[ORAL ARGUMENTS HELD SEPTEMBER 8, 2005, AND MARCH 22, 2006]

Nos. 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, *et al.*,

Plaintiffs-Petitioners-Appellees/Cross-Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants-Respondents-Appellants/Cross-Appellees.

ON CONSOLIDATED APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THE GUANTANAMO DETAINEES' SUPPLEMENTAL REPLY BRIEF ADDRESSING SECTION 7 OF THE MILITARY COMMISSIONS ACT OF 2006

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SUMMARY

1. The government claims that MCA § 7(b) unambiguously repeals habeas jurisdiction over pending cases, but fails to explain why § 7(b), unlike § 3(a) of the same Act, makes no mention of habeas, or why the pending cases language in § 7(b) tracks that portion of the language of § 7(a) that excludes habeas cases. The government relies heavily on remarks of individual Senators, but "[i]mplications from . . . legislative history are not sufficient to repeal habeas jurisdiction,"[1] and the drafting history of § 7(b) shows that Congress rejected proposals that would have explicitly revoked habeas jurisdiction in pending cases.

2. *Rasul v. Bush*, 542 U.S. 466, 479-82 (2004), held that these Petitioners have the right to habeas and that they would have been entitled to the writ under the common law in 1789. "[A]t the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'"[2] Therefore, regardless of whether Petitioners have a Fifth Amendment right to habeas, their common law right to habeas is protected by the Suspension Clause. The government misconstrues a number of common law cases, and relies on inapposite cases involving judicial review of convictions by military commissions, to contend that the constricted review allowed under the MCA is an adequate substitute for habeas. It clearly is not.

3. The government mischaracterizes Petitioners' argument regarding MCA § 3(a)(1). Petitioners do not argue here that military commissions are unlawful, but that, due to the MCA provision making CSRT determinations dispositive for purposes of military commission jurisdiction, the habeas-stripping provisions impermissibly deny Petitioners the right to challenge the commission's jurisdiction *before* trial.

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1 *INS v. St. Cyr*, 533 U.S. 289, 299 (2001).

2 *St. Cyr.*, 533 U.S. at 301.

4. Finally, the government argues that the Geneva Conventions are not a source of enforceable rights. But this Court must construe §5(a) to permit the assertion of enforceable rights under the Geneva Conventions to avoid serious constitutional questions.

I. THE MCA, BY ITS TERMS, DOES NOT APPLY TO PENDING HABEAS ACTIONS.

1. Recognizing that a statute must unambiguously revoke habeas jurisdiction over any cases, the government asserts seven times in seven pages that MCA § 7(b) "unambiguously" strips jurisdiction over pending habeas actions. Section 7(b) does not stand alone; it must be read *in pari materia* with the other sections of the statute to discern its meaning.[3] Read in context, § 7(b) does not encompass habeas cases, and certainly does not "unambiguously" strip jurisdiction over these cases.

The government offers no convincing explanation of the fact that Congress withdrew jurisdiction over pending cases in two sections of the MCA: in one – § 3(a) – it expressly included habeas cases, and in the other – § 7(b) – it did not. By including habeas cases in § 3(a) and omitting mention of them in § 7(b), Congress indicated that § 7(b) should not apply to pending habeas cases.[4] Furthermore, the government's argument that that no negative inference is to be drawn from the fact that § 950j(b) specifically mentions habeas while § 7(b) does not (because § 950j(b) mentions habeas only in its introductory clause) is unavailing. The point of the introductory clause is to ensure that the jurisdiction-stripping clause is read to include habeas claims.

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[3] *See MPA, Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002).

[4] *See, e.g., Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2765 (2006); *BPF v. RTC*, 511 U.S. 531, 537 (1994) ("[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another") (quoting *Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338 (1994)).

The government also fails to come to grips with the fact that the language of § 7(b) tracks the language of § 1005(e)(2) (added by § 7(a)), which deals with *non*-habeas cases. Reading § 7(b) to apply to habeas cases would render § 1005(e)(1) (dealing with habeas cases) superfluous, violating a cardinal rule of construction.[5]

2. The government argues that reading § 7(b) *not* to withdraw jurisdiction over pending habeas cases would render it "redundant" because *Hamdan* already held that the DTA did not withdraw that jurisdiction. Section 7(b) is not redundant because § 7(a), to which § 7(b) applies, broadened the territorial reach of § 2241(e) beyond Guantanamo and made its bar applicable to aliens held not just by the Department of Defense, but by the United States.

3. To support its contention that the statute is unambiguous, the government relies on floor remarks by individual members of Congress. Gov't MCA Br. 10-11. But "[i]mplications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous *statutory* directives to effect a repeal." *St. Cyr*, 533 U.S. at 299 (emphasis added). There is no such "specific and unambiguous" directive in the statute itself, and resort to legislative history cannot justify adding words to the statute that Congress did not include.

In fact, the statute's drafting history confirms that the omission of habeas from § 7(b) was deliberate.[6] Congress considered House and Senate versions of § 7 that expressly eliminated jurisdiction over pending habeas cases, but it enacted a version of § 7 that did not.

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[5] *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (stating rule against interpreting statutory provisions in manner that renders any superfluous).

[6] *See Hamdan*, 126 S. Ct. at 2766 (2006).

Representative Duncan Hunter, the chairman of the House Armed Services Committee, proposed the following language in H.R. 6054:

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

H.R. 6054, 109th Cong. § 5 (Sept. 12, 2006) (emphasis added). Senators Frist and McConnell proposed similar language:

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

S. 3886, 109th Cong. § 105 (Sept. 11, 2006) (emphasis added).

Instead of enacting either of these versions, Congress divided the quoted language into two parts: § 7(a), which states limitations on jurisdiction, and § 7(b), which specifies an effective date. Congress then subdivided § 7(a) into two parts – a new amendment to 28 U.S.C. § 2241(e)(1), encompassing habeas actions, and a new amendment to § 2241(e)(2), encompasssing "other actions." As enacted, § 7(b) refers to the "other actions" encompassed by newly-amended § 2241(e)(2), but not those encompassed by newly-amended § 2241(e)(1). "Congress' rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation." *Hamdan*, 126 S. Ct. at 2766.

4. Finally, the government urges the Court to ignore the principle of constitutional avoidance because, it says, the Court will eventually have to confront the Suspension Clause

question. Gov't MCA Br. 12. As this Court has consistently held, "a court should avoid, not seek out, a constitutional issue the resolution of which is not essential to the disposition of the case before it," *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001), and should "avoid addressing broad constitutional issues unless their resolution is imperative in the context of the case at hand," *Karriem v. Barry*, 743 F.2d 30, 38-39 (D.C. Cir. 1984). Whether the Suspension Clause issue will be raised in the future is unclear. What is clear is that the Suspension Clause issue is squarely raised in this case, it is a substantial issue, and it can be avoided by interpreting the statute as it is written not to revoke jurisdiction over pending habeas cases.[7]

II. IF THE MCA APPLIES TO PETITIONERS' PENDING HABEAS CASES, IT VIOLATES THE SUSPENSION CLAUSE.

A. Petitioners' Right To Habeas Is Protected By The Suspension Clause.

Relying once again on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the government argues that Petitioners cannot invoke the Suspension Clause because they are "not 'entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas.'" Gov't MCA Br. 15-16.[8] But that argument misses the point. In *Rasul*, the Supreme Court found that

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[7] The government also argues that, "even in the absence of the withdrawal of habeas jurisdiction, Petitioners' claims regarding their detention can only be heard pursuant to this Court's exclusive jurisdiction." Gov't MCA Br. 9-10. As pointed out previously, however, the Supreme Court rejected the identical argument in *St. Cyr*, 533 U.S. at 297-98, 308-14. *See* Pet. *Hamdan* Br. 12-13 (Aug. 8, 2006).

[8] *Eisentrager* held that German prisoners of war – tried and convicted of war crimes by a military commission in China and imprisoned in Germany – did not have a right under the Due Process Clause of the Fifth Amendment to seek habeas relief in U.S. courts. 339 U.S. at 785. *Eisentrager* does not mention the Suspension Clause.

petitioners, imprisoned in a territory over which the United States has plenary and exclusive jurisdiction, have both a statutory and *a common-law right* to seek habeas relief.[9]

That common-law right to the writ is protected by the Suspension Clause. The Supreme Court has recognized that, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301. Petitioners' common-law right to the writ as of 1789 is protected by the Suspension Clause. Therefore, regardless of whether Petitioners have constitutional rights,[10] they clearly have a right to habeas protected by the Suspension Clause.

The writ of habeas corpus "does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." *Rasul*, 542 U.S. at 478 (internal quotations omitted). Similarly, the Suspension Clause, unlike the Due Process Clause, does not confer individual rights, but rather acts as a restraint on the power of Congress. Absent rebellion or invasion, Congress is simply without power to revoke access to the writ by persons, like Petitioners, who would have been entitled to the writ as of 1789.

B. The MCA/DTA Does Not Provide An Adequate Substitute For Habeas.

1. Petitioners have not been afforded "greater rights" than military commission defendants.

The government argues that the MCA does not violate the Suspension Clause because it provides Petitioners "with *greater rights* of judicial review than that traditionally afforded to those convicted of war crimes by a military commission." Gov't MCA Br. 18. In the cases cited by the government, the military commissions had already afforded petitioners there many of the

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[9] The Court pointed out that, "[a]t common law, courts exercised habeas jurisdiction over the claims of aliens detained within . . . all . . . dominions under the sovereign's control . . . . even if a territory was 'no part of the realm.'" 542 U.S. at 481-82.

[10] As the District Court held, Petitioners do have rights protected by the Fifth Amendment. *See* Pet. Opening Br. 22-28 (May 27, 2005); Pet. Reply Br. 5-6 (June 28, 2005).

procedural rights Petitioners have been denied here – the right to examine and rebut the factual evidence against them, to confront their accusers, to call witnesses and present evidence, and to be represented by counsel.

For example, in *Ex parte Quirin*, 317 U.S. 1 (1942), the accused Nazi saboteurs received a trial in which 42 witnesses testified and the government presented proof "in mind-numbing detail," including physical evidence of the Germans' attempted sabotage, and the testimony of "every FBI agent who had come into contact" with the defendants, all of whom the defendants were permitted to cross-examine freely.[11] In *In re Yamashita*, 327 U.S. 1 (1946), the general's military trial lasted over five weeks, entertained motions challenging the evidence, and heard testimony from 286 witnesses, who produced over "three thousand pages of testimony," and the general was represented by six appointed military lawyers who, "[t]throughout the proceedings . . . demonstrated their professional skill and resourcefulness and their proper zeal for the defense with which they were charged." 327 U.S. at 5. In *Eisentrager*, the 27 German defendants had received a full trial lasting months, and six of the accused were acquitted.[12]

The limited habeas review afforded in *Quirin*, *Yamashita*, and *Eisentrager* is consistent with the limited habeas review that common law courts afforded petitioners who challenged convictions resulting from prior trial-like processes deemed fair and adequate. *See* Pet. MCA Br. 13. Petitioners have had no such process. *Cf. Rasul*, 542 U.S. at 476 (distinguishing *Rasul* Petitioners from those in *Eisentrager* because "they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing").

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[11] Pierce O'Donnell, IN TIME OF WAR: HITLER'S ATTACK ON AMERICA 152-53, 156, 165-66, 189 (2005).

[12] *See Eisentrager*, Index to Pleadings filed in Supreme Court, Ex. F – "Regulations Governing the Trial of War Criminal in the China Theater" at 34.

In *Quirin*, *Yamashita*, and *Eisentrager*, moreover, the Supreme Court engaged in a searching and detailed analysis of whether the jurisdiction of the military commissions was proper, whether the admission of certain types of evidence violated constitutional, military, or treaty law, and whether procedural irregularities occurred in violation of the Geneva Convention. *Quirin*, 317 U.S. at 24; *Yamashita*, 327 U.S. at 5-6, 9; *Eisentrager*, 339 U.S. at 780-81, 785-91. By contrast, the government argues that the DTA leaves this Court without authority to inquire into such matters or independently assess the fairness and adequacy of the CSRT procedures. *See* Gov't Opp. Mot. Compel 12-19, *Bismullah v. Rumsfeld*, No. 06-1197 (filed Aug. 31, 2006). Pet. MCA Br. 10-12.

Finally, it must be remembered that Petitioners have not been convicted of war crimes by military commissions. They have not even been charged, and the *post hoc* CSRT process to which they were subjected, instituted unilaterally by the military a few days after the *Rasul* decision as a matter of internal department "management,"[13] cannot be compared to duly authorized military commissions established for adjudicating war crimes.

2. The ARB process is not an adequate substitute for habeas review.

The government made clear in its filing in *Bismullah* that it considers review of the CSRT process under the DTA to be very limited, with no opportunity for Petitioners to present evidence.[14] The government does not contest this characterization of its position, but claims that

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[13] The purpose of the CSRT process was never to judge the guilt or innocence of the detainees. The CSRTs, according to the government, are avowedly administrative, "non-adversarial proceedings," charged with affirming the enemy combatant determinations already made pursuant to "multiple levels of review" by "officers of the Department of Defense." Order Establishing Combatant Status Review Tribunal (July 7, 2004) at 1 (J.A. 1187).

[14] *See* Pet. MCA Br. 10-12.

Petitioners have an opportunity to present evidence during the ARB process.[15] That is clearly no substitute. The ARBs have nothing to do with a detainee's designation as an enemy combatant; the purpose of the ARB, according to the government, is to "determine whether the *enemy combatant* represents a continuing threat," a decision wholly within the Executive's unreviewable discretion. ARB Memo and Procedures (July 14, 2006)[16] § 1.c (emphasis added). There is no reconsideration of the underlying CSRT determination.

A prisoner's ability to "present information" to an ARB, moreover, is illusory. The prisoner is in no position to gather information, and he is not allowed counsel who might do so on his behalf. There is "no provision . . . for the attendance of witnesses," *id.* § 3.d, and the prisoner is denied access to the evidence considered by the ARB, *id.* at § 3.a, and the evidence on which the CSRT determination was originally made.

3. The government misconstrues *St. Cyr.*

The government misquotes *St. Cyr* for the proposition that, under "traditional habeas review," only questions of law and not underlying factual determinations could be reviewed. Gov't MCA Br. 19. The government deletes from its quotation the first three words ("[i]n such cases") that show the Court was specifically discussing the cases before it, in which a petitioner was challenging "the legality of a deportation order." *St. Cyr*, 533 U.S. at 306. In "such cases," *id.*, factual review on habeas is limited because the petitioner has *already* had the opportunity to participate in full immigration removal proceedings and an appeal to the Board of Immigration

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[15] *See* Gov't MCA Br. 26-28.

[16] *Available at* www.defenselink.mil/news/Aug.2006/d20060809ARBProceduresMemo.pdf.

Appeals.[17] The Court stressed that at common law generally, "an attack on an executive order *could raise all issues relating to the legality of the detention.*" 533 U.S. at 301 n.14 (citation omitted and emphasis added).

4. The government misconstrues the common law cases.

Although the government challenges Petitioners' account of the historical scope of habeas, it does not dispute the fundamental difference at common law between habeas challenges to detention pursuant to decisions by courts of competent jurisdiction, where limited review was considered adequate, and habeas challenges to executive and other non-judicial detentions, where a searching review into the factual and legal bases for the detention was required. *See* Pet. MCA Br. 13-18. The government, moreover, addresses only a few of the pertinent common law cases.

First, the government claims that enemy aliens detained as prisoners of war could not challenge their detention through habeas. Gov't MCA Br. 23-25. This is wordplay. Enemy aliens could be properly detained as prisoners of war, but an individual detained as a prisoner of war had the ability to challenge through habeas whether he or she was, in fact, an enemy alien. The courts in *R. v. Scheiver*, 97 Eng. Rep. 551 (K.B. 1750), and *Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779), ultimately concluded on the facts presented that the petitioners in those cases were enemy aliens, but did so after considering the merits of the petitions, including evidence presented by the petitioners.[18] Similarly, in *Lockington's Case*, although the court

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[17] *See, e.g., Dunbar v. INS*, 64 F. Supp. 2d 47, 49 (D. Conn. 1999) (detailing the process that St. Cyr had prior to filing his habeas petition). Removal proceedings are conducted in conformance with the requirements of due process, providing fair notice of the allegations supporting deportation and a meaningful opportunity to rebut them. *See* Br. of British and American Habeas Scholars at 21 n.8.

[18] The government also cites *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) for the proposition that courts will not grant habeas corpus in the case of a prisoner of war. Gov't MCA Br. 13, 23. *Moxon*

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concluded that habeas review is foreclosed where a petitioner "admits himself" to be an enemy alien, it noted that the writ would issue if the "applicant can make an affidavit in the first instance that he is not an enemy alien."[19]

Petitioners dispute that they are enemy aliens or enemy combatants. Accordingly, even under the cramped view of habeas proffered by the government by analogy to historic prisoner-of-war cases, a habeas court would have to consider and decide factual allegations made by the prisoners rebutting the government's assertions in support of its authority to detain them as "enemy combatants." *See Rasul*, 542 U.S. at 476 (noting that the *Rasul* Petitioners are not enemy aliens and claim to be "wholly innocent" of any wrongdoing).

Second, the government miscites *Goldswain's Case* for the proposition that, at common law, habeas petitioners were not permitted to "controvert the truth of the return." Gov't MCA Br. 25-26 n.13. The case held the opposite.[20] In the opinion, Judge Gould explained that "[n]either the Court [n]or the party are concluded by the return of a habeas corpus, but may plead to it any special matter necessary to regain his liberty." 96 Eng. Rep. at 712. Although the Board of Admiralty claimed "urgent necessity" for the impressment of sailors,[21] the full court

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was a non-habeas case involving a request for restoration of a ship captured by the French from the British in U.S. territory. The request was denied under admiralty law principles concerning captured vessels. The quotation from *Moxon* cited by the government was dicta and cannot stand in the face of *Quirin*, which held that habeas was available to prisoners of war. *See* 317 U.S. at 25.

19 Bright (N.P.) 269, 276 (Tilghman, C.J.), 298-99 (Pa. 1813) (Brackenridge, J.).

20 The statement quoted by the government comes as one of several other subsequent and unrelated comments made by the case reporter as was sometimes done during that era; it is *not* part of the court's decision. *See* 96 Eng. Rep. 713 note (e). As such, that statement can only be seen as a summary of the general rule applied to judgments of courts of competent jurisdiction, and categorically not to executive detentions. *See* Pet. MCA Br. 13 & n.15.

21 The government also misunderstands the impressment cases when it suggests that they did not review prior "adjudications." At common law, military impressment decisions were adjudicated by the Board of Admiralty, which was effectively an executive agency serving the King. Accordingly, habeas review of impressment decisions at common law was considered a "very notorious instance of

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stated that it "could not willfully shut their eyes against such facts as appeared on the affidavits" presented, and ordered Goldswain's discharge. *Id.* The government's assertion that this case stands *against* allowing a petitioner to present evidence to controvert the evidence presented by the government in its return is therefore incorrect. *See* Pet. MCA Br. 13-17.

Finally, the government once again raises the specter of interference with military operations. Gov't MCA Br. 20-21. But these same arguments were made and rejected in *Rasul*, 542 U.S. at 474-75, 485, *Hamdi v. Rumsfeld*, 542 U.S. 507, 526-32, 534-38, and *Hamdan*, 126 S. Ct. at 2769-75. The petitions in the present cases were not filed within "a zone of active military operations." *Eisentrager*, 339 U.S. at 780. Rather, they were filed to review indefinite detentions at Guantanamo, which is "in every practical respect a United States territory, and . . . one far removed from any hostilities." *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring). Executive detention outside of the battlefield context "suggests a much weaker case of military necessity and much greater alignment with the traditional function of habeas corpus." *Id.* at 488.

III. THE MCA WOULD DEPRIVE PETITIONERS OF THE RIGHT TO CHALLENGE THE JURISDICTION OF A MILITARY COMMISSION.

Contrary to the government's assertion,[22] Petitioners do not address here the lawfulness of military commissions or the MCA provisions that relate to commissions. Instead, they challenge the habeas-stripping provisions of the MCA that relate to CSRT determinations. These provisions would deny Petitioners their right to make critical pre-trial jurisdictional challenges, through habeas, to military commissions convened to try them. MCA § 3(a)(1), adding 10

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judicial authority in matters most nearly concerning the executive." A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 223 (9th ed. 1939). *See also* Jonathan Hafetz, *The Untold Story of NonCriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2526 (1998) ("[A]t common law executive detentions – even by proto-agencies such as the Admiralty and the Sewers Commission – triggered a broad scope of review on habeas.").

[22] Gov't MCA Br. 30.

U.S.C. § 948d(c), treats as dispositive for purposes of military commission jurisdiction a CSRT determination that an individual is an unlawful enemy combatant, making Petitioners automatically eligible for trial by military commission and precluding an otherwise authorized challenge to military commission jurisdiction. The fact that no military commissions are currently pending is irrelevant because the CSRT determination renders Petitioners permanently eligible for criminal prosecution at the whim of the government.[23]

The government erroneously argues that the MCA bars the Court from considering the military commission-related consequences of CSRT determinations because Congress intended to eliminate jurisdiction over challenges to the commissions, except as provided under the DTA. Gov't MCA Br. 30-31. In support of this position, the government recycles arguments regarding post-conviction review of military commission proceedings that have already been rejected. *See* Gov't MCA Br. 31. Those arguments were specifically rejected with respect to the DTA in *Hamdan*, where the Supreme Court concluded that review of a military commission's underlying jurisdiction to try the defendant must be available to the defendant *before* trial. 126 S. Ct. at 2772. *See also Hamdan v. Rumsfeld,* 415 F.3d 33, 36 (D.C. Cir. 2005) ("[S]etting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction"). This is no less true after the passage of the MCA than it was following enactment of the DTA. The government fails to mention, must less rebut, these unambiguous statements of the courts.[24]

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[23] Moreover, the government has never withdrawn or dismissed the charges against petitioners Hicks or Khadr, or the "reason to believe" determination pursuant to the November 13, 2001 Order. *See* Pet. MCA Br. 21 n.29.

[24] The government makes passing reference to *Schlesinger v. Councilman,* 420 U.S. 738 (1975), Gov't MCA Br. 30, despite the Supreme Court's rejection of the government's *Councilman* abstention argument in *Hamdan.* 126. S. Ct. at 2769-72. The only other cases cited by the government deal

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IV. THE MCA DOES NOT PRECLUDE HABEAS RELIEF FOR PETITIONERS' CLAIMS UNDER THE GENEVA CONVENTIONS.

The government contends that MCA § 5(a) – and, by extension, 10 U.S.C. 948b(g) (added by MCA § 3(a)(1)) – is "not a change in the law" but merely "clarifies" that the Geneva Conventions do not provide, and have never provided, judicially enforceable individual rights. Gov't MCA Br. 29-30. *See* Pet. MCA Br. 22-25. This erroneous characterization of the statute both assumes the conclusion it purports to support and is contradicted by recent Supreme Court precedent. While this Court in *Hamdan* held that the Geneva Conventions were not judicially enforceable, the Supreme Court stated that it found this Court's holding " not persuasive" on the issue. *Hamdan*, 126 S. Ct. at 2793.[25] In contrast, Supreme Court precedent is clear that it is the duty of the courts, not Congress, to decide whether the Conventions provide judicially enforceable rights: "If treaties are to be given effect as federal law, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court.'" *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2673 (2006) (citation omitted).[26]

To the extent the MCA § 5(a) *does* effect a change in the law it would raise serious Due Process, Suspension Clause, and Article III problems. *See* Pet. MCA Br. 24. The government

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with the exhaustion of administrative remedies in civil proceedings for money damages, and are easily distinguishable from the harm of subjecting a detainee to criminal trial by a tribunal without jurisdiction. *See McCarthy v. Madigan,* 503 U.S. 140 (1992); *Booth v. Churner,* 532 U.S. 731 (2001).

[25] As noted in earlier briefing, even if § 5(a) were construed to effect a change in existing law, § 5(a) does not purport to apply to pending actions, and thus the presumption against retroactive application applies. Pet. MCA Br. 23. Nor does MCA § 7 bear on whether MCA § 5(a) or § 948b(g) is retroactive. If MCA § 7 applied to Geneva Conventions claims, MCA § 5(a) and § 948b would be superfluous. *See Hibbs*, 542 U.S. at 88.

[26] *See also United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000).

does not address these problems, and in its neglect, waives its opposition. Gov't MCA Br. 30. MCA § 5(a) and § 948b(g) can avoid these problems only if construed to permit the assertion of rights protected by other sources of law, including the "consistency with U.S. law" review under the DTA. Pet. MCA Br. 25.[27]

The government's reliance on *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972), is misplaced. *Holmes* stands only for the proposition that many treaties do not create judicially enforceable individual rights, and that such treaties are enforced through diplomatic and non-judicial processes. This assertion in no way supports the claim that Congress may constitutionally deny persons the right to invoke otherwise valid treaty-based claims on habeas.[28]

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[27] The qualifying phrase "as a source of rights" in MCA § 5(a) and § 948b(g) only possesses meaning if construed to refer to rights afforded exclusively by the Geneva Conventions, not to rights afforded by other sources of law, regardless of whether the rights are also afforded by the Geneva Conventions. Thus, MCA § 5(a) and § 948b(g) cannot be read to bar enforcement of rights afforded by other sources of law, even though such law may incorporate rights afforded by the Geneva Conventions, and even though the Geneva Conventions may incorporate rights afforded by such law. *See Hamdan*, 126 S. Ct. at 2786.

[28] Legislation that retroactively denied Guantanamo prisoners the protections afforded them under the laws of war would also constitute a forbidden Bill of Attainder. See *Foretich v. United States*, 351 F.3d 1198, 1217 (D.C. Cir. 2003); *United States v. Lovett*, 328 U.S. 303, 317-18 (1946) (Attainder Clause is intended to prevent trial by unlawful means, citing military commission case); *Pierce v. Carskadon*, 83 U.S. 234, 239 (1872) (declaring lack of access to the courts an unlawful attainder).

CONCLUSION

For these reasons and the reasons given in Petitioners' previous briefs, the Court should affirm Judge Green's denial in part of the government's motion to dismiss and reverse Judge Green's grant in part of the government's motion to dismiss.

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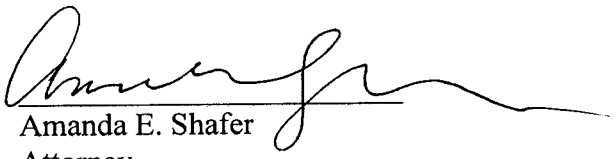
CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE AND CIRCUIT RULE 32(a)

I certify that, in accordance with Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), the foregoing Guantanamo Detainees' Supplemental Reply Brief Addressing Section 7 of the Military Commissions Act of 2006 is proportionately spaced with a font size of 11 point or greater and contains 4,999 words, which is within the word count authorized by this Court in its Order of October 18, 2006.



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CERTIFICATE OF SERVICE

I certify that today, November 20th, 2006, I served the foregoing Guantanamo Detainees' Supplemental Reply Brief Addressing Section 7 of the Military Commissions Act of 2006 on the government by causing copies to be sent, via the Court Security Officer, to the following counsel of record for the government:

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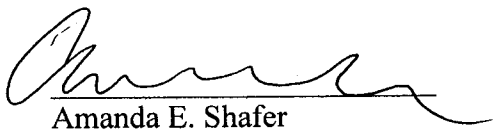

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