

HAMDAN V. RUMSFELD AND THE GOVERNMENT'S
RESPONSE: THE MILITARY COMMISSIONS ACT
OF 2006 AND ITS IMPLICATIONS ON
THE SEPARATION OF POWERS

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I. INTRODUCTION

IN the years following September 11, 2001, the branches of the United States Government continue to engage in an ongoing power struggle over what actions should and should not be taken in the name of national security. At the same time, we continue to test the validity of those actions through this country's system of checks and balances. More often than not, that system, as it was originally intended, has proven to be successful. An important example of the system functioning at its best is the 2006 U.S. Supreme Court decision of *Hamdan v. Rumsfeld*.¹ *Hamdan* involved a critical analysis of the allocation of power among Congress, the President, and the judicial system in the war on terror. In a five-three decision, the Court strongly limited the Bush administration's power to convene military commissions for suspected terrorists detained at the U.S. Naval base in Guantanamo Bay, Cuba.² In doing so, the Court made four main findings:

1. The Detainee Treatment Act ("DTA")³ did not suspend judicial review of cases pending at the time the Act was enacted.⁴
2. The Court was not required to abstain from intervening in the ongoing military case.⁵
3. The President did not have congressional authority to convene the military commissions under the Authorization for the Use of Military

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

2. *Id.*

3. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005) (codified as amended in scattered sections of 10, 28, and 42 U.S.C.A.).

4. *Hamdan*, 126 S. Ct. at 2764.

5. *Id.* at 2772.

Force (“AUMF”),⁶ the DTA, or the Uniform Code of Military Justice (“UCMJ”).⁷

4. The military commissions violated the structure and procedures set up by the UCMJ and Common Article 3 of the Geneva Conventions;⁸ further, Common Article 3 applied to the conflict with al Qaeda and was binding on the President and his subordinates.⁹

Nevertheless, by October 2006, both Congress and the President responded to the Court’s decision in *Hamdan* by passing the Military Commissions Act of 2006 (“MCA”).¹⁰ The MCA, among other things, gives explicit authorization for a new type of military commission that is not based on the UCMJ, limits the enforceability of the Geneva Conventions, and attempts to eliminate judicial review of alien detainee proceedings except for military commission trial verdicts.¹¹ There is widespread concern surrounding the constitutionality of various provisions of the Act, including the use of classified information, the suspension of habeas corpus, and the applicability and interpretation of Common Article 3.¹² There is also concern that the Act concentrates too much power in the Executive Branch.¹³ Ironically, because the Court remanded *Hamdan* to the district court for further proceedings, there is a strong possibility that it will test a number of the key provisions of the MCA.¹⁴

6. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

7. *Hamdan*, 126 S. Ct. at 2775. The UCMJ is codified at 10 U.S.C. §§ 801-946 (2000). Established in 1951, the UCMJ revolutionized the procedures, offenses, and punishments available in the military system. See generally INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE (William S. Hein & Co. 2000) (1950) (discussing the history of the UCMJ).

8. *Hamdan*, 126 S. Ct. at 2786; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention].

9. *Hamdan*, 126 S. Ct. at 2796.

10. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.A.).

11. *Id.* at §§ 3, 7, 120 Stat. at 2600-31, 2635-36 (codified as amended at 10 U.S.C.A. §§ 948b(c), 948b(g), 950g(a) (West 2000 & Supp. 2007)).

12. See generally Editorial, *Rushing Off a Cliff*, N.Y. TIMES, Sept. 28, 2006, at A22; Benjamin Davis, *All the Laws but One: Parsing the Military Commissions Bill*, Sept. 25, 2006, <http://jurist.law.pitt.edu/forumy/2006/09/all-laws-but-one-parsing-military.php>; Aziz Huq, *How the Military Commissions Act of 2006 Threatens Judicial Independence: Attempting to Keep the Courts out of the Business of Geneva Conventions Enforcement*, FINDLAW, Sept. 26, 2006, http://writ.news.findlaw.com/commentary/20060926_huq.html; Keith Olbermann, *National Yawn As Our Rights Evaporate*, MSNBC.COM, Oct. 18, 2006, <http://www.msnbc.msn.com/id/15318240>; Anup Shah, *Military Commissions Act 2006—Unchecked Powers?*, ZNET, Oct. 2, 2006, <http://www.zmag.org/content/showarticle.cfm?ItemID=11095>.

13. See, e.g., LOUIS FISHER, MILITARY TRIBUNALS AND PRESIDENTIAL POWER 255 (2005) (“Military tribunals represent an unwise and ill-conceived concentration of power in the executive branch.”).

14. On December 13, 2006, the D.C. District Court held the following:

- (1) As a matter of statutory interpretation and construction, Congress succeeded in removing the court’s statutory habeas jurisdiction over the detainee habeas cases; (2) However, the Military Commissions Act is not a constitutionally valid “suspension” of the writ of habeas

Section II of this comment discusses the Court's analysis and decision regarding the major issues presented in *Hamdan*. Section III examines the factors that influenced the rapid response of the Legislative and Executive Branches in enacting the MCA. This Comment concludes by analyzing the MCA's effect on judicial independence and arguing that the habeas corpus and Geneva Convention provisions present possible constitutional violations.

II. *HAMDAN V. RUMSFELD*: LIMITING THE EXECUTIVE

A. *Setting the Stage*

Immediately following the September 11, 2001 terrorist attacks on New York City and the Pentagon, Congress authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks ... in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."¹⁵

Roughly two months later, while the United States was engaged in active combat with the Taliban, President Bush bypassed Congress and issued a comprehensive military order that governed the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" ("Military Order").¹⁶ The Military Order set forth the practices and procedures that would govern a new type of military commission convened by the President in Guantanamo Bay, Cuba. President Bush's Military Order closely resembled President Franklin Roosevelt's controversial military order of 1942, which established the military commissions that tried the Nazi saboteurs during World War II.¹⁷ Among the similarities were the number of votes needed to convict and sentence a detainee tried by the commission, the commission's ability to admit evidence that had probative value to a reasonable person, and the prohibition against judicial review.¹⁸ Critics argued that President Bush's Military Order was similarly vague in scope, lacked appropriate procedural safeguards, and concentrated too much power within the Executive.¹⁹

corpus within the meaning of the Suspension Clause; and (3) Nevertheless, *Hamdan* does not have a right to seek such a writ.

Hamdan v. Rumsfeld, 464 F. Supp. 2d 9, 11 (D.D.C. 2006), *appeal filed*, No. 07-5042 (D.D.C. Feb. 13, 2007).

15. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

16. Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 32 C.F.R. 9.1-9.12 (2002). *See also* FISHER, *supra* note 13, at 174-75.

17. FISHER, *supra* note 13, at 168-69. *See also* Frank J. Murray, *Justice to Use FDR Precedent for Military Tribunals*, WASH. TIMES, Dec. 5, 2001, at A1, *available at* <http://www.rense.com/general17/tribasd.htm>.

18. FISHER, *supra* note 13, at 168-69.

19. *Id.* at 172-73.

Meanwhile, in late 2001, Afghan militia forces captured Salim Ahmed Hamdan, a Yemeni citizen and former driver for Osama bin Laden.²⁰ After Hamdan was turned over to the U.S. military, he was detained and subsequently transferred to Guantanamo Bay in 2002.²¹ Nearly a year and a half later, President Bush determined there was reason to believe that Hamdan had participated in terrorism against the United States and was therefore subject to the Military Order.²² The military held him without trial until July 2004 when the Government charged him with “conspiracy to commit terrorism” based primarily on his association with bin Laden.²³

In April 2004, Hamdan filed a petition for a writ of habeas corpus, arguing that neither Congress nor the common law of war authorized the military commissions, and that the procedures the President adopted to try him violated the UCMJ and the Geneva Conventions.²⁴ Following the U.S. Supreme Court’s ruling in *Hamdi v. Rumsfeld*,²⁵ which held that a detainee seeking to challenge his classification as an enemy combatant is entitled to receive notice of the factual basis for his classification and a fair opportunity to rebut the Government’s factual assertions before a neutral decision-maker, Hamdan was granted a review before a Combatant Status Review Tribunal (“CSRT”). Nevertheless, the CSRT agreed with the President’s determination and declared that he was an enemy combatant, and the military further detained him.²⁶

Thereafter, the U.S. District Court for the District of Columbia granted Hamdan’s habeas petition, in part, but upheld his continued detention.²⁷ However, it enjoined any further proceedings by the military commission on two primary grounds. First, the court held that the military commission violated the Third Geneva Convention, which provides that persons with uncertain eligibility for prisoner-of-war status “shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”²⁸ The court held that because Hamdan contested his enemy combatant status,

20. *Hamdan v. Rumsfeld*, 415 F.3d 33, 35 (D.C. Cir. 2005).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Hamdi v. Rumsfeld*, 542 U.S. 507, 535-36 (2004). Writing for the plurality, Justice O’Connor noted:

[W]e necessarily reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for courts in such circumstances.... We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.... Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.

Id.

26. *Hamdan*, 415 F.3d at 36.

27. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 155 (D.D.C. 2004).

28. *Id.* at 161 (quoting Geneva Convention, *supra* note 8).

which a competent tribunal had not yet determined, he was entitled to the same protections of prisoners of war, including trial by a court-martial.²⁹ Second, even if Hamdan did not qualify as a prisoner-of-war, the court found that the military commission procedures were still unlawful because they excluded Hamdan from certain parts of his trial,³⁰ which was directly contrary to UCMJ requirements.

On appeal, the D.C. Circuit unanimously reversed the district court's ruling, holding that Hamdan's trial by military commission was indeed lawful.³¹ It found that the President had not violated the separation of powers doctrine because Congress had expressly authorized the military commissions through the AUMF.³² The court further stated that the Third Geneva Convention was not enforceable in federal court, but rather, such violations should be addressed in the international arena.³³ Alternatively, the court found that even if federal courts could enforce the Third Geneva Convention, the Convention did not apply to Hamdan because the President had determined that Hamdan was not a prisoner of war.³⁴ The court noted that the Third Geneva Convention did not apply to al Qaeda because the Convention recognizes only two types of conflicts: "cases of ... armed conflict which may arise between two or more of the High Contracting Parties"³⁵ and "armed conflict not of an international character."³⁶ Because al Qaeda was not a signatory to the Convention, it was not a contracting party.³⁷ Moreover, the court stated that President Bush had determined that the conflict at issue was international in scope and did not qualify as an "armed conflict not of an international character."³⁸

Given the large disparity between the district court and the D.C. Circuit's rulings, the U.S. Supreme Court granted certiorari in an attempt to clarify the law governing the war on terror and to determine the scope of the President's power during such volatile times.³⁹ In doing so, the Court recognized "that trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure."⁴⁰

B. Threshold Issue: Does the U.S. Supreme Court Have Jurisdiction?

Shortly after the Supreme Court agreed to hear Hamdan's case, Congress passed the DTA, which appeared to strip the Court of jurisdiction to hear the

29. *Id.* at 165.

30. *Id.* at 172.

31. *Hamdan v. Rumsfeld*, 415 F.3d 33, 38 (D.C. Cir. 2005).

32. *Id.* at 37-38.

33. *Id.* at 40.

34. *Id.*

35. *Id.* at 41 (quoting Geneva Convention, *supra* note 8, art. 2).

36. *Id.* (quoting Geneva Convention, *supra* note 8, art. 3).

37. *Id.*

38. *Id.*

39. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2762 (2006).

40. *Id.* at 2759 (citing *Ex parte Quirin*, 317 U.S. 1, 19 (1942)).

case.⁴¹ The DTA addressed a variety of issues related to Guantanamo detainees. It restricted the “treatment and interrogation of detainees in U.S. custody,” provided “procedural protections for U.S. personnel accused of engaging in improper interrogation,” and set “forth certain ‘procedures for the status review of detainees outside the United States.’”⁴²

The DTA provisions specifically called into question in *Hamdan* were sections 1005(e)(1) and 1005(h)(2). Section 1005(e)(1), which was essentially a jurisdiction stripping provision, provided that “no court ... shall have jurisdiction to hear or consider ... an application for ... habeas corpus filed by ... an alien detained ... at Guantanamo Bay.”⁴³ Section 1005(h)(2) provided that sections 1005(e)(2) and (3), which gave the D.C. Circuit *exclusive* jurisdiction to review final decisions of combatant status review tribunals and military commissions, “shall apply with respect to any claim whose review is ... pending on” the DTA’s effective date.⁴⁴

It was undisputed that Congress’ intent regarding the inclusion of subsections (e)(2) and (e)(3) within subsection (h)(2) was unambiguous and, therefore, was not at issue in *Hamdan*’s case. The Court concluded that Congress wrote both sections to expressly apply to pending cases.⁴⁵ However, it found that the Act was silent about whether subsection (e)(1) also applied to “claims pending on the date of enactment.”⁴⁶ If it did not apply to pending claims, the Supreme Court would have jurisdiction to hear *Hamdan*’s case and to determine the validity of the military commissions. On the other hand, if the subsection did apply, *Hamdan* would undergo trial by military commission and the D.C. Circuit would be his only avenue for redress.⁴⁷ For obvious reasons, *Hamdan* did not favor the latter interpretation.

In addressing the first issue, the Court considered whether the DTA had effectively repealed its jurisdiction to hear *Hamdan*’s case.⁴⁸ Ultimately, the Court denied the Government’s motion to dismiss and held that, for reasons of ordinary statutory construction, the DTA did not repeal its jurisdiction.⁴⁹ It relied heavily on *Lindh v. Murphy*⁵⁰ in concluding that Congress’ deliberate omission of

41. *Id.* at 2762 (citing Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005) (codified as amended in scattered sections of 10, 28, and 42 U.S.C.A.)). See also David Cole, *Why the Court Said No*, N.Y. REV. BOOKS, Aug. 10, 2006, <http://www.nybooks.com/articles/19212>.

42. Detainee Treatment Act §§ 1002-05 (codified as amended at 42 U.S.C.A. §§ 2000dd, 2000dd-1 and 10 U.S.C.A. § 801 (West 2000 & Supp. 2007)).

43. *Id.* at § 1005(e)(1) (codified as amended at 28 U.S.C.A. § 2241 (West 2000 & Supp. 2007)).

44. *Id.* at § 1005(h)(2) (codified as amended at 10 U.S.C.A. § 801 (West 2000 & Supp. 2007)).

45. *Hamdan*, 126 S. Ct. at 2764.

46. *Id.* at 2763.

47. *Id.*

48. *Id.* at 2764-65.

49. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764 (2006).

50. 521 U.S. 320 (1997).

(e)(1) from (h)(2) precluded any notion of repealing federal jurisdiction of pending cases.⁵¹

In *Lindh*, the Court addressed whether new limitations on the availability of habeas relief imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”)⁵² applied to habeas actions pending on the date of its enactment.⁵³ The Court answered in the negative and determined that the Act’s limitations applied only to cases filed after that statute’s effective date.⁵⁴ In reaching its conclusion, the Court largely relied on congressional intent,⁵⁵ noting that, “cases where this Court has found truly ‘retroactive’ effect adequately authorized by a statute have involved statutory language that was so clear that it could sustain only one interpretation.”⁵⁶ The Court drew a similar inference to *Hamdan*’s case, finding that if Congress “was reasonably concerned to ensure that [subsections 1005(e)(2) and (3)] be applied to pending cases, it should have been just as concerned about [subsection 1005(e)(1)], unless it had the different intent that the latter [section] not be applied to ... pending cases.”⁵⁷ The Court concluded that the “evidence of deliberate omission” was stronger in *Hamdan*’s case than it was in *Lindh*.⁵⁸

Indeed, the legislative history behind the DTA indicated that Congress had evaluated the reaches of all three subsections and ultimately chose to omit (e)(1) from its directive “only after having *rejected* earlier proposed versions of the statute that would have included [(e)(1) within the scope of (h)(2)]”.⁵⁹ The Court found that Congress’ “rejection of the very language that would have achieved the result the Government urge[d] weigh[ed] heavily against the Government’s interpretation.”⁶⁰ Certainly, absent *explicit* statutory intent, courts should not read a statute to repeal federal jurisdiction.⁶¹ Moreover, denying the federal court of

51. *Hamdan*, 126 S. Ct. at 2753, 2765-68 (finding that “a negative inference may be drawn from Congress’ failure to include § 1005(e)(1) within the scope of § 1005(h)(2)”) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”)).

52. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

53. *Lindh*, 521 U.S. at 322-23.

54. *Id.* at 336.

55. *Id.* at 326-27.

56. *Id.* at 328 n.4.

57. *Hamdan*, 126 S. Ct. at 2766 (quoting *Lindh*, 521 U.S. at 329).

58. *Id.*

59. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2766 (2006) (emphasis in original).

60. *Id.* See also *Doe v. Chao*, 540 U.S. 614, 626-27 (2004) (stating that the legislative history of subsequently enacted statutes “will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment”) (internal citations omitted).

61. See, e.g., *Jones v. United States*, 526 U.S. 227, 238 (1999) (expressing “leeriness” in relying on hindsight in legislative history to interpret statutory intent) (citing *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (“[S]ubsequent legislative history is a ‘hazardous basis for inferring the intent of an earlier Congress.’”)); *United States v. Texas*, 507 U.S. 529, 535

jurisdiction “raises grave questions about Congress’ authority to impinge upon [the U.S. Supreme] Court’s appellate jurisdiction.”⁶²

C. *Should the Court Abstain?*

Even though the Court found that it had jurisdiction to hear Hamdan’s case, it next considered whether reasons of comity required it to nevertheless abstain from intervening in the pending case. But, like the district court and the D.C. Circuit before it, the Court rejected the Government’s argument that under *Schlesinger v. Councilman*, the Court “should apply the ‘judge-made rule that civilian courts should await the final outcome of on-going military proceedings before entertaining an attack on those proceedings.’”⁶³ In *Councilman*, the military brought court-martial charges against an Army captain for selling, “transferr[ing], and possess[ing] marijuana.”⁶⁴ The captain then brought suit in federal district court seeking to enjoin the military from proceeding with the court-martial.⁶⁵ The Supreme Court abstained from intervening in the action, determining there was “nothing in the particular circumstances of the captain’s case to displace the general rule.”⁶⁶ The Court reasoned that the military justice system operates most efficiently when civilian courts refrain from interfering with its proceedings,⁶⁷ and that “federal courts should respect the balance Congress struck when it created ‘an integrated system of military courts and review procedures.’”⁶⁸

In Hamdan’s case, however, the Court rejected *Councilman* as controlling and found that it need not abstain for two primary reasons.⁶⁹ First, the Court stated that Hamdan was not an armed forces member, unlike the defendant in *Councilman*⁷⁰ and, therefore, concerns about military discipline and efficiency did not apply.⁷¹ Second, Hamdan’s commission was “not part of the integrated system of military courts, complete with independent review panels, that

n.4 (1993) (noting that “Congress’ obvious desire to enhance the common law in specific, well-defined situations does not signal its desire to extinguish the common law in other situations”).

62. *Hamdan*, 126 S. Ct. at 2764 (citing *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1869) (holding that Congress had validly foreclosed one avenue of appellate review where its repeal of habeas jurisdiction, reproduced in the margin, could not have been “a plainer instance of positive exception”). See also *Felker v. Turpin*, 518 U.S. 651, 660 (1996) (holding that Title I of the Antiterrorism and Effective Death Penalty Act did not repeal the Court’s authority to entertain original habeas petitions).

63. *Hamdan*, 126 S. Ct. at 2769 (quoting Brief for Respondents at 12).

64. *Schlesinger v. Councilman*, 420 U.S. 738, 738 (1975).

65. *Id.*

66. *Hamdan*, 126 S. Ct. at 2770 (citing *Councilman*, 420 U.S. at 758).

67. *Councilman*, 420 U.S. at 757-58.

68. *Hamdan*, 126 S. Ct. at 2770 (quoting *Councilman*, 420 U.S. at 758).

69. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2771 (2006).

70. “*Councilman* distinguished service personnel from civilians, whose challenges to ongoing military proceeding are cognizable in federal court.” *Id.* at 2770 n.16 (citing *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955)). See also *Councilman*, 420 U.S. at 759.

71. *Hamdan*, 126 S. Ct. at 2771.

Congress has established.”⁷² The Court stated, “Unlike the officer in *Councilman*, Hamdan ha[d] no right to appeal any conviction to the civilian judges” of the U.S. Court of Appeals for the Armed Forces.⁷³ Instead, a panel of three military officers designated by the Secretary of Defense would review his conviction,⁷⁴ which then might be reviewed by the Secretary of Defense and the President.⁷⁵

The Court thus distinguished *Councilman* on the merits and adopted *Ex parte Quirin*⁷⁶ as the more relevant precedent.⁷⁷ In *Quirin*, the Federal Bureau of Investigation captured seven German saboteurs upon their arrival in New York and Florida.⁷⁸ The President appointed a military commission to try the men for violations of the law of war.⁷⁹ The men later filed habeas corpus petitions in federal district court, arguing that the President did not have statutory or constitutional authority to convene the military commission.⁸⁰ Instead of declining to intervene, the Court expedited its review of the ongoing military proceedings, citing the public importance of the questions raised, the Court’s duty in both war and peace to preserve the constitutional safeguards of civil liberty, and the public’s interest in a timely decision on those questions.⁸¹

In Hamdan’s case, both the D.C. Circuit and the Supreme Court recognized that *Quirin* provided “a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions.”⁸² The Supreme Court explained that the circumstances of Hamdan’s case did not involve “the ‘obligations of comity’ that, under the appropriate circumstances, justify abstention.”⁸³ It held that “the Government has identified no other ‘important countervailing interest’ that would permit federal courts to depart from their general ‘duty to exercise the jurisdiction that is conferred upon them by Congress.’”⁸⁴ In its conclusion, however, the Court left open the possibility that abstention could be appropriate in some instances where a review of ongoing military commission proceedings is sought.⁸⁵ After deciding that abstention was not justified in this case, the Court considered the merits of Hamdan’s appeal.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. 317 U.S. 1 (1942).

77. *Hamdan*, 126 S. Ct. at 2771.

78. *Quirin*, 317 U.S. at 21.

79. *Id.* at 18.

80. *Id.* at 18-19.

81. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2772 (2006) (quoting *Quirin*, 317 U.S. at 19).

82. *Id.* at 2772 (quoting *Hamdan v. Rumsfeld*, 415 F.3d 33, 36 (D.C. Cir. 2005)).

83. *Id.* (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 733 (1996) (Kennedy, J., concurring)).

84. *Id.* (quoting *Quackenbush*, 517 U.S. at 716).

85. *Id.*

D. *Do the Military Commissions Lack Authorization?*

The third issue the Court addressed was whether Congress had given the President the authority to convene the military commissions at issue. The Government maintained that the DTA, the UCMJ, and the AUMF all provided explicit authorization for the President's actions. Indeed, the D.C. Circuit found that the AUMF gave the President the express authority to convene the commissions.⁸⁶ The Supreme Court, however, rejected both the Government's argument and the D.C. Circuit's holding and held that Congress did not expressly authorize the military commission that was convened to try Hamdan.⁸⁷ This section begins with a brief history of military commissions; then it addresses the interplay between congressional and executive authority during times of war and the factors that led to the Court's decision on this issue.

1. *A Brief History of Military Commissions*

The U.S. armed forces have convened military commissions of one type or another for more than a century and a half.⁸⁸ In 1847, General Winfield Scott convened the first official military commissions during the Mexican War.⁸⁹ General Scott convened two types of commissions. The first type of commission operated "to try ordinary crimes committed in the occupied territory," while the second, "council[s] of war" were used to prosecute violations of the law of war.⁹⁰ Next, during the Civil War, Union commanders used military commissions to try Confederate soldiers and civilians who committed crimes against the Union army.⁹¹ The United States again established a military commission during World War II to try seven German saboteurs who unlawfully entered the country.⁹²

Although military commissions serve an important purpose in times of war, their use has been severely limited because of their inherent threat to civil liberties and separation of powers.⁹³ Indeed, the Supreme Court has repeatedly recognized that "the Framers harbored a deep distrust of executive military

86. *Hamdan*, 415 F.3d at 37.

87. *Hamdan*, 126 S. Ct. at 2775.

88. Military commissions were not created by statute, but rather "born of military necessity." *Hamdan*, 126 S. Ct. at 2773 (citing WILLIAM WINTHROP, *MILITARY LAW & PRECEDENTS* 831 (2d ed. 1920)).

89. *Id.* (citing WINTHROP, *supra* note 88, at 832; GEORGE B. DAVIS, *A TREATISE ON THE MILITARY LAW OF THE UNITED STATES* 308 n.1 (2d ed. 1909)).

90. *Id.* (quoting WINTHROP, *supra* note 88, at 832).

91. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773 (2006).

92. *See Ex parte Quirin*, 317 U.S. 1 (1942). *See also supra* Section II (C).

93. *See generally* Gerald Clark, *Military Tribunals and the Separation of Powers*, 63 U. PITT. L. REV. 837, 866-67 (2002); Neal Katyal & Laurence Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1308-10 (2002); George Terwilliger et al., *The War on Terrorism: Law Enforcement or National Security*, FEDERALIST SOC'Y, Feb. 15, 2005, http://www.fed-soc.org/publications/pubID.107/pub_detail.asp.

power and military tribunals.”⁹⁴ “Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, section 8 and Article III, section 1 of the Constitution unless some other part of that document authorizes a response to the felt need.”⁹⁵

Shortly after their unveiling, President Bush’s military commissions became the focus of widespread controversy throughout legal and political communities alike.⁹⁶ Many critics harbored concerns regarding what they saw as an unconstitutional, unilateral creation of the commissions by the President and a lack of due process for defendants detained there.⁹⁷ Despite the criticism, the President maintained that Congress had expressly authorized him to convene the commissions, and that the Executive Branch was complying with both the Constitution and international treaties in doing so.⁹⁸

2. *Interplay of Congressional and Executive Authority during Times of War and the President’s Authority to Convene Military Commissions in Hamdan*

It is undisputed that Congress has the authority to define the rules of war. Article I, section 8 of the Constitution empowers Congress “[t]o declare War ... and make Rules concerning Captures on Land and Water,”⁹⁹ “[t]o raise and support Armies,”¹⁰⁰ “[t]o define and punish ... Offences against the Law of Nations,”¹⁰¹ and “[t]o make Rules for the Government and Regulation of the land and naval Forces.”¹⁰² Article II, section 2 of the Constitution further bestows upon the President the title of Commander in Chief.¹⁰³ As the Court noted in *Hamdan, Ex parte Milligan* effectively described the relationship of these powers:

The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President ... Congress cannot direct the conduct of campaigns, nor can the President, or any

94. *Loving v. United States*, 517 U.S. 748, 760 (1996) (citing *Reid v. Covert*, 354 U.S. 1, 23-24 (1957)).

95. *Hamdan*, 126 S. Ct. at 2773 (citing *Ex parte Milligan*, 71 U.S. 2, 121 (1866) (“Certainly no part of the judicial power of the country was conferred on [military commissions.]”); *Ex parte Vallandigham*, 68 U.S. 243, 249-51 (1864); *Quirin*, 317 U.S. at 25 (“Congress and the President, like the courts, possess no power not derived from the Constitution.”)).

96. Charles Lane, *High Court Rejects Detainee Tribunals*, WASH. POST, June 30, 2006, at A1, <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/29/AR2006062900928.html>.

97. *Id.*

98. *Id.*

99. U.S. CONST. art. I, § 8, cl. 11.

100. U.S. CONST. art. I, § 8, cl. 12.

101. U.S. CONST. art. I, § 8, cl. 10.

102. U.S. CONST. art. I, § 8, cl. 14.

103. U.S. CONST. art. II, § 2, cl. 1.

commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.¹⁰⁴

More than fifty years after *Milligan*, the Supreme Court revisited the law governing military commissions in *Ex parte Quirin*,¹⁰⁵ holding that Congress had authorized the use of military commissions to try offenders for offenses against the law of war through Article of War 15.¹⁰⁶ Article 21 of the UCMJ, one statute upon which the Government relied as support for its authorization argument in *Hamdan*, is largely the same as the now preserved Article 15.¹⁰⁷ The article provides, in relevant part:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions ... or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions ... or other military tribunals.¹⁰⁸

In its argument to the Court, the Government construed Article 21 of the UCMJ and the holding in *Quirin* in such a manner as to give the President additional authority to “invoke military commissions when he deems them necessary.”¹⁰⁹ However, the Court explicitly rejected this idea and held that the UCMJ did not give the President the authority to convene military commissions.¹¹⁰ The Court maintained that *Quirin* “recognized that Congress had simply preserved what power, under the Constitution and the common law of war, the President had ... to convene military commissions.”¹¹¹

Interestingly, although the Government relied on *Quirin* to support its argument that Congress had authorized the military commissions, it nevertheless argued that the *Hamdan* Court should disregard the analysis undertaken in *Quirin*

104. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773-74 (2006) (quoting *Ex parte Milligan*, 71 U.S. 2, 139-140 (1866)); WINTHROP, *supra* note 88, at 831 (“[I]n general, it is those provisions of the Constitution which empower Congress to ‘declare war’ and ‘raise armies,’ and which, in authorizing the initiation of war, authorize the employment of all necessary and proper agencies for its due prosecution, from which this tribunal derives its original sanction.”).

105. *Ex parte Quirin*, 317 U.S. 1, 28 (1942). See also discussion in *supra* Section II (C).

106. *Hamdan*, 126 S. Ct. at 2774 (citing *Quirin*, 317 U.S. at 28 (“By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases.”)).

107. “Article 15 was first adopted as part of the Articles of War in 1916.” *Hamdan*, 126 S. Ct. at 2774 (citing Act of Aug. 29, 1916, ch. 418, § 3, art. 15, Pub. L. No. 64-242, 39 Stat. 653 (codified as amended at 10 U.S.C. §§ 801, 821 (2000))).

108. *Id.* (citing Uniform Code of Military Justice, 10 U.S.C. § 821 (2000)).

109. *Id.* (quoting Brief for Respondents at 17).

110. *Id.* at 2775. “Contrary to the Government’s assertion, ... even *Quirin* did not view ... [Art. 15] as a sweeping mandate for the President to ‘invoke military commissions whenever he deems them necessary.’” *Id.* at 2774 (quoting Brief for Respondents at 17).

111. *Id.* (citing *Quirin*, 317 U.S. at 28-29).

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and find either the AUMF or the DTA as “specific, overriding authorization for the ... commission ... convened to try Hamdan.”¹¹² Again, the Court expressly rejected this idea and stated that neither act “expand[ed] the President’s authority to convene military commissions.”¹¹³

While the Court recognized that the “AUMF activated the President’s war powers,”¹¹⁴ which “include the authority to convene military commissions in appropriate circumstances,”¹¹⁵ it found “there [was] nothing in the [AUMF’s] text or legislative history ... even hinting that Congress intended to expand or alter the authorization set forth in [UCMJ Art. 21].”¹¹⁶ In fact, the legislative history behind the AUMF indicated that “Congress reserved from the President the full range of powers that accompany a Declaration of War.”¹¹⁷

The Court added that the DTA could not be construed to authorize the commission either.¹¹⁸ The Court held that “[a]lthough the DTA, unlike either Article 21 or the AUMF, was enacted after the President had convened Hamdan’s commission, it contains no language authorizing that tribunal or any other at Guantanamo Bay.”¹¹⁹ The Court conceded, however, that because the DTA made reference to the military orders governing the commissions and further limited the judicial review of their final decisions, that it at least recognized the existence of the military commissions.¹²⁰ Nevertheless, the Court noted that the statute “reserves judgment on whether the ‘Constitution and laws of the United States are applicable’ in reviewing such decisions and whether the ‘standards and procedures’ used to try Hamdan and other detainees actually violate the ‘Constitution and laws.’”¹²¹

The Court concluded by holding that “[t]ogether, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the ‘Constitution and laws,’ including the law of war,” but had not provided express authorization for the commissions at issue.¹²² That said, the Court next faced the task of determining whether Hamdan’s commission was in violation of those laws that recognize the existence of military commissions.

112. *Id.* at 2774-75.

113. *Id.* at 2775.

114. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2775 (2006) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion)).

115. *Id.* (citing *Hamdi*, 542 U.S. at 518; *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942); *In re Yamashita*, 327 U.S. 1, 11 (1946)).

116. *Hamdan*, 126 S. Ct. at 2775.

117. *See* Brief for Petitioner at 14, *Hamdan*, 126 S. Ct. 2749 (2006) (No. 05-184).

118. *Hamdan*, 126 S. Ct. at 2775.

119. *Id.*

120. *Id.* (citing Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(3), 119 Stat. 2739, 2743 (2005)).

121. *Id.*

122. *Id.*

E. Are the Military Commissions Properly Convened?

The final issue the Court ruled on was whether the structure and procedures employed by the military commissions violated the safeguards that were put into place by the UCMJ and the Geneva Conventions. The Court ultimately rejected the Government's assertion that it had properly convened Hamdan's commission and held that the commission "lack[ed] power to proceed because its structure and procedures violate[d] both the UCMJ and the four Geneva Conventions."¹²³

There are three recognized types of military commissions.¹²⁴ The first, a "martial law court," is used to replace civilian courts when martial law is declared during times of emergency within the nation's borders.¹²⁵ The second, a "military government court," is used to try civilians when U.S. military forces occupy territory outside the U.S., and the occupied nation's courts are unable or refuse to function.¹²⁶ The third type, often called a "law of war court," is convened to try individuals accused of violating the law of war.¹²⁷ It was during World War II and the case of *Quirin*, that the Supreme Court sanctioned President Roosevelt's use of this last type of commission.¹²⁸

In *Hamdan*, the Government repeatedly relied on *Quirin* to support the commission the President had convened to try Guantanamo Bay detainees.¹²⁹ According to the Court, this was neither surprising nor improper because Guantanamo Bay is "neither enemy-occupied territory nor is it under martial law."¹³⁰ The Court warned, however, that *Quirin* is the most "robust model of executive power [that] exists," and implied that one must tread carefully when invoking such precedent.¹³¹ Keeping this historical context in mind, the Court next considered whether the present military commissions violated the UCMJ.

123. *Id.* at 2759.

124. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2775 (2006) (citing WINTHROP, *supra* note 88, at 831-46; Curtis Bradley & Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2132 (2005)). See also Kathleen T. Rhem, *Long History behind Military Commissions*, AM. FORCES PRESS SERVICE, Aug. 19, 2004, http://www.defenselink.mil/news/Aug2004/n08192004_2004081903.html.

125. Brian C. Baldrate, *The Supreme Court's Role in Defining the Jurisdiction of Military Tribunals: A Study, Critique, & Proposal for Hamdan v. Rumsfeld*, 186 MILITARY L. REV. 1, 8 (2005) (internal citations omitted). See also *Hamdan*, 126 S. Ct. at 2776 (citing *Duncan v. Kahanamoku*, 327 U.S. 304, 323-24 (1946) (invalidating commission when civilian court able to function); *Ex parte Milligan*, 71 U.S. 2, 2 (1866) (holding commission may not try civilian charged with conspiracy and other violations when civilian courts remain open)); Rhem, *supra* note 124.

126. Baldrate, *supra* note 125, at 8 (internal citations omitted). See also *Hamdan*, 126 S. Ct. at 2776 (citing *Duncan*, 327 U.S. at 314; *Milligan*, 71 U.S. at 141-42).

127. Baldrate, *supra* note 125, at 8 (internal citations omitted). See also *Hamdan*, 126 S. Ct. at 2776 (citing *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942)).

128. *Hamdan*, 126 S. Ct. at 2776 (citing *Quirin*, 317 U.S. 28).

129. Brief of Respondents at 27-30, *Hamdan*, 126 S. Ct. 2749 (2006) (No. 05-184). See also *Hamdan*, 126 S. Ct. at 2777.

130. *Hamdan*, 126 S. Ct. at 2777.

131. *Id.* See also FISHER, *supra* note 13, at xi-xii.

1. *UCMJ Violations*

The procedures that govern military commissions are generally the same as those that govern courts-martial.¹³² UCMJ Article 836(b) specifically reflects this uniformity idea and provides that the procedural rules the President promulgates for courts-martial and military commissions alike must be “uniform insofar as practicable.”¹³³ It thus follows that Hamdan’s commission should have been governed by court-martial rules—*e.g.*, Congress would define offenses, the parties would know the procedures and regulations for the trial in advance, and the commission would use normal rules of evidence.¹³⁴ The commission would also employ existing military judges with experience in dealing with the types of sensitive matters tried in such settings.¹³⁵ The jury members of the commission would be selected from current court-martial convening orders, which typically function like civilian jury pools.¹³⁶ Most importantly, the final decision of the commission would be subject to review by a specialized court of military justice composed of judges named by the President and confirmed by the Senate.¹³⁷

However, the President rejected the uniformity principle and promulgated his own procedures for Hamdan’s commission. Military Commission Order No. 1 (“Commission Order”), an adaptation of the military order issued by the President in 2001, set forth the procedures to be used in Hamdan’s commission.¹³⁸ Although some of the procedures it articulated followed court-martial rules, a closer look revealed that the Commission Order permitted substantial deviations from recognized UCMJ practice. For example, the Commission Order provided that the military commission could exclude the defendant and his or her civilian counsel from any part of the proceeding that the presiding officer decided to close.¹³⁹ Grounds for closure included protection of classified information, safety of participants and witnesses, protection of intelligence and law enforcement sources, methods, or activities, and “other national security interests.”¹⁴⁰ The Commission Order further prevented both defendant and counsel from knowing what evidence was presented during the closed session.¹⁴¹ Moreover, while appointed military defense counsel was privy to the information presented at these closed sessions, the commission had the

132. FISHER, *supra* note 13, at 182-83.

133. Uniform Code of Military Justice, 10 U.S.C.A. 836(b) (West 2000 & Supp. 2007).

134. 10 U.S.C. §§ 843-49.

135. 10 U.S.C. § 826.

136. 10 U.S.C. § 825.

137. 10 U.S.C. § 864.

138. Department of Defense Military Commission Order No. 1 (Mar. 21, 2002), *available at* <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> [hereinafter MCO] (last visited Dec. 8, 2007). The Commission order was amended most recently on August 31, 2005 after Hamdan’s trial had already begun. Department of Defense Military Commission Order No. 1 (Aug. 31, 2005), *available at* <http://www.defenselink.mil/news/Sep2005/d20050902order.pdf>.

139. MCO at § 4(A)(5)(a).

140. *Id.* at § 6(B)(3).

141. *Id.*

power to forbid the military counsel from revealing to the defendant what took place.¹⁴²

Another “striking feature” of the Commission Order was that it permitted the admission of any evidence that, in the presiding officer’s opinion, “would have probative value to a reasonable person.”¹⁴³ Such evidence could include hearsay, unsworn live testimony, and statements gathered through torture.¹⁴⁴ The military commission could also deny both the defendant and his or her civilian counsel access to classified and other protected information if the presiding officer determined that the evidence was “probative” and that its admission without the defendant’s knowledge would not “result in the denial of a full and fair trial.”¹⁴⁵

Ultimately, the Court found that the rules set forth in the Commission Order substantially deviated from rules typically applied in courts-martial.¹⁴⁶ The Court found the military commission’s failure to recognize the fundamental right to be present particularly disturbing.¹⁴⁷ The Court held that because “the jettisoning of so basic a right cannot lightly be excused as ‘practicable,’ ... the rules applicable in courts-martial must apply.”¹⁴⁸

The Court made it clear that, because the procedures governing Hamdan’s commission did not comply with the provisions set forth in UCMJ Article 836, they were illegal.¹⁴⁹ It emphasized that although the uniformity principle was flexible, “any departure [from the UCMJ] must be tailored to the exigency that necessitates it.”¹⁵⁰

While President Bush cited various “practicability” reasons for which he said were sufficient to justify the variations from the courts-martial procedures, the Court expressly rejected his argument.¹⁵¹ The Court stated that even though the President had determined that it was “impracticable to apply the rules and principles of law that govern ‘the trial of criminal cases’” in federal courts to Hamdan’s commission, he did not make a “similar determination that it [was] impracticable to apply the rules for courts-martial.”¹⁵² Although the Court

142. *Id.*

143. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2786 (2006) (citing MCO at § 6(D)(1)).

144. *Id.* (citing MCO at § 6(D)(2)(b), (3)). *See also* Sean D. Murphy, *U.S. Department of Defense Rules on Military Commissions*, 96 AM. J. INT’L L. 731, 734 (2002) (noting that the MCO did “not expressly exclude statements extracted under torture”).

145. *Hamdan*, 126 S. Ct. at 2787 (citing MCO at § 6(D)(5)(b)).

146. *Id.* at 2792.

147. *Id.* at 2792. *See, e.g.,* *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (“[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.”); *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934) (holding that “the privilege to confront one’s accusers and cross-examine them face to face is assured to a defendant by the Sixth Amendment”).

148. *Hamdan*, 126 S. Ct. at 2792.

149. *Id.* at 2793.

150. *Id.* at 2790.

151. *Id.* at 2791.

152. *Id.* “There is no suggestion, for example, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility.” *Id.* at 2792.

recognized the inherent danger in capturing and trying terrorists, it nevertheless concluded that the danger was not enough to justify such an extreme variation from court-martial procedures.¹⁵³

2. Geneva Convention Violations

After determining that the procedures adopted to try Hamdan violated the UCMJ, the Court next decided whether the procedures also violated the Geneva Conventions. The Court answered this question in the affirmative, rejecting the D.C. Circuit's holding that the Conventions were not judicially enforceable and that Hamdan was not entitled to their protections.¹⁵⁴

The D.C. Circuit had found that the political and military authorities, and not the judiciary, had sole responsibility for recognizing and enforcing prisoners' rights under the Conventions.¹⁵⁵ It relied on *Johnson v. Eisentrager*¹⁵⁶ to suggest that the Supreme Court lacked the power to even consider the merits of a Geneva Convention argument.¹⁵⁷

Eisentrager involved a challenge by several civilian employees of the German Government that were working in China during World War II.¹⁵⁸ During that time, Japanese military forces controlled the Chinese cities in which they were located.¹⁵⁹ After Japan surrendered to the United States, military forces arrested the German citizens and charged them with the crime of continuing to engage in military activity against the United States after Germany's surrender.¹⁶⁰ A military commission tried and convicted the prisoners.¹⁶¹ The prisoners argued that, according to the 1929 Geneva Conventions, the procedures used during their commission trials were illegal because they deviated from the procedures used by courts-martial to try American soldiers.¹⁶² The Court rejected their argument because they "failed to identify any prejudicial disparity 'between the Commission that tried [them] and those that would try an offending soldier of the American forces of like rank.'"¹⁶³

The D.C. Circuit relied on a footnote within the *Eisentrager* opinion to support its conclusion that "the 1949 Geneva Convention [did] not confer upon Hamdan a right to enforce its provisions in court."¹⁶⁴ The footnote suggested that

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

154. *Id.* at 2793.

155. *Hamdan v. Rumsfeld*, 415 F.3d 33, 38 (D.C. Cir. 2005).

156. 339 U.S. 763 (1950).

157. *Hamdan*, 415 F.3d at 39-40.

158. *Eisentrager*, 339 U.S. at 765.

159. See FREDERICK W. MARKS III, *WIND OVER SAND: THE DIPLOMACY OF FRANKLIN ROOSEVELT* 40-76 (1988). Chapter 2, "Roosevelt v. Japan," includes discussion of Japanese-Chinese interaction. *Id.*

160. *Eisentrager*, 339 U.S. at 765-66.

161. *Id.*

162. *Id.* at 789-90.

163. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2793 (2006) (quoting *Eisentrager*, 339 U.S. at 790).

164. *Hamdan*, 415 F.3d at 40.

the Supreme Court did not have the power to consider the merits of a Geneva Convention argument:

We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1949 ... concluded ... an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign Government are vindicated only by Presidential intervention.¹⁶⁵

The Supreme Court disregarded the footnote in its entirety and held that “*Eisentrager* does not control here because, regardless of the nature of the rights conferred on Hamdan, they are indisputably part of the law of war, compliance with which is the condition upon which UCMJ Art. 21 authority is granted.”¹⁶⁶

After determining that it did, in fact, have the power to enforce the Geneva Conventions, the Court turned next to whether the Geneva Conventions applied to the conflict in which Hamdan was captured. From the outset, the Executive Branch determined that Hamdan was captured in connection with the war with al Qaeda, which was distinctly different from the war with the Taliban in Afghanistan.¹⁶⁷ It reasoned that the war with al Qaeda was not within the province of the Geneva Conventions.¹⁶⁸ The Court agreed with the Executive Branch’s first conclusion, but disagreed with the latter.¹⁶⁹

The Government argued that detainees of the al Qaeda conflict did not receive the full protections of the Geneva Conventions because full protections were only applicable to “cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties.”¹⁷⁰ It claimed that because militia captured Hamdan during the al Qaeda conflict and “since al Qaeda, unlike Afghanistan, [was] not a High Contracting Party,”¹⁷¹ the protections of the Conventions did not apply to Hamdan.¹⁷²

The Court declined to reach the merits of the Government’s argument because it found that “at least one provision of the Geneva Conventions that applie[d] [to Hamdan’s case] even if the relevant conflict was not one between

165. *Hamdan*, 126 S. Ct. at 2794 (quoting *Eisentrager*, 339 U.S. at 789).

166. *Id.* at 2756 (internal citations omitted).

167. See *Hamdan v. Rumsfeld*, 415 F.3d 33, 41-42 (D.C. Cir. 2005).

168. *Id.* The Taliban was declared to be within the reach of the Geneva Conventions. *Id.*

169. *Hamdan*, 126 S. Ct. at 2795.

170. *Id.* (quoting Geneva Convention, *supra* note 8, art. 2).

171. *Id.* A High Contracting Party is a signatory of the Conventions. *Id.*

172. *Id.* “The President has stated that the conflict with the Taliban is a conflict to which the Geneva Conventions apply.” *Id.* (citing White House Memorandum, Humane Treatment of Taliban and al Qaeda Detainees (Feb. 7, 2002), available at http://www.justicescholars.org/pegc/archive/White_House/bush_memo_20020207_ed.pdf).

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signatories.”¹⁷³ It stated that Common Article 3, which appears in all four Conventions, provides that in a

conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, certain provisions protecting persons ... placed hors de combat [out of the fight] by ... detention, including a prohibition on the passing of sentences ... without previous judgment ... by a regularly constituted court affording all the judicial guarantees ... recognized as indispensable by civilized peoples.¹⁷⁴

Although the D.C. Circuit analyzed Common Article 3 and its applicability to Hamdan, it nevertheless held that it did not apply because the conflict with al Qaeda was “international in scope” and not a “conflict not of an international character.”¹⁷⁵ The Supreme Court, however, found the D.C. Circuit’s reasoning to be flawed and held that Common Article 3 afforded “some minimal protection, falling short of full protections under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory ... who are involved in a conflict ‘in the territory of’ a signatory.”¹⁷⁶

Accordingly, the Court found that Common Article 3 “require[d] that Hamdan be tried by a ‘regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.’”¹⁷⁷ Although Common Article 3 did not define the term “regularly constituted court,” the Court relied on other sources to provide its fundamental meaning.¹⁷⁸ For example, a commentary of the Fourth Geneva Convention defined “‘regularly constituted’ tribunals to include ‘ordinary military courts’ and ‘definitely exclude[ed] all special tribunals.’”¹⁷⁹ The Court also cited the Red Cross’ definition of “regularly constituted court,”¹⁸⁰ which stated that, as used in Common Article 3, “regularly constituted” means “established and organized in accordance with the laws and procedures already in force in a country.”¹⁸¹

Taking into consideration the various definitions, the Court found that “regular military courts in our system are the courts-martial established by

173. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2795 (2006).

174. *Id.* (internal quotations omitted).

175. *Id.* (citing *Hamdan*, 415 F.3d at 41).

176. *Id.* at 2795-96.

177. *Id.* (quoting Geneva Convention, *supra* note 8, art. 3, ¶ 1(d)).

178. *Id.*

179. *Id.* at 2796-97 (quoting Geneva Convention IV Commentary 340 (defining the term “properly constituted” in Article 66, which the commentary treats as identical to “regularly constituted”) and citing *In re Yamashita*, 327 U.S. 1, 44 (1946) (Rutledge, J., dissenting) (describing military commission as a court “specially constituted for a particular trial”).

180. *Id.* at 2797.

181. *Id.* (quoting Int’l Comm. of the Red Cross, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 355 (2005) and citing Geneva Convention IV Commentary 340 (observing that “ordinary military courts” will “be set up in accordance with the recognized principles governing the administration of justice”).

congressional statutes.”¹⁸² The Court stated that a military commission “can be ‘regularly constituted’ by the standards of our military justice system only if some practical need explains deviations from court-martial practice.”¹⁸³ As previously noted, the Court found that no such need had been demonstrated in Hamdan’s case.¹⁸⁴ Thus, the military commission convened to try Hamdan was not a regularly constituted court.

The Court emphasized that although “Common Article 3 ... tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But requirements they are nonetheless.”¹⁸⁵ The Court’s reasoning made it apparent that the military commission the President convened to try Hamdan and those similarly situated did not meet those requirements. In concluding, the Court made a final statement to the Executive Branch, “[I]n undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.”¹⁸⁶

F. *Aftermath of Hamdan*

Hamdan is one of the most significant Supreme Court rulings to date dealing with the war on terror. Immediately following the decision, speculation arose about the impact the ruling would have on Guantanamo Bay detainees, pending cases, and wartime policies. Indeed, the ruling had the effect of suspending all other military commission proceedings at Guantanamo Bay and halted most pending cases in their tracks until the Government reached a solution.

While the Court’s decision severely limited the President’s wartime powers, it rested purely on statutory grounds. Thus, nothing prevented the President from returning to Congress to seek the necessary authority to convene the kind of military commission at issue in Hamdan’s case. In essence, the Court’s decision made it clear to the administration that no military commission could try Hamdan unless the President did one of two things: operate the commissions by the rules of regular military courts-martial under the UCMJ or ask Congress for specific authorization to proceed differently.

The administration quickly rejected the first option and proceeded to ask Congress for explicit approval for the type of commission it sought.¹⁸⁷ The decision shifted the spotlight to Congress whose members faced mid-term elections in November and who had largely avoided the military commission

182. *Id.*

183. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2797 (2006) (internal quotations omitted).

184. *Id.* at 2797-98.

185. *Id.* at 2798 (emphasis omitted).

186. *Id.*

187. *See A Solution for Trials*, WASH. POST, Sept. 9, 2006, at A16, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/08/AR2006090801554.html?refer=er=email>.

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issue since the September 11 attacks because of its political uncertainties.¹⁸⁸ Nevertheless, within two months, Congress had initiated a bill that purported to give President Bush the authority he needed to convene the commissions.

III. THE MILITARY COMMISSIONS ACT OF 2006

On October 17, 2006, the President signed into effect the Military Commissions Act of 2006.¹⁸⁹ The Act is a controversial piece of legislation drafted in response to the Court's decision in *Hamdan* that gives the President the explicit authorization to convene military commissions.¹⁹⁰ The Act further set forth rules and regulations to govern the military commissions established to try alien enemy combatants for violations of the law of war and other offenses triable by military commissions.¹⁹¹ Supporters of the Act maintain that the strict procedural rules and regulations are necessary to combat terrorism. Opponents, however, fear that the MCA unnecessarily takes away many fundamental human rights.

One implication of the MCA that has led to a surge of public outcry is its attempt to eliminate any judicial checks on the Executive Branch's conduct relating to the war on terror. Many legal critics argue that one of the most disturbing provisions of the MCA is its elimination of the writ of habeas corpus with respect to the claims of detainees.¹⁹² The MCA also prohibits any person from invoking international humanitarian law as a source of rights and gives the President the final authority to interpret the Geneva Conventions.¹⁹³ These provisions all appear to be direct attacks on the Court's decision in *Hamdan*.

188. See Drake Bennett, *Who Cares about Civil Liberties?*, BOSTON GLOBE, Oct. 15, 2006, at E1, available at http://www.boston.com/news/globe/ideas/articles/2006/10/15/who_cares_about_civil_liberties/; Dana Milbank, *109th Congress Gets Props for Creativity, If Nothing Else*, WASH. POST, Sept. 28, 2006, at A2, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/27/AR2006092701818.html>.

189. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.A.).

190. *Id.* at § 2, 120 Stat. at 2600 (codified as amended at 10 U.S.C.A. § 948b(b) (West 2000 & Supp. 2007)).

191. *Id.* at § 3, 120 Stat. at 2600-31 (codified as amended at 10 U.S.C.A. §§ 948a-950w (West 2000 & Supp. 2007)).

192. *Id.* at § 7 (codified as amended at 28 U.S.C.A. § 2241(e)(1) (West 2000 & Supp. 2007)). See 152 CONG. REC. S10, 243-74 (daily ed. Sept. 27, 2006) (citing criticism on U.S. Senate floor by Senator Arlen Specter and Senator Patrick Leahy during floor debate on the final bill); Letter from Retired Judge Advocate General and Law Professors to Members of Congress, Sept. 26, 2006, available at <http://www.law.harvard.edu/news/2006/09/letter.pdf>; Human Rights Watch, *U.S.: Congress Should Reject Detainee Bill; Denies Right of Habeas Corpus, Defines Enemy Combatant too Broadly*, Sept. 26, 2006, <http://hrw.org/english/docs/2006/01/26/usdom14266.htm>; Christopher E. Anders & Caroline Frederickson, ACLU Letter to the Senate Strongly Urging Opposition to S. 3930, The Military Commission Act of 2006, Sept. 25, 2006, available at <http://www.aclu.org/natsec/gen/26861leg20060925.html>.

193. Military Commissions Act of 2006, Pub. L. No. 109-366, § 6, 120 Stat. 2600, 2632 (2006) (codified as amended at 10 U.S.C.A. § 948b(g) and 18 U.S.C.A. § 2441 (West 2000 & Supp. 2006)).

Although the Senate proposed several amendments before the final passage of the bill, all were defeated. Among them was an amendment proposed by Senators Arlen Specter¹⁹⁴ and Patrick Leahy,¹⁹⁵ which would have preserved the writ of habeas corpus.¹⁹⁶ Specter called it unthinkable that Congress would eliminate habeas corpus rights that go back 800 years, but Senator Lindsey Graham¹⁹⁷ responded that he did not “believe judges should be making military decisions in a time of war.”¹⁹⁸

The Senate rejected Specter’s amendment by a vote of 51-48,¹⁹⁹ but interestingly, Specter still voted for the bill despite the defeat of his amendment.²⁰⁰ After much debate, which itself received widespread criticism,²⁰¹ the House finally passed the bill on September 29, 2006 and presented it to the President for signing.²⁰²

A. *Does the MCA Unconstitutionally Suspend Habeas Corpus?*

Arguably, the most controversial provision of the MCA purports to strip the federal courts of jurisdiction to hear, or even consider, habeas corpus appeals that challenge the detention of anyone held in U.S. custody as an “enemy combatant.”²⁰³ Section 7 of the Act amends the federal habeas statute by removing the jurisdiction of any “court, judge, or justice” over habeas petitions and all other actions filed by aliens who are either detained as enemy combatants or are “awaiting such determination.”²⁰⁴

194. Republican from Pennsylvania. Senator Arlen Specter—Pennsylvania, <http://specter.senate.gov/> (last visited Dec. 8, 2007).

195. Democrat from Vermont. Office of Senator Patrick Leahy, <http://leahy.senate.gov/> (last visited Dec. 8, 2007).

196. See James M. Yoch, Jr., *Senate Passes Military Commissions Bill after Rejecting Habeas Amendment*, JURIST, Sept. 28, 2006, <http://jurist.law.pitt.edu/paperchase/2006/09/senate-passes-military-commissions.php>.

197. Republican from South Carolina. U.S. Senator Lindsey Graham of South Carolina, <http://lgraham.senate.gov/> (last visited Dec. 8, 2007).

198. See David G. Savage & Richard Simon, *Legal Battle over Detainee Bill Likely*, L.A. TIMES, Sept. 29, 2006, at A1, available at <http://www.latimes.com/news/nationworld/nation/la-na-detain29sep29,0,142943.story?coll=la-home-headlines>.

199. U.S. Senate: Legislation & Records, Roll Call Vote, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00255 (last visited Dec. 8, 2007).

200. U.S. Senate: Legislation & Records, Roll Call Vote, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00259 (last visited Dec. 8, 2007).

201. See Mark Hosenball, *Change of Heart: How the Bush Administration and GOP Senators Reached a Difficult Compromise over U.S. Treatment of Terror Detainees*, NEWSWEEK, Sept. 22, 2006, <http://www.newsweek.com/id/45801>; *Bush Terror Bill Signing a Major Victory*, MSNBC.COM, Oct. 17, 2006, <http://www.msnbc.msn.com/id/15301023/>.

202. THOMAS (Library of Congress), <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN03930:@@@@X> (last visited Dec. 8, 2007).

203. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635-36 (2006) (codified as amended at 28 U.S.C.A. § 2241(e)(1) (West 2000 & Supp. 2006)).

204. *Id.* (codified as amended at 28 U.S.C.A. § 2241(e)(1)).

The question likely to come before the Supreme Court is whether the MCA's habeas stripping provision violates the Constitution, and more specifically, whether detainees have substantive legal rights under the Constitution to proceed under habeas. The *Hamdan* opinion explicitly stated that because the DTA did not bar it from considering Hamdan's habeas petition, it was unnecessary to decide whether laws that unconditionally barred habeas corpus petitions would unconstitutionally violate the Suspension Clause.²⁰⁵ However, it appears now that the Court must decide this question as it relates to the MCA.

Congress undeniably has the power to establish²⁰⁶ and define the jurisdiction of the lower federal courts.²⁰⁷ However, it does not necessarily follow that because Congress has repealed its statutory grant of habeas jurisdiction, it has also suspended the writ. The Suspension Clause of 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."²⁰⁸ "Although ... [the Suspension Clause] does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood, consistent with English practice and the Clause's placement in Article I."²⁰⁹

The Supreme Court has never decided whether a congressional act alone has effectively suspended the writ. It has, however, determined that the evolution of the habeas statute over the past two centuries "clearly has expanded habeas corpus 'beyond the limits that [were] obtained during the 17th and 18th centuries.'"²¹⁰ "[A]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."²¹¹

While supporters of the MCA argue that Congress has the utmost authority to suspend the writ under the present circumstances, a plain reading of the Suspension Clause suggests otherwise. It is unquestionable that the protection of the Suspension Clause is absolute in the absence of rebellion or invasion. When Congress enacted the MCA, neither *rebellion* nor *invasion* was occurring. Indeed, the fact that Congress did not make the requisite findings that such conditions existed at the time of enactment is evidence that the writ was not effectively suspended. As the *Hamdan* opinion recognized, although there is considerable danger posed by international terrorism, it is not enough to vary from court-martial procedures and, thus, should not be enough to suspend

205. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2763-64, 2769 n.15 (2006); U.S. CONST. art I, § 9, cl. 2.

206. U.S. CONST. art. III § 1.

207. U.S. CONST. art. III, § 2, cl. 2.

208. U.S. CONST. art. I, § 9, cl. 2.

209. *Hamdi v. Rumsfeld*, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting) (citing *Ex parte Bollman*, 8 U.S. 75, 101 (1807)).

210. *Rasul v. Bush*, 542 U.S. 466, 474 (2004) (quoting *Swain v. Pressley*, 430 U.S. 372, 380 (1977)).

211. *Id.* (quoting *INS v. St. Cyr*, 533 U.S. at 301 (2001) and citing *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.")).

something as fundamental as the writ of habeas corpus. Moreover, removing the Supreme Court's ability to consider the writ without following proper procedure is borderline unconstitutional and in violation of the separation of powers.²¹²

Although it is likely that the Court will declare the habeas stripping provision an unconstitutional violation of the Suspension Clause, the next question, then, is whether aliens detained at Guantanamo Bay fall within the Suspension Clause's protections. In the 2004 case of *Rasul v. Bush*, the Court addressed the issue of "whether [U.S.] courts lack[ed] jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba."²¹³ The Court determined that the jurisdiction over the habeas petitions of Guantanamo Bay detainees depended upon the grant of jurisdiction in the habeas statute and upon the United States' exercise of "complete jurisdiction and control" over the Naval base in Cuba.²¹⁴ "Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under [28 U.S.C.] § 2241."²¹⁵

The MCA, however, amended § 2241 so that it no longer provides a basis for federal court jurisdiction over habeas petitions. The question remains then whether the holding in *Rasul* has become moot. If it has, then it follows that *Eisentrager* controls Hamdan's case and the availability of constitutional habeas to enemy aliens.

In *Eisentrager*, the Supreme Court held that the enemy aliens had no constitutional entitlement to habeas relief in U.S. courts because "at no relevant time were [they] within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States."²¹⁶ Under *Eisentrager*, Hamdan would not be entitled to habeas relief. The notable difference between the enemy aliens in *Eisentrager* and *Hamdan*, however, is that Hamdan has spent several years in a territory within "the complete jurisdiction and control" of the United States.²¹⁷ Whether mere presence within the exclusive jurisdiction and control of the United States is enough for the Court to conclude that Hamdan is entitled to the protections of the writ is questionable. Although the Court in *Rasul* held that it was, that holding is arguably no longer controlling precedent.

212. *Ex parte Yerger*, 75 U.S. 85, 102-03 (1869) ("[T]he denial to this court of appellate jurisdiction" to consider an original writ of habeas corpus would "greatly weaken the efficacy of the writ"). See also *Hamdan*, 126 S. Ct. at 2764 ("Congress would not be presumed to have effected such denial absent an unmistakably clear statement to the contrary." (citing *Yerger*, 75 U.S. at 104-105; *Durousseau v. United States*, 10 U.S. 307, 314 (1810) (finding that the "appellate powers of [this court] are not created by statute but are 'given by the Constitution'"))).

213. *Rasul*, 542 U.S. at 470.

214. *Id.* at 480.

215. *Id.* at 481.

216. *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950).

217. *Rasul*, 542 U.S. at 480 (internal citations omitted).

B. *Does the MCA Run Afoul of the Geneva Conventions?*

The MCA is also likely to be challenged because it prohibits a detainee seeking to challenge the military commission or any aspect of their detention from relying upon the Geneva Conventions. It provides, “No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights” at his trial by military commission.²¹⁸ This provision, like many, appears to explicitly target *Hamdan*’s holding that Common Article 3 applied to al Qaeda detainees. Although both Congress and the Executive Branch acknowledge that Common Article 3 applies in the war on terror, the MCA appears to interpret the Geneva Conventions in such a manner that narrows its protections to almost none.

On a related point, the MCA specifically states that military commissions are a “regularly constituted court.”²¹⁹ Again, this provision explicitly targets the section of the *Hamdan* opinion that stated that the military commissions were not regularly constituted courts as required by the Geneva Conventions and, therefore, were not an appropriate venue to try detainees. Whether the commissions do meet the international standard of Common Article 3, as the MCA claims they do, will most likely be a question presented to the Supreme Court to decide.

Another provision of the MCA that seeks to remove the federal courts from the playing field of the military commissions is Section 6.²²⁰ It prohibits all federal courts from using any foreign or international source of law as “a basis for a rule of decision ... in interpreting the prohibitions enumerated.”²²¹ This severe restriction on what rule of law judges may rely upon to interpret and enforce Common Article 3 is unprecedented in the United States.²²² Indeed, judges consistently utilize foreign and international law to decide and analyze complex cases and issues.²²³

This section also further weakens a defendant’s rights by giving the President the “authority ... to interpret the meaning and application of the Geneva Conventions” and states that his formal interpretations will be “authoritative ... in the same manner as other administrative regulations.”²²⁴ A serious issue arises, however, when one considers what could happen when the Executive Branch reads the Geneva Conventions in a clearly unreasonable way.

For example, the Conventions prohibit the use of evidence gained by cruel, inhuman, or degrading treatment or punishment, or as a result of “outrages upon

218. Military Commissions Act of 2006, Pub. L. No. 106-366, § 3(g), 120 Stat. 2600, 2602 (2006) (codified as amended at 10 U.S.C.A. § 948b(g) (West 2000 & Supp. 2007)).

219. *Id.* at § 3 (f) (codified as amended at 10 U.S.C.A. § 948b(f) (West 2000 & Supp. 2007)).

220. *Id.* at § 6(a)(2) (codified as amended at 18 U.S.C.A. § 2441 (West 2000 & Supp. 2007)).

221. *Id.* (codified as amended at 18 U.S.C.A. § 2441).

222. See Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOY. L.A. L. REV. 239 (2003) (discussing the role of international law in U.S. courts).

223. See generally *Roper v. Simmons*, 543 U.S. 551, 575-77 (2005); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003); *Atkins v. Virginia*, 536 U.S. 304, 316-17 n.21 (2002).

224. Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(a)(3), 120 Stat. 2600, 2632 (2006) (codified as amended in scattered sections of 10, 18, and 42 U.S.C.A.).

personal dignity.”²²⁵ As it stands now, the President’s interpretation of the word cruel or inhuman might not include methods such as religious and sexual humiliation, waterboarding,²²⁶ and other coercive tactics, thereby giving interrogators a wide range of questionable tactics to use against detainees. While the Geneva Conventions arguably prohibit such interrogation methods, the President’s interpretation of the Conventions is the final authority. This provision is dangerous when one considers what could happen if another Geneva Convention signatory chooses to enact a similar law. Under such circumstances, United States citizens and military personnel could be captured and not given the essential protections that exist under the Conventions.

Cumulatively speaking, the provisions of the MCA attempt to deny an alien combatant the ability to invoke any Geneva Convention rights. It is undisputed that the Geneva Conventions are part of the law of the United States. It follows that the three branches of Government should be required to abide by the standards set forth in the Conventions. Nevertheless, the MCA makes an unprecedented step toward a line that, if crossed, could cause irreparable damage in the international arena. Indeed, the MCA makes it apparent that the Geneva Conventions still bind the United States, but there is no way for individuals to enforce violations of the Conventions.²²⁷ It has the practical effect of rendering the core protections of Common Article 3 irrelevant and unenforceable. Without any rights from the UCMJ or the Geneva Conventions, detainees are only able to raise grounds within the military commission itself. As Professor Benjamin G. Davis opined, “It is a kind of isolation of the military commission from the rest of the statutory and international law structure which underpins *Hamdan*.”²²⁸

IV. CONCLUSION

Although the U.S. Supreme Court’s ruling in *Hamdan* limited the President’s powers in the war on terror, it did so only temporarily. The decision was a victory for the doctrine of separation of powers, and it reinforced to the Executive Branch that the judiciary does not take the President’s wartime actions lightly. Nevertheless, the swift enactment of the MCA and its controversial provisions could put the Court in a position to decide, again, how far Congress and the President may go in combating terrorism.

The MCA is another chapter in the back-and-forth saga waging between the three branches of the U.S. government, but it will not be the last. While many

225. Geneva Convention, *supra* note 8, art. 3.

226. Waterboarding is a technique used to make someone feel like they are being drowned. Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1571 n.48 (2007).

227. Except that grave breaches of Common Article 3 can still be prosecuted under the War Crimes Statute. 18 U.S.C. §2441(d)(1) (2000).

228. Davis, *supra* note 12.

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legal groups and detainees, including Hamdan, are planning to challenge provisions of the MCA, they have a long road ahead of them.²²⁹

229. See Karen DeYoung, *Court Told It Lacks Power in Detainee Cases*, WASH. POST, Oct. 20, 2006, at A18, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/10/19/AR2006101901692.html?nav=rss_nation/special.