

**Testimony of
Professor Neal Katyal
Georgetown University Law Center
Before the
Senate Armed Services Committee
April 26, 2007**

INTRODUCTION

Thank you Chairman Levin, Senator McCain, and members of the Senate Armed Services Committee for inviting me to speak to you today. I appreciate the time and attention that your Committee is devoting to the legal and human rights crisis surrounding the detainees at Guantánamo Bay.

On November 28, 2001, I testified before the Senate Judiciary Committee about the President's then two-week-old plan to try suspected terrorists before *ad hoc* military commissions. I warned the Committee that our Constitution precluded the President from unilaterally establishing military tribunals and that the structural provisions employed by our Founders required these tribunals to be set up by Congress. On June 29, 2006, the Supreme Court agreed in a case I argued, *Hamdan v. Rumsfeld*.¹ The *Hamdan* decision invalidated the makeshift tribunal scheme devised by presidential fiat alone.

Indeed, every time the Supreme Court has ruled on the merits regarding the Executive Branch's procedures for detainees, it has found them lacking, forcing Congress and the Executive back to the drawing board at great expense to the nation in terms of money, time, and the trust of the American people. Now, as the trials of suspected individuals are once more supposedly about to begin, the failings of this piecemeal strategy are more evident now than ever. The military commission trial system lacks credibility—both Americans and our global neighbors question the motives and methods of the government's prosecutors and interrogators.

Each week, the headlines bring a new report of a major figure in American life coming out to call for the Guantánamo detention facility to be closed. This

¹ 126 S. Ct. 2749 (2006).

week it was someone well known to this Committee, General James Jones, who said that “the U.S. should close the Guantánamo military prison ‘tomorrow.’”² Recent weeks brought reports stating that the current Secretary of Defense, Robert Gates, and the current Secretary of State, Condoleezza Rice, have also called for Guantánamo’s closure.

I believe that both national security and a commitment to justice require—at a minimum—that the military commission trials be moved from Guantánamo to the continental United States. According to front-page news reports, Secretary Gates evidently agrees. The eyes of the world will be on these trials, and it will be extremely detrimental for them to take place in the legal vacuum created by this Administration at Guantanamo.

Furthermore, as I told this Committee back in July 2006, I believe that it would be far better to use our nation’s tried-and-true court-martial institution to try the individuals at Guantánamo. The court-martial system, complemented by the existing federal criminal justice apparatus, provides all the tools needed to bring suspected terrorists to account while protecting national security and counterterrorism efforts. And the court-martial system does not require us to abandon our most deeply held beliefs about what it means to administer justice. Moreover, as I warned the Committee, legislation specifically crafted to target a handful of individuals and do away with important criminal procedure guarantees is not only unnecessary but also unwise. Such a two-tiered justice system threatens our nation’s foundational values, as well as American credibility in the international arena.

Unfortunately, like the Detainee Treatment Act of 2005, the Military Commissions Act of 2006 (MCA) implements precisely such an impoverished two-tiered system. The MCA provides a blunt instrument for a complex operation. It eliminates the right of habeas corpus for a group defined not by objective principle, but rather by the arbitrary judgment of the Executive.³ Under the MCA, the federal courts lack jurisdiction to hear habeas claims from any alien detained

² Neil King Jr., *The Courting of General Jones*, WALL ST. J., Apr. 23, 2007, at A6.

³ The interpretation of the MCA is currently the subject of pending petitions for certiorari before the Supreme Court of the United States in *Hamdan v. Gates* (No. 06-1169). This testimony adopts, *arguendo*, the current controlling interpretation, which has been offered in *Boumediene v. Bush*, No. 05-5062 (D.C. Cir. Feb. 20, 2007), and *Al Odah v. United States*, No. 05-5063 (D.C. Cir. Feb. 20, 2007).

by the United States and determined (by an untested and hastily constructed Executive proceeding) to be an enemy combatant.⁴ And after a trial proceeding at which the Executive acts as judge, jury, prosecutor, and possibly executioner, the MCA allows only for the most cursory review by an independent judicial authority. It lightens the government's burden by casting aside constitutional rights and guarantees as if they are simple inconveniences, the chaff rather than the grain of our democratic order. This is plainly a stop-gap law, designed for expediency and guaranteed convictions, but not for endurance, legitimacy, or justice. In the end, the gravely flawed MCA only burdens this new Congress and the federal courts with divisive litigation. It is a law that not only invites judicial scrutiny, but clamors for it.

Forward-thinking members of the Administration and this Congress have foreseen the end result: a new Supreme Court decision, this year or the next, followed by new legislation, this year or the next, driven by reaction rather than responsibility. This Committee has asked us here today because it is interested in breaking this counterproductive cycle and is considering enacting a bill that makes sense, one that revises the current system to ensure fair trials that our nation can be proud of.

The Founders envisioned a vibrant system of innovation, evolution, and interlocking responsibilities, with Congress at the helm. I applaud this Committee for taking this duty seriously. How can we forget the stirring speech of the great statesman, James Madison, as a young Member of Congress, urging the House of Representatives to determine for itself the deep question of whether the proposed Bank of the United States was constitutional?⁵ The need for new direction, and a return to Madison's view of Congress's role, is apparent.

Last month I testified in the House Armed Services Committee, stating that Congress should act now, rather than later, to restore fundamental rights and establish a framework for the habeas procedures that I believe the Supreme Court

⁴ Indeed, the MCA inexplicably attempts to cement into law the enemy combatant determinations of the Combatant Status Review Tribunals, which were hastily conceived and are notoriously skewed to provide the detainee with little opportunity to disprove the "enemy combatant" allegations against him. See Corine Hegland, *Empty Evidence*, NAT'L J., Feb. 4, 2006.

⁵ James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), *reprinted in* JAMES MADISON, WRITINGS 480 (Jack N. Rakove ed., 1999).

is likely to require when it considers the MCA. The legal challenges to the military trials of suspected terrorists held at Guantánamo will cast a glaring spotlight on every nook and cranny of United States policy in the War on Terror, and the shortcomings present in the current system will be made apparent to all. The military justice system cannot afford another public relations disaster like that following the guilty plea of David Hicks. A politics of responsibility, not reaction, is required.

With that in mind, I would like to offer my thoughts on the most urgent legislative needs at the moment and on the Restoring the Constitution Act.

I. Moving the Trials to the United States Is a First (But Not Last) Step

Defense Secretary Gates has attempted, bravely, to argue out of turn on this issue, and I commend his proposal to transfer all terrorism trials from Guantánamo Bay to the United States. As reported by the *New York Times* last month, the purpose of this move would be to make the trials more credible, as high-level officials (evidently including the Secretary of State) acknowledge that Guantánamo's continuing existence hampers the nation's war effort.⁶ Moving the trials would communicate to the world that America has no intention of relegating these incredibly important trials to a "legal black hole," and that the fundamental trial rights we enjoy at home will not be treated as special privileges, doled out to foreign prisoners at the pleasure of an absentee warden.

However, while the Gates plan would be a first step in signaling the government's intention to integrate these unusual proceedings into our tradition of open, fair adjudication, it would do only a little to substantively further that goal. The MCA denies habeas rights to people based on their citizenship, not on the locus of their detention. An alien detainee on trial in Leavenworth, Kansas, and an alien detainee on trial in Guantánamo are both excluded under the MCA from our legal system's most crucial protections, including habeas corpus. This despite the fact that the writ of habeas corpus has been described by the Supreme Court as the "highest safeguard of liberty" in our system.⁷

⁶ Thom Shanker and David E. Sanger, *New to Job, Gates Argued for Closing Guantánamo*, N.Y. TIMES, Mar. 23, 2007, at A1.

⁷ *Smith v. Bennett*, 365 U.S. 708, 712 (1961).

The Supreme Court has held that geography alone does not create or destroy rights. In *Johnson v. Eisentrager*, the Court determined that enemy aliens held abroad did not have enough of a connection to the United States to be entitled to habeas corpus rights.⁸ While *Eisentrager* suggested that presence on U.S. soil might change the analysis, the Court later held that lawful but involuntary presence in this country does not necessarily entitle an individual to constitutional protection, either.⁹ But, even if geography were determinative, a move from Guantánamo to the United States would itself change only small details: the Court has already determined that the military base is effectively U.S. soil for reviewing detainee claims.¹⁰

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

In addition to the symbolic value, there are also cost and logistical concerns that weigh in favor of Secretary Gates's proposal to move these trials to America. My understanding is that the Department of Defense is currently planning to spend \$15 million to build a new bare-bones modular courthouse for commission cases. These courthouses, as I understand it, won't even have running water. Yet at this very moment, there are already ample courtrooms on highly secure military bases in the United States that could host commission proceedings—and without having to divert any Defense dollars from more pressing concerns.

⁸ 339 U.S. 763 (1950).

⁹ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1991). Notably, however, *Verdugo-Urquidez* did not concern constitutional rights to habeas corpus, but rather Fourth Amendment rights to suppress illegally obtained evidence.

¹⁰ *Rasul v. Bush*, 542 U.S. 466, 480 (2004).

And once a military commission case starts, trying it in the United States would be far less expensive than in Guantánamo. For the military commission hearing in the *Hicks* case that occurred in Guantánamo last month, the military judge, the prosecutors, the defense counsel, their support personnel, and all of the spectators had to fly from Andrews Air Force Base to Guantánamo and back. The only trial participant who was in Guantánamo before the hearing machinery began was the defendant. Moving that one individual to a base on the United States would be far more efficient than flying dozens of individuals back and forth from the continental United States to Guantánamo for every military commission hearing.

Military commission proceedings in the United States would not only be less expensive; they would also be considerably fairer. For example, a witness cannot be subpoenaed to attend a judicial proceeding outside of the United States.¹¹ So a military commission trial in Guantánamo may have to proceed without testimony from a crucial witness due to the lack of subpoena power. But if the trial were held in the United States, witnesses could be subpoenaed to testify. The result is a proceeding that is fairer, more accurate, and more likely to do what a trial is meant to do: find the truth.¹²

Concerns for fairness, accuracy, and preservation of scarce military resources all suggest that commission trials should be held in the United States.

¹¹ See, e.g., Manual for Courts Martial, R. 703, Discussion (“A subpoena may not be used to compel a civilian to travel outside the United States and its territories.”).

¹² Many additional logistical reasons exist to prefer a trial in the United States to one in Guantánamo. Because military defense counsel are not allowed to speak to their clients over the telephone, any time a defense counsel needs to speak to a client in Guantánamo—even for 10 minutes—it requires a four-day round trip. This is time that could be put to far more productive uses if the client were anywhere in the continental United States, where a roundtrip from Washington could easily be accomplished in less than a day. Additionally, in one military commission case, the Presiding Officer realized the afternoon before a hearing that the commission did not have a translator who spoke the accused’s language. If the trial were held anywhere in the United States, a Farsi translator could have been obtained by the next day. But not at Guantánamo. And because of security concerns, scheduled commission proceedings had to be canceled in June 2006 due to the suicides of three detainees at Guantánamo. Holding the cases at Guantánamo thus carries a great risk of disruption due to operational problems—which might multiply if there were to be a mass exodus of refugees from Cuba at any time while the commission system continues in operation.

More than enough high-security military facilities are located throughout the United States to accommodate such proceedings without raising any security concerns. Indeed, Senator McCain has just advocated moving all of the detainees from Guantánamo to Fort Leavenworth.¹³ Securely moving the much smaller group of detainees subject to commission trials to military confinement facilities in the United States is certainly within the Defense Department's capability.

Separately, Congress should provide for expedited judicial review of the Military Commissions Act. After all, that Act will certainly be the subject of continued litigation.¹⁴ The constitutionality of many of its provisions is in serious doubt. Before investing more years and tens of millions of more dollars in a system that might—like its predecessor—ultimately be invalidated, the best way forward is to provide for *expedited* judicial review of the military commission system's constitutionality, much as Congress did when it enacted the Bipartisan Campaign Reform Act of 2002.¹⁵ Congress anticipated a constitutional challenge and set up a system to quickly resolve the Act's enforceability. That approach succeeded spectacularly when the constitutional challenge to the Act moved quickly to the Supreme Court.¹⁶ If Congress were to enact a similar expedited review provision for the Military Commissions Act, then the new system's constitutionality could be quickly assessed. If, as I believe, the new system is unconstitutional, then its defects could be identified and addressed. On the other hand, if the judiciary were to uphold the new system, then it would move forward with greater public and international acceptance because it would have received the Article III courts' seal of approval.

Fortunately, even leaving aside the recent Restoring the Constitution Act introduced by Senator Dodd, there is already a model for such legislation. During the last Congress, now-Chairman Skelton proposed an amendment providing for expedited judicial review for what became the Military Commissions Act of

¹³ *McCain: I Will Close Guantánamo*, UNITED PRESS INT'L, Mar. 19, 2007 (“I would immediately close Guantánamo Bay, move all the prisoners to Fort Leavenworth [Kansas] and truly expedite the judicial proceedings in their cases,” he said.”).

¹⁴ In his *Hamdan* concurring opinion, Justice Kennedy noted that any new commission system enacted by Congress would “require[e] a new analysis consistent with the Constitution and other governing laws.” *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2808 (2006) (Kennedy, J., concurring).

¹⁵ Pub. L. No. 107-155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.).

¹⁶ See *McConnell v. FEC*, 540 U.S. 93 (2003).

2006.¹⁷ Consideration of Chairman Skelton's amendment was not allowed last year. But it represents the best way forward for the new military commission system.

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

II. The Military Commissions Act Is Unconstitutional

The only way to truly solve the problems that the MCA creates is to repeal the entire law and pass one consistent with this nation's Constitution and foundational values. As it stands, the MCA discriminates against people on the basis of alienage, a violation of Equal Protection principles that are deeply ingrained in both our legal culture and our American narrative. And in further contravention of the basic guarantees of a free society, the law burdens the fundamental right of access to the courts. Finally, the commissions sanctioned by the MCA flout international law and dispense with many of the procedures fundamental to the fair administration of justice, including the prohibition on hearsay evidence. To solve these infirmities, Congress should repeal the MCA and pass a law, such as the Restoring the Constitution Act, that uses the existing system of courts-martial as the basis of a legal regime to deal with the Guantánamo detainees.

a. The MCA Establishes Unconstitutional Barriers Based on Alienage

The MCA purports to deny the writ of habeas corpus to any alien detained by the United States. As the text of the MCA makes clear, it is not only those whom the Government has held under its control for years in Guantánamo that have their habeas rights removed. The MCA deprives *all* aliens of those rights,

¹⁷ See 152 CONG. REC. H7508 (daily ed. Sept. 27, 2006).

even lawful resident aliens living within the United States, who are currently determined, or will be determined, by the Executive's makeshift procedures to be "enemy combatants." Citizen detainees remain free to challenge their detention in civilian courts, while alien detainees are now excluded from independent judicial review based on a mere Executive determination of their combatant status that the MCA cements into law.

I believe that such distinctions based on alienage will eventually be struck down by the federal courts. As I explained in my earlier testimony to this Committee, the Equal Protection components of the Fifth and Fourteenth Amendments preclude both the restriction of fundamental rights and, independently, government discrimination against a protected class unless the law in question passes strict scrutiny review. The MCA targets both a fundamental right and a protected class, and as such it simply cannot survive the stringent constitutional standard. The statute purports to restrict the right of equal access to the courts, one of the most fundamental of rights under our legal system. Worse still, the line that divides those who do and do not receive full habeas review under the MCA is based on a patently unconstitutional distinction—alienage. The onus is on this Congress and this Committee to recognize that we can no longer tolerate this unconstitutional deviation from longstanding American law in the current war on terror.

The commissions set up by the MCA, like President Bush's first attempt to set up a system of military commissions, appear to be the first ones in American history designed to apply only to foreigners. The United States first employed military commissions in the Mexican-American war, where "a majority of the persons tried . . . were American citizens."¹⁸ The tribunals in the Civil War naturally applied to citizens as well. And in *Ex parte Quirin*, President Roosevelt utilized the tribunals symmetrically for the saboteur who claimed to be an American citizen as well as for others who were indisputably German nationals, prompting the Supreme Court to hold: "Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war."¹⁹

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

¹⁹ *Ex Parte Quirin*, 317 U.S. 1, 37 (1942).

Those who drafted the Equal Protection Clause knew all too well that discrimination against non-citizens must be constitutionally prohibited. The Clause's text itself reflects this principle; unlike other parts of the Fourteenth Amendment, which provide privileges and immunities to "citizens," the drafters intentionally extended equal protection to all "persons."²⁰ Foremost in their minds was the language of *Dred Scott v. Sandford*, which had limited due process guarantees by framing them as nothing more than the "privileges of the citizen."²¹ This language was repeatedly mentioned in the Senate debates on the Fourteenth Amendment, with the very first draft of the Amendment distinguishing between persons and citizens: "Congress shall have power to . . . secure to all citizens . . . the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty, and property."²² The Amendment's principal author, Representative John Bingham, asked: "Is it not essential to the unity of the people that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States? Is it not essential . . . that all persons, whether citizens or strangers, within this land, shall have equal protection . . . ?"²³

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

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

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

²² AMAR, *supra* note 20, at 173 (quoting a draft of the Fourteenth Amendment).

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

activities. Indeed, both the Executive and Congress appear to believe that citizens and non-citizens pose an equal threat in the War on Terror. Since the attacks of September 11th, the Executive has argued for presidential authority to detain and prosecute U.S. citizens. And in *Hamdi v. Rumsfeld*, the Supreme Court agreed that “[a] citizen, no less than an alien, can be ‘part of or supporting forces hostile to the United States or coalition partners’ and ‘engaged in an armed conflict against the United States.’ . . . [S]uch a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict.”²⁴ Likewise, this body did not differentiate between citizens and non-citizens in the Authorization for the Use of Military Force Resolution, which provided the President with the authority to “use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001.”²⁵

The threat of terrorism knows no nationality; rather, it is a global plague, and its perpetrators must be brought to justice regardless of their country of origin. Terrorism does not discriminate in choosing its disciples and neither should we in punishing those who employ this perfidious and cowardly tactic. If anything, we can expect organizations such as al Qaeda to select, wherever possible, American citizens to carry out their despicable bidding. The Attorney General himself has recently reminded us that “[t]he threat of homegrown terrorist cells . . . may be as dangerous as groups like al Qaeda, if not more so.”²⁶ Given this sensible recognition by all three branches of government that the terrorist threat is not limited to non-citizens, the disparate procedures for suspected terrorist detainees on the basis of citizenship simply make no sense.

²⁴ 504 U.S. 507, 519 (2004).

²⁵ 115 Stat. 224, note following 50 U.S.C. §1541.

²⁶ Alberto Gonzales, U.S. Attorney General, Remarks at the World Affairs Council of Pittsburgh on Stopping Terrorists Before They Strike: The Justice Department’s Power of Prevention (Aug. 16, 2006), transcript available at

http://www.usdoj.gov/ag/speeches/2006/ag_speech_060816.html; see also *Foiled Dirty-Bomb Plot Reveals Chilling New Threats*, USA TODAY, June 11, 2002, at 10A (reporting that when announcing Jose Padilla’s arrest in 2002 for suspicion of planning a dirty bomb attack on U.S. soil, Attorney General John Ashcroft described Padilla’s American citizenship as attractive to al Qaeda because Padilla could move freely and easily within the United States); Jessica Stern, Op-Ed., *Al Qaeda, American Style*, N.Y. TIMES, July 15, 2006, at A15 (expressing concern that al Qaeda is aiming to recruit American citizens for domestic terror attacks).

Further, in the wake of international disdain for and suspicion of the military tribunals authorized by President Bush in his Military Order, our country is already under global scrutiny for its disparate treatment of non-U.S. citizens. The reported Gates plan recognizes, at the very least, that our handling of Guantánamo detainees has garnered (and warranted) bad publicity. A letter signed by dozens of former diplomats that was sent to each of you attests that the Gates plan is critical to remove this credibility gap: “To proclaim democratic government to the rest of the world as the supreme form of government at the very moment we eliminate the most important avenue of relief from arbitrary governmental detention will not serve our interests in the larger world.”²⁷ This asymmetry will not go unnoticed.

We must be careful not to further the perception that, in matters of justice, the American government adopts special rules that single out foreigners for disfavor. If American citizens get a “Cadillac” version of justice, and everyone else gets a “beat-up Chevy,” the result will be fewer extraditions, more international condemnation, and increased enmity towards America worldwide. The recently departed General Counsel of the Navy, Alberto Mora, in an editorial co-written with Ambassador Thomas Pickering, put it well:

Our country’s detention policy has undermined its reputation around the world and has weakened support for the fight against terrorism. Restoring habeas corpus rights would help repair the damage and demonstrate U.S. commitment to a counterterrorism policy that is tough but that also respects individual rights. Congress should restore the habeas corpus rights that were eliminated by the Military Commissions Act, and President Bush should sign that bill into law.²⁸

b. The MCA’s Attempt To Strip Federal Courts of Habeas Jurisdiction over Alien Detainees Is Unconstitutional

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

²⁸ Alberto Mora & Thomas Pickering, *Extend Legal Rights to Guantánamo*, WASH. POST, Mar. 4, 2007, at B7.

Because Congress has not invoked its Suspension Clause power, it may not eliminate the core habeas rights enshrined into our Constitution.²⁹ Rather, absent suspension, the Great Writ protects all those detained by the government who seek to challenge executive detention, particularly those facing the ultimate sanctions—life imprisonment and the death penalty.³⁰ As one of this nation’s greatest legal scholars, Paul Bator, once wrote: “The classical function of the writ of habeas corpus was to assure the liberty of subjects against detention by the executive or the military”

Indeed, even if Congress were to invoke its Suspension Clause power, it lacks carte blanche authority to suspend the writ at will, even in times of open war. Instead, the Constitution permits a suspension of habeas only when in “Cases of Rebellion or Invasion the public Safety may require it.”³¹ In enacting the MCA, Congress made no such finding that these predicate conditions exist. Indeed, even during evident “Rebellion or Invasion,” the Supreme Court has required that congressional suspension be limited in scope and duration in ways that the MCA is not.

First, Congress must tailor its suspension geographically to those jurisdictions in rebellion or facing imminent invasion. Thus, in *Ex parte Milligan*, the Court determined that because Milligan was a resident of Indiana, a state not in rebellion, his right to habeas was protected.³² Like Indiana, “Guantánamo Bay . . . is . . . far removed from any hostilities.”³³ In fact, the detention cells at Guantánamo Bay have served the explicit purpose of holding captured suspects in U.S. custody away from the tumult of the battlefield abroad.

²⁹ If Congress intends to implement its Suspension Clause power, it must do so with unmistakable clarity. See *INS v. St. Cyr*, 533 U.S. 289, 298-300, 305 (2001). This requirement arises not merely from the principle of avoiding serious constitutional questions, but also from the historical understanding of habeas corpus—and suspension—in our country’s history. See *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 14 (2006).

³⁰ Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 475 (1963).

³¹ U.S. CONST. art. I, § 9, cl. 2.

³² 71 U.S. 2, 126 (1866). The Court reached this conclusion even though Congress had authorized a broader suspension. See Act of Mar. 3, 1863, 12 Stat. 755 (authorizing the President to “suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof.”).

³³ *Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring).

Second, Congress may suspend the writ for only a limited time. The MCA, however, has no terminal date and indefinitely denies alien detainees access to habeas corpus. As a result, alien detainees swept into U.S. custody would be left to languish in an extralegal zone, their fundamental rights left to the whim of the Executive, potentially suspended forever. The Constitution simply does not condone the existence of a lawless vacuum within its jurisdiction.

Third, the MCA's jurisdiction-stripping provision not only breaches the geographical and temporal restraints imposed by the Constitution, it also defies the historic scope and purposes of the writ. Habeas rights have extended to every individual in U.S. jurisdiction—citizen or alien, traitor or enemy combatant. *See, e.g., Quirin*, 317 U.S. at 24-25 (deciding habeas corpus application by enemy aliens on the merits, despite a Presidential proclamation to the contrary); *see also In re Yamashita*, 327 U.S. 1, 9 (1946) (stating that Congress “has not withdrawn [jurisdiction], and the Executive branch of the Government could not, unless there was suspension of the writ [of] . . . habeas corpus”); *id.* at 30 (Murphy, J., dissenting) (stating that the majority “fortunately has taken the first and most important step toward insuring the supremacy of law and justice in the treatment of an enemy belligerent” by affording rights of habeas corpus and rejecting the “obnoxious doctrine asserted by the Government”).

The Supreme Court has declared that the judiciary retains the obligation to inquire into the “jurisdictional elements” of the detention of an enemy alien with a sufficient connection to U.S. territory, explaining that “it [is] the alien’s presence within its territorial jurisdiction that [gives] the Judiciary the power to act.”³⁴ Guantánamo Bay is not immune from these dictates of the Constitution. In *Rasul*, the Court rejected the Government’s assertion that Guantánamo is a land outside U.S. jurisdiction.³⁵ Indeed, considering that “[t]he United States exercises ‘complete jurisdiction and control’ over the Guantánamo Bay Naval Base,”³⁶ the Court observed that alien detainees held at Guantánamo are not categorically barred from seeking review of their claims. The majority opinion included a pointed footnote strongly suggesting that the detainees were protected by the Constitution.³⁷ In addition, Justice Kennedy separately concluded that

³⁴ *Johnson v. Eisentrager*, 339 U.S. 763, 775, 771 (1950).

³⁵ 542 U.S. at 480-84.

³⁶ *Id.* at 480.

³⁷ The footnote states:

Guantánamo detainees had a constitutional right to bring habeas petitions based on the status of Guantánamo Bay and the indefinite detention that the detainees faced.³⁸ It makes sense not to constitutionalize the battlefield; but a long-term system of detention and punishment in an area far removed from any hostilities, like that in operation at Guantánamo Bay, looks nothing like a battlefield.

The fact remains that if the military commissions are fundamentally unfair, they are unfair for everyone. It is no more just to subject an alien detainee in Guantánamo Bay to an inferior adjudicatory process than it is to subject a citizen detainee in Norfolk, Virginia to the very same. The MCA, in its attempt to relegate alien detainees to a lesser brand of justice and to eliminate their right to challenge their Executive detention, unconstitutionally tramples on the habeas rights of prisoners held within U.S. jurisdiction. The Constitution will not tolerate such arbitrary exclusions.

Fourth, such restrictive habeas review jeopardizes the finality and confidence surrounding verdicts of the military commissions. If the international community believes the entire process is invalid, we cannot expect it to respect the authority of the commission outcomes. Secretary Gates has recognized that the trials of terror suspects must be credible in the eyes of the world. Removing the trials from Guantánamo would lift at least some of the perception of injustice that currently clouds the proceedings. But to truly bring the military commission system into accord with American values and traditions, detainees must be allowed to test the validity of their detention and trials before judicial authorities independent of the Executive.

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.” 28 U.S.C. § 2241(c)(3). *Cf.* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring), and cases cited therein.

Id. at 484 n.15. This passage certainly contemplates constitutional violations; otherwise the Court's citation to pages in Justice Kennedy's *Verdugo* concurrence would make no sense, as those pages deal exclusively with the Constitution's applicability.

³⁸ *Id.* at 488 (Kennedy, J., concurring in the judgment).

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

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

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

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

d. Congress Should Repeal the MCA and Enact a System To Deal with These Prosecutions Based on the Uniform Code of Military Justice and Courts-Martial.

Contrary to the stark dichotomy presented by the media and talk-show hosts, the choice here is not between the unconstitutional tribunals under the MCA and the civilian justice system with the full panoply of criminal procedure rights possessed by any ordinary defendant. There is a middle way to run these prosecutions that provides the flexibility required to safeguard national security while still employing fair procedures and protecting fundamental rights. It can be

found in the longstanding system of courts-martial set forth in the Uniform Code of Military Justice. As Justice Stevens declared in *Hamdan*, “Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case.”³⁹

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

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

Neither Congress nor the Executive has offered any compelling reason why the established court-martial system would be insufficient to try suspected terrorists. Given its robust safeguards for national security and its careful balance between security and the rights of the defense, the court-martial system is the ideal forum in which to try these cases and the only acceptable one that we have today.

³⁹ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2792 (2006).

III. Congress Must Take the Lead Now To Repeal the MCA

There is a reason why *Law & Order* is one of the longest-running shows on television. Trials are gripping, dramatic, and relatively easy to follow. Unlike detention, which involves little drama and no grand moment of resolution, a trial has developments, recognizable characters, and a climax in the form of a verdict. The military trials of the suspected terrorists housed at Guantánamo will be watched by the world because each trial is a self-contained, symbolic event. We must not forget that in these trials, the United States, not just the detainees it is prosecuting, is also facing judgment.

Changing the background set from Guantánamo to a U.S. military base will not ultimately change the verdict, but it will provide at least an appearance of good faith and greater fairness. It is a crucial first step—arguably even more important than the repeal of the habeas-stripping provisions in the MCA and DTA. Still, with the world watching, Congress must be sure that these trials measure up to the substantive standards, both constitutional and moral, against which we judge our own court system.

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

As I have argued, the likelihood of an adverse Supreme Court ruling on the MCA is high, and Congress will need to return to the drawing board. Intense discussion and compromise followed the Supreme Court decisions in *Rasul* and *Hamdan*, and ultimately Congress updated the law, much the way doctors re-engineer a vaccine, as if the Constitution were a persistent viral strain coming back to haunt it. This Congress has the opportunity to get ahead of the curve to rework the law now, and thereby design a habeas procedure that is consistent with both our national security goals and the Constitution. Or it can wait for yet another Court decision and return to cutting corners and erasing words and commas.

Senator Arlen Specter, the Ranking Member on the Senate Judiciary Committee, put it bluntly: “While this exchange of ideas is surely healthy and appropriate, the conversation has begun to generate diminishing returns.”⁴⁰ No detainee has been tried in the five and a half years since the war on terror began. International perception of the United States remains embarrassingly low for a country that has always been the world’s champion of democracy and the rule of law.

IV. The Restoring the Constitution Act of 2007

Senator Dodd has introduced legislation that would remedy the constitutional problems I have pointed out. It makes significant changes in the following four arenas:

Detentions: The Act would restore habeas corpus rights to detainees, establish a definition of “enemy combatant” that attempts to prevent the arbitrary detention of people who are captured outside the zone of war, and eliminate the unconstitutionally disparate treatment of aliens and citizens.

Trials: The Act would ban the use of evidence obtained by torture and coercion, and apply the procedures and evidentiary rules of our court-martial system to the military trials, subject to exceptions only when the Secretary of Defense and the Attorney General have both considered the case. It would also help level the playing field between the prosecution and the defense by making it easier to challenge hearsay evidence.

Appeals: The Act would channel judicial review of these trials to the Court of Appeals for the Armed Forces, which has handled highly sensitive cases relating to this country’s military operations for the past half century. Outside the trial context, any challenges to the Military Commissions Act would be heard by a three-judge panel of the federal district court for the District of Columbia on an expedited schedule, with direct review by the Supreme Court. This system, which is currently in place for voting rights cases, guarantees immediate resolution of questions implicating fundamental rights.

⁴⁰ Brief Amicus Curiae of United States Senator Arlen Specter in Support of Petitioners at 19, *Boumediene v. Bush*, 127 S.Ct. 1478 (2007) (No. 06-1195).

International Obligations: The Act would require genuine compliance with the Geneva Conventions, preventing the President from interpreting them without the input of the other branches. It would also classify cruel, inhuman, and degrading treatment as a war crime, and bring our definition of this treatment in line with the longstanding interpretations in treaty law.

In short, the Restoring the Constitution Act would restructure, from the ground up, our current legal system for detainees in the war on terror. By restoring habeas corpus and implementing greater procedural protections, it ensures greater credibility for the trials and any eventual convictions that result. By providing for expedited review, it enables resolution of difficult issues that have thus far held up this country's ability to do justice in the war on terror. It is the type of legislation that leaders throughout the world have asked Congress to provide, and the type of legislation that our nation's proud tradition demands.

As with any legislation that makes deep structural changes to constitutionally sensitive policy, the Restoring the Constitution Act would benefit greatly from the addition of a sunset clause. Setting a time limit on the law would not only ensure quicker passage of this necessary legislation; it is also the smartest move to make when there are long time-horizons involved. Just as the PATRIOT Act's sunset clause permitted review and ultimately rejection of provisions that were out of step with court decisions and the changing national security landscape, a sunset clause in Senator Dodd's bill would allow future revision once we see how these trials operate in practice.

I ask the members of this Committee to realize the power that lies in your hands—the power to ensure the safety of our troops, the values they defend with their lives, and the dignity of our entire nation. As Senator John Warner eloquently put it last summer, “The eyes of the world are on this nation as to how we intend to handle this type of situation and handle it in a way that a measure of legal rights and human rights are given to detainees.”⁴¹ We are here now, ten months after the Supreme Court decision in *Hamdan*, and nearly six years after the horrible attacks of September 11th, and *still no trials have begun*. Yet the eyes of the world continue to watch Guantánamo Bay. For that reason (among many

⁴¹ Remarks of Sen. John Warner, *Hearing on the Future of Military Commissions To Try Enemy Combatants*, July 13, 2006.

others), I applaud Secretary Gates, members of this Committee, Senator Dodd, and all others in our government who recognize that the only thing worse than making a mistake is failing to correct it when you still have the chance.

Thank you.