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One Step Forward, Two Steps Back: *Hamdan v. Rumsfeld* and the Military Commissions Act of 2006

Ida L. Bostian*

I. Introduction

On June 29, 2006, the U.S. Supreme Court struck down the Bush Administration's plan to try individuals detained in the war on terror by military commissions.¹ *Hamdan v. Rumsfeld* has far reaching implications for both domestic and international law, as well as the interaction between the two, and is therefore a true U.S. foreign relations law decision. Specifically, because the Court relied in part on the Third Geneva Convention of 1949 ("Third Geneva Convention")² in reaching its decision, the opinion was regarded as an important

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1. See *Hamdan v. Rumsfeld*, ___ U.S. ___, 126 S.Ct. 2749 (2006). [Ed. note: U.S. Rptr. citation not yet available.]
2. See *id.* (citing Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T.S. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]). There are currently four Geneva Conventions and three additional Protocols to those Conventions. The four Geneva Conventions were adopted in 1949 and include the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 1 (2006)

victory for those who argue that the United States must abide by international law in our struggle against terrorism. Nevertheless, the Court's opinion relied heavily on domestic law to incorporate international legal standards, and it left significant openings for Congress to alter the result of the opinion in ways that would violate U.S. international legal obligations.

Indeed, within just a few months of the *Hamdan* decision, Congress passed the Military Commissions Act of 2006 ("MCA" or "Act"), which not only approves the use of military commissions to try military detainees, but also eliminates statutory *habeas corpus* actions for non-citizens detained in the war on terror, retroactively validates cruel, inhuman, and degrading interrogation tactics, and prohibits military detainees and others from invoking the Geneva Conventions in U.S. courts.³ The Act therefore represents a significant setback for those who take U.S. international legal obligations seriously, and sets the stage for important court challenges to the legislation in the coming months.

II. *Hamdan's* Factual and Procedural History

In response to the terrorist attacks of September 11, 2001, President George W. Bush ordered the invasion of Afghanistan, whose Taliban regime had supported the terrorist organization al Qaeda.⁴ As part of this ongoing conflict,⁵ Salim

Members of Armed Forces at Sea; the Convention (III) relative to the Treatment of Prisoners of War; and the Convention (IV) relative to the Protection of Civilian Persons in Time of War. Two Additional Protocols, relating to the Protection of Victims of International Armed Conflicts (Protocol I) and the Protection of Victims of Non-International Armed Conflicts (Protocol II) were adopted in 1977, and a third Protocol relating to the Adoption of an Additional Distinctive Emblem (Protocol III) was adopted in 2005, *see* International Committee of the Red Cross, *The Geneva Conventions: the core of international humanitarian law*, <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions> (last visited November 24, 2006).

3. Military Commissions Act of 2006, S. 3930, 109th Cong. [hereinafter MCA], *available at* <http://thomas.loc.gov/home/multicongress> (follow Search hyperlinks on title)
4. *See Hamdan*, 126 S.Ct. at 2760. On September 18, 2001, Congress adopted the Authorization for Use of Military Force ("AUMF"), which authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons," *id.* (citing 115 Stat. 224, note following 50 U.S.C. § 1541).
5. In 2004, the Supreme Court held that the AUMF, together with "longstanding law-of-war principles," authorized the President to preventively detain an alleged Taliban fighter, captured in Afghanistan "for the duration of the relevant conflict," *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004). The Court refused to consider the argument that the "war on terror" is unlike other wars in that it might have no temporal ending, but reasoned instead that "[a]ctive combat operations against Taliban fighters apparently are ongoing in

Ahmed Hamdan was one of several hundred individuals taken into U.S. military custody.⁶ In November 2001, President Bush issued a military order⁷ providing that individuals such as Hamdan⁸ could be tried for certain crimes by “military commission” (as opposed to court martial or criminal court) and thereafter sentenced by the commissions to “imprisonment or death.”⁹

The President also promulgated procedures for the military commissions,¹⁰ and many of these procedures raised significant due process concerns. For example, an accused as well as his civilian counsel could be excluded from the military commission proceedings in various circumstances, including to “protect[] information classified or classifiable . . . [or for] other national security interests.”¹¹ In addition, the accused and his civilian counsel could be denied access to “protected information,” even if it were used as evidence against the accused.¹² Finally, evidence could be admitted at commission proceedings if, in the judgment of the presiding officer or a majority of commission members, the evidence

Afghanistan,” and thus Hamdi, as an accused Taliban fighter, could be detained for the duration of the Taliban-U.S. conflict, *id.* The issue of *prevention* detention was not raised in *Hamdan*, which instead concerned the President’s ability to try and punish detainees for crimes under the law of war, *see Hamdan*, 126 S.Ct. at 2798; *see also infra* note 71 and accompanying text.

6. *See Hamdan*, 126 S.Ct. at 2759.
7. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, (Nov. 13, 2001) [hereinafter November 13 Order]; *see also Hamdan*, 126 S.Ct. at 2760.
8. The November 13 Order applied *inter alia* to any non-citizen about whom the President decided there was “reason to believe” he or she “is or was a member of the organization known as al Qaida” [ed. note: “al Qaida” is alternatively spelled “al Queda” in official documents cited.] or “has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, 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.” November 13 Order, 66 Fed. Reg. at 57,834.
9. November 13 Order, 66 Fed. Reg. at 57,834.
10. Military Commission Order No. 1 was issued by the President on March 21, 2002; it was amended several times, most recently on August 31, 2005 [hereinafter Order No. 1]. *See* Department of Defense, Military Commission Order No. 1, (Aug. 31, 2005), *available at* <http://www.defenselink.mil/news/Sep2005/d20050902order.pdf>; *see also Hamdan*, 126 S.Ct. at 2771.
11. Order No. 1, *supra* note 10, at § 6 (B) (3). Indeed, before the commission proceedings were halted, Hamdan was in fact excluded from portions of his own trial, *see Hamdan*, 126 S.Ct. at 2788.
12. Order No. 1, *supra* note 10, at §§ 6 (D) (5) (a)-(b). “Protected Information” under Order No. 1 included, *inter alia* “information classified or classifiable,” “information protected by law or rule from unauthorized disclosure,” and “information concerning other national security interests,” Order No. 1, *supra* note 10, at 6 (D) (5) (a).

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 1 (2006)

“would have probative value to a reasonable person.”¹³ This standard would allow the admission of hearsay evidence, unsworn live testimony or witness statements, or evidence obtained through coercion, including cruel, unusual, and degrading treatment.¹⁴

Although he was captured during the same month that the order creating the military commissions was promulgated, Hamdan was not charged with a crime pursuant to the order for another three years.¹⁵ Specifically, he was charged with one count of “conspiracy,” and commission proceedings commenced on this count.¹⁶ While this trial was ongoing, however, the D.C. District Court granted

13. Order No. 1, *supra* note 10, § 6 (D) (1); *see also Hamdan*, 126 S.Ct. at 2786.
14. *See* Order No. 1, *supra* note 10, §§ 6 (D) (1), (3); *see also* Department of Defense, Military Commission Order No. 10, § 3(A) (Mar. 24, 2006), *available at* <http://www.defenselink.mil/news/Mar2006/d20060327MCI10.pdf> (prohibiting admission of statements made as a result of torture, but not prohibiting admission of statements made as a result of “lesser” coercion up to and including cruel, inhuman, and degrading treatment); *Hamdan*, 126 S.Ct. at 2786-87. As Justice Kennedy notes in his concurrence, these standards “could permit admission of multiple hearsay and other forms of evidence generally prohibited on grounds of unreliability,” *see id.* at 2808 (Kennedy, J., concurring). For example, the use of hearsay evidence is restricted in both Federal criminal trials and U.S. courts-martial, *see generally* FED. R. EVID. 801-807; MIL. R. EVID. 801-807. Testimony in both criminal trials and courts-martial must also be under oath, FED. R. EVID. 603; MIL. R. EVID. 603, and of course evidence obtained through coercion is inadmissible in both types of proceedings, U.S. CONST. amends. IV, XIV; MIL. R. EVID. 304 (a), (c) (3); *see also* *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961) (“[C]onvictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system . . .”).
15. *See Hamdan*, 126 S.Ct. at 2760. Several months after his capture, in June 2002, Hamdan was transported to the U.S. detention facility at Guantanamo Bay, Cuba. There he was initially detained as an “enemy combatant,” but he was not charged in any court or tribunal with any crime. After another year, on July 3, 2003, President Bush declared that Hamdan and five other detainees were eligible for trial by military commission. However, yet another year passed before Hamdan was actually charged with an alleged offense in July 2004.
16. *See id.* at 2760-61. The charging document alleged that “from on or about February 1996 to on or about November 24, 2001, [Hamdan] willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with [bin Laden and other members of al Qaeda] to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism,” *United States of America v. Salim Ahmed Hamdan*, Charge: Conspiracy, *in* Petition for Certiorari, Appendix A at Appendix E: 62a, 65a, *Hamdan v. Rumsfeld*, No. 0400040 (MIL. COMM’N. July 13, 2004) *available at* <http://www.law.georgetown.edu/faculty/nkk/documents/hamdan.certapp3.pdf> [hereinafter Charging Document]. This document further lists four “overt acts” that Hamdan is alleged to have committed “in furtherance of this enterprise and conspiracy”: (1) acting as bin Laden’s “bodyguard and personal driver” while “believ[ing] that . . . bin Laden and his

Hamdan's *habeas corpus* petition and stayed the commission proceedings.¹⁷ In an opinion joined by now-Chief Justice John Roberts, the D.C. Court of Appeals reversed, and the Supreme Court granted *certiorari*.¹⁸

III. The Supreme Court's Opinion in Hamdan

A. The Majority Opinion

In an opinion authored by Justice Stevens, the Supreme Court reversed the D.C. Circuit's decision and held that the President's military commissions violated federal statutes as well as international treaties.¹⁹ The Court first considered the government's argument that the Detainee Treatment Act of 2005 ("DTA") deprived the Court of jurisdiction in the case.²⁰ Although the DTA severely restricted the jurisdiction of federal courts to hear *habeas* petitions or other cases arising out of the detentions at Guantanamo Bay, the Court held that the Act did not deprive the courts of jurisdiction in cases, including *Hamdan*, that were pending at the time of the DTA's enactment.²¹ This ruling was significant in that it preserved the courts' ability to hear scores of other Guantanamo-related petitions, many of which raise significant domestic and international law issues concerning the detention, treatment, and trial of military detainees.²² The ruling also avoided

associates were involved in" various terrorist acts including the attacks of September 11, 2001; (2) arranging for the transportation of and transporting "weapons, ammunition or other supplies" to al Qaeda members and others; (3) driving or accompanying bin Laden "to various al Qaida-sponsored training camps, press conferences, or lectures" at which bin Laden encouraged "martyr missions" against Americans; and (4) receiving weapons training at al Qaeda-sponsored camps, *id.* at 65a-67a; *Hamdan*, 126 S.Ct. at 2761.

17. See *Hamdan*, 126 S.Ct. at 2761; *Hamdan v. Rumsfeld*, 344 F.Supp.2d 152 (D.D.C. 2004).

18. See *Hamdan*, 126 S.Ct. at 2762; *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005). Because he was on the panel at the D.C. Circuit, Chief Justice Roberts did not participate in the consideration or decision of the case at the Supreme Court, see *Hamdan*, 126 S.Ct. at 2758-59.

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

20. See *id.* at 2762-69; Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 [hereinafter DTA].

21. See *Hamdan*, 126 S.Ct. at 2764; see also DTA, Pub. L. 109-148, § 1005 (e)-(h).

22. Cf. *Hamdan*, 126 S.Ct. at 2810 (Scalia, J., dissenting) (arguing that because of the Court's decision, "every 'court, justice, or judge' before whom [a *habeas* petition from a Guantanamo Bay detainee] was pending on [the date the DTA was enacted] has jurisdiction to hear, consider, and render judgment on it.") (emphasis in original). See also *id.* at 2817-18, (explaining that "[t]he Solicitor General represents that '[h]abeas petitions have been filed on behalf of a purported 600 [Guantanamo Bay] detainees . . . cases sufficiently numerous to keep the courts busy for years to come.'). See also, e.g., *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443 (D.D.C. 2005) (detainees objecting to their detentions as violating the Constitution and the Geneva Conventions).

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 1 (2006)

significant constitutional issues that would arise if Congress purported to completely strip the detainees' rights to bring *habeas* petitions, particularly in cases pending at the time of the statute's enactment.²³

The Court next considered the President's power to convene military commissions. Invoking the *Youngstown* doctrine,²⁴ the Court reasoned that the President's power to convene military commissions was at its "lowest ebb"²⁵ because Congress had placed limitations on the President's powers in this area.²⁶ Specifically, Article 21 of the Uniform Code of Military Justice ("UCMJ") provided that "[t]he provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving *military commissions* . . . of concurrent jurisdiction in respect of offenders or offenses that by statute *or by the law of war* may be tried by such military commissions . . ."²⁷ The Court thus reasoned that Article 21 preserved the President's constitutional or common law war powers to convene military commissions, but only "with the express condition that the President and those under his command comply with the law of war."²⁸

Further, the Court reasoned that the law of war included UCMJ Article 36, which required that military commission procedures be consistent with federal *criminal* trial procedures only "so far as [the President] *considers practicable*,"²⁹ but that "[a]ll rules and regulations made under this article [which include rules for courts-martial] shall be uniform *insofar as practicable* . . ."³⁰ While the Court held that "complete deference" was owed to the President's determination with

23. *Hamdan*, 126 S.Ct. at 2763-64. As discussed *infra*, the Military Commissions Act of 2006 may now force the courts to address these issues.
24. See *Youngstown Sheet & Tube co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). In *Youngstown*, Justice Jackson set out a three-part analysis of executive authority: First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate" *id.* at 635. Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain," *id.* at 637. Third, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb," *id.* See also *Hamdan*, 126 S.Ct. at 2774 n. 23; *Hamdan*, 126 S.Ct. at 2800 (Kennedy, J., concurring).
25. *Hamdan*, 126 S.Ct. at 2800.
26. *Id.* at 2774 n. 23 ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."); see also *id.* at 2773.
27. 10 U.S.C. § 821 (2006); see also *Hamdan*, 126 S.Ct. at 2774.
28. See *Hamdan*, 126 S.Ct. at 2774 (citing *Ex Parte Quirin*, 317 U.S. 1, 28-29 (1942)).
29. 10 U.S.C. § 836 (a) (2006).
30. 10 U.S.C. § 836(b) (2006); see also *Hamdan*, 126 S.Ct. at 2790.

One Step Forward, Two Steps Back 223

respect to criminal trials, the latter provision limited the President's ability to use procedures different from those applicable in courts-martial.³¹ The Court specifically held that the President must make an affirmative determination that uniformity between courts-martial and military commission procedures would be "impracticable," but that the President had not made this determination³² and moreover that the record would not support such a determination here.³³

The Court then turned to Hamdan's argument that his trial by military commission violated several provisions of the Third Geneva Convention, either the expansive protections available to "prisoners of war,"³⁴ or at least the minimum

31. *See Hamdan*, 126 S.Ct. at 2791-92.

32. *See id.* at 2791.

33. *Id.* at 2792. While the Court did not specifically state what the President's practicability determination would need to include, it did note that the President had made "no suggestion, for example, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility." The court also noted that the denial of Hamdan's right to be present in the proceedings "cannot lightly be excused as 'practicable.'"

34. Prisoners of war are entitled to a multitude of rights and protections under the Third Geneva Convention. Most relevant for the *Hamdan* case, "A prisoner of war can be validly sentenced only if the sentence has been pronounced *by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power . . .*" in other words, by courts-martial. *Id.* at Art. 102 (emphasis added). *See also id.* at Art. 103-108 (additional restrictions on trying and sentencing prisoners of war). If Hamdan is a prisoner of war, then trying him by military commission would clearly violate Article 102. "Prisoners of War" under the Third Geneva Convention include several categories of detained persons, including *inter alia*,

1. Members 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.

2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) That of being commanded by a person responsible for his subordinates;

(b) That of having a fixed distinctive sign recognizable at a distance;

(c) That of carrying arms openly;

(d) That of conducting their operations in accordance with the laws and customs of war.

3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 1 (2006)

protections available to detainees under common Article 3.³⁵ First, however, the Court addressed the government's argument, which had been accepted by the D.C. Circuit, that Hamdan could not invoke the Geneva Conventions in U.S. courts.³⁶ In the World-War II-era Supreme Court opinion *Johnson v. Eisentrager*, the Court had stated in a footnote that:

It is . . . the obvious scheme of the [1929 Geneva Convention] that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it *only through protests and intervention of protecting powers* as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.³⁷

According to the *Hamdan* Court, however, even assuming that *Eisentrager* was correct with respect to the non-justiciability of the 1929 Geneva Convention, and also assuming that the change from the 1929 to the 1949 Geneva Conventions did not alter this result,³⁸ Hamdan could nevertheless assert protections under the

4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

. . .

6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Third Geneva Convention, *supra* note 2, at Art. 4A. As discussed below, Hamdan argued that he was entitled to full prisoner of war protections under Article 5 of the Third Geneva Convention because no "competent tribunal" has yet determined that he is *not* a prisoner of war. *See infra* note 41.

35. As discussed below, Common Article 3 provides limited protections in certain armed conflicts to all "[p]ersons taking no active part in the hostilities," including those in detention, and not just to prisoners of war. *See* text and notes 43-51, *infra*. Common Article 3 is so-called because it appears in all four 1949 Geneva Conventions. *See Hamdan*, 126 S.Ct. at 2795.
36. *See Hamdan*, 126 S.Ct. at 2793.
37. *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950) (emphasis added); *see also Hamdan*, 126 S.Ct. at 2794.
38. *But see Hamdan*, 126 S.Ct. at 2794 n. 57, citing 4 INT'L COMM. OF RED CROSS, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 21 (1958) ("the 1949 Geneva Conventions were written 'first and foremost to protect individuals, and not to serve State interests'); *id.*, citing 3 INT'L COMM. OF RED CROSS, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 91 (1960) ("It was not . . . until the Conventions of

Third Geneva Convention of 1949 because the Convention is “part of the law of war . . . [a]nd compliance with the law of war is the condition upon which the [President’s] authority set forth in [UCMJ] Article 21 is granted.”³⁹ Thus, Hamdan was allowed to invoke the Third Geneva Convention of 1949 because of its incorporation through a domestic statute, and the Court bypassed the issue of whether the Conventions would otherwise offer detainees any protections in U.S. courts.⁴⁰

Next, without reaching the issue as to whether the entire Third Geneva Convention applies to military detainees in the war on terror,⁴¹ the Court held that *at least* one provision — common Article 3 — applies to the conflict with al Qaeda in Afghanistan.⁴² By its own terms, common Article 3 applies in “cases of armed conflict *not of an international character* occurring in the territory of one of the High Contracting Parties.”⁴³ The government had argued that this is not the case here because, even though Afghanistan is a High Contracting Party, the U.S. conflict with al Qaeda is in fact “international,” in that it is being fought in several places throughout the world.⁴⁴ However, the Court rejected this argument, holding

1949 . . . that the existence of ‘rights’ conferred in prisoners of war was affirmed”); *id.* at 2794 n. 58, citing 1 INT’L COMM. FOR THE RED CROSS, COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 84 (1952) (“It should be possible in States which are parties to the Convention . . . for the rules of the Convention to be evoked before an appropriate national court by the protected person who has suffered a violation.”)

39. *Hamdan*, 126 S.Ct. at 2794.

40. As noted *infra*, the MCA seeks to prohibit military detainees from invoking the 1949 Geneva Conventions in U.S. Courts. See MCA, *supra* note 3, at §3(a)(1)(adding new provision at 10 U.S.C. §948b(g)); see also *id.* at §5(a).

41. The full protections of the Third Geneva Convention apply, *inter alia*, to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” Third Geneva Convention, *supra* note 2, at Art. 2. Even though Afghanistan is a “High Contracting Party,” to the Conventions, al Qaeda is not, and thus the government argued that because Hamdan was captured pursuant to the conflict with al Qaeda, rather than the conflict with the Taliban, the Third Geneva Convention does not apply to him. See *Hamdan*, *supra* note 1, at 2795. Hamdan had argued that he was nevertheless entitled to full Geneva protections because (1) under Article 5 of the Third Geneva Convention, if there is “any doubt” about whether a detainee is entitled to full prisoner of war protections, he “shall enjoy the protection of the present Convention until such time as [his] status has been determined by a competent tribunal”; but (2) no such “Article 5 Tribunal” has ever determined his status. See Third Geneva Convention, *supra* note 2, at Art. 5. Because the Court based its holding on Common Article 3, it did not decide this issue. See *Hamdan*, *supra* note 1 at 2795 n. 61.

42. See *Hamdan*, 126 S.Ct. at 2795.

43. Third Geneva Convention, *supra* note 2, at Art. 3 (emphasis added); *Hamdan*, 126 S.Ct., at 2796.

44. See *Hamdan*, 126 S.Ct. at 2795.

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 1 (2006)

that the term “conflict not of an international character” simply means a conflict not “between nations.”⁴⁵ The Court therefore concluded that common Article 3 — a significant provision of international law that provides minimum protections to persons involved in armed conflict — applies to the war on terror even if additional Geneva protections may lawfully be denied.

Finally, the Court noted that common Article 3 prohibits, *inter alia*, “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.”⁴⁶ Although the term “regularly constituted” is not defined in the Convention, the Court reasoned that “[t]he regular military courts in our system are the courts-martial established by congressional statutes.”⁴⁷ Thus, the Court concluded that “[a]t a minimum” a military commission could meet the regularly constituted standard “only if some practical need explains deviations from courts-martial practice.”⁴⁸ The government had not made such a demonstration in this case,⁴⁹ and thus the Court held that Hamdan’s trial by military commission violated common Article 3.⁵⁰

B. The Plurality Opinion

Justice Kennedy did not join in certain portions of Justice Stevens’s opinion, and therefore a plurality rather than majority of the Court also held that conspiracy is not an offense that, under the law of war, may be tried by military commissions.⁵¹ The plurality reasoned that where, as here, the offense is not defined by statute or treaty, the government “must make a *substantial showing*” that the offense violates the law of war before it can be tried by military commission.⁵² The plurality, relying both on the lack of domestic conspiracy trials before military commissions as well as on international legal sources, found that the government had not met that burden here.⁵³

45. *See id.* at 2795-96.

46. Third Geneva Convention, *supra* note 2, at Art. 3(1)(d).

47. *Hamdan*, 126 S.Ct. at 2797; 2803 (Kennedy, J., concurring).

48. *Id.* at 2804 (Kennedy, J., concurring).

49. *See id.* at 2797.

50. *See id.*

51. *See id.* at 2785-86 (plurality opinion); 10 U.S.C. § 821.

52. *Id.* at 2780 (emphasis added).

53. *Hamdan*, 126 S.Ct. at 2780-85. With regard to international legal sources, the plurality reasoned that “none of the major treaties governing the law of war identified conspiracy as a violation thereof,” *id.* at 2784, and that the only conspiracy crimes recognized by international war crimes tribunals are conspiracy to commit genocide and conspiracy (or “common plan”) to wage aggressive war, *see id.*

One Step Forward, Two Steps Back 227

The plurality also held that Hamdan's trial by military commission violated common Article 3 not only because the commission was not a regularly constituted court, but also because the commission's rules did not "afford[] all the judicial guarantees which are recognized as indispensable by civilized peoples."⁵⁴ Recognizing that this phrase is not defined in the Conventions, the plurality nevertheless held that it incorporates at least some minimal protections under customary international law.⁵⁵ The plurality then noted that many of those protections are "described in Article 75 of Protocol I to the Geneva Conventions of 1949," including the right of the accused to be tried in his or her presence.⁵⁶ The plurality further reasoned that "[a]lthough the United States declined to ratify Protocol I, its objections were not to Article 75 thereof," and noted that the government appeared to agree that the Article was authoritative with respect to the rights of the accused in military trials.⁵⁷ The plurality also cited the International Convention on Civil and Political Rights, to which the United States is a party, as further confirmation of the right to be present at one's own trial.⁵⁸ Thus, the plurality concluded, the President's commissions' broad ability to exclude the accused from portions of his trial also violated common Article 3.⁵⁹

54. Third Geneva Convention, *supra* note 2, at a Art. 3(1)(d); *Hamdan*, 126 S.Ct. at 2797.

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

56. *See id.* (Protocol Additional to the Geneva Conventions of Aug. 12, 1949 art. 75, June 8, 1977, 1125 U.N.T.S. 3., *entered into force* Dec. 7, 1979, *available at* <http://www.unhcr.ch/html/menu3/b/93.htm>. Article 75 to Protocol I provides in relevant part that:

No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following: . . .

(e) Anyone charged with an offence shall have the right to be tried in his presence.)

57. *Hamdan*, 126 S.Ct. at 2797 (citing William H. Taft IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 *YALE J. INT'L L.* 319, 322 (2003)).

58. *Hamdan*, 126 S.Ct. at 2797 n. 66; International Covenant on Civil and Political Rights, Art. 14(3)(d), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976. The United States ratified this treaty, with reservations, in 1992. *See* U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992). *See* Office of the United Nations High Commissioner for Human Rights, International Covenant on Civil and Political Rights: Ratifications and Reservations, at <http://www.ohchr.org/english/countries/ratification/4.htm> and http://www.ohchr.org/english/countries/ratification/4_1.htm (last visited September 1, 2006).

59. *See Hamdan*, 126 S.Ct. at 2798.

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 1 (2006)

C. Justice Kennedy's Concurring Opinion

Justice Kennedy also filed an opinion concurring-in-part, in which he emphatically stated that “domestic statutes control this case.”⁶⁰ Thus, even when considering the Geneva Conventions, Justice Kennedy tied the concept of “a ‘regularly constituted court’ providing ‘indispensable’ judicial guarantees” firmly to the U.S. domestic system of justice.⁶¹ Specifically, he reasoned that common Article 3 requires a uniformity principle as does Article 36(b) of the UCMJ, and that therefore “courts-martial provide the relevant benchmark” for the deciding whether military commissions are “regularly constituted.”⁶² Because there were numerous structural and procedural differences between the President’s military commissions and courts-martial, differences that were not explained by an “evident practical need,” Justice Kennedy agreed that Common Article 3’s “regularly constituted” requirement was violated.⁶³

Justice Kennedy disagreed, however, with the plurality’s choice to decide whether Common Article 3 required the accused to be present at all stages of the trial or whether Article 75 of Protocol I accurately reflected binding customary international law.⁶⁴ He also disagreed with the plurality’s decision to consider the validity of the conspiracy charge, reasoning that “Congress, not the Court,” should “undertake the sensitive task of establishing a principle not inconsistent with the national interest or international justice.”⁶⁵ Likewise, with respect to the entire case, Justice Kennedy concluded that “[i]f Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so.”⁶⁶

IV. The Limitations of Hamdan

A. An Important, but Limited Decision

Hamdan is an extremely important decision in many respects. Once again, the

60. *Id.* at 2800 (Kennedy, J., concurring). The portion of Justice Kennedy’s opinion that concurred with the majority was joined by three justices. *See id.* In addition, Justice Breyer wrote a brief concurring opinion in which he stressed that “here, no emergency prevents consultation with Congress.” *Id.* at 2799 (Breyer, J., concurring).

61. *Id.* at 2803.

62. *Id.* at 2803-04.

63. *Id.* at 2805-07.

64. *Id.* at 2809.

65. *Hamdan*, 126 S.Ct. at 2809 (internal quotations omitted).

66. *Id.* at 2800 (emphasis added).

Supreme Court upheld the idea that a “state of war is not a blank check,” and instead insisted that the President’s authority in this area has limits.⁶⁷ The decision also reflected a willingness to seriously consider international legal obligations in reviewing the President’s war powers. The Court not only held that common Article 3 applies here, but it also gave real substance to that Article, noting that although “its requirements are general ones, crafted to accommodate a wide variety of legal systems . . . requirements they are nonetheless.”⁶⁸

Moreover, if common Article 3 applied in this instance, then it would also apply to other aspects of the war on terror, including the requirement that those placed *hors de combat* (out of the fight) by detention, be treated humanely, as well as the accompanying prohibition on “[o]utrages upon personal dignity, in particular, humiliating and degrading treatment.”⁶⁹ Thus, the Court took an important step toward aligning U.S. practice in the war on terror with international law.⁷⁰

At the same time, however, and even before the passage of the MCA, the *Hamdan* decision was quite limited in both its scope and in its willingness to fully embrace our [the U.S.’s] international legal obligations. First, the opinion applied only to the *trial* of military detainees in the war on terror; it did not address the separate but extremely important issues of the President’s authority to preventively detain these individuals or the standards of treatment to which these individuals are entitled.⁷¹ In addition, as noted *supra*, the Court’s decision considered international law because it was incorporated through a domestic statute, and all of the justices acknowledged that Congress could change the result of the case simply

67. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion).

68. *Hamdan*, 126 S.Ct. at 2798 (emphasis in original).

69. Third Geneva Convention, *supra* note 2, at Art. 3(1), (1)(c).

70. The decision is also noteworthy in its citation of international sources, including not only numerous treaties, but also important international law commentaries and decisions of past and present international judicial bodies. See, e.g., *Hamdan*, 126 S.Ct. at 2790 & n. 48, 2794 n. 57 & n.58, 2795 n. 62, 2796 & n.63, 2797 (numerous citations to the International Committee of the Red Cross commentary on the Geneva Conventions); *id.* at 2784-85 & n.40 (plurality opinion) (citing the International Military Tribunal at Nuremberg as well as the International Criminal Tribunal for Yugoslavia (ICTY) in support of conclusion that a conspiracy charge cannot be tried by military commission); *id.* at 2793 n.63 (citing ICTY decision for proposition that that “‘the character of the conflict is irrelevant’ in deciding whether Common Article 3 applies.”)

71. See *Hamdan*, 126 S.Ct. at 2798 (“It bears emphasizing that *Hamdan* does not challenge, and we do not today address, the Government’s power to detain him for the duration of active hostilities in order to prevent [future] harm to the United States.”); see also *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that Guantanamo detainees had a statutory right to bring *habeas* actions challenging their detentions in federal court, but bypassing the issue of constitutional *habeas* rights); *Hamdan*, 126 S.Ct. at 2764 (DTA does not deprive courts of statutory *habeas* jurisdiction in pending cases).

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 1 (2006)

by authorizing the use of military commissions to try detainees.

Finally, Chief Justice Roberts, who took no part in the Supreme Court's decision but who voted to dismiss Hamdan's petition at the D.C. Circuit, will almost certainly vote to uphold the government's position in any subsequent similar cases. This makes Justice Kennedy's concurring opinion particularly important, as he will likely cast the tie-breaking vote in future cases. Justice Kennedy has developed a reputation as a friend of international law, and perhaps he is, but he is also reluctant to take an expansive view of the role of international law in the field of national security without additional Congressional approval. His concurring opinion expressed hope that Congress would "establish[] principle[s] not inconsistent with the national interest *or international justice*," and that any new statutes would "conform[] with the Constitution *and other laws*,"⁷² but it seems likely that he would apply new Congressional statutes in this area whether or not they complied with international law.⁷³

B. The Military Commissions Act of 2006

Indeed, just a few months after the Court decided *Hamdan*, Congress passed the Military Commissions Act of 2006, which "overrules" many aspects of the decision and which displays a marked hostility toward international law. First, the Act grants the President authority to create military commissions to try and punish, including through the use of the death penalty, non-citizen military detainees for "violations of the law of war and other offenses," some of which are defined within the Act.⁷⁴ The Act does provide detainees with several important procedural protections, and in this respect it is an improvement over the President's plan.⁷⁵ For example, the accused now has the right to be present at all stages of his trial,⁷⁶ except during deliberation and voting,⁷⁷ or if excluded due to his own misconduct in the courtroom.⁷⁸ Nevertheless, many aspects of the new procedures are still problematic. For example, they permit the government to introduce some hearsay evidence,⁷⁹ as well as classified evidence against the accused where the accused has not had an opportunity to review and challenge the

72. *Id.* at 2800, 2809 (emphasis added).

73. Of course, compliance with the Constitution is another matter.

74. MCA, *supra* note 3, at §3(a)(1) (adding new provisions at 10 U.S.C. § 948d(a), (b), (d)).

75. *See id.* (adding new provisions at 10 U.S.C. § 948q-950j).

76. *See id.* (adding new provisions at 10 U.S.C. §948d(a)(2)-(b)).

77. *See id.* (adding a new provision at 10 U.S.C. §948d(c)).

78. *See id.* (adding a new provision at 10 U.S.C. §948d(d)).

79. *See id.* (adding a new provision at 10 U.S.C. §949a(b)(2)(E)).

“sources, methods, or activities” by which the government acquired the evidence.⁸⁰ The Act also limits the government’s obligation to fully disclose exculpatory evidence to the accused.⁸¹

Second, the Act attempts to remove the Geneva Conventions from the courtrooms. Although the MCA states that the “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 3 of the Geneva Conventions,”⁸² the Act nevertheless forbids detainees who are subject to trial by military commission from “invok[ing] the Geneva Conventions as a source of rights.”⁸³ Even more broadly, the Act prohibits *anyone* from invoking the Conventions “as a source of rights” in any *habeas* or civil proceedings where the United States is a party.⁸⁴

Third, the MCA sets out several substantive offenses that may be tried by the commissions, including conspiracy, and declares that that Act “does not establish new crimes . . . but rather codifies those crimes for trial by military commission,” and therefore “do[es] not preclude trial for crimes that occurred before the date of the enactment of this chapter.”⁸⁵ This provision thereby attempts to “reverse” the result of the *Hamdan* plurality opinion with respect to the crime of conspiracy, and sets the stage for Hamdan and others to be charged with this offense.

Fourth, the Act weakens the War Crimes Act (“WCA”), the statute that could potentially be used to try U.S. officials for detainee abuses.⁸⁶ Specifically, the MCA removes the prohibition on “violation[s] of common Article 3” and instead prohibits only “grave breaches” of that article. The Act also provides that “[n]o foreign or international source of law shall supply a basis for a rule of decision” in

80. MCA, *supra* note 3, at §3(a)(1) (adding new provision at 10 U.S.C. §949d(f)(2)(B)).

81. *See id.* (adding new provisions at 10 U.S.C. §949i(c)-(d)).

82. *See id.* (adding a new provision at 10 U.S.C. § 948b(f)).

83. *See id.* (adding a new provision at 10 U.S.C. § 948b(g)). Remarkably, some crimes within the commission’s jurisdiction are defined in the MCA by reference to these same Conventions, thus creating a situation where the accused may be limited in his ability to cite a source of law that is one of the bases for his prosecution. *See, e.g., id.* (adding new provision at 10 U.S.C. § 948v(a)(2)) (“protected person” defined, *inter alia*, as “any person entitled to protection under one or more of the Geneva Conventions”); *id.* (adding new provision at 10 U.S.C. § 948v(b)(1)) (defining offense, triable by military commission, of intentionally killing “one or more protected persons.”) In addition, the definitions of other crimes expressly reference the “law of war,” which according to *Hamdan* includes the Geneva Conventions. *See, e.g., id.* (adding new provision at 10 U.S.C. § 948v(b)(15) (murder in violation of the law of war).

84. *Id.* at §5(a).

85. *See id.* at §3(a)(1) (adding a new provision at 10 U.S.C. § 950p).

86. 18 U.S.C. § 2441.

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 1 (2006)

interpreting the new WCA provisions,⁸⁷ and gives the “President . . . authority for the United States to interpret the meaning and application of the Geneva Conventions” with respect to “non-grave” breaches.⁸⁸

In addition, although “grave breaches” are defined in the Act to include “cruel or inhuman treatment,” as well as torture, the statute defines physical “cruel or inhuman treatment” narrowly, as including at least “a substantial risk of death,” “extreme physical pain,” “a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises),” or “significant loss or impairment of the function of a bodily member, oral, or mental faculty.”⁸⁹ Moreover, although the MCA prohibits the admission, by military commissions, of statements obtained through torture, statements obtained by cruel, inhuman, and degrading treatment, if obtained prior to the enactment of the Detainee Treatment Act of 2005, *may be admitted* against the defendant, thereby ratifying several years of controversial interrogation techniques.⁹⁰ Presumably, these are two of the provisions that the President had in mind when stating that the MCA will “allow the Central Intelligence Agency to continue its program for questioning” terrorist suspects and that the Act “provides legal protections that ensure our military and intelligence personnel will not have to fear lawsuits filed by terrorists simply for doing their jobs.”⁹¹ Yet these provisions, by which Congress has ratified past (and perhaps some future) interrogation techniques that amount to cruel, inhuman and degrading treatment, clearly violate international law, including common Article 3.

Fifth, and perhaps most alarmingly, the MCA contains numerous provisions designed to limit the courts’ jurisdiction over military detainee cases. The Act forbids the courts from considering “an application for a writ of habeas corpus

87. See MCA, *supra* note 3, at §6(2); 18 U.S.C. § 2441.

88. See *id.* at § 6(3)(A) (emphasis added).

89. *Id.* at §6(b) (adding new provisions at 18 U.S.C. 2441 (d)(1)(B) & (2)(D)). In addition, with respect to mental cruel or inhuman treatment, the statute again weakens the prohibition for past crimes, requiring mental harm inflicted prior to the enactment of the MCA to be “prolonged.” See *id.* at §6(d)(1)(B) & (2)(E).

90. See *id.* at §3(a)(1) (adding new provisions at 10 U.S.C. § 948r(c)-(d)). Section 948r(d) provides that statements obtained after the enactment of the DTA are admissible only if the military judge finds that “the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment” prohibited by the DTA; however, under §948r(c), statements obtained prior to the enactment of the DTA may be admitted without the military judge making such a finding. In both cases, the military judge must find that “the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and . . . the interests of justice would best be served by admission of the statement into evidence.” See *also id.* (adding a new provision at § 949a(b)(2)(C)).

91. White House Press Release, *President Bush Signs Military Commissions Act of 2006*, available at <http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html>.

filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”⁹² The Act also severely limits the abilities of the Courts to hear “action[s] against the United States or its agents

92. MCA, *supra* note 3, at §7(a) (adding a new provision at 28 U.S.C. 224(e)(1)). The phrase “enemy combatant” is notoriously ill-defined. For example, in *Hamdi*, the Supreme Court noted that “[t]here is some debate as to the proper scope of [the term enemy combatant], and the Government has never provided any court with the full criteria that it uses in classifying individuals as such.” *Hamdi*, 542 U.S. 507, 516 (2004). For purposes of that case, the Court accepted and used a limited definition: an individual who “was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.” *Id.* (internal quotations omitted). In contrast, for purposes of conducting “Combatant Status Review Tribunal” (“CSRT”) hearings to determine if detainees *are* enemy combatants, the Department of Defense has defined the term as follows: “[A]n individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” See Department of Defense, Combatant Status Review Tribunal Process, last updated July 14, 2006, available at <http://www.defenselink.mil/news/Jan2005/d20050131process.pdf>. The DOD definition is therefore considerably broader than the one acknowledged by the Court, in that it does not have a geographical limitation, and it also includes individuals who have “directly supported hostilities” in addition to those who actually “commit[] a belligerent act.”
- Recent congressional legislation does not simplify matters. The DTA, without defining the phrase, referenced the CSRT procedures and established some judicial review over them. DTA, *supra* note 20, at 1005(e) (adding 28 U.S.C. § 2241(e)-(f)). The MCA, in turn, defines “unlawful” and “lawful” enemy combatants in the course of establishing military commissions, and it subjects only non-citizen “unlawful” combatants to those commissions, but the Act contains no statutory definition of the unmodified phrase. See MCA, *supra* note 3, at § 3 (adding new provisions at 10 U.S.C. § 948a (1)-(2)); see also *id.* (adding § 948d(a)). Specifically, “[t]he term ‘unlawful enemy combatant’ means (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been *determined to be an unlawful enemy combatant* by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.” MCA, *supra* note 3, at § 3 (adding new provisions at 10 U.S.C. § 948a (1)(A)) (emphasis added). This language is interesting because, as noted, the current CSRT procedures do not determine whether individuals are “unlawful” enemy combatants,” but simply whether they are “enemy combatants.” See Combatant Status Review Tribunal Process, *infra*. In addition, as noted in the text, a separate section of the MCA uses the phrase “enemy combatants” – perhaps to include both “lawful” and “unlawful” enemy combatants – when limiting the scope of *habeas* and other judicial review over the individuals who have been so labeled. MCA, *supra* note 3, at § 7 (amending 28 U.S.C. § 2241(e)). The phrase “enemy combatant” is thus riddled with confusion, and the issues become even less clear when one considers whether, or to what extent, the term overlaps with others used in this field, including the Third Geneva Convention “prisoner of war” concept. See note 34, *supra*.

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 1 (2006)

relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien” determined to be an enemy combatant or “awaiting such determination.”⁹³ In addition, except for the limited appeals discussed *infra*, the MCA provides that courts may not hear “any claim or cause of action whatsoever,” including *habeas* petitions, relating to the trial of a detainee by military commissions, “including challenges to the lawfulness of procedures of military commissions under this chapter.”⁹⁴

Thus, under the MCA, the only access that military detainees have to civilian courts are narrow appeals that do not appear to allow the detainees to challenge the factual basis underlying their detention or their treatment while in U.S. custody. As provided by the DTA, only the U.S. Court of Appeals for the D.C. Circuit may hear a claim as to “whether the status determination of [a] Combatant Status Review Tribunal . . . was consistent with the standards and procedures specified by the Secretary of Defense . . . and . . . to the extent . . . applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.”⁹⁵ In addition, the MCA allows direct appeals from the verdicts of military commissions – again only to the U.S. Court of Appeals for the D.C. Circuit and, by writ of *certiorari*, to the U.S. Supreme Court.⁹⁶ Yet the MCA again limits the scope of this review to “matters of law,” specifically “whether the final decision [of the military commission] was consistent with the standards and procedures” set out in the MCA, as well as “to the extent applicable, the Constitution and the laws of the United States.”⁹⁷ Although this is a potentially crucial line of appeal, it does not negate the seriousness of the deprivation of *habeas* review or other forms of access to civilian courts.

Finally, at least some of the jurisdiction-stripping provisions of the MCA apply retroactively. Section 7(b) states that to “[t]he amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.”⁹⁸

93. MCA, *supra* note 3 at §7(a) (adding new provision at 28 U.S.C. 2241(e)(2)).

94. *Id.* at §3(a)(1) (adding new provision at 10 U.S.C. § 950j(b)).

95. *Id.* at §7(a)(2)

96. *Id.* at §3(a)(1) (adding new provision at 10 U.S.C. 948g).

97. *Id.* at §3(a)(1)(adding new provision at 10 U.S.C. 948g(b)-(c)).

98. *Id.* at §7(b). It is not yet known whether the courts will interpret MCA section 7(b)’s retroactivity provision to apply only to section 7(a)’s added provision at 28 U.S.C. §2241(e)(2), as both that provision and section 7(b) use extremely similar language, or

One Step Forward, Two Steps Back 235

Thus, these provisions will likely force the courts to consider one or more issues arising out of military detainee cases that have so far been avoided, such as (1) whether Congress may constitutionally remove *habeas* jurisdiction in pending military detainee cases;⁹⁹ (2) whether there is a constitutional right to bring *habeas* petitions when a prisoner is held by the United States outside of U.S. territory;¹⁰⁰ and (3) whether Congress may constitutionally suspend the right of *habeas* for non-citizens held both within and outside United States territory.¹⁰¹

In conclusion, recent events amount to “one step forward, two steps back” for those advocating limitations on the President’s power to deprive individuals of their liberty in the name of national security. They amount to an even larger setback for those who advocate a strong role for international law in cases arising out of the detention, treatment, and trial of military detainees. This trend is a mistake, and must be corrected by either judicial or further legislative action. We owe it to the individuals we have detained, as well as to the international community, to abide by our international obligations. But most of all, we owe it to ourselves, not only to salvage our international reputation, but also to prove that we can lead the fight for the protection of individual dignity even in the most troubling of times.

whether section 7(b) will also be held to apply to the *habeas*-stripping provision in section 7(a)’s addition at 28 U.S.C. §2241(e)(1). Compare new provision created by MCA §7(a) at 28 U.S.C. §2241(e)(2) (“any other action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien detained by the United States . . .”) with MCA §7(b) (“all cases . . . which relate to any aspect of the detention, transfer, treatment, trial or conditions of detention of an alien detained by the United States . . .”) and with new provision created by MCA §7(a) at 28 U.S.C. §2241(e)(1) (“an application for a writ of *habeas corpus* filed by or on behalf of an alien detained by the United States . . .”). There is also a separate retroactivity provision relating to challenges to the military commissions. See *id.* at §3(a)(1)(adding new provision at 10 U.S.C. 950j(b)) (precluding courts from hearing claims challenging military commissions applies to “any claim or cause of action whatsoever, including any action” “pending on or filed after the date of the enactment” of the MCA).

99. See *Hamdan*, 126 S.Ct. at 2764. However, as set out in note 98, *supra*, the courts may continue to avoid this issue with respect to *habeas* cases by interpreting MCA section 7(b)’s jurisdiction-stripping provision to apply only to cases that fall under the new 28 U.S.C. §2241(e)(2) but not those arising under new §2241(e)(1).
100. See, e.g., *Rasul*, 542 U.S. 466 (cited in *Hamdan*, 126 U.S. at 2693-94); *Eisenrager*, 339 U.S. 763, 777 (1950).
101. See, e.g., *Hamdan*, 126 S.Ct. at 2764; U.S. Const. Art. 1 § 9 cl. 2 (“The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”) Even if the courts hold that the jurisdiction-stripping provisions do not apply to pending *habeas* cases, they will still be required, because of the MCA, to address the constitutionality of those provisions with respect to any new actions filed by military detainees in the future.