

RESOLUTION 06-11-2007

DIGEST

Enemy Combatants: Right of Habeas Corpus

Recommends that the California congressional delegation sponsor legislation to provide for habeas corpus review of the findings of the military tribunals.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVAL IN PRINCIPLE

History:

Similar to Resolution 05-08-2006, which was approved.

Reasons:

This resolution recommends that the California congressional delegation sponsor legislation to provide for Habeas review of the findings of the military tribunals. This resolution should be approved in principle because it provides judicial review to ensure application of the rule of law.

In *Hamdan v. Rumsfeld* (2006) ___ U.S. ___, 126 S. Ct. 2749, a Yemeni national in custody at an American prison at Guantánamo Bay, Cuba, filed petitions for writs of habeas corpus and mandamus to challenge the Executive Branch's intended means of prosecuting a charge of conspiracy to commit offenses triable by military commission. The Supreme Court held that the system of military tribunals, which was set up by executive order, violated the Geneva Convention. The Court also held that the military tribunal system violated then-existing law, as the use of military tribunals fell outside the jurisdiction of the military courts established by Congress. Finally, the Court held that exclusion of the accused from the proceedings created a presumption that the procedures employed therein violated the law.

The outgoing Congress established a new military tribunal system which expressly divested the judiciary of any jurisdiction to review the actions of these tribunals as to anyone designated as an enemy combatant. This resolution recommends that the California congressional delegation sponsor legislation to strike those portions of the new statute which would otherwise deprive the court of habeas review. Legislation to restore habeas review has now been introduced into the Senate (S.185, The Habeas Corpus Restoration Act of 2007) and the House of Representatives (H.R. 1416). Both pieces of legislation are currently pending and should be supported.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates of California Bar Associations recommends to the California Congressional delegation that legislation be sponsored to amend Section 950j(a) of title 10 United States Code, and Section 2241 of title 28 United States Code, as follows:

- 1 §950j
- 2 (a) FINALITY. - The appellate review of records of trial provided by this chapter,
- 3 and
- 4 the proceedings, findings, and sentences of military commissions as approved, reviewed,

5 or affirmed as required by this chapter, are final and conclusive. Orders publishing
6 the proceedings of military commissions under this chapter are binding upon all
7 departments,
8 courts, agencies and officers of the United States, except as otherwise provided by the
9 President or by a court of the United States in habeas corpus proceedings.

10 ~~(b) PROVISIONS OF CHAPTER SOLE BASIS FOR REVIEW OF MILITARY~~
11 ~~COMMISSION PROCEDURES AND ACTIONS. — Except as otherwise provided in this~~
12 ~~chapter and notwithstanding any other provision of law (including section 2241 of title 28 or~~
13 ~~any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear~~
14 ~~or consider any claim or cause of action whatsoever, including any action pending on or~~
15 ~~filed after the date of the enactment of the Military Commissions Act of 2006, relating to the~~
16 ~~prosecution, trial, or judgment of a military commission under this chapter, including~~
17 ~~challenges to the lawfulness of procedures of military commissions under this chapter.~~

18
19 §2241

20 ~~No court, justice, or judge shall have jurisdiction to hear or consider an application~~
21 ~~for a writ of habeas corpus filed by or on behalf of an alien detained by the United States~~
22 ~~who has been determined by the United States to have been properly detained as an enemy~~
23 ~~combatant or is awaiting such determination.~~

24 ~~(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee~~
25 ~~Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have~~
26 ~~jurisdiction to hear or consider any other action against the United States or its agents~~
27 ~~relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement~~
28 ~~of an alien who is or was detained by the United States has been determined by the United~~
29 ~~States to have been properly detained as an enemy combatant or is awaiting such~~
30 ~~determination.~~

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

Existing Law: Provides a system of military tribunals as the exclusive means of determining the legality of confinement of an alien designated as an unlawful enemy combatant by the President and expressly deprives the federal courts of jurisdiction to hear challenges to such confinement pursuant to a writ of habeas corpus.

This Resolution: Would repeal the ban on habeas corpus jurisdiction over unlawful enemy combatants and expressly provide for review of their detention by writ of habeas corpus.

The Problem: In *Hamdan v. Rumsfeld*, ___ U.S. ___, 126 S. Ct. 2749 (2006), a habeas corpus proceeding, the Supreme Court held that the ad hoc system of military tribunals set up by Executive Order following 9/11 and the invasion of Afghanistan was illegal for a number of reasons. In response to *Hamdan* the lame-duck Republican Congress enacted the Military Commissions Act of 2006, which established a new military tribunal system for reviewing the

status of so-called “unlawful enemy combatants” that purported to correct the shortcomings identified by the Court. Undoubtedly out of concern that the new system would not satisfy the Supreme Court, Congress also stripped the federal courts of jurisdiction to hear challenges to the system or to the confinement of persons as “unlawful enemy combatants” by writ of habeas corpus. Although in some of its provisions, the denial of the right of habeas corpus is limited to aliens designated as enemy combatants, other provisions could be broad enough to include any persons, including U.S. Citizens, among those denied the right of habeas corpus.

The Constitution provides that “[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.” There clearly is no existing rebellion, and to treat the so-called War on Terror as an invasion is to stretch words beyond any rational meaning. Nor has there been any demonstration that public safety requires the suspension of the great writ as to the large and varied class of persons the President, or his delegates, have designated as illegal enemy combatants. If the government has solid evidence that persons so detained have committed illegal acts and are a threat to public safety, it should have no difficulty justifying to a court the continued detention pending trial of such persons. The obvious reason the administration does not want to have to justify its actions in detaining “illegal enemy combatants” is that it has detained such person on flimsy or no evidence.

IMPACT STATEMENT: This resolution does not impact any other law, statute or rule.

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