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Douglas A. Hass

Indiana University School of Law

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Crafting Military Commissions Post-*Hamdan*: The Military Commissions Act of 2006

DOUGLAS A. HASS*

In June 2006, the Supreme Court invalidated President Bush's military commission rules in Hamdan v. Rumsfeld. The Court held that the military commissions fell outside of the military court system established by Congress, and ruled the commissions unconstitutional as applied to both citizens and non-citizens. Congress responded with the Military Commissions Act of 2006 ("the Act"), new legislation to establish military commissions. The Act fails to balance properly the Court's fairness requirements with the extraordinary demands placed on the laws of war by terrorism.

This Note summarizes whether terrorist attacks implicate the laws of war, what protections are due parties detained in the War on Terror, and concludes that only the laws applicable to non-international armed conflicts govern Al Qaeda's attacks. After examining Justice Kennedy's safe harbor in his Hamdan concurrence, the Note considers the procedures of the Military Commissions Act of 2006. In light of the Court's decision in Hamdan, as well as the provisions of the Geneva Conventions that it incorporates, the Military Commissions Act fails to uphold the fairness standards expressed by the Court. The Act would require significant revisions before it could withstand constitutional scrutiny, even in wartime.

INTRODUCTION

On September 11, 2001, Al Qaeda terrorists attacked the United States killing nearly 3,000 innocent civilians. The death toll surpassed the previous largest loss of life due to a single terrorist attack, the Beslan school massacre in North Ossetia.¹ Al Qaeda had attacked the United States several times over the previous decade and claimed responsibility for the September 11 attacks.² Following the attacks, the United States commenced several military and legal actions against terrorist groups, including Al Qaeda as the most prominent group. Among many orders and procedural changes, the administration of President George W. Bush issued a military order claiming that the executive branch could detain "enemy combatants" for the duration of hostilities.³

* J.D. Candidate, 2008, Indiana University School of Law—Bloomington. Special thanks to the University of Auckland Faculty of Law, Professor Kevin Jon Heller, and Dean Rosemary Tobin for providing the author with a unique opportunity and the necessary accommodations to write this paper. Any errors and oversights are solely attributable to the author.

1. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 311 (2004) [hereinafter 9/11 COMMISSION REPORT]. See J.F.O. McAllister & Paul Quinn-Judge, *Defenseless Targets*, TIME EUROPE MAGAZINE, Sept. 5, 2004, <http://www.time.com/time/europe/html/040913/story.html>. In the Beslan school massacre, Chechen rebels killed nearly 350 hostages. *Id.*

2. 9/11 COMMISSION REPORT, *supra* note 1, at 59–61 (listing previous attacks by Al Qaeda in Somalia in 1992 and 1993, the World Trade Center in 1993, Saudi Arabia in 1995 and 1996, and the U.S.S. Cole in 2000).

3. Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War

Based on the administration's guidance, the Department of Defense subsequently issued its own order specifying the procedures that the military would use to try these enemy combatants before military commissions.⁴

In June 2006, the Supreme Court invalidated these military commission rules in *Hamdan v. Rumsfeld*.⁵ The Court held that the military commissions fell outside of the "integrated system of military courts and review procedures" established by Congress and ruled the commissions unconstitutional as applied to both citizens and non-citizens.⁶ Congress responded with the Military Commissions Act of 2006, new legislation to establish military commissions. Despite the extraordinary demands placed on the laws of war by terrorism, the Act fails to address the fairness requirements the Court reasserted in *Hamdan*. The Act structured military commissions so that a single authority with a stake in the outcome controls virtually every key aspect of the process.

This Note argues that, in light of the Court's decision in *Hamdan* and the provisions of the Geneva Conventions, the Military Commissions Act, as currently enacted, does not withstand constitutional scrutiny, even in wartime. Part I summarizes and analyzes the *Hamdan* decision. Part II examines whether terrorist attacks implicate the laws of war. Using Al Qaeda as an example, Part III concludes that only the laws applicable to non-international armed conflicts govern terrorist attacks. Part III also outlines the level and type of protections due parties detained by the United States incident to the War on Terror. Here, the Note disagrees with the International Committee of the Red Cross and finds that the Geneva Conventions and the later Additional Protocols support the Bush administration's classification of War on Terror detainees as unlawful combatants. Part IV briefly outlines the military tribunal structure that preceded *Hamdan* and acted as a foundation for Bush's Military Order. Finally, in Part V, the Note evaluates the procedures of the Military Commissions Act of 2006 in light of *Hamdan* and the safe harbor for military commissions outlined by both Justice Kennedy and the *Hamdan* majority.

I. SUMMARIZING *HAMDAN*

The *Hamdan* decision recited a complicated litany of arcane questions of domestic law, customary international law, Geneva Convention interpretations, the Uniform Code of Military Justice (UCMJ), and jurisdiction. A four-Justice plurality signed the entire opinion written by Justice Stevens.⁷ Justice Kennedy joined the plurality to create a five to three majority in all but Part V and a small part of Part VI of the opinion.⁸ Justice Kennedy did not agree with the plurality on the question of applying

Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter Military Order].

4. Department of Defense Commission Order No. 1 (Mar. 21, 2002) available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> (last visited Feb. 24, 2006).

5. 126 S. Ct. 2749 (2006).

6. *Id.* at 2770 (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975)). This Note examines only non-citizen combatants as defined by the Military Order.

7. *Id.* at 2759.

8. *Id.* at 2775, 2797. Specifically, Justice Kennedy did not join the majority for Part VI-d-iv. *Id.* at 2797. That Part, along with Part V, applied the Geneva Conventions directly to military commissions rather than filtering the requirements through the UCMJ. *Id.* Justice Roberts did not participate in *Hamdan*, having heard the case as a judge on the D.C. Circuit Court prior to

Common Article three of the Geneva Conventions to the case, seeing no reason to decide the question.⁹ Justice Stevens's opinion addressed three key issues that also affect the Military Commissions Act. The first two issues involved the laws of war. Justice Stevens outlined the framework of acceptable tribunals under the Uniform Code of Military Justice (UCMJ), and applied what the plurality viewed as overlapping Geneva Conventions requirements. Finally, Justice Stevens provided a basic legislative safe harbor for the President and Congress that Justice Kennedy refined further in his concurrence.

First, the Court held that Congress must set the parameters for any military commissions,¹⁰ barring an "emergency [that] prevents consultation."¹¹ The Court drew parallels to its line of separation-of-powers cases, specifically *Ex parte Milligan*¹² and *Youngstown Sheet & Tube Co. v. Sawyer*.¹³ In *Milligan*, the Court pointed to the Constitution's distinction between the conduct of war and prosecution for war offenses. While the President acts as Commander-in-Chief of the armed forces, Congress retains the power to "make Rules concerning Captures on Land and Water."¹⁴ Given this separation, the Court in *Milligan* rejected the position that the President could "institute tribunals for the trial and punishment of offences" except in "cases of controlling necessity."¹⁵

The *Hamdan* Court noted that its earlier decisions found Congressional authorization for the use of military tribunals, but only within the "limitations that Congress has, in proper exercise of its own war powers, placed on [the President's powers]."¹⁶ Congress did not specifically address the issue of military tribunals in its authorization for military action after September 11,¹⁷ nor in its later Detainee Treatment Act of 2005 (DTA).¹⁸

The Authorization for Use of Military Force (AUMF) provided the President with the ability:

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 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.¹⁹

his elevation to the Supreme Court. *Id.* at 2758–59.

9. *Hamdan*, 126 S. Ct. at 2749.

10. *Id.* at 2770.

11. *Id.* at 2799 (Breyer, J., concurring).

12. 71 U.S. 2 (1866).

13. 343 U.S. 579 (1952).

14. U.S. CONST. art. I, § 8, cl. 11.

15. *Milligan*, 71 U.S. at 139–40.

16. *Hamdan*, 126 S. Ct. at 2774 n.23 (citing *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

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

18. See Pub. L. No. 109-148, §§ 1001-06, 119 Stat. 2739 (2005) (to be codified at 10 U.S.C. § 801 and 42 U.S.C. §§ 2000dd to 2000dd-1).

19. AUMF, 115 Stat. at 224.

Reviewing the AUMF in an earlier detainee decision, the Court held that the authorization included the right of the President to convene *lawful* military commissions.²⁰

The DTA required the Secretary of Defense to submit procedures for Combatant Status Review Tribunals (CSRT) to Congress within six months, and outlined other general procedures.²¹ Congress provided numerous details about the review system, including evidentiary rules, scopes of review, limitations on appeals, and more. Like the AUMF, the DTA did not authorize the President to convene tribunals that differed from those authorized by the Uniform Code of Military Justice (UCMJ). As the Court noted, the DTA did nothing other than to acknowledge the tribunals' existence.²²

Having found no specific Congressional authority or guidance in either the AUMF or the DTA, the Court looked to existing laws governing military tribunals, specifically the UCMJ.²³ Previously, the Court had required that the "use of military commissions [comply] not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the 'rules and precepts of the law of nations'" including the Geneva Conventions.²⁴

To find support for ruling the tribunals unconstitutional, the *Hamdan* Court seized on the language of Article 36 of the UCMJ. At first glance, the Article allows the President to promulgate "[p]retrial, trial, and post-trial procedures" that "so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized" in United States courts.²⁵ However, the end of the first subsection and the entire second subsection qualify the President's power, requiring that any regulations "be uniform insofar as practicable."²⁶ The majority's opinion found that Military Commission Order No. 1, which established the actual military tribunal procedures for alien detainees, imposed requirements that differed from the UCMJ. The Court interpreted Article 26(b) of the UCMJ as requiring a sufficient showing that practicality dictated departure from the normal UCMJ standards referenced in that Article.²⁷ The Court then found that the government had failed to offer a sufficient basis for departing from the UCMJ's uniformity requirement. The majority cast doubt that the military commissions would face any actual difficulties in following the UCMJ's evidentiary procedures, or its provisions for impartial judges.²⁸ Accepting the Government's logistical contentions and showing deference to the President's determination that civilian court policies were impracticable, the Court rejected the nebulous "danger posed by international terrorism" as a justifiable reason for departing

20. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) ("[T]he capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942))).

21. § 1005, 119 Stat. at 2740.

22. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2775 (2006) ("The DTA obviously 'recognize[s]' the existence of the Guantanamo Bay commissions in the weakest sense . . .").

23. 10 U.S.C. §§ 801-950 (2000).

24. *Hamdan*, 126 S. Ct. at 2786 (quoting *Quirin*, 317 U.S. at 28).

25. 10 U.S.C. § 836(a) (2000).

26. 10 U.S.C. § 836(b) (2000).

27. *Hamdan*, 126 S. Ct. at 2791 (finding that "the 'practicability' determination the President has made is insufficient" to justify departing from UCMJ procedures).

28. *Id.*

from the UCMJ procedures.²⁹ The Court found that the UCMJ provided the only specific guidance, rejecting the government's contention that the AUMF or DTA could implicitly do so. Since the Bush administration presented no support for a departure other than the threat of terrorism, the Court rejected the President's authority to create the tribunals under the UCMJ.

Later in the opinion, the majority expanded this analysis further. While Justice Kennedy objected to applying the Geneva Conventions' Common Article 3 directly to the *Hamdan* case, he joined the rest of Justice Stevens's Part VI of the opinion. The remainder of this Part VI applied the Common Article 3 guarantees to the conflict through existing provisions of the UCMJ.³⁰ The Court identified three different situations where the United States had used military tribunals in the past. The third situation, those commissions "convened as an incident to war" described in the Court's decision in *Quirin*, applied to the *Hamdan* case.³¹ The facility at Guantanamo Bay and Hamdan's detention did not fit either of the other two models cited by the Court.³²

Although the Court doubted some of the government's charges against Hamdan, Part VI of the opinion ultimately considered how to apply Common Article 3 to the "War on Terror" (i.e., armed conflict with Al Qaeda and other terrorist groups). Returning to its World War II-era detention cases, *Ex parte Quirin*³³ and *In re Yamashita*,³⁴ the Court noted that the UCMJ not only required compliance with American common and statutory law, but also with the "rules and precepts of the law of nations . . . including, *inter alia*, the four Geneva Conventions signed in 1949."³⁵ Like the UCMJ, Common Article 3 of the Geneva Conventions acts as a further restraint on the President's ability to create military commissions.

To tie the restraints provided by Common Article 3 to the UCMJ, the Court overturned the finding by the D.C. Circuit Court that the conflict with Al Qaeda did not fall under the Article's "conflict not of an international character." The Court disagreed with the assertion that courts should read the term "international character" narrowly without regard for its context. The majority instead opted for its own literal interpretation, observing that "international" merely referred to conflicts between sovereigns, and that "a non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other."³⁶ While the commentaries to the Geneva Conventions suggest the drafters intended the non-

29. *Hamdan*, 126 S. Ct. at 2792. Justice Thomas criticized this broad interpretation, arguing that Article 36(b)'s uniformity requirement either only applied to "uniformity across the separate branches of the armed services" or did not apply because the UCMJ recognizes that "different tribunals will be constituted in different manners and employ different procedures." *Hamdan*, 126 S. Ct. at 2842 (Thomas, J., dissenting).

30. See *supra* note 9 and accompanying text.

31. *Hamdan*, 126 S. Ct. at 2776 (internal citation omitted).

32. *Id.* The Court cited military commissions in times of martial law and in occupied enemy territory where no civilian government operated as the other two inapplicable situations.

33. 317 U.S. 1, 28 (1942).

34. 327 U.S. 1, 20–21 (1946).

35. *Hamdan*, 126 S. Ct. at 2786 (quoting *Quirin*, 317 U.S. at 28) (italics in original).

36. *Hamdan*, 126 S. Ct. at 2796 (citing CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1351 (1987)).

international conflicts category to protect the rights of domestic rebel groups in a conflict with a sovereign government,³⁷ other portions of the commentaries suggest “that the scope of the Article must be as wide as possible.”³⁸ The Court supported this interpretation by citing cases from the International Court of Justice³⁹ and the International Criminal Tribunal for the Former Yugoslavia (ICTY).⁴⁰

Having established that Common Article 3 applied to the Al Qaeda conflict, and that the UCMJ incorporated the Geneva Conventions as a whole as a part of the “laws of war,” the Court held that the military commissions established by Commission Order No. 1 violated Common Article 3’s basic protections. Since the tribunals violated the UCMJ, they could not meet the requirement in Common Article 3 that the government try Hamdan in a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”⁴¹ Under the Court’s interpretation of the UCMJ, the military commissions were not “regularly constituted” because of the deviations from the procedural protections in the UCMJ.

II. DOES COMMON ARTICLE 3 APPLY DIRECTLY TO THE WAR ON TERROR?

The *Hamdan* Court split on the question of whether Common Article 3 applied to the conflict with Al Qaeda and other facets of the War on Terror. Justice Kennedy did not join the plurality in this portion of the decision, leaving an open question of how—or whether—to apply Common Article 3. Specifically, the Court failed to resolve clearly the status of the War on Terror in light of the Geneva Conventions’ definition of “armed conflict.” By only applying the Conventions through the UCMJ, the Court also allowed Congress and the President an opportunity to revise the UCMJ in an attempt to decouple the Conventions entirely.⁴²

Certain questions about the application of the Geneva Conventions have simple answers though. Common Article 2 provides that “the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.”⁴³ Under the Geneva Conventions, Al Qaeda’s September 11 attacks did not create an “international armed conflict” since Al Qaeda did not represent Afghanistan or any other High Contracting Party or other recognized international group.⁴⁴ Common Article 3, as the *Hamdan* Court noted,

37. *Id.* (citing 3 COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 36–37 (Jean de Preux, ed., 1960)).

38. *Id.*

39. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 114 (June 27) (Common Article 3 “constitute[s] a minimum yardstick” of protection in all international and non-international conflicts, and not just armed conflicts.).

40. *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 102 (Oct. 2, 1995) (“[W]ith respect to the minimum rules in Common Article 3, the character of the conflict is irrelevant.”).

41. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3320 [hereinafter Third Convention].

42. See *infra* Part V.B (discussing the Military Commissions Act’s attempted decoupling from the UCMJ).

43. Third Convention, *supra* note 41, art. 2, ¶ 1, 6 U.S.T. at 3318.

44. Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1, 12 (2003).

applies to “armed conflicts not of an international character” and “regulate[s] conflicts between states and sub-state armed groups” regardless of state boundaries.⁴⁵ Given its intended broad application,⁴⁶ courts face difficulties in defining the point at which a disturbance reaches the point of an “armed conflict” under Common Article 3.

The drafters of the Geneva Conventions never defined armed conflict, likely a product of the desire to encourage as broad an application of the Conventions as possible. The International Committee of the Red Cross (ICRC) commentary nonetheless highlights several “convenient criteria” used to establish the existence of an armed conflict.⁴⁷

1. That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
2. That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
3. (a) That the de jure Government has recognized the insurgents as belligerents; or
(b) That it has claimed for itself the rights of a belligerent; or
(c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
(d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
4. (a) That the insurgents have an organization purporting to have the characteristics of a State.
(b) That the insurgent civil authority exercises de facto authority over persons within a determinate portion of the national territory.
(c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war.
(d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.⁴⁸

While these criteria provide better guidance than the term “armed conflict” itself, they still fall short of an actual definition.⁴⁹ Difficult cases—such as the conflict with Al Qaeda—that do not apply seamlessly to the criteria present significant definitional challenges. Unlike an insurgent rebel group, such as the Kurds in Saddam Hussein-controlled Iraq for example, Al Qaeda does not control any United States territory. The terrorist group does not challenge the authority of the United States over domestic or

45. *Id.* at 21–22.

46. *See supra* text accompanying note 38.

47. 4 COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 35 (Oscar Uhler & Henri Cousier eds., 1958) [hereinafter 4 COMMENTARY].

48. *Id.* at 35–36 (emphasis omitted).

49. Professor Jinks notes that the Commentary also “offers no methodology to guide the systematic application of these factors,” most notably any ranking of the criteria. Jinks, *supra* note 44, at 30.

international territory.⁵⁰ Since Al Qaeda meets none of these conditions, the conflict does not meet the traditional definition of a war of national liberation.⁵¹

Without a clear-cut definition, other considerations govern whether the War on Terror qualifies as an armed conflict for purposes of Common Article 3. Two sets of these considerations provide the clearest classification guidance: "(1) the intensity of the violence; and (2) the capacity and willingness of the parties to carry out sustained, coordinated hostilities."⁵² Additionally, the United States government's perception of the conflict bears on the definition as well.⁵³ Based on the government's own statements, the United States interprets the situation as an armed conflict. Because the government interprets the situation as an armed conflict, Common Article 3 will apply to the situation as an "armed conflict" irrespective of the intensity of the violence or ability of the parties to sustain hostilities.⁵⁴ As discussed below, the United States terms the situation with Al Qaeda and other loosely affiliated terrorist groups as the "War on Terror." The term is not empty rhetoric.⁵⁵ The comprehensive military operations in Afghanistan and Iraq, and increased military and intelligence efforts worldwide, lend further support to the government's verbal characterization. Given the U.S. approach to the hostilities, the War on Terror should qualify as an "armed conflict" under international humanitarian law and Common Article 3. As an armed conflict, the Conventions' protections of combatants and non-combatants should apply, at least in some form.

III. DO "WAR ON TERROR" DETAINEES QUALIFY AS PRISONERS OF WAR?

Salim Hamdan contended "Article 5 of the Third Geneva Convention requires that if there be 'any doubt' whether he is entitled to prisoner-of-war protections, he must be afforded those protections until his status is determined by a 'competent tribunal.'"⁵⁶ The Supreme Court, however, treated the question of Hamdan's potential status as moot given their holding that the military tribunal was unconstitutional.⁵⁷ Absent

50. Arguably, Al Qaeda's calls for the destruction of the United States and its government could meet this standard. See *Full Text: bin Laden's "Letter to America"*, THE OBSERVER, Nov. 24, 2002, <http://observer.guardian.co.uk/international/story/0,,845724,00.html>.

51. See HEATHER A. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS 23-24 (1988) (discussing the characteristics of wars of national liberation and governing international law).

52. Jinks, *supra* note 44, at 31.

53. *Id.* at 32 ("Cases of internal strife constitute 'armed conflict' within the meaning of international humanitarian law if . . . the state party to the hostilities interprets them as an 'armed conflict' (a subjective standard).").

54. The converse is not true, however. If the government does not view the situation as an armed conflict, the other considerations apply in determining the situation's status under the Conventions.

55. Although not an issue here, the statements alone could conceivably qualify as establishing a refutable presumption that the government views the situation as an armed conflict.

56. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795 n.61 (2006) (citing Third Convention, art. 4, 6 U.S.T. 3316, 3324).

57. *Id.*

guidance from courts, the Bush administration, the ICRC, and other organizations have put forward competing interpretations of the Conventions.

The 1949 Third Geneva Convention Relative to the Treatment of Prisoners of War defines prisoners of war as:

[P]ersons belonging to one of the following categories, who have fallen into the power of the enemy:

- (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
 - (a) that of being commanded by a person responsible for his subordinates;
 - (b) that of having a fixed distinctive sign recognizable at a distance;
 - (c) that of carrying arms openly;
 - (d) that of conducting their operations in accordance with the laws and customs of war . . .⁵⁸

The Third Geneva Convention applies Prisoner of War (POW) protections to groups of combatants found on the field of battle. However, these POW protections only apply in “cases of declared war or any other armed conflict that may arise between two or more of the High Contracting Parties” that signed and ratified the accords.⁵⁹ The Convention also binds the parties to the terms of the Convention in any conflict with a “Power,” provided the Power accepts and applies the Convention.⁶⁰ Although the United States is a High Contracting Party,⁶¹ Al Qaeda is not. Like other terrorist groups, and unlike the former ruling groups like the Taliban, Al Qaeda does not fit the definition of a “Power.” Not only has Al Qaeda never accepted or applied the Convention, but the Convention’s drafters never intended the term “Power” to apply to such groups. The drafters intended “the obligation to recognize . . . the Convention be applied to the *non-contracting adverse State*.”⁶²

The Fourth Geneva Convention provides civilians with protections similar to the Third Convention’s protections for POWs.⁶³ Unsurprisingly, the Fourth Convention

58. Third Convention, *supra* note 41, art. 4, 6 U.S.T. at 3320.

59. *Id.*, art. 2, 6 U.S.T. at 3318.

60. *Id.* (“Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.”).

61. ICRC, Geneva Conventions of 12 August 1949—United States of America Reservation / Declaration Text, <http://www.icrc.org/IHL.nsf/NORM/D6B53F5B5D14F35AC1256402003F9920?OpenDocument> (last visited Oct. 10, 2006).

62. 3 COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 22 (Jean de Preux ed., 1960) (emphasis added) (quoting FEDERAL POLITICAL DEPARTMENT, BERNE, 2-A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 108 (William S. Hein & Co. 2005)).

63. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 3520 [hereinafter Fourth Convention] (protecting civilians

defines “civilians” far more broadly than POWs under the Third Convention.⁶⁴ The Conventions generally afford “a robust rights regime for all war detainees,” including civilians.⁶⁵ Among the rights granted to civilians are “due process rights . . . ; the right to humane treatment; freedom from coercive interrogation; freedom from discrimination; . . . and the prohibition on attacks directed against civilian objects.”⁶⁶ As with the Third Convention, the Fourth Convention only applies to citizens of those parties who signed and ratified it.⁶⁷

While the Fourth Convention may purport to apply broadly, commentators disagree on the application of civilian protections to unlawful combatants.⁶⁸ While some agree with the United States’ position that civilian protections apply only to those not taking any part in combat, human rights organizations such as the ICRC disagree vehemently.⁶⁹ A plain reading of the Fourth Convention supports the ICRC view. The provisions define civilians as “[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”⁷⁰ Where the Third Convention, among others, contains detailed definitions of POWs, combatants, and other protected categories, the Fourth

during wartime while in the hands of a “Party to the conflict” or during any occupation by a foreign “Occupying Power”).

64. *Id.*, art. 4, 6 U.S.T. at 3520 (“Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”).

65. Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT’L L.J. 367, 374, 378 (2004) (discussing whether the Conventions’ POW protections apply to detainees at Guantanamo Bay).

66. *Id.* at 380–81.

67. *Id.* (“[N]ationals of a state ‘not bound by the Convention are not protected by it.’”) (quoting Fourth Convention, *supra* note 63, art. 4, 6 U.S.T. 3516, 3520). Common Article 3 protections still apply. See *supra* note 45 and accompanying text.

68. Compare *id.* at 381–86 (arguing that the Fourth Convention civilian protections “apply to all enemy nationals—including unlawful combatants—not protected by other Conventions”) with KARMA NABULSI, TRADITIONS OF WAR: OCCUPATION, RESISTANCE, AND THE LAW 241 (1999) (“By the end of the Geneva negotiations in 1949, significant progress had been made in the codification of the laws of war However, the question of the distinction between lawful and unlawful combatants remained essentially unresolved.”); Frits Kalshoven, *The Position of Guerrilla Fighters under the Law of War*, 11 REVUE DE DROIT PENAL MILITAIRE ET DE DROIT DE LA GUERRE 55, 70–71 (1972) (arguing that Geneva Convention drafters did not consider any combatants not included under the Third Convention when drafting the Fourth Convention).

69. ICRC, *International Humanitarian Law and Terrorism: Questions and Answers* (2004), <http://www.icrc.org/Web/eng/siteeng0.nsf/html/5YNLEV> (“Civilians detained for security reasons must be accorded the protections provided for in the Fourth Geneva Convention. Combatants who do not fulfil[] the requisite criteria for POW status (who, for example, do not carry arms openly) or civilians who have taken a direct part in hostilities in an international armed conflict (so-called ‘unprivileged’ or ‘unlawful’ belligerents) are protected by the Fourth Geneva Convention provided they are enemy nationals.”); see also George Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT’L L. 891, 893 (2002); Knut Dörmann, *The Legal Situation of “Unlawful/Unprivileged Combatants,”* 85 INT’L REV. RED CROSS 45 (2003).

70. Fourth Convention, *supra* note 63, art. 4.

Convention uses only a broad definition. This expansive view of civilians suggests that the Fourth Convention's drafters intended its provisions to serve as an encompassing provision.⁷¹ International war crimes tribunals have followed this broad interpretation as well. In *Prosecutor v. Delalic*,⁷² the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that "[i]f an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of Convention IV, provided that its article 4 requirements are satisfied."⁷³

However, not all commentators agree with this interpretation. Using virtually the same texts to support the contrary position—that civilian protections apply only to noncombatants—this side argues that the Conventions do not contain any all-encompassing clauses. Under this contrary view to the *Delalic* decision, unlawful combatants would not "necessarily fall" within the Fourth Convention's protections.⁷⁴ This alternate view rejects the implicit inclusion of unlawful combatants in the definition of civilians, and focuses more carefully on the Article 4 requirements noted by the ICTY in *Delalic*. Since other articles that define protected classes do so in careful detail, only detailed, explicit definitions could cover unlawful combatants. While drafters may have rejected amendments that explicitly defined unlawful combatant protections in lieu of a more general, consensus definition, the drafting history also lends support to the position that unlawful combatants do not qualify for Fourth Convention protection. The final record suggests that "although the [Third and Fourth] conventions might appear to cover all the categories concerned, irregular belligerents were not actually protected."⁷⁵ Even the text of Protocol I, cited by commentators supporting civilian protections for unlawful combatants,⁷⁶ discusses minimum procedural protections for those who neither qualify for POW status nor are entitled to "more favourable treatment in accordance with the Fourth Convention."⁷⁷ If Protocol I and the Fourth Convention meant to place unlawful combatants under civilian protections, the specific minimum protections would have been unnecessary.

71. See Jinks, *Declining Significance*, *supra* note 65, at 384–85. Professor Jinks arrives at this conclusion by examining both the final text and the Plenary's decision to reject proposed amendments that would have excluded unlawful combatants.

72. Case No. IT-96-21-T, Judgment (Nov. 16, 1998).

73. *Id.* ¶ 271.

74. S. EXEC. DOC. NO. 84-9, at 2 (1955) (The "[Fourth] Convention was drawn up at the Geneva Convention in 1949, which spells out to a degree never before attempted the obligations of the parties to furnish humanitarian treatment to two broad categories of civilians: enemy aliens present within the home territory of a belligerent, and civilian persons found in territory which it occupies in the course of military operations.").

75. FEDERAL POLITICAL DEPARTMENT, BERNE, 2-A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 622 (William S. Hein & Co. 2005).

76. See Jinks, *Declining Significance*, *supra* note 65, at 384–85 ("The relevant provisions of Additional Protocol I involve two conceptually distinct reforms: (1) these provisions relaxed the requirements for lawful combatant and POW status; and (2) they clarified the protective consequences of failing to meet these relaxed requirements.").

77. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 45, June 8, 1977, 1125 U.N.T.S. 3, 24 [hereinafter Protocol I].

The Fourth Convention's "derogation" provision in Article 5 also supports the separate classification of unlawful combatants. Under this provision, a party may detain enemy combatants—lawful or otherwise—indefinitely for security reasons, subject to a few critical limitations.⁷⁸

Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.⁷⁹

The text appears to limit detention to those combatants "in the territory of a Party to the conflict [or] . . . in occupied territory."⁸⁰ Article 5 only applies when the detaining party has "good reason to suspect that a particular individual has engaged in hostile acts."⁸¹ Most detainees will meet this standard, since the text considers only the good faith belief of the detaining party. The derogation article also provides an upper limit on the length of the detention, limiting it to "the earliest date consistent with the security" of the detaining party.⁸² As with the "good reason" provision, the Fourth Convention's limitation on detention realistically applies almost no barrier to the indefinite detention of terror suspects or combatants. Even the last paragraph's requirement that detaining parties treat prisoners with humanity and grant them a "fair and regular trial" provides little specific guidance, other than preventing the detaining party from suspending the right to a fair trial (even in the face of security concerns that authorize further detention).

In 1949, the Conventions' drafters likely did not anticipate the rise decades later of asymmetric warfare and terrorism. As a result, the Conventions' categorizations do not apply neatly to terror suspects such as Hamdan. However, arguments for Fourth Convention protection of unlawful combatants fail to explain why combatants engaged in sustained combat or asymmetric terrorist acts should receive identical, or virtually

78. Fourth Convention, *supra* note 63, art. 5.

79. *Id.*

80. *Id.*; see also Jinks, *Declining Significance*, *supra* note 65, at 388.

81. Jinks, *Declining Significance*, *supra* note 65, at 389; see also Fourth Convention, *supra* note 63, art. 5.

82. Fourth Convention, *supra* note 63, art. 5; see also Jinks, *Declining Significance*, *supra* note 65, at 390.

identical, protections as innocent noncombatants do when detained incident to occupation or combat.

While not addressing terrorists or unlawful combatants directly, other articles in the Conventions provide further support for classifying Al Qaeda members or other belligerents as combatants rather than civilians. The Conventions prohibit the intentional, reckless, or even negligent killing of civilians,⁸³ but other articles provide combatants the authority to kill their adversaries.⁸⁴ Classifying captured Al Qaeda and other unlawful combatants as civilians creates a conflict between these provisions. If unlawful combatants qualified as civilians under the Fourth Convention, then United States forces would have violated the Conventions by intentionally targeting and killing these “civilians.”

The United States properly classified Al Qaeda members as “unlawful combatants” because they “lack some or all of the four attributes specified in Article 4 [of the Third Convention].”⁸⁵ Specifically, while Al Qaeda members and other detainees qualify as “[m]embers of other militias . . . [or] organized resistance movements,”⁸⁶ these belligerents do not meet the conditions outlined by Article 4, Section 2. To qualify for protection, combatants must “fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.”⁸⁷ With the possible exception of the command structure provision in (a), Al Qaeda and other similar combatants have failed to wear any insignia or uniform distinguishing them from the civilian population, have used hidden bomb vests in bombings, and deliberately targeted civilians—all violations of the Conventions.

Precisely because the law of war draws a distinction between noncombatants and combatants on the battlefield, noncombatants may not take up arms against forces that respect their complete immunity.⁸⁸ Classifying unlawful combatants such as Al Qaeda

83. *E.g.*, Commentary to Protocol I, at 615 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman eds., 1977) (stating that the Geneva and Hague Conventions, and their Additional Protocols “explicitly confirm[ed] the customary rule that innocent civilians must be kept outside hostilities as far as possible and enjoy general protection against danger arising from hostilities”); 4 COMMENTARY, *supra* note 47, at 3 (it is a “cardinal principle of the law of war . . . that the civilian population must enjoy complete immunity”).

84. *E.g.*, MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 243 (1982) (“[Combatant] privilege provides immunity from the application of municipal law prohibitions against homicides[,] wounding and maiming, or capturing persons and destruction of property, so long as these acts are done as acts of war and do not transgress the restraints of the rules of international law applicable in armed conflict.”).

85. INT’L AND OPERATIONAL LAW DEP’T, JUDGE ADVOCATE GEN. LEGAL CTR. AND SCH., OPERATIONAL LAW HANDBOOK 418 (MAJ John Rawcliffe & CPT Jeannine Smith eds., 2006).

86. Third Convention, *supra* note 41, art. 4.

87. *Id.*

88. See BOTHE, PARTSCH & SOLF, *supra* note 84, at 243–44 (“Civilians who participate directly in hostilities, as well as spies and members of the armed forces who forfeit their combatant status, do not enjoy that privilege, and may be tried, under appropriate safeguards, for direct participation in hostilities as well as for any crime under municipal law which they might have committed.”) (citation omitted).

members as civilians encourages all combatants—lawful and unlawful alike—to take advantage of parties that comply with the Conventions. Arguably, some combatants already do this. Numerous groups in the West Bank and Gaza Strip, in Iraq, and elsewhere use mosques, churches, U.N. missions and posts, and other protected areas as fortresses or operations bases almost certainly because parties targeting those areas directly would violate the Conventions. Allowing civilians and unlawful combatants to participate directly in hostilities without fear of prosecution or lack of protection under the Conventions would make distinguishing between combatants and noncombatants considerably more difficult, and encourage parties to ignore the laws of war in favor of achieving military objectives.⁸⁹ With the Military Commissions Act of 2006, Congress made the debate over unlawful enemy combatant classification purely academic under United States law.⁹⁰

IV. A BRIEF LOOK AT MILITARY COMMISSIONS PRE-*HAMDAN*

Article 5 of the Third Convention provides procedures for determining whether a particular individual or group belongs to any of the protected categories of combatants or noncombatants. The Conventions specifically authorize parties to make this decision by using a tribunal: “Should any doubt arise as to whether persons . . . belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”⁹¹

Army Regulation 190-8, a joint regulation with all branches of the United States armed forces, outlines the procedures for the “competent tribunal” described in the Third Convention.⁹² The tribunal, commonly referred to as an AR 190 tribunal, consists of three commissioned officers.⁹³ AR 190 provides procedures for the oath,⁹⁴ the tribunal record,⁹⁵ and witness testimony,⁹⁶ specifies the burden of proof,⁹⁷ and outlines the rights to an interpreter,⁹⁸ to an open hearing,⁹⁹ to the detainee’s presence,¹⁰⁰ and a detainee’s right to testify¹⁰¹ (or not).¹⁰² An AR 190 tribunal

89. See Richard R. Baxter, *So-called “Unprivileged Belligerency”: Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT’L L. 323, 343 (1951).

90. This Note discusses Congress’ refined definition *infra* Part V.

91. Third Convention, *supra* note 41, art. 5.

92. Dep’t of the Army, Army Regulation 190-8 Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, (1997) http://www.usapa.army.mil/pdffiles/r190_8.pdf [hereinafter AR 190].

93. *Id.* § 1-6(c). Interestingly, the only other requirement specified by AR 190 is that at least one officer must be a “field grade” officer (an officer above the rank of captain). None of the members of the tribunal needs any specific legal or judicial training. *Id.*

94. *Id.* § 1-6(e)(1).

95. *Id.* § 1-6(e)(2).

96. *Id.* § 1-6(e)(6). The detainee may “call witnesses if reasonably available.” *Id.*

97. *Id.* § 1-6(e)(9) (“Preponderance of the evidence shall be the standard.”).

98. *Id.* § 1-6(e)(5) (“Persons whose status is to be determined . . . will be provided an interpreter if necessary.”).

99. *Id.* § 1-6(e)(3) (“Proceedings shall be open except for deliberation and voting . . .”).

100. *Id.* § 1-6(e)(5) (“Persons whose status is to be determined shall be allowed to attend . . .”).

categorizes a detainee as a member of one of four groups: an Enemy Prisoner of War (EPW in the regulation); a Recommended Retained Personnel (RP in the regulation) “entitled to EPW protections, who should be considered for certification as a medical, religious, or volunteer aid society RP”; a Civilian Internee “who for reasons of operational security, or probable cause incident to criminal investigation, should be detained”; or an innocent civilian “who should be immediately returned to his home or released.”¹⁰³

The Department of Defense’s Commission Order No. 1, however, described a different procedure. The Order established separate military tribunals to try noncitizen detainees¹⁰⁴ for violations of the laws of war and other laws.¹⁰⁵ The Order covers a wide range of potential detainees, provided

- (1) there is reason to believe that such individual, at the relevant times,
 - (i) is or was a member of the organization known as al Qaida;
 - (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
 - (iii) has knowingly harbored one or more individuals described [in earlier sections]¹⁰⁶

Although not specified in the Order, the Department of Defense also relied on the intelligence value of a detainee to determine the detainee’s status.¹⁰⁷ This initial order’s broad definition of covered individuals required no finding of fact and consequently precluded any significant discussion of whether the detainee was eligible for trial by the tribunal in the first place.¹⁰⁸ In most other aspects, though, the Combatant Status

101. *Id.* § 1-6(e)(7).

102. *Id.* § 1-6(e)(8).

103. *Id.* § 1-6(e)(10). The list of categories available to the tribunal does not include a category for unlawful combatants, arguably providing support for critics that support categorization of unlawful combatants as civilians.

104. Hamdan was a citizen and much of the debate in his case focused on his detention as a citizen. In contrast, Bush’s Military Order specifically stated “[t]he term ‘individual subject to this order’ shall mean any individual who is not a United States citizen.” Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834. (Nov. 16, 2001).

105. *Id.* at 57,833.

106. *Id.* at 57,834.

107. Press Release, U.S. Dep’t of Def., Transfer of Five Moroccan Detainees Completed (Aug. 2, 2004), <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=7598> (“The decision to transfer or release a detainee is based on many factors, *including whether the detainee is of further intelligence value to the United States* and whether he is believed to pose a continued threat to the United States if released.”) (emphasis added).

108. The Court’s decisions in *Hamdi v. Rumsfeld*, 542 U.S. 507, 509–12 (2004), and *Rumsfeld v. Padilla*, 542 U.S. 426, 430–32 (2004), however, narrowed this definition—at least when applied to citizens. These cases required the United States to undertake a significant fact-finding inquiry to determine whether it held a detained *citizen* lawfully. See *Hamdi*, 542 U.S. at 532–39.

Review Tribunal established by a subsequent order¹⁰⁹ followed AR 190. The similarities were unsurprising, both since the government had well-established procedures in AR 190, and since the Court in *Hamdi* referred favorably to that existing regulation.¹¹⁰ As discussed above in Part I, the Court rejected these tribunals largely because Congress had not expressly authorized them.¹¹¹

V. *HAMDAN'S SAFE HARBOR AND THE MILITARY COMMISSIONS ACT OF 2006*

A. *Hamdan's Safe Harbor: Justice Kennedy's Concurrence*

The majority's opinion in *Hamdan* struck down the military commissions established by Commission Order No. 1 and subsequent orders. However, as in *Hamdi* when the Court referred to AR 190 approvingly,¹¹² the Court in *Hamdan* provided Congress and the President with a road map to a constitutionally sound tribunal. The plurality in Justice Stevens's opinion discusses the issues in this section generally and notes agreement with Justice Kennedy's concurrence in several places. Justice Kennedy, however, explains in detail the "safe harbor" available to the President and Congress in his concurrence. Satisfying Justice Kennedy's concerns would likely tip the balance of the Court toward approval of the Military Commissions Act. Accordingly, much of this Note's Part V draws from Justice Kennedy's concurring opinion.

The Court (and Justice Kennedy's concurrence in particular) suggested acceptable types of military commissions by outlining differences between the military commissions created by Commission Order No. 1 and those permitted by the UCMJ. Specifically, the Court focused on procedures and oversight mechanisms that applied to courts-martial but were missing from the tribunals at issue in the case. Justice Kennedy specifically highlighted the "several noteworthy departures" in the power granted to the Appointing Authority in the military commissions.¹¹³

The UCMJ requires not only that a presiding officer be "a member of a state or federal bar and [be] specially certified for judicial duties by the Judge Advocate General for the officer's Armed Service," but also requires that he or she be "directly

109. See Memorandum from the Dep't of Def. to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004), <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

110. *Hamdi*, 542 U.S. at 538 ("There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention.").

111. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2799 (2006) ("The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check.' Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.") (Breyer, J., concurring) (internal citation omitted).

112. *Hamdi*, 542 U.S. at 538.

113. *Hamdan*, 126 S. Ct. at 2805-06 (Kennedy, J., concurring).

responsible to the Judge Advocate General or the Judge Advocate General's designee."¹¹⁴ The Court in *Weiss v. United States* held that placing presiding officers "under the authority of the appropriate Judge Advocate General rather than under the authority of the convening officer" protected a court-martial's independence and supported due process.¹¹⁵

Unlike courts-martial, the presiding officer and commission members in the tribunals at issue in *Hamdan* had little insulation from control by the Defense Department's political appointees.¹¹⁶ The Appointing Authority determined the size and makeup of the commissions, directed the chief prosecutor, adjudicated plea agreements, handled media contact, and even provided discretionary investigative assistance to the defense "insofar as he or she 'deem[ed] necessary for a full and fair trial.'"¹¹⁷ This overarching control threatened the important judicial independence emphasized by the Court in *Weiss*. In contrast to the Court's guidance in that case, the Order placed the commission's presiding officers and prosecutors under the direct control of Department of Defense stakeholders.

The military tribunals and regular courts-martial differed in other fundamental aspects as well. The Rules for Courts-Martial adhere to a strict separation between the convening authority and appellate authorities. For example, the Court of Criminal Appeals, Courts of Military Review, and the Court of Military Appeals function separately from the convening authority. Either the President, with the advice and consent of the Senate, or a Judge Advocate General select and appoint judges to these military courts.¹¹⁸ Contrast this approach with the one used in the *Hamdan* tribunal, where, for example, the Appointing Authority (and not a military appeals court) decided dispositive interlocutory issues and accepted or rejected plea agreements.¹¹⁹ The military tribunals in *Hamdan* failed because the Appointing Authority's extraordinary supervisory powers compromised the trial process. The commission structure left a single authority with a stake in the outcome controlling virtually every key aspect of the process. Justice Kennedy believed that this derivation from courts-martial procedures could "affect the deliberative process and the prosecution's burden of persuasion" and "raise concerns that the commission's decisionmaking may not be neutral."¹²⁰

The Court also criticized the tribunals' standards governing the admission of evidence. Both Justice Kennedy's concurrence and the majority noted the Order's departure from the rules that govern courts-martial. The UCMJ permits significant flexibility for the admissibility of evidence in courts-martial. For example, Article 49 permits the introduction of depositions from absent or unavailable witnesses.¹²¹ The

114. *Id.* at 2806 (Kennedy, J., concurring) (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, R. FOR COURTS-MARTIAL 502(c) (2005)).

115. 510 U.S. 163, 180 (1994).

116. Justice Stevens notes that the Secretary of Defense had appointed "John D. Altenberg, Jr., a retired Army major general and longtime military lawyer [as] 'Appointing Authority for Military Commissions.'" *Hamdan*, 126 S. Ct. at 2760 (Stevens, J., concurring).

117. *Id.* at 2805 (Kennedy, J., concurring) (internal citations omitted).

118. *Weiss*, 510 U.S. at 168-69.

119. *Hamdan*, 126 S. Ct. at 2805-06 (Kennedy, J., concurring).

120. *Id.* at 2806-07 (Kennedy, J., concurring).

121. 10 U.S.C. § 849(d) (2000), amended by 10 U.S.C.S. § 849(d) (LexisNexis Supp. 2006)

Military Rules of Evidence in courts-martial permit military courts to redact “classified information from documents made available to the accused,” provide summaries or substitutes, or even withhold disclosure entirely in the interests of national security.¹²² Justice Kennedy explained further that Commission Order No. 1 “abandon[ed] the detailed Military Rules of Evidence” modeled after the Federal Rules of Evidence in favor of a single rule: “Evidence shall be admitted if . . . the evidence would have probative value to a reasonable person.”¹²³ This “reasonable probative value” rule encouraged the admission of any statement, regardless of its reliability.¹²⁴ Conceivably, the military commissions could have admitted several types of statements prohibited under the UCMJ or the Military Rules of Evidence: those obtained through coercion,¹²⁵ hearsay,¹²⁶ the product of multiple levels of hearsay,¹²⁷ or unsworn depositions.¹²⁸ Even if the presiding officer found evidence inadmissible, military commission members—unlike those appointed to a court-martial—could override the decision by majority vote or simply view the material anyway.¹²⁹

Rejecting the sole justification of “the danger posed by international terrorism,” the majority opinion found “no suggestion, for example, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility.”¹³⁰ The majority left open the converse proposition. If the administration offers evidence that courts-martial procedures reach the standard of impracticability required, even otherwise highly flawed commissions could secure the Court’s approval.

The Court also left open two other important avenues. As explained in Part III above, the administration still could detain prisoners for the duration of hostilities in accordance with the Geneva Conventions.¹³¹ Although the Conventions provide prisoners detained under these circumstances with certain rights that may create other issues with detainee treatment, the Conventions would not require the administration to provide a civil trial or military tribunal beyond a possible Article V adjudication. Justice Kennedy urged the government to choose a second potential option in his concurrence. With the Court’s decision that the military commissions were unauthorized, Kennedy reminded the government that Congress on its own initiative or

(permitting an otherwise admissible deposition to be admitted if the witness resides more than 100 miles from the jurisdiction where the board sits, if the witness cannot reasonably appear, or if the witness’s whereabouts are unknown).

122. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R. FOR COURTS-MARTIAL 505 (2005).

123. *Hamdan*, 126 S. Ct. at 2807–08 (Kennedy, J., concurring) (omission in original).

124. *See id.* at 2808 (noting that the broad admissibility rule “could permit admission of multiple hearsay and other forms of evidence generally prohibited on grounds of unreliability”).

125. 10 U.S.C. § 831(d) (2000).

126. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R. FOR COURTS-MARTIAL 802 (2005).

127. *See id.* at R. 805.

128. *See* 10 U.S.C. § 849 (2000).

129. *See Hamdan*, 126 S. Ct. at 2808 (Kennedy, J., concurring).

130. *Id.* at 2792. In his concurrence, Justice Kennedy agreed “the Government [had] made no demonstration of practical need for these special rules and procedures, either in this particular case or as to the military commissions in general, nor is any such need self-evident.” *Id.* at 2808 (Kennedy, J., concurring) (internal citation omitted).

131. *See supra* note 78 and accompanying text.

at the direction of the administration could still “choose to provide further guidance in this area.”¹³²

B. Applying Hamdan to the Military Commissions Act of 2006

Following the Court’s decision in *Hamdan*, Congress did revise the tribunal process with the Military Commissions Act of 2006 (MCA) only months later. On September 27, 2006, the House of Representatives passed the MCA.¹³³ On the next day, the Senate passed a nearly identical version,¹³⁴ which the House then approved on September 29.¹³⁵ President Bush signed the MCA into law on October 17, 2006.¹³⁶

The MCA molds a new military tribunal regime based on Justice Kennedy’s concurrence and safe harbor in *Hamdan*. The bill amends Title 10 of the United States Code, adding a new Chapter 47A with seven subchapters, providing explicit authorization for new military commissions not based on the UCMJ, limiting the enforceability of the Geneva Conventions to illegal enemy combatants, and eliminating most judicial review for alien detainees.¹³⁷

Subchapter I (General Provisions) of Chapter 47A clarifies Common Article 3’s ambiguity concerning unlawful and lawful enemy combatants. Section 948a(1) of the new law defines “unlawful enemy combatant” as:

- (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
- (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.¹³⁸

132. *Hamdan*, 126 S. Ct. at 2809 (Kennedy, J., concurring).

133. H.R. 6166, 109th Cong. (2006).

134. S. Res. 3930, 109th Cong. (2006) (enacted).

135. *Id.* The original version of the Senate bill differed in one respect from the one ultimately passed by both houses and signed into law. The original version contained a list of “Findings” ostensibly to build a stronger case of congressional authorization for the Court, but also to assert authority in the battle over war powers. The Findings did not appear in either the House version or the final law, but asserted congressional supremacy over military commissions. While noting that the President and military commanders had convened military commissions in the past, the original Senate bill’s Section Two stated that “[i]t is in the national interest for Congress to exercise its authority under the Constitution to enact legislation” authorizing military commissions. S. Res. 3930, § 2 (enacted) (emphasis added), available at <http://thomas.loc.gov/> as “S.3930.ES.”

136. Press Release, Office of the Press Sec’y of the President, President Bush Signs Military Commissions Act of 2006 (Oct. 17, 2006), <http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html>.

137. See S. Res. 3930 § 3(a)(1) (enacted).

138. *Id.*

Section 948a(2) defines “lawful enemy combatants” as:

- (A) a member of the regular forces of a State party engaged in hostilities against the United States;
- (B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or
- (C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.¹³⁹

Therefore, the new Subchapter I makes clear the difference between *regular* armed forces, as traditionally understood by—but not defined precisely in—the Geneva Conventions, and any terrorist or other irregular armed force. Congress’s definition fills a significant hole and substantially clarifies the debate over classification as it applies to military commissions in the United States.¹⁴⁰ By separating lawful and unlawful enemy combatants, Congress expressly recognizes a previously unstated category of belligerent that does not fit any conventional definition and should be treated differently by the law.

Congress’s new definitions also serve to limit the courts’ jurisdiction over illegal enemy combatants, especially noncitizens. The definition of “illegal enemy combatant” includes not just those engaged in hostilities, but also those who have “purposefully and materially supported hostilities.”¹⁴¹ Under the broadest definition, the United States could detain individuals who provide financial or other material support to hostilities—perhaps including clerics and others that incite violence through speeches or writings—as illegal enemy combatants. The second portion of the definition retroactively includes any detainees judged unlawful enemy combatants by an Article V tribunal.¹⁴²

The definition of “illegal enemy combatant” in the MCA includes both citizens and noncitizens. The Court in *Hamdi* found “no bar to [the United States’] holding one of its own citizens as an enemy combatant,”¹⁴³ but the majority required that detained citizens receive the opportunity to challenge an enemy combatant designation.¹⁴⁴ To respect the narrow *Hamdi* decision, the MCA limits military commissions’ jurisdiction to aliens only.¹⁴⁵

139. *Id.*

140. Unfortunately, Congress’s new definition likely does not resolve the classification debate in international courts and tribunals. Debates over customary international law, the application of Additional Protocols I and II of the Geneva Conventions, the definition of “unlawful combatants,” and the nature of the War on Terror will continue at least until a new protocol or convention clearly defines the status of terrorist groups such as Al Qaeda.

141. S. Res. 3930 § 3(a)(1) (enacted).

142. *Id.*

143. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004).

144. *Id.* at 533 (“[A] citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”).

145. See S. Res. 3930 § 3(a)(1) (enacted). The bill’s new 10 U.S.C. § 948d(a) provides the Act’s military commissions “jurisdiction to try any offense made punishable by this chapter or

The MCA does not afford non-citizen detainees the same right to challenge adjudications. Section 950j in the Act strips courts of jurisdiction over any cause of action, including habeas corpus petitions, related “to the prosecution, trial, or judgment of a military commission . . . including challenges to the lawfulness of procedures of military commissions.”¹⁴⁶ The Act applies retroactively to “any action pending on or filed after the date of enactment”¹⁴⁷ and allows only a limited review by the Court of Appeals for the District of Columbia and the Supreme Court. Section 950g limits appeals to matters of law with a primary focus on whether a commission’s “standards and procedures” were consistent with the Act.¹⁴⁸

The Act places a further limit on causes of action by preventing alien unlawful enemy combatants from invoking “the Geneva Conventions as a source of rights.”¹⁴⁹ For reasons discussed in Part III, the MCA’s denial of Geneva Conventions’ protections for unlawful enemy combatants merely reaffirms the status of combatants envisioned by Convention drafters. The MCA carefully avoids removing Geneva Conventions’ protection from lawful combatants or citizens and the removal of protection applies only to alien unlawful enemy combatants. This clarification represents the further guidance that Justice Kennedy, in his *Hamdan* concurrence, urged Congress to provide.

However, the Court’s decision in *Hamdi* casts doubt on the constitutionality of this provision. The Court would likely strike the limited scope of review and specific removal of habeas corpus as unconstitutional. A plurality of the Court in *Hamdi* noted that absent suspension, the writ of habeas corpus is available to all enemy combatants detained in the United States regardless of their citizenship.¹⁵⁰ Justice Kennedy, the key vote in *Hamdan*, was a member of the *Hamdi* plurality. If the Court splits along the same lines as in *Hamdan* on habeas corpus petitions for non-citizen detainees, the provisions described above would certainly violate constitutional protections.

Subchapter I of the MCA continues by addressing one of the Court’s primary contentions in *Hamdan*. The subchapter’s definitions specifically exempt the military commissions from some requirements of courts-martial. Although “[t]he procedures for military commissions set forth in [the new Act] are based upon the procedures for trial by general courts-martial,” the latter procedures do not “apply to trial by military commission except as specifically provided in [the MCA].”¹⁵¹ In other words, “[t]he judicial construction and application of [the general courts-martial statute] are not

the law of war when committed by an alien unlawful enemy combatant.”

146. *Id.*

147. *Id.*

148. *Id.* The new § 950g purports to allow the Court of Appeals for the District of Columbia and the Supreme Court to consider “to the extent applicable, the Constitution and the laws of the United States” in any appeal. *Id.*

149. *Id.*

150. *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004). The plurality reluctantly adopted the definition of “enemy combatants” proffered by the government: individuals who were “part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.” *Id.* at 516 (quoting Brief for the Respondents at 3, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696)). Despite the definition, the plurality of Justices O’Connor, Kennedy, and Breyer and Chief Justice Rehnquist chose to limit their opinion to the “narrow question” of “the detention of citizens falling within that definition [of enemy combatants].” *Id.*

151. S. Res. 3930 § 3(a)(1) (enacted).

binding on military commissions established under [the MCA].”¹⁵² MCA Section 948b(e) further segregates military commissions from regular courts-martial. The section prohibits the government from introducing or considering “findings, holdings, interpretations, and other precedents of military commissions” in courts-martial.¹⁵³ Not only does the MCA create a separate military commission regime, it also attempts to ensure that the commissions will have no precedential effect on other military courts or tribunals.

The attempt to separate the MCA tribunals from courts-martial reappears later in the Act in revisions to the UCMJ itself. In *Hamdan*, Justice Kennedy—joined by Justices Souter, Ginsburg, and Breyer—held that, through 10 U.S.C. § 821, “Congress require[d] that military commissions like the ones at issue conform to the ‘law of war.’”¹⁵⁴ Section 4 of the Act amends the UCMJ by excluding the new military commissions from the conformity requirements used by the Court in *Hamdan* to incorporate the Geneva Conventions into the UCMJ.¹⁵⁵ Section 4 of the MCA also amends section 836 of the UCMJ to address the practicability and uniformity concerns raised by the Court in *Hamdan*.¹⁵⁶ The Act removes the duty that the new commissions 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.¹⁵⁷

Section 4 of the MCA also eliminates the UCMJ’s requirement in section 836 for uniformity in rules and regulations.¹⁵⁸ In both cases, the MCA adds language exempting military commissions established by the MCA from these requirements.¹⁵⁹ The elimination of the practicability and uniformity requirements removes two critical supporting sections in the Court’s decision in *Hamdan*. Under the MCA, the Court can no longer make determinations about the adequacy of the procedures of the military commissions. This forced separation may reach too far. The *Hamdan* Court objected to the marked differences between the original military commissions and statutory and international requirements.¹⁶⁰ The MCA does not attempt to address those concerns.

The Court in *Hamdan* expressed differing views on the standard of a “regularly constituted” court under the UCMJ (and, by extension, Common Article 3).¹⁶¹ Whether the MCA’s decidedly irregular tribunal meets the standard is unclear. The plurality did not address the point directly, and Justice Alito’s dissent urged the Court to adopt a narrow standard. He argued that “the term ‘regularly’ is synonymous with ‘properly’” and that a properly constituted tribunal is one “properly appointed, set up, or

152. *Id.*

153. *Id.*

154. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2799 (2006) (quoting 10 U.S.C. § 821 (2000)).

155. *See* S. Res. 3930 § 4(a)(2) (amending 10 U.S.C. §§ 821, 828, 848, 850, 905, 906).

156. *See id.* § 4(a)(3)(A)–(B).

157. 10 U.S.C. § 836(a) (2000).

158. *See* S. Res. 3930 § 4(a)(3)(B) (enacted).

159. *Id.* § 4(a)(3) (enacted).

160. *See supra* Part V.A and text accompanying notes 29–41.

161. *See supra* note 41 and accompanying text.

established” under domestic law.¹⁶² Justice Kennedy’s concurrence, however, repeatedly referred to fairness concerns: executive branch interference,¹⁶³ uniformity with the UCMJ,¹⁶⁴ tribunal structure and composition,¹⁶⁵ the tribunal review process,¹⁶⁶ and evidence.¹⁶⁷ The MCA creates a two-tier standard by treating illegal enemy combatant aliens far more harshly than it would treat illegal enemy combatant citizens—a structure the Court would likely find unfair as well.¹⁶⁸

The MCA does partially address one of Justice Kennedy’s concerns: in Subchapter II, the Act bars the convening authority from “prepar[ing] or review[ing] any report concerning the effectiveness, fitness, or efficiency of a military judge detailed to the military commission which relates to his performance of duty as a military judge on the military commission.”¹⁶⁹ This eliminates some of the potential for executive branch interference, though the military judge still reports to the convening authority and not the Judge Advocate General. The “Prohibition on Evaluation of Fitness”¹⁷⁰ could prevent certain types of reprisals but would not address the host of structure and composition issues that Justice Kennedy found troublesome. The Act addresses none of the other fairness concerns outlined by Justice Kennedy’s concurrence.

The Act attempts to address the concern that the separation of military commissions from the UCMJ and Common Article 3 results in commissions that do not meet the standard of a “regularly constituted court.”¹⁷¹ The MCA specifically states that “[a] military commission established under [the Act] is a regularly constituted court” for purposes of the UCMJ and Common Article 3 of the Geneva Conventions.¹⁷² Despite the MCA’s assertion that the new commissions meet the standard of a regularly constituted court under the UCMJ and Common Article 3, if the definition of “regularly constituted” includes fairness considerations, the Court will overturn the Act. If the MCA’s decoupling from UCMJ procedures violates the fairness principles of the UCMJ and Common Article 3 stressed by Justice Kennedy, then the MCA tribunals cannot constitute “regular” courts. If the Court splits along the same lines as

162. *Id.* at 2850 (Alito, J., dissenting). Since the Act rejects the Geneva Conventions as a source of rights, the Court could find that Common Article 3 would not recognize the commission as a regularly constituted court even under Justice Alito’s narrow definition.

163. *See id.* at 2804 (Kennedy, J., concurring) (“[A]ny suggestion of Executive power to interfere with an ongoing judicial process raises concerns about the proceeding’s fairness.”).

164. *See id.* at 2803 (“The concept of a ‘regularly constituted court’ providing ‘indispensable’ judicial guarantees requires consideration of the system of justice under which the commission is established, though no doubt certain minimum standards are applicable.”).

165. *See id.* at 2805 (noting that “the structure and composition of the military commission . . . raise questions about the fairness of the trial”).

166. *See id.* at 2807 (“[Detainees] must navigate a military review process that again raises fairness concerns.”).

167. *See id.* at 2809 (“This fairness determination [on admission of secret evidence], moreover, is unambiguously subject to judicial review under the [Detainee Treatment Act].”).

168. A finding of unfairness on this point alone may not necessarily doom the structure. Noncitizens do not enjoy the same level of constitutional protection as citizens do, and the Court may choose to look beyond the dichotomous structure itself to invalidate the MCA.

169. S. Res. 3930, 109th Congress, § 3(a)(1) (2006) (enacted).

170. *Id.*

171. *See supra* note 41 and accompanying text.

172. S. Res. 3930 § 3(a)(1) (enacted).

Hamdan, Justice Kennedy's definition of a regularly constituted court, and not Justice Alito's, will likely prevail.

CONCLUSION

Following the September 11 terrorist attacks, the Bush Administration made fundamental changes to its counterterrorism approach. The Military Commissions Act of 2006 removes any ambiguity about Congress's commitment to both the War on Terror and the President's power to pursue terrorists aggressively. The MCA represents a unique application of both domestic and international laws of war to a situation that the Geneva Convention drafters likely could not have foreseen in 1949 (or even 1977). The Act sensibly redefines nonsovereign terror groups such as Al Qaeda—its most significant contribution. However, the rest of the Act represents a strong statutory rebuke of the Supreme Court's decision in *Hamdan*.

Congress will not have the last voice on this subject, though. The Court has traditionally shown reluctance to intervene in wartime, especially when the executive and legislative branches have joined in a common strategy.¹⁷³ However, the MCA does not adequately balance the standards of fairness and detainee rights with the competing concerns of national security and war prosecution. In 1998, Chief Justice Rehnquist wrote that "it is both desirable and likely that more careful attention will be paid by the courts to the basis for the government's claims of necessity as a basis for curtailing civil liberty."¹⁷⁴ The MCA tests the boundaries of the Court's traditional deference. The Court cannot remedy the deficiencies in the Geneva Conventions' treatment of terrorists, nor completely define the world's approach to the War on Terror. However, the Court must clearly define the value of civil liberties for the United States' political branches and the scope of liberty, even for the most reprehensible of terrorists. Under Justice Kennedy's overarching fairness standard in *Hamdan*, the MCA clearly needs improvement and will not withstand inevitable challenges to its validity.

173. *E.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 637 (1952) (Jackson, J., concurring).

174. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 225 (1998).