No. 06-5242

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL INSTITUTE OF MILITARY JUSTICE,

Appellant,

v.

DEPARTMENT OF DEFENSE,

Appellee.

On Appeal from the United States District Court
for the District of Columbia

No. 04cv00312

The Honorable Reggie B. Walton

BRIEF OF AMICUS CURIAE THE CONSTITUTION PROJECT SUPPORTING APPELLANT AND REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(A) Parties and Amici

All parties, intervenors and amici appearing in this court are listed in the Brief for Appellant.

(B) Rulings Under Review

References to the rulings at issue appear in the Brief for Appellant.

(C) Related Cases

This case has not previously been considered by this Court, and Amicus Curiae is unaware of any related cases.

DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the District of Columbia, undersigned counsel certifies that the Constitution Project is a non-profit corporation engaged in advocacy efforts on a range of issues including openness in government. The Project has no corporate parents or subsidiaries, and no publicly held company has an ownership interest in it of any kind or degree.

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INTEREST OF THE *AMICUS CURIAE*

The Constitution Project ("the Project") is an independent think tank that promotes and defends constitutional safeguards. The Project creates coalitions of respected leaders of all political stripes who issue consensus recommendations for policy reforms. After September 11, 2001, the Project created its Liberty and Security Committee, a bipartisan, blue-ribbon committee of prominent Americans, to address the importance of preserving civil liberties as we work to enhance our Nation's security. The committee develops policy recommendations on such issues as the use of military commissions and governmental surveillance policies, which emphasize the need for all three branches of government to play a role in safeguarding constitutional rights. The committee Co-Chairs are David Cole, Professor of Law, Georgetown University Law Center, and David Keene, Chair, American Conservative Union.

In September 2002, the Constitution Project's Liberty and Security Committee released *Recommendations for the Use of Military Commissions*. This report notes the committee's "many concerns" about the rules for military commissions established by the President's Order of November 13, 2001. In addition, in July 2003, the committee released a *Report on First Amendment Issues*. The report urges that in formulating anti-terrorism measures, the federal government should continue to promote openness, robust political dialogue, and freedom of association, and specifically cautions that the "federal government should not weaken FOIA." Most recently, on May 31, 2007, the Constitution Project released its report on *Reforming the State Secrets Privilege*, urging that this privilege be "limited to balance the interests of private parties, constitutional liberties, and national security." The report signers note the importance of limiting secrecy and preserving independent checks to ensure that disclosure of evidence is only restricted when such disclosure would pose a threat to national security.

Members of the Constitution Project's bipartisan Liberty and Security Committee who endorsed all three of these reports include: Morton Halperin, Director of U.S. Advocacy, Open Society Institute; Thomas R. Pickering, Undersecretary of State for Political Affairs 1997-2000, U.S. Ambassador and Representative to the United Nations, 1989-1992; John Podesta, President and CEO, Center for American Progress, White House Chief of Staff, Clinton Administration; William S. Sessions, former Director, Federal Bureau of Investigation, former Chief Judge, U.S. District Court for the Western District of Texas; and John Whitehead, President, Rutherford Institute.

The government's action before the Court today – withholding communications about the controversial military commissions rules – thwarts the Constitution Project's objectives and, because no FOIA exemption justifies this withholding, should be reversed.

All parties consent to the filing of this brief, provided that the time for Appellee's response is calculated from the filing of this brief and not the earlier filing of Appellant's brief.

SUMMARY OF ARGUMENT

This case is about the checks and balances that are essential to our democratic system. The founders intended for each branch of our government to restrain the potential excesses of the other branches and for the public to serve as a check on all of the branches of government. To enhance the public's ability to play this vital role, Congress passed the Freedom of Information Act ("FOIA"), which grants citizens access to government documents. The transparency FOIA provides is particularly important in contexts in which there are few other restraints on executive branch action and which implicate constitutional rights, such as military commission rulemaking.

On November 13, 2001, President Bush issued an Order creating military tribunals outside of the established U.S. court system to try, and potentially sentence to death, certain

suspected terrorists. Thereafter, the Department of Defense ("DoD") promulgated rules implementing this Order that provided details about how the military commissions were to be run. Although these rules affect fundamental life and liberty interests, they were issued without any of the usual procedural guidelines that are essential to democratic rulemaking. Moreover, these rules were not subject to judicial review. Without transparency to the public about how these rules were made, there are effectively no checks on the Executive's establishment of military commissions. Nevertheless, the government denied appellant's FOIA request for communications between DoD and private individuals that were acknowledged by Donald Rumsfeld to have played an important role in the development of the military commission rules. Because of the vital importance of transparency in this context and because of the life and liberty interests at stake here, the Court should reverse the decision below, compel the executive branch to make FOIA work as it was intended – as a mechanism for sharing government information – and require DoD to disclose the letters from the private citizens to the appellant pursuant to FOIA.

ARGUMENT

I. THE PROCEDURES IMPLEMENTING THE PRESIDENT'S MILITARY ORDER DIRECTLY AFFECT LIFE AND LIBERTY INTERESTS AND ARE OF PROFOUND PUBLIC INTEREST

This case directly affects interests of life and liberty. The undisclosed letters at the heart of this appeal concern the establishment of military commissions under President Bush's November 13, 2001 Military Order ("Military Order"). This Order contemplates the indefinite military detention, trial, and even execution of persons subject to the Order. 66 Fed. Reg. 57,833 (Nov. 16, 2001). The Military Order provides no limit on the length of time for which persons subject to it can be detained and asserts that any individual subject to the order shall "be tried by

military commission . . . and may be punished with . . . the penalties . . . including life imprisonment or death." *Id.* These powers are not hypothetical; since September 11, 2001, the Government has indefinitely detained hundreds of people and has stridently tried to assign the authority for trying and sentencing these detainees to military commissions.[1] *See* Adam Liptak, *Detainee Deal Comes with Contradictions*, N.Y. Times, Sept. 23, 2006 at A1.

The Military Order's impact extends beyond the current detainees whose lives and liberty are directly jeopardized by it.[2] Nothing in the Military Order or the subsequent Detainee Treatment Act of 2005 and Military Commissions Act of 2006 suggests that military commissions are more necessary for aliens than for citizens suspected of terrorist activities. *See* Neal Katyal, *Equality in the War on Terror*, 59 Stan. L. Rev. 1365, 1388 (2007). In fact, the Executive has argued for presidential authority to detain and prosecute even U.S. citizens in cases such as *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Therefore, even U.S. citizens, who are not explicitly subject to the Military Order's provisions, have reason to fear the encroachment of their civil rights reflected in its provisions.

Moreover, the regulations ultimately promulgated by DoD to implement the Military Order govern the most fundamental adjudicative rights of our legal system, including the rights to confront an accuser and see adverse evidence, the right of cross examination, the right to a neutral decision maker, and the right to appeal adverse decisions. *See* Eugene R. Fidell, *Military*

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[1] Although military commissions are now governed by the Military Commissions Act of 2006 ("MCA"), that Act also relies upon non-APA rulemaking, and the very same issues of transparency are implicated by the MCA.

[2] This is true in part because the universe of persons covered by the Order is defined as those people about whom the President determines there is reason to believe they might be a member of al Qaeda or have aided a terrorist act. 66 Fed. Reg. 57,833 (Nov. 16, 2001). Because there are no measures established for checking the Executive's discretion, it is easy to see how erroneous decisions could be made that would seriously endanger innocent individuals' freedoms. By restricting the freedoms of arbitrarily selected individuals, the government restricts the freedoms of all who are subject to its jurisdiction.

Commission & Administrative Law, 6 Green Bag 2d 379 (2003); Peter Raven-Hansen, *Detaining Combatants by Law or by Order? The Rule of Lawmaking in the War on Terrorists*. 64 La. L. Rev. 831 (2004). The impairment of these rights is critical to all Americans because it affects the fundamental definition of what American jurisprudence considers "just." *See* Kevin J. Barry, *Military Commissions: Trying American Justice.* Army Law. (Nov. 2003). It is also of significant importance because the regulations' constriction of liberties affects America's stature in the world. The commissions' procedures have engendered international criticism, with Spain and other European countries even expressing reluctance or refusal to extradite terrorists to the U.S. if they were to be tried by military tribunals. *Id.*

Because these issues are so important, they have elicited rancorous public debate and generated great controversy. Over 500 law review articles and a greater number of newspaper and magazine articles have been written on the subject.[3] Moreover, both the American Bar Association ("ABA") and the National Association of Criminal Defense Lawyers have criticized the procedures. Report from Am. Bar Ass'n Task Force on Terrorism and the Law, Report and Recommendations on Military Commissions (Jan. 4, 2002), *available at* http://www.abanet.org/leadership/military.pdf; Nat'l Ass'n of Criminal Def. Lawyers Ethics Advisory Comm., Opinion 03-04 (August 2003), *available at* http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/4eb3faa9f0274aad85256b9c00487c6c/$FILE/op03-04.pdf. The Supreme Court has also joined the debate, finding in *Hamdan v. Rumsfeld* that the military commissions were unauthorized and that the procedures established for the commissions violate American law, the Uniform Code of Military Justice, and, according to many of the justices, the law of nations. 126 S. Ct. 2749, 2786 (2006).

[3] These numbers were generated by searching the Westlaw and Lexis databases for sources involving the terms "'Military commission!' or 'Military Order' and November /s 2001."

II. EXCEPT FOR THE COMMUNICATIONS AT ISSUE IN THIS CASE, THE PUBLIC WAS LARGELY EXCLUDED FROM THE PROCESS OF ESTABLISHING THE MILITARY COMMISSIONS, WHICH WAS CONDUCTED WITHOUT THE MINIMUM PROCEDURAL PROTECTIONS GUARANTEED BY THE RULE OF LAW

Despite the public interest in the establishment of military commissions and the tremendous powers these commissions were granted, the commissions were created without the minimum procedural protections guaranteed by the rule of law. Instead, standard procedural protections and principles of transparency were blatantly circumvented in the creation of the military commission rules.

The practice used in promulgating the Military Order was highly irregular. It deviated significantly from the procedures outlined in the Administrative Procedure Act (APA), which, although not binding in this context, provide generally accepted guidelines for sound and fair lawmaking.[4] It also deviated from internal DoD rulemaking procedures, which are analogous to the APA's provisions. Under the APA, the rulemaking process begins with the government publishing a proposed draft rule. 5 U.S.C. § 553(b). Proposed agency rules are then subject to a pre-publication notice-and-comment period. 5 U.S.C. § 553(c). During this period, interested persons are afforded an opportunity to participate in the rulemaking by submitting comments on

[4] While the government is not technically required to follow the APA's procedures when it makes rules relating to military affairs and military commissions, the APA procedures are fundamentals of sound and fair lawmaking and should have been followed when the government created military commission rules. *See* Peter Raven-Hansen, *Detaining Combatants by Law or by Order? The Rule of Lawmaking in the War on Terrorists*, 64 La. L. Rev. 831, 844 (2004); 5 U.S.C. § 551(1)(F) (excluding military commissions from the APA definition of "agency"); 5 U.S.C. § 553(a)(1) (excepting rules regarding military or foreign affairs functions of the United States from the APA's rulemaking requirements). A broad range of commentators have urged repeal of the APA's exemption of military commissions, in order to subject such rules to public oversight. *See, e.g.* Arthur E. Bonfield, *Military and Foreign Affairs Function Rule-Making Under the APA*, 71 Mich. L. Rev. 221 (1972); *Project, Federal Administrative Law Developments – 1969*, 1970 Duke L. J. 67, 109-10).

the government's draft. *Id.* The government then prepares a final version of the rule, which contains a concise general statement of basis and purpose. *Id.* This resulting rule is published in the Federal Register not less than 30 days before the rule's effective date,[5] and interested persons are provided the right to petition for the amendment or repeal of the rule. 5 U.S.C. § 553(d)-(e). Any changes to rules are made following this same procedure and rules generated in this manner are presumptively subject to judicial scrutiny. 5 U.S.C. §§ 702, 706 (2000).

By providing opportunity for public involvement in the rulemaking process, the APA procedures accomplish three important objectives of the rule of law. First, involving the public may improve the quality of the resulting law because it may force the Executive to change the proposed rule to make it more acceptable to the public by constraining administration overreaching. Peter Raven-Hansen, *Detaining Combatants by Law or by Order? The Rule of Lawmaking in the War on Terrorists*, 64 La. L. Rev. 831, 846 (2004). *See also* Neal Devins, *Congress, Civil Liberties, and the War on Terrorism*, 11 Wm. & Mary Bill Rts. J. 1139, 1149 (2003). Second, by making rules transparently, they welcome the public's opportunity to understand and accept them. This is important because in order for the law to guide people's actions, it must be transparent (publicly available and knowable) and non-arbitrary. Dianne P. Wood, *The Rule of Law in Times of Stress*, 70 U. Chi. L. Rev. 455, 467 (2003). Finally, openness in rulemaking contrasts our values with those of regimes that criminalize public criticism and therefore can be seen as a weapon against terrorism.

Indeed, DoD itself has acknowledged how important such procedures are by adopting processes analogous to those delineated in the APA in a number of contexts. DoD, for example, voluntarily required notice-and-comment procedures for the issuance of some regulations that it

[5] This schedule does not apply to (1) substantive rules that grant or recognize an exemption or relieve a restriction; (2) interpretive rules and statements of policy; and (3) other situations provided by the agency for good cause found and published with the rule. 5 U.S.C. § 553(d).

finds have a substantial and direct impact on the public. 32 C.F.R. Pt. 336 (2002). Furthermore, DoD has edged towards using APA-like notice-and-comment procedures for making changes to the Manual for Courts-Martial ("MCM"), one of the primary authorities governing military justice in the United States. Peter Raven-Hansen, *Detaining Combatants by Law or by Order? The Rule of Lawmaking in the War on Terrorists*, 64 La. L. Rev. 831, 844 (2004). The Joint Service Committee on Military Justice ("JSC"), the entity responsible for recommending changes to the MCM and the Uniform Code of Military Justice ("UCMJ"), is required to receive public input and consider all public comments before finalizing any proposed amendments. Kevin J. Barry, *Modernizing the Manual for Courts-Martial Rulemaking Process: A Work in Progress*, 165 Mil. L. Rev. 237, 256 (2000). In addition, the JSC is required to publish any specific recommendations for changes to the MCM, including a concise statement of the basis and purpose of any proposed change. *Id.* at 255-59.

Given the significant public interest in the military commissions and the procedures by which they were established, as well as DoD's demonstrated respect for standard rulemaking procedures in other contexts, the aforementioned notification, disclosure and publication procedures should have been followed when the government established the existence of, and rules for, the military commissions. Instead, the military commission rules were promulgated in a manner that deviated from almost every good rulemaking norm delineated in the APA. Most of the military commission rules were never published in draft form. Eugene R. Fidell, *Military Commission & Administrative Law*, 6 Green Bag 2d 379, 381-82 (2003). Similarly, with but one exception, comments from the general public were never solicited.[6] *Id.* In fact, there was no public notice of the proposed procedures and DoD explicitly rejected calls for such notification.

[6] On February 28, 2003, DOD circulated for comment a draft of what was to become Military Commission Instruction No. 2, but these comments were not published. Eugene R. Fidell, *Military Commission & Administrative Law*, 6 Green Bag 2d 379, 383 (2003).

The ABA and NIMJ both called for a notice-and-comment period for the implementing rules. *See* Eugene R. Fidell, *Military Commission & Administrative Law*, 6 Green Bag 2d 379, 382 (2003). DoD, however, resisted these requests, informing ABA President Robert E. Hirshon that it had decided against employing notice-and-comment rulemaking for a variety of reasons, including its need to move decisively and expeditiously in the ongoing war against terrorism. Letter from William J. Haynes II, General Counsel, Dep't of Defense, to Robert E. Hirshon, Pres., ABA (Mar. 19, 2002), *cited in* Eugene R. Fidell, *Military Commission & Administrative Law*, 6 Green Bag 2d 379, 382 (2003).[7] Despite this "need to move expeditiously," months went by without further action.

As time passed, a renewed demand arose for notice-and-comment rulemaking. Despite these renewed requests, the suggested notification procedure was only implemented with respect to one of the eight Instructions promulgated pursuant to the Military Order. *See* Press Release, U.S. Dep't of Def., DOD Releases Draft Military Comm'n Instruction, News Release No. 092-03 (Feb. 28, 2003).[8] No drafts of any of the other Instructions were ever made available to the general public for comments. Vanessa Blum, *Tribunals Put Defense Bar in a Bind,* Legal Times, July 4, 2003, at 1, 14; *see also* Neil A. Lewis, *Rules Set Up for Terror Tribunals May Deter Some Defense Lawyers*, N.Y. Times, July 13, 2003, at A1.

In fact, private citizen involvement in the military commission rulemaking was primarily limited to the communications between DoD and the civilian lawyers handpicked

[7] NIMJ had been advised only a few days earlier that DoD had made no decision on NIMJ's similar suggestion. Letter from William J. Haynes II, General Counsel, Dep't of Defense, to Eugene R. Fidell, Pres., NIMJ (Mar. 7, 2002).

[8] Moreover, the government even changed the web version of one of its published rules without notifying the public and without reflecting the change in the formally published version in the Federal Register. *See* Peter Raven-Hansen, *Detaining Combatants By Law or By Order? The Rule of Lawmaking in the War on Terrorists*, 64 La. L. Rev. 831, 836-38 (2004).

by DoD[9] that Donald Rumsfeld referenced in his March 21, 2002 news briefing and that are the subject of this appeal. *See* JA0094-97; Peter Raven-Hansen, *Detaining Combatants by Law or by Order? The Rule of Lawmaking in the War on Terrorists*, 64 La. L. Rev. 831, 837 (2004). These non-governmental individuals were not designated as an advisory committee, their communications have not been published, and the Administration did not discuss them in any subsequent public briefing. The government has refused to even disclose the contents of these communications, prompting the litigation in this matter.

III. TRANSPARENCY BY DISCLOSURE IS ESPECIALLY IMPORTANT IN THE MAKING OF MILITARY COMMISSION RULES BECAUSE OF THE UNAVAILABILITY OF OTHER CHECKS AND BALANCES

The secretive and procedurally deficient manner in which the military commission rules were established denied the public a role in the creation of military commission law. This is problematic because few other checks on the executive branch's authority are available in this context.[10] The lack of such controls increases the importance of requiring greater transparency

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[9] These individuals included Newton Minnow, former Chair of the Federal Communications Commission; Lloyd Cutler, former White House Counsel to President Bill Clinton; William Webster, former federal judge and Director of the Federal Bureau of Investigation; and several retired General Counsels of the Department of Defense. Peter Raven-Hansen, *Detaining Combatants by Law or by Order? The Rule of Lawmaking in the War on Terrorists*, 64 La. L. Rev. 831, 836 (2004). *See also*, Steven Brill, *After: How America Confronted the September 12 Era*, 240-241, 266 (2003).

[10] Our democracy is fundamentally rooted in the idea of divided powers. Each power granted to one area of the government by the public is held in check by parallel powers bestowed elsewhere. It is only through this balance of powers that each branch of the government can function to the full extent of its mandate: an effective government agency is unlikely to relinquish power of its own accord, and must therefore be limited by external forces. *See* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267, 443 (1998) (arguing that democracy is empowered by separation of powers principles).

The need to preserve our system of checks and balances is especially critical in the national security context. In the realm of national security, there is a natural tendency for the executive branch to overreach its authority. *See e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Ex Parte Milligan*, 71 U.S. 2 (1866). Thus, there is an even greater reason to require some measure of external check:

> In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty . . . is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human

in the development of military commission rules and, in particular, for disclosure of the communications by private citizens at issue here.[11]

Two elements – judicial review and procedural transparency – establish a dual framework for effective and efficient public oversight of any Executive action that substantially affects the public interest. These elements do not operate independently, but rather maintain a dynamic relationship: if one element is wanting in a particular instance, the other should be proportionally stronger to ensure effective oversight. *See* Michael Chertoff, *Judicial Review of the President's Decisions as Commander in Chief*, 55 Rutgers L. Rev. 1289, 1302 (2003) (discussing the relationship between procedural regularity and judicial review). The rulemaking process that established the procedures for trial by commission – as opposed to the commission's authority or operation – however, is not subject to the check of judicial review. *See Peter Raven-Hansen, Detaining Combatants by Law or by Order? The Rule of Lawmaking in the War on Terrorists*, 64 La. L. Rev. 831, 843 (2004). This exclusion means that transparency in the rulemaking

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> nature . . . the responsibility for security will naturally amplify the claim that security legitimately raises.

Hamdi, 542 U.S. at 545 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). Failing to enable such external control creates a substantial risk of abuse of power, in addition to running afoul of our fundamental democratic principles. *See* Louis Fisher, *Military Commissions: Problems of Authority and Practice*, 24 B.U. Int'l L.J. 15, 16 (2006). As the Supreme Court recognized in *Hamdi*, "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." 542 U.S. at 536.

[11] The importance of checks and balances in the context of military commission rulemaking was highlighted by the recent decisions of two military judges. On June 4, 2007, these two judges, in separate proceedings, dismissed charges against detainees brought before the military commissions at Guantanamo Bay, Cuba, on the ground that the administration, in its prosecution of the defendants in these cases, had not complied with the Military Commissions Act that Congress passed in the fall of 2006 to regulate the military commissions. Adam Liptak, *Tribunal Sytem, Newly Righted, Stumbles Again*, N.Y. Times, June 5, 2007, at http://www.nytimes.com/2007/06/05/washington/05combatant.html?_r=1&adxnnl=1&oref=slogin&adxnnlx=1181308185-QfViAGStSzx+9P94puL1zQ. Specifically, military prosecutors had failed to show that the detainees were "unlawful enemy combatants" as required for commission jurisdiction under the MCA, rather than merely "enemy combatants." This development demonstrated that when the executive branch seeks to create a new system of military commissions, rigorous checks and balances are critical to ensure compliance with the rule of law.

process provides the chief remaining check on Executive action with regard to setting the commissions' procedures. *See* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within*, 115 Yale L.J. 2314, 2326-27 & n.39 (2006).

Without transparency in the rulemaking process, there would effectively be no checks on or oversight of Executive action. The Supreme Court itself has noted that this is an unacceptable scenario, stating that separation of powers principles dictate that there must be meaningful checks on the Executive's power to establish and govern the commissions:

> Trial by military commission raises separation-of-powers concerns of the highest order. Located within a single branch, these courts carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review . . . concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid. (Internal citations omitted.)

Hamdan, 126 S. Ct. at 2800 (Kennedy, J., concurring in part). Although Justice Kennedy's words applied specifically to the procedures under which military commissions would be *operated,* his caution on preserving checks and balances applies with equal force to the procedures under which such commissions were *developed.*

While it is too late for public comment on the procedures governing the commissions, after-the-fact transparency regarding the establishment of those procedures will partly, but importantly, compensate for the lack of transparency that accompanied the process.

IV. THE FOIA EXEMPTION FOR INTER-AGENCY COMMUNICATIONS SHOULD NOT BE CONSTRUED TO EXEMPT FROM DISCLOSURE COMMUNICATIONS OF HAND-PICKED PRIVATE CITIZENS IN THE CONTEXT OF MILITARY COMMISSION LAWMAKING

Amicus curiae the Constitution Project does not argue for this Court to remedy the deficiencies of DoD's rulemaking process, but this Court should construe FOIA, when its plain

words permit, to further the goal of transparency and thus, derivatively, a system of checks and balances. By finding for appellant in this case, the Court would allow the FOIA statute to work as Congress intended it to: to ensure "an informed citizenry, vital to the functioning of a democratic society." *Dep't of the Interior v. Klamath Water Users Protective Ass'n.*, 532 U.S. 1, 16 (2001). While Congress did provide some exemptions to the FOIA statute, these "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id.* at 7-8 (quoting *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976)). Thus, the Court should read 5 U.S.C. § 552(b)(5)'s exemption from the FOIA requirements of inter-agency and intra-agency communications ("exemption five") as its plain words indicate, and find it does not cover the communications at issue in this case between the government and *private* citizens. If, despite the exemption's plain language, there is ambiguity about the exemption's application to the communications at issue, that ambiguity should be construed against secrecy. As discussed above, transparency is particularly important in the making of military commission law, especially in light of the fact that other checks and balances are unavailable in this context, and that the issues involved in this area of the law are of significant public interest.

In general, FOIA exemptions are to be narrowly construed and any doubts are to be resolved in favor of disclosure. *See, e.g., FBI v. Abramson*, 456 U.S. 615 (1982); *In re Sealed Case,* 121 F.3d 729, 749 (D.C. Cir.1997) ("exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth"); *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350 (2d Cir. 2005) ("[FOIA] exemptions are 'narrowly construed with all doubts resolved in favor of disclosure'").

Especially where the Executive has asserted largely unchecked powers, there is a heightened need to construe FOIA exemptions strictly and allow the public access to the decision-making mechanisms guiding these decisions. As this Court has noted: "the argument for a narrow construction [of a FOIA exemption] is particularly strong in cases . . . where the public's ability to know how its government is being conducted is at stake." *In re Sealed Case*, 121 F.3d at 749.

Additionally, disclosure of government processes is acutely important when those processes potentially violate constitutional rights. As Judge Tatel of this Court wrote in another post-September 11 FOIA case: a "compelling interest" at stake in such cases is "the public's interest in knowing whether the government, in responding to the attacks, is violating the constitutional rights of the hundreds of persons whom it has detained in connection with its terrorism investigation." *Center for Nat'l Security Studies v. U.S. D.O.J.*, 331 F.3d 918, 938 (D.C. Cir. 2003) (Tatel, J., dissenting).

This case meets all of the criteria for a FOIA exemption to be construed strictly. There is a particularly compelling interest in disclosure here, since *no* other information about how the military commission rules were generated has been made publicly available. Without disclosure of the private citizen's communications with DoD, the public's compelling interest in understanding how its government works is completely thwarted. Similarly, the communications at issue in this case affect constitutional rights and our system of checks and balances. The military commissions that they established – and that served as the model for the current commissions under the MCA – affect the life and liberty interests of the detainees.

Because the communications at issue in this case concern rulemaking processes that lacked the requisite checks and balances and implicate constitutional rights, they are of great

public interest. While rules of great public interest should be subject to public notice and comments, these rules were generated without the corresponding public input. The FOIA request at issue partially cures that problem by making the relevant documents, including the communications from the private citizens, available to the public. In light of these factors, the Court should construe exemption five strictly and find that it does not cover the communications at issue in this case.

CONCLUSION

For the foregoing reason, amicus curiae The Constitution Project requests that the decision below be reversed and the letters from the private citizens be disclosed to plaintiff-appellant pursuant to FOIA.

Dated: August 29, 2007

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I hereby certify that on August 29, 2007, I caused copies of the foregoing final Amicus Brief Supporting Appellants and Reversal to be served by first-class mail, postage prepaid on:

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