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YOU AIN'T SEEN NOTHIN' YET: THE INEVITABLE POST-HAMDAN CONFLICT BETWEEN THE SUPREME COURT AND THE POLITICAL BRANCHES

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On September 21, 2006, my colleagues, Professors Singer, Quint, and Young, and I led a workshop for our faculty on the Supreme Court's last, and most important, case of the previous Term, *Hamdan v. Rumsfeld*.¹ As was doubtless true of law scholars across the country (indeed, perhaps throughout the world), we expressed wonderment about the sweep of the decision. In *Hamdan*, a conservative Court, having just been joined by two conservative appointees named by a conservative President (known for attempting a dramatic expansion of his Article II war powers authority)² and confirmed by a conservative Republican-controlled Senate (known for accommodating the President's Article II authority even at the expense of its own constitutional prerogatives),³ had accepted the arguments of Osama Bin Laden's alleged bodyguard and driver that one of President Bush's asserted principal tools in the "war on terror," i.e., the executive branch's unilateral establishment of military tribunals, was constitutionally defective.⁴ On a 5-3 vote, the Court held, in essence, that the President's military commission procedures inadequately protected accused ter-

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

2. See Harold Hongju Koh, *Setting The World Right*, 115 YALE L.J. 2350, 2356-60 (2006).

3. See Michael Greenberger, *The Missing Link: Congress Has Shirked Its Constitutional Duties and Floundered in the War on Terror*, LEGAL AFFAIRS, Sept.-Oct. 2005, at 32, 32-33.

4. Justice Kennedy emphasized in his concurring opinion, the President's actions were unconstitutional under Justice Jackson's now famous *Steel Seizure* tripartite analysis, because the President's powers as Commander in Chief do not trump Congress when the latter has expressly prohibited the presidential actions at issue. *Hamdan*, 126 S. Ct. at 2800-08 (Kennedy, J., concurring in part). While Justice Stevens only references Jackson's *Steel Seizure* trilogy in a footnote, *id.* at 2774 n.23 (majority opinion), his opinion is also clearly based fundamentally on separation of powers issues. See Jana Singer, *Hamdan as an Assertion of Judicial Power*, 66 MD. L. REV. 759, 767 (2007); Peter E. Quint, *Silences and Peculiarities of the Hamdan Opinions*, 66 MD. L. REV. 772, 772 (2007); Gordon G. Young, *Youngstown, Hamdan, and "Inherent" Emergency Presidential Policymaking Powers*, 66 MD. L. REV. 787, 796-98 (2007).

rorists, thereby reversing a panel of the D.C. Circuit in which Chief Justice Roberts, then sitting as a circuit judge, had joined.⁵

I. THE IMPORTANCE OF *HAMDAN*

A. *The Merits*

As my colleagues explain in detail elsewhere in the accompanying essays,⁶ the five Justices composing the *Hamdan* majority (through an opinion of the Court by Justice Stevens and a concurring opinion of Justice Kennedy, joined by Justices Souter, Ginsburg, and Breyer) held that, in establishing the military commission system by unilateral Executive Order, the President ran afoul of controlling congressional restrictions within the Uniform Code of Military Justice (UCMJ).⁷ He did so by violating: (1) the UCMJ's "uniformity requirement," i.e., military commissions must parallel the highly protective procedures for the accused within courts-martial proceedings in the absence of a finding of "impracticability," a finding never made by the President;⁸ and (2) the part of the UCMJ which the Court found incorporated Common Article 3 of the Geneva Conventions, requiring the President's tribunals to embody the characteristics of "regularly constituted court[s]."⁹ The *Hamdan* majority found the military commissions at issue so laden with procedural defects that they violated Common Article 3.¹⁰

The latter holding concerning the Geneva Conventions was nothing short of stunning. From the day the Bush Administration opened the Guantanamo Bay detention facility on January 11, 2002,¹¹ it made clear that combatants in the "war on terror" were not entitled to the

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

6. See Singer, *supra* note 4, at 759; Quint, *supra* note 4, at 781–82; Young, *supra* note 4, at 797.

7. 10 U.S.C. §§ 801–946 (2000).

8. *Hamdan*, 126 S. Ct. at 2790–92; *id.* at 2801, 2804 (Kennedy, J., concurring in part).

9. *Id.* at 2796–97 (majority opinion); *id.* at 2803–04, 2807 (Kennedy, J., concurring in part).

10. *Id.* at 2796–97, 2798 (majority opinion); see also *id.* at 2803–04 (Kennedy, J., concurring in part).

11. The first detainees arrived at the detention center at Guantanamo Bay on January 11, 2002. See Carol D. Leonnig & Julie Tate, *Some at Guantanamo Mark 5 Years in Limbo; Big Questions About Low-Profile Inmates*, WASH. POST, Jan. 16, 2007, at A1; see also Steve Vogel, *U.S. Takes Hooded, Shackled Detainees to Cuba*, WASH. POST, Jan. 11, 2002, at A10 ("20 al Qaeda and Taliban detainees were flown out of Afghanistan on a U.S. military aircraft yesterday, the first of hundreds of prisoners from the war expected to be sent to the U.S. Navy base at Guantanamo Bay, Cuba, for interrogation and possible trial.")

protections of the Geneva Conventions.¹² Prior to *Hamdan*, the majority of courts that ruled on this issue had agreed that the Conventions either did not apply or that, if they did apply, they were not “self-executing,”¹³ i.e., detainees had no right to bring actions to enforce their rights under the Conventions.¹⁴ Because the *Hamdan* majority had already held that the military commissions violated the “uniformity requirement” of the UCMJ, it had no need to reach the Geneva Convention issue. However, not only did it do so, but, without ruling on whether these treaties are self-executing, the *Hamdan* majority found that these treaties were incorporated within the UCMJ’s requirement that commissions abide by the “laws of war,”¹⁵ and, as so incorporated, Common Article 3 fully applied to the accused terrorists at issue.¹⁶ Not a single court to confront the issue, whether finding Common Article 3 apt or not, had ever considered the fact that the UCMJ incorporated these treaties. Justice Stevens cited no judicial precedent on point.

12. Memorandum from President George W. Bush to Vice President Richard Cheney et al. (Feb. 7, 2002), *available at* <http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf> (“I also accept the legal conclusion . . . that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees . . . [and] I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva.”); *see also* Michael Greenberger, *A ‘Third’ Magna Carta*, NAT’L L.J., Aug. 2, 2004, at S7 (noting that the Bush Administration had branded the detainees as “enemy combatants” who were not entitled to Geneva protections because they had violated the “laws of war” through irregular fighting methods).

13. For a full description of the origin and use of the term “self executing” in reference to treaties, *see* Quint, *supra* note 4, at 777–78.

14. *See Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005) (“We therefore hold that the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court.”); *Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003) (noting that “the Geneva Convention is not self-executing”); *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002) (holding that the court lacked jurisdiction to consider claims under international law), *aff’d sub nom.* *Al Odah v. United States*, 321 F.3d 1134, 1144–45 (D.C. Cir. 2003) (finding that “[detainees] cannot seek release based on violations of the Constitution or treaties or federal law; the courts are not open to them. Whatever other relief the detainees seek, their claims . . . are . . . beyond the jurisdiction of the federal courts.”), *rev’d sub nom.* *Rasul v. Bush*, 542 U.S. 466 (2004). *But see Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 165 (D.D.C. 2004) (finding that the Geneva Convention was self-executing and that its protections applied to Hamdan); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 478–79 (D.D.C. 2005) (concluding that the Third and Fourth Geneva Conventions are self-executing, relying on the reasoning from *Hamdan*), *vacated sub nom.* *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), *cert. denied*, 127 S. Ct. 1478 (2007).

15. *Hamdan*, 126 S. Ct. at 2794; *see also* 10 U.S.C. § 818 (2000) (“General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.”).

16. *Hamdan*, 126 S. Ct. at 2795–96 (rejecting the lower court’s reasoning that the combatants in Guantanamo were not engaged in the kind of conflict that is covered by Common Article 3).

B. *The Far-Reaching Implication of the Merits*

As Professor Singer notes in her accompanying essay,¹⁷ the *Hamdan* majority's holding pertaining to the Geneva Conventions had important consequences far beyond the legitimacy of military commissions. Those treaties may have broad implications for the manner in which captured combatants are classified,¹⁸ interrogated,¹⁹ and otherwise treated.²⁰ Violations of the Conventions constitute criminal conduct in violation of the federal War Crimes Act.²¹ Hence, reversal of the Bush Administration's doctrine that the Geneva Conventions did not apply to the Guantanamo detainees suddenly raised the prospect that any mistreatment by government interrogators, most especially malpractices going back to the opening of the Guantanamo facility, could lead to felony prosecutions in United States federal courts. As Professor Singer aptly speculates,²² the *Hamdan* majority, in reaching out to make these treaties apt, could hardly have been unaware of the broad significance of that holding.

17. Singer, *supra* note 4, at 764–65.

18. See *Hamdan*, 344 F. Supp. 2d at 161–62 (discussing Article 5 of the Third Geneva Convention, which provides that if there is any doubt whether those captured were operating under the laws of war, they should receive the protections of the Convention until their proper status is determined by a competent tribunal). In the *Hamdan* district court opinion, Judge James Robertson relied on Article 5 to conclude that “[t]here is nothing in this record to suggest that a competent tribunal has determined that Hamdan is not a prisoner-of-war under the Geneva Conventions. . . . Until or unless such a [competent] tribunal decides otherwise, Hamdan has, and must be accorded, the full protections of a prisoner-of-war.” *Id.* at 162. Judge Robertson’s reliance on Article 5 in ruling that Hamdan was not given a proper status hearing demonstrates the type of implication that treaty provisions may have on the classification schemes for captured combatants.

19. See Geneva Convention Relative to the Treatment of Prisoners of War, art. 3(1)(c), Aug. 12, 1949, 6 U.S.T. 3316, 3319–20, 75 U.N.T.S. 135, 138 [hereinafter Third Geneva Convention] (prohibiting “outrages upon personal dignity, in particular humiliating and degrading treatment”).

20. See *id.* art. 25 (providing that “[p]risoners of war shall be quartered under conditions as favourable as those for the forces of the Detaining Power Said conditions shall make allowance for the habits and customs of the prisoners.”); *id.* art. 26 (providing that prisoners of war should receive basic food rations and that their habitual diets should be taken into account); *id.* art. 27 (“Clothing, underwear and footwear shall be supplied to prisoners of war in sufficient quantities”); *id.* art. 29 (requiring the Detaining Power to “take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps and to prevent epidemics”); *id.* art. 30 (requiring adequate infirmary for prisoners of war); *id.* art. 38 (“The Detaining Power shall encourage the practice of intellectual, educational, and recreational pursuits, sports and games amongst prisoners, and shall take the measures necessary to ensure the exercise thereof.”); *id.* art. 48 (providing for procedures regarding mail and parcel transfer to new addresses in the event of transfer).

21. 18 U.S.C. § 2441 (2000 & Supp. II 2002).

22. See Singer, *supra* note 4, at 764.

C. *Overcoming Procedural Hurdles to Reach the Merits*

As Professor Singer also observes in her accompanying piece,²³ perhaps even more astonishing than the substantive holdings of the *Hamdan* majority is its rejection of a series of threshold jurisdictional issues, any one of which would have allowed the Court to avoid ruling on the highly controversial issues embodying the merits. At least one of those issues seemed to have substantial stopping power. After certiorari had been granted in *Hamdan*, Congress passed the Detainee Treatment Act of 2005 (DTA),²⁴ a critical portion of which was designed to overrule legislatively the Court's 2004 decision in *Rasul v. Bush*.²⁵ *Rasul*, reversing a unanimous panel in the D.C. Circuit, held that the Guantanamo Bay detainees, even though aliens held outside the sovereign United States in Cuba, had the right to bring habeas actions in federal district courts under the controlling habeas statute.²⁶ Almost as an afterthought, Congress, through the DTA, which was principally designed to impose Geneva-like limits on controversial Bush Administration interrogation tactics, amended the governing habeas statute to bar habeas actions and to prohibit detainees from even challenging the very interrogation tactics outlawed by that statute.²⁷ Certainly the authors of the habeas bar within the DTA had thought that the language of that statute clearly applied to cases pending at the time of DTA passage, such as *Hamdan*.²⁸

However, the *Hamdan* majority, deftly employing a series of canons of statutory construction, found that the DTA's habeas bar did not apply to pending cases,²⁹ and thus enabling the majority to reach the merits in *Hamdan*. As Professor Singer suggests,³⁰ the majority's circumnavigation of the DTA language is an important sign of the majority's commitment to resolving the substance of the constitu-

23. See *id.* at 761–62.

24. Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (2005) (to be codified at 42 U.S.C. §§ 2000dd to 2000dd-1).

25. 542 U.S. 466 (2004).

26. For a full description of the *Rasul* decision, see Greenberger, *supra* note 12.

27. § 1005(e), 119 Stat. at 2741–43.

28. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2816 (2006) (Scalia, J., dissenting) (discussing statements made by Senators during the DTA's passage and concluding that “[t]hese statements were made when Members of Congress were fully aware that our continuing jurisdiction over this very case was at issue”).

29. See *id.* at 2769 (majority opinion) (finding that “Congress here expressly provided that subsections (e)(2) and (e)(3) [of the DTA] applied to pending cases”).

30. See Singer, *supra* note 4, at 763–64.

tional and statutory issues before it adversely to the Bush Administration.³¹

D. The Hamdan Dissents

The three separate dissenting opinions,³² each joined in by all three of the dissenters (Justices Scalia, Thomas, and Alito), vigorously articulated the various doctrines of deference that both the Court and Congress should pay to the President, acting as Commander in Chief, that conventional wisdom had expected from the Court as a whole. The dissenters did so by accepting the plethora of arguments advanced by the Bush Administration that the Court had no jurisdiction over the matter,³³ and that, even if the merits could be reached, the President was acting lawfully within the scope of his constitutional powers—powers that should be unfettered by statute or international treaty.³⁴ Because the Chief Justice had sat on the lower court panel, he recused himself from *Hamdan*. However, had he been able to rule,

31. Of course, it is true, as Justice Stevens acknowledges in his opinion, that had the Court found that the DTA stripped it of jurisdiction to hear the *Hamdan* case, the Court would have been required to address the constitutionality of such a measure. See *Hamdan*, 126 S. Ct. at 2769 n.15; Singer, *supra* note 4, at 762–63. On the other hand, whether five Justices would coalesce around a finding that such a statute is unconstitutional is certainly an open question, and the early lower court rulings on this issue have not offered a reason for optimism over such an argument. In December 2006, Judge James Robertson of the United States District Court for the District of Columbia held that the MCA was clear in denying Guantanamo detainees the use of habeas corpus and he found the statute constitutional. *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 11–13, 19 (D.D.C. 2006). An even more recent ruling by the D.C. Circuit also held that provisions of the MCA strip foreign nationals held as enemy combatants of the right to file habeas petitions challenging their detention. Much like Judge Robertson’s December 2006 *Hamdan* opinion, the D.C. Circuit relied on *Johnson v. Eisentrager*, 339 U.S. 762 (1950), to support the finding that there exists no common law or constitutional right to habeas corpus for aliens captured outside of the United States, therefore the MCA is not an unconstitutional suspension of the writ. *Boumediene v. Bush*, 476 F.3d 981, 990–92 (D.C. Cir.), *cert. denied*, 127 S. Ct. 1478 (2007). Both opinions essentially stated that when Congress enacted the new MCA and it addressed retroactive habeas claims, “Congress and the president had undone the basis of the Supreme Court’s ruling” in *Hamdan*. Neil A. Lewis, *Judge Sets Back Guantanamo Detainees*, N.Y. TIMES, Dec. 14, 2006, at A4. *But see Boumediene*, 127 S. Ct. at 1479 (Breyer, J., dissenting from denial of certiorari) (noting that the reasoning of *Rasul v. Bush*, 542 U.S. 466 (2004), that the federal habeas statute extended to Guantanamo may “appl[y] to the scope of the constitutional habeas right as well. . . . [I]n *Rasul*, we said that Guantanamo was under the complete control and jurisdiction of the United States.”).

32. *Hamdan*, 126 S. Ct. at 2810–22 (Scalia, J., dissenting); *id.* at 2823–49 (Thomas, J., dissenting); *id.* at 2849–55 (Alito, J., dissenting).

33. *Id.* at 2810–18 (Scalia, J., dissenting).

34. *Id.* at 2823–29, 2839–49 (Thomas, J., dissenting). Justice Alito joined only part of Justice Thomas’s dissent on the merits, finding that because the military commissions were “regularly constituted courts” under Common Article 3, it was unnecessary to address issues concerning the President’s wartime powers. *Id.* at 2849–55 (Alito, J., dissenting).

it is almost self-evident that, based on his lower court vote upholding the commissions, he would have dissented in *Hamdan*.

Embedded within Justice Thomas's dissent was a fiercely expressed admonition that the majority's ruling would weaken the nation's ability to fight the "war on terror."³⁵ That message seems to have had its effect. Justice Breyer wrote a separate concurrence, joined in by Justices Kennedy, Souter, and Ginsburg, offering an assurance that the majority's rulings need not be the last word on this subject.³⁶ Justice Breyer emphasized that the Court's ruling essentially rested on statutes that were inconsistent with the President's desires and that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary."³⁷

II. THE MILITARY COMMISSIONS ACT

Indeed, President Bush did return to Congress seeking the necessary authority. On October 17, 2006, President Bush signed the Military Commissions Act of 2006 (MCA),³⁸ which, in large measure, can only be read as a harsh rebuke of the *Hamdan* Court. In that statute, Congress made crystal clear that federal district courts had no habeas jurisdiction over detainees, whether in pending cases or otherwise.³⁹

35. See *id.* at 2823 (Thomas, J., dissenting) (commenting that "the Court's . . . opinion openly flouts our well-established duty to respect the Executive's judgment in matters of military operations and foreign affairs"); *id.* at 2825 ("I note the Court's error respecting the AUMF not because it is necessary to my resolution of this case . . . but to emphasize the complete congressional sanction of the President's exercise of his commander-in-chief authority to conduct the present war."); *id.* ("Military and foreign policy judgments . . . are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.") (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 582-83 (2004) (Thomas, J., dissenting)); *id.* at 2830 (concluding that the plurality's reference to the *Federalist Papers* "merely highlights the illegitimacy of today's judicial intrusion onto core executive prerogatives in the waging of war, where executive competence is at its zenith and judicial competence at its nadir"); *id.* at 2838 (commenting that the plurality's ruling concerning *Hamdan*'s conspiracy charge "would sorely hamper the President's ability to confront and defeat a new and deadly enemy").

36. See *id.* at 2799 (Breyer, J., concurring).

37. *Id.*

38. Pub. L. No. 109-366, 120 Stat. 2600 (2006); see also JENNIFER K. ELSEA, CONG. RESEARCH SERV., THE MILITARY COMMISSIONS ACT OF 2006: ANALYSIS OF PROCEDURAL RULES AND COMPARISON WITH PREVIOUS DOD RULES AND THE UNIFORM CODE OF MILITARY JUSTICE 6 (2006), available at <http://www.fas.org/sgp/crs/natsec/RL33688.pdf> (explaining that Congress passed the MCA in response to *Hamdan*).

39. The MCA language reads:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Indeed, unlike the DTA, where the elimination of habeas was so cavalierly approached that it was thought to be “inadvertent,”⁴⁰ Congress debated the habeas bar thoroughly when considering the MCA.⁴¹ It fully understood the magnitude of its action, recognizing that this was only the fifth time in the nation’s history that this age-old foundation of democratic government was suspended.⁴²

Congress further expressly provided within the MCA that the Geneva Conventions are not “self executing”⁴³ in so far as they cannot form the basis of any cause of action against the United States, its officers, or its agents. The UCMJ was also amended to make clear that, in important respects, military commissions are to differ from courts-martial, thereby legislatively undermining the UCMJ’s “uniformity requirement” relied upon by the *Hamdan* Court.

While some of the differences between courts-martial and military commissions established by the MCA are either wholly rational, e.g., eliminating the need for *Miranda* warnings upon detention of suspected terror combatants on the field of battle, or helpfully remedial,⁴⁴ others are problematic.

§ 7(a), 120 Stat. at 2636.

40. See Transcript of Oral Argument at 57–60, *Hamdan*, 126 S. Ct. 2749 (No. 05-184), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-184.pdf (Chief Justice Roberts found reference to habeas suspension as possibly being “inadvertent”). Linda Greenhouse reported on the following exchange between Justice Souter and Solicitor General Clement at the *Hamdan* oral argument:

“Now wait a minute!” Justice Souter interrupted, waiving a finger. “The writ is the writ. There are not two writs of habeas corpus, for some cases and for other cases. The rights that may be asserted, the rights that may be vindicated will vary with the circumstances, but jurisdiction over habeas corpus is jurisdiction over habeas corpus.”

Linda Greenhouse, *Justices Hint That They’ll Rule On Challenge Filed by Detainee*, N.Y. TIMES, Mar. 29, 2006, at A1.

41. Arlen Specter, then-chairman of the Senate Judiciary Committee, emphasized the importance of habeas corpus, claiming that it should be applied broadly to include the alleged terrorists being held at Guantanamo Bay. See David G. Savage, *Habeas Corpus and An Era of Limits*, L.A. TIMES, Jan. 30, 2007, at A9. However, in a 51-48 vote, the Senate joined the House and affirmed the President’s view that habeas corpus should not extend to aliens who are enemy combatants. *Id.*; see also Editorial, *Careless Congress*, L.A. TIMES, Nov. 3, 2006, at A28 (noting that although Senator Specter harbored doubts about the constitutionality of the MCA, he justified his vote for it because the Supreme Court would “clean it up”).

42. Cf. Carol D. Leonnig & Julie Tate, *Sept. 11 Plotter Asks Court for Lawyer Trial; Case Embodies Debate Over Habeas Rights*, WASH. POST, Oct. 26, 2006, at A3 (noting that the writ of habeas corpus has been suspended only four times previously in American history, and opining that the suspension embodied in the MCA would be subject to review in the Supreme Court).

43. § 3, 120 Stat. at 2602.

44. There are a wide variety of differences between pre-MCA and post-MCA military commission procedures. The MCA provides that a military judge preside over panels of

For example, Congress broadened the personal jurisdiction of military commissions to apply to any alien, even those not necessarily actively engaged in hostilities against the United States, who, *inter alia*, “ha[ve] purposefully and *materially supported* hostilities against the United States . . . (including a person who is part of . . . [terrorist-] associated forces).”⁴⁵ Whereas the President’s original Executive Order contemplated jurisdiction over aliens actively engaged in combatant activities on foreign fields of battle,⁴⁶ the MCA’s focus on the vague term “material support”—a phrase already the subject of substantial constitutional litigation in other related contexts⁴⁷—by

five military officers, or in death penalty cases, twelve military officers. ELSEA, *supra* note 38, at 13. Prior to the MCA, there was no requirement that the military commissions be supervised by military judges. *Id.* Furthermore, the MCA provides for a Court of Military Commission Review for appeals from the commissions, a body composed exclusively of military judges who meet the same standards as other military or civilian judges. *Id.* at 26. Prior to the MCA, appeals were reviewed by panels who were appointed by the President. *Id.* at 14. Additionally, pre-MCA processes had no bars to improper “command influence” on military lawyers representing detainees. *Id.* The MCA now strictly prohibits command influence by insulating those military personnel on the commissions or acting as counsel from adverse impacts in performance evaluations. *Id.* Moreover, the MCA greatly limits the circumstances where a defendant can be tried while not present to those times when the defendant is disruptive or dangerous. *Id.* at 17.

45. § 3, 120 Stat. at 2601 (emphasis added).

46. Under this order, persons subject to its requirements are noncitizens and

- (1) there is reason to believe that such individual, at the relevant times,
 - (i) is or was a member of the organization known as al Qaeda;
 - (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation 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; . . . and
- (2) it is in the interest of the United States that such individual be subject to this order.

Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism § 2(a), 66 Fed. Reg. 57,833, 57,834 (Nov. 16, 2001).

47. *E.g.*, *United States v. Afshari*, 426 F.3d 1150, 1160 (9th Cir. 2005) (finding that contributing money to a group branded by the State Department as a “foreign terrorist organization” constitutes “materially supporting the organization” and, as such, is considered “materially supporting actual violence”), *reh’g en banc denied*, 446 F.3d 915, 920 n.6 (9th Cir. 2006) (Kozinski, J., dissenting from denial of rehearing en banc) (arguing that the monetary donations were made during a period where the designated foreign terrorist organization should not have been so designated), *cert. denied sub nom. Rahmani v. United States*, 127 S. Ct. 930 (2007); *United States v. Sattar*, 272 F. Supp. 2d 348, 360–61 (S.D.N.Y. 2003) (finding unconstitutionally vague certain provisions of 18 U.S.C. § 2339B (2000), which prohibits the knowing provisions of material support or resources, including in the form of “communications equipment” and “personnel,” to a foreign terrorist organization). *But see United States v. Goba*, 220 F. Supp. 2d 182, 194 (W.D.N.Y. 2002) (finding the criminalization in 18 U.S.C. § 2339B of the act of providing material support to a foreign terrorist organization not to be unconstitutionally vague as applied to defendants charged with training at a foreign terrorist organization camp).

someone merely “associated” with terrorists opens a Pandora’s box of confusing ambiguity. Some have thought that this loose definition opens the door to military commissions focused on purely domestic activities within the United States, including those of resident aliens otherwise fully protected by the Constitution who have nothing to do with armed conflict.⁴⁸ It has been generally understood that an essential predicate to the use of military commissions is a focus on violations of the laws of war in military battles.⁴⁹

Moreover, the MCA, while prohibiting evidence adduced by torture, nevertheless affords military judges considerable latitude to use detainee statements coerced by interrogators. Coerced statements elicited prior to the DTA’s prohibition of “cruel, inhumane, or degrading”⁵⁰ interrogations are admissible only if the military judge should conclude that “the totality of the circumstances renders the [coerced] statement reliable and possessing sufficient probative value” and “the interests of justice would best be served by [admissibility].”⁵¹ Statements coerced after passage of the DTA’s McCain Amendment are admissible if the two standards articulated above are met and “the interrogation methods . . . do not amount to cruel, inhuman, or degrading treatment” prohibited, *inter alia*, by the Eighth Amendment.⁵² Thus, by legislative legerdemain, the protections within the much-lauded McCain Amendment are redefined merely to prevent conduct violating the quite limited reach of the Eighth Amendment.⁵³

Finally, Congress did not undertake what it deemed to be a tempting, but legally questionable and politically unpopular, decision to make the Geneva Conventions wholly inapplicable to the Guantanamo detainees. However, it did make the Conventions much harder to enforce. Not only did it remove habeas jurisdiction as an avenue

48. *Cf.* Human Rights First, Human Rights First Opposes Military Commissions Legislation, http://www.humanrightsfirst.org/US_law/etn/index.asp (last visited Mar. 9, 2007) (arguing that the definition of “unlawful enemy combatants” is overly broad, as it might include resident aliens).

49. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 773, 836 (2d ed. 1920); *see also* ELSEA, *supra* note 38, at 8 (explaining that military commissions have jurisdiction over any offense that is covered by the MCA or that is a violation of the law of war).

50. Pub. L. No. 109-148, div. A, tit. X, § 1003, 119 Stat. 2739 (2005) (to be codified at 42 U.S.C. § 2000dd).

51. MCA § 3, Pub. L. No. 109-366, 120 Stat. 2600, 2607 (2006).

52. *Id.* (citing Pub. L. No. 109-148, div. A, tit. X, § 1003, 119 Stat. 2739, 2739–40 (to be codified at 42 U.S.C. §§ 2000dd to 2000dd-1)).

53. *Cf.* *Ingraham v. Wright*, 430 U.S. 651, 670 (1977) (finding that “[a]fter incarceration, only the ‘unnecessary and wanton infliction of pain’ constitutes cruel and unusual punishment forbidden by the Eighth Amendment” (citations omitted) (quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976))).

for seeking relief under the Conventions,⁵⁴ it also expressly eliminated using those treaties as a basis for *any* other cause of action against the United States.⁵⁵ More importantly, it watered down Common Article 3's prohibition against "humiliating and degrading treatment" of detainees by defining (or, more accurately, redefining) that term to bar only those activities causing bodily injury that involve "(I) a substantial risk of death; (II) extreme physical pain; (III) a burn or physical disfigurement of a serious nature . . . ; or (IV) significant loss or impairment of the function of a bodily member, organ, or mental faculty."⁵⁶ This definition not only departs from international norms,⁵⁷ thereby permitting interrogation practices generally thought to be barred by Common Article 3, but it has the additional troubling effect of attempting to make prosecution of a wide range of abusive practices by U.S. interrogators nearly impossible under the federal War Crimes Act.⁵⁸

III. THE HARSH REALITY OF GUANTANAMO

The question that remains, however, is how a conservative Supreme Court ended up being the *bête noir* of an equally conservative Congress. In this vein, it must be remembered that since Lyndon Johnson nominated, and a Democratic-controlled Senate confirmed,

54. MCA § 5, 120 Stat. at 2631.

55. *Id.*

56. *Id.* § 3, 130 Stat. at 2627–28. The MCA definition reverts back to an August 2002 Office of Legal Counsel memorandum, later retracted by the Justice Department, which defined torture as inflicting permanent injury "such as organ failure, impairment of bodily function, or even death." Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>. For a comprehensive description of the initial disclosure of the "Torture Opinion" and the Justice Department's policy revisions, see Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture, Justice Dept. Gave Advice in 2002*, WASH. POST, June 8, 2004, at A1; R. Jeffrey Smith & Dan Eggen, *Justice Expands "Torture" Definition; Earlier Policy Drew Criticism*, WASH. POST, Dec. 31, 2004, at A1.

57. *E.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85, 113–14 (defining torture as "severe pain or suffering" without requiring any type of permanent physical or mental injury).

58. The MCA definition was incorporated into the federal War Crimes Act, 18 U.S.C. § 2441 (2000). See MCA § 6, 120 Stat. at 2634. Furthermore, the MCA retroactively applies this definition to limit the liability of American military personnel, *id.* § 6, 120 Stat. at 2635, denies the right of any person subject to the military commission to invoke the Geneva Conventions in any action against the United States or its agents, *id.* § 5, 120 Stat. at 2631, denies the ability to invoke the Geneva Conventions as a source of law in general, *id.* § 3, 120 Stat. at 2602, and, subject to exceptions within the Act, strips the courts of any jurisdiction over habeas corpus claims, *id.* § 7, 120 Stat. at 2635–36.

Justice Thurgood Marshall almost forty years ago, there have been fifteen judicial confirmations to the Court.⁵⁹ Only two of those Justices were appointed by a Democratic President.⁶⁰ The remaining thirteen have been nominated by conservative Republican Presidents and, with every nomination, that President assured both the public and the Senate that his nominee would uphold conservative, “strict constructionist,” and non-activist principles. Yet, even after those forty years, the Court has continued a centrist or moderate drift, befuddling the conservative Presidents, Senators, and activists engaged in the confirmation process.⁶¹ Indeed, the *Hamdan* majority itself was composed of three Justices appointed by Republican Presidents.

For a better understanding of the motivations of the *Hamdan* majority, it is useful to examine the broader factual undergirdings of the Guantanamo facility itself and the detainees held there. On January 3, 2002, Secretary of Defense Rumsfeld announced that al Qaeda and Taliban combatants captured on the field of battle in the Afghanistan conflict would be detained by the Department of Defense (DOD) at the United States naval facility at Guantanamo Bay, Cuba.⁶² The Secretary announced several days later that these detainees, having allegedly fought without uniforms or insignia and having chosen innocent civilians as their principal targets, would be deemed unlawful enemy combatants not entitled to the protections of the Geneva Convention.⁶³ Since its opening as a detention facility, Guantanamo has housed over 770 alleged unlawful combatants, but only ten have been charged with crimes.⁶⁴ A majority of the detainees were not captured by the U.S. military, but were instead turned over by Afghanistan and Pakistan militia and civilians to the United States in return for substantial bounties paid by the United States for capturing al Qaeda or

59. Members of the Supreme Court of the United States, <http://www.supremecourt.us.gov/about/members.pdf> (last visited Mar. 30, 2007).

60. *See id.*

61. *See, e.g.*, Fred Barnes, *Souter-phobia*, WKLY. STANDARD, Aug. 1, 2005, at 11; Fred Hutchison, *The Enigma of the Moderate Republican Judges: The Mystery of the Leftward Migration*, RENEW AMERICA, July 16, 2005, <http://www.renewamerica.us/analyses/050717hutchison.htm>; Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, Apr. 9, 2005, at A3.

62. Donald Rumsfeld, U.S. Sec’y of Def., Department of Defense News Briefing with Secretary Rumsfeld and General Myers (Jan. 3, 2002), <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=1046>.

63. Donald Rumsfeld, U.S. Sec’y of Def., Department of Defense News Briefing with Secretary Rumsfeld and General Myers (Jan. 11, 2002), <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2031>.

64. *See* Judd Legum et al., *National Security: Five Years Too Long*, CTR. FOR AM. PROGRESS ACTION FUND, Jan. 12, 2007, http://www.americanprogressaction.org/progressreport/2007/01/pr_2007_01_12.html.

Taliban forces.⁶⁵ There has been speculation that the financial incentives for capture overwhelmed the true non-combatant nature of those detained.⁶⁶

Until the June 28, 2004 Supreme Court decisions in *Rasul v. Bush*⁶⁷ and *Hamdi v. Rumsfeld*,⁶⁸ no systematic effort was made by the DOD to determine whether the detainees were combatants or, if combatants, whether they were entitled to the substantial protections the Geneva Conventions affords to prisoners of war. Thus, the Afghanistan incursion became the first conflict since the advent of the Geneva Conventions in 1949 where the United States military did not convene battlefield tribunals to determine whether those captured were properly classified as combatants or prisoners of war or were innocent civilians⁶⁹ caught up in military turmoil. After *Rasul* established that Guantanamo detainees could bring habeas actions challenging their detention⁷⁰ and after *Hamdi* strongly implied that they had due process rights pertaining to the question of the propriety of their detention,⁷¹ the DOD quickly instituted Combatant Status Review Tribunals (CSRTs) to review the unlawful enemy combatant determination made pertaining to the detainees.⁷² Criticism pertaining to the procedural shortcomings of the CSRTs has been legion. Detainees before CSRTs have not been represented by counsel.⁷³ Often confronted with nothing more than bare allegations that there was classified but

65. See MARK DENBEAUX & JOSHUA DENBEAUX, REPORT ON GUANTANAMO DETAINEES 2–3, 14–15 (2006), http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf [hereinafter DENBEAUX & DENBEAUX, GUANTANAMO DETAINEE REPORT].

66. See *id.* at 15 (noting that bounty hunters were driven by cash incentives to assert that certain individuals now held at Guantanamo were enemy combatants).

67. 542 U.S. 466 (2004).

68. 542 U.S. 507 (2004).

69. See Robert M. Chesney, *Panel Report: Beyond Article III Courts: Military Tribunals, Status Review Tribunals, and Immigration Courts*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 27, 37 (2006) (discussing the remarks of Gitanjali Gutierrez, counsel for several Guantanamo detainees, who suggested that there are large numbers of innocent people currently held at Guantanamo Bay); Peter Irons, "The Constitution Is Just a Scrap of Paper": *Empire Versus Democracy*, 73 U. CIN. L. REV. 1081, 1086–87 (2005) (asserting that many "bystanders or innocent villagers" had been picked up by the U.S. military in Afghanistan); Tom Malinowski, Editorial, *Who's Really Locked Up in Guantanamo?*, L.A. TIMES, Mar. 16, 2006, at B11 (reporting that "[f]ewer than half [of the detainees] were caught on battlefields in Afghanistan or by U.S. troops"); David Rohde, *Afghans Freed from Guantanamo Speak of Heat and Isolation*, N.Y. TIMES, Oct. 29, 2002, at A18 (describing accusations that American officials relied on "faulty information" when detaining people).

70. *Rasul*, 542 U.S. at 484.

71. *Hamdi*, 542 U.S. at 533 (plurality opinion).

72. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 450 (D.D.C. 2005), *vacated sub nom. Boumediene v. Bush*, 476 F.2d 981 (D.C. Cir.), *cert. denied*, 127 S. Ct. 1478 (2007).

73. See *id.* at 450 (observing that detainees do not have a right to counsel in CSRT proceedings).

undisclosed evidence that they were unlawful combatants, detainees without the right to access evidence of their own bore the burden of proving their non-combatant status.⁷⁴ A recent report by Amnesty International on the CSRTs⁷⁵ has led the British director of Amnesty to brand these proceedings “shabby show trials.”⁷⁶ Very few detainees were found to be noncombatants under these one-sided proceedings.⁷⁷ Moreover, those who were deemed noncombatants often remained at Guantanamo because the DOD was unable to repatriate them.⁷⁸

Besides the inadequacy of process pertaining to their status, the abuses of the detention and the interrogation practices employed at Guantanamo have become legendary. Detainees have been held incommunicado without access to the outside world.⁷⁹ Before *Rasul* and *Hamdi*, detainees were denied any form of legal assistance. Even after those decisions, counsel for detainees have lodged protests over the lack of adequate access to their clients and violations of the attorney-client privilege.⁸⁰

Interrogation practices have almost certainly included waterboarding,⁸¹ extreme temperature changes,⁸² profaning Islamic relig-

74. See, e.g., *id.* at 450, 468–70 (discussing the hearing of one detainee who could only continually assert that he had no association with an al Qaeda operative because the CSRT refused to give him the name of that operative).

75. AMNESTY INT’L, UNITED STATES OF AMERICA: JUSTICE DELAYED AND JUSTICE DENIED? TRIALS UNDER THE MILITARY COMMISSIONS ACT (2007), http://amnesty.org.uk/uploads/documents/doc_17641.pdf.

76. *Protest over ‘Shabby Show Trials,’* BBC NEWS, Mar. 22, 2007, <http://news.bbc.co.uk/1/hi/uk/6477957.stm>; see also MARK DENBEAUX & JOSHUA DENBEAUX, NO-HEARING HEARINGS, CSRT: THE MODERN HABEAS CORPUS? (2006), http://law.shu.edu/news/final_no_hearing_hearings_report.pdf [hereinafter DENBEAUX & DENBEAUX, NO-HEARING HEARINGS].

77. See DENBEAUX & DENBEAUX, NO-HEARING HEARINGS, *supra* note 76, at 39 (explaining that 7% of detainees who received a hearing through the CSRT process were found to be noncombatants or no longer enemy combatants and released).

78. See Press Release, President George W. Bush, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html> [hereinafter Military Commissions Speech] (“[O]ne of the reasons we have not been able to close Guantanamo is that many countries have refused to take back their nationals held at the facility.”).

79. See ACLU, ENDURING ABUSE: TORTURE AND CRUEL TREATMENT BY THE UNITED STATES AT HOME AND ABROAD 27 (2006), http://www.aclu.org/safefree/torture/torture_report.pdf.

80. See, e.g., Ben Fox, *Defense Seeks to Move Gitmo Trials to U.S.*, ASSOC. PRESS, June 15, 2006, available at <http://www.cbsnews.stories/2006/06/15/ap/world/mainD818DE580.html>; Ben Fox, *Guantanamo Lawyers Say Letters Seized*, ASSOC. PRESS, June 30, 2006, available at <http://abcnews.go.com/International/wireStory?id=2140656&page=1>.

81. ENDURING ABUSE, *supra* note 79, at 4.

82. Dan Eggen & R. Jeffrey Smith, *FBI Agents Allege Abuse of Detainees at Guantanamo Bay*, WASH. POST, Dec. 21, 2004, at A1.

ious materials and practices,⁸³ sleep and food deprivation,⁸⁴ physical stress positions,⁸⁵ and rough physical handling (e.g., punching and slapping).⁸⁶ It was soon reported that the interrogation practices were so abusive that at one stage the FBI refused to participate further in them.⁸⁷ Investigative reports have suggested that the interrogation and prisoner abuses at Abu Ghraib have their genesis in practices developed by the military at Guantanamo.⁸⁸

Reports of the abuses at Guantanamo have received widespread and worldwide condemnation. The British Parliament,⁸⁹ the European Union,⁹⁰ two Secretaries General of the United Nations,⁹¹ international jurists,⁹² international and domestic bar associations,⁹³ and

83. See Press Release, ACLU, *Guantánamo Prisoners Told FBI of Qur'an Desecration in 2002, New Documents Reveal* (May 25, 2005), available at <http://www.aclu.org/safefree/general/17630prs20050525.html>.

84. See Dan Eggen, *FBI Reports Duct-Taping, "Baptizing" at Guantanamo*, WASH. POST, Jan. 3, 2007, at A1.

85. See Eggen & Smith, *supra* note 82 (describing how detainees were chained to the floor in the fetal position).

86. See ACLU, *supra* note 83.

87. See Julia Preston, *A.C.L.U. Gains in Its Quest for C.I.A. Documents on Detainees*, N.Y. TIMES, Feb. 3, 2005, at A13; ACLU, *FBI Inquiry Details Abuses Reported by Agents at Guantánamo* (Jan. 3, 2007), <http://www.aclu.org/safefree/torture/27816prs20070103.html> (detailing accounts of detainees being beaten).

88. See, e.g., Nick Timiraos, *Army Officer OK'd Dogs in Interrogations*, L.A. TIMES, Mar. 16, 2006, at A12 (reporting that Col. Pappas, who oversaw interrogations at Abu Ghraib, stated that "the military requested dog handlers at the [Abu Ghraib] prison at the recommendation of Maj. Gen. Geoffrey D. Miller, an Army detention officer who oversaw the U.S. prison at Guantanamo Bay, Cuba"); Josh White, *Abu Ghraib Tactics Were First Used at Guantanamo*, WASH. POST, July 14, 2005, at A1 (comparing the abusive practices depicted in the photographs of Abu Ghraib with the tactics used to interrogate Mohamed Qahtani, the believed "20th hijacker" in the 9/11 terrorist attacks, at Guantanamo Bay in 2002).

89. See FOREIGN AFFAIRS COMMITTEE, *VISIT TO GUANTÁNAMO BAY, 2006-7*, H.C. 44-2, at 37 (recommending that Guantanamo be closed "as soon as may be consistent with the overriding need to protect the public from terrorist threats"), available at <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfa/44/44.pdf>.

90. See *Euro MPs Urge Guantanamo Closure*, BBC NEWS, June 13, 2006, <http://news.bbc.co.uk/2/hi/americas/5074216.stm>; see also Letter from Human Rights Watch to EU Foreign Ministers (July 14, 2006), available at <http://hrw.org/english/docs/2006/07/14/usdom13738.htm>.

91. See U.N. Chief: "Ban" *Gitmo*, N.Y. POST, Jan. 12, 2007, at 30 (discussing U.N. Secretary-General Ban Ki-moon's remarks that both he and former Secretary-General Kofi Annan believe that the Guantanamo facility should be closed).

92. See Tony Karon, *Why Guantanamo Has Europe Hopping Mad*, TIME.COM, Jan. 24, 2002, <http://www.time.com/time/world/article/0,8599,197210,00.html> (stating that many leading international jurists support the view that prisoners at Guantanamo should be afforded rights commensurate with POWs or common criminals and that the category "unlawful combatant" does not exist in international law).

93. See Press Release, Int'l Bar Ass'n, *Guantanamo Bay Detainees are Entitled to Challenge their Detention in Court, IBA Human Rights Institute Briefs US Supreme Court* (Jan. 25, 2004) (criticizing the U.S. government for attempting to hold prisoners outside of

human rights groups⁹⁴ have all condemned the handling of detainees at Guantanamo in the strongest of terms and, in most instances, have called for its closure. The International Red Cross, the body assigned to monitor the enforcement of the Geneva Conventions, has gone so far as to take the unprecedented step of publicly condemning the United States for the conditions at Guantanamo after repeated visits to that facility failed to lead to remediation of conditions.⁹⁵

The facility has widely been recognized by some in the media and in international polling as one of the foremost reasons for the United States' substantial loss of standing in the world community.⁹⁶ Additionally, key Bush Administration officials, including Secretary of Defense Robert Gates and Secretary of State Condoleezza Rice, have expressed their desire to see Guantanamo Bay "shut down as quickly as possible."⁹⁷ Even President Bush has recently acknowledged an interest in closing the facility.⁹⁸

their sovereign territory and normal legal frameworks by placing detainees at Guantanamo), available at <http://archive.ibanet.org/news/NewsItem.asp?newsID=132>; Katerina Ossanova, *UK Attorney General Repeats Call for Guantanamo Bay Closure on US Visit*, JURIST, Sept. 17, 2006, <http://jurist.law.pitt.edu/paperchase/2006/09/uk-attorney-general-repeats-call-for.php>; Neal R. Sonnett, *Guantanamo: Still a Legal Black Hole*, 33 HUM. RTS.: J. INDIVIDUAL RTS. & RESP. 8 (2006) (discussing the absence of basic due process procedures at Guantanamo detainee hearings).

94. Michael Posner, Editorial, *Close Camp Delta*, BALT. SUN, June 5, 2005, at C5; US: *Mark Five Years of Guantanamo by Closing it*, HUM. RTS. WATCH, Jan. 5, 2007, <http://hrw.org/english/docs/2007/01/05/usdom14974.htm> (denouncing ongoing detentions at Guantanamo as a shameful denial of human rights by America).

95. See Press Release, Int'l Comm. of the Red Cross, ICRC President Urges Progress on Detention-Related Issues (Jan. 16, 2004) (stating that two years after capture, Guantanamo detainees were still facing indefinite detention without any recourse in law), available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5v9te8?opendocument>; see also Gabor Rona, "War" Doesn't Justify Guantanamo, FIN. TIMES (UK), Mar. 1, 2004, at 17 (observing that the U.S. worldview of the war on terror permits American forces to detain suspected terrorists under international law, but also allows them to deny these detainees a legal hearing); Brett Murphy, *Detainee Abuse in CIA Secret Prisons Documented in ICRC Report*, JURIST, Mar. 21, 2007, <http://jurist.law.pitt.edu/paperchase/2007/03/detainee-abuse-in-cia-secret-prisons.php> (reporting that detainees held around the globe by the CIA were subject to sleep deprivation and abuse).

96. See, e.g., *World View of US Role Goes From Bad to Worse*, BBC NEWS, Jan. 23, 2007, http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/23_01_07_us_poll.pdf (noting that 67% of people in twenty-two different countries disapprove of American treatment of prisoners at Guantanamo); Editorial, *The President's Prison*, N.Y. TIMES, Mar. 25, 2007.

97. Thom Shanker & David E. Sanger, *New to Pentagon, Gates Argued For Closing Guantanamo Prison*, N.Y. TIMES, Mar. 23, 2007, at A1. State Department and Pentagon officials have admitted that close allies are uncomfortable with the policies at Guantanamo, making it harder "to coordinate efforts in counterterrorism, intelligence and law enforcement." *Id.*

98. See Military Commissions Speech, *supra* note 78 ("[W]e will continue to urge nations across the world to take back their nationals at Guantanamo who will not be prosecuted by our military commissions. America has no interest in being the world's jailer.").

In then-Secretary of Defense Rumsfeld's defense of Guantanamo, he assured the American public and the world community that the detainees there represented the "worst of the worst" terrorists.⁹⁹ However, the facts have long since belied that claim. Even with the absence of adequate process, the DOD has voluntarily released thirty-eight detainees, most of whom have been set free by their home countries upon their return.¹⁰⁰ The British lobbied for years for the release of nine of its citizens held at Guantanamo, and when those detainees were finally returned to England, they were freed virtually as soon as they walked off of their returning planes.¹⁰¹ Additionally, three of the detainees held at Guantanamo were under sixteen years old when detained and were held in a holding facility especially equipped for adolescents.¹⁰² It has now been reported that many of the detainees had never even engaged in combat on a battlefield against the United States.¹⁰³

Further evidence of the lack of serious culpability on the part of the majority of the detainees is that at the time the *Hamdan* decision was rendered—nearly four and one half years after the Guantanamo facility opened—only ten detainees had been charged with war crimes and made subject to the pre-MCA military commissions.¹⁰⁴ Proceedings had commenced against only four of those ten, including Hamdan himself.¹⁰⁵ Moreover, by the time the MCA was enacted on October 17, 2006, not a single proceeding against a detainee had entered the trial phase.¹⁰⁶

99. Ari Fleischer, White House Press Sec'y, Press Briefing (Jan. 16, 2002), <http://www.whitehouse.gov/news/releases/2002/01/20020116-7.html>.

100. DENBEAUX & DENBEAUX, NO-HEARING HEARINGS, *supra* note 76, at 39.

101. See Dafna Linzer & Glenn Kessler, *Decision to Move Detainees Resolved Two-Year Debate Among Bush Advisors*, WASH. POST, Sept. 8, 2006 (noting the Administration's decision to release the final four British detainees who "were sent home to Britain and immediately freed").

102. See *U.S. Frees 3 Teens at Guantanamo Base*, CNN.com, Jan. 29, 2004, <http://www.cnn.com/2004/WORLD/americas/01/29/gitmo.teens/index.html>.

103. See DENBEAUX & DENBEAUX, GUANTANAMO DETAINEE REPORT, *supra* note 65, at 4; Irons, *supra* note 69, at 1086; Malinowski, *supra* note 69, at B11; see also *Boumediene v. Bush*, 127 S. Ct. 1478, 1480 (2007) (Breyer, J., dissenting from denial of certiorari) ("[M]any [Guantanamo detainees] were seized outside any theater of hostility, in places like Pakistan, Thailand, and Zambia.").

104. See ELSEA, *supra* note 38, at 3.

105. Kathleen T. Rhem, *Judge Orders Military Trial at Guantanamo Bay Halted*, U.S. FED. NEWS, Nov. 15, 2005.

106. Neil A. Lewis, *Officials See Qaeda Trials Using New Law in 2007*, N.Y. TIMES, Nov. 3, 2006, at A18. Despite the enactment of the MCA, detainees may still be able to challenge their detentions as violative of their constitutional habeas rights.

Indeed, after *Hamdan* had been decided and the President began his campaign to pass legislation that was to become the MCA, he removed fourteen top al Qaeda operatives from secret CIA-run prisons in Europe to hold them at Guantanamo for war crimes prosecution.¹⁰⁷ That move was viewed as necessary to justify the MCA, because, in the absence of these alleged front line al Qaeda operatives being held in Cuba, it was hard to make a case for the dire need for military commissions in light of the absence of serious culpability of most of the remaining Guantanamo detainees.¹⁰⁸

The reputation of the President's pre-MCA Guantanamo military commissions has fared no better than that of the detention facility itself. Those Commissions were established by a bare-bones Executive Order of November 13, 2001.¹⁰⁹ The DOD's attempts to flesh out the details of the commissions' operation were met with repeated worldwide condemnation, including two separate stinging critiques by the American Bar Association House of Delegates.¹¹⁰ The DOD was repeatedly forced to revise the military commission structure as evidenced by the publication of two separate military orders and ten military commission instructions outlining practices and procedures before the commission.¹¹¹ The process was so confusing and obtuse that those charged with launching formal proceedings were forced to shut them down because of uncertainty of how to proceed.¹¹² As he attempted to launch tribunal proceedings, one military commission judge was discovered to have a request pending before the Attorney General to become an immigration judge.¹¹³ JAG officers assigned to defend the detainees complained of harassment and career threats if

107. See Jonathan Karl, "High Value" Detainees Transferred to Guantanamo, ABC NEWS, Sept. 6, 2006, <http://abcnews.go.com/International/story?id=2400470>.

108. Cf. Linzer & Kessler, *supra* note 101 (discussing the international reaction to the public disclosure of the secret CIA prisons and the push to end the prolonged detention without trial of those at Guantanamo).

109. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism § 4, 66 Fed. Reg. 57,833, 57,834–35 (Nov. 16, 2001).

110. For both resolutions, as well as a letter addressed to the DOD regarding the MCA, see http://www.abanet.org/poladv/letters/antiterror/061020letter_milcom_dod.pdf.

111. See ELSEA, *supra* note 38, at 2–3 & n.11.

112. Joshua Pantesco, *Guantanamo Military Judge Unsure of What Laws Govern Detainee Trial*, JURIST, Apr. 4, 2006, http://www.jurist.law.pitt.edu/paperchase/2006/04/guantanamo_military_judge_ensure_of.php (describing how one military judge, uncertain if military or federal criminal laws and procedures governed the proceeding, responded to the request of a detainee's counsel for specific instructions with "I'm not going to speculate as to what is or what is not controlling").

113. Sara Wood, *Case of Accused Teen Terrorist Hits More Legal Road Blocks*, U.S. FED. NEWS, Apr. 6, 2006.

they pursued too active a defense.¹¹⁴ Indeed, within two weeks of his victory before the Supreme Court, Hamdan's lead military counsel, Lieutenant Commander Charles Swift, was denied promotion, thereby necessitating his leave of military service.¹¹⁵ JAG officers have also complained about abundant ethical conflicts presented by the ineffective organization of their offices, requiring them, inter alia, to represent groups of detainees who should be represented separately.¹¹⁶

While some of these damning facts made their way to the Supreme Court either as part of the *Hamdan* record or in briefs amicus curiae in that case, the full scope of the worldwide controversy over the Guantanamo facility and the ineptitude of the military commission effort was so prevalent within the everyday media in general and the proceedings of the worldwide associations of jurists and lawyers in particular that it could not possibly have escaped the attention of the Justices. These facts clearly had little impact on the three *Hamdan* dissenters or on Chief Justice Roberts when he participated in the D.C. Circuit's consideration of the *Hamdan* case. However, one cannot help but speculate that these facts had a substantial impact on the thinking of the five Justices in the majority, especially on the crucial "swing" vote of Justice Kennedy.

IV. JUSTICE KENNEDY AND THE WORLD

While not a certainty by any means prior to the decision, the votes of four more liberal members of the Court (Justices Stevens, Souter, Ginsburg, and Breyer) in *Hamdan* could not be classified as a great surprise. To the casual Court observer and to the larger public, however, Justice Kennedy's affirmation of the sweep of *Hamdan*, especially that part of the decision making the Geneva Conventions appli-

114. Cf. Jonathan Mahler, *Commander Swift Objects*, N.Y. TIMES, June 13, 2004, § 6 (Magazine), at 42, 45 (discussing the conflicting tensions between the role of Navy JAGs as counsel for detainees and the DOD as the JAGs' employer).

115. See Carol Rosenberg, *Guantanamo Defense Attorney Forced Out of Navy*, SEATTLE TIMES, Oct. 8, 2006.

116. See, e.g., *Hamdan v. Rumsfeld: Establishing a Constitutional Process: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Charles D. Swift, Lieutenant Commander, Judge Advocate General Corps, U.S. Navy), available at http://judiciary.senate.gov/print_testimony.cfm?id=1986&wit_id=5510. Lieutenant Commander Swift testified:

The system for assigning several defense counsel from the same office to represent alleged co-conspirators violated some defense counsel's state bar ethical rules. The Pennsylvania Bar Association advised the military defense counsel in one military commission case that she had "a disqualifying conflict of interest" due to the office's representation of multiple alleged co-conspirators.

Id.

cable to the detainees, was highly noteworthy.¹¹⁷ Yet, a careful examination of Justice Kennedy's legal background, scholarly interests, extra-judicial relationships, and his recent high profile rulings make his vote more understandable. Indeed, these very factors are strong predictors of where the Court will go when detainee cases return to the Justices, as a result of the plethora of issues raised by Congress's throwing down the gauntlet by passing the MCA.

The most helpful key to understanding Justice Kennedy's influences in this regard is Jeffrey Toobin's biographical sketch of the jurist in the *New Yorker*, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, which was written almost a year before *Hamdan* was decided.¹¹⁸ In what can now be viewed as prescient observations, Toobin explains that a myopic focus on the Justice's "provincial background"¹¹⁹ as a Harvard-trained lawyer/lobbyist in Sacramento, California may be quite deceiving. As a teenager, Justice Kennedy worked on oil rigs in Canada and Louisiana. After college, he studied at the London School of Economics. While practicing in Sacramento, he was admitted to the bar in Mexico. As a Ninth Circuit Judge, he was appointed by Chief Justice Burger as a supervisor of U.S. territorial courts in the South Pacific, to which he traveled frequently.

For the last sixteen years, Justice Kennedy has spent his summers in Salzburg, Austria, where he teaches classes in a program that the McGeorge School of Law hosts at the University of Salzburg. At that program, he teaches a course entitled *Fundamental Rights in Europe and the United States*. During his Salzburg stays, he has also actively participated, both officially and unofficially, in what Toobin correctly calls "the most important international judges' conference"¹²⁰ in the

117. To be sure, Justice Kennedy's concurrence limited the sweep of that portion of Justice Stevens's opinion, which only garnered four votes. See Quint, *supra* note 4, at 782 (commenting that only a plurality found that the crime of conspiracy to violate the laws of war was not itself a violation of the "laws of war," and that several procedures of military commissions violated Common Article 3); Young, *supra* note 4, at 798 (noting that Justice Kennedy found it unnecessary to reach the constitutionality of certain features of the military commissions system). However, as mentioned at length in the accompanying essays and above, what remains of *Hamdan* after Kennedy's concurrence is of the most substantial import.

118. Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, *NEW YORKER*, Sept. 12, 2005, at 42. The biographical information laid out immediately below is derived from the Toobin article.

119. *Id.*

120. *Id.* at 47.

world, the Salzburg Seminar, where the Justice is described as always “eager to meet his foreign counterparts.”¹²¹

The Justice also serves on “the board of an [ABA] group that advises judges and lawyers in China, where he travels about once a year.”¹²² After the fall of the Berlin Wall, Justice Kennedy “began to advise emerging democracies—including Czechoslovakia and Russia—on their constitutions and rule of law.”¹²³

Based on these broad and diverse experiences, Toobin concludes that, while the Justice on many issues remains a reliable conservative vote (having, for example, been recognized as the principal author of the unsigned majority opinion in *Bush v. Gore*),¹²⁴ he

has a passion for foreign cultures and ideas [H]e has become a leading proponent of one of the most cosmopolitan, and controversial, trends in constitutional law: using foreign and international law as an aid to interpreting the United States Constitution. Kennedy’s embrace of foreign law may be among the most significant developments on the Court in recent years¹²⁵

Justice Kennedy’s most prominent uses of foreign law as a guide to U.S. constitutional interpretation are his majority opinions in *Lawrence v. Texas*¹²⁶ and *Roper v. Simmons*.¹²⁷ On a 6-3 vote, *Lawrence* overruled the seventeen-year-old precedent of *Bowers v. Hardwick*,¹²⁸ by holding that states cannot criminalize sodomy between consenting adults.¹²⁹ Among the legal authorities and institutions Justice Kennedy relied upon were an act passed by British Parliament, a decision by the European Court of Human Rights, the European Convention on Human Rights, and the Council of Europe.¹³⁰

121. *Id.* at 48.

122. *Id.*

123. *Id.* at 47.

124. 531 U.S. 98 (2000) (per curiam). Edward Lazarus recently observed that Justice Kennedy, “as the unacknowledged author,” has aggressively defended the opinion. Edward Lazarus, *Supreme Court Justices’ Increased Propensity to Speak Publicly: It May Be Positive at Times, but when the Justices Speak Out on Bush v. Gore, They Only Do Further Damage*, FINDLAW, Mar. 6, 2007, <http://writ.news.findlaw.com/lazarus/20070306.html>.

125. Toobin, *supra* note 118, at 42.

126. 539 U.S. 558 (2003).

127. 543 U.S. 551 (2005).

128. 478 U.S. 186 (1986).

129. *Lawrence*, 539 U.S. at 578. Justice Kennedy’s majority opinion drew the votes of five Justices, and although Justice O’Connor agreed with the result, she concurred separately on equal protection grounds. *Id.* at 579 (O’Connor, J., concurring).

130. *Id.* at 572–73.

On a 5-4 vote in *Roper*, Justice Kennedy, writing for the Court, declared the death penalty unconstitutional for juveniles under the age of eighteen.¹³¹ In that opinion for the Court, he relied on the United Nations Convention on the Rights of the Child and the recognition that only seven countries besides the United States had executed juveniles since 1990.¹³² He added:

It is proper we acknowledge the overwhelming weight of international opinion against the juvenile death penalty

. . . It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.¹³³

Needless to say, Justice Kennedy's views have not been well received by all members of the Court. Chief Justice Rehnquist and Justices Scalia and Thomas dissented in both *Lawrence*¹³⁴ and *Roper*,¹³⁵ condemning reliance on foreign sources of law to interpret the Constitution. Justice Alito expressed doubts about the foreign law approach in his confirmation hearings.¹³⁶ Justice Scalia's observation in his *Roper* dissent best exemplifies the criticism by these Justices:

[T]he basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand

. . . .

. . . What these foreign sources "affirm," . . . is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America.¹³⁷

The reaction from conservative members of Congress to Justice Kennedy's use of foreign legal authorities in *Lawrence* and *Roper* was predictably "swift and strong"¹³⁸ with legislative opponents "seem[ing]

131. *Roper*, 543 U.S. at 578.

132. *Id.* at 576–77.

133. *Id.* at 578.

134. *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting).

135. *Roper*, 543 U.S. at 622–28 (Scalia, J., dissenting).

136. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr., to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 370 (2006) (statement of Samuel A. Alito, Jr.) ("We have our own law, we have our own traditions, we have our own precedents, and we should look to that in interpreting our Constitution.").

137. *Roper*, 543 U.S. at 624, 628 (Scalia, J., dissenting).

138. Harlan Grant Cohen, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, 24 BERKELEY J. INT'L L. 273, 273 (2006).

to shudder with anger.”¹³⁹ For example, Congressman Tom Feeny (R-FL) insisted on the “removal of international influence in the United States court system. . . . The Supreme Court has insulted the Constitution by overturning its own precedent to appease contemporary foreign laws, social trends, and attitudes.”¹⁴⁰

Senator John Cornyn (R-TX) complained that the Court’s transnationalist tendencies meant that “the American people may be losing their ability to determine what their criminal laws shall be—losing to the control of foreign courts and foreign governments.”¹⁴¹ One scholar has observed that “Justice Kennedy raised such ire with his decision in *Roper* that some were even calling for his impeachment.”¹⁴² This sentiment has also spurred legislative proposals to bar federal courts from using foreign law for purposes of constitutional interpretation.¹⁴³

Given Justice Kennedy’s proclivity to find foreign law and respected international scholarly thinking persuasive, his vote in *Hamdan* can therefore hardly be viewed as unexpected. That is especially the case in light of the disrepute Guantanamo has brought to the United States and that facility’s role in the undercutting of this country’s long-standing reputation as the foremost worldwide exponent of the rule of law. The nation’s standing has been widely viewed as tarnished by the now well-recognized fact that a large number of Guantanamo detainees were and are civilian non-combatants swept up and held for years by the United States military for reasons having little to do with military necessity or national security. To be sure, as the accompanying essays make clear, Justice Kennedy’s concurrence limited the scope of Justice Stevens’s reading of Common Article 3. Indeed, even Justice Stevens pulled back from the brink by finding the Geneva Conventions applicable to the detainees because the treaties had been incorporated into governing U.S. law, i.e., the UCMJ, not

139. *Id.*

140. Press Release, Representative Tom Feeny, Supreme Court Ruling Reiterates Importance of the *Reaffirmation of American Independence Resolution* (Mar. 2, 2005), available at <http://www.house.gov/hensarling/rsc/doc/Feeny—intlinfluence.pdf> (internal quotation marks omitted).

141. 151 CONG. REC. S3109, 3111 (2005) (statement of Sen. Cornyn) (introducing Senate Resolution 109-92, which condemns the use of foreign law as a means to interpret the Constitution).

142. Donald J. Kochan, *Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocations of Foreign and International Law*, 29 FORDHAM INT’L L.J. 507, 520 (2006).

143. *E.g.*, American Justice for American Citizens Act, H.R. 1658, 109th Cong. 1, 1 (2005) (“To ensure that the courts interpret the Constitution in the manner that the Framers intended.”).

because the treaties were self-executing. However, even with these caveats, the *Hamdan* holdings are stunningly broad as outlined here and in the accompanying essays at great length.

V. CONGRESS AND THE 2006 MID-TERM ELECTIONS

It might well be asked why, if Guantanamo was so clearly the problem articulated above, Congress undercut *Hamdan*'s sweep through passage of the MCA. The MCA, however, must be viewed in its political context. *Hamdan* was decided as the House and the Senate entered a summer lull at the end of the 109th Congress. When the pace of legislative business began to pick up after Labor Day, the President and the Republican Congress saw the chance to use *Hamdan* as a sword against the Democratic Party entering into the November mid-term elections.¹⁴⁴

By September 2006, polls were showing the substantial possibility that the Democrats would take back control of one or both Houses of Congress.¹⁴⁵ In the mid-term elections of 2002¹⁴⁶ and the Presidential election of 2004,¹⁴⁷ the President and the Republican Party were able to make substantial electoral gains by emphasizing their ability to deal better with the terror threat than the Democrats. With the 2002 and 2004 elections as the backdrop, the President and the Republican Congress repeatedly stressed the need, in mid-September 2006, for

144. See Charles Babington & Jonathan Weisman, *Senate Approves Detainee Bill Backed by Bush; Constitutional Challenges Predicted*, WASH. POST, Sept. 29, 2006, at A1 (detailing then-Speaker of the House Dennis Hastert's statements that, by opposing the MCA and other Republican initiatives, Nancy Pelosi and House Democrats voted for "MORE rights for terrorists" and "to protect the rights of terrorists"). Then-House Majority Leader John Boehner also stated that such opposition by the Democrats demonstrated an "'irrational opposition to strong national security policies.'" *Id.*; see also 152 CONG. REC. S10354, 10363 (statement of Sen. Dianne Feinstein) ("I do not believe the bill before us is constitutional. It is being rushed through a month before a major election in which the [Republican] leadership of this very body is being challenged."); Mark Mazzetti, *C.I.A. Still Awaiting Rules on Interrogating Suspects*, N.Y. TIMES, Mar. 25, 2007, § 1, at 14 (reporting on statements made by President Bush in late October 2006 that the C.I.A. detention facilities have kept Americans safe from terrorists).

145. Adam Nagourney & Janet Elder, *Only 25% in Poll Voice Approval of the Congress*, N.Y. TIMES, Sept. 21, 2006, at A1.

146. Tom Freedman & Bill Knapp, Op-Ed., *How Republicans Usurped the Center*, N.Y. TIMES, Nov. 8, 2002, at A31 ("Republicans used the insecurity and anxiety over terrorism to win the midterm election.").

147. See Nick Anderson, *The Race for the White House: Bin Laden's Image Crops Up in Ads*, L.A. TIMES, Sept. 28, 2004, at 17 ("President Bush and his Republican allies have used the terrorist images to paint Sen. John F. Kerry of Massachusetts as a weak leader.").

military tribunals to provide swift justice for terrorists to combat future terror attacks.¹⁴⁸

Of course, this sudden interest in quick process was belied by the fact that not a single tribunal had entered the trial phase since their establishment by Executive Order on November 13, 2001. Nor was any emphasis placed on the fact that of the over 700 detainees held at Guantanamo since January 2002, only four had been charged with war crimes by the time *Hamdan* had been decided. Nor was it made clear that the United States had actually obtained important terror-related convictions and guilty pleas in federal district courts prior to *Hamdan*, thereby demonstrating that traditional criminal processes were readily available for purposes of retribution and example-setting.¹⁴⁹

Nor was it clearly emphasized that the inability to bring any war crimes charges against the detainees had nothing to do with whether they would be released. *Hamdi* makes clear that if the United States properly demonstrates that the detainees are unlawful enemy combatants (as opposed to being guilty of war crimes), they can still be held for the duration of the conflict.¹⁵⁰ Indeed, even if the detainees were declared prisoners of war and thus eligible for better treatment under the Geneva Conventions, they would still be subject to detention until hostilities ceased.¹⁵¹ In this regard, the public impression imparted by supporters of the MCA was that in the absence of establishing valid military commissions to comply with *Hamdan*, the UCMJ, and the Geneva Conventions, detainees would have to be released.¹⁵²

148. See Carl Hulse & Kate Zernike, *House Passes Detainee Bill As It Clears Senate Hurdle*, N.Y. TIMES, Sept. 28, 2006, at A20 (relating the statement of then-majority leader Boehner that “[i]t is outrageous that House Democrats, at the urging of their leaders, continue to oppose giving President Bush the tools he needs to protect our country”).

149. See, e.g., *United States v. Moussaoui*, 382 F.3d 453, 457–62 (4th Cir. 2004) (detailing the arrest and trial procedures of 9/11 plotter Zacarias Moussaoui); *United States v. Goba*, 220 F. Supp. 2d 182, 196–223 (W.D.N.Y. 2002) (discussing the proffered government evidence against five suspected terrorists in Western New York who attended a military training camp in Afghanistan); *United States v. Lindh*, 227 F. Supp. 2d 565, 566–70 (E.D. Va. 2002) (describing the training and actions of John Walker Lindh, the American member of the Taliban, in Afghanistan).

150. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion).

151. See *In re Territo*, 156 F.2d 142, 146–48 (9th Cir. 1946) (holding lawful the military detention, without trial, of a U.S. citizen who was, as a member of the Italian military during World War II, a prisoner of war seized from the battlefield in Sicily and then held in the United States even beyond the duration of hostility).

152. See, e.g., R. Jeffrey Smith, *On Rough Treatment, a Rough Accord*, WASH. POST, Sept. 23, 2006, at A6 (citing Bush Administration approval of the jurisdictional-stripping provisions of the MCA “so that dangerous detainees could be subject to lengthy interrogations without hope of release before military trials”).

So with the mid-term elections in the background and the experience of using the terrorist threat as an effective election weapon, the President and Congress had an open road before them in structuring the MCA as a way to attempt to undercut substantially the law as the Supreme Court found it in *Hamdan*. Those members of Congress, worried about the lawfulness of key provisions of the MCA, were reduced to emphasizing that the Supreme Court would have to “clean up” what they believed to be the self-evidently unlawful provisions within the MCA.¹⁵³ Nor could those in the Senate who opposed seemingly unlawful measures afford in that heightened political context to employ stalling devices, such as the filibuster, to stop the process.¹⁵⁴

As it turned out, neither the passage of the MCA nor any other attempt to use the war on terror as a method of regaining the upper political hand in the mid-term elections were successful. While these tactics did provide temporary traction for the President and his party in September 2006,¹⁵⁵ the unfolding of the congressional page scandal and the role of Congressman Mark Foley therein, quickly undid whatever benefit was provided by the MCA.¹⁵⁶ Moreover, the war in Iraq and congressional scandals involving the Republican leadership continued to hold sway, and on November 7, 2006, the Democratic Party was able to gain control of the both the House and the Senate.¹⁵⁷

As a result of new congressional leadership, there are prospects that some of the harshest provisions of the MCA and detainee treatment in general may be undone. For example, Representative John Murtha (D-PA), chairman of the House Appropriations Subcommittee on Defense, has proposed eliminating appropriations to hold de-

153. See *supra* note 41.

154. With forty-nine Senators voting against the provision barring habeas corpus as a remedy within the MCA, there were certainly adequate votes to support a filibuster on that issue alone. However, it was clear in this intense political context that a filibuster would have played into the hands of the President and the Republicans, in that it would have risked raising an issue easily converted to the kind of political weapon that had undercut Democratic incumbents and candidates in the 2002 and 2004 elections.

155. See Michael A. Fletcher, *Bush Signs Terrorism Measure; New Law Governs Interrogation, Prosecution of Detainees*, WASH. POST, Oct. 18, 2006, at A4 (noting that Republicans, with mid-term elections approaching, “immediately seized on the [MCA], which was opposed by most Democratic lawmakers, as evidence of their commitment to protect the country against terrorist attacks”).

156. See Scott Canon, *Surprise! It's Too Late for an October Surprise this Election Year*, KAN. CITY STAR, Oct. 29, 2006 (describing the series of negative events affecting Republicans prior to the mid-term elections).

157. John M. Broder, *Democrats Take Senate*, N.Y. TIMES, Nov. 10, 2006, at A1 (“Democrats gained control of the Senate on Thursday, giving them a majority in both houses of Congress for the first time since 1994 . . .”).

tainees at the Guantanamo facility except the fourteen high level al Qaeda operatives brought there from secret CIA prisons in Eastern Europe by early September 2006.¹⁵⁸ Reiterating his commitment to closing the Guantanamo facility, Representative Murtha told National Public Radio, “And certainly we can limit the funds for it, and that would shut it down.”¹⁵⁹

Senator Chris Dodd (D-CT) has introduced legislation to reverse the habeas bar included within the MCA and other questionable provisions therein.¹⁶⁰ The change in the makeup of the Senate from the time the MCA passed makes it more than likely that a majority of the Senate would now reverse the 51-48 vote in 2006 in support of eliminating habeas. It may be, however, that this or any other change to the MCA would require a super-majority given the prospect of a Republican-led filibuster in the Senate or a presidential veto of any change to the MCA. Nevertheless, the MCA will undoubtedly be thoroughly reexamined in the new Congress.

VI. JUSTICE KENNEDY AND THE FUTURE OF THE MCA

To the extent that the MCA is not changed by the new Congress, that statute raises a plethora of legal issues likely to be contested within the federal courts. For example:

- In the absence of “Cases of Rebellion or Invasion,” can Congress suspend habeas corpus for the Guantanamo detainees?¹⁶¹

158. See Editorial, *Close the U.S. Prisons for Terrorism Suspects at Guantanamo Bay, Cuba? Then What?*, S. FLA. SUN SENTINEL, Feb. 22, 2007, at A20; see also *Securing America's Interests in Iraq: The Remaining Options: Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. 6 (2007) (statement of Rep. John P. Murtha, Chairman, H. Subcomm. on Defense Appropriations) (“I believe we should shut down the Guantanamo detention facility . . .”), available at <http://foreign.senate.gov/testimony/2007/MurthaTestimony070123.pdf>.

159. *Morning Edition: Murtha Vows to Fight Bush Iraq Strategy* (NPR radio broadcast Feb. 14, 2007).

160. Press Release, Senator Chris Dodd, *Dodd Introduces Effective Terrorist Prosecution Act; Brings Terrorists to Justice, Honors America's Good Name* (Nov. 17, 2006), available at <http://dodd.senate.gov/index.php?q=node/3661>. For a full description of proposed changes to the MCA due to its harsh impact upon detainees, see Editorial, *The Must-Do List*, N.Y. TIMES, Mar. 4, 2007, § 4, at 11.

161. The Constitution provides that “[t]he 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. There can be no doubt that neither rebellion nor invasion justified the habeas bar in the MCA. The D.C. Circuit upheld the bar by holding that habeas protection did not reach aliens held outside the sovereign United States. See *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), cert. denied, 127 S. Ct. 1478 (2007); see also *supra* note 31 and accompanying text. However, the D.C. Circuit, once again, has put “all of its eggs” in the *Eisenstrager* “basket” to find that the habeas constitutional protections do not extend outside the United States. As noted earlier, the Supreme Court in *Rasul* went

- Can Congress alter the protections of the Geneva Conventions by:
 - redefining “humiliating and degrading treatment,” to encompass only intentional conduct designed to impose, inter alia, serious bodily or permanent psychological injury?¹⁶²
 - eliminating the protections of Article 5 that ensure meaningful determinations as to the combatant status of detainees?¹⁶³
 - barring the Conventions from being the source of remedial actions?¹⁶⁴
- Can Congress allow military judges to authorize the use of “coerced” testimony for purposes of proving a violation of the laws of war?¹⁶⁵

As Professors Quint and Singer make clear,¹⁶⁶ while the *Hamdan* majority acknowledged Congress’s appropriate role in responding to

to great lengths to distinguish *Eisentrager* and find that the Guantanamo detainees had the protection of the then-relevant habeas statute. See *supra* note 26 and accompanying text. While it is true that *Rasul* related to statutory interpretation of a federal statute (rather than a determination of the reach of the Constitution’s habeas clause), it certainly would not be a great leap for the Court to extend its *Rasul* analysis to find that the habeas constitutional protection does reach Guantanamo, a facility that has all the attributes of U.S. control. See *Rasul v. Bush*, 542 U.S. 466, 486–88 (2004) (Kennedy, J., concurring).

Nor does the denial of certiorari in *Boumediene* detract from what is likely to be the primacy of the courts in this area. Justice Breyer, joined by Justices Souter and Ginsburg, dissented from that denial, making it clear that these Justices, inter alia, found persuasive the argument that the extraterritorial reasoning of *Rasul* should apply to the habeas bar for Guantanamo detainees within the MCA and that the provision was therefore constitutionally suspect. *Boumediene*, 127 S. Ct. at 1479 (Breyer, J., dissenting from denial of certiorari). Justices Stevens and Kennedy filed a statement accompanying the *Boumediene* certiorari denial, saying that “[d]espite the obvious importance of the issues raised,” doctrines of constitutional avoidance and exhaustion led them to favor allowing the judicial review procedures of the DTA to play out before Supreme Court consideration. *Id.* at 1478 (statement of Stevens & Kennedy, JJ.). Indeed, besides stating that “as always, denial of certiorari does not constitute an expression of any opinion on the merits,” they also warned that any perceived inadequacy, unreasonable delay, “or some other and ongoing injury,” would provide “alternative means . . . for us to consider our jurisdiction over the allegations made by the petitioners before the Court of Appeals.” *Id.* In sum, the collective writings of these five Justices accompanying the *Boumediene* certiorari denial make clear that a decision on the constitutionality of the MCA habeas bar will likely be dealt with by the Supreme Court on another day in the not too distant future.

162. See *supra* notes 49–58 and accompanying text.

163. See *supra* note 18.

164. See *supra* notes 54–55 and accompanying text (noting that the MCA barred the Geneva Conventions from being the basis of a cause of action against the United States). Again, the *Hamdan* majority expressly left open the question whether the Conventions can be self-enforcing.

165. See *supra* notes 52–55 and accompanying text.

166. See Singer, *supra* note 4, at 761; Quint, *supra* note 4, at 783–84.

its ruling, it did so with important strings attached. Most importantly, Justice Kennedy twice strongly implied that, while Congress may act, it may not have the final say here, by stating in his concurrence:

If Congress, after due consideration, deems it appropriate to change the controlling statutes, in *conformance with the Constitution and other laws*, it has the power and prerogative to do so.

. . . .

. . . Because Congress has prescribed these limits, Congress can change them, *requiring a new analysis consistent with the Constitution and other governing laws*. . . .¹⁶⁷

Doubtless the Constitution will have much to say about eliminating habeas in the absence of rebellion or invasion for detainees held “under the complete control and jurisdiction of the United States”¹⁶⁸ or about convicting detainees of violations of the laws of war through the use of coerced testimony. That is especially the case, when the Constitution is read—not with an eye to the next election (which was the prevailing influence leading to the passage of the MCA)—but with the critical eye of certain Justices on the United States’ jurisprudential role within the civilized world as a beacon for the establishment and support of the rule of law and human rights. That same judicial influence will have much to say about the application of the Geneva Conventions in this context, which after all, by virtue of the Constitution, once ratified by the Senate, are a part of U.S. domestic law, whether incorporated by statute or not.¹⁶⁹

As Professor Singer has demonstrated,¹⁷⁰ even Chief Justice Roberts has strongly implied in another context that it is the federal courts, and not Congress, who define what those treaties mean. The *Hamdan* majority certainly left open readings of the Geneva Conventions that, as ratified by the Senate, may: make those treaties self-enforcing; protect against abusive detentions and interrogations; and

167. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2800, 2808 (2006) (Kennedy, J., concurring in part).

168. *See supra* note 31.

169. As the Supremacy Clause states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

170. *See Singer, supra* note 4, at 766 (noting Chief Justice Roberts’s view that it is the duty of the Supreme Court to interpret approved treaties).

assure appropriate determinations about the correct status of detainees, i.e., whether they are unlawful combatants, prisoners of war, or innocent civilians who, unfortunately found themselves in harm's way.

What is clear, then, is that neither *Hamdan* nor the MCA provides the final thoughts on the treatment of detainees in the war on terror, and it is the Court, not Congress, that will likely have the last word.