

Symposium on the New Face of Armed Conflict: Enemy Combatants After *Hamdan v. Rumsfeld*

FOREWORD

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Introduction

This issue of *The George Washington Law Review* publishes papers presented at a symposium held at The George Washington University Law School on October 19 and 20, 2006. The Symposium, entitled “The New Face of Armed Conflict: Enemy Combatants after *Hamdan v. Rumsfeld*,” addressed key topics related to the Supreme Court’s decision in *Hamdan v. Rumsfeld*, which was announced on June 26, 2006.¹ In *Hamdan*, the Supreme Court held that the President lacked authority to order the use of special tribunals, called “military commissions,” to try suspected enemy war criminals, at least as those tribunals were constituted at the time of the case.²

The *Law Review* chose to hold the symposium for two reasons. First, *Hamdan* is the most important judicial decision to arise out of the war against terror to date. As described below,³ the Court addressed numerous significant questions and its holding required the government either to pass new legislation or to abandon some of its most controversial counterterrorism efforts. Second, the decision came at a significant interval for assessing legal issues arising from U.S. counterterrorism policies. The symposium approximately coincides with the five-year anniversary of the attacks of September 11, 2001; the five-year anniversary of the Authorization for the Use of Military Force (“AUMF”) passed by Congress on September 18,

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¹ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

² *See id.* at 2793.

³ *See infra* Part I.A.

2001;⁴ and the five-year anniversary of the President's Military Order of November 13, 2001, in which he authorized trials by military commissions.⁵

When first planning the symposium, the *Law Review* could not know that two other important events would occur on the eve of the scholarly event. In September 2006, the President announced the transfer of fourteen high-value enemy detainees from secret places of detention to Guantanamo Bay, Cuba, with the expectation that they would face trials by military commissions.⁶ This action made military commissions potentially more significant because previously only lower-level defendants had faced charges before the military commissions.⁷ In October 2006, Congress passed, and the President signed, the Military Commissions Act of 2006 ("MCA").⁸ The MCA, enacted in response to the *Hamdan* decision, expressly gives the President statutory authority to conduct trials by military commissions under revised procedural and evidentiary rules.⁹ These developments have added to the importance of the subjects considered by the participants in the symposium.

The remainder of this Forward consists of three Parts. Part I provides context for the symposium. It describes the complicated *Hamdan* litigation, the transfer of the fourteen high-value detainees to Guantanamo Bay, and the effects of the MCA. Part II then introduces the written contributions of the distinguished authors who participated in the symposium.

Part III of this Forward concerns the MCA, a subject that the other writers in the symposium have not specifically covered. This part makes three specific claims. First, it asserts that the federal

⁴ See Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001), reprinted in note following 50 U.S.C. § 1541 (Supp. 2004) [hereinafter AUMF] (authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . to prevent any future acts of international terrorism against the United States by such nations, organizations or persons").

⁵ Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001) [hereinafter Military Order].

⁶ See Jess Bravin, *Bush Confirms Existence of Secret CIA Prisons: Alleged al Qaeda Members Are Moved to Guantanamo, Addressing Court Criticism*, WALL ST. J., Sept. 7, 2006, at A3.

⁷ See U.S. DEP'T OF DEF., MILITARY COMMISSIONS: CHARGE SHEETS, http://www.defense.gov/news/Nov2004/charge_sheets.html (last visited July 25, 2007) (providing links to the charge sheets for the ten detainees facing trial by military commission before the *Hamdan* decision, none of whom are alleged to have held high-level operational leadership positions in al Qaeda).

⁸ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

⁹ See *id.* § 3(a)(1), 120 Stat. at 2602; see also *infra* Part II.C.2.

courts should, and likely will, reject the most probable legal challenges to the MCA—namely, that the Act improperly suspends the writ of habeas corpus, that it establishes evidentiary rules that will deny the accused due process, and that it violates aspects of the Geneva Conventions.¹⁰ Second, it asserts that, despite the ostensible legality of the MCA, the government is unlikely to bring many prosecutions before military commissions.¹¹ For specific reasons, the government will find trying cases under the new rules difficult, perhaps even more difficult than prosecution of terrorists before federal courts. Third, it contends that the MCA, the *Hamdan* case, and the general controversy regarding the trial and detention of enemy terrorists are producing, and will continue to produce, several important, but largely unnoticed, unintended consequences.¹² The United States (and its European allies) may decide to pursue three less complicated alternatives: killing enemy combatants on the battlefield rather than attempting to capture and try them, releasing dangerous detainees already in custody, and turning suspected terrorists over to the governments of Afghanistan and Iraq where they will suffer worse treatment. A fair assessment of the *Hamdan* decision requires a sober consideration of these unintended consequences. Following the analysis in Part III, I offer a brief conclusion.

I. Background to the Symposium

A. Military Commissions and *Hamdan's* Habeas Petition

The United States throughout its history has used special “military commissions” to try suspected war criminals.¹³ These tribunals traditionally have consisted of a panel of military officers that hears evidence and decides whether the accused committed offenses in violation of the laws of war. Military commissions generally have not followed the evidentiary and procedural rules of courts-martial.¹⁴ Instead, they have utilized more relaxed rules and standards.¹⁵

A prominent use of a military commission occurred during World War II, after the United States apprehended eight Nazi saboteurs who

¹⁰ See *infra* Part III.A.

¹¹ See *infra* Part III.A.

¹² See *infra* Part III.C.

¹³ See *Ex parte Quirin*, 317 U.S. 1, 42 n.14 (1942) (describing this history, beginning with cases involving enemy spies during the Revolutionary War, and examining the use of such tribunals during the Civil War).

¹⁴ See *In re Yamashita*, 327 U.S. 1, 18–19 (1946) (concluding that military commissions do not have to follow the rules applicable to courts-martial).

¹⁵ See *id.* at 18–20 (permitting the use of hearsay).

had snuck into the country by submarine.¹⁶ As explained in *Ex parte Quirin*, President Franklin D. Roosevelt ordered the men to be tried by military commission.¹⁷ The United States charged the men with four offenses: (1) violation of the laws of war; (2) “relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy”; (3) spying; and (4) conspiracy to commit the offenses alleged in the first three charges.¹⁸

The men filed a petition for a writ of habeas corpus, challenging their detention, the authority of the military commission, and the charges against them.¹⁹ The Supreme Court unanimously held that the first of the four charges “alleged an offense which the President is authorized to order tried by military commission,” that the President had properly authorized the military commission, and that the United States was holding the men in “lawful custody.”²⁰

A few additional challenges to military commissions came before the Supreme Court in the years immediately following the *Quirin* decision, but they were also unsuccessful.²¹ After World War II and the occupations that followed had ended, the use of military commissions stopped, and interest in the legal issues arising out of their use faded—that is, until the momentous events of the fall of 2001.

On September 11, 2001, members of al Qaeda, an Islamist terrorist conspiracy led by Osama bin Laden, a former Saudi national operating out of Afghanistan, attacked the United States.²² By hijacking and crashing aircraft, they succeeded in killing nearly three thousand people.²³ Following these attacks, Congress authorized the President to use military force against the persons responsible.²⁴ Shortly afterward, the United States invaded Afghanistan to battle members of al Qaeda and their allies.

¹⁶ See *Quirin*, 317 U.S. at 20–22.

¹⁷ See *id.* at 22–23.

¹⁸ *Id.* at 23.

¹⁹ *Id.* at 18.

²⁰ *Id.* at 48.

²¹ See, e.g., *Johnson v. Eisentrager*, 339 U.S. 763, 785 (1950) (holding that “the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States”); *In re Yamashita*, 327 U.S. 1, 19 (1946).

²² See NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 145–73 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf> (discussing bin Laden and his co-conspirators, and the attacks they planned to carry out on 9/11).

²³ See *id.* at 285–311, 316 (describing the events surrounding the 9/11 attacks, as well as the extent of the loss that was caused).

²⁴ See AUMF, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

In Afghanistan, the military soon began taking prisoners, some of whom may have had involvement in the September 11 attacks or in other war crimes. To address the detainees' responsibility, President Bush issued an order in November 2001 directing the Department of Defense to establish military commissions for trying the suspected war criminals.²⁵ The order closely tracked President Roosevelt's order of 1942, and President Bush presumably relied on the *Quirin* case in considering the legality of this action.²⁶

The President's military order directed the Department of Defense to promulgate evidentiary and procedural rules for these new commissions.²⁷ The Department of Defense subsequently issued these rules.²⁸ The rules notably differed from the rules that applied in courts-martial. Among the most controversial of the provisions, the rules allowed the commissions to consider all reliable evidence, including hearsay.²⁹ They also permitted the military commissions, in extreme circumstances, to close the proceedings for national security purposes and to consider in closed session evidence that the accused's appointed attorney could see but that the accused himself could not see.³⁰ In addition, the rules gave the accused only very limited rights to appeal the judgment of a military commission.³¹

The United States eventually charged ten persons captured in Afghanistan and detained in Guantanamo Bay, Cuba, with offenses that the United States considered war crimes.³² One of them was Salim Ahmed Hamdan.³³ His charge sheet accused him of conspiring with Osama bin Laden and others to commit various war crimes, including "attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism."³⁴ The charge sheet also listed various overt acts that Hamdan committed in furtherance of this con-

²⁵ See Military Order, *supra* note 5, § 4(a), 66 Fed. Reg. at 57,834.

²⁶ See Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1 (reporting that the White House relied on the 1942 order).

²⁷ See Military Order, *supra* note 5, § 4(c), 66 Fed. Reg. at 57,834.

²⁸ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2771 (2006) (describing the complicated history of the promulgation and amendment of these rules).

²⁹ See *id.* at 2786–87.

³⁰ See *id.* at 2786.

³¹ See *id.* at 2787 (describing the process of appeal as being reviewed by a "three-member review panel," whose recommendations are ultimately forwarded to the President, who makes the "final decision").

³² For a list of the persons originally charged and links to the "charge sheets" stating the crimes of which they are accused, see U.S. DEP'T OF DEF., *supra* note 7.

³³ See *id.*

³⁴ *Hamdan*, 126 S. Ct. at 2761.

spiracy, including serving as Osama bin Laden's personal driver and bodyguard.³⁵

Hamdan sought to enjoin his trial by military commission by filing a petition for a writ of habeas corpus in federal court. The U.S. District Court for the District of Columbia granted the injunction, but the Court of Appeals for the D.C. Circuit reversed.³⁶ The case then went to the Supreme Court, presenting a host of issues concerning the jurisdiction of the courts and the President's statutory and constitutional authority to order trial by military commission. On June 29, 2006, the Supreme Court granted the relief requested by Hamdan.³⁷ The decision divided the Court and prompted six separate opinions that ran 185 pages in slip form.

B. Hamdan v. Rumsfeld

Hamdan v. Rumsfeld is a long and complicated decision, but not one that defies description. The following briefly summarizes both the majority opinion and the plurality opinion and then states the positions of the various concurring and dissenting opinions.

1. *Majority Opinion.* The majority opinion, written by Justice Stevens, and joined by Justices Kennedy, Souter, Breyer, and Ginsburg, reached five main conclusions about the jurisdiction of the Court and the legality of trying Hamdan by military commission. The dissents in the case disagreed with nearly every one of these points. For brevity, the summary of the majority opinion appears in the text, while footnotes briefly mention criticisms from the dissents. A full debate about the merits of the case is beyond the scope of this introduction.

First, the Court held that the Detainee Treatment Act of 2005 ("DTA"),³⁸ which Congress had enacted during the *Hamdan* litigation, did not require dismissal of Hamdan's habeas corpus petition.³⁹ The government had asked the Supreme Court to dismiss the case because section 1005(e)(1) of the DTA says "no court . . . shall have jurisdiction to hear or consider . . . an application for . . . habeas corpus filed by or on behalf of an alien detained . . . at Guantanamo

³⁵ See *id.*

³⁶ See *id.* at 2762.

³⁷ See *id.* at 2798 (reversing the court of appeals and remanding for further proceedings).

³⁸ Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739 (2005) [hereinafter DTA].

³⁹ *Hamdan*, 126 S. Ct. at 2764 (holding that congressional "failure to expressly reserve federal courts' jurisdiction over pending cases erects a presumption against jurisdiction, and that presumption is rebutted by neither the text nor the legislative history of the DTA").

Bay.”⁴⁰ The Court concluded, however, that this section did not apply to pending cases.⁴¹ It reached this conclusion because section 1005(h)(2) of the DTA expressly stated that two other provisions of the DTA applied to pending cases but did not mention section 1005(e)(1).⁴² The Court inferred from this omission and from the legislative history that Congress did not intend section 1005(e)(1) to apply to pending cases.⁴³

Second, the Court decided that principles of comity did not require it to abstain from interfering with the ongoing military commission trial.⁴⁴ The government had argued that the court should abstain under the so-called *Councilman*⁴⁵ abstention doctrine, which normally requires federal courts to avoid intervening in pending courts-martial against service members.⁴⁶ The Court, however, disagreed, saying that *Councilman* abstention rests on two considerations that are not applicable to military commissions.⁴⁷ One consideration is that judicial interference might hinder the ordinary function of military discipline.⁴⁸ The Court reasoned that this consideration is inapplicable to Hamdan because he is not a service member.⁴⁹ The second rationale for *Councilman* abstention is that Congress created “an integrated system of military courts and review procedures” for trying service members.⁵⁰ Here, the Court concluded that Congress had not created a comparable system of review for military commissions.⁵¹

⁴⁰ *Id.* at 2762–63 (quoting DTA, § 1005(e)(1), 119 Stat. at 2742).

⁴¹ *Id.* at 2764–69.

⁴² *See id.* at 2766. Section 1005(h)(2) provides: “Review of combatant status tribunal and military commission decisions.—Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.” DTA, § 1005(h)(2), 119 Stat. at 2743–44.

⁴³ *See Hamdan*, 126 S. Ct. at 2766. Justice Scalia criticized this conclusion in his dissent. He asserted that courts generally apply new procedural and jurisdictional rules to pending cases unless the rules specifically provide otherwise. Because the DTA is silent on the issue of pending cases, he concluded that it should have applied to the *Hamdan* case. *See id.* at 2810 (Scalia, J., dissenting).

⁴⁴ *See id.* at 2772 (majority opinion).

⁴⁵ *See Schlesinger v. Councilman*, 420 U.S. 738 (1975) .

⁴⁶ *See id.* at 739–40 (1975) (holding that “the balance of factors governing exercise of equitable jurisdiction by federal courts normally weighs against intervention”).

⁴⁷ *See Hamdan*, 126 S. Ct. at 2770–71 (rejecting the two considerations that normally drive *Councilman* abstentions as not applicable to the present case).

⁴⁸ *Id.* at 2770 (citing *Councilman*, 420 U.S. at 752).

⁴⁹ *See id.* at 2771. Justice Scalia disagreed in his dissent. He reasoned that other military needs, besides the need for maintaining good order and discipline, may justify abstention. *See id.* at 2820 (Scalia, J., dissenting).

⁵⁰ *Id.* at 2770 (majority opinion) (quoting *Councilman*, 420 U.S. at 758).

⁵¹ *See id.* at 2769–72. Justice Scalia also criticized this conclusion. He said that Congress,

The Court's third conclusion was that Congress had not authorized, in any statute, the President to create military commissions at Guantanamo.⁵² This conclusion did not necessarily mean that the President lacked authority to use military commissions altogether. On the contrary, the Court assumed (without fully deciding) that the President had some inherent constitutional authority to convene military commissions without statutory authorization from Congress.⁵³ The Court did hold, however, that when the President relies solely on his inherent authority to create military commissions, those commissions must comport with the "law of war" and with any specifically restrictive federal legislation (subjects that the Court addressed next).⁵⁴

In deciding that Congress had not statutorily authorized the military commissions at Guantanamo Bay, the Court considered three pieces of legislation that the government contended provided authority: article 21 of the Uniform Code of Military Justice ("UCMJ"),⁵⁵ the AUMF,⁵⁶ and the DTA.⁵⁷ The UCMJ, which generally governs ordinary courts-martial used for trying service members,⁵⁸ at the time of the case said in article 21: "[J]urisdiction [of] courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by [the] commissions"⁵⁹ The government asserted that this provision gave the President authority to create military commissions.⁶⁰ The Court, however, said that this provision merely preserved whatever inherent authority the President had to convene military commissions.⁶¹ The AUMF authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, commit-

in the DTA, had set up a comprehensive system of review that allowed the U.S. Court of Appeals for the D.C. Circuit to review the decisions of military commissions. *See id.* at 2821–22 (Scalia, J., dissenting).

⁵² *See id.* at 2775 (majority opinion).

⁵³ *See id.* at 2774.

⁵⁴ *Id.* at 2775.

⁵⁵ Uniform Code of Military Justice, 10 U.S.C. § 821 (2000).

⁵⁶ AUMF, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001), *reprinted in* note following 50 U.S.C. § 1541 (Supp. 2004).

⁵⁷ DTA, Pub. L. 109-148, 119 Stat. 2739 (2005).

⁵⁸ *See* UCMJ, § 802 (listing the "[p]ersons subject to this chapter" of Title X).

⁵⁹ *Id.* § 821.

⁶⁰ *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 (2006) (citing *Ex parte Quirin*, 317 U.S. 1, 28 (1942), which relied on a nearly identically worded provision from the Articles of War, to show that the Court has never "view[ed] the authorization as a sweeping mandate for the President to 'invoke military commissions when he deems them necessary'").

⁶¹ *See id.*

ted, or aided the terrorist attacks that occurred on September 11, 2001.”⁶² Yet the Court said that this authorization did not expand the President’s power to create military commissions.⁶³ The DTA expressly establishes appellate review procedures for Military Commissions.⁶⁴ Nonetheless, the Court held that the DTA could not serve as authority for the military commissions because it contains no authorizing language.⁶⁵

Fourth, the Court held that the Guantanamo Bay military commission procedures violated the UCMJ because their rules differ from the rules applicable to courts-martial without sufficient justification.⁶⁶ Article 36(a) of the UCMJ authorizes the President to promulgate rules for military commissions.⁶⁷ But article 36(b), at the time of the case, said “[a]ll rules and regulations made under this article shall be uniform insofar as practicable.”⁶⁸ The Court interpreted this provision to mean that the procedural rules that the President promulgates for military commissions must be the same as the rules that he promulgates for courts-martial, unless uniformity is not practicable.⁶⁹ The military commissions violated this rule, the Court concluded, because the President had not made an official determination that it would be impracticable to apply the rules for courts-martial.⁷⁰

⁶² AUMF, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001), *reprinted in* note following 50 U.S.C. § 1541 (Supp. 2004).

⁶³ *See Hamdan*, 126 S. Ct. at 2775.

⁶⁴ *See* DTA, Pub. L. 109-148, § 1005(e)(3), 119 Stat. 2739, 2743 (2005) (giving exclusive appellate jurisdiction to the United States Court of Appeals for the D.C. Circuit).

⁶⁵ *See Hamdan*, 126 S. Ct. at 2772–75. Justice Thomas criticized this conclusion in dissent, concluding that the statutes cited by the government did provide authorization for military commissions. *See id.* at 2824–25 (Thomas, J., dissenting) (arguing that the President’s decision to try Hamdan before a military commission “is entitled to a heavy measure of deference”).

⁶⁶ *See id.* at 2771 (majority opinion).

⁶⁷ *See* UCMJ, 10 U.S.C. § 836(a) (2000). At the time of the case, article 36 said: Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

Id.

⁶⁸ *Hamdan*, 126 S. Ct. at 2790 (quoting the unrevised 10 U.S.C. § 836(b)). Congress amended § 836(b) in the Military Commission Act of 2006 (“MCA”), Pub. L. No. 109-366, § 4(a)(3)(B), 120 Stat. 2600, 2631. The section now provides: “All rules and regulations made under this article shall be uniform insofar as practicable, *except insofar as applicable to military commissions* established under chapter 47A of this title.” 10 U.S.C. § 836(b) (emphasis added).

⁶⁹ *Hamdan*, 126 S. Ct. at 2791.

⁷⁰ *Id.* at 2791–92. Justice Thomas criticized this conclusion on two levels. First, he as-

Fifth, the Court held that the military commissions were also unauthorized because they violated the Geneva Conventions.⁷¹ This portion of the Court's opinion was complicated because it involved what amounts to a chain of three syllogisms:

(1) The major premise of the first syllogism was that the President only has authority to establish military commissions in accordance with the laws of war (as the Court had previously concluded).⁷² The minor premise of this syllogism was that the Geneva Conventions of 1949⁷³ are part of the laws of war.⁷⁴ Therefore, the Court reasoned, military commissions are authorized only if they are constituted in accordance with the requirements of the Geneva Conventions.⁷⁵

(2) The major premise of the second syllogism was that "Common Article 3" of the Geneva Conventions sets forth rules that apply to conflicts "not of an international character."⁷⁶ The minor premise here was that the war between the United States and al Qaeda does not have an international character because it is not a war between two separate nations (al Qaeda being a terrorist organization, rather than a state).⁷⁷ The Court concluded, therefore, that Common Article

serted that the requirement of uniformity means that rules must be uniform for each of the armed services (i.e., the Army, Navy, and Air Force), not for each type of tribunal (i.e., court-martial, board of inquiry, or military commission). *Id.* at 2842 (Thomas, J., dissenting). Second, he cited White House statements that explained why court-martial rules were impracticable for trying the detainees. *See id.* at 2842–43 (discussing various news briefings and statements to show impracticality of court-martial rules to this specific situation).

⁷¹ *See id.* at 2793 (majority opinion).

⁷² *See id.* at 2794 (explaining that "compliance with the law of war is the condition upon which the authority [for military commissions] set forth in [UCMJ] article 21 is granted").

⁷³ The Third Geneva Convention of 1949 concerns the treatment of prisoners of war. *See Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]. The Fourth Geneva Convention of 1949 concerns civilians in occupied territories. *See Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

⁷⁴ *See Hamdan*, 126 S. Ct. at 2794 (asserting that the Geneva Conventions "are, as the Government does not dispute, part of the law of war").

⁷⁵ *See id.* (holding that the authority under the UCMJ is based on "compliance with the law of war").

⁷⁶ The text of article 3 in the Third Geneva Convention is identical to the text of article 3 in the Fourth Geneva Convention. *See Geneva Convention III*, *supra* note 73, art. 3; *Geneva Convention IV*, *supra* note 73, art. 3. For this reason, the article is called "Common Article 3."

⁷⁷ *See Hamdan*, 126 S. Ct. at 2795–96. The Court said that Common Article 3 had to be read in contradistinction to article 2, which applies to conflicts between nations that have signed the Geneva Conventions. It rejected the government's argument that the geographically global war against al Qaeda was a conflict of an "international character." *Id.*

3 of the Geneva Conventions applies to the conflict between the United States and al Qaeda.⁷⁸

(3) The major premise of the third syllogism was that Common Article 3, by its terms, permits the trial of detainees only by a “regularly constituted court.”⁷⁹ The minor premise was that the military commissions were not regularly constituted because their rules violated article 36(b) of the UCMJ, for the reasons explained above.⁸⁰ The Court, therefore decided that the military commissions violated Common Article 3 of the Geneva Conventions and were unauthorized.⁸¹

In reaching these three conclusions, the Court rejected the government’s argument that the rights granted by the Geneva Conventions are not judicially enforceable.⁸² The Court said that the direct issue was not whether the Geneva Conventions created enforceable rights; the only pertinent question was whether the military commissions were authorized, and they were only authorized if they were convened in accordance with the laws of war (of which the Geneva Conventions are a part).⁸³

2. *The Plurality Opinions.* A plurality of four members of the Court found two additional problems with the prosecution of Hamdan. The plurality opinion was written by Justice Stevens and joined by Justices Souter, Ginsburg, and Breyer, but not joined by Justice Kennedy who had otherwise agreed with Justice Stevens.⁸⁴ The first problem, according to the plurality, was that the government had

⁷⁸ See *id.* at 2796. Justice Thomas criticized this conclusion, asserting that the Court should have deferred to the President’s determination that the worldwide conflict against al Qaeda was an international conflict. See *id.* at 2846 (Thomas, J., dissenting) (“The President’s interpretation of Common Article 3 is reasonable and should be sustained.”).

⁷⁹ *Id.* at 2796 (majority opinion); Geneva Convention III, *supra* note 73, art. 3(1)(d) (prohibiting “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court”).

⁸⁰ See *Hamdan*, 126 S. Ct. at 2797; *supra* text accompanying notes 67–70.

⁸¹ See *id.* at 2797–98. Justice Thomas and Justice Alito each disagreed, contending that the military commissions were regularly constituted even if their procedures differed from those of courts-martial. See *id.* at 2847 (Thomas, J., dissenting) (“The 150-year pedigree of the military commission is itself sufficient to establish that such tribunals are ‘regularly constituted.’”); *id.* at 2850 (Alito, J., dissenting) (arguing that Hamdan’s military commission is a “regularly constituted” court).

⁸² See *id.* at 2793–94 (majority opinion). The Government relied on *Johnson v. Eisentrager*, which held that “responsibility for observance and enforcement” of rights under the 1929 Geneva Convention rested on “political and military authorities” rather than the courts. See *id.* at 2794 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 780 n.14 (1950)).

⁸³ See *id.* at 2794.

⁸⁴ See *id.* at 2808–09 (Kennedy, J., concurring) (finding it unnecessary to reach the issues decided by the plurality).

not charged Hamdan with an offense triable by military commission.⁸⁵ The plurality gave two different reasons for this view. One reason was that the President did not have the authority to punish crimes committed before his war powers commenced.⁸⁶ The plurality believed that the President's war powers began on September 11, 2001, under the AUMF.⁸⁷ The plurality argued, however, that Hamdan was not alleged to have committed any overt act in a theater of war or on any specified date after September 11, 2001.⁸⁸ The other reason that Hamdan was not charged with an offense triable by military commission, the plurality stated, is that his charge, conspiracy to commit war crimes, has not been recognized historically nor internationally as an offense against the laws of war.⁸⁹

The second problem, according to the plurality, was that trials by military commissions violate another part of Common Article 3 of the Geneva Conventions, which requires that trials must provide "all the judicial guarantees . . . recognized as indispensable by civilized peoples."⁹⁰ The plurality reasoned that the military commission did not provide these guarantees because the procedural rules permitted the exclusion of the accused (although not his appointed counsel) if necessary to protect classified information.⁹¹ According to the plurality, these rules violated the fundamental principle that the accused should have a right to be present at all stages of his trial and should have access to all evidence against him.⁹²

⁸⁵ See *id.* at 2775–86 (plurality opinion).

⁸⁶ See *id.* at 2778–79.

⁸⁷ See *id.*

⁸⁸ See *id.* (discussing the need for the offense to occur "both in a theater of war and during, not before, the relevant conflict"). Justice Thomas disagreed, contending that the AUMF looks backward and allows the President to use military commissions to try offenses that occurred before September 11, 2001. See *id.* at 2827 and n.3 (Thomas, J., dissenting).

⁸⁹ See *id.* at 2780–81 (plurality opinion). Justice Thomas found that this conclusion was contrary to precedent. He argued that "conspiracy to violate the laws of war was charged in the highest profile case tried before a World War II military commission, see *Quirin*, 317 U.S., at 23, 63 S. Ct. 1, and on numerous other occasions. See, e.g., *Colepaugh v. Looney*, 235 F.2d 429, 431 (C.A.10 1956); . . ." *Id.* at 2834 (Thomas, J., dissenting).

⁹⁰ See *id.* at 2797 (plurality opinion) (quoting Geneva Convention III, *supra* note 73, art. 3).

⁹¹ See DEP'T OF DEF., MILITARY COMMISSION ORDER NO. 1, § 6(B)(3) (Aug. 31, 2005), <http://www.defenselink.mil/news/Sep2005/d20050902order.pdf>.

⁹² See *Hamdan*, 126 S. Ct. at 2798 (Stevens, J., plurality opinion). Justice Alito viewed this issue as not ripe for review, given that the military commission had not excluded Hamdan. He said: "It makes no sense to strike down the entire commission structure based on speculation that some evidence might be improperly admitted in some future case." *Id.* at 2854 (Alito, J., dissenting).

3. *The Concurring and Dissenting Opinions.* Justice Breyer filed a concurring opinion, joined by Justices Souter, Ginsburg, and Kennedy (but not Justice Stevens), which emphasized that Congress had substantial power to reform military commissions by legislation.⁹³ Justice Kennedy filed a partial concurrence and partial dissent in which he principally explained why he felt it unnecessary to decide the two specific issues addressed by Justice Stevens's plurality opinion.⁹⁴ Justices Scalia, Thomas, and Alito each wrote dissents; as explained previously, for brevity, their principal disagreements with the majority opinion are recounted in previous footnotes.

C. *Post-Hamdan Developments*

The *Hamdan* decision brought all proceedings before the military commissions in Guantanamo Bay to an immediate halt,⁹⁵ but two very important developments then occurred. First, the United States transferred fourteen important detainees, whom it had been holding in secret CIA prisons at unknown locations, to Guantanamo Bay, Cuba, and announced that they would face trial by military commission as soon as Congress corrected the commission procedures.⁹⁶ Second, Congress passed the MCA, which addressed each of the problems identified by the majority and plurality opinions in *Hamdan*.

1. *Transfer of High-Value Detainees from Secret CIA Prisons to Guantanamo Bay.* During the five years following the attacks of September 11, 2001, the United States occasionally announced that it had captured high-level al Qaeda commanders.⁹⁷ The persons captured included Ramzi Binalshibh and Khalid Sheikh Mohammed, who allegedly had played key roles in planning the attacks.⁹⁸ The United States, however, did not produce these prisoners or say where they were being held. Accordingly, speculation arose that the CIA had established secret prisons where it was keeping these high-level detainees.⁹⁹

⁹³ See *id.* at 2799 (Breyer, J., concurring) (“Nothing prevents the President from returning to Congress to seek the authority he believes necessary.”).

⁹⁴ See *id.* at 2809 (Kennedy, J., concurring in part) (asserting that because the Court concluded that the trial by military commission was unauthorized, it was not necessary also to decide whether conspiracy was a war crime or whether the military commissions afforded all of the judicial guarantees required by Common Article 3 of the Geneva Conventions).

⁹⁵ See Bravin, *supra* note 6, at A3.

⁹⁶ See *id.*

⁹⁷ See *id.*

⁹⁸ *Id.*

⁹⁹ See *id.* (noting the public skepticism toward the Bush administration's counterterrorism program).

Prior to the *Hamdan* decision, the President and his advisers declined to answer questions about the whereabouts of these detainees or about the possibility that secret CIA prisons might exist. In the wake of the *Hamdan* decision, however, the Bush administration changed its policy. On September 6, 2006, the administration announced that the secret CIA prisons had existed, and that it was transferring fourteen “high value detainees” from these prisons to Guantanamo Bay, Cuba, with the view that they would eventually stand trial for war crimes before military commissions.¹⁰⁰

The President did not announce his motivation for ending the secret detention of the detainees or for announcing that they would face trials by military commissions, but three factors may have led to the decision. First, the President may have concluded that the *Hamdan* decision required him to end the secret detentions. The Supreme Court ruled in *Hamdan*, as described above, that Common Article 3 of the Geneva Conventions of 1949 applied to the conflict between the United States and al Qaeda.¹⁰¹ In addition to its other requirements, this article states: “An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.”¹⁰² To make visits by the International Committee of the Red Cross possible, the United States could not continue to hold any detainees in secret. Shortly after the detainees arrived in Guantanamo Bay, the International Committee of the Red Cross announced that it would be visiting them.¹⁰³

Second, the President may have wanted to pressure Congress into taking action on the military commissions. *Hamdan* and the other nine detainees that were facing trials by military commissions generally played lesser roles in terrorism than the high-value detainees. Some politicians may have felt that trying them was ultimately not very important, especially because the Supreme Court previously had held that the United States presumptively could detain them as enemy combatants until the end of the conflict.¹⁰⁴ But the President may have believed that Congress would see a greater urgency in bringing

¹⁰⁰ See *id.*

¹⁰¹ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2796 (2006); see also *supra* notes 71–83 and accompanying text.

¹⁰² Geneva Convention III, *supra* note 73, art. 3(2), 75 U.N.T.S. at 138.

¹⁰³ See *World-Wide*, WALL ST. J., Sept. 21, 2006, at A1.

¹⁰⁴ A plurality of four Justices reached this conclusion. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (O'Connor, J., plurality opinion). Justice Thomas agreed with this plurality on this issue but did not join the plurality opinion. See *id.* at 587 (Thomas, J., dissenting).

to justice persons like Razmi bin al-Shihb, the accused mastermind of the 9/11 attacks.

Third, the President may have seen a need to reduce the controversy over the administration's anti-terrorism policies. The practice of holding some detainees secretly had generated a great deal of criticism, both within the United States and abroad. The President weathered this criticism prior to *Hamdan*, but the *Hamdan* case, in the eyes of many observers, amounted to a judicial rebuke of the executive branch. Perhaps in doubt about how much total criticism U.S. policies could withstand, the President may have decided to reduce the growing controversy over the high value detainees and their secret confinement.

2. *Military Commissions Act of 2006*. The Supreme Court did not have the final word on military commissions. The MCA, enacted on October 17, 2006, specifically responded to the *Hamdan* decision.¹⁰⁵ Some observers consider the Act a strong congressional chastisement of the Supreme Court.¹⁰⁶ Following are some of the most important changes under the Act.

First, the MCA reaffirms the DTA's previous prohibition on habeas corpus review.¹⁰⁷ To eliminate all possible doubt about whether this prohibition applies to pending cases, the MCA makes clear that it "shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001."¹⁰⁸ To avoid an end-run around the prohibition on habeas corpus jurisdiction with some other kind of lawsuit, Congress also specifically eliminated any other judicial interference with a non-final military commission action.¹⁰⁹

¹⁰⁵ See MCA, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

¹⁰⁶ See, e.g., John Yoo, Op-Ed., *Congress to Courts: "Get Out of the War on Terror."* WALL. ST. J., Oct. 19, 2006, at A18. The MCA found very strong support in Congress. It passed the House with fifty-seven percent voting for it and only thirty-nine percent voting against it. And it passed the Senate with sixty-five percent voting for it and only thirty-four percent against it. See Library of Congress, Thomas, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN03930:@@R> (last visited August 4, 2007).

¹⁰⁷ See MCA, sec. 7(a), 120 Stat. at 2635–36 (to be codified at 28 U.S.C. § 2241(e)(1)–(2)).

¹⁰⁸ *Id.* sec. 7(b), 120 Stat. at 2636.

¹⁰⁹ See *id.* sec. 3(a)(1), 120 Stat. at 2623–24 (to be codified at 10 U.S.C. § 950j) (providing "no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military

Second, the President now has statutory authority for using military commissions. The MCA explicitly provides: “The President is authorized to establish military commissions . . . for offenses triable by military commission as provided in this chapter.”¹¹⁰ This statutory authority is important. Although the Court in *Hamdan* recognized that the President had inherent constitutional authority to use military commissions, it concluded that this inherent authority was limited by the laws of war.¹¹¹ These limitations meant that the military commissions had to comply with the requirements of the Geneva Conventions and that they could not try offenses that did not constitute war crimes under the laws of war.¹¹² These limitations may no longer apply now that the President has statutory authority for military commissions.

Third, the MCA strives to eliminate objections under the Third Geneva Convention. Common Article 3, as explained above, prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”¹¹³ The Court in *Hamdan* held that the military commissions created by the President’s military order were not “regularly constituted court[s].”¹¹⁴ And the plurality further concluded those military commissions did not provide sufficient “judicial guarantees.”¹¹⁵ The MCA responds to these requirements of the Geneva Conventions in part by announcing: “A military commission established under this chapter is a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions.”¹¹⁶

The MCA also goes further than merely making this announcement. Although Congress did not agree that Common Article 3 should pose a bar to military commissions, Congress accepted the plurality’s view that military commissions should not exclude the accused

commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter”).

¹¹⁰ See *id.* sec. 3(a)(1), 120 Stat. at 2602 (to be codified at 10 U.S.C. § 948b(b)).

¹¹¹ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2775 (2006).

¹¹² See *id.* at 2776–77.

¹¹³ See Geneva Convention III, *supra* note 73, art. 3.

¹¹⁴ *Hamdan*, 126 S. Ct. at 2797.

¹¹⁵ *Id.* at 2803 (plurality opinion).

¹¹⁶ MCA, Pub. L. No. 109-366, sec. 3(a)(1), 120 Stat. 2600, 2602 (2006) (to be codified at 10 U.S.C. § 948b(f)).

from the trial even for national security reasons. The MCA, accordingly, adds a new section providing: “The accused shall be present at all sessions of the military commission (other than those for deliberations or voting), except when excluded under section 949d of this title [i.e., for disruptive behavior].”¹¹⁷

Fourth, the MCA establishes that military commissions may charge the crime of conspiracy to commit war crimes. The Act says:

“The following offenses shall be triable by military commission under this chapter at any time without limitation: . . .
(28) CONSPIRACY.—Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does an overt act to effect the object of the conspiracy, shall be punished . . . [by death or imprisonment]”¹¹⁸

This provision addresses the *Hamdan* plurality’s conclusion that conspiracy to commit war crimes is not a violation of the laws of war and that military commissions constituted under the President’s military order cannot try conspiracy charges if the President is relying solely on his war powers.¹¹⁹

In addition to responding to the *Hamdan* majority and plurality, the MCA also contains several provisions aimed at other possible issues and objections with respect to military commissions as they were constituted under the President’s military order. Like Military Commission Order No. 1, the MCA continues to allow admission of hearsay evidence,¹²⁰ but the MCA imposes important limitations. The relevant provision says that a party may introduce hearsay only if the party (a) makes known its intention to introduce the evidence and (b) reveals the particulars of the evidence, and does both of these things “sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence.”¹²¹ Even then, the MCA insists that hearsay “shall not be admitted in a trial by military commission if the party opposing the admission of the evidence demonstrates that the evidence is unreliable or lacking in probative value.”¹²² As described below, these restrictions greatly reduce the evidentiary differences

¹¹⁷ *Id.* sec. 3(a)(1), 120 Stat. at 2608 (to be codified at 10 U.S.C. § 949a(b)(1)(B)).

¹¹⁸ *Id.* sec. 3(a)(1), 120 Stat. at 2626, 2630 (to be codified at 10 U.S.C. § 950v(b)(28)).

¹¹⁹ *See Hamdan*, 126 S. Ct. at 2785 (plurality opinion).

¹²⁰ *See* MCA, sec. 3(a)(1), 120 Stat. at 2608–09 (to be codified at 10 U.S.C. § 949a(b)(2)(E)(i)).

¹²¹ *Id.*

¹²² *Id.* (to be codified at 10 U.S.C. § 949a(b)(2)(E)(ii)).

between military commissions and courts-martial or civilian criminal courts.¹²³

The MCA now also gives the accused a “right” to defend himself without counsel.¹²⁴ Although stated as a benefit to the accused, this provision may prove helpful to the government as well. Some of the accused at Guantanamo Bay do not want legal representation; instead, they simply want to confess their actions because they feel no remorse over what they have done.¹²⁵ Appointed military defense counsel or civilian counsel no longer will discourage or stand in the way of these confessions.

Finally, the MCA makes decisions of military commissions reviewable by a military appellate court, by the United States Court of Appeals for the D.C. Circuit, and then by the Supreme Court.¹²⁶ This review addresses concerns about the inadequacy of the previous review scheme.¹²⁷ Somewhat ironically, the MCA thus gives enemy combatants a right to review by an Article III federal court (i.e., the D.C. Circuit), while service-members convicted by court-martial generally have only the possibility of discretionary review by an Article I federal court (i.e., the U.S. Court of Appeals for the Armed Forces).¹²⁸

II. *The Essays in This Symposium*

This issue of *The George Washington Law Review* publishes the papers of seven speakers at the symposium. Two of these papers cover a broad range of topics. In the written summary of his keynote address, John Bellinger, the former Legal Adviser to the State Department, emphasizes and explains the great uncertainty and difficulty that the United States has faced in seeking to formulate legal re-

¹²³ See *infra* Part III.B.

¹²⁴ See MCA, sec. 3(a)(1), 120 Stat. at 2608 (to be codified at 10 U.S.C. § 949a(b)(1)(D)) (“The accused shall be permitted to represent himself . . .”). This “right” is subject to an exception if the accused fails to comport himself to the decorum of the military commission. *Id.* at 2608–09 (to be codified at 10 U.S.C. § 949a(b)(3)(A)).

¹²⁵ See Carol Rosenberg, *Terror Captive Makes It “Easy” by Confessing: A Saudi Captive Makes His Military-Tribunal Debut, Confesses and Swats Aside Pentagon Defense Counsel—in Perfect English*, MIAMI HERALD, Apr. 28, 2006, at A7.

¹²⁶ See MCA, sec. 3(a)(1), 120 Stat. at 2622 (to be codified at 10 U.S.C. § 950g).

¹²⁷ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2771 (2006) (explaining that under Military Commission Order No. 1, any conviction by a military commission “would be reviewed by a panel consisting of three military officers designated by the Secretary of Defense” and that “appeal of a review panel’s decision may be had only to the Secretary of Defense himself and then, finally, to the President” (citations omitted)).

¹²⁸ See 10 U.S.C. § 867(a)–(b) (specifying jurisdiction and procedures for seeking review). The Supreme Court may review decisions of the Court of Appeals for the Armed Forces by writ of certiorari. See *id.* § 867a.

sponses to the War on Terror. He cites, among his examples, the questions that the United States confronted in attempting to apply the Geneva Conventions to terrorist organizations and the inability of the United States to try many of the detainees in federal court on federal criminal charges given the limitations of federal court jurisdiction and federal criminal law. In *Ten Key Questions About the War on Terror*, Professor Stephen Saltzburg identifies and addresses a host of legal and policy issues that the government's anti-terrorism response since 2001 has raised.¹²⁹ His questions, which include "Have we compromised our commitment to the rule of law?";¹³⁰ "Is there any argument that is too extreme to make?";¹³¹ and "Will anyone believe us again?"¹³² are suggestive of his answers. Professor Saltzburg concludes that the courts and Congress must do more to act as checks on executive power.¹³³

Two of the submissions concern the legality of delivering terrorist suspects to foreign governments. In ratifying the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United States had agreed not to "expel, return . . . or extradite a person to another State where there are substantial grounds for believing" that he might face torture.¹³⁴ In *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*,¹³⁵ Professor Margaret L. Satterthwaite describes how the United States has argued that this prohibition of the Convention does not apply to extraditions (1) that occur wholly outside of the United States,¹³⁶ (2) that occur during the course of warfare,¹³⁷ or (3) that are made contingent on agreements by the receiving nations not to use torture.¹³⁸ She concludes that these positions are incorrect and that some of the United States' actions are unlawful.¹³⁹ Professor Leila Nadya Sadat

¹²⁹ Stephen Saltzburg, *A Different War: Ten Key Questions About the War on Terror*, 75 GEO. WASH. L. REV. 1021 (2007).

¹³⁰ *Id.* at 1032.

¹³¹ *Id.* at 1043.

¹³² *Id.* at 1045.

¹³³ *Id.* at 1048.

¹³⁴ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3(1), Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (ratified 136 CONG. REC. 36,007, 36,192 (Oct. 27, 1990)).

¹³⁵ Margaret Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007).

¹³⁶ *Id.* at 1351.

¹³⁷ *Id.* at 1394.

¹³⁸ *Id.* at 1379.

¹³⁹ *Id.* at 1419.

expresses similar concerns in *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*.¹⁴⁰ She addresses the topics of rendering prisoners abroad from the United States¹⁴¹ and transfers of persons from occupied Iraq to other countries.¹⁴² The former type of transfers, she argues, violate the Convention Against Torture, among other legal rules.¹⁴³ The latter type, she contends, violates the Fourth Geneva Convention.¹⁴⁴

Two of the symposium participants write about the limitations of federal courts in terrorism cases. In *State Secrets and the Limits of National Security Litigation*,¹⁴⁵ Professor Robert M. Chesney conducts a historical survey of the government's invocation of the state secrets doctrine, which may require courts to dismiss cases based on national security grounds. He concludes that the Bush administration's practice "does not differ qualitatively or quantitatively"¹⁴⁶ from that of its predecessors. He does suggest, however, that the administration adopt new procedures that might allow litigation to proceed when litigants claim the government has acted in an unconstitutional manner.¹⁴⁷ In *Trying Enemy Combatants in Civilian Courts*,¹⁴⁸ Michael German, Policy Counsel for the American Civil Liberties Union, agrees with the conventional wisdom that prosecuting terrorists in federal court is difficult.¹⁴⁹ He argues, however, that the success prosecutors have had in important international terrorism cases proves the criminal justice system is "up to the challenge."¹⁵⁰ Indeed, he contends that ordinary criminal courts are the most fair, open, and appropriate forums for adjudicating the guilt of suspected terrorists and the least likely to give rise to propaganda supporting additional terrorism.¹⁵¹

¹⁴⁰ Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200 (2007).

¹⁴¹ *Id.* at 1216.

¹⁴² *Id.* at 1226.

¹⁴³ *Id.* at 1219, 1222.

¹⁴⁴ *Id.* at 1227, 1230.

¹⁴⁵ Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249 (2007).

¹⁴⁶ *Id.* at 1249, 1308.

¹⁴⁷ *Id.* at 1308.

¹⁴⁸ Michael German, *Trying Enemy Combatants in Civilian Courts*, 75 GEO. WASH. L. REV. 1421 (2007).

¹⁴⁹ *Id.* at 1421, 1422.

¹⁵⁰ *Id.* at 1422.

¹⁵¹ *Id.* at 1425–26.

Finally, three of the symposium participants write about the application of the Geneva Conventions. In *The Law of War and Illegal Combatants*,¹⁵² Professor Dr. Ingrid Detter presents a European perspective on a broad range of law of war issues that have arisen in the War on Terror. It is perhaps not a view that many American academics would expect, especially given some of the European governments' criticism of American policies. One of Professor Dr. Detter's most important conclusions is that the Supreme Court in *Hamdan* wrongly concluded that detainees at Guantanamo Bay have rights under Common Article 3 of the Third Geneva Convention.¹⁵³ She agrees with the *Hamdan* dissent that Article 3 does not apply because it concerns conflicts "not of an international character"¹⁵⁴ and, in her view, the war with al Qaeda is a war of an international character. Professor Dr. Detter also criticizes the International Committee of the Red Cross for leading the Supreme Court astray with its erroneous interpretation of the Geneva Conventions.¹⁵⁵

Professor Mark A. Drumbl, in *The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law*,¹⁵⁶ argues that one of the most important penological reasons for bringing terrorists to justice is "expressive," in his words, "to augment the moral value of law, stigmatize those who break it, and establish an authoritative public, and transnational, narrative regarding the heinousness of terrorist violence."¹⁵⁷ Professor Drumbl asks how well military commissions that do not comport with international law standards, including the Geneva Conventions, can accomplish that goal.¹⁵⁸

In *Evolving Geneva Convention Paradigms in the "War on Terrorism": Applying the Core Rules to the Release of Persons Deemed "Unprivileged Combatants"*,¹⁵⁹ Professor Sean D. Murphy challenges the conventional assumption that the United States has a right to hold

¹⁵² Ingrid Detter, *The Law of War and Illegal Combatants*, 75 GEO. WASH. L. REV. 1049 (2007).

¹⁵³ *Id.* at 1103–04.

¹⁵⁴ *Id.* at 1088.

¹⁵⁵ *Id.* at 1081–82, 1103.

¹⁵⁶ Mark A. Drumbl, *The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law*, 75 GEO. WASH. L. REV. 1165 (2007).

¹⁵⁷ *Id.* at 1170.

¹⁵⁸ *Id.* at 1170–71.

¹⁵⁹ Sean D. Murphy, *Evolving Geneva Convention Paradigms in the "War on Terrorism": Applying the Core Rules to the Release of Persons Deemed "Unprivileged Combatants"*, 75 GEO. WASH. L. REV. 1105 (2007).

detainees until the end of hostilities. He argues that the United States may hold a detainee only so long as he “represents a danger or threat to the detaining power.”¹⁶⁰ Afterward, the United States must release the detainees. If the United States cannot find another country that will take the detainee, Professor Murphy argues that “the United States is obligated to release the detainee in the United States until an appropriate alternative place for relocation can be resolved.”¹⁶¹ Litigation on this issue seems likely.

III. *Three Claims Regarding the Future*

In the final part of this Forward, I make three claims regarding the future. First, I contend that federal courts should and will reject the most likely legal challenges to the MCA. Second, I predict that the government will not bring many prosecutions before military commissions because the MCA’s rules make prosecutions difficult. Third, I assert that the *Hamdan* case and the general controversy regarding the trial and detention of enemies in the War on Terror will have important, unintended, and undesirable consequences.

A. *Constitutional and Other Legal Challenges to the MCA*

Congress enacted the MCA on the eve of the symposium. As a result, *The George Washington Law Review* did not ask the symposium participants to comment on potential legal challenges to its provisions. But constitutional and other arguments against military commission procedures almost certainly will arise in the future when prosecutions resume.

One set of challenges likely will focus on the MCA’s restrictions on habeas corpus jurisdiction. In the DTA, as explained above, Congress previously attempted to eliminate federal habeas corpus jurisdiction over detainees at Guantanamo Bay.¹⁶² But the Supreme Court in *Hamdan* did not determine the constitutionality of that aspect of the DTA because the Court interpreted the restrictions not to apply to pending cases.¹⁶³ In the future, though, the Court cannot so easily avoid the constitutional question. The MCA amends the federal habeas corpus statute, again restricting habeas corpus jurisdiction, but this time saying that the prohibition “shall take effect on the date of

¹⁶⁰ *Id.* at 1164.

¹⁶¹ *Id.*

¹⁶² See DTA, Pub. L. No. 109-148, § 1005(e)(1)–(2), 119 Stat. 2739, 2742 (2005); *supra* notes 38–43 and accompanying text.

¹⁶³ See *Hamdan*, 126 S. Ct. at 2765–69.

the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act.”¹⁶⁴

Detainees confronted with this complete habeas corpus restriction may contend in lawsuits that Congress improperly has suspended the writ of habeas corpus. The Constitution provides: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”¹⁶⁵ Detainees may assert that the United States is not experiencing a rebellion or invasion and the public safety does not require suspending habeas corpus rights of petitioners held in prison at Guantanamo Bay. The government may disagree with these assertions, may also respond that enemy combatants at Guantanamo Bay do not have a constitutional right to habeas corpus,¹⁶⁶ and may also assert that a suspension of habeas corpus is not justiciable.¹⁶⁷

I predict, however, that even if the government is incorrect in these arguments, the federal courts will uphold the new habeas restrictions as they apply to persons facing charges by military commissions on the simple ground that no true suspension has occurred. The MCA permits judicial review of the decisions of military commissions after they are complete; in particular, it expressly provides for appellate review by the D.C. Circuit upon completion of the trial.¹⁶⁸ Accordingly, the courts should see that the MCA’s restrictions on habeas corpus operate much like the Court’s self-created *Councilman* abstention doctrine.¹⁶⁹ Just as *Councilman* bars federal courts from interfering

¹⁶⁴ See MCA, Pub. L. No. 109-366, sec. 8, 120 Stat. 2600, 2636 (2006).

¹⁶⁵ U.S. CONST. art. I, § 9, cl. 2.

¹⁶⁶ The D.C. Circuit, in fact, recently accepted this argument in *Boumediene v. Bush*, 476 F.3d 981, 992 (D.C. Cir. 2007), a case in which the Supreme Court has granted certiorari, see *Boumediene v. Bush*, 2007 WL 1854132 (U.S. June 29, 2007). The D.C. Circuit dismissed habeas cases filed by detainees held at Guantanamo under the MCA and concluded that the detainees, as enemy aliens held abroad, could not assert constitutional challenges to the MCA. The court relied on *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In *Johnson*, the Supreme Court held that German prisoners captured and tried by a military commission in China for war crimes following World War II, and then held in Germany, had no constitutional right to habeas corpus review. See *Johnson v. Eisentrager*, 339 U.S. 763, 765–66 (1950). The Supreme Court subsequently said that the enemy combatants held at Guantanamo “differ from the *Eisentrager* detainees in important respects” but did not rule on the question whether they had a constitutional right to habeas corpus. *Rasul v. Bush*, 542 U.S. 466, 476 (2004).

¹⁶⁷ See generally Amanda Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333 (2006) (discussing whether the judiciary has the power to review acts taken under the Suspension Clause of the Constitution).

¹⁶⁸ See *supra* Part I.C.2 (discussing the MCA).

¹⁶⁹ See *Schlesinger v. Councilman*, 420 U.S. 738, 740 (1975).

with pending courts-martial, the MCA principally bars interference with pending military commissions.

True, as explained above, the Supreme Court in *Hamdan* declined to abstain under the *Councilman* doctrine for two reasons.¹⁷⁰ First, the Court in *Hamdan* saw no strong policy justification for abstention. But Congress now has made clear in the MCA that it wants the courts to abstain from all cases, including pending cases. Second, the Court in *Hamdan* said that Congress had not developed complete appellate procedures for military commissions like it had for courts-martial. But in the MCA, Congress now has created a complete appellate review system that runs through a military appellate court to the D.C. Circuit and then to the Supreme Court and thus ensures that the federal courts will have the opportunity to check the executive branch.

Another set of challenges likely will focus on whether the tribunals' new evidentiary rules meet the requirements of due process under the Fifth Amendment. The MCA specifically addresses a major concern expressed by the plurality opinion in *Hamdan*. In particular, the Act makes clear that the accused now has a right to be present at all stages of the trial and hear all of the evidence against him,¹⁷¹ eliminating the former possibility that a military commission could exclude the accused when it considered classified evidence.¹⁷² But admission of evidence under the MCA still differs from the admission of evidence in ordinary criminal trials. For example, subject only to a few exceptions, the MCA permits the military commissions to consider any evidence that "would have probative value to a reasonable person."¹⁷³ Litigants may contend that the lack of more specific evidentiary rules, of the kind found either in the Federal Rules of Evidence or the Military Rules of Evidence, violates due process.

The courts very well may decide that detainees at Guantanamo Bay have no right to due process under the Fifth Amendment because they are not United States citizens and because they are being detained outside of the United States.¹⁷⁴ But even if the detainees have a right to due process, the courts should, and likely will, conclude that the evidentiary rules established by the MCA do not violate this right.

¹⁷⁰ See *supra* Part I.B.

¹⁷¹ See MCA, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2608 (2006) (to be codified at 10 U.S.C. § 949a(b)(1)(B) ("The accused shall be present at all sessions of the military commission . . .").

¹⁷² See *Hamdan*, 126 S. Ct. at 2786.

¹⁷³ MCA, § 3(a)(1), 120 Stat. at 2608 (to be codified at 10 U.S.C. § 949a(b)(2)(A)).

¹⁷⁴ See *supra* note 167.

The principal concern about the new rules is that they still permit hearsay evidence.¹⁷⁵ But the Supreme Court previously has upheld military commission verdicts based on hearsay,¹⁷⁶ and, as explained above and discussed more fully below, the MCA tightly limits hearsay evidence.¹⁷⁷ In addition, the Supreme Court previously has shown substantial flexibility in upholding evidentiary rules promulgated for courts-martial.¹⁷⁸ The federal courts likely will see an even stronger argument for deference in the case of military commissions, given the difficulties that both the prosecution and the accused face in acquiring evidence.

A third set of challenges may assert that the military commissions still violate the Geneva Conventions. The Court in *Hamdan* concluded that the military commissions, as originally established by the President's military order, violated Common Article 3 because they were not "regularly constituted" courts.¹⁷⁹ A plurality also said that they violated Common Article 3 because they did not provide "all the judicial guarantees which are recognized as indispensable by civilized peoples."¹⁸⁰ Congress, in the MCA, sought to prevent further challenges of this kind by proclaiming: "A military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for the purposes of common Article 3 of the Geneva Conventions."¹⁸¹ Congress further said that no alien unlawful combatant could invoke the Geneva Conventions as a source of rights.¹⁸²

The courts will likely have to decide whether Congress has this power to declare that the military commissions do not violate the Geneva Conventions. Surely, Congress cannot unilaterally change the meaning of the Geneva Conventions for the entire world. Instead, the meaning of the conventions could change only if other signatory na-

¹⁷⁵ See, e.g., Warren Richey, *Will the Supreme Court Shackle New Tribunal Law?*, CHRISTIAN SCI. MONITOR, Oct. 17, 2006, at 1, 10 (discussing key objections to the MCA).

¹⁷⁶ See, e.g., *In re Yamashita*, 327 U.S. 1, 18–20 (1945).

¹⁷⁷ See *supra* Part I.C.2.

¹⁷⁸ See *United States v. Scheffer*, 523 U.S. 303, 309 (1998) (holding that Military Rule of Evidence 707's ban on admissions of exculpatory polygraph evidence does not violate due process).

¹⁷⁹ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2796–97 (2006) (quoting Geneva Convention III, *supra* note 73, art. 3).

¹⁸⁰ *Id.* at 2796 (quoting Geneva Convention III, *supra* note 73, art. 3).

¹⁸¹ MCA, Pub. L. No. 109-366, sec. 3(a)(1), 120 Stat. 2600, 2602 (to be codified as amended at 10 U.S.C. § 948b(f)).

¹⁸² See *id.* (to be codified as amended at 10 U.S.C. § 948b(g)).

tions agree to a change. Congress can, however, abrogate a treaty, in whole or in part, by passing a statute.¹⁸³ In this instance Congress appears to be saying that the United States no longer is bound by the “regularly constituted” and “judicial guarantees” requirements of Common Article 3 to the extent that the military commissions would violate those requirements. Congress has that power.

For these reasons, I do not think that the most likely challenges to the MCA will succeed. But of course, in addition to possible lawsuits challenging the Act as it now exists, the new procedures also face another possible source of conflict: the change in the balance of power in both the House and the Senate after the November 2006 elections. The new Congress may decide to address military commissions further, and may even conclude that the United States should close the Guantanamo Bay prison and release the detainees or turn them over to other authorities.

B. Difficulties of Prosecution Under the MCA

My second claim is that, contrary to conventional wisdom, prosecutors are likely to find it difficult to win convictions under the MCA. A common assumption among opponents of the use of military commissions to try detainees at Guantanamo is that the military commissions are “kangaroo courts”; they are sham tribunals designed to produce guilty verdicts without a fair trial.¹⁸⁴ Indeed, this belief surely motivates some of the constitutional and other challenges to military commission procedures. But experience may not confirm the common assumption that prosecutions will be easy.

The government is likely to discover that one of the purported advantages that the military commissions have over other tribunals is largely illusory. Apart from structural differences, the military commissions appear to differ from courts-martial and other tribunals most significantly in that they have very relaxed evidentiary rules. Prior to the MCA, a military commission could consider all evidence probative to a reasonable person.¹⁸⁵ Prosecutors must have liked this provision because it would allow them to present any evidence of guilt, without regard to the evidence the Federal Rules of Evidence or Military

¹⁸³ See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (holding that “if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control”).

¹⁸⁴ See *infra* note 190 and accompanying text.

¹⁸⁵ See DEP’T OF DEF., *supra* note 91, § 6(D)(1).

Rules of Evidence would exclude in an ordinary criminal trial or court-martial.

This provision, however, was controversial. A significant concern, specifically mentioned by the Court in *Hamdan* was that the government would rely on hearsay to convict the accused.¹⁸⁶ Although nearly all foreign nations and international tribunals permit the prosecution to admit hearsay in criminal trials,¹⁸⁷ that is not the American tradition. Subject only to a small number of exceptions, American courts generally exclude hearsay to ensure that the defendant has the right to confront his or her accusers.¹⁸⁸

Hearsay evidence might not prejudice the accused very much if the evidence clearly lacks credibility. For example, suppose a detainee at Guantanamo Bay testifies against the accused as follows: “A friend of mine at the al Qaeda camp told me that the defendant was plotting with bin Laden and others to hijack aircraft.” If the accused could show that the witness had a shaky memory of the events, that he had incentive to lie to gain favor with prosecutors, or that he told contradictory stories in the past, the military commission—if it acts fairly—might give the testimony very little weight.

But hearsay evidence may pose a great problem in other situations. For example, imagine that a military investigator is testifying against the accused. The investigator might testify that he interrogated a high profile detainee, like Ramzi bin al-Shibh, in Pakistan and that the detainee implicated the accused in various specific ways. In this situation, the military commission might be more likely to believe the testimony, and the accused would have little grounds to impeach the government investigator.

¹⁸⁶ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2786–87 (2006).

¹⁸⁷ See David Aronofsky, *International War Crimes & Other Criminal Courts: Ten Recommendations for Where We Go from Here and How to Get There—Looking to a Permanent International Criminal Tribunal*, 34 *DENV. J. INT'L L. & POL'Y* 17, 24 (2006) (“[H]earsay evidence derived from anonymous witnesses appears to have become the norm rather than the exception in important international cases [before international criminal tribunals] to date.”); David Weissbrodt et al., *Piercing the Confidentiality Veil: Physician Testimony in International Criminal Trials Against Perpetrators of Torture*, 15 *MINN. J. INT'L L.* 43, 58–59 (2006) (“The hearsay rule is characteristic of common law systems. In civil law systems, where there is no jury and the judge conducts the fact-finding process, out-of-court statements are usually admitted when relevant. International criminal courts have borrowed their rules of evidence from both common law and civil law systems, but usually favor admissibility of all evidence.”).

¹⁸⁸ See *Crawford v. Washington*, 541 U.S. 36, 49–50 (2004) (discussing early American cases to determine the scope of the “common-law right” of confrontation).

The MCA continues to make hearsay admissible.¹⁸⁹ For this reason, some opponents have argued that the prosecutors still have a significant and unfair advantage in proving their cases.¹⁹⁰ But in reality, prosecutors will find introducing hearsay very difficult. The MCA contains a significant limitation that provides that hearsay is admissible only if the proponent of the evidence provides “the adverse party with a fair opportunity to meet the evidence.”¹⁹¹ This rule realistically would prevent the United States from simply calling a military investigator as a witness to testify about what some other detainee said under interrogation. Under the limitation, the accused would have to have access to the detainee before the government could present the detainee’s statements as hearsay and presumably could call the detainee as a witness. That may be especially difficult if the United States has already released the detainee.

In addition, in a few significant ways, the MCA places greater burdens on the government than it would face before either a court-martial or a federal court. The clearest example involves the definition of the crime of conspiracy. Often when fighting organized criminal enterprises, a charge of conspiracy is essential for bringing all the culpable persons to justice. For example, the nineteen terrorists who actually hijacked the aircraft on September 11, 2001, will never face trial because everyone of them died in the commission of their heinous crimes. But these hijackers had help, and anyone guilty of conspiring with them should face severe punishment. The same is true for many other terrorist incidents, and thus conspiracy is one of the most important offenses that can be charged.

Proving conspiracy, however, is harder before a military commission than before a court-martial or federal district court. Ordinary criminal law requires that the prosecution prove that a co-conspirator agreed with another to commit a crime and that someone involved in the conspiracy took an overt act in furtherance of the conspiracy.¹⁹² In

¹⁸⁹ See MCA, Pub. L. No. 109-366, sec. 3(a)(1), 120 Stat. 2600, 2608 (2006) (to be codified at 10 U.S.C. § 949a(b)(2)(E)(i)) (“[H]earsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission . . .”).

¹⁹⁰ See, e.g., Michelle Norris & Robert Seigel, *All Things Considered* (National Public Radio broadcast Oct. 16, 2006) (reporting that the American Civil Liberties Union has condemned the MCA of 2006 in part because “the law makes it possible for people to be tried and put to death based on hearsay”).

¹⁹¹ MCA, sec. 3(a)(1), 120 Stat. at 2608–09 (to be codified at 10 U.S.C. § 949a(b)(2)(E)(i)).

¹⁹² See, e.g., 18 U.S.C. § 1117 (2000) (“Conspiracy to murder. If two or more persons conspire to [commit murder in violation of particular sections of Federal Criminal Code], and one or

contrast, before a military commission, the prosecution must prove not only the existence of the conspiracy and the overt act, but also that the accused himself committed the overt act.¹⁹³ Obviously, proving that the *accused* committed an overt act is much more difficult than simply proving that *someone* committed an overt act.

Emphasis on the accused's personal undertaking of an overt act may make the government's case appear less compelling if the accused's overt acts were not crimes. The *Hamdan* case itself provides an example. Hamdan was charged with conspiracy to commit murder—the killing of thousands of innocent people who died on September 11, 2001.¹⁹⁴ But none of the overt acts that Hamdan allegedly committed, such as driving and guarding bin Laden,¹⁹⁵ was itself a crime. As a result, some observers got the wrong impression that Hamdan's alleged crime was being a chauffeur for bin Laden—an accusation that does not sound very culpable.¹⁹⁶

Despite all the controversy that military commissions have created, no one should expect the government to have all the advantages that it might appear to have at first blush. Indeed, a careful examination shows that, in at least some respects, the government may face greater burdens than before.

C. *The "Take No Prisoners" Alternatives to Military Commissions*

The Supreme Court in *Hamdan* addressed miscarriages of justice that enemy combatants might suffer if the government tries them by military commission. The Court did not consider what might happen to enemy combatants if the government chooses not to try them by military commission. The Court's silence on this subject is neither blameworthy nor surprising. The issue of alternatives to military commissions was not before the Court and the proper choice of alternatives seems better left to the President and Congress in the exercise of their respective war powers.

more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.”).

¹⁹³ See MCA, sec. 3(a)(1), 120 Stat. at 2630 (to be codified at 10 U.S.C. § 950v(b)(28)) (“Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished . . .”).

¹⁹⁴ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2761 (2006).

¹⁹⁵ See *id.*

¹⁹⁶ See, e.g., Nina Totenberg, *Guantanamo Decision Puts President in Difficult Spot*, Morning Edition (National Public Radio broadcast June 30, 2006) (reporting that “in the case of Salim Ahmed Hamdan, the particulars of the charges against him are that he was Osama bin Laden’s driver and bodyguard and helped move weapons”).

But the Supreme Court's decision in *Hamdan* nonetheless brings to the forefront the question of alternatives to military commissions. The Court barred the use of military commissions as constituted under the President's military order of November 13, 2001,¹⁹⁷ and although Congress has attempted to redress the legal deficiencies of military commissions in the MCA,¹⁹⁸ this action does not eliminate the need to consider alternatives to military commissions. The new procedures, as explained above, undoubtedly will face numerous legal challenges.¹⁹⁹ And even if the procedures can survive these challenges, prosecutors may find them cumbersome to use for the various reasons described in the previous section.²⁰⁰

Given the difficulties of prosecution, I predict that only a small fraction of enemy combatants whom the United States suspects of war crimes (including the war crime of engaging in unlawful combat) are likely to face trial before military commissions. If I am correct, then the United States will have to consider other methods of dealing with enemy combatants. A full assessment of *Hamdan's* impact accordingly must take into account the likely alternatives that the government will pursue.

One alternative is for the United States simply to take fewer prisoners in the War on Terror. This approach has numerous immediate advantages. If the United States does not catch enemy combatants suspected of war crimes, it will not have to try them before military commissions. It will not have to address lawsuits challenging the authority and procedures of the military commissions. It will not have to defend habeas actions by prisoners questioning the basis for their detention (or lawsuits challenging the restriction of habeas corpus jurisdiction).²⁰¹ It will not face the bad publicity and liability if prisoner abuses occur. And it will avoid the extreme dangers that holding detainees entails.²⁰²

¹⁹⁷ The district court in *Hamdan* stayed the trial by military commission. *See Hamdan*, 126 S. Ct. at 2761. The court of appeals reversed the district court. *See id.* at 2762. The Supreme Court reversed the court of appeals and remanded the case for further proceedings. *See id.* at 2798. Its decision clearly implies that the government could not use military commissions, as they were then constituted, to try other defendants; that is why Congress enacted the MCA of 2006.

¹⁹⁸ *See supra* Part I.C.2.

¹⁹⁹ *See supra* Part III.A.

²⁰⁰ *See supra* Part III.B.

²⁰¹ The MCA, as explained more fully above, seeks to bar habeas corpus challenges. *See* MCA, Pub. L. No. 109-366, sec. 7(a), 120 Stat. 2600, 2635-36 (2006) (amending 28 U.S.C. § 2241(e)).

²⁰² Even in confinement, the enemies continue their struggle. Consider the following inci-

Given these advantages, it is perhaps not surprising that the United States already has embarked on this alternative. In January 2005, U.S. Army Colonel Gary Cheek, the U.S. commander for Eastern Afghanistan, announced: “The U.S. military is taking as few prisoners as possible in its campaign against al-Qaida and the Taliban in Afghanistan in part to forestall more complaints about its conduct.”²⁰³ In some ways, this development merely brings the United States into line with its allies. Although the United States military has been fighting in Afghanistan along side forces from two dozen countries, including France, Germany, the Netherlands, and Canada, only the United States has detained a significant number of prisoners.²⁰⁴ The Europeans have shied away from this thankless task and thereby have escaped the associated hazards and controversy.²⁰⁵

The question then arises of what the coalition forces are doing if they are not taking suspected terrorists prisoner. Part of the answer is brutally simple: the coalition forces are killing the enemy on the battlefield without attempting to detain and hold them. The practice of targeted killing is the most dramatic manifestation of this alternative. Targeted killing consists of finding individual enemies and attacking

dent on May 18, 2006, as related to the *Wall Street Journal* by Rear Adm. Harry Harris, a commander of Joint Task Force Guantanamo:

A guard noticed a detainee who appeared to be trying to hang himself. “The detainee had put a sheet in the ceiling around the lights and built what looked like a noose and was putting his head toward that noose,” Adm. Harris says. “The quick-reaction force rushed into that [cell] block to save the life of the individual they thought was trying to kill himself. When they got in there, the detainees had slickened the floor with feces, urine and soapy water,” making it hard for the guards to keep their footing.

“They proceeded to attack the guard force. . . . The attack was obviously planned. They managed to get a guard down on the ground. They attacked him with broken light fixtures, with fan blades and with [security] cameras that they had torn off to use as bludgeoning weapons. . . .”

“. . . [A]t the same time, detainees in two adjacent blocks erupted and tore up their blocks completely—tore down all the lights, tore up all the fans, tore down all the cameras, and all that kind of stuff. . . .”

James Taranto, *Weekend Interview with Harry Harris: War Inside the Wire*, WALL ST. J., Sept. 16, 2006, at A8.

²⁰³ *World in Brief: U.S. Military Is Directed to Take Fewer Prisoners in Afghanistan*, WASH. POST, Jan. 4, 2005, at A12.

²⁰⁴ See David Bosco, *A Duty NATO Is Dodging in Afghanistan*, WASH. POST, Nov. 5, 2006, at B7 (reporting that “NATO countries have essentially opted out of the detainee business. Before committing their troops to combat areas, the Canadian, Dutch and British governments signed agreements with the Afghan government stating that any captured fighters would be handed over to Afghan authorities rather than to American forces.”).

²⁰⁵ See *id.* (“[T]hey don’t want any part of the prisoner scandals that have dogged American forces.”).

them, usually from the air, regardless of their location or current activity. The *Los Angeles Times* recently counted nineteen significant incidents of targeted killing where the United States made no efforts to capture the enemy combatants but instead simply attacked them.²⁰⁶

A prominent example of targeted killing occurred in June 2006, when the U.S. killed Abu Musab al-Zarqawi.²⁰⁷ Al-Zarqawi was the leader of al Qaeda in Iraq until the U.S. Air Force dropped two 500-pound bombs on a house in which he was staying.²⁰⁸ The military earned great and well-deserved praise for its skill in executing the order to attack al-Zarqawi,²⁰⁹ but an important aspect of the incident went largely unnoticed. What many readers did not initially learn in news accounts of the attack was that the safe house in which al-Zarqawi hid was located in an isolated palm grove outside a small village.²¹⁰ Although the house was under surveillance by U.S. military personnel, *Newsweek* reports that “little thought was given to trying to storm the safe house to take Zarqawi alive.”²¹¹ Instead, the Air Force just destroyed the house and everyone in it. Is it too speculative to believe that the United States felt that killing al-Zarqawi would produce less controversy, difficulty, and danger than attempting to take him prisoner and try him for his many suspected terrorism offenses?

In addition to the targeted killing of terrorist suspects, the United States also now avoids taking prisoners simply by the way it conducts its conventional military operations against al Qaeda and the Taliban. The evidence appears in the daily military press releases from Afghanistan. Week after week, the military describes raids that it makes on suspected al Qaeda or Taliban outposts. Although occasionally these reports mention the capture of a prisoner or two, a great many simply describe how the military surrounded a particular site and killed everyone there. For example, one release from August 2006 reports: “Coalition forces engaged Taliban leadership with joint fires, killing a known Taliban commander and 15 other militants on Aug. 25 in the central Khod Valley of Uruzgan Province.”²¹² It makes no mention of

²⁰⁶ Josh Meyer, *CIA Expands Use of Drones in Terror War*, L.A. TIMES, Jan. 29, 2006, at A1.

²⁰⁷ See Nelson Hernandez, *Zarqawi's Hideout: Bombed, Bulldozed*, WASH. POST, June 11, 2006, at A21.

²⁰⁸ See *id.*

²⁰⁹ See Eliot A. Cohen, *A Laudable Death*, WALL ST. J., June 9, 2006, at A14.

²¹⁰ Evan Thomas & Rod Nordland, *Death of a Terrorist*, NEWSWEEK, June 19, 2006, at 30, 30.

²¹¹ *Id.*

²¹² Combined Forces Command-Afghanistan Coalition Press Information Center, *Coalition*

any terrorists captured. Another from the same month says: “Afghan and Coalition forces killed 25 Taliban extremists during an attack Aug. 3 just northeast of Gereshk, in the Nahr Surkh District of Helmand Province,” again with no prisoners taken.²¹³ Still another describes how “Afghan National Army and Coalition forces conducted a raid June 26 on a suspected enemy compound in the Shahidi Hass District of Uruzgan Province,” killing ten “extremists” without taking anyone prisoner.²¹⁴ Reports of this kind stretch back for months and months. The news does not even make the papers. In contrast, any effort to bring a person before a military commission generates hundreds or even thousands of news articles. It does not take a political economist to determine what kind of incentives these circumstances create.

A second alternative to trying prisoners before military commissions is just to set them free after they have been captured, even if they are potentially very dangerous. Consider for example, the case of Feroz Abbasi, a citizen of the United Kingdom who was captured as a combatant in Afghanistan and taken to Guantanamo. At his combatant status review hearing, Abbasi was candid about his activities in Afghanistan. He said: “Do not be fooled into thinking that I am in any way perturbed by you classifying me as a (non-sensical) ‘enemy combatant.’ In fact quite to the contrary I am humbled that Allah would honour me so.”²¹⁵ Abbasi admitted that he undertook paramilitary training in Afghanistan and that Osama bin Laden himself gave a speech to his training group.²¹⁶ Abbasi stressed that he wanted to kill “Americans and the Jews.”²¹⁷

What happened to Abbasi? Following great diplomatic pressure on the United States (and a lawsuit in the United Kingdom),²¹⁸ the

Forces Kill Known Taliban Commander (Aug. 26, 2006) (Release # 060826-03), http://cjtf82.afghan.swa.army.mil/Afghan_Site/Sites/News%20Release/2006/08-August/Coalition%20forces%20kill%20known%20Taliban%20commander.htm (last visited Aug 1, 2007).

²¹³ Combined Forces Command-Afghanistan Coalition Press Information Center, *Afghan, Coalition Forces Kill 25 Taliban Extremists in Counter-terrorism Mission* (Aug. 4, 2006) (Release # 06-08-04P), <http://www.cfc-a.centcom.mil/News%20Release/2006/08-August/Afghan%20Coalition%20forces%20kill%2025%20Taliban%20extremists%20in%20counter-terrorism%20mission.htm> (last visited Feb. 12, 2007).

²¹⁴ Combined Forces Command-Afghanistan Coalition Press Information Center, *Afghan, Coalition Forces Conduct Raid in Uruzgan* (June 27, 2006) (Release # 060627-02), http://cjtf82.afghan.swa.army.mil/Afghan_Site/Sites/News%20Release/2006/06-June/Afghan,%20Coalition%20forces%20conduct%20raid%20in%20Uruzgan.htm (last visited Aug 1, 2007).

²¹⁵ U.S. DEP'T OF DEF., SUMMARIZED SWORN DETAINEE STATEMENT, http://www.dod.mil/pubs/foi/detainees/csrt/Set_5_0465-0672_Revised.pdf (last visited July 25, 2007).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ See *R (Abbasi) v. Sec'y of State for Foreign & Commonwealth Affairs*, [2002] EWCA

United States turned Abassi over to the United Kingdom, as it did other British citizens held at Guantanamo.²¹⁹ The United Kingdom then just let him go.²²⁰ Holding prisoners captured on the battlefield, even if they proudly assert their enemy status and their desire to kill Americans and Jews, is apparently too burdensome compared to releasing them. Indeed, in an ironic demonstration of the dangers that some detainees pose, the United Kingdom and other European nations have simultaneously demanded that the United States release other prisoners from Guantanamo, but adamantly have refused the United States permission to return them to the European nations where they used to reside.²²¹

Some of the detainees released from Guantanamo have reverted to terrorism. Bowing to pressure, the United States released Rasul Kудayev from Guantanamo.²²² He later participated in a terrorist attack in Russia that killed thirty-five police officers and twelve civilians.²²³ The United States also released Abdullah Mehsud from Guantanamo, who returned to Pakistan, where he kidnapped and murdered two Chinese engineers.²²⁴ These cases and others like them²²⁵ show that the alternative of releasing prisoners instead of trying them before military commissions is not working out well for victims of terrorism. Ironically, this alternative also does not seem to be entirely successful for those who are released. The United States has killed at least two former Guantanamo detainees after re-encountering them on the battlefield,²²⁶ and yet, the alternative of releasing prisoners still remains less controversial than holding them.

(Civ) 1598, [2002] All E.R. 70 (lawsuit to compel the British government to undertake more diplomatic action).

²¹⁹ See James Kirkup, *After More than 1,000 Days in Jail, Guantanamo Four Fly Back to Britain*, THE SCOTSMAN, Jan. 26, 2005, at 4.

²²⁰ See Robert Verkaik, *Back on the Streets, the Men Still Trying to Readjust*, INDEP. (London), Feb. 3, 2005, at 5 (explaining that Abassi was returned to the United Kingdom where British authorities released him after one day).

²²¹ See Craig Whitlock, *U.S. Faces Obstacles to Freeing Detainees: Allies Block Returns from Guantanamo*, WASH. POST, Oct. 17, 2006, at A1.

²²² See Deroy Murdock, *Second Chances*, NAT'L REV., Feb. 17, 2006, available at <http://www.nationalreview.com/murdock/murdock200602170825.asp>.

²²³ See *id.*

²²⁴ See *id.*

²²⁵ See *id.* (describing how the Pentagon knows of at least a dozen persons released from Guantanamo who have returned to the fight); see also Bakhtiyar Akhmedanov, *Former Guantanamo Bay Inmates Convicted in Tatarstan*, MOSCOW NEWS, May 19, 2006, at 18 (describing trial of two former detainees in connection with a gas pipeline explosion).

²²⁶ See Niles Lathem, *Ex-Gitmo Thugs at It Again*, N.Y. POST, Oct. 13, 2004, at 8.

A third alternative to holding prisoners and trying them by military commission has been to turn over prisoners to local governments. The United States, for example, hands nearly all detainees captured in Iraq to the newly created Iraqi Central Criminal Court. Surely, few would contend that conditions for detainees in the Iraqi justice system are better than conditions for detainees at Guantanamo.²²⁷

The *Los Angeles Times* reports that these prisoners in Iraq typically wait months before receiving a hearing and have poor legal representation at best.²²⁸ Some ninety percent of the prisoners complain that they have confessed under torture.²²⁹ Their jailers insist on bribes.²³⁰ Upon conviction, the conditions are harsh. Many detainees in Iraq are held in the infamous Abu Ghraib prison, which Iraqi authorities now control. Conditions in this prison are grim, with inadequate sanitation and food rations cut to just rice and water.²³¹ When the Americans left, the prisoners (many of whom are non-Iraqi terrorists) “pleaded to go with their departing captors, rather than be left in the hands of Iraqi guards.”²³² “The Americans were better than the Iraqis. They treated us better,” a prisoner at Abu Ghraib said.²³³ Moreover, the ones merely imprisoned are the fortunate ones. In September 2006, just a few weeks before this symposium, in the central hall of Abu Ghraib prison, Iraq carried out a mass execution in which it hanged twenty-six men and one woman convicted of terrorism.²³⁴ Needless to say, the condemned did not have anything like the judicial review available to persons detained by the United States. Yet, while the fate of the few hundred detainees at Guantanamo is well known, few have read about the fate of the thousands of terrorists the United States has detained in Iraq and turned over to Iraqi authorities.

²²⁷ See *Omar v. Harvey*, No. 06-5126, 2007 WL 420137, at *1, *10–*11 (D.C. Cir. Feb. 9, 2007) (discussing habeas petition of American citizen detained in Iraq who opposes his transfer to the Iraqi Criminal Court).

²²⁸ See Jeffrey Fleishman & Asmaa Waguih, *The Conflict in Iraq*, L.A. TIMES, June 19, 2005, at A1; see also Jeffrey Fleishman, *Justice Is Swift and Deadly in Baghdad*, L.A. TIMES, June 6, 2005, at A1.

²²⁹ See Fleishman & Waguih, *supra* note 228, at A1.

²³⁰ See *id.*

²³¹ See Ali Saber & Gethin Chamberlain, *Torture Screams Ring Out as Iraqis Take Over Abu Ghraib*, SUNDAY TELEGRAPH (London), Sept. 10, 2006.

²³² *Id.*

²³³ *Id.*

²³⁴ See Oliver Poole, *27 Are Hanged at Abu Ghraib in First Mass Execution Since Saddam's Fall*, DAILY TELEGRAPH (London), Sept. 8, 2006, at 16.

In sum, *Hamdan* on its face addresses only the legality of military commissions. The Court saw its decision as a victory for justice, ensuring that even despised members of the world community will receive fair trials. But the case in reality does not require that any enemy combatants receive a fair trial. On the contrary, the United States has other alternatives. Under pressure, both domestically and from Europe, it already is pursuing these alternatives. It is killing detainees instead of trying them; it is releasing them instead of trying them (and in some cases then killing them on the battlefield); and it is turning them over to foreign governments where they have far less chance of receiving a fair trial. A fair assessment of *Hamdan* thus leads to the conclusion that its vision of justice comes at a high price—to justice itself.

Conclusion

By any measure, *Hamdan v. Rumsfeld* is an exceedingly important decision. The case bears on the future of military commissions and the rights of suspected terrorists in all of the ways addressed by the panels involved in this symposium. Late breaking developments include the passage of the MCA, the transfer of high profile detainees to Guantanamo, and the largely unnoticed steering of the United States into pursuing seemingly less fair alternatives to trying prisoners by military commissions. I hope readers will benefit from this symposium as they consider these issues.