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To Boldly Go Where No Signatory Has Gone Before: How the Military Commissions Act of 2006 Has Rewritten the United States' Obligations Under the Geneva Conventions

Jason W. Hobbes*

I. Introduction

“[T]he war against terrorism is a new kind of war. . . . In my judgment, this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners.”¹ These were the words of Alberto Gonzalez, then White House Counsel for the Bush Administration, in a 2002 memo to President Bush. This quotation encapsulates the irreverent attitude that the Bush Administration has displayed towards the Geneva Conventions,² as well as the inherent difficulties facing the United States in its quest to protect its citizens while remaining compliant with international law.

The United States has long struggled with legal classification of detainees and prisoners of war. Balancing the legal requirements of the

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1. Memorandum from Alberto Gonzalez, White House Counsel to George W. Bush, President of the United States (Jan. 25, 2002), <http://www.npr.org/documents/2005/nov/torture/torturegonzales.pdf> (last visited 10/16/2007) [hereinafter *Memorandum from Alberto Gonzalez*].

2. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter *First Geneva Convention*]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 7 U.N.T.S. 85 [hereinafter *Second Geneva Convention*]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3116, 75 U.N.T.S. 135 [hereinafter *Third Geneva Convention III*]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *Fourth Geneva Convention*].

Geneva Conventions and the Uniform Code of Military Justice³ (“UCMJ”) with the competing needs of national security has proven to be a difficult task. The Geneva Conventions deal largely with traditional warfare and the problems that accompany it. Consequently, little mention is made of those individuals classified by the United States as “unlawful combatants” or “enemy combatants,”⁴ such as members of Al Qaeda.⁵

In recent years, non-traditional warfare, in the form of terrorism, has become a much larger issue than conventional “open” warfare. As a result, the interpretation and application of the Geneva Conventions in the United States has been called into question.⁶

In Section II, this Comment explores the common-law foundation of the classification and detention of prisoners of war (“POWs”) and other combatants, including the most significant of the recent United States Supreme Court (“Supreme Court”) decisions on the issue. Section III discusses the various international treaties and conventions relevant to classification of detainees. Section IV then analyzes how the treaties and conventions discussed in Section III have been interpreted and legally enacted in the United States, specifically through the Military Commissions Act of 2006⁷ (“MCA”). Finally, in Section V, this Comment analyzes the reasoning of the Supreme Court cases construing detainee classifications and contrasts them with the texts of the various relevant international treaties and of the MCA.

Through this analysis, this Comment develops a framework for understanding the roles that should be played by international treaties, military tribunals, and United States’ court decisions. The events of September 11, 2001 have placed the United States in a difficult position where it must balance the competing interests of civil liberties and security from terrorist attacks. In addition, this Comment attempts to illustrate the gravity and potentially dangerous consequences of reinterpreting the United States’ obligations under the Geneva Conventions.

3. Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950) [hereinafter *UCMJ*].

4. Although the treatment of non-combatants was discussed briefly in the Geneva Conventions III and IV, a comprehensive plan for trial and sentencing of the various possible classifications of detainees has yet to be established. See generally *Third Geneva Convention*, *supra* note 2; *Fourth Geneva Convention*, *supra* note 2.

5. See generally *Ex Parte Quirin*, 317 U.S. 1 (1942) [hereinafter *Quirin*].

6. See William Haynes, *Enemy Combatants*, Council on Foreign Relations (2002), http://www.cfr.org/publication/5312/enemy_combatants.html (last visited 10/16/2007).

7. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 [hereinafter *MCA*].

II. Common Law Background

The law of war, or the common law concerning acceptable practices while engaged in war, is referred to as “*jus in bello*.”⁸ It has developed over time through treaties, and through common military practice, such as the Nuremberg War Trials.⁹ At the time of the Supreme Court’s decision in *Ex Parte Quirin* (“*Quirin*”),¹⁰ much of the law of war was still truly “common” law based on traditional practices and treatises on the subject.¹¹ This common law provided a foundation for the Court’s decision in *Quirin*.¹² Today, in contrast, treaties such as the Geneva and Hague Conventions and the United Nations Charter have codified much of the law of war.

The United States Congress recently enacted the MCA,¹³ which defined the classifications of detainees and established the constitutionality of and procedures for military commissions. Nevertheless, the Supreme Court laid the groundwork for this legislation in cases such as *Quirin*.¹⁴

A. Ex Parte Quirin

Quirin clearly established the United States’ interpretation of the difference between detainees entitled to treatment as prisoners of war (“lawful combatants”),¹⁵ and detainees not entitled to such treatment

8. The other half of the law of war is called “*jus ad bellum*,” and refers to justifications for going to war. Condorelli & Naqvy, *The War Against Terrorism and Jus in bello*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM, 30-33 (Andrea Bianchi ed., 2004); see also *Changes to the Department of Defense Law of War Program*, Army Lawyer, 2006-AUG ARMY LAW. 23, 25.

9. See generally Theodor Meron, *From Nuremberg to The Hague*, 149 MIL. L. REV. 107 (1995) [hereinafter *Nuremberg to The Hague*]; Theodor Meron, *War Crimes Law Comes of Age*, 92 AJIL 462 (1998) [hereinafter *War Crimes Law*].

10. *Quirin*, 317 U.S. at 31.

11. See generally *Nuremberg to The Hague*, *supra* note 10; see also *War Crimes Law*, *supra* note 9.

12. *Quirin*, 317 U.S. at 31.

13. See generally MCA, *supra* note 7.

14. See generally *Quirin*, 317 U.S. 1. It is worth noting that issues regarding *habeas corpus* and congressional authority to establish tribunals were considered as early as 1866 in the case of *Ex Parte Milligan*, 71 U.S. 2 (1866). However, the ruling of the Supreme Court was only that civilians could not be tried by tribunal in a jurisdiction where the courts were still operating. See generally *Ex Parte Milligan*, 71 U.S. at 40-46. Moreover, this holding could easily be construed to apply only to certain classes of lawful combatants.

15. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.

Id. at 31.

(“unlawful combatants” or “enemy belligerents”).¹⁶ In support of this distinction, the Supreme Court made repeated references to the “law of war” and the “law of nations” throughout the case.¹⁷

As mentioned, when *Quirin* was decided during the 1940’s, the law of war was largely dictated by common law. The Second, Third, and Fourth Geneva Conventions were still a few years away,¹⁸ and the Hague Conventions of 1899 and 1907 left in place much of the common law of war.¹⁹ Nevertheless, the common law already contained firmly established and internationally recognized principles. One such principle was the rule that combatants who do not wear “fixed and distinctive emblems” are not entitled to treatment as prisoners of war.²⁰ The Court recognized this and based its distinctions between types of detainees on the idea that this standard was already firmly established, “[b]y universal agreement and practice.”²¹

Quirin involved a trial by military tribunal of eight men accused of being German saboteurs who entered the United States covertly in June of 1942.²² All eight men landed on the beaches of Long Island and Florida carrying supplies of explosive devices while wearing complete or partial German uniforms.²³ Immediately after landing, however, the men buried their uniforms and proceeded to their destinations in Chicago and New York in civilian clothing. All eight men were taken into custody shortly thereafter in New York and Chicago by the Federal Bureau of Investigation.²⁴

President Franklin D. Roosevelt (“Roosevelt”) appointed a military commission to try the men for offenses committed against the law of

16. *Id.*

17. *Id.*

18. *The Geneva Conventions: The Core of International Humanitarian Law*, International Committee of the Red Cross (2004), <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions> (last visited 11/7/2007).

19. The Hague Convention of 1907, to which the United States was a signatory, had outlined the basic definition of a “lawful belligerent” but had retained the common “law of war,” “[u]ntil a more complete code of the laws of war has been issued.” *Quirin*, 317 U.S. at 35.

20. Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who though combatants do not wear “fixed and distinctive emblems.” And by Article 15 of the Articles of War Congress has made provision for their trial and punishment by military commission, according to “the law of war.”

Id.

21. *Id.* at 30.

22. *Id.* at 22.

23. “[A]n officer of the German High Command . . . had instructed them to wear their German uniforms while landing in the United States.” *Id.* at 23.

24. *Quirin*, 317 U.S. at 22.

war.²⁵ Roosevelt also issued a proclamation authorizing trial by military tribunal for similar offenders.²⁶ Roosevelt's proclamation specified that persons captured entering the United States with the intention of causing harm to its people or property were not entitled to the protection of the United States court system.²⁷

After trial and sentencing by the tribunal, all eight men filed petitions for *habeas corpus* with the U.S. District Court for the District of Columbia.²⁸ They argued the President was without authority to order trial by military tribunal.²⁹

The District Court denied these motions and the men subsequently filed motions for leave to file petitions of *habeas corpus* with the Supreme Court.³⁰ The Supreme Court granted *certiorari*, and affirmed the order of the District Court denying the petitions.³¹

In its decision, the Court established that the President did have the authority to order certain offenses tried before military commissions. The Court concluded that at least one of the charges against the detainees "alleged an offense which the President is authorized to order tried by military commission."³² The Court further concluded that Roosevelt's order establishing the commission itself was lawful and that the authorization and makeup of the commission were also constitutional and lawful.³³ The President derived this authority from Article 15 of the Articles of War,³⁴ which gave the President the power to enforce the

25. The proclamation reads, in part:

All persons who are subjects, citizens, or residents of any Nation at war with the United States or who give obedience to or act under the direction of any such Nation and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals; and that such persons shall not be privileged to seek any remedy . . . in the courts of the United States.

Proclamation 2561, 7 Fed. Reg. 5101 (July 2, 1942), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=16281> [hereinafter *Proclamation 2561*].

26. *Id.*

27. *Id.*

28. *Quirin*, 317 U.S. at 18.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 48.

33. *Quirin*, 317 U.S. at 48.

34. The Articles of War was the legislative predecessor to the current UCMJ, which was enacted on May 31, 1951. See *UCMJ*, *supra* note 3.

Articles of War,³⁵ as well as the law of war, through the creation of such commissions.³⁶

*B. Hamdi v. Rumsfeld*³⁷

The next significant development in judge-made law interpreting the United States' legal classifications of detainees came some fifty years after *Quirin* with the case of *Hamdi v. Rumsfeld* ("*Hamdi*"). This case arrived in the wake of the World Trade Center attacks of September 11, 2001. In this post-9/11 era, classification of detainees and the law of war grew dramatically in importance and media coverage. The increased media coverage of and interest in terrorism and detainees in the war on terror naturally served to increase public consciousness about these issues. As these issues grew in coverage and importance, they became more divisive, resulting in a great deal of politicizing by the two primary political parties.

In *Hamdi*, Justice O'Connor, writing for a plurality of the Court, recognized that the executive branch had the power to detain enemy combatants subject to very limited due process rights.³⁸ This power, however, did not extend to United States citizens.³⁹

The *Hamdi* case concerned a young man (Hamdi) captured in Afghanistan in late 2001. The United States Government alleged that Hamdi had been fighting alongside the Taliban, and detained him at Guantanamo Bay.⁴⁰ Shortly after his capture, it was discovered that

35. Regarding the authority of the president to enact military commissions, the Court said: "[W]e think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War." *Quirin*, 317 U.S. at 35-36. It is important here to note that Article 15 of the Articles of War has been replaced with the "substantially identical" Article 21 of the UCMJ. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 (2006) [hereinafter *Hamdan*].

36. 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. *Quirin*, 317 U.S. at 30-32, (quoting 10 U.S.C. §§ 1471-1593).

37. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) [hereinafter *Hamdi*].

38. *Id.*

39. *Id.*

40. *Id.* at 511-12. Guantanamo Bay is a United States naval base located on the island of Cuba. The Guantanamo Bay detainment camp, located on a portion of the naval base, was created in 2002 and is operated by Joint Task Force Guantanamo. *Afghan Prisoners Going to Gray Area: Military Unsure What Follows Transfer to U.S. Base in Cuba*, WASHINGTON POST, January 9, 2002. In addition to controversy over allegations of torture taking place in the camp since its creation in 2002, a legal firestorm has raged over whether detainees located in the camp are beyond the jurisdiction of the courts of the United States, since it is technically located within the territory of Cuba, a sovereign nation. Although the Supreme Court determined that detainees held at Guantanamo did have access to U.S. courts in *Rasul v. Bush*, 542 U.S. 466 (2004), this determination has

Hamdi was a United States citizen. Still, the Bush Administration argued that Hamdi's actions in Afghanistan made him an "enemy combatant."⁴¹ Consequently, the Administration asserted that he was not entitled to access to the United States court system.⁴²

Hamdi's father filed a petition for *habeas corpus* in the Eastern District of Virginia.⁴³ He claimed that Hamdi's detention, without access to legal counsel or notice of any charges pending against him,⁴⁴ was a violation of the Fourth and Fourteenth Amendments of the United States Constitution.⁴⁵

Justice O'Connor's opinion stated that the President had the authority to detain enemy combatants pursuant to the Authorization for Use of Military Force ("AUMF").⁴⁶ The AUMF stated, in relevant part, "the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."⁴⁷ The Court accordingly found that the detention of Hamdi as an enemy combatant was lawful under this act.⁴⁸ Nevertheless, Justice O'Connor asserted that Hamdi's status as a United States citizen entitled him to basic due process rights including the right to counsel and the right to notice of the charges against him.⁴⁹

C. Hamdan v. Rumsfeld⁵⁰

The case of *Hamdan v. Rumsfeld* ("Hamdan"), decided in the summer of 2006, clarified the classification and treatment of unlawful combatants.

In *Hamdan*, the Supreme Court found that the President had overstepped his bounds by creating military commissions to try unlawful combatants without congressional authorization.⁵¹ Furthermore, the Court held that the military commissions at issue were not mentioned in

been called into question by the MCA.

41. *Id.*

42. *Hamdi*, 542 U.S. at 511-12.

43. *Id.*

44. *Id.*

45. *Id.* U.S. CONST. amend. IV; U.S. CONST. amend. XIV.

46. *Hamdi*, 542 U.S. at 511-12; Authorization for Use of Military Force, 115 Stat. 224 (2001) [hereinafter *AUMF*].

47. *Id.*

48. "[W]e agree with the Government's alternative position, that Congress has in fact authorized Hamdi's detention, through the AUMF." *Hamdi*, 542 U.S. at 517.

49. *Id.* at 511-12.

50. *Hamdan*, 126 S. Ct. 2749.

51. *Id.* at 2775-76.

the AUMF⁵² or the Detainee Treatment Act (“DTA”)⁵³ and, consequently, were not authorized. This decision affirmed the relevance of the UCMJ, the Geneva Conventions, and the law of war in general and effectively limited the war power of the executive branch.

In November of 2001, Afghan forces captured Hamdan (a Yemeni citizen) in Afghanistan.⁵⁴ He was subsequently turned over to the United States military and transferred to Guantanamo Bay in 2002, where he was detained as an enemy combatant.⁵⁵ Over two years later, Hamdan was finally charged by the United States Government with conspiracy “to commit offenses . . . triable by military commission.”⁵⁶

Hamdan filed petitions for *habeas corpus* and *mandamus*,⁵⁷ arguing that the President was without the requisite authority to establish military commissions such as the one before which he was tried.⁵⁸ Hamdan based his argument on the grounds that military commissions were not authorized by either the AUMF⁵⁹ or the law of war to try the crime of conspiracy. In addition, Hamdan argued that conspiracy was not actually a violation of the law of war.⁶⁰ Finally, Hamdan contended that the military commission at issue did not offer the safeguards guaranteed to him by international law, such as the right to hear the charges against him, see the evidence against him, and challenge the witnesses presented against him.⁶¹

The Court of Appeals dismissed Hamdan’s petition on three

52. See generally AUMF, *supra* note 46.

53. *Hamdan*, 126 S. Ct. at 2776; Detainee Treatment Act of 2005, Pub. L. No. 109-148 § 1001, 119 Stat. 2739 [hereinafter *DTA*].

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

55. *Id.*

56. *Id.* at 2759. This charge is particularly interesting in light of the fact that it appears to be nothing more than a truism intended to guarantee a trial before a military commission.

57. A petition for mandamus is a document filed with a court requesting that court to order a public official to perform a certain action, believed by the petitioner to be within the scope of the official’s duties. A petition for *habeas corpus* (Latin for “you should have the body”) is a legal document filed with a court that requests relief from imprisonment by a detainee believing himself to be held unlawfully. ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY*, (NYU Press) (2001). Notably, the right of a detainee classified as an “unlawful combatant” to file a petition for *habeas corpus* has been eliminated by the MCA of 2006. See Section III *infra* for more information.

58. *Hamdan*, 126 S. Ct. at 2759. Hamdan did not challenge his status as an enemy combatant, perhaps because of the broad definition used by the government, defining the term as, “an 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.” *Id.* at 2761.

59. See generally AUMF, *supra* note 46.

60. *Hamdan*, 126 S. Ct. at 2759-61.

61. *Id.* at 2759.

independent grounds: (1) the Geneva Conventions were not judicially enforceable; (2) even if they were, Hamdan was not entitled to their protections; and (3) even if he was entitled to their protections, abstention was appropriate.⁶²

Relying in part on *Quirin*, Justice Stevens found that *habeas corpus* was available to Hamdan in spite of language in the DTA that the Court found inapplicable. The government argued unsuccessfully that the DTA had stripped United States courts of jurisdiction to hear such petitions.⁶³ The Court declined to rule on whether petitions for *habeas corpus* were still available to enemy combatants,⁶⁴ finding merely that the DTA was not retroactive.⁶⁵

Justice Stevens proceeded to consider the constitutionality of the military commission convened to try Hamdan.⁶⁶ The Court found that the military commission convened to try Hamdan was not authorized by any congressional act⁶⁷ and that the commission violated the UCMJ and the Geneva Conventions.⁶⁸

The Court held that neither the AUMF nor the DTA contain a specific provision authorizing the creation of military commissions, nor was this authority implied in either of the legislative acts.⁶⁹ The Court also scorned, without elaboration, the “controversial” decision by the Court in *Quirin* to rely on Article 15 of the Articles of War for authorization of military commissions.⁷⁰

Justice Stevens further discussed the three primary roles of military commissions under the traditional law of war, which are to: (1) substitute for civilian courts when martial law has been declared, (2) try civilians in occupied territory under temporary military rule, and (3) convene “incident to the conduct of war” in order to try those who have violated the law of war.⁷¹ Justice Stevens pointed out that the third role of military commissions is primarily a fact-finding role. Only the

62. *Id.* at 2794.

63. *Id.* at 2766-69.

64. This abstention may increase in importance in light of the MCA, which specifically eliminated the right of *habeas corpus* to those classified as unlawful combatants, should the Supreme Court choose to rule on the issue. *See generally MCA, supra* note 7.

65. *Hamdan*, 126 S. Ct. at 2765.

66. *Id.* at 2776-78.

67. *Id.*

68. *See generally id.* at 2749.

69. *Id.* at 2775-76.

70. “We have no occasion to revisit *Quirin*’s controversial characterization of Article of War 15 as congressional authorization for military commissions.” *Hamdan*, 126 S. Ct. at 2775.

71. *Id.* at 2776.

decision in *Quirin* has implicated this fact-finding role in modern times.⁷² The military commission that tried Hamdan was established in order to fulfill this third role but had overstepped its bounds. Justice Stevens explained that, "*Quirin* represents the high-water mark of military power to try enemy combatants for war crimes."⁷³ This statement, and others throughout the opinion, implied that the Court was uncomfortable with the use of military commissions in this case.

With regard to the procedures used by the military commission, the Court quoted Article 36 of the UCMJ.⁷⁴ Article 36 states that the President, though free within the boundaries of the UCMJ to prescribe regulations for the procedures of military commissions, is still bound by the UCMJ and no commissions may violate its rules.⁷⁵

Hamdan argued that the military commissions' practices of refusing to allow detainees to view the evidence against them and holding proceedings to which detainees are not admitted, violate UCMJ Article 36.⁷⁶ Without drawing any bright-line rule, the Court agreed with Hamdan that the military commissions at issue had overstepped the President's flexible but limited authority to set procedures for trial by military commission.⁷⁷

Finally, Hamdan argued that the procedures used by the military commission also violated the Geneva Conventions.⁷⁸ Partially dismissing the government's claim that the Geneva Conventions were inapplicable in that Al Qaeda is not a signatory to the Conventions, the Court concluded that certain provisions of the Geneva Conventions nevertheless apply:

There is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories. . . . One such provision prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."⁷⁹

72. *Id.* at 2777.

73. *Id.*

74. *Id.* at 2791.

75. [P]rocedure . . . 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 . . . but which may not be contrary to or inconsistent with this chapter.

Hamdan, 126 S. Ct. at 2791.

76. *Id.* at 2791.

77. *Id.* at 2792.

78. *Id.* at 2775-76.

79. *Hamdan*, 126 S. Ct. at 2796.

The Court found that this provision alone required reversal of the case. Justice Stevens reasoned that, “the procedures adopted to try Hamdan . . . deviate from those governing courts-martial in ways not justified . . . and for that reason . . . fail to afford the requisite guarantees.”⁸⁰ Justice Stevens went on to explain that the procedures employed by the commissions must comply with the UCMJ and the “rules and precepts of the law of nations.”⁸¹

The most flagrant violation by the commissions, according to the Court in *Hamdan*, was the exclusion of the accused detainee from the proceedings.⁸² “Commission Order No. 1” permits the government to exclude the accused detainee and his civilian counsel from “ever learning what evidence was presented during any part of the proceeding.”⁸³

In further violation of the rights of the accused, any evidence was admissible at hearings before these commissions if it would have “probative value to a reasonable person.”⁸⁴ Hearsay and other impermissible testimony, even when obtained through torture, would be admitted into evidence in order for the government to obtain its conviction.

The Court also concluded that the conflict with Al Qaeda fell within the ambit of Common Article III of the Geneva Conventions.⁸⁵ Common Article III provides limited protections to non-signatories involved in conflicts that are “not international in scope.”⁸⁶ However, the Court ruled that Common Article III should be read as broadly as possible; the conflict with Al Qaeda was “not international in scope” because Al Qaeda was neither a nation-state nor a signatory to the Geneva Conventions.⁸⁷

III. Applicable International Conventions

The Geneva Conventions are composed of four separate treaties, drafted in Geneva, Switzerland between 1864 and 1949.⁸⁸ These treaties have been amended by three additional “protocols,” added from 1977

80. *Id.* at 2798.

81. In perhaps the strongest statement in the opinion against the procedures employed by the commission, the Court wrote: “The procedures that the Government has decreed will govern Hamdan’s trial by commission violate these laws.” *Id.* at 2787.

82. *Id.*

83. *Id.*

84. *Hamdan*, 126 S. Ct. at 2787.

85. *Id.* at 2796.

86. *Id.*

87. *Id.*

88. *A Brief History of the Laws of War*, Society of Professional Journalists (2003), <http://www.genevaconventions.org/> (last visited 10/16/2007) [hereinafter *Brief History of the Laws of War*].

through 2005.⁸⁹ Each of the four Geneva Conventions contains so-called Common Articles I, II, and III.⁹⁰ These articles are called “common” because they are in-fact common to all four Geneva Conventions. These govern the duty of the signatories⁹¹ to enforce the conventions (Common Article I), the scope of the conventions (Common Article II), and minimum provisions that each signatory must provide to all persons within a signatory’s territory in any conflict “not of an international character” (Common Article III).⁹²

The recent controversies⁹³ regarding interpretation of the Geneva Conventions have largely surrounded Common Article III of the Geneva Conventions and Article IV of the Third Geneva Convention.⁹⁴

Common Article III contains a number of minimum provisions to be applied in times of war. One of the most significant of these minimum provisions is the clause prohibiting, “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.”⁹⁵ This provision is applicable only to certain specified persons, including “members of armed forces who have laid down their arms.”⁹⁶ It also applies only to conflicts “of an international character.”⁹⁷ The interpretation of these criteria has been a subject of vigorous debate because it determines which guarantees and rights must

89. Protocol I Additional to the Geneva Conventions of 12 August, 1949, and relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3, art. 86(2) (1979) [hereinafter *Protocol I*]; Protocol II Additional to the Geneva Conventions of 12 August, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (June 8, 1977), 26 I.L.M. 561, 1125 U.N.T.S. 609 [hereinafter *Protocol II*]; Protocol III Additional to the Geneva Conventions of 12 August, 1949, and relating to the Adoption of an Additional Distinctive Emblem, Dec. 8, 2005, <http://www.icrc.org/ihl.nsf/FULL/615>, (last visited 10/16/2007) [hereinafter *Protocol III*]; see also Brief History of the Laws of War, *supra* note 88.

90. *First, Second, Third, & Fourth Geneva Conventions*, *supra* note 2.

91. A signatory is a nation-state that chooses to literally sign a treaty, thereby becoming bound by its provisions. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 332 (dated May 23, 1969 and entered into force Jan. 27, 1980) [hereinafter *Vienna Convention*].

92. See generally Brief History of the Laws of War, *supra* note 88.

93. Lionel Beehner, *The Geneva Convention Debate*, Council on Foreign Relations (2006), http://www.cfr.org/publication/11469/geneva_convention_debate.html (last visited 10/16/2007); *We Don't Care about International Law*, FOIA Centre (2006), http://www.foiacentre.com/newsgbay060304_03.html (last visited 10/16/2007); Joseph P. Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1, 30-34 (2004).

94. Lionel Beehner, *The United States and the Geneva Conventions*, Council on Foreign Relations (2006), <http://www.cfr.org/publication/11485/> (last visited 10/16/2007); see generally Geneva Convention III, *supra* note 3.

95. See generally Third Geneva Convention, *supra* note 2.

96. *Id.*

97. *Id.*

be provided to detainees or unlawful combatants.

Article IV of the Third Geneva Convention, defining a “prisoner of war,”⁹⁸ has been interpreted by the Bush Administration not to include “unlawful combatants” captured in the “war on terror.”⁹⁹ As mentioned above in Part I, the term “unlawful combatant” was coined in the 1940’s around the time of *Quirin*, but was never used in the Geneva Conventions.

Article V of the Third Geneva Convention states in part that those who fall into the hands of an enemy after committing a “belligerent act” should be extended certain minimum protections where doubt exists as to their legal status.¹⁰⁰ Further, the Convention states that, “such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”¹⁰¹ These provisions establish that detainees must be treated as prisoners of war, at least until a “competent tribunal” determines they do not satisfy the definition of a prisoner of war.

IV. Domestic Enactment of International Obligations Under the Geneva Conventions

Shortly after the decision in *Hamdan*, several sources reported that the Bush Administration was considering amending domestic law to reinterpret the United States’ obligations under Common Article III of the Geneva Conventions.¹⁰² The Supreme Court’s decision in *Hamdan*, discussed in Part I, held that current procedures used by the military commissions were in violation of the Geneva Conventions.¹⁰³ Although

98. The definition of someone entitled to be treated as a “prisoner of war” under the Third Geneva Convention, was interpreted by the Bush Administration in 2003 to be determined by the satisfaction of four conditions:

They would have to be part of a military hierarchy; they would have to have worn uniforms or other distinctive signs visible at a distance; they would have to have carried arms openly; and they would have to have conducted their military operations in accordance with the laws and customs of war.

Press Release, Office of the White House Press Secretary, Statement by the Press Secretary on the Geneva Convention, May 7, 2003, <http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html> (last visited 10/16/2007) [hereinafter *Statement on the Geneva Convention*].

99. *Statement on the Geneva Convention*, *supra* note 98; see generally *Third Geneva Convention*, *supra* note 2.

100. *Third Geneva Convention*, Art. V, *supra* note 2.

101. *Id.*

102. R. Jeffrey Smith, War Crimes Act Changes Would Reduce Threat of Prosecution, THE WASHINGTON POST, August 9, 2006, available at http://www.truthout.org/docs_2006/080906O.shtml [hereinafter *Threat of Prosecution*].

103. *Hamdan*, 126 S. Ct. at 2796, (quoting Geneva Convention III, *supra* note 2); *Hamdan v. Rumsfeld: The Legal Academy Goes To Practice*, 120 HARV. L. REV. 65, (2006) [hereinafter *Legal Academy*].

the Court did not comprehensively review the procedures used by the commissions, it held that the provisions of Common Article III applied to detainees held on United States territory.¹⁰⁴

The decision in *Hamdan* made it clear that the military commissions at issue would have to allow detainees access to their hearings, permit them to view the evidence against them, and probably limit the admission of hearsay evidence in order to be constitutional.¹⁰⁵ The Bush Administration believed that the concessions required by the Court would compromise national security and thus began to find a way around these standards.¹⁰⁶

In the fall of 2006, Congress passed the MCA in an attempt to answer the Supreme Court's decision in *Hamdan*.¹⁰⁷

The purpose of the act was to "authorize trial by military commission for violations of the law of war."¹⁰⁸ Within this broad framework, Congress also established a clear definition of "unlawful combatant," and eliminated both the right of *habeas corpus* for alien unlawful combatants,¹⁰⁹ and any potential causes of action arising under the Geneva Conventions brought by unlawful combatants.¹¹⁰

The MCA allows unlawful combatants¹¹¹ to be tried, as before *Hamdan*, with virtually no legal safeguards.¹¹² Unlawful combatants may find themselves facing vague charges such as "conspiracy to commit crimes triable by military commission," and unable to view the evidence supporting these charges.¹¹³ Even where the evidence is

104. *Hamdan*, 126 S. Ct. at 2796.

105. *Id.*

106. *Threat of Prosecution*, *supra* note 102.

107. Warren Richey, *Will the Supreme Court Shackle New Tribunal Law?*, THE CHRISTIAN SCIENCE MONITOR, 2006, available at <http://www.csmonitor.com/2006/1017/p01s02-usju.html> (last visited 10/16/2007) [hereinafter *New Tribunal Law*].

108. MCA, *supra* note 7, at 2602.

109. On the issue of the suspension of *habeas corpus*, there are several strong arguments against the constitutionality of the MCA based on its elimination of the right of *habeas corpus* for those determined to be unlawful combatants, possibly in violation of Article 1, Section 9, Clause 2 of the United States Constitution. "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." U.S. CONST. art. I, § 9, cl. 2; see Karen DeYoung, *Court Told It Lacks Power in Detainee Cases*, THE WASHINGTON POST, Oct. 20, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/10/19/AR2006101901692.html?nav=rss_nation/special.

110. See generally *Hamdan*, 126 S. Ct. 2749.

111. Whether the MCA applies only to unlawful enemy combatants is a question that has not yet been decided. William Glaberson, *Judge Throws Out Charges in Guantanamo Prison Case*, THE NEW YORK TIMES, June 4, 2007.

112. "The [MCA] rules permit the exclusion of a defendant from his trial if classified evidence is being presented, and the admission of hearsay and coerced statements as evidence." *New Tribunal Law*, *supra* note 107.

113. *Id.*

brought to light, hearsay evidence is admissible and the mere written notes of an interrogator can result in a conviction, which is obtained by a two-thirds vote of the commission.¹¹⁴ These rules nearly eliminate any legal rights or safeguards that may have been possessed by unlawful combatants under the Geneva Conventions.

In addition to removing the petition of *habeas corpus* from the legal arsenal of any detainee determined to be an unlawful combatant, the MCA also prohibits detainees awaiting legal classification from filing such a petition.¹¹⁵ This effectively gives the President the power to detain individuals indefinitely without charging them with any specific crime or offering them any legal recourse to challenge their detention.

The MCA was presented as a limitation and prohibition of torture by the military or government interrogators. While it is true that the MCA specifically limits the forms of interrogation or coercion that may be used against detainees, it also goes a long way towards eliminating liability of government actors for war crimes or torture committed against unlawful combatants.¹¹⁶

V. Analysis of the Concerns Regarding the Military Commissions Act of 2006

Congress and President Bush have redefined the obligations of the United States under the Geneva Conventions through these changes.¹¹⁷ This “re-writing” is not unconstitutional in and of itself, but it presents numerous issues regarding foreign policy and separation of powers among the Judicial, Legislative, and Executive Branches.

The language of the MCA explicitly acknowledges the authority of the President to interpret the nation’s obligations under the Geneva Conventions.¹¹⁸ This Comment does not question the existence of the constitutional authority of the President to interpret and enforce the provisions of an international treaty through appropriate legislation. Rather, this Comment questions the long-term consequences of this interpretation of international law and foreign policy, and whether the MCA is, as it claims, actually beyond the reach of the Supreme Court.

114. *MCA*, *supra* note 7, at 2610-14.

115. *Id.* at 2636.

116. Joanne Mariner, *The CIA, the MCA, and Detainee Abuse*, FindLaw, Nov. 08, 2006, <http://writ.news.findlaw.com/mariner/20061108.html> (last visited 10/16/2007).

117. Specifically, the MCA and Patriot Act.

118. [T]he President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.

MCA, *supra* note 7.

A. *Separation of Powers Concerns*

The authority of the President, with the concurrence of two-thirds of the Senate, to make treaties is grounded in the Constitution.¹¹⁹ Congress' power to enact legislation enforcing those treaties is similarly expressly permitted by the Constitution.¹²⁰ This power has been exercised through the MCA.

In order to avoid the inconvenient standards of Common Article III while staying technically within the boundaries of international law, the MCA employs blatant circular reasoning. The MCA accomplishes this by defining itself as a "constitutionally authorized interpretation of a treaty"¹²¹ that does not produce any grave violations of the Geneva Conventions.¹²² Further, the commission unashamedly defines the very commissions it authorizes to be "regularly constituted courts" offering the same judicial guarantees "indispensable to civilized peoples."¹²³ Congress included self-legitimizing provisions in its legislation instead of provisions that are objectively compliant with internationally-practiced norms.

Although treaty interpretation is a necessary and regular part of domestic enforcement of international treaties, it is not meant to be a legislative free-for-all.¹²⁴ By allowing breaches of treaties so long as they are not considered "grave,"¹²⁵ (presumably a subjective standard judged by the breaching signatory) the United States has entered into unknown and dangerous territory.¹²⁶

119. U.S. CONST. art. II, § 2, cl. 2.

120. *Id.* at art. I, § 1, 8 cl. 8, 10, 14, 17.

121. As provided by the Constitution and by this section, the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.

MCA, *supra* note 7, at 2632.

122. *Id.*

123. *Id.* at 2602.

124. *See generally Vienna Convention, supra* note 92.

125. Section 6 of the MCA, "Implementation of Treaty Obligations," states that the MCA:

fully satisf[ies] the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character.

MCA, *supra* note 7, at 2632.

126. Although some argue that reciprocity in terms of international humanitarian law is not necessary against terrorist actors. *See* Steven Ratner, *Rethinking the Geneva Conventions, Crimes of War* (2003), <http://www.crimesofwar.org/expert/genevaConventions/gc-ratner.html> (last visited 10/16/2007). This argument goes against basic principles in U.S. constitutional history (the Declaration of Independence's

The Vienna Convention on the Law of Treaties, though drafted in 1969 and non-retroactive, specifically allows signatories to pass “reservations”¹²⁷ to treaties at the time of ratification. This provides an argument, however attenuated, for at least the structural international legality of legislation such as the MCA, if not for its substantive provisions.

Although criticisms to this effect have been raised,¹²⁸ the Bush Administration has glossed over fears of negative long-term consequences to the MCA’s provisions, choosing instead to re-emphasize the importance of national security in light of the terrorist threats facing our nation. In President Bush’s own words, “The Military Commissions Act of 2006 will allow the continuation of a CIA program that has been one of America’s most potent tools in fighting the War on Terror.”¹²⁹

Despite the language in the MCA defining itself as constitutional, the Supreme Court has recently reasserted the principle that it is the “province and duty” of the Supreme Court to interpret the United States’ obligations under the treaties to which it is a signatory.¹³⁰ This indicates that, although the President and Congress may sign treaties and enact legislation enforcing them or interpreting them, the final say remains within the purview of the Supreme Court.¹³¹

With regard to congressional implication in the MCA that the Geneva Conventions are both good law and above judicial interpretation,

“inalienable rights”) and Common Article Three of the Geneva Conventions (rights and standards “indispensable” to “civilized peoples”).

127. Treaty “reservations” are essentially written amendments to the ratification of a treaty excluding or reserving certain portions of the treaty. Signatories may only pass reservations to non-essential portions of a treaty. *See Vienna Convention, supra* note 92.

128. Senator John McCain has been a vocal opponent to any use of torture by the United States military, emphasizing that it can only have negative long-term consequences in terms of reprisals against the United States and its soldiers. McCain, however, eventually supported the MCA and focused on its limitations on potential uses of force in interrogation. Surprisingly, this support came despite the failure of an amendment (S.A. 5088) by Senator Ted Kennedy which would have outlawed the use of waterboarding, a form of very controversial coercion/interrogation. Statement of Senator John McCain, On the Military Commissions Act, S. 3930, September 28, 2006; *see also*, Carlos Vazquez, Hamdan and the Geneva Conventions, Georgetown Law Faculty Blog (2006), http://gulcfac.typepad.com/georgetown_university_law/2006/06/hamdan_and_the_.html (last visited 10/16/2007) [hereinafter *Vazquez Blog*].

129. Statement by President Bush, White House Press Office, Office of the Press Secretary (Sept. 28, 2006), <http://www.whitehouse.gov/news/releases/2006/09/20060928-15.html> (last visited 11/7/2007).

130. Vazquez Blog, *supra* note 129, (citing *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006)).

131. On June 29, 2007, the Supreme Court granted petitions for *certiorari* in two cases challenging the MCA. These cases will be heard sometime during the term beginning in October, 2007. *See Boumediene v. Bush*, 127 S. Ct. 3078 (2007).

one writer argues, “[f]or a statute that purports to protect the courts’ Article III judicial power but deny courts the authority to look at all the law before them challenges one of the fundamental tenets of *Marbury v. Madison* itself.”¹³² This quote recognizes the logical breakdown internalized in the MCA’s attempt to avoid Supreme Court review in possible contravention of the firmly established principles of *Marbury v. Madison*.¹³³

B. *International Law/Norms Concerns*

To the extent that the MCA is a re-interpretation of the United States’ obligations under the Geneva Conventions, it is presumptively constitutional.¹³⁴ Nevertheless, the wisdom of interpreting the Geneva Conventions so as to limit the substantive rights granted by those treaties is questionable at best. Through this legislation, Congress and the President have interpreted the Geneva Conventions in a manner that effectively defines its substantive provisions (at least as applied to unlawful combatants) into obsolescence.

The Supreme Court in *Hamdan* implied that the practices of the military tribunals were in violation of Common Article III of the Geneva Conventions.¹³⁵ This implication was based in part on substantive violations. For instance, military tribunals are used instead of “regularly constituted court[s],” which provide judicial guarantees recognized as “indispensable by civilized peoples.”¹³⁶

Justice Stevens in *Hamdan* rejected the Bush Administration’s argument that Common Article III did not apply to all detainees because the conflict with al Qaeda was not a conflict of an “international character.”¹³⁷ Consequently, all detainees captured pursuant to this conflict were entitled to the minimum protections provided by Common Article III.¹³⁸ Congress, in the MCA, explicitly rejected the minimum

132. Deborah N. Pearlstein, *Saying What the Law Is*, 1 HARV. L. POL’Y REV (online) (Nov 6, 2006), <http://www.hlpsonline.com> (last visited 10/16/2007).

133. See *Marbury v. Madison*, 5 U.S. 137 (1803).

134. As provided by the Constitution and by this section, the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.

MCA, *supra* note 7, at 2632 (This assumption puts aside questions of executive or congressional aggrandizement of federal judicial authority, as considered in Subsection A above.).

135. *Hamdan*, 126 S. Ct. at 2796.

136. *Third Geneva Convention*, *supra* note 2.

137. *Hamdan*, 126 S. Ct. at 2796.

138. *Id.*

protections offered by Common Article III.¹³⁹ It will be interesting to see whether the Supreme Court chooses to press the issue, or defer to Congressional judgment.

Not wishing to be confined by standards recognized as “indispensable by civilized peoples,”¹⁴⁰ the Bush Administration worked with Congress to pass the MCA. This was an attempt not only to comply with the Supreme Court’s decision in *Hamdan* regarding authorization of military commissions, but also to subvert the effect of the decision with regard to detainee rights.¹⁴¹

As a result of this interpretation, the definition of “unlawful combatants” has been completely removed from the protections of the Geneva Conventions.¹⁴² The Geneva Conventions are not relevant because they no longer hold any real rights for most detainees.¹⁴³ Standards once found by the United States to be “indispensable to civilized peoples” have been easily and conveniently discarded. The President now has final authority to define “unlawful combatant,” and determine what rights that individual will or will not receive.¹⁴⁴

One of the most interesting, and perhaps far-reaching, changes brought about by the MCA is the elimination of any cause of action or right for detainees arising under the Geneva Conventions. The provision establishing this reads, “[n]o alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva

139. *MCA*, *supra* note 7, at 2602.

140. *Third Geneva Convention*, *supra* note 2.

141. *See generally Hamdan*, 126 S. Ct. 2749.

142. *MCA*, *supra* note 7, at 2601.

143. *Id.* at 2602.

144. Alison Nathan of Fordham University School of Law expressed a very strong response to the MCA in a recent article.

Pursuant to the habeas-stripping provision, any non-U.S. citizen who has been or will be swept up by the military, the CIA, or our allies and transferred to a secret black-site or Guantanamo Bay, or rendered to another country where they are held and interrogated at the behest of the U.S. government, may no longer have any recourse to a U.S. court. As a result, the administration will have no obligation to put forward to an independent branch of government even a minimal explanation of the basis for a potentially indefinite detention. Nor will there exist any mechanism to check military or CIA abuses, including torture, of detainees. Whatever rights to humane treatment under the Geneva Conventions that remain following the “compromise” between the White House and the Republican Senators (and there is serious question as to whether this was indeed a compromise or a capitulation to the White House) will be meaningless since the habeas-stripping provision unquestionably ensures that those rights will find no day in court and no remedy.

Alison Nathan, *History Starts Today: the Perils of Habeas-Stripping*, Jurist Legal News & Research (2006), <http://jurist.law.pitt.edu/forumy/2006/09/history-starts-today-perils-of-habeas.php> (last visited 10/16/2007).

Conventions as a source of rights.”¹⁴⁵

The MCA clearly established that there are no individual causes of action under the Geneva Conventions. Not even the Supreme Court in *Hamdan* disputed this conclusion.¹⁴⁶ However, these treaties are still binding upon all signatories. As the Court explained, “[t]he question whether the Conventions are judicially enforceable is quite separate from the question whether the Conventions are binding.”¹⁴⁷

VI. Conclusion

The events of September 11, 2001 placed a tremendous amount of pressure on President Bush and Congress to secure American citizens against future acts of terrorism. As Niccolo Machiavelli pointed out long ago¹⁴⁸ (and Benjamin Franklin warned),¹⁴⁹ people willingly sacrifice liberty in exchange for increased security in times of danger.

Machiavelli understood that people often confuse liberty and security, and are thus willing to exchange the one for the other.¹⁵⁰ Consequently, in times of war or insecurity, a leader can aggrandize his or her authority by offering the citizens increased security from harm in exchange for various liberties.

It is an established phenomenon (or more aptly put, construct of social behavior) that people are willing to accept restraints upon freedoms in times of great danger. The internment of Japanese-Americans during World War II provides a modern example. Although the idea of locking up 110,000 men, women, and children because of their ethnicity¹⁵¹ would seem absurd to nearly everyone in the United States today, it was quite widely accepted in 1942, and even upheld by the Supreme Court in cases such as *Korematsu v. United States*.¹⁵² Although there are obvious differences in scale and application between the Japanese-American internment program and treatment of detainees under the MCA, the motivating principle behind the legislation remains

145. *MCA*, *supra* note 7, at 2602.

146. *See generally Hamdan*, 126 S. Ct. 2749.

147. *Vazquez Blog*, *supra* note 129.

148. Niccolo Machiavelli, *Discourses on Livy*, in *The Chief Works and Others*, (A. Gilbert trans., Duke University Press) (1965) [hereinafter *Discourses on Livy*]; Niccolo Machiavelli, *The Prince*, (Q. Skinner and R. Price eds., Cambridge University Press) (1988) [hereinafter *The Prince*].

149. With his famous quote, “those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety.” This statement is generally attributed to Benjamin Franklin, and was used in the title of the work, AN HISTORICAL REVIEW OF THE CONSTITUTION AND GOVERNMENT OF PENNSYLVANIA (1759).

150. *See generally Discourses on Livy*, *supra* note 148; *The Prince*, *supra* note 148.

151. Summary of *Korematsu v. United States*, available at <http://usinfo.state.gov/usa/infousa/facts/democrac/65.htm> (last visited 10/16/2007).

152. *See Korematsu v. United States*, 323 U.S. 214 (1944).

the same.

The idea of exchanging liberty for security helps to understand how legislation such as the Patriot Act¹⁵³ and the MCA have been passed by Congress and, for the most part, accepted by the American people.¹⁵⁴ The collapse of the World Trade Center towers and the deaths of nearly 3,000 American citizens on September 11, 2001 had a strong psychological impact on the nation, as “predicted” by Machiavelli. After 9/11, most people were willing to allow the FBI to search library records¹⁵⁵ or allow Congress to eliminate the right of *habeas corpus* from those who the President deems dangerous enough to receive the title “unlawful combatant.”¹⁵⁶

Increased security may be purchased at the cost of civil liberty, but a balance must be found between the two. Of what worth is increased security from terrorist attacks if we must give up, or refuse to offer to others, the liberties (the standards recognized as “indispensable to civilized peoples”) we enjoy? Some may argue that liberties are of little value if we are not alive to enjoy them. Nevertheless, no person and no combatant, lawful or unlawful, should be denied the principles and rights that Americans hold dear and that are espoused in the Geneva Conventions based upon any technicality or legal classification.

153. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56 [hereinafter *Patriot Act*].

154. The Patriot Act was the first in a series of laws passed under the Bush Administration after September 11, 2001 that significantly reduced civil liberties in exchange for security against terrorism. (Further substantive information regarding the Patriot Act is beyond the scope of this comment, but is available at the Library of Congress site shown). To further illustrate its widespread acceptance, the Act was passed in the Senate by a vote of 98 to 1, and in the House by a vote of 357 to 66. Library of Congress, H.R. 3162 Vote Summary, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR03162:@@L&summ2=m&> [hereinafter H.R. 3162 Vote Summary].

155. This is in regard to a provision of the Patriot Act that, though not directed specifically at libraries, allows the FBI to order the production by a third person of books and records. H.R. 3162, Pub. L. No. 107-56, Title II, Sec. 215.

156. *MCA*, *supra* note 7, at 2636.

