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Military Commission Trials at Guantanamo Bay, Cuba: Do They Satisfy International and Constitutional Law?

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Jennifer Trahan

Abstract

Part I of this Article discusses historical precedent for the use of military commissions. Part II discusses President Bush's Military Order of November 13, 2001 ("Executive Order") [FN14] as well as various procedural rules issued for the military commission trials. [FN15] Part III discusses the U.S. Supreme Court's decision, *Hamdan v. Rumsfeld*, which struck down those arrangements. Part IV discusses the recent revisions to trial procedures made in the Military Commissions Act, and also analyzes the extent to which these recent revisions: (a) diverge from trial procedures under the Uniform Code of Military Justice; (b) alter U.S. domestic implementation of the Geneva Conventions; (c) *783 deprive U.S. courts of habeas corpus review regarding Guantanamo detainees, seek to deprive U.S. courts of review over other issues of international law, and attempt to create new immunities regarding certain war crimes; and (d) render military commission trials profoundly overbroad—exceeding all historical precedent—for example, by authorizing trials of individuals obtained far from any field of battle and/or without any link to armed conflict. This Article concludes that the Military Commissions Act is politically and legally unwise, and should be thoroughly revised so that trial procedures adhere to prior courts-martial procedures under the Uniform Code of Military Justice and to the Geneva Conventions. The concluding section argues that in attempting to change how the United States implements the Geneva Conventions, Congress is setting hugely problematic precedent—virtually inviting other countries to unilaterally change how they implement the Geneva Conventions when it behooves them. The denial of habeas corpus review is also profoundly troubling given suggestions that detainees could be held at Guantanamo indefinitely. Finally, the concluding section suggests that there is confusion as to the proper use of military commissions derived from invocations of a global "war on terrorism" or "war on terror"; as to individuals apprehended far from any field of battle and/or not during traditional armed conflict, trials should be held in federal court, pursuant to federal anti-terrorism laws, as were terrorism cases in the United States throughout the 1990s.

MILITARY COMMISSION TRIALS AT GUANTANAMO BAY, CUBA: DO THEY SATISFY INTERNATIONAL AND CONSTITUTIONAL LAW?

*Jennifer Trahan**

“We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well.”¹

INTRODUCTION

After terrorist attacks by members of al-Qaida against the United States on September 11, 2001, and after the United States’ military response in Afghanistan against al-Qaida and the Taliban regime that had harbored al-Qaida, President George W. Bush authorized the creation of military tribunals to be held at the U.S. Naval Station at Guantanamo Bay, Cuba (“Guantanamo”).² The tribunals were given jurisdiction to try: (i) members of al-Qaida, (ii) individuals “engaged in” or who “aided or abetted, or conspired to commit acts of international terrorism . . . ,” and (iii) those who “knowing harbored” individuals cov-

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1. Justice Robert H. Jackson, Opening Statement before the International Military Tribunal at Nuremberg (Nov. 21, 1945), *reprinted in* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 167, 168 (Jonathan Segal ed., 1992).

2. The United States holds an indefinite lease on the Guantanamo Bay naval base, and has “complete jurisdiction and control over” the area. *See* *Rasul v. Bush*, 542 U.S. 466, 471 (2004). The military commission tribunals could, however, sit elsewhere than Guantanamo. *See* RULES FOR MILITARY COMMISSIONS (R.M.C.) 201(a)(3), *printed in* THE MANUAL FOR MILITARY COMMISSIONS (Jan. 18, 2007), *available at* <http://www.defenselink.mil/news/d20070118MCM.pdf>.

ered by categories (i) or (ii).³

In its decision, *Hamdan v. Rumsfeld*, issued on June 29, 2006, the U.S. Supreme Court held President Bush's military order creating the military commissions defective.⁴ In particular, the Court found the military commissions invalid because they did not follow the procedures required for U.S. courts-martial trials under the Uniform Code of Military Justice ("Uniform Code of Military Justice" or "UCMJ")⁵ and violated the Geneva Conventions.⁶ In response to the Supreme Court's ruling, Congress enacted and President Bush signed the Military Commissions Act of 2006 ("Military Commissions Act") to govern future military commission trials at Guantanamo.⁷ This legislation does not conform trial procedures to those of the Uniform Code of Military Justice and the requirements of the Geneva Conventions, but rather changes UCMJ procedures vis-à-vis Guantanamo trials and U.S. implementation of the Geneva Conventions. It also eliminates habeas corpus review regarding all Guantanamo detainees,⁸ prohibits certain judicial review of issues of international law, and creates immunity regarding certain war crimes resulting from collateral damage.⁹

As a result, future military commission trials could suffer from serious flaws, including potentially violating the Geneva

3. Military Order of November 13, 2001: Detention, Treatment, and Trials of Certain Non-Citizens in the War Against Terrorism § 2(a), 66 Fed. Reg. 57833 (Nov. 16, 2001) [hereinafter Executive Order].

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

5. The Uniform Code of Military Justice ("UCMJ"), codified at 10 U.S.C. §§ 801-946, controls proceedings before the U.S. courts-martial.

6. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. These treaties will be referred to collectively as the "Geneva Conventions."

7. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in various sections of U.S.C.) [hereinafter Military Commissions Act].

8. Congress had already eliminated habeas corpus review for future Guantanamo cases in the Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739 (2005). The Detainee Treatment Act was interpreted by the Supreme Court in *Hamdan* to not cover pending cases. See *infra* Part III.A.

9. See *infra* Part IV (discussing Military Commissions Act).

Conventions Common Article 3 standard requiring that trials be conducted by a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”¹⁰ The stakes are indeed high, because if that is the case, then the United States, in proceeding with military commission trials, could arguably be committing war crimes.¹¹ Similarly, if the United States tries any members of the Taliban (the former regular armed forces of Afghanistan), who should be treated as prisoners-of-war (i.e., lawful enemy combatants) using the standards established under the Military Commissions Act, that might arguably constitute a “grave breach” of the Geneva Conventions, also a war crime.¹² Furthermore, by altering its implementation of the Geneva Conventions, the United States risks continuing to tarnish its reputation as a country that is willing to abide by the rule of law and the laws of war.¹³

Part I of this Article discusses historical precedent for the use of military commissions. Part II discusses President Bush’s Military Order of November 13, 2001 (“Executive Order”)¹⁴ as well as various procedural rules issued for the military commission trials.¹⁵ Part III discusses the U.S. Supreme Court’s decision, *Hamdan v. Rumsfeld*, which struck down those arrangements. Part IV discusses the recent revisions to trial procedures made in the Military Commissions Act, and also analyzes the extent to which these recent revisions: (a) diverge from trial procedures under the Uniform Code of Military Justice; (b) alter U.S. domestic implementation of the Geneva Conventions; (c)

10. Geneva Conventions, *supra* note 6, art. 3 [hereinafter Common Article 3]. Common Article 3 is found in all four iterations of the Geneva Conventions.

11. See 18 U.S.C. § 2441(c) (2006) (including “grave breaches” of Geneva Conventions and “Common Article 3” violations among war crimes). While Congress has attempted to create certain immunities in this regard, as discussed *infra*, it can only change how the United States implements war crimes laws but cannot change war crimes laws of other countries, so at least some potential exposure remains.

12. See *id.*

13. Serious harm has also been done to the reputation of the U.S. military through the Abu Ghraib scandal in Iraq, as well as persistent attempts by the U.S. Government to authorize questionable interrogation techniques. See, e.g., HINA SHAMSI, HUMAN RIGHTS FIRST, COMMAND’S RESPONSIBILITY: DETAINEE DEATHS IN U.S. CUSTODY IN IRAQ AND AFGHANISTAN (2006), available at <http://www.humanrightsfirst.info/pdf/06221-etn-hrf-dic-rep-web.pdf>.

14. Military Order of November 13, 2001, 66 Fed. Reg. at 57833.

15. See Procedures for Trials by Military Commission of Certain Non-United States Citizens in the War Against Terrorism, 32 C.F.R. § 9.1-9.8 (2002) [hereinafter Military Commission Order No. 1].

deprive U.S. courts of habeas corpus review regarding Guantanamo detainees, seek to deprive U.S. courts of review over other issues of international law, and attempt to create new immunities regarding certain war crimes; and (d) render military commission trials profoundly overbroad—exceeding all historical precedent—for example, by authorizing trials of individuals obtained far from any field of battle and/or without any link to armed conflict.

This Article concludes that the Military Commissions Act is politically and legally unwise, and should be thoroughly revised so that trial procedures adhere to prior courts-martial procedures under the Uniform Code of Military Justice and to the Geneva Conventions. The concluding section argues that in attempting to change how the United States implements the Geneva Conventions, Congress is setting hugely problematic precedent—virtually inviting other countries to unilaterally change how they implement the Geneva Conventions when it behooves them. The denial of habeas corpus review is also profoundly troubling given suggestions that detainees could be held at Guantanamo indefinitely. Finally, the concluding section suggests that there is confusion as to the proper use of military commissions derived from invocations of a global “war on terrorism” or “war on terror”; as to individuals apprehended far from any field of battle and/or not during traditional armed conflict, trials should be held in federal court, pursuant to federal anti-terrorism laws, as were terrorism cases in the United States throughout the 1990s.

I. HISTORICAL USES OF MILITARY COMMISSIONS

A. Authority for Military Commissions

Authority to create military commissions derives both from the U.S. Constitution (“Constitution”) and the Uniform Code of Military Justice.¹⁶ Presidential powers regarding military commissions reside in Article II of the Constitution, which makes the President “Commander in Chief of the Army and Navy.”¹⁷ Con-

16. See AM. BAR ASS’N TASK FORCE ON TERRORISM & L., REP. & RECOMMENDATIONS ON MILITARY COMMISSIONS 2 (2002) [hereinafter ABA REPORT]; see also *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773-74 (2006).

17. U.S. CONST. art. II, § 2, cl. 1; see also *Hamdan*, 126 S. Ct. at 2773 (invoking the same).

gress holds the power to “declare War . . . and make Rules concerning Captures on Land and Water,” to “raise and support Armies,” to “define and punish . . . [o]ffenses against the Law of Nations” and “[t]o make rules for the government and regulation of the land and naval forces.”¹⁸ The Supreme Court explained in *Ex parte Milligan* that “[t]he power to make the necessary laws [regarding military commissions] is in Congress; the power to execute in the President.”¹⁹

While the Court in *Ex parte Milligan* suggested that the President might act without Congress to create military commissions where “controlling necessity” is present,²⁰ Congress has since been interpreted as having generally authorized the creation of military commissions. Specifically, Article 21 of the UCMJ provides:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commission, provost court, or other military tribunals.²¹

The predecessor provision, Article of War 15, adopted in 1916, contained substantially the same language.²² These provisions have been construed as retaining prior common law jurisdiction over military commissions.²³ While the Supreme Court in its re-

18. U.S. CONST. art. I, § 8, cls. 10, 11, 12, 14; *see also Hamdan*, 126 S. Ct. at 2773-74 (citing *Madsen v. Kinsella*, 343 U.S. 341, 347 n.9 (1952) and quoting WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 831 (2d ed. 1920)) (invoking the Constitution).

19. *Ex parte Milligan*, 71 U.S. (4 Wall) 2, 139-40 (1866).

20. The Supreme Court stated:

[T]he President . . . [cannot] without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature

Milligan, 71 U.S. (4 Wall) at 139-40 (quoted in *Hamdan*, 126 S. Ct. at 2773-74). The Supreme Court, in the recent *Hamdan* decision, did not answer whether *Milligan* properly articulated this standard, in view of Congress having subsequently authorized the creation of military commissions through the Articles of War and, later, the UCMJ. *See Hamdan*, 126 S. Ct. at 2774.

21. 10 U.S.C. § 821 (2006).

22. *See* ABA REPORT, *supra* note 16, at 2. Article of War 15, when originally enacted in 1916, did not contain the language “by statute or” before the words “by the law of war.” *See id.* In 1920, when Article of War 15 was renewed, that language was added. *See Madsen*, 343 U.S. at 350 n.17.

23. *See* ABA REPORT, *supra* note 16, at 2 n.8 (explaining that both Article 21 and its

cent decision in *Hamdan v. Rumsfeld* suggested that the characterization of Article of War 15 (and thus Article 21 of the Uniform Code of Military Justice) as “congressional authorization for military commissions” was “controversial,” it did not revisit the issue.²⁴

B. Past Use of Military Commissions

Historically, there have been three types of military commission:²⁵ (i) commissions that substitute for civilian courts at times and places where martial law has been declared (“martial law tribunals”);²⁶ (ii) commissions 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” (“occupied territory tribunals”);²⁷ and (iii) commissions “incident to the conduct of war” when there is a need “to seize and subject to disciplinary measures those enemies who . . . have violated the law of war”²⁸ (“law-of-war tribunals”). It is the third type (or some variant of it) that is at issue here. Military commissions are used because “the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offenses defined in a written code.”²⁹

A precursor to the military commission was used for trying British Major John André for spying during the Revolutionary

predecessor, Article of War 15, were intended to retain the common law jurisdiction of military commissions); see also *Madsen*, 343 U.S. at 350 (in the Articles of War, Congress “expressly preserved to ‘military commissions, provost courts or other military tribunals’ all of their existing concurrent jurisdiction”).

24. See *Hamdan*, 126 S. Ct. at 2774 (“We have no occasion to revisit *Quirin*’s controversial characterization of Article of War 15 as congressional authorization for military commissions.”).

25. See *Hamdan*, 126 S. Ct. at 2775 (citing Bradley & Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2132-33 (2005); WINTHROP, *supra* note 18, at 831-46; Hearings on H.R. 2498 before the Subcommittee of the House Committee on Armed Services, 81st Cong., 1st Sess., 975 (1949)).

26. See *Hamdan*, 126 S. Ct. at 2775; see also Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509, 514-16 (1994) (surveying history of war courts as created in the past by the United States).

27. See *Hamdan*, 126 S. Ct. at 2775-76, (quoting *Duncan v. Kahanamoku*, 327 U.S. 304, 314 (1946)); see also Everett & Silliman, *supra* note 26, at 514-16.

28. *Hamdan*, 126 S. Ct. at 2776 (quoting *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942)).

29. *Madsen v. Kinsella*, 343 U.S. 341, 347 n.9 (1952) (quoting WINTHROP, *supra* note 18, at 831.

War.³⁰ The military commission “as such” was inaugurated in 1847 during the Mexican War.³¹ Military commissions first had extensive use during the Civil War, when terrorist saboteurs from the opposing army were frequently sentenced capitally by military commissions for seizure, arson or destruction of transportation, communication or other systems of infrastructure.³² Civil War tribunals operated both as martial law tribunals and law-of-war tribunals, trying both ordinary crimes and war crimes.³³

Law-of-war military commissions were used in the context of World War II, and their use occasioned three Supreme Court rulings. In *Ex parte Quirin*,³⁴ the Court upheld the use of a military commission sitting in Washington D.C. that tried eight saboteurs, originally from Germany,³⁵ who landed on the Atlantic Coast by submarine, armed with explosives.³⁶ The Court upheld the use of the military commission created by order of the President, explaining: “By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases.”³⁷

30. See *Hamdan*, 126 S. Ct. at 2773 (citing WINTHROP, *supra* note 18, at 831). What was essentially a military commission trial was ordered by George Washington for trying Major John André, Adjutant-General to the British Army, for spying, and in particular, meeting with U.S General Benedict Arnold. See *id.*

31. *Hamdan*, 126 S. Ct. at 2773 (quoting WINTHROP, *supra* note 18, at 832). While military commissions tried “ordinary crimes” committed in occupied territory, it was a “council of war” that tried offenses against the law of war; however, that dual system was later not adopted and a single tribunal took jurisdiction over ordinary crimes, war crimes and breaches of military orders. *Id.*

32. See Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U. L. REV. 349, 368 (1996). Use of military tribunals occurred after President Abraham Lincoln suspended the writ of habeas corpus and authorized martial law in several regions. See CRS REPORT, LOUIS FISHER, MILITARY TRIBUNALS: HISTORICAL PATTERNS AND LESSONS 16 (Cong. Res. Ser., 2004), available at <http://www.fas.org/sgp/crs/natsec/RL32458.pdf> [hereinafter CRS REPORT]. For further discussion of the use of military tribunals during the civil war, see *id.* at 16.

33. See *Hamdan*, 126 S. Ct. at 2776 n.27 (citing John M. Bickers, *Military Commissions are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 TEX. TECH. L. REV. 899, 908 (2003)).

34. 317 U.S. 1 (1942).

35. One saboteur had been a citizen of the United States, although, upon attaining majority, he apparently either elected to maintain German citizenship and/or renounced his American citizenship. See *id.* at 20.

36. See Everett & Silliman, *supra* note 26, at 513-14 n.26.

37. See *Quirin*, 317 U.S. at 28. The military commission at issue there was created

Because the petitioners had buried their German military uniforms on the beach after landing, they were tried as “unlawful belligerents.”³⁸

In *Johnson v. Eisentrager*,³⁹ the Supreme Court, in the context of review of a denial by a district court of petitions for habeas corpus, held that twenty-one German nationals incarcerated in the Landsberg Prison in occupied Germany could be convicted by a military commission sitting in China for violations of the laws of war.⁴⁰ The Supreme Court held that “enemy aliens” who have not been within the United States’ territorial jurisdiction have no constitutional right to habeas corpus review, while observing that military tribunals have been held to be lawful for trying law of war violations.⁴¹

The Court additionally upheld jurisdiction for a military commission to try Japanese General Tomyuki Yamashita, former Japanese commander in the Philippines, for war crimes, in *In re*

by the President. *See id.* at 22-23; *see also id.* at 26 (the “Articles [of War] also 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”).

38. While they carried their arms openly, they failed to wear a “fixed distinctive emblem” otherwise required to qualify as lawful belligerents. *See* Third Geneva Convention *supra* note 6, art. 4.A(2) (requiring a command structure, uniforms with a “fixed distinctive sign,” that arms be carried openly and that operations be conducted in accordance with the laws and customs of war). The Court held: “It is without significance that petitioners were not alleged to have borne conventional weapons or that their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States.” *Quirin*, 317 U.S. at 37. The remainder of the decision is devoted to the issue of whether it was constitutional to try the defendants without a jury. The Court held that it was. *See id.* at 38; *see also* Everett & Silliman, *supra* note 26, at 513-14 n.26 (discussing facts of *Quirin*).

39. 339 U.S. 763 (1950).

40. *Id.* at 766. The tribunal was constituted by U.S. Commanding General at Nanking, by delegation from the U.S. Commanding General, China Theatre, pursuant to authorization granted by the U.S. Joint Chiefs of Staff. *See id.*

41. *See id.* at 777-80, 787. Specifically, in finding that enemy aliens have no constitutional right to habeas corpus review, the six critical facts the Supreme Court focused on were that the prisoner:

- (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

Id. at 777. In *Rasul v. Bush*, the Court however suggested it would be possible to distinguish these facts from those concerning at least certain of the Guantanamo detainees. *See Rasul v. Bush*, 542 U.S. 466, 476 (2004).

Yamashita.⁴² Yamashita had argued that the military commission, which had been created by order of Lieutenant General Wilhelm D. Styer, lacked jurisdiction to try him after the cessation of hostilities.⁴³ The Court upheld the power to try enemy combatants by military commission even after hostilities had ceased, at least until peace was officially recognized by treaty or proclamation.⁴⁴ (In both *In re Yamashita* and *Ex parte Quirin*, the Supreme Court engaged in a full review of the merits of the habeas corpus petitions presented, while ultimately denying leave to file the petitions).⁴⁵

Additional military commissions were also employed by the United States after World War II for trials in the U.S.-occupied portion of West Germany.⁴⁶ These commissions have been described as similar in composition and procedure to the international war crimes tribunals following World War II⁴⁷—the Inter-

42. 327 U.S. 1 (1946).

43. *See id.* at 9-10. Styer was Commanding General of the U.S. Armed Forces in the Western Pacific. He acted under orders from General MacArthur, Commander of the U.S. Armed Forces in the Pacific, who, in turn, acted under orders from the Joint Chiefs of Staff and the President. *See id.* at 10.

44. *See id.* at 12. A subsequent case, *Madsen v. Kinsella*, recognized the propriety of using military commissions "even after peace has been declared, pending complete establishment of civil government in an occupied territory." *Madsen v. Kinsella*, 343 U.S. 341, 348 n.12 (1952). The *Yamashita* decision has since been widely criticized for imposing a concept of command responsibility beyond what was then recognized in the law: that Yamashita was responsible for the crimes of his troops because "they must have been known" to Yamashita, and if he did not know "it was simply because he took affirmative action not to know." RICHARD L. LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY 83 (1982) (quoting Transcript of Record at 100; *Yamashita*, 327 U.S. 1). For criticism of the case, *see* Ann Marie Prevost, *Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita*, 14 HUM. RTS. Q. 303, 328-29 (1992); *see also* CRS REPORT, *supra* note 32, at CRS-16.

45. For instance:

While it is the usual procedure on an application for a writ of habeas corpus in the federal courts for the court to issue the writ and on the return to hear and dispose of the case, it may without issuing the writ consider and determine whether the facts alleged by the petition, if proved, would warrant discharge of the prisoner.

Ex parte Quirin, 317 U.S. 1, 24 (citing *Walker v. Johnston*, 312 U.S. 275, 284; *Yamashita*, 327 U.S. 1).

46. *See* Everett & Silliman, *supra* note 26, at 514-15. Two hundred and fifty-eight lesser officials of the Third Reich were sentenced to death by such American military tribunals. *See* Crona & Richardson, *supra* note 32, at 388-89; *see also* *Madsen*, 343 U.S. 341 (upholding military commission trial of military spouse for murdering her husband while he was stationed in U.S.-occupied Germany following World War II, where civilian courts were not functioning).

47. *See* ABA REPORT, *supra* note 16, at 5.

national Military Tribunal at Nuremberg⁴⁸ and the International Military Tribunal for the Far East.⁴⁹

Past uses of military commissions, however, have not been without their share of controversy. First, it has perennially been a source of conflict whether presidential or congressional authorization is required for military commissions.⁵⁰ Thus, for example, the dissent in *Madsen v. Kinsalla* argued that Congress should have created the military commission at issue (an occupied territory tribunal), which was used to try a U.S. citizen charged with murdering her husband in the U.S. Area of Control in occupied Germany. The dissent argued that “no part of the Constitution contains a provision specifically authorizing the President to create courts to try American citizens.”⁵¹ Second, the *Eisenstrager* case holds that “enemy aliens”—at least in certain

48. The International Military Tribunal (“IMT”) at Nuremberg, Germany was created by the four Allied Powers, and only judges from those powers heard the cases. The IMT at Nuremberg tried a total of twenty-two defendants, of whom nineteen were convicted and twelve condemned to death. For background on the Nuremberg trials, see generally MICHAEL R. MARRUS, *THE NUREMBERG WAR CRIMES TRIAL 1945-46: A DOCUMENTARY HISTORY* (1997).

49. The IMT for the Far East was created by Special Proclamation of General MacArthur. See Elizabeth S. Kopelman, *Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial*, 23 *NYU J. INT’L L & POL.* 373, 388 (1991). The judges were from eleven different countries. See Dr. R. John Pritchard, *The International Military Tribunal for the Far East and Its Contemporary Resonances*, 149 *MIL. L. REV.* 25, 27 (1995). The IMT for the Far East tried a total of twenty-eight defendants, of whom seven were sentenced to death by hanging, and eighteen to prison terms; two died during trial and one was found mentally incompetent. See Maria Hsia Chang & Robert P. Baker, *Victor’s Justice & Japan’s Amnesia: The Tokyo War Crimes Trial Reconsidered*, in *THE SEARCH FOR JUSTICE: JAPANESE WAR CRIMES* 33, 37-38 (Peter Li ed., 2003).

At least one scholar prior to the Supreme Court’s *Hamdan* decision argued that the *Yamashita* case provides poor precedent because under the then-governing Geneva Convention of 1929, prisoners of war, including Yamashita, could be convicted and sentenced “only by the same courts according to the same procedures as in the case of persons belonging to the forces of the detaining Power”—i.e., courts martial; yet, Yamashita was tried by military commission. See George P. Fletcher, *War and the Constitution*, *AMER. PROSPECT*, Jan. 14, 2002, at 26.

50. As Colonel William Winthrop explains:

In some instances . . . Congress has specifically recognized the military commission as the proper war-court, and in terms provided for the trial thereby of certain offences. In general, however, it has left it the President, and the military commanders representing him, to employ the commission, as occasion may require, for the investigation and punishment of violations of the laws of war and other offences not cognizable by court-martial.

Madsen, 343 U.S. at 347 n.9 (quoting WINTHROP, *supra* note 18, at 831).

51. *Madsen*, 343 U.S. at 372.

circumstances—may be denied habeas corpus review,⁵² a position also adopted by Congress in the recent Military Commissions Act—yet, highly problematic in the current context.⁵³

Finally, past uses of military commissions occurred either where the United States was either clearly engaged in a conventional war, or following such a war. U.S. engagement in Afghanistan, particularly against Taliban armed forces (and even al-Qaida) resembled such a conventional war, and, indeed, followed congressional authorization for the use of force.⁵⁴ Yet, there are added aspects of the “war against terrorism” that are dissimilar to a conventional war—particularly where detained individuals were apprehended far from any field of battle. Are these individuals part of a “war”? Or should they be treated more akin, for example, to how drug traffickers would be treated—subject to federal law and prosecuted in federal court? If this is a legitimate “war,” who is the enemy? When did such a war commence—on September 11, 2001, or prior thereto? And when will such a war cease—or will it continue indefinitely, allowing the United States to apprehend suspected terrorists worldwide indefinitely?⁵⁵

C. Procedures for Past Military Commission Trials

Authorities seem in some disagreement as to how they characterize the procedures that have been used in the past for military commission trials—although this divergence may simply be a matter of gilding the lily differently. Some have suggested that

52. *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950).

53. See *infra* Part IV.C.

54. Congress authorized the President to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.” Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). Similarly, the U.N. Security Council recognized the United States’ right to self-defense. See S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001). The Supreme Court and Congress have also recognized that a state of war may exist without formal declaration. See ABA REPORT, *supra* note 16, at 5 (citing *The Prize Cases*, 67 U.S. 635 (1863); *Bas v. Tingy*, 4 U.S. 37 (1800)); see also WINTHROP, *supra* note 18, at 668 (regarding the Mexican War, Congress did not “declare war”; rather, it recognized that “by the act of the Republic of Mexico, a state of war exists between that government and the United States”).

55. For example, the *Yamashita* case suggests that military commissions can try enemy combatants after hostilities have ceased until peace is reached. See *In re Yamashita*, 327 U.S. 1, 11-12 (1946). It is unclear how this standard would apply to an open-ended “war” against terrorism. For further discussion of such issues, see *infra* Part IV.D.

military tribunals “have been relatively free in adopting whatever procedures they like, even adopting them after a trial is underway.”⁵⁶ Supporters of this position cite, for example, *Ex parte Quirin* and *Yamashita*, where the “Presidents and military commanders devised rules and procedures that departed widely from . . . earlier statutory standards.”⁵⁷

The Supreme Court, by contrast, in its recent *Hamdan* decision explains that “the procedures governing trials by military commission historically have been the same as those governing courts-martial.”⁵⁸ The Supreme Court notes that accounts of “authoritative” commentators “confirm as much.”⁵⁹ The Supreme Court, however, admits that there has been “a glaring historical exception to this general rule,” namely, the *Yamashita* case, in which the procedures “deviated in significant respects from those then governing courts-martial.”⁶⁰ The Court notes that two members of the *Yamashita* Court offered an “unusually long and vociferous critique” regarding the departures from the “procedures and rules of evidence” used in courts-martial trials.⁶¹ Among the dissenters’ primary concerns was that the commission could consider all evidence “which in the commission’s

56. CRS REPORT, *supra* note 32, at 35.

57. *Id.* For example, President Roosevelt’s order that created the military tribunal at issue in *Quirin* directed that the trial record, including any judgment or sentence, be transmitted “directly to me for my action thereon.” *Id.* at 38. This conflicted with Articles of War 46 and 50 1/2 that provided that conviction or sentence by a military court was subject to review within the military system. *Id.* at 38-39. In a memorandum, Justice Frankfurter offered the view that he had “not a shadow of doubt” that Roosevelt “did not comply with Article [of War] 46 *et seq.*” *Id.* at 42 (citing “Memorandum of Mr. Justice Frankfurter, *In re Saboteur Cases*,” Papers of William O. Douglas, Box 77, Library of Congress).

58. *Hamdan*, 126 S. Ct. at 2788 (2006) (citing 1 THE WAR OF THE REBELLION 248 (2d ser. 1894)).

59. *Id.* at 2788 (citing WINTHROP, *supra* note 18, at 835 n.81, 841-42; S. REP. NO. 64-1, at 40 (1916) (testimony of Gen. Crowder); H. COPPEE, FIELD MANUAL OF COURTS-MARTIAL 104 (1863)).

60. *Id.* at 2789 (citing *Yamashita*, 327 U.S. 1). In *Johnson v. Eisentrager*, there was a claim that the individuals were entitled to be tried:

[B]y the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power,” but the Court held that “no prejudicial disparity is pointed out as between the commission that tried prisoners and those that would try an offending soldier of the American forces of like rank.

339 U.S. 763, 790 (1950).

61. *Hamdan*, 126 S. Ct. at 2789 (citing *Yamashita*, 327 U.S. at 41-81 (Rutledge, J., joined by Murphy, J., dissenting)).

opinion 'would be of assistance in proving or disproving the charge,' without any of the usual modes of authentication."⁶² The *Yamashita* majority did not pass on the merits of Yamashita's challenge to the military commission procedures.⁶³

Article 36 of the Uniform Code of Military Justice provides that:

(a) The procedures, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, *so far as he considers practicable*, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) *All rules and regulations made under this article shall be uniform insofar as practicable* and shall be reported to Congress.⁶⁴

The Preamble to the Manual for Courts Martial additionally states that:

Military commissions and provost courts for the trial of cases within their respective jurisdictions. Subject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, *military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial.*⁶⁵

Regardless of whether one accepts the characterization that (a) past military commission trials "have been relatively free in adopting whatever procedures they like" or the position that (b) with the exception of *Yamashita*, military commission trials generally follow the rule of courts-martial, the starting point for construing the President's original Military Order is in the Uniform Code of Military Justice, Article 36. As discussed *infra*, the Supreme Court in *Hamdan* reads Article 36 to allow the President

62. *Id.* (citing *Yamashita*, 327 U.S. at 49 (Rutledge, J., joined by Murphy, J., dissenting)).

63. *Id.* (citing *Yamashita*, 327 U.S. at 20). The *Yamashita* Court found Yamashita neither subject to the Articles of War, nor a "protected prisoner of war." *Id.* (citing *Yamashita*, 327 U.S. at 21). However, subsequently, the UCMJ expanded its category of persons subject thereto and the Third Geneva Convention extended prisoner-of-war protections to individuals tried for crimes committed before their capture. *See id.*

64. 10 U.S.C. § 836 (2006) (emphasis added).

65. MANUAL FOR COURTS-MARTIAL UNITED STATES, pmb. § 2(b)(2) (2000 ed.) (emphasis added).

to promulgate rules for military commissions, but that they may not be “contrary to or inconsistent with” the Uniform Code of Military Justice and the rules must be “uniform insofar as practicable,”⁶⁶ meaning that “any departure must be tailored to the exigency that necessitates it.”⁶⁷

II. THE MILITARY ORDER AND PROCEDURAL RULES ORIGINALLY ISSUED

A. *The Executive Order Calling for Military Commissions*

On November 13, 2001, President Bush issued an Executive Order,⁶⁸ based on his authority, *inter alia*, as Commander in Chief,⁶⁹ providing that “individuals subject to this order” shall be tried by military commission for “violations of the laws of war” and “other applicable laws.”⁷⁰ Section 2(A) of the Executive Order defined “individuals subject to this order” broadly as non-citizens with respect to whom the President determines “from time to time in writing” that:

66. *Hamdan*, 126 S. Ct. at 2790 (quoting UCMJ art. 36).

67. *Id.* at 2790.

68. See Military Order of November 13, 2001, 66 Fed. Reg. at 57833.

69. Specifically, the Executive Order stated that it was promulgated pursuant to the Constitution and laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Pub. L. No. 107-40, 115 Stat. 224), and Sections 821 and 836 of Title 10 of the United States Code. See Military Order of November 13, 2001, 66 Fed. Reg. at 57833.

10 U.S.C. § 821 provides that:

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

10 U.S.C. § 836 provides, in relevant part, that:

Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

70. Military Order of November 13, 2001, 66 Fed. Reg. at 57833, §§ 1(E), 2; see also Procedures for Trials by Military Commission of Certain Non-United States Citizens in the War Against Terrorism, Department of Defense, Military Commission Order No. 1, § 3(B) (Mar. 21, 2002), 41 I.L.M. 725 (codified at 32 C.F.R. §§ 9.1-9.12) (2007), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> (military commissions may try “violations of the laws of war and all other offenses triable by military commission”) [hereinafter Rules].

- (1) There is reason to believe that such individual, at the relevant times,
 - (i) is or was a member of the organization known as al Qaeda;
 - (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
 - (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and
- (2) it is in the interest of the United States that such individual be subject to this order.⁷¹

Thus, the Executive Order broadly covered non-citizen: (a) al-Qaida members, (b) persons who have engaged in international terrorism against the U.S., and (c) persons who harbor either (a) or (b). The Executive Order also gave the President flexibility in determining whether persons would be subject to the Executive Order because it permitted the President to designate individuals “from time to time in writing” who would be “subject to this order” where in “the interest of the United States.”⁷²

B. *Rules for the Military Commission Trials*

While the Executive Order was silent on many details of how the military commissions would function, federal rules (“Rules”) were subsequently promulgated to address those details.⁷³ They provided that the commissions would consist of three to seven commissioned officers of the U.S. armed forces, who are appointed to serve on the commissions by the Secretary of Defense or his designee.⁷⁴ Convictions and sentencing would

71. Military Order of November 13, 2001, 66 Fed. Reg. at 57833, § 2(A). The Rules additionally provided for jurisdiction over persons “alleged to have committed an offense in a charge that has been referred to the Commission by the Secretary of Defense or his designee.” See Rules, 32 C.F.R. § 9.3(A)(2). This language presumably did not expand the jurisdiction of the commissions since “[in] the event of any inconsistency between the President’s Military Order and [the Rules] . . . the provisions of the President’s Military Order shall govern.” See Rules, 32 C.F.R. § 9.7(B).

72. See Military Order of November 13, 2001, 66 Fed. Reg. at 57833, § 2(A).

73. See Rules, 32 C.F.R. § 9.

74. See Rules, 32 C.F.R. § 9.4(A)(1)-(3). Under the newly promulgated rules, see

be based on the concurrence of two-thirds of the members of a military commission,⁷⁵ although death sentences would require unanimity of all seven members of a commission.⁷⁶ The accused would have a right to a military lawyer⁷⁷ and to select a different military lawyer,⁷⁸ or to retain a civilian lawyer at his or her own expense.⁷⁹

While proceedings would generally be open to the public, the Presiding Officer⁸⁰ could close them for a number of reasons, including protecting classified or classifiable information; “information protected by law or rules from unauthorized disclosure”; the physical safety of participants, including witnesses; intelligence and law enforcement sources, methods, or activities; “other national security interests”;⁸¹ or “for any other reason necessary for the conduct of a full and fair trial.”⁸² A decision to

infra note 93 and accompanying text, for a non-capital case, at least five members and a military judge are required; for a capital case, at least twelve members and a military judge are required, although that may be reduced to nine members where twelve members are not reasonably available because of physical conditions or military exigencies. See R.M.C. 501(a)(1)-(3).

75. Military Order of November 13, 2001, 66 Fed. Reg. at 57833, § 4(C)(6)-(7); Rules, 32 C.F.R. § 9.6(F). The new Rules also provide for convictions by a two-thirds vote. See R.M.C. 921(c)(2).

76. See Rules, 32 C.F.R. § 9.6(F). Under the new rules, capital convictions would require a 2/3 vote, but only a unanimous vote by a panel of at least twelve members would establish the prerequisite for a capital sentence proceeding. See R.M.C. 921(c)(2), Rule Discussion.

77. See Rules, 32 C.F.R. § 9.4(C)(2). The new rules provide: “The accused has the right to be represented before a military commission by civilian counsel if provided at no expense to the Government, and by the detailed defense counsel. The accused is not entitled to be represented by more than one military counsel.” R.M.C. 506(a).

78. See Rules, 32 C.F.R. § 9.4(C)(3)(a).

79. See Rules, 32 C.F.R. § 9.4(C)(3)(b). To represent a defendant, the civilian defense lawyer would need to be: (i) a U.S. citizen; (ii) admitted to practice; (iii) not the subject of sanctions or a disciplinary action; (iv) eligible for access to information “classified at the level SECRET”; and (v) willing to sign a written agreement to comply with all applicable regulations or instructions for counsel. Representation by a civilian defense counsel would not relieve military defense counsel. There would additionally be a Chief Defense Counsel who would be a judge advocate of the U.S. armed forces, and who would supervise the overall defense efforts, “preclude conflicts of interest” and “facilitate proper representation of all [a]ccused.” See Rules, 32 C.F.R. § 9.4(C)(1), (3)(b).

80. The “Presiding Officer” would be a commission member who is designated by the Secretary of Defense or his designee; the Presiding Officer would be a judge advocate in the U.S. armed forces. See Rules, 32 C.F.R. § 9.4(A)(4).

81. See Rules, 32 C.F.R. § 9.6(B)(3). For the new rule on the president of the military commission, see R.M.C. 502(b).

82. See Rules, 32 C.F.R. § 9.4(A)(5)(a). The new rule regarding closure of pro-

close proceedings could include a decision to exclude the accused and any civilian defense counsel.⁸³

The Rules provided for the admission of evidence that “would have probative value to a reasonable person,”⁸⁴ the presumption of innocence, and proof beyond a reasonable doubt.⁸⁵ Various provisions also governed witness protection and methods for allowing protected witnesses to testify.⁸⁶ Certain materials also could be classified as “protected information,”⁸⁷ in which case they would not be disclosed to the accused or any civilian defense counsel, but could be admitted into evidence if presented to military defense counsel.⁸⁸

The Rules as originally issued provided for no independent appellate review by a court.⁸⁹ Congress, however, subsequently, in the Detainee Treatment Act, provided for appellate review before the U.S. Circuit Court for the District of Columbia for some final decisions,⁹⁰ as well as for the creation of “Status Re-

ceedings permits closure only for the purpose of (A) “protecting information the disclosure of which could reasonably be expected to damage national security, including intelligence or law enforcement sources, methods, or activities; or (B) ensuring the physical safety of individuals.” *See* R.M.C. 806.

83. *See* Rules, 32 C.F.R. § 9.6(B)(3). In those instances, military defense counsel, who would remain assigned to represent the accused even if replaced by civilian defense counsel, could not be excluded. *See* Rules, 32 C.F.R. § 9.4(C)(3)(b). The new rules do not appear to permit exclusion of the accused or civilian defense counsel while trial continues.

84. Rules, 32 C.F.R. § 9.6(D)(1). The new rules state: “All evidence having probative value to a reasonable person is admissible, except as otherwise provided by these rules, this Manual, or any Act of Congress applicable to trials by military commission.” MILITARY COMMISSION RULES OF EVIDENCE (“MIL.R.EVID.”) 402, *printed in* MILITARY COMMISSIONS MANUAL (Jan. 18, 2007), *available at* <http://www.defenselink.mil/news/d20070118MCM.pdf>. Probative evidence, however, may be excluded on grounds of unfair prejudice, confusion, undue delay, waste of time, or needless presentation of cumulative evidence. *See* MIL.R.EVID. 403.

85. *See* Rules, 32 C.F.R. § 9.5(B)-(C). The new rule requiring proof beyond reasonable doubt is Rule 918(b). *See* R.M.C. 918(b); *see also* R.M.C. 920(e)(5)(a) (requiring instructions as to the presumption of innocence).

86. *See* Rules, 32 C.F.R. § 9.6(D)(2)(d).

87. Rules, 32 C.F.R. § 9.6(D)(5)(a).

88. *See* Rules, 32 C.F.R. § 9.6(D)(5)(b) (the Presiding Officer could order “deletion of specified items of Protected Information” before the documents are made available to the accused, military or civilian defense counsel; “substitution of a portion or summary of the information for such Protected Information”; or “the substitution of a statement of the relevant facts that the Protected Information would tend to prove”). For the current rules on the exclusion of classified information and substitutions for such information, *see* MIL.R.EVID. 505, *see also infra* note 169.

89. *See* Rules, 32 C.F.R. § 9.6(H)(4).

90. Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739 (2005),

view Tribunals” to review the status of detainees being held.⁹¹

As discussed below, both President Bush’s Executive Order⁹² as well as the Rules originally issued⁹³ regarding military commission trials, have since been replaced.

III. THE SUPREME COURT’S RULING IN HAMDEN V. RUMSFELD

In *Hamdan v. Rumsfeld*,⁹⁴ the Supreme Court struck the military commission created by President Bush’s November 2001 Executive Order. The Court found that commission procedures violated (i) the fair trial standards required by the Uniform Code of Military Justice,⁹⁵ and (ii) Common Article 3 of the Geneva Conventions.⁹⁶ Four of the five justices also found that the charges did not allege a violation of the laws of war.⁹⁷ The Court also expressed some concerns about why a military commission would be appropriate in that case, and discussed four preconditions to the exercise of military commission jurisdiction.⁹⁸

The petitioner in *Hamdan* is a Yemeni national, held in custody of the United States in Guantanamo Bay, Cuba.⁹⁹ He was captured by militia forces in November 2001, during hostilities between the United States and the Taliban, and was turned

§ 1005(e)(3) (providing that the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of final merits decisions, with review as of right for sentences of ten years or more, and discretionary review in other cases) [hereinafter Detainee Treatment Act]. The new rules on appeals are set forth in R.M.C. Rule 908.

91. Detainee Treatment Act, § 1005(a) (requiring the Secretary of Defense to submit procedures for status review of detainees). The Military Commissions Act additionally provides that the Secretary of Defense shall establish a Court of Military Commission Review. See Military Commissions Act, § 950(f). For further discussion of the Court of Military Commission Review, see R.M.C. 1201, *et seq.*

92. See *infra* Part IV.

93. On January 18, 2007, the Secretary of Defense transmitted to Congress “The Manual for Military Commissions,” setting forth new rules for the conduct of military commission trials. The Manual consists of four parts: (1) the Preamble, (2) the Rules for Military Commissions (“R.M.C.”); (3) the Military Commission Rules of Evidence (“MIL.R.EVID.”); and (4) the Crimes and Elements. As discussed further below, the new rules and rules of evidence contain various provisions that are problematic to ensuring fair trials. See, e.g., *infra* notes 167, 169, 171.

94. 126 S. Ct. 2749 (2006).

95. See *id.* at 2792.

96. See *id.* at 2793.

97. See *id.* at 2800.

98. See *id.*

99. See *id.* at 2759.

over¹⁰⁰ to the U.S. military, which transported him to Guantanamo Bay in June 2002.¹⁰¹ He was charged with one count of conspiracy “to commit . . . offenses triable by military commission.”¹⁰² He filed petitions for writ of habeas corpus and mandamus.¹⁰³ The U.S. District Court for the District of Columbia granted Hamdan’s writ of habeas corpus,¹⁰⁴ but the Court of Appeals for the District of Columbia reversed.¹⁰⁵

100. The fact that there was a cash rewards program whereby, *inter alia*, Afghan and Pakistani individuals could turn in al-Qaida or Taliban members in exchange for cash rewards, presents some concerns about the soundness of apprehension methods, and raises questions as to whether the most appropriate individuals were apprehended and detained. See generally, MARK DENBEAUX & JOSHUA DENBEAUX, REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 17, 19 (2006), available at <http://law.shu.edu/aaafinal.pdf> (suggesting, for example, that the United States has used facts such as flight from attacking Northern Alliance forces, being a cook for the Taliban, and possession of a Kalashnikov rifle—something not uncommon in Afghanistan and Pakistan—as grounds for detention). Based on estimates derived from Combatant Status Review Board letters prepared and released by the U.S. Government, only seven percent of the detainees were apprehended by U.S. or coalition forces, while thirty-six percent were apprehended by Pakistani authorities or in Pakistan, and eleven percent were apprehended by Northern Alliance forces of Afghan authorities. See DENBEAUX & DENBEAUX, *supra*, at 14; see also *Guantanamo Inmates Say They Were “Sold”: Warlords, Others “Trumped Up Charges” for U.S. Cash Rewards*, ASSOCIATED PRESS, May 31, 2005, available at <http://www.msnbc.msn.com/id/8049868/> (May 31, 2005) (bounties ranged from \$3,000 to \$25,000); U.S. DEP’T OF STATE, REWARDS FOR JUSTICE PROGRAM, available at <http://www.state.gov/m/ds/terrorism/c8651.htm> (describing reward program).

101. See *Hamdan*, 126 S. Ct. at 2759.

102. See *id.* at 2759 (quoting App. To Petition For Certiorari 65a). For further discussion of the charges, see *infra* Part III.B.

103. See *Hamdan*, 126 S. Ct. at 2759. The habeas and mandamus petitions were originally filed in the U.S. District Court for the Western District of Washington, but subsequently transferred to the U.S. District Court for the District of Columbia. See *id.* at 2761. A Combatant Status Review Tribunal meanwhile also determined that Hamdan’s continued detention was warranted because he was an “enemy combatant.” *Id.* An “enemy combatant” is defined under President Bush’s Military Order as “an individual who was part of or supporting Taliban or al-Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.” *Id.* at 2761 n.1.

104. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004). The District Court concluded that the President’s authority to establish military commissions extends only to “‘offenders or offenses triable by military [commission] under the law of war’”; that Hamdan is entitled to full protections of the Third Geneva Convention until adjudged not to be a prisoner of war; and that, whether or not he is classified as a prisoner of war, the military commission violated both the UCMJ and Common Article 3 of the Third Geneva Convention, because it could convict based on evidence the accused would never see or hear. See *id.* at 158-72; see also *Hamdan*, 126 S. Ct. 2749 at 2761-62 (explaining same).

105. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005). The Court of Appeals, by contrast, deemed the Geneva Conventions not “judicially enforceable,” and held that

A. *Congress Did Not Eliminate Habeas Corpus Review for Pending Cases*

Initially, the Supreme Court examined whether, by passage of the Detainee Treatment Act of 2005,¹⁰⁶ Congress had eliminated habeas corpus review regarding pending cases. That Act provides, *inter alia*, that “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 Department of Defense at Guantanamo Bay, Cuba.”¹⁰⁷ The Court, however, concluded that because other provisions of the Detainee Treatment Act were made explicitly applicable to pending cases, the fact that that language was not made applicable to pending cases was significant.¹⁰⁸ Thus, the Court concluded that Congress did not intend to preclude habeas corpus review of pending cases, and the Act was not an impediment to the Court’s review.¹⁰⁹ The Supreme Court did not examine whether it would be permissible for Congress to preclude habeas corpus review for all Guantanamo detainees—as it has now done in the Military Commissions Act.¹¹⁰

B. *Preconditions to the Exercise of Jurisdiction and Whether a Law of War Violation Was Charged*

Congress next examined whether four preconditions to the exercises of jurisdiction for a law-of-war military commission were satisfied. First, the Court observed that a military commission can legally assume jurisdiction only over offenses commit-

Hamdan’s trial would violate neither the UCMJ nor the U.S. Armed Forces regulations intended to implement the Geneva Conventions. *Id.* at 42-43; *see also* Hamdan, 126 S. Ct. at 2762 (explaining same).

106. Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739 (2005).

107. Detainee Treatment Act, §1005(e), §1005(e)(1). The Detainee Treatment Act also, *inter alia*: (i) provides uniform standards for interrogation (§ 1002); (ii) prohibits cruel, inhuman, or degrading treatment or punishment (§ 1003); and purports to create a defense to prosecutions that the individual interrogating “did not know that the practices [in use] were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful,” specifying that “[g]ood faith reliance on advice of counsel” is an “important factor . . . to consider” (§ 1004).

108. Specifically, the Court found that certain provisions of the Detainee Treatment Act (§§ 1005(e)(2)-(3)) explicitly applied to pending claims. The Court reasoned that Congress could have, but did not provide that the section addressing habeas review applied to pending claims. *See Hamdan*, 126 S. Ct. at 2766.

109. *See id.* at 2762-69.

110. *See infra* Part IV.C.

ted within “the theatre of war.” Second, the offense “must have been committed within the period of war.” Third, a military commission may only try members of the “enemy’s army” and “members of one’s own army, who become chargeable with crimes or offenses not cognizable, or triable by the criminal courts or under the Articles of war.” Fourth, a law-of-war commission may only try two offenses: violations of the laws and usages of war, and breaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war.¹¹¹

Hamdan was charged¹¹² with “‘from on or about February 1996 to on or about November 24, 2001,’” “‘willfully and knowingly join[ing] an enterprise of persons who shared a common criminal purpose and conspired and agreed with [named members of al-Qaida] to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism.’”¹¹³ Specifically, he was charged with four “‘overt acts’”:

- (1) acting as Osama bin Laden’s “‘bodyguard and personal driver’” “‘believing” all the while that bin Laden “‘and his associate were involved in’” terrorist acts prior to and including the attacks of September 11, 2001;
- (2) arranging for transportation of and actually transporting, weapons used by al Qaida members and by bin Laden’s bodyguards (Hamdan among them);
- (3) driving or accompanying “‘Osama bin Laden to various al Qaida-sponsored training camps, press conferences, or lectures,’” at which bin Laden encouraged attacks against American; and
- (4) receiving weapons training at al Qaida-sponsored camps.¹¹⁴

The Supreme Court found that the offenses charged were

111. See *Hamdan*, 126 S. Ct. at 2777 (quoting and citing *WINTHROP*, *supra* note 18, at 836-39). *Winthrop* had a fifth criterion—that “the trial must be had within the theatre of war.” *Id.* at 2777 n.29 (citing *WINTHROP*, *supra* note 18, at 836). The Court described the fifth criterion as a “not-always-complied-with . . . criterion.” *Id.*

112. The Supreme Court notes that it took a year *after* President Bush announced that Hamdan and five other Guantanamo Bay detainees were subject to the Executive Order and trial by military commission before any charges were made against Hamdan. See *id.* at 2760.

113. *Id.* at 2761 (quoting Application to Petition for Certiorari 65a).

114. *Id.*

neither committed in a “theatre of war” nor during the relevant conflict.¹¹⁵ As to the conspiracy charges, which extended from 1996 to November 2001, the Court observed that “[a]ll but two months of that more than 5-year-long period preceded the attacks of September 11, 2001, and the enactment of the AUMF [Authorization of the Use of Military Force].”¹¹⁶ Similarly, the Court noted that no purported agreement to commit war crimes, nor a single covert act “is alleged to have occurred in a theater [sic] of war or on any specified date after September 11, 2001.”¹¹⁷

Four of the justices concluded that the offense with which Hamdan had been charged did not state a law of war violation.¹¹⁸ The Court found that “conspiracy” was not a crime appearing in either the Geneva or Hague Conventions.¹¹⁹ It also noted that while the International Military Tribunal at Nuremberg recognized conspiracy to commit aggressive war, it did not recognize conspiracy to commit war crimes as a violation.¹²⁰ While the Court noted that the charges also included “joint criminal enterprise,” it concluded that that is a theory of liability, not a substantive offense.¹²¹ Accordingly, in the most questionable part of the decision,¹²² the Court found that because “con-

115. *See id.* at 2778-79.

116. *Id.* at 2777-78.

117. *Id.* at 2778.

118. *See id.* at 2759-60 (quoting UCMJ art. 21, 10 U.S.C. § 821).

119. *See id.* at 2780-81.

120. *See id.* at 2784.

121. *See id.* at 2785 n.40.

122. “Joint criminal enterprise” responsibility has been extensively recognized in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda. *See generally* JENNIFER TRAHAN, GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: A DIGEST OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 390-438 (2006); JENNIFER TRAHAN & ADELA MALL, GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: DIGESTS OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 65 (2004).

Furthermore, the crimes with which Hamdan was charged were characterized as “attacking civilians; attacking civilian objects; murder by an unprivileged belligerent and terrorism.” *Hamdan*, 126 S. Ct. at 2761 (quoting App. to Pet. For Cert. 65a). At least the first two of these are recognized violations of the laws of war. *See, e.g.*, TRAHAN, *supra*, at 122-35 (discussing elements of the crime of unlawful attack on civilians and civilian objects under ICTY law); *Prosecutor v. Strugar*, Case No. IT-01-42-T, Trial Chamber Judgment, ¶ 223 (Jan. 31, 2005) (“The offence of attack on civilian objects is a breach of a rule of international humanitarian law [derived from Article 52 of Addi-

spiracy to violate the law of war” is not itself a violation of the law of war, “the charge does not support the commission’s jurisdiction”; thus, “the commission lacks authority to try Hamdan.”¹²³

The Court appropriately also noted the lack of urgency in trying Hamdan that was suggested by the facts:

Any urgent need for imposition or execution of judgment is utterly belied by the record; Hamdan was arrested in November 2001 and he was not charged until mid-2004. These simply are not the circumstances in which, by any stretch of the historical evidence or this Court’s precedents, a military commission established by Executive Order under the authority of Article 21 of the UCMJ may lawfully try a person and subject him to punishment.¹²⁴

C. *The Commission Violated the Uniform Code of Military Justice*

The U.S. Supreme Court further concluded that the military commission convened “lacks power to proceed”¹²⁵ because its structure and procedures violate both the Uniform Code of Military Justice and the Geneva Conventions.¹²⁶ The Court found that:

[T]he UCMJ conditions the President’s use of military com-

ditional Protocol I to the Geneva Conventions] . . . [the offense] had previously attained the status of customary international law.”). Compare Noman A. Goheer, *The Unilateral Creation of International Law During the ‘War on Terror’: Murder by an Unprivileged Belligerent is not a War Crime* 12 (Am. U. L. Rev. Working Paper No. 1871, 2006), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=8917&context=expresso> (murder by an unprivileged belligerent is a charge unprecedented under the law of war, international humanitarian law, and customary international law). Thus, a joint criminal enterprise to attack civilians and civilian objects is a cognizable war crime.

The Supreme Court noted that Hamdan was not charged with “command responsibility,” playing a leadership role, or participating in planning any of the activity. *Hamdan*, 126 S. Ct. at 2761. Yet, that is beside the point. There may be individual criminal responsibility (such as joint criminal enterprise responsibility) without there being command responsibility. See Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7.1, S.C. Res. 827, art. 6, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute] (covering individual responsibility), art. 7.3 (separately covering command responsibility); see also *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Appeals Chamber Judgment, ¶ 79 (Feb. 28, 2005) (“participation in a joint criminal enterprise is a form of ‘commission’ under Article 7(1) of the Statute.”). Furthermore “playing a leadership role” and “planning” are not required elements for a joint criminal enterprise. See generally TRAHAN, *supra*, at 390-438.

123. *Hamdan*, 126 S. Ct. at 2785.

124. *Id.* at 2785-86.

125. *Id.* at 2786.

126. See *id.* at 2759.

missions on compliance not only with the American common law of war, but also *with the rest of the UCMJ itself*, insofar as applicable, and with the “rules and precepts of the law of nations”—including, *inter alia*, the four Geneva Conventions signed in 1949.¹²⁷

As to the Uniform Code of Military Justice, the Court noted at least three “striking features” about the military commission rules. *First*, they permit that the “accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to ‘close’” (*exclusion of defendant from proceedings*).¹²⁸ *Second*, the rules “permit the admission of *any* evidence that, in the opinion of the presiding officer ‘would have probative value to a reasonable person.’” Thus, hearsay and testimony obtained through coercion would be “fully admissible” and “neither live testimony nor witness statements would need to be sworn” (*allowing “any” evidence, including hearsay and coerced testimony*).¹²⁹ *Third*, “the accused and his civilian counsel may be denied access to evidence in the form of ‘protected information’” so long as “the presiding officer concludes that the evidence is ‘probative’” and that “its admission without the accused’s knowledge would not ‘result in the denial of a full and fair trial’” (*denial of access to protected information used as evidence*).¹³⁰

As discussed above,¹³¹ the Supreme Court concluded that, with the “glaring historical exception” of the *Yamashita* case,¹³² “the procedures governing trials by military commission historically have been the same as those governing courts-martial.”¹³³

127. *Id.* at 2786 (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942); citing *In re Yamashita*, 327 U.S. 1, 20-21 (1946)) (emphasis added).

128. *Id.* at 2786.

129. *Id.* at 2786-87.

130. *Id.* at 2787 (quoting Commission Order No. 1, sections 6(B) and 6(D)). The Court noted that a presiding officer’s determination “that evidence ‘would not have probative value to a reasonable person’ may be overridden by a majority of the other commission members.” *Id.* (quoting Commission Order No. 1, section 6(D)(1)).

131. See *supra* Part I.C.

132. *Hamdan*, 126 S. Ct. at 2788-89. The Court concluded that “[a]t least partially in response to subsequent criticism of General Yamashita’s trial” the U.C.M.J. expanded the category of persons subject thereto and the Third Geneva Convention extended prisoner-of-war protections. *Id.* at 2789. Thus “[t]he most notorious exception to the principle of uniformity, then, has been stripped of its precedential value.” *Id.* at 2790.

133. *Id.* at 2788.

The Court held that while not all departures from the procedures of the Uniform Code of Military Justice are precluded, “any departure must be tailored to the exigency that necessitates it.”¹³⁴ Specifically, the Court relied on Article 36 of the UCMJ¹³⁵ to conclude that there are two restrictions on the President’s power to promulgate military commission and courts-martial rules: *first*, “no procedural rule” may be “‘contrary to or inconsistent with’” the UCMJ, and *second*, “the rules adopted must be ‘uniform insofar as practicable.’”¹³⁶

While the Court did not reach the question of whether any provision of the rules in Commission Order No. 1 was “‘contrary to or inconsistent with’ other provisions of the UCMJ,” the Court concluded that the “‘practicability’ determination the President has made is insufficient to justify variances from the procedures governing courts-martial.”¹³⁷ Procedures for courts-martial trials and military commission trials must be “‘uniform *insofar as practicable*.’”¹³⁸ While observing that the President has determined it was “impracticable” to apply the rules for district court trial, the Court found that he had not determined it was impracticable to apply the rules for courts-martial.¹³⁹ The Court explained that the absence of this “impracticability” showing is “particularly disturbing” given the 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.”¹⁴⁰

Thus, the Court concluded: “Under the circumstances then, the rules applicable in courts-martial must apply. Since it is undisputed that Commission Order No. 1 deviates in many significant respects from those rules, it necessarily violates Article 36(b).”¹⁴¹ While “exigency lent the commission its legitimacy,” it “did not further justify the wholesale jettisoning of procedural protection.”¹⁴²

134. *Id.* at 2790.

135. *See* text accompanying *supra* note 64 (quoting art. 36 of the UCMJ).

136. *Hamdan*, 126 S. Ct. at 2790.

137. *Id.* at 2791.

138. *Id.* at 2791 (quoting 10 U.S.C. § 836(b) (2006) (emphasis added by Court)).

139. *See id.*

140. *Id.* at 2792 (citing 10 U.S.C. § 839(c) (2006)).

141. *Id.*

142. *Id.*

D. *The Commission Violated the Third Geneva Convention*

The Supreme Court additionally concluded that “[t]he procedures adopted to try Hamdan also violate the Geneva Conventions.”¹⁴³ The Government took the position that the conflict with al-Qaida is not “a conflict to which the full protections afforded detainees under the 1949 Geneva Conventions apply” because the full protections apply only to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.”¹⁴⁴ While the Court did not decide the merits of that position, it found that “at least one provision of the Geneva Conventions . . . applies here even if the relevant conflict is not one between signatories,” namely, Common Article 3.¹⁴⁵ That Article provides for certain minimum provisions regarding “‘conflict not of an international character occurring in the territory of one of the High Contracting Parties,’” and protects, *inter alia*, “‘persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by . . . detention.’”¹⁴⁶ One of the provisions prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”¹⁴⁷

The Court noted that while the term “regularly constituted court” is not specifically defined in Common Article 3 or its accompanying commentary, commentary to the Fourth Geneva Convention defines “regularly constituted” tribunals to include “ordinary military courts” and exclude all special tribunals.¹⁴⁸ Additionally, one of the Red Cross’s treaties defines “regularly constituted courts” in Common Article 3 to mean “‘*established and organized in accordance with the laws and procedures already in force in a country.*’”¹⁴⁹ As to the requirement that the tribunal must afford “all the judicial guarantees which are recognized as

143. *Id.* at 2793.

144. *Id.* at 2795.

145. *Id.*

146. *Id.* (quoting Common Article 3).

147. *Id.* (quoting Common Article 3).

148. *Id.* at 2796-97.

149. *Id.* at 2797 (quoting 1 INT’L COMM. OF RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 355 (2005)) (emphasis added).

indispensable by civilized peoples,”¹⁵⁰ the Court concluded that this requires “at least the barest of those trial protections that have been recognized by customary international law.”¹⁵¹ Because the military commission procedures deviated from “those governing courts-martial” in ways not justified by “any ‘evident practical need,’” the Court held that they fail to satisfy the requisite guarantees of Common Article 3.¹⁵² In particular, the Court stated that it is “indisputably part of the customary international law, which an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him.”¹⁵³

IV. THE MILITARY COMMISSIONS ACT OF 2006

In response to the Supreme Court’s ruling in *Hamdan v. Rumsfeld*, Congress enacted the Military Commissions Act (the “Act”).¹⁵⁴ The Act, which provides congressional authorization for military commission trials, does not bring the trials into compliance with the Uniform Code of Military Justice and the Geneva Conventions, but changes UCMJ procedures for the purpose of Guantanamo trials, as well as the United States’ implementation of its Geneva Convention obligations, so that military commission trials would meet these newly “relaxed” requirements.

The potentially problematic aspects of the Act can be classified into four types. *First*, there are procedures for military commission trials that are at variance with, or allow for variance from, procedures established under the Uniform Code of Military Justice. While Congress has authority to create such variances, the changes raise the question of whether the resulting trials would satisfy the Geneva Convention obligation of trials pursuant to a “regularly constituted court.”¹⁵⁵

Second, there are procedures or substantive definitions that are at odds with the Geneva Conventions and seek to change

150. *Id.* (quoting Common Article 3).

151. *Id.*

152. *Id.* at 2797-98.

153. *Id.* at 2798. While the former of these concerns is cured under the Military Commissions Act, the latter, arguably, is not fully cured. *See infra* Part IV.A.

154. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in various sections of U.S.C.).

155. *See* Common Article 3, *supra* note 10.

how the United States implements the Geneva Conventions. These include an altered definition of who is a lawful enemy combatant, attempts to immunize U.S. personnel from war crimes exposure where there is “collateral damage,” and attempts at watering down the requirement of trial by a “regularly constituted court” so that the newly changed procedures would satisfy it.¹⁵⁶

Third, there are aspects of the Act that seek to prevent judicial review (such as the denial of habeas corpus review to Guantanamo detainees), or take issues that should be the subject of judicial review out of that province, particularly as to matters of international law.

Fourth, the Military Commissions Act is arguably overbroad. For example, it purports to create military commission jurisdiction regarding individuals who were never on any battlefield and/or have no nexus to traditional armed conflict—this is clearly at odds with how such commissions have functioned in the past. While it is beyond the scope of this Article to address every troubling provision of the Act, below are illustrations of each of these four areas.

A. *Provisions that Diverge from the Uniform Code of Military Justice*

In several places, the Military Commissions Act permits military commission procedures to diverge from procedures under the Uniform Code of Military Justice. For example:

- Under the Military Commissions Act, procedures for military commission trials are “based upon the procedures for trial by general courts-martial” But the Act specifically provides that [*procedures for courts-martial trials*] are “not binding upon military commissions.”¹⁵⁷
- The Act also explicitly states that *certain provisions regarding courts-martial trials do not apply*: (a) those relating to speedy trials (Article 10 of the Uniform Code of Military Justice); (b) those relating to compulsory self-incrimination (Articles 31(a), (b), and (d) of the UCMJ); and (c) those relating to pretrial investigation (Article 32 of the Uniform Code of Military Justice). Additionally, the Act provides that “[o]ther provisions of chapter 47 of [the Uniform

156. *See infra*.

157. Military Commissions Act, 10 U.S.C. § 948b(c) (emphasis added).

Code of Military Justice] shall apply to trial by military commission under this chapter only to the extent provided by this chapter.”¹⁵⁸

- Two of the military commission rules that the Supreme Court in *Hamdan* appeared to have been particularly concerned with have not been cured in the Act:¹⁵⁹
 - Allowing “any” evidence, including hearsay, and coerced testimony. As discussed above,¹⁶⁰ the Court in *Hamdan* was critical of the fact that the rules “permit the admission of any evidence that, in the opinion of the presiding officer ‘would have probative value to a reasonable person.’” Thus, hearsay and testimony obtained through coercion would be “fully admissible.”¹⁶¹

These evidentiary issues are not cured in the Military Commissions Act. The Act provides that “[e]vidence shall be admissible if the military judge determines that the evidence would have probative value to a reasonable person”;¹⁶² “[e]vidence shall not be excluded . . . on the grounds that the evidence was not seized pursuant to a search warrant . . .”;¹⁶³ and “hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted . . .”; however, such hearsay “shall not be admitted . . . if the party opposing the admission of the evidence demonstrates that the evidence is unreliable or lacking probative value.”¹⁶⁴ A statement obtained by torture would be inadmissible,¹⁶⁵ but a statement where coercion is disputed could be admit-

158. *Id.* § 948b(d) (emphasis added).

159. A third concern of the *Hamdan* Court was regarding the ability to exclude the accused from trials. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2786 (2006). This is cured in the Military Commissions Act, § 949d(e) of which provides that exclusion of the accused may only occur where, “after being warned by the military judge, the accused persists in conduct that justifies exclusion from the courtroom (1) to ensure the physical safety of individuals; or (2) to prevent disruption of the proceedings by the accused.” 10 U.S.C. § 949d(e).

160. See *supra* Part III.C.

161. *Hamdan*, 126 S. Ct. at 2786-87.

162. Military Commissions Act, 10 U.S.C. § 949a(b)(2)(A).

163. *Id.* § 949a(b)(2)(B).

164. *Id.* § 949a(b)(2)(E) (emphasis added).

165. *Id.* § 948r(b).

ted in certain circumstances.¹⁶⁶ Similar provisions are found in the newly promulgated rules.¹⁶⁷

- *Denial of access to evidence.* The Court in *Hamdan* was also critical that “the accused and his civilian counsel may be denied access to evidence in the form of ‘protected information’” so long as “the presiding officer concludes that the evidence is ‘probative’” and that “its admission without the accused’s knowledge would not ‘result in the denial of a full and fair trial.’”¹⁶⁸ This problem is also not fully cured by the Military Commissions Act.¹⁶⁹

166. A statement obtained before enactment of the Detainee Treatment Act of 2005 as to which the degree of coercion is disputed may be admitted if “(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (2) the interests of justice would best be served by admission of the statement into evidence.” *Id.* § 948r(c). As to a Statement obtained after enactment of the Detainee Treatment Act of 2005, where the degree of coercion is disputed, it may be admitted if “(1) the totality of the circumstances render the statement reliable and possessing sufficient probative value; (2) the interests of justice would best be served by admission of the statement into evidence; and (3) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005.” *Id.* § 948r(d).

167. *See* M.R.EVID. 802 (“Hearsay may be admitted on the same terms as any other form of evidence except as provided by these rules or by any Act of Congress applicable in trials by military commission”); M.R.EVID. 402 (“All evidence having probative value to a reasonable person is admissible”); M.R.EVID. 807 (allowing admission of “hearsay within hearsay”); M.R.EVID. 803(c) (it is the burden of the party opposing admission of hearsay evidence to demonstrate by a preponderance of the evidence that it is unreliable under the totality of the circumstances); M.R.EVID. 304(c) (admissibility of certain statements where coercion is disputed).

168. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2787 (2006) (quoting Commission Order No. 1, §§ 6(B), 6(D)) (emphasis added). The Court noted that a presiding officer’s determination “that evidence ‘would not have probative value to a reasonable person’ may be overridden by a majority of the other commission members.” *Id.* (quoting Commission Order No. 1, § 6(D)(1)).

169. Under the prior approach, “protected information” would not be disclosed to the accused or any civilian defense counsel, but could be admitted into evidence if presented to military defense counsel. *See* Rules, 32 C.F.R. § 9.6(D)(5)(b). The Presiding Officer could order “deletion of specified items of Protected Information” before the documents were made available to the accused, military or civilian defense counsel; “substitution of a portion or summary of the information for such Protected Information”; or “the substitution of a statement of the relevant facts that the Protected Information would tend to prove.” *Id.*

The Military Commissions Act now provides that: “[C]lassified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security.” Military Commissions Act, 10 U.S.C. § 949d(f)(1)(A); *see also id.* § 949j(c). Similar to the prior Rules, the military judge shall authorize “to the extent practicable:” (i) “the deletion of specified items of classified information from docu-

- The Act also allows for the Secretary of Defense to prescribe procedural rules for military commission trials, and states that they shall “so far as the Secretary considers practicable or consistent with military or intelligence activities, apply the principles of law and the rules of evidence in trials by general courts martial.”¹⁷⁰ Thus, such rules are clearly permitted to diverge from courts-martial procedural rules.¹⁷¹

The *Hamdan* decision did not suggest that military commission trials must adhere strictly to the procedures under the Uniform Code of Military Justice for courts-martial trials, but rather (interpreting the *prior* statutory scheme) that the President could not authorize variances from courts-martial trial procedures without justification.¹⁷² Rather than having the President attempt to justify such variances (one option suggested by the *Hamdan* decision) or Congress *conforming* Guantanamo military commission procedures to courts-martial trial procedures (another alternative), Congress has authorized variances from courts-martial trial procedures (a new statutory scheme). Such action is within Congress’s power. Congress enacted the Uni-

ments to be introduced;” (ii) “substitution of a portion or summary of the information;” or (iii) “the substitution of a statement of relevant facts that the classified information would tend to prove.” *Id.* § 949d(f)(2)(A).

Under the new rules, not only is “classified” information protected and privileged from disclosure if disclosure would be detrimental to national security (including exculpatory evidence), but the military judge may issue a protective order preventing disclosure of “the sources, methods or activities by which the United States acquired the evidence.” R.M.C. 701(f), 701(f)(3), 701(f)(5); M.R.EVID. 505. The new rules also contain a privilege for “Government information” that is not classified, which may be privileged from disclosure if disclosure would be “detrimental to the public interest.” *See* M.R.EVID. 506.

170. Military Commissions Act, 10 U.S.C. § 949a(a) (emphasis added).

171. Non-governmental organizations such as Human Rights First have been critical as to additional provisions in the new Manual, for example: (1) offenses such as conspiracy and “providing material support for terrorism,” which they argue violate the prohibition on *ex poste facto* laws; (2) the scope of appellate review, which is limited to matters of law, not fact; (3) the lack of protection regarding evidence obtained through unlawful search or seizure; (4) that military commission may take place absent critical witnesses or evidence; (5) that judges and jury have access to witnesses that the defense and counsel do not; (6) and the fast-tracking of appeals regarding classified evidence, closure of proceedings, and exclusion of the defense from proceedings. *See* HUMAN RIGHTS FIRST, ANALYSIS OF PROPOSED RULES FOR MILITARY COMMISSION TRIALS, <http://www.humanrightsfirst.info/pdf/07125-usls-hrf-rcm-analysis.pdf> (last visited Apr. 2, 2007).

172. *See supra* Part III.C.

form Code of Military Justice, and possesses power to amend the statute. It therefore follows that Congress has power to change trial procedures for one subset of the types of trials covered—military commission trials at Guantanamo. Yet, this leaves open the issue (discussed *infra*) whether such amendments satisfy the United States' Geneva Convention obligations under Common Article 3 to hold trials pursuant to a "regularly constituted court."¹⁷³ Arguably the preferable course of action would have been for Congress to adopt trial procedures for Guantanamo military commissions that adhere to the Uniform Code of Military Justice, eliminating any issue as to whether the trials would violate the requirement of trial pursuant to a "regularly constituted court."

B. *Provisions That Change U.S. Domestic Implementation Of
The Geneva Conventions*

A number of provisions contained in the Military Commissions Act appear to be at odds with the language of the Geneva Conventions. What Congress has done here is change the way the United States *implements* the Geneva Conventions, not actual U.S. treaty obligations. Such provisions include:

- *Redefining prisoners-of-war as "unlawful enemy combatants."* The Military Commissions Act defines an "unlawful enemy combatant" as: "[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 Qaida, or associated forces*)."¹⁷⁴ This is a confusing definition. Congress also provides that some individuals are "lawful enemy combatant[s]" (namely, "a member of the regular forces of a State party," as well as "militia" meeting four criteria, and

173. As discussed *infra*, Congress has attempted to curtail this possibility by reinterpreting Common Article 3 to eliminate war crimes exposure for holding trials not pursuant to a "regularly constituted court." See *infra* Part IV.B. While Congress has the power to change how the U.S. domestically implements the Geneva Conventions in this manner, as discussed *infra*, any such changes would not impact on the manner in which other countries implement the Geneva Conventions—meaning that Congress cannot eliminate all potential exposure—for example, if another country were to charge war crimes under universal jurisdiction principles.

174. 10 U.S.C. § 948a(1)(i) (emphasis added).

other “regular armed forces”),¹⁷⁵ yet, at the same time, appears to mandate that members of the “Taliban, al Qaeda, or associated forces” are necessarily “unlawful enemy combatants.”¹⁷⁶

Under the Geneva Conventions, however, *any* individual who is a “[m]ember of the armed forces of a Party to the conflict” would qualify as a prisoner-of-war (a “lawful enemy combatant”).¹⁷⁷ In fact, members of the Taliban (the former army of Afghanistan) clearly were members of the armed forces of a State party to the conflict. Any definition that suggests they are not “lawful enemy combatants” or “prisoners-of-war” is at odds with the Geneva Conventions.¹⁷⁸

- *Redefining Common Article 3 to eliminate war crimes exposure for holding trials not pursuant to a “regularly constituted court.”* Section 6(b)(d)(1) of the Military Commissions Act (Implementation of Treaty Obligations) seeks to redefine under the War Crimes Act what are Geneva Convention Common Article 3 violations. Notably, it leaves off its list of violations “the passing of sentences

175. *See id.* § 948a(2) (defining “lawful enemy combatant”).

176. *See id.* § 948a(1)(i).

177. The Third Geneva Convention grants prisoner of war status to “[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces,” and irregular fighters meeting certain criteria. *See* Third Geneva Convention, *supra* note 6, art. 4A(1).

178. In theory, the determination that all al-Qaida are *necessarily* “unlawful enemy combatants” is also problematic. Militia meeting four criteria set forth in the Geneva Conventions are “lawful enemy combatants” or “prisoners-of-war.” *See* Third Geneva Convention, *supra* note 6, art. 4A(2) (requiring a command structure, uniforms with a “fixed distinctive sign,” that arms be carried openly and that operations be conducted in accordance with the laws and customs of war). Al-Qaida members likely do not meet the criteria needed for irregular fighters to qualify as prisoners-of-war. Yet, the Geneva Conventions suggest that if there is doubt as to whether persons qualify as prisoners-of-war, those persons “shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal”—an “Article 5 determination.” Third Geneva Convention, *supra* note 6, art. 5. Defining al-Qaida *necessarily* as “unlawful enemy combatants” appears to eliminate any ability individuals should have to contest that designation at a status determination hearing, and any benefit of the doubt that is due prior to that determination.

The Military Commissions Act is further at odds with the Geneva Conventions by eliminating from its coverage of members of the armed forces “members of militias or volunteer corps forming part of such armed forces,” which is part of the Geneva Convention definition. *Compare* Third Geneva Convention, *supra* note 6, art. 4A(1), *with* Military Commissions Act, 10 U.S.C. § 948a(2)(B).

and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”¹⁷⁹ This amendment would apply retroactively to November 26, 1997.¹⁸⁰

- *Redefining Common Article 3 to create potential immunity regarding “collateral damage.”* Section 6(b)(3) of the Military Commissions Act additionally seeks to change Common Article 3 by providing with regard to the Common Article 3 crimes of “murder,” “mutilation or maiming” and “intentionally causing serious bodily injury,” that where there is “collateral damage,” intent to commit the Common Article 3 crimes would be lacking.¹⁸¹ This amendment would also apply retroactively to November 26, 1997.¹⁸²

These changes are quite problematic.

1. Redefining Prisoners-of-War as “Unlawful Enemy Combatants”

As to the attempt to redefine who is a “lawful” or “unlawful” combatant in such a way that the Taliban would be “unlawful” combatants, Congress has deemed that a group of individuals (former members of the Taliban) will not be treated as prisoners-of-war, when they are entitled to such treatment under the Geneva Conventions.¹⁸³ This is exceedingly inadvisable at a policy level, in that it virtually invites foreign countries to respond accordingly, and in the future deny prisoner-of-war status to U.S. service-members should they fall behind enemy lines. It is additionally troubling in that the Geneva Conventions mandate that prisoners-of-war be tried in the same manner as U.S. armed forces,¹⁸⁴ namely, according to U.S. courts-martial trial proce-

179. Compare Military Commissions Act, 18 U.S.C. § 2441(d)(1), with Common Article 3, *supra* note 10.

180. See Military Commissions Act, Pub. L. No. 109-366, § 6(b)(2), 120 Stat. 2600, 2635 (2006) (“Retroactive Applicability”).

181. See Military Commissions Act, 18 U.S.C. § 2441(d)(3).

182. See Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600, 2635 § 6(b)(2) (2006) (“Retroactive Applicability”).

183. See *supra* notes 174-178 and accompanying text.

184. The Third Geneva Convention provides that prisoners of war “can be validly sentenced only . . . by the same courts according to the same procedure as [are] . . .

dures. As detailed above, however, procedures under the Military Commissions Act vary considerably from those under the Uniform Code of Military Justice.¹⁸⁵ If any Taliban¹⁸⁶ are therefore tried under the Military Commissions Act procedures, then the United States arguably would be committing a “grave breach” of the Geneva Conventions.¹⁸⁷ Furthermore, as suggested *supra*, any immunity created by Congress in this regard would not impact on other countries’ implementation of the Geneva Conventions, potentially creating criminal exposure under other countries’ war crimes laws.¹⁸⁸

2. Redefining U.S. Domestic Implementation of Common Article 3—Eliminating the Requirement of Conducting “Trials Pursuant to a Regularly Constituted Court”

As to the attempt to redefine Common Article 3 such that not conducting “trials pursuant to a regularly constituted court” would no longer be a war crime, and making that provision retroactive, Congress is clearly seeking to eliminate any possible U.S. exposure for conducting military commission trials that might be perceived as “irregular”—either, for example, because they are at variance from pre-existing courts-martial standards¹⁸⁹

members of the armed forces of the Detaining Power.” Third Geneva Convention, *supra* note 6, art. 102. The Third Geneva Convention also states that prisoners of war may not be tried by a court “of any kind which does not offer the essential guarantees of independence and impartiality as [are] generally recognized.” Third Geneva Convention, *supra* note 6, art. 84.

185. See *supra* Part IV.A.

186. Based on Combatant Status Review Board letters prepared and released in 2005 by the U.S. Government following Combatant Status Review Tribunal determinations, it is estimated that as of 2005, twenty-two percent of the Guantanamo detainees were classified as Taliban; twenty-eight percent as al-Qaida and Taliban; and seven percent as al-Qaida or Taliban. See DENBEAUX & DENBEAUX, *supra* note 100, at 8.

187. See Fourth Geneva Convention, *supra* note 6, art. 147 (defining grave breaches to include “willfully depriving a protected person of the rights of fair and regular trial”); see also 18 U.S.C. § 2441 (2006) (making “grave breaches” war crimes). The U.S. Government would likely argue, as it has done, that the body of the Geneva Conventions is inapplicable. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795 (2006). Yet, at least vis-à-vis fighting between the United States and the Taliban (the armed forces of the former Afghan regime), a quite plausible argument can be made that the fighting constituted “armed conflict” “between two or more of the High Contracting parties, even if the state of war is not recognized by one of them.” See Third Geneva Convention, *supra* note 6, art. 2. If that is the case, then the fully body of all four Geneva Conventions would apply.

188. See *supra* note 173.

189. As to the phrase “regularly constituted court,” the Supreme Court noted that

or because they do not satisfy internationally accepted fair trial standards.¹⁹⁰ Again, this is problematic from a policy perspective because it suggests the acceptability of holding irregular trials—something the United States ought to be opposing in order to protect its service-members who might in the future fall behind enemy lines and be tried. It also suggests a brazen “exceptionalism”—that the United States should be bound to different legal standards than the rest of the world¹⁹¹ (which has almost univer-

that term has been defined to mean “ordinary military courts” and not special tribunals, and courts “established and organized in accordance with the laws and procedures *already in force in a country.*” *Hamdan*, 126 S. Ct. at 2797 (quoting 1 INT’L COMM. OF RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 355 (2005)) (emphasis added). It should be noted that courts-martial, as they regularly function, need to be individually convened by a convening authority, and are not standing or pre-existing tribunals. See generally Lieut. Col. Bradley J. Huestis, *Anatomy of a Random Court-Martial Panel*, ARMY LAWYER 22 (Oct. 2006).

190. It is beyond the scope of this Article to compare internationally accepted fair trial standards to the procedures established under the Military Commissions Act. Such an analysis (now out of date) has been compiled by Human Rights Watch regarding the Guantanamo tribunals as originally constituted. See HUMAN RIGHTS WATCH, DUE PROCESS PROTECTIONS AFFORDED DEFENDANTS: A COMPARISON BETWEEN THE PROPOSED U.S. MILITARY COMMISSIONS AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (2001), available at <http://www.hrw.org/press/2001/12/miltrib1204.htm>. Human Rights Watch concluded that “[j]udicial standards permitted by a new presidential order on military commissions would be significantly lower than those at war-crimes courts established by the United Nations.” See Human Rights Watch, Press Release, U.S.: Military Commissions Can’t Compare to International Courts: Due Process Standards Much Lower for Proposed U.S. Trials (2001), <http://hrw.org/english/docs/2001/12/04/usdom3404.htm> (last visited Apr. 3, 2007).

Note that as to the requirement that courts afford “all the judicial guarantees which are recognized as indispensable by civilized peoples,” the Supreme Court explained that at minimum that requires “at least the barest of those trial protections that have been recognized by customary international law.” *Hamdan*, 126 S. Ct. at 2796-97 (quoting Common Article 3). The Court also explained that it is “indisputably part of the customary international law, which an accused must, absent disruptive conduct or consent, be present for his trial *and must be privy to the evidence against him.*” *Id.* at 2798 (emphasis added). Trials pursuant to the Military Commissions Act would not allow the defense to obtain protected information used in evidence.

191. This is part of a trend shown under this Administration, including insistence by the United States that countries sign bilateral agreements that are designed to ensure that no U.S. citizens are tried by the International Criminal Court, along with U.S. attempts to redefine “torture.” See, e.g., Coalition for the International Criminal Court, Status of US Bilateral Immunity Agreements (2006) http://www.iccnw.org/documents/CICCFS_BIAstatus_current.pdf (compiling information on US Bilateral Immunity Agreements); JEFFREY L. DUNOFF, STEVEN R. RATNER, DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 462-72 (2d ed., 2006) (discussing changes by United States of interrogation techniques and the definition of torture as part of the “global war on terrorism”).

sally ratified¹⁹² the four 1949 Geneva Conventions containing Common Article 3, which is regarded as customary international law in any event).¹⁹³ The U.S. military has consistently seen itself bound by Common Article 3 in every conflict since the Geneva Conventions were ratified in 1949,¹⁹⁴ and there is no cogent reason to change this fundamental provision of the laws of war now or to provide immunity for its violation.

3. Redefining U.S. Domestic Implementation of Common Article 3—Creating Potential Immunity Regarding “Collateral Damage”

As to the change to the mens rea for certain war crimes under Common Article 3—providing that where there is “collateral damage” intent to commit certain war crimes would be lacking,¹⁹⁵ this change appears aimed at insulating American servicemen from war crimes exposure. These changes also are at odds

192. See INT’L COMM. OF RED CROSS, STATE PARTIES TO THE FOLLOWING INTERNATIONAL HUMANITARIAN LAW AND OTHER RELATED TREATIES 6, [http://www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_treaties.pdf) (last visited Feb. 14, 2007) (listing 194 states as parties to the Geneva Conventions).

193. See *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 98 (Oct. 2, 1995) (“[S]ome treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions”); *Prosecutor v. Kunarac, Kovac & Vokovic*, Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶ 68 (June 12, 2002) (holding same); see also First Lieutenant Melissa J. Epstein and Chief Warrant Officer Three Richard Butler, *The Customary Origins and Elements of Select Conduct of Hostilities Charges Before the International Criminal Tribunal for the Former Yugoslavia: A Potential Model for Use by Military Commissions*, 179 MIL. L. REV. 68, 82 (2004).

The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the protection of War Victims; . . . the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; . . . the Convention on the Prevention and Punishment of the Crime of Genocide of 09 December 1948; . . . and the Charter of the International Military Tribunal of 08 August 1945.

Id. (quoting Report of the Secretary-General Pursuant to Paragraph 2 of United Nations Security Council Resolution 808 (1993), adopted on Feb. 22, 1993 (S/25704) (May 3, 1993)).

194. See Katherine Newell Bierman, Counterterrorism Counsel—U.S. Program, Human Rights Watch, *To Continue to Receive Testimony on Military Commissions in Light of the Supreme Court Decision in Hamdan v. Rumsfeld: Hearing Before the Senate Comm. on Armed Services*, 109th Cong. 06-59 (2006) (Prepared Statement to the Senate Committee on Armed Services, July 19, 2006).

195. See 18 U.S.C. §2441(d)(3); see also *supra* note 181 and accompanying text.

with the laws of war which permit “collateral damage” only in certain narrowly circumscribed situations. For example, precautionary measures are required to be taken in launching an attack. Namely, the attacker must (i) “[d]o everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects”; (ii) “take all feasible precautions in the choice of means and methods of attack . . .”; and (iii) “[r]efrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”¹⁹⁶ If such required measures are taken and “collateral damage” nonetheless results, that is not a violation of the laws of war.

Yet, Congress’s change suggests that it is acceptable to simply exempt all “collateral damage” (no matter how severe) from war crimes consequences. Thus, for example, if a bomb that could not be accurately targeted were dropped by U.S. military on a legitimate military target that was next to a school, while school was in session, and killed all the children in school, that would presumably not be a war crime according to Congress because there was a legitimate military target and the children’s deaths were mere “collateral damage.” Such a result would not only be at odds with key provisions of the laws of war,¹⁹⁷ but be unconscionable and violate customary international law.¹⁹⁸ Again, even if such immunity were effective under U.S. law, it would not impact other countries’ implementation of their war

196. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 57 (2)(a)(i)-(iii), adopted June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Geneva Protocol I].

197. See *id.* at art. 48 (“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”); art. 51(4) (“Indiscriminate attacks are prohibited.”); art. 57(2) (stating precautionary measures are required to be taken). While the United States has not ratified Geneva Protocol I, these rules are regarded as customary. See, e.g., Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, in 857 INT’L REV. RED CROSS 175, 187-88 (2005).

198. See Henckaerts, *supra* note 197, at 187-88 (stating the principle of distinguishing between civilians and combatants and between civilian objects and military objectives; the prohibition of indiscriminate attacks; and the principle of proportionality all reflect customary international law).

crimes laws, meaning that potential war crimes exposure would still remain.

4. The Inadvisability of Weakening U.S. Domestic Implementation of the Geneva Conventions

As a policy matter, it is exceedingly inadvisable to weaken U.S. domestic implementation of the Geneva Conventions because it: (a) suggests to other countries that they might do likewise and weaken their domestic implementation of the Geneva Conventions (at least regarding countries where treaty obligations are not automatically incorporated into their domestic laws);¹⁹⁹ (b) places the United States in no position of moral authority to object if other countries change how they domestically implement the Geneva Conventions; and, in particular, (c) suggests the permissibility of weakening domestic implementation of Geneva Convention provisions that address the status of combatants and procedures for trials of such combatants. In fact, it is precisely these rules that the United States should be strictly upholding in order to protect its service-members, should they require these protections.

Recently, the U.S. military has had forces in nearly one hundred and thirty countries around the world, performing duties ranging from combat operations to peacekeeping; total force deployment exceeded 350,000.²⁰⁰ Given this exposure, the chance that U.S. service-members might have need to rely upon Geneva Convention protections is far from theoretical. The changes additionally suggest disrespect for the rule of law, in that Congress has shown great willingness to alter implementation of key provisions of the laws of war for short-term expedience.

199. For States that are "monist," international law is automatically part of that state's domestic legal system. For states that are "dualist" (such as the United States), international law and domestic law are two distinct branches of law. "Under the dualist view, each state determines for itself whether, when, and how international law is 'incorporated' into a domestic law, and the status of international law in the domestic system is determined by domestic law." DUNOFF, RATNER & WIPPMAN, *supra* note 191, at 267-68.

200. See GlobalSecurity.org, *Where are the Legions? [SPQR] Global Deployments of US Forces*, <http://www.globalsecurity.org/military/ops/global-deployments.htm> (last visited Feb. 3, 2006) (the figure of 350,000 was as of January 2005 and included deployments in support of combat, peacekeeping and deterrence operations, as well as forces normally present in Germany, Italy, the United Kingdom and Japan).

5. Congress's Power to Change U.S. Domestic Implementation of the Geneva Conventions

As inadvisable as these changes may be as a policy matter, the issue arises whether Congress had power to authorize them. As to Congress's ability to amend the War Crimes Act,²⁰¹ because Congress passed that legislation, it has sufficient power to amend it. Where federal legislation conflicts with U.S. treaty obligations, courts are charged with interpreting the legislation such that conflict is avoided.²⁰² If such a construction is not possible, it appears that under the "last-in-time rule" the legislation would override inconsistent treaty obligations, at least *vis-à-vis* U.S. domestic law.²⁰³ While there are critics of the "last-in-time rule,"²⁰⁴ the rule appears to represent the majority approach.²⁰⁵ While a policy argument might be made that legislation should not conflict with customary international law,²⁰⁶ it would likely prove dif-

201. 18 U.S.C. § 2441.

202. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.").

203. The "last-in-time rule" states "that a federal statute can supercede [sic] a treaty obligation if the statute was enacted after the ratification of the treaty." Francisco Forrest Martin, *Symposium: Is United States Constitutionalism Good Or Bad For International Human Rights?: The Constitution and Human Rights: The International Legal Constructionist Approach to Ensuring the Protection of Human Rights*, 1 FLA. INT'L U. L. REV. 71, 72 (2006).

204. See *id.* at 73 (arguing "that the Last-in-Time Rule is an unconstitutional and immoral judge-made rule," and that, *inter alia*, "[t]he text of the Supremacy Clause [in the U.S. Constitution] indicates that treaties have greater authority than federal statutory law."); see also Patrick M. McFadden, *Provincialism In United States Courts*, 81 CORNELL L. REV. 4, 32 (1995) ("When Congress passes a law that is inconsistent with one of the United States' international obligations, courts can ameliorate—or even eradicate—the harm by refusing to enforce the legislation. But they cannot do so if they take the position that later congressional legislation supersedes treaty and customary law."); Jules Lobel, *The Limits Of Constitutional Power: Conflicts Between Foreign Policy And International Law*, 71 VA. L. REV. 1071, 1075-76 (1985).

205. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 115 (1987) (last-in-time rule); see also GARY L. MARIS, *INTERNATIONAL LAW* 224 (1984) ("In the United States, the rule established by court decisions since the 1880s for which has precedence between a law of Congress and a treaty, is that the latest is given effect."); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1563 n.31 (1984) ("Both the equality of statutes and treaties and the later-in-time rule have, however, been upheld in numerous cases and seem firmly established.")

206. See, e.g., McFadden, *supra* note 204, at 31-34 (arguing that when U.S. courts engage in "provincialism" and fail to invoke international legal standards this harms: (a) the United State's reputation as a country that supports "the rule of law in international affairs;" (b) "the rule of law" when courts countenance violations of international

difficult to convince a court to adhere to customary international law where there is contrary legislation on point.²⁰⁷ A stronger argument might, however, be made if one were to take the position that Congress has infringed on a fundamental *jus cogens* norm of international law.²⁰⁸

Thus, for example, any change to the laws of war that exonerates those who cause unlimited “collateral damage” conflicts with fundamental tenets of the laws of war requiring observance of the principles of distinction and proportionality.²⁰⁹ Yet, if the phrase “collateral damage” were read to prevent war crimes exposure where there was “collateral damage incident to a lawful attack,” that would be a construction that gives effect to both Congress’s language and respects the laws of war.²¹⁰ It is difficult, however, to imagine a construction of the Military Commissions Act provisions which redefine “regularly constituted court,” redefine prisoners-of-war as “unlawful enemy combatants,” and

law by the executive and legislative branches; and (c) “corrodes the very system of international law”).

207. In the Military Commissions Act, Congress has attempted to prevent judicial reliance on international law in this context by providing: “No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of such section 2441”—the War Crimes Act’s definition of Common Article 3 violations. Military Commissions Act, § 6(a)(2), 18 U.S.C. § 2441(d); *see also* McFadden, *supra* note 204, at 12-13 (discussing the hesitance of federal courts to apply international law, citing, *inter alia*: “[T]he reluctance of U.S. courts to recognize the existence of international custom”; “the rule that courts may not invoke customary law, unless, like treaties, it is self-executing”; “the rule that congressional legislation supersedes pre-existing customary law”; and “the reluctance of U.S. courts to recognize the existence of an international rule based on the ‘general principles of law recognized by civilized nations.’”).

208. As one author argues:

Even Congress and the President jointly should not have the power to violate fundamental international norms, such as the prohibitions on torture, assassination of civilians, aggression, or war crimes. These norms effectively operate as an implicit part of the constitutional limitations on governmental power. Violations of such fundamental rules should be subject to judicial review as long as a proper case or controversy exists.

Lobel, *supra* note 204, at 1075-76 (emphasis added, footnote omitted); *see also* Christopher W. Haffke, *The Torture Victim Protection Act: More Symbol Than Substance*, 43 EMORY L.J. 1467, 1502 (1994) (arguing that “*jus cogens*, as a non-derogable rule of the highest status in international law, will arguably supersede a state’s conflicting domestic law”). *But see* Garland A. Kelley, *Does Customary International Law Supersede a Federal Statute?*, 37 COLUM. J. TRANSNAT’L L. 507 (1999) (collecting certain decisions that hold that *jus cogens* does not supersede a federal statute).

209. *See supra* notes 197-198 and accompanying text.

210. In other words, if all the laws of war were observed—i.e., the attack was “lawful”—then resulting collateral damage would not be cause for criminal exposure.

provide immunity regarding irregular trials, that would be in harmony with the Geneva Conventions.

If Congress's changes were for any reason invalid (or, viewing these changes under other countries' war crimes laws), then military commission trials that do not adhere to the Uniform Code of Military Justice (which the military commission trials as currently constituted do not)²¹¹ arguably would constitute trials not by a "regularly constituted court"—a Common Article 3 violation, i.e., a war crime.²¹² While it is unclear whether any such trials would be so defective as to rise to this level—they well might not since a good number of procedural protections do exist—the fact that this issue even arises suggests the inadvisability of Congress's modifying the UCMJ's regular trial procedures. Similarly, as explained above, trials of Taliban members pursuant to the military commission trials as currently constituted arguably would be "grave breaches" or war crimes because they do not follow UCMJ procedures.²¹³

C. Provisions That Limit Judicial Review, Particularly Regarding Issues of International Law and the Geneva Conventions

In a variety of provisions, the Military Commissions Act seeks to limit or eliminate U.S. federal court review of certain issues. In particular, the Military Commissions Act seeks to ensure that detainees may not obtain federal court habeas corpus review, and that neither detainees nor the judiciary, in certain instances, may invoke the Geneva Conventions or international law. For example:

- *Striking habeas corpus review.* The Military Commissions Act eliminates habeas corpus review as to any military commission trials—including pending cases.²¹⁴ The Mil-

211. See *supra* Part IV.A.

212. See 18 U.S.C. § 2441 (2006) (making "grave breaches" and "Common Article 3" violations war crimes; where "death results to the victim," the perpetrator "shall also be subject to the penalty of death").

213. See *supra* note 187 and accompanying text.

214. Military Commissions Act § 950j(b) provides:

Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission

itary Commissions Act amends the Detainee Treatment Act (which the Supreme Court construed in *Hamdan* to permit habeas review of pending cases)²¹⁵ so that habeas corpus review is not available regarding pending cases.²¹⁶

- *Attempting to limit reliance by the judiciary and detainees on international law.* Section 6(a)(2) of the Military Commissions Act states that “[n]o foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of [the War Crimes Act].”²¹⁷
- Additionally, Section 948b(g) 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.”²¹⁸
- *Taking issues of international law away from the judiciary.* Section 948b(f) provides that “A military commission established under this chapter is a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article Three of the Geneva Conventions.”²¹⁹
- Similarly, Section 6(a)(2) states that the provisions of the War Crimes Act “fully satisfy the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave

under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

215. See *supra* Part III.A.

216. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635-36 (codified at 28 U.S.C. 2241) (“Habeas Corpus Matters”).

217. *Id.* § 6(a)(2), 120 Stat. at 2632 (interpreting 18 U.S.C. 2441(d) by notation).

218. 10 U.S.C § 948b(g). In a note interpreting 28 U.S.C. 2241, the Military Commissions Act, Pub. L. No. 109-366, § 5, 120 Stat. 2600, 2631 (“Treaty Obligations Not Establishing Grounds for Certain Claims”), also states: “No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.”

219. 10 U.S.C § 948b(f).

breaches”²²⁰

- Additionally, Section 6(a)(3)(A) provides that “the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions”²²¹

These provisions, taken together, arguably constitute: (a) an assault upon international law; (b) an attempt to prevent the judiciary from using international law as a source of law in construing issues related to military commission trials and war crimes; (c) an attempt to prevent federal court review as to whether certain war crimes have occurred; and (d) an attempt to insulate congressional actions from federal court review by eliminating habeas corpus. Some of these provisions raise policy questions and some raise legal questions, but they add up to legislation that is arguably not in the best interests of the United States.

1. Eliminating Habeas Corpus Review

Given statements by the U.S. government that detainees could be held indefinitely at Guantanamo,²²² depriving detainees of federal court habeas corpus review is profoundly troubling.²²³ It is completely unacceptable from the perspective of the

220. Military Commissions Act of 2006, Pub. L. No. 109-366, § 6, 120 Stat. 2600, 2632 (interpreting 18 U.S.C. 2441 by notation).

221. *Id.* (interpreting 18 U.S.C. 2441 by notation).

222. See Transcript of Attorney General Alberto R. Gonzales Briefing with Reporters Regarding Military Commissions (Sept. 18, 2006), http://www.usdoj.gov/opa/pr/2006/September/06_ag_629.html (last visited Apr. 2, 2007) (“[W]e believe it’s important for a commander in chief to have the tools of a military commission in order to bring terrorists to justice. But if for some reason that couldn’t—we can’t get that from the Congress, we could continue to hold these enemy combatants for the duration of the hostilities.”); Bill Dedman, *US to Hold Detainees at Guantanamo Indefinitely*, BOSTON GLOBE, April 25, 2004, at A1 (“Most of the 595 suspected terrorists detained by the United States at Guantanamo Bay, Cuba, will be held indefinitely, even though there is not yet enough evidence to charge them with crimes, a senior Pentagon official said in an interview with the Globe.”); *Guantanamo Detainees May Remain Indefinitely: Gonzalez*, AGENCE FRANCE PRESSE, Aug. 3, 2006, <http://sg.news.yahoo.com/060803/1/42iww.html> (last visited Apr. 2, 2007) (“We can detain any combatants for the duration of the hostilities.” “If we choose to try them, that’s great. If we don’t choose to try them, we can continue to hold them.”).

223. Federal courts’ ability to entertain writs of habeas corpus traces its ancestry to the Judiciary Act of 1789; common law roots go back far earlier. See *Rasul v. Bush*, 542 U.S. 466, 473-74 (2004).

human rights of the detainees,²²⁴ the United States' proclaimed respect for the rule of law, and the international image of the United States to hold individuals indefinitely beyond the reach of independent legal review.

First, as Justice Black so eloquently argued in his dissent in *Johnson v. Eisentrager*:

These prisoners [being held in Germany] were convicted by our own military tribunals under our own Articles of War, years after hostilities had ceased. However illegal their sentences might be, they can expect no relief from German courts or any other branch of the German Government we permit to function. Only our own courts can inquire into the legality of their imprisonment. Perhaps, as some nations believe, there is merit in leaving the administration of criminal laws to executive and military agencies completely free from judicial scrutiny. Our Constitution has emphatically expressed a contrary policy

Conquest by the United States, unlike conquest by many other nations, does not mean tyranny. For our people "choose to maintain their greatness by justice rather than violence." Our constitutional principles are such that their mandate of equal justice under law should be applied as well when we occupy lands across the sea as when our flag flew only over thirteen colonies. Our nation proclaims a belief in the dignity of human beings as such, no matter what their nationality or where they happen to live. Habeas corpus, as an instrument to protect against illegal imprisonment, is written into the Constitution. Its use by courts cannot in my judgment be constitutionally abridged by Executive or by Congress. I would hold that our courts can exercise it whenever

224. While various of the provisions of the International Covenant on Civil and Political Rights ("ICCPR") dealing with fair trials are derogable in time of emergency, the derogations must be "strictly required"—which has been interpreted to mean that they must be of an "exceptional and temporary nature." See ICCPR, G.A. res. 2000A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) ("In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from [certain of] their obligations under the present Covenant to the extent strictly required by the exigencies of the situation"); see also Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) ("Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature."). The United States, however, has filed no declaration attempting to justify any such derogations. See Kenneth Roth, *The Law of War in the War on Terror*, 83 FOREIGN AFF. 6 (2004).

any United States official illegally imprisons any person in any land we govern. Courts should not for any reason abdicate this, the loftiest power with which the Constitution has endowed them.²²⁵

Justice Black's approach should be the correct one. Even in times of war, the executive and military should not have completely unfettered discretion regarding detainees; particularly where military commissions are held not in the traditional context of the "theatre of war" and/or in conjunction with traditional armed conflict. The suspension of habeas corpus also again provides troubling precedent should other countries follow the United States' lead and preclude similar oversight of military commissions under their laws.

Second, as to any detainees being held in U.S. military custody who were apprehended in the United States—such as Ali Saleh Kahlah al-Marri, arrested in Peoria, Illinois²²⁶—it is questionable whether Congress has the power as a matter of law to eliminate such review. In *Johnson v. Eisentrager*, the Court found that "enemy aliens" have no constitutional right to habeas corpus review, but only when six critical facts were met, including that the individual "has never been or resided in the United States; . . . was captured outside of our territory . . . ; and is at all times imprisoned outside the United States."²²⁷ Thus, *vis-à-vis* individuals apprehended in the United States there indeed may exist a constitutional right to habeas corpus review.²²⁸

Third, it may be possible to argue that even with regard to individuals who were not apprehended within the United States that *Johnson v. Eisentrager* should not apply, and a constitutional right to habeas corpus review should be found. It is noteworthy

225. *Johnson v. Eisentrager*, 339 U.S. 763, 797-98 (1950).

226. See *U.S. Defends Legal Limits For Detainees*, WASH. POST, Nov. 14, 2006, at A08 (discussing the case of "Ali Saleh Kahlah al-Marri, a citizen of Qatar, who was arrested in 2001 while studying in the United States and is being held at a military prison in South Carolina as an 'enemy combatant.'" The Government contends that he may be held indefinitely on suspicion of terrorism and "may not challenge [his detention through habeas corpus]"); see also *al-Marri v. Rumsfeld*, 360 F.3d 707 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 34 (2004).

227. *Eisentrager*, 339 U.S. at 777.

228. See *Padilla v. Rumsfeld*, 352 F.3d 695, 724 (2d Cir. 2003) (holding, *inter alia*, that in the domestic context, the President's inherent constitutional powers do not extend to the detention as an enemy combatant of an American citizen seized within the country away from a zone of combat), *rev'd*, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (jurisdictional grounds).

that the Supreme Court in *Bush v. Rasul*, in hearing the habeas petitions of two Australians and twelve Kuwaitis held at Guantanamo, readily distinguished the situation of those Guantanamo detainees from the detentions at issue in *Johnson v. Eisentrager*.²²⁹ While *Bush v. Rasul*, which upholds a statutory right to habeas corpus review based on the law prior to enactment of the Military Commissions Act, is no longer determinative, it suggests clear grounds by which to distinguish *Eisentrager*.²³⁰

2. Limiting Reliance by the Judiciary and Detainees on International Law

As to the Military Commissions Act's attempting to limit reliance by the judiciary and detainees on international law, international law has historically been part of U.S. law. As stated in the Supreme Court case, *Paquette Habana*: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . ." ²³¹ The attempt to eliminate reliance on international law regarding certain war crimes arguably raises separation of powers concerns, and argua-

229. The Court found *Eisentrager* not controlling:

Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Bush v. Rasul, 542 U.S. 466, 476 (2004). Justice Kennedy, in his concurring opinion, distinguished *Eisentrager* because "Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities" and, in part, "the detainees at Guantanamo Bay are being held indefinitely . . ." *Id.* at 487-88.

Additional reasons for denying habeas in the *Eisentrager* case also are inapplicable regarding Guantanamo detainees. For example, the Supreme Court in *Eisentrager* in part reasoned on the basis of logistics: "[t]o give the writ to these prisoners might mean that our army must transport them across the seas [from Germany] for hearing". *Id.* at 778-79. In the present situation, however, the logistical difficulties seem far less because Guantanamo is not distant and various detainees already have U.S. counsel.

230. The Court of Appeals for the D.C. Circuit on February 20, 2007, upheld the provisions of the Military Commissions Act that strip Guantanamo detainees of the ability to have habeas corpus petitions heard in federal court. *See Boumediene v. Bush*, 2007 U.S. App. LEXIS 3682 (D.C. Cir., Feb. 20, 2007). Certiorari was recently denied by the U.S. Supreme Court.

231. The *Paquete Habana*, 175 U.S. 677, 700 (1900) (quoted in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 452-53 (1964); *Skiriotes v. Florida*, 313 U.S. 69, 72-73 (1941); *Kansas v. Colorado*, 206 U.S. 46, 97 (1907)).

bly encroaches on the role of the judiciary.²³² While the United States is a “dualist” system, in which international legal obligations cannot be directly invoked as a source of rights,²³³ plaintiffs have been free to invoke international law, and judges have been free to construe international law, for example, where there is a sufficient statutory basis, such as under the Alien Tort Claims Act and Torture Victim Protection Act.²³⁴ The provision that “the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions”²³⁵ similarly appears to give the President an unfettered hand in interpreting the Geneva Conventions, which is again not only problematic precedent in terms of protecting the Geneva Conventions, but arguably undermines the role of the judiciary and international law as well.²³⁶

D. *Over-breadth of the Military Commissions Act: Trying
Individuals Not Apprehended on the Battlefield and/or
During Traditional Armed Conflict*

As explained *supra*, law-of-war military commissions, have historically only been used in conjunction with traditional armed conflicts.²³⁷ As to the breadth of the commissions authorized under the Military Commissions Act, the question is whether Congress may authorize the use of military commissions where: (a) offenses were not committed within the “theatre of war”; and (b) offenses were not committed during “the period of war”; or alternatively, whether one is willing to accept (c) an expansive definition of the “war on terrorism” such that the “theatre of

232. See U.S. CONST. art. III, § 1 (vesting judicial power in the judiciary); *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) (holding that Congress violates the First Amendment and Article III when it “seek[s] to prohibit the analysis of certain legal issues and to truncate presentation to the courts,” and that the Court would be “vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge”).

233. See DUNOFF, RATNER & WIPPMAN, *supra* note 191, at 267-68 (discussing “monist” and “dualist” approaches to international law).

234. See 28 U.S.C. § 1350.

235. Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(a)(3)(A), 120 Stat. 2600, 2632 (interpreting 18 U.S.C. 2441 by notation).

236. See, e.g., *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2684 (2006) (“[i]f treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law ‘is emphatically the province and duty of the judicial department.’”) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

237. See *supra* Part I.B.

war” is worldwide and the “period of war” continues indefinitely; or (d) Congress has simply created a new form of tribunal that is not a traditional law-of-war military tribunal.

1. The Four Criteria Set Forth in *Hamdan* Justifying Trial by Military Commissions Would Not Be Satisfied

As discussed *supra*,²³⁸ the Supreme Court in *Hamdan* suggested that for offenses to be triable before military commissions, four “preconditions” to the exercise of jurisdiction would need to be satisfied. While these “preconditions” were those the Court found incorporated into the Uniform Code of Military Justice,²³⁹ despite Congress having enacted broader jurisdiction for military commission trials (rendering the “preconditions” technically inapplicable), examination of the criteria is still a useful tool by which to compare past military commissions and the current ones.

Two of the prior jurisdictional prerequisites were that the offense must have been committed (1) within “the theatre of war” and (2) “within the period of war.”²⁴⁰ It is clear that these prerequisites would not be satisfied regarding trials pursuant to the Military Commissions Act. In terms of where the crimes occurred, those triable by military commission include “a person

238. See *supra* Part III.B.

239. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2777 (2006) (“All parties agree that Colonel Winthrop’s treatise [from which the four preconditions were derived] accurately describes the common law governing military commissions, and that the jurisdictional limitations he identifies were incorporated in Article of War 14 and, later, Article 21 of the UCMJ.”).

240. The other criteria are that: (i) a military commission may only try members of the “enemy’s army” and “members of one’s own army, who are chargeable with crimes not cognizable or triable by the criminal courts or under the Articles of war”; and (ii) a law-of-war commission may only try two offenses: violations of the laws and usages of war, and breaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of War. See *Hamdan*, 126 S. Ct. at 2777 n.29 (quoting and citing WINTHROP, *supra* note 18, at 836-39). Both of these criteria are arguably also violated here. For example, the Military Commissions Act would not simply permit trials of members of the “enemy’s army” but also of those who “purposefully and materially support hostilities against the United States”—which might be broader than the “enemy’s army,” for instance, by covering terrorist organizations that have no traditional “army.” See 10 U.S.C. § 948a(1). The Military Commission Act apparently also permits trials for offenses not classically deemed law of war offenses. See, e.g., *Hamdan*, 126 S. Ct. at 2761 (quoting app. to pet. for cert. 65a (charging Hamdan with murder by an unprivileged belligerent)); see also Goheer, *supra* note 122, at 12 (arguing that murder by an unprivileged belligerent is a charge unprecedented under the law of war, international humanitarian law, and customary international law).

who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States,”²⁴¹ but this does not limit application to those who “engaged” or “supported” hostilities against the United States on the battlefield in Afghanistan or in attacking the United States on September 11, 2001, but presumably would include any such engagement or support worldwide. Indeed, based on estimates, only eight percent of those held at Guantanamo as of 2005 were classified as “fighters”²⁴² and fifty-five percent of the detainees were classified as having committed no hostile act against the United States.²⁴³ Similarly, section 948d(a) of the Military Commissions Act gives military commissions jurisdiction to try offenses even when committed before September 11, 2001²⁴⁴—and there appears no cut-off date regarding jurisdiction, suggesting it continues for the indefinite future. For these reasons alone, the jurisdiction asserted under the Military Commissions Act appears overbroad when compared to historical precedent.

2. The Armed Conflict That Has Occurred and is Occurring Can Only Justify Part of the Current Military Commission Jurisdiction—If Traditional Military Commission Criteria Are Applied

If one accepts that military commission jurisdiction requires crimes to have been committed within the “theatre of war” and within the period of war,²⁴⁵ then only a subset of the crimes could be tried by military commissions. Armed conflict has been defined in international jurisprudence as existing “‘whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.’”²⁴⁶

241. Military Commissions Act, 10 U.S.C. § 948a(1)(i).

242. See DENBEAUX & DENBEAUX, *supra* note 100, at 9. Note, however, that as to individuals classified as “members” of the Taliban and/or al-Qaida (some thirty percent of detainees), some of those were classified as “members and participated in hostile acts.” See *id.* at 28, Appendix C.

243. See *id.* at 11.

244. See 10 U.S.C. §948d(a).

245. As noted *supra*, these former jurisdictional preconditions are no longer technically required because Congress has arguably permitted broader jurisdiction under the Military Commissions Act. See *supra* Part IV.D.1.

246. Prosecutor v. Kunarac, Kovac & Vokovic, Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶ 56 (June 12, 2002) (quoting Prosecutor v. Tadic, Case

When the United States responded to al-Qaida's September 11 attack, the ensuing fight seems appropriately characterized as international "armed conflict," for it involved both armed force between States (the United States and Afghanistan) and between governmental authorities (the United States) and an organized armed group (al-Qaida—assuming al-Qaida qualifies as sufficiently "organized"). Yet, there is now a new government in Afghanistan. While there is continuing violence in Afghanistan, any continuing engagement with remaining Taliban and/or al-Qaida certainly no longer qualifies as "armed force between States" because there is no conflict with the current government. It might be argued that the residual Taliban forces and al-Qaida in Afghanistan and its environs (i.e. Pakistan) still constitute "organized armed groups" with which International Security Assistance Force ("ISAF")²⁴⁷ forces are engaged in "armed conflict." Thus, arguably, members of al Qaida and Taliban forces apprehended in Afghanistan or Pakistan during a period of engagement with U.S./ISAF²⁴⁸ forces might appropriately be the subject of military commission trials until hostilities there have ceased or peace has been officially recognized.

The Military Commissions Act, however, would also cover: (a) individuals apprehended before any "armed conflict" in Afghanistan, or the "armed attack" against the United States on September 11, 2001; (b) al-Qaida and Taliban members, even after hostilities cease and/or peace is declared in Afghanistan; (c) individuals apprehended far from the context of Afghanistan, including potentially worldwide; and (d) individuals not associated with the Taliban or al-Qaida, but any "person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States"²⁴⁹—i.e., includ-

No. IT-94-1-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995)).

247. NATO forces are deployed in Afghanistan as part of the International Security Assistance Force ("ISAF"). See SC Res. 1707, U.N. Doc.S/RES/1707 (Sept. 12, 2006) (Security Council extends ISAF in Afghanistan until Oct. 2007).

248. ISAF took over international military operations in Afghanistan with the Oct. 5, 2006 transfer of authority over fourteen remaining eastern provinces from United States-led coalition forces. See David McKeeby, U.S. Dept. of State, *NATO Commanding International Security Operations in Afghanistan* (Oct. 5, 2006), <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2006&m=October&x=20061005175423idybeekcm0.4493524> (last visited Feb. 6, 2007).

249. 10 U.S.C. § 948a(1).

ing additional and future terrorist organizations and those who support them. The jurisdiction allowed under the Military Commissions Act thus—applying prior criteria—suffers from temporal over-breadth and lacks the required nexus to armed conflict.²⁵⁰

Trying individuals apprehended for offenses before September 11, 2001. The current Military Commissions Act purports to grant military commissions jurisdiction over acts prior to September 11, 2001.²⁵¹ While there have been a variety of terrorist attacks against the United States, starting with the 1993 World Trade Center bombing and continuing with the Khobar Towers bombing and attack on the USS Cole,²⁵² they may not qualify as “protracted” or “armed conflict” with the United States.²⁵³ Thus, good grounds may exist for rejecting any attempt at military commission jurisdiction over offenses prior to the September 11 attack or, at least, offenses prior to the planning of the September 11 attack—if prior past military commissions are an appropriate model by which to judge current Congressional action. Any argument that protracted armed conflict with al-Qaida commenced earlier does not seem supported by the facts. Furthermore, the fact that terrorist trials prior to the September 11,

250. For war crimes responsibility, the International Criminal Tribunal For the former Yugoslavia (“ICTY”) has required that there be a “nexus” between the crime and the armed conflict. See TRAHAN, *supra* note 122, at 21 (citing ICTY cases holding that for “grave breaches” there must be a nexus between the conflict and the crimes alleged); see also *id.* at 69 (citing ICTY cases holding that for “violations of the laws or customs of war,” this nexus requires that the acts of the accused be “closely related” to the hostilities).

251. See 10 U.S.C. § 948d(a).

252. The Khobar Towers bombing occurred on June 25, 1996. See *Al Qaeda Is Now Suspected in 1996 Bombing of Barracks*, N.Y. TIMES, May 14, 2003, at A13. The attack on the USS Cole occurred on October 12, 2000. See John F. Burns, *No Special Alert for Cole Before Bombing*, N.Y. TIMES, Oct. 25, 2000, at A10.

253. Factors for assessing whether armed conflict exists include the “intensity” of the conflict. See *Prosecutor v. Limaj*, Case No. IT-03-66-T, Trial Chamber Judgement, ¶¶ 89-90 (Nov. 30, 2005) (citing factors for measuring “intensity”). Terrorist activities have been excluded from constituting “armed conflict,” as have been “isolated and sporadic” acts of violence. *Id.* ¶ 89 (“The two determinative elements of an armed conflict, intensity of the conflict and level of organization of the parties, are used ‘solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.’”) (emphasis added, original emphasis removed); see also Rome Statute of the International Criminal Court art. 8(2)(d), A/CONF. 183/9, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (July 17, 1998) (entered into force July 1, 2002) (excluding “isolated and sporadic acts of violence” from constituting armed conflict).

2001 attack were conducted in federal court,²⁵⁴ and not before military commissions, suggests that the United States did not then perceive itself to be engaged in armed conflict, but rather in law enforcement matters.

Trying individuals for offenses after traditional armed conflict ceases and peace in Afghanistan is proclaimed. The Military Commissions Act has no end date for jurisdiction. Thus, for example, if there were an amnesty in Afghanistan wherein former Taliban and al-Qaida members were to relinquish their weapons and peace were officially proclaimed, in theory, there would still be military commission jurisdiction over any remaining isolated Taliban and al-Qaida hostile to the United States. This would be at odds with the Supreme Court's criteria that offenses triable by military commission must have been committed within "the period of war."²⁵⁵ It is also arguably at odds with the Supreme Court's decision in *Yamashita*, which upheld the power to try enemy combatants by military commission even after hostilities had ceased, at least until peace was officially recognized by treaty or proclamation.²⁵⁶

Trying individuals apprehended globally. As mentioned above, the Military Commissions Act clearly allows for jurisdiction over individuals apprehended far from the context of the armed conflict in Afghanistan, including potentially worldwide. Such an extensive exercise of jurisdiction would be at odds with the requirement recognized *vis-à-vis* past military commissions, that the offenses must have been committed within "the theatre of war."²⁵⁷

Trying individuals associated with neither the Taliban nor al-Qaida. The Military Commissions Act also purports to create jurisdiction for military commission trials of "a person who has en-

254. Federal court trials include those regarding the 1993 bombing of the World Trade Center, the trial of Ramsey Yousef, and the trial for the 1998 bombing of the U.S. embassies in Kenya and Tanzania. *See, e.g.*, *United States v. Yousef*, 925 F. Supp. 1063 (S.D.N.Y. 1996).

255. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2777 n.29 (2006) (quoting and citing *WINTHROP*, *supra* note 18, at 836-39).

256. *See In re Yamashita*, 327 U.S. 1, 12 (1946). A subsequent case, *Madsen v. Kinsella*, 343 U.S. 341 (1952), recognized the propriety of using military commissions "even after peace has been declared, pending complete establishment of civil government in an occupied territory." *Id.* at 348 n.12.

257. *See Hamdan*, 126 S. Ct. at 2777 n.29 (quoting and citing *WINTHROP*, *supra* note 18, at 836-39).

gaged in hostilities or who has purposefully and materially supported hostilities against the United States.”²⁵⁸ But, to the extent there was “armed conflict,” it was between the United States and the Taliban and/or al-Qaida. While it might be supportable to include jurisdiction over persons who intentionally and knowingly provided substantial assistance to the Taliban and/or al-Qaida in their hostilities against the United States, including jurisdiction regarding individuals with no link to the Taliban or al-Qaida²⁵⁹ also removes the link the military commission trials would have with armed conflict—which is the link required in the past to justify the existence of military commissions. The Military Commissions Act thus suffers from serious over-breadth concerns to the extent that Congress is attempting to create law-of-war military commissions supported by historical precedent.

3. The “War on Terror” Does Not Provide a Basis for Establishing the Current Military Commission Trials

Proponents of expansive military commission jurisdiction might argue that in fact the traditional criteria required for past military commissions would be satisfied in the current instance, because, with regard to the “war on terror” or “war on terrorism,” the “theatre of war” is worldwide and the “period of war” continues indefinitely. It is inappropriate to adopt such an expansive definition of the “war on terrorism.” For example, as illustrated above, the requirement of “armed conflict” is not satisfied regarding such a comprehensive “war on terrorism,” but only regarding a subset of the conduct at issue.²⁶⁰ When one starts applying the laws of war to individuals outside the context of traditional armed conflict, one begins reaching nonsensical results. For example, if it were appropriate to treat all terrorism as a conventional war, then enemy combatants could be shot on sight.²⁶¹ While clearly U.S. armed forces are entitled to shoot a combatant on the field of battle (unless the individual is incapac-

258. Military Commissions Act, 10 U.S.C. § 948a(1)(i) (2006) (emphasis added).

259. An estimated two percent of the detainees were classified as having no nexus to al-Qaida or the Taliban. See DENBEAUX & DENBEAUX, *supra* note 100, at 9.

260. See *supra* Part IV.D.1.

261. See Roth, *supra* note 224, at 8-9 (under the rules of war “an enemy combatant can be shot without warning (unless he or she is incapacitated, in custody, or trying to surrender)”).

itated, in custody or trying to surrender),²⁶² outside that context—for example, in an airport in Chicago or in suburban Peoria, Illinois—shooting seems completely inappropriate unless the individual appears armed and dangerous (in which case, authorities would be entitled to act as a matter of law enforcement).²⁶³

Furthermore, if, as the Supreme Court suggested, the urgency for trial upon the battlefield is not present,²⁶⁴ then why permit abbreviated military commission trial procedures at all? It is unclear, if terrorists during the 1990s were tried successfully in federal court, why federal court trials would not be appropriate now, particularly regarding individuals apprehended far from any battlefield. Put another way, how far from the context of traditional armed conflict can military commission jurisdiction be stretched? For example, could Congress not create similar legislation allowing for military commission trials to combat a declared “war on narcotics”? At a certain point, it is clear such law enforcement matters (which the war on terror largely entails) do not meet the criteria of armed conflict and do not justify military commission trials whatsoever.

Past criteria for evaluating the need for military commission trials are relevant to evaluating the military commissions here, as Congress is using the laws of war to attempt to justify its actions, yet attempting to create a tribunal far broader than any law-of-war type military commission of the past. To the extent that military commission trials are appropriate in the current instance, they should only try individuals apprehended in conjunction with traditional armed conflict and/or on the battlefield during a period of armed conflict. All others should be tried in federal court under federal anti-terrorism laws, or released.

262. *Id.*

263. *See id.* at 10 (arguing that if the laws of war are applied to the cases of Jose Padilla and Ali Saleh Kahlal al-Marri, detained at Chicago’s O’Hare International Airport and in Peoria, Illinois, respectively, then they would be combatants who could be shot on sight—a conclusion Roth finds repugnant; Roth argues that ordinary criminal law should apply in such situations).

264. *See Hamdan*, 126 S. Ct. 2749, 2785-86 (2006). The Court noted the lack of urgency in trying Hamdan that was suggested by the facts in that case. *See supra* Part III.B.

CONCLUSION

Not only does this Administration arguably risk war crimes exposure if it has erred in the Military Commissions Act of 2006, it risks harming the perception of the United States as a country willing to adhere to its international legal obligations. It also risks jeopardizing the U.S. military in future conflicts, when other countries might choose to follow the lead of the United States and change how they implement law of war protections. Human Rights Watch has appropriately argued to the Senate Armed Services Committee: “[I]t is only a matter of time before governments who might otherwise avoid the appearance of illegality will exploit America’s efforts to carve out exceptions to the Geneva Conventions to justify poor treatment of captured Americans.”²⁶⁵

The United States will be able to firmly stand behind the rule of law and its Geneva Convention obligations if it: (1) adopts military commission trial procedures identical to those in the Uniform Code of Military Justice and limits military commission trials to trying individuals apprehended in conjunction with traditional armed conflict and/or on the battlefield during a period of armed conflict; (2) tries any other Guantanamo detainees whose charges can be satisfactorily substantiated in federal court under federal anti-terrorism laws; (3) desists from redefining the United States’ Geneva Convention obligations in any way (which there would be less need for if trials were held pursuant to the UCMJ and/or in federal court); (4) desists from attempting to immunize war crimes resulting from “collateral damage”; (5) reinstates habeas corpus review for Guantanamo detainees; and (6) ceases attempting to undermine judicial review as to matters of international law. Then, the United States could hold its head high on the international stage, as it should, regarding military commission trials, and start reclaiming its moral authority in its continued response to the attacks of September 11, 2001.

265. Bierman, *supra* note 194.