IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SALIM AHMED HAMDAN, *et al.*, Petitioner, v. DONALD RUMSFELD, Secretary, United States Department of Defense, *et al.,* Respondents.	Civil Action No. 1:04-cv-01519-JR

RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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Pursuant to this Court's Order of October 27, 2006, respondents submit this reply to petitioner's Opposition to Motion to Dismiss for Lack of Subject Matter Jurisdiction.

INTRODUCTION

The central issue raised by the Court's consideration of respondents' October 18, 2006 Notice of Military Commissions Act of 2006 is whether the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366 – which in addition to establishing a detailed statutory regime for the conduct of military commissions, *see* MCA §§ 2-3, explicitly divests district courts of jurisdiction to review "habeas petitions 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," *id.* § 7(a) – applies to the present case so as to deprive this Court of subject matter jurisdiction. Petitioner, who has been determined to be an enemy combatant and is detained as such by the United States at Guantanamo Bay Naval Base, and who claims that his habeas petition challenges not only the prior, now-defunct military commission proceedings against

him but also his detention as an enemy combatant, argues that the MCA does not apply to pending cases such as his, and that even if it does, the MCA is unconstitutional in several respects.

As discussed below, the plain language of the MCA and its legislative history leave no doubt that the MCA's provisions limiting this Court's jurisdiction in favor of exclusive review of combatant detention claims in the Court of Appeals apply to all pending cases, including this one. In enacting the MCA, Congress specifically intended to address the Supreme Court's decision in this case, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), that the Detainee Treatment Act ("DTA") of 2005, Pub. L. No. 109-148, tit. X, 119 Stat. 2680 (10 U.S.C. § 801 note), which contained a similar jurisdiction-shifting provision, did not clearly eliminate district court habeas jurisdiction over habeas cases pending at the time of the DTA's enactment. The MCA is a response to this and other rulings, and explicitly provides that the provision withdrawing district court jurisdiction in favor of exclusive jurisdiction in the Court of Appeals "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." MCA § 7(b) (emphasis added). Petitioner's statutory arguments to the contrary lack merit.

Petitioner argues that alien enemy combatants detained outside of the sovereign territory of the United States nevertheless have habeas rights protected by the Suspension Clause of the Constitution and that the MCA infringes those rights. The position that alien enemy combatants possess habeas rights protected by the Constitution, however, was rejected by the Supreme Court in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), in which the Court specifically held that aliens captured and held abroad by the United States military have no constitutional right to habeas relief. *See* 399 U.S. at 777, 784-85. Indeed, the detention of enemy combatants during an armed conflict is a necessary attribute and by-product of war. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518-19 (2004). Permitting alien enemy combatants abroad the constitutional privilege of seeking habeas relief in

our civil courts would require not only overruling controlling Supreme Court precedent, but also upsetting the long-settled principle that the Constitution does not apply extraterritorially to aliens lacking significant voluntary connections with this country.

Under *Eisentrager*, Congress could have simply withdrawn jurisdiction over petitioner's habeas claims and left the decision of whether to detain enemy aliens held abroad to the military, as has been the case traditionally. The MCA and DTA, however, take the extraordinary additional step of granting enemy aliens like petitioner held outside the sovereign territory of the United States the right to obtain judicial review of their detentions during an armed conflict. That judicial review, which permits the Court of Appeals for the District of Columbia Circuit to review final decisions of Combatant Status Review Tribunals and of military commissions, provides petitioner with greater habeas rights than traditionally available in the military tribunal context, and is at least consistent with that available in the non-military context. Thus, even assuming petitioner has a constitutional right to a writ of habeas corpus, there is no Suspension Clause violation.

The primary arguments raised by petitioner concerning the effect and constitutionality of the MCA are pending before the Court of Appeals in the appeals of the habeas cases of other Guantanamo Bay detainees, *Al Odah, et al. v. United States,* 05-5064 (D.C. Cir.), and *Boumediene v. Bush, et al.*, No. 05-5062 (D.C. Cir.), with briefing having been completed on Nov. 20, 2006 on those issues. As explained below, to the extent the Court proceeds to a ruling on the jurisdictional issue in advance of the Court of Appeals' ruling on the issue in the other pending Guantanamo detainee appeals, the Court should dismiss this case. At a minimum, however, because the bases for the Court's prior November 8, 2004 injunction concerning military commission proceedings against petitioner have been superceded by the MCA's establishment of a statutory regime for military commissions, the Court should vacate its November 8, 2004 Order.

BACKGROUND

This case is currently on remand from the Court of Appeals. The petition for a writ of habeas corpus as originally filed in this case challenged the lawfulness of the military commission proceedings previously brought against petitioner. *See* Petition (dkt. no. 1). The petition did not challenge Hamdan's detention as an enemy combatant, or offer any argument as to why he could not lawfully be detained as an enemy combatant, although in its request for relief, it asked the district court to order respondents "promptly to justify as lawful any continued detention of Mr. Hamdan," and "[i]n the absence of adequate justification, order Mr. Hamdan's release."[1] *Id.* Further, while detained at Guantanamo, petitioner was given a hearing before a Combatant Status Review Tribunal ("CSRT"), which found him to be an enemy combatant, subject to continued detention. *See* Declaration of Lieutenant Commander Charles Swift in Support of Petitioner's Opposition to Motion to Dismiss for Lack of Subject Matter Jurisdiction ["Swift Decl."] ¶ 16; *see also* Exhibit 1 to Declaration of Karen L. Hecker ["Hecker Decl."] (attached as Exhibit A) (listing petitioner – ISN 149 – as having received CSRT determination and been classified as enemy combatant).[2]

On November 8, 2004, this Court enjoined the military commission proceedings against petitioner. *See Hamdan v. Bush,* 344 F. Supp. 2d 152 (D.D.C. 2004). The Court held "that, unless and until the rules for Military Commissions (Department of Defense Military Commission Order No. 1) are amended so that they are consistent with and not contrary to Uniform Code of Military

[1] On October 1, 2004, respondents filed an unopposed motion to clarify that the Government was not required to file any material justifying Hamdan's detention as an enemy combatant. *See* dkt. no. 24. On October 4, 2004, the Court (Green, S.J.) granted the government's motion, stating that respondents were not required to address enemy combatant status issues pending further order of the Court. *See* dkt. no. 26.

[2] The November 3, 2006 Declaration of Ms. Hecker states that three detainees determined by CSRTs to be "no longer enemy combatants" remain detained at Guantanamo; those three detainees subsequently were released from United States custody, however.

Justice Article 39, 10 U.S.C. § 839, petitioner may not be tried by Military Commission for the offenses with which he is charged." *Id.* at 173-74. The Court further ordered "that, unless and until a competent tribunal determines that petitioner is not entitled to the protections afforded prisoners-of-war under Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, he may not be tried by Military Commission for the offenses with which he is charged." *Id.* at 173. The Court also ordered petitioner placed in the general detention population at the Guantanamo, "unless some reason other than the pending charges against him require[d] different treatment." *Id.* at 174. In granting this relief, this Court noted that "Hamdan does not currently challenge his detention as an enemy combatant in proceedings before this Court." *Id.* at 173 n.18.

On July 15, 2005, the Court of Appeals reversed the ruling enjoining the military commission proceedings. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005). The Court of Appeals held that "Congress authorized the military commission that will try Hamdan." *Id.* at 38. The court also rejected the district court's ruling, based on Article 5 of the Third Geneva Conventions and Army Regulation 190-8, that Hamdan could not be tried by the military commission because he had not yet had his status determined by a "competent tribunal;" the Court held that Article 5 was not judicially enforceable. *Id.* at 38-40. The court further held that Army Regulation 190-8 did not provide Hamdan any basis for relief. While one subsection of the regulation requires that prisoners receive the protections of the Convention until some other legal status is determined by "competent authority," the Court held, *inter alia*, that the President's determination that Hamdan was not a prisoner of war under the Convention was sufficient for that purpose. *Id.* at 43. The Court of Appeals, accordingly, reversed the judgment, though the mandate did not issue pending certiorari.

Thereafter, Congress enacted the Detainee Treatment Act of 2005, which eliminated district court habeas jurisdiction over petitioners "filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." *id.* DTA § 1005(e)(1). Further, sections 1005(e)(2) and (e)(3) of the DTA established an exclusive-review mechanism in the Court of Appeals "to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant," *id.* § 1005(e)(2)(A), and "exclusive jurisdiction to determine the validity of any final decision" rendered by a military commission, *id.* § 1005(e)(3)(A).

On June 29, 2006, the Supreme Court reversed the Court of Appeals' ruling. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). As an initial matter, the Supreme Court rejected the argument that the DTA deprived the Court of jurisdiction over Hamdan's case. *Id*. at 2769. On the merits, the Supreme Court held that the military commission convened to try Hamdan was not authorized by Article 21 of the Uniform Code of Military Justice ("UCMJ") and was inconsistent with UCMJ Article 36(b) and common Article 3 of the 1949 Geneva Conventions, which it held to be applicable through UCMJ Article 21. *See* 126 S. Ct. at 2786-2798. The Supreme Court did not reach Hamdan's argument "that Article 5 of the Third Geneva Convention requires that if there be 'any doubt' whether he is entitled to prisoner-of-war protections, he must be afforded those protections until his status is determined by a 'competent tribunal,'" or his related claim under Army Regulation 190-8. *See* 126 S. Ct. at 2795 n.61. The Court explained, "[b]ecause we hold that Hamdan may not, in any event, be tried by the military commission the President has convened pursuant to the November 13 Order and Commission Order No. 1, the question whether his potential status as a prisoner of war independently renders illegal his trial by military commission may be reserved." *Id*. The Court also "emphasiz[ed] that Hamdan [did] not challenge, and [the Court] [did] not address,

the Government's power to detain him for the duration of active hostilities in order to prevent such harm." *Id.* at 2798. The Court remanded the case to the Court of Appeals, which, in turn, remanded the case to this Court.

On October 17, 2006, the MCA was enacted, not only explicitly divesting district courts of jurisdiction to consider habeas petitions filed by aliens detained as enemy combatants, but also establishing a detailed regime governing the establishment and conduct of military commissions. *See* MCA §§ 2-3, 7.

ARGUMENT

I. THE MILITARY COMMISSIONS ACT ELIMINATES DISTRICT COURT JURISDICTION OVER PETITIONER'S PENDING HABEAS ACTION

Petitioner argues that the MCA's jurisdiction-limiting provision is inapplicable to his case because the MCA's retroactive application extends to only non-habeas cases pending at the time of the MCA's enactment, and not pending habeas petitions, such as his. Petitioner's Opposition to Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Petr's Opp'n") at 10-15. The plain language of the MCA, the context of its enactment, and the legislative history, however, unambiguously provide otherwise.[3]

A. The Plain Language of the MCA Makes Clear that the Act Divests This Court of Jurisdiction to Hear Petitioner's Habeas Petition.

Section 7(a) of the MCA amended the habeas statute, 28 U.S.C. 2241, to provide:

> (e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

[3] It is not clear that petitioner's challenge to his detention as an enemy combatant was even "pending" at the time of the enactment of the MCA. *See supra* at 5-7. Even if considered pending, however, the MCA divests this Court of jurisdiction, as explained in the text.

> (2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

As for the effective date for the amendment to the habeas statute in 7(a), the MCA provides in section 7(b) ("Effective Date") that:

> The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to *all cases, without exception*, *pending on or after the date of the enactment* of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

MCA § 7(b) (emphasis added).

The plain language of section 7 leaves no doubt concerning Congress' intent to divest district courts of jurisdiction over all pending detainee habeas and non-habeas cases, including this case in which petitioner has been determined by a CSRT to be an enemy combatant. The scope of section 7(b) ("Effective Date") is clear – it applies to the amendment "made by subsection (a)." MCA § 7(b). Section 7(a) in turn expressly includes the elimination of habeas claims brought by an "alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant." MCA § 7(a).

There is no basis for reading, as petitioner suggests, section 7(b)'s clause, "all cases, without exception . . . which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention," as not including the habeas cases addressed in section 7(a). The habeas cases are indisputably cases relating to "detention." *See Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) ("the essence of habeas corpus is an attack by a person in custody on the legality of that custody").

Congress unambiguously eliminated jurisdiction over "all cases, without exception," of that nature, including the present habeas case.[4]

In addition, the sweeping language used in section 7(b) – "all cases, without exception" – is plainly broader than the more limited category of cases referenced in the second part of section 7(a). The first part of section 7(a) addresses habeas cases challenging the detainees' detention. The second part of section 7(a) speaks to "any other action" relating to detention, or transfer, etc. The language used in 7(b) is not, however, limited to the category of "other actions." Rather, in stating that section 7(a) applies to pending cases, Congress explicitly addressed not just "other actions," but "all cases, without exception" relating to detention, or transfer, etc. This statutory language plainly refers to "all" of the cases described in both parts of section 7(a). At bottom, there can be no question that this case, which challenges petitioner's detention, falls within the scope of "all cases, without exception" relating to detention.

B. The MCA's Legislative History Confirms That the Act's Jurisdiction-Shifting Provision Applies to Petitioner's Pending Habeas Case.

The context and legislative history of section 7's enactment also unambiguously demonstrate that the whole point of the provision was to eliminate district court habeas jurisdiction over pending cases. When this case was before the Supreme Court, the United States argued that the DTA eliminated district court habeas jurisdiction over pending cases and placed exclusive jurisdiction in the Court of Appeals for the District of Columbia Circuit. *See* DTA § 1005(e)(1), (e)(2), (h)(1).

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[4] Petitioner attempts to contrast the language used in section 7 (speaking to "all cases, without exception") to the language in section 3 of the MCA (enacting 18 U.S.C. § 950j). *See* Petr's Opp'n at 11 n. 4. In section 3, however, Congress used very similar language to that used in section 7, speaking to "any claim or cause of action" pending on the date of enactment. Just like section 7, the reference to habeas jurisdiction in section 3 is in the first clause regarding the scope of the bar on judicial review, and is not mentioned again in regard to the temporal reach of the provision. The language used in section 7 ("all cases, without exception") is even broader than the language used in section 3 ("any claim or cause of action"). Thus, there is no "negative inference" to be drawn from section 3.

The Supreme Court, however, held that the DTA was not clear that the elimination of district court habeas jurisdiction applied to pending cases.[5] *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). Congress reacted swiftly to *Hamdan* by extending the elimination of habeas jurisdiction to "all cases, without exception, pending" on the date of the MCA's enactment. MCA § 7(b). As Senator Sessions explained during the debate over the MCA: "Section 7 of the [MCA] fixes this feature of the DTA and ensures that there is no possibility of confusion in the future." 152 Cong. Rec. S10404 (daily ed. Sept. 28, 2006). After quoting subsection (b), he stated, "I don't see how there could be any confusion as to the effect of this act on the pending Guantanamo litigation. The MCA's jurisdictional bar applies to that litigation 'without exception.'" *Id*. The sponsor of section 7, Senator Graham, similarly states, "[t]he only reason we are here is because of the *Hamdan* decision. The *Hamdan* decision did not apply the [DTA] retroactively, so we have about 200 and some habeas cases left unattended and we are going to attend to them now." *Id.* at S10367.

Indeed, although different versions of the bill were introduced, all sought to achieve the same end. The legislative debate over section 7 establishes that, without exception, both the proponents and opponents of the section understood the statute as enacted to eliminate habeas jurisdiction in district courts over the pending claims by detainees challenging their detentions as enemy combatants, with the D.C. Circuit having exclusive jurisdiction to hear such claims as provided by the DTA, *see* DTA § 1005(e)(2)(A), (h)(2).[6]

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[5] The *Hamdan* Court recognized that, under the DTA, the D.C. Circuit's exclusive jurisdiction over enemy combatant determinations did apply to pending cases, *id.* at 2764 ("paragraphs (2) and (3) of subsection (e) are expressly made applicable to pending cases"); *id.* at 2769 ("Congress here expressly provided that subsections (e)(2) and (e)(3) applied to pending cases"), and the Court left open the question of whether the pending district court habeas challenges brought by the detainees to their detention as enemy combatants would have to be transferred to the Court of Appeal's exclusive jurisdiction. *Id.* at 2769 n.14.

[6] *See, e.g.,* 152 Cong Rec. S10262 (daily ed. Sept. 27, 2006) (Sen. Bingaman) (quoting a letter opposing section 7, "the provision . . . would strip the federal courts of jurisdiction over

Despite Congress's clear intent regarding section 7, petitioner nevertheless contends that the significance of section 7 of the MCA is "not that it strips habeas jurisdiction in pending cases, but that it expands the territorial reach of the withdrawal of habeas jurisdiction to detainees held anywhere in the world instead of simply to Guantanamo." Petr's Opp'n at 12 n. 4. This interpretation makes no sense because it essentially renders the MCA redundant of the DTA (which, as *Hamdan* held, already eliminated district court jurisdiction prospectively). Indeed, if Congress were merely expanding the territorial reach of the DTA, then amending the language "an alien detained by the Department of Defense at Guantanamo Bay, Cuba" in the jurisdiction-limiting provision to "an alien detained by the United States" would have been sufficient.

Because Congress plainly intended to repeal district court habeas jurisdiction in cases such as this (and the language of the MCA is a clear statement of this intent), there is no need, as petitioner urges, *see* Petr's Opp'n at 14, to invoke the canon of constitutional avoidance. Not only does the avoidance doctrine "ha[ve] no application in the absence of statutory ambiguity," *United States v. Oakland Cannabis Buyers' Cooperative,* 532 U.S. 483, 494 (2001), but also the Suspension Clause issues raised by petitioner in any event cannot be avoided by his countertextual reading of

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even the pending habeas cases"); 152 Cong. Rec. S10357 (daily ed. Sept. 28, 2006) (Sen. Leahy) ("the bill goes far beyond what Congress did in the [DTA]. . . . This new bill strips habeas jurisdiction retroactively, even for pending cases"); *id.* at S10403 (Sen. Cornyn) ("once . . . section 7 is effective, Congress will finally accomplish what it sought to do through the [DTA] last year. It will finally get the lawyers out of Guantanamo Bay. It will substitute the blizzard of litigation instigated by *Rasul v. Bush* with a narrow DC Circuit-only review of the Combatant Status Review Tribunal--CSRT--hearings"); *id.* at S10404 (Sen. Sessions) ("It certainly was not my intent, when I voted for the DTA, to exempt all of the pending Guantanamo lawsuits . . . . Section 7 of the [MCA] fixes this feature of the DTA and ensures that there is no possibility of confusion in the future"); 152 Cong. Rec. H7938 (Rep. Hunter) (daily ed. Sept. 29, 2006) ("The practical effect of this amendment will be to eliminate the hundreds of detainee lawsuits that are pending in courts throughout the country and to consolidate all detainee treatment cases in the D.C. Circuit"); *id.* at H7942 (Rep. Jackson-Lee) ("The habeas provisions in the legislation are contrary to congressional intent in the [DTA]. In that act, Congress did not intend to strip the courts of jurisdiction over the pending habeas").

the statute; there is no dispute that the DTA and MCA eliminate habeas jurisdiction prospectively, and petitioners in habeas cases brought since the enactment of the DTA are arguing that the elimination of habeas jurisdiction is unconstitutional. *See, e.g., Taher v. Bush*, No. 06-cv-1684 (GK); *Ezatullah v. Bush*, No. 06-cv-01752 (CKK). Thus, even under petitioner's construction, federal courts will have to determine whether Congress may eliminate district courts' habeas jurisdiction in this context.

In fact, as discussed in more detail *infra* V., the Court of Appeals is already addressing this very issue in the pending appeals of certain habeas corpus petitions of other Guantanamo Bay detainees, *Al Odah, et al. v. United States,* 05-5064 (D.C. Cir.), and *Boumediene v. Bush, et al.*, No. 05-5062 (D.C. Cir.). The issue is unavoidable, and the "avoidance" doctrine cited is, therefore, inapplicable.[7]

C. The Exclusive Judicial Review Provided by the DTA Independently Deprives This Court of Jurisdiction.

In any event, regardless of the otherwise explicit withdrawal of district court jurisdiction over pending cases, the provision for exclusive review of CSRT decisions in the Court of Appeals itself operates independently to deprive this Court of jurisdiction. It is well-settled that an exclusive-review scheme, where applicable, precludes the exercise of jurisdiction under more general grants of jurisdiction, including *habeas corpus*. *Cf.*, *e.g.*, 5 U.S.C. § 703 ("form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for . . . writs of . . . habeas corpus"); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207-09 (1994) ("exclusive" jurisdiction under federal Mine Act precludes

[7] The doctrine also requires the statute be fairly read to avoid "serious constitutional problems," *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001), which, as discussed *infra* II, are not present here.

assertion of district court jurisdiction); *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984) (Hobbs Act) ("The appropriate procedure for obtaining judicial review of the agency's disposition of these issues was appeal to the Court of Appeals as provided by statute."); *Laing v. Ashcroft*, 370 F.3d 994, 999-1000 (9th Cir. 2004) ("§ 2241 is ordinarily reserved for instances in which no other judicial remedy is available"); *Lopez v. Heinauer*, 332 F.3d 507, 511 (8th Cir. 2003) ("Because judicial review was available . . . the district court was not authorized to hear this § 2241 habeas petition."). *See also Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) ("even where Congress has not expressly stated that statutory jurisdiction is 'exclusive' . . . a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute") (footnote omitted); *id.* at 75, 78-79 (request for relief in district court that might affect Court of Appeals' future, exclusive jurisdiction is subject to the exclusive review of the Court of Appeals). Accordingly, the petition in this case should be dismissed because the Court lacks jurisdiction over the case.

II. THE MCA DOES NOT VIOLATE THE SUSPENSION CLAUSE

A. Aliens Abroad Have No Constitutional Rights, Under the Suspension Clause or Otherwise.

Given that the MCA clearly applies to petitioner's case, petitioner is left to argue that section 7 of the MCA violates the Suspension Clause by eliminating district court habeas jurisdiction over his case and by vesting in the Court of Appeals a narrower scope of review. Petr's Opp'n at 15-29. According to petitioner, the MCA is an invalid suspension of the writ because there is no "rebellion or invasion" to justify the suspension. U.S. Const., art. I, § 9, cl. 2. To accept petitioner's argument, however, assumes that aliens detained overseas as enemy combatants have constitutional habeas rights protected by the Suspension Clause – a proposition soundly rejected by the Supreme Court

over 50 years ago, *see Johnson v. Eisentrager*, 339 U.S. 763 (1950), and not undermined in any way by *Rasul v. Bush,* 542 U.S. 466 (2004) *or Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

In *Eisentrager*, a group of German nationals – who were captured in China by U.S. forces during World War II and imprisoned in a U.S. military base in Germany – sought habeas relief in federal court. Although the military base in Germany was controlled by the U.S. Army, *id.* at 766, the Supreme Court held that these prisoners, detained as enemies outside the United States, were not "entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas." *Id*. at 777; *see also id.* at 781 ("no right to the writ of habeas corpus appears"). This is so because the prisoners "at no relevant time were within any territory over which the United States is *sovereign*, and the scenes of their offense, their capture, their trial, and their punishment were all beyond the territorial jurisdiction of any court of the United States." *Id.* at 777-78 (emphasis added). The Court further held the Fifth Amendment inapplicable to these aliens because, in reasoning fully applicable to the Suspension Clause, there is no textual or historical support for "[s]uch extraterritorial application of organic law." *Id.* at 782-85; *see also id.* at 768. As the Court noted, such application "would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. . . . None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it." *Id.* at 784-85.

The Supreme Court later explained in *United States v. Verdugo-Urquidez* that *Eisentrager*'s rejection of constitutional claims by alien prisoners in U.S. custody at a military base abroad was emphatic because aliens outside United States sovereign territory have no constitutional rights. *See* 494 U.S. 259, 269 (1990); *id.* at 273 ("Not only are history and case law against [the alien], but as pointed out in [*Eisentrager*], the result of accepting this claim would have significant and deleterious

consequences for the United States in conducting activities beyond its boundaries."). In *Zadvydas v. Davis*, the Court similarly confirmed the "well established" principle that "certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." 533 U.S. 678, 693 (2001); *cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens."). Following these precedents, the D.C. Circuit consistently has held that a "'foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.'" *32 County Sovereignty Comm. v. Department of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (citation omitted).

Furthermore, even when a alien is found within United States sovereign territory, an alien's lack of *voluntary* connection to the Nation denies him protections under the Constitution. As the Supreme Court explained in *Eisentrager*, the alien has been accorded "an ascending scale of rights as he increases his identity with our society," 339 U.S. at 770, and the privilege of litigation has been extended to aliens "only because permitting their presence in the country implied protection," *id.* at 777-78. Thus, an alien seeking constitutional protections must establish not only that he has come within the territory over which the United States has sovereignty, but also that he has developed substantial voluntary connections with this country. *See Verdugo-Urquidez*, 494 U.S. at 271-72; *accord Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004). In *Verdugo-Urquidez*, the Supreme Court held that a non-resident alien, who had no previous significant voluntary connection with the United States and was involuntarily transported to the United States and held against his will, had no Fourth Amendment right with respect to the search of his property abroad by U.S. agents. 494 U.S. at 271. The Court reasoned that presence in the United States that is "lawful but involuntary [ ] is not of the sort to indicate any substantial connection with our country." *Id.*

In light of these principles, petitioner cannot claim in this case any constitutional protections, including under the Suspension Clause. Petitioner is an alien who has no voluntary connection to the United States at all. Furthermore, he is detained at Guantanamo Bay, and it is clear that Guantanamo is outside the sovereign territory of the United States. As the Supreme Court observed in *Rasul v. Bush*, under the 1903 Lease Agreement executed between the United States and Cuba, "'the United States recognizes the continuance of the *ultimate sovereignty of the Republic of Cuba* over the [leased areas],' while 'the Republic of Cuba consents that . . . the United States shall exercise complete jurisdiction and control over and within said areas.'"[8] *Rasul v. Bush*, 542 U.S. 466, 471 & n.2 (2004) (emphasis added). Indeed, even as the Court in *Rasul* framed the question before it for review, it fully recognized a distinction between "'ultimate sovereignty'" and "plenary and exclusive jurisdiction" at Guantanamo.[9] *Id*. at 475 ("The question now before us is whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises 'plenary and exclusive jurisdiction,' but not 'ultimate sovereignty.'"). *Cf. United States v. Spelar*, 338 U.S. 217, 221-22 (1949) (lease for military air base in Newfoundland "effected no transfer of sovereignty with respect to the military bases concerned"); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380-81 (1948) (U.S. naval base in Bermuda, controlled by United States under lease with Great Britain, was outside United States sovereignty).

Given the absence of U.S. sovereignty over Guantanamo and petitioner's status as an alien enemy who has no voluntary connection to this country and is held during armed conflict, petitioner

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[8] *See* Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.–Cuba, art. III, T.S. No. 418 (6 Bevans 1113) ("1903 Lease").

[9] Indeed, the 1903 Lease prohibits the United States from establishing certain "commercial" or "industrial" enterprises over Guantanamo, a restriction wholly inconsistent with control congruent with sovereignty. *See* 1903 Lease, art. II.

lacks cognizable constitutional rights, including under the Suspension Clause.[10] Accordingly, the withdrawal of habeas jurisdiction by the MCA over petitioner's case does not implicate the Suspension Clause.

Petitioner nevertheless argues that the Supreme Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004), supports a common law right to habeas relief that is "protected by the Suspension Clause," Petr's Opp'n at 6-7, and that *Rasul* somehow limited *Eisentrager*'s constitutional holding to only those cases having the same fact pattern as that in *Eisentrager*, *id.* at 25. These arguments have no merit.

Rasul held for the first time that aliens outside of the United States have a right to habeas relief. That holding, however, addressed only the reach of the federal habeas *statute*, and did not

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[10] The decision of Judge Green in *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 461-64 (D.D.C. 2005), extending Fifth Amendment due process rights to Guantanamo detainees should not be followed. *See Khalid v. Bush*, 355 F. Supp. 2d 311, 320-21 (D.D.C. 2005) (Leon, J.) (aliens detained at Guantanamo are not possessed of constitutional rights). Judge Green's rationale places undue, virtually dispositive weight upon a single, oblique footnote in *Rasul* that "[p]etitioners' allegations . . . unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'" 124 S. Ct. at 2698 n.15. That footnote, however, appended to a paragraph focused entirely on the question of statutory jurisdiction under 28 U.S.C. § 2241 and to a sentence asserting what "[p]etitioners contend[ed]" for such statutory jurisdictional purposes, cannot fairly be read as *sub silentio* overruling *Eisentrager* and the other repeated holdings of the Supreme Court that aliens outside sovereign United States territory and with insufficient connection to the United States lack constitutional rights. *See Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001) (the Supreme Court "does not . . . hide elephants in mouseholes"). The reliance in *In re Guantanamo Detainee Cases* upon the *Insular Cases* and *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977), as extending fundamental constitutional rights to areas where the United States "technically" is not considered sovereign, *see* 355 F. Supp. 2d at 461, is likewise misplaced. The territories at issue in those cases were governed essentially as sovereign areas, that is, by Congress pursuant to its constitutional power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," U.S. CONST. art. IV, § 3, cl.2, and, thus, are distinct from Guantanamo where the United States does not exercise sovereignty. *See Balzac v. People of Porto Rico*, 258 U.S. 298, 312-13 (1922); *Dorr v. United States*, 195 U.S. 138, 142-43, 149 (1904); *Ralpho*, 569 F.2d at 618-19.

address in any way the scope of the Suspension Clause. *See* 542 U.S. at 476-79; *see also id.* at 475 ("The question now before us is whether the *habeas statute* confers a right to judicial review of the legality of Executive detention of aliens [at Guantanamo].") (emphasis added). Indeed, *Rasul* expressly distinguished between the statutory and constitutional holdings of *Eisentrager* and limited its analysis to the proper interpretation of section 2241, *see id.* at 476-79, particularly its distinctive phrase relating to the power of courts to issue writs of habeas corpus "within their respective jurisdictions." *Id.* at 471; *see* 28 U.S.C. § 2241(a). The Court found that the "statutory predicate" for the Court's holding in *Eisentrager* was "overruled" by the Court's decision in *Braden v. 30th Judicial Circuit County of Kentucky*, 410 U.S. 484 (1973). *Rasul*, 542 U.S. at 479. Given the additional fact that "the [habeas] *statute* dr[e]w[] no distinction between Americans and aliens held in federal custody," the Court held that "[a]liens held at the base, no less than American citizens, [were] entitled to invoke the federal courts' authority *under § 2241*." *Rasul*, 542 U.S. at 484 (emphasis added). The Court did not, however, cast any doubt on *Eisentrager's* ruling that the *Constitution* does not guarantee aliens held abroad a right to habeas corpus. *See id*. at 478.

To be sure, in interpreting the habeas statute, the Court in *Rasul* also examined "the historical reach of the writ," noting that at common law, courts exercised habeas jurisdiction over the claims of not only "aliens detained within sovereign territory of the realm," but also "persons detained in the so-called 'exempt jurisdictions,' where ordinary writs did not run, and all other dominions under the sovereign's control." *Id.* at 481-82 & nn. 11-13. This observation, however, does not help petitioner because the "persons" cited by the Court to be in "exempt jurisdictions" or other dominions under the sovereign's control were all citizens (or subjects) of the sovereign that was holding them. *See id.* at 481-82 nn. 12-13. And "[c]itizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar." *Eisentrager*, 339 U.S. at 770. "Even by the most magnanimous view, our law does not abolish inherent distinctions recognized

throughout the civilized world between citizens and aliens," *id.* at 769, not to mention alien enemies. Indeed, even "[a]t common law 'alien enemies have no rights, no privileges, unless by the king's special favour, during the time of war.' (1 Blackstone at 372, 373)." *Id.* at 775 (quoting *Citizens Protective League v. Clark*, 155 F.2d 290, 293 (D.C. Cir. 1946)); *see also Case of the Three Spanish Sailors*, 96 Eng. Rep. 775, 776 (C.P. 1779) (petitioners, as prisoners of war, were "not entitled to any of the privileges of Englishmen; much less to be set at liberty on habeas corpus"); *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (courts "will not even grant a habeas corpus in the case of a prisoner of war, because such a decision on this question is in another place, being part of the rights of sovereignty").

Moreover, *Rasul* discussed the common law in the context of interpreting congressional intent under the habeas statute. After concluding that there was "little reason to think that Congress intended the geographical coverage of [§ 2241] to vary depending on the detainee's citizenship," *Rasul,* 542 U.S. at 481, the Court then went on to note that such an interpretation would be consistent with the historical reach of the writ. *Id.* at 481-82. The question before the Court consistently was a statutory one, and so was the Court's holding, which has now been legitimately superceded by the MCA.

B. The Judicial Review Provided under the MCA and the DTA Fully Comports With the Suspension Clause, in any Event.

Even if petitioner were entitled to habeas relief as a matter of constitutional right, Congress has provided an alternative judicial review scheme that fully comports with the Suspension Clause. The Supreme Court has stressed that the "'the power to award the writ by any of the Courts of the United States, must be given by written law.'" *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) (quoting *Ex Parte Bollman*, 8 U.S. (4 Cranch.) 75, 94 (1807)). *See also* 518 U.S. at 664 ("judgments about the proper scope of the writ [of habeas corpus] are 'normally for Congress to make'") (quoting

Lonchar v. Thomas, 517 U.S. 314, 323 (1996)). Consistent with these principles, the Supreme Court has held that Congress may freely repeal habeas jurisdiction, if an adequate and effective substitute remedy is provided. *See Swain v. Pressley*, 430 U.S. 372, 381 (1977) (non-Article III court review of detention can form adequate substitute for habeas and avoid suspension issue).[11]

The judicial review scheme provided under the DTA and the MCA is such an adequate substitute. Section 1005(e)(2)(C) of the DTA permits the Court of Appeals of the District of Columbia Circuit to review whether the United States' determination of a CSRT with regard to an alien detainee was consistent with the standards and procedures specified by the Secretary of Defense for CSRTs. The Court of Appeals can also review whether the conclusion of the CSRT is supported by a preponderance of the evidence. DTA § 1105(e)(2)(C). In addition, the Court of Appeals may consider, "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." *Id.* Similarly, final decisions of a military commission are reviewable both as to their consistency with standards and procedures specified for a military

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[11] Petitioner also argues that the MCA unconstitutionally interferes with core functions of the judiciary because it prevents this Court from enforcing its November 8, 2004 Order and narrows the scope of habeas review in a fashion so as to dictate judicial decision. *See* Petr's Opp'n at 29-32. This argument is frivolous because in addition to Congress's power to define the proper scope of the writ of habeas corpus, it has long been established that Congress has the power to limit or withdraw the jurisdiction of the federal courts (even as to pending cases). *See Gallardo v. Santini Fertilizer Co.*, 275 U.S. 62, 63 (1927) (ordering dismissal because after the district court had issued an injunction, Congress passed a law "that took away the jurisdiction of the District Court in this class of cases"); *Bruner v. United States*, 343 U.S. 112, 114, 117 (1952); *see also Cobell v. Norton*, 392 F.3d 461, 467 (D.C. Cir. 2004) ("For purposes of the rule limiting congressional reversal of final judgments, an injunction is not 'final' . . . '[A]lthough an injunction may be a final judgment for purposes of appeal, it is not the last word of the judicial department because any provision of prospective relief is subject to the continuing supervisory jurisdiction of the court, and therefore may be altered according to subsequent changes in the law.'") (quoting *National Coalition To Save Our Mall v. Norton*, 269 F.3d 1092, 1096-97 (D.C. Cir. 2001)).

commission and with the Constitution and laws of the United States to the extent they are applicable. DTA § 1005(e)(3)(D).

Thus, while petitioner complains about the nature of the CSRT process, the enemy combatant definition used by CSRTs, and the types of material submitted to CSRTs, among other things, all of those issues can be raised before the Court of Appeals in an appropriate DTA proceeding. The Court of Appeals can determine the nature of petitioner's rights, if any, under "laws of the United States" and the U.S. Constitution, and can adjudicate whether the CSRT process or the military commission decision violated any applicable rights. *See* DTA § 1005(e)(2), (3). While respondents have argued (and continue to argue) that petitioner has no constitutional rights in this context, petitioner can plead his arguments to the contrary, where appropriate, to the Court of Appeals. In sum, the availability of judicial review under the DTA and the MCA negates any argument under the Suspension Clause.

i. The MCA and the DTA provide alien detainees with greater rights than that traditionally available in the military tribunal context.

Petitioner argues that the DTA's failure to allow for *de novo* district court review, for plenary, factual inquiry; for discovery; and for introduction of new evidence, make the D.C. Circuit's exclusive review scheme an inadequate substitute for habeas. *See* Petr's Opp'n at 19-22. Petitioner is wrong for several reasons.

First, there is simply no constitutional right to the type of plenary, factual inquiry urged by petitioner. The Supreme Court has held that the habeas review traditionally afforded in the context of military tribunals does not examine the guilt or innocence of the defendant, nor does it examine the sufficiency of the evidence. Rather, it is limited to the question whether the military tribunal had jurisdiction over the charged offender and offense. *See Yamashita v. Styer*, 327 U.S. 1, 8 (1946) ("If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject

to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions"); *id.* at 17 ("We do not here appraise the evidence on which petitioner was convicted" because such a question is "within the peculiar competence of the military officers composing the commission and were for it to decide"); *Ex parte Quirin*, 317 U.S. 1, 25 (1942) ("We are not here concerned with any question of the guilt or innocence of petitioners"). *See also Eisentrager*, 339 U.S. at 786. By providing for constitutional and other legal claims, including issues of compliance with the military's own procedures and evidentiary sufficiency, the DTA and the MCA actually provide petitioner with *greater rights* of judicial review than that traditionally afforded to those convicted of war crimes by a military commission.

Second, the idea that petitioner has a constitutional habeas right to a sweeping factual inquiry in district court cannot be reconciled with *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). The controlling opinion in that case made clear that constitutional requirements for detaining even citizens in this country as enemy combatants "could be met by an appropriately authorized and properly constituted military tribunal" modeled upon military procedures implementing the Geneva Conventions for determining the status of detainees potentially entitled to prisoner-of-war status. *See id*. at 538 (plurality opinion). Acknowledging "the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States," *id.* at 531, as well as the need to "tailor[] [enemy combatant proceedings] to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict," *id.* at 533, the plurality noted that proceedings by which the military determined enemy combatant status could legitimately be severely limited in scope, in ways that are not characteristic of traditional judicial proceedings, including permitting hearsay from the government, establishing a presumption in favor of the government, and limiting factual disputes to the alleged combatant's acts. *Id*. at 534.

The CSRT process is modeled on this same process, with additional procedural process and protections. Consistent with *Hamdi* and *Yamashita*, the MCA and DTA were enacted to ensure that, while each detainee is afforded his day in court, the substantive decision of whether to consider an alien captured during an armed conflict an enemy combatant remains a military decision. *See* 152 Cong. Rec. S10266 (daily ed. Sept. 27, 2006) (Sen. Graham) ("[t]he role of the courts in a time of war is to pass muster and judgment over the processes we create -- not substituting their judgment for the military"); *id.* at S10403 (Sen. Cornyn) ("Weighing of the evidence is a function for the military when the question is whether someone is an enemy combatant. Courts simply lack the competence -- the knowledge of the battlefield and the nature of our foreign enemies -- to judge whether particular facts show that someone is an enemy combatant"). The approach adopted by Congress through the CSRT process used for enemy combatant status determinations, *see* DTA § 1005(e)(2), simply cannot be reconciled with an argument that wide-ranging, *de novo* court review of the outcome of those proceedings is necessary to avoid Suspension Clause concerns.

Third, any suggestion that the Constitution provides a freestanding jurisdictional basis for habeas relief in *district court* independent of the jurisdiction Congress provides by statute is insupportable. The Constitution contains no provision requiring the existence of district courts,[12] and thus, there is no extra-statutory authority, under the Constitution or otherwise, that would automatically vest district courts with *habeas* or other jurisdiction. *See*, *e.g.*, *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies."); *Kokkonen v. Guardian Life Ins. Co of America*, 511 U.S. 375, 377

[12] *See* U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

(1994) ("Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.") (citation omitted).

ii. The judicial review available under the MCA and the DTA is at least consistent with that available in the non-military habeas context.

The review provided under the DTA and the MCA is not only greater than that afforded under *Yamashita*, but it is also consistent with traditional habeas practice outside the military tribunal context. In *INS* v. *St. Cyr*, the Supreme Court explained that under traditional habeas review in alien-specific contexts, "the courts generally did not review the factual determinations made by the Executive," other than the question whether there was some evidence to support the order. *St. Cyr*, 533 U.S. at 305-06; *accord Jackson v. Virginia*, 443 U.S. 307, 320-24 (1979). The DTA and MCA review is consistent with that approach; such review permits the Court of Appeals to assess whether the CSRT, in reaching its decision, complied with "the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence." DTA § 1105(e)(2)(C)(i). In fact, at common law, habeas courts did not even engage in any sufficiency review, given the longstanding rule that the truth of the custodian's return could not be controverted. *See, e.g.,* Opinion on the Writ of Habeas Corpus, Wilm 77, 107, 97 Eng. Rep. 29, 43 (H.L. 1758); *see also* Note, Developments in the Law – Federal Habeas Corpus, 83 HARV. L. REV. 1038, 1113-1114 (1970) ("From 1789 to 1867, the period during which, with minor exceptions, federal habeas corpus extended only to federal prisoners, the federal habeas court did not hold fact hearings. The facts asserted in the return to the writ had to be accepted despite the prisoner's attempt to controvert them."). Thus, even if the non-military habeas authority is considered, the review provided under the DTA and the MCA is consistent with it, and does not give rise to any Suspension Clause issue.

The cases cited by petitioner are not to the contrary. In *Goldswain's Case*, 96 Eng. Rep. 711 (C.P. 1778), the petitioner challenged his eligibility for military impressment where the central

questions had never been adjudicated by any body, judicial or otherwise. And even in that case, the court held that, once a return had been made, habeas petitioners were not permitted to "controvert the truth of the return to a habeas corpus, or plead or suggest any matter repugnant to it." 96 Eng. Rep. at 713. In both *R. v. Schiever*, 97 Eng. Rep. 551 (K.B. 1750), and *Case of the Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779), the alien petitioners were being held as prisoners of war on *sovereign English territory,* and thus, the cases do not speak to the habeas rights of aliens held as enemies outside sovereign territory, which is the relevant class of petitioners and the class of petitioners addressed squarely in *Eisentrager*.

Similarly inapposite is *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), which involved review of the decision of a military tribunal regarding a U.S. citizen being held in sovereign U.S. territory. *Milligan* obviously does not diminish the later controlling holding of *Eisentrager*. Moreover, even the *Milligan* Court did not "evaluate" exculpatory evidence presented by the petitioner, but relied entirely on facts that were not in dispute, namely, the residency of the petitioner in a state where the Civil War had not been active and where the regular courts were operational. *Id.* at 118, 121. The *Milligan* Court certainly did not engage in or authorize any process approaching the sort of evidentiary hearing envisioned by petitioner here.

iii. CSRTs are entitled to presumption of regularity and any alleged potential bad faith on the part of the government to avoid judicial review is unfounded.

Petitioner argues that the DTA review is constitutionally deficient also because it does not allow for judicial inquiry for those awaiting their CSRT determination. According to petitioner, the government may preclude judicial review by merely asserting that a detainee is awaiting a determination by the United States of whether he or she is in fact an enemy combatant, and thus the MCA and the DTA may afford no judicial review as a practical matter. Petr's Opp'n at 18-19. Petitioner's argument should be rejected out of hand because he has no standing to challenge the

MCA on behalf of those detainees who are awaiting their enemy combatant status determination. Petitioner had his CSRT on October 2, 2004, and was determined to be an enemy combatant, *see* Swift Decl. ¶ 16; Hecker Decl., Ex. 1 at 2; he is not "awaiting determination" of his enemy combatant status. The Supreme Court has long held that "a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). "A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations." *County Court of Ulster County v. Allen*, 442 U.S. 140, 154-55 (1979); *cf. United States v. Salerno*, 481 U.S. 739, 745 (1987) (overbreadth challenges to facial validity of a legislative act permitted only "in the limited context of the First Amendment"). Thus, Hamdan may not challenge the MCA based on its supposed effects on differently situated detainees.

Moreover, the government is presumed to act in good faith, and the military's CSRTs are entitled to a strong presumption of regularity. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Morris v. Sullivan*, 897 F.2d 553, 560 (D.C. Cir. 1990) ("[t]he presumption of regularity supports the official acts of public officers" and, "in the absence of clear evidence to the contrary," courts presume that they will properly discharge their official duties) (quoting *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926)); *FTC v. Owens-Corning Fiberglass, Inc.*, 626 F.2d 966, 975 (D.C. Cir. 1980) ("until evidence appears to the contrary," the government is "entitled to a presumption of administrative regularity and good faith"). Indeed, except for 14 new detainees who were transferred to Guantanamo Bay only this fall, every Guantanamo detainee has already received a CSRT. *See* Hecker Decl. ¶ 5. The Department of Defense previously also has released

detainees held at Guantanamo who were determined not to be enemy combatants. *Id.* ¶ 3. The speculation that the government will act in bad faith by purposely refusing to determine any Guantanamo detainee's enemy combatant status so as to avoid judicial review is improper and simply unfounded.

C. The MCA Provision Establishing That the Geneva Conventions Are Not Judicially Enforceable Is Fully Consistent with Congress's Legislative Authority under the Constitution and Does Not Violate the Suspension Clause.

Petitioner further argues that the MCA effects a suspension of the writ because it denies a detainee the right to invoke the protection of the Geneva Conventions, when, according to petitioner, review of treaty-based claims is historically part of the habeas inquiry. According to petitioner, because Congress intends to fully implement U.S. obligations under the Geneva Conventions, and because those treaties have the status of domestic law, violations of the treaties provide a basis for habeas relief. *See* Petr's Opp'n at 24. Petitioner also raises similar arguments with respect to the MCA's preclusion of claims under the Geneva Conventions before military commissions. *Id.* at 28. Petitioner's arguments have no merit.

Section 5(a) of the MCA, which provides that no person may invoke the Geneva Conventions as "a source of rights" in any civil court proceeding to which the United States is a party, clarifies settled law that treaties, such as the Geneva Conventions, are presumed not to create individually enforceable rights. A treaty "is primarily a compact between independent nations," *Head Money Cases*, 112 U.S. 580, 597 (1884), and absent a clear contrary intent, a treaty "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Id.*; *see also Whitney v. Robertson*, 124 U.S. 190, 194-195 (1888); *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988). If a treaty is violated, this "becomes the subject of international negotiations and reclamation," not the subject of a lawsuit.

Head Money Cases, 112 U.S. at 597 ("It is obvious that with all this the judicial courts have nothing to do and can give no redress.").

Thus, simply because Congress intends to implement the United States' obligations under the Geneva Conventions does not mean that Congress also intends those treaties to be judicially enforced in court by private individuals. The presumption is to the contrary, and the MCA specifically confirms that there is no congressional intent to provide individually enforceable rights under those treaties, even if they speak in terms of protecting individuals.[13] *See Holmes v. Laird*, 459 F.2d 1211, 1213, 1222 (D.C. Cir. 1972) (denying U.S. soldiers' claims that because the NATO Status of Forces Agreement granted individual members of the armed forces specific rights, a federal court could adjudicate a claim based upon those treaty rights; holding that "the corrective machinery specified in the treaty itself is nonjudicial"); *see also Eisentrager*, 339 U.S. at 789 (holding that the 1929 Geneva Convention is not judicially enforceable by the captured party).

Nor does the fact that this is a habeas proceeding change the constitutional analysis. The habeas statute is simply a grant of jurisdiction, and does not itself create any substantive rights against detention. Accordingly, every court of appeals to consider the question has determined that treaties that do not themselves create judicially enforceable rights may not be enforced through the habeas statute. As the Sixth Circuit has explained, "the reference to 'treaties of the United States' in § 2241 cannot be construed as an implementation of non-self-executing provisions of treaties so as to render them judicially enforceable." *Bannerman v. Snyder*, 325 F.3d 722, 724 (6th Cir. 2003);

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[13] In fact, Congress specifically intended to preclude all treaty claims in any challenges to CSRT determinations. Section 1005(e)(2)(C)(ii) of the DTA limits judicial review to the question whether the standards and procedures used by the CSRTs are "consistent with the Constitution and laws of the United States," to the extent the "Constitution and laws of the United States" are applicable. In contrast, the habeas statute permits review of claims that a petitioner is being held "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3).

accord Poindexter v. Nash, 333 F.3d 372 (2d Cir. 2003); *Wesson v. United States Penitentiary Beaumont*, 302 F.3d 343 (5th Cir. 2002); *Hain v. Gibson*, 287 F.3d 1224 (10th Cir. 2002); *United States ex rel. Perez v. Warden*, 286 F.3d 1059 (8th Cir. 2002). In any event, there cannot possibly be any constitutional impediment to Congress limiting enforcement of a treaty to diplomatic and non-judicial processes. That is the norm for treaties. *See, e.g., Holmes v. Laird*, 459 F.2d 1211, 1220-22 (D.C. Cir. 1972); *cf. Tag v. Rogers*, 267 F.2d 664, 667 (D.C. Cir. 1959) ("it has long been established that treaties and statutes are on the same level and, accordingly, that the latest action expresses the controlling law"). In sum, petitioner never had any judicially enforceable rights under the Geneva Conventions, and there can be no Suspension Clause violation simply because the MCA clarifies that fact.

D. The MCA's Limitation of Petitioner's Ability to Challenge Any Military Commission That Might Be Convened Against Him in the Future Similarly Does Not Violate the Suspension Clause.

Petitioner argues that the MCA's limitation on his ability to challenge the jurisdiction of any military commission that might be convened against him in the future renders the MCA an inadequate substitute for habeas corpus. Petr's Opp'n at 26-28. As characterized by petitioner, the MCA forecloses him from raising any jurisdictional challenges to the military commission. *See id.* at 26. Petitioner is wrong, and in any event, his complaint is premature at this juncture.

As an initial matter, since the Supreme Court's decision in *Hamdan v. Bush*, 126 S. Ct. 2749 (2006), which determined petitioner's prior military commission to be inconsistent with the then-existing statutory scheme, the military commission against petitioner ceased to exist, the government has yet to bring new charges against petitioner, and no new military commission has been convened against him.[14] Accordingly, any claim respecting a future military commission is, at this point,

[14] Therefore, petitioner's assertion that respondents' compliance with the prior holding of the Supreme Court in this case amounts to nothing more than "voluntary cessation of a

premature. Petitioner, accordingly, lacks standing to bring such a claim. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *City of Los Angeles v. Lyons*, 461 U.S. 95, 102-03 (1983).

If and when a military commission proceeding does commence against petitioner, however, he will be able to challenge the lawfulness of the commission process in the Court of Appeals, including any jurisdictional defects there might be regarding the military commission, once there is a final military commission decision. *See* DTA § 1005(e)(3) (providing that an alien detainee may challenge in the D.C. Circuit the final decision of the military commission as being inconsistent with "the Constitution and laws of the United States"). In other words, the MCA has merely provided a different forum for petitioner to raise the jurisdictional challenge.

In addition, contrary to petitioner's contention that he has a right to challenge the jurisdiction of the military commission before trial, Congress can, as it has here, jurisdictionally bar a detainee's claims until the commission ruling becomes final. *Cf. McCarthy v. Madigan,* 503 U.S. 140, 144 (1992) ("Where Congress specifically mandates, exhaustion is required."); *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994) ("Whether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review."); *see, e.g.,* 28 U.S.C. § 2254(b)(1)(A) (providing that an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless the applicant has exhausted the remedies available in the courts of the State). Neither the Supreme Court nor the Court of Appeals has held to the contrary in this case, despite what petitioner claims. The discussions cited by petitioner about the parties' interest in knowing in advance the lawfulness of the military commission then convened against him were in the context of determining

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challenged practice," *i.e.*, the conduct of military commission proceedings against petitioner, *see* Petr's Opp'n at 27 n.19, has no merit.

whether abstention was appropriate (namely, whether the court should apply the judge-made rule that civilian courts should await the final outcome of on-going military proceedings before entertaining an attack on those proceedings), *see Hamdan*, 126 S.Ct. at 2771-72; 415 F.3d at 36, and in the absence of any congressional action regarding the timing of judicial review. They have nothing to do with any supposed habeas right protected by the Suspension Clause. Congress's intent remains the touchstone in cases regarding the timing of judicial review, and Congress has made a clear judgment regarding that issue through the DTA and the MCA.[15] Congress's judgment should be respected.

Similarly without merit is petitioner's argument that the government may attempt to preclude judicial review of final decisions of the military commission by purposely failing to finalize the military commission's judgment. *See* Petr's Opp'n at 28-29. In addition to the presumption of regularity and good faith to which the government is entitled,[16] *see Armstrong*, 517 U.S. at 464; *Morris*, 897 F.2d at 560; *Owens-Corning Fiberglass, Inc.*, 626 F.2d at 975, petitioner's argument is too speculative to establish standing. As petitioner himself recognizes, regulations regarding military commissions, including any requirements regarding the timing of finalizing results, are yet to be promulgated. *See* Petr's Opp'n at 29. Any allegation of future injury based on the government's bad faith inaction is pure conjecture or mere hypothesis at best, which is wholly insufficient to establish petitioner's standing. *See Defenders of Wildlife*, 504 U.S. at 560; *Lyons*, 461 U.S. at 102-03.

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[15] Thus, petitioner's citation of *Rafeedie v. INS*, 880 F.2d 506 (D.C. Cir. 1989), *see* Petr's Opp'n at 28, is inapposite. The court in that case merely engaged in a prudential balancing of the parties' interests with respect to requiring exhaustion of administrative processes where "Congress did not manifest an intent" to apply an exhaustion requirement. 880 F.2d at 513-18.

[16] *Cf. Hamdan*, 126 S.Ct. at 2771 ("We have no doubt that the various individuals assigned review power under Commission Order No. 1 would strive to act impartially and ensure that Hamdan receive all protections to which he is entitled.").

III. THE MCA IS NOT AN UNCONSTITUTIONAL BILL OF ATTAINDER

Petitioner's argument that the MCA is an unconstitutional bill of attainder must be rejected. Not only does petitioner lack the ability to avail himself of constitutional rights, *see supra* II.A., but the MCA is not a bill of attainder in any event.

The Constitution provides that "[n]o Bill of Attainder . . . shall be passed." Art. I, § 9, cl. 3. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841 (1984). Because the Bill of Attainder Clause acts as "safeguard against legislative exercise of the judicial function or more simply - trial by legislature," *United States v. Brown*, 381 U.S. 437, 442 (1965), it has rarely been invoked to condemn legislation. Indeed, the Supreme Court has struck down statutes on bill of attainder grounds only five times in the nation's history. *See BellSouth Corp. v. F.C.C.*, 162 F.3d 678, 683 (D.C. Cir. 1998). In light of the separation of powers principles underlying the Bill of Attainder Clause,[17] the Supreme Court has held that only "the clearest proof" suffices "to establish the unconstitutionality of a statute on such a ground." *Communist Party of United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 83 (1961). As explained below, the MCA does not contain either of the required elements of a bill of attainder: it neither singles out petitioner nor does it impose

[17] "[T]he Bill of Attainder Clause not only was intended as one implementation of the general principle of fractionalized power, but also reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness, of, and levying appropriate punishment upon, specific persons." *United States v. Brown*, 381 U.S. 437, 445 (1965). Put simply, "[t]he distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt." *De Veau v. Braisted*, 363 U.S. 144, 160 (1960).

punishment. *See Foretich v. United States*, 351 F.3d 1198, 1217 (D.C. Cir. 2003) ("Both 'specificity' and 'punishment' must be shown before a law is condemned as a bill of attainder.").

A. Section 7 of the MCA Does Not Target Specific Individuals But Is Rather A Jurisdictional Statute That Applies to an Open-ended Class of Individuals.

As a threshold matter, the MCA does not meet the specificity requirements for a bill of attainder because it does not apply "either to named individuals or to easily ascertainable members of a group." *United States v. Lovett*, 328 U.S. 303, 315-6 (1946). The group punished by the MCA, according to petitioner, consists of all non-citizens presently designated or designated in the future by the government as "enemy combatants." *See* Petr's Opp'n at 33. Thus, the MCA does not unlawfully "single out" petitioner alone for punishment – the historical hallmark of a bill of attainder. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 471 n.34 (1977); *Selective Serv. Sys.*, 468 U.S. at 847. Furthermore, because the constitutional prohibition on bills of attainder is directed at the legislative determination and punishment of guilt, it can have no application to the MCA, a jurisdictional statute that applies to an open-ended class of individuals – aliens determined by administrative processes to be enemy combatants or who are being held as enemy combatants while awaiting such determinations. *See Korte v. Office of Personnel Management*, 797 F.2d 967, 972 (Fed. Cir. 1986) (rejecting bill of attainder challenge where alleged finding of "guilt" was not imposed on plaintiff by federal statute, but by agency-level adjudicative body whose decision was subject to judicial review).

Indeed, the broad reading of the Bill of Attainder Clause advanced by petitioner would extend the prohibition far beyond its intended scope. Accepting petitioner's argument would "cripple the very process of legislating" because "every person or group made subject to legislation that he or it finds burdensome" would complain that "he or it is being subjected to punishment." *Nixon*, 433 U.S.

at 470. Such reasoning would impermissibly transform any law into a bill of attainder merely because it regulates conduct on the part of designated individuals or classes of individuals. *See Wilson v. Yaklich*, 148 F.3d 596, 605-06 (6th Cir. 1998) (rejecting bill of attainder challenge to provision of Prison Litigation Reform Act that precludes filing of *in forma pauperis* civil actions by a prisoner who has had similar petitions dismissed as frivolous on three or more prior occasions); *Marozsan v. United States*, 90 F.3d 1284,1287 (7th Cir. 1996) (concluding that statute forbidding judicial review of individual veterans' benefits decisions is not bill of attainder); *Nagac v. Derwinski*, 933 F.2d 990, 990-91 (9th Cir. 1991) (holding that provision of the Veterans' Judicial Review Act limiting the jurisdiction of the Court of Veterans Appeals to hear certain claims is not a bill of attainder). For this reason, petitioner notably does not identify a single case in which a statute regulating the jurisdiction of the federal courts with respect to certain classes of litigants has been struck down on bill of attainder grounds.

Petitioner's bill of attainder argument is essentially an attempt to recast his equal protection argument – both arguments essentially contend that the MCA unlawfully discriminates against non-citizen enemy combatants by limiting the scope of judicial review. The Supreme Court, however, has held that the Bill of Attainder Clause "surely was not intended to serve as a variant of the equal protection doctrine, invalidating every Act of Congress or the States that legislatively burdens some persons or groups but not all other plausible individuals." *Nixon*, 433 U.S. at 470.

B. The MCA Does Not Inflict Legislative Punishment.

Even assuming the specificity element of the Bill of Attainder Clause were deemed satisfied, petitioner's claim should also be rejected because "the proscription on bills of attainder reaches only statutes that inflict punishment." *Selective Serv. Sys.*, 468 U.S. at 851. In this case,

section 7 of the MCA is not a bill of attainder because its regulation of the jurisdiction of the federal courts does not "inflict punishment" on those who come within its purview.

In "determining whether a statute inflicts punishment within the proscription against bills of attainder," the severity of the sanction imposed "is not determinative of its character as punishment." *Selective Serv. Sys.*, 468 U.S. at 851. Neither is the fact that the statute "regulates conduct on the part of designated individuals or classes of individuals," or compels "an individual or defined group . . . to bear burdens which the individual or group dislikes." *Nixon*, 433 U.S. at 470. Instead, to "decid[e] whether a statute inflicts forbidden punishment," a court must make "three necessary inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes;' and (3) whether the legislative record 'evinces a congressional intent to punish.'" *Selective Serv. Sys.*, 468 U.S. at 852 (quoting *Nixon*, 433 U.S. at 475-76). The MCA does not satisfy any of these criteria.

According to petitioner, the "punishment" imposed by the MCA is the "deprivation of habeas review" and the limitation on the scope of judicial review to which petitioner believes he would otherwise be entitled.[18] *See* Petr's Opp'n at 35-36. But the list of punishments covered by the Bill of Attainder Clause has been limited to death, imprisonment, banishment, the punitive confiscation of property, and legislative bars to participation by individuals or groups in specific employments or professions. *Selective Serv. Sys.*, 468 U.S. at 852; *Nixon*, 433 U.S. at 474. By contrast, the MCA

[18] As explained *supra* II.B.i, petitioner's insistence that enemies captured during armed conflict, and detained by the military as enemy combatants have a right to *de novo* review of the ruling of the governing military tribunal is wholly unfounded and inconsistent with Supreme Court precedent. Consequently, the MCA does not impose "punishment" because petitioner is not entitled to such sweeping judicial review. In any event, the MCA does not fall within the historical meaning of legislative punishment.

simply specifies the forum in which permissible claims by enemy combatants must be brought and clarifies the scope of that review. Accordingly, the MCA does not involve any of the several punishments the Supreme Court has noted as being historically associated with bills of attainder.[19]

Additionally, the MCA plainly "can be said to further nonpunitive legislative purposes." *Selective Serv. Sys.*, 468 U.S. at 852. The purpose of the MCA is not to punish petitioner but to clarify the scope of the habeas statute by creating a jurisdictional scheme establishing a single judicial forum in which claims by enemy combatants must be brought. Through the MCA, Congress was acting to clarify the meaning of the DTA, after *Hamdan*, to state expressly that the elimination of jurisdiction over habeas claims applies to all pending cases. The statutory response by Congress to the *Hamdan* decision can hardly be deemed punishment. *See, e.g.*, 152 Cong. Rec. S10367 (Sen. Graham) ("The only reason we are here is because of the *Hamdan* decision. The *Hamdan* decision did not apply to the [DTA] retroactively, so we have about 200 and some habeas cases left unattended and we are going to attend to them now.").

Moreover, there can be no serious question that the MCA is a rational means of furthering nonpunitive purposes. *See Foretich*, 351 F.3d at 1221. The outgrowth of the Supreme Court's decision in *Rasul*, which for the first time read the habeas statute to provide jurisdiction over the claims of aliens held outside the United States, was a flood of habeas corpus petitions filed in district court raising a wide variety of claims, including challenges to nearly every aspect of detention, transfer, and treatment of alien enemy combatants. In response to this unprecedented litigation,

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[19] Petitioner's reliance on *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234 (1872), is inapposite. *Pierce* arose in the unique context of the Reconstruction period following the Civil War and involved a statute that deprived non-residents of all access to West Virginia state courts to protect property rights, unless they provided a loyalty oath that they had not supported the Confederacy. Conversely, the MCA involves no similar circumstance and, in fact, expressly *creates* procedures for judicial review of permissible enemy combatant claims.

Congress enacted both the DTA and MCA – comprehensive legislation establishing procedures for military commissions and a uniform system of judicial review of enemy combatants in single forum. *See* 152 Cong. Rec. H7938 (Rep. Hunter) (daily ed. Sept. 29, 2006) ("The practical effect of this amendment will be to eliminate the hundreds of detainee lawsuits that are pending in courts throughout the country and to consolidate all detainee treatment cases in the D.C. Circuit"). Congress, therefore, sought to bring relief and clarity to the federal courts, which in its view, had been burdened with claims that were not appropriate for judicial review. *See* 152 Cong. Rec. S10403 (Sen. Cornyn) ("Weighing of the evidence is a function for the military when the question is whether someone is an enemy combatant. Courts simply lack the competence -- the knowledge of the battlefield and the nature of our foreign enemies -- to judge whether particular facts show that someone is an enemy combatant"). Thus, far from punishing petitioner, Congress exercised its legitimate constitutional authority to provide a comprehensive legislative solution to the unique situation presented by the litigation resulting from the detention of enemy combatants during wartime.

For these reasons, the legislative record does not support the conclusion that Congress was motivated by a desire to punish petitioner. Although petitioner contends that Congress's intent was punitive, the statements from the floor debates cited by petitioner simply reflect legitimate distinctions between the judicial process afforded to United States citizens and alien enemy combatants. *See* Petr's Opp'n at 38-39. In any event, such "isolated statements are not sufficient to show a punitive intent." *Navegar, Inc. v. United States*, 192 F.3d 1050, 1067 (D.C. Cir. 1999) ("unmistakable evidence of punitive intent" required); *see also BellSouth Corp. v. F.C.C.*, 144 F.3d 58, 67 (D.C. Cir. 1998) (requiring " 'smoking gun' evidence of congressional vindictiveness" to justify finding punitive intent). In sum, the MCA is not a bill of attainder.

IV. PETITIONER'S EQUAL PROTECTION CHALLENGE TO THE MCA IS MERITLESS

Petitioner also alleges that the MCA's restriction on court jurisdiction deprives petitioner and other aliens held as enemy combatants of a fundamental right – habeas corpus – and thus violates the equal protection component of the Fifth Amendment because it applies to non-citizens only. *See* Petr's Opp'n at 39-45. As explained below, petitioner's argument lacks merit and should be rejected.

A. The Equal Protection Component of the Fifth Amendment Does Not Apply To Hamdan.

As an initial matter, petitioner's argument should be rejected because, as respondents have argued *supra* II.A., as a non-resident alien with no voluntary contacts with the United States, petitioner cannot invoke the Constitution of the United States. In fact, the Supreme Court has already expressly rejected the claim that the equal protection component of the Fifth Amendment applies to non-resident aliens lacking appropriate voluntary contacts with the Nation. *See Verdugo-Urquidez*, 494 U.S. at 269-74 (citing *Eisentrager*, 339 U.S. at 782-85).

B. Even If Hamdan Could Invoke Equal Protection, His Claim Lacks Merit.

Even assuming Hamdan could raise a claim under the Fifth Amendment's equal protection component, that claim fails. Contrary to petitioner's arguments, the MCA does not deprive aliens of any fundamental constitutional habeas corpus right. Further, Hamdan is not a member of a suspect class, and, regardless, courts have historically shown extraordinary deference to the federal government regarding its policies towards aliens – deference that reaches its apex when applied to decisions of Congress and the President during wartime concerning issues related to enemy aliens, which implicate national security and foreign policy matters.

Petitioner bases his equal protection argument upon a claim that the MCA deprives persons such as himself of a fundamental right, *i.e.*, to seek habeas corpus relief, and thus is subject to heightened scrutiny. *See* Petr's Opp'n at 42-43. As explained *supra* II.B. however, the MCA does not transgress any constitutional right related to habeas corpus, even if petitioner were in a position to be able to assert a constitutional claim. The MCA's provisions controlling court jurisdiction and review do not transgress any constitutional habeas right, but rather provide adequate and appropriate substitute relief through the judicial review and court access mechanism established in the Court of Appeals under the DTA. *See supra* II.B. Nor does petitioner's assertion that "[f]ar less intrusive incursions into the fundamental right of access to the courts" have failed equal protection review, *see* Petr's Opp'n at 42, withstand scrutiny in the context of this case. For instance, in *Ludecke v. Watkins*, 335 U.S. 160, 163, 170-73 (1948), the Supreme Court determined that no constitutional issue existed with respect to the severe restriction of judicial access and review provided a person determined to be an enemy alien with respect to the summary seizure and removal of the alien under the Alien Enemy Act of 1798 (50 U.S.C. § 21). *See also Eisentrager*, 339 U.S. at 775 (citing *Ludecke*). Indeed, none of the cases cited by petitioner regarding restrictions on access to courts involved policies related to the access of aliens held as enemy combatants or rationales that would legitimately apply to issues of such access. *See Douglas v. California*, 372 U.S. 353 (1963); *In re Griffiths*, 413 U.S. 717 (1973); *Jackson v. Indiana*, 406 U.S. 715 (1972). And petitioner's mere invocation of equal protection principles does not somehow constitutionalize, or transmogrify into a fundamental right, any aspect of court access or judicial review that petitioner claims he lacks as a result of the MCA. *See San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973) ("It is not the province of [the courts] to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.").

Petitioner also asserts that aliens are a suspect class, citing *In re Griffiths*, 413 U.S. 717, 721-722 (1973); *Graham v. Richardson*, 403 U.S. 365, 372 (1971), and *Nyquist v. Mauclet*, 432 U.S. 1 (1977), for this proposition. Those cases, however, stand for a substantially narrower point: that *lawful, resident* aliens are a suspect class for equal protection purposes, and that policies that differentiate within that group or between that group and other similarly situated persons are subject to "close judicial scrutiny." *See Graham*, 403 U.S. at 372. Nothing in these cases suggests that the Supreme Court meant to include aliens differently situated from Griffiths, Richardson, and the plaintiffs in *Nyquist*, who were lawfully admitted resident aliens. *See, e.g., Griffiths*, 413 U.S. at 722 (according protection to resident aliens on the premise that "like citizens, [they] pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society"); *Verdugo-Urquidez*, 494 U.S. at 273 (rejecting nonresident alien's reliance on *Graham*).

Section 7 of the MCA limits district court habeas jurisdiction with respect to certain "alien[s]," to be sure, and so applies to lawful, resident aliens as well. As a nonresident alien, however, Hamdan has no standing to allege an equal protection violation on behalf of that distinct group. *See Kowalski,* 543 U.S. at 129; *County Court of Ulster County*, 154 U.S. at 55; *see also Salerno*, 481 U.S. at 745. As a representative of the broader, unprotected class of aliens, Hamdan's challenge would be subject to rational basis review. *See, e.g., Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *United States v. Carolene Products*, 304 U.S. 144, 152 (1938). Under that lenient standard, the MCA § 7 restrictions must be upheld as long as a court can identify any rational basis for them. *Carolene Products*, 304 U.S. at 152. Here, it cannot be seriously argued that no rational basis exists supporting section 7 of the MCA, in which Congress has acted to regulate the jurisdiction of the federal courts as it pertains to actions by aliens held as enemy combatants during

wartime.[20] *See supra* III; *cf. Ludecke*, 335 U.S. at 170-73 (upholding statute permitting summary seizure and removal of enemy aliens with only limited judicial recourse).

Moreover, *Graham*, *Griffiths*, and *Nyquist* only applied the heightened scrutiny petitioner seeks to policies regarding aliens promulgated by *states*, as opposed to the federal government. The Supreme Court has made it clear that *federal* policies regarding aliens are entitled to a much higher degree of deference, however. *See, e.g., Graham*, 413 U.S. at 379-80; *Nyquist*, 432 U.S. at 7 & n.8. As the Supreme Court has repeatedly observed,

> [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Matthews v. Diaz, 426 U.S. 67, 81 n.17 (1976) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589 (1952)); *see also Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). The concerns motivating the Court's deference – that regulation of aliens is committed to the political branches – is magnified in this case, which involves the regulation of aliens held as enemy combatants, thus implicating grave war powers, national security, and foreign policy concerns.

For these reasons, petitioner's equal protection challenge to the MCA should be rejected and cannot save this case from dismissal.

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[20] Indeed, while the MCA jurisdictional provisions need only have a rational basis, as they undoubtedly do, they would survive exacting scrutiny as well.

V. THE COURT OF APPEALS IS CURRENTLY CONSIDERING SIMILAR CHALLENGES TO THE MCA BY OTHER GUANTANAMO DETAINEES

In requesting briefing in this case regarding the withdrawal of this Court's jurisdiction by the MCA, petitioner argued that litigation of claims regarding the validity of petitioner's detention as an enemy combatant – claims not clearly raised until recently, *see supra* at 5-7 – should proceed, beginning with consideration of the jurisdictional issue. *See* dkt. no. 73.

In the pending D.C. Circuit appeals of certain habeas corpus petitions of other Guantanamo Bay detainees, *Al Odah, et al. v. United States,* 05-5064 (D.C. Cir.), and *Boumediene v. Bush, et al.*, No. 05-5062 (D.C. Cir.), however, the Court of Appeals is also considering the effect and constitutionality of the MCA, with briefing having been completed on November 20, 2006 on those issues in the appeals. The petitioners in those appeals have raised a number of arguments similar to those raised by petitioner here, including, for example, that the MCA does not apply to pending cases; that if construed to apply to pending cases, the MCA would violate the Suspension Clause of the Constitution; that the exclusive judicial review scheme provided in the DTA and the MCA is not an adequate substitute for habeas; that the MCA improperly eliminates alien detainees' pre-trial ability to challenge the jurisdiction of any military commission yet to be convened; and that the MCA improperly precludes alien detainees' claims under the Geneva Conventions. Resolution by the Court of Appeals of these and other issues in those appeals, including whether detention claims by Guantanamo detainees may proceed at all in district court, is likely to be dispositive of petitioner's recently articulated detention challenge in this case. At a minimum, the ruling of the Court of Appeals will impact this Court's resolution of the jurisdictional question here.[21]

[21] Although petitioner has raised additional arguments, such as that the MCA is an unlawful bill of attainder and that the MCA's jurisdiction-limiting provision violates equal protection, those arguments likewise will be significantly affected by resolution of the question

Accordingly, the Court need not reach the jurisdictional issue in this case in advance of the Court of Appeals' ruling on the issue.

At this juncture, however, it would be appropriate for the Court to revisit and set aside its prior November 8, 2004 injunction relating to military commission proceedings against petitioner. The Court may do so not only based on the withdrawal of this Court's continued jurisdiction pursuant to the MCA, but also for the independent reason that the bases for the injunction have been superceded by statute.[22] The portion of the November 8, 2004 Order stating, "that, unless and until the rules for Military Commissions (Department of Defense Military Commission Order No. 1) are amended so that they are consistent with and not contrary to Uniform Code of Military Justice Article 39, 10 U.S.C. § 839, petitioner may not be tried by Military Commission for the offenses with which he is charged," has been superceded by the MCA. In addition to withdrawing district court jurisdiction with respect to detention-related claims by aliens held as enemy combatants, the MCA also provides a detailed statutory regime governing the establishment and conduct of military commissions, creating within the Uniform Code of Military Justice an entire chapter on "Military Commissions." *See* MCA §§ 2-3 (creating 10 U.S.C. ch. 47A). That chapter establishes requirements for military commissions distinct from and in the place of the UCMJ courts martial

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whether alien detainees such as petitioner can invoke the protections of Constitution – an issue that is also pending before the Court of Appeals in *Al Odah* and *Boumediene* both with respect to the MCA issues and otherwise in the appeals.

[22] *See Cobell v. Norton*, 392 F.3d 461, 467 (D.C. Cir. 2004) ("For purposes of the rule limiting congressional reversal of final judgments, an injunction is not 'final' . . . '[A]lthough an injunction may be a final judgment for purposes of appeal, it is not the last word of the judicial department because any provision of prospective relief is subject to the continuing supervisory jurisdiction of the court, and therefore may be altered according to subsequent changes in the law.'") (quoting *National Coalition To Save Our Mall v. Norton*, 269 F.3d 1092, 1096-97 (D.C. Cir. 2001).

provisions found applicable in various respects by the Court prior to the enactment of the MCA. *See also* MCA § 4(a), (b) (amending various provisions of UCMJ pertaining to courts marshal to make clear that they do not apply to military commissions established under the MCA).

Further, the portion of the November 8, 2004 Order barring a military commission "unless and until a competent tribunal determines that petitioner is not entitled to the protections afforded prisoners-of-war" should be vacated. The underpinnings of that portion of the order, including that the conduct of military commissions are constrained by Article 21 of the UCMJ have similarly been superceded by the MCA, which now specifically defines persons subject to trial by military commission, *i.e.*, aliens determined to be unlawful enemy combatants, including those determined to be such by a CSRT. *See* MCA § 2 (to be codified at 10 U.S.C. §§ 948a, 948c). Accordingly, the proper course of action is for the Court to vacate that portion of the November 8, 2004 Order.[23]

[23] Further, the portion of the November 8, 2004 Order requiring that petitioner be detained in the general detention population at the Guantanamo, "unless some reason other than the pending charges against him require[d] different treatment," must fall given that the other aspects of the Order, upon which the detention constraint was predicated, have been undermined.

CONCLUSION

For the foregoing reasons, this Court should dismiss the petition for lack of subject matter jurisdiction[24] or, at a minimum, vacate the November 8, 2004 injunction in this case.

Dated: December 8, 2006

Respectfully submitted,

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[24] Alternatively, the Court should transfer this action, to the extent it now challenges petitioner's detention as an enemy combatant, to the Court of Appeals for the D.C. Circuit. *See* 28 U.S.C. § 1631; *Tootle v. Sec'y of the Navy*, 446 F.3d 167, 173 (D.C. Cir. 2006) ("[U]nder § 1631, a district court must dismiss *or* transfer upon concluding that it lacks jurisdiction.") (emphasis in original); *cf. Berrum-Garcia v. Comfort*, 390 F.3d 1158, 1162-63 (10th Cir. 2004) (transferring petition for writ of habeas corpus filed in district court by alien challenging INS removal order to court of appeals pursuant to 28 U.S.C. § 1631 because Congress provided for direct judicial review of such orders in the courts of appeals). As explained *supra*, the MCA and DTA have withdrawn this Court's jurisdiction to hear the petitioner's claims in this case and vested exclusive jurisdiction, to the extent petitioner challenges his detention, in the Court of Appeals.