

The Military Commissions Act - Question & Answers

The Center For Constitutional Rights

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What New Powers does the Military Commissions Act give to the President? What other objectionable provisions does it include?

- It authorizes the suspension of habeas corpus for non-citizens, including legal permanent residents, in U.S. custody
- It authorizes the President to detain anyone, including U.S. citizens, without charge by designating them enemy combatants or unlawful enemy combatants
- It authorizes the President to determine what constitutes torture.
- It authorizes the use of evidence obtained by coercion
- It authorizes the use of hearsay
- It authorizes retroactive immunity for U.S military and intelligence officials for abuses that occurred at sites such as, Abu Ghraib, Guantánamo, Bagram and secret CIA facilities.
- The definitions of rape and sexual assault are narrower than under international law and have higher thresholds for proof.

How does the Military Commissions Act violate the law?

- It violates the Suspension Clause of the Constitution by denying non-citizens any meaningful opportunity to challenge the legality of their detention
- It violates the 6th Amendment by allowing classified evidence which the accused can only see in summary
- It violates the 4th Amendment by allowing evidence obtained by coercion or without a warrant or probable cause
- It violates the Geneva Conventions by watering down humanitarian law protections of Common Article 3 and by effectively granting a retroactive amnesty to U.S. officials who have tortured detainees

What is the Writ of Habeas Corpus?

- Habeas Corpus, which has its origins in the Magna Carta of 1215, is the "Great Writ" that protects people from arbitrary arrest, disappearance and indefinite detention without charge. The cornerstone of Western justice, it is essential to the idea that laws-not individuals, be they Presidents or kings-govern a land.

What will happen to the cases of detainees who have already petitioned

a court for a writ of Habeas Corpus?

- While it is unclear how the government will seek to apply the new law, or what impact it will have on pending cases, the laws states that the suspension of habeas corpus is retroactive

- This challenge will most likely occur first in the *Al Odah v. United States of America* and *Boumediene v. Bush*, consolidated cases brought on behalf of 53 Guantánamo detainees, which are pending before the Court of Appeals in Washington, DC. · It is likely that the Government will ask for these cases to be dismissed shortly after the MCA is signed

What is the basis for challenging the "habeas stripping" provision of the MCA?

- The habeas-stripping provision of the MCA (section 6) violates the Suspension Clause of the U.S. Constitution by denying non-citizens any meaningful opportunity to challenge the legality of their detention.
- The Suspension Clause specifically permits a suspension of habeas corpus only when "in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. If Congress intends to suspend habeas corpus, it must do so with unmistakable clarity. Congress has not made any finding that this is a time of invasion or rebellion in which the public safety may require a temporary suspension of habeas. Even Ken Starr acknowledged that this is not such a time in his recent letter to Congress opposing the habeas-stripping provision in the MCA. · There are additional constitutional challenges to the MCA, including a possible equal protection challenge since it treats citizens and non-citizens differently.

Does the suspension clause cover non-citizens?

- Yes. Where the Constitution applies, it protects everyone equally. Indeed, it forbids the government from denying individuals the equal protection of the laws based on their citizenship. Nor as a matter of policy should we have two tiers of laws for people in this country.

What are the details of the two new cases CCR filed on behalf of detainees before the bill was signed into law?

Mohammed v. Rumsfeld · There are an estimated 500 men detained in U.S. custody at Bagram Air Force base in Afghanistan. Though some have been held for years, none of these men has ever received a hearing of any sort. Bagram has been the site of notorious examples of abuse - including abuses that led to the December 2002 deaths of two Afghan detainees · On October 2, CCR filed a habeas corpus petition in federal court in Washington, D.C. on behalf of 25 people being held at

Bagram. Mohammed v. Rumsfeld directly contests the MCA's denial of due process to non-citizens held in U.S. custody. · Mohammed v. Rumsfeld is a natural extension of the Supreme Court's decision in Rasul v. Bush, which held that Guantánamo detainees have the right to challenge their detention in the federal courts through habeas corpus Khan v. Bush · On October 3, 2006, CCR filed a habeas corpus petition in the D.C. District Court in Washington, D.C., on behalf of Majid Khan (Khan v. Bush), one of the 14 'ghost detainees' President Bush recently transferred to Guantánamo. The petition challenges the constitutionality of denying non-citizen detainees the right of habeas corpus. · Mr. Khan was imprisoned in secret CIA detention for 3 1/2 years and subjected to "alternative interrogation methods" that amount to torture. He has never been formally charged with a crime or declared an enemy combatant. · Khan v. Bush squarely challenges the legality of the CIA's secret prisons, and the likely torture and abuse of the detainees who "disappeared" and were held in those prisons overseas for several years.

These cases were filed before enactment of the MCA in order to preserve any possible legal arguments that our clients might have to challenge the retroactive application of the law, including, for example, challenges to the new expansive definition of "unlawful enemy combatant" and the purported suspension of habeas corpus for any non-citizen detained by the United States anywhere in the world.

· As far as we know, everyone at Guantánamo has had a CSRT except for the fourteen detainees who were transferred there from the CIA secret prisons. · CSRT's were established under the Detainee Treatment Act (DTA) and provide extremely limited review of CSRT determinations and are not an adequate substitute for habeas corpus. · A CSRT is a "non-adversary" hearing conducted pursuant to rules and procedures that are unfair in design and biased in practice. For example, under the CSRT rules and procedures, every detainee is: (a) Denied access to counsel; (b) Denied the right to see the evidence against him; (c) Denied the right to confront, or even know the identity of, his accusers; (d) Denied the right to call witnesses; (e) Denied the right to present evidence; (f) Denied the right to know how the military collected evidence; and (g) Denied an impartial tribunal because the CSRT must presume that evidence against a detainee (which he has not seen) is genuine and accurate.

· The DTA only allows challenges to (1) whether the military complied with its own flawed CSRT procedures for making enemy combatant determinations, and (2) whether those procedures comply with the Constitution and laws of the United States. But President Bush claims that our laws do not protect detainees, and the MCA even goes so far as to authorize him to hold detainees who "awaiting designation" as

enemy combatants.

The CSRT rules and procedures further allow for the consideration of hearsay evidence and/or evidence obtained by torture or coercion. These rules and procedures in practice and effect virtually compel the CSRT conclusion that the detainee is an "enemy combatant."

· In addition, the CSRTS are incapable of determining who is or is not properly detained by the government as an "enemy combatant." Even where a CSRT determines that a detainee is actually innocent of any offense or wrongdoing, that detainee may continue to be held virtually incommunicado, indefinitely, without charge, without access to counsel, and without any meaningful opportunity to challenge the legality of his detention. The government has even held, and continues to hold, detainees who have been determined through the CSRT process to be "no longer enemy combatants" or "non-enemy combatants" without affording them the right to an adequate and meaningful judicial process. (For details see CCR'S report Faces of Guantánamo.

http://ccr-ny.org/v2/reports/docs/FACES_OF_GUANTANAMO.pdf

Could American citizens be held as "enemy combatants" or as "unlawful enemy combatants?"

Yes. The MCA includes language that states that persons who "materially support" hostilities against the U.S. can be labeled and held as 'unlawful enemy combatants.' This might include, for instance, someone who donates money to a charity in Afghanistan that turns out to have some connection to the Taliban or Al Qaeda, or even the organizer of an anti-war rally, without regard to actual hostilities. The definition also presumptively includes members of the Taliban, Al Qaeda, or "associated forces." · The definition allows Bush or Rumsfeld to establish new secret procedures to detain anyone they themselves deem legally and appropriately classified an enemy combatant.

Will CCR and others who represent detainees be immediately denied access to Guantánamo Bay upon signing of the MCA?

· It is not likely, but we will not know for sure until the MCA is signed by President Bush. Even under the limited review allowed by the DTA and the MCA, access by counsel will be necessary. However, the government may try to place even more restrictions on attorneys' ability to meet and communicate with their clients than already exist.

What happens if the Democrats regain control of Congress? Is there any chance they will revisit the MCA?

· Many Senators have publicly acknowledged what Republican Senator Arlen Specter said about the MCA before it was passed that it is "patently unconstitutional on its face." Unfortunately, he and a majority of others in Congress voted for it. By voting for a law that they knew was unconstitutional, they abdicated their constitutional responsibilities and once again compelled the federal courts to step in and uphold the Constitution. If the Democrats regain control of both houses, we hope they will repeal one of the most egregious pieces of legislation since the Alien and Sedition Acts, which now serve as a stain on Congress and our nation's history.

http://ccr-ny.org/v2/legal/Docs/MCA_Signing_Briefing_Paper.pdf

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