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HAMDAN'S LIMITS AND THE MILITARY COMMISSIONS ACT

*Samuel Estreicher**
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On June 29, 2006, the Supreme Court by a 5-3 vote in *Hamdan v. Rumsfeld*¹ set aside President Bush's November 13, 2001 order² providing for trial by military commission of non-citizens believed to be associated with the al Qaeda terrorist organization and apprehended during the conflict in Afghanistan and being held in Guantanamo Bay, Cuba. In an opinion authored by Justice Stevens, the Court held that President Bush lacked congressional authorization to provide for the trial of these Guantanamo detainees by military commission and that some of the procedures contemplated for these trials contravened the Uniform Code of Military Justice ("UCMJ").³ Heralded by many academic observers as a signal victory for the "Rule of Law" and human rights even in wartime, *Hamdan* requires the President to try the Guantanamo detainees by court-martial proceedings or to seek from Congress express authorization of the use of military commissions falling short of court-martial procedures. Now, less than one year after the Court's decision, Congress has provided such authorization in the Military Commissions Act of 2006 ("MCA").⁴ Before discussing the MCA, we begin with an examination of the limits of the Court's holding in *Hamdan*.

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** Judge, U.S. Court of Appeals for the Ninth Circuit. An earlier version of this Article, written before enactment of the MCA and without footnotes, appeared in 9 The Green Bag 2d 353 (2006). The comments of Laurence Gold are gratefully acknowledged; any remaining errors are our own.

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

2. Military Order of November 13, 2001, 66 Fed. Reg. 57833-36 (Nov. 16, 2001) [hereinafter November 13 Order].

3. 10 U.S.C. § 801, ch. 47 (2000).

4. Pub. L. 109-366, signed by President Bush into law on October 17, 2006.

I. THE LIMITS OF *HAMDAN V. RUMSFELD*

Hamdan is a remarkable ruling. Use of military commissions during wartime to try military personnel or enemy combatants considered to have violated the laws of war has a long history, dating back to the Mexican War⁵ and in some accounts to the Revolutionary War.⁶ To our knowledge, the Court had not previously placed curbs on the President's ability to try suspected unlawful combatants by military commission. *Ex parte Milligan* was, of course, a case involving "a citizen in civil life, in nowise connected with the military service. . . ." The decisions from the World War II era, especially *Ex parte Quirin*⁸ and *In re Yamashita*,⁹ pointed in one direction¹⁰—that existing Articles of War legislation had authorized military commissions as an exercise of the President's common law military power, and that courts-martial provided a concurrent means for trying war criminals that did not alter the traditional role for military commissions.¹¹

5. David Glazier of the University of Virginia's Center for National Security Law reports that General Winfield Scott, the U.S. Army's commander during the Mexican War of 1846-48, "established a separate tribunal . . . called Councils of War for trying law of war violations that would be known as 'war crimes' today." David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5, 36 (2005). The *Hamdan* Court seemingly agrees that the military "commission 'as such' was inaugurated in 1847." 126 S. Ct. at 2773 (citing WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 832 (rev.2d ed.1920); G. DAVIS, *A TREATISE ON THE MILITARY LAW OF THE UNITED STATES* 308 (2d ed. 1909)).

6. The Court noted that the military commission was "foreshadowed in some respects by earlier tribunals like the Board of General Officers that General Washington convened to try British Major John Andre for spying during the Revolutionary War. . . ." 126 S. Ct. at 2773. Andre had been captured in civilian clothes behind enemy lines carrying documents from Benedict Arnold; Washington's panel reported that he "ought to be considered as a spy from the enemy and . . . agreeable to the Law and usage of nations . . . he ought to suffer death." Proceedings of A Board of General Officers Respecting Major John Andre 79, Sept. 29, 1780 (Francis Bailey ed. 1780). Glazier discounts this precedent, arguing that the Andre panel was not a military court with power of execution but merely rendered an advisory opinion to General Washington; and that, in any event, courts-martial were used for the vast majority of accused British spies during the Revolution. See Glazier, *supra* note 5, at 18-23.

7. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121-22 (1866).

8. *Ex parte Quirin*, 317 U.S. 1 (1942). For a very interesting account of Justice Jackson's views, see Jack Goldsmith, *Justice Jackson's Unpublished Opinion in Ex parte Quirin*, 9 The Green Bag 2d 223 (2006).

9. *In re Yamashita*, 327 U.S. 1 (1946).

10. The Court in *Hamdan* recognized that the "law-of-war military commission" was used during World War II, that the Court had "sanctioned President Roosevelt's use of such a tribunal to try Nazi saboteurs captured on "American soil during the War," 126 S. Ct. at 2776 (citing *Quirin*), and that "we held that a military commission had jurisdiction to try a Japanese commander for failing to prevent troops under his command from committing atrocities in the Philippines." *Id.* (citing *Yamashita*).

11. For the *Hamdan* Court, "*Quirin* represents the high-water mark of military

Congress codified the Articles of War by enacting the UCMJ in 1950¹² but it made no changes in the Articles dealing with military commissions or the procedures governing them. It did provide in Article 36(b) that the President's rules and regulations prescribing procedure "in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals . . . shall be uniform insofar as practicable and shall be reported to Congress."¹³ Despite contrary World War II precedent,¹⁴ the *Hamdan* Court seized on this seemingly modest provision, the implications of which for military commissions occasioned no discussion in the relevant committee reports,¹⁵ as establishing a "uniformity principle" contravened by Hamdan's military commission.

With the benefit of hindsight, the President might have done a better job framing the issue for the courts. It was naturally difficult to convince the Justices of a military exigency re-

power to try enemy combatants for war crimes." 126 S. Ct. at 2777. The *Quirin* Court stated that the Articles of War, 10 U.S.C. §§ 1471–1593, "recognize the 'military commission' appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial." 317 U.S. at 12. In *Yamashita*, the Court read *Quirin* as holding that "Congress gave sanction . . . to any use of the military commission contemplated by the common law of war." 327 U.S. at 20. This reading was reaffirmed in *Madsen v. Kinsella*, 343 U.S. 341, 355 (1952).

12. Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950).

13. 10 U.S.C. § 836 (2000).

14. The Court in *Yamashita* had sustained a military commission proceeding that did not follow court-martial procedures. Because the accused Japanese commander in that case was not subject to the Articles of War by virtue of Article 2, "the military commission before which he was tried, though sanctioned, and its jurisdiction saved by Article 15, was not convened by virtue of the Articles of War, but pursuant to the common law of war The Articles left the control over the procedure in such a case where it had previously been, with the military command." 327 U.S. at 20. However, since "the UCMJ's codification of the Articles of War after World War II expanded the category of persons subject thereto to include defendants in Yamashita's (and Hamdan's) position, and the Third Geneva Convention of 1949, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, extended prisoner-of-war status to individuals tried for crimes committed prior to their capture, the *Hamdan* Court reasoned that *Yamashita*, "[t]he most notorious exception to the principle of uniformity, . . . has been stripped of its precedential value." 126 S. Ct. at 2789–90.

15. Referring to Justice Thomas's dissenting view that the adoption of Article 36(b) was motivated solely by a desire to promote uniformity of procedure across the separate branches of the armed services, without including military commissions, the *Hamdan* Court noted that "even if Congress were concerned with ensuring uniformity across service branches, that does not mean it did not also intend to codify the longstanding practice of procedural parity between courts-martial and other military tribunals." 126 S. Ct. at 2791 n.50. *But see* Eugene R. Fidell, Dwight H. Sullivan & Detlev F. Vagts, *Military Commission Law*, *The Army Lawyer*, pp. 47–48 (Dec. 2005): "One might argue that this uniformity clause [in Article 36(b)] implies that the rules and regulations must, 'insofar as practicable,' be uniform as between courts-martial, military commissions, and other military tribunals (such as provost courts), but the better reading is that the uniformity referred to is uniformity among the various armed forces."

quiring trial by military commission when Hamdan, reputed to have been Osama Bin Laden's driver in Afghanistan, was turned over to the U.S. military in November 2001, transported to Guantanamo Bay in June 2002, deemed triable by military commission for unspecified offenses in July 2003, and, only after he had brought suit seeking his release, was charged on July 13, 2004 with one count of conspiracy "to commit . . . offenses triable by military commission."¹⁶ More work also could have been done to consult with Congress so that the Justices might have been less inclined to view the President's November 13 Order as grounded in bald claims of inherent executive power rather than reflecting the exercise of a shared responsibility between the two branches.

Even so, Congress was plainly aware of the President's Order and even after Hamdan's commission had been named, it enacted the Detainee Treatment Act of 2005 ("DTA").¹⁷ The DTA provides for restrictions on the treatment and interrogation of the Guantanamo detainees, requires the Secretary of Defense to report to Congress on the procedures used to determine the proper classification of these detainees, and establishes the exclusive jurisdiction of the U.S. Court of Appeals for the D.C. Circuit to review both classification determinations and final decisions of military commissions convened to try the detainees. There is a strong argument that the DTA provided sufficient authorization for the President's Order, particularly in light of the long history of the use of military commissions in wartime. Justice Jackson's observation, concurring in the *Steel Seizure* case,¹⁸ would have seemed particularly apt: "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."¹⁹ Indeed, the Government argued that the DTA both authorized the commissions and limited the Court's jurisdiction to entertain Hamdan's writ when his trial before the commission had not yet begun.

The Court, however, was of a different view. Not only did it find no bar to its jurisdiction in the DTA, it also held the DTA

16. Hamdan, 126 S. Ct. at 2759.

17. Pub.L. No. 109-148, Div. A, Tit. X, 119 Stat. 2739, 2680 (signed into law on December 30, 2005).

18. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

19. *Id.* at 635.

to be insufficiently “specific congressional authorization” for Hamdan’s military commission.²⁰ The DTA, we are told, “contains no language authorizing [Hamdan’s] tribunal or any other at Guantanamo Bay”;²¹ “‘recognizes’ the existence of the Guantanamo Bay commissions in the weakest sense” of merely “referenc[ing] some of the military orders governing them and creat[ing] limited judicial review of their ‘final decision(s)’”;²² and, at most, “acknowledge[s] a general Presidential authority to convene military commissions in circumstances where justified under the ‘Constitution and laws,’ including the law of war.”²³ No authority was given for the Court’s rather demanding “clear statement” requirement—that Congress, in essence, must state affirmatively, “we authorize” or “we approve” the use of military commissions for the particular conflict (and presumably with the particular procedures specified by the President).

Justice Stevens’ opinion has six substantive parts, all of which were joined by Justices Souter, Ginsburg and Breyer. Justice Kennedy provided a key fifth vote, joining Justice Stevens’ opinion in all but Parts V and VI-D-iv.²⁴ For ease of exposition, we set out the structure of Justice Stevens’ opinion, as follows:

- Part II. The Court denied the Government’s request to dismiss for lack of jurisdiction based on the DTA.
- Part III. The Court declined to abstain and await the outcome of ongoing military proceedings in Hamdan’s case.
- Part IV. The Court rejected the Government’s argument that the DTA and Congress’s 2001 Authorization for Use of Military Force (“AUMF”) “to prevent any future acts of international terrorism against the United States”²⁵ provided sufficient authorization for the President’s use of military commissions to try Guantanamo detainees (at least pursuant to the procedures specified by the President).
- Part V. After discussing the circumstances in which military commissions have been convened in the past, a plurality of the Court stated that the conspiracy charge lev-

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

21. *Id.*

22. *Id.*

23. *Id.*

24. The Chief Justice recused himself from the case because he sat on the panel that considered Hamdan’s appeal in the D.C. Circuit. Justice Kennedy’s vote was key because a 4-4 vote would have affirmed the judgment of the D.C. Circuit below.

25. 115 Stat. 224, note following 50 U.S.C. § 1541 (2000 ed., Supp. III).

eled against Hamdan does not state a violation of the “law of war” (which delimits the jurisdiction of military commissions under Article 21 of the UCMJ²⁶).

- Part VI. The Court held that Hamdan’s military commission lacked the power to proceed because “the procedures’ admitted deviation from those governing courts-martial itself renders the commission illegal.”²⁷ Several bases were given:
 - The Court read Article 36 of the UCMJ to establish a “uniformity principle,” requiring court-martial rules to apply to military commissions, at least absent a Presidential determination that it is “impracticable” to do so. Here, the order establishing Hamdan’s military commission permits exclusion of the accused from the proceeding, whereas the UCMJ normally requires a trial “in the presence of the accused.”²⁸ Such variance from court-martial procedures was not saved by a Presidential determination of impracticability; nor did the record indicate that it would be impractical in this case to apply the rules used in courts-martial. (Part VI-C)
 - Hamdan’s military commission contravened Common Article 3 of the Geneva Conventions of 1949, which was deemed implicitly incorporated in the UCMJ’s authorization of military commissions for offenses in violations of the “law of war.” Common Article 3 applies to the conflict with al Qaeda, which is considered a “conflict not of an international character” because it is not a conflict between states but, rather, between the United States and non-state groups occurring in the territory of a contracting power (i.e., Afghanistan).²⁹ Common Article 3 requires use of a “regularly constituted court” to try

26. *Hamdan*, 126 S. Ct. at 2778-86.

27. *Hamdan*, 126 S. Ct. at 2787 (noting Hamdan’s position).

28. *See id.* at 2792: “The absence of any showing of impracticability is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself: the right to be present. See 10 U.S.C.A. § 839(c) (Supp.2006).”

29. *But see* International Comm. of the Red Cross (“ICRC”), Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War 37 (Jean Pictet ed. 1960) (“Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, . . . which are in many respects similar to an international war, but take place within the confines of a single country.”).

Hamdan; and Hamdan's military commission is not such a court.³⁰ "At a minimum, a military commission 'can be "regularly constituted" by the standards of our military justice system only if some practical need explains deviation from court-martial practice.' As we have explained, no such need has been demonstrated here."³¹ (Part VI-D-i through iii)

- The plurality maintained that the procedures contemplated for Hamdan's commission violate both Common Article 3 and "customary international law" principles embodied in Article 75 of Protocol I to the Geneva Conventions of 1949—most notably, in failing to guarantee that "an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him."³² (Part VI-D-iv)

It is clear from the foregoing that a majority of the Court agreed that (1) it had jurisdiction to hear Hamdan's case notwithstanding the judicial review provisions of the DTA; (2) abstention was not appropriate in this case; (3) neither the DTA nor the AUMF provided sufficient authorization for the President's order establishing use of military commissions for the Guantanamo detainees, at least pursuant to the procedures therein contemplated; (4) such commissions were subject to the "uniformity principle" established by the UCMJ, requiring use of court-martial procedures at least absent a Presidential finding of impracticability, not made here; and (5) the contemplated procedures were at variance with certain court-martial procedures and with Common Article 3's requirement of a "regularly constituted court."

30. The *Hamdan* Court allowed that "the term 'regularly constituted court' is not specifically defined in either Common Article 3 or its accompanying commentary," but for "its core meaning" relied, *inter alia*, on commentary to the Fourth Geneva Convention that "defines 'regularly constituted' tribunals to include ordinary military courts' and 'definitely exclude(s) all special tribunals.' [ICRC, Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 340 (Jean S. Pictet ed. 1958)] (defining the term 'properly constituted' in Article 66, which the commentary treats as identical to 'regularly constituted'). . . ." 126 S. Ct. at 2796–97. Henceforth, U.S. constitutional lawyers will need to keep abreast of the "relevant," but "not binding" commentaries to the Geneva Conventions and other ICRC publications—all postdating the negotiation and entry into force of the Conventions themselves. *Hamdan*, 126 S. Ct. at 2790 n.48.

31. *Hamdan*, 126 S. Ct. at 2797.

32. *Id.* at 2798 (plurality opinion).

Justice Kennedy also penned a separate concurrence. In addition to choosing somewhat narrower language to indicate where he agreed with Justice Stevens' opinion, he also made clear that, especially in light of military commission regulations requiring a "full and fair trial," he would not decide at this point in the proceedings whether the UCMJ or Common Article 3 "necessarily requires that the accused have the right to be present at all stages of a criminal trial."³³

It should also be clear that because Justice Kennedy parted ways, there was no majority for the view that the charge against Hamdan failed to state an offense against the laws of war; that the accused has a nearly absolute right to be present at all stages of the military commission proceedings; or that certain provisions of the Protocol I to the Geneva Conventions, which have not been ratified by the United States,³⁴ were applicable to Hamdan's trial.

Even where the Justices spoke as a Court, there are significant limits to the Court's ruling that should inform Congressional deliberations over which procedures should govern any military commissions for the Guantanamo detainees.

First, *Hamdan* says nothing about the President's authority to detain the Guantanamo detainees or other alleged unlawful combatants for the duration of hostilities, even without bringing formal charges against them. Justice Stevens's opinion states that it assumes, at least for purposes of its decision, that Hamdan is a dangerous individual who would act on his beliefs if given the opportunity, and does not address "the Government's power to detain him for the duration of active hostilities in order to prevent such harm."³⁵

Second, the overarching theme of the Court's decision is that, at least under existing UCMJ legislation, the Government must show military necessity for departing from court-martial

33. *Hamdan*, 126 S. Ct. at 2799, 2809 (Kennedy, J., concurring).

34. The Reagan Administration refused to submit Protocol I to the Senate in part because of provisions that "would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war." S. Treaty Doc. 100-2, 100th Cong., 1st Sess. 4 (1987). It is unclear whether other provisions of the Protocol are acceptable to, and presumably binding on, the United States as merely reflecting customary international law. The plurality in *Hamdan* relied on an article by William H. Taft, IV, then Legal Adviser to the State Department, for its assertion that Article 75 of Protocol I is entitled to such status. See *Hamdan*, 126 S. Ct. at 2797 (quoting Taft, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 322 (2003)).

35. *Hamdan*, 126 S. Ct. at 2798.

procedures. The Court would appear to be suggesting that the use of military commissions in occupied territory or in the theater of conflict³⁶ might trigger judicial abstention from interference with ongoing commission proceedings³⁷ and might warrant different procedures from those commonly afforded in courts-martial.³⁸

Third, *Hamdan* is not a constitutional ruling, but rather a decision about the presence *vel non* of Congressional authorization and the content of any legislated limits on the President's use of military commissions. Justice Breyer separately concurred, in an opinion joined by Justices Kennedy, Souter and Ginsburg, to emphasize that while "Congress has denied the President the legislative authority to create military commissions of the kind at issue here . . . [n]othing prevents the President from returning to Congress to seek the authority he believes necessary."³⁹

Indeed, as a formal matter, *Hamdan* does not necessarily require further Congressional authorization. Although we think the President was well advised, as a political matter, to seek such authorization, it is possible to read the Court's opinion as predi-

36. The Court's opinion identified three different contexts in which military commissions have been used: (1) "they have substituted for civilian courts at times and in places where martial law has been declared"; (2) they "have been established to try civilians as part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function"; and (3) they have been "convened as 'incident to the conduct of war' when there is a need 'to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.'" *Id.* at 2775-76 (quoting *Duncan v. Kahanamoku*, 327 U.S. 304, 314 (1946), and *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942)). The third type of military commission, "the law-of-war military commission," *Hamdan*, 126 S. Ct. at 2776, is the one that was at issue in the case: "Since Guantanamo Bay is neither enemy-occupied territory nor under martial law, the law-of-war commission is the only model available" to the Government. *Id.* at 2777. In finding the charges against Hamdan insufficient, the Court observed: "The charge's shortcomings are not merely formal, but indicative of a broader inability on the Executive's part here to satisfy the most basic precondition—at least in the absence of specific congressional authorization—for establishment of military commissions—military necessity. Hamdan's tribunal was appointed not by a military commander in the field of battle, but by a retired major general stationed away from any active hostilities." *Id.* at 2785.

37. The Court stated that "we certainly do not foreclose the possibility that abstention may be appropriate in some cases seeking review of ongoing military commission proceedings (such as military commissions convened on the battlefield). . . ." *Id.* at 2772.

38. The uniformity principle that the Court derived from Article 36 of the UCMJ is cabined by the concept of impracticability: "The uniformity principle is not an inflexible one; it does not preclude all departures from the procedures dictated for use by courts-martial. But any departure must be tailored to the exigency that necessitates it." *Id.* at 2790. However, the Court notes, "[n]othing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case." *Id.* at 2792.

39. *Id.* at 2799 (Breyer, J., concurring).

cated on the absence of a requisite Presidential finding under Article 36 of the UCMJ. The Court states in Part VI-C of its opinion:

... Without reaching the question whether any provision of Commission Order No. 1 is strictly “contrary to or inconsistent with” other provisions of the UCMJ, we conclude that the “practicability” determination the President has made is insufficient to justify variances from the procedures governing courts-martial. . . .

The President here has determined, pursuant to subsection (a) [of Article 36], that it is impracticable to apply the rules and principles of law that govern “the trial of criminal cases in the United States district courts,” §836(a), to Hamdan’s commission. We assume that complete deference is owed to that determination. *The President has not, however, made a similar official determination that it is impracticable to apply the rules for courts-martial.*⁴⁰

The Court, however, went on to suggest that the record would not support a Presidential determination of impracticability. It is a bit difficult to understand, however, how the Court could have done anything more than offer preliminary but non-binding views, without awaiting an initial President determination as to which of the court-martial procedures would be impracticable in the al Qaeda cases and why. There is a rule in administrative law, called the *Chenery* doctrine, requiring that administrative action be judged on an agency’s stated reasons. But if these reasons are found to be inadequate as a legal matter, the court must remand the case back to the agency for a reexamination (unless there is only one outcome that is legally sustainable).⁴¹ This doctrine, which reflects respect for the actions of politically accountable branches, would seem at least equally applicable to the President, and would argue for treating the Court’s discussion of the quality of the procedures anticipated for Hamdan’s military commission as dicta. It may serve as guidance to the President and Congress but it is not a holding that is

40. *Id.* at 2791 (emphasis added). Admittedly, the President’s November 13 Order omits an express determination under Article 36(b) while providing one under Article 36(a). Read in a less-crabbed manner, however, the Order would seem to reflect adequately an executive determination that the stated military exigency required the contemplated departure from procedures normally governing court-martial procedures, including special provisions for the admission of evidence and the handling of classified information. See November 13 Order, *supra* note 2, at § 4(c)(3)-(4).

41. See *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

binding on either branch or the Court in a later case squarely addressing the adequacy of procedures actually adopted by a military commission.

Fourth, *Hamdan* does not hold, as some have suggested, that Common Article 3 is treaty law that may be directly invoked during private litigation. The Supreme Court's 1950 decision in *Johnson v. Eisentrager*⁴² rejected the view that the Geneva Convention of 1929⁴³ was judicially enforceable.⁴⁴ As Justice Jackson wrote, a few years after his service as chief prosecutor for the United States in the Nuremberg trials: "It is . . . the obvious scheme of the [Geneva] 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 interventions of protecting powers. . . ."⁴⁵

Hamdan is a construction of the UCMJ, not a direct application of the Geneva Conventions of 1949. The Court neither purports to overturn *Eisentrager* nor suggests that the Geneva Conventions of 1949 are entitled to a different status than their 1929 predecessor.⁴⁶ Rather, the Court reasons, even if *Hamdan* cannot invoke the Conventions as an "independent source of law binding upon the Government's actions," the protections of the Conventions are "part of the law of war" and "compliance with the law of war is the condition upon which the authority set forth in Article 21 [of the UCMJ] is granted."⁴⁷ Article 21 is the provi-

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

43. Geneva Convention of July 27, 1929, 47 Stat. 2021.

44. *Eisentrager*, 339 U.S. 763 (1950).

45. *Id.* at 789 n.14.

46. The *Hamdan* Court noted: "We may assume that 'the obvious scheme' of the 1949 Conventions is identical in all relevant respects to that of the 1929 Convention, and even that that scheme would, absent some other provision of law, preclude *Hamdan*'s invocation of the Convention's provisions as an independent source of law binding upon the Government's actions and furnishing petitioner with any enforceable right." 126 S. Ct. at 2794.

47. *Id.* It is not clear, however, why a similar argument could not have been made in *Eisentrager*, since the text of Article 21 of the UCMJ, on which the *Hamdan* Court relied, is virtually identical to Article 15 of the Articles of War ("AW"), which were enacted during World War I, see Act of Aug. 29, 1916, ch. 418, § 3, 39 Stat. 650, and presumably would have applied in *Eisentrager*. The apparent purpose of Article 15 was to preserve the preexisting jurisdiction of military commissions despite the enlargement of the concurrent jurisdiction of courts-martial over violations of the law of war. See *Madsen v. Kinsella*, 343 U.S. 341, 353-54 (1952). When Congress enacted Article 21 of the UCMJ in 1950, 64 Stat. 115, 145, it merely codified Article 15 without intending any change. See S. Rep. No. 486, 81st Cong., 1st Sess. 13 (1949) ("This article preserves existing Army and Air Force law which gives concurrent jurisdiction to military tribunals other than courts-martial. The language of AW 15 has been preserved because it has been construed by the

sion granting courts-martial concurrent jurisdiction over “offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.”

The significance of this point is that Congress may enjoy considerable latitude in revisiting the applicable provisions of the UCMJ to make a more discerning incorporation of treaty-based obligations than was apparently the case in *Hamdan*. For example, Congress might provide its own interpretation of Common Article 3’s requirement of a “regularly constituted” tribunal, perhaps more in keeping with the discernible intent of the contracting parties in 1949 to bar only “‘summary’ justice”⁴⁸ rather than adopting all of the court-martial procedures used to try ordinary criminal offenses committed by armed forces personnel. Indeed, as we shall see below, this is exactly what Congress has done. Justice Kennedy’s separate concurrence provides further support for this conclusion by tying the requirements of Article 3 to both the absence of specific Congressional authorization and a Presidential showing of “some practical need” to dispense with court-martial procedures.⁴⁹

Our final point about *Hamdan* goes to the procedures that the decision requires be followed in any military commissions used for al Qaeda suspects. Here, too, there has been a tendency among commentators to overstate the reach of the Court’s decision. Professor Michael Scharf, for example, testified in July

Supreme Court” (citing *Ex parte Quirin*, 317 U.S. 1, 29 (1942)); see also H.R. Rep. No. 491, 81st Cong., 1st Sess. 17 (1949) (same).

48. “Sentences and executions without previous trial are by definition open to error. ‘Summary justice’ may be effective on account of the fear it arouses, but it adds too many innocent victims to all of the other innocent victims of the conflict. All civilized nations surround the administration of justice with safeguards aimed at eliminating the possibility of judicial errors. The Convention has rightly proclaimed that it is essential to do this even in time of war. *We must be very clear about one point; it is only ‘summary’ justice which it is intended to prohibit.*” ICRC, Commentary, III Geneva Convention Relative to the Treatment of Prisoners of War 3940 (Jean S. Pictet ed. 1960) (emphasis added). As Professor Kenneth Anderson of American University’s Washington College of Law notes on his blog: This passage in Common Article 3 “was, after all, about preventing summary execution. No one ever imagined it to be about giving detainees in civil wars all the protections of a regular court—if for no other reason than that its terms apply to *both* government forces and insurgent forces.” Posting of Professor Kenneth Anderson, <http://kennethandersonlawofwar.blogspot.com/2006/07//hamdan-geneva-conventions-and-c> (July 17, 2006) (emphasis in original).

49. “At a minimum a military commission like the one at issue—a commission specifically convened by the President to try specific persons without express congressional authorization—can be ‘regularly constituted’ by the standards of our military justice system only if some practical need explains deviations from court-martial practice.” *Hamdan*, 126 S. Ct. at 2804 (Kennedy, J., concurring).

2006 before House Armed Services Committee that the Court held that the Guantanamo detainee commissions violated “required international rules of due process” by:

- Authorizing the exclusion of the defendant from his own trial (whenever the government invokes “national security concerns” whether the particular evidence is classified or not).
- Permitting the admission of unreliable evidence (such as hearsay and evidence gained through coercion).
- Permitting witnesses to testify without disclosing their identities to the defendant (in order to protect intelligence sources and methods).
- Establishing review procedures that do not amount to an appeal to an independent higher court.⁵⁰

None of these assertions, in our view, is a plausible account of the Court’s holding. As we have suggested, the Court essentially remanded to Congress the question of authorization for the military commissions and the procedures they should follow. The Court’s criticism of the procedures outlined in the President’s order should be read in light of the fact that it was engaged in a statutory construction of the UCMJ, which Congress and perhaps even the President on a showing of military necessity or “some practical need,” to quote Justice Kennedy, could alter.

Even on the Court’s own terms, however, these “required international rules of due process” cannot be advanced as part of the Court’s holding. As to the first and third of these rules, Justice Kennedy withheld his vote from Part VI-D-iv of the plurality opinion to leave open the question of the circumstances under which Hamdan or other detainees could be excluded from proceedings to protect sensitive information or confidential sources. Justice Kennedy is quite explicit in saying that he would not rely at all on Article 75 of Protocol I to the Geneva Conventions (given the Government’s decision in the 1980s not to accede to the protocol) or decide whether Common Article 3 “requires that the accused have the right to be present at all stages of a criminal trial.”⁵¹ While Justice Kennedy considered “the

50. House Armed Services Comm., Hearing on Standards of Military Commissions and Tribunals, Prepared Statement of Michael P. Scharf, Professor of Law and Director, Frederick K. Cox International Law Center, Case Western Reserve University School of Law (July 26, 2006), p. 3 (on file with authors).

51. *Hamdan*, 126 S. Ct. at 2809.

possibility of a conviction and sentence” based on evidence not seen or heard by the accused to be “troubling,” he pointed out that both the military order’s overall requirement of a “full and fair trial” and the availability of judicial review under the DTA justified refraining from ruling on this issue at this juncture.⁵²

The second “rule” barring “unreliable evidence” seems beside the point because the President’s order did not authorize use of unreliable evidence; instead, it provided for “admission of such evidence as would . . . have probative value to a reasonable person.”⁵³ As for “evidence gained through coercion,” the commission regulations provided for exclusion of declarations “established to have been made as a result of torture. . . .”⁵⁴ Moreover, the DTA expressly bars “cruel, inhuman, or degrading treatment or punishment” of persons in U.S. custody, and requires assessment by the Defense Department and a report to Congress as to whether any determination regarding a detainee used evidence that “was obtained as a result of coercion” and “the probative value (if any) of any such statement.”⁵⁵

As for Scharf’s third proposed “rule,” requiring identification of testifying witnesses, this matter was not decided by the Court. Justice Kennedy observed that military rules of evidence already regulate “use of classified information,” and that the commission regulations already “bar the presiding officer from admitting secret evidence if doing so would deprive the accused of a ‘full and fair trial.’ This fairness determination, moreover, is unambiguously subject to judicial review under the DTA.”⁵⁶

With regards to the fourth “rule,” since the DTA expressly provides for review by the D.C. Circuit of both classification determinations and final decisions of military commissions, it is a bit difficult to understand how the Court could have had before it the issue of whether the review procedures afforded the Guantanamo detainees did or did not “amount to an appeal to an independent higher court.” In any event, the Court did not purport to pass on this question.

52. *Id.* (“The evidentiary proceedings at Hamdan’s trial have yet to commence, and it remains to be seen whether he will suffer any prejudicial exclusion.”).

53. See November 13 Order, *supra* note 2, § 4(c)(3).

54. *Hamdan*, 126 S. Ct. at 2808 (citing Military Commission Instruction No. 10, § 3(A) (Mar. 24, 2006)).

55. Detainee Treatment Act of 2005, H.R. 2863, 109th Cong. §§ 1003, 1005(b) (2005).

56. *Hamdan*, 126 S. Ct. at 2809.

Hamdan is an extremely important decision, and the Justices faced a difficult task of assessing the imperatives of national security in terms of existing statutory restrictions on the use of military tribunals. It is important, however, to distinguish between what the *Hamdan* Court held, and what it suggested in dicta or in a simple plurality opinion. The former, of course, is binding precedent. The latter, however, represents a discussion that may indeed have influence over Congress, the President, and the courts, but only to the extent the Court's reasoning has the power to persuade.

II. THE MILITARY COMMISSIONS ACT OF 2006

Taking up the Court's invitation in *Hamdan*, Congress enacted the Military Commissions Act of 2006 ("MCA" or "Act"), which President Bush signed into law on October 17, 2006. Congress plainly supplied the specific authorization to try Guantanamo detainees by military commission that the *Hamdan* Court found lacking. The legislation states that an "alien unlawful enemy combatant," which includes "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)," is subject to trial by military commission for any offense made punishable by the MCA or the law of war committed after September 11, 2001.⁵⁷ A military commission established under the MCA is expressly deemed "a regularly constituted court" for purposes of Common Article 3 of the Geneva Conventions of 1949.⁵⁸ Under the Act, military commissions are separated from the UCMJ, as the procedures for trial by general courts-martial do not "apply to trial by military commission except as specifically provided in this chapter."⁵⁹ Moreover, "judicial construction and application" of the UCMJ "are not binding on military commissions established under this chapter."⁶⁰ Similarly, any rulings by a military commission "may not be introduced or considered" or "form the basis of any holding, decision, or other determination" in any court-martial proceedings.⁶¹

57. Military Commissions Act of 2006, 10 U.S.C. §§ 948a(1), 948d(a) (2006).

58. *Id.* § 948b(f).

59. *Id.* § 948b(c).

60. *Id.*

61. *Id.* § 948b(e).

The MCA rejects the *Hamdan* ruling in other respects as well. First, disavowing the plurality's position, Congress in the MCA declared that a conspiracy "to commit one or more of the substantive offenses triable by military commission under this chapter," including one "who knowingly does any overt act to effect the object of the conspiracy," constitutes a punishable offense.⁶² Second, restoring the law to where it had been under *Eisentrager*, the MCA provides that "[n]o alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights."⁶³ Third, the MCA expressly allows use of hearsay evidence not admissible in trial by general courts-martial if the proponent of the evidence makes known to the adverse party "sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the intention of the proponent to offer the evidence, and the particulars of the evidence (including information on the general circumstances under which the evidence was obtained)."⁶⁴ The adverse party can attempt to have the hearsay evidence excluded by demonstrating that the evidence "is unreliable or lacking in probative value."⁶⁵

On two procedural points, the legislation essentially adopts the *Hamdan* Court's view. First, the accused and his counsel are given the right to have all commission proceedings conducted in their presence and made part of the record, except where the commission is deliberating or voting or the accused after warning persists in conduct disrupting the proceedings.⁶⁶ Second, the accused and his counsel are permitted to hear and confront classified information, although the military judge is required to take certain steps to protect confidential information the disclosure of which "would be detrimental to the national security."⁶⁷ The military judge is authorized to delete specified items of classified information, substitute a summary for such classified information, or substitute a statement of relevant facts that the classified information would tend to prove.⁶⁸ The Secretary of Defense is given the authority to prescribe additional regulations for the use and protection of classified information that are "consistent with" these provisions of the MCA.

62. *Id.* § 950v(b)(28).

63. *Id.* § 948b(g).

64. *Id.* § 949a(b)(2)(E).

65. *Id.*

66. *Id.* §§ 949a(b)(B), 949d(b),(c) & (e).

67. *Id.* §§ 949a(b)(A), 949d(f).

68. *Id.* § 949d(f)(2)-(3).

On the whole, the MCA provides a set of substantial safeguards for the trial of detainees considered to be alien unlawful enemy combatants who have committed punishable offenses or violations of the law of war. These include (1) advance notice to the accused of the charges against him;⁶⁹ (2) a prohibition of compulsory self-incrimination;⁷⁰ (3) an absolute exclusion of statements obtained by use of torture and qualified protection against use of statements obtained by coercion;⁷¹ (4) a guarantee of institutional independence for military commissions by barring any discipline or adverse consideration of members of the commissions for any determinations or other acts performed in course of commission proceedings;⁷² (5) a right on the part of the accused to be represented by civilian counsel in addition to detailed military counsel;⁷³ (6) a requirement that all commission proceedings be held in the presence of the accused and his counsel and be made part of the record;⁷⁴ (7) proceedings held in public unless closed on a specific finding by the military judge that such closure is necessary to prevent disclosure harmful to national security or risk to the physical safety of individuals;⁷⁵ (8) guarantees against double jeopardy, including a bar to any appellate correction of a not-guilty determination;⁷⁶ (9) provision of a defense of lack of mental responsibility sufficient “to appreciate the nature and quality of the wrongfulness of the acts”;⁷⁷ (10) required instructions that the accused “must be presumed innocent until his guilt is established by legal and competent counsel beyond a reasonable doubt” and that “the burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the United States”;⁷⁸ (11) the opportunity for post-trial review of findings of guilty and the accompanying sentence by the convening authority and a newly-established Court of Military Commission Review;⁷⁹ and (12) judicial review of final judgments of military commissions on “matters of law” by the U.S.

69. *Id.* § 948q(b).

70. *Id.* § 948r(a).

71. *Id.* § 948r(b)-(d).

72. *Id.* § 949b.

73. *Id.* § 949c(b)(3).

74. *Id.* §§ 949a(b)(B), 949d(b).

75. *Id.* § 949d(d).

76. *Id.* §§ 949h, 950a, 950b(c)(2)(C) & (d)(2)(B), 950d(a)(2), 950e(b), 950g(a)(2).

77. *Id.* § 949k(a).

78. *Id.* § 949l(c)(1),(4).

79. *Id.* §§ 950b-950g.

Court of Appeals for the D.C. Circuit and, on writ of certiorari, by the Supreme Court.⁸⁰

There are, however, certain aspects of the new legislation that give us pause. The definition of “alien unlawful enemy combatant” is written so broadly as possibly to include even individuals apprehended within the United States even when they engage in no punishable conduct while here.⁸¹ If so, we question why it is always appropriate to have such individuals tried by military commission rather than in the courts. We are also troubled by the failure of the Act to deal with the problem of indefinite detention of individuals who are not forwarded to a Combatant Status Review Tribunal, or another competent tribunal established by the President. We appreciate the fact that the Administration conducts an ongoing review of the status of the Guantanamo detainees—in 2005, 460 detainees cases were reviewed and fourteen detainees were declared eligible for release as no longer believed to pose a significant threat.⁸² While this record indicates the Government’s willingness to correct mistakes, it also suggests that mistakes have been made.

As we write, these and other important questions are in litigation. On February 20, 2007, a divided panel of the D.C. Circuit upheld the constitutionality of the MCA’s restriction on habeas review.⁸³ Almost immediately, a petition for a writ of certiorari was filed in the Supreme Court, presenting two questions; first, whether the MCA validly stripped federal court jurisdiction over habeas corpus petitions filed by foreign citizens imprisoned indefinitely at Guantanamo Bay; and second, whether the petitioner’s five-year detention demonstrates unlawful confinement requiring the grant of habeas relief or, at the least, a hearing on the merits. In addition, attorneys for the petitioners have filed a motion to expedite the Court’s consideration of the petition.⁸⁴ As for Salim Hamdan, the D.C. Circuit remanded his case to the district court, where Hamdan filed a brief challenging the constitutionality of the MCA. The Government responded with a brief arguing that the district court lacks jurisdiction over Hamdan’s petition for writ of habeas corpus. On

80. *Id.* § 950g.

81. There is no express geographic limitation to the definition of “unlawful enemy combatant” in the Military Commissions Act of 2006, 10 U.S.C. § 948a(1) (2006).

82. Department of Defense, Administrative Review Board Summary, 2006 (available at <http://www.defenselink.mil/news/Jan2006/d20060130arb.pdf>).

83. *Boumediene v. Bush, et al.*, 476 F.3d 981 (D.C. Cir. 2007), *petition for cert. filed*, (Mar. 5, 2007) (No. 06-1195).

84. See *Petition For Writ of Certiorari, Boumediene v. Bush, et al.*, No. 06-1195.

December 13 2006, the District Court held that the MCA required dismissal of Hamdan's petition.⁸⁵ The United States' brief also takes the position that the MCA does not violate the Suspension Clause because aliens abroad have no constitutional rights. Although we express no view on the merits of that claim, or the merits of Hamdan's constitutional attack upon the MCA, we are confident that at least some of the questions and concerns raised in this article will be addressed by the two courts. We are also confident, however, that the legal debate over the treatment of enemy combatants will not end there.

* * *

Many academic commentators argued that the Court's intervention in *Hamdan v. Rumsfeld* was salutary as it required Congress to play an explicit role in shaping the structure and procedures governing the use of military commissions to try the Guantanamo detainees. As Justice Breyer noted in his concurring opinion, "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary."⁸⁶ The President did return to Congress, and it has now acted, providing a resolution in response to the Court's holding but one that may not be entirely welcome to *Hamdan's* enthusiasts.

85. *Hamdan v. Rumsfeld*, Civ. A. No. 04-1518 (D.D.C.).

86. *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring).