Nos. 05-5062, 05-5064, 05-5095 through 05-5116

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

KHALED A. F. AL ODAH, Next Friend of FAWZI KHALID,
ABDULLAH FAHAD AL ODAH, et. al.,
LAKHDAR BOUMEDIENE, Detainee, Camp Delta, et. al.,
Petitioners/Appellants

v.

George W. BUSH, President of the United States of America, et. al.,
UNITED STATES OF AMERICA, et. al.,
Respondents/Appellees

ON ORDER FROM THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF AMICUS CURIAE OF THE WORLD ORGANIZATION FOR HUMAN RIGHTS USA IN SUPPORT OF PETITIONERS'/APPELLANTS' POSITION ON THE JURISDICTIONAL IMPACT OF THE MILITARY COMMISSIONS ACT FILED PURSUANT TO THE COURT ORDER OF OCT. 18, 2006

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES AND REGULATIONS

TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

TREATISES AND COMMENTARIES

OTHER AUTHORITIES

ISSUES PRESENTED

1. Do the habeas and court stripping provisions of the Military Commissions Act apply to the Petitioners in the present habeas proceedings since they have not been "properly determined" to be "unlawful enemy combatants" under the specific terms of the statute?

2. Can jurisdictional changes be mandated by Congress on a retroactive basis where they would adversely affect vested legal and Constitutionally protected rights and interests?

3. Can jurisdictional changes be used by Congress to overturn specific judicial determinations or to control the rules of decision applied by the courts in specific cases?

4. Does the special review procedure provided in the MCA meet the "adequate, effective and equivalent" test that the Supreme Court applies under the Suspension Clause when access to habeas is restricted?

5. Does the limitation in Section 5 of the MCA on the use of the Geneva Conventions as a basis for legal claims by unlawful enemy combatants provide a basis for eliminating the jurisdiction of this Court over the present proceedings?

SUMMARY OF ARGUMENT

In its October 17 Rule 28(j) supplementary submission of authorities to the Court, the Government seeks to cite provisions of the newly enacted Military Commissions Act (MCA) altering the jurisdiction of the U.S. courts in cases involving "unlawful enemy combatants" as mandating dismissal of the instant proceedings. In fact, for the reasons listed below, the provisions of the MCA that the Government cites do not provide the basis for dismissal that the Government claims.

First, the elimination of jurisdiction over claims of individuals who have been "properly determined" to be unlawful enemy combatants in Section 7(a) of the MCA can not be applied to the present habeas proceedings because the question of whether the Petitioners have been "properly determined" to be unlawful enemy combatants and therefore ineligible under the terms of the MCA to file habeas petitions is still very much in dispute, has been acknowledged by the U.S. Supreme Court in several recent decisions to be an open question, and is the focus of the present proceedings. It would be premature to presume that these Petitioners meet the "properly determined" test.

Second, even if the specific terms of the habeas stripping provisions of the MCA are deemed to apply to the Petitioners, questions must be raised as to whether these jurisdictional restrictions are lawful and constitutional on a number

of grounds, including whether they improperly restrict vested legal and constitutionally protected rights and interests on a retroactive basis, whether Congress has violated the principle of separation of powers by seeking to control or limit the legal interpretations or rules of decision that courts (including the Supreme Court) have articulated in specific cases (thereby implicitly overruling concrete decisions of the Supreme Court), and whether the result would be to improperly and unconstitutionally violate due process standards by leaving the Petitioners in the position of having no reasonably effective judicial means for challenging government violations of what the Supreme Court has suggested may well be their vested and legally enforceable rights.

Moreover, interpreting the statute so as to allow the elimination of habeas jurisdiction in the present cases would raise constitutional concerns under the Suspension Clause, given the fact that the alternative form of judicial relief provided for under the MCA involving a special appeals procedure with the U.S. Court of Appeals for the District of Columbia Circuit for review of final decisions of the Military Commissions and Combatant Status Review Tribunals does not meet the "adequate, effective and equivalent form of judicial review" test that the Supreme Court has determined must be provided if restrictions are placed on availability of habeas remedies. This special review procedure does not cover all potential habeas petitioners nor the full range of legal claims and issues that must

be addressed, nor does it provide the same type of judicial review that is available under habeas.

Finally, contrary to the claim made by the Government, the provision of the MCA seeking to limit the use of Geneva Convention standards as a basis for claims in U.S. courts does not provide an additional ground for dismissal of the present proceedings. This provision, by its own terms, would not affect the ability of the Court in its own right to invoke and apply Geneva Convention standards separate and apart from whether individual petitioners would be precluded from making such claims. Moreover, any interpretation of the MCA provision that would eliminate the judicial enforceability of the Geneva Conventions would directly contradict the opposite finding to this effect that has just been made by the U.S. Supreme Court in Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006) and would therefore constitute an unconstitutional effort by Congress to overturn specific Supreme Court legal standards and rules of decision in violation of the principle of separation of powers.

ARGUMENT

I. The Habeas and Court Stripping Provisions of the Military Commissions Act Do Not Apply to the Petitioners in the Instant Cases Because, Under the Specific Terms of the Applicable Provisions of the Statute, the Petitioners Have Not Been "Properly Determined by the United States Government" to be "Unlawful Enemy Combatants," and Thereby Subject to Loss of Access to Habeas.

Under the specific terms of Section 7(a) of the Military Commissions Act (MCA), federal courts are denied jurisdiction over habeas corpus 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 [unlawful] enemy combatant*** or is awaiting such determination" (emphasis added). The Government cites this provision as a basis for seeking dismissal of the pending habeas corpus petitions in the instant proceedings. What the Government's position overlooks is that by its own terms this habeas stripping provision would not apply where, as here, serious underlying questions exist and remain to be resolved as to whether the determinations of "unlawful enemy combatant" status applied by the President and confirmed by the Combatant Status Review Tribunals are, in fact, lawful and adequate to meet the "properly determined" standard set out in the MCA statute as a precondition to the loss of access to habeas.

By its own terms, the MCA can not be can not be held to apply to the Petitioners in the instant proceedings, since their claims for relief now before this

Court are premised on allegations that their status as unlawful enemy combatants was not "properly determined" by the U.S. Government. A number of significant questions have been raised concerning the adequacy and legality of the procedures that have been followed by the U.S. Government in designating many of the detainee Petitioners as "unlawful enemy combatants." Indeed, the U.S. Supreme Court itself has noted and acknowledged the relevancy of some these concerns in its recent Rasul v. Bush, 124 S.Ct. 2686 (2004) and Hamdan decisions. In Rasul, the Court indicated that the alleged terrorist detainees at Guantanamo Bay were entitled to access to U.S. courts to challenge their detainee status and treatment. In the related Hamdan decision the Supreme Court found significant due process deficiencies in the procedures established by the Government to prosecute a number of the detainees through the use of military tribunals, holding that many of these procedures did not meet basic due process type standards set out in the Uniform Code of Military Justice, and in Article 3 of the Geneva Conventions.

Especially given these findings by the Supreme Court on related matters, the question of whether, under the explicit terms of the statute, the Petitioners in the instant proceedings have been "properly determined" to be unlawful enemy combatants still must be considered very much open to question. Indeed, this question is the exact and primary focus of the present habeas proceedings. Under these circumstances, and until the issue of whether the Petitioners do or do not

properly fit under the explicit terms of the statute can be resolved, it would be premature and inappropriate for this Court to authorize dismissal of these habeas proceedings under this statutory provision of the MCA. Certainly, particularly in view of the Supreme Court's findings in Rasul and Hamdan regarding the arbitrary and unlawful nature of the Government's status determinations of the Guantanamo Bay detainees, the resolution of whether the unlawful enemy combatant designations are "proper" under the terms of the MCA is not a matter that can be left solely to the discretion of the President, and requires judicial review and consideration by this Court. For these reasons, completion of consideration by this Court of the merits of the Petitioners' habeas claims in the instant proceedings is necessary before the Section 7(a) provisions of the MCA can be applied to the present cases.

II. Core Legal, Constitutional and Separation of Powers Concerns Would Be Raised If the MCA Statute Is Applied to the Petitioners in the Instant Proceedings So As to Severely Restrict or Eliminate Their Vested and Pre-Existing Legal and Constitutional Rights and Interests By Denying Them Access to the Courts.

While it is recognized that Congress has considerable authority to determine the jurisdiction of the federal courts, there are well-established limits on how far this power can be exercised, grounded in a variety of well-established constitutional standards. Where Congress oversteps its bounds and intrudes on these standards and/or on the courts' prerogatives by attempting to use its

jurisdictional authority outside of the recognized limits, the courts have made clear that such intrusions violate the core principle of separation of powers, and are therefore unlawful and unconstitutional.

In the circumstances of the MCA, many of these limits have been exceeded, with the result that serious constitutional concerns would be raised if the MCA were to be applied so as to eliminate the detainees' access to habeas corpus and to the federal courts by dismissing the present petitions. Among the specific, well-recognized limits that have been exceeded by the provisions of the MCA seeking to eliminate or restrict habeas and access to the federal courts are the following:

A. Jurisdictional Changes Can Not Be Imposed by Congress on a Retroactive Basis, Even if Such A Result is Specifically Stipulated in a Statute, Where Vested Legal Rights and Constitutional Protections Are Adversely Affected, Including Due Process, and the Prohibitions Against Bills of Attainder and Ex Post Facto Laws.

The general authority of Congress to give retroactive effect to its laws can not be disputed. But some limits on Congress' exercise of this power nevertheless exist and have been widely recognized by the courts, most notable among them being that a statute can not be given retroactive effect, even if Congress so mandates, where such an application would have the effect of violating constitutional protections, such as due process or other forms of vested rights. See, e.g., Koshkonong v. Burton, where the Court held that "declaratory laws, so far as they operate upon vested rights, can have no legal effect in depriving an individual

of his rights." 104 U.S. 668, 667. See, also, Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 315 65 S.Ct. 1137,89, 89 L.Ed. 1628 (1945), and Rogers v. Tennessee, 532 U.S. 451, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001). The operable rule is that "a statute will not be given [retroactive] effect if it would impair vested rights, deny due process, or violate the prohibition against *ex poste facto* laws." Allstate Ins., Co. v. Kim, 829 A.2d 611, 618 (Crt. App. MD, 2003). See, also, Police Patrol Sec. Systems, Inc. v. Prince George's County, 838 A.2d 1191 (2003), and Hochman, Charles, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv.L.Rev. 692, where a "vested right" is described as a right that "has been so far perfected that it cannot be taken away by statute," especially "if it contravenes a specific provision of the Constitution." Id. at 694.

For this reason, as amicus noted in its Second Supplemental Brief on the Jurisdictional Impact of the Detainee Treatment Act, filed in these proceedings with this Court on March 10, 2006, the habeas and court stripping provisions of the DTA (and now the MCA) can not be considered to be simply "jurisdictional" or "procedural" in nature, since by purpose and practical effect they adversely affect and eliminate substantive rights and interests. (Amicus' Second Supplemental Brief, p. 8-12) To be classified solely as making a "jurisdictional" change that does not affect substantive interests, a statute must be seen as "tak[ing] away no substantive right but simply *chang[ing]* the tribunal that is to hear the case."

Hughes Aircraft v. U.S. ex rel. Schumer, 520 U.S. 939, 950-51 (1997). Even if a statute is "phrased in 'jurisdictional' terms," if it "speaks to the substantive rights of the parties as well … [it] is as much subject to our presumption against retroactivity as any other [statute]." Id. This Court followed this standard in LaFontant v. INS, when it held that "courts must determine whether the statute is 'procedural' in nature, or whether it affects substantive entitlement to relief." 135 F.3d 158, 163 (D.C.Cir. 1998)

Although the MCA is framed in jurisdictional terms, it speaks to and damages fundamental and vested interests in a number of concrete ways. In the present proceedings, if the retroactive application of the MCA that Congress mandated is given effect, it would deny petitioners in pending habeas cases a form of judicial relief previously available to them, and would adversely affect their ability through that means to challenge governmental actions (including arbitrary arrest and imprisonment, and denial of liberty without due process) that were prohibited under the law in effect before availability to habeas remedies was restricted. In essence this would permit the Government to impose additional restrictions on liberty and criminal type penalties without due process of law, and would violate the prohibition against applying *ex poste facto* punishments.

In addition, Bill of Attainder concerns under Art. I, section 9 of the Constitution might well be raised to the extent that a particular group or class of

disfavored persons (Guantanamo Bay detainees, or suspected terrorist detainees more generally) has been singled out for summary punishment, or a special denial of their protected rights and interests. See, e.g., U.S. v. Brown, 381 U.S. 437, 456-62(1965). In Brown, the Supreme Court voiced special concern about a situation, almost identical to the one involving MCA, where a legislative body seeks to impose especially prejudicial treatment against a particular group when "the popular feeling is strongly excited," and the situation is "peculiarly susceptible to popular clamor." (FN 19) What the framers of the Constitution sought to bar in the Bill of Attainder Clause, as is happening in the present cases with the MCA in the aftermath of the Supreme Court's Hamdan decision, was legislative punishment, of any form or severity, of specifically designated persons or groups. See Ogden v. Saunders, 12 Wheat. 231, 286, 25 U.S. 213 (1827).

> "Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without judicial trial are bills of attainder prohibited by the Constitution." U.S. v. Brown, 381 U.S. 437, 448-49 (1965)

B. Petitioners With At Least a Colorable Basis for Claiming Legal or Constitutionally Protected Rights Can Not Be Left with No Reasonably Effective Form of Judicial Relief for Challenging the Legality and Constitutionality of Government Action Designed to Restrict These Rights Without Raising Serious Due Process Concerns.

In a number of other situations where Congress has attempted to

restrict access to habeas corpus or other judicial remedies, the courts have made clear that petitioners with some type of reasonable legal or constitutional claims can not be placed in a situation where they have no judicial forum available to them, and no reasonable method for bringing their claims before the courts. Especially in the context of refugee and immigration cases, the courts have found that habeas stripping language in Congressional statutes could not be given effect, and would violate due process standards, if the result would leave petitioners without any means for pursuing their claims and protecting their vested rights and protections in the federal courts. As is true in the present cases, the issue is not simply whether one particular type of remedy or another can or should be used, but the more fundamental question of whether Congress can take action that would adversely affect vested rights while stripping the petitioners of any reasonable and effective means for protecting their interests before the federal courts, leaving them with no judicial remedy whatsoever. See, e.g., INS v. St. Cyr, 533 U.S. 289, 364 (2001), and Calcano-Martinez v. INS, 121 S.Ct. 2268 (2001). See, also, Goddard v. Frazier, 156 F.2d 938 (10th Cir. 1946), citing Campbell v. Holt, 115 U.S. 620 (1885).

Given the fact that the Supreme Court's prior decisions in Hamdan and Rasul suggest that the detainees objections to their status determinations, and to their detention and treatment more generally, may well have some basis in law, and

that the federal courts do have jurisdiction to consider and deal with these claims in the habeas context, serious constitutional concerns would be raised if the MCA were interpreted so as to deprive these detainees of exactly the type of reasonable and meaningful form of judicial review for consideration of their claims that the Supreme Court in Rasul found was necessary and appropriate.

This brings into focus the question of whether the special form of judicial review provided for in the MCA for appealing decisions of Combatant Status Review Tribunals and decisions of the Military Commissions would, in fact, provide for an adequate form of judicial review that would meet this standard and avoid potential due process concerns. On their face, the special appeal procedures with the U.S. Circuit Court of Appeals for the D.C. Circuit could not be held to meet these standards because by their own terms they do not apply to all detainees whose rights are affected, cover only a limited number of issues or claims that might be subject to review, and can not be invoked until after CSRT or Military Commission decisions are issued. Quite apart from the Suspension Clause issues discussed in Section III, below, lack of availability to a judicial forum and to of an effective means for seeking judicial relief in these cases would raise due process concerns of the type identified by the Supreme Court in their St. Cyr and Calcano decisions.

C. Jurisdictional Changes Can Not Be Used to Overturn Specific Judicial Determinations, Or to Seek to Control or Limit the Legal Standards or Rules of Decision that Courts Apply to Specific Cases, Especially Where Proceedings Are Pending.

Courts have consistently refused to give effect to legislation whose purpose and effect, even if described in more neutral terms, would be to prescribe and control the rules of decision that courts apply in specific cases, thereby intruding on the prerogatives of the courts, and violating the principle of separation of powers. The Supreme Court spelled out this standard in U.S. v. Klein. That case dealt with whether Congress had the power to remove from the federal courts their authority to consider cases involving individuals whose property had been confiscated during the Civil War for supporting the rebel cause, but who had subsequently made loyalty oaths entitling them to pardons and the return of their property. The Court held definitively that this type of effort to control the outcome of cases through the use of jurisdictional statutes was an unconstitutional violation of the principle of separation of powers, since it was aimed at prescribing a rule for the decision of pending cases in a particular way, and, in essence, to preclude courts from making decisions that go against the interests of the Government. The Court found the jurisdictional statute in that case to be nothing more than "a means to an end," that end being outright disqualification of pardons that would otherwise result in reinstatement of property rights to those associated with rebel forces in the Civil War. This result "passed the limit which separates the legislative from the

judicial power," by seeking to use Congress' control over the jurisdictional authority of the courts to overturn judicial decisions in pending cases that were "adverse to the government and favorable to the suitor." 80 U.S. 128, 145-148 (1871). See, also, Ruiz v. U.S., 243 F.3d 941 (5th Cir. 2001), and Walker v. HUD, 912 F.2d 819 (5th Cir. 1990)(holding that "Congress cannot prescribe the rule of decision in cases pending before the courts so as to decide matters as Congress would like.")

The distinction that the Court makes is that while Congress has unquestioned authority to change or deal with "underlying law" and to change controlling legal standards, even if it affects pending cases or overrides the effects of already rendered decisions, it can not do this where the purpose and effect is to alter "specific results" of decided or pending cases, or to control the rules of decision that courts apply in these cases. See Brown v. Hutton Group, 795 F.Supp. 1307 (S.D.N.Y. 1992) (holding that a "violation of separation of powers doctrine occurs when Congress enacts legislation that prescribes a rule of decision to the judicial branch of government in cases pending before it without changing underlying or procedural law.") The circumstances in the present proceedings, and with respect to the MCA, fit the framework that the Supreme Court outlined in Klein precisely, in that Congress' purpose in passing the statute was specifically to deal with, and overturn, the results of the Supreme Court's Hamdan decision by denying alleged

terrorist detainees the rights and protections that the Court had determined they possessed.

III. Suspension Clause Concerns Are Raised by the Habeas Stripping Provisions of the MCA Because the Alternative Appeal Process Established Under the Statute Does Not Provide for the Type of "Adequate, Effective and Equivalent" Form of Judicial Review That the Supreme Court Requires Before Access to Habeas Can be Restricted.

As was true for the Detainee Treatment Act (DTA) that preceded it, and whose provisions have been incorporated in the MCA in large part, the alternative appeals process that has been established as a replacement for access to habeas for Guantanamo Bay detainees (and now under the MCA for all "unlawful enemy combatants" wherever they are held) does not meet the Suspension Clause standard that the Supreme Court and the lower federal courts have articulated in a number of cases. That standard is that no restrictions can be imposed on the availability of habeas corpus unless what amounts to an "adequate, effective and equivalent" form of judicial review is provided in its place.

Specifically, under the alternative form of review provided for under the MCA many of the Petitioners in the instant cases would not have access to the MCA special appeal procedures or to any other form of judicial relief if the MCA habeas stripping provisions were applied, since many of these detainees, and many of the legal claims or issues they seek to raise, would not be covered by the alternative form of review provided for under the MCA. Nor, as the Supreme

Court held to be necessary in Hamdan, would they be able to challenge invalid CSRT or Military Commission procedures before they were carried out.

Rather than review and repeat in detail these Suspension Clause concerns in the present brief, Amicus refers the Court to its and the Petitioners' Supplemental Briefs filed with this Court regarding the Jurisdictional Issues posed by the Detainee Treatment Act, and notes that these same concerns are raised by the MCA. See, e.g., Amicus' First and Second Supplemental Briefs on the Jurisdictional Impact of the Detainee Treatment Act filed on January 25 and March 10, 2006, and Section III, pp. 9-10, of Amicus' Supplemental Brief on the Impact of the Supreme Court's Decision in Hamdan, filed on August 7, 2006. MCA incorporates the same special appeals procedure with the Court of Appeals for the D.C. Circuit as the DTA, applies it more broadly to all unlawful enemy combatants, and makes it more specific that these provisions are intended to be applied on a retroactive basis.

Under these appeal procedures, as Justice Kennedy pointed out in Hamdan, "the scope of that review is limited" in a number of significant ways (126 S.Ct. at 2807, Kennedy, J., concurring), raising questions whether they provide an "adequate, effective and equivalent" substitute form of judicial review to habeas, which must be available to avoid Suspension Clause concerns. See Swain v. Pressley, 430 U.S. 372 (1977) and U.S. v. Hayman, 342 U.S. 205, 223

(1952)(holding that to be adequate an alternative to habeas must afford "the same right in another more convenient forum.") Specifically, the MCA alternative would not meet the requirement that any substitute for habeas be "identical in scope" and coverage to the protections available under habeas corpus. "[I]t is the scope of inquiry on habeas that differentiates 'habeas review' from [other forms of] 'judicial review.'" St. Cyr, Id., quoting Heikkila v. Barber, 345 U.S. 229, 236 (1953). Nor would the MCA special review procedures allow detainees to raise problems concerning the type of structural defects in the procedures themselves that Justice Kennedy and the Supreme Court held in Hamdan were properly subject to review under habeas without the necessity of having to be subjected to futile and burdensome procedures of doubtful validity. In addition, the special review procedures under MCA would not provide for the "fact finding and record developing capabilities of a federal district court" that are essential elements of the habeas petition process. See McNary v. Haitian Refugee Center, 498 U.S. 479, 497 (1991), where the Court concluded that "restricting judicial review to the courts of appeals ... is the practical equivalent of a total denial of judicial review of … statutory and constitutional claims."

IV. The Elimination by Section 5 of the MCA of the Use of Geneva Convention Grounds as a Basis for Court Claims Does Not Affect the Jurisdiction of This Court in the Present Proceedings.

In its October 17, 2006 Rule 28(j) submission the Government makes special note of the reference in Section 5 of the MCA prohibiting the use of the Geneva Conventions as a basis for court claims as support for "the Government's argument that petitioners' treaty claims should be dismissed." In fact, Section 5 does not make "explicit that the Geneva Conventions are not judicially enforceable" as the Government claims. Instead, by its specific terms Section 5 mandates that the Geneva Conventions can not be "invoked" in legal actions in U.S. courts by a person making a claim against the United States or its officials. This does not preclude the Court from applying the Geneva Convention Standards pursuant to Article VI of the Constitution as part of the "law of the land" and as part of treaty-based and customary international law binding upon the United States. Nor does it address the underlying question of whether Congress' attempt to remove this treaty based legal protection, and specific "rule of decision" as relied on by the Supreme Court in Hamdan,comports with the principle of separation of powers.

Even if the statute could be construed as successfully prohibiting individual claimants from invoking these provisions as a basis for their claims, this does not mean that courts are precluded from applying the Geneva Convention standards as

legally binding and enforceable, particularly in view of the U.S. Supreme Court's findings to that effect in its recent Hamdan decision. Serious questions must be raised as to whether Congress can, through a statute that affirms the Geneva Convention standards in many respects, nevertheless seek to prevent private claimants from using these very same provisions as a basis for their claims. The Supreme Court, in essence, has properly declared in Hamdan that the relevant provisions of the Geneva Conventions are legally binding and enforceable in U.S. courts as part of the treaty and international law commitments of the U.S. Government. As such, any action by Congress to remove a rule of decision that they did not like in a recently decided case must be seen as an intrusive effort by Congress to overturn the Supreme Court's determination on this specific legal issue, and therefore unlawful and unconstitutional as a violation of the principle of separation of powers, and an impermissible intrusion on the Supreme Court's prerogatives.

Whether because of the separation of powers problem, or more simply because Section 5 of the MCA does not alter the ability of the courts, in their own right (as opposed to individual claimants), to apply and follow the Geneva Convention standards that the Supreme Court has so recently affirmed, the Section 5 provisions does not provide the additional basis for dismissal of the instant proceedings that the Government improperly claims in its October 17 submission.

It must be noted, in this regard, that while the MCA includes a provision unilaterally declaring that the newly enacted Military Commission procedures are to be considered as meeting Geneva Convention standards, no such provision is included regarding the adequacy or legitimacy of the Combatant Status Review Tribunal procedures, which is the focus for these proceedings. The question posed by these proceedings is whether the CSRT procedures that have been used to review and confirm the unlawful enemy combatant status determinations made by the President are consistent with the requirements of the Geneva Conventions and Section 1-6 of U.S. Army Regulation 190-8 specifying that "a competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities," (Subsection 1-6(b) of Army Regulation 190-8). This Court's authority to make this determination has not been abridged or eliminated by the provisions in the MCA that alter the UCMJ standards with respect to Military Commission (but not CSRT) procedures. Nor does the MCA, nor the CSRT procedures as presently constituted, deal with the threshold question that many of the Petitioners in the present proceedings seek to raise as to whether or not they qualify for prisoner of war status as a preliminary matter. This determination is required to be made under both Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War, and Army Regulation 190-8, section 1-6(d), but is not covered

by the CSRTs' limited mandate "to review the detainee's status as an enemy combatant." Memorandum for the Sec. of the Navy from Deputy Sec. of Defense Wolfowitz, Order Establishing the CSRT, issued July 7, 2004.) This issue also remains subject to this Court's jurisdiction in the present proceedings, and is not affected by any of the jurisdictional provisions of the MCA.

V. Conclusion

For the above reasons, Amicus supports the Petitioners' position that the MCA has not eliminated the jurisdiction of this Court over the present proceedings. Accordingly, this Court should continue to consider and to issue its decision on the merits of these cases.

Respectfully submitted this first day of November, 2007 by:

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CERTIFICATE OF COMPLIANCE

This is to certify, under penalty of perjury, that this Amicus Brief conforms in every respect, to the best of our understanding and belief, with all requirements of the Federal and Local Rules of Appellate Procedure, and with the requirements of this Court's Order of October 18 regarding the timing and length of this submission. It consists of 4,971 words and 22 pages of narrative text in double spaced Times Roman 14 point font.

Signed and certified to this first day of November, 2006 by:

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CERTIFICATE OF SERVICE

This is to certify, under penalty of perjury, that true and complete copies of this Amicus Brief have been served on all counsel to the parties in the above-captioned case as indicated below by US Postal Service Mail and/or electronic transmission (where indicated):

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