

with foreign partners. International criticism does not depend primarily on the *place* where enemy combatants are detained. Instead, at bottom, it rejects the fundamental legal paradigm under which the United States asserts the right to detain individuals as enemy combatants (and, hence, without charge) in the armed conflict with al Qaeda. Unless the United States is prepared to abandon the entire law-of-war framework governing the conflict with al Qaeda — which I strongly believe it should not do — simply moving the detainees to the U.S. is likely to accomplish little in appeasing critics in the international community.

In addressing these issues, I want to emphasize a theme that I believe is too often lost when debate focuses on specific proposals for altering military commission procedures or providing other procedural protections for the enemy combatants at Guantanamo. The proper touchstone for judging the mechanisms the military uses in detaining enemy combatants or in prosecuting enemy combatants for war crimes is not the full panoply of protections provided in criminal trials in Article III courts. Military commissions are part and parcel of the conduct of war and their procedures have always been flexible enough to be adapted to the exigencies of war. Although the United States must ensure that it provides full and fair trials that comply with all of its treaty obligations, it also should not lose sight of the fact that fair trials under the law of war need not replicate the full protections provided by the Constitution in an American criminal court.

## **I. The Military Commissions Act of 2006 and Proposed Amendments**

### **A. Background**

The current debate about amendments to the MCA can be fully understood only in the context of the history — including the series of Supreme Court decisions and congressional responses — that led to the passage of the MCA in 2006. A brief synopsis of that history is thus warranted.

In late 2001, the President determined that military commissions should be convened to try captured enemy combatants in the conflict with al Qaeda for violations of the laws of war. As administration officials explained to Congress at the time, multiple considerations made military commissions rather than our domestic criminal justice system the most appropriate forum for prosecuting enemy combatants. In part, using military commissions, which are the standard mechanism the Executive has always used for war crimes trials, acknowledged the fundamental fact that the struggle with al Qaeda was not simply a matter of criminal law enforcement — it had risen to the level of an armed conflict to which the laws of war would apply.

In addition, the circumstances of war-fighting in which enemy combatants are captured and interrogated and in which documents and computers are seized are not remotely adapted to satisfying the strict requirements of the Constitution in later bringing a criminal prosecution in an Article III court. For example, enemy combatants are properly interrogated without a lawyer present, but would that mean that under *Miranda* their statements could not be used? Statements made by other enemy combatants might be useful in the trial of a different accused, but would a record of those statements be barred by hearsay rules? Soldiers raiding an al Qaeda hideout will seize for intelligence purposes materials that might later become “evidence,” but they are not concerned (nor should they be) with establishing a chain of custody as FBI agents at a crime scene would. And there was a concern that classified information could not adequately be protected in regular criminal trials. Precisely because the circumstances in fighting a war are always different from those in investigating a crime in our domestic system, military commissions have always been the standard mechanism used for prosecuting war crimes. Thousands of commissions were convened in Europe and the Far East after World War II, and

(to give just one example) the orders convening those commissions routinely called for flexible evidentiary rules, permitting the admission of “such evidence as in [the commission’s] opinion would be of assistance in proving or disproving the charge, or such as in the commission’s opinion would have probative value in the mind of a reasonable man.”<sup>1</sup> That practice reflected what the Supreme Court later acknowledged was one of the characteristics of military commissions; namely, that their procedure “has been adapted in each instance to the need that called it forth.” *Madsen v. Kinsella*, 343 U.S. 341, 347-48 (1952).

In early 2002, the Department of Defense began detaining enemy combatants seized overseas in operations in Afghanistan at the Naval Base at Guantanamo Bay, Cuba. In addition to the ideal attributes Guantanamo provided from a security perspective and other reasons, the decision to use Guantanamo was based, in part, on reliance on a clear-cut decision from the Supreme Court handed down shortly after World War II holding that aliens seized and detained outside the United States had no right to file habeas corpus petitions in United States courts. That decision was *Johnson v. Eisentrager*, 339 U.S. 763 (1950). When detainees at Guantanamo began to file habeas petitions in federal court, therefore, the Government relied on *Eisentrager* to argue that no federal court had jurisdiction to entertain the petitions.

The Supreme Court ultimately disagreed with that position and in *Rasul v. Bush*, 542 U.S. 466 (2004), concluded that the habeas statute, 28 U.S.C. § 2441, extended jurisdiction to habeas petitions filed by detainees held at Guantanamo. The Court made clear, however, that its holding was based on an interpretation of the habeas statute – not upon the Constitution. *See, e.g., Rasul*, 542 U.S. at 484 (“We therefore hold that § 2241 confers on the District Court jurisdiction to hear

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<sup>1</sup> Regulations Governing the Trial of War Criminals, General Headquarters, United States Army Forces, Pacific, 24 September 1945.

petitioners' habeas corpus challenges to the legality of their detention at Guantanamo Bay Naval Base.”).

At the same time the Court decided *Rasul*, it also decided *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), a decision relevant here primarily for one thing: in it, the plurality outlined the type of procedures that, in keeping with the Due Process Clause of the Constitution, the military could employ to determine to detain an *American citizen* as an enemy combatant in the United States.

The Government responded to these decisions in several ways. The Department of Defense soon promulgated a new procedure – a Combatant Status Review Tribunal or “CSRT” – that would review the determination of enemy combatant status for every detainee at Guantanamo. The CSRTs were modeled in part on the hearings used to determine POW status of captured combatants under the Geneva Conventions. They were also designed to meet the procedural requirements that the Supreme Court in *Hamdi* had suggested would be sufficient to provide due process to a U.S. citizen held in the United States, even though such procedures were not required for the aliens held at Guantanamo. In addition, prior to these decisions, DOD had recently announced another mechanism for reviewing the detention of those at Guantanamo – the Administrative Review Board or “ARB.” The ARBs provide a yearly review of the detention of every enemy combatant and, by assessing the threat each continues to pose, provide a determination of whether continued detention is warranted for each combatant.

Congress also responded to the *Rasul* decision by passing the Detainee Treatment Act of 2005 (“DTA”). In addition to defining standards for treatment of detainees, the DTA eliminated habeas jurisdiction for petitions filed by detainees at Guantanamo. In its place, it provided for judicial review in the United States Court of Appeals for the District of Columbia Circuit for

both the decisions of CSRTs and the decisions of military commissions.<sup>2</sup> Providing such review in regular civilian courts for the decisions of military tribunals was an unprecedented move. Particularly with respect to CSRTs it bears emphasis that the military's determination to detain an alien overseas as an enemy combatant in an armed conflict has never been reviewable in civilian court, and certainly not under the scope of review provided by the DTA, which allows the D.C. Circuit to review whether the CSRT's determination was supported by a preponderance of the evidence and to hear all legal claims under the Constitution and laws of the United States. DTA § 1005(e)(2)(C).

Despite the elimination of habeas jurisdiction in the DTA, the Supreme Court concluded in 2006 that habeas jurisdiction still existed over cases pending when the DTA was passed, and in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), struck down the procedures the military had promulgated for conducting military commissions. Once again, the Court's decision was based on statutory, not constitutional grounds, and rested primarily on the conclusion that procedures for the military commissions violated provisions of the UCMJ.

In response, Congress passed the MCA of 2006. In it, Congress closed the jurisdictional loophole that had allowed the *Hamdan* case to proceed by making clear that the elimination of habeas jurisdiction for detainees at Guantanamo applied to *all* cases, including those pending on the date of enactment. In addition, Congress established by statute a detailed procedural framework for the conduct of trials by military commission.

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<sup>2</sup> Although the DTA originally made review in the D.C. Circuit of some military commission decisions discretionary, the MCA has since changed that provision and now makes all final military commission decisions reviewable in the D.C. Circuit as of right.

The latter was an extraordinary step, but probably a necessary one to ensure that military commissions would finally begin to dispense justice to some of the enemy combatants detained at Guantanamo. Although military commissions have been used almost since the Founding of the Republic, they have traditionally been created, and their procedures determined, wholly by the Executive. As the Supreme Court explained in *Madsen v Kinsella*, 343 U.S. 341, 346-48 (1952), “[s]ince our nation’s earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent government responsibilities related to war. They have been called our common law war courts. . . . Neither their procedure nor their jurisdiction has been prescribed by statute,” but instead, “it has been adapted in each instance to the need that called it forth.” The creation of a detailed set of statutory procedures for the military commissions was thus a measure without precedent in the Nation’s history.

Congress was also careful in the MCA to remedy each of the defects identified by the Court (and even by justices not forming a majority) in *Hamdan*. By providing military commissions a statutory basis, the MCA ensures that the commissions are “regularly constituted courts” for purposes of Common Article 3 of the Geneva Conventions, *cf. Hamdan*, 126 S. Ct. at 2796-97, and, among other protections, it also ensures that the accused will have the right to be present at all proceedings and hear all evidence presented against him, *cf. Hamdan*, 126 S. Ct. at 2797-98 (Opinion of Stevens, J, joined by Souter, Ginsburg, and Breyer, JJ.).

As a result of this whole series of events, the unlawful enemy combatants detained at Guantanamo Bay, Cuba currently have available to them an array of procedural protections unprecedented in the history of warfare. Each has his status as an enemy combatant reviewed by a panel of officers in a CSRT according to procedures that were designed to meet the due process requirements that would be necessary for detaining a U.S. citizen as an enemy combatant in the

United States. The detainee may appear before a board of officers; he may examine unclassified evidence to be considered by the board; he has the assistance of a Personal Representative to help him make his case; and he may call witnesses that are reasonably available. The CSRT's decision is then subject to review in the D.C. Circuit. In addition, each detainee has his detention reviewed once a year by an ARB, which assesses the extent to which the detainee continues to pose a threat and should be detained. Detainees who are charged before a military commission have a complete set of statutory procedures for their trials that – again in an unprecedented departure from past practice – include review by an Article III court.

The point that I would like to make to the Committee is that, given this unprecedented set of procedures, and the amount of time and delay it has already taken to get to this point, the wise choice for Congress now is to let the MCA work. Absent some compelling need for a change that is demanded by the Constitution, there is no need to make further modifications to the Act. Changes at this point will only further postpone the day when military commissions can begin to deliver justice.

#### **B. Proposed Amendments to the MCA**

Before I turn to the specifics of proposed amendments to the MCA, it is worth noting the titles of some of the bills proposing amendments, because they reflect a fundamental premise that I believe is misguided. The bills bear titles such as “Restoring the Constitution Act of 2007.” That title attempts to draw rhetorical force from the unstated assumption that aliens detained as enemy combatants outside the United States in the midst of an armed conflict have constitutional rights that have been taken away by the MCA and that should be “restored.” As a matter of law, that is a fundamentally incorrect assumption. As a result, I think it provides a distorted basis for guiding congressional action in this area.

The Supreme Court made clear more than fifty years ago in *Eisentrager* that aliens held outside the United States do not have rights under the Constitution. As the *Eisentrager* Court explained, if the Constitution conferred rights on aliens detained overseas as enemy combatants, “enemy elements . . . could require the American Judiciary to assure them freedom of speech, press, and assembly as in the First Amendment, the right to bear arms as in the Second, security against ‘unreasonable searches and seizures’ as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.” 339 U.S. at 784. As the Court explained, “[s]uch extraterritorial application of organic law would have been so significant an innovation in the practice of governments . . . that it could scarcely have failed to excite contemporary comment.” *Id.* But there is nothing in the records of the constitutional convention or contemporary practice to suggest that the Founders intended such a novel approach. Nothing in the Supreme Court’s decisions since *Eisentrager* — including the recent decisions in *Rasul* and *Hamdan* — has disturbed these fundamental principles. To the contrary, in ruling in 1990 that the Fourth Amendment did not protect aliens outside our borders, the Court resoundingly reaffirmed the teaching of *Eisentrager*, stressing that in *Eisentrager* “our rejection of extraterritorial application of the Fifth Amendment was emphatic.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990); see also *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).<sup>3</sup> *Eisentrager*’s constitutional holding thus remains the law today.

As a result, clothing the debate about the MCA in the rhetoric of constitutional rights distorts the law and improperly obscures the fact that what is at stake here is not a matter of

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<sup>3</sup> The same rule, following the Supreme Court’s teaching, has been consistently applied in the courts of appeal. See, e.g., *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) (“A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.”).



constitutional imperative. Instead, the issues at hand are policy choices for Congress to make about the best mechanisms for allowing the military to deal with enemy combatants in an ongoing armed conflict.

**1. Providing habeas corpus for detainees at GTMO**

One of the primary changes proposed for the MCA would restore jurisdiction of federal courts to hear habeas corpus petitions from enemy combatants at Guantanamo Bay. Such a change is not required by law, and it is certainly not called for by any practical necessity. To the contrary, it would serve only to add an unnecessary and confusing parallel avenue for judicial review of detentions in addition to that already provided in the DTA.

There is no merit to the idea that restoring habeas jurisdiction over claims brought by aliens held at Guantanamo Bay is somehow required by the Suspension Clause of the Constitution. That clause provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. Const., Art. I, sect. 9, cl. 2. That prohibition does not require any change to the MCA for at least two reasons.

First, as explained above, aliens held outside the United States have no rights under the Constitution, including under the Suspension Clause. The same reasoning that the Supreme Court applied in *Eisentrager* (and reaffirmed in cases such as *Verdugo-Urquidez*) to conclude that aliens overseas do not have rights under the Fifth Amendment applies equally to the Suspension Clause. If it did not, and aliens overseas did have a constitutional right to habeas review, there is no immediately apparent reason why the same right would not apply to aliens held in Iraq or in Baghram, Afghanistan (or to aliens held anywhere in the world any future war). Congress should be reluctant to adopt such a novel and extraordinarily expansive notion of constitutional rights.

Second, even if aliens at Guantanamo had some rights under the Suspension Clause, the procedures provided in the DTA for judicial review of detentions (after a CSRT decision) fully satisfy any rights they may have. The purpose of the writ of habeas corpus is to provide judicial review for executive detention. As long as Congress provides some mechanism for securing that judicial review, the demands of the Suspension Clause are satisfied, whether or not the procedure is labeled a "habeas" proceeding. As the Supreme Court has explained, "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." *Swain v. Pressley*, 430 U.S. 372, 381 (1977). Indeed, the Court has specifically noted that "Congress could, without raising any constitutional questions, provide an adequate substitute through the court of appeals." *INS v. St. Cyr*, 533 U.S. 289, 314 n.38 (2001). Congress has provided precisely such an adequate substitute here by providing for review in the D.C. Circuit of both the determinations of CSRTs and the final decisions of military commissions.

In fact, the DTA and the MCA provide even greater review than what has been available historically upon habeas challenges to a military tribunal decision in cases where habeas was available. In cases involving military commissions in World War II, the Supreme Court made clear that the function of habeas corpus was simply to test the jurisdiction of the tribunal to issue a decision, not to examine the correctness of its decision. *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 decision."); *see also Ex parte Quirin*, 317 U.S. 1, 25 (1942). In providing for review of constitutional and other claims, including the legal claim of

insufficiency of evidence, the DTA and MCA actually provide the detainees at Guantanamo with far more judicial review than has traditionally been provided through habeas to those convicted by a military commission. The MCA thus certainly provides an adequate substitute for any constitutional right to habeas that the detainees could be found to have.

The Court of Appeals for the District of Columbia Circuit has recently rejected the claim that the MCA's elimination of habeas review for Guantanamo violates any constitutional provision. *See Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007). Following the longstanding precedent outlined above, the court ruled that the detainees have no constitutional rights under the Suspension Clause. *See id.* at 988-94. There is certainly no need for Congress to intervene to amend the MCA now when the courts are still in the midst of their review and the latest indication from the Court of Appeals is that the statute's habeas provisions suffer from no constitutional infirmity at all.

Re-establishing habeas jurisdiction over Guantanamo at this point, moreover, would simply generate confusion and wasteful litigation by creating a parallel avenue for legal challenges, but without clear standards to govern them. The Supreme Court recognized long ago the practical dangers that would be posed by permitting enemy combatants detained overseas free access to our courts to file petitions for habeas corpus. As the Court explained in *Eisentrager*, permitting such petitions "would hamper the war effort and bring aid and comfort to the enemy. . . . It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to the enemies of the United

States.” 339 U.S. at 779. The initial rounds of habeas litigation on behalf of detainees at Guantanamo, culminating in the *Rasul* decision, proved that Justice Jackson’s fears in *Eisenrager* were well founded.

After *Rasul*, however, Congress wisely alleviated the worst of these problems by providing orderly judicial review mechanisms that would proceed only after military decisions had been completed through military processes. Thus, it made the enemy combatant status determination of a CSRT reviewable in the D.C. Circuit and the final decision of a military commission reviewable in the same court. Opening the field up once again to unrestricted challenges under the general habeas statute will only generate a flood of litigation that will unnecessarily divert the resources of the military and the Department of Justice and eliminate the very advantages of an orderly process that Congress sought to achieve through the DTA and MCA. It would do so, moreover, without providing any clear guidance as to any *substantive* change in detainees’ rights. To the contrary, presumably no substantive change in rights would be intended. But it would take years of litigation to establish that result.

Based on all of these considerations, there is simply no reason to return to the confusing legal landscape that existed before Congress created the well structured and orderly review mechanisms in the DTA and the MCA.

## **2. Prohibiting the use of testimony obtained by “coercion”**

Another proposed amendment would alter the MCA’s carefully balanced provisions regulating the use of statements obtained by some disputed degree of coercion. This amendment would simply ban all testimony obtained by “coercion.” I believe such an amendment would be a grave error. It would needlessly deprive military commissions of reliable evidence that was obtained in compliance with all requirements of law and would spawn endless litigation over the meaning of the undefined term “coercion.”

The MCA, of course, rightly includes a categorical prohibition on the use of any evidence obtained by torture. 10 U.S.C. § 948r(b). That is not at issue here. In addition, the MCA takes a balanced approach to deal with the thorny issue of statements obtained through some lesser and disputed degree of coercion. For statements obtained after passage of the DTA, it prohibits the use of any statement obtained in violation of the DTA's standards of treatment. 10 U.S.C. § 948r(d). For statements obtained before passage of the DTA, it provides that the statement may be admitted only if the military judge finds that the statement is reliable and possesses sufficient probative value and "the interests of justice would be served by the admission of the statement into evidence." 10 U.S.C. § 948r(c). This approach wisely ties admissibility to the standards of conduct already provided by the DTA. And, for the period before the passage of the DTA, it ensures that the military judge will provide a safeguard against the use of statements obtained by methods that suggest a degree of pressure that might have produced false testimony.

Changing the MCA to prohibit any use of statements obtained by "coercion" would only sow confusion in military commission proceedings and generate further delay as new rounds of litigation would be needed to determine the meaning of "coercion." To begin with, Congress should recognize that virtually every detainee will assert that his statements (and those of others) were obtained by coercion. Al Qaeda training manuals instruct those who are captured to claim that they were *tortured*. The detainees will hardly fail to assert that their treatment amounted to some lesser level of "coercion."

More important, this provision would likely prove particularly confusing in litigation, because the concept of "coerced" testimony already has a well-developed meaning in the context of the protections provided by the Fifth Amendment in criminal prosecutions. But it would be absurd to apply the finely reticulated standards and presumptions that courts have developed

under the Fifth Amendment in this context. That would require that any statement obtained without *Miranda* warnings be deemed coerced. Indeed, the very suggestion that all testimony obtained by “coercion” should be prohibited reflects, in my view, a misguided effort to carry over into the context of military commission trials for war crimes the mind-set and standards of the criminal law. War fighting is not the same as prosecuting criminals in the Article III court system. Everything about the detention and interrogation of an unlawful enemy combatant is – under the way we use the term in the criminal law – inherently coercive. But that does not mean that it violates the laws of war (including Common Article 3 of the Geneva Conventions), or the standards of treatment of the DTA. And it certainly does not mean that a military commission should be deprived of the evidence such an interrogation produces if a military judge deems it reliable.

Indeed, most Americans rightly expect that, in interrogating al Qaeda operatives, our military and intelligence services may use some methods that fall within the broad bounds of the term “coercive” – especially as that term is commonly understood when used in our criminal law. Some degree of coercion seems entirely appropriate when the objective is to obtain vital intelligence from a detainee such as Khalid Sheikh Mohammed – intelligence that could save potentially thousands of lives by preventing another attack like that of September 11th. There is a range of permissible conduct between prohibited “cruel, inhuman, and degrading treatment” and mere “coercion,” and there is no basis in law or logic for Congress to deprive military commissions of evidence obtained by such lawful means.

Moreover, Congress should be wary that in setting standards for the admission of evidence in military commissions, it does not inadvertently affect the standards used in the vital task of obtaining intelligence from captured members of al Qaeda. Under the MCA, the

standards for admissibility of evidence and the standards governing interrogators' primary conduct are essentially aligned. If the standard for admissibility in military commissions, however, were changed to depend upon some undefined notion of "coercion" it could have unintended consequences for interrogations. Of course, interrogations of enemy combatants for vital intelligence should be conducted with the paramount objective of obtaining intelligence — not the objective of building a case for a military commission. But if negative consequences would flow from using interrogation practices that, although perfectly lawful under the DTA, might later be deemed "coercive" under a different standard, there is always the chance that, at the margins, interrogators may alter their approach in a way that sacrifices the intelligence objective to preserve the viability of a later prosecution. Congress should avoid risking such an outcome by adhering to the current provisions of the MCA.

None of this, of course, is to suggest that military commissions should receive into evidence statements obtained through means that suggest the declarant was pressured into saying something false to satisfy his questioners. Such a result would be abhorrent to notions of justice deeply rooted in the common law, contrary to the President's order that military commissions provide "full and fair" trials, and would likely violate norms under the laws of war. The MCA, however, already fully guards against that possibility by prohibiting statements obtained in violation of the DTA and by requiring the military judge, in all cases where coercion is at issue, to assess whether "the totality of the circumstances renders the statement reliable and possessing sufficient probative value." 10 U.S.C. § 948r(c)(1), (d)(1). That provision directly addresses the concern at the heart of "coercion" — that false statements not be used as evidence. And it does so through a standard that is far more judicially administrable than a vague prohibition on "coercion" that would only lead to further litigation.

**3. Making CSRT determinations of enemy combatant status reviewable by a military commission for purposes of determining jurisdiction.**

Under the MCA as currently written, the final determination of a CSRT that an individual is an enemy combatant conclusively determines that person's status for purposes of the jurisdiction of a military commission.<sup>4</sup> That provision makes eminent sense. It recognizes that the procedures provided by CSRTs (including review by the D.C. Circuit) are fully adequate to make a decision about the status of a detainee that may lead to his detention for years as an enemy combatant and provides finality to that threshold status determination. Allowing a detainee to reopen that fundamental status determination as part of the proceedings of a military commission would serve no useful purpose and would only embroil military commissions in unnecessary further litigation.

As outlined above, CSRTs already provide unlawful enemy combatants a degree of process for determining their status that is unprecedented in the history of warfare. The CSRTs are modeled in part after the procedures used by the military under Army Regulation (AR) 190-8 for determining the POW status of detained personnel under Article 5 of the Geneva Conventions. They provide for a board of three officers to review evidence to determine the status of the detainee and permit the detainee to make a case concerning his status, including the right to call witnesses reasonably available. But the CSRTs also provide procedures well beyond those required in AR 190-8. To name just a few, the detainee is provided a Personal Representative to assist him in presenting his case; he is given access to the unclassified

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<sup>4</sup> Military commissions under the MCA have jurisdiction only over unlawful enemy combatants. 10 U.S.C. §§ 948c, 948d(a).



evidence being used by the CSRT; and, most significantly, the CSRT determination is subject to judicial review in a civilian court — the D.C. Circuit.

This elaborate process is not only unprecedented in the history of warfare, it was also designed specifically to satisfy the requirements of due process that the Supreme Court outlined in *Hamdi v. Rumsfeld* in describing the process due to a U.S. citizen held as an enemy combatant in the United States. A plurality of the Court in *Hamdi* explained that the basic elements for such a process consisted of “notice of the factual basis for [the individual’s] classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” 542 U.S. at 533. The plurality made clear, moreover, that “the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal.” *Id.* at 538. Indeed, the Court specifically noted that AR 190-8 “already provide[s] for such process,” *id.*, in the context of POW-status determinations. The CSRTs are tailor-made to comply with the dictates of due process that the Supreme Court outlined.

It is true that the CSRT is not a full-blown adversarial proceeding involving representation by counsel. But there is no need for such a process in the context of detention of enemy combatants during an armed conflict. Once again, the touchstone for comparison here should not be the procedures we use as part of the criminal law in deciding upon the detention of an individual. That paradigm provides the wrong frame of reference. Adversarial hearings have never been required for detaining enemy combatants until the end of a conflict. And as the Supreme Court itself pointed out in *Hamdi*, even where the detention of a U.S. citizen is concerned, “the exigencies of the circumstances may demand that . . . enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at the time of ongoing military conflict.” 542 U.S. at 533 (plurality).

The procedures provided by CSRTs are well tailored to suit the needs of the situation and they are more than adequate to satisfy all legal requirements to justify the detention of enemy combatants under the law of war. If they provide a sufficient process for that purpose — which will deprive a detainee of his liberty potentially for years — they certainly provide sufficient process to treat the status determination they produce as final for purposes of the jurisdiction of a military commission. Affording them that treatment does not eliminate any of the rights of the accused to challenge the evidence presented against him, nor does it eliminate the government's burden to establish every element of a charge beyond a reasonable doubt. Failing to treat CSRT determinations as final would simply generate further re-litigation of an issue already properly decided with full procedural protections and cause confusion and delay in military commission proceedings.

## **II. Continued Use of U.S. Naval Base, Guantanamo Bay, Cuba as a Detention Facility**

The continued use of Guantanamo Bay for detaining enemy combatants unquestionably raises a difficult issue for the United States. There can be no doubt that Guantanamo has become a lightning rod for criticism in the international community. And maintaining good relations with our allies and securing their continuing support (as well as securing the good will of other nations more broadly) is an important aspect of winning the conflict with al Qaeda. At the same time, the detention of those remaining at Guantanamo Bay serves an imperative national security function. The military has reviewed the situation of every enemy combatant at Guantanamo at least twice (and is now starting a third round of review) and determined that they would continue to pose a threat of rejoining al Qaeda or the Taliban if released.<sup>5</sup> I believe the Government has

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<sup>5</sup> This leaves to one side the situation of some detainees whom the military has determined to release but who cannot be repatriated to their home countries for fear they would be persecuted there.

an obligation to the American people not to release such enemy combatants who would continue to pose a threat to the United States and its coalition partners in an ongoing armed conflict. The danger that these detainees potentially pose is quite real, as has been demonstrated by the fact that to date at least 29 detainees released from Guantanamo re-engaged in terrorist activities, some by rejoining hostilities in Afghanistan where they were either killed or captured on the battlefield.<sup>6</sup>

One aspect of the debate about Guantanamo should be dispensed with at the outset. To some extent, critics of Guantanamo assert that the detainees should be “charged or released.” Indeed, many articles critical of Guantanamo repeatedly emphasize that those detained there have been “held without charge” for years. These criticisms fundamentally misconceive the nature of the military mission in detaining enemy combatants and the rights under the law of war on which it is founded. Once again, the criticisms are improperly based on assumptions derived from the wholly different context of the criminal law. Under the laws of war, enemy combatants may be detained for the duration of the conflict simply because they are enemy combatants. This detention is not punitive; it is designed simply to prevent the enemy from rejoining the fight. As a result, under the law of war, there is no need to charge an enemy with any violation of the law of war to justify detaining him until the end of the conflict. It is true that, in this unconventional war, the “end of the conflict” is difficult to predict and, at this point, difficult to foresee. But to address that concern, the military has adopted the unprecedented measure of holding ARBs — annual reviews to determine whether each detainee continues to pose a threat warranting his

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<sup>6</sup> See [www.defenselink.mil/news/Mar2005/d20050304info.pdf](http://www.defenselink.mil/news/Mar2005/d20050304info.pdf) (citing outdated figure of 10 confirmed returning to terrorist activity and describing specific cases).

detention. There is no requirement under the laws of war for such a review, and this innovation ensures that the military will not detain any enemy combatant who no longer poses a threat.

Ultimately, I believe that Guantanamo Bay must continue to be used for three reasons:

First, the Government has a duty to the American people not to release those who would return to the fight and pose a threat to Americans or our coalition partners.

Second, there is no practical alternative to Guantanamo. In particular, moving the detainees to the United States is not a viable alternative for both practical and legal reasons. As a practical matter, there is no adequate facility in the United States for fulfilling the mission currently served at Guantanamo Bay. The facilities at Guantanamo – by virtue of both their location and the physical plant that the military has in place – are the most secure place for these individuals to be detained. They house the detainees in a setting where they pose little risk of escape, and they provide key facilities for the dual missions of detaining enemy combatants and interrogating them for intelligence. Interrogations of detainees at Guantanamo have produced significant intelligence in the war with al Qaeda, and to the extent we continue to capture key al Qaeda operatives, we can expect that the intelligence mission must continue. Indeed, just this Monday an al Qaeda operative potentially possessing valuable intelligence about al Qaeda's network in East Africa was transferred to Guantanamo after being seized in Kenya. As I understand it, the military simply does not have any facility large enough and secure enough to fulfill these roles in the United States. Nor could the detainees be housed by parceling them out to different federal facilities run by the Bureau of Prisons. That solution would inevitably provide the detainees unmonitored means of transmitting and receiving messages to the outside and increase the security threat they pose.

In theory, if enough money were spent, a new facility might be created in the United States that would be secure enough to house the detainees. But it would inevitably raise additional security concerns that simply are not present at Guantanamo — concerns for the community near that facility. Bringing to a U.S. facility over 270 enemy combatants<sup>7</sup> whom the military has already determined, through multiple reviews, are the ones who are most dangerous and would return to the fight if they were released would likely increase the threat of an attempted escape and the danger of harm to American civilians if there were such an escape. These are individuals who have made various threats confirming their intent to do harm to Americans wherever possible. For example, one detainee has said that if released he would “arrange for the kidnapping and execution of U.S. citizens”; another has threatened MPs that he would come to their homes and cut their throats; and yet another has said that “one day I will enjoy sucking their blood, although their blood is bitter.”<sup>8</sup> In addition, any transfer would make the new U.S. facility a prime target of opportunity for any terrorist attack that al Qaeda is able to mount within our borders. Although the Government has been hard at work keeping our borders secure since 9/11, there is always the risk that an al Qaeda cell could evade those efforts and slip into the country. If that happened, an attack on the facility detaining their comrades would provide a target with media potential that would be difficult pass up. That, too, would create a

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<sup>7</sup> After the most recent round of ARBs was completed, the military recommended 273 enemy combatants for continued detention at Guantanamo, which reflects an assessment that those detainees are sufficiently dangerous that they must remain in U.S. custody. Other detainees at Guantanamo (at least 55) have been recommended for transfer to another nation. That does not mean, however, that they are not dangerous. As I understand it, a recommendation for transfer (as opposed to a recommendation for release) is conditioned on fulfillment of certain security requirements (including, perhaps, detention by the transferee nation). Many detainees recommended for transfer remain at Guantanamo because those security requirements have not yet been met by the potential transferee nation.

<sup>8</sup> JTF-GTMO Information on Detainees at 2, 3, available at [www.defenselink.mil/news/Mar2005/d20050304info.pdf](http://www.defenselink.mil/news/Mar2005/d20050304info.pdf).

danger for the entire area around such a new facility. In short, the simple fact is that any place inside the United States will be more accessible and less secure than Guantanamo Bay.

In addition to the significant practical hurdles presented by moving enemy combatants to the United States, the legal implications of bringing them onto U.S. soil are also daunting. The law is clear that various constitutional rights do not apply outside the United States to aliens, and nothing in the Supreme Court's recent decision regarding enemy combatants has altered that. But the general rule as to aliens who have crossed our borders is quite different. As the Supreme Court has explained, "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 694 (2001) (collecting cases); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("[I]t must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] amendments . . .").

Whether and to what extent these decisions would be applied to unlawful enemy combatants brought to the United States solely for detention purposes is not necessarily foreordained. Current case law, however, favors the conclusion that these individuals would secure constitutional rights once on U.S. soil. And it is a certainty that detainees will attempt to assert such rights in an entirely new round of litigation. Given the array of procedures provided for the detainees, it may well be that even if they were brought to the United States and were held to have constitutional rights, the procedures already provided would satisfy those rights. But even if that were the ultimate outcome, it would take years of further litigation and delay to finally reach that result. In the meantime, the military commission process would be stalled once again, none of the enemy combatants at Guantanamo would be brought to justice, and the scarce

resources of both the Department of Justice and the Department of Defense would be drained in a needless round of additional litigation.

Third, and finally, I believe that the United States should continue to use Guantanamo because simply closing Guantanamo and moving detainees to U.S. soil would almost certainly not achieve the desired objective of eliminating criticism and securing support from the international community. The criticisms from the international community do not hinge on the *place* where detainees are held. Guantanamo is a flashpoint because it is the place where detainees are held now and, admittedly, because of the initial legal battles about detainees' access to courts. But criticisms have not stopped despite the unprecedented procedures now afforded at Guantanamo, including judicial review. In my view, that is because the fundamental criticism the United States faces is an attack on the entire law-of-war paradigm under which the United States asserts the right to treat the struggle with al Qaeda as an armed conflict and to detain enemy combatants under the laws of war without "prosecuting" them on some "charge." Thus, unless the United States is prepared to abandon the law-of-war framework that currently governs the detention of those at Guantanamo, simply moving the detainees to the United States will likely do little to quell the outcry from the international community. I believe the United States was right to treat the conflict with al Qaeda as an armed conflict; that exercising the rights provided a belligerent under the law of war are critical for succeeding in that conflict; and that the United States should not abandon the course it has pursued.

For these reasons, I believe that the continued use of Guantanamo Bay — even though it has costs for the United States in the international community — provides the only practical alternative for fulfilling the imperative of detaining those enemy combatants who would pose a threat to the United States if released.

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Thank you, Mr. Chairman, for the opportunity to address the Committee. I would be happy to address any questions the Committee may have.



TESTIMONY OF  
WILLIAM H. TAFT, IV  
HOUSE COMMITTEE ON ARMED SERVICES  
MARCH 29, 2007

Mr. Chairman and Members of the Committee:

I am pleased to appear in response to your invitation to discuss two subjects – the future of the detention facility at Guantanamo Bay and the Military Commissions Act. As you know, I have testified many times before this committee, but I don't think I have been here since 1988, when I left the Pentagon almost twenty years ago. It's a pleasure to be back. Although I miss some faces, I am glad to see at least a few familiar ones and, of course, many new ones.

Regarding the future of the detention facility at Guantanamo Bay, I understand that most people would like to close it and transfer the persons we have captured in our conflict with al Qaeda and the Taliban regime who are there to other facilities. I share this view. There is no doubt that the facility has acquired a notorious reputation around the world, and its continued use is a focal point for criticism of our foreign policy and a drag on our ability to get important things done. Its notoriety arises, I believe, from two causes. First, it is evident that some detainees have been abused at the facility and that interrogation methods that have been used there have not complied with our international obligations under the Geneva Conventions, particularly Common Article 3 of the conventions. Second, there is an impression that the facility was established in Guantanamo in order to deprive the persons we captured in the conflict with the terrorists of access to our courts and other rights that they would enjoy if they were being held at a facility in the United States.

As to the treatment of the detainees and the methods of interrogation that have been employed at Guantanamo, I believe it was a mistake not to follow the consistent U.S. practice in all our conflicts since World War II. That practice was to treat all detainees in strict accordance with the Geneva Conventions and the Army Field Manual, regardless of whether they were entitled to this. I understand that this is now the policy embodied in the Detainee Treatment Act

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