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Abstract

This Article examines the procedures contained in the Military Commissions Act of 2006 ("MCA") and finds that they are consistent with the practice of prior military tribunals, domestic and international law, and recent U.S. Supreme Court decisions. The Article discusses specifically two questions that have arisen since the U.S. Supreme Court's decision in Hamdan v. Rumsfeld and Congress's subsequent passage of the MCA. First, do the procedures in the MCA comport with international standards? The Article considers the procedures arising from international agreements and those used in military tribunals during and after World War II, the international tribunals for Rwanda, the former Yugoslavia, and the International Criminal Court. Second, does Congress have the authority to prescribe almost all the rules for military commissions? The conclusion is that both questions should be answered affirmatively.

ARTICLES

THE PROSECUTION OF WAR CRIMES: MILITARY COMMISSIONS AND THE PROCEDURAL AND SUBSTANTIVE PROTECTIONS BEYOND INTERNATIONAL LAW

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I. *INTRODUCTION: MILITARY COMMISSIONS AS A TRADITIONAL PROCEDURE*

Military commissions reflect traditional processes and are used by States to prosecute individuals for committing war crimes and other grave offenses.[1] The military commissions contemplated by Congress[2] to try detainees[3] held at Guantanamo Bay, Cuba, and perhaps elsewhere, are generally unremarkable. This Article examines the procedures contained in the Military Commissions Act of 2006 ("MCA")[4] and finds that they are consistent with the practice of prior military tribunals, domestic and international law, and recent U.S. Supreme Court decisions. The Article discusses specifically two questions that have arisen since the U.S. Supreme Court's decision in *Hamdan v. Rumsfeld*[5]

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1. Sometimes referred to as "military tribunals," which represent several types of proceedings before military courts, military commissions represent trials of individuals accused of committing crimes against the law of war, and were prevalent in the Revolutionary War, the Civil War, and World War II. *See* Scott L. Silliman, *On Military Commissions*, 37 CASE W. RES. J. INT'L L. 529, 530 (2005); *see also* Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600 (2006).

2. Military commissions have jurisdiction over crimes defined by statute or the law of war. *See* 10 U.S.C. § 821.

3. *See id.* § 950v(b)(1)-(28) (listing the crimes over which military commissions have jurisdiction).

4. *See* 10 U.S.C.S. §§ 948a *et. seq.*

5. *See generally* 126 S.Ct. 2749 (2006) (finding that military commission convened to try Salim Ahmed Hamdan—an alleged alien combatant held at Guantanamo Bay, Cuba—lacked power to proceed because it both structurally and procedurally violated the Uniform Code of Military Justice and the Geneva Conventions).

and Congress's subsequent passage of the MCA.[6] First, do the procedures in the MCA comport with international standards? The Article considers the procedures arising from international agreements and those used in military tribunals during and after World War II,[7] the international tribunals for Rwanda,[8] the former Yugoslavia,[9] and the International Criminal Court.[10] Second, does Congress have the authority to prescribe almost all the rules for military commissions? The conclusion is that both questions should be answered affirmatively.

The primary legal argument now available to detainees is that the MCA or some of its provisions violate the U.S. Constitution. This argument seems unlikely to prevail because the MCA provides procedural protections that exceed those used by military tribunals that have been approved by the Supreme Court in the past. In decisions from cases during and after World War II, including *Hamdan v. Rumsfeld*,[11] *Hamdi v. Rumsfeld*,[12] and *Rasul v. Bush*,[13] the Supreme Court has approved virtually every Congressional enactment and rule related to military commissions. Despite ruling against several actions of the Bush Administration, the Supreme Court has not deviated from its position, first outlined in *Youngstown Sheet & Tube v. Sawyer*,[14] that the Presi-

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6. The MCA was passed Oct. 17, 2006.

7. *See* Charter of the International Military Tribunal, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers annex, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 284; *see also* Charter of the International Military Tribunal for the Far East ("IMFE") art. 13, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20 (as amended Apr. 26, 1946, 4 Bevans 27).

8. *See* Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. Doc S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

9. *See* Statute of the International Tribunal, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute].

10. *See* U.N. GAOR, 53rd Sess., U.N. Doc. A/53/387 (September 19, 1998) (establishing International Criminal Court); *see also* U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15-July 17, 1998, *Final Act*, ¶ 23, U.N. Doc. A/CONF.183/10 (July 17, 1998) [hereinafter ICC Statute] (establishing the International Criminal Court).

11. 126 S.Ct. 2749 (2006).

12. 542 U.S. 507 (2004) (finding that the President could not deny a citizen, an alleged unlawful combatant, access to habeas corpus, at least in the absence of a prohibition authorized by Congress).

13. *See* 542 U.S. 466 (2004) (finding that the President could not deny a noncitizen, an alleged unlawful combatant, access to habeas corpus when the detainee was held in a location over which the government exercised complete control, at least in the absence of a prohibition authorized by Congress).

14. 343 U.S. 579 (1952); *see also* Dames & Moore v. Regan, 453 U.S. 654 (1981)

dent, when acting with the approval of Congress and especially in regard to foreign affairs and national security, possess a high level of constitutional authority. Thus, detainees will have to work within the procedures outlined in the MCA and will find no additional protections in international law.

II. *MILITARY COMMISSIONS AND PROCEDURES IN INTERNATIONAL LAW*

The detainees at Guantanamo Bay are subject to prosecution before military commissions because of their alleged participation in war crimes.[15] In defense, the detainees might argue that their procedural protections at trials for these crimes, at least before military commissions, arise from customary international law.[16] They could rely on the practices of prior military tribunals, international criminal tribunals, and international agreements, such as the Geneva Conventions,[17] the Charter of the United Nations,[18] the Universal Declaration of Human Rights,[19] and the International Covenant on Civil and Political

(approving the President's suspension of private claims emanating from a federal judicial decision because Congress had implicitly approved the President's action).

15. Though prosecution of Guantanamo detainees before military commissions may be possible, the *Hamdan* Court determined that the particular crime of conspiracy was not cognizable as a law of war offense. 126 S.Ct. 2749, 2780-85 (Thomas, J., dissenting). The plurality concluded that only completed offenses against the law of nations were cognizable. *Id.* Subsequently, however, Congress, in the MCA, made conspiracy an offense within the jurisdiction of military commissions. 10 U.S.C. *§ 950v(b)(28) (2006).*

16. *See House Armed Services Committee Hearing on Standards of Military Commissions and Tribunals*, 110th Cong., 3 (2006) (statement of Michael P. Scharf, Professor of Law and Director, Frederick K. Cox International Law Center, Case Western Reserve University School of Law).

17. *See* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

18. *See* Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153.

19. *See generally* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

Rights.[20] It is likely, however, that the detainees have fewer rights in international law than they have under the MCA.

The four Geneva Conventions provide basic humanitarian protections to anyone as a result of armed conflict. Perhaps similar to flexible Due Process in U.S. constitutional law,[21] the protections are based on a person's status; some persons have more protections than others. As alleged war criminals, the detainees from the wars in Iraq and Afghanistan would have the fewest rights and would depend on the fourth Geneva Convention for their protections (Relative to the Protection of Civilians in Time of War).[22] Geneva Conventions I, II, and III, respectively, prescribe rules for wounded and sick armed forces in the field; wounded and sick armed forces at sea or who are shipwrecked; and prisoners of war. The Guantanamo Bay detainees do not fall within Geneva Conventions I and II because they are not members of recognized national militias. Under Geneva Convention III, the detainees could not be considered prisoners of war because they do not possess the formal attributes of an internationally recognized fighter. To be entitled to prisoner of war protections, an individual must: (1) fight under a recognized commander; (2) wear a distinctive insignia or uniform; (3) carry arms openly; and (4) fight according to the laws of war.[23] One primary reason for these requirements is to limit civilian casualties. If soldiers cannot identify their adversaries, they cannot defend themselves. Indeed, soldiers will be more likely to attack civilians, intentionally or mistakenly, if the soldiers' adversaries—unlawful combatants[24]—are not wearing uniforms and are dressed like civilians.

A government could deny a detainee the status of prisoner of war solely because the detainee fought without a uniform.[25]

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20. *See* International Covenant on Civil and Political Rights ("ICCPR"), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

21. *See* Mathews v. Eldridge, 424 U.S. 319, 334 (1976) ("'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'") (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

22. *See generally* Geneva Conventions I-IV, *supra* note 17.

23. Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

24. To distinguish lawful from unlawful fighters, the Court in *Quirin* used the term "unlawful combatants." 317 U.S. 1, 31 (1942) (denying a petition to gain access to the federal courts via habeas corpus after the petitioner was convicted by a military commission and sentenced to death).

25. *See id.* at 46.

In *Ex parte Quirin*,[26] a case from World War II, the U.S. Government captured a citizen (presumably), who sympathized with Germany and was planning to disrupt industrial operations inside the United States. The evidence did not show any plan to fight outside the laws of war. Indeed, it would be legal and proper for a soldier in uniform to do everything possible to disrupt the war-making ability of an adversary, such as attacking a factory. Yet, when captured the fighter was wearing civilian clothes. The Supreme Court upheld the military commission's conviction and death sentence, a traditional punishment for spies, concluding that an unlawful combatant has no access to civilian courts via habeas corpus because:

> Unlawful combatants are . . . subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.[27]

Similarly, in the M.C.A., Congress applied the status of "unlawful combatant" to distinct categories of detainees:

> [A] person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy Combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or . . . a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006 [enacted Oct. 17, 2006], has been determined to be an unlawful enemy Combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.[28]

A person would be an unlawful combatant if charged with one of

26. *See generally id.*
27. *Id.* at 31.
28. 10 U.S.C.S. § 948a(1)(a).

the crimes in the Military Commissions Act, which are enumerated in twenty-eight sub-sections.[29]

The government does not appear intent on trying detainees for fighting without uniforms but rather for violating the laws of war when fighting, such as killing civilians or participating in the attacks on September 11, 2001.[30] Such detainees would have basic protections under the fourth Geneva Convention, which guarantees humane treatment, a requirement in Article 3 of each the four Geneva Conventions.[31] The Conventions provide no bar and few protections that would apply to a prosecution before a military commission. Thus, any detainee who will be subject to prosecution before a commission must rely on customary international law—essentially prior military commissions—as a basis for procedural protections. However, the procedures of the military tribunals created after World War II, such as the International Military Tribunal at Nuremberg and the International Tribunal for the Far East, seem harsh when compared against the standards and procedures contained in the Military Commissions Act and could not be relied on by detainees as a source of additional protection. At Nuremberg, for example, defendants were not allowed to question the legitimacy of the court or the seating of a judge, and hearsay, including 300,000 un-sworn "affidavits," was admitted routinely against the defendants, who had no right of appeal.[32]

A detainee might argue that customary international law has evolved not only from prior military tribunals but also from the workings and decisions of the international criminal tribunals for the former Yugoslavia and Rwanda, established in 1993 and 1994. Yet, the protections emanating from those tribunals do not exceed those contained in the Military Commissions Act. The Yugoslavia and Rwanda Tribunals, like the International Criminal Court, were designed to prosecute individuals who committed crimes within a national boundary. In contrast, military commissions are used during and after international conflicts to prosecute an adversary's civilian and military leadership, as well as other individuals of lesser culpability or prominence.

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29. 10 U.S.C.S. § 950v(1)-(28)(b).

30. In *Hamdan*, the government's charges against the detainee were based on conspiracy to commit the attacks of September 11, 2001. *See* 126 S.Ct. 2749, 2761 (2006).

31. *See* Geneva Conventions I-IV, *supra* note 17, art. 4.

32. *See* Scharf, *supra* note 16, at 3.

The international criminal tribunals for Yugoslavia and Rwanda focus on selective prosecutions of a relatively few individuals in a formal, deliberative setting at The Hague, Netherlands. In contrast, military commissions must be capable of trying potentially thousands of detainees at or near the place of war or within a military setting, where a national army, as opposed to local marshals, might be the only entity capable of ensuring security and where soldiers in the armed forces will be witnesses. In upholding the convictions of Germans in a United States military tribunal in China after World War II, the Supreme Court provided its rationale as to why trials of alleged war criminals should occur in a military setting:

> To grant the writ [of habeas corpus] to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation for shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be conflict between judicial and military opinion highly comforting to enemies of the United States.[33]

Military commissions have a purpose that is very different from the tribunals for Rwanda and Yugoslavia.

Regrettably, the nature of war is to overwhelm and destroy the enemy within the laws of war. The mission of a soldier is not to find facts about whether the enemy has committed a wrongful act. That decision has been made previously by the President or

33. Johnson v. Eisentrager, 339 U.S. 763, 778-79 (1950) (holding that nonresident enemy aliens imprisoned in Germany yet captured and tried by a U.S. military commission located in China had no access to the writ of habeas corpus).

Congress. A soldier must force the enemy to submit. In contrast, the essence of domestic criminal law, including proceedings against soldiers under the Uniform Code of Military Justice,[34] is to find facts and, if necessary, select an appropriate disposition that is fair to the defendant and the government.

War is designed to be unfair to the enemy. War is not a comparison or balancing of the rights and interests of enemy soldiers and the government. The only governmental interest is that of totally subduing and incapacitating enemy soldiers. Then, only when enemy soldiers are incapacitated and treated as prisoners of war do they acquire the right not to be killed without any judicial process. Those enemy soldiers who have fought within the laws of war are entitled to the protections guaranteed to prisoners of war and will be released when the war ends. Those individuals who have fought outside the laws of war are entitled to humanitarian treatment, but they are also subject to trial for violating the laws of war and, if convicted, they might never be released from custody.

Thus, military commissions permit nations to maintain resources, especially personnel, near the scene of battle or in a place under military control, where the readiness of soldiers will be less affected by a trial. By circumscribing or even eliminating some protections that would be available at trials or in proceedings within a civilian legal system, military commissions allow soldiers to concentrate on fighting national adversaries rather than having to spend time training how to comply with the constitutional and statutory rules of criminal procedure, such as those regarding arrest,[35] collection of evidence,[36] identification,[37] interrogation,[38] and the exclusionary rule.[39]

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34. 10 U.S.C. §§ 801-941 (2006).

35. Payton v. New York, 445 U.S. 573 (1980) (requiring a warrant to arrest a person on a felony charge in a private home).

36. Hudson v. Michigan, 126 S.Ct. 2159 (2006) (concluding that the benefits of admitting contested narcotics evidence outweighed exclusion of the evidence).

37. United States v. Wade, 388 U.S. 218 (1967) (discussing procedures necessary to ensure a fair and constitutionally proper identification procedure).

38. Dickerson v. United States, 530 U.S. 428 (2000) (concluding that U.S. Constitution, not Supreme Court rule, demands the police interrogation procedures outlined in *Miranda v. Arizona*, 384 U.S. 436 (1966)).

39. Weeks v. United States, 232 U.S. 383 (1914) (concluding that evidence obtained by police in violation of U.S. Constitution shall be excluded from federal trial); *see also* Mapp v. Ohio, 367 U.S. 643 (1961) (concluding that the exclusionary rule applies in state courts).

The Rwanda and Yugoslavia tribunals attach responsibility to individuals who committed crimes in violent circumstances that have ended.[40] The military commissions contemplated by the United States government are part of a national security strategy to protect a nation that has been attacked and which is continuing the wars in Iraq and Afghanistan. Military commissions allow but do not require the government to concentrate on the most threatening individuals. Nazis at Nuremberg, Japanese generals, and terrorist conspirators are probably more threatening to international peace and the security of nations than irregular soldiers, barbarous individuals, or informally constituted groups in Yugoslavia and Rwanda. The crimes and circumstances within Yugoslavia and Rwanda were grave, but those circumstances had less potential than cross-border attacks to affect international peace and the security of nations. The focus of military commissions has always been on prosecuting enemy combatants who are involved in threatening the nation. Indeed, the Military Commissions Act[41] permits the prosecution of world-wide terrorism.[42]

At least for purposes of argument, one might presume that military commissions are, indeed, needed to confront threats to international peace that are greater than those presented at international criminal tribunals, such as those for Rwanda and Yugoslavia. Under a flexible concept of due process, such as that approved by the Supreme Court in *Mathews v. Eldridge*,[43] one could expect further, then, that the international tribunals, arising from perhaps less dangerous circumstances and occurring after the circumstances have ended, would have greater leeway to deliberate and would thus provide more protections than those contained within the military commissions. But, the international tribunals do not provide more protections. The Rwanda and Yugoslavia tribunals provide:

> the presumption of innocence; the right to be informed promptly and in detail of the charges and to have adequate time and facilities to prepare a defense and to communicate freely with counsel of choice; the right to be tried without undue delay; the right to be present during trial and to ap-

40. *See generally* ICTR Statute, *supra* note 8; ICTY Statute, *supra* note 9.
41. 10 U.S.C. §§ 948a *et. seq.*
42. *Id.* § 950v(b)(24).
43. 424 U.S. 319 (1976).

> pointment of counsel; the right to have counsel present during questioning; the right to examine and confront witnesses; the right against self-incrimination and not to have silence taken into account in determining guilt; and the right to disclosure by the Prosecution of exculpatory evidence, and witness statements; and the right to appeal.[44]

While it is impossible to know how courts will interpret and apply such provisions, each protection provided by the international military tribunals is provided also under the MCA.[45]

In regard to appellate rights, the MCA provides significantly more procedural protection than do the international tribunals. The tribunals allow review by one Appeals Chamber.[46] The MCA provides detainees with three layers of review or appeal. First, detainees may submit their convictions to the military officer who convened the commission.[47]

> [T]he convening authority [officer] . . . may, in his sole discretion . . . dismiss any charge or specification by setting aside a finding of guilty thereto . . . [or] change a finding of guilty to a charge to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge,"[48] [and/or] "approve, disapprove, commute, or suspend the sentence in whole or in part . . . [but] may not increase a sentence beyond that which is found by the military commission.[49]

Second, if unsatisfied with the decision of the convening authority, the detainee may appeal to a newly created court, the Court of Military Commission Review.[50] If unsatisfied with the disposition of the case by both the convening authority and also the Court of Military Commission Review, the detainee may begin a third layer of review within the civilian court system by appealing, first, to the Court of Appeals for the District of Columbia and, second, to the U.S. Supreme Court.[51]

Although the detainees are not entitled to habeas corpus review,[52] their right of direct appeal exceeds that of military per-

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44. Scharf, *supra* note 16, at 4.
45. *See* 10 U.S.C. §§ 948a-950w.
46. *See generally* ICTR Statute, *supra* note 8; ICTY Statute, *supra* note 9.
47. 10 U.S.C. § 950b.
48. *Id.* § 950b(c)(3)(A-B).
49. *Id.* § 950b(c)(2)(C).
50. *Id.* § 950f.
51. *Id.* § 950g.
52. *Id.* § 950j(a-b).

sonnel under the Uniform Code of Military Justice and civilian defendants in the federal courts. In the military system, service personnel are entitled to appeal to the applicable intermediate appellate court for the Army, Navy-Marine Corps, Air Force, or Coast Guard.[53] They may then appeal to the Court of Appeals for the Armed Services[54] and then to the Supreme Court.[55] In the civilian system, defendants can request review by the applicable courts of appeals and the Supreme Court.[56]

Thus, absent review by the Supreme Court, military personnel are restricted to courts within the military system—the applicable intermediate appellate court and the Court of Appeals for the Armed Forces. In contrast, the detainees have a right of review before a military commission appellate court and the Court of Appeals for the District of Columbia—a military court and a civilian court. The detainee's appellate rights serve as an additional advantage because the Court of Appeals for the Armed Forces, to which service personnel may appeal, is composed of judges appointed for a term of fifteen years.[57] In theory, these judges will have less judicial independence than judges who have lifetime tenure. In appealing to a U.S. court of appeal, the detainees will appear before judges with lifetime tenure[58] who will presumably have more freedom to rule favorably for unpopular causes or defendants, such as detainees accused of war crimes. Moreover, while a circuit court sits initially with three judges, the court may consider cases en banc,[59] an additional avenue of review that is unavailable to United States service personnel.

Finally, several prominent international agreements mandate fundamental protections, but the protections are too broad to have any practical effect on or applicability to a trial based on the MCA. In essence, all the rights combined in all the international agreements provide fewer protections than those contained in the MCA. The Charter of the United Nations, adopted in 1945, regulates the conduct of States and reaffirms generally

53. 10 U.S.C. § 866 (2000). The relevant courts are: the Army Court of Criminal Appeals; the Navy-Marine Corps Court of Criminal Appeals; Air Force Court of Appeals; and the Coast Guard Court of Criminal Appeals.

54. *Id.* at § 867.

55. *Id.* at § 867a.

56. 28 U.S.C. §§ 1291, 2101 (2000).

57. 10 U.S.C. § 942.

58. U.S. CONST. art III, § 1.

59. 28 U.S.C. § 46 (2000).

"faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women."[60] The Universal Declaration of Human Rights, adopted in 1948, mandates fundamental procedural protections in actions by a State against individuals. The Declaration guarantees the "right to life, liberty and security of person"[61] and, more specifically, "a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."[62] When penal sanctions are at issue, an accused person enjoys a presumption of innocence and a public trial, along with "all the guarantees necessary for his defence."[63] Neither the UN Charter nor the Universal Declaration provides any relevant additional protections.

The International Covenant on Civil and Political Rights provides the most specific procedural protections of the major international agreements. The International Covenant does not contain any reference to military commissions or tribunals but might be instructive because some of the protections it contains apply to trial procedures. In Article 14, the Covenant guarantees: a fair and public hearing by a competent, independent and impartial tribunal; a presumption of innocence; prompt notice of charges; adequate time and facilities to prepare a defense; a trial without undue delay; a trial in the presence of the accused; the assistance of counsel; the right to remain silent; and the right of review by a higher tribunal.[64] Like the international tribunals for Yugoslavia and Rwanda (providing an Appeals Chamber), the right of review in the International Covenant—review by a "higher tribunal"[65]—is more vague and less protective than the right of appeal contained in the MCA, which allows three courts to review convictions arising from military commissions.

In the debate over the treatment and possible trial of the detainees, it is particularly important to note what protections the International Covenant on Civil and Political Rights does not

60. U.N. Charter, *supra* note 18, pmbl.
61. Universal Declaration of Human Rights, *supra* note 19, art. 3.
62. *Id.* art. 10.
63. *Id.* art. 11(1).
64. *See* ICCPR, *supra* note 20, art. 14(1)-(7).
65. *See id.* art. 14(5).

provide and, indeed, what protections it specifically disclaims. The military commissions have provisions allowing for closure of proceedings to protect "national security"[66] and the "physical safety of individuals."[67] The International Covenant contains a provision of identical effect. It reads:

> The Press and the public may be excluded from all or part of a trial for reasons of morals, public order. . .or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.[68]

Unlike the Military Commissions Act, the International Covenant does not provide an indigent defendant with an absolute right to an attorney.[69] Under the Covenant, the defendant does have the right to "legal assistance of his own choosing,"[70] presumably if he or she can afford an attorney. However, the Covenant contemplates that an indigent person will be entitled to an attorney only on a case-by-case basis. Under the Covenant, an accused person has the right:

> To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, *in any case where the interests of justice so require*, and without payment by him in any such case if he does not have sufficient means to pay for it (emphasis added).[71]

Thus, an indigent accused person is entitled to an attorney only "where the interests of justice so require." The indigent defendant's provisional right to an attorney is further illustrated in the immediate next subsection of the Covenant, which provides that the defendant may "examine, or have examined, the witnesses against him."[72] The need to "have witnesses examined" indicates that the defendant might not have the legal ability or an attorney to examine a witness.

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66. 10 U.S.C. § 949d(d)(2)A.
67. *Id.* § 949d(d)(2)B.
68. ICCPR, *supra* note 20, art. 14(1).
69. 10 U.S.C. § 948k (providing indigent defendants with right to an attorney).
70. ICCPR, *supra* note 20, art. 14(3)(b).
71. *Id.* art. 14(3)(d).
72. *Id.* art. 14(3)(e).

The important point is not to emphasize the procedural limitations of prior military tribunals, recent international criminal tribunals, or international agreements, but rather to illustrate that the procedures contained in the MCA exceed the international legal protections afforded to alleged war criminals—past, present, and future. Like the U.S. Constitution, international law provides varying procedural protections that are dependent on the status of individuals, the offenses with which they have been charged, and a consideration of the interests of the larger community. Affording the detainees at Guantanamo Bay and elsewhere the constitutional protections that are available to regular criminal defendants who are citizens of the United States would be to begin an era of jurisprudence unknown thus far in history. International law and the international community have never provided and international agreements have never contemplated that enemy forces accused of violating the laws of war would have rights equal to those of the citizens of the nation that the enemy forces are trying mightily to destroy.

III. CONGRESSIONAL AUTHORITY OVER MILITARY COMMISSIONS

If the procedural protections of the MCA surpass those contained within international law, the detainees' only remaining viable legal argument is that the U.S. Constitution mandates that they receive additional protections. However, the Supreme Court has never invalidated a Congressional rule authorizing military commissions to exercise authority over non-citizens or citizens.[73] The detainees' status as "unlawful enemy combat-

73. *See* Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2759-60 (2006); Hamdi v. Rumsfeld, 542 U.S. 507, 516-18 (2004); Rasul v. Bush, 542 U.S. 466, 472-473, 485 (2004); *see also* Johnson v. Eisentrager, 339 U.S. 763, 789-90 (1950); Application of Yamashita, 327 U.S. 1 (1946) (concluding that the Constitution and Congress's Articles of War provided sufficient authority to deny access to habeas corpus to a non-citizen held in the Philippine Islands following the surrender of Japan and the end of the War); *Ex parte* Quirin, 317 U.S. 1, 44-45 (1942); *accord Ex Parte* Milligan, 71 U.S. 2, 118, 131 (1866) (concluding that a habeas corpus statute prevented the President from trying a citizen in a military commission where the civilian courts were open). In each of the cases, the Court limited its decisions to interpreting the meaning of Congressional enactments—Articles of War; habeas corpus statutes; and Resolutions. In *Quirin* and *Yamashita*, the Court found that Congress could deny habeas review to a citizen and a non-citizen. However, the Court has never squarely decided whether the Constitution provides access to habeas review where Congress has specifically denied review, as in the Military Commissions Act.

ants," taken from the battlefield, places them in the weakest possible position when compared with virtually any criminal defendant or any person protected by the Geneva Conventions.[74] The detainees' claims are restricted further by the many specific provisions in Article I of the U.S. Constitution that seem to provide Congress with total control over rules regarding war,[75] except for the authority the President might possess as commander in chief under Article II.[76] In the instance of the MCA, the Congress and President have concurred as to how to treat the detainees and are at the zenith of their authority by virtue of their agreement.[77]

Article I provides Congress with the authority to "define and punish . . . Offenses against the Law of Nations."[78] An example of an offense against the law of nations would be fighting or spying in civilian clothing.[79] The result of the offense is that the violator will be denied the status of prisoner of war under Geneva Convention III,[80] receive only humanitarian treatment under Geneva Convention IV,[81] and be treated as an unlawful

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74. *See, e.g.*, Geneva Convention IV, *supra* note 17.

75. *See* U.S. CONST. art. I, § 8, cls. 10-16. Congress has authority:

> To define and punish Piracies and felonies committed on the high Seas, and Offenses against the Law of Nations; To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

76. *See* U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.").

77. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-55 (Jackson, J., concurring) (concluding that the President possesses the greatest authority when Congress approves his actions and the least authority when Congress disapproves).

78. U.S. CONST. art I, § 8, cl. 10.

79. *See Ex parte* Quirin, 317 U.S. 1, 44-45 (1942).

80. *See* Geneva Convention III, *supra* note 17, art. 4(2)(b). To receive prisoner of war protections, a person must be under the command of a person responsible for subordinates; have a fixed distinctive sign recognizable at a distance; carry arms openly; and conduct operations in accordance with the laws and customs of war. *Id.* arts. 4(2)(a)-(d).

81. *See* Geneva Convention IV, *supra* note 17, art. III.

combatant under the MCA.[82] Fighting with a uniform is important so that soldiers can distinguish combatants from non-combatants.[83]

The rule requiring a uniform is clear and unyielding. As early as 1780, General George Washington convened a board of senior military officers, who sentenced a British major, John Andre, to death after Andre was caught wearing civilian clothes and carrying the plans for the military reservation at West Point.[84] The British refused to exchange Andre for Benedict Arnold, a former commanding general at West Point and Andre's co-conspirator, and General Washington allowed Andre to be hanged. In 1942, the Supreme Court (in *Quirin*) allowed the execution of a presumed citizen who was tried before a military commission instead of a civilian court because he was engaged in espionage inside the United States and was wearing civilian clothes instead of a German uniform.[85] Fighting without a uniform can be a serious violation of international law because of the increased likelihood of civilian deaths, but today States are focused also on the greater dangers that can result from fighting with a particular animus.[86] Thus, the international community has recognized what are now known as genocide, crimes against humanity, war crimes, and aggression.[87]

In cases arising from military commissions, the Supreme Court has decided mainly only whether Congress authorized a rule related to the commissions, not whether a rule was substantively based within the Constitution.[88] In one instance, a plurality addressed a substantive issue but only in the context of interpreting Congress's intent. In *Hamdan*, a plurality of four justices concluded that conspiracy, as charged by the President, was not an offense against the law of nations—or at least that the Presi-

82. *See* 10 U.S.C.A. § 948a(1)(a). For a consideration of "unlawful combatants," see also *Quirin*, 317 U.S. at 31.

83. W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 513-14 (2003) (discussing the concept and requirement of distinction).

84. *See* Silliman, *supra* note 1, at 530; *see also* David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. INT'L L. & POL. 363, 381 n.49 (2003).

85. *See Quirin*, 317 U.S. at 1.

86. *See, e.g.*, ICTR Statute, *supra* note 8; ICTY Statute, *supra* note 9; ICC Statute, *supra* note 10.

87. *See* ICC Statute, *supra* note 10, arts. 5(1)(a)-(d).

88. *See supra* note 73 and accompanying text.

dent was not authorized under Article II to include conspiracy as an offense against the law of nations.[89] However, the plurality implied, indeed virtually concluded, that Congress could make conspiracy a violation of the laws of war. The plurality said: "There is no suggestion that Congress has, in exercise of its constitutional authority to "define and punish . . . Offences against the Law of Nations," U.S. Const., Art. I, § 8, cl. 10, positively identified 'conspiracy' as a war crime."[90]

In three primary cases decided since 2004, including *Hamdan* in 2006,[91] the Supreme Court heard claims by the President that he possessed independent authority under Article II to issue rules for military commissions. The Supreme Court decided each case based on Congressional action or silence, but in no instance did the Court invalidate any Congressional rule or enactment. In *Hamdi*, the Court found that a Congressional Resolution, the Authorization for Use of Military Force, passed in 2001 following the September 11 attacks, provided the President with the authority to hold a U.S. citizen as an unlawful combatant.[92] Finding Congressional authority, the Supreme Court did not determine the President's claim that Article II provided him with independent authority to promulgate rules for military commissions. In *Hamdi*, the Court specifically avoided overruling *Quirin*, a case from 1942 in which the Court approved the trial, conviction, and death sentence of a citizen who was caught inside the United States engaged in espionage.[93] In *Quirin*, the Supreme Court found that the Articles of War, drafted by Congress, provided the authority for the President to try the detainee before a military commission and deny him access to statutory habeas corpus.[94]

On the same day in 2004 that it decided *Hamdi*, the Court held, in *Rasul*, that a non-citizen detained as an unlawful combatant at a military base in Guantanamo Bay, Cuba had a statutory habeas corpus right to access federal courts so long as the government held the detainee in a place—a leased military base

89. *See* Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2784 (2006).

90. *Id.* at 2779.

91. *See id.* at 2749; *see also* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004).

92. *See Hamdi*, 542 U.S. at 521.

93. *See Ex parte* Quirin, 317 U.S. 1 (1942).

94. *See id.* at 47-48.

in Cuba—over which the government exercised "complete jurisdiction and control."[95] The Court's decision in *Rasul* was based on its interpretation of 28 U.S.C. §§ 2241(a), (c)(3), a habeas corpus statute.[96] In both *Hamdi* and *Rasul*, involving a citizen and a non-citizen, the Supreme Court found that the President could not limit detainees' access to federal courts so long as a statute, at least in the Court's interpretation of the statute, provided access. However, the Court did not address whether any detainee would have any Constitutional habeas corpus right of access to federal courts[97] where a statute, such as the MCA, denied access.[98]

However, the Court did indicate that Congress might have the authority to prohibit detainees from accessing federal courts. In *Rasul*,[99] the Court distinguished *Eisentrager*, in which a non-citizen detainee had no right to access federal courts absent Congressional authorization.[100] In *Eisentrager*, unlike the detainees held in Guantanamo Bay, Cuba, a place over which the government exercises "complete jurisdiction and control" by virtue of a lease,[101] the detainee was held in another country where the United States did not exercise such control. The Supreme Court held that in time of war an enemy alien in that circumstance had no access to courts in the United States.[102]

The Court's holding in *Hamdan*[103] was dependent on its interpretation of the Detainee Treatment Act,[104] a statute Congress enacted in 2005 to regulate the conditions of detainees' confinement and interrogation. The Detainee Treatment Act prohibited habeas corpus for detainees but was not clear as to whether federal courts could continue to hear habeas petitions pending at the time the MCA became law. In *Hamdan*, the

95. *Rasul*, 542 U.S. at 480.

96. *See id.* at 473.

97. U.S. CONST. art. 1, § 9 ("The 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.").

98. 10 U.S.C. § 950j.

99. *See Rasul*, 542 U.S. at 476.

100. *See generally* Johnson v. Eisentrager, 339 U.S. 763 (1950).

101. *Rasul*, 542 U.S. at 480.

102. *See Eisentrager*, 339 U.S. at 777.

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

104. Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739 (codified at 42 U.S.C. § 2000dd (2006)).

Court held that the language in the Act could not be read to eliminate pending habeas corpus petitions.

Following the Court's decision in *Hamdan*, Congress passed the MCA,[105] which explicitly prohibits detainees from filing habeas corpus petitions[106] and effectively directs courts to dismiss all pending habeas actions.[107] Congress did authorize detainees to challenge their convictions in the Court of Military Commission Review,[108] the Court of Appeals for the District of Columbia,[109] and the Supreme Court.[110] To claim successfully that Congress lacks the authority to regulate military commissions to the extent it has done so in the MCA, the detainees will have to prevail on each of several arguments:

1. that the Constitution's text does not allow Congress, alone, to interpret when habeas corpus may be limited;
2. that Congress and the President, even when in agreement, do not possess complete authority to regulate military commissions; and
3. that the appellate review for detainees is not an acceptable substitute for habeas corpus (if the Constitution mandates habeas review for detainees).

Congress's authority over habeas corpus arises under Article I, section 9, which reads: "The 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."[111] In claiming that the text of the Constitution does not allow Congress to prohibit habeas corpus, the detainees will have to argue, first, that the Supreme Court, instead of Congress, is authorized and competent to determine what is a "rebellion" or "invasion" and also what is necessary for "public safety." In essence, the Court would have to make military judgments about the gravity of the threat facing the United States. At a minimum, for the Court to find that Congress's limitations on habeas corpus were unconstitutional, the Supreme Court would have to devise some method to

105. *See* MCA, Pub. L. No. 109-366, § 3, 120 Stat. 2600, 2601-31 (2006) (creating 10 U.S.C. §§ 948-950).

106. *See id.* (creating 10 U.S.C. § 948b(g)).

107. *See id.* (creating 10 U.S.C. § 950j(b)).

108. *See id.* (creating 10 U.S.C. § 950f).

109. *See id.* (creating 10 U.S.C. § 950g(a)).

110. *See id.* (creating 10 U.S.C. § 950g(d)).

111. U.S. CONST. art. I, § 9.

determine that terrorism inside the United States and the wars in Afghanistan and Iraq do not constitute "invasion" and thus do not justify limiting habeas corpus.

Of course, it also seems that with the abilities of States to engage in modern warfare, the Supreme Court, except under the most formalistic interpretation, could not plausibly read Article I, section 9, to require an actual invasion before Congress could suspend habeas corpus as part of a plan to defend the nation. For example, intercontinental ballistic nuclear missiles, traveling over 15,000 miles per hour, can circumnavigate the world in minutes.[112] Practically, Congress would have to have some authority to take action, whether or not such action included limitations on habeas corpus, before the missiles "invaded" the United States' air space and destroyed the nation.

Especially in time of war when urgency and secrecy are often essential, it is not clear how the Supreme Court could ever possess the competence to determine when habeas corpus should be suspended or limited. Indeed, the Constitution provides no role for the Court in matters concerning war. Article I provides Congress with authority over all war making functions[113] and Article II provides the President with the authority to prosecute wars.[114] In essence, law, and practice, Congress creates and funds the Army,[115] and the President, as Commander In Chief, prosecutes the military actions that Congress authorizes.[116] Indeed, in Application of Yamashita,[117] a case arising after World War II—where a military commission sentenced a Japanese general to death—the Supreme Court provided its reasoning as to why the general had no access to U.S. Courts:

> The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military

112. U.S. Air Force, LGM-30 Minuteman III Fact Sheet, http://www.af.mil/factsheets/factsheet.asp?fsID=113 (last visited Apr. 17, 2007) (reporting the U.S. Minuteman III missile has a top speed of 15,000 miles per hour and a range of over 6000 miles).

113. *See* U.S. CONST. art. I, § 8, cls. 10-16.

114. *See id.* art. II, § 2.

115. *See id.* art. I, § 8, cl. 12.

116. *See id.* art. II, § 2, cl. 1.

117. Application of Yamashita, 327 U.S. 1 (1946).

> justice recognized by the law of war. That sanction is without qualification as to the exercise of this authority so long as a state of war exists—from its declaration until peace is proclaimed . . . . The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognized, the evils which the military operations have produced . . . . We cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government.[118]

The Court recognizes that only Congress, which determines the parameters and time of war, has the authority to issue rules regarding military commissions emanating from war, or, today, from terrorism.[119]

Habeas corpus is a means to gain access to federal courts.[120] For detainees, the MCA provides a right of review by a U.S. court of appeal and the U.S. Supreme Court, as well as an appeal to the Court of Military Commission Review.[121] The detainees' access to both civilian and also military appellate courts prior to Supreme Court review is unavailable to any other defendant in the United States.[122] The only court unavailable to detainees is a U.S. district court,[123] but access would make little practical sense. If the detainees were confined at prisons throughout the United States and world and had access to habeas corpus, they would also have access to a myriad of individual judges sitting in the district courts. For many reasons, the most important of which would be to attend hearings to testify, detainees would have to

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118. *Id.* at 11-12.

119. *See id.* at 7-10.

120. *See* 28 U.S.C. § 2241(e)(1) ("No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."); *see also* 28 U.S.C. § 2254 (regarding habeas procedures for persons in state custody); 28 U.S.C. § 2255 (regarding habeas procedures for persons in federal custody).

121. *See* 10 U.S.C. §§ 950g(a), 950g(d), 950f.

122. *See id.*

123. *See id.*

be transported by soldiers from facilities throughout the world to attend hearings throughout the United States.

The different district court judges could be expected to reach different conclusions about the detainees' rights. The decisions of the judges would be appealed to the different circuit courts of appeals, whose decisions could be appealed to the Supreme Court. Even if all detainees were always confined at Guantanamo Bay, similar conflicting and numerous decisions would be issued by the various district court judges throughout the nation who found that habeas venue could be obtained in their courts. Even if all detainee cases were directed to the district court in Washington, D.C., the various judges there could be expected to issue conflicting decisions, all of which would have to be reconciled by the Court of Appeals for the District of Columbia—the same court to which the detainees can appeal their convictions under the MCA.[124]

IV. *CONCLUSION: A TRADITIONAL COURT AND EXPANSIVE PROTECTIONS*

The MCA provides detainees with more substantive and procedural protections than any military commission or tribunal has provided to any defendant in history. In World War II, the Nuremberg and Far East Tribunals did not even permit appeals.[125] Since then, the most significant international agreements—the U.N. Charter, the Geneva Conventions, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights—have provided only the broadest of fundamental trial protections, which are relatively minimal when compared with the protections contained in the MCA. Even if international law provided protections beyond those contained in the MCA—which it does not—the detainees would be limited to whatever protections they obtained under the Act because it came "later-in-time" than international law and thus prevails over earlier treaties and customary international law under the

124. *See* Swain v. Pressley, 430 U.S. 372, 381 (1977) ("[T]he substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus."). Thus, even if Congress' suspension of enemy combatants' right to habeas corpus were unconstitutional, the provision in the MCA permitting appeals to federal courts would be an acceptable substitute to habeas.

125. *See* Sharf, *supra* note 16, at 3-4.

United States' constitutional system.[126] No State has contemplated that war crimes defendants should have protections equal to those of a nation's soldiers and citizens who sit before domestic military and civilian courts. It might be nice to provide every person in every circumstance with equal due process, but there is nothing in law that requires it for the detainees on trial for committing war crimes.

126. *See* Breard v. Greene, 523 U.S. 371, 376 (1998) ("[A]lthough treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply. We have held 'that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.'").