IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOHAMMED AHMED TAHER, Petitioner, v. GEORGE W. BUSH, *et al.*, Respondents.	:	Civil Action No. 06-CV-1684 (GK)

PETITIONER'S OPPOSITION TO MOTION TO DISMISS OR TRANSFER FOR LACK OF JURISDICTION AND CROSS-MOTION FOR HABEAS HEARING AND RELATED RELIEF

Petitioner Mohammed Ahmed Taher ("Petitioner"), by and through his undersigned counsel, respectfully submits this memorandum of law in opposition to Respondents' motion to dismiss this case for lack of jurisdiction or, in the alternative, to transfer it to the Court of Appeals. Petitioner also cross-moves for a habeas hearing and additional related relief, including expedited entry of the protective order, access to his counsel, and production of a factual return to his habeas petition. Respondents' motion to dismiss should be denied, and Petitioner's cross-motion should be granted, for the following reasons.

Introduction

Petitioner is a citizen of Yemen, who is currently detained virtually *incommunicado* in military custody at the U.S. Naval Station at Guantánamo Bay, Cuba ("Guantánamo"). Petitioner is being held without lawful basis, without charge, and without access to counsel or any meaningful opportunity to challenge his detention.

ORAL ARGUMENT REQUESTED

On September 29, 2006, Petitioner filed a habeas corpus petition challenging the legality of his detention ("Petition").[1] Petitioner alleges that he has been wrongfully classified as an "enemy combatant"; that he was not a member or associate of the Taliban or Al Qaeda; that he did not commit any hostile acts against the United States or its coalition allies; and that he had no involvement in the attacks on September 11th, the ensuing armed conflict, or any other acts of international terrorism. *See* Petition ¶¶20, 22. Petitioner also contends that Respondents have seized and continue to detain him without affording him any fundamental due process. *See* Petition ¶56. In these respects, his arrest and continued detention violate the Suspension Clause of the U.S. Constitution, *see* U.S. Const., art. I, § 9, cl. 2, which guarantees him the right to be charged criminally or released. *See* Petition ¶¶54-57. Moreover, Petitioner argues that the Detainee Treatment Act of 2005 ("DTA") is unconstitutional on its face and as applied to him because it purports to remove this Court's jurisdiction over the Petition in violation of the Suspension Clause. Accordingly, he argues, the DTA does not deprive this Court of jurisdiction to hear or consider the Petition and grant the relief that he seeks therein. *See* Petition ¶¶11, 57.[2]

On October 16, 2006, the Court ordered Respondents to show cause by November 6, 2006 why the Petition should not be granted. Respondents filed a response to that order, and moved to dismiss this case for lack of jurisdiction under the DTA and the Military Commission Act of 2006 ("MCA") or, in the alternative, to transfer the case to the Court of Appeals (*see* dkt. nos. 4 & 5) ("Gvt. Br."). In support of their motion, Respondents argue that the DTA and MCA withdrew jurisdiction of the district courts to consider habeas petitions filed by non-citizens like Petitioner, who are held as "enemy combatants." *See* Gvt. Br. at 4-7. They also contend that the

[1] The Petition was authorized in writing by Petitioner's father, who acts as his next friend.

[2] Petitioner also alleges other violations of U.S. and international law.

DTA and MCA do not effect a suspension of habeas corpus inconsistent with the Constitution because (1) Petitioner has no constitutional rights, including under the Suspension Clause, *see id.* at 7-11, and (2) the DTA and MCA provide a constitutionally adequate substitute for habeas, *i.e.*, record review of Petitioner's Combatant Status Review Tribunal ("CSRT") determination in the Court of Appeals, *see id.* at 11-15. Respondents are wrong on all accounts.[3]

Respondents attempt to create an artificial distinction between the right to habeas corpus and the protections afforded against unilateral suspension of that right by the political branches of government. But the Supreme Court has held that detainees are entitled to the protections of the writ as it existed at common law, at the time the Constitution was adopted, and that the common law right of habeas is protected by the Suspension Clause. Thus, regardless of whether detainees have constitutional rights, they have the right to habeas and may seek to protect that right by asserting a challenge to the DTA and MCA under the Suspension Clause. This Court also plainly has the power under Article III of the Constitution to invalidate the DTA and MCA on the ground that those statutes violate the Suspension Clause.

The DTA and MCA are also constitutionally deficient because they fail to provide an adequate substitute for habeas in several respects. First, they provide no review at all for certain detainees. Second, they provide no opportunity for the Court of Appeals to engage in a factual inquiry into the bases for detainees' detentions or to engage in any fact-finding at all. Third, the laws prevent detainees from introducing, and the Court of Appeals from considering, extrinsic evidence to controvert Respondents' evidence, including evidence of "actual innocence" or evidence that statements used against them were obtained through torture. Fourth, neither detainees nor their counsel are entitled under the DTA and MCA to all relevant classified

[3] Petitioner was granted an extension of time until December 11, 2006 to file this response to the motion to dismiss.

information that may provide the factual bases for detainees' detentions. Fifth, while the DTA and MCA authorize the Court of Appeals to consider whether the CSRT standards and procedures are "consistent with the Constitution and laws of the United States," Respondents argue that there is not a single constitutional protection, including fundamental due process, which detainees may invoke. Sixth, Respondents have made clear their view that the DTA and MCA give the Court of Appeals no authority to order detainees' releases even if it determines that their CSRTs were unfair or unlawful. The only remedy, according to Respondents, is for the Court of Appeals to order new CSRTs.[4]

The MCA is also unconstitutional in several other respects. First, it violates core separation of powers principles by prescribing rules of decision that necessarily resolve all cases and controversies in Respondents' favor. Second, to the extent the MCA may be interpreted to bar habeas review of otherwise valid non-constitutional claims, including Geneva Conventions-based claims that would otherwise support habeas relief, it violates the Suspension Clause. Third, the MCA constitutes an unlawful Bill of Attainder by imposing legislative punishment (limiting access to courts) on a specifically designated group (Guantánamo detainees and other non-citizens designated by Respondents as "unlawful enemy combatants"). Finally, the MCA violates equal protection by denying a class of individuals the fundamental right of equal access to the courts on the basis of an inherently suspect distinction (alienage).

[4] Respondents correctly point out that the Court of Appeals is considering similar issues in certain of the pending Guantánamo detainee appeals, *Boumediene v. Bush*, Nos. 05-5062 & 05-5063 (D.C. Cir.), and *Al Odah v. United States*, Nos. 05-5064, *et al.* (D.C. Cir.). *See* Gvt. Br. at 4 n.4. Those issues are also currently being briefed in *Hamdan v. Rumsfeld*, No. 04-CV-1519 (JR), which is pending before Judge Robertson. However, unlike those cases which raise statutory construction arguments against the retroactive application of the DTA and MCA, the serious constitutional flaws addressed here cannot be avoided because this case was filed after enactment of the DTA and thus falls squarely within its purported withdrawal of jurisdiction. *See* DTA §§ 1005(e)(1), (h)(1); *see also infra* Part VI.C.

The Court should therefore deny Respondents' motion to dismiss. The Court should also enter the protective order, order counsel access to Petitioner and production of a factual return, and schedule a hearing on the merits of the Petition.

Background

On December 30, 2005, President Bush signed the DTA into law. *See* Pub. L. No. 109-148, 119 Stat. 2680 (2005). Section 1005(e)(1) of the DTA amended the federal habeas statute, 28 U.S.C. § 2241, to eliminate the jurisdiction of the federal courts to hear or consider habeas petitions and other actions brought by or on behalf of detainees held by the Defense Department at Guantánamo. That provision took effect on the date of enactment. *See* DTA § 1005(h)(1).[5] Section 1005(e)(2)(A) of the DTA also granted the U.S. Court of Appeals for the District of Columbia Circuit "exclusive jurisdiction" to determine the validity of any final decision of a CSRT that an alien is properly detained as an "enemy combatant."[6] In addition, § 1005(e)(2)(C) provided that the applicable "scope of review" by the Court of Appeals is limited to determining whether a final CSRT decision "was consistent with the standards and procedures specified by the Secretary of Defense," and "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."[7]

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[5] Again, because this case was filed after enactment of the DTA, it falls squarely within this purported withdrawal of jurisdiction. *See infra* Part IV.C.

[6] Respondents' argument that this provision for the exclusive review of CSRT decisions in the Court of Appeals operates independently to deprive this Court of jurisdiction over the Petition, *see* Gvt. Br. at 6, has already been squarely rejected by the Supreme Court and need not be considered further. *See INS v. St. Cyr*, 533 U.S. 289, 297-98, 308-11 (2001).

[7] Section 1005(e)(3)(A) of the DTA also granted the Court of Appeals "exclusive jurisdiction" to determine the validity of any final decision rendered by a military commission. Section 1005(e)(3)(D) specified a "scope of review" analogous to that provided for final CSRT determinations. However, like most detainees Petitioner has not been charged and likely never will be charged by military commission. *See* Craig Whitlock, *U.S. Faces Obstacles to Freeing*

On June 29, 2006, the Supreme Court issued its decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), reaffirming its holding in *Rasul v. Bush*, 542 U.S. 466 (2004), that Guantánamo detainees are entitled to challenge their detention through habeas. The Court also struck down the military commission procedures established to try detainees for violations of the laws of war, concluding that those procedures violated the Uniform Code of Military Justice and the Geneva Conventions. In addition, the Court determined that Common Article 3 of the Geneva Conventions applied in the conflict in Afghanistan and, among other things, entitled Guantánamo detainees to trial by "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.* at 2796 (internal quotation marks omitted).

The MCA was enacted on October 17, 2006, ostensibly in response to *Hamdan*. *See* Pub. L. No. 109-366, 120 Stat. 2600 (2006). Among other things, the MCA established new military commission procedures and also amended 28 U.S.C. § 2241 to expand the withdrawal of habeas jurisdiction under the DTA. Thus, Section 7(a) of the MCA specifically provides, in relevant part, that:

> 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.

Section 7(b) also provides that this amendment:

> [S]hall 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.

Detainees from Guantanamo, Wash. Post, Oct. 17, 2006, at A1 (reporting only 60 to 80 detainees are expected to be tried by military commission).

Section 7 of the MCA thus not only attempts to withdraw habeas jurisdiction in pending cases, but also expands the territorial reach of that withdrawal to non-citizen detainees held anywhere in the world instead of simply to detainees at Guantánamo. It also expands the withdrawal of jurisdiction to detainees held by the "United States" – which presumably includes detainees imprisoned by the Central Intelligence Agency in secret ghost prisons overseas – not just detainees in the custody of the Defense Department. And it extends the withdrawal of jurisdiction to include not only detainees designed as "enemy combatants" by CSRTs, but also those who are "awaiting such determination" by a CSRT or some other undisclosed "competent tribunal established under the authority of the President or the Secretary of Defense," MCA § 948a (defining "unlawful enemy combatant"), at some indeterminate point in the future.

Accordingly, for the reasons set forth below, because Congress has not invoked its stated powers under the Suspension Clause, and because it has otherwise breached the limitations on its constitutional powers by attempting to eliminate habeas entirely for a single class of individuals, the withdrawal of habeas jurisdiction under the DTA and MCA is invalid and this Court retains jurisdiction to consider the Petition.

Argument

"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). Petitioner's central argument – that he was seized and continues to be detained as an enemy combatant without "notice of the factual basis for his classification [or] a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker," *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) – falls squarely within this historical core of habeas review. Indeed, the Supreme Court has held that alleged

enemy combatants detained at Guantánamo have the right to challenge their detention through habeas corpus: "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." *Rasul v. Bush*, 542 U.S. 466, 474 (2004).

The Court's jurisdiction to issue the writ in a case like this is a function not only of the federal habeas statute, but also of the common law, *see id.* at 481-82, as recognized and protected by the Suspension Clause of the Constitution. *See St. Cyr*, 533 U.S. at 304 n.24 (Suspension Clause "was intended to preclude any possibility that 'the privilege itself would be lost' by either the inaction or the action of Congress"). The constitutional right to habeas relief therefore exists even in the absence of statutory authorization, and may be suspended only by explicit congressional action under strictly limited circumstances. *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).[8] The Suspension Clause thus 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. *See 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.").

[8] The Supreme Court has further signaled that detainees in Guantánamo are entitled to fundamental rights protected by the federal courts. *See Rasul*, 542 U.S. at 484 n.15 ("Petitioners' allegations . . . unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'") (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring)); *see also In re Guantanamo Detainee Cases*, 355 F. Supp. 2d

In the Guantánamo detainee cases, Congress has plainly exceeded its constitutional power and improperly infringed on the Article III powers of the Judiciary. Far from invoking its constitutional powers to suspend habeas, Congress instead has attempted for the first time in our history to eliminate habeas altogether for a single class of individuals – non-citizens detained by the United States – by passage of the DTA and MCA. Indeed, Congress has attempted to do so indefinitely on a countrywide (and worldwide) basis. Congress has violated the Constitution, and these laws should therefore be struck down by the Court.

I. THE DTA AND MCA VIOLATE THE SUSPENSION CLAUSE

In their motion to dismiss, Respondents argue that the DTA (and now the MCA) do not effect an unconstitutional suspension of the writ of habeas corpus because Petitioner has no constitutional rights under the Suspension Clause. In particular, they argue that "aliens" detained outside the sovereign territory of the United States have no constitutional rights, including under the Suspension Clause. *See* Gvt. Br. at 7-11. Respondents also contend that the DTA and MCA provide a constitutionally adequate substitute for habeas. These claims are meritless and should be rejected.

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

As indicated above, the Supreme Court held in *Rasul* that the Guantánamo detainees have the right to habeas corpus. *See* 542 U.S. at 484. In addition to finding that they have that right under the federal habeas statute, *Rasul* confirmed that they are entitled to the writ under the common law and would have been entitled to the writ as it existed in 1789 when the

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443, 464 (D.D.C. 2005) (Green, J.), *appeal pending*. *But see Khalid v. Bush*, 355 F. Supp. 2d 311, 320-21 (D.D.C. 2005) (Leon, J.), *appeal pending*.

Constitution was adopted. *See id.* at 479-82.[9] Because "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789,'" *St. Cyr*, 533 U.S. at 301, Petitioner's right to the writ as it existed in 1789 includes the protection of the Suspension Clause. Accordingly, regardless of whether detainees have constitutional rights, they have the right to habeas and may seek to protect that right by asserting a challenge to the DTA and MCA under the Suspension Clause.

This Court also clearly has the power under Article III of the Constitution to invalidate a statute that violates the Suspension Clause. *Rasul* held that habeas corpus "does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." 542 U.S. at 478 (internal quotation marks omitted). The Suspension Clause is likewise a plain, direct, and explicit limitation imposed on the power of Congress by Article I of the Constitution. Unlike the Due Process Clause of the Fifth Amendment, it does not confer individual rights.[10] Rather, it acts as a restraint on the power of Congress. It provides that Congress may not suspend habeas corpus except in certain limited circumstances of "invasion" or "rebellion" as the public safety may require, which plainly do not exist here.[11] Thus, because those circumstances do not exist, Congress cannot suspend habeas corpus and this Court cannot

[9] Respondents' contention that the holding in *Rasul* is limited to the reach of the federal habeas statute is simply wrong. *See* Gvt. Br. at 10 n.6.

[10] Nonetheless, we believe that Judge Green correctly held that the Guantánamo detainees have stated valid Fifth Amendment claims. *See* 355 F. Supp. 2d at 464.

[11] The Suspension Clause 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." U.S. Const., art. I, § 9, cl. 2. Respondents do not argue that Congress has authorized a suspension of the writ, as it has done only four times in American history, *see* William F. Duker, A Constitutional History of Habeas Corpus 149, 178 n.190 (1980), or that a state of rebellion or invasion endangering the public safety otherwise exists to justify suspension of the writ. *See also* Letter from Hon. Kenneth W. Starr to Hon. Arlen Specter (Sept. 24, 2006) [hereinafter "Starr Letter"] ("The United States is neither in a state of rebellion nor invasion. Consequently, it would [be] problematic for Congress to modify the constitutionally protected writ of *habeas corpus* under current events.") (attached hereto as Ex. A).

allow such a suspension to stand. *See United States v. Klein*, 80 U.S. 128, 147 (1872) (invalidating a statute that unconstitutionally stripped the Supreme Court of jurisdiction in violation of the separation of powers); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("[A]n act of the legislature, repugnant to the constitution, is void.").

Respondents also mistakenly rely on *Johnson v. Eisentrager*, 399 U.S. 763 (1950), a case involving admitted "enemy aliens" tried by an American military commission in China in the immediate aftermath of Japan's surrender in World War II. *See id.* at 765-66, 784. There, the Court held that the petitioners were not entitled to habeas corpus because they "at no relevant time and in no stage of [their] captivity, ha[d] been within [U.S.] territorial jurisdiction." *Id.* at 768, 781. Notably, however, the Court considered their application for a writ of habeas corpus on the merits but concluded that there was no basis for issuing the writ. *See id.* at 780-81 ("the doors of our courts have not been summarily closed upon these prisoners"). Indeed, the *Eisentrager* petitioners were afforded "the same preliminary hearing as to sufficiency of [their habeas] application that was extended in *Quirin* [and] *Yamashita*. . . ." *Id.* at 781; *see infra* Part I.B.4 (discussing *Quirin* and *Yamashita*).

Moreover, to the extent that the Court's decision was based on a lack of jurisdiction, that conclusion arose from factors not present in this case, as established in *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; *see also id.* at 487-88 (Kennedy, J., concurring). Accordingly, *Eisentrager* does not stand for the proposition that alleged enemy combatants held outside the United States have no habeas rights.[12] *See also* Starr Letter ("[T]he Eisentrager case may no longer be relied upon with confidence to rule out constitutional *habeas* protections for Guantanamo detainees.") (attached hereto as Ex. A).

B. The DTA and MCA Do Not Provide a Constitutionally Adequate Substitute for Habeas

Respondents contend that even if Petitioner could properly invoke the Suspension Clause, the review of his "enemy combatant" determination available in the Court of Appeals is "more than constitutionally sufficient" to withstand a suspension challenge to the validity of the DTA and MCA. In support of this argument, they note that the DTA permits the Court of Appeals to consider (1) whether the CSRT determination that Petitioner is properly held as an "enemy combatant" was consistent with the "standards and procedures" governing the CSRT process, including whether that determination was supported by a "preponderance of the evidence," and (2) whether the CSRT standards and procedures were "consistent with the Constitution and laws of the United States." Gvt. Br. at 13 (quoting DTA § 1005(e)(2)(C)). But such limited review is hardly adequate or effective to test the legality of Petitioner's detention as

[12] The other cases cited by Respondents also do not support their position. *See* Gvt. Br. at 8-9. For example, *32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797 (D.C. Cir. 2002), and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), did not involve habeas or the Suspension Clause. However, in each case the court considered the merits of the petition. Notably, in *32 County Sovereignty* that review included examination of classified information concerning an alleged terrorist organization. *See* 292 F.3d at 799. In addition, although it rejected the extraterritorial application of U.S. law, *Verdugo-Urquidez* involved only non-fundamental rights (suppression of evidence obtained in violation of the Fourth Amendment). To the extent the Court addressed fundamental rights under the Fifth Amendment, it merely cited *Eisentrager*, *see* 494 U.S. at 269, which, as discussed above, is readily distinguishable from this case. *Verdugo-Urquidez* also largely relied on the "impractical and anomalous" application of the Fourth Amendment's warrant requirement in Mexico, *see id.* at 278 (Kennedy, J., concurring); but Respondents make no claim that the application of Fifth Amendment rights to Guantánamo – thousands of miles from any battlefield – would be similarly burdensome.

would be required in a habeas hearing. *See Swain v. Pressley*, 430 U.S. 372, 381 (1977) (any statutory substitute for habeas must provide an "adequate and effective" means to test the legality of the detention, in a process "commensurate" with habeas, to avoid a violation of the Suspension Clause).[13]

1. The DTA and MCA Provide No Review for Certain Detainees

As an initial matter, to illustrate just how far Congress has gone in its unlawful attempt to eliminate judicial review for Guantánamo detainees, it must be noted that the DTA and MCA provide *no review at all* for certain detainees. The limited review available under the DTA and MCA only extends to the "final decision" of a CSRT that a detainee is "properly detained as an enemy combatant." DTA § 1005(e)(2)(A). Thus, a detainee's challenge to his detention as an "enemy combatant" is necessarily limited to a challenge to the adequacy of the CSRT. But, as indicated above, Section 7 of the MCA purports to withdraw habeas jurisdiction for detainees held as "enemy combatants" *and* those "awaiting such determination." The DTA and MCA also impose no limits whatsoever on the time within which Respondents must make such determinations. Nor do those statutes even require that future determinations be made by a CSRT, as opposed to some other undisclosed tribunal established by the President or the Secretary of Defense. *See* MCA § 948a. Accordingly, the DTA and MCA do not provide for any judicial inquiry or relief for those detainees awaiting an enemy combatant determination. For this reason alone, the DTA and MCA violate the Suspension Clause.

[13] The *Swain* Court upheld a statute providing a collateral remedy for prisoners in custody in the Superior Court of the District of Columbia against a Suspension Clause challenge for reasons that are not applicable here. In particular, the Court cited the statute's "savings clause" allowing a federal district court to hear an application for habeas if the statute's remedy was "inadequate or ineffective" to test the legality of the prisoner's detention. The DTA and MCA have no such "savings clause" allowing resort to habeas if limited review of the CSRTs under the DTA is determined to be inadequate or ineffective to test the legality of a detainee's detention.

2. The DTA and MCA Are Also Constitutionally Deficient for the Reasons Set Forth in Respondents' Filings in the *Bismullah* Case

In a recent filing in *Bismullah v. Rumsfeld*, No. 06-1197 (D.C. Cir.) – in which a Guantánamo detainee seeks review in the Court of Appeals under the DTA – Respondents have set forth their views concerning the scope of review available under the DTA (and now the MCA), making it clear that such review is not commensurate with the searching inquiry required by common law habeas. *See* Response in Opp'n to Motion to Compel (Aug. 21, 2006) ("*Bismullah* Opp'n") (attached hereto as Ex. B).

First, according to Respondents' position in *Bismullah*, the DTA provides no opportunity for the Court of Appeals to engage in a factual inquiry into the bases for detainees' detentions or to engage in any fact-finding at all. *Id.* at 15. Rather, they argue, the Court of Appeals is limited to reviewing the CSRT "record," *id.* at 14, which as a practical matter consists only of the evidence that Respondents themselves chose to put before the CSRT panel. In Respondents' view, the Court of Appeals also may only examine the CSRT record to determine "whether the CSRT followed appropriate procedure." *Id.* at 12-13. And although the DTA instructs the Court of Appeals to determine whether a detainee's enemy combatant designation is consistent with "the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence," Respondents claim that this provision "limits review to the question of whether the CSRT followed appropriate procedure and rendered a decision supported by sufficient evidence." *Id.* at 12. Moreover, by "sufficient evidence" Respondents mean "simply such relevant evidence as a reasonable person might accept as proof of a conclusion." *Id.* at 13 (citation omitted).

Second, Respondents contend that the DTA prevents detainees like Petitioner from introducing, and the Court of Appeals from considering, extrinsic evidence to controvert

Respondents' evidence, including evidence of "actual innocence" or evidence that statements used against detainees were obtained through torture. *Id.* at 16-17.[14] According to Respondents, the DTA simply "does not authorize the submission of new evidence." *Id.* at 16.

Third, Respondents contend that, although the factual bases for a detainee's detention may be classified, neither the detainees nor their counsel are entitled under the DTA to have access to all such relevant but classified information. Indeed, Respondents argue that detainees and their counsel are not entitled to any evidence relevant to the detainees' detentions that is outside the "record" compiled by them for the CSRTs. *Id.* at 10-12, 17-20. Moreover, in this case Respondents have refused to provide even the record evidence concerning Petitioner's CSRT proceedings, thus requiring counsel to file a motion for production of a factual return. *See infra* Part VI.B.

Fourth, while the DTA authorizes the Court of Appeals to consider whether the CSRT standards and procedures are "consistent with the Constitution and laws of the United States" – and Respondents point to that provision in their instant motion as a basis for why the DTA is not unconstitutional, *see* Gvt. Br. at 13 – Respondents argue in *Bismullah* that there is not a single constitutional protection, including fundamental due process, which detainees may invoke. *See Bismullah* Opp'n at 6 n.5 & 7. Thus, under Respondents' interpretation, DTA § 1005(e)(2)(C)(ii) is utterly meaningless.

Fifth, during oral argument in the *Al Odah/Boumediene* consolidated appeals, Respondents have made clear their view that the DTA gives the Court of Appeals no authority to

[14] The CSRTs' acceptance of evidence obtained by torture – and the presumption that such evidence is genuine and accurate – constitutes a particularly troubling departure from habeas corpus, for all of the reasons set forth in the *amicus* brief filed by seven former federal judges in the *Al Odah/Boumediene* consolidated appeals (attached hereto as Ex. C), which we incorporate herein by reference.

order a detainee's release even if it determines that his CSRT was unfair or unlawful. The only remedy, according to Respondents, is for the Court of Appeals to order a new CSRT.

According to a recent analysis of unclassified CSRT proceedings, there have already been at least three cases where detainees who were found by CSRTs not to be "enemy combatants" were sent back for new hearings rather than being released. Respondents simply sent went back for a second or third "bite at the apple," ordering new CSRTs for each of those detainees until they eventually obtained "enemy combatant" determinations. *See* Mark Denbeaux & Joshua Denbeaux, *No-Hearing Hearings: An Analysis of the Proceedings of the Government's Combatant Status Review Tribunals at Guantánamo* at 3, 37-39 (Nov. 17, 2006) ("Denbeaux Report") (attached hereto as Ex. D).[15] Nor is there any indication that the detainees in those cases were ever informed of the initial favorable decisions, or informed of or allowed to participate in the later CSRT proceedings. *See id.* Perhaps nothing could offend fundamental due process more starkly than sending an innocent man back for additional pro forma hearings until Respondents are able to obtain a preferred outcome that results in potentially life-long detention without charge for the detainee.

In any event, the Court of Appeals' purported inability to order detainees released certainly belies any claim that CSRT review under the DTA is an adequate substitute for habeas corpus. *See*, *e.g.*, *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) ("[T]he essence of habeas

[15] It also appears from recently obtained unclassified factual returns in the case *Thabid v. Bush*, No. 05-CV-2398 (ESH), that all twenty-two of the Uighur detainees from China who have ever been detained at Guantánamo may at one time have been determined not to be "enemy combatants," and that all but five of those men (who have since been released to Albania) were sent back for subsequent CSRTs until it was determined that they were "enemy combatants." *See also*, *e.g.*, *Lawyers Argue for Chinese at Guantanamo*, Assoc. Press (Dec. 5, 2006) (Navy spokesman confirming Uighurs had "multiple" enemy combatant reviews). Respondents have repeatedly refused to provide additional information concerning the status of the Uighurs. Nonetheless, if we are correct this would mean that many more detainees were sent back for additional CSRTs instead of being released than are reflected in the Denbeaux Report.

corpus is an attack by a person in custody upon the legality of that custody, and [ ] the traditional function of the writ is to secure release from illegal custody."); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 576 (2004) (Scalia, J., dissenting) ("The role of habeas corpus is to determine the legality of the executive detention, not to supply the omitted process necessary to make it legal. . . . It is not the habeas court's function to make illegal detention legal by supplying a process that the Government could have provided, but chose not to.").

Nor are these constitutional deficiencies merely theoretical or academic in this particular case, as the limited information available concerning Petitioner's CSRT and Administrative Review Board ("ARB") proceedings illustrates so clearly. *See infra* Part I.B.5.

3. In Cases of Executive Detention, Common Law Habeas Demands a Far More Searching and Extensive Review than the Limited DTA Review Espoused by Respondents

Petitioner has been imprisoned in Guantánamo for several years without charge or trial. He is detained not under sentence of any court or tribunal, but by the sheer might of the Executive. In these circumstances of "pure executive detention," common law habeas would require a searching judicial inquiry into the factual and legal basis for the detention, including the opportunity to traverse Respondents' factual return – which, again, has not even been provided to Petitioner in this case – to present exculpatory evidence and to obtain a judicial determination of any disputed factual issues.

The common law distinguished between habeas petitions challenging a prior conviction pursuant to judicial process and those challenging pure executive detentions. While courts prohibited petitioners from introducing extrinsic evidence and limited their review of the underlying facts in cases where the petitioners were challenging a criminal conviction by a duly

constituted court of "competent jurisdiction,"[16] that was never the case with respect to executive detentions. As indicated above, the Supreme Court has emphasized: "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest." *St. Cyr*, 533 U.S. at 301.

In cases of non-judicial detention, the common law required a searching judicial examination into the bases for detention. This examination included not only an examination of the Executive's return, but also allowed a petitioner to dispute the return and present evidence. And the court would review all of the evidence and order the petitioner's release if it concluded that the evidence as a whole was insufficient to justify the detention. *See*, *e.g.*, *Goldswain's Case*, 96 Eng. Rep. 711, 712 (C.P. 1778) (petitioner "may plead to [court] any special matter necessary to regain his liberty" and court "could not willfully shut [its] eyes against such facts as appeared on the affidavits, but which were not noticed on the return"). Early American courts also required the same searching judicial examination into the bases for detention. *See*, *e.g.*, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (court examined "facts stated in Milligan's petition, and the exhibits [he] filed" to decide ultimate questions of lawful authority); *State v. Joseph Clark*, 2 Del. Cas. 578 (Del. Chancery 1920) (releasing habeas petitioner after reviewing his affidavit traversing the return and hearing testimony from his father). Likewise, non-citizens detained by the Executive in wartime were able to submit evidence in habeas proceedings to challenge whether they were properly detained by the Executive as "enemy aliens." *See*, *e.g.*, *Lockington's Case,* Bright (N.P.) 269, 298-99 (Pa. 1813); *Case of the Three Spanish Sailors*, 96 Eng. Rep. 775, 776 (C.P. 1779); *Rex v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759).[17]

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[16] *See generally* R.J. Sharpe, The Law of Habeas Corpus 51 (1989).

[17] Respondents misconstrue *INS v. St. Cyr*, 533 U.S. 289, 306 (2001), in support of the proposition that "[t]raditional habeas review in alien-specific contexts involved, in general,

Nor does habeas otherwise entail a limited, highly deferential review that Respondents have suggested is the extent of judicial inquiry available under the DTA. Even if the Executive has undertaken some prior process of its own to justify the detention, a habeas court would not be bound by that process or restricted simply to reviewing whether the Executive had abided by its own rules in conducting that process. *See*, *e.g.*, *Bushell's Case*, 124 Eng. Rep. 1006, 1007 (C.P. 1670) ("[O]ur judgment ought to be grounded upon our own inferences and understandings, and not upon [those of an inferior tribunal]."); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 125 (1807) (Supreme Court examined written depositions to determine if there was sufficient evidence of petitioner levying war against United States to justify detention for treason); *see also 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").

4. Petitioner Has Not Been Afforded More "Procedural Process and Protections" Than Military Commission Defendants

Respondents also suggest that the DTA and MCA do not violate the Suspension Clause because the CSRT process is modeled on Army Regulation § 190-8 (1997), which implements the Geneva Conventions' requirement for determining whether detainees are entitled to prisoner-of-war status. Indeed, Respondents contend that the CSRTs provide detainees like Petitioner with "significant additional procedural process and protections" beyond what is required by Army Regulation § 190-8. Gvt. Br. at 14 & n.9. Respondents also argue that these

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review of questions of law, but 'other than the question of whether there was some evidence to support the order, the courts generally did not review the factual determinations made by the Executive.'" Gvt. Br. at 13. To the contrary, in the cases cited in *St. Cyr* on which Respondents apparently rely the factual review of habeas was limited because the petitioners had already had the opportunity to participate in full immigration removal proceedings and appeals to the Board of Immigration Appeals. Indeed, the Court emphasized that at common law "an attack on an executive order could raise *all issues* relating to the legality of the detention." *Id.* at 301 n.14 (emphasis added; citation omitted).

minimal procedures comport with the due process requirements of *Hamdi*. *See id.* Again, Respondents are wrong on all accounts.

As an initial matter, the CSRT process falls well short of the requirements of Army Regulation § 190-8. As Judge Green explained, Article 5 of the Third Geneva Convention entitles all individuals to be treated as prisoners of war "until such time as their status has been determined by a competent tribunal," even if there is doubt as to whether they are entitled to that status under Article 4 of the Convention. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 479-80 (D.D.C. 2005), *appeal pending*. "Army Regulation 190-8 created the rules for the 'competent tribunal' referenced in Article 5 of the Third Geneva Convention." *Id.*

"Article 5 hearings, like the CSRT, involve a panel of three officers who hear information from the military and the prisoner. These hearings, the [*Hamdi*] Court said, had proven successful in resolving doubts about the status of prisoners captured during conflicts governed by the Geneva Conventions." Joseph Margulies, Guantánamo and the Abuse of Presidential Power 160 (2006). "The streamlined proceedings of an Article 5 hearing were developed in response to the unique circumstances presented in the field. . . . Admittedly, these hearings are extremely summary, which creates a significant risk of error. But the consequences of a mistake are mitigated by the fact that prisoners will be confined under conditions that comply with the Geneva Conventions." *Id.* That is far from true with the CSRTs, which are unrestrained by the applications of the Geneva Conventions. *See id.* at 170.

Indeed, while a CSRT "bears a glancing resemblance to an Article 5 hearing, [it] actually provides fewer procedural protections." *Id.* at 161. For example, in the Guantánamo detainee cases the "inflexible and expansive definition of enemy combatant made it inevitable the CSRT would rule against a number of prisoners who should have been released. Yet this

problem was exacerbated by the procedural rules governing the CSRTs. To begin with, the tribunals based their decision on secret evidence kept from the prisoner. This sometimes produced absurd spectacles, fit for Lewis Carroll . . ." *Id.* at 163.

> At the same time, the [CSRT] tribunal must presume that the evidence presented by the military, including secret evidence, is genuine and accurate. This distinguishes the CSRT from an Article 5 hearing, where the prisoner is presumed to be a POW until proven otherwise, and there is no presumption in favor of the military's evidence. In addition, the CSRT panel may rely on "any information it deems relevant and helpful," including any degree of hearsay. . . . and for the first time in U.S. military history, the tribunal may rely on evidence secured by torture, coercive interrogations, or cruel and degrading treatment. . . . Article 5 hearings, by contrast, rely on evidence secured in compliance with the Geneva Conventions, which prohibit torture and unlawful coercion and thereby minimize the risk of error caused by unreliable confessions.

Id. at 164.

The CSRTs are also decidedly not administered by impartial decisionmakers. *See id.* at 166. "Like an Article 5 hearing, each [CSRT] tribunal consists of three commissioned officers. But in an Article 5 hearing, the prisoner is presumed a POW. In these tribunals, by contrast, [Respondents] have all repeatedly announced that each detainee is an enemy combatant" without determining on an individualized basis whether a particular detainee complied with the laws of war or otherwise falls within an exception denying him POW status. *Id.*; *see also* 355 F. Supp. 2d at 480; *infra* note 24. In this respect, a CSRT is exactly the opposite of an Article 5 hearing.

Accordingly, while there are other examples of how CSRTs fall short of the standards for Article 5 hearings, "the conclusion is simply inescapable that these tribunals were created for no other purpose than to validate a predetermined result." Margulies at 169. The CSRTs bear "superficial similarity to Article 5 hearings" but only serve to "create[ ] the impression that the Administration has fixed the problem identified in *Rasul*." *Id.*

Respondents are also incorrect that under *Hamdi* "proceedings by which the military determined enemy combatant status legitimately could be severely limited in scope, in ways that are not characteristic of traditional judicial proceedings." Gvt. Br. at 14. To the contrary, *Hamdi* held that an individual detained by Respondents as an "enemy combatant" must receive notice of the factual basis for that determination and a fair opportunity to rebut Respondents' factual assertions before a neutral decisionmaker. *See* 542 U.S. at 533. In reaching that conclusion, the Court "necessarily reject[ed]" Respondents' suggestions that "separation of powers principles mandate a heavily circumscribed role of the courts in such circumstances." *Id.* at 535. The Court cautioned that "a state of war is not a blank check for the President." *Id.* at 536.

The *Hamdi* plurality also suggested *in dicta* that "exigencies of the circumstances may demand that, aside from these core elements [of due process], enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." 542 U.S. at 533. "Hearsay, for example, may need to be accepted as the most reliable evidence available from the Government," and there may be a "presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided." *Id.* at 533-34. The Court further explained that "once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside that criteria." *Id.* at 534. But in the absence of a tribunal following constitutionally mandated procedures, the district courts must provide those procedural rights to the detainee through habeas. *See id.* at 605.

Here, Respondents have not shown – and cannot show – that exigent circumstances require anything less than full habeas review.[18] And they have not demonstrated that admission of hearsay evidence is necessary, or that such evidence would be reliable. They have not put forth any evidence – let alone "credible" evidence – to show that Petitioner is properly held as an enemy combatant. Nor has Petitioner had a fair opportunity to contest that designation before a neutral decisionmaker. *See infra* Part I.B.5. Thus, under *Hamdi*, this Court must afford him full habeas review.

Respondents also overlook prior precedent establishing that detainees subject to military commissions have traditionally been afforded all of the rights that Petitioner has been denied here. For instance, unlike Petitioner, military commission defendants typically have the right to examine and rebut the factual evidence against them, to confront their accusers, to call witnesses and present evidence, and to be represented by counsel. *See Ex parte Quirin*, 317 U.S. 1 (1942); *In re Yamashita*, 327 U.S. 1 (1946); *Johnson v. Eisentrager*, 339 U.S. 763 (1950). The limited habeas review afforded in these cases is also consistent with the limited habeas review that common law courts afforded petitioners who challenged convictions resulting from prior

[18] While Respondents have often raised the specter of interference with military operations, the Supreme Court has rejected their argument that such circumstances justify the denial of due process in the detainee cases. The Court has done so in the context of tribunals to determine who is properly detained, and with respect to military commissions to try and punish violations of the laws of war. *See Hamdi*, 542 U.S. at 532, 534-35 ("It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad. . . . We think that it is unlikely that this basic [due] process will have the dire impact on the central functions of warmaking that the Government forecasts. . . . [I]t does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here."); *Hamdan*, 126 S. Ct. at 2773 ("Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by . . . the Constitution unless some other part of that document authorizes a response to the felt need."). Here, too, any rote claims of exigency could not operate to deprive Petitioner of full habeas review because the Petition was not filed in a "zone of active military operations" and Petitioner is detained on an island thousands of miles away from any battlefield. *Cf. Johnson v. Eisentrager*, 339 U.S. 763, 780 (1950).

trial-like procedures deemed fair and adequate. Moreover, in each of these cases the Supreme Court engaged in a searching and detailed analysis of whether the military commissions complied with the laws of war, including the Geneva Conventions. *See* 317 U.S. at 24; 327 U.S. at 5-6, 9; 339 U.S. at 780-81, 785-91. Here, by contrast, Respondents contend that the Court of Appeals has no such power to inquire into such matters or independently assess the fairness and adequacy of the CSRT process.

Finally, it is important to remember that Petitioner has not been convicted of war crimes by military commission. He has not even been charged with any offense. Nor can the post-hoc CSRT process to which he was unilaterally subjected by the military after *Rasul* in order to confirm his "enemy combatant" status be compared to duly authorized military commissions established to try war crimes.

5. The Limited Information Available Concerning Petitioner's CSRT and ARB Proceedings Illustrates the Urgent Need for Habeas Review

Although Respondents have refused to provide a factual return – or any other information concerning Petitioner's continuing detention – they did release unclassified summaries of his CSRT and ARB proceedings to the public as the result of a Freedom of Information Act lawsuit instituted by the Associated Press.[19] Those summaries illustrate beyond any doubt the grave inadequacies of the CSRT process and the urgent need for habeas review.

According to the summary of Petitioner's CSRT proceeding, there appear to be two central allegations against Petitioner: (1) that he was sent a personal greeting from the Taliban Deputy Minister of Intelligence; and (2) that a senior Al Qaeda lieutenant recognized a

[19] Those summaries are attached here to as Exhibits E (CSRT) and F (ARB).

photograph of him.[20] Petitioner repeatedly denied both allegations, arguing that they were probably just cases of mistaken identity.

He asked repeatedly for the opportunity to confront both the Taliban official and the alleged Al Qaeda lieutenant about these claims:

- "I'd like to meet this [alleged Al Qaeda] person and see if he can, and show him that it's not me. That's all." (Ex. E at 7); and

- "How did this happen? Can you bring [the alleged Al Qaeda lieutenant and the Taliban official] in front of this tribunal? Or in front of this . . . your law says that you can. You didn't bring them, and I even asked you, but you didn't. We are following the rules and laws. How come these laws do not apply?" (*Id.* at 11).

Petitioner also requested two witnesses in his defense – a Pakistani intelligence agent and a Yemeni government official – to prove his actual innocence of any wrongdoing. *Id.* at 1. Petitioner explained the critical need for these witnesses to the CSRT panel:

> [T]he interrogator from the Pakistani intelligence said yes, all of what [Petitioner] said is correct and all he said about his story in Pakistan is correct and therefore that is why we are going to give him back his passport that we took. . . . I was really surprised that the American intelligence refused all of those proofs and they said no. We still need him, they said, and then they took me [to Guantánamo]. That's why for these reasons I chose the Pakistani government as a witness because they have all this information and they know everything. I also chose the Yemeni government because I'm sure my government will confirm what the Pakistanis are saying. That's why I am very confident that will be the case. I have great confidence that you will find out too, that what I'm really saying is true and that I really don't have anything to do with all these things that are being said about me.

Id. at 4.

[20] Another allegation against Petitioner was his purported admission that he was a "terrorist," which the military officers on the CSRT and ARB panels apparently realized was a mistake resulting from a translating error.

In addition, Petitioner requested the opportunity to examine documentary evidence against him and to submit his own evidence, including documents from his family concerning his educational background:

- "I wanted to ask my family to gather information and to help me prove that I finished high school, and that I was fine, to prove that all this is not funded [sic], not based on any reasonable proof. That's what I was trying to get my family to give me." (*Id.* at 3); and

- "I'm talking about the videos [i.e., the letter and photograph]. I heard in the beginning that you said, you said you could not bring these people, the people that saw me . . . and said such things about me." (*Id.* at 11).

In the end, the CSRT panel denied each and every one of Petitioner's repeated requests to call or confront witnesses, to see the evidence against him, and to obtain and present his own evidence.[21] The importance of the deprivation of Petitioner's right to confront the evidence against him – and, in particular, his right to cross-examine witnesses against him – cannot be understated. *See Crawford v. Washington*, 541 U.S. 36, 49 (2004) ("It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.") (quoting *State v. Webb*, 2 N.C. 103, 104 (1749)); *see also Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2798 n.67 (2006).

After being detained without charge or trial for three years at the time of his CSRT, *see id.* at 10, Petitioner summed up his frustration with the process as follows:

> I have no means, or no ways of defending myself; I have no lawyer. I don't have any way to get witnesses to prove that I am really innocent of all this. I was hoping that all the time that I have been here, that they would look, look at my file, and search the information for them to prove, and to read and get to a reasonable conclusion to clear me from all this. . . .

[21] Petitioner's requests to examine the purported letter from the Taliban official and the photograph concerning the alleged Al Qaeda lieutenant – perhaps the most critical evidence against him – were denied because the information had "national security implications for the United States and cannot be released." *Id.* at 11.

> I wasn't given the chance to prepare my defense, or help myself, gather witnesses or to see if this is not correct or not true. If you check the Pakistani government and the Yemeni government, they know everything about me. All I wanted was just for you to look deeply into my case and to take into consideration all these things. I would like America not to be unjust or judge me at all, really, because that will reflect badly on the Americans. They preach justice and they don't want to be unjust against anybody or to do wrong to anybody and that's what they swore to do. You and I hope that you will be just.

Id. at 3.

Petitioner fared no better in his ARB proceeding. Again, he made repeated requests to call or confront witnesses, to see the evidence against him, and to obtain and present his own evidence:

- "Detainee said if [an alleged Al Qaeda lieutenant] saw him in a photo, bring that person so he can meet him. The Detainee said it is possible that the person who saw his photo may have made a mistake." (Ex. F at 4);

- "In response to the allegation that the Detainee was sent a personal greeting from the Taliban Deputy Minister of Intelligence, the Detainee laughed and asked, 'where is the letter, and what is the address it was sent [to]?' The Detainee said he has never received the letter. The Detainee said he never knew or heard of the Taliban until the Tribunal." (*Id.*);

- "I would like for you to consider, that I could not give you [I did not give you] enough information is because I did not have any documentation. [Because] they did not allow me to send or receive any letters. Three years I have not been able to contact my family, my attorney or even exercise my rights. And I wish that you consider that in your decision." (*Id.* at 5-6) (alterations in original);

- "There was no proof to show that I am an individual that is trying to attack somebody. . . . And maybe they meant to capture somebody else, but they captured me instead. I hope that they don't make a mistake." (*Id.* at 6);

- "Did you find this letter [from the Taliban official]?" (*Id.* at 8)[22];

- "Whoever told you [that I got a letter from the Taliban official]; ask him to give you the letter. . . . I don't know who would say something like that. This

[22] The ARB panel's only response was "[w]e can discuss that in the closed session." *Id.*

question should not be directed to me. You should look for that yourself. . . . Where's the source of this lie?" (*Id.* at 9); and

- *"[Petitioner's personal representative at the CSRT] indicated they could not find any proof, that I am a member or I belong to either the Taliban or al-Qaeda but he said 'we are looking for something, regardless what it is to connect me to them.' I told them, is this what you consider justice? The guy said 'no.'"* (*Id.* at 8) (emphasis added).

As with the CSRT, all of these requests were denied by the ARB panel.

Petitioner further explained that he had discussed the ARB process with other detainees, who considered it a sham:

> They told me about it. They say this is nothing more than a theatrical thing. It's formality. They're just going through this thing and everybody is laughing at the whole process. But I made up my mind that I wanted to attend the ARB despite what they said. That's why I attended the Tribunal and I'm here now. . . .
>
> Everybody is saying that these ARBs are nothing but a formality. These are not interrogators and even you don't know that this is just formality. *They, the soldiers and interrogators, said it was a matter of paperwork and paper pushers and the American politics is just playing its role and that's true. You can check with your countrymen, you'll find out that's true.* A lot of people, they end up leaving the camp here without having to attend the ARB or the Tribunal. They were accused of larger crimes than myself. You people know that as well.

Id. at 10 (emphasis added). Sadly, Petitioner was entirely correct.[23]

In sum, these CSRT and ARB summaries bear out the allegations included in the Petition: (1) that a CSRT is a non-adversary hearing conducted pursuant to rules and procedures that are unfair in design and biased in practice; (2) that these rules and procedures in practice and effect virtually compel the CSRT conclusion that the detainee is an "enemy combatant"; and (3)

[23] Wholly apart from Petitioner's inability to present evidence during the ARB process, that process does not provide an adequate substitute for habeas because it has nothing to do with a detainee's designation as an "enemy combatant." The purpose of the ARBs, according to Respondents, is to determine whether "enemy combatants" may be released despite that designation. ARB determinations are also not reviewable by the courts. *See* ARB Memo and Procedures § 1.c (July 14, 2006). There is no reconsideration of the underlying CSRT determination.

that they are incapable of determining who is or is not properly detained by Respondents as an "enemy combatant." Petition ¶¶7-8. The limited review of the CSRTs that is available under the DTA and MCA simply does not come close to providing the full measure of process, rights and remedies required by habeas. The withdrawal of habeas jurisdiction therefore violates the Suspension Clause and is void.

II. THE MCA IS UNCONSTITUTIONAL BECAUSE IT INVADES THE CORE FUNCTION OF THE JUDICIARY IN VIOLATION OF THE SEPARATION OF POWERS

The jurisdictional provisions of the MCA are also unconstitutional because they offend the separation of powers principles articulated in *United States v. Klein*, 80 U.S. 128 (1872), by unconstitutionally interfering with the core judicial functions of Article III courts.

In *Klein*, Congress passed a law providing that "no pardon [or amnesty granted by the President] shall be admissible in evidence in support of any claim against the United States in the Court of Claims," and "when judgment has been already rendered [in the Court of Claims in favor of a claimant based on a Presidential pardon], the Supreme Court, on appeal, shall have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction." *Id.* at 143. The Court acknowledged that "[u]ndoubtedly the legislature has complete control over the organization and existence of that court and may confer or withhold the right of appeal from its decision." *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 manipulation of its jurisdiction was not a proper exercise of legislative authority because it invaded the judicial function. 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 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.

Here, the MCA operates in a similar fashion. It 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 Conventions as a source of rights." MCA § 948b(g). This is directly analogous to the statute in *Klein*, which attempted to prevent courts from giving effect to a presidential pardon. As in *Klein*, the MCA's prohibition on giving effect to Geneva Convention rights is tantamount to "allowing one party to a controversy to decide it in its own favor." And the MCA does so here with respect to the decision of the Supreme Court in *Hamdan*, which finally resolved the question of whether Common Article 3 of the Geneva Conventions applies in these cases.

In addition, by stripping the courts of jurisdiction over habeas claims filed by alleged members of the "Taliban, al Qaeda or associated forces" held at Guantánamo, MCA § 948a(1)(A)(i), the MCA "prescribe[s] a rule for the decision of a cause in a particular way" in precisely the same manner as the jurisdictional strip in *Klein*. It is an unconstitutional "means to an end" because the Taliban, Al Qaeda and associated forces are defined by the statute to be unlawful combatants, and the courts are directed that that determination is "dispositive." MCA §§ 948a(1)(A), 948d(c). Indeed, even if there were to be a subsequent judicial review of this determination under Section 7 of the MCA (and, again, there is no assurance of one given that

Section 7 purports to strip habeas jurisdiction for anyone "awaiting" an enemy combatant status determination), Section 5 of the MCA would block any effort to seek redress because it provides that Geneva Convention rights – even those concerning combatant immunity as a prisoner of war ("POW"), for example – cannot be invoked. This is directly analogous to the situation in *Klein*, where "the court [was] forbidden to give the effect to evidence which, in its own judgment, such evidence should have." 80 U.S. at 147.

There are a number of other ways in which the MCA attempts to dictate a judicial decision. The MCA's definition of "unlawful enemy combatant," for example, is a jurisdictional prerequisite for a military commission and, concomitantly, a prejudgment of guilt for any detainee hauled before a commission (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 ("GCIII"). 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 [CSRT]." 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 GCIII as persons entitled to POW status. *Compare* MCA § 948a(2), *with* GCIII, Art. 4.[24] And POWs are lawful combatants. Thus, by refusing to recognize as

[24] As Judge Green explained:

> Article 4 of the Third Geneva Convention defines who is considered a "prisoner of war" under the treaty. Paragraph (1) provides that the term "prisoners of war" includes "members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces." As provided in Paragraph (2), the definition of "prisoners of war" also includes "members of other militias and members of other volunteer corps, including those of organized resistance movements," but only if they fulfill the following conditions: "(a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance;

lawful combatants all persons entitled to POW status under the GCIII, the MCA not only violates the GCIII (by 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, *see* GCIII, Art. 102), it also completely decides the controversy in favor of the prosecution in any military commission trial because the only defendants before the commissions are those who have already been determined to be "unlawful combatants." Without "combatant immunity" detainees are guilty by definition (just as in *Klein* people who had accepted a Presidential pardon were statutorily defined as guilty of disloyalty and were penalized rather than allowed the immunity conferred by the pardon).

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)(ii). This definition is 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. 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 Section 5 of MCA (prohibiting any person from invoking the Geneva Conventions as a source of law in any American court), the effect of the habeas strip in Section 7 of the MCA and the inadequate substitute provided by the statute is to "decide the controversy"

> (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war."

In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 479-80 (D.D.C. 2005), *appeal pending*. "Nothing in the Convention itself or in Army Regulation 190-8 authorizes the President of the United States to rule by fiat that an entire group of fighters covered by the Third Geneva Convention falls outside of the Article 4 definitions of 'prisoners of war.'" *Id.*

against any detainee who might have a defense based on Geneva Convention rights. This is a particularly egregious invasion of the judicial function. *See Hamdan*, 126 S. Ct. at 2796; *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 be deemed constitutionally invalid. *Klein*, 80 U.S. at 147.

III. THE MCA DOES NOT PRECLUDE HABEAS RELIEF FOR CLAIMS UNDER THE GENEVA CONVENTIONS OR FOR VIOLATIONS OF CUSTOMARY INTERNATIONAL LAW

Because Section 5 of the MCA attempts to block detainees' efforts to invoke their Geneva Convention rights in any federal or state court, it risks placing this country in default of its obligations under these treaties and customary international law, and makes the judicial inquiry authorized by the MCA an inferior process to that which has historically been available through habeas. For this reason, the MCA must be read not to preclude habeas relief for claims under the Geneva Conventions or for violations of customary international humanitarian law.

Section 5(a) of the MCA provides, in relevant part, that "[n]o 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 . . . is a party as a source of rights in any court of the United States or its States or territories. *See also* MCA § 948b(g) ("No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights."). This section prohibiting invocation of the Geneva

Conventions contains no indicia of retroactivity and thus plainly does not apply to pending actions, including this case.

In addition, the qualifying phrase "as a source of rights" would appear to have meaning only if construed to refer to rights afforded exclusively by the Geneva Conventions, and not to rights afforded by other sources of law, regardless of whether the rights are also afforded by the Geneva Conventions. Section 5(a) of the MCA thus should be read not to bar enforcement of rights afforded by the laws of war or customary international law, even though such law may incorporate rights afforded by the Geneva Conventions, and even though the Geneva Conventions may incorporate rights afforded by such law. *See Hamdan*, 126 S. Ct. at 2793-98.[25]

Thus construed, Section 5(a) of the MCA would not violate the Suspension Clause to the extent that other law also affords the rights at issue. Such a construction comports with "the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction," *INS v. St. Cyr*, 533 U.S. 289, 298 (2001), and also with the canon that statutes "ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see also Weinberger v. Rossi*, 456 U.S. 25, 32 (1982).

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[25] *See Ali v. Rumsfeld*, No. 06-CV-145 (TFH) (D.D.C. Nov. 28, 2006) (dkt. no. 33); *see also* Theodor Meron, *The Geneva Conventions as Customary International Law*, 81 Am. J. Int'l L. 348 (1987). The minimal rules governing all armed conflicts are set forth in Common Article 3 of the four Geneva Conventions, which bars violence to life and person, including murder, mutilation, cruel treatment, torture and "outrages on personal dignity." *See*, *e.g.*, Michael J. Matheson, *Session One: The U.S. Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions* 2 Am. U. J. Int'l L. & Pol'y 419, 430-31 (1987) (Common Article 3 is a part of generally accepted customary international law); International Committee of the Red Cross, Customary International Humanitarian Law (2005) (Rules) (discussing sources of customary international law in addition to the Geneva Conventions). In addition, U.S. courts have held that violations of Common Article 3 are violations of the law of nations and justiciable under the Alien Tort Statute. *See*, *e.g.*, *Kadic v. Karadzic*, 70 F.3d 232, 242-43 (2d Cir. 1995).

However, to the extent that Section 5(a) of the MCA may be interpreted to bar habeas review of otherwise valid non-constitutional claims in pending cases like the instant case, including habeas review of Geneva Conventions-based claims, it would violate the Suspension Clause because those treaties have the status of supreme federal law within the meaning of Article VI of the Constitution and 28 U.S.C. § 2241(c)(3), and thus provide a substantive source of rights that may be vindicated through habeas. *See Breard v. Greene*, 523 U.S. 371, 376 (1998); *United States v. Alvarado-Torres*, 45 F. Supp. 2d 986, 988 n.3 (S.D. Cal. 1999) ("as law of the land, courts must give a treaty the same consideration as a federal statute"), *aff'd*, 230 F.3d 1368 (9th Cir. 2000).

IV. THE MCA IS AN UNLAWFUL BILL OF ATTAINDER

Laws violate the Attainder Clause, U.S. Const. art. I, § 2, cl. 3, 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.'"). The jurisdiction-stripping provision of Section 7 of the MCA targets only "aliens" who by virtue of Respondents' own designation are deemed "unlawful enemy combatants." *See also* MCA § 948a(1). There can be no real question that this language in the MCA, like the DTA before it, is specifically targeted at Guantánamo detainees, though it may be applied to non-citizens elsewhere as well. *See Foretich*, 351 F.3d at 1217 (specificity element satisfied by describing affected persons without naming them).

Furthermore, the definition of "unlawful enemy combatant" includes "a person who is part of the Taliban, al Qaeda, or associated forces." MCA § 948a(1)(A)(i). But any Taliban fighters detained at Guantánamo were part of the armed forces of a sovereign state when

American military personnel invaded Afghanistan in the fall of 2001. The MCA is therefore a legislative decree that strips members of that military force of the protections and immunities that must be afforded to them under the laws of war. As such, it is an unlawful Bill of Attainder. *See Pierce v. Carskadon*, 83 U.S. 234, 239 (1872) (declaring lack of access to the courts an unlawful attainder); *see also United States v. Lovett*, 328 U.S. 303, 317-18 (1946) (noted that the Attainder Clause, at its core, is intended to prevent trial by unlawful means and citing a case involving trial by military commission).

V. THE MCA'S WITHDRAWAL OF HABEAS JURISDICTION VIOLATES EQUAL PROTECTION

The right of equal access to the courts is a fundamental right under equal protection, and that right is taken away by the MCA. *See 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, 522-23 (2004) ("the right of access to the courts" is subject to "more searching judicial review" under equal protection). Moreover, the line that divides who does and does not receive habeas review under Section 7 of the MCA is based on a patently unconstitutional distinction – alienage. *See Graham v. Richardson*, 403 U.S. 365, 372 (1971) ("classifications based on alienage . . . inherently suspect and subject to close judicial scrutiny"). As the text of the MCA makes clear, it is not only those detainees like Petitioner, whom Respondents have imprisoned without charge for several years, who have their habeas rights removed. The MCA deprives those rights to all non-citizens – even lawful permanent residents of the United States – and thus violates equal protection. The MCA's withdrawal of habeas jurisdiction is therefore unconstitutional on this basis as well and must be stricken.

* * *

For all of these reasons, Respondents' motion to dismiss for lack of jurisdiction should be denied. Respondents' alternate request to transfer this case to the Court of Appeals, pursuant to 28 U.S.C. § 1631, based on its exclusive jurisdiction under the DTA, *see* Gvt. Br. at 15-17, should likewise be denied.

VI. THE COURT SHOULD SCHEDULE A HABEAS HEARING AND GRANT ADDITIONAL RELATED RELIEF

Because the withdrawal of habeas jurisdiction under the DTA and MCA is unconstitutional, there is no reason to delay consideration of the merits of the Petition. Petitioner thus moves for an order scheduling a habeas hearing. He also requests additional related relief, including expedited entry of the protective order, access to his counsel, and production of a factual return to his habeas petition.[26]

A. Expedited Entry of the Protective Order and Access to Counsel

As indicated above, it is clear from the unclassified summaries of Petitioner's CSRT and ARB proceedings that he wants – and desperately needs – access to his counsel in order to challenge the legality of his continuing, indefinite detention. Indeed, based on the unclassified summaries it appears that Petitioner may currently be detained as an enemy combatant solely as a result of mistaken identity. He may very well be "actually innocent" of any offense, as he maintained throughout the CSRT and ARB proceedings. *See supra* Part I.B.5. As this Court is also aware, Petitioner may not meet or otherwise communicate with his counsel until the protective order first entered by Judge Green in the *In re Guantanamo Detainee Cases*, 344 F. Supp. 174 (D.D.C.), is also entered in this case.[27] Petitioner therefore respectfully

[26] Respondents object to these requests. *See* Gvt. Br. at 16 n.11.

[27] *See* Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba (Nov. 8, 2004); Order Addressing Designation

requests that the Court order expedited entry of the protective order and direct Respondents to provide him access to his counsel as soon as possible.[28]

The Court plainly has the power to order entry of the protective order and grant counsel access to Petitioner because the withdrawal of habeas jurisdiction under the DTA and MCA is unconstitutional. Even if the Court were to conclude otherwise, that would not prevent the Court from granting this limited form of relief. Courts have entered the protective order more than forty times since enactment of the DTA. *See* Ex. G (attached hereto). In addition, Courts have entered the protective order several times since enactment of the MCA, including in cases like this that were filed between enactment of the DTA and MCA. *See*, *e.g.*, *Al-Zarnouqi v. Bush*, No. 06-CV-1767 (D.D.C. Dec. 4, 2006) (Urbina, J.) (order attached hereto as Ex. H); *Hentif v. Bush*, No. 06-CV-1766 (D.D.C. Nov. 21, 2006) (Kennedy, J.); *Saleh v. Bush*, No. 06-CV-1765 (D.D.C. Nov. 17, 2006) (Kennedy, J.); *Lal v. Bush*, No. 06-CV-1763 (D.D.C. Oct. 29, 2006 (Kollar-Kotelly, J.); *see also Feghoul v. Bush*, No. 06-CV-618 (D.D.C. Oct. 31, 2006) (Roberts, J.) (petition filed before, but docketed after, enactment of the DTA) (order attached hereto as Ex. I).

As Judge Urbina recently explained in *Al-Zarnouqi*, "[d]espite the lack of finality regarding the issues on appeal [ ] it is hardly sensible to withhold or frustrate something that no one doubts is petitioner's right – a meaningful communication with counsel regarding the factual basis of petitioner's detention. Allowing petitioners to meet with their lawyers is not the type of interim relief that even remotely risks infringing on the Court of Appeals' possible jurisdiction."

Procedures for "Protected Information" (Nov, 10, 2004); Order Supplementing and Amending Filing Procedures Contained in November 8, 2004 Amended Protective Order (Dec. 13, 2004).

[28] Counsel have obtained the necessary security clearances to meet with Petitioner under the terms of the protective order; and they intend to meet with him as soon as possible.

Ex. H, at 2 (quoting *Feghoul*; citations and internal quotation marks omitted). Moreover, even if this case ultimately must be litigated in the Court of Appeals under the DTA and MCA, Petitioner will certainly require and – as Respondents have conceded – be granted access to counsel. Accordingly, there is no reason to delay entry of the protective order or counsel access.

B. Production of a Factual Return to the Petition

Petitioner likewise seeks production of a factual return to the Petition, which at least two Courts have ordered since enactment of the MCA. *See Feghoul*, No. 06-CV-618 (D.D.C. Oct. 31, 2006) (Ex. I); *Lal v. Bush*, No. 06-CV-1763 (D.D.C. Oct. 29, 2006) (Kollar-Kotelly, J.) (requiring production within thirty days of ruling by Court of Appeals). He specifically requests copies of all classified and unclassified records from his CSRT and ARB proceedings, including without limitation any audio recordings or verbatim transcripts of those proceedings and any interim or final decisions of those proceedings. Like entry of the protective order and counsel access, there can be no dispute that Petitioner is entitled to receive such information in order to fully and adequately challenge the factual and legal basis for his enemy combatant designation before a neutral decisionmaker. *See Hamdi*, 542 U.S. at 533. As it stands now, Petitioner has not even received the most basic notice concerning the basis for his continuing, indefinite detention except for the limited information contained in the two unclassified summaries of his CSRT and ARB proceedings, which is plainly insufficient to satisfy the due process requirements of *Hamdi*.

Moreover, we note that Respondents have already provided the type of information that Petitioner seeks here to members of the media – *some of whom previously attended CSRT and/or ARB proceedings* – who recently broadcast audio excerpts of such hearings on National Public Radio. *See* Jackie Northam, *Tapes Provide First Glimpse of Secret*

Gitmo Panels, NPR Morning Ed. (Nov. 21, 2006), *available at* http://www.npr.org/templates/story/story.php?storyId=6514923. Accordingly, there can be no good reason why this information should not also be provided to counsel for Petitioner. Respondents' refusal to provide Petitioner with even the most limited information about the basis for his detention can only be seen as part of a campaign to frustrate and delay judicial scrutiny.

C. The Court Should Schedule a Habeas Hearing

Finally, the Court should schedule a hearing on the merits of the Petition. As Your Honor noted in a recent decision:

> [T]he Court has felt compelled, for purposes of judicial economy and efficiency, to grant Respondents' Motions to stay proceedings of the Guantanamo Bay cases until completion of related appeals. The longer appellate proceedings drag on, the more problematic it becomes as to whether a stay serves the interest of justice. It is often said that 'justice delayed is justice denied.' Nothing could be closer to the truth with reference to the Guantanamo Bay cases."

Mem. Order at 3, *Razak v. Bush*, No. 05-CV-1601 (D.D.C. Dec. 1, 2006) (dkt. no. 41). While the Court nonetheless stayed that case pending resolution of the *Al Odah/Boumediene* appeals, this case is distinct and should not be stayed for two reasons.[29]

First, the consolidated appeals will not necessarily resolve the serious constitutional issues raised here. The cases now on appeal were all filed long before enactment of the DTA, and thus fall squarely outside its prospective withdrawal of habeas jurisdiction. *See* DTA §§ 1005(e)(1), (h)(1). As to the MCA, the petitioners on appeal have argued that under ordinary canons of statutory construction the MCA's withdrawal of habeas jurisdiction is not retroactive and thus not applicable to them. *See also Hamdan v. Rumsfeld*, No. 04-CV-1519 (JR) (dkt. no. 78, at 10-15) (including statutory non-retroactivity argument). If they are correct, this argument may avoid the need for the Court of Appeals to address some (or all) of the

[29] To the extent this case may have already been stayed, Petitioner moves to lift that stay.

constitutional arguments raised here. But those constitutional arguments may not be avoided in this case because it was filed after enactment of the DTA and thus falls squarely within its purported withdrawal of jurisdiction, regardless of the retroactive application of the MCA. *See* DTA §§ 1005(e)(1), (h)(1).

Second, there is otherwise no basis for this Court to stay consideration of the merits of the Petition pending appeals in other habeas cases. Indeed, the Habeas Corpus Act itself requires that "[w]hen the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed," and directs that the Court "shall summarily hear and determine the facts, and dispose of the matter as law and justice require." 28 U.S.C. § 2243. No good cause exists to stay this case.

In deciding whether to grant a stay pending resolution of an appeal in another case, a court "must weigh competing interests and maintain an even balance." *Landis v. N. Am. Co*., 299 U.S. 248, 254-255 (1936). "[T]he suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Id.* at 255; *see Dellinger v. Mitchell*, 442 F.2d 782, 787 (D.C. Cir. 1971) ("Any protracted halting or limitation of plaintiffs' right to maintain their case would require not only a showing of 'need' in terms of protecting the other litigation involved but would also require a balanced finding that such need overrides the injury to the parties being stayed. This consideration is of particular importance where the claim being stayed involves a not insubstantial claim of present and continuing infringement of constitutional rights. No such consideration or balancing was provided by the District Court.").

Because this is a habeas case, it is no answer for Respondents to cite to the usual stay jurisprudence, which applies abuse-of-discretion review to the unremarkable proposition that a trial court has broad flexibility to manage its general civil docket. *See Yong v. INS*, 208 F.3d 1116, 1119 (9th Cir. 2000) (explaining that the standard of review in a habeas proceeding "is somewhat less deferential than the flexible abuse of discretion standard applicable in other contexts"). Habeas is fundamentally different. The statutory provisions for prompt returns, immediate hearings, and summary disposition of habeas cases expressly require that petitions must be heard and decided promptly. 28 U.S.C. §§ 2241, 2243; *see Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 490 (1973) (noting the interest of the prisoner and of society in "preserv[ing] the writ of habeas corpus as a swift and imperative remedy in all cases of illegal restraint or confinement") (internal quotations and citation omitted); *Yong*, 208 F.3d at 1120 ("[H]abeas proceedings implicate special considerations that place unique limits on a district court's authority to stay a case in the interests of judicial economy."); *Ruby v. United States*, 341 F.2d 585, 587 (9th Cir. 1965) ("The application for the writ usurps the attention and displaces the calendar of the judge or justice who entertains it and receives prompt action from him within the four corners of the application. . . . One who seeks to invoke the extraordinary, summary and emergency remedy of habeas corpus must be content to have his petition or application treated as just that and not something else."); *Van Buskirk v. Wilkinson*, 216 F.2d 735, 737-38 (9th Cir. 1954) ("[The Writ] is a speedy remedy, entitled by statute to special, preferential consideration to insure expeditious hearing and determination.").

In habeas proceedings, stays are substantive, not procedural. Delay means more indefinite imprisonment, and that is the harm *itself*. So grievous is that harm, and so fundamental the right to be protected from it, that Congress limited the right to impair habeas

corpus in the Suspension Clause of the Constitution. Even an adjudicated criminal alien who has never made an entry into the United States, and has no right in law to be here, must be released into the United States when faced with the prospect of indefinite detention. *See Clark v. Martinez*, 543 U.S. 371, 386 (2005).

Yong is directly on point with this case. It held that the entry of a lengthy and indefinite stay in a habeas case pending an appeal in a similar case is unlawful. *See* 208 F.3d at 1120-21 ("The stay . . . placed a significant burden on Yong by delaying, potentially for years, any progress on his petition. Consequently, although considerations of judicial economy are appropriate, they cannot justify the indefinite, and potentially lengthy, stay imposed here."). In *Yong*, a former Cambodian citizen filed a habeas petition challenging his indefinite detention after the United States was unable to promptly negotiate an agreement for his repatriation to Cambodia. *Id.* at 1118. Instead of ruling on the merits of his petition, the district court entered a stay pending resolution of similar issues on appeal of a different case. *Id*. Recognizing that the writ is intended to be a "swift and imperative remedy in all cases of illegal restraint of confinement," *id*. at 1120 (internal quotations and citations omitted), the Ninth Circuit vacated the five-month old stay order and remanded the case for further proceedings, *id*. at 1121. Here, as in *Yong*, a prolonged stay would impermissibly restrict the writ and should not be imposed.

The need for a prompt hearing is never greater than where, as here, a petitioner has been afforded no judicial review. *See Rasul*, 542 U.S. at 473-75; *St. Cyr,* 533 U.S. at 301; *Johnson v. Rogers*, 917 F.2d 1283, 1284 (10th Cir. 1990) (recognizing that if delay in deciding a habeas petition, absent good reason, were routinely permissible, "the function of the Great Writ would be eviscerated"); *Jones v. Shell*, 572 F.2d 1278, 1280 (8th Cir. 1978) ("The writ of habeas corpus, challenging illegality of detention, is reduced to a sham if the trial courts do not act

within a reasonable time."); *Cross v. Harris*, 418 F.2d 1095, 1105 n.64 (D.C. Cir. 1969) ("This is a habeas corpus proceeding, and thus particularly inappropriate for any delay.").

* * *

The Center for Constitutional Rights filed the first habeas petition on behalf of Guantánamo detainees in February 2002. That case proceeded to the Supreme Court, which held in *Rasul* (and again in *Hamdan*) that the detainees have the right to challenge their detention through habeas. The Court also instructed the district courts to consider the "merits" of those petitions in the first instance. That has not happened.

Nearly five years after the first habeas case was filed, and after two Supreme Court decisions in favor of the detainees, Respondents continue to imprison more than 400 men virtually *incommunicado*, without charge, and without any meaningful opportunity to challenge the legality of their continuing detention. The results have been predictable: three detainees have died; more than eighty detainees suffer from serious mental illnesses precipitated or exacerbated by their indefinite detention; and many others have suffered and continue to suffer untold physical and psychological harm as a result of their hopeless circumstances.[30] This is not justice. For justice finally to be done at Guantánamo, this Court must consider the merits of the Petition.

[30] In some cases the harm may be so great as to impair a detainee's ability ever to proceed with a hearing on the merits of his petition. *See*, *e.g.*, Emergency Motion to Supplement Record on Appeal, *Kiyemba v. Bush*, Nos. 05-5487, *et al.* (D.C. Cir. Sept. 1, 2006) (with redacted supporting affidavit) (attached hereto as Ex. J).

Conclusion

Petitioner respectfully requests that the Court deny Respondents' motion to dismiss and grant his cross-motion in its entirety.

Dated: New York, New York
December 11, 2006

Respectfully submitted,

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