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Implications of the Supreme Court's Boumediene Decision for Detainees at Guantanamo Bay, Cuba: Hearing Before the H. Comm. on Armed Services, 110th Cong., July 30, 2008 (Statement of Neal Katyal, Prof. of Law, Geo. U. L. Center)

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**Testimony of**

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**Before the**

**House Armed Services Committee**

**July 30, 2008**

**Implications of the Supreme Court's *Boumediene* Decision for Detainees  
at Guantanamo Bay, Cuba**

**INTRODUCTION**

Thank you Chairman Skelton, Representative Hunter, and members of the House 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 Guantánamo Bay.

On November 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 the structural provisions employed by our Founders required these tribunals to be set up by Congress. On June 29, 2006, the Supreme Court agreed in a case I argued, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). The *Hamdan* decision invalidated the makeshift tribunal scheme devised by presidential fiat alone.

Indeed, every time the Supreme Court has ruled on the merits regarding the Executive Branch's procedures for detainees, it has found them lacking, forcing Congress and the Executive back to the drawing board at great expense to the nation in terms of money, time, and the trust of the American people. The latest event occurred last month, when the Supreme Court struck down a key part of the Military Commissions Act of 2006 ("MCA") in *Boumediene v. Bush*.

The basic question I am here to answer today is: What changed after *Boumediene v. Bush*? The simple answer is: Everything. The Supreme Court's decision in *Boumediene* profoundly affects the detainees currently held at Guantanamo Bay and the Military Commission system established to try many of them for war crimes. The case marked the fourth time in as many years that the Supreme Court rejected the government's attempts to defend its Guantanamo Bay policy. A clear pattern has emerged. Each subsequent decision has further chipped away at the foundation of that policy. Despite the familiar result, *Boumediene* nevertheless was unique, as it was the first Guantanamo-related case the Court heard after Congress passed the MCA. The Court invalidated part of that law as unconstitutional, in the process emphasizing that the Constitution applies to Guantanamo Bay. As a result, it is now clear that detainees held at Guantanamo Bay have a constitutionally-protected right to have an Article III court review the legality of their detention in a habeas corpus action. The practical implications of the case do not end there. The Court's holding in *Boumediene* did more than invalidate a single section of the MCA; it stripped away the veneer to expose the eroding foundation of the military commission system.

In this testimony, I will make four points: (1) the *Boumediene* decision has called into question the foundational assumption on which the MCA is based, that the Constitution and treaties of the United States do not protect detainees at Guantanamo Bay; (2) the MCA unconstitutionally discriminates against noncitizens; (3) Congress, after careful deliberation, should take up legislation to follow *Boumediene* and balance national security and civil liberties concerns; and (4) legislation should make clear that the military commission process is no substitute for the Great Writ of habeas corpus.

### **The Constitution Now Applies to Guantanamo Bay**

The MCA was enacted as a direct response to the Supreme Court's decision in *Hamdan v. Rumsfeld*.<sup>1</sup> The Court in that case held that the

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<sup>1</sup> *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 18 (D.D.C. 2006) ("Hamdan is to face a military commission newly designed, because of his efforts, by a Congress that finally stepped up to its responsibility, acting according to guidelines laid down by the Supreme Court [in the earlier *Hamdan v. Rumsfeld* decision, available at 126 S. Ct. 2749 (2006)]").

President did not have the authority to try detainees by military commission without specific Congressional authorization, and that the system established by the President violated the requirements of the Geneva Conventions. The main goal of the MCA was to establish military commissions at Guantanamo in which the Government could try detainees charged with war crimes. It is evident that the MCA reflected two fundamental beliefs about the rule of law and Guantanamo: (1) that the Constitution did not apply there; and (2) that international treaties had no force there. *Boumediene* eviscerated the first belief and the second is bound to suffer the same fate.

In the myriad cases challenging its detention methods, the Government consistently argued that fundamental provisions of the U.S. Constitution did not apply in Guantanamo because the U.S. lacked *de jure* sovereignty there. Accordingly, the Government's view was that the Constitution did not constrain its detention policy. This was a troubling assertion, but such a view was not limited to the Executive branch; the prevailing view by Congress' MCA supporters was the same.<sup>2</sup>

In *Boumediene*, the Supreme Court flatly rejected a formalistic approach to determining the Constitution's reach, and instead approached the question functionally. "Guantanamo . . . is no transient possession. *In every practical sense*, Guantanamo is not abroad; it is within the constant jurisdiction of the United States." 128 S. Ct. at 2261 (citations omitted) (emphasis added). The Suspension Clause explicitly limits suspension of the writ of habeas corpus to times of "rebellion or invasion."<sup>3</sup> Given the historical importance of habeas corpus as a linchpin of liberty, the Court asked whether it was "impractical or anomalous" for this Constitutional

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<sup>2</sup> See, e.g., Hamdan v. Rumsfeld: *Establishing a Constitutional Process: Before the S. Comm. on the Judiciary*, 109th Cong. 36 (statement of Sen. Sessions) (July 2006) ("But all the provisions that are engrafted in the United States Code, State law, and Federal constitutional privileges are not required in military commissions. They never have been.") (on file with the S. Comm. on the Judiciary); 152 CONG. REC. S10243, 10273 (daily ed. Sept. 27, 2006) (statement of Sen. Cornyn) (stating that Guantanamo Bay detainees do not have constitutional rights); 152 CONG. REC. S10243, 10263 (daily ed. Sept. 27, 2006) (remarks of Sen. Warner & Sen. Levin); *Legal Issues Regarding Individuals Detained by the Department of Defense as Unlawful Enemy Combatants: Hearing Before the S. Comm. on Armed Services*, 110th Cong. 94 (2007) (testimony of Daniel J. Dell'Orto, Principal Deputy Gen. Counsel, Department of Defense) ("If we talk about, now, moving [military commissions] to the United States, I think then you bump up against the legal aspect, and that is, are we going to have the full panoply of constitutional protections for those individuals, by virtue of their presence on U.S. soil?").

<sup>3</sup> U.S. Const. art. I, § 9, cl. 2.

protection to extend beyond the nation’s traditional borders.<sup>4</sup> Deciding that it was neither, the Court concluded that Section 7 of the MCA, which attempted to strip federal courts of habeas jurisdiction, was therefore unconstitutional. Judicial enforcement of the Suspension Clause in an area where the U.S. had complete jurisdiction and control, which was not in an active theater of war, and where there was no threat of friction with a host government was neither “impractical” nor “anomalous.”<sup>5</sup> “[N]o law other than the laws of the United States applies at the naval station.” 128 S. Ct. at 2251. “The United States has maintained complete and uninterrupted control of the bay for over 100 years.” *Id.* at 2258.

The Court’s logic and analysis regarding habeas corpus and detention under the MCA apply with equal force to the military commissions also established by the MCA. The structure and procedures of these commissions clearly transgress structural limits on the powers of the U.S. government and violate fundamental constitutional guarantees. In invalidating part of the MCA, the *Boumediene* Court was unequivocal. It reminded Congress that: “Even when the United States acts outside its borders, its powers are not ‘absolute and unlimited’ but are subject ‘to such restrictions as are expressed in the Constitution.’”<sup>6</sup> In short, *Boumediene* confirmed what we already knew: Congress cannot switch the Constitution on and off as it pleases. “Our basic charter cannot be contracted away like this.”<sup>7</sup> To paraphrase Chief Justice Marshall in *Marbury v. Madison*, it is emphatically the duty and province of the Courts to say what the law is. To hold otherwise—to let the political branches decide where and when the Constitution applies to catch the prevailing winds of the hour—would undermine foundational principles of separation of powers that define our system of government.

It is incorrect to believe that this principle applies only to the Suspension Clause. After all, habeas corpus exists to protect “the rights of the detained by a means consistent with the essential design of the Constitution.”<sup>8</sup> *Boumediene*’s right to habeas corpus would be meaningless if there were no substantive rights to protect. Given the myriad

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<sup>4</sup> *Boumediene*, 128 S. Ct. at 2255.

<sup>5</sup> *Id.* at 2261.

<sup>6</sup> *Id.* at 2259 (quotation omitted).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 2247.

constitutional defects inherent in the military commissions established under the MCA, Congress should consider itself on notice that the entirety of that system now rests on a crumbling foundation. In light of the serious national security concerns at stake, Congress should be proactive and act carefully rather than let the current system fall apart, piece-by-piece. It is worth bearing in mind that letting the system fall apart will have a number of other terrible consequences, including possibly having convictions reversed and individuals unable to be retried.

The second invalid assumption of the MCA was that the treaties of the United States, most notably the Geneva Conventions, have no effect at Guantanamo. It is frequently said that treaties are agreements between nations, and that courts have no business enforcing a treaty's guarantees. This is true in some circumstances, but generally speaking, the Supremacy Clause mandates that "treaties" are part of "the supreme law of the land."<sup>9</sup> Moreover, the Supreme Court already demonstrated in *Hamdan v. Rumsfeld* that it would invalidate a military commission system that violated the laws of war and the Geneva Conventions.<sup>10</sup> Yet the existing system under the MCA is fatally deficient. It not only violates the Constitution, but also various treaties of the U.S., including Common Article 3 of the Geneva Conventions, which guarantees a set of minimum rights for all combatants.

In multiple places, the MCA seeks to limit the ability to invoke the Geneva Conventions as a "source of rights."<sup>11</sup> This appears to be a statement of Congress's belief that the Geneva Conventions provide no independently enforceable rights, or do not create a private right of action in certain situations. Such an assertion is constitutionally dubious. Principles of separation of powers prevent Congress from enacting a statute that requires federal courts to exercise their jurisdiction "in a manner repugnant to the text, structure, and traditions of Article III."<sup>12</sup> A quintessential example of such an invalid statute is one that "prescribe[s] rules of decision to the Judicial Department."<sup>13</sup> The MCA does not diminish or alter the United States' obligations under the Geneva Conventions. Instead, it

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<sup>9</sup> U.S. Const. art. VI.

<sup>10</sup> 126 S. Ct. 2749 (2006).

<sup>11</sup> See MCA Section 3 (specifically 10 U.S.C. § 948b(g)) and MCA Section 5.

<sup>12</sup> *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995).

<sup>13</sup> *United States v. Klein*, 80 U.S. 128, 136 (1872).

reinforces their applicability to the military commissions it created.<sup>14</sup> To the extent the MCA seeks to prevent federal courts from considering federal law in certain situations, it creates exactly this serious constitutional problem. More specifically, “Congress may limit the jurisdiction of the courts, but it cannot give them jurisdiction and instruct them to decide the case without regard to applicable federal law.”<sup>15</sup>

*Boumediene*’s holding that detainees at Guantanamo have a right to habeas corpus further undermines this second assumption. Courts historically have granted habeas relief for treaty violations, even when a treaty does not itself confer individually enforceable rights.<sup>16</sup> In such cases, the treaty itself does not create the right of action or remedy for its violation—habeas does. Despite assertions to the contrary in the statute itself, military commissions under the MCA do not comport with the Geneva Conventions.<sup>17</sup> Accordingly, a court easily could find that trial by such a military commission is unlawful, just as the Supreme Court did two years ago in *Hamdan*. If that happened, Congress would be forced to go back to the drawing board and rethink its system for dealing with detainees at Guantanamo.

### **The Military Commissions Act Is Unconstitutional**

The only way to solve the multiple problems created by the MCA is to repeal the entire law and pass one consistent with this nation’s Constitution and principles. As it stands, the MCA discriminates against people on the basis of alienage, a violation of Equal Protection principles that are deeply ingrained in both legal doctrine and our American narrative. And in further contravention of the basic guarantees of a free society, the

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<sup>14</sup> Section 3 of the MCA (10 U.S.C. § 948b(f)) states that a military commission established under the MCA satisfies the requirements of Common Article 3, reaffirming the relevance and applicability of the Geneva Conventions in this context.

<sup>15</sup> Carlos M. Vazquez, *The Military Commissions Act, The Geneva Conventions, and the Courts: A Critical Guide*, 101 Am. J. Int’l L. 73, 86 (2007).

<sup>16</sup> See, e.g., *United States v. Rauscher*, 119 U.S. 407 (1886); *Chew Heong v. United States*, 112 U.S. 536 (1884).

<sup>17</sup> These arguments are analyzed in detail in two briefs filed in the United States District Court for the District of Columbia. See Petitioner’s Reply Brief in Support of Motion for a Preliminary Injunction, *Hamdan v. Gates*, available at <http://www.scotusblog.com/wp/wp-content/uploads/2008/07/hamdan-reply-on-inj-7-16-08.pdf>; Amicus Brief of United Kingdom and European Union Parliamentarians, *Hamdan v. Gates*, available at <http://www.scotusblog.com/wp/wp-content/uploads/2008/07/parliamentarians-brief-hamdan-7-08.pdf>.

law burdens the fundamental right of access to the courts. The commissions sanctioned by the MCA also flout international law and dispense with many of the 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, such as the Restoring the Constitution Act, that uses an existing, constitutionally-sound system of courts or courts-martial to deal with the Guantánamo detainees.

There are many constitutional problems with the MCA (to mention just a few of the most glaring ones, it violates the *Ex Post Facto* Clause, Suspension Clause, Define & Punish Clause, Bill of Attainder Clause, and Due Process Clause). For the sake of brevity, I will focus on just one: Equal Protection. The Equal Protection components of the Fifth and Fourteenth Amendments preclude both the restriction of fundamental rights and, independently, government discrimination against a protected class unless the law in question passes strict scrutiny review. The MCA targets both a fundamental right and a protected class, and as such it simply 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 those who do and do 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 can no longer tolerate this unconstitutional deviation from longstanding American law in the current war on terror.

The commissions set up by the MCA, like President Bush's first attempt to set up a system 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, where "a majority of the persons tried . . . were American citizens."<sup>18</sup> The tribunals in the Civil War naturally applied to citizens as well. And in *Ex parte Quirin*, President Roosevelt utilized the tribunals symmetrically for the saboteur who claimed to be an American citizen as well as for others who were indisputably German nationals, prompting the Supreme Court to hold:

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<sup>18</sup> David Glazier, Note, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2030 (2005).



“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.”<sup>19</sup>

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 all “persons.”<sup>20</sup> 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.”<sup>21</sup> 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.”<sup>22</sup> 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 . . . ?”<sup>23</sup>

Moreover, drawing lines based on alienage offends all logic and sound policy judgment for effectively fighting the war on terror. Our country understands all too well that the kind of hatred and evil that leads to the massacre of innocent civilians is born both at home and abroad. And

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<sup>19</sup> *Ex Parte Quirin*, 317 U.S. 1, 37 (1942).

<sup>20</sup> U.S. CONST. amend. XIV, § 1; *see also* AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 388-89 (2005) (providing evidence that the Equal Protection Clause was intentionally written as it was specifically in order to extend certain rights to aliens); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 *YALE L.J.* 1385, 1442-47 (1992) (same).

<sup>21</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 449 (1857). *See generally* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 170-72 (1998) (tracing the historical origins of the Equal Protection Clause and its use of the word “persons” to *Dred Scott*); *id.* at 217-18 n.\* (stating that the Equal Protection Clause is “paradigmatically” concerned with “nonvoting aliens”).

<sup>22</sup> AMAR, *supra*, at 173 (quoting a draft of the Fourteenth Amendment).

<sup>23</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866). Similarly, Senator Howard stated that the Amendment was necessary to “disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State.” *Id.* at 2766.

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 11<sup>th</sup>, 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.”<sup>24</sup> Likewise, this body did not differentiate between citizens and non-citizens in the Authorization for the Use of Military Force Resolution, 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.”<sup>25</sup>

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 and neither should we in punishing those who employ this perfidious and cowardly tactic. If anything, we can expect organizations such as al Qaeda to select, wherever possible, American citizens to carry out their despicable bidding. Former Attorney General Gonzales stated that “[t]he threat of homegrown terrorist cells . . . may be as dangerous as groups like al Qaeda, if not more so.”<sup>26</sup> Given this sensible recognition by all three branches of government that the terrorist threat is not limited to non-citizens, the

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<sup>24</sup> 504 U.S. 507, 519 (2004).

<sup>25</sup> 115 Stat. 224, note following 50 U.S.C. §1541.

<sup>26</sup> Alberto Gonzales, U.S. Attorney General, Remarks at the World Affairs Council of Pittsburgh on Stopping Terrorists Before They Strike: The Justice Department’s Power of Prevention (Aug. 16, 2006), transcript available at [http://www.usdoj.gov/ag/speeches/2006/ag\\_speech\\_060816.html](http://www.usdoj.gov/ag/speeches/2006/ag_speech_060816.html); see also *Foiled Dirty-Bomb Plot Reveals Chilling New Threats*, USA TODAY, June 11, 2002, at 10A (reporting that when announcing Jose Padilla’s arrest in 2002 for suspicion of planning a dirty bomb attack on U.S. soil, Attorney General John Ashcroft described Padilla’s American citizenship as attractive to al Qaeda because Padilla could move freely and easily within the United States); Jessica Stern, Op-Ed., *Al Qaeda, American Style*, N.Y. TIMES, July 15, 2006, at A15 (expressing concern that al Qaeda is aiming to recruit American citizens for domestic terror attacks).

disparate procedures for suspected terrorist detainees on the basis of citizenship simply make no sense.

Further, in the wake of international disdain for and suspicion of 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. A letter signed by dozens of former diplomats that was sent to you attests that it is critical to remove this credibility gap: “To proclaim democratic government to the rest of the world as the supreme form of government at the very moment we eliminate the most important avenue of relief from arbitrary governmental detention will not serve our interests in the larger world.”<sup>27</sup> This asymmetry will not go unnoticed.

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.

### **The Military Commissions Cannot Substitute for the Great Writ**

To the extent this Congress considers legislation related to the detainees, a core purpose of any Bill should be to clarify that criminal prosecution before a military commission cannot be a substitute for, or barrier to, a timely federal habeas hearing. This would seem to be an unremarkable and obvious point—military commission prosecutions and habeas review of detentions serve two vastly different purposes. But the Bush Administration has indicated that it may view criminally charging the detainees before military commissions as a vehicle to escape the Supreme Court’s recent decision in *Boumediene* that the Constitution requires the detainees be granted proper and timely habeas hearings. Although only a fraction of the Guantanamo detainees have been criminally charged at this point, if the Administration’s theory were successful, it could charge a great number of the detainees in an effort to forestall, or foreclose altogether, their rights to habeas hearings.

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<sup>27</sup> Letter from William D. Rogers et al. to Members of Congress, Sept. 25, 2006.

To avoid this sort of run-around, any legislation should clarify that whether or not a detainee is prosecuted by a military commission has no bearing on his right to a timely and meaningful habeas hearing to challenge the legality of his ongoing Executive detention. In the rest of this Section of my testimony I will first explain the legal background behind this particular issue and explain why a military commission cannot and should not be a habeas replacement.

Military commissions allow for the prosecution and sentencing of individuals who are unlawful enemy combatants and have committed war crimes. Habeas hearings allow an individual who is detained to challenge the President's authority to detain him, and the legality of the ongoing detention. Although prosecution by military commission and review of the legality of executive detention are entirely different proceedings which serve wholly different functions, the Bush Administration has indicated that it views prosecution before a military commission as a substitute to a habeas hearing.<sup>28</sup>

To begin, there is no doubt that individuals detained at Guantanamo Bay all have the same right to habeas corpus, whether or not they are to be tried by military commission. The Administration itself conceded this point, at an earlier stage of the litigation involving Mr. Hamdan, when it stated to the Supreme Court that: "If th[e] Court holds in *Boumediene* and *Al Odah* that enemy combatants at Guantanamo Bay may petition for habeas corpus to challenge their detention notwithstanding the MCA, there is no reason to suppose that its holding would not apply to those enemy combatants who have been designated for trial by military commission."<sup>29</sup>

Under longstanding Supreme Court doctrine, as reaffirmed in *Boumediene*, unless Congress formally suspends the writ, it can only remove

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<sup>28</sup> See, e.g., Gov't Br. in Opp'n to Pet's Motion for Preliminary Injunction at 20 (July 14, 2008), *Hamdan v. Gates*, No. 04-CV-1519-JR (D.D.C.) (asserting that habeas review into Hamdan's designation as an enemy combatant is not necessary because the commissions themselves, "in conjunction with review by [the D.C. Circuit], certainly comprise a sufficient habeas substitute. . .").

<sup>29</sup> Br. in Opp'n to Cert., *Hamdan v. Gates*, No. 07-15, at 12; see also *id.* at 10 ("[t]he jurisdictional provision of the MCA makes no distinction between aliens detained as enemy combatants and those who are also subject to trial by military commission, see MCA § 7(a), 120 Stat. 2636, and petitioner provides no reason why any decision of this Court in *Boumediene* and *Al Odah* would not apply to him.").

jurisdiction over habeas petitions from federal courts if it provides an adequate alternative or substitute process.<sup>30</sup> The Supreme Court held in *Boumediene* that a CSRT conducted by the military, and the limited review provided by the DTA, are not adequate alternatives to the writ of habeas corpus guaranteed in Article I, Section 9 of the Constitution.<sup>31</sup>

There are at least five reasons why trial by a military commission is no substitute for a detainee's right to a timely habeas hearing to challenge his ongoing Executive detention.

*First*, and most significantly, any habeas hearing to challenge the legality of a detention must have, as a possible outcome, the detainee's ultimate release from unlawful detention. This is the very purpose of the writ of habeas corpus. But the military commission process does not contemplate or permit this result. Even if a military commission proceeding results in an acquittal,<sup>32</sup> or a conviction is ultimately overturned, the detainee's captivity continues.<sup>33</sup> There is simply no mechanism in a military commission or the D.C. Circuit review of a commission that is prescribed by the MCA to end unlawful Executive detention.

*Second*, military commissions and habeas hearings serve entirely different purposes. The purpose of the constitutional habeas hearing recognized in *Boumediene* is to determine whether the President has authority to hold an individual as an enemy combatant. The purpose of a military commission is to criminally prosecute an individual for violating the laws of war. One foundational aspect of the laws of war is that certain people are entitled to prisoner of war (POW) or combatant immunity, and so cannot be criminally prosecuted for their participation in hostilities. Thus,

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<sup>30</sup> See *Boumediene*, 128 S. Ct. at 2262 (questioning "whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus" and finding the substitute to be inadequate).

<sup>31</sup> See *Boumediene*, 128 S. Ct. at 2274 ("[T]he DTA review process is, on its face, an inadequate substitute for habeas corpus.").

<sup>32</sup> I would note, also, the statement of my distinguished co-panelist today, the former Chief Prosecutor of the Military Commissions, Col. Mo Davis. See Josh White, *From Chief Prosecutor To Critic at Guantanamo*, WASH. POST, Apr. 29, 2008, at A1 (quoting former Chief Prosecutor Col. Morris Davis recalling the Defense Department General Counsel stating "'We've been holding these guys for years. How can we explain acquittals? We have to have convictions.'").

<sup>33</sup> See Jeffrey Toobin, *Camp Justice; Everyone Wants to Close Guantanamo, but What Will Happen to the Detainees?*, NEW YORKER, Apr. 14, 2008, at 32.

one of the few defenses available to a defendant before a military commission is to argue that he is a lawful combatant and so cannot be tried. But, requiring a defendant in a military commission to argue that he is a lawful combatant entitled to POW status would force him to argue directly against his interests in a habeas hearing, where the detainee would wish to argue he is not a combatant at all. In sum, because a military commission is engaged in a fundamentally different inquiry than a habeas court, a commission will not hear the proper arguments to evaluate the legality of a defendant's detention. By design, the commission cannot possibly substitute for the habeas hearing.

*Third*, the procedures used by a military commission may be inconsistent with the Supreme Court's guidance in *Boumediene* on the requisite elements of a proper habeas hearing. For example, the commission permits the admission into evidence of testimony extracted by coercion.<sup>34</sup> So too, hearsay is readily admissible in commission proceedings, gravely undermining the right of confrontation.<sup>35</sup> In addition, the commission has already ruled that the sharply curtailed right against self-incrimination afforded to defendants under the MCA "is at odds with the balance of American jurisprudence."<sup>36</sup> And as I said earlier, military commission defendants are stripped of any right to invoke the Geneva Conventions, which are crucial in determining whether an individual may be detained as an enemy combatant.<sup>37</sup> These are just some of the reasons why a military commission proceeding lacks the proper procedures for a habeas hearing. It is for these reasons, moreover, that a military commission's own jurisdictional decision about whether a detainee is a so-called "unlawful enemy combatant" is likewise insufficient as a habeas substitute.

*Fourth*, the D.C. Circuit review of the final judgment of a military commission that is provided by the MCA is far more restricted than the review of CSRTs provided by the DTA—which the Supreme Court in *Boumediene* has already found an inadequate habeas substitute.<sup>38</sup> Most significantly, unlike the DTA-provided review of CSRTs, the MCA does not

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<sup>34</sup> See 10 U.S.C. § 948r.

<sup>35</sup> See 10 U.S.C. § 949a(b)(2)(E).

<sup>36</sup> See Ruling on Motion to Suppress (D-030) at 3, *United States v. Hamdan*.

<sup>37</sup> See 10 U.S.C. § 948b(g).

<sup>38</sup> See *Boumediene*, 128 S. Ct. at 2263–69.

permit any review of the factual findings and determinations of the military commission. When reviewing a military commission, “the Court of Appeals may act only with respect to matters of law.”<sup>39</sup> By contrast, the DTA requires judicial review of facts for challenges to CSRTs.<sup>40</sup> So, too, the MCA has a more restrictive provision than the DTA for the D.C. Circuit to look to the “Constitution and the laws of the United States.”<sup>41</sup> Given that the Supreme Court has already found the DTA federal review provisions to be inadequate, it goes without saying that these inferior provisions in the MCA cannot suffice as a habeas substitute.

*Fifth*, as the Supreme Court reaffirmed in *Boumediene*, the writ of habeas corpus commands timely access to a hearing to review the factual and legal basis of the ongoing Executive detention. Many of the detainees have already been held in captivity at Guantanamo Bay and denied a habeas hearing for nearly seven years.<sup>42</sup> Given that the delay up to this point already conflicts with the core concept of habeas, a further delay to await the conclusion of military commission trials and review would be deeply problematic. Indeed, the military commissions have already demonstrated that they are incapable of a speedy trial, and the MCA places no time limit on when a military commission judgment must be finalized, raising the specter that they could be drawn out indefinitely to prevent detainees from ever getting a day in court. The near certainty of lengthy additional delay is thus another reason not to view military commission proceedings as a habeas substitute.

For these reasons, a criminal trial before a military commission should not be considered to serve as a substitute to a detainee’s right to challenge the legality of his detention in a federal habeas proceeding. Given the Bush Administration’s indication that it may view military commissions as a

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<sup>39</sup> 10 U.S.C. § 950g(b).

<sup>40</sup> See DTA § 1005(e)(2)(C)(i) (with respect to CSRTs the D.C. Circuit must ensure “that the conclusion of the Tribunal be supported by a preponderance of the evidence”).

<sup>41</sup> Compare the MCA provision on this point, 10 U.S.C. § 950g(c), with the DTA provision, DTA § 1005(e)(3)(D), 119 Stat. at 2743.

<sup>42</sup> See *Boumediene*, 128 S. Ct. at 2263 (“[T]he fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional.”); see also *id.* at 2275 (that waiting for the D.C. Circuit to address the sufficiency of DTA review “would be to require additional months, if not years, of delay”).

habeas substitute, Congress should consider explicitly making this point clear in any legislation.

### **Next Steps: A National Security Court?**

Moving forward, perhaps the most important line in last month's *Boumediene* opinion belonged to Chief Justice Roberts' dissent: After the Supreme Court in 2004 gave Guantanamo detainees the right to habeas corpus, "Congress responded 18 months later . . . [and] cannot be faulted for taking that time to consider how best to accommodate both the detainees' interests and the need to keep the American people safe." 128 S. Ct. at 2282 n.1.

Some are ignoring the Chief's wise words and calling immediately for legislation to create a national security court as a response to the *Boumediene* decision. I support a security court. But the litany of policy questions that surround it are far too massive to be tackled in the next few months, right before a presidential election. Rushing ahead is a huge mistake that will weaken American security.

The current system of detention is totally broken. The current Administration has been asserting an open-ended power to detain people forever with little or no serious process. The result of its system not only has been that the truly innocent could potentially be detained forever, but also that the seriously guilty could call themselves mere shepherds and escape the consequences of criminal conviction. The Supreme Court wisely shut that system down. Now, what is needed is a serious plan to prosecute everyone we can in regular courts, and a separate system to deal with the small handful of cases in which patently dangerous people cannot be tried.

That's where a national security court could come in—a system that would be staffed by federal judges, with experienced counsel on both sides, in which the government would have an ability to temporarily detain a dangerous individual. It might only come into being after a criminal trial has failed. Or it might be limited in other ways—from a numerical cap on the number of detainees in the system to innovative ideas such as forcing the government to give an escalating amount of money in foreign aid to the country of origin of each detainee for every additional month of detention.



Every aspect of the system is up for grabs—from the rules of evidence to the length of an initial detention period and what an appeals system would look like. The point here is simply that there are literally hundreds of different models from which to choose.

And yet each of those models will differ from our traditional system of justice. Americans take pride in our criminal trial system—and our system works best when we convict terrorists in our court system. We showcase the rule of law—and contrast it with the despicable world of the enemy, who lacks respect for our way of life and our values. If we are to modify our system, even in the slightest of ways, we should do so cautiously, with appreciation for the risks involved.

The very worst time to contemplate such changes is a few months before a major election (and particularly when both presidential candidates have announced that they will change policy and close Guantanamo). A rush to judgment produces sloganeering without a sustainable product. Consider what happened before the last election: The Supreme Court struck down President Bush's Guantanamo trial system and Geneva Convention policies in June of 2006, and the Congress fast-tracked new legislation to try to overturn the Supreme Court three months later in the form of the MCA. Members of Congress on both sides of the aisle warned that this legislation was unconstitutional and would be struck down by the courts. But the Administration did not listen. And so here we are again, nearly seven years after the horrible 9-11 attacks with only half of a single trial completed at Guantanamo Bay, and that very law, the MCA, already struck down in part by the Supreme Court.

We need a better plan than simply looking tough if we want to demonstrate to our courts and the world that we are serious about terrorism. This country desperately needs, and deserves, a serious inquiry, perhaps catalyzed by a bipartisan national commission, to examine whether a national security court is necessary and, if so, what it should look like.

We have spent far too many years with intemperate solutions that have gotten us nowhere. Many warned the Administration that it needed a plan for the day after the Supreme Court's highly predictable decision to restore basic rights to the Guantanamo detainees—but it stubbornly clung to

notions of executive power that the Supreme Court in *Boumediene* eviscerated. If we rush into a national security court, we will need another plan for the next predictable “day after.”

### **Conclusion**

In light of the rampant constitutional and treaty-based defects that infect the entire military commission system established by the MCA, I am grateful for the attention that this Committee, and the Congress as a whole, is expending on this matter. I am pleased to answer any questions that you might have.