

# CRS Report for Congress

## Enemy Combatant Detainees: *Habeas Corpus* Challenges in Federal Court

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## Summary

After the U.S. Supreme Court held that U.S. courts have jurisdiction pursuant to 28 U.S.C. § 2241 to hear legal challenges on behalf of persons detained at the U.S. Naval Station in Guantanamo Bay, Cuba, in connection with the war against terrorism (*Rasul v. Bush*), the Pentagon established administrative hearings, called “Combatant Status Review Tribunals” (CSRTs), to allow the detainees to contest their status as enemy combatants, and informed them of their right to pursue relief in federal court by seeking a writ of *habeas corpus*. Lawyers subsequently filed dozens of petitions on behalf of the detainees in the District Court for the District of Columbia, where district court judges reached inconsistent conclusions as to whether the detainees have any enforceable rights to challenge their treatment and detention.

In December 2005, Congress stepped into the fray, passing the Detainee Treatment Act of 2005 (DTA) to require uniform standards for interrogation of persons in the custody of the Department of Defense, and expressly to ban cruel, inhuman, or degrading treatment of detainees in the custody of any U.S. agency anywhere overseas. The DTA also divested the courts of jurisdiction to hear some detainees’ challenges by eliminating the federal courts’ statutory jurisdiction over *habeas* claims by aliens detained at Guantanamo Bay (as well as other causes of action based on their treatment or living conditions). The DTA provides instead for limited appeals of CSRT determinations or final decisions of military commissions.

In *Hamdan v. Rumsfeld*, the Supreme Court rejected the view that the DTA left it without jurisdiction to review a *habeas* challenge to the validity of military commissions established by President Bush to try suspected terrorists. In holding the military commissions invalid, the Court did not revisit its 2004 opinion in *Hamdi v. Rumsfeld* upholding the President’s authority to detain individuals in connection with antiterrorism operations, but it did hold that “in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.”

The Court’s decision led the 109<sup>th</sup> Congress to enact the Military Commissions Act of 2006 (MCA) (P.L. 109-366) to authorize the President to convene military commissions and to amend the DTA to further reduce access to federal courts by “alien enemy combatants,” wherever held, by eliminating pending and future causes of action other than the limited review of military proceedings permitted under the DTA. The Court of Appeals for the D.C. Circuit dismissed the Guantanamo detainees’ *habeas* petitions on the basis of the DTA, as amended. The Court has granted certiorari to hear *Boumediene v. Bush* to determine whether the MCA is valid under the Suspension Clause (U.S. Const. Art. 1, § 9, cl. 2), which may include a determination of whether it amounts to an impermissible “court-stripping” measure to deprive the judiciary of jurisdiction over matters of law entrusted to it by the Constitution and whether such constitutionally sensitive issues can be avoided in light of the alternative procedures provided. Pertinent legislation includes H.R. 267, S. 185, S. 576, S. 1547, S. 1548, H.R. 1415, H.R. 1416, H.R. 1585, H.R. 1189, H.R. 2543, H.R. 2710, H.R. 2826, S. 1249 and H.R. 2212.

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# Enemy Combatant Detainees: *Habeas Corpus* Challenges in Federal Court

## Introduction

In *Hamdi v. Rumsfeld*,<sup>1</sup> a divided Supreme Court declared that “a state of war is not a blank check for the president” and ruled that persons deemed “enemy combatants” have the right to challenge their detention before a judge or other “neutral decision-maker.” The Court did not decide whether the same right applies to aliens held as enemy combatants outside of the United States, but held in *Rasul v. Bush*<sup>2</sup> that federal courts have jurisdiction to hear *habeas* petitions by or on behalf of such detainees. The latter decision reversed the holding of the Court of Appeals for the District of Columbia Circuit, which had agreed with the Bush Administration that no U.S. court has jurisdiction to hear petitions for *habeas corpus* by or on behalf of the detainees because they are aliens and are detained outside the sovereign territory of the United States. Lawyers filed dozens of petitions on behalf of the detainees in the District Court for the District of Columbia, where judges reached conflicting conclusions as to whether the detainees have any enforceable rights to challenge their treatment and detention.

After the Supreme Court granted certiorari to hear a challenge by one of the detainees to his trial by military tribunal, Congress passed the Detainee Treatment Act of 2005 (DTA). The DTA requires uniform standards for interrogation of persons in the custody of the Department of Defense (DOD), and expressly bans cruel, inhuman, or degrading treatment of detainees in the custody of any U.S. agency. At the same time, however, it divested the courts of jurisdiction to hear challenges by those detained at Guantanamo Bay based on their treatment or living conditions. The DTA also includes a modified version of the Graham Amendment (S.Amdt. 2516 to S. 1042, 109<sup>th</sup> Cong., “the Graham-Levin Amendment”), which eliminates the federal courts’ statutory jurisdiction over *habeas* claims by aliens challenging their detention at Guantanamo Bay, but provides for limited appeals of status determinations made pursuant to the DOD procedures for Combatant Status Review Tribunals (CSRTs) or by military commissions.

In *Hamdan v. Rumsfeld*, decided June 29, 2006, the Supreme Court rejected the government’s argument that the DTA divested it of jurisdiction to hear the case, and reviewed the validity of military commissions established to try suspected terrorists of violations of the law of war, pursuant to President Bush’s military order. The Court did not revisit its 2004 opinion in *Hamdi v. Rumsfeld* upholding the President’s

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<sup>1</sup> 542 U.S. 507 (2004).

<sup>2</sup> 542 U.S. 466 (2004).

authority to detain individuals in connection with antiterrorism operations, and did not resolve whether the petitioner could claim prisoner-of-war (POW) status, but held that “in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.”

In response to the Court’s decision, the 109<sup>th</sup> Congress enacted the Military Commissions Act of 2006 (MCA) (P.L. 109-366) to authorize the President to convene military commissions and to amend the DTA to further reduce the access of aliens in U.S. custody to federal court, to the extent that such jurisdiction existed, by expressly eliminating court jurisdiction over all pending and future causes of action other than the limited review of military proceedings permitted under the DTA. A federal district judge dismissed Hamdan’s new petition for *habeas corpus* on the basis of the DTA, as amended, holding that the MCA is not a suspension of the Writ of Habeas Corpus within the meaning of the Constitution.<sup>3</sup> The U.S. Court of Appeals for the D.C. Circuit issued an order dismissing other detainee cases based on similar reasoning.<sup>4</sup> The Supreme Court initially denied the petitioners’ request for review,<sup>5</sup> with three Justices dissenting to the denial and two Justices explaining the basis for their support. Justice Breyer, joined by Justices Souter and Ginsburg, dissented, expressing disagreement with the circuit court decision and skepticism that the relevant issues can be resolved through the alternate remedies. Justice Stevens, joined by Justice Kennedy, wrote a statement explaining their view that the petitioners should first exhaust remedies available under the DTA unless the petitioners can show that the government is causing delay or some other ongoing injury that would make those remedies inadequate. In June, however, the Supreme Court vacated its earlier denial and granted the petition on the petitioners’ motion to reconsider.<sup>6</sup>

The U.S. Court of Appeals for the Fourth Circuit granted *habeas* relief to a resident alien who was arrested in Illinois on criminal charges but then transferred to South Carolina and detained in military custody as an “enemy combatant.”<sup>7</sup> While one judge on the panel dissented with respect to the holding that the detention was not authorized by Congress, all three judges on the panel agreed that the MCA did not divest it of jurisdiction to hear the petition, notwithstanding the MCA’s lack of geographical limits. The government is expected to ask for a rehearing *en banc*.

Unless Congress or the President takes some action to alter the MCA or resolve the petitioners’ complaints, the Supreme Court will, in its upcoming term, weigh constitutional issues with respect to the Suspension Clause (U.S. Const. Art. 1, § 9, cl. 2), perhaps determining whether the provision amounts to an impermissible “court-stripping” measure to deprive the Supreme Court of jurisdiction over matters

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<sup>3</sup> Hamdan v. Rumsfeld, 464 F.Supp. 2d 9 (D.D.C. 2006).

<sup>4</sup> Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007).

<sup>5</sup> Boumediene v. Bush, 549 U.S. \_\_ (2007).

<sup>6</sup> Boumediene v. Bush, 551 U.S. \_\_ (2007).

<sup>7</sup> Al-Marri v. Wright, 487 F.3d 160 (4<sup>th</sup> Cir. 2007).

of law entrusted to it by the Constitution or whether the alternative procedures provided in the MCA are an adequate substitute for the Writ.

This report provides an overview of the CSRT procedures, summarizes court cases related to the detentions and the use of military commissions, and summarizes the Detainee Treatment Act, as amended by the Military Commissions Act of 2006, analyzing its effects on detainee-related litigation in federal court. The report summarizes pending legislation and provides an analysis of relevant constitutional issues, including whether the DTA provisions amount to a suspension of the Writ of Habeas Corpus within the meaning of the Suspension Clause or whether it is a valid exercise of Congress's power under the Constitution to regulate the jurisdiction of federal courts.

## Background

The White House determined in February 2002 that Taliban detainees are covered under the Geneva Conventions,<sup>8</sup> while Al Qaeda detainees are not,<sup>9</sup> but that none of the detainees qualifies for the status of prisoner of war (POW).<sup>10</sup> The Administration deemed all of them to be “unlawful enemy combatants,” and claimed the right to detain them without trial or continue to hold them even if they are acquitted by a military tribunal. Fifteen of the detainees had been determined by the President to be subject to his military order (“MO”) of November 13, 2001,<sup>11</sup> making them eligible for trial by military commission.<sup>12</sup> The Supreme Court, however, found that the procedural rules established by the Department of Defense to govern the military commissions were not established in accordance with the Uniform Code of Military Justice (UCMJ).<sup>13</sup> The following sections trace the judicial developments with respect to the detention of alleged enemy combatants.

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<sup>8</sup> The two most relevant conventions are the Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3317 (hereinafter “GPW”); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516 (hereinafter “GC”).

<sup>9</sup> White House Memorandum, “Humane Treatment of al Qaeda and Taliban Detainees” (February 7, 2002), *available at* [<http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf>].

<sup>10</sup> For more history and analysis, see CRS Report RL31367, *Treatment of ‘Battlefield Detainees’ in the War on Terrorism*, by Jennifer K. Elsea.

<sup>11</sup> Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, November 13, 2001, 66 *Federal Register* 57833 (2001)(hereinafter “MO” or “military order”).

<sup>12</sup> For an analysis of the military commission rules, see CRS Report RL33688, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice*, by Jennifer K. Elsea.

<sup>13</sup> 10 U.S.C. § 801 *et seq.*

***Rasul v. Bush***<sup>14</sup>

Petitioners were two Australians and twelve Kuwaitis (a petition on behalf of two U.K. citizens was mooted by their release) who were captured during hostilities in Afghanistan and were being held in military custody at the Guantanamo Bay Naval Base, Cuba. The Administration argued, and the court below had agreed, that under the 1950 Supreme Court case *Johnson v. Eisentrager*,<sup>15</sup> “‘the privilege of litigation’ does not extend to aliens in military custody who have no presence in ‘any territory over which the United States is sovereign.’” The Court distinguished *Rasul* by noting that *Eisentrager* concerned the constitutional right to *habeas corpus* rather than the right as implemented by statute. The *Rasul* Court did not reach the constitutional issue, but found authority for federal court jurisdiction in 28 U.S.C. § 2241, which grants courts the authority to hear applications for *habeas corpus* “within their respective jurisdictions,” by any person who claims to be held “in custody in violation of the Constitution or laws or treaties of the United States.”<sup>16</sup>

The Court also declined to read the statute to vary its geographical scope according to the citizenship of the detainee. Justice Kennedy, in a concurring opinion, would have found jurisdiction over the Guantanamo detainees based on the facts that Guantanamo is effectively a U.S. territory and is “far removed from any hostilities,” and that the detainees are “being held indefinitely without the benefit of any legal proceeding to determine their status.” Noting that the Writ of Habeas Corpus (“Writ”) has evolved as the primary means to challenge executive detentions, especially those without trial, the Court held that jurisdiction over *habeas* petitions does not turn on sovereignty over the territory where detainees are held. Even if the *habeas* statute were presumed not to extend extraterritorially, as the government urged, the Court found that the “complete jurisdiction and control” the United States exercises under its lease with Cuba would suffice to bring the detainees within the territorial and historical scope of the Writ.

Without expressly overruling *Eisentrager*, the Court distinguished the cases at issue to find *Eisentrager* inapplicable. *Eisentrager* listed six factors that precluded those petitioners from seeking *habeas* relief: each petitioner “(a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our

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<sup>14</sup> 542 U.S. 466 (2004).

<sup>15</sup> 339 U.S. 763 (1950).

<sup>16</sup> *Rasul*, 542 U.S. at 478-79. When *Eisentrager* was decided in 1950, the *Rasul* majority found, the “respective jurisdictions” of federal district courts were understood to extend no farther than the geographical boundaries of the districts (citing *Ahrens v. Clark*, 335 U.S. 188 (1948)). According to the Court, that understanding was altered by a line of cases, recognized in *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973), as overruling the statutory interpretation that had established the “inflexible jurisdictional rule” upon which *Eisentrager* was implicitly based. Justice Scalia, with Chief Justice Rehnquist and Justice Thomas, dissented, arguing that the *habeas* statute on its face requires a federal district court with territorial jurisdiction over the detainee. The dissenters would have read *Braden* as distinguishing *Ahrens* rather than overruling it. For more analysis of the *Rasul* opinion, see CRS Report RS21884, *The Supreme Court 2003 Term: Summary and Analysis of Opinions Related to Detainees in the War on Terrorism*, by Jennifer K. Elsea.

territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.”<sup>17</sup> The *Rasul* Court noted that the Guantanamo petitioners, in contrast, “are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.”

As to the petitioners’ claims based on statutes other than the *habeas* statute, which included the federal question statute<sup>18</sup> as well as the Alien Tort Statute,<sup>19</sup> the Court applied the same reasoning to conclude that nothing precluded the detainees from bringing such claims before a federal court.<sup>20</sup>

The Court’s opinion left many questions unanswered. It is unclear which of the *Eisentrager* (or *Rasul*) factors would control under a different set of facts.<sup>21</sup> The opinion did not address whether persons detained by the U.S. military abroad in locations where the United States does not exercise full jurisdiction and control would have access to U.S. courts. However, the *Hamdan* opinion seems to indicate that a majority of the Court regards *Eisentrager* as a ruling denying relief on the merits rather than a ruling precluding jurisdiction altogether.<sup>22</sup> Under this view, it may be argued, there was no statutory bar precluding detainees in U.S. custody overseas from petitioning for *habeas* relief in U.S. courts.

The Court did not decide the merits of the petitions, although in a footnote the majority opined that “Petitioners’ allegations — that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing — unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’”

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<sup>17</sup> *Rasul*, 542 U.S. at 475 (citing *Eisentrager*, 339 U.S. at 777).

<sup>18</sup> 28 U.S.C. § 1331 (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

<sup>19</sup> 28 U.S.C. § 1350 (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

<sup>20</sup> *Rasul*, 542 U.S. at 484 (“nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the ‘privilege of litigation’ in U.S. courts”).

<sup>21</sup> The Court noted that “*Eisentrager* made quite clear that all six of the facts critical to its disposition were relevant only to the question of the prisoners’ constitutional entitlement to habeas corpus.” *Rasul*, 542 U.S. at 476 (emphasis original).

<sup>22</sup> *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2793 (2006)(characterizing the *Eisentrager* decision, 339 U.S. 763, 790(1950), as having rejected the treaty claim “on the merits”).



The opinion left to lower courts such issues as whether the detentions are authorized by Congress, who may be detained and what evidence might be adduced to determine whether a person is an enemy combatant, or whether the Geneva Conventions afford the detainees any protections. The Court did not address the extent to which Congress might alter federal court jurisdiction over detainees' *habeas* petitions, an issue which is discussed more fully below.

## Combatant Status Review Tribunals

In response to Supreme Court decisions in 2004 related to “enemy combatants,” the Pentagon established procedures for Combatant Status Review Tribunals (CSRTs), based on the procedures the Army uses to determine POW status during traditional wars.<sup>23</sup> Detainees who are determined not to be enemy combatants are to be transferred to their country of citizenship or otherwise dealt with “consistent with domestic and international obligations and U.S. foreign policy.”<sup>24</sup> CSRTs have confirmed the status of at least 520 enemy combatants. Any new detainees that might be transported to Guantanamo Bay will go before a CSRT. The CSRTs are not empowered to determine whether the enemy combatants are unlawful or lawful, which recently led two military commission judges to hold that CSRT determinations are inadequate to form the basis for the jurisdiction of military commissions.<sup>25</sup>

The tribunals are administrative rather than adversarial, but each detainee has an opportunity to present “reasonably available” evidence and witnesses<sup>26</sup> to a panel

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<sup>23</sup> See Department of Defense (DOD) Fact Sheet, “Combatant Status Review Tribunals,” available at [<http://www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf>]. CSRT proceedings are modeled on the procedures of Army Regulation (AR) 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997), which establishes administrative procedures to determine the status of detainees under the Geneva Conventions and prescribes their treatment in accordance with international law. It does not include a category for “unlawful” or “enemy” combatants, who would presumably be covered by the other categories.

<sup>24</sup> See DOD Press Release, “Combatant Status Review Tribunal Order Issued” (June 7, 2004), available at [<http://www.defenselink.mil/releases/2004/nr20040707-0992.html>]; Memorandum from the Deputy Secretary of Defense to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal, July 7, 2004 (hereinafter “CSRT Order”), available at [<http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>]; Memorandum from Deputy Secretary of Defense, Implementation of Combatant Status Review Tribunals Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba, July 14, 2006 (hereinafter “CSRT Implementing Directive”), available at [<http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>].

<sup>25</sup> See Josh White and Shailagh Murray, *Guantanamo Ruling Renews The Debate Over Detainees*, WASH. POST, June 6, 2007, at A3.

<sup>26</sup> Witnesses from within the U.S. Armed Forces are not “reasonably available” if their participation, as determined by their commanders, would adversely affect combat or support operations. CSRT Implementing Directive, *supra* note 24, at encl. 1, para. G(9)(a). All other witnesses, apparently including those from other agencies, are not “reasonably available” if they decline to attend or cannot be reached, or if security considerations prevents their presence. *Id.* at para. G(9)(b). It is unclear who makes the security (continued...)

of three commissioned officers to try to demonstrate that the detainee does not meet the criteria to be designated as an “enemy combatant,” defined as “an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners[,] ... [including] any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”<sup>27</sup> Each detainee is represented by a military officer (not a member of the Judge Advocate General (“JAG”) Corps)<sup>28</sup> and may elect to participate in the hearing or remain silent.<sup>29</sup> The government’s evidence is presented by the recorder, who is a military officer, preferably a judge advocate.<sup>30</sup>

The CSRTs are not bound by the rules of evidence that would apply in court, and the government’s evidence is presumed to be “genuine and accurate.”<sup>31</sup> The government is required to present all of its relevant evidence, including evidence that tends to negate the detainee’s designation, to the tribunal.<sup>32</sup> The CSRT is required to assess, “to the extent practicable, whether any statement derived from or relating to such detainee was obtained as a result of coercion and the probative value, if any, of any such statement.”<sup>33</sup> Unclassified summaries of relevant evidence may be provided to the detainee.<sup>34</sup> The detainee’s personal representative may view classified information and comment on it to the tribunal to aid in its determination<sup>35</sup> but does not act as an advocate for the detainee.<sup>36</sup> If the tribunal determines that the preponderance of the evidence is insufficient to support a continued designation as

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<sup>26</sup> (...continued)

determination. Non-government witnesses appear at their own expense. Testimony is under oath and may be provided in writing or by telephone or video.

<sup>27</sup> CSRT Order, *supra* note 24, at 1.

<sup>28</sup> CSRT Implementing Directive, *supra* note 24, at encl. 1, para. B.

<sup>29</sup> *Id.* at para. F.

<sup>30</sup> *Id.* at para. C(2). In an affidavit submitted in DTA litigation, the government acknowledged that it has utilized the procedures set forth in the CSRT Implementing Directive. *See* Bismullah v. Gates, Nos. 06-1197 and 06-1397, slip op. at 3 (D.C. Cir. July 20, 2007) (order on motions) (Rogers, J. Concurring) (citing differences between written procedures and those described by Rear Admiral James M. McGarrah in the *Boumediene* case). Rather than having a JAG officer in the rank of O-3 or above compile government information, the Department of Defense has utilized research, collection, and coordination teams to gather information to be assessed by a “case writer” who has “received approximately two weeks of training.” *Id.* at 4. Thus, the reporter assigned to represent the government’s case may not have had access to all government information.

<sup>31</sup> *Id.* at para. G(7) & (11).

<sup>32</sup> *Id.* at para. G(8).

<sup>33</sup> *Id.* at encl. 10.

<sup>34</sup> *Id.* at encl. 1, para. E(3)(a).

<sup>35</sup> *Id.* at para. H(7).

<sup>36</sup> *Id.* at encl. 2, para. D (the personal representative is required to explain to the represented detainee that he or she is neither the attorney or advocate for the detainee, and that any information provided by the detainee is not confidential).

“enemy combatant” and its recommendation is approved through the chain of command, the detainee will be informed of that decision upon finalization of transportation arrangements (or earlier, if the task force commander deems it appropriate).<sup>37</sup>

In March 2002, the Pentagon announced plans to create a separate process for periodically reviewing the status of detainees.<sup>38</sup> The process, similar to the CSRT process, affords persons detained at Guantánamo Bay the opportunity to present to a review board, on at least an annual basis while hostilities are ongoing, information to show that the detainee is no longer a threat or that it is in the interest of the United States and its allies to release the prisoner. If new information with a bearing on the detainee’s classification as an “enemy combatant” comes to light, a new CSRT may be ordered using the same procedures as described above.<sup>39</sup> The detainee’s State of nationality may be allowed, national security concerns permitting, to submit information on behalf of its national.

## Court Challenges to the Detention Policy

While the Supreme Court clarified that the detainees had at least statutory recourse to federal courts to challenge their detention, the extent to which they may enforce any rights they may have under the Geneva Conventions and other law remains unclear. Prior to the enactment of the Detainee Treatment Act provisions eliminating *habeas* review, the Justice Department argued primarily that *Rasul v. Bush* merely decided the issue of jurisdiction, but that the 1950 Supreme Court decision in *Johnson v. Eisentrager*<sup>40</sup> remains applicable to limit the relief to which the detainees may be entitled. While more than one district judge from the D.C. Circuit agreed,<sup>41</sup> others did not, holding for example that detainees have the right to the assistance of an attorney.<sup>42</sup> One judge found that a detainee has the right to be

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<sup>37</sup> *Id.* at encl. 1, para. I(9)-(10).

<sup>38</sup> See DOD Press Release, “DoD Announces Draft Detainee Review Policy” (March 3, 2004), available at [<http://www.defenselink.mil/releases/2004/nr20040303-0403.html>]; Memorandum from Deputy Secretary of Defense, Revised Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Navy Base, Guantánamo Bay, Cuba (July 14, 2006), available at [<http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf>].

<sup>39</sup> CSRT Implementing Directive, *supra* note 24, at encl. 10 (implementing Detainee Treatment Act provisions).

<sup>40</sup> 339 U.S. 763 (1950) (holding that the federal courts did not have jurisdiction to hear a petition on behalf of German citizens who had been convicted by U.S. military commissions in China because the writ of *habeas corpus* was not available to “enemy alien[s], who at no relevant time and in no stage of [their] captivity [have] been within [the court’s] jurisdiction”).

<sup>41</sup> *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005); *Hamdan v. Rumsfeld*, 464 F. Supp.2d 9 (D.D.C. 2006).

<sup>42</sup> *Al Odah v. United States*, 346 F. Supp. 2d 1 (D.D.C. 2004).

treated as a POW until a “competent tribunal” decides otherwise,<sup>43</sup> but the appellate court reversed. The following sections summarize the three most important decisions prior to the enactment of the MCA, including the first case to reach the Supreme Court, *Hamdan v. Rumsfeld*. The Court of Appeals for the D.C. Circuit has ordered these cases dismissed for lack of jurisdiction on the basis of the MCA.<sup>44</sup>

### ***Khalid v. Bush***<sup>45</sup>

Seven detainees, all of whom had been captured outside of Afghanistan, sought relief from their detention at the Guantanamo Bay facility. U.S. District Judge Richard J. Leon agreed with the Administration that Congress, in its Authorization to Use Military Force (AUMF),<sup>46</sup> granted President Bush the authority to detain foreign enemy combatants outside the United States for the duration of the war against al Qaeda and the Taliban, and that the courts have virtually no power to review the conditions under which such prisoners are held. Noting that the prisoners had been captured and detained pursuant to the President’s military order,<sup>47</sup> Judge Leon agreed with the government that “(1) non-resident aliens detained under [such] circumstances have no rights under the Constitution; (2) no existing federal law renders their custody unlawful; (3) no legally binding treaty is applicable; and (4) international law is not binding under these circumstances.”<sup>48</sup>

Judge Leon rejected the petitioners’ contention that their arrest outside of Afghanistan and away from any active battlefield meant that they could not be “enemy combatants” within the meaning of the law of war, finding instead that the AUMF contains no geographical boundaries,<sup>49</sup> and gives the President virtually unlimited authority to exercise his war power wherever enemy combatants are found.<sup>50</sup> The circumstances behind the off-battlefield captures did, however, apparently preclude the petitioners from claiming their detentions violate the Geneva

<sup>43</sup> *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004), *rev’d* 415 F.3d 33 (D.C. Cir.), *rev’d* 548 U.S. \_\_ (2006).

<sup>44</sup> *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

<sup>45</sup> 355 F. Supp. 2d 311 (D.D.C. 2005), *vacated and dismissed sub nom.* *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), *cert. denied* 549 U.S. \_\_ (2007).

<sup>46</sup> Authorization for Use of Military Force (“the AUMF”), P.L. 107-40, 115 Stat. 224 (2001).

<sup>47</sup> Although the MO authorized detention as well as trial by military commissions, only fifteen of the detainees were formally designated as subject to the MO.

<sup>48</sup> 355 F. Supp. 2d at 314.

<sup>49</sup> *Id.* at 320.

<sup>50</sup> *Id.* at 318. Judge Leon wrote:

The President’s ability to make the decisions necessary to effectively prosecute a Congressionally authorized armed conflict must be interpreted expansively. Indeed, the Constitution does not delegate to Congress the power to “conduct” or to “make” war; rather, Congress has been given the power to “declare” war. This critical distinction lends considerable support to the President’s authority to make the operational and tactical decisions necessary during an ongoing conflict. Moreover, there can be no doubt that the President’s power to act at a time of armed conflict is at its strongest when Congress has specifically authorized the President to act.

Conventions.<sup>51</sup> Other treaties put forth by the petitioners were found to be unavailing because of their non-self-executing nature.<sup>52</sup>

The court declined to evaluate whether the conditions of detention were unlawful. Judge Leon concluded that “[w]hile a state of war does not give the President a ‘blank check,’ and the courts must have some role when individual liberty is at stake, any role must be limited when, as here, there is an ongoing armed conflict and the individuals challenging their detention are non-resident aliens.”<sup>53</sup> He dismissed all seven petitions, ruling that “until Congress and the President act further, there is ... no viable legal theory under international law by which a federal court could issue a writ.”

### ***In re Guantanamo Detainee Cases***<sup>54</sup>

U.S. District Judge Joyce Hens Green interpreted *Rasul* more broadly, finding that the detainees do have rights under the U.S. Constitution and international treaties, and thus denied the government’s motion to dismiss the eleven challenges before the court. Specifically, Judge Green held that the detainees are entitled to due process of law under the Fifth Amendment, and that the CSRT procedures do not meet that standard. Interpreting the history of Supreme Court rulings on the availability of constitutional rights in territories under the control of the American government (though not part of its sovereign territory), Judge Green concluded that the inquiry turns on the fundamental nature of the constitutional rights being asserted rather than the citizenship of the person asserting them. Accepting that the right not to be deprived of liberty without due process of law is a fundamental constitutional right, the judge applied a balancing test to determine what process is due in light of the government’s significant interest in safeguarding national security.<sup>55</sup> Judge Green rejected the government’s stance that the CSRTs provided more than sufficient due process for the detainees. Instead, she identified two categories of defects. She objected to the CSRTs’ failure to provide the detainees with access to material evidence upon which the tribunal affirmed their “enemy combatant” status and the failure to permit the assistance of counsel to compensate for the lack of access. These circumstances, she said, deprived detainees of a meaningful opportunity to challenge the evidence against them.

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<sup>51</sup> *Id.* at 326.

<sup>52</sup> *Id.* at 327. It may be argued that the *habeas* statute itself (28 U.S.C. § 2241), which authorizes challenges of detention based on treaty violations, provided a means for private enforcement, at least prior to its amendment by the MCA. See *Eisentrager*, 339 U.S. at 789 (while noting that the 1929 Geneva Convention did not provide for private enforcement, considering but rejecting the *habeas* claim that the treaty vitiated jurisdiction of military commission).

<sup>53</sup> *Id.* at 330 (citations omitted).

<sup>54</sup> 355 F. Supp. 2d 443 (D.D.C. 2005), *vacated and dismissed sub nom.* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir.), *cert. granted* 549 U.S. \_\_\_ (2007).

<sup>55</sup> *Id.* at 465 (citing *Hamdi v. Rumsfeld*).

Second, in particular cases, the judge found that the CSRTs' handling of accusations of torture and the vague and potentially overbroad definition of "enemy combatant" could violate the due process rights of detainees. Citing detainees' statements and news reports of abuse, Judge Green noted that the possibility that evidence was obtained involuntarily from the accused or from other witnesses, whether by interrogators at Guantanamo or by foreign intelligence officials elsewhere, could make such evidence unreliable and thus constitutionally inadmissible as a basis on which to determine whether a detainee is an enemy combatant. Judge Green objected to the definition of "enemy combatant" because it appears to cover "individuals who never committed a belligerent act or who never directly supported hostilities against the U.S. or its allies." She noted that government counsel had, in response to a set of hypothetical questions, stated that the following could be treated as enemy combatants under the AUMF: "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities, a person who teaches English to the son of an al Qaeda member, and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source."<sup>56</sup> Judge Green stated that the indefinite detention of a person solely because of his contacts with individuals or organizations tied to terrorism, and not due to any direct involvement in terrorist activities, would violate due process even if such detention were found to be authorized by the AUMF.<sup>57</sup>

The D.C. Circuit Court of Appeals heard the appeal of this case, consolidated with the *Khalid* decision, *supra*, and vacated both, dismissing the petitions for lack of jurisdiction on the basis of the MCA. The appellate court decision and Supreme Court actions with respect to certiorari are discussed *infra*.

### ***Hamdan v. Rumsfeld***

Salim Ahmed Hamdan, who was captured in Afghanistan and is alleged to have worked for Osama Bin Laden as a bodyguard and driver, brought this challenge to the lawfulness of the Secretary of Defense's plan to try him for alleged war crimes before a military commission,<sup>58</sup> arguing that the military commission rules and procedures were inconsistent with the UCMJ<sup>59</sup> and that he had the right to be treated as a prisoner of war under the Geneva Conventions.<sup>60</sup> U.S. District Judge Robertson agreed, finding no inherent authority in the President as Commander-in-Chief of the Armed Forces to create such tribunals outside of the existing statutory authority, with which the military commission rules did not comply. He also concluded that the Geneva Conventions apply to the whole of the conflict in Afghanistan, including

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<sup>56</sup> *Id.* at 475 (internal citations omitted).

<sup>57</sup> *Id.* at 476.

<sup>58</sup> 344 F. Supp. 2d 152 (D.D.C. 2004), 415 F.3d 33 (D.C. Cir. 2005), *rev'd* 548 U.S. \_\_\_ (2006).

<sup>59</sup> 10 U.S.C. §§ 801 *et seq.*

<sup>60</sup> There are four Conventions, the most relevant of which is The Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3317 (hereinafter "GPW").

under their protections all persons detained in connection with the hostilities there,<sup>61</sup> and that Hamdan was thus entitled to be treated as a prisoner of war until his status was determined to be otherwise by a competent tribunal, in accordance with article 5 of the Third Geneva Convention (prisoners of war).

The D.C. Circuit Court of Appeals reversed, ruling that the Geneva Conventions are not judicially enforceable. Judge Williams wrote a concurring opinion, construing Common Article 3 to apply to any conflict with a non-state actor,<sup>62</sup> without regard to the geographical confinement of such a conflict within the borders of a signatory state. The Circuit Court interpreted the UCMJ language to mean that military commission rules have only to be consistent with those articles of the UCMJ that refer specifically to military commissions, and therefore need not be uniform with the rules that apply to courts-martial. After the appellate court decision was handed down, Congress passed the Detainee Treatment Act of 2005 (DTA),<sup>63</sup> which revoked federal court jurisdiction to hear *habeas corpus* petitions and other causes of action brought by Guantanamo detainees. (The provisions of the DTA are discussed in greater detail *infra*). The Supreme Court nevertheless granted review and reversed.

**Jurisdiction.** Before reaching the merits of the case, the Supreme Court declined to accept the government's argument that Congress, by passing the DTA, had stripped the Court of its jurisdiction to review *habeas corpus* challenges by or on behalf of Guantanamo detainees whose petitions had already been filed.<sup>64</sup> The Court also declined to dismiss the appeal as urged by the government on the basis that federal courts should abstain from intervening in cases before military tribunals that have not been finally decided,<sup>65</sup> noting the dissimilarities between military commission trials and ordinary courts-martial of service members pursuant to

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<sup>61</sup> 344 F. Supp. 2d at 161.

<sup>62</sup> GPW art. 3. For a discussion of Common Article 3, see CRS Report RL31367, *Treatment of "Battlefield Detainees" in the War on Terrorism*, by Jennifer K. Elsea.

<sup>63</sup> P.L. 109-148, §1005(e)(1) provides that "no court ... shall have jurisdiction to hear or consider ... an application for ... habeas corpus filed by ... an alien detained ... at Guantanamo Bay." The provision was not yet law when the appellate court decided against the petitioner, *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd* 548 U.S. \_\_ (2006). At issue was whether this provision applies to pending cases. The Court found that the provision did not apply to Hamdan's petition, because the case did not fall under either of the categories of cases over which the DTA had created appellate review in the D.C. Circuit. The Court did not resolve whether the DTA affects cases that fall under the DTA's provisions regarding final review of Combatant Status Review Tribunals, for which *habeas* review was eliminated as to pending cases. Slip op. at 19, and n.14.

<sup>64</sup> *Id.* at 7. To resolve the question, the majority employed canons of statutory interpretation supplemented by legislative history, avoiding the question of whether the withdrawal of the Court's jurisdiction would constitute a suspension of the Writ of Habeas Corpus, or whether it would amount to impermissible "court-stripping." Justice Scalia, joined by Justices Alito and Thomas in his dissent, interpreted the DTA as a revocation of jurisdiction.

<sup>65</sup> *Id.* at 20. The court below had also rejected this argument, 413 F.3d 33, 36 (D.C. Cir. 2005).

procedures established by Congress.<sup>66</sup> The government’s argument that the petitioner had no rights conferred by the Geneva Conventions that could be adjudicated in federal court likewise did not persuade the Court to dismiss the case. Regardless of whether the Geneva Conventions provide rights enforceable in Article III courts, the Court found that Congress, by incorporating the “law of war” into UCMJ article 21,<sup>67</sup> brought the Geneva Conventions within the scope of law to be applied by courts. Justice Scalia, joined by Justices Thomas and Alito, dissented, arguing that the DTA should be interpreted to preclude the Court’s review.

**Presidential Authority.** With respect to the authority to create the military commissions, the Court held that any power to create them must flow from the Constitution and must be among those “powers granted jointly to the President and Congress in time of war.”<sup>68</sup> It disagreed with the government’s position that Congress had authorized the commissions either when it passed the Authorization to Use Military Force (AUMF)<sup>69</sup> or the DTA. Although the Court assumed that the AUMF activated the President’s war powers, it did not view the AUMF as expanding the President’s powers beyond the authorization set forth in the UCMJ. The Court also noted that the DTA, while recognizing the existence of military commissions, does not specifically authorize them. At most, these statutes “acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the ‘Constitution and laws,’ including the law of war.”<sup>70</sup>

**The Geneva Conventions and the Law of War.** The *habeas corpus* statute permits those detained under U.S. authority to challenge their detention on the basis that it violates any statute, the Constitution, or a treaty.<sup>71</sup> The D.C. Circuit nevertheless held that the Geneva Conventions are never enforceable in federal courts.<sup>72</sup> The Supreme Court disagreed, but found the Conventions were applicable as incorporated by UCMJ Article 21, because “compliance with the law of war is the

<sup>66</sup> See *Hamdan*, slip op. at 23 (stating that the bodies established by the Department of Defense to review the decisions of military commissions “clearly lack the structural insulation from military influence that characterizes the Court of Appeals for the Armed Forces....”).

<sup>67</sup> 10 U.S.C. § 821 (“The provisions of [the UCMJ] conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.”)

<sup>68</sup> *Hamdan*, slip op. at 27 (citing Congress’s powers to “declare War ... and make Rules concerning Captures on Land and Water,” Art. I, §8, cl. 11, to “raise and support Armies,” *Id.*, cl. 12, to “define and punish ... Offences against the Law of Nations,” *Id.*, cl. 10, and “To make Rules for the Government and Regulation of the land and naval Forces,” *Id.*, cl. 14.).

<sup>69</sup> P.L. 107-40, 115 Stat. 224 (2001).

<sup>70</sup> *Hamdan*, slip op. at 30.

<sup>71</sup> 28 U.S.C. § 2241(c)(3)(permitting petitions by prisoners “in custody in violation of the Constitution or laws or treaties of the United States”).

<sup>72</sup> See 415 F.3d at 39 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 789, n. 14).



condition upon which the authority set forth in Article 21 is granted.”<sup>73</sup> In response to the alternative holding by the court below that Hamdan, as a putative member of al Qaeda, was not entitled to any of the protections accorded by the Geneva Conventions, the Court concluded that Common Article 3 of the Geneva Conventions applies even to members of al Qaeda, according to them a minimum baseline of protections, including protection from the “passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>74</sup>

While recognizing that Common Article 3 “obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict,” and that “its requirements are general ones, crafted to accommodate a wide variety of legal systems,” the Court found that the military commissions under M.C.O. No. 1 did not meet these criteria. In particular, the military commissions did not qualify as “regularly constituted” because they deviated too far, in the Court’s view, from the rules that apply to courts-martial, without a satisfactory explanation of the need for such deviation.<sup>75</sup> Justice Alito, joined by Justices Scalia and Thomas, dissented, arguing that the Court is bound to defer to the President’s plausible interpretation of the treaty language.

**Analysis.** While the *Hamdan* Court declared the military commissions as constituted under the President’s Military Order to be “illegal,” it left open the possibility that changes to the military commission rules could cure any defects by bringing them within the law of war and conformity with the UCMJ, or by asking Congress to authorize or craft rules tailored to the “Global War on Terrorism” (GWOT). The Court did not resolve the extent to which the detainees, as aliens held outside of U.S. territory, have constitutional rights enforceable in federal court.

The decision may affect the treatment of detainees outside of their criminal trials; for example, in interrogations for intelligence purposes. Common Article 3 of the Geneva Conventions mandates that all persons taking no active part in hostilities, including those who have laid down their arms or been incapacitated by capture or injury, are to be treated humanely and protected from “violence to life and person,” torture, and “outrages upon personal dignity, in particular, humiliating and degrading treatment.” Insofar as these protections are incorporated in the UCMJ and

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<sup>73</sup> *Hamdan*, slip op. at 63.

<sup>74</sup> GPW art. 3 § 1(d). The identical provision is included in each of the four Geneva Conventions and applies to any “conflict not of an international character.” The majority declined to accept the President’s interpretation of Common Article 3 as inapplicable to the conflict with al Qaeda and interpreted the phrase “in contradistinction to a conflict between nations,” which the Geneva Conventions designate a “conflict of international character”. *Hamdan*, slip op. at 67.

<sup>75</sup> *Id.* at 70 (plurality opinion); *Id.* (Kennedy, J., concurring) at 10. Justice Stevens, joined by Justices Ginsburg, Breyer, and Souter, further based their conclusion on the basis that M.C.O. No. 1 did not meet all criteria of art. 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I). While the United States is not party to Protocol I, the plurality noted that many authorities regard it as customary international law.

other laws, it would seem the Court is ready to interpret and adjudicate them, to the extent it retains jurisdiction to do so. It is not clear how the Court views the scope of the GWOT, however, because its decisions on the merits have been limited to cases arising out of hostilities in Afghanistan.

The opinion reaffirms the holding in *Rasul v. Bush*<sup>76</sup> that the AUMF does not provide the President a “blank check,” and, by finding in favor of a noncitizen held overseas, seems to have expanded the *Hamdi* comment that

[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.<sup>77</sup>

The dissenting views also relied in good measure on actions taken by Congress, seemingly repudiating the view expressed earlier by the Executive that any efforts by Congress to legislate with respect to persons captured, detained, and possibly tried in connection with the GWOT would be an unconstitutional intrusion into powers held exclusively by the President.<sup>78</sup> Expressly or implicitly, all eight participating Justices applied the framework set forth by Justice Jackson in his famous concurrence in the *Steel Seizures* case,<sup>79</sup> which accords greater deference to the President in cases involving national security where he acts with express congressional authority than when he acts alone. The differing views among the Justices seem to have been a function of their interpretation of the AUMF and other acts of Congress as condoning or limiting executive actions.<sup>80</sup> The Military Commissions Act of 2006 likely resolves many issues regarding the scope of authority the President may exercise; however, the constitutionality of the various measures remains to be resolved, assuming the courts retain jurisdiction to resolve them.

### ***Al-Marri v. Wright***

The case of Ali Saleh Kahlah al-Marri differs from cases discussed above in that the petitioner, a lawful alien resident, was arrested and is imprisoned within the United States. Al-Marri, a Qatari student, was arrested in December 2001 in Peoria, Illinois, and transported to New York City, where he was held as a material witness for the grand jury investigating the 9/11 attacks. He was later charged with financial

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<sup>76</sup> 542 U.S. 466 (2004).

<sup>77</sup> 542 U.S. 507, 535 (2004).

<sup>78</sup> See, e.g., *Oversight of the Department of Justice: Hearing Before the Senate Judiciary Committee*, 107<sup>th</sup> Cong. (2002) (testimony of Attorney General John Ashcroft) (arguing that a statute that could be read to interfere with the executive power to detain enemy combatants must be interpreted otherwise to withstand constitutional scrutiny).

<sup>79</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>80</sup> For information about relevant legislation, see CRS Report RL31600, *The Department of Defense Rules for Military Commissions: Analysis of Procedural Rules and Comparison with Proposed Legislation and the Uniform Code of Military Justice*.

fraud and making false statements and transferred back to Peoria. Before his case went to trial, however, he was declared an “enemy combatant” and transferred to military custody in South Carolina. Al-Marri’s counsel filed a petition for *habeas corpus* challenging Al-Marri’s designation and detention as an “enemy combatant.” The petition was eventually dismissed for lack of jurisdiction by the U.S. Court of Appeals for the Seventh Circuit,<sup>81</sup> and a new petition was filed in the Fourth Circuit. In March 2005, Judge Floyd agreed with the government that the detention was authorized by the AUMF and transferred the case to a federal magistrate to examine the factual allegations supporting the government’s detention of the petitioner as an enemy combatant.<sup>82</sup> The magistrate judge recommended the dismissal of the petition on the basis of information the government provided, which the magistrate judge concluded was sufficient for due process purposes in line with the *Hamdi* decision.<sup>83</sup> The district judge adopted the magistrate judge’s report and recommendations in full, rejecting the petitioner’s argument that his capture away from a foreign battlefield precluded his designation as an “enemy combatant.”<sup>84</sup> The U.S. Court of Appeals for the Fourth Circuit reversed, after determining that the *habeas* restrictions Congress enacted in the DTA, as amended by the MCA, did not apply. The appellate court decision is addressed below.

## Detainee Treatment Act of 2005 (DTA)

The Detainee Treatment Act of 2005 (DTA), passed after the Court’s decision in *Rasul*, requires uniform standards for interrogation of persons in the custody of the Department of Defense,<sup>85</sup> and expressly bans cruel, inhuman, or degrading treatment

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<sup>81</sup> Al-Marri v. Rumsfeld, 360 F.3d 707 (7<sup>th</sup> Cir. 2004), *cert. denied* 543 U.S. 809 (2004).

<sup>82</sup> Al-Marri v. Hanft, 378 F. Supp.2d 673 (D. S.C. 2005) (order denying summary judgment).

<sup>83</sup> Al-Marri v. Wright, 443 F. Supp. 2d 774 (D. S.C. 2006) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)). With respect to the “due process hearing” required to establish that an enemy combatant is properly held, the *Hamdi* plurality stated that:

enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.

443 F. Supp. 2d 778 (quoting *Hamdi* at 534).

<sup>84</sup> *Id.* at 778-80.

<sup>85</sup> Section 1002 of P.L. 109-148 requires DOD to follow the Army Field Manual for intelligence interrogation. See DEPARTMENT OF THE ARMY FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION (1992), available at [<http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/FM34-52IntelInterrogation.pdf>] (September 1, 2004). For an analysis of the approved interrogation procedures, see CRS Report RL32567, *Lawfulness* (continued...)

of detainees in the custody of any U.S. agency.<sup>86</sup> The prohibited treatment is defined as that which would violate the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution, as the Senate has interpreted “cruel, inhuman, or degrading” treatment banned by the U.N. Convention Against Torture.<sup>87</sup> The provision does not create a cause of action for detainees to ask a court for relief based on inconsistent treatment, and it divests the courts of jurisdiction to hear challenges by those detained at Guantanamo Bay based on their treatment or living conditions.<sup>88</sup> It also provides a legal defense to U.S. officers and agents who may be sued or prosecuted based on their treatment or interrogation of detainees.<sup>89</sup> This language appears to have been added as a compromise because the Administration reportedly sought to have the Central Intelligence Agency excepted from the prohibition on cruel, inhuman and degrading treatment on the grounds that the President needs “maximum flexibility in dealing with the global war on terrorism.”<sup>90</sup>

The DTA also includes a modified version of the “Graham-Levin Amendment,”<sup>91</sup> which requires the Defense Department to submit to the Armed Services and Judiciary Committees the procedural rules for determining detainees’ status.<sup>92</sup> The amendment neither authorizes nor requires a formal status determination, but it does require that certain congressional committees be notified 30 days prior to the implementation of any changes to the rules. As initially adopted

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<sup>85</sup> (...continued)

*of Interrogation Techniques under the Geneva Conventions*, by Jennifer K. Elsea.

<sup>86</sup> Section 1003 of P.L. 109-148. See CRS Report RL33655, *Interrogation of Detainees: Overview of the McCain Amendment*, by Michael John Garcia.

<sup>87</sup> Section 1003(d) of P.L. 109-148. For more information, see CRS Report RL32438, *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, by Michael John Garcia.

<sup>88</sup> Section 1005 of P.L. 109-148 (denying aliens in military custody privilege to file writ of *habeas corpus* or “any other action against the United States or its agents relating to any aspect of the[ir] detention. . .”).

<sup>89</sup> Section 1004 of P.L. 109-148 provides a defense in litigation related to “specific operational practices,” involving detention and interrogation where the defendant

did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful.

<sup>90</sup> See Eric Schmitt, *Exception Sought in Detainee Abuse Ban*, N.Y. TIMES, October 25, 2005, at 16.

<sup>91</sup> 151 CONG. REC. S12667 (daily ed. November 10, 2005)(introduced by Sen. Graham, passed by roll call vote, 49 - 42), as amended by S.Amdt. 2524, 151 CONG. REC. S12771 (daily ed. November 14, 2005).

<sup>92</sup> The amendment refers to both the Combatant Status Review Tribunals (“CSRTs”), the initial administrative procedure to confirm the detainees’ status as enemy combatants, and the Administrative Review Boards, which were established to provide annual review that the detainees’ continued detention is warranted.

by the Senate, the amendment would have required these procedural rules to preclude evidence determined by the board or tribunal to have been obtained by undue coercion, however, the conferees modified the language so that the tribunal or board must assess, “to the extent practicable ... whether any statement derived from or relating to such detainee was obtained as a result of coercion” and “the probative value, if any, of any such statement.”

The Graham-Levin Amendment also eliminates the federal courts’ statutory jurisdiction over *habeas* claims by aliens detained at Guantanamo Bay, but provides for limited appeals of status determinations made pursuant to the DOD procedures for Combatant Status Review Tribunals (CSRTs).<sup>93</sup> The D.C. Circuit Court of Appeals has exclusive jurisdiction to hear appeals of any status determination made by a “Designated Civilian Official,” but the review is limited to a consideration of whether the determination was made consistently with applicable DOD procedures, including whether it is supported by the preponderance of the evidence, but allowing a rebuttable presumption in favor of the government. The procedural rule regarding the use of evidence obtained through undue coercion applies prospectively only, so that detainees who have already been determined by CSRTs to be enemy combatants may not base an appeal on the failure to comply with that procedure. Detainees may also appeal status determinations on the basis that, “to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.” Jurisdiction was to cease if the detainee were transferred from DOD custody. (Currently, jurisdiction is cut off if the detainee is transferred from U.S. custody.)

The DTA does not elaborate on the role of the “Designated Civilian Official” whose decision may be appealed. As the CSRTs were initially established,<sup>94</sup> the final approval of CSRT decisions was the responsibility of the convening authority, and there was no mention of a “designated civilian official,” although this appears to be a reference to the role of the Secretary of the Navy, to whom the order establishing CSRTs was addressed.<sup>95</sup> The procedures established by Secretary England refer to the position of Director, CSRT, who appears to be the convening authority for the tribunals.<sup>96</sup> At any rate, it does not appear that the Graham-Levin Amendment would give the D.C. Circuit Court of Appeals jurisdiction to review CSRT determinations that have not been made or approved by a civilian official who had been appointed with the advice and consent of the Senate.

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<sup>93</sup> Section 1405(e). Sen. Bingaman offered a second-degree amendment to eliminate the provision, but it was not adopted.

<sup>94</sup> CSRT Order, *supra* note 24.

<sup>95</sup> *See id.* The Department of Defense appointed the Secretary of the Navy, Gordon England, to be the designated civilian official to operate and oversee the annual administrative review boards set up to determine the continued detention of persons affirmed by CSRTs to be enemy combatants at Guantanamo Bay Naval Base, Cuba. *See* Press Release, Department of Defense, Navy Secretary to Oversee Enemy Combatant Admin Review (June 23, 2004), *available at* [<http://www.defenselink.mil/releases/release.aspx?releaseid=7489>].

<sup>96</sup> *See* CSRT Implementing Directive, *supra* note 24.

The DTA also provides for an appeal to the Court of Appeals for the District of Columbia Circuit of final sentences rendered by a military commission. As initially enacted, the DTA required the court to review capital cases or cases in which the alien was sentenced to death or to a term of imprisonment for 10 years or more, and made review over convictions with lesser penalties discretionary. The scope of review was limited to considering whether the decision applied the correct standards consistent with Military Commission Order No. 1 (implementing the President's Military Order) and whether those standards were consistent with the Constitution and laws of the United States, to the extent applicable.

## **The Military Commissions Act of 2006 (MCA)**

After the Court's decision in *Hamdan*, the Bush Administration proposed legislation to Congress, which Senator Frist introduced as the "Bringing Terrorists to Justice Act of 2006," S. 3861. The Senate Armed Services Committee reported favorably a bill called the "Military Commissions Act of 2006" (S. 3901), which was in many respects similar to the Administration's proposal, but varied with respect to jurisdiction and some rules of evidence. The House Armed Services Committee approved H.R. 6054, also called the "Military Commissions Act of 2006," which closely tracks the Administration's proposal. After reaching an agreement with the White House with respect to several provisions in S. 3901, Senator McCain introduced S. 3930, also entitled the "Military Commissions Act of 2006." Representative Hunter subsequently introduced a modified version of H.R. 6054 as H.R. 6166, which the House of Representatives passed on September 28, 2006. A manager's amendment to S. 3930, substantially identical to the bill passed by the House, was passed by the Senate the following day.

### **Provisions Affecting Court Jurisdiction**

The Military Commissions Act of 2006 amended the DTA provisions regarding appellate review and *habeas corpus* jurisdiction.<sup>97</sup> It expands the DTA to make its review provisions the exclusive remedy for all aliens detained as enemy combatants anywhere in the world, rather than only those housed at Guantanamo Bay, Cuba. It does not, however, require that all detainees undergo a CSRT or a military tribunal in order to continue to be confined. Thus, any aliens detained outside of Guantanamo Bay might be effectively denied access to U.S. courts.

Appeals from the final decisions of military commissions continue to go to the United States Court of Appeals for the District of Columbia Circuit,<sup>98</sup> but are routed through a new appellate body, the Court of Military Commission Review (CMCR). CSRT determinations continue to be appealable directly to the D.C. Circuit. Review

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<sup>97</sup> P.L. 109-366. For a further description of the procedures associated with these military commissions, see CRS Report RL33688, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice*, by Jennifer K. Elsea.

<sup>98</sup> MCA § 5.

of decisions of a military commission may only concern matters of law, not fact.<sup>99</sup> Appeals may be based on inconsistencies with the procedures set forth by the MCA, or, to the extent applicable, the Constitution or laws of the United States.

The MCA revokes U.S. courts' jurisdiction to hear *habeas corpus* petitions by all aliens in U.S. custody as enemy combatants, including lawful enemy combatants, regardless of the place of custody. It replaces 28 U.S.C. § 2241(e), the *habeas* provision added by the DTA, with language providing that

- (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
- (2) Except as provided in paragraphs (2) [review of CSRT determinations] and (3) [review of final decisions of military commissions] of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.<sup>100</sup>

This amendment takes effect on the date of its enactment, and applies to “all cases, without exception, pending on or after the date of [enactment] which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.” This provision appears to disallow actions in court by alien lawful combatants, but it might permit actions by aliens who are found not to be enemy combatants by a CSRT. There is no apparent limit to the amount of time a detainee could spend awaiting a determination as to combatant status. Aliens who continue to be detained despite having been determined not to be enemy combatants are not permitted to challenge their continued detention or their treatment, nor are they able to protest their transfer to another country, for example, on the basis that they fear torture or persecution.

## Provisions Regarding the Geneva Conventions

A continuing source of dispute in the detention and treatment of detainees is the application of the Geneva Convention. As noted previously, the *habeas corpus* statute has traditionally provided for, among other things, challenges to allegedly unlawful detentions based on rights found in treaties.<sup>101</sup> Thus, for instance, Common Article 3 of the 1949 Geneva Conventions, which provides for the “passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are

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<sup>99</sup> 10 U.S.C. § 950g(b).

<sup>100</sup> MCA § 7.

<sup>101</sup> 28 U.S.C. § 2241.

recognized as indispensable by civilized peoples,” has been used as a basis for challenging the confinement of detainees.<sup>102</sup>

Section 5 of the MCA, however, specifically precludes the application of the Geneva Conventions to *habeas* or other civil proceedings.<sup>103</sup> Further, the MCA provides that the Geneva Conventions may not be claimed as a source of rights by an alien who is subject to military commission proceedings.<sup>104</sup> Rather, Congress deems that the military commission structure established by the act complies with the requirement under Common Article 3 of the Geneva Convention that trials be by a regularly constituted court.<sup>105</sup>

In addition, the act provides that the President shall have the authority to interpret the meaning of the Geneva Conventions.<sup>106</sup> The intended effect of this provision is, however, unclear. While the President generally has a role in the negotiation, implementation, and domestic enforcement of treaty obligations,<sup>107</sup> this power does not generally extend to “interpreting” treaty obligations, a role more traditionally associated with courts.<sup>108</sup> In general, Congress is prohibited from exercising powers allocated to another branch of government.<sup>109</sup> In *United States v.*

<sup>102</sup> GPW art. 3 § 1(d). *See Hamdan*, slip op. at 63 (noting the application of this provision of the Geneva Conventions to detainees through the UCMJ Article 21).

<sup>103</sup> MCA § 5(a) provides that “No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.”

<sup>104</sup> MCA § 3 (10 U.S.C. § 948c) provides that “No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.”

<sup>105</sup> MCA § 3 (10 U.S.C. § 948b(f), as amended) provides that a military commission is a “regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions.” While this language could be construed as directing a court to find that the MCA does not conflict with the Geneva Conventions, a better reading would appear to be that, to the extent that there is a conflict between the MCA and the Geneva Conventions, that the MCA should be given precedence. *See generally* *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429 (1992).

<sup>106</sup> MCA § 6(a)(3)(A) provides that “the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.”

<sup>107</sup> *See, e.g., id.* (President is given power to promulgate higher standards and administrative regulations for violations of treaty obligations).

<sup>108</sup> *See, e.g.,* MCA § 6(a)(3)(B) (“No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of such section 2441.”).

<sup>109</sup> *See Dickerson v. United States*, 530 U.S. 428, 438 (2000) (striking down congressional (continued...))



*Klein*,<sup>110</sup> the Congress passed a law designed to frustrate a finding of the Supreme Court as to the effect of a presidential pardon.<sup>111</sup> Similarly, a law which was specifically intended to grant the authority of the President to adjudicate or remedy treaty violations could violate the doctrine of separation of powers, as providing relief from acts in violation of treaties is a judicial branch function.<sup>112</sup> Instead, what appears to be the main thrust of this language is to establish the authority of the President within the Executive Branch to issue interpretative regulations by Executive Order.<sup>113</sup> However, the context in which this additional authority would be needed is unclear.

One possible intent of this provision is that the President is being given the authority to “interpret” the Geneva Convention for diplomatic purposes (e.g., to define treaty obligations and encourage other countries to conform to such definitions). This interpretation seems unlikely, as the President’s power in this regard is already firmly established.<sup>114</sup> Another possible meaning is that the President is being given the authority to apply the Geneva Conventions to particular fact situations, such as specifying what type of interrogation techniques may be lawfully applied to a particular individual suspected of being an enemy combatant. This interpretation is possible, but it is not clear how the power to “interpret” would be significant in that situation, as the MCA precludes application of the Geneva Convention in those contexts in which such interrogations would be challenged — military commissions, *habeas corpus*, or any other civil proceeding.<sup>115</sup>

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<sup>109</sup> (...continued)

statute purporting to overturn the Court’s Fourth Amendment ruling in *Miranda v. Arizona*; *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997)(Congress’ enforcement power under the Fourteenth Amendment does not extend to the power to alter the Constitution); *Plaut v. Spendthrift Farm*, 514 U.S. 211, 225 (Congress may not disturb final court rulings).

<sup>110</sup> 80 U.S. (13 Wall.) 128 (1871).

<sup>111</sup> The Court struck down the law, essentially holding that the Congress had an illegitimate purpose in passage of the law. “[T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. . . . It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.” 80 U.S. at 146. The Court also found that the statute impaired the effect of presidential pardon, and thus “infringe[ed] the constitutional power of the Executive.” *Id.* at 147.

<sup>112</sup> See generally *Miller v. French*, 530 U.S. 327, 350-51 (2000)(Souter, J., concurring).

<sup>113</sup> MCA § 6(a)(3)(B).

<sup>114</sup> “If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance.” *Whitney v. Robertson* 124 U.S. 190, 194 (1888).

<sup>115</sup> MCA § 5(a). It is unclear why the MCA addresses the application of the Geneva (continued...)

The more likely intent of this language would be to give the President the authority to promulgate regulations prescribing standards of behavior of employees and agents of federal agencies. For instance, this language might be seen as authorizing the President to issue regulations to implement how agency personnel should comply with the Geneva Conventions, policies which might otherwise be addressed at the agency level. Thus, for instance, if the CIA had established internal procedures regarding how to perform interrogation consistent with the Geneva Convention, then this language would explicitly authorize the President to amend such procedures by Executive Order. Whether the President already had such power absent this language is beyond the scope of this report.

## Post-MCA Developments

Shortly after the enactment of the MCA, the government filed motions to dismiss all of the *habeas* petitions in the D.C. Circuit involving detainees at Guantanamo Bay<sup>116</sup> and the petition of an alien detained as an enemy combatant in a naval brig in South Carolina.<sup>117</sup> Legislation introduced at the end of the 109<sup>th</sup> Congress to amend the MCA did not reach the floor of either house.<sup>118</sup>

**Possible Application to U.S. Citizens.** Some observers have raised concern that the MCA permits the President to detain American citizens as enemy combatants without trial.<sup>119</sup> The prohibition in the Military Commissions Act (MCA) with respect to *habeas corpus* petitions applies only to those filed by or on behalf of aliens detained by the United States as enemy combatants. However, the MCA can be read by implication to permit the detention of U.S. citizens as enemy combatants, although it does not permit their trial by military commission, which could affect their entitlement to relief using *habeas corpus* procedures.

A plurality of the Supreme Court held in 2004, in *Hamdi v. Rumsfeld*,<sup>120</sup> that the President has the authority to detain U.S. citizens as enemy combatants pursuant to

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<sup>115</sup> (...continued)

Convention to *habeas corpus* proceeding brought by detainees, since such suits are precluded by the DTA and the MCA. Section 1405(e) of P.L. 109-63; MCA, §7(a). It may be intended to apply to *habeas* cases brought by U.S. citizens or by aliens who do not fall under the definition of “enemy combatant.” On the other hand, as will be discussed *infra*, there may be constitutional issues associated with limiting access of enemy combatants to *habeas corpus* proceeding. In the event the *habeas* restrictions of the DTA are found to be unconstitutional, then this provision may become relevant to those proceedings.

<sup>116</sup> See Karen DeYoung, *Court Told It Lacks Power in Detainee Cases*, WASH. POST, October 20, 2006, at A18 (reporting notice submitted by Justice Department to courts of intention to move for dismissal of pending enemy combatant cases).

<sup>117</sup> *Al-Marri v. Wright*, 487 F.3d 160 (4<sup>th</sup> Cir. 2007).

<sup>118</sup> See S. 4081 and H.R. 6381, 109<sup>th</sup> Cong.

<sup>119</sup> See, e.g., Scott Shane and Adam Liptak, *Detainee Bill Shifts Power to President*, N.Y. TIMES, September 30, 2006, at A1.

<sup>120</sup> 542 U.S. 507 (2004).

the Authorization to Use Military Force (AUMF),<sup>121</sup> but that the determination of combatant status is subject to constitutional due process considerations. The *Hamdi* plurality was limited to an understanding that the phrase “enemy combatant” means an “individual who...was ‘part of or supporting forces hostile to the United States or coalition partners’ in Afghanistan and who ‘engaged in an armed conflict against the United States’ there,”<sup>122</sup> but left it to lower courts to flesh out a more precise definition.

In theory, the executive branch could detain a citizen as an enemy combatant and argue that the definition of “unlawful enemy combatant” provided in the MCA, which does not explicitly limit the definition to aliens and includes persons who provide material support to terror groups engaged in hostilities against the United States, should also apply to the detention authority already found by virtue of the AUMF. Constitutional due process would apply, and the citizen could petition for *habeas corpus* to challenge his detention, but under the MCA, the citizen-combatant would not be able to assert rights based on the Geneva Convention in support of his contention that he is not an enemy combatant. In that sense, U.S. citizens could be affected by the MCA even though it does not directly apply to U.S. citizens.

On the other hand, since the MCA definition for unlawful enemy combatant applies on its face only for the purposes of the new chapter 47a of Title 10, U.S. Code (providing for the trial by military commission of alien unlawful enemy combatants), it may be argued that outside of that context, the term “enemy combatant” should be understood in the ordinary sense, that is, to include only persons who participate in direct combat against the United States. The difficulty with this argument is that it could then be argued that this narrower definition of “enemy combatant” would also apply in the context of the MCA’s *habeas corpus* provisions, such that some aliens who fall under the jurisdiction of a military commission under the MCA could nevertheless argue that the MCA does not affect their right to petition for *habeas corpus* or pursue any other cause of action in U.S. court, a reading that does not seem consistent with Congress’s probable intent. Further, it does not appear that Congress meant to apply a different definition of “enemy combatant” to persons depending on their citizenship. Congress could specify that U.S. citizens captured in the context of the “Global War on Terror” be subject to trial in U.S. court for treason or a violation of any other statute, or prescribe procedures for determining whether U.S. citizens are subject to detention as enemy combatants, but it has not done so.

***Boumediene v. Bush.*** The Court of Appeals for the D.C. Circuit issued a ruling in February, 2007, in the case of *Boumediene v. Bush*,<sup>123</sup> validating the MCA’s restrictions on *habeas* jurisdiction with respect to detainees at the Guantanamo Bay Naval Station. The D.C. Circuit opinion closely tracks the district court’s

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<sup>121</sup> P.L. 107-40, 115 Stat. 224 (2001).

<sup>122</sup> 542 U.S. at 516.

<sup>123</sup> 476 F.3d 981 (D.C. Cir. 2007)(consolidated appeal of *Kalid v. Bush* and *In re Guantanamo Detainee Cases*, discussed *supra* pages 9-10).

determination in *Hamdan v. Rumsfeld*,<sup>124</sup> on remand after the Supreme Court decision, that it no longer had jurisdiction to consider the petition, jurisdiction having been revoked by the MCA. In that case, Judge Robertson did not agree with the petitioner that the revocation of jurisdiction with respect to *habeas corpus* petitions did not apply to pending cases. Further, he found the measure to be an exercise of Congress's power "to establish and to define the jurisdiction of the lower federal courts," and that "the fact that Congress has repealed its statutory grant of *habeas* jurisdiction, [does not mean] that Congress has also 'suspended' the writ."<sup>125</sup> Finally, finding no relevant distinction between the facts in the *Eisentrager* decision and the case at hand, the judge determined that the detainee has no constitutional right to file a *habeas* petition<sup>126</sup> and dismissed the case.

All three judges on the panel of the D.C. Circuit deciding *Boumediene* agreed that the MCA is intended to strip the courts of jurisdiction over all cases brought by or on behalf of aliens held as enemy combatants, and did not, as petitioners had argued, spare pending *habeas* cases from the prohibition. The panel divided over whether the jurisdictional prohibition is valid. Judge Randolph, joined by Judge Sentelle, found that the measure does not constitute a suspension of the Writ within the meaning of the Constitution because the majority was "aware of no case prior to 1789 going the detainees' way," and were thus convinced that "the writ in 1789 would not have been available to aliens held at an overseas military base leased from a foreign government." That the Supreme Court had suggested possibly significant differences between the situations facing the *Eisentrager* petitioners and that of the Guantanamo detainees<sup>127</sup> did not dissuade the court from reverting to the position it had taken in its *Al Odah* opinion,<sup>128</sup> namely, that *Eisentrager* was controlling and mandated dismissal for lack of jurisdiction. Judge Rogers, in dissent, would have given the *Rasul* opinion greater deference, citing the principle that "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative."<sup>129</sup> Accordingly, she would have found the naval base to be within the historical scope of the Writ, and would have concluded that the MCA does constitute a suspension within the meaning of the Constitution, an issue not addressed in *Eisentrager*.<sup>130</sup>

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<sup>124</sup> 464 F. Supp. 2d 9 (D.D.C. 2006).

<sup>125</sup> *Id.* at 12-13. The judge indicated, however, that if the measure does constitute a suspension of the Writ within the meaning of the Constitution, "it was plainly unconstitutional, in the absence of rebellion or invasion." *Id.* at 19.

<sup>126</sup> *Id.* at 19.

<sup>127</sup> *Rasul v. Bush*, 542 U.S. 466, 475 (2004).

<sup>128</sup> *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir 2003), *rev'd sub nom Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>129</sup> *Boumediene*, 476 F.3d at 1002 (Rogers, J., dissenting)(citing *Sierra Club v. EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003)).

<sup>130</sup> *See id.* at 1004 ("The detainees do not here contend that the Constitution accords them a positive right to the writ but rather that the Suspension Clause restricts Congress's power to eliminate a preexisting statutory right.").

The Supreme Court initially denied the petitioners' request for review,<sup>131</sup> with three Justices dissenting to the denial and two Justices explaining the basis for their support. Justice Breyer, joined by Justices Souter and Ginsburg, would have granted certiorari to provide immediate attention to the issues, given that the detainees have already been held for more than five years and that Supreme Court review at this stage could help define constitutional boundaries with respect to *habeas corpus*. He further found plausible petitioners' argument that the lower court's reasoning conflicted with the *Rasul* opinion, and noted the possible constitutional relevance of the fact that many petitioners are citizens of friendly nations who were not captured during battle. The dissenters also viewed it as unlikely that further treatment by the lower courts might elucidate the issues, given that the MCA limits jurisdiction to the Court of Appeals for the D.C. Circuit, which has already indicated that Guantanamo detainees have no constitutional rights. Justices Breyer and Souter would have granted expedited consideration.

Justice Stevens, joined by Justice Kennedy, wrote a statement explaining their view that, "despite the obvious importance of this issues raised," the petitioners should first exhaust remedies available under the DTA unless the petitioners can show that the government is causing delay or some other ongoing injury that would make those remedies inadequate. In the event of such injury, Justice Stevens wrote that "alternative means exist [for the Court] to consider [its] jurisdiction over the allegations...",<sup>132</sup> possibly indicating that at least these two Justices do not believe the MCA curtails such jurisdiction.

In June, 2007, however, the Court reversed its earlier denial and granted certiorari to hear the consolidated petitions. The questions presented in *Boumediene* are:

1. Whether the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, validly stripped federal court jurisdiction over habeas corpus petitions filed by foreign citizens imprisoned indefinitely at the United States Naval Station at Guantanamo Bay.
2. Whether Petitioners' habeas corpus petitions, which establish that the United States government has imprisoned Petitioners for over five years, demonstrate unlawful confinement requiring the grant of habeas relief or, at least, a hearing on the merits.

The questions presented in *Al Odah* are:

1. Did the D.C. Circuit err in relying again on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), to dismiss these petitions and to hold that petitioners have no common law right to habeas protected by the Suspension Clause and no constitutional rights whatsoever, despite this Court's ruling in *Rasul v. Bush*, 542 U.S. 466 (2004), that these petitioners are in a fundamentally different position from those in *Eisentrager*, that their access to the writ is consistent with the

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<sup>131</sup> *Boumediene v. Bush*, 549 U.S. \_\_ (2007).

<sup>132</sup> *Boumediene v. Bush*, 549 U.S., slip op. at 2 (citing the All Writs Act, 28 U.S.C. § 1651, and the *habeas corpus* statute, 28 U.S.C. § 2241).

historical reach of the writ at common law, and that they are confined within the territorial jurisdiction of the United States?

2. Given that the Court in *Rasul* concluded that the writ at common law would have extended to persons detained at Guantanamo, did the D.C. Circuit err in holding that petitioners' right to the writ was not protected by the Suspension Clause because they supposedly would not have been entitled to the writ at common law?

3. Are petitioners, who have been detained without charge or trial for more than five years in the exclusive custody of the United States at Guantanamo, a territory under the plenary and exclusive jurisdiction of the United States, entitled to the protection of the Fifth Amendment right not to be deprived of liberty without due process of law and of the Geneva Conventions?

4. Should section 7(b) of the Military Commissions Act of 2006, which does not explicitly mention habeas corpus, be construed to eliminate the courts' jurisdiction over petitioners' pending habeas cases, thereby creating serious constitutional issues?

The Court will schedule supplemental briefings if necessary to obtain the parties' views with respect to the outcome of the *Bismullah* case currently pending in the Circuit Court of Appeals for the District of Columbia Circuit.<sup>133</sup>

***Bismullah v. Gates/Parhat v. Gates.*** Haji Bismullah, who was captured in Afghanistan in 2003, and Husaifa Parhat and six other detainees, all ethnic Chinese Uighers captured in Pakistan in December 2001, filed these challenges under the DTA contesting CSRT determinations that they are properly detained as "enemy combatants." At issue at this stage in the proceedings was a series of motions filed by both parties seeking to establish procedures governing access to classified information, attorneys' access to clients, and other matters. The petitioners sought to have the court adopt rules similar to what the district court had ordered when the cases were before it on petitions of habeas corpus. The government sought to establish rules restricting scope of discovery and attorney-client communication to what it viewed as the proper scope of the court's review, that is, the CSRT proceedings.

The D.C. Circuit recently issued an order rejecting the government's motion to limit the scope of the court's review to the official record of the CSRT hearings.<sup>134</sup> Rather, the court decided, in order to determine whether a preponderance of evidence supported the CSRT determinations, it must have access to *all* the information a CSRT "is authorized to obtain and consider, pursuant to the procedures specified by the Secretary of Defense." The court denied the petitioners' motion for discovery, at least for the time being, stating there was no need for additional evidence to challenge a CSRT's ruling that specific evidence or a witness was not reasonably available. And, because the DTA does not authorize the court to hold a status

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<sup>133</sup> *Boumediene v. Bush*, 551 U.S. \_\_ (2007) (referring to *Bismullah, et al., v. Gates*, No. 06-1197, and *Parhat, et al., v. Gates*, No. 06-1397).

<sup>134</sup> *Bismullah v. Gates*, No. 06-1197 (July 20, 2007).

determination invalid as “arbitrary and capricious,” there was no need for it to evaluate the conduct of other detainees’ CSRTs. The court also denied as unnecessary the petitioners’ motion to appoint a special master.

The court also promised to enter a protective order to implement guidelines for handling classified and sensitive information and for government monitoring of attorney client written communications (“legal mail”). Again stressing its mandate under the DTA to determine whether a preponderance of the evidence supports a CSRT’s status determination, the court found that counsel for the detainees, to aid in their capacity to assist the court, should be presumed to have a “need to know” all government information concerning their clients except for highly sensitive information, in which case the government could present the evidence to the court *ex parte*. The court rejected the government’s proposal that would have allowed the government, rather than the court, to determine what unclassified information would be required to be kept under seal. With respect to legal mail, the court agreed to the government’s proposal to have mail from attorneys to detainees reviewed by a “privilege team,” composed of Department of Defense personnel not involved in the litigation, to redact information not pertinent to matters within the court’s limited scope of review.

***Al-Marri v. Wright.*** After Al-Marri appealed the decision of the district court upholding his detention as an enemy combatant, discussed above, the government moved to dismiss the appeal on the basis that the MCA strips the court of jurisdiction. The petitioner asserted that Congress did not intend to deprive him of his right to *habeas* or that, alternatively, the MCA is unconstitutional. A three-judge panel of the Fourth Circuit held that the MCA does not apply to the petitioner. The majority avoided the constitutional question by finding that Al-Marri does not meet the statutory definition as an alien who “has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.” While the President’s order designating Al-Marri an “enemy combatant” satisfied the requirement for an initial status determination, the majority found it did not satisfy the statutory requirement for a review process to confirm that the initial determination was proper. The MCA, according to the majority’s interpretation, requires a two-step process for determining whether persons are properly detained as enemy combatants.

The court next found that Al-Marri could not be said to be awaiting such a determination within the meaning of the MCA, inasmuch as the government was arguing on the merits that the presidential determination had provided all of the process that was due, and the government had offered the possibility of bringing Al-Marri before a CSRT only as an alternative possibility in the event the petition were dismissed. Further, the majority looked to the legislative history of the MCA, from which it divined that Congress did not intend to replace *habeas* review with the truncated review available under the amended DTA in the case of aliens within the United States, who it understood to have a constitutional as opposed to merely statutory entitlement to seek *habeas* review.<sup>135</sup> District Judge Hudson, sitting by

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<sup>135</sup> Al-Marri v. Wright , 487 F.3d 160 (4<sup>th</sup> Cir. 2007). The majority opined that

(continued...)

designation, agreed that the MCA did not divest the court of its constitutional jurisdiction to review *habeas corpus* decisions involving individual detainees within the United States, although he did not otherwise concur with the majority's reasoning on jurisdiction.

Turning to the merits, the majority found that Al-Marri does not fall within the legal category of "enemy combatant" within the meaning of *Hamdi*, and that if the government wishes to continue holding him, it must charge him with a crime, commence deportation proceedings, hold him as a material witness in connection with grand jury proceedings, or detain him for a limited time pursuant to the Patriot Act.<sup>136</sup> In so holding, the majority rejected the government's contention that the AUMF authorizes the President to order the military to seize and detain persons within the United States under the facts asserted by the government, or that, alternatively, the President has inherent constitutional authority to order the detention. The government cited the *Hamdi* decision and the Fourth Circuit's decision in *Padilla v. Hanft*<sup>137</sup> to support its contention that Al-Marri is an enemy combatant within the meaning of the AUMF and the law of war. The court, however, interpreted *Hamdi* as confirming only that "the AUMF is explicit congressional authorization for the detention of individuals in the *narrow category* ... [of] individuals who were 'part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.'"<sup>138</sup> Likewise, *Padilla*, although captured in the United States, could be detained pursuant to the AUMF only because he had been, prior to returning to the United States, "'armed and present in a combat zone' in Afghanistan as part of Taliban forces during the conflict there with the United States."<sup>139</sup> The court explained that the two cases cited by the government, *Hamdi* and *Padilla*, involved situations similar to the World War II case *Ex parte Quirin*,<sup>140</sup> in which the Supreme Court agreed that eight German saboteurs could be tried by military commission

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<sup>135</sup> (...continued)

the Government's argument that the phrase "awaiting such determination" covers persons confined within the United States yields a strange result. It would mean that Congress assured that Guantanamo Bay detainees were provided with an administrative factfinding process (the CSRT) followed by judicial review in the D.C. Circuit when eliminating habeas jurisdiction over their cases-but that Congress provided neither any substitute administrative procedure nor any form of judicial review when eliminating the habeas rights of those captured and detained within the United States. The Government offers nothing to indicate that Congress embarked on this strange course, and the legislative history of the MCA renders that theory untenable.

*Id.* at 172.

<sup>136</sup> *Id.* at 196.

<sup>137</sup> 423 F.3d 386 (4th Cir. 2005). The government is no longer holding Jose Padilla as an enemy combatant, having turned him over to civil authorities for trial on charges associated with terrorism.

<sup>138</sup> *Al-Marri* at 180 (citing *Hamdi* at 516-17)(emphasis in original).

<sup>139</sup> *Id.* (citing *Padilla*, 423 F.3d at 390-91).

<sup>140</sup> 317 U.S. 1 (1942).



because they were enemy belligerents within the meaning of the law of war.<sup>141</sup> In contrast, Al-Marri's situation was to be likened to *Ex parte Milligan*,<sup>142</sup> the Civil War case in which the Supreme Court held that a citizen of Indiana accused of conspiring to commit hostile acts against the Union was nevertheless a civilian who was not amenable to military jurisdiction.<sup>143</sup> The court concluded that enemy combatant status rests, in accordance with the law of war, on affiliation with the military arm of an enemy government in an international armed conflict.

Judge Hudson dissented, arguing that the broad language of the AUMF, which authorized the President "to use all necessary and appropriate force against those nations, *organizations, or persons* he determines" were involved in the terrorist attacks of September 11, 2001, "would certainly seem to embrace surreptitious al Qaeda agents operating within the continental United States."<sup>144</sup> He would have found no meaningful distinction between the present case and *Padilla*.

**Legislation.** The House of Representatives included in the National Defense Authorization Act for Fiscal Year 2008, H.R. 1585, a provision requiring the President to submit a report that contains information about detainees at Guantanamo Bay, Cuba, under the control of the Joint Task Force Guantanamo, who are or have ever been classified as "enemy combatants." S. 1249 and H.R. 2212 would require the President to close the detention facilities at Guantanamo Bay and either transfer the detainees to the United States for trial (by military proceeding or Article III court) or for detention as enemy combatants as may be authorized by Congress; transferred to an appropriate international tribunal operating under U.N. auspices; transferred to their country of citizenship or a different country for further legal process, where adequate assurances are given that the individual will not be subject to torture or cruel, inhuman, or degrading treatment; or released from any further detention

The Senate is considering a provision in two FY2008 Defense authorization bills, S. 1547 and S. 1548, that would require the Secretary of Defense to convene a CSRT, conducted in accordance with requirements similar to those that apply in military commissions, to determine the status of each detainee who has been held for more than two years as an "unlawful enemy combatant," unless such detainee is undergoing trial or has been convicted by a military commission. The term "unlawful enemy combatant" would be defined as in the MCA, with the addition of an alien who is not a lawful combatant and who has been a "knowing and active participant in an organization that engaged in hostilities against the United States." CSRT findings would not be dispositive for determining jurisdiction of military commissions. The bills would prohibit the use of information acquired through coercion not amounting to cruel, inhuman or degrading treatment (as defined in the DTA) unless the totality of the circumstances renders the statement reliable and possessing sufficient probative value; the interests of justice would best be served by

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<sup>141</sup> *Al-Marri* at 179 (citing *Quirin*, 317 U.S. at 37-38; *Hamdi*, 542 U.S. at 519; *Padilla*, 423 F.3d at 391).

<sup>142</sup> 71 U.S. (4 Wall.) 2 (1866).

<sup>143</sup> *Al-Marri* at 189.

<sup>144</sup> *Id.* at 196 (Hudson, J., dissenting).

admission of the statement into evidence; and the Tribunal determines that the alleged coercion was incident to the lawful conduct of military operations at the point of apprehension; or the statement was voluntary.

Several bills have been introduced in both Houses of Congress to amend the *habeas* provisions in the DTA. H.R. 1189, the Habeas Corpus Preservation Act, would provide that the MCA is to be construed to avoid any effect on the right of any U.S. resident to *habeas corpus*.

The Military Commissions Habeas Corpus Restoration Act of 2007, H.R. 267, would repeal subsection (e) of 28 U.S.C. § 2241. The bill would add a new Section 1632 to Title 28 providing that no court has jurisdiction to hear cases against the United States or its agents by aliens detained as enemy combatants except for the reviews provided in the DTA and *habeas corpus* petitions. H.R. 2826 would amend 28 U.S.C. § 2241(e) to allow *habeas corpus* actions and requests for injunctive relief against transfer, except in cases of detainees held in an active war zone where the Armed Forces are implementing AR 190-8 or any successor regulation. However, *habeas* challenges related to the decisions of CSRT would be limited to the United States Court of Appeals for the District of Columbia Circuit under the same restrictions in scope that currently apply to appeals of CSRT decisions under the DTA. The bill would also amend 10 U.S.C. § 950j(b) to restore jurisdiction for *habeas corpus*, but not for other actions, related to the prosecution, trial or judgment of a military commission.

H.R. 2710 would repeal 28 U.S.C. § 2241(e) to restore jurisdiction over all cases related to the detention of persons as “enemy combatants,” but would prohibit challenges other than *habeas corpus* actions in cases relating to the prosecution, trial, or judgment of a military commission. H.R. 2543, the Military Commissions Revision Act of 2007, would revise the definition of unlawful enemy combatant to cover only a “person who has engaged in, attempted, or conspired to engage in acts of armed hostilities or terrorism against the United States or its co-belligerents, and who is not a lawful enemy combatant.” Under the bill, CSRT decisions would no longer be dispositive for purposes of determining the jurisdiction of military commissions. Statements obtained by a degree of coercion less than torture would be admissible in a military commission only if the military judge finds that “the totality of the circumstances indicates that the statement possesses probative value to a reasonable person; the interests of justice would best be served by admitting the statement into evidence; and the interrogation methods used to obtain the statement do not amount to cruel, inhuman or degrading treatment.” Habeas corpus jurisdiction would be restored for alien enemy combatants after two years since the date of detention if no criminal charges are pending against the detainee.

S. 185/H.R. 1416, the Habeas Corpus Restoration Act, would repeal subsection (e) of 28 U.S.C. § 2241, but would amend 10 U.S.C. § 950j so that court jurisdiction would continue to be unavailable for detainees seeking to challenge military commissions, except through the limited procedures under the DTA, as amended, and “as otherwise provided in [chapter 47a of title 10, U.S. Code] or in section 2241 of title 28 or any other habeas corpus provision.” S. 576, the Restoring the Constitution Act of 2007, and its companion bill, H.R. 1415, would amend the definition of “unlawful enemy combatant” in the MCA, 10 U.S.C. § 948a, to mean an individual

who is not a lawful combatant who “directly participates in hostilities in a zone of active combat against the United States,” or who “planned, authorized, committed, or intentionally aided the terrorist acts on the United States of September 11, 2001” or harbored such a person. A status determination by a CSRT or other tribunal would no longer be dispositive of status under 10 U.S.C. § 948d. The bills would also expressly restrict the definition of “unlawful enemy combatant” for use in designating individuals as eligible for trial by military commission. They would repeal 28 U.S.C. § 2241(e), but limit other causes of action related to the prosecution, trial, and decision of a military commission. DTA provisions related to the limited review of status determinations and final decisions of military commissions would be eliminated, and appeals of military commissions would be routed to the Court of Appeals for the Armed Forces. H.R. 1415 would expand the scope of that review to include questions of fact. With respect to the Geneva Conventions, the bills would eliminate the MCA provision excluding their invocation as a “source of rights” by defendants (10 U.S.C. § 948b(g)), replacing it with a provision that military commission rules determined to be inconsistent with the Geneva Conventions are to have no effect. They would also add a reference to the effect that the President’s authority to interpret the Geneva Conventions is subject to congressional oversight and judicial review. Finally, the bills would provide for expedited challenges to the MCA in the D.C. district court. (Provisions amending the War Crimes Act or military commission procedures are not covered in this report.)

## Constitutional Considerations

The Supreme Court has granted certiorari to address whether the DTA is a valid suspension of the Writ or whether it violates the Constitution’s Suspension Clause (article I, § 9, cl. 2) or possibly exceeds Congress’s authority to regulate the jurisdiction of federal courts. The *Hamdan* Court interpreted the DTA provision revoking the privilege of *habeas corpus* as inapplicable to the case before it. Because the petitioner was not challenging a final decision of a military commission, the Court reasoned that the DTA provision revoking jurisdiction over pending cases involving such decisions did not apply. The Court did not address the effect of the DTA on cases that were pending at the time of enactment and that would have been covered under the DTA’s provisions regarding final review of Combatant Status Review Tribunals, thus avoiding having to address the constitutionality of the DTA’s *habeas* provisions. In enacting the MCA, Congress amended the DTA specifically to revoke *habeas corpus* jurisdiction over all cases involving aliens detained as enemy combatants or awaiting such determination. So far, federal courts have upheld the *habeas* provision and dismissed petitions for *habeas corpus* based on the DTA as amended, finding that the revocation of their jurisdiction over such petitions does not amount to a suspension of the Writ.<sup>145</sup>

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<sup>145</sup> *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007); *Hamdan v. Rumsfeld*, 464 F.Supp.2d 9 (D.D.C. 2006).

## The Suspension of *Habeas Corpus*

The Writ of Habeas Corpus (*ad subjiciendum*), also known as the Great Writ, has its origin in Fourteenth Century England.<sup>146</sup> It provides the means for those detained by the government to ask a court to order their warden to explain the legal authority for their detention. In the early days of the Republic, its primary use was to challenge executive detention without trial or bail, or pursuant to a ruling by a court without jurisdiction, but the writ has expanded over the years to include a variety of collateral challenges to convictions or sentences based on alleged violations of fundamental constitutional rights.<sup>147</sup> A court reviewing a petition for *habeas corpus* does not determine the guilt or innocence of the petitioner; rather, it tests the legality of the detention and the custodian's authority to detain. If the detention is not supported by law, the detainee is to be released.<sup>148</sup> Minor irregularities in trial procedures that do not amount to violations of fundamental constitutional rights are generally to be addressed on direct appeal.<sup>149</sup>

Given the emphasis the *Rasul* Court placed on the distinction between the statutory and constitutional entitlement to *habeas corpus*, it would seem reasonable to suppose that Congress might easily revoke by statute what it had earlier granted without offending either the Court or the Constitution. However, the special status accorded the Writ by the Suspension Clause of the Constitution complicates matters.

Article I, § 9, cl. 2, provides: “The 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.” If the DTA amounts to a suspension of the writ of *habeas corpus*, the Supreme Court could take up the question of whether a “case of rebellion or invasion” exists and whether the federal courts’ consideration of the detainees’ petitions actually endangers the public safety to such a degree that suspension of the Writ is warranted. If, on the other hand, the amendment represents the mere regulation of procedures for seeking relief, or eliminates a statutory right not guaranteed by the Constitution, then the Supreme Court may rule itself ineligible to review detainee cases.

While the federal courts’ power to review petitions under *habeas corpus* has historically relied on statute,<sup>150</sup> it has been explained that the Constitution obligates Congress to provide “efficient means by which [the Writ] should receive life and

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<sup>146</sup> For a general background and description of related writs, see 39 AM. JUR. 2d. *Habeas Corpus* § 1 (1999).

<sup>147</sup> See generally S. DOC. NO. 108-17 at 848 *et seq.*

<sup>148</sup> *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830) (Marshall, C.J.) (“The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause.”).

<sup>149</sup> 39 AM. JUR. 2d. *Habeas Corpus* § 27 (1999).

<sup>150</sup> *Ex parte Bollman*, 8 U.S. (4 Cr.) 75 (1807).

activity.”<sup>151</sup> While the Court has stated that “at the absolute minimum, the Suspension Clause protects the writ ‘as it existed in 1789,’”<sup>152</sup> it has also presumed that “the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789.”<sup>153</sup> Consequently, the Court may be unwilling to permit Congress to eliminate *habeas* rights it previously granted, at least to the extent that no other avenue of relief is available.<sup>154</sup> In particular, even if Congress is found to have suspended the Writ, the Court may be reticent to give up the authority of the judicial branch to decide whether the suspension applies to a particular case.<sup>155</sup> Whether a limitation on *habeas* jurisdiction constitutes a suspension of the Writ has been held to depend on whether Congress has provided an effective and adequate alternative means of pursuing relief.<sup>156</sup>

Congress’s authority to control the courts’ jurisdiction over *habeas* cases was tested in the aftermath of the Civil War. As part of its Reconstruction efforts, Congress broadened the scope of the Writ to provide for review of convictions of state courts and to give the Supreme Court appellate jurisdiction in *habeas corpus* cases. Prior to that time, the Supreme Court could review *habeas* decisions only by issuing an original writ of *habeas corpus* combined with *certiorari*. However, when the Court’s new appellate review appeared to threaten the legitimacy of much of the Reconstruction legislation, including a statute that allowed military trials of civilians in formerly Confederate states, Congress hastily revoked the Supreme Court’s appellate jurisdiction over *habeas* cases. The Supreme Court upheld Congress’s authority to revoke its appellate jurisdiction, even though it had already heard arguments in the case of *McCardle*, a civilian held for trial by a military commission in Mississippi. Upon dismissing *McCardle*’s appeal, however, the Court remarked:

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.<sup>157</sup>

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<sup>151</sup> *Id.* at 94.

<sup>152</sup> *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289, 301 (U.S. 2001).

<sup>153</sup> *Felker v. Tupin*, 518 U.S. 663 (1996)(citing *Swain v. Pressley*, 430 U.S. 372 (1977)).

<sup>154</sup> *Cf. id.* (Holding that restrictions on successive petitions for *habeas corpus* by prisoners convicted in state courts did not suspend the writ, but merely applied a modified *res judicata* rule to control abuse of the writ).

<sup>155</sup> *See ex parte Milligan*, 71 U.S. (4 Wall.) 2, 115-16 (1866); *cf. ex parte Quirin*, 317 U.S. 1, 24-25 (1942)(dismissing contention that presidential proclamation stripped Court of authority to review case, stating that “nothing in the Proclamation precludes access to the courts for determining its applicability to the particular case”).

<sup>156</sup> *See United States v. Hayman*, 342 U.S. 205 (1952); *Hill v. United States*, 368 U.S. 424 (1962); *Swain v. Pressley*, 430 U.S. 372 (1977); *Felker v. Turpin*, 518 U.S. 651 (1996); *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001).

<sup>157</sup> *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 515 (1868).

Shortly after the *McCardle* case, the Supreme Court, in agreeing to review the case of another civilian held by military authority, confirmed that it could indeed continue to issue original writs of *habeas corpus* and *certiorari* notwithstanding the repeal of the 1867 law.<sup>158</sup> Repeal of those parts of the Judiciary Act of 1789 that conferred power on the Supreme Court to review *habeas* cases was not to be found by implication. Congress made no effort to further diminish the Court's *habeas* jurisdiction over Civil War cases, leaving open the question whether such an effort would have amounted to a violation of the Suspension Clause.

The Supreme Court had an opportunity to revisit the question after Congress in 1996 passed the Antiterrorism and Effective Death Penalty Act (AEDPA), part of which restricted successive *habeas* petitions by prisoners in state custody. Until 1867, prisoners held pursuant to convictions in state courts were not eligible to seek federal *habeas* relief,<sup>159</sup> yet it remains unclear whether Congress is free to revoke such jurisdiction without effecting a suspension of the Writ. In *Felker v. Turpin*,<sup>160</sup> the Supreme Court followed its holding in *ex parte Yerger* to interpret a section of the AEDPA preventing its review of orders denying leave to file a second *habeas* petition as leaving intact the Supreme Court's power to consider original petitions for *habeas* relief, apparently avoiding an unconstitutional "suspension" of the Writ, or at least avoiding the need for the Court to determine whether the Suspension Clause was in fact implicated.

The DTA appears to be less equivocal with respect to the rights of a narrowly defined class of persons to petition for *habeas* relief: no jurisdiction, whether original or appellate, will lie in federal court for petitions on behalf of aliens detained by the United States as "enemy combatants." As the act is implemented, the Court may find it necessary to resolve the question of the Suspension Clause's effect on Congress's authority to regulate the jurisdiction of federal courts, particularly the Supreme Court. The enactment of legislation to deny the rights of all aliens in U.S. custody to petition for *habeas corpus*, whether held abroad or within the United States, may bring the Court to clarify a question it did not resolve in *Rasul*, namely, whether that decision extended beyond Guantanamo Bay to other U.S. prisons abroad where the United States does not exercise exclusive jurisdiction and control.<sup>161</sup>

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<sup>158</sup> *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869).

<sup>159</sup> See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 99 (1807)(interpreting Section 14 of the Judiciary Act of 1789, which established the jurisdiction of federal courts over *habeas corpus* and other matters, to withhold from state prisoners access to the federal writ of *habeas corpus*). For an analysis of why the interpretation may have been in error, see Eric M. Freedman, *Milestones in Habeas Corpus: Part I Just Because John Marshall Said It, Doesn't Make it So: Ex Parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531 (2000).

<sup>160</sup> 518 U.S. 651 (1996).

<sup>161</sup> The President has indicated that all "high-value detainees" previously held in undisclosed prisons in Eastern European countries and elsewhere have been transferred to Guantanamo, but has not foreclosed the possibility that suspected terrorists captured in the future will be held for interrogation in other countries. Persons detained in Afghanistan and Iraq may be  
(continued...)

## Limiting Court Jurisdiction

At the brink of the Suspension Clause issue is the question whether the relief available under *habeas* may be available under other procedures. In addition, the question arises as to whether the DTA, by limiting certain procedural routes to challenge the Guantanamo detainees' detention and treatment, would limit the vindication of constitutional rights and unconstitutionally usurp the role of the federal courts. A definitive interpretation of the effect of the DTA is difficult, however, since many of the constitutional and procedural issues raised by the detentions and CSRT proceedings at Guantanamo remain unresolved.

Generally, it would appear that there are two categories of cases that are likely to be brought by detainees at Guantanamo: cases challenging the fact or length of a detainee's incarceration, and cases challenging the conditions under which a detainee is being held. While there may be some overlap, these two categories may involve different procedural routes and the application of different constitutional rights.

**The Fact and Length of Detention.** As noted above, the Supreme Court in *Rasul* found that the Guantanamo detainees had a statutory right to petition a federal district court for a writ of *habeas corpus*<sup>162</sup> based on claims that they are held "in custody in violation of the Constitution or laws or treaties of the United States."<sup>163</sup> In general, writs of *habeas corpus* are available as a means of challenging the fact or length of a detention or incarceration.<sup>164</sup> The DTA appears intended to prohibit detainees from utilizing this particular statutory procedure to bring cases into court.<sup>165</sup>

Thus, the question arises as to whether there are alternate procedural routes by which detainees could bring suits challenging the fact or length of their detention. Under the DTA, the United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to determine the validity of decisions by a CSRT that a detainee is an enemy combatant and to review final decisions of military commissions convicting detainees of violations of the law of war. The scope of

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<sup>161</sup> (...continued)

affected by the Supreme Court's eventual ruling. *See* Maqaleh v. Gates, No. 06-1669 (D.D.C. July 18, 2007) (order denying motion for dismissal based on lack of jurisdiction under the MCA of a petition filed by a detainee at Bagram Air Base in Afghanistan).

<sup>162</sup> 28 U.S.C. §§ 2241(a), (c)(3).

<sup>163</sup> *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>164</sup> Although it appears less common for challenges to prison conditions to be entertained under this procedural route, such cases can be brought. "A motion pursuant to § 2241 generally challenges the execution of a federal prisoner's sentence, including such matters as the administration of parole, computation of a prisoner's sentence by prison officials, prison disciplinary actions, prison transfers, type of detention and prison conditions." *Jiminian v. Nash*, 245 F.3d 144 (2d Cir. 2001). *See, e.g.,* *Rickenbacker v. United States*, 365 F. Supp. 2d 347 (E.D.N.Y. 2005) (challenging failure to provide drug and psychiatric treatment in accordance with sentencing court's recommendation).

<sup>165</sup> As discussed above, there may be limits to the extent to which the writ of *habeas corpus* may be suspended.

evidence it may review in reaching such a determination remains unclear. In the context of CSRT challenges, the government has argued that administrative law (applicable to reviews of agency determinations) supplies the appropriate model, so that only the record of the CSRT proceedings is subject to review, and that extrinsic evidence not already part of the record should not be subject to discovery.<sup>166</sup> The D.C. Circuit, however, rejected that view, holding that its review must encompass all of the information a CSRT is authorized to obtain and consider.<sup>167</sup> The D.C. Circuit's jurisdiction also includes constitutional review of whether the standards and procedures utilized in the military proceedings below were consistent with the Constitution and laws of the United States.

The remedy available in court may also have some bearing on whether the DTA review procedures are an adequate and effective alternative to *habeas* review. Under Title 28, U.S. code, the court must “award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the detainee is not entitled to it.”<sup>168</sup> The court can order either party to expand the record by submitting additional information bearing on the petition.<sup>169</sup> The court may order hearings to assist it in determining the facts, and is authorized to “dispose of the matter as law and justice require,”<sup>170</sup> or in criminal cases, to vacate a sentence, grant a new trial, or order that a prisoner be released.<sup>171</sup> By contrast, the DTA review procedures do not address the remedies available to detainees who prevail in a challenge. In the context of CSRT determinations, the government has suggested that remand for new CSRT proceedings is the appropriate remedy for a determination that an error of law was made or to consider new evidence.<sup>172</sup>

**Conditions of Detention.** A variety of challenges have been raised by detainees in Guantanamo regarding conditions of their detention, including such issues as whether prisoners can be held in solitary confinement<sup>173</sup> when they can be transferred,<sup>174</sup> or whether they can have contact with relatives.<sup>175</sup> Although some of

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<sup>166</sup> See Gov't Br. Address. Pend. Prelim. Mots. at 49-51, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir.).

<sup>167</sup> *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. July 20, 2007)(order on procedural motions).

<sup>168</sup> 28 U.S.C. § 2243.

<sup>169</sup> Rules Governing § 2255 Cases, Rule 7, 28 U.S.C.A. foll. § 2255 (applicable to prisoners subject to sentence of a federal court).

<sup>170</sup> 28 U.S.C. § 2243.

<sup>171</sup> 28 U.S.C. § 2255.

<sup>172</sup> See Gov't Br. in Opp. to Pet. for Reh'g, *Boumediene v. Bush*, No. 16-1195 (U.S.).

<sup>173</sup> Paul Shukovsky, *Terrorism Suspect's Suit Tells of U.S. Abuse: Documents in Guantanamo Case Describe Extreme Isolation*, SEATTLE POST-INTELLIGENCER, August 6, 2004, at A1.

<sup>174</sup> *Al-Anazi v. Bush*, 370 F. Supp. 2d 188 (D.D.C. 2005).

<sup>175</sup> Josh White, *Lawyers Seek Improved Conditions for Suicidal Detainee*, WASH. POST, (continued...)



these were brought as *habeas corpus* cases,<sup>176</sup> Guantanamo detainees have also sought relief from the courts using the All Writs Act,<sup>177</sup> principally to prevent their transfer to other countries without notice,<sup>178</sup> but for other reasons too.<sup>179</sup> Use of the All Writs Act by a court is an extraordinary remedy, generally not invoked if there is an alternative remedy available.<sup>180</sup>

Prisoners in federal prison, acting under a district court's general jurisdiction to consider claims arising under the Constitution,<sup>181</sup> have also sought writs of mandamus<sup>182</sup> to obtain changes in prison conditions.<sup>183</sup> These writs, which are directed against government officials, have been used to require those officials to act in compliance with constitutional requirements. Although these challenges are often denied on the merits or on procedural grounds, cases have been brought based on the First Amendment,<sup>184</sup> Sixth Amendment,<sup>185</sup> Eighth Amendment<sup>186</sup> and various other

<sup>175</sup> (...continued)

November 5, 2005, at A8.

<sup>176</sup> See, e.g., *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 480-81 (D.D.C. 2005)(rejecting claims on other grounds).

<sup>177</sup> All Writs Act, 28 U.S.C. § 1651.

<sup>178</sup> *Al-Anazi v. Bush*, 370 F. Supp. 2d 188 (D.D.C. 2005)(denying a preliminary injunction to provide their counsel with 30-days' notice of any proposed transfer of detainees to any place outside the U.S.); *Almurbati v. Bush*, 366 F. Supp. 2d 72 (D.D.C. 2005)(same); *Abdah v. Bush*, 2005 U.S. Dist. LEXIS 4144 (D.D.C. 2005)(Thirteen Yemeni nationals were entitled to a TRO preventing the government from transferring them to the custody of another government).

<sup>179</sup> See *El-Banna v. Bush*, 2005 U.S. Dist. LEXIS 16880 (2005) (seeking preservation of records relating to treatment of detainees).

<sup>180</sup> *Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 196 (D.D.C. 2005).

<sup>181</sup> 28 U.S.C. § 1331. See *Caldwell v. Miller*, 790 F.2d 589 (7th Cir. 1986).

<sup>182</sup> Russell Donaldson, *Mandamus, under 28 U.S.C.A. §1361, To Obtain Change in Prison Condition or Release of Federal Prisoner*, 114 A.L.R. Fed. 225 (2005).

<sup>183</sup> Relief in mandamus is generally available where: (1) the plaintiff can show a clear legal right to the performance of the requested action; (2) the duty of the official in question is clearly defined and nondiscretionary; (3) there is no other adequate remedy available to the plaintiff; (4) there are other separate jurisdictional grounds for the action. *Id.* at 1(a). A writ of mandamus may issue only where "the duty to be performed is ministerial and the obligation to act peremptory, and clearly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and undisputable." *Ali v. Ashcroft*, 350 F. Supp. 2d 28, 65 (D.D.C. 2004), quoting *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1479 (D.C. Cir. 1995).

<sup>184</sup> See *Long v. Parker*, 390 F.2d. 816 (3<sup>rd</sup> Cir. 1968) (prisoner suit to obtain access to religious weekly newspaper stated a valid cause of action worthy of a factual hearing).

<sup>185</sup> *Stover v. Carlson*, 413 F. Supp. 718 (D. Conn. 1976) (ending federal prison practice of opening privileged communications outside of prisoner's presence).

<sup>186</sup> *Fullwood v. Clemmer*, 206 F. Supp. 370 (D.D.C. 1962) (keeping prisoner in solitary confinement for more than two years for minor disciplinary infractions violates the Eighth (continued...))

grounds.<sup>187</sup> To the extent that these alternate writs are not cut off by the DTA,<sup>188</sup> they might offer an alternative route to challenge conditions of detention.<sup>189</sup>

Finally, it is possible that the detainees in Guantanamo could have attempted to bring a *Bivens* action for damages against relevant government officials.<sup>190</sup> In *Bivens v. Six Unknown Federal Narcotics Agents*,<sup>191</sup> the Supreme Court has held that suits can be brought against federal government officials directly under the Constitution for violations of the Fourth Amendment. The Court has also explicitly provided that such suits are available to federal prisoners alleging cruel and unusual punishment in violation of the Eighth Amendment.<sup>192</sup> Again, this remedy is most likely to be available where Congress has not provided an adequate remedy for constitutional violations.<sup>193</sup> However, it should be noted that the number of successful *Bivens* actions appears to be relatively small, and state actors in certain roles, such as federal agency enforcement officials, may have absolute immunity from damage suits.

Statements regarding the DTA, however, indicate that its sponsors anticipated that the act would limit the ability of detainees to seek redress regarding the conditions of their detention.<sup>194</sup> The language of the DTA itself appears to cut off all

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<sup>186</sup> (...continued)

Amendment). It should be noted that where a prisoner has not yet been convicted of a crime, a challenge to conditions of detentions may sound in Due Process rather than as an Eighth Amendment challenge. *Bell v. Wolfish*, 441 U.S. 520 (1979).

<sup>187</sup> See generally *Donaldson*, *supra* note 182.

<sup>188</sup> P.L. 109-148, § 1005(e) (as amended) (prohibiting “any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination”).

<sup>189</sup> *Housley v. United States*, 1992 U.S. App. LEXIS 26368 (9<sup>th</sup> Cir.). *But see* *Ali v. Ashcroft*, 350 F. Supp. 2d 28, 65 (D.D.C. 2004) (rejecting argument that the Hostage Act requires the President to seek release of plaintiff from custody of the Saudi Arabian government).

<sup>190</sup> See JOHN BOSTON AND DANIEL E. MANVILLE, *PRISONERS’ SELF-HELP LITIGATION MANUAL* (3<sup>rd</sup> ed. 1995). There is also limited authority to indicate that a plaintiff may seek an injunction as part of a *Bivens* claim. *Sheptin v. United States*, 2000 U.S. Dist. LEXIS 12999, \*6 (N.D. Ill. September 1, 2000).

<sup>191</sup> 403 U.S. 388 (1971).

<sup>192</sup> *Carlson v. Green*, 446 U.S. 14 (1980)(Court allowed a *Bivens* action against federal prison officials for failing to provide adequate medical treatment).

<sup>193</sup> In *Carlson*, the Supreme Court held that a *Bivens*-type action cannot be brought in situation: where defendants (1) demonstrate special factors counseling hesitation in the absence of affirmative action by Congress, or (2) show that Congress has provided a sufficient alternate remedy.

<sup>194</sup> See 151 Cong. Rec. S12752-54 (daily ed. November 14, 2005)(statement of Senator Lindsay Graham).

court jurisdiction for detainees except for limited review of the fact of detention.<sup>195</sup> The DTA itself appears to provide no opportunity for a court to review issues related to detention, thus arguably banning challenges to conditions of detention such as cases based on the Eighth Amendment ban on cruel and unusual punishment.

## Congressional Authority over Federal Courts

As noted, sponsors of the DTA have indicated that its intent was, in part, to limit the ability of detainees to bring cases challenging the conditions of their detention. To the extent that such challenges are based on constitutional considerations, however, the question arises as to whether Congress can impose such limitations. If it is determined that no procedure is available to vindicate constitutional rights, then it might be argued that the Congress's limitation on the use of *habeas corpus* or other avenues of redress by the detainees is an unconstitutional limitation.

The Constitution contains few requirements regarding the jurisdiction of the federal courts. Article III, Section 1, of the Constitution provides that

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.<sup>196</sup> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Although Article III provides for a Supreme Court headed by the Chief Justice of the United States,<sup>197</sup> nothing else about the Court's structure and operation is set forth, leaving the size and composition of the Court, as well as the specifics, if any, of the lower federal courts, to Congress.<sup>198</sup> Utilizing its power to establish inferior courts, Congress has also created the United States district courts,<sup>199</sup> the courts of appeals for the thirteen circuits,<sup>200</sup> and other federal courts.<sup>201</sup>

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<sup>195</sup> DTA, § 1005(e) (codified at 28 U.S.C. 2241(e)).

<sup>196</sup> The latter part of this quoted language dovetails with clause 9 of § 8 of Article I, under which Congress is authorized “[t]o constitute tribunals inferior to the supreme Court.”

<sup>197</sup> Although the position of Chief Justice is not specifically mandated, it is referenced in Article I, § 3, Cl. 6, in connection with the procedure for the Senate impeachment trial of a President:

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no Person shall be convicted without Concurrence of two-thirds of the Members present.

<sup>198</sup> By the Judiciary Act of 1789, it was established that the Court was to be composed of the Chief Justice and five Associate Justices. The number of Justices was gradually increased to ten, until in 1869 the number was fixed at nine, where it has remained to this day.

<sup>199</sup> 28 U.S.C. §§ 81-131, 132.

<sup>200</sup> 28 U.S.C. §§ 41, 43 (District of Columbia Circuit, First Circuit through Eleventh Circuit, (continued...))

On its face, there is no limit on the power of Congress to make exceptions to or otherwise regulate the Supreme Court’s appellate jurisdiction, to create inferior federal courts, or to specify their jurisdiction. However, the same is true of the Constitution’s other grants of legislative authority in Article I and elsewhere, which does not prevent the application of other constitutional principles to those powers. “[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas,” Justice Black wrote for the Court in a different context, but “these granted powers are always subject to the limitations that they may not be exercised in a way that violates other specific provisions of the Constitution.”<sup>202</sup> Justice Harlan seems to have had the same thought in mind when he said that, with respect to Congress’s power over jurisdiction of the federal courts, “what such exceptions and regulations should be it is for Congress, in its wisdom, to establish, having of course due regard to all the Constitution.”<sup>203</sup>

Thus, it is clear that while Congress has significant authority over administration of the judicial system, it may not exercise its authority over the courts in a way that violates constitutional rights such as the Fifth Amendment due process clause or precepts of equal protection. For instance, Congress could not limit access to the judicial system based on race or ethnicity.<sup>204</sup> Nor, without amendment of the Constitution, could Congress provide that the courts may take property while denying a right to compensation under the takings clause.<sup>205</sup> In general, the mere fact Congress is exercising its authority over the courts does not serve to insulate such legislation from constitutional scrutiny.

## Separation of Powers Issues

It is also clear that Congress may not exercise its authority over the courts in a way that violates precepts of separation of powers. The doctrine of separation of powers is not found in the text of the Constitution, but has been discerned by courts, scholars, and others in the allocation of power in the first three Articles; that is, the “legislative power” is vested in Congress, the “executive power” is vested in the President, and the “judicial power” is vested in the Supreme Court and the inferior

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<sup>200</sup> (...continued)  
Federal Circuit).

<sup>201</sup> See, e.g., 28 U.S.C. §§ 151 (U.S. bankruptcy courts); 251 (U.S. Court of International Trade).

<sup>202</sup> *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

<sup>203</sup> *United States v. Bitty*, 208 U.S. 393, 399-400 (1908).

<sup>204</sup> Laurence Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L.L. REV. 129, 142-43 (1981). For instance, segregation in courtrooms is unlawful and may not be enforced through contempt citations for disobedience, *Johnson v. Virginia*, 373 U.S. 61 (1963), or through other means. Treatment of parties to or witnesses in judicial actions based on their race is impermissible. *Hamilton v. Alabama*, 376 U.S. 650 (1964)(reversing contempt conviction of witness who refused to answer questions so long as prosecutor addressed her by her first name).

<sup>205</sup> The Fifth Amendment provides that no “private property [ ] be taken for public use without just compensation.”

federal courts. That interpretation is also consistent with the speeches and writings of the framers. Beginning with *Buckley v. Valeo*,<sup>206</sup> the Supreme Court has reemphasized separation of powers as a vital element in American federal government.<sup>207</sup>

The federal courts have long held that Congress may not act to denigrate the authority of the judicial branch. In the 1782 decision in *Hayburn's Case*,<sup>208</sup> several Justices objected to a congressional enactment that authorized the federal courts to hear claims for disability pensions for veterans. The courts were to certify their decisions to the Secretary of War, who was authorized either to award each pension or to refuse it if he determined the award was an “imposition or mistaken.” The Justices on circuit contended that the law was unconstitutional because the judicial power was committed to a separate department and because the subjecting of a court’s opinion to revision or control by an officer of the executive or the legislative branch was not authorized by the Constitution. Congress thereupon repealed the objectionable features of the statute.<sup>209</sup> More recently, the doctrine of separation of powers has been applied to prevent Congress from vesting jurisdiction over common-law bankruptcy claims in non-Article III courts.<sup>210</sup>

Allocation of court jurisdiction by Congress is complicated by the presence of state court systems that can and in some cases do hold concurrent jurisdiction over cases involving questions of federal statutory and constitutional law. Thus, the power of Congress over the federal courts is really the power to determine how federal cases are to be allocated among state courts, federal inferior courts, and the United States Supreme Court. Congress has significant authority to determine which of these various courts will adjudicate such cases, and the method by which this adjudication will occur. For most purposes, the exercise of this power is relatively noncontroversial.

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<sup>206</sup> 424 U.S. 1, 109-43 (1976).

<sup>207</sup> It is true that the Court has wavered between two approaches to cases raising separation-of-powers claims, using a strict approach in some cases and a less rigid balancing approach in others. Nevertheless, the Court looks to a test that evaluates whether the moving party, usually Congress, has “impermissibly undermine[d]” the power of another branch or has “impermissibly aggrandize[d]” its own power at the expense of another branch; whether, that is, the moving party has “disrupt[ed] the proper balance between the coordinate branches [by] preventing the [other] Branch from accomplishing its constitutionally assigned functions.” *Morrison v. Olson*, 487 U.S. 654, 695 (1988). *See also* *INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Mistretta v. United States*, 488 U.S. 361 (1989); *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Airport Noise*, 501 U.S. 252 (1991).

<sup>208</sup> 2 U.S. (2 Dall.) 409 (1792). This case was not actually decided by the Supreme Court, but by several Justices on circuit.

<sup>209</sup> Those principles remain vital. *See, e.g., Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 113-14 (1948) (“Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government.”); *Connor v. Johnson*, 402 U.S. 690 (1971).

<sup>210</sup> *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

As regards the DTA, however, there appears to be little chance of state courts exercising jurisdiction over the detainees in Guantanamo Bay.<sup>211</sup> Consequently, the issue here appears to be, not where the cases of the Guantanamo detainees will be heard, but whether such cases will be heard in any court, whether state or federal. To the extent that the DTA cuts off court jurisdiction over cases involving aliens detained within U.S. territory, however, state courts might be able to assert jurisdiction. Although the Supreme Court has not specifically addressed the issue of the withdrawal of jurisdiction from all courts to consider challenges to the actions of government officials, it would seem likely that such restrictions would be constitutionally suspect.

## **Eliminating Federal Court Jurisdiction Where There Is No State Court Review**

A series of lower federal court decisions seem to indicate that in most cases, some forum must be provided for the vindication of constitutional rights, whether in federal or state courts. For instance, in 1946, a series of Supreme Court decisions<sup>212</sup> under the Fair Labor Standards Act of 1938<sup>213</sup> exposed employers to \$5 billion dollars in damages, and the United States itself was threatened with liability for over \$1.5 billion. Subsequently, Congress enacted the Portal to Portal Act of 1947,<sup>214</sup> which limited the jurisdiction of any court, state or federal, to impose liability or impose punishment with respect to such liabilities. Although the act was upheld by a series of federal district courts and courts of appeals, most of the courts disregarded the purported jurisdictional limits, and decided the cases on the merits.

As one court noted, “while Congress has the undoubted power to give, withhold, or restrict the jurisdiction of courts other than the Supreme Court, it must not exercise that power as to deprive any person of life, liberty, or property without due process or just compensation...”<sup>215</sup> The Court has also construed other similar statutes narrowly so as to avoid “serious constitutional questions” that would arise if no judicial forum for a constitutional claim existed.<sup>216</sup>

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<sup>211</sup> The DTA provides that no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of *habeas corpus* filed by or on behalf of an alien outside of the United States. The argument could be made, however, that this language is intended to be limited to the statutory provision it is amending, 28 U.S.C. § 2241, which only covers federal writs of *habeas corpus*. If the Amendment was found to be so limited, a Guantanamo detainee might seek a writ of *habeas corpus* in a state court relying on state statutes. *See, e.g.,* Cal Pen Code § 1473 (2005)(state writ of *habeas corpus*). Such an extraterritorial application of state *habeas* law is likely to be novel and would be specific to each state statute. Consequently, an evaluation of the likely success of such a suit is beyond the scope of this report.

<sup>212</sup> *See, e.g.,* Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944).

<sup>213</sup> 29 U.S.C. §§ 201-219.

<sup>214</sup> 29 U.S.C. §§ 251-262.

<sup>215</sup> Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948).

<sup>216</sup> *See, e.g.,* Webster v. Doe, 486 U.S. 592 (1988).

The Supreme Court has not directly addressed whether there must exist a judicial forum to vindicate all constitutional rights. Justice Scalia has pointed out that there are particular cases, such as political questions cases, where all constitutional review is in effect precluded.<sup>217</sup> Other commentators point to sovereign immunity and the ability of the government to limit the remedies available to plaintiffs.<sup>218</sup> However, the Court has, in cases involving particular rights, generally found a requirement that effective judicial remedies be present. Thus, for instance, the Court has held that the Constitution mandates the availability of effective remedies for takings.<sup>219</sup> These cases would seem to indicate a basis for the Court to find that parties seeking to vindicate other particular rights must have a judicial forum for such challenges. Although the extent of constitutional rights enjoyed by aliens outside the territory of the United States is subject to continuing debate, the right of aliens within the United States to liberty except when restricted in accordance with due process of law seems well-established.

## Conclusion

The Administration's policy of detaining wartime captives and suspected terrorists at Guantanamo Bay Naval Station raises a host of novel legal questions regarding, among other matters, the relative powers of the President and Congress to fight terrorism, and the power of the courts to review the actions of the political branches. The DTA may be Congress's first effort to impose limits on the President's conduct of the Global War on Terrorism and to prescribe a limited role for the courts. The MCA provides the President the authority to conduct military commissions and further limits the availability of judicial review. The Supreme Court's decision to review the cases of Guantanamo detainees whose *habeas* petitions were dismissed pursuant to the MCA will likely lead, absent a change to the detention policy that would render the dispute moot, to a judicial clarification of the meaning of the Suspension Clause and the extent of Congress's power to regulate the authority of the judicial branch. The Court's determination of those issues may hinge in part on the interpretation by the Court of Appeals for the District of Columbia Circuit of the proper scope of its review of detainee cases under the MCA.

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<sup>217</sup> 486 U.S. at 612-13 (Scalia, J., dissenting).

<sup>218</sup> *Bartlett v. Bowen*, 816 F.2d 695, 719-720 (1987)(Bork, J., dissenting).

<sup>219</sup> *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987).