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## Casenote

### **Commission Control: The Court's Narrow Holding in *Hamdan v. Rumsfeld* Spurred Congressional Action But Left Many Questions Unanswered. So What Happens Now?**

By a 5-3 vote in *Hamdan v. Rumsfeld*,<sup>1</sup> the United States Supreme Court held that the military commissions established by President George W. Bush to try al Qaeda members and other terrorists lacked the “power to proceed because [their] structure and procedures” violate the Uniform Code of Military Justice (“UCMJ”)<sup>2</sup> and the Geneva Conventions.<sup>3</sup> In so holding, the Court exercised its power as a significant check on presidential power, but left many questions unanswered. In the wake of *Hamdan*, Congress enacted the Military Commissions Act

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1. 126 S. Ct. 2749 (2006).

2. *Id.* at 2759; 10 U.S.C. §§ 801-950 (2000 & Supp. IV 2004).

3. *Hamdan*, 126 S. Ct. at 2759; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention]. The court also held that enactment of the Detainee Treatment Act of 2005 (“DTA”), Pub. L. No. 109-148, 119 Stat. 2739 (2005) (to be codified at 42 U.S.C. §§ 2200dd-2200dd-1), did not revoke the Court’s jurisdiction over cases pending at the time of the DTA’s enactment. *Hamdan*, 126 S. Ct. at 2762-69.

of 2006 ("MCA").<sup>4</sup> The answers to the questions not addressed by the Court in *Hamdan* will likely be revisited in future challenges to the MCA.

### I. FACTUAL BACKGROUND

In response to the September 11, 2001 terrorist attacks on the World Trade Center in New York City and the Department of Defense building in Arlington, Virginia, Congress adopted the Authorization for Use of Military Force ("AUMF").<sup>5</sup> The AUMF is a joint resolution that authorizes 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."<sup>6</sup> Acting pursuant to the AUMF, the President ordered the invasion of Afghanistan. In November 2001 Salim Ahmed Hamdan, a Yemeni national and noncitizen of the United States, was captured by militia forces in Afghanistan, turned over to the United States military, and later detained at Guantanamo Bay, Cuba.<sup>7</sup>

On November 13, 2001, the President issued a military order that governed the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" ("November 13 Order").<sup>8</sup> The November 13 Order provided that any "noncitizen for whom the President determines 'there is reason to believe' that he or she (1) 'is or was' a member of al Qaeda or (2) has engaged or participated in terrorist activities aimed at or harmful to the United States . . . 'shall, when tried, be tried by military commission. . . .'"<sup>9</sup> On July 3, 2003, the President declared that Hamdan and five other noncitizen detainees were subject to the November 13 Order.<sup>10</sup> Hamdan was appointed counsel, who filed demands for charges and for a speedy trial under Article 10 of the Uniform Code of Military Justice ("UCMJ").<sup>11</sup> The demands were denied by the legal adviser to the Appointing Authority,

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4. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (to be codified at 10 U.S.C. §§ 948a-950w).

5. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2760 (2006); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

6. Authorization for Use of Military Force § 2.

7. *Hamdan*, 126 S. Ct. at 2759-60.

8. Military Order of November 13, 2001, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

9. *Hamdan*, 126 S. Ct. at 2760 (quoting Military Order of November 13, 2001, 66 Fed. Reg. at 57,834).

10. *Id.*

11. *Id.*; 10 U.S.C. § 810 (2000 & Supp. IV 2004).

who ruled that Hamdan was not entitled to any of the protections of the UCMJ.<sup>12</sup>

On July 13, 2004, after Hamdan had already begun an action for mandamus and habeas corpus in the United States District Court for the Western District of Washington, the Government charged Hamdan with conspiracy, alleging four overt acts committed in furtherance of the conspiracy between 1996 and 2001.<sup>13</sup> On November 8, 2004, after Hamdan's petitions for writs of mandamus and habeas corpus were transferred to the United States District Court for the District of Columbia, the district court granted Hamdan's habeas petition and stayed the commission's proceedings.<sup>14</sup> In granting Hamdan's petition, the district court concluded that the President's authority to establish military commissions was limited by the law of war, including the Geneva Conventions,<sup>15</sup> and that the military commission's procedures that allowed Hamdan to be convicted without being present for his full trial violated Common Article 3 of the Geneva Conventions.<sup>16</sup> The Court of Appeals for the District of Columbia Circuit reversed.<sup>17</sup> The court of appeals held that (1) the Geneva Conventions were not judicially enforceable;<sup>18</sup> (2) even if the conventions were enforceable, they did not apply to Hamdan;<sup>19</sup> and (3) the military commission procedures established to try Hamdan did not violate the UCMJ.<sup>20</sup> The Supreme Court granted certiorari and held that the structure and procedures of

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12. *Hamdan*, 126 S. Ct. at 2760.

13. *Id.* at 2760-61. The alleged overt acts were:

(1) [Hamdan] acted as Osama bin Laden's "bodyguard and personal driver," "believ[ing]" all the while that bin Laden "and his associates were involved in" terrorist acts prior to and including the attacks of September 11, 2001; (2) he arranged for transportation of, and actually transported, weapons used by al Qaeda members and by bin Laden's bodyguards (Hamdan among them); (3) he "drove or accompanied [O]sama bin Laden to various al Qa[e]da-sponsored training camps, press conferences, or lectures," at which bin Laden encouraged attacks against Americans; and (4) he received weapons training at al Qaeda-sponsored camps.

*Id.* at 2761 (quoting Appendix to Petition for Writ of Certiorari at 65a-75a (2005), *Hamdan*, 126 S. Ct. 2749 (No. 05-184) (second and third alterations in original)).

14. *Id.* Further, during this time, the Combatant Status Review Tribunal "decided that Hamdan's continued detention at Guantanamo Bay was warranted because he was an 'enemy combatant.'" *Id.*

15. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 158-60 (D.D.C. 2004); Geneva Convention, *supra* note 3.

16. *See Hamdan*, 344 F. Supp. 2d at 166-68; *see also Hamdan*, 126 S. Ct. at 2760-61.

17. *Hamdan v. Rumsfeld*, 415 F.3d 33, 44 (D.C. Cir. 2005).

18. *Id.* at 38-39.

19. *Id.* at 40-42.

20. *Id.* at 43.

the President's military commissions violated both the UCMJ and the Geneva Conventions.<sup>21</sup>

## II. LEGAL BACKGROUND

The military commission is a military tribunal born of necessity "for the investigation and punishment of violations of the laws of war and other offences not cognizable by court-martial."<sup>22</sup> Military commissions have been in existence since the earliest times of the United States,<sup>23</sup> developing principally as a supplement to the court-martial, for which jurisdiction was "restricted by statute almost exclusively to members of the military force and to certain specific offences defined in a written code."<sup>24</sup> It was not until 1847, during the Mexican-American War, that the military commission as it is known today was initiated.<sup>25</sup>

Supreme Court precedent recognizes three types of valid military commissions: martial law courts, military government courts, and law of war courts.<sup>26</sup> Martial law courts are "courts established by a military commander whose forces have occupied a particular area within the United States and displaced the civil government."<sup>27</sup> Military government courts are similar to martial law courts, except they are used when a military government is established "either outside of the United States or in areas within the United States in a state of rebellion."<sup>28</sup> Law of war courts are different from either martial law courts or military government courts.<sup>29</sup> They are convened "as an appropriate tribunal for the trial and punishment of offenses against the

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21. *Hamdan*, 126 S. Ct. at 2759.

22. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 831 (2d ed. 1920).

23. *See id.* at 832-33 (noting that "[i]n our early wars . . . cases which would now be referred to a military commission were brought to trial before special courts-martial. Such was the case of Joshua Hett Smith . . . in 1780, . . . Louis Louaillier . . . in March, 1815[, and] . . . Arbuthnot and Ambrister . . . in April, 1818 . . .").

24. *Id.* at 831. The military commission did "not extend to many criminal acts, especially of civilians, peculiar to time of war . . ." *Id.*

25. *Id.* at 832. At this time, jurisdiction was divided into two separate courts: the "military commission" and the "council of war." *Id.* at 833. The military commissions were essentially a replacement for the civilian criminal courts. *See id.* at 832. The council of war, however, was a war court, used to try violations of the law of war. *Id.* at 832-33. These two courts were later combined into one court known as the military commission. *Id.* at 839; Major Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, 2002 *ARMY LAW* 19, 28.

26. *See Hamdan*, 126 S. Ct. at 2775-76; MacDonnell, *supra* note 25, at 26.

27. MacDonnell, *supra* note 25, at 26.

28. *Id.*

29. *Hamdan*, 126 S. Ct. at 2776.

law of war not ordinarily tried by court martial."<sup>30</sup> The validity of military commissions is usually discussed in the context of three considerations: (1) who has the power to convene a military commission and under what circumstances such power may be exercised; (2) whether the commission has jurisdiction over the offense; and (3) whether the procedures used in the commission are sufficient to uphold the rights of the person on trial.<sup>31</sup> Each of these considerations is different, depending on what type of military commission has been convened. This section discusses only the law of war military commissions.

*A. When and By Whom May a Military Commission Be Convened?*

The Constitution grants Congress the power to "provide for the common Defence,"<sup>32</sup> to "make Rules for the Government and Regulation of the land and naval Forces,"<sup>33</sup> to "declare War,"<sup>34</sup> to "define and punish . . . Offences against the Law of Nations,"<sup>35</sup> and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . ."<sup>36</sup> The Constitution makes the President the Commander in Chief of the Army and Navy,<sup>37</sup> grants him the "executive Power,"<sup>38</sup> and confers on him the duty to "take Care that the Laws be faithfully executed."<sup>39</sup> These powers have been interpreted to give both Congress and the President the authority to convene military commissions as "an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-chief in war."<sup>40</sup> There is little debate that Congress and the President may, together, convene military commissions. However, when the President wishes to act without Congress's approval, the exact balance of this concurrent power has been the subject of disagreement, or at the very least, ambiguity.

In *Ex parte Milligan*,<sup>41</sup> the Government argued that the authority to convene military commissions was granted to the President through the

30. *Ex parte Quirin*, 317 U.S. 1, 27 (1942).

31. See WINTHROP, *supra* note 22, at 835-42.

32. U.S. CONST. art. I, § 8, cl. 1.

33. U.S. CONST. art. I, § 8, cl. 14.

34. U.S. CONST. art. I, § 8, cl. 11.

35. U.S. CONST. art. I, § 8, cl. 10.

36. U.S. CONST. art. I, § 8, cl. 18.

37. U.S. CONST. art. II, § 2, cl. 1.

38. U.S. CONST. art. II, § 1, cl. 1.

39. U.S. CONST. art. II, § 3.

40. WINTHROP, *supra* note 22, at 831.

41. 71 U.S. 2 (1866).

laws of war.<sup>42</sup> The Court, however, refused to decide that issue, holding that neither Congress nor the President, under any circumstance, has the authority to try a nonmilitary United States citizen by military commission when the courts are "open and . . . unobstructed."<sup>43</sup> The Court emphasized that no actual necessity for the commission existed—only a mere threat of necessity.<sup>44</sup> Chief Justice Chase concurred in the result but disagreed as to this issue.<sup>45</sup> He believed that the President did have the power to convene a military commission in such a situation, as long as Congress authorized it.<sup>46</sup> Further, the Chief Justice stated that the President could not convene military commissions without the sanction of Congress except "*in cases of a controlling necessity*, which justifies what it compels."<sup>47</sup> Therefore, Chief Justice Chase believed that the President may convene a military commission not only with congressional authorization, but also without it, as long as a controlling necessity exists.<sup>48</sup>

In *Ex parte Quirin*,<sup>49</sup> it was argued, as it was in *Milligan*, that the President had the authority to convene military commissions without Congress's approval.<sup>50</sup> The Court, however, declined to decide this issue.<sup>51</sup> Instead, the Court held that Congress, using its constitutional power to define and punish offenses against the laws of nations, had explicitly authorized the President to use military commissions to try offenses against the law of war through Articles 12 and 15 of the Articles of War.<sup>52</sup> Further, the Court held that by convening the commission, the President merely exercised his powers as the Commander in Chief

42. *Id.* at 124.

43. *Id.* at 121.

44. *See id.*

45. *See id.* at 132 (Chase, C.J., dissenting).

46. *See id.* at 139-40.

47. *Id.* at 140 (emphasis added).

48. *Id.*

49. 317 U.S. 1 (1942).

50. *See id.* at 29.

51. *Id.*

52. *See id.* at 27, 28. The Court determined that Article 12 did "not exclude from that class 'any other person who by the law of war is subject to trial by military tribunals' and who under Article 12 may be tried by court martial or under Article 15 by *military commission*." *Id.* at 27 (emphasis added). The Court noted that Article 15 provided "the provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving *military commissions* . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such *military commissions* . . . or other military tribunals."

*Id.* (emphasis added and omissions in original). Article 15 is almost identical to Article 21 of the UCMF. *Hamdan*, 126 S. Ct. at 2774. *See infra* note 100.

"to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war."<sup>53</sup>

Until *Madsen v. Kinsella*,<sup>54</sup> the Court had always refrained from discussing what power the President may have to convene military commissions without Congress's approval.<sup>55</sup> However, in *Madsen* the Court seemed to address this issue.<sup>56</sup> In that case, the Court stated, "In the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions."<sup>57</sup> *Madsen*, though, was not a situation in which the President attempted to act without the authority of Congress.<sup>58</sup> The Court recognized that Congress had authorized the use of military commissions in Articles 2, 12, and 15 of the Articles of War and expressly reserved jurisdiction over violations of the law of war.<sup>59</sup> Therefore, while the Court appeared to expand the President's authority to convene military commissions without Congress's approval, it merely followed its previous holding in *Quirin*<sup>60</sup> that the President was acting within Congress's grant of authority.<sup>61</sup>

#### B. *The Jurisdiction of the Law of War Military Commission*

In order to be tried before a military commission, an offense must have been committed (1) "within the field of . . . command of the convening commander;" (2) in "the theatre of war or a place where military government or martial law may legally be exercised;" and (3) "within the [time] period of the war or of the exercise of military government or

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53. *Quirin*, 317 U.S. at 28.

54. 343 U.S. 341 (1952).

55. See generally *Quirin*, 317 U.S. 1; *In re Yamashita*, 327 U.S. 1 (1946).

56. See *Madsen*, 343 U.S. at 348.

57. *Id.*

58. *Id.* at 341.

59. *Id.* at 350-52.

60. 317 U.S. 1. *Quirin* was followed by *In re Yamashita*, which further defined the scope of the President's war power. *Yamashita*, 327 U.S. at 7-11. The Court declined to hold that military commissions may not be convened after the cessation of hostilities if (1) the offense was committed before the cessation of hostilities and (2) there has been no official recognition of peace by treaty or proclamation. *Id.* at 12. The Court explained:

The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognized, the evils which the military operations have produced.

*Id.*

61. See *Madsen*, 343 U.S. at 350-52. But see MacDonnell, *supra* note 25, at 22, 24.



martial law."<sup>62</sup> Also, the law of war military commission may only try "[v]iolations of the laws and usages of war," or violations of military orders or regulations that cannot legally be tried by military commissions.<sup>63</sup>

*C. Procedural Limitations on the Law of War Military Commission*

Historically, military commissions followed the same procedural rules that were placed on courts-martial.<sup>64</sup> Military commissions permitted objections, formally arraigned the prisoner, allowed counsel, received evidence, heard argument, and sentenced.<sup>65</sup> The commission usually followed the established rules of law and evidence, albeit in a less technical form.<sup>66</sup> However, because Congress never defined the rules for such proceedings, failure to fully comply with the rules of courts-martial did not render the commission illegal.<sup>67</sup> If justice required, the rules and principles of military commissions were liberally construed.<sup>68</sup>

The procedures of a military commission were first challenged in *Ex parte Quirin*.<sup>69</sup> In *Quirin* the Court refrained from deciding whether Congress may proscribe the procedures of the commission, stating that "the Articles [of War] could not at any stage of the proceedings afford any basis for issuing the writ."<sup>70</sup> However, the Court's reasoning was split. Some members of the Court argued that the Articles of War were not intended to regulate military commissions and therefore, were inapplicable.<sup>71</sup> The other members argued that even if Congress could regulate the procedures of the commission through the Articles of War, the particular Articles in question did not prohibit the procedures used.<sup>72</sup> Therefore, the Court essentially held that military commissions

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62. WINTHROP, *supra* note 22, at 836-37. Also, the trial must have been "had within the theatre of war, military government, or martial law," and not somewhere that the civil courts were open and available. *Id.* at 836. However, this last requirement has not always been followed. *Id.* at 836-37.

63. *Id.* at 839. If the military commission is a martial law or military government court, then it may also try "[c]rimes and statutory offences cognizable by State or U.S. courts, and which would properly be tried by such courts if open and acting." *Id.*

64. *See id.* at 841.

65. *Id.* at 841-42.

66. *Id.* at 842.

67. *Id.* at 841.

68. *Id.* at 842.

69. 317 U.S. at 46-47.

70. *Id.* at 47.

71. *Id.*

72. *Id.*

have no procedural limitations above that which is made a part of the law of war—not even those that govern courts-martial.<sup>73</sup>

In *In re Yamashita*,<sup>74</sup> the military commission that tried Yamashita followed procedures that allowed evidence that “would have probative value in the mind of a reasonable man,” including “affidavits, depositions or other statements taken by officers detailed for that purpose by military authority.”<sup>75</sup> There the Court held that neither the Articles of War nor the law of war applied to Yamashita, and therefore, neither placed any procedural restrictions on his military commission.<sup>76</sup> However, in a lengthy dissent, Justice Rutledge condemned the procedures used to try Yamashita as, *inter alia*, an unconstitutional departure from due process resulting in an unfair trial.<sup>77</sup> Justice Rutledge stated that due process applies to “all men, whether citizens, aliens, alien enemies or enemy belligerents,” and every “departure” from due process “weakens the tradition, whether it touches the high or the low, the powerful or the weak, the triumphant or the conquered.”<sup>78</sup> Justice Rutledge concluded by quoting Thomas Paine: “He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.”<sup>79</sup>

#### D. *Military Detainees and Habeas Corpus*

In discussing the trial of detainees by military commission, the method by which those procedures are challenged, habeas corpus, must also be addressed. In *Hamdi v. Rumsfeld*,<sup>80</sup> a plurality of the Court, relying on the AUMF and longstanding law of war principles, authorized for the duration of the military conflict the detention of American citizens who had been determined to be “enemy combatants.”<sup>81</sup> Justice Scalia, dissenting, argued that Hamdi should be released “unless (1) criminal proceedings are promptly brought, or (2) Congress has suspended the writ of habeas corpus.”<sup>82</sup> He further pointed to the Suspension Clause

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73. See generally *Quirin*, 317 U.S. 1.

74. 327 U.S. 1 (1946).

75. *Id.* at 18.

76. *Id.* at 19-20.

77. *Id.* at 78-80 (Rutledge, J., dissenting).

78. *Id.* at 42.

79. *Id.* at 81 (quoting 2 THE COMPLETE WRITINGS OF THOMAS PAINE 588 (Philip S. Foner, Ph.D., ed., 1945)).

80. 542 U.S. 507 (2004).

81. *Id.* at 521-22.

82. *Id.* at 573 (Scalia, J., dissenting).

of the Constitution,<sup>83</sup> which states that the only time suspension of the writ is constitutional is during rebellion or invasion.<sup>84</sup> But Justice Scalia explicitly declined to decide whether the attacks of September 11, 2001 constituted an invasion or, even if they did, whether the attacks would justify suspension several years later.<sup>85</sup>

In *Rasul v. Bush*,<sup>86</sup> the Court held that it had jurisdiction to hear habeas petitions from “foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base” in Cuba.<sup>87</sup> In so holding, the Court declined to apply any presumption that congressional legislation does not have extraterritorial application and stated that in any event, Guantanamo Bay, Cuba, is within “the territorial jurisdiction” of the United States for habeas purposes.<sup>88</sup> As a final note regarding habeas corpus, in 2005 Congress enacted the Detainee Treatment Act of 2005 (“DTA”),<sup>89</sup> which stated 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 . . . at Guantanamo Bay, Cuba.”<sup>90</sup>

### III. THE COURT’S RATIONALE

#### A. *The Power of the President to Convene a Military Commission*

The Court in *Hamdan v. Rumsfeld*<sup>91</sup> first dismissed two preliminary issues.<sup>92</sup> Next, the Court addressed whether the President has the

83. U.S. CONST. art. I, § 9, cl. 2.

84. 542 U.S. at 578.

85. *Id.*

86. 542 U.S. 466 (2004).

87. *Id.* at 470, 485.

88. *Id.* at 480.

89. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005) (to be codified at 42 U.S.C. §§ 2200dd-2200dd-1).

90. *Id.*

91. 126 S. Ct. 2749 (2006).

92. *See id.* at 2762-69, 2769-72. Before discussing the merits of Hamdan’s claims that the military commission lacked authority to try him, the Court first dealt with two preliminary issues: (1) whether the newly enacted DTA stripped the Court of jurisdiction to hear Hamdan’s petition and (2) whether considerations of comity required the Court to refrain from hearing Hamdan’s petition, regardless of jurisdiction. *See id.* As to the first issue, the Court held that the DTA did not strip the Court of jurisdiction over pending cases. *Id.* at 2769. The Court reasoned that Congress specifically stated that sections 1005(e)(2) and (3) of the DTA applied to pending cases. *Id.* at 2764. However, Congress did not place that same language in section 1005(e)(1), the provision that stripped the Court of jurisdiction over writs of habeas corpus filed by detainees at Guantanamo Bay, Cuba. *See id.* Here, the Court stated, the principle of statutory interpretation that “a

power under the Constitution to convene military commissions.<sup>93</sup> The Court analyzed past Supreme Court cases, the UCMJ,<sup>94</sup> the DTA,<sup>95</sup> and the AUMF,<sup>96</sup> and held that “at most,” these sources “acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the ‘Constitution and laws,’ including the law of war.”<sup>97</sup> The Court first discussed *Ex parte Quirin*,<sup>98</sup> where the Court held that Congress had authorized the use of military commissions through Article 15 of the Articles of War.<sup>99</sup> The Court noted that Article 21 of the UCMJ contains language that is “substantially identical” to Article 15 of the Articles of War.<sup>100</sup> However, the Court explained that *Quirin* did not expand the scope of presidential power.<sup>101</sup> Instead, it merely preserved the power already

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negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute” controls. *Id.* at 2765. Further, the presumption against retroactivity had no effect in this case. *See generally Hamdan*, 126 S. Ct. 2749. A “jurisdiction-conferring or jurisdiction-stripping statute . . . ‘takes away no substantive right but simply changes the tribunal that is to hear the case.’” *Id.* at 2765 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). When a statute has no retroactive effect, the presumption against retroactivity does not apply. *Id.* Therefore, the Court concluded the statute would have applied to pending cases if not for the rule of statutory construction that “dictate[d] otherwise.” *Id.* Thus, the Court held that Congress did not intend for section 1005(e)(1) to apply to pending cases. *Id.* at 2769.

As to the second issue, the Court held that the comity considerations discussed in *Schlesinger v. Councilman*, 420 U.S. 738 (1975)—that courts should refrain from interfering in ongoing courts-martial proceedings against members of the armed forces—did not apply to Hamdan. *Hamdan*, 126 S. Ct. at 2770-71. First, the Court noted that Hamdan is not a member of the United States armed forces; therefore, concern for military discipline is not implicated. *Id.* at 2771. Second, the Court stated that the military commission is not a part of the integrated system of military courts established by Congress. *Id.* Therefore, the Court reasoned that intervening in an ongoing proceeding does not interfere with “the balance that Congress struck between military preparedness and fairness to individual service members” when it created the military courts. *Id.* at 2770. Thus, the Court held that *Councilman* did not prevent the Court from hearing Hamdan’s petition. *Id.* at 2771.

93. *See id.* at 2772-75.

94. 10 U.S.C. §§ 801-950 (2000 & Supp. IV 2004).

95. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005) (to be codified at 42 U.S.C. §§ 2200dd-2200dd-1).

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

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

98. 317 U.S. 1 (1942).

99. *Id.* at 28-29.

100. *Hamdan*, 126 S. Ct. at 2774. Article 21 of the UCMJ states: “The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions . . . .” 10 U.S.C. § 821 (2000 & Supp. IV 2004).

101. *See Hamdan*, 126 S. Ct. at 2774.

afforded the President under the Constitution, including an “express condition that the President . . . comply with the law of war.”<sup>102</sup> The Court further explained that neither the AUMF nor the DTA expanded the President’s power.<sup>103</sup> According to the Court, the AUMF only authorized the President to use his already-existing war power, which includes the ability to convene military commissions when appropriate.<sup>104</sup> Further, while the DTA recognizes the existence of the Guantanamo Bay military commissions, it does not expand the scope of the President’s war power to convene them.<sup>105</sup> Therefore, the Court concluded that the UCMJ, the AUMF, and the DTA recognize a presidential power to convene military commissions “where justified under the ‘Constitution and laws.’”<sup>106</sup>

*B. The Military Commission Did Not Have Jurisdiction Over the Offense Charged*

A plurality of the Court<sup>107</sup> concluded that Hamdan’s military commission was deficient.<sup>108</sup> The plurality stated that four preconditions must exist for a military commission to be valid: (1) the offense must have been committed within the convening commander’s field of command; (2) the offense must have occurred during the period of the war; (3) the offender must have violated the law of war; and (4) the offense charged must be a violation of the law of war “cognizable by military tribunals only.”<sup>109</sup>

According to the plurality, Hamdan’s military commission failed in three respects.<sup>110</sup> First, the alleged offense was not committed in a theater of war.<sup>111</sup> Second, the alleged offense did not occur during a period of war because the charge against Hamden alleged conspiracy extending from 1996 to November 2001.<sup>112</sup> All but two months of the

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102. *Id.*

103. *Id.* at 2775.

104. *Id.*

105. *See id.* The Court specifically reserved judgment on whether “the Constitution and laws of the United States are applicable’ in reviewing such decisions” and also on whether “the ‘standards and procedures’ used to try Hamdan and other detainees actually violate the ‘Constitution and laws.’” *Id.* (quoting Detainee Treatment Act § 1005(e)(3)).

106. *Id.* (quoting Detainee Treatment Act § 1005(e)(3)).

107. *Id.* at 2759. Only Justices Stevens, Souter, Ginsburg, and Breyer joined in this part of the opinion. *Id.*

108. *See id.* at 2777-78.

109. *Id.* at 2777 (quoting WINTHROP, *supra* note 22, at 839).

110. *See id.* at 2777-78.

111. *Id.* at 2778.

112. *Id.* at 2777-78.

alleged conspiracy occurred before the September 11, 2001 attacks and the enactment of the AUMF.<sup>113</sup> Therefore, the offense occurred neither in a theater of war nor during time of war.<sup>114</sup> Third, the plurality stated that the offense charged, conspiracy, is not an offense recognized under the law of war.<sup>115</sup> According to the plurality, Congress had not exercised its constitutional authority to define conspiracy as a war crime,<sup>116</sup> and in the absence of such a statute, plain and unambiguous precedent must exist.<sup>117</sup> The plurality found no such precedent.<sup>118</sup> Also, the plurality determined that *Quirin* did not control.<sup>119</sup> The plurality noted that while the saboteurs in *Quirin* were charged with conspiracy, the Court did not discuss the charge.<sup>120</sup> However, according to the plurality, the *Quirin* Court did “place[] special emphasis on the *completion* of an offense.”<sup>121</sup> Further, the plurality claimed that international sources do not recognize conspiracy as a violation of the law.<sup>122</sup> Therefore, the plurality concluded that the military commission lacked jurisdiction to try Hamdan.<sup>123</sup> Last, the plurality stated that the deficiencies in the charge were “indicative of a broader inability on the Executive’s part here to satisfy the most basic precondition . . . for establishment of military commissions: military necessity.”<sup>124</sup>

*C. The Military Commission’s Procedures Violated the UCMJ and the Geneva Conventions*

With regard to the commission’s procedures, the Court stated that although the President is authorized by Congress to convene military commissions, he is also restricted by Congress’s requirement that he comply with the UCMJ and the law of war, including the Geneva

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113. *Id.*

114. *Id.*

115. *Id.* at 2779.

116. *Id.*

117. *Id.* at 2780.

118. *Id.* Historically, the common law governing military commissions did not recognize a mere intention to violate the law of war, even when overt acts were committed in furtherance of that intention, unless the overt acts by themselves violated the law of war or constituted an attempt. *Id.* at 2781.

119. *Id.*

120. *Id.*

121. *Id.* at 2782.

122. *Id.* at 2784.

123. *Id.* at 2785.

124. *Id.*

Conventions.<sup>125</sup> The Court held that the procedures established to try Hamdan violated the UCMJ as well as the Geneva Conventions.<sup>126</sup>

**1. The Procedures Established to Try Hamdan Violated the UCMJ.** In holding that the procedures established for trial by the military commission violated the UCMJ, the Court relied principally on subsections (a) and (b) of Article 36 of the UCMJ.<sup>127</sup> These provisions place two restrictions on the procedures the President may use in a military commission: (1) no rule may be “contrary to or inconsistent with” the UCMJ<sup>128</sup> and (2) the rules must be “uniform insofar as practicable.”<sup>129</sup> The Court construed these provisions to mean that the rules for military commissions and for courts-martial must be the same, unless impracticable.<sup>130</sup> The Court then determined that no official statement of impracticability had been made and that nothing else demonstrated that applying the court-martial rules would be impracticable.<sup>131</sup> However, the Court added, the procedural rules established to try Hamdan deviated from the court-martial rules in several respects.<sup>132</sup> First, normal evidence rules did not apply.<sup>133</sup> Unlike normal rules for evidence, any evidence that “would have probative value to a reasonable person,” including hearsay and evidence obtained through

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125. *Id.* at 2786; Geneva Convention, *supra* note 3.

126. *Hamdan*, 126 S. Ct. at 2786.

127. *See id.* at 2790. Subsection (a) of Article 36 of the UCMJ provides that the procedures, including modes of proof, [in cases before] courts-martial, 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.

10 U.S.C.S. § 836(a) (2006) (emphasis added). Subsection (b) provides: “All rules and regulations made under this article shall be uniform *insofar as practicable*.” 10 U.S.C.S. § 836(b) (2001 & Supp. 2006) (emphasis added).

128. 10 U.S.C.S. § 836(a).

129. *Id.* § 836(b).

130. *Hamdan*, 126 S. Ct. at 2790. The Court noted the difference in choice of language between subsection (a) and subsection (b). Subsection (a), the Court stated, allows the President to make different rules for military courts than are used in the district courts insofar as “*he considers practicable*.” *Id.* at 2791 (quoting 10 U.S.C.S. § 836(a)). However in subsection (b), Congress chose to require uniformity among courts-martial and military commissions “*insofar as practicable*.” *Id.* (quoting 10 U.S.C.S. § 836(b)). The Court determined these to be different requirements. *Id.*

131. *Id.* at 2791-92.

132. *Id.* at 2790-91.

133. *Id.*

coercion, was admissible against Hamdan.<sup>134</sup> Second, for various reasons not present in a court-martial proceeding, Hamdan could be excluded from his own trial.<sup>135</sup> Therefore, the Court determined that the procedures established to try Hamdan violated the UCMJ.<sup>136</sup>

**2. The Procedures Established to Try Hamdan Violated the Geneva Conventions.** The Court further concluded that the procedural rules established to try Hamdan also violated the Geneva Conventions.<sup>137</sup> The Court's determination was largely based on a statutory interpretation of Common Article 3 of the Geneva Conventions,<sup>138</sup> part of the law of war which is made applicable to military commissions by Article 21 of the UCMJ.<sup>139</sup> The Court discussed the language of Common Article 3, which states that in a "conflict not of an international character" that occurs in the territory of one of the "High Contracting Parties," all parties are required to apply certain provisions that protect people "taking no active part in the hostilities, including members of armed forces . . . placed *hors de combat* . . . by detention."<sup>140</sup> One provision that the contracting parties are bound to apply "prohibits 'the passing of sentences . . . without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."<sup>141</sup> The Court interpreted the term "not of an international character" to mean not between nations.<sup>142</sup> Therefore, the Court held that Common Article 3 applies to the United States' war against al Qaeda because al Qaeda is not a nation.<sup>143</sup> Further, the Court reasoned that the military commission convened to try Hamdan was not a

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134. *Id.* at 2786.

135. *Id.* at 2792.

136. *Id.*

137. *Id.* at 2793.

138. *Id.* at 2795. Article 3 of the Geneva Conventions is often called "Common Article 3" because it is in all four Geneva Conventions. *Id.*

139. *See id.* at 2794. The Geneva Conventions are a part of the law of war. *See id.* at 2786. Further, "compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted." *Id.* at 2794. Therefore, Hamdan may seek enforcement of the laws of war in United States courts. *See id.*

140. *Id.* at 2795 (quoting Geneva Convention, *supra* note 3, 6 U.S.T. at 3318, 75 U.N.T.S. at 136).

141. *Id.* (quoting Geneva Convention, *supra* note 3, 6 U.S.T. at 3320, 75 U.N.T.S. at 138).

142. *Id.* at 2795-96 (quoting Geneva Convention, *supra* note 3, 6 U.S.T. at 3318, 75 U.N.T.S. at 136).

143. *See id.*



“regularly constituted court.”<sup>144</sup> At a minimum, in order for a military commission to be regularly constituted, a “practical need” must explain its “deviations from court-martial practice.”<sup>145</sup> Here, the Court stated, there was no such need.<sup>146</sup>

Last, a plurality of the Court interpreted the Geneva Conventions’ requirement of a trial that affords “all the judicial guarantees which are recognized as indispensable by civilized peoples” to include the right to be tried in one’s presence.<sup>147</sup> Because Hamdan could be convicted on undisclosed evidence presented in his absence, the plurality concluded that his military commission violated the Geneva Conventions.<sup>148</sup>

#### D. *The Dissents*

Three dissenting opinions were written by Justices Scalia,<sup>149</sup> Thomas,<sup>150</sup> and Alito.<sup>151</sup> Justice Thomas discussed in his dissent, *inter*

144. *See id.* at 2796-97 (quoting Geneva Convention, *supra* note 3, 6 U.S.T. at 3320, 75 U.N.T.S. at 138).

145. *Id.* at 2797 (quoting *Hamdan*, 126 S. Ct. at 2804 (Kennedy, J., concurring)).

146. *Id.*

147. *Id.* at 2797-98 (quoting Geneva Convention, *supra* note 3, 6 U.S.T. at 3320, 75 U.N.T.S. at 138). Justice Kennedy concurred with the Court’s decision, but because the Court decided that the military commission was unauthorized under the UCMJ, he found it unnecessary to decide several issues. *Id.* at 2808-09 (Kennedy J., concurring). Justice Kennedy would not decide three issues: (1) whether the conspiracy charge against Hamdan was valid; (2) “the merits of other limitations on military commissions described as elements of the common law of war;” and (3) whether Common Article 3, by requiring courts to “afford[] all the judicial guarantees which are recognized as indispensable by civilized peoples” requires the accused to be present for the entirety of his trial. *Id.* at 2809 (quoting Geneva Convention, *supra* note 3, 6 U.S.T. at 3320, 75 U.N.T.S. at 138). Justice Kennedy, however, did discuss the separation of powers issues raised by military commissions, stating that they raise “concerns of the highest order.” *Id.* at 2800. Citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Kennedy argued that because the President exceeded the limits for military commissions imposed by Congress, this case is one in which the President’s power is at its lowest force. *Hamdan*, 126 S. Ct. at 2800-01, 2808 (Kennedy, J., concurring). Therefore, he argued, Congress’s limitations are binding upon the President. *See id.*

148. *Id.* at 2797-98 (plurality opinion).

149. *See id.* at 2810-23 (Scalia, J., dissenting). Justice Scalia’s dissent focused on the issues of jurisdiction and abstention. *See id.* Because these issues were not given much discussion in this Note, Justice Scalia’s dissent will not be discussed.

150. *See id.* at 2823-49 (Thomas, J., dissenting). Justice Thomas was joined by Justice Scalia and Justice Alito in all but parts I, II.C.1, and III.B.2. *Id.* at 2823.

151. *See id.* at 2849-54 (Alito, J., dissenting). Justice Alito was joined by Justices Scalia and Thomas. *Id.* at 2849. Justice Alito dissented because he believed Hamdan’s commission was a “regularly constituted court.” *Id.* at 2850 (quoting Geneva Convention, *supra* note 3, 6 U.S.T. at 3320, 75 U.N.T.S. at 138). First, he stated that Common Article 3 does not require uniformity in structure and composition among all military courts. *Id.*

*alia*, the separation of powers.<sup>152</sup> He argued that the Constitution confers upon the President a broad power to protect the security of the nation "in the manner he deems fit."<sup>153</sup> This power is at its greatest, he stated, when the President's actions were either expressly or impliedly authorized, and a congressional authorization of certain action does not imply a congressional disapproval of actions not specifically authorized.<sup>154</sup> Justice Thomas argued that Article 21 of the UCMJ, as well as the AUMF, authorized Hamdan's military commission.<sup>155</sup> Therefore, Justice Thomas would hold that the President was acting in the realm of his greatest power, and his actions should be given great deference.<sup>156</sup>

#### IV. IMPLICATIONS

*Hamdan v. Rumsfeld*<sup>157</sup> is foremost an important check on presidential power.<sup>158</sup> The importance of *Hamdan* as a check on presidential power may be most apparent when considered in light of the "unitary executive theory" of constitutional interpretation.<sup>159</sup> The unitary executive theory suggests that "the authority to enforce federal law and to implement federal policy rests exclusively in the executive branch."<sup>160</sup> This theory has been criticized for being "designed to justify and make constitutional a type of presidency that is largely insulated from the checks and balances normally associated with a

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at 2851. Second, Justice Alito argued that even if the UCMJ requires some limited uniformity, failure to fully comply with that requirement does not render the commission illegal. *Id.* at 2852-53. Rather, according to Justice Alito, the proper remedy is to proscribe the use of particular procedures. *Id.* at 2853. Third, Justice Alito believed that all of the elements required by Common Article 3 had been satisfied: the military commission qualified as a court; the commission was appointed, set up, and established in compliance with domestic law; and the commission's procedures, "taken as a whole," did not render the commission illegal. *Id.* Further, Justice Alito stated that review is available for any procedural improprieties that might arise. *Id.*

152. *Id.* at 2823-49 (Thomas, J., dissenting).

153. *Id.* at 2823.

154. *Id.* at 2823-24.

155. *Id.* at 2825. Justice Thomas argued that Article 21, alone, authorized Hamdan's military commission, but that the UCMJ in combination with the AUMF represents a "complete congressional sanction of the President's exercise of his commander-in-chief authority." *Id.*

156. *Id.* at 2824.

157. 126 S. Ct. 2749 (2006).

158. *See id.* at 2798.

159. *See* Karl Manheim & Allan Ides, *The Unitary Executive: Federal Courts Have Almost Always Rebuffed Assertions of Unchecked Power by the Executive Branch*, L.A. LAW., Sept. 2006, at 27-32.

160. *Id.* at 27.

republican form of government."<sup>161</sup> In *Hamdi v. Rumsfeld*,<sup>162</sup> Justice Thomas stated that "[t]he power to protect the Nation 'ought to exist without limitation.'"<sup>163</sup> He stated further that "judicial interference in [foreign affairs and national security] destroys the purpose of vesting primary responsibility in a unitary Executive."<sup>164</sup> Therefore, under Justice Thomas's view of the unitary executive, the President may act in the realm of national security unchecked by either Congress or the Court.<sup>165</sup>

Presidential signing statements have also been used to further this view of presidential power. While the signing statement is not new, the way in which the President is using them is new.<sup>166</sup> In these signing statements, the President often gives the Executive's interpretation of laws passed by the legislature.<sup>167</sup> The reality of these signing statements is that the President has signaled his intent to disobey more than 750 statutes<sup>168</sup> by interpreting legislation in a way that does not interfere with "the President's Constitutional authority . . . to supervise the unitary executive branch."<sup>169</sup> When viewed in light of this theory,

161. *Id.* at 28.

162. 542 U.S. 507 (2004).

163. *Id.* at 580 (Thomas, J., dissenting) (quoting THE FEDERALIST NO. 23, at 200 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961)) (emphasis added).

164. *Id.* at 582 (emphasis omitted).

165. *See id.* at 580-82.

166. *See* Charlie Savage, *Bush Challenges Hundreds of Laws: President Cites Power of His Office*, BOSTON GLOBE, Apr. 30, 2006, at A1. The author states:

Far more than any predecessor, Bush has been aggressive about declaring his right to ignore vast swaths of laws [,] many of which he says infringe on power he believes the Constitution assigns to him alone as the head of the executive branch or the commander in chief of the military.

*Id.*

167. *Id.*

168. *Id.*

169. Statement on Signing the Palestinian Anti-Terrorism Act of 2006, WEEKLY COMP. PRES. DOC. 2199, 2199-2200 (Dec. 21, 2006). The signing statement states:

Because the constitutional authority of the President to supervise the unitary executive branch and take care that the laws be faithfully executed cannot be made by law subject to a requirement to consult with congressional committees or to involve them in executive decisionmaking, the executive branch shall construe the references in the provisions to consulting to require only notification. . . .

. . . .

Such provisions, if construed as mandatory rather than advisory, would impermissibly interfere with the President's constitutional authorities to conduct the Nation's foreign affairs, including protection of American citizens and American military and other Government personnel abroad, and to supervise the unitary executive branch.

*Hamdan* is a reaffirmation that both the Court and Congress still operate as significant checks of presidential power—even on matters of national security. The Court's refusal to defer to the President in *Hamdan* indicates that the Court has not wholly accepted the unitary executive theory. Therefore, future challenges to signing statements that ignore, disobey, or reinterpret congressional law will potentially be deemed unconstitutional.

While *Hamdan* is definitely important as a significant check on presidential power, *Hamdan* is equally important when considering challenges to the newly enacted MCA.<sup>170</sup> The MCA, a direct response to the Court's decision in *Hamdan*, adopted most of the military commission procedures that were held violative of the UCMJ<sup>171</sup> and the Geneva Conventions in *Hamdan*.<sup>172</sup> With congressional approval of the

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*Id.*

170. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (to be codified at 10 U.S.C. §§ 948a-950w).

171. 10 U.S.C. §§ 801-950 (2000 & Supp. IV 2004).

172. See Military Commissions Act § 948a, 120 Stat. at 2601-02. The MCA explicitly authorizes the President to convene military commissions to try "alien unlawful enemy combatants;" states that the military commission 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;" creates a new definition of "unlawful enemy combatant;" and prohibits evidence obtained by torture but does not prohibit all evidence obtained by coercion. Military Commissions Act §§ 948a(1), 948b(a), 948b(f)-(g), 120 Stat. at 2602.

Under section 948r, potentially coerced statements made before the enactment of the DTA on December 30, 2005 are subject to a different standard than statements made after the enactment of the DTA. Statements where the level of coercion is disputed that were made *before* the enactment of the DTA will only 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." Military Commissions Act § 948r(c)(1)-(2), 120 Stat. at 2607. However, statements where the level of coercion is disputed that were made *after* the enactment of the DTA will be admitted only if: (1) "the totality of the circumstances renders 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." Military Commissions Act § 948r(d)(1)-(3), 120 Stat. at 2607. Therefore, statements made before December 30, 2005 may be admitted into evidence even though they were obtained through the use of cruel, inhuman, or degrading treatment, as long as they meet the pre-DTA test.

Further, the MCA allows hearsay to be admitted if the detainee gets proper notice and the evidence is determined to be reliable; provides that the accused must be present for all stages of the trial unless for reasons of safety or disruption; makes classified information privileged but allows for alternative forms of disclosure that allow some of the information to be presented to the accused; and provides that no person "may invoke the Geneva

military commissions and their procedures, the statutory interpretation and separation of powers issues that were the bases of the Court's reasoning in *Hamdan* no longer exist. *Hamdan*, however, will inevitably be the case that commentators look to in an effort to predict the outcome of future challenges to the MCA. Because the Court decided *Hamdan* on statutory grounds, it left many questions unanswered. The answers to these questions will be important to future challenges against the MCA.

First, the Court did not address whether, or to what extent, military combatants held in Guantanamo Bay or similar installations are afforded rights under the Constitution. The Court's decision in *Rasul v. Bush*<sup>173</sup> may be a hint as to how the Court will decide this issue in the future. In *Rasul* the Court stated that Guantanamo Bay, Cuba, is within "the territorial jurisdiction" of the United States for habeas purposes.<sup>174</sup> The "same basis for applying habeas statutes to Guantanamo Bay detainees also supports recognizing their substantive constitutional rights."<sup>175</sup> The analysis with regard to habeas corpus or other constitutional provisions "should apply in both contexts or in neither."<sup>176</sup> Therefore, the Court may use this analysis in applying some constitutional rights to military detainees held in Guantanamo Bay. If the Court were to adopt this analysis and confer constitutional rights on the detainees at Guantanamo Bay, some provisions of the MCA could be unconstitutional. However, the Court's narrow holding in *Hamdan* suggests that most constitutional liberties will not be granted to noncitizen detainees.

Second, the Court did not decide whether a congressional denial of the Court's jurisdiction to hear an original writ of habeas corpus is an unconstitutional suspension of the writ.<sup>177</sup> In recent cases, including

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Conventions as a source of rights" in any court of the United States. Military Commissions Act §§ 948b(g), 949a(b)(1)(B), 949d(e)-(f)(2). Last, the MCA modifies the DTA to prohibit any court from hearing habeas petitions filed by detainees who have been determined (or who are awaiting determination) to have been "properly detained as an enemy combatant" and to limit other review a detainee may seek to an appeal of either a CSRT or a military commission decision. 28 U.S.C.S. § 2241(e)(1)-(2) (2001 & Supp. 2006).

173. 542 U.S. 466 (2004).

174. *Id.* at 480. The Court based this statement on the terms of the Guantanamo Bay lease between the United States and Cuba, which allows the United States to exercise "complete jurisdiction and control" over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses." *Id.* (quoting Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, Feb. 16-23, 1903, 6 Bevans 1113).

175. Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 WASH. U. L. REV. 99, 171 n.331 (2006).

176. *Id.*

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

*Hamdan*, the Court has given brief discussion to this issue. As Justice Scalia pointed out in his dissent in *Hamdi v. Rumsfeld*, the Constitution allows for suspension of the writ only during a time of rebellion or invasion.<sup>178</sup> While Scalia refused to decide if the September 11, 2001 attacks satisfy this requirement of the Suspension Clause, his analysis of the issue left only two ways to deal with military detainees: either (1) release them or (2) charge them, unless habeas has been suspended.<sup>179</sup> Considering these two limited options in the absence of habeas suspension, it seems likely that Justice Scalia would, instead, accept an argument that the requirements of the Suspension Clause of the Constitution<sup>180</sup> have been met.

The Court in *Hamdan*, however, seemed less amenable to the idea of suspending the writ. While refraining to decide the issue, the Court did discuss in dicta Hamdan's argument that the DTA unconstitutionally suspended habeas corpus,<sup>181</sup> stating that "the denial to this court of appellate jurisdiction' to consider an original writ of habeas corpus would 'greatly weaken the efficacy of the writ.'"<sup>182</sup> If the Court does choose to address the constitutionality of the MCA's habeas suspension, the decision will probably turn on the issue of whether the September 11, 2001 attacks constitute a "rebellion or invasion" under the Suspension Clause.<sup>183</sup> Even if the Court does find that the attacks constituted an invasion, in light of the singular nature of the attack and the time that has passed since, the Court will probably not hold that the invasion continued until 2006. Further, the Court's brief discussion of habeas in *Hamdan* and its previous holding in *Rasul*<sup>184</sup> indicate that, if challenged, the Court will likely decide that habeas has been unconstitutionally suspended.

THOMAS M. GORE

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178. *Hamdi*, 542 U.S. at 578 (Scalia, J., dissenting).

179. *See id.*

180. U.S. CONST. art. I, § 9, cl. 2.

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

182. *Id.* (quoting *Ex parte Yerger*, 75 U.S. 85, 102-03 (1869)).

183. U.S. CONST. art. I, § 9, cl. 2. However, the Court may decide the issue, as it did in *Hamdan*, on more narrow grounds. One probable statutory argument with regard to habeas corpus will be that Congress has not suspended the writ in the MCA, but because Congress has expanded the reach of the writ by statute, it can also narrow the reach by statute without infringing on any constitutional provisions.

184. 542 U.S. at 470, 563.

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