THE MILITARY COMMISSIONS ACT OF 2006 AND HABEAS CORPUS JURISDICTION

DID THE CONGRESS VIOLATE THE SUSPENSION CLAUSE OF THE U.S. CONSTITUTION LIMITING ITS SUSPENSION AUTHORITY TO CASES OF REBELLION AND INVASION?

A REPORT OF THE AMERICAN ASSOCIATION FOR THE INTERNATIONAL COMMISSION OF JURISTS TO THE ICJ'S DISTINGUISHED JURISTS PANEL

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"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety requires it."

Article I, Section 9, Clause 2 of the U.S. Constitution

Introduction

The writ of habeas corpus is perhaps the most fundamental guarantee of liberty in a democracy.[1] The federal habeas corpus statute was first enacted as part of the Judiciary Act of 1789.[2] As Justice Stevens has noted, habeas corpus is "however, a writ antecedent to statute . . . throwing its root deep into the genius of our common law. . . The writ appeared in English law several centuries ago, and became an integral part of our common law heritage by the time the Colonies achieved independence."[3] One of the most significant features of the Military Commissions Act (MCA)[4] is its elimination of jurisdiction by any court over habeas corpus applications filed on behalf of an alien detained by the United States who has been "determined to have been properly detained as an enemy combatant or who is awaiting such determination."[5] It is the thesis of this report that this elimination of habeas corpus rights for those declared to be enemy combatants, at least to the extent that they have substantial connections with the United States or are detained in the United States or at Guantanamo, violates the Suspension Clause of the U.S. Constitution.

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[2] Act of September 24, 1789, ch. 20, § 14, 1 Stat. 82.

[3] *Rasul v Bush*, 542 U.S. 466, 473-474 (2004) (citations and internal quotations omitted).

[4] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

[5] 28 U.S.C.A. § 2241(c)(1).

Earlier Proceedings

In 2002 a number of habeas corpus petitions were filed with the U.S. District Court for the District of Columbia on behalf of two Australian citizens and 12 Kuwaiti citizens who were captured abroad during hostilities between the United States and the Taliban to challenge the legality of their detention at Guantanamo Bay. The District Court dismissed the cases based on a finding that *Johnson v. Eisentrager*, 339 U.S. 763 (1950), barred claims of an alien seeking to enforce the U.S. Constitution in a habeas proceeding unless the alien is in custody in sovereign United States territory. The U.S. Court of Appeals affirmed the District Court's decision. *Al Odah v. United States*, 321 F.3rd 1134 (2003). In *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court considered whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty", and reversed the District Court's decision.

The majority opinion found that several facts distinguished the Guantanamo Bay petitioners from petitioners in *Eisentrager.* The Court noted that the Guantanamo Bay petitioners were not nationals at war with the United States and that they denied they had engaged in acts of aggression against the United States. The Court further indicated that petitioners had never been afforded access to any tribunal and that for more than two years they had been imprisoned in territory over which the United States exercises exclusive jurisdiction. In addition, the Court ruled that post-*Eisentrager* precedent required the recognition of statutory habeas corpus even over cases brought by petitioners outside the territorial jurisdiction of any federal district court. The Court held that "aliens

held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under the habeas statute." *Rasul v. Bush*, 542 U.S. 466, 481 (2004).

On the same day *Rasul* was decided, the Supreme Court considered in *Hamdi v. Rumsfeld* an American citizen's due process challenge to his designation as an "enemy combatant" by the military. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). The government classified Hamdi, who was captured during the war in Afghanistan and detained in a naval brig in Charleston, N.C. as an "enemy combatant" for allegedly taking up arms with the Taliban. Hamdi's father filed a habeas corpus petition. The government produced a Defense Department declaration that Hamdi was affiliated with a Taliban unit during the time when the Taliban was at war with the United States. The U.S. Court of Appeals held that no factual inquiry or evidentiary hearing was necessary to rebut the government's assertions and dismissed the habeas petition. The Supreme Court reversed. The Court found that resolution of a due process challenge such as Hamdi's required balancing Hamdi's private interest, the risk of erroneous deprivation of that interest, and the competing interests of the government. Emphasizing the importance of maintaining due process safeguards during periods when the national security is threatened, the Court held "that a citizen detained seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker." 542 U.S. at 533.

As a response to the *Rasul* and *Hamdi* decisions, the Deputy Secretary of Defense announced the establishment of Combatant Status Review Tribunals ("CSRTs") to review determinations by the Department of Defense that the detainees were "enemy

combatants".[6] Section 1005 of the Detainee Treatment Act (DTA) of 2005 provides that the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a CSRT that an alien is properly detained as an enemy combatant.[7] The scope of such an appeal is further limited to a consideration of whether the status determination of the CSRT is consistent with the standards and procedures specified by the Department of Defense for CSRTs.[8]

While the *Rasul* and *Hamdi* cases were making their way through the courts, the Bush administration also established a system of military commissions to try detainees for war crimes and began trial procedures before these commissions.[9] The validity of these military commissions was challenged in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), the case that led to enactment of the Military Commissions Act. The decision completely rejected the Bush's administration's contention that it had inherent authority to establish military commissions to try detainees. The Supreme Court held, *inter alia*, (1) that the Detainee Treatment Act did not deprive the Supreme Court of jurisdiction; (2) that abstention was not appropriate; (3) that the military commissions established by President Bush to try detainees were not expressly authorized by any congressional act; (3) that the procedures of the military commissions violated the Uniform Code of

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[6] Paul Wolfowitz, Order Establishing Combatant Status Review Tribunal (July 7, 2000).

[7] *See* § 1005, Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2680 (2005).

[8] See DTA, § 1005 (e)(2)(C)(i), 119 Stat. at 2742. § 1005(e)(2)(C)(ii) also permits the court to consider whether the CSRT's determination is "consistent with the Constitution and laws of the United States, to the extent they are applicable".

[9] *See* Order Concerning "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism", 66 Fed Reg. 57833 (Nov. 16, 2001); *see also* Department of Defense, Military Commission Order No. 1 (March 21, 2002), superseded by Military Commission Order No. 1 (August 31, 2005).

Military Justice; and (4) that the military commissions did not satisfy the Geneva Conventions. President Bush responded to the *Hamdan* decision by proposing the Military Commissions Act which was enacted by Congress in October, 2006.

The Jurisdictional Framework Established by the Military Commissions Act

The basic intent of the legislation is articulated in the statute's statement of purpose in § 948b which sets forth the jurisdictional framework on which the act proceeds:

> This chapter establishes procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commissions.[10]

There are two central components to the jurisdiction of the military tribunals established by this provision of the MCA. First, the act applies only to aliens, rather than to American citizens.[11] Second, military tribunals established by the statute have jurisdiction over an "unlawful enemy combatant" who is defined to mean:

> (i) a person who has engaged in hostilities or who has purposely and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person

[10] 10 U.S.C.A. § 948b.

[11] "Alien" is defined in § 948a (3): "The term alien means a person who is not a citizen of the United States." 10 U.S.C.A. § 948a (3). Resident aliens are therefore potentially subject to trial by military tribunals. For example, a permanent resident alien residing in New York City is within the class of individuals covered by the statute. Thus, the reach of the act is extremely broad covering not only foreign suspects arrested abroad but also long term residents in the United States whom the government alleges are abetting terrorist causes.

> who is part of the Taliban, al Qaeda, or associated forces); or
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> (ii) a person who, before, on, or after the date of enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by the Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.[12]

Military Commissions Act § 948a (1). In turn, a "lawful enemy combatant" is defined as

> (A) a member of the regular forces of a State party engaged in hostilities against the United States;
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> (B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or
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> (C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.[13]

Military Commissions Act § 948a (2). Whether or not the accused is an "unlawful enemy combatant" will generally not be decided by the Commission itself but rather by a Combatant Status Review Tribunal. § 948d (c) provides that:

> A finding, whether before, on, or after the date of enactment of the Military Commissions Act of 2006, by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy

[12] 10 U.S.C.A. § 948a (1).

[13] 10 U.S.C.A. § 948a (2).

> combatant is dispositive for purposes of jurisdiction for trial by military commission.[14]

The Habeas Corpus Provisions of the Military Commissions Act

One of the questions left unanswered by the *Rasul* case is whether, if Congress were to amend the habeas statute so as to deny its application to persons held on Guantanamo, such a law would violate the Constitution. The MCA puts this question directly in issue. The MCA eliminates any statutory right to habeas corpus for aliens determined by the government to be enemy combatants. § 7(a) contains a new provision for § 2241 of Title 28 of the U.S. Code to the effect that no court, justice, or judge shall have jurisdiction to 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.[15] That amendment also adds that:

> Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 USC 801 note), no court, justice, or judge shall have the jurisdiction to hear or consider any

[14] 10 U.S.C.A. § 948d (c).

[15] "No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus 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." 28 U.S.C.A. § 2241(e)(1). It should be noted that military commissions have jurisdiction over "unlawful enemy combatants" whereas the jurisdiction of the federal courts is removed by this section over individuals determined to be "enemy combatants." This internal inconsistency in the statute creates a number of troubling questions. For example, what happens to a "lawful enemy combatant"? Why would Congress have intended to strip the federal courts of jurisdiction over such persons? Another problem with the phrase "enemy combatant" is that the term is undefined in the statute. The statute only defines "lawful" and "unlawful" enemy combatants. This lack of definition will make the task of interpreting the statute quite difficult for the courts.

> 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.[16]

As will be discussed below, there is a serious question whether these provisions are consistent with the Suspension Clause of the Constitution. Before considering this question, however, it is appropriate to place this matter in context and consider the scope of the MCA's habeas provisions.

The Scope of the Habeas Provisions of the Military Commissions Act

In order to precisely define the constitutional issues raised by the habeas provision of the Military Commissions Act, it is necessary to consider the scope of this section of the statute. It has been argued that the Military Commissions Act is unconstitutional to the extent that it permits the government to detain an alien residing in the United States without allowing the alien to file a petition for habeas corpus. As Prof. Michael Dorf noted in a recent article:

> The MCA also provides a potential test of the question left open by *Rasul* – the scope of *Eisentrager's* constitutional holding. The MCA eliminates any statutory right to habeas corpus for aliens determined by the government to be enemy combatants, regardless of where they are detained. Absent a valid suspension of the privilege of the writ of habeas corpus, that provision is surely unconstitutional to the extent that it authorizes the government to, say, detain a permanent resident alien residing in New York City, without ever permitting the alien to file a habeas petition. Even construed for all it's worth, *Eisentrager* does not give

[16] 28 U.S.C.A. § 2241(e)(2).

> the government this sort of un-reviewable authority on what is indisputably US soil.[17]

Prof. Dorf's concern is quite understandable since the plain language of the habeas provision appears to apply to aliens who are determined by the government to be enemy combatants, regardless of where they are detained. However, this construction of the language of the habeas provision does not appear to be consistent with its legislative intent. As Judge Motz explained in a recent decision of the Court of Appeals:

> In enacting the MCA, Congress distinguished between those individuals it believed to have a constitutional right to habeas corpus and those individuals it understood had been extended the right of habeas corpus by statute, i.e. 28 U.S.C. § 2241. The supporters of the MCA consciously tracked the distinction the Supreme Court had drawn in *Johnson v. Eisentrager*, 229 U.S. 763, 77-78 (1950), and *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990), between aliens within the United States who became " 'invested with the rights guaranteed by the Constitution to all people within our borders,' " *Verdugo-Urquidez*, 494 U.S. at 271 (quoting *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n. 5 (1953)), and aliens who have no lawful contacts with this country and are captured outside its sovereign territory.

Al-Marri et al. v. Wright, 487 F.3d 160, 171 (4th Cir. 2007). The House Judiciary Committee Report describes the purpose of the habeas provisions of the statute as follows:

> Opponents of the bill claim that it impermissibly "suspends" or limits the right of habeas corpus for individuals held as enemy combatants at Guantanamo Bay or elsewhere. This argument ignores decades of Supreme Court precedent to the contrary. In fact, the case of *Johnson v. Eisentrager* held that United States constitutional protections do not apply to alien prisoners of war held outside our borders. . . . The Committee believes that

[17] Dorf, Michael, *The Orwellian Military Commissions Act of 2006*, 5 *Journal of International Criminal Justice* 10, 15 (2007).

> terrorists and other detainees suspected of planning, supporting, or otherwise participating in attacks against the United States and its citizens have not developed the type of substantial connections with the United States sufficient to justify extending to them all of the protections of our Constitution.[18]

Senator Kyl noted in floor debate:

> Now, let me just proceed from that. Our Supreme Court has held that U.S. constitutional protections do not apply to aliens held outside of our borders. The *Johnson v Eisentrager* case, for example, rejected the view that the U.S. Constitution applies to enemy war prisoners held abroad. . . . So both *Eisentrager* and *Verdugo* are still the governing law in this area. These precedents hold that aliens who are either held abroad or held here but have no other substantial connection to this country are not entitled to invoke the U.S. Constitution.[19]

The *Boumediene v. Bush* Decision

The question of whether MCA § 7 violates the Suspension Clause came before the United States Court of Appeals in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir 2007). Foreign nationals held at Guantanamo Bay had filed petitions for writs of habeas corpus alleging violations of the Constitution, treaties, statutes, the common law, and the law of nations. In the "Al Odah" cases, which consisted of eleven cases involving 56 detainees, Judge Green denied the government's motion to dismiss with respect to claims arising from alleged violations of the 5th Amendment's Due Process Clause and the Third

[18] H.R. Rep. No. 109-664, pt. 2, at 5 (2006). It should be noted that Judge Motz's phrase, "aliens who have no lawful contacts with this country" is considerably different from the committee's phrase, "terrorists and other detainees. . . [who] have not developed the type of substantial connections with the United States sufficient to justify extending to them the protections of our constitution." The Judge's statement of the test is somewhat narrower than that of the House Judiciary Committee.

[19] 152 Cong. Rec. S10268 (daily ed. Sept. 27, 2006) (statement of Sen. Kyl).

Geneva Convention but dismissed all other claims. In the "Boumediene" cases – two cases involving seven detainees – Judge Leon granted the government's motion and dismissed the cases in their entirety. The first question before the Court was whether the MCA applied to the detainees' habeas petitions. § 7(b) states that the amendment to the habeas corpus statute applies to "all cases, without exception, pending on or after the date of enactment." The detainees argued that their cases were not covered by this language. The Court disagreed and found that Congress revoked all federal jurisdiction retroactively as to the habeas petitions of detainees held at Guantanamo Bay.

Having determined that the MCA applied to the detainees' cases, the Court reached the question of whether the MCA, in depriving courts of jurisdiction over detainees' habeas petitions, violates the Suspension Clause of the Constitution. The majority concluded that the MCA does not violate the Suspension Clause. The Court noted that the Suspension Clause protects the writ as it existed in 1789 when the first Judiciary Act created the federal courts and granted jurisdiction to issue writs of habeas corpus. After reviewing a number of common law cases, the majority concluded that, ". . . [G]iven the history of the writ in England prior to the founding, habeas corpus would not have been available in 1789 to aliens without presence or property within the United States." 476 F.3d at 990. The Court also relied on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and other cases for the proposition that the Constitution does not confer rights on aliens without property or presence in the United States, citing, in particular, the following language from *Eisentrager*: "If the Fifth Amendment confers its rights on all the world . . . [it] would mean that during the military occupation irreconcilable enemy elements, guerilla fighters, and 'werewolves' could require the American Judiciary to

assure them freedoms of speech, press and assembly as in the First Amendment, the right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments," 476 F.3d at 991.

Judge Rogers dissented from the majority opinion:

> A review of the text and operation of the Suspension Clause shows that, by nature, it operates to constrain the powers of Congress. Prior to the enactment of the MCA, the Supreme Court acknowledged that the detainees held at Guantanamo had a statutory right to habeas corpus. *Rasul*, 542 U.S. at 483-84. The MCA purports to withdraw that right but does so in a manner that offends the constitutional constraint on suspension. The Suspension Clause limits the removal of habeas corpus, at least as the writ was understood at common law, to times of rebellion and invasion, unless Congress provides an adequate alternative remedy. The writ would have reached the detainees at common law and Congress has neither provided an alternative remedy, through the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Div. A, tit. X, 119 Stat. 2680, 2739 ("DTA"), nor invoked the exception to the Clause by making the required findings to suspend the writ. The MCA is therefore void and does not deprive this court or the district courts of jurisdiction.

476 F.3d at 995.

The detainees filed a petition for a writ of certiorari. The Supreme Court initially denied the petition. Generally, the court denies such petitions without comment. In this case, two opinions were issued which accompanied the order denying certiorari. One opinion, issued by Justice Breyer, joined by Justices Ginsburg and Souter, indicated that the cases raised questions justifying the Court's immediate attention. *Boumediene v. Bush*, 127 S. Ct. 1479 (2007). The other opinion was a statement respecting the denial of certiorari issued by Justices Stevens and Kennedy explaining why they voted against

hearing the cases. *Id.* at 1478. They noted that, in their view, the Court should follow its usual practice of requiring the exhaustion of available remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus. *Id.* Linda Greenhouse, in an article in the New York Times, speculated on the real story behind this decision:

> Despite the apparent transparency, the real story was probably one that no Justice acknowledged: the inability of the court's four most liberal members, Justices Stevens, Breyer, Souter and Ginsburg to count on Justice Kennedy's eventual vote . . . While four votes are sufficient to grant a case under the court's rules, five are of course necessary to win it. The liberal justices, or at least their leader, Justice Stevens, may well have decided that refraining at this point was the wisest course, given the risk that the case may have come out the "wrong" way.[20]

However, in an astonishing about face, the Supreme Court issued an order on June 29, 2007, granting rehearing, vacating the order denying certiorari, and granting the petition for a writ of certiorari. *Boumediene v. Bush*, 127 S. Ct. 3078 (2007). Linda Greenhouse explained this reversal as follows, in article in the New York Times on July 3, 2007:

> On June 22, days before the justices were to consider the "petition for rehearing" filed by the detainees' lawyers, those lawyers filed a final brief that included a remarkable document, a description of how the "combatant status review tribunals" worked written by an Army officer, Lt. Col. Stephen Abraham, who had been a member of one. The statement, the detainees' lawyers said in their brief, made it clear that the process was an "irremediable sham."[21]

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[20] *See Supreme Court Turns Down Detainee's Habeas Corpus Case*, Linda Greenhouse, New York Times, April 3, 2007.

[21] *See Clues to the New Dynamic on the Supreme Court*, Linda Greenhouse, New York Times, July 3, 2007.

While it is not possible to know what the justices made of this document, it is possible that Justice Kennedy decided, upon reading the affidavit, that it was appropriate to grant the petition for a writ of certiorari.[22]

The Military Commissions Act and the Suspension Clause

Article I, Section 9, Clause 2 of the Constitution provides: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety requires it." The Supreme Court has held that, at a minimum, the Suspension Clause protects habeas corpus as it existed in 1789, and that access to habeas corpus may not be abridged unless the Congress validly suspends the writ or provides an adequate substitute for habeas review.[23] The majority in *Boumediene* did not reach the question involving the Suspension Clause because it held that, under *Johnson v.*

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[22] The Supreme Court heard argument in *Boumediene v. Bush* on December 5, 2007. A decision in the case is expected before the Court recesses for the summer in June, 2008.

[23] *See Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289, 301(2001); *Swain v. Pressley*, 430 U.S. 372 (1977). Congress generally makes findings of rebellion or invasion when it suspends habeas corpus. In 1863, Congress authorized President Lincoln during the Civil War to suspend habeas. Act of March 3, 1863, ch. 81, 12 Stat. 755 (suspension during civil war). Congress also authorized suspension in 1871 to address problems with the Ku Klux Klan. Act of April 20, 1871, ch. 22, 17 Stat. 13 (authorizing suspension upon proclamation of rebellion during reconstruction). In addition, the writ was suspended in Hawaii and the Philippines. See Act of July 1, 1902, ch. 1369, 32 Stat. 691 (authorizing suspension upon proclamation by President or Governor with approval of the Philippines Commission of rebellion or invasion in the Philippines) and Hawaiian Organic Act, ch. 339, 31 Stat. 141 (1900)(authorizing suspension upon proclamation by Governor of rebellion or invasion). In the MCA the Congress made no findings that rebellion or invasion justified the suspension of habeas corpus.

Eisentrager, the Constitution does not confer rights on aliens without property or presence in the United States.[24]

Therefore, deciding whether the MCA's habeas provisions violate the Suspension Clause involves a consideration of three separate questions. The first question is whether *Johnson v. Eisentrager* is controlling precedent. The second question, since the Suspension Clause protects the writ of habeas corpus as it existed in 1789, is whether the detainees would have had access to the writ in 1789.[25] The final question is whether the Congress has provided an adequate alternative procedure for challenging detention.[26]

In deciding the suspension issue against the detainees, the majority in *Boumediene* relied on *Eisentrager*:

> The detainees encounter another difficulty with their Suspension Clause claim. Precedent in this court and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence in the United States. As we explained in *Al Odah*, 321 F.3rd at 1140-41, the controlling case is *Johnson v. Eisentrager*.

476 F.3d at 991.

In *Eisentrager* German nationals held in custody by the U.S. Army filed habeas corpus petitions. A military commission convicted them of war crimes arising from military activity against the United States in China. They claimed that their convictions violated various provisions of the U.S. Constitution and the Geneva Conventions. The

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[24] *Boumediene v. Bush*, 476 F.3d 981, 991 (D.C. Cir. 2007).

[25] *See Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289, 301 (2001) (". . . [A]t the absolute minimum, the Suspension Clause protects the writ as it existed in 1789.")

[26] Since neither rebellion nor invasion justified the suspension of habeas corpus, the elimination of habeas jurisdiction violates the Suspension Clause unless Congress provided an adequate alternative procedure for challenging detention.

Court of Appeals had found jurisdiction to consider the petitions, finding that "any person who is deprived of his liberty by officials of the United States, acting under purported authority of that government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ." *Eisentrager v. Forrestal*, 174 F. 2d 961, 963 (1949). In reversing that determination, the Court summarized the six critical facts in the case:

> We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a basic constitutional right, to sue in some court of the United States for a writ of habeas corpus. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our 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) and is at all times imprisoned outside the United States.

339 U.S. at 777. On this set of facts the Court concluded there was no right of habeas corpus. The Court rejected the proposition "that the Fifth Amendment confers its rights on all persons, whatever their nationality, wherever they are located and whatever their offenses." 339 U.S. at 783.

The problem with the reliance on *Eisentrager* by the majority in *Boumediene* is that it is clear that at least four justices on the Supreme Court do not agree with its analysis. In *Rasul v. Bush*, 542 U.S. 466, 476 (2004), the Court noted:

> Petitioners in these cases differ from the *Eisentrager* detainees in important respects: they 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.[27]

Admittedly, this language from the *Rasul* decision is dicta. However, it is likely that the four justices who signed the opinion containing this language who are still on the Court would follow the same reasoning if the question of *Eisentrager's* applicability were to come before them again. It should also be noted, however, that both Justices Thomas and Scalia dissented in *Rasul* and found *Eisentrager* directly applicable to the situation of the detainees and, in fact, argued that the majority had overruled *Eisentrager*. 542 U.S. at 479. Moreover, both Chief Justice Roberts and Justice Alito who have joined the Court since the *Rasul* decision could very well side with Thomas and Scalia on this issue.[28]

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[27] This last distinction is particularly cogent. In a recent article Professors Fallon and Meltzer from Harvard Law School argue it makes sense to read *Eisentrager* as holding that aliens detained abroad generally have no constitutional right to habeas while leaving open the possibility that some aliens may have sufficient contacts with the United States to possess constitutional rights. If *Eisentrager* is so interpreted, the professors suggest that it is soundly reasoned: ". . . [I]f habeas were available to non-citizens worldwide, it could in theory (if not always in practice) be pressed. . . in conventional wars, in which there might be thousands of alien captives. . . Moreover, efforts even to entertain petitions by aliens abroad would present practical problems. We have no constituted courts that sit abroad. . . [T]here could be considerable difficulties in litigating, in the U.S., claims pertaining to detentions in distant areas over which American control rests on a temporary and possibly fragile military balance." Richard H. Fallon, Jr. and Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 *Harvard L. Rev*. 2031, 2056-2057 (2007). In light of these concerns, the authors note that it is easy to distinguish *Rasul* from *Eisentrager* based on the special status of Guantanamo Bay: "Under a lease permanently renewable at its own discretion, the U.S. exercises complete control there. . . In these circumstances, a denial of jurisdiction could have established Guantanamo Bay as a permanent law free zone, where the writ of no country's courts would run, in contrast with the traditional situation in which American military detention abroad occurred during wars or occupations with anticipated end points. Moreover, courts and lawyers can safely obtain access to detainees at Guantanamo Bay without the risks . . . that recognition of global habeas jurisdiction over aliens would present." *Id*. at 2059.

[28] Justice Kennedy who may well end up breaking a tie did not join the majority decision in *Rasul* but wrote his own concurring opinion. 542 U.S. at 485. Justice Kennedy's

The same problem pertains to the majority's analysis in *Boumediene* of the second question concerning the Suspension Clause. As noted, in determining the Suspension Clause question, the majority had to decide, since the Suspension Clause protects the writ of habeas corpus as it existed in 1789, whether the detainees would have had access to the writ in 1789. The detainees cited several older British decisions for the proposition that in 1789 the privilege of the writ extended to aliens outside the sovereign's territory. One of these cases, for example, was *Rex v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759). *Schiever* involved a Swedish citizen who wished to enter the English merchant trade. A French vessel took Schiever, who was on a British vessel, prisoner. An English ship captured the French ship and its crew and took them to Liverpool where Schiever was imprisoned. Schiever petitioned for a writ of habeas corpus, claiming he was a citizen of Sweden and only by force entered the service of the French. The Court denied the petition finding reasonable grounds for holding him as a prisoner of war. The majority in *Boumediene* rejected the applicability of this case as well as the other cases relied on by the detainees:

> None of these cases involved an alien outside the territory of the sovereign. Lockington was a resident of Philadelphia. And the three Spanish sailors and Schiever were all held within English sovereign territory. The detainees cite no case and no historical treatise showing that the English common law writ of habeas corpus

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position as expressed in the concurring opinion is similar to that of Meltzer and Fallon (see fn. 27). Justice Kennedy asserted that while generally aliens detained abroad under the *Eisentrager* ruling do not have habeas corpus rights, the *Rasul* case was distinguishable because Guantanamo Bay was "in every practical respect a United States territory." 542 U.S. at 487. Justice Kennedy also noted that Guantanamo Bay detainees were being held indefinitely, noting that, ". . . indefinite detention without trial . . . allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus." 542 U.S. at 488.

> extended to aliens beyond the crown's dominions. Our review shows the contrary. See WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 53 (1980); WILLIAM HOLDWORTH, A HISTORY OF ENGLISH LAW 116-17, 124 (1982 ed.); 3 BLACKSTONE, COMMENTARIES 131 (1768); see also Op. Att'y Gen. 47 (1794); *In Re Ning Yi-Ching*, 56 T.L.R. 3, 5 (Vacation Ct. 1939) (noting prior judge "had listened in vain for a case in which the writ of habeas corpus had issued in respect of a foreigner detained in a part of the world which was not a part of the King's dominion or realm").

However, the majority's conclusion that the detainees would not have had access to the writ in 1789 is again inconsistent with the reasoning of the Supreme Court in *Rasul*:

> Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called "exempt jurisdictions," where ordinary writs did not run, and all other dominions under the sovereign's control. As Lord Mansfield wrote in 1759, even if a territory was "no part of the realm," there was "no doubt" as to the court's power to issue writs of habeas corpus if the territory was "under the subjection of the Crown." *King v. Cowle*, 2 Burr. 834, 854-855, 97 Eng. Rep. 587, 598-599 (K.B.) Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of "the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown." *Ex parte Mwenya*, [1960] 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M.R.).

542 U.S. at 481-482. Justice Breyer in his statement (joined by Justices Souter and Ginsburg) dissenting from the original denial of certiorari in *Boumediene v. Bush*, 127 S. Ct. at 1479 (2007), noted that this reasoning from *Rasul* could very well be applicable in *Boumediene*. As with the first question concerning the Suspension Clause issue, both

Justices Scalia and Thomas disagreed with this conclusion in *Rasul*. Given the presence of two new justices on the Court, it is hard to predict how this issue will be resolved when it is argued.[29]

The final question involved in determining whether the MCA's elimination of habeas corpus for detainees violates the Suspension Clause is whether the CSRT procedures provide an adequate alternative method for the detainees to challenge their detention at Guantanamo. In *Swain v. Pressley*, 430 U.S. 372 (1977), the Court set forth the test to determine whether a statute substituting a remedy for habeas corpus violates the Suspension Clause. The statute in *Swain* provided a collateral remedy for prisoners in custody who had been sentenced by the Superior Court of the District of Columbia. The statute allowed such a prisoner to move for release on the grounds that the sentence had been imposed in violation of the U.S. Constitution or was otherwise unlawful. The statute provided that, unless the files and records in the case demonstrated that the prisoner was entitled to no relief, the court should cause notice to be served upon the prosecuting authority, grant a prompt hearing, determine the issues, make findings of fact and conclusions of law and, if the prisoner's claims were sustained, release the prisoner. The Court upheld the statute against the suspension challenge. It found that the statute expressly allowed the District Court to entertain a habeas application if "it appears that the remedy" provided by the statute was "inadequate or ineffective to test the legality of the (applicant's) detention." 430 U.S. at 381. The court held that the substitution of a

[29] The amicus brief filed by a group of legal historians with the Supreme Court in *Boumediene v. Bush* (available at http://www.abanet.org/publiced/preview/briefs/dec07.shtml#boumediene) contains a detailed analysis of British and American common law habeas proceedings involving aliens detained outside the sovereign's territory.

collateral remedy which is "neither inadequate or ineffective" to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus. *Id.*[30]

The CSRT proceedings do not appear to be an adequate or effective alternative to a habeas corpus proceeding. It is central to a habeas proceeding that a prisoner has an opportunity to challenge the factual assertions of the government. *See Hamdi v. Rumsfeld*, 352 U.S. 507, 537 (2004). In a typical habeas proceeding, the writ is directed to the person having custody of the person detained. *See* 28 U.S.C. § 2243. The person to whom the writ is directed files a "return" with the court explaining the reason for detention; the prisoner then has a right to challenge the factual basis of the government's assertions. *Id.* By contrast, in a CSRT proceeding, it is virtually impossible for a prisoner to challenge the basis for his detention. While the government's case to the tribunal may consist of both classified and unclassified evidence, the detainee only has access to unclassified evidence. *July 29, 2004 Memorandum* (hereinafter cited as *Memorandum*) at E-1, ¶ H (5).[31] There is a rebuttable presumption that the government's evidence is genuine and accurate. *Id.* at E-1, ¶ G (11). Therefore, unlike a habeas proceeding, the burden is effectively on the prisoner to prove why he shouldn't be detained. Moreover, he has no opportunity to challenge the portion of government's case that is based on

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[30] *See also U.S. v. Hayman*, 342 U.S. 205 (1952).

[31] In a July 2004 Memorandum for the Secretary of the Navy, the Secretary of Defense established skeletal procedures for the conduct of CSRT proceedings with respect to foreign nationals held at Guantanamo "to review the detainees' status as enemy combatants." The Secretary of the Navy, who was appointed to operate and oversee the CSRT process, promptly issued a Memorandum specifying detailed procedures which are still in effect. The Secretary of the Navy attached to his memorandum three enclosures which are referred to in the citations below to CSRT procedures as "E-1", "E-2", and "E-3".

classified evidence. These problems are further exacerbated because the case is heard by military officers who are subject to command influence.[32]

The absurdity of a detainee attempting to defend himself from evidence which hasn't been disclosed to him is illustrated by this example of one of the CSRT proceedings given by Judge Green in *In Re Guantanamo Detainee Cases*, 355 F. Supp. 3d 443, 472 (D.D.C. 2005):

> In reading a list of allegations forming the basis for detention of Mustafa Ait Idr, a petitioner in *Boumediene v. Bush*, 04-CV-1166 (RJL), the Recorder of the CSRT asserted, "While living in Bosnia, the Detainee associated with a known Al Qaida operative." In response the following exchange occurred:
> Detainee: Give me his name.
> Tribunal President: I do not know.
> Detainee: How can I respond to this?
> Tribunal President: Did you know the name of anybody that was a member of Al Qaida?
> Detainee: No
> Tribunal President: No?
> Detainee: No. . . I asked the interrogators to tell me who the person was. Then I could tell you if I might have known this person, but not if the person is a terrorist. Maybe I knew the person as a friend. . . But I do not know if this person is Bosnian, Indian, or whatever. If you tell me the name, then I can respond and defend myself against this accusation.

To some extent it is understandable that the government would be reluctant to share classified evidence with a person suspected of terrorism. Such problems could

[32] The military officers who staff CSRTs are far less insulated from command influence than a military judge. A military judge has been certified for judicial duties by the Judge Advocate General for the officer's armed service. To protect their independence military judges are responsible to the Judge Advocate General. This system is designed to protect military judges from command influence and preserves their impartiality. *See* concurring opinion of Justice Kennedy, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2805-2806 (2004); *see also Weiss v. United States*, 510 U.S. 163, 179-181 (1994) (discussing provisions that "insulate military judges from effects of command influence").

possibly be mitigated by sharing such evidence with an attorney representing the detainee. However, under the rules governing the CSRT proceedings, the detainee is not allowed to be represented by counsel. Rather than providing the prisoner with counsel, the rules provide the detainee with a Personal Representative. The Personal Representative is a commissioned officer. *Memorandum* at E-3, ¶ A (1). He is not an attorney and does not have a confidential relationship with the prisoner. *Id.* While the Personal Representative has access to classified evidence, he is not permitted to disclose classified information to the detainee. *Id.* at E-3, ¶ C (4). Thus, it is not possible to view the Personal Representative as a surrogate for the detainee. Judge Green noted these problems in her opinion in *In Re Guantanamo Detainee Cases*, 355 F. Supp. 3d 443, 472 (D.D.C. 2005):

> The CSRT regulations do acknowledge to some extent the detainees' need for assistance during the tribunal process, but they fall far short of the procedural protections that would have existed had counsel been permitted to participate. The implementing regulations create the position of "Personal Representative" for the purpose of "assisting the detainee in reviewing all relevant unclassified information, in preparing and presenting information and in questioning witnesses at the CSRT." July 29, 2004 Implementing Regulations at Enclosure (1), ¶ C (3). But notwithstanding the fact that the Personal Representative may review classified information considered by the tribunal, the person is neither a lawyer nor an advocate and thus cannot be considered an effective surrogate to compensate for a detainee's inability to personally review and contest classified evidence against him. *Id.* at Enclosure (3), ¶ D.

These problems with CSRT proceedings are further aggravated by the possible use of coerced evidence. The use of coerced confessions is not permitted in American courts.

As Justice White noted in *Jackson v. Denno*, 378 U.S. 368, 385 (1963) (citations omitted):

> It is inescapably clear that the 14th Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the "strongly felt attitude of our society that important values are sacrificed when an agency of the government, in the case of securing a conviction, wrings a confession out of the accused against his will . . ."

The Detainee Treatment Act implicitly permits use of statements in CSRT proceedings obtained by coercion. While § 1005(b)(1) requires procedures submitted by the Department of Defense shall ensure that a CSRT assess whether any statement obtained from a detainee was obtained as a result of coercion, the requirement only applies to a proceeding begun after enactment of the statute.[33] Concerns that CSRTs use coerced testimony appear to have some basis in fact. For example, Judge Green noted the allegation of Mamdouh Habib in *In Re Guantanamo Detainee Cases*, 355 F. Supp. 3d 443, 473 (D.D.C. 2005):

> The allegations and factual return of Mamdouh Habib, a petitioner in Habib v. Bush, 02-CV-1130 (CKK) are illustrative in this regard. Mr. Habib has alleged that, after his capture by Allied forces in Pakistan, he was sent to Egypt for interrogation and was subjected to torture there, including routine beatings to the point of unconsciousness. . . Additionally, the petition contends that he was locked in a room that would gradually be filled with water to a level just below his chin as he stood for hours on the tips of his toes. . . He further claims that he was suspended from a wall with his feet resting on the sides of a large electrified cylindrical drum which forced him to either suffer pain from hanging from his arms or pain from electric shocks to his feet.

[33] *See* DTA, § 1005 (b)(2), 119 Stat. at 2741.

Many of these problems in the CSRT procedures were noted in testimony given by Stephen E. Abraham, former reserve military intelligence officer and lawyer who had a role in the process, in a House Armed Services Committee hearing on July 26, 2007. Mr. Abraham testified that CSRT hearings relied on incomplete and dated information, screened by officers who were under intense pressure from their commanders to conclude that the detainees should be held. For example, Mr. Abraham noted that he was assigned to one of the CSRT panels to review the status of a detainee. He stated that there was no credible evidence supporting the allegation that the detainee was a member of the Libyan Islamic Fighting Group. "What purported to be specific statements of fact lacked the most fundamental earmarks of objectively credible evidence," Mr. Abraham noted in his testimony.[34] Mr. Abraham added that the evidence against the detainee often "lacked detail" and consisted of "generalized statements" of culpability, rather than specific evidence. Mr. Abraham indicated that when he asked intelligence agencies if there was evidence that might clear certain detainees, he was told that the evidence that he had been shown was all that he would be shown.[35] "On those occasions when I asked that a representative of the organization provide a written statement that there was no exculpatory evidence, the requests were summarily denied," Mr. Abrahams testified.[36] Mr. Abraham further indicated in an interview with the N.Y. Times that the hearing

[34] Testimony at 10.

[35] Testimony at 8.

[36] *Id.*

process included what amounted to a presumption that the detainees were guilty.[37] As a result, Mr. Abraham noted in the interview, the hearing often had a predictable result, even if there was little specific evidence against the detainee.

None of these problems will be cured by appellate review of a CSRT's determinations. The DTA only permits the D.C. Circuit to review (1) whether the CSRT's determination is consistent with Department of Defense procedures[38] and (2) "whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States". DTA § 1005(e)(2)(C)(ii). This limited review is obviously insufficient to fully test the factual and legal basis for the detention which is the type of review historically conducted by habeas courts. As noted above, the record compiled in CSRT proceedings is inadequate and incomplete. Detainees have no meaningful opportunity to rebut the evidence used against them by the government. The limited review permitted by the statute will not cure the defects of a record based on secret evidence, hearsay, and coerced confessions.

In addition to all of these ways in which the CSRT proceedings do not provide an adequate alternative to habeas corpus proceedings, Professor Dorf noted in the recent article cited above two additional ways in which these proceedings are inadequate substitutes for habeas corpus proceedings:

> First, the MCA expressly strips the federal courts of any and all power to entertain challenges to conditions of confinement. Thus, for example, the federal courts must dismiss a lawsuit filed on behalf of a detainee claiming that he has been tortured in violation of federal law, including

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[37] *See Reserve Officer Criticizes Process of Identifying Enemy Combatants at Guantanamo Bay*, William Glaberson, *New York Times*, June 23, 2007.

[38] *See* DTA § 1005(e)(2)(C)(i).

> the MCA itself.[39] Second, although the MCA and DTA do provide for some judicial review of the decisions of CSRTs, nothing in either statute requires the government to utilize a combatant status review tribunal or its equivalent. The MCA defines an unlawful enemy combatant as someone to be determined to be thus by a CSRT or other competent tribunal or someone who simply meets the Act's definition of unlawful enemy combatant.[40]

The Suspension of Habeas and International Humanitarian Law

While the focus of this article is on the Suspension Clause, it is worth noting that the MCA's elimination of habeas also raises concerns under international humanitarian law. Given the MCA's elimination of habeas corpus, CSRTs have sole authority to define the legality of a detainee's detention. CSRT procedures, however, do not meet the requirements of the Geneva Conventions.

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[39] This provision of the MCA raises its own serious issues. The elimination of judicial review of challenges to conditions of confinement is probably constitutionally infirm, as Fallon and Meltzer note, because, ". . . it contravenes a broad postulate of the constitutional structure of which the Suspension Clause forms a part: that some court must always be open to hear an individual's claim to possess a constitutional right to judicial redress of a constitutional violation. That privilege applies whether the remedy sought is habeas relief, an injunction against unconstitutional conditions of confinement, or some other constitutionally required remedy." *See* Fallon and Meltzer, *op. cit.*, at 2063 (fn. 27).

[40] Dorf, Michael, *The Orwellian Military Commissions Act of 2006*, 5 *Journal of International Criminal Justice* 10, 15-16 (2007). Professor Dorf's reading of the statutory language is possible, but it is probably not the best way to read the statute. While the statute read literally does not require the government to bring an alien before a CSRT whom it wishes to detain, as Fallon and Meltzer note: ". . . [T]he statute need not and should not be read so literally, especially when such a reading would not only produce harsh results but give rise to serious constitutional issues. The statutory framework appears to presuppose, although it does not guarantee, that the government will, in due course, bring before a CSRT aliens whom it wishes to detain without trial either within the United States or at Guantanamo Bay." *See* Fallon and Meltzer, *op. cit*., at 2062 (fn. 27). The Fallon and Meltzer article contains an extensive discussion concerning why such a reading of the statute would raise serious constitutional issues.

During an international armed conflict, Article 5 of the Geneva Convention requires that should a question arise as to whether a combatant who has committed a belligerent act is protected as a prisoner of war, this question should be determined by a tribunal of "competent jurisdiction". However CSRTs have no authority to determine the status of a detainee under the Geneva Conventions; they are only authorized to determine if the detainee is an "unlawful enemy combatant". Moreover, there is a serious question whether CSRTs would qualify as a "competent tribunal". The United Nations Human Rights Committee concluded that CSRTs "may not offer adequate due process", noting the lack of independence from the executive branch and restrictions on the rights of detainees to access evidence as well as possible use of coerced testimony.[41]

As James Stewart concluded in a recent article:

> As a consequence, the MCA's attempt to preclude "alien unlawful combatants" voicing habeas petitions before domestic courts relegates those detainees to a status determination that does not conform to the terms of the Geneva Conventions in substance or form. Again, these

[41] "The Committee is concerned that, following the Supreme Court ruling in *Rasul v. Bush* (2004), proceedings before the Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards (ARBs), mandated respectively to review and determine the status of detainees, may not offer adequate safeguards of due process, due in particular to their lack of independence from the executive branch and the army, restrictions on the rights of detainees to have access to all proceedings and evidence, the inevitable difficulty they face in summoning witnesses and the possibility given to CSRTs and ARBs, under Section 1005 of the 2005 Detainees Treatment Act, to weigh evidence obtained by coercion for its probative value. . . The State Party should ensure that, in accordance with Article 9(4) of the Covenant [of Civil and Political Rights], that persons detained in Guantanamo are entitled to proceedings before a court to decide without delay on the lawfulness of their detention or order their release if the detention is not lawful. Due process, independence of the reviewing court from the executive branch and the army, access of detainees to counsel of their choice and to all proceedings and evidence, should be guaranteed in this regard." *Concluding Observations of the Human Rights Committee, United States of America*, 15 September 2006, CCPR/C/USA/CO/3, § 18, available at http: www.ohchr.org/english/bodies/hrc/hrcs87.htm.

> inconsistencies are a matter of urgent concern since such practices amount to the grave breach of "unlawful confinement". . . [42]

Conclusion

For the reasons set forth above, the elimination of habeas corpus by the Military Commissions Act for those declared to be alien unlawful enemy combatants, at least to the extent that they have substantial connections with the United States or are detained in the United States or at Guantanamo, violates the Suspension Clause of the U.S. Constitution. As the Supreme Court noted in *Rasul v. Bush*, 542 U.S. 466 (2004), *Johnson v. Eisentrager,* 339 U.S. 763 (1950), is distinguishable and does not bar access to American courts on habeas corpus applications by the detainees at Guantanamo Bay. The CSRT proceedings are an utterly inadequate and ineffective substitute for a habeas corpus proceeding. Such proceedings do not provide an opportunity for determining the legality of detention for those declared to be enemy combatants.

Habeas corpus has been one of the basic guarantees of liberty for almost a thousand years in Britain, the United States, and all common law jurisdictions. It is essential to preserving the rule of law. Let us hope that the Supreme Court or the Congress will speedily restore habeas corpus to its rightful place in our constitutional structure.

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[42] James Stewart, *The Military Commission's Act Inconsistencies With the Geneva Conventions: An Overview*, 5 *Journal of International Criminal Law* 26, 36 (2007).