BARRY M. KAMINS
PRESIDENT
Phone: (212) 382-6700
Fax: (212) 768-8116
bkamins@nycbar.org

March 6, 2007

Hon. Patrick J. Leahy, Chairman
Senate Committee on the Judiciary
433 Russell Senate Office Building
Washington, DC 205109-4502

Hon. John Conyers, Jr., Chairman
House Judiciary Committee
2426 Rayburn House Office Building
Washington, DC 20515-2214

Hon. Arlen Specter, Ranking Member
Senate Committee on the Judiciary
711 Hart Senate Office Building
Washington, DC 20510-3802

Hon. Lamar S. Smith, Ranking Member
House Judiciary Committee
2409 Rayburn House Office Building
Washington, DC 20515-4321

Re: Restoration of Habeas Corpus and Judicial Enforcement of the Geneva Conventions

Dear Senator Leahy, Senator Spector, Representative Conyers and Representative Smith:

The Association of the Bar of the City of New York ("the Association") submits the attached Report urging Congress to amend the Military Commissions Act of 2006 ("MCA") by eliminating restrictions it imposes on habeas corpus jurisdiction and restoring the federal habeas corpus statute as it read prior to the enactment of the Detainee Treatment Act ("DTA").[1] The Report also asks that Congress amend the MCA by eliminating provisions that interfere with the judiciary's role in interpreting and enforcing the Geneva Conventions.

The new Congress has commenced its work with the declared interest in promoting respect for the rule of law as an integral part of our national security agenda. We applaud this new emphasis. The enclosed Report addresses the issues that the Association believes require Congress' most immediate attention. We recognize a number of other important issues raised by the MCA and Administration practices also deserve attention in the effort to restore our Nation's reputation as a model for justice and the rule of law. Accordingly, in the next months the Association also will be submitting the results of its study and analysis of several of those issues.

---

[1] Founded in 1870, the Association is an independent non-governmental organization with a membership of more than 22,000 lawyers, judges, law professors and government officials, principally from New York City but also from throughout the United States and from 50 other countries.

Restoring Habeas Corpus and the Judiciary's Role
in Enforcing the Geneva Conventions

As Thomas Jefferson emphasized in his First Inaugural Address, "freedom of the person under the protection of habeas corpus" is one of the six "essential principles of our Government." The enclosed Report reflects our deep concerns about the provisions of the MCA, and predecessor provisions in the DTA, that purport to eliminate habeas corpus jurisdiction for alien detainees labeled "enemy combatants." The MCA amends the federal habeas corpus statute to bar non-citizens from petitioning the courts for habeas corpus to challenge the lawfulness of their detentions if they were "determined by the United States to have been properly detained as enemy combatants or are awaiting such determination". The Government has attempted to give these provisions the broadest application, for example maintaining that an alien lawfully residing in the United States may be arrested in his home in the United States and held indefinitely without any opportunity to judicially challenge his detention merely because the President labels him an "enemy combatant." Most recently, the D.C. Circuit Court of Appeals read the MCA to deprive Guantánamo detainees of any right to petition for habeas corpus,[2] thus nullifying the rights previously established by the Supreme Court in *Rasul*.[3]

The act of stripping detainees of the Great Writ is at odds with the most fundamental Anglo-American traditions of justice and has been viewed around the world as a departure from our commitment to equal justice under law for all. The enclosed Report, therefore, urges Congress to restore habeas corpus jurisdiction as it existed prior to the MCA and DTA and as it was interpreted in *Rasul*.

The Report also addresses MCA provisions that undermine the judiciary's role in enforcing and interpreting the Geneva Conventions. As the Report explains, these provisions effectively render the Conventions unenforceable except as a matter of Presidential grace. Senators Warner, McCain and Graham expressed concern that the White House's initial formulation of the MCA would undermine America's commitment to the Geneva Conventions and related law. Fidelity to the values and the letter of the Geneva Conventions means fidelity to our own values concerning the humane treatment of prisoners, forged in the crucibles of our Revolution and Civil War. These provisions cast doubt on our commitment to these values. Moreover, we embrace the Founders' view that it is the special province of the courts to interpret and enforce our treaty obligations. Accordingly, our Report urges Congress to strike all provisions of the MCA which purport to restrict reliance upon the Geneva Conventions as a source of law and guidance for the courts.

We note that proposed legislation put forward by Senators Dodd, Leahy, Feingold and Menendez entitled the "Restoring the Constitution Act of 2007" would achieve many of the objectives we support in our Report.

Other Concerns

The Report transmitted today does not reflect the full scope of our engagement with issues in this area. We will be addressing several further concerns in greater detail in the near future:

Procedures for Military Commissions. The MCA would allow the use in trials before military commissions of testimony obtained by coercion, as well as hearsay offered by the prosecution unless an accused can show that the hearsay is unreliable. This is an almost impossible burden because the accused is denied access to information about the sources and methods by which the hearsay was obtained and will have no way to challenge it. Congress

---

[2] Boumediene v. Bush, No. 5062, Al-Odah v. Bush, No. 5064 (D.C. Cir. February 20, 2007)

[3] Rasul v. Bush, 542 U.S. 466 (2004)

should reexamine these provisions, which conflict with our most rudimentary concepts of fair process.

The Department of Defense has also offered rules of procedure to govern proposed military commissions. It prepared these rules in secret and spurned offers from this and other bar associations to review and comment on them. We expect to furnish you shortly with our comments on these rules. In the meantime, we encourage Congress to convene hearings on these rules and allow the opportunity for comment which the Department of Defense has sought to avoid.

Defining War Crimes. Another area of concern is the practice of introducing in the MCA new definitions of "war crimes" that reach only a subset of the war crimes as defined by the War Crimes Act of 1996 and that exist today under the Geneva Conventions, in particular as regards the interpretation and enforcement of Common Article 3. The Association urges Congress to carefully reconsider these deviations and return to prior U.S. practice.

The Concept of Enemy Combatant. The Administration has greatly expanded the concept of "enemy combatant" as a means of indefinitely imprisoning persons allegedly suspected of engaging in or supporting terrorism without charges and without any of the protections of the criminal justice system. This concept -- originally used to allow the detention of enemy soldiers captured during hostilities on a battlefield -- has been so stretched by the Administration that, as it acknowledged in court proceedings, it could even include a "little old lady in Switzerland who writes checks to what she thinks is a charity in Afghanistan but … really is a front for al-Qaeda." In Re Guantánamo Detainee Cases, 355 F.Supp. 2d 443, 475 (D. D.C. 2005). We hope to provide our views on this problem in the near future.

Extraordinary Renditions and Black Sites. We urge Congress to investigate the practice known as "extraordinary renditions", which involves the kidnapping and transfer of suspected terrorists for interrogation in countries known to engage in torture. The cases of Maher Arar and Khaled El Masri are notorious examples of this activity that violates domestic and international law. Its damaging effect on our reputation and international relationships is evidenced by recent criminal prosecutions in Germany and Italy indicting CIA agents and condemnation by the Council of Europe.

We hope the attached Report is useful. We look forward to supporting Congress' work on these issues in the coming session.

Respectfully submitted,

Barry Kamins

Barry M. Kamins

Enclosure

cc: Senate Armed Services Committee:
Sen. Carl Levin, Chairman
Sen. John McCain, Ranking Member

Senate Select Committee on Intelligence:
Sen. John D. Rockefeller IV, Chairman
Sen. Christopher S. Bond, Vice Chairman

House Armed Services Committee:
Rep. Ike Skelton, Chairman
Rep. Duncan Hunter, Ranking Member

House Permanent Select Comm. on Intelligence
Rep. Silvestre Reyes, Chairman
Rep. Peter Hoekstra, Ranking Member

Sen. Christopher Dodd
Sen. Russell D. Feingold
Sen. Charles E. Schumer
Sen. Hillary Rodham Clinton
Rep. Gary Ackerman
Rep. Joseph Crowley
Rep. Vito Fossella
Rep. Carolyn Maloney
Rep. Jerrold Nadler
Rep. Nydia M. Velazquez
Rep. Anthony D. Weiner
Rep. Yvette D. Clarke
Rep. Elliot Engel
Rep. Gregory W. Meeks
Rep. Charles B. Rangel
Rep. Jose E. Serrano
Rep. Edolphus Towns

Secretary of Defense Robert Gates

REPORT CONCERNING PROVISIONS OF THE MILITARY COMMISSIONS ACT OF 2006 RESTRICTING HABEAS CORPUS JURISDICTION AND INTERFERING WITH JUDICIAL ENFORCEMENT OF THE GENEVA CONVENTIONS

MARCH 2007

Introduction

The Association of the Bar of the City of New York (the "Association") submits this Report to urge repeal of Section 7 of the Military Commissions Act of 2006 ("MCA") insofar as it strips federal courts of their statutory jurisdiction to entertain habeas corpus petitions from non-U.S. citizens ("aliens") detained by the United States as "enemy combatants."[1] This provision condemns persons detained by the Executive—many of whom may be completely innocent and wrongfully detained on the basis of mistaken or false information[2]—to indefinite imprisonment, without any opportunity to challenge their detention through a procedure even remotely resembling due process. It violates our most basic notions of justice and the long-established role of the judiciary as a check on the Executive's power to deprive persons of their liberty, a role that has its roots in Magna Carta. Congress, therefore, should act promptly to restore the statutory right of habeas corpus as it existed prior to the enactment of the MCA and the Detainee Treatment Act of 2005 ("DTA")[3] and as it was interpreted in *Rasul* v. *Bush*.[4]

The Association also urges repeal of provisions of Sections 5 and 6 of the MCA that purport to bar any person from seeking judicial enforcement of rights guaranteed them by the Geneva Conventions, that seem to prevent courts from considering foreign or international courts' interpretations of the Conventions, and that might be read to expand the deference due the President's interpretations of the Conventions.[5] By barring individuals from judicially

---

1 Military Commissions Act (MCA) of 2006, Pub. L. No. 109-366, §7, 120 Stat. 2600, 2636 (2006). This provision is codified at 28 U.S.C. § 2241(e)(1).

2 This point is made in the report widely referred to as "the Seton Hall Report," in which Department of Defense documentation of detainees' CSRT proceedings were reviewed. JOSHUA DENBEAUX & MARK DENBEAUX, NO-HEARING HEARINGS: CSRT: THE MODERN HABEAS CORPUS? (2006), *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf (hereinafter SETON HALL REPORT)

3 Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005).

4 542 U.S. 466 (2004).

5 This Report is directed to MCA provisions affecting the role of the Judiciary. A subsequent report will address military commissions procedures. However, we note that Section 3 of the MCA purports

enforcing the protections guaranteed by the Geneva Conventions and by interfering with the Judiciary's role in interpreting and enforcing them, these provisions would effectively render the Conventions unenforceable, except at the unreviewable discretion of the Executive. Sections 5 and 6 therefore cast doubt on the sincerity of the United States' commitment to the Conventions and ultimately undermine the protections we expect others to afford our own armed forces.

I. The Stripping of Habeas Jurisdiction

Congress initially sought to strip courts of jurisdiction to entertain habeas petitions of detainees at Guantánamo by enacting the DTA in 2005. In *Hamdan* v. *Rumsfeld*, however, the Supreme Court held that the DTA did not strip federal courts of jurisdiction to entertain pending habeas petitions.[6] Section 7 of the MCA purports to address that aspect of *Hamdan*, and also deletes language in the DTA that limited the scope of the habeas stripping provision to detainees at Guantánamo.

Specifically, Section 7(a) of the MCA amends the habeas statute by providing, in part:

> 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.[7]

Section 7(a) further provides:

> [N]o court, judge, or justice shall have jurisdiction to hear or consider *any other action* against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial or condition of detention brought by any alien who is or was detained by the United Sates and who was determined to have been an enemy combatant or is awaiting such a determination.[8]

---

to bar invocation of the Geneva Conventions before military commissions in the same way Section 5 does in judicial proceedings. We therefore also urge repeal of Section 3 of the MCA.

6 126 S. Ct. 2749, 2769 (2006).

7 28 U.S.C. § 2241(e)(1).

8 28 U.S.C. § 2241(e)(2) (emphasis added).

The term "enemy combatant" is not defined by the MCA for purposes of the jurisdiction-stripping provisions. However, Section 7 seems to contemplate the definition used by the Department of Defense ("DoD") in Combatant Status Review Tribunals ("CSRTs") for determining a detainee's status as an "enemy combatant," namely: "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners . . . [including] any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."[9]

The limitations imposed on jurisdiction by Section 7(a) are subject to a single exception for limited review by the D.C. Circuit in certain narrow circumstances, as discussed below.

Section 7(b) of the Act provides that the provisions of Section 7(a) are effective immediately upon enactment and apply "to all cases, without exception, pending on or after the date of enactment, which relate to any aspect of the detention, transfer, treatment, trial, or condition of detention of an alien detained since September 11, 2001."[10]

There are now pending before the courts numerous questions about the scope and constitutional validity of the habeas-stripping provisions of Section 7. The Constitution forbids Congress from suspending the writ of habeas corpus except temporarily and only "when in Cases of Rebellion or Invasion the public Safety may Require it."[11] Recently, in a 2-1 decision, the D.C. Circuit Court of Appeals held that the MCA required the dismissal of 63 pending habeas corpus petitions of Guantánamo detainees, reasoning that the Suspension Clause did not deprive Congress of the power to deny habeas corpus to Guantánamo detainees because, as aliens detained outside the sovereign territory of the United States, such individuals do not have a

---

[9] Memorandum from Deputy Secretary of Defense Paul Wolfowitz to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunals (Jul. 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.

[10] MCA § 7(b).

[11] U.S. CONST. art. I, § 9, cl. 2.

constitutional right to habeas, or indeed, any other constitutional rights.[12] A strongly worded dissent challenged this holding, arguing that the majority misread the relevant common law precedent defining the scope of habeas corpus jurisdiction at the time the Constitution was adopted, which the Suspension Clause was intended to preserve.[13] The dissent also argued that the majority misread the Supreme Court's *Rasul* decision—which previously confirmed the habeas corpus rights of Guantánamo detainees—as merely a statutory construction, ignoring its broader language suggesting that the habeas rights of Guantánamo detainees have a constitutional basis.[14] Petitioners are seeking Supreme Court review of this split decision. Another case pending in the Fourth Circuit raises, among other questions, the issue of whether Section 7 was intended to deny habeas to aliens lawfully residing and detained in the United States.[15]

We submit that Congress should not await judicial resolution of these and other issues concerning the habeas-stripping provisions. For regardless of whether Congress has the power to impose such restrictions on habeas corpus jurisdiction, they are wrong as a matter of policy and never should have been enacted. Such restrictions perpetuate an ongoing injustice that continues to damage the Nation's reputation in the world community. For the reasons discussed below, we submit that considerations of fairness and justice long reflected by habeas corpus, as well as the best interests of the United States, require the prompt repeal of these habeas-stripping provisions.

II. The Unjust Impact of the Stripping of Habeas Jurisdiction

The MCA's removal of habeas jurisdiction deprives alien detainees, imprisoned without charges—possibly for the rest of their lives—of their only hope of challenging that confinement

---

[12] Boumediene v. Bush & Al Odah v. United States, Nos. 05-5062 & 05-5064, 2007 WL 506581, at *4-8 (D.C. Cir. Feb. 20, 2007).

[13] *Id.* at *12-17 (Rogers, J., dissenting).

[14] *Id.* at *15.

[15] *See* Al-Marri v. Wright, No. 06-7427 (4th Cir. 2007).

in proceedings affording them due process before a neutral arbiter. In addition, our recent detention policies have already severely damaged the reputation of the United States in the international community. Thus, the habeas-stripping provisions not only may perpetuate the injustice of indefinite imprisonment without charge, but also will exacerbate the damage to our world image.

Proponents of the habeas-stripping provision argue that alien detainees at Guantánamo are not entitled to the protections of habeas corpus because they are "terrorists" and the "worst of a very bad lot";[16] that granting them habeas would be unprecedented under the Law of War and comparable to claiming that the thousands of Axis prisoners of war captured in World War II were entitled to habeas;[17] and that the detainees already receive adequate due process and judicial review under procedures established by the DoD following the Supreme Court's decision in *Hamdi* v. *Rumsfeld*.[18] None of these arguments can be sustained.

Whether these detainees are "terrorists" is a question that must be determined by a fair and lawful process. Indeed, the sweeping assumption that all the detainees are "terrorists" has proven dangerously overbroad. Approximately half of the individuals who have been held at Guantánamo, in some cases for several years, have been subsequently released due to a lack of any evidence of wrongdoing.[19] An additional 85 of the 393 detainees who remain in detention at Guantánamo have been found to pose no threat,[20] but have had their release or transfer delayed because they might be tortured if they are returned to their home countries or because their home

---

16 Carol D. Leonnig & Julie Tate, *Some at Guantánamo Mark 5 Years in Limbo*, WASH. POST, Jan. 16, 2007, at A1 (quoting Vice President Cheney).

17 *See* Government's Supplemental Brief Addressing the Military Commissions Act, Boumediene v. Bush & Al Odah v. United States, Nos. 05-5062 & 05-5064, at 13-16 (D.C. Cir. Nov. 13, 2006).

18 Hamdi v. Rumsfeld, 542 U.S. 507, 525 (2004) (plurality opinion).

19 *See* Leonnig & Tate, *supra* note 16.

20 *See* Press Release, U.S. Department of Defense, Detainee Transfer Announced (Feb. 21, 2007), *available at* http://www.defenselink.mil.

countries will not accept the conditions that the United States seeks to impose.[21] Moreover, many detainees who remain in custody at Guantánamo and elsewhere were seized by unreliable third parties enticed by the large bounties paid to them by U.S. forces in exchange for turning over alleged supporters of Al-Qaeda or the Taliban.[22] As DoD data has revealed, 86% of those detained at Guantánamo who were picked up in Afghanistan were arrested not by the U.S. military but by Pakistani or Northern Alliance forces and then turned over to the United States.[23]

In short, the danger that many of those who remain in custody at Guantánamo and at other sites have been wrongly seized is very high. As the *Washington Post* recently reported, detainees such as Gholam Ruhani and Shakhrukh Hamiduva remain in captivity, despite significant evidence that they are not guilty of any crime but were simply in the wrong place at the wrong time.[24] Stories such as these underline the error made by those who analogize these detainees to prisoners of war captured on the battlefield during World War II. Many of the Guantánamo detainees were not captured on the battlefield, and they were not wearing the recognizable uniform of an opposing army in a declared war between nation states. Rather they were turned over to U.S. forces under unclear circumstances, far from any battlefield, by third parties with unknown and potentially self-interested agendas. Even those captured on or near a

---

21 *See* Leonnig & Tate, *supra* note 16.

22 The caption of one poster distributed by the CIA throughout Afghanistan in the aftermath of September 11th, read: "You can receive millions of dollars for helping the Anti-Taliban Force catch Al-Qaida and Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people." Afghanistan Leaflets, http://www.psywarrior.com/afghanleaf40.html (last visited February 1, 2007).

23 JOSHUA DENBEAUX & MARK DENBEAUX, REPORT ON GUANTÁNAMO DETAINEES, A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 3 (2006), *available at* http://law.shu.edu/aaafinal.pdf.

24 *See* Leonnig & Tate, *supra* note 16.

battlefield may have been non-combatants who were in the area for non-hostile reasons and picked up through mistaken or false information.[25]

Moreover, unlike prisoners held during conventional wars, these detainees are being held in a "war on terror" with no foreseeable end, and thus face possible imprisonment for the rest of their lives. The stripping of habeas jurisdiction means that these detainees will not be afforded any opportunity to challenge their detention in a fair, adversarial process before a neutral arbiter.

Habeas proceedings traditionally have afforded broad review, including a searching factual and legal inquiry into the government's proffered basis for detention.[26] Further, an individual imprisoned by the Executive without charge was historically entitled "to present his own factual case to rebut the Government's return."[27] This approach to the review of Executive detention was developed and maintained over the centuries as a crucial means of preventing abuses of power. As described below, however, the kind of review now provided to detainees stands in sharp contrast to this tradition.

Most of these detainees will never be charged with a crime or tried by military commission. The United States has indicated that only 60 to 80 of the Guantánamo detainees will ever be brought before a military commission.[28] Thus, the great majority of Guantánamo detainees will have access only to a Combatant Status Review Tribunal ("CSRT"), an entity

---

[25] *See, e.g.*, *Hamdi*, 542 U.S. at 534 (noting that basic due process is needed to ensure "that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error"); Steve Duin, *Justice a Casualty of War*, THE OREGONIAN, Jan. 16, 2007, at CO1 (outlining the weak evidence against detainee Adel Hamad, a charity worker).

[26] *See e.g.*, *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807); Goldswain's Case, (1778) 96 Eng. Rep. 711 (K.B.). While the Government has contested this account of habeas review, it mistakenly relies on post-conviction habeas cases where the petitioner already had a full trial of the charges against him. Government's Supplemental Brief Addressing the Military Commissions Act, *supra* note 17, at 23-25.

[27] *Hamdi*, 542 U.S. at 538.

[28] Sara Wood, *DoD Releases Military Commissions Manual*, AM. FORCES INFO. SERVICE, Jan. 18, 2007, *available at* http://www.defenselink.mil/news/NewsArticle.aspx?ID=2745. We put aside questions about the fairness of the procedures governing trials by military commission, which will be addressed in a subsequent report.

specifically established by DoD to review the status of Guantánamo detainees.[29] As provided by the DTA, the final decisions of these CSRTs are subject to a limited review in the D.C. Circuit. As detailed below, this scheme provides nothing approaching due process or the searching inquiry into the legal and factual bases of a detention available under habeas corpus.[30]

Finally, nothing in the MCA or any other law or regulation entitles a detainee to receive even the limited review provided by a CSRT. Hence, it is possible that some detainees may be imprisoned indefinitely without any review whatsoever.

A. Combatant Status Review Tribunals

CSRTs were established by the DoD in response to the Supreme Court's 2004 decisions in *Rasul*[31] and *Hamdi*.[32] *Rasul* construed the habeas corpus statute, as it then read, to provide jurisdiction over habeas petitions from Guantánamo detainees.[33] *Hamdi* held that a U.S. citizen

---

[29] Neither of these procedures is available to an estimated 14,000 detainees in Iraq, Afghanistan, and other locations outside the United States, as the CSRT procedure is established only for Guantánamo. Memorandum from Deputy Secretary of Defense Gordon England, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba (Jul. 14, 2006), *available at* http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf (hereinafter CSRT Implementation Memo). In *Al-Marri*, the government claims that it would give a CSRT to an alien resident of the United States, alleged to be an enemy combatant and who is detained in the United States. *See* Respondent-Appellee's Motion to Dismiss for Lack of Jurisdiction and Proposed Briefing Schedule, Al-Marri v. Wright, No. 06-7427, at 4-5 (4th Cir. Nov. 13, 2006). It appears, however, that to provide the CSRT, he would need to be removed to Guantánamo. Moreover, the government also claims in *Al-Marri* that an alien can fall within the habeas-stripping provisions merely on the determination of the President that he can be detained as an "enemy combatant." *Id.* If that view were accepted, no judicial review whatsoever would be available to Al-Marri, as the D.C. Circuit review is limited to review of final CSRT decisions. *See* DTA § 1005(e)(2).

[30] *See* Supplemental Brief of Amici Curiae of British and American Constitutional Scholars Listed Herein in Support of Petitioners Addressing Section 1005 of the Detainee Treatment Act of 2005, *Boumediene* & *Al Odah*, Nos. 05-5062 & 05-5064, at 12 (D.C. Cir. Jan. 25, 2006).

[31] 542 U.S. 466 (2004).

[32] 542 U.S. 507 (2004).

[33] *Rasul*, 542 U.S. at 481. In *Rasul*, the Supreme Court was construing the habeas statute, but its analysis suggests that detainees at Guantánamo also have a constitutional right to habeas. *See id.* at 482 (noting that at common law "the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the extent and nature of the jurisdiction or dominion exercised in fact by the Crown.'" (quoting *Ex parte* Mwenya, (1960) 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M.R.)); *see also id*. at 483, n. 15 ("[P]etitioners' allegations . . .

captured on the battlefield while engaged in combat against the U.S. and detained first at Guantánamo and then in the U.S. was entitled to due process, which, at a minimum requires notice of the basis for his detention, a fair opportunity to be heard before a neutral decisionmaker, and access to counsel.[34] Read with *Rasul*, *Hamdi* might be construed to have imposed the same due process requirements for alien detainees at Guantánamo.

Shortly after these decisions, DoD established the CSRT procedure for Guantánamo detainees, ostensibly to comply with *Hamdi*. This procedure, however, lacks even the minimal requirements established by the Court.[35] Detainees are not brought before a neutral decision maker, but before military officials who are notified that the detainee's status as an enemy combatant has already been established "through multiple levels of review by officers of the Department of Defense."[36] The detainees are not permitted the advice of lawyers. Rather, they are "assisted" by a "personal representative" who does not serve as an advocate for the detainee; communications between the detainee and the personal representative are not confidential and may be revealed by the personal representative to the CSRT.[37] Detainees are not permitted to see any of the classified evidence upon which their enemy combatant status determination was

---

unquestionably describe custody in violation of the Constitution or laws or treaties of the United States." (internal quotations and citations omitted)).

34 *Hamdi*, 542 U.S. at 529-533.

35 We note that these procedures were established by the *Hamdi* plurality with the caveat that its decision was limited to the specific facts alleged there, involving a detainee captured on the battlefield in Afghanistan engaged in combat against the United States. *Id.* at 518. In that narrow context, the Court also indicated that hearsay might be admissible if reliable. *Id.* at 533-34. Greater due process protections under *Hamdi*'s balancing test may be required where the detainee was captured far from a battlefield and not engaged overtly in any combat against U.S. forces.

36 *See* CSRT Implementation Memo, *supra* note 29.

37 *See id.* at enclosure (3) (instructing personal representative to tell the detainee: "I am neither a lawyer nor your advocate, but have . . . the responsibility of assisting your preparation for the [CSRT]. None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing.").

based.[38] Even though the CSRT procedures purportedly afford the detainees the right to call witness if "reasonably available,"[39] DoD data reveals that detainees are routinely denied requests to call witnesses, even when such witnesses are also detained at Guantánamo.[40] Additionally, the CSRT is not bound by any rules of evidence, is free to rely on hearsay, and is not restricted from basing its determination on testimony elicited by torture or other coercive means.[41] All of the government's evidence, which the detainee is given little to no opportunity to see or to contest, is then entitled to a rebuttable presumption and is evaluated using the preponderance-of-the-evidence standard of proof.[42] Far from giving the detainees a fair opportunity, required by *Hamdi*, to rebut the favorable presumption given the government's evidence, these procedures turn CSRTs into sham proceedings that do not remotely satisfy the requirements of *Hamdi*, due process, or the ideals of fundamental fairness for which the U.S. has long been known.[43]

B. D.C. Circuit Review of CSRTs

The MCA permits those who have been afforded a CSRT the right to seek review of final CSRT decisions in the D.C. Circuit Court of Appeals, as provided in the DTA.[44] The scope of that review is extremely narrow, however. It is limited to determining whether the CSRT proceedings conformed to the standards and procedures specified by the Secretary of Defense.[45] No provision is made to permit the detainee to submit any evidence. As a result, review by the D.C. Circuit appears confined to the deeply flawed record generated by the CSRT, where the

---

38 *Id.* at enclosure (1) (stating that the detainee shall be provided with notice of the unclassified factual basis for his detention).

39 *Id.*

40 *See* SETON HALL REPORT, *supra* note 2, at 2-3.

41 CSRT Implementation Memo, *supra* note 29, at enclosure (1).

42 *Id.*

43 *See* SETON HALL REPORT, *supra* note 2.

44 MCA § 9 (amending DTA § 1005(e)(2) and providing that the D.C. Circuit "shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.").

45 DTA § 1005(e)(2)(C)(i).

detainee had no realistic opportunity to challenge, and in many respects to even see,[46] the government's evidence, let alone to call witnesses or present evidence of his own. While the D.C. Circuit also is permitted to determine if the standards and procedures of the CSRT are consistent with the Constitution and laws of the United States, it only can do so "to the extent the Constitution and laws of the United States are applicable."[47]

As noted, the D.C. Circuit recently held that Guantánamo detainees, as aliens outside the sovereign territory of the United States, have no rights to habeas, or indeed any other rights, under the Constitution.[48] Moreover, it is not clear whether the D.C. Circuit has been given authority to consider the fundamental question of whether the detentions—as distinct from the DoD standards and procedures—are constitutional. Thus, it is not clear that the D.C. Circuit review can provide the most fundamental function of habeas: a review of whether the detention is lawful under the Constitution and laws of the United States.[49]

* * *

Congress' failure to provide alien detainees with an adequate Article III substitute for habeas raises serious constitutional issues. The constitutional justification for the suspension of habeas—rebellion or invasion—is clearly absent. Congress therefore could not constitutionally deny habeas corpus to U.S. citizens or to aliens lawfully residing in the U.S. without providing such a substitute.[50] The question now pending before the courts is whether the constitutional

---

46 *See* SETON HALL REPORT, *supra* note 2, at 2-3.

47 DTA § 1005(e)(2)(C)(ii).

48 *Boumediene* & *Al Odah*, at *4-8.

49 18 U.S.C. § 2241(c)(3).

50 INS v. St. Cyr, 533 U.S. 289, 305 (2001) (noting that "a serious Suspension Clause issue would be presented if . . . [the] statutes have withdrawn [habeas] power from federal judges and provided no adequate substitute for its exercise"); Swain v. Pressley, 430 U.S. 372, 381 (1977). In her dissent, Judge Rogers concluded that "Congress in enacting the MCA has revoked the writ of habeas corpus where it would have issued under the common law in 1789, without providing an adequate alternative. . . ." *Boumediene* & *Al Odah*, at *17-19.

right to habeas or an adequate Article III substitute must also be provided to alien detainees imprisoned under the exclusive jurisdiction of the United States at Guantánamo.

The Association submits that whether or not the denial of habeas to these aliens is constitutional, Congress should not deny them a statutory right to habeas. The fact is that detainees imprisoned by the United States, possibly for life, are being denied a meaningful avenue for challenging that confinement before a neutral arbiter in a proceeding affording them due process. This violates every notion of elemental justice and should shock the conscience of every American who cherishes the rule of law. Accordingly, the Association urges Congress to repeal the provisions of Section 7 of the MCA that strip the courts of habeas jurisdiction and to restore the statutory right to habeas corpus as it existed prior to the enactment of the DTA.

III. Limiting the Force and Effect of the Geneva Conventions

The Association also urges repeal of several other sections of the MCA, which purport to insulate the Executive's interpretation and application of the Geneva Conventions from judicial scrutiny.

The broadest of these limiting provisions is MCA Section 5(a),[51] which states:

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

Section 3 of the MCA contains a similar provision, which states 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." These litigant-focused provisions are complemented by two provisions aimed at the courts' engagement with the Conventions. The first, MCA Section 6(a)(2), states that "[n]o foreign or international source of law shall supply a basis for a rule of

[51] This provision is codified at 28 U.S.C. § 2241.

decision in the courts of the United States in interpreting the prohibitions enumerated in" the MCA's amendments to the War Crimes Act that narrow the scope of violations of common Article 3 of the Conventions prosecutable under that Act.[52] The second, Section 6(a)(3), provides that "the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions," and that "[a]ny Executive Order published under this paragraph shall be authoritative (except as to grave breaches of common Article 3) as a matter of United States law, in the same manner as other administrative regulations."[53]

These provisions belie our declared adherence to the Conventions, undermine the constitutional function of our judiciary, and diminish our standing in the eyes of the world. The MCA repeatedly declares that the United States is bound by and complies with the Geneva Conventions.[54] In direct contradiction to these declarations, however, these provisions could be read to render the conventions unenforceable by the very persons whose rights they are intended to protect and deprive the Conventions of their force by making compliance with them a matter of Executive grace rather than legal obligation. As Senator Edward Kennedy noted during the debate on the MCA, the ultimate result of the Act will be that "the President's interpretation [of the Conventions] may well likely escape judicial review."[55] Indeed, the MCA could be

---

[52] 18 U.S.C. § 2441.

[53] *Id.*

[54] For example, 10 U.S.C. § 948b(f) states that a commission established under the MCA "is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions," and 18 U.S.C. § 2441 similarly declares that the MCA's amendments to the War Crimes Act "fully satisfy the obligation under Article 129 of the Third Geneva Convention to provide effective penal sanctions for grave breaches [of common Article 3]." In addition, 18 U.S.C. § 2441(5) states that "[t]he definitions in this subsection are intended only to define the grave breaches of common Article 3 and not the full scope of United States obligations under that Article."

[55] 152 Cong. Rec. S10,400 (Sept. 28, 2006). Numerous commentators agree with this interpretation. *See, e.g.*, HUMAN RIGHTS WATCH, Q AND A: MILITARY COMMISSIONS ACT OF 2006, at 11 (2006) ("The additional provisions that preclude any person from invoking the Geneva Conventions as a source of rights in an action against any U.S. official will make it difficult, if not impossible for individuals to challenge presidential interpretations of the Conventions."); Post of Professor Martin

interpreted to give the President essentially unreviewable authority to determine numerous crucial questions regarding the applicability of the Geneva Conventions, including whom the Conventions protect and which "aggressive" interrogation techniques—other than those "grave breaches" of common Article 3 falling within the War Crimes Act—violate the Conventions.

Whether or not this arrangement is constitutional, it is an unjustifiable assault on the federal judiciary and the status of treaties as the "supreme Law of the land" under our Constitution.[56] As Alexander Hamilton wrote in *The Federalist* No. 22:

> Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations.

Writing for the Supreme Court, Chief Justice John Roberts recently reaffirmed this proposition, stating that "[i]f treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department.'"[57] These provisions of the MCA interfere with the courts' core function as the interpreter and enforcer of our nation's treaties and call into question our commitment to the Geneva Conventions.

The prohibition on the use of foreign and international law as a "basis for a rule of decision" in interpreting the Conventions, as enforced by the War Crimes Act, is also misguided. Even Justice Antonin Scalia—an ardent opponent of the use of foreign and international authority in interpreting our domestic laws—acknowledges that he "will use it in the

---

Lederman on Balkinization, Sept. 22, 2006, http://balkin.blogspot.com/2006/09/three-of-most-significant-problems.html ("What this means, in effect, is that the President's interpretation and application of the Geneva Conventions will be virtually unreviewable, no matter who the affected parties may be, in this and other armed conflicts, now and in the future . . . across the board.").

[56] U.S. CONST., art. VI, § 2.

[57] Sanchez-Llamas v. Oregon, 126 S.Ct. 2669, 2684 (2006) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

interpretation of a treaty" because "the object of a treaty being to come up with a text that is the same for all the countries, we should defer to the views of other signatories, much as we defer to the view of agencies."[58] The MCA, however, seems to forbid this practice, despite the fact that foreign and international authorities are the most well-developed sources of law interpreting the Geneva Conventions.

Similarly, in seeming to expand the deference otherwise due the President's interpretations of the Conventions—which frequently have been opposed by the relevant experts within the administration[59]—the MCA may prevent courts from making their own judgments regarding the reliability of those interpretations, as they do in all other areas of administrative law. While deference is ordinarily due the President's interpretations of a treaty, such deference is inappropriate where the interpretation is contrary to the treaty's plain language or structure, would lead to unreasonable results, or would contradict well-established practices or understandings of the signatories.[60] To the extent that the MCA seeks to expand the deference due such interpretations, it wrongfully interferes with the courts' ability to reject plainly unsound interpretations of the Conventions.

As the International Committee of the Red Cross has emphasized, the Conventions were designed "first and foremost to protect individuals, and not to serve State interests."[61] The effect of the MCA's review-limiting provisions, however, is to deprive these individuals of their ability

---

58 *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 521 (2005).

59 *See* Neal Kumar Katyal, Hamdan v. Rumsfeld*: The Legal Academy Goes To Practice*, 120 HARV. L. REV. 65, 111 (2006) (detailing the dissent within the Bush Administration regarding the President's interpretation of the Conventions).

60 See United States v. Stuart, 489 U.S. 353, 365-66 (1989); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 259 (1984); Perkins v. Elg, 307 U.S. 325, 348-49 (1939); Johnson v. Browne, 205 U.S. 309, 316-22 (1907).

61 4 INT'L COMM. OF RED CROSS, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 21 (1958), *cited in Hamdan*, 126 S.Ct. at 2794 n.57.

to enforce these rights if their captors choose not to recognize them. In taking this position, the MCA announces to others that we do not share their view of the importance of the rights guaranteed by the Conventions, which, in turn, exposes our nation to scorn and our troops to reciprocal treatment.[62] We believe that this is a profoundly unwise and dangerous development.

Finally, these provisions may be unconstitutional as well as inadvisable. The MCA's directive that "no person" can "invoke" the Geneva Conventions "as a source of rights" in suits against the government and its officials is an unusual one. In fact, no similar provision appears in the United States Code. This broad language, however, suggests that the intent of the MCA is to leave the Conventions on the books while simultaneously undermining them by forbidding litigants from invoking their protections. Some have argued that this legislative sleight-of-hand violates separation-of-powers principles by impermissibly obstructing the exercise of the judicial powers granted by Article III.[63] Thus, in *Legal Services Corporation* v. *Velazquez,*[64] the Court held that Congress violates the First Amendment and Article III when it "seek[s] to prohibit the analysis of certain legal issues and to truncate presentation to the courts," and that the Court would be "vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge."[65]

The MCA's apparent ban on courts' consideration of foreign and international law in interpreting the Conventions also raises constitutional questions, as there is some uncertainty about the extent to which Congress can control the courts' interpretive techniques through statutory mandates requiring or forbidding the use of certain interpretive resources. Professor

---

62 *See generally* Amicus Curiae Brief of Retired Generals and Admirals et al. in Support of Petitioner, *Hamdan*, 126 S.Ct. 2749 (No. 05-184).

63 *See* Plaintiffs' Supplemental Memorandum of Law Responding to Defendants' Notice of Supplemental Authority, *In re*: Iraq and Afghanistan Detainees Litigation, Misc. No. 06-145, at 13-14 (D.D.C. Nov. 28, 2006) (raising this argument).

64 531 U.S. 533 (2001)

65 *Id.* at 545, 548.

Gary Lawson, for example, contends that separation-of-powers principles must include "an independent judicial power to ascertain, interpret, and apply the relevant law,"[66] and he concludes that "Congress cannot tell the courts how to reason any more than it can tell the courts how to decide."[67]

But whether or not these legal arguments would ultimately convince a court to invalidate these provisions of the MCA, the Association strongly believes that they should be repealed. As Representative Jerrold Nadler stated during the legislative debate on the MCA, it is "simply wrong and hypocritical" to both "hope that other civilized powers will abide by [the Conventions]" and make known that "we are not going to allow our courts to enforce them."[68] By pursuing this disingenuous course of action, we not only damage our standing in the world community, but we also give others an excuse to undermine the Conventions' protections, ultimately to the detriment of our own armed forces. In explaining his vote for the MCA, Senator John McCain reaffirmed his belief that Congress remained committed to the Geneva Conventions, stating that "the [MCA] does not redefine the Geneva Conventions in any way."[69] Whether or not this is true, the fact remains that the MCA has rendered the Conventions effectively unenforceable.

---

66 Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 212 (2001).

67 *Id.*; *see also* Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 707 (1995) (reaching the same conclusion). Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2109 (2002), offers an opposing view, arguing that "[t]here is no general, Article III objection that developing interpretive methodology is an inalienable judicial prerogative."

68 H. COMM. ON THE JUDICIARY, MILITARY COMMISSIONS ACT OF 2006, H.R. Rep. No. 109-664, pt. 2, at 173 (Sept. 25, 2006)

69 152 Cong. Rec. S10274 (Sept. 27, 2006).