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Military Commissions Act and the Continued Use  
of Guantanamo Bay as a Detention Facility:  
Hearing Before the H. Comm. on Armed Services,  
110th Cong., Mar. 29, 2007 (Statement of Professor  
Neal Kumar Katyal, Geo. U. L. Center)

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**Testimony of Neal Kumar Katyal**

**Professor, Georgetown University Law Center**

**Hearing: Guantanamo Bay**

**March 29, 2007**

**U.S. House Armed Services Committee**

March 29, 2007

## INTRODUCTION

Thank you Chairman Skelton, Representative Hunter, and Members of the Armed Services Committee, for inviting me to speak to you today. I appreciate the time and attention that your Committee is devoting to the legal and human rights crisis surrounding the detainees at Guantanamo Bay.

On Nov. 28, 2001, I testified before the Senate Judiciary Committee about the President's then two-week old plan to try suspected terrorists before ad hoc military commissions. I warned the committee that our Constitution precluded the President from unilaterally establishing military tribunals and that our Founders' structure required that these tribunals be set up by Congress. On June 29, 2006, the Supreme Court agreed in *Hamdan v. Rumsfeld*, invalidating the makeshift tribunal scheme devised by presidential fiat alone.<sup>1</sup> Indeed, every time the Supreme Court has ruled on the merits regarding the Executive's procedures for detainees, it has found them lacking, forcing Congress and the Executive Branch back to the drawing board at great expense in terms of money, time, and trust. Meanwhile, for five years and counting, the nation and the world at large wait for the United States to bring terrorists to justice consistent with our ideals of democracy and the rule of law.

A few weeks after the *Hamdan* decision, on July 19, 2006, I testified before the Senate Armed Services Committee, advocating a unitary court system for all suspected terrorists. I emphasized that our nation's tried-and-true courts-martial institution, complemented by the existing federal criminal justice system, provide all the safeguards needed to bring suspected terrorists to account without abandoning our most deeply-held beliefs about what it means to administer justice. I warned that legislation specifically crafted for a handful of individuals that does away with important criminal procedure guarantees is not only unnecessary but unwise. Such a two-tiered justice system threatens our nation's foundational values, as well as American credibility in the world arena.

Unfortunately, like the Detainee Treatment Act of 2005, the Military Commissions Act of 2006 (MCA) implements precisely such an impoverished two-tier system. The MCA provides a blunt instrument for a complex operation. It eliminates the right of habeas corpus for a group defined not by objective principle, but rather by arbitrary judgment of the Executive. Under the MCA, the federal courts lack jurisdiction to hear habeas claims from any alien detained by the United States and determined (by an untested and hastily constructed Executive proceeding) to be an enemy combatant. And after constructing a proceeding where the Executive acts as judge, jury, prosecutor, and possibly executioner, the MCA allows only for the most ephemeral review by an independent judicial authority in which neither the facts nor all of the law may be questioned by the defendant. It lightens the government's burden by casting aside constitutional rights and guarantees as if they are simple conveniences, the chaff rather than the grain of our democratic order. This is plainly a stop-gap law, designed for expediency and guaranteed convictions, not for endurance, legitimacy, or justice. In the end, the gravely flawed MCA only burdens this new Congress and the federal courts with divisive litigation. It is a law that does not merely invite judicial scrutiny, but clamors for it. Forward-thinking members of the Administration and this Congress have foreseen the end result: a new Supreme Court decision, this year or the next, followed by new legislation, this year or the next, driven by reaction rather than deliberation. This Committee has asked me here today, as I understand it, because it is interested in breaking this counterproductive cycle and avoiding a new round of constitutional hot potato between the political branches of government. Leaving a vacuum of constitutional leadership for the Court to fill falls far short of the ideal envisioned by our nation's founders: a vibrant system of innovation, evolution, and interlocking responsibility with Congress at the helm. How can we forget the stirring words of the great statesman, James Madison, as a young Member of this esteemed body, urging the House of Representatives to determine for itself the deep question of whether the proposed Bank of the United States was constitutional? The need for fresh direction, and a return to Madison's view of Congress's role, is apparent.

On the other hand, a litigation-based approach to this problem can only mean delay and

embarrassment as the nation and the world wait for real justice, for a sixth year. Congress should act now, rather than later, to restore rights and establish a framework for the habeas procedures that the Supreme Court is likely to require. The legal challenges to the military trials of suspected terrorists held at Guantanamo will cast a glaring spotlight on every nook and cranny of United States policy, and its shortcomings will be apparent. A politics of responsibility, and not reaction, is required now.

#### I. Moving the Trials to the U.S. Is A First (But Not Last) Step

Defense Secretary Gates has made the most recent brave attempt to argue out of turn on this issue, and I commend his proposal to transfer all terrorism trials from Guantanamo Bay to the United States. As reported by the New York Times last week, the purpose of this move would be to make the trials more credible, as high-level officials (evidently including the Secretary of State) acknowledge that Guantanamo's continuing existence hampers the nation's war effort. Moving the trials would communicate to the world that America has no intention of relegating these trials to a "legal black hole," and that the fundamental rights we assume daily here will not be treated as special privileges, doled out to our prisoners at the pleasure of an absentee warden.

However, while the Gates plan would be a first step in signaling the government's intention to integrate these unusual proceedings into our tradition of open, fair adjudication, it would do quite little to substantively further that goal. The MCA denies habeas rights to people based on their citizenship. An alien detainee on trial in Leavenworth, Kansas and an alien detainee on trial in Guantanamo are both excluded from our legal system's most crucial protections, including habeas corpus, under the MCA. This despite the fact that the writ of habeas corpus has been described by the Supreme Court as the "highest safeguard of liberty" in our system.

The Supreme Court has held that geography alone does not create rights. In *Eisentrager v. Johnson*, the Court determined that enemy aliens held abroad did not have enough of a connection to the United States to be entitled to habeas corpus rights. While *Eisentrager*

suggested that presence on U.S. soil might change the analysis, the Court later held that lawful but involuntary presence in this country does not necessarily entitle an individual to constitutional protection, either. But even if geography were determinative, a move from Guantanamo to the United States would do little: the Court has already determined that the military base is effectively U.S. soil for reviewing detainee claims.

In short, some of the constitutional and prudential defects of the MCA would follow these alien detainees on their trip from Guantanamo to the United States. Whether these trials take place in the United States or Guantanamo, it is my view that the Court will ultimately hold that the Constitution's fundamental guarantees must govern these trials. Yet if these trials take place at Guantanamo, and the courts follow the Administration's claim that the judiciary is powerless to intervene until after individuals are convicted in these makeshift tribunals, the result will be atrocious: the Court will have to throw out all of the convictions because of the inescapable legal conclusion that Guantanamo is not a legal black hole where the Executive can do anything it wants when it punishes someone.

Therefore, while an incremental step like Secretary Gates's plan would provide a welcome shift of perspective, sure to be lauded by the international community, it would not address all of the substantive legal challenges raised by the detainees or halt the progress of these cases on their way to the Supreme Court. That said, it is a very useful first step in helping to restore the credibility of the United States in this matter, and, as a practical matter, would expedite the trials by eliminating the logistical delays inherent to having trials take place in such a removed locale as Guantanamo.

### The Military Commissions Act is Unconstitutional

The only way to truly solve the problems that the MCA creates is to repeal the entire law and pass one consistent with this nation's Constitution and moral principles. As it stands, the MCA discriminates against people on the basis of alienage, a violation of the Equal Protection principle so deeply ingrained in our legal culture. And in further contravention of the basic guarantees of a free society, the law burdens the fundamental right of access

to the courts. Furthermore, the commissions sanctioned by the MCA flout international law and dispense with procedures fundamental to the fair administration of justice, including the prohibition on hearsay evidence. To solve these infirmities, Congress should repeal the MCA and pass a law using the existing system of courts-martial as the basis of a legal regime to deal with the Guantanamo detainees.

a. The MCA Establishes Unconstitutional Barriers Based on Alienage

The MCA purports to deny the writ of habeas corpus to any alien detained by the United States. As the text of the MCA makes clear, it is not only those whom the Government has held under its control for years in Guantanamo that have their habeas rights removed. The MCA deprives those rights to all aliens, even lawful resident aliens living within the United States, who are currently or in the future determined by the Executive's makeshift procedures to be "enemy combatants." Citizen detainees remain free to challenge their detention in civilian courts, while detained aliens are now excluded from independent judicial review based on an arbitrary Executive determination of their combatant status that the MCA cements into law.

I believe that such distinctions based on alienage will eventually be struck down by the courts. As I explained in my Senate testimony, the Equal Protection components of the Fifth and Fourteenth Amendments preclude the restriction of fundamental rights and government discrimination against a protected class. The MCA targets both a fundamental right and a protected class, and as such it just cannot survive the stringent constitutional standard. The statute purports to restrict the right of equal access to the courts, one of the most fundamental of rights under our legal system. Worse still, the line that divides who does and who does not receive full habeas review under the MCA is based on a patently unconstitutional distinction alienage. The onus is on this Congress and this Committee to recognize that we cannot tolerate this unconstitutional deviation from longstanding American law in the current war on terror any longer. The commissions set up by the MCA, like President Bush's first set of military commissions, appear to be the first ones in American history designed to apply only to foreigners. The

United States first employed military commissions in the Mexican-American war and "a majority of the persons tried . . . were American citizens." The tribunals in the Civil War naturally applied to citizens as well. And in *Quirin*, President Roosevelt utilized the tribunals symmetrically for the saboteur who claimed to be an American citizen and along with the others who were indisputably German nationals, prompting the Supreme Court to hold: "Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war."

Those who drafted the Equal Protection Clause knew all too well that discrimination against non-citizens must be constitutionally prohibited. The Clause's text itself reflects this principle; unlike other parts of the section, which provide privileges and immunities to "citizens," the drafters intentionally extended equal protection to "persons."

Foremost in their minds was the language of *Dred Scott v. Sandford*, which had limited due process guarantees by framing them as nothing more than the "privileges of the citizen." This language was repeatedly mentioned in the Senate debates on the Fourteenth Amendment, with the very first draft of the Amendment distinguishing between persons and citizens: "Congress shall have power to . . . secure to all citizens . . . the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty, and property." The Amendment's principal author, Representative John Bingham, asked: "Is it not essential to the unity of the people that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States? Is it not essential . . . that all persons, whether citizens or strangers, within this land, shall have equal protection . . . ?"

Moreover, drawing lines based on alienage offends all logic and sound policy judgment for effectively fighting the war on terror. Our country knows all too well that the kind of hatred and evil that has led to the massacre of innocent civilians is born both at home and abroad. And nothing in the MCA, nor the DTA or the Military Order that preceded it, suggests that military commissions are more necessary for aliens than for citizens



suspected of terrorist activities. Indeed, both the Executive and Congress appear to believe that citizens and non-citizens pose an equal threat in the war on terror. Since the attacks of September 11th, the Executive has argued for Presidential authority to detain and prosecute U.S. citizens. And in *Hamdi v. Rumsfeld*, the Supreme Court agreed that "[a] citizen, no less than an alien, can be 'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States.' . . . [S]uch a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict." Likewise, Congress did not differentiate between citizens and non-citizens in the Authorization for the Use of Military Force, which provided the President with the authority to "use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001."

The threat of terrorism knows no nationality; rather, it is a global plague, and its perpetrators must be brought to justice no matter what their country of origin. Terrorism does not discriminate in choosing its disciples. If anything, we can expect organizations such as al Qaeda to select, wherever possible, American citizens to carry out its despicable bidding. The Attorney General himself has recently reminded us that "[t]he threat of homegrown terrorist cells . . . may be as dangerous as groups like al Qaeda, if not more so." Given this sensible recognition by all three branches of government that the terrorist threat is not limited to non-citizens, the disparate procedures for suspected terrorist detainees on the basis of citizenship simply makes no sense.

Further, in the wake of international disdain for the military tribunals authorized by President Bush in his Military Order, our country is already under global scrutiny for its disparate treatment of non-U.S. citizens. The reported Gates plan recognizes, at the very least, that our handling of Guantanamo detainees has garnered (and warranted) bad publicity. We must be careful not to further the perception that, in matters of justice, the American government adopts special rules that single out foreigners for disfavor. If American citizens get a "Cadillac" version of justice, and everyone else gets a "beat-up Chevy," the result will be fewer extraditions, more international condemnation, and

increased enmity towards America worldwide.

b. The MCA's Attempt to Strip Federal Courts of Habeas Jurisdiction Over Alien Detainees is Unconstitutional

Aliens and citizens alike have a constitutional right to challenge the legality of their trial by military commission. Because Congress has not invoked its Suspension Clause power, it may not eliminate the core habeas rights enshrined into our Constitution. Rather, absent suspension, the Great Writ protects all those detained by the government who seek to challenge executive detention, particularly those facing the ultimate sanctions - life imprisonment and the death penalty.

And even if Congress were to invoke its Suspension Clause power, it lacks *carte blanche* power to suspend the writ at will. Instead, the Constitution permits a suspension of habeas only when in "Cases of Rebellion or Invasion the public Safety may require it." In enacting the MCA, Congress made no such finding that these predicate conditions exist. Indeed, even during evident "Rebellion or Invasion," the Supreme Court has required that congressional suspension be limited in scope and duration in ways that the MCA is not: First, Congress must tailor its suspension geographically to those jurisdictions in rebellion or facing imminent invasion. Thus, in *Ex parte Milligan*, the Court determined that because Milligan was a resident of Indiana, a state not in rebellion, his right to habeas was protected. Like Indiana, "Guantanamo Bay . . . is . . . far removed from any hostilities." In fact, the detention cells at Guantanamo Bay have served the explicit purpose of holding captured suspects in U.S. custody away from the tumult of the battlefield abroad. Moreover, Congress may suspend the writ for only a limited time. The MCA, however, has no terminal date and indefinitely denies alien detainees access to habeas corpus. As a result, alien detainees swept into U.S. custody would be left to languish in an extralegal zone, their fundamental rights left to the whim of the Executive, potentially suspended forever. The Constitution simply does not condone the existence of a lawless vacuum within its jurisdiction.

The MCA's jurisdiction-stripping provision not only breaches the geographical and temporal restraints imposed by the Constitution, it also defies the historic scope and purposes of the writ. Habeas rights have always extended to individuals in U.S. jurisdiction -- citizen or alien, traitor or enemy combatant. The Supreme Court has declared that the judiciary retains the obligation to inquire into the "jurisdictional elements" of the detention of an enemy alien with a sufficient connection to U.S. territory, explaining that "it [is] the alien's presence within its territorial jurisdiction that [gives] the Judiciary the power to act." Guantanamo Bay is not immune from these dictates of the Constitution. In *Rasul*, the Court rejected the Government's assertion that Guantanamo is a land outside U.S. jurisdiction. Indeed, as "[t]he United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base," the Court observed that alien detainees held at Guantanamo are not categorically barred from seeking review of their claims. The majority dropped a pointed footnote, strongly suggesting that the detainees were protected by the Constitution. In addition, Justice Kennedy separately concluded that Guantanamo detainees had a constitutional right to bring habeas petitions based on the status of Guantanamo Bay and the indefinite detention that the detainees faced. It makes sense not to constitutionalize the battlefield; but a long-term system of detention and punishment in an area far removed from any hostilities, like that in operation at Guantanamo Bay, looks nothing like a battlefield.

The fact remains that if the military commissions are fundamentally unfair, they are unfair for everyone. It is no more just to subject an alien detainee in Guantanamo Bay to an inferior adjudicatory process than it is to subject a citizen detainee in Norfolk, Virginia to the very same. The MCA, in its attempt to relegate alien detainees to a lesser brand of justice and eliminate their right to challenge their Executive detention, unconstitutionally tramples on the habeas rights of prisoners held within U.S. jurisdiction. The Constitution will not tolerate such arbitrary exclusions. Finally, such restrictive habeas review jeopardizes the finality and confidence surrounding verdicts of the military commissions. If the international community believes the entire process is invalid, we cannot expect it to respect the authority of the commission outcomes. Secretary Gates has recognized that the trials of terror suspects must be credible in the eyes of the world. Removing the trials

from Guantanamo would lift at least some of the perception of injustice that currently clouds the proceedings.

c. The MCA Establishes a Trial System That Violates Both Domestic and International Law

In addition to violating principles of Equal Protection that are central to our constitutional order, the MCA further violates longstanding rules of criminal procedure and evidence. For example, prosecutions under the MCA may employ hearsay evidence against a defendant on trial for his life, which deprives him of the most elemental opportunity for fairness: challenging allegations against him through cross-examination or confrontation. Further, the MCA leaves open the possibility that evidence that is the fruit of torture may be introduced and used to convict a defendant in the military commissions, a principle previously unheard of in American law.

The MCA also disposes of Common Article 3 of the Geneva Conventions as a possible source of law under which a defendant may assert rights. And what the MCA does retain of the Geneva Conventions is, under the Administration's view, thin gruel. For instance, grave breaches of Common Article 3 are subject to criminal sanction but a court may not consider international or foreign law to determine what would constitute such a grave breach. And American personnel accused of violating Common Article 3 have a ready defense - as long as they acted in good faith that their actions were lawful (which might include reliance on administration memos on torture), they may not be held liable.

The MCA quite simply fails to take our treaty obligations seriously. When this happens, we can no longer be surprised to see our credibility in the world community falling and anti-Americanism on the rise.

d. Congress should repeal the MCA and enact a system to deal with these prosecutions based on the Uniform Code of Military Justice and the courts-martial.

Unlike the dichotomy presented by the media and talk-show hosts, the choice here is not between the unconstitutional tribunals under the MCA and the civilian justice system with the full panoply of criminal procedure rights possessed by any ordinary defendant. There is a middle way to run these prosecutions that provides the flexibility required to safeguard national security while still employing fair procedures and protecting fundamental rights. Namely, the longstanding system of courts-martial set forth in the Uniform Code of Military Justice. As Justice Stevens declared in Hamdan, "Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case."

Most importantly, the existing courts-martial are already equipped to deal with the unique circumstances of a terrorism trial and, in fact, have been statutorily authorized to try such cases for ninety years. These military trials use judges and juries that already possess security clearances and can view classified evidence without fear of security compromises. The rules governing courts-martial provide for trials on secure military bases and for courtroom closures when sensitive evidence is presented, another measure that would help guarantee information security. Courts-martial also already utilize measures that would, among other things, protect the identities of witnesses if necessary. In short, the procedures for conducting courts-martial protect vital national security information.

In addition, unlike the rules for tribunals under the MCA, the court-martial rules benefit from the fact that they are fully delineated, tested by litigation, and validated by the Supreme Court. Thus, a system that tries suspected terrorists under these rules of military justice need not be delayed by legal challenges seeking relief from rigged and un-American procedures such as the introduction of evidence resulting from torture. Indeed, all the energy the government currently spends defending these flawed policies could be redirected to actually trying and convicting terrorists under a tough but fair system that is consonant with American values and ideals.

Neither Congress nor the Executive has offered any compelling reason why the

established court-martial system would be insufficient to try suspected terrorists. Given its robust safeguards for national security and its careful balance between security and the rights of the defense, the court-martial system is the most acceptable forum in which to try these cases today.

### III. Congress Must Take the Lead Now to Repeal the MCA

There is a reason why Law & Order is one of the longest-running shows on television. Trials are gripping, dramatic, and relatively easy to follow. Unlike detention, which involves little drama and no grand moment of resolution, a trial has developments, recognizable characters, and a climax in the form of a verdict. The military trials of the suspected terrorists housed at Guantanamo will be watched by the world because each trial is a self-contained, symbolic event. Yet we must not forget that in these trials, the United States, not just the detainees it is prosecuting, is also facing judgment. Changing the background set from Guantanamo to a United States military base will not ultimately change the verdict, but it will provide at least an appearance of good faith and greater fairness. It is a crucial first step arguably even more important than the repeal of the habeas-stripping provisions in the MCA and DTA. Still, with the world watching, Congress must be sure that these trials measure up to the substantive standards, both constitutional and moral, against which we judge our own court system.

The Administration clings to the belief that Guantanamo is a legal black hole where literally none of the protections of the American constitution apply. This short-sighted theory is directly responsible for the MCA's unconstitutional provisions, and it will corrupt these important trials. Such views must be repudiated and replaced with an appropriate system that reflects the traditions and values of Americans, one built upon the recognition that the war on terror will only be won with the world - and justice - at our side, not at our back.

As I have argued, the likelihood of an adverse Supreme Court ruling on the MCA is high, and Congress will need to return to the drawing board. Intense discussion and

compromise followed the Supreme Court decisions in Rasul and Hamdan, and ultimately Congress updated the law, much the way doctors re-engineer a vaccine, as if the Constitution were a persistent viral strain coming back to haunt it. This Congress has the choice of getting ahead of the curve to rework the law now, and thereby design a habeas procedure that is consistent both with our national security goals and the Constitution, or it can wait for yet another Court decision and return to cutting corners and erasing words and commas.

Senator Arlen Specter, former Chair of the Senate Judiciary Committee, put it bluntly: "While this exchange of ideas is surely healthy and appropriate, the conversation has begun to generate diminishing returns."<sup>29</sup> No detainee has been tried in the five and a half years since the war on terror began. International perception of the United States remains embarrassingly low for a country that has always been the world's champion of democracy and the rule of law.

I ask the members of this Committee to realize the power that lies in your hands the power to ensure the safety of our troops and the dignity of the nation and values they defend. As Senator John Warner eloquently put it last summer, "The eyes of the world are on this nation as to how we intend to handle this type of situation and handle it in a way that a measure of legal rights and human rights are given to detainees." The world's scrutiny is specifically targeted at our handling of Guantanamo Bay, and I applaud Secretary Gates and all others in our government who recognize that the only thing worse than making a mistake is failing to correct it when you still have the chance. Thank you.