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MILITARY COMMISSIONS ACT OF 2006

LEGISLATIVE HISTORY

The Military Commissions Act was prompted, in part, by the U.S. Supreme Court's June 2006 ruling in *Hamdan v. Rumsfeld* which rejected the President's creation of military commissions by executive fiat and held unequivocally that the protections of Common Article 3 of the Geneva Conventions apply in the context of the conflict with Al Qaeda. According to Administration statements, the Act was also prompted by concerns among CIA interrogators that the Detainee Treatment Act's prohibition of torture and coercive interrogations implied potential liability for the perpetrators and disbanding of the program of interrogation in secret CIA prisons.

The MCA was passed in the House by a vote of 250 to 70.[1] The law was passed in the Senate by a vote of 65 to 34.[2] Five proposed amendments failed in the Senate by a narrow margin. Senator Specter (R-PA) proposed an amendment which would have removed the MCA's jurisdiction-stripping provision. This amendment failed by a vote of 51-48.[3] The MCA was signed into law by President Bush on October 17, 2006.

THE LAW

The Military Commissions Act[4]:

- Creates a broad definition of "unlawful enemy combatant" [Sec. 3(a)(1), amending § 948(a)(1)];
- Severely limits the avenues of judicial review for non-citizens held in U.S. custody, aiming to eliminate both habeas and post-release civil challenges, thus effectively sanctioning indefinite detention and abusive interrogations of non-citizens and limiting accountability [Sec. 7];
- Permits coercive interrogations and torture by creating narrow re-definitions, limiting judicial review, and allowing for statements obtained under torture or coercion to be used in prosecutions in some instances [Sec. 3(a)(1), amending §§ 948r, 949a(b)(2)(C), 949d(f)(2)(B-C), 949j(c)(2), 950v(b)(11), 950v(b)(12); Sec. 6(b)(1)(B); Sec. 6(b)(2); Sec. 7];
- Authorizes military commissions which do not satisfy fundamental due process requirements and with procedures which deviate markedly from criminal trials in civilian courts, courts-martial under military law, and international criminal trials [Sec. 3(a)(1), amending §§ 948b(d), 948j, 948q(b), 948r, 949a(b), 949c(b)(4), 949d(d-f), 949j(c-d), 950b, 950c, 950f, 950p(a), 950v(b); Sec. 4(b)];
- Narrows the scope of the War Crimes Act, the U.S. mechanism for criminal prosecution of war crimes [Sec. 6];
- Narrows the definitions of rape and sexual assault or abuse in defining crimes triable by military commission or subject to prosecution under the War Crimes Act [Sec. 3(a)(1), amending § 950v(21-22); Sec. 6(b)];
- Confers retroactive immunity on some U.S. officials who have engaged in illegal actions which have been authorized by the Executive [Sec. 6(b)(2); Sec. 7; Sec. 8]; and
- Limits the use of international law in U.S. courts [Sec. 3(a)(1), amending §§ 948b(f), 948b(g); Sec. 5(a); Sec. 6].

The MCA creates a broad definition of "unlawful enemy combatant," a designation nonexistent in international law.

The MCA creates a dangerously broad definition of "unlawful enemy combatant." The laws of war require that an individual be classified appropriately under the Geneva Conventions and receive all the protections and rights emanating from that designation. The term "unlawful enemy combatant" was created by the Bush Administration and does not exist within international law. Thus, the MCA definition attempts to undermine the laws of war to which all civilized nations have agreed to adhere. The MCA is the first instance in which "unlawful enemy combatant" is statutorily defined.[5]

The MCA defines an unlawful enemy combatant ("UEC") as any person who (1) "has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents," or (2) has been deemed an enemy combatant by a Combatant Status Review Tribunal or "another competent tribunal" under the authority of the President or Defense Secretary.[6]

The first prong of the definition is overbroad. As noted above, it includes detainees engaged in hostilities who, under the Geneva Conventions, would have been classified appropriately, including as prisoners of war or protected persons, i.e., members of armed forces who have laid down their arms or been placed *hors de combat* and would have received all the protections and rights emanating from that designation.[7] For instance, members of the Taliban and "associated forces" now are presumptively classified as unlawful enemy combatants instead of prisoners of war. In addition, it includes those who have *not* been directly involved in hostilities but who have only provided "material support." In other contexts, the U.S. government has interpreted "material support" expansively. For instance, in the refugee context, the provision of a glass of water or an insubstantial "war tax" to a terrorist group, even under duress, has been classified as material support to terrorism.[8]

The second prong of the definition could swallow the first. It delegates to the President or Secretary of Defense relatively unrestricted power to deem anyone an unlawful enemy combatant. It sanctions the determinations made by Guantánamo's much-criticized Combatant Status Review Tribunals (CSRTs).[9] Further, it authorizes the President or Secretary of Defense to create undefined tribunals with the power to classify individuals as "unlawful enemy combatants." The only statutory limitation on these tribunals is that they be "competent."

The definitions established in the MCA are part of the Administration's attempt to develop an entirely new terminology to carry out post-September 11 detention, interrogation and trial operations. In addition to creating a dramatically overbroad "unlawful enemy combatant" definition, the MCA also defines a category of "lawful enemy combatants"[10] that does not correspond to any category in international law. Furthermore, the use of the term "hostilities", which is undefined and open to broad interpretation, is a deviation from "armed conflict" as used in the Geneva Conventions and in international humanitarian law.

The MCA's definition of "unlawful enemy combatant" does not distinguish between citizens and non-citizens. However, all substantive provisions of the Act which limit the rights of unlawful enemy combatants apply exclusively to non-citizens.[11]

The MCA severely limits the avenues of judicial review for non-citizens held in U.S. custody, thus effectively sanctioning indefinite detention and abusive interrogations.

The MCA aims to eliminate judicial review for any claims challenging any aspect of detention or treatment of all non-citizen detainees determined to be "enemy combatants," or "awaiting such determination."[12] This jurisdiction-stripping provision is intended to apply to both habeas and non-habeas claims. The Administration contends that the MCA's jurisdiction-stripping provision applies retroactively to all cases brought on behalf of non-citizens detained since September 11, 2001, anywhere in the world.[13]

The MCA ratifies the severely limited CSRT review process, established under the DTA, as a substitute for *habeas corpus* review. The DTA/MCA situates this review mechanism exclusively in the United States Court of Appeals for the District of Columbia ("D.C. Circuit"). This review mechanism provides for a narrow scope of review and is only applicable once a "final decision" of the CSRT has been rendered. Under the DTA/MCA, the D.C. Circuit is only authorized to consider (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, "to the extent the Constitution and laws of the United States are applicable."[14] As the Government asserts that the laws and Constitution do not apply to detainees held in Guantánamo or outside of the United States, the government contemplates an extraordinarily narrow scope of review.

If the jurisdiction-stripping provision survives judicial review and is held to apply retroactively, it will effectively sanction the indefinite detention and abusive interrogation of non-citizens detained inside and outside the United States. The Executive has asserted that this is a war without end, and that international law permits indefinite detention of those captured in wartime.[15] And while the DTA and other laws prohibit torture and cruel, inhuman or degrading treatment, the lack of judicial review makes this a right without a remedy. Under a broad reading, the President would need only to assert that a non-citizen is "awaiting determination" as to whether or not s/he is an enemy combatant to deny her/him access to the courts.

The MCA permits coercive interrogations and torture by creating narrow re-definitions, limiting judicial review, and allowing for statements obtained under torture or coercion to be used in prosecutions in some instances.

The MCA permits torture and coercive interrogations because the law creates a narrow definition of torture and cruel or inhuman treatment and permits statements obtained under torture or coercive interrogation to be entered into evidence in a military commission without inquiry into the source of the statement. The express limitations on judicial review, discussed above, also limit the avenues for detainees to assert that they have suffered torture or cruel, inhuman or degrading treatment.

First, the MCA creates unacceptably restrictive definitions of torture and cruel or inhuman treatment so that many harsh forms of interrogation would arguably not fit within these definitions.[16] "Torture" and "cruel or inhuman treatment" are narrowly defined to require intentionality, including specific intent to prove torture, and the infliction of, respectively, "severe" or "serious" physical or mental pain or suffering."[17] After the MCA's amendment, "cruel or inhuman treatment" is punishable under the War Crimes Act ("WCA") as a grave breach of Common Article 3 of the Geneva Conventions ("CA3") only to the extent that the act intentionally inflicts "severe or serious physical or mental pain or suffering," as narrowly defined.[18] Under the MCA, for treatment to rise

to the level of "serious" or "severe" physical pain or suffering, it must involve a "substantial risk of death," "extreme physical pain," a "serious" burn or physical disfigurement, or "significant loss or impairment of the function of a bodily member, organ, or mental faculty."[19] For treatment to rise to the level of "serious" or "severe" mental pain or suffering, it must involve "the intentional infliction or threatened infliction" of severe or serious *physical* pain or suffering; the administration of mind-altering substances; a death threat; or a threat of death or severe or serious abuse to another.[20]

Second, the legislation permits evidence obtained by coercion to be used against a defendant in a military commission.[21] While the law explicitly prohibits the introduction of evidence obtained by torture, the MCA defines torture so narrowly that evidence obtained under treatment that amounts to torture could be considered admissible. Further, the MCA explicitly permits the introduction of coerced evidence obtained prior to the enactment of the DTA if a judge considers it reliable and relevant, and coerced evidence obtained after the DTA's enactment if it satisfies the aforementioned requirements and the coercion did not amount to cruel, inhuman or degrading treatment. The Administration would have license to argue that the MCA permits the introduction of evidence obtained through the extremely abusive interrogation techniques believed to have been used most before December 2005.

Third, the MCA limits inquiry into whether evidence was obtained through torture or coercive interrogations.[22] In addition to the general limitations on judicial review discussed above, the MCA denies the defendant the right to challenge classified "sources, methods, or activities." This will limit the defendant's right to ascertain information that would demonstrate that statements admitted into evidence were obtained under torture or cruel, inhuman or degrading treatment.

The MCA includes a provision explicitly prohibiting cruel, inhuman or degrading treatment or punishment.[23] However, this provision is identical to the McCain Amendment to the Detainee Treatment Act and does not add or codify any new protections.[24]

The MCA authorizes military commissions which do not satisfy fundamental due process requirements and with procedures which deviate markedly from criminal trials in civilian courts, courts-martial under military law, and international criminal trials.

The MCA establishes procedures that depart significantly from the domestic and international law requirements of a fair trial. Among the most egregious deviations are the following:

- The MCA denies the accused the right to be informed promptly, at the time of his detention, of the nature and cause of the charges against him. Under the MCA, the accused is informed of the charges against him "as soon as practicable," but no time frame is specified and there are no sanctions or remedy for a delay.[25]
- The MCA explicitly rejects the right to a speedy trial.[26]
- The MCA allows for secret trials. The MCA provides that the military judge "may close all or part of the proceedings of a military commission" to the public.[27] Indeed, the MCA specifies that the trial may continue in the absence of the accused.[28]
- The MCA denies the accused the right to a trial before an independent and impartial court or tribunal. The procedure for appointing military judges is left to the discretion of the Secretary of Defense.[29]

- The MCA allows for offenses that have not previously been considered war crimes to be tried by military commission. This includes "conspiracy" and "providing material support to terrorism."[30] These offenses could lead to charges by military commission for relatively insignificant activities.
- The MCA denies the accused the right to examine or have examined witnesses on his behalf under the same conditions as witnesses against him. Defense counsel are only permitted a "reasonable opportunity" to obtain witnesses and other evidence "as provided in regulations prescribed by the Secretary of Defense."[31]
- The MCA denies the accused full access to exculpatory evidence known to the government.[32]
- The MCA allows for the introduction of certain coerced evidence at military commission hearings.[33]
- The MCA permits the introduction of hearsay and evidence obtained without a warrant or probable cause.[34] The MCA permits the introduction of hearsay if a judge considers it reliable and probative. The MCA permits the introduction of evidence obtained without a warrant or probable cause, even if such evidence was obtained within the United States.
- A military commission defendant can be convicted on the basis of secret evidence. The MCA requires that classified evidence be protected. It requires only that unclassified redactions or summaries be provided to a detainee "to the extent practicable."[35]
- The MCA does not provide for an independent review of convictions and sentences.[36]

The MCA narrows the scope of the War Crimes Act, the U.S. mechanism for criminal prosecution of war crimes.

The War Crimes Act (18 USC 2441) was enacted in 1996 to allow for the criminal prosecution of war crimes within U.S. courts.[37] The WCA provides for the prosecution of war crimes committed inside or outside of the United States when either the victim or the alleged perpetrator is a U.S. national or member of the U.S. Armed Forces. Prior to the MCA, the WCA included in the definition of a war crime any violation of Common Article 3 (CA3) of the Geneva Conventions. Among other protections, CA3 prohibits the use of torture, cruel treatment and other outrages against the dignity of persons in custody.[38] In the ten years since the enactment of the WCA, no person has been criminally prosecuted under its provisions.

In *Hamdan*, the Supreme Court held that the protections of CA3 apply in the context of the conflict with Al Qaeda.[39] This ruling supported the legal argument that, absent an amendment to the WCA, U.S. officials involved in controversial policies and practices carried out as part of the "war on terror" could be held accountable for committing "outrages upon personal dignity, in particular humiliating and degrading treatment" or "violence to life and person," including "cruel treatment and torture."[40]

The MCA limits the scope of offenses which could be prosecuted under the WCA. Prior to the MCA, any violation of CA3 was a criminal act that could be prosecuted under the WCA. That is no longer true. The MCA amended the WCA so that it criminalizes only certain enumerated "grave breaches" of Common Article 3: torture; cruel or inhuman treatment; performing biological experiments; murder, mutilating or maiming; intentionally causing serious bodily injury; rape; sexual

assault or abuse; and hostage-taking.[41] After the MCA, any other violations of CA3 are not defined as "grave breaches" and cannot be prosecuted under the WCA. Furthermore, torture and cruel or inhuman treatment are defined narrowly for the purposes of war crimes prosecutions under the WCA. The MCA's restricted definitions arguably would exempt certain U.S. officials who have implemented or had command responsibility for coercive interrogation techniques from war crimes prosecutions.[42]

Under the MCA, the President has sole discretion to punish other violations of the Geneva Conventions that do not rise to the level of "grave breaches" – including degrading treatment in violation of Common Article 3 – and to approve whatever interrogation techniques he deems legal and appropriate.[43]

The MCA's amendments to the WCA apply retroactively to November 1997.[44] This amendment is designed to protect U.S. government perpetrators of abuses during the "war on terror" from prosecution.

The MCA narrows the definitions of rape and sexual assault or abuse in defining crimes triable by military commission or subject to prosecution under the War Crimes Act.

The definitions of rape and sexual assault or abuse in the MCA are significantly narrower than the definitions of those crimes in international law and in many state laws. Within the MCA, the definition of rape requires penetration of the anus or genitals with a part of the body or a foreign object through force or coercion.[45] The MCA definition of sexual assault or abuse requires physical sexual assault, as well as proof of force, coercion or the threat of force.[46]

These definitions could be interpreted to limit the forms of abuse that can rise to the level of a crime. They exclude "outrages upon personal dignity," which have been used in international tribunals to prosecute such sexual abuse as forced nakedness and other forms of mental abuse. The requirement of sexual contact in the definition of sexual assault and abuse could be interpreted to mean physical contact and exclude abuses such as those witnessed in Abu Ghraib when they do not amount to torture. The definition of rape does not include forced oral copulation despite its inclusion under international law.

Moreover, the requirement for a showing of force, coercion or threat of force ignores that rape occurs whenever the victim does not give free and voluntary consent. International criminal tribunals have recognized that a perpetrator may commit rape, sexual assault, or sexual abuse by taking advantage of coercive circumstances without exercising direct coercion.

The MCA retroactively immunizes some U.S. officials who have engaged in illegal actions which have been authorized by the Executive.

Provisions of the MCA attempt to confer retroactive immunity on officials engaged in abusive interrogations and treatment in Guantánamo, Abu Ghraib, Bagram, and other detention locations around the world.

First, as mentioned above, the MCA amends the WCA to limit the offenses which can be prosecuted. The MCA's amendments to the WCA apply retroactively to November 1997.[47]

Second, the MCA immunizes military and intelligence officials from criminal prosecution for detention and interrogation practices that occurred between September 11, 2001 and the DTA.[48] A provision in the DTA provides protection against prosecution for U.S. Government personnel "engaged in authorized interrogations."[49] The MCA makes this protection retroactive to September 11, 2001.

Finally, the MCA prohibits civil suits "relating to any aspect of the detention, transfer, treatment, trial or conditions of confinement" for non-citizens detained by the U.S. and "determined to be an enemy combatant" or "awaiting such determination."[50] This provision applies to pending and future cases of non-citizens detained since September 11, 2001.[51] While not actively immunizing government officials, this provision serves to further limit challenges to illegal government conduct by cutting off the ability to seek redress through civil proceedings, such as the Alien Tort Statute, U.S. civil rights statutes or the Religious Freedom Restoration Act.

The MCA places limitations on the use of international law in U.S. courts and seeks to re-write U.S. obligations under international law.

The MCA limits the use of international law in domestic courts in two ways. *First*, the MCA prohibits a U.S. court from referring to a foreign or international source of law to determine whether Common Article 3 of the Geneva Conventions has been violated under the War Crimes Act.[52]

Second, the Act prohibits the invocation of the Geneva Conventions as a "source of rights" in any habeas or other civil proceeding for citizens or non-citizens challenging the actions of United States or government officials.[53] Further, the Act prohibits non-citizen detainees who are "subject to trial by military commission" from invoking the Geneva Conventions "as a source of rights," whether or not the detainee is ever actually tried by military commissions. Because of the breadth of the "unlawful enemy combatant" definition, virtually all non-citizen detainees could be deemed "subject to trial by military commission."[54]

Moreover, the MCA seeks to rewrite U.S. obligations under international law. In addition to creating a system which does not satisfy our obligations under international law to provide due process to defendants, the MCA creates a two-tiered system of offences within Common Article 3 of the Geneva Conventions, namely "grave breaches" of Common Article 3, which fall within the scope of the amended War Crimes Act, and other offences, enumerated in CA3, including "outrages upon personal dignity," which do not.[55]

LEGAL CHALLENGES TO THE MCA

CCR is challenging the jurisdiction-stripping provision of the MCA through pending and new habeas petitions. Prior to the enactment of the MCA, CCR filed new habeas petitions on behalf of 25 men detained in the U.S. military base in Bagram, Afghanistan. In addition, CCR filed a habeas petition on behalf of Majid Khan, a Pakistani refugee whose family lives in Baltimore and who was held in CIA ghost detention sites before being transferred to Guantánamo in early September 2006. Finally, immediately prior to, and then subsequent to, the enactment of the MCA, CCR filed a total of thirty *habeas corpus* petitions on behalf of men detained in Guantánamo who had previously only been part of the group-based *Doe v. Bush* litigation. All of these petitions, as well as all pending *habeas corpus* petitions, represent challenges to the MCA because the MCA aims to retroactively strip the courts of habeas jurisdiction.

The challenge to the MCA's jurisdiction-stripping provision is likely to advance most rapidly in the cases of *Al Odah / Boumediene v. Bush*, currently pending in the D.C. Circuit. In November 2006, both the petitioners and the government filed supplemental briefing on the effect of the MCA on the pending *habeas corpus* petitions of the Guantánamo detainees represented in these consolidated cases. The petitioners invoked (1) a statutory challenge asserting that the MCA did not successfully deprive the courts of jurisdiction to consider pending *habeas corpus* petitions; (2) a constitutional challenge asserting that a reading that the MCA successfully stripped the courts of jurisdiction would be an unconstitutional suspension of the writ of *habeas corpus*, and that the limited review mechanism provided by the DTA is not an adequate substitute for the writ; and (3) an international law challenge invoking the Geneva Conventions.

On November 21, 2006, CCR filed *Celikgogus et.al. v. Rumsfeld et.al.*, a damage action brought on behalf of two released Turkish detainees who suffered physical, psychological, and sexual abuse as part of their detention and coercive interrogation by U.S. officials in Kandahar, Afghanistan and Guantánamo Bay. This also will likely represent a challenge to the MCA's broad jurisdiction-stripping provision.

CCR, cooperating counsel and others will surely challenge other components of the MCA as well. The few dozen Guantánamo detainees expected to be tried before a military commission, perhaps including Majid Khan, will undoubtedly challenge components of the Act.

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[1] Thirty-two Democrats voted in favor, 162 against; 218 Republicans voted in favor, 7 against.

[2] All Republicans except Lincoln Chaffee (RI) voted for it, as did twelve Democrats. Democratic Senators Carper (DE), Johnson (SD), Landrieu (LA), Lautenberg (NJ), Lieberman (CT), Menendez (NJ), Nelson (FL), Nelson (NE), Pryor (AR), Rockefeller (WV), Salazar (CO), Stabenow (MI) voted for the MCA.

[3] All Democrats except for Senator Nelson (NE) supported the Specter amendment. Three Republicans – Senators Specter (PA), Smith (OR), and Sununu (NH) – broke rank and supported the amendment.

[4] Military Commissions Act of 2006, Pub. L. No. 109-336, 120 Stat. 2600 (codified in scattered sections of 10 and 18 U.S.C.) [hereinafter "MCA"].

[5] The prior versions of the Military Commissions Act included far narrower definitions of "unlawful enemy combatant." An earlier version of the Administration bill defined an "unlawful enemy combatant" as someone affiliated with a terrorist organization and engaging in or supporting hostilities against the United States. An earlier version of a rival Senate bill limited the definition of "unlawful enemy combatant" to those actually engaged in hostilities.

[6] Sec. 3(a)(1), amending § 948a(1)(A): "The term 'unlawful enemy combatant' means—

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense."

[7] Prior to the "war on terror," the U.S. government adhered to the Geneva Conventions. *See, e.g.*, Memorandum from Colin L. Powell to Counsel to the President, January 26, 2002 (arguing that adopting as a matter of policy the non-applicability of the Geneva Conventions in this instance would "reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general").

[8] *See, e.g.*, Georgetown University Law Center Human Rights Institute, "Unintended Consequences: Refugee Victims of the War on Terror" (2006), *available at* http://www.law.georgetown.edu/humanrightsinstitute/documents/UnintendedConsequences-RefugeeVictimsoftheWaronTerror.pdf.

[9] The CSRTs are grossly lacking in due process. They consistently deny detainees access to exculpatory witnesses, permit the introduction of statements obtained under abusive interrogations, and reach conclusions based largely on classified evidence. *See, e.g.*, Mark Denbeaux, No Hearing-Hearings: An Analysis of the Government's Combatant Status Review Tribunals at Guantánamo, Seton Hall University School of Law (October 2006), *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

[10] Sec. 3(a)(1), amending §948a(2), defines a "lawful enemy combatant" as anyone who is (A) a member of the regular forces of a State party engaged in hostilities against the United States; (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 (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." Combatant Status Review Tribunals in Guantánamo classify individuals as "enemy combatants" or "no longer enemy combatants"; they do not distinguish between lawful and unlawful enemy combatants.

[11] *See* Sec. 3(a)(1), amending § 948c (*alien* UECs are subject to trial by military commission); Sec. 7 (jurisdiction stripping for *aliens* determined to be UECs or "awaiting determination").

[12] Section 7 amends the habeas statute, 28 U.S.C. 2241, to include the following provisions:

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

Section 7(b) states that the jurisdiction-stripping provision "shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001."

[13] CCR asserts that the MCA does not effectively strip jurisdiction over pending habeas petitions. The Department of Justice rejects this interpretation. This issue, along with the constitutionality of the provision, is currently being litigated in *Al Odah / Boumediene v. Bush*. The jurisdiction-stripping provision in the Detainee Treatment Act (DTA), enacted December 30, 2005, was intended to apply only (1) to detainees held in Guantánamo; and (2) to habeas petitions brought after the DTA's enactment. DTA § 1005(e)(1). *See Hamdan v. Rumsfeld*, Slip Op. 11-20 (2006).

[14] DTA § 1005(e)(2).

[15] The MCA even explicitly denies charged defendants the right to a speedy trial.

[16] MCA Sec. 6(b)(1)(B), 6(b)(2) (definition of torture and cruel or inhuman treatment for purposes of defining "grave breaches" of Common Article 3 that constitute "war crimes" subject to prosecution under the War Crimes Act). *See also* MCA Sec. 3(a)(1), amending § 950v(b)(11) (definition of torture and cruel or inhuman treatment in list of offenses chargeable by military commission).

[17] MCA Sec. 6(b)(1)(B)(1)(A-B).

[18] MCA Sec. 6(c)(2).

[19] MCA Sec. 6(b)(2)(D).

[20] MCA Sec. 6(b), referencing 18 U.S.C. § 2340(2).

[21] MCA Sec. 3(a)(1), amending § 948r, § 949a(b)(2)(C).

[22] MCA Sec. 3(a)(1), amending § 949d(f)(2)(B) ("protection of sources, methods, or activities" where classified and where the judge finds that the evidence is "reliable"), MCA Sec. 3(a)(1), amending § 949j(c)(2) (to protect classified information, the military judge "shall authorize trial counsel . . . to protect from disclosure the sources, methods, or activities by which the United States acquired evidence if the military judge finds that the sources, methods, or activities by which the United States acquired such evidence are classified"). *See also* MCA Sec. 3(a)(1), amending § 949d(f)(2)(C) ("trial counsel may object to any question, line of inquiry, or motion to admit evidence that would require the disclosure of classified information").

[23] MCA Sec. 6(c) ("Additional Prohibition on Cruel, Inhuman, or Degrading Treatment or Punishment – (1) In General—No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.").

[24] DTA § 1003.

[25] MCA Sec. 3(a)(1), amending § 948q(b), *see also* MCA Sec. 3(a)(1), amending § 948s.

[26] MCA Sec. 3(a)(1), amending § 948b(d).

[27] MCA Sec. 3(a)(1), amending § 949d(d).

[28] MCA Sec. 3(a)(1), amending § 949d(e).

[29] MCA Sec. 3(a)(1), amending § 948j.

[30] MCA Sec. 3(a)(1), amending §§ 950v(b), 950v(b)(25), 950v(b)(28). *But see* MCA Sec. 3(a)(1), amending § 950p(a) ("The provisions of this subchapter codify offenses that have traditionally been triable by military commissions.").

[31] MCA Sec. 3(a)(1), amending § 949(j).

[32] MCA Sec. 3(a)(1), amending § 949c(b)(4) (prohibiting civilian defense counsel from divulging classified information to "unauthorized" persons, presumably including the defendant); MCA Sec. 3(a)(1), amending § 949d(f), § 949j(c) (protection of classified information); § 949j(d) (exculpatory evidence).

[33] MCA Sec. 3(a)(1), amending § 948r, § 949a(b)(2). *See* torture and coercive interrogation, *below*.

[34] MCA Sec. 3(a)(1), amending §§ 949a(b)(2)(A), 949a(b)(2)(B), 949a(b)(2)(E).

[35] MCA Sec. 3(a)(1), amending § 949d(f), § 949j(c).

[36] MCA Sec. 3(a)(1), amending § 950b and 950f.

[37] 18 U.S.C. § 2441(a) defines an offense that can be prosecuted under the WCA: "Whoever, whether inside or outside the United States, commits a war crime . . . shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death."

A war crime, as defined in subsection (c) prior to the MCA, included "any conduct—

(1) defined as a grave breach" of the Geneva Conventions or protocols to the conventions to which the United States is a party;

(3) "which constitutes a violation of common Article 3" of the Geneva Conventions, "or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict…"

[38] Third Geneva Convention, Art. 3, Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3316, 3320, T. I. A. S. No. 3364 [*hereinafter* CA3]. Common Article 3 provides for minimum standards "in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." Under the protections of CA3, High Contracting Parties are obliged to treat humanely and protect people placed outside of combat by "sickness, wounds, detention, or any other cause" from:

"(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

[39] *Hamdan v. Rumsfeld*, Op. 65-68 (2006).

[40] *See* CA3, *supra*.

[41] MCA § 6(b).

[42] *See* retroactive immunity section, *below*.

[43] MCA Sec. 6(a)(3).

[44] MCA Sec. 6(b)(2).

[45] MCA Sec. 3(a)(1), amending § 950v(21) (defining rape as "forcibly or with coercion or threat of force wrongfully invad[ing] the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused, or with any foreign object"); Sec. 6(b).

[46] MCA Sec. 3(a)(1), amending § 950v(22) (defining sexual assault or abuse as "forcibly or with coercion or threat of force engag[ing] in sexual contact with one or more persons, or caus[ing] one or more persons to engage in sexual contact"); Sec. 6(b).

[47] MCA Sec. 6(b)(2). *See* War Crimes Act section, above.

[48] MCA Sec. 8. The MCA makes DTA § 1004 retroactive for prosecutions relating to actions since September 11, 2001. DTA § 1004 protects U.S. Government personnel from prosecution for their engagement "in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity . . . and that were officially authorized and determined to be lawful at the time that they were conducted. . ." Thus the MCA provides retroactive immunity from criminal prosecution for certain actions of government officials in the "war on terror."

[49] DTA § 1004.

[50] MCA Sec. 7.

[51] MCA Sec. 7(b).

[52] MCA Sec. 6(a)(2) ("No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting" the WCA amendment).

[53] MCA Sec. 5(a) ("No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.").

[54] *See* MCA Sec. 3(a)(1), amending § 948c ("Any alien unlawful enemy combatant is subject to trial by military commission…"); MCA Sec. 3(a)(1), amending § 948d(c) (CSRT determinations "dispositive for purposes of jurisdiction fro trial by military commission").

[55] *See* War Crimes Act section, *above*.