(b) of the MCA are also unlawful because they violate the prohibition on Bills of Attainder. U.S. Const. Art. I, § 2, cl. 3 ("No Bill of Attainder…shall be passed."). Laws violate the Attainder Clause when they inflict "legislative punishment, of any form or severity, on specifically designated persons or groups." *United States v. Brown*, 381 U.S. 437, 447 (1965); *Foretich v. United States*, 351 F.3d 1198, 1217 (D.C. Cir. 2003) ("[A] law is prohibited under the bill of attainder clause 'if it (1) applies with specificity, and (2) imposes punishment.'") (quoting *BellSouth Corp. v. FCC*, 162 F.3d 678, 683 (D.C. Cir. 1998)). By guarding against the punishment of disfavored persons or groups identified by past acts or other criteria beyond the control of the targets of the legislation, the Attainder Clause acts as a bulwark against Congress's interference with the prerogatives of the Judiciary. It was thus "intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function." *Brown*, 381 U.S. at 442.

The prohibition against bills of attainder was prompted by "the fear that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of judge or, worse still, lynch mob." *Nixon v. Administrator of General Services*, 433 U.S. 425, 480 (1977). The MCA violates the constitutional prohibition on attainders because it singles out non-citizens whom – like Hamdan – the Government has unilaterally and extra-judicially labeled "unlawful enemy combatants," and then punishes them by depriving them of full and complete habeas review based solely on that status.[23]

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[23] Although, for reasons discussed below, Hamdan is protected by the due process clause of the Fifth Amendment, his invocation of rights under the Attainder Clause is not dependent on that fact. Structural limits on Congress' power – like the Attainder Clause – are exempt from any analysis as to whether the claimant may have individual constitutional rights.

> To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles of the Constitution apply to the island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root

1. The MCA applies only to a specifically designated group.

The first prong of an unlawful attainder challenge is satisfied if the legislation in question targets an identifiable individual or group. *Nixon*, 433 U.S. at 468. The Attainder Clause is not avoided, however, simply because the challenged law does not mention a particular person or persons. Rather, the specificity requirement is met "whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons." *Selective Service Sys. v. Minnesota PIRG*, 468 U.S. 841, 848 (1984). *See also Brown*, 381 U.S. at 461 ("[i]t was not uncommon for English acts of attainder to inflict their deprivations upon relatively large groups of people, sometimes by description rather than name."). The Supreme Court has long recognized that a law meets the specificity requirement of attainder analysis if it operates against an identifiable group based on past actions or status designation that cannot be changed. *Cummings v. Missouri*, 71 U.S. 277, 323 (1867) (law that did not single out petitioner or other named individuals nonetheless violated Attainder Clause by punishing former confederates); *Ex Parte Garland*, 71 U.S. 333, 376 (1866) (same).

Here, the specificity requirement of the Attainder Clause is easily met. The jurisdiction stripping provisions of Section 7 and § 948a(1) of the MCA target only "aliens" who, by virtue of the Government's own designation are deemed "unlawful enemy combatants." MCA, § 7. There can be no real question that this language in the MCA, like the DTA before it, is specifically targeted at Guantanamo detainees, though it may be applied to aliens elsewhere as well. *Foretich*, 351 F.3d at 1217 (specificity element satisfied by describing affected persons without naming them). The MCA's language facially satisfies the first element of an attainder

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> of power of Congress to act at all, irrespective of time or place, and such as are operative only "throughout the United States" or among the several states. Thus, when the Constitution declares that "no bill of attainder or *ex post facto* law shall be passed" and that "no title of nobility shall be granted by the United States," it goes to the competency of Congress to pass a bill *of that description*.

Downes v. Bidwell, 182 U.S. 244, 276-77 (1901) (emphasis in original).

challenge, but even if it did not, statements in Congress describing who is targeted by the jurisdiction-stripping provisions of the MCA would resolve any possible doubt on that point. 151 Cong. Rec. S10374 ("We cannot give terrorists the right to bring a habeas corpus petition that seeks release from prison on the grounds of unlawful imprisonment, as the Specter amendment would. Such legislation will clog our already overburdened courts. Additionally, such petitions are often frivolous and disrupt operations at Guantanamo Bay.") (Sept. 28, 2006) (remarks of Sen. Domenici).

2. The MCA imposes punishment by limiting Petitioner's access to the court.

The second prong of the attainder clause analysis requires the court to examine whether the law in question imposes punishment on the identified group. Because of the creativity with which Congress may devise punishment, more than criminal sanctions qualify as attainders. To answer whether the law imposes punishment, courts are guided by a three part inquiry.

> (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute "viewed in terms of the type and severity of the burdens imposed, reasonably can be said to further nonpunitive legislative purposes"; and (3) whether the legislative record "evinces a congressional intent to punish."

Selective Service, 468 U.S. at 852 (citing *Nixon*, 433 U.S. at 473). No one factor in this analysis is dispositive; rather, they are used as guideposts to determine whether the law is sufficiently punitive. "The Court has applied each of these criteria as an independent – although not necessarily decisive – indicator of punitiveness." *Foretich*, 351 F.3d at 1218. Here, the deprivation of habeas review – enjoyed by those subject to the MCA prior to its passage and taken from them now based only on their Government-designated status – satisfies all three of these indicia.

First, for at least the past 140 years the Supreme Court has recognized that the deprivation of full and complete access to the courts is "punishment," and therefore qualifies as an historical attainder if directed at a specific person or group. In *Pierce v. Carskadon*, 83 U.S. 234, 238-39 (1872), the Supreme Court held that it was an unlawful attainder for West Virginia

to limit access to the courts by refusing to allow petitioners to reopen a judgment attaching property in that State solely because the petitioners refused to swear an oath disavowing allegiance to the Confederacy. *Id.* at 237-38. In *Pierce*, non-residents of West Virginia were required to swear the loyalty oath in order to have their case heard, but no such restriction applied to residents. *Id.* at 236. The petitioners were denied review of a judgment attaching their property, a denial based only on the non-resident status and inability to take the loyalty oath. *Id*. Relying *Cummings* and *Garland*, the Court summarily declared this lack of access to the courts an unlawful attainder. 83 U.S. at 239.[24] Since that time, the Supreme Court has continued to read *Pierce* for the proposition that denying complete access to the courts qualifies as an attainder. *See Brown*, 381 U.S. at 448 n.21 ("In [*Pierce*] the Court voided as a bill of attainder a West Virginia statute *conditioning access to the courts* upon the taking of an oath similar to those involved in *Cummings* and *Garland*.") (emphasis added); *Fleming v. Nestor*, 363 U.S. 603, 615 n.8 (1960) (same); *cf. BellSouth Corp.*, 162 F.3d at 683 (citing *Pierce* as an example of the Court striking down an attainder).

Depriving Hamdan of access to the courts by limiting the scope of review to which he is entitled – because he is an "alien" and because the Government has deemed him an "unlawful enemy combatant" – is the precise effect of the MCA and precisely what *Pierce* bars. *See* Section III.D., *infra.* As in *Pierce* where the petitioners were denied access to the courts because of their non-resident status and perceived disloyalty to the Union, Hamdan is deprived of the full measure of judicial review based on his alienage and his extra-judicial designation as an "unlawful enemy combatant." Since the Civil War era, this kind of disparate treatment and denial of full court access has been considered an attainder, thereby satisfying the "historical" test for punishment. *Pierce*, 83 U.S. at 238-39.

Second, the jurisdiction-stripping provisions of the MCA imposes a severe burden on

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[24] *Cummings* stated that the "deprivation of any rights, civil or political, previously enjoyed may be punishment, the circumstances attending and the causes of the deprivation determining this fact." 71 U.S. at 320. The Court specifically provided that "[d]isqualification . . . from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment." *Id.*

Hamdan and similarly situated petitioners, which greatly outweighs any non-punitive purpose to be found in depriving him of habeas rights. Discussing the purpose of the Attainder Clause, the Court has noted that at its core it is intended to prevent trial by unlawful means, citing a case involving trial by military commission to make that express point.

> [The Framers] intended to safeguard the people of this country from punishment without trial by duly constituted courts. *See Duncan v. Kahanamoku*, 66 S.Ct. 606….An accused in court must be tried by an impartial jury….the law which he is charged with violating must have been passed before he committed the act charged, he must be confronted by the witnesses against him….he cannot be twice put in jeopardy for the same offense ….When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder.

United States v. Lovett, 328 U.S. 303, 317-18 (1946). Hence the burden imposed by the MCA – depriving this Court of jurisdiction and substituting a less robust and inadequate system of review – runs to the very core of the Attainder Clause's prohibition against congressionally mandated punishment. Moreover, as the Supreme Court held just months ago in this case, Hamdan has a right to avoid trial by an otherwise unlawful or improper court. *Hamdan*, 126 S.Ct. at 2768 ("Hamdan and the Government both have a compelling interest in knowing in advance whether Hamdan may be tried by a military commission that arguably is without any basis in law and operates free from many of the procedural rules prescribed by Congress for courts-martial—rules intended to safeguard the accused and ensure the reliability of any conviction.").[25] By purporting to strip this Court of jurisdiction to hear Hamdan's detention claim or a pre-trial challenge to the constitution of any commission that might try him, the MCA imposes a burden that is at the heart of the Attainder Clause's protections.

Against this burden is placed the supposed non-punitive legislative purpose of relieving the courts from legal challenges by unlawful enemy combatants or preventing future terrorist

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[25] This includes challenging whether the crime with which he is charged constitutes a valid war crime and thus falls within the MCA's valid jurisdiction. *Hamdan*, 126 S.Ct. at 2780-81. If and when the Government does charge him, the MCA would prevent that challenge if its jurisdiction stripping provisions are given full effect.

acts. Explaining the MCA as an act that purportedly serves to prevent detainees from engaging in future acts of terrorism, does not cure it of its punitive nature. *Nixon*, 433 U.S. at 476, n.40 ("In determining whether punitive or non-punitive objectives underlie a law, *United States v. Brown* established that punishment is not restricted purely to retribution for past events, but may include inflicting deprivations on some blameworthy or tainted individuals in order to prevent his future misconduct."). Moreover, as further proof that the purported justification for the MCA does not "reasonably" advance any nonpunitive purpose, the D.C. Circuit is still required to hear post-conviction commission challenges and cases brought by aliens detained as "unlawful enemy combatants" (although via a review that falls far short of what would ordinarily be required by habeas) thus ultimately leaving the Court's docket with the same number of detainee cases it had before the MCA or DTA were passed. The MCA does not "unburden" this or any other Court; it simply makes it far easier for the Government to turn back the habeas claims by dictating the scope of review.

Third, as the legislative history of the MCA makes clear, stripping federal courts of jurisdiction to hear detention and pre-trial commission claims was premised largely on a desire to punish those that Congress viewed as terrorists unworthy of trial in our courts and likewise not entitled to full rights under habeas.[26] 152 Cong. Rec. S10238-01 at S10239 (Sept. 27, 2006) (statement of Sen. Lott) ("Now we have this huge discussion about habeas corpus. Bring on the lawyers. What a wonderful thing we can do to come up with words like this. Our forefathers were thinking about citizens, Americans. They were not conceiving of these terrorists who are killing these innocent men, women, and children."); 152 Cong. Rec. H7522-03, at H7538 (Sept. 27, 2006) (statement of Rep. McHugh) ("Why should an accused terrorist enjoy protections that exceed what the Constitution provides to every one of us as United States

[26] The taking away of "any rights, civil or political, previously enjoyed" also evinces an intent to punish. *Cummings*, 71 U.S. at 320. There is no doubt that, before the MCA's passage, Hamdan was entitled to bring a habeas claim challenging his detention, as well as a pre-trial claim challenging the commission. *Rasul*, 542 U.S. at 484-85 (habeas rights permitting detention challenges extend to those detained at Guantanamo); *Hamdan*, 126 S.Ct. at 2767-68 (discussing ability to challenge commission itself).

Citizens?"); *Hearing Before the Senate Judiciary Committee* (Sept. 25, 2006) (statement of Sen. Cornyn) ("It is important to remember, and sometimes I think I forget, that these are enemies of the United States captured on the battlefield. These are not individuals who have been arrested for committing crimes and then who are entitled to all the process an American citizen would have in an Article III court."). In sum, the effort to strip an identifiable group of claimants, including Hamdan, from accessing the courts to have full review of their habeas claims constitutes punishment, and so the jurisdiction stripping provisions of the MCA must be stricken as violations of the Attainder Clause.[27]

G. The MCA's Jurisdiction-Stripping Provisions Violate Equal Protection.

The right of equal access to the courts is a fundamental right under equal protection, and is a right that is taken away by the MCA. *Griffin v. Illinois*, 351 U.S. 12, 17 (1956); *Douglas v. California*, 372 U.S. 353, 358 (1963); *see also Tennessee v. Lane*, 541 U.S. 509, 523 (2004) ("the right of access to the courts" is subject to "more searching judicial review" under equal protection). Laws that interfere with fundamental rights are subject to strict scrutiny, a standard that the MCA cannot survive. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("[C]lassifications affecting fundamental rights, are given the most exacting scrutiny.") (internal citations omitted). Moreover, the line that divides who does and who does not receive habeas review under the MCA is based on a patently unconstitutional distinction – alienage. *See* MCA, § 7(e)(1), (2) (describing limited habeas review under MCA available for "aliens"); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) ("[C]lassifications based on alienage…inherently suspect and subject to close judicial scrutiny."). As the text of the MCA makes clear, it is not only those – like Hamdan – whom the Government has held under its control for the past four years in Guantanamo that have their habeas rights removed. The MCA deprives those rights to

[27] The length of Mr. Hamdan's detention – now five years and running – itself suggests that the nonpunitive aspects of his detention have been overwhelmed by the punitive ones. *See United States v. Melendez-Carrion*, 820 F.2d 56 (2d Cir. 1987) (looking in part to length of detention to decide whether it is punishment); *United States v. Ojeda-Rios*, 846 F.2d 167 (2d Cir. 1988) (finding 32 month detention unconstitutional).

all aliens, even lawful resident aliens living within the United States, and violates equal protection for this reason as well.[28] Because it interferes with the fundamental right of access to the courts and does so based on alienage, the jurisdiction-stripping provisions of the MCA are unconstitutional and must be stricken.

1. Hamdan – and other aliens similarly situated – is guaranteed equal protection of the laws under the Fifth Amendment's Due Process clause.

The Equal Protection Clause of the Fourteenth Amendment applies to all "persons" regardless of citizenship. As the Supreme Court directed in *Plyler v. Doe*, 457 U.S. 202, 210 (1982), "an alien is surely a 'person' in any ordinary sense of the term," and therefore entitled to equal protection of the laws. *See also Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . .[Its] provisions are universal in their application to all persons within the territorial jurisdiction…"). The Supreme Court has recognized that the Fifth Amendment's Due Process Clause embraces the "concept of equal justice under law." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). Accordingly, the Fourteenth Amendment's Equal Protection Clause and the Fifth Amendment's Due Process Clause "require the same type of analysis." *Id.*; *see Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995) ("the equal protection obligations imposed by the Fifth and Fourteenth Amendments [are] indistinguishable"); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n.2 (1975).

To the extent that Respondents contend Hamdan is not entitled to invoke equal protection by virtue of the Government's decision to hold him in Guantanamo, they are

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[28] The Government has recently confirmed that it will enforce the MCA against resident aliens who are both arrested and jailed in the United States. *See* Swift Decl. ¶ 34, Ex. 9 (Respondent-Appellee's Motion to Dismiss for Lack of Jurisdiction and Proposed Briefing Schedule, *Al-Marri v. Wright*, No. 06-7427 (4th Cir., November 13, 2006)). In *Al-Marri*, the Government has sought dismissal of the petitioner's habeas action on the basis of the MCA's jurisdiction-stripping provisions and its determination that the petitioner is an "enemy combatant." *Id.* at 2-5. Al-Marri is a lawful resident alien who was arrested at his home in Peoria, Illinois and is currently imprisoned at the Navy Brig in Hanahan, South Carolina; he maintains that he is not an enemy combatant. Swift Decl. ¶ 35, Ex. 10 (Petitioner-Appellant's Merits Brief, *Al-Marri v. Wright*, No. 06-7427 (4th Cir., November 13, 2006)) at 3-4.

incorrect. The protections of the Fifth Amendment, which include equal protection rights, fall to all "aliens within the *jurisdiction* of the United Sates[.]" *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (emphasis added); *Wong Wing v. United States*, 163 U.S. 228, 242-43 (1896) ("The contention that persons within the *territorial jurisdiction* of this republic might be beyond the protection of the law was heard with pain on the argument at the bar – in face of the great constitutional amendment which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws."). The Court has already rejected the Government's assertion that Guantanamo is outside that jurisdiction. "The United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base." *Rasul*, 542 U.S. at 480. Indeed, the Court observed in *Rasul* that detainees held at Guantanamo are not categorically barred from raising constitutional claims, based on its conclusion that Guantanamo falls within the United States' territorial jurisdiction. *Id.* at 484 n.15 (persons "held in Executive detention for more than two years in territory subject to the *long-term, exclusive jurisdiction and control of the United States*, without access to counsel and without being charged with any wrongdoing-unquestionably describe '*custody in violation of the Constitution* or laws or treaties of the United States'") (emphases added).

For Hamdan, that "long term" detention at Guantanamo in the hands of the U.S. Military has now stretched to over four years. Thus, there can be no credible argument advanced that Hamdan should be denied constitutional protections on the grounds that he has only a transitory connection with the United States. *Verdugo-Urquidez*, 494 U.S. at 272 (alien had insufficient connection with the United States where involuntary presence here lasted "only a matter of days"). As Justice Kennedy recognized in *Verdugo*, the fact that an alien may have been outside United States territory at some point in the sequence of his capture, does not freeze into place a permanent denial of constitutional rights when that person later comes within the United States' jurisdiction and under its long-term control. *Id.* at 278 ("I do not mean to imply, and the Court has not decided, that persons in the position of the respondent have no constitutional protection.") (Kennedy, J., concurring).

2. The MCA violates equal protection because it interferes with access to the courts – a fundamental right.

Laws that interfere with access to fundamental rights are subject to strict scrutiny under equal protection. *Clark*, 486 U.S. at 461. The MCA obstructs access to what is arguably the Constitution's most fundamental right – the right to seek relief under habeas corpus. *Carafas v. LaVallee*, 391 U.S. at 238 (habeas is "shaped to guarantee the most fundamental of all rights"); *Coolidge v. New Hampshire*, 403 U.S. 443, 454 n.4 (1971) (habeas among rights "to be regarded as the very essence of constitutional liberty"). Far less intrusive incursions into the fundamental right of access to the courts have been subject to strict scrutiny under equal protection, and have failed to survive that analysis. For example, in *Douglas v. California*, 372 U.S. at 358, the Court struck down on equal protection grounds a California law that allowed the appellate court to pick and choose whether indigent defendants would be entitled to appellate counsel. Similarly, in *Griffin* , 351 U.S. at 15-16, the Court invalidated a regulation that denied defendants access to the court transcript for appellate review. As the Court noted, "our own constitutional guarantees of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons." *Id.* at 17. The Court's scrutiny of laws that prevent fair and equal access to the courts and adequate process is not limited to instances where the defendant is indigent.[29] In *Jackson v. Indiana*, 406 U.S. 715, 724 (1972), the Court invalidated on equal protection grounds an Indiana law that subjected defendants to far more stringent standards for release from civil commitment if criminal charges were pending against them, than persons who were committed but not facing criminal charges. *Id.* at 726. Striking down the law, the Court reasoned "[B]y subjecting [petitioner] to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with

[29] Although the petitioners in *Griffin* and *Douglas* happened to be indigent, the Court has subsequently held that poverty is not a suspect class. *Harris v. McRae*, 448 U.S. 297 (1980). This clarified that the basis for the Court's equal protection decision in *Griffin* and *Douglas* rests on the deprivation of access to the courts, not the specific petitioner's economic circumstances.

offenses, and by thus condemning him in effect to permanent institutionalization….[the State] deprived petitioner of equal protection of the laws[.]" *Id.* at 730.

Just like in *Jackson*, where the State attempted to justify differing standards for release from civil commitment based on the pendency of criminal charges, the Government here has erected a separate and unequal channel for habeas review resting primarily on the ground that those seeking it are aliens and have been deemed "unlawful enemy combatants." MCA § 948(1). For reasons explained above, *see* Part III.D., *supra*, the review Hamdan receives is inferior to what would be received by identically situated persons who are not subject to the MCA. If criminal charges do not justify differing degrees of process for purposes of equal protection, designation as an enemy combatant for purposes of diminishing habeas rights cannot satisfy that standard either. *Jackson*, 406 U.S. at 730 ("If criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges cannot suffice."). Indeed, a designation as an enemy combatant arguably carries less weight than criminal charges as a basis for subjecting Hamdan to unequal habeas review. In any event, the statute distinguishes among enemy combatants – subjecting aliens within this category to a markedly inferior process than citizens – on a matter concerning fundamental rights.

3. The MCA violates equal protection because it discriminates against a suspect class – aliens.

Although the interference with access to the courts effected by the MCA is a sufficient basis upon which to invalidate the jurisdiction-stripping provisions of the Act, its constitutional infirmity is compounded because it uses alienage as the dividing line for who does and who does not fall within its purview. MCA § 7 (purporting to bar any legal challenge raised by an "alien"). Laws that discriminate on the basis of alienage – and the MCA unapologetically does so on its face – are subject to strict scrutiny. *Graham*, 403 U.S. at 371; *In re Griffiths*, 413 U.S. 717, 721-22 (1973) (laws that discriminate based on alienage impose on a State "a heavy

burden of justification")(internal citations omitted); *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977) ("Alienage classifications by a State that do not withstand this stringent examination cannot stand."). While Congress may arguably be afforded more latitude than the States in promulgating laws that make distinctions based on alienage, that latitude only extends to laws that distribute government benefits and thus confer "advantages of citizenship," not laws which impinge rights "protected by the Due Process Clause." *Mathews*, 426 U.S. at 78. When liberty interest are at issue, "the Fifth Amendment….protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." *Id.* at 77.

Habeas corpus and the right to a proper criminal trial are not government "benefits" that it can dole out in unequal portions as it sees fit, using alienage as the dividing line. Rather, they are fundamental rights that the Constitution specifies that a person holds *against* the government. *Hamdi*, 542 U.S. at 525 (the writ of habeas corpus "has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with the law"); *Quirin, supra*; *Milligan, supra*.[30] To the extent the MCA's restrictions on habeas could be justified on the basis that terrorism or war crimes must be dealt with more harshly than other criminal conduct, that distinction does not explain why citizen enemy combatants are exempt from such treatment, as the Court has previously held that the jurisdiction of military commissions may reach to citizens where appropriate. *Quirin*, 317 U.S. at 37-38. The MCA purports to deprive all aliens of access to federal courts, regardless of the site of their detention. Whatever the reach of the Fifth Amendment to aliens held in battlefield detentions, its protections clearly reach aliens detained in the United States and Guantanamo Bay. Under the

[30] In addition, the Suspension Clause places an important structural limitation on the powers of Congress, and preserves for the Judiciary an essential role in safeguarding liberty. This is wholly independent of the issue of whether aliens do, or do not, possess constitutional rights. *Hamdi*, 542 U.S. at 536 ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.").

MCA's purported attempt to restrict habeas, however, these aliens remain shrouded in a law-free zone wherever they go. Aliens held on U.S. territory, potentially alongside U.S. citizens, are denied access to U.S. courts, in contravention of our country's Fifth Amendment principle of equal justice for all persons within its jurisdiction.

Assuming, *arguendo*, that the jurisdiction stripping aspects of the MCA are otherwise constitutional, the disparity between citizens and aliens nevertheless invalidates the MCA. So even if Congress can exempt all persons, citizens and aliens alike, from habeas jurisdiction, it cannot do so selectively. Indeed, the Constitution's guarantee of equal protection stands as a way to ensure that the weak and vulnerable are represented by the powerful. *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) ("[T]he democratic majority [must] accept for themselves and their loved ones what they impose on you and me."); *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring) ("[N]othing opens the door to arbitrary action so effectively as to allow . . . officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected."); N. Katyal & L. Tribe, "Waging War, Deciding Guilt: Trying the Military Tribunals," 111 YALE L. J. 1259 at 1302–03 (2002) (equal protection prohibits disparate treatment of citizens and aliens in dispensation of justice). If Congress wants to exempt Guantanamo from the Great Writ, at a minimum they must do so for all persons, and not selectively target only those without a political voice.

CONCLUSION

For the foregoing reasons, Respondents Motion to Dismiss for Lack of Subject Matter Jurisdiction should be denied.

Respectfully submitted this 17th day of November, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2006, copies of the foregoing **Petitioner's Opposition to Motion to Dismiss for Lack of Subject Matter Jurisdiction**, was served by electronic mail upon the following:

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