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# Vindicating the Rule of Law

## The Legacy of *Hamdan v. Rumsfeld*

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Preserving the rule of law is a theme that runs throughout the United States Supreme Court's June 2006 decision in *Hamdan v. Rumsfeld*,<sup>1</sup> and will likely serve as the decision's most enduring legacy. In *Hamdan*, the Court invalidated the military commissions established by President George W. Bush to try suspected terrorists of war crimes, finding that they violated domestic and international law. In particular, the Court rejected the approach that has underpinned the administration's post-9/11 detention policy: invoking the law of war to avoid prosecuting terrorist suspects in civilian courts, while ignoring the limits that the law of war imposes on the detention, treatment, and trial of prisoners. By invalidating the President's military commissions and concluding that, at a minimum, Common Article 3 of the Geneva Conventions applies to alleged members of al-Qaeda and other terrorists, the Supreme Court made clear that the President cannot continue to act outside of any established legal framework.

*Hamdan* thus marks a significant moment in American jurisprudence and counterterrorism policy, vindicating the rule of law and the role of the federal courts in protecting it. The decision reaffirms the United States' commitment to battling terrorism consistent with American values and legal traditions, and affirming the importance of checks on executive power. As *Hamdan* suggests, the Constitution and federal courts are vital components to a successful national security policy, not only because they are the instruments of the law, but also because they represent the foundational values of the United States during times of war as well as times of

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peace. The struggle against terrorist groups like al-Qaeda cannot be “won” if the United States sacrifices its values and system of government. To the contrary, *Hamdan* suggests how the rule of law can be an integral part of national security policy, giving legitimacy to counterterrorism operations at home and abroad.

At the same time, *Hamdan*’s long-term impact remains uncertain. The judgment imposed baseline requirements for the trial and treatment of suspected terrorists, but did not grapple with some larger questions raised by what the administration has described as the war on terror. Previously, the United States did not view terrorism as an armed conflict, but instead

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..... treated it as criminal activity to be addressed through domestic criminal law.<sup>2</sup> After September 11, however, the administration declared a war on terror—unprecedented in scope, duration, and all other criteria that traditionally separate a state of war from a state of peace—with significant implications for detention operations and counterterrorism strategy generally. Under the administration’s view, it may capture individuals anywhere in the world and detain them indefinitely, as it has done at Guantánamo, Bagram Air Base, and secret detention sites or “black spots” run by the Central Intelligence Agency (CIA). *Hamdan* did not grapple with the legitimacy of that framework or the concept of a war on terror itself. *Hamdan*, moreover, could create a perverse incentive for the administration to continue to detain individuals without charge or due process, rather than subject them to a military trial that adheres to the standards that the Supreme Court said the law requires. Entrenching a system of indefinite and perpetual detention without trial undermines the administration’s own claims that it intends to bring suspects to justice and detracts from the legitimacy of the system as a whole.

*Hamdan* also spurred the passage of new legislation, the Military Commissions Act of 2006 (MCA),<sup>3</sup> which threatens to roll back important safeguards to executive overreaching made during the past five years in challenges to military detentions and trials. The MCA not only establishes new military commissions, but also creates a broad and elastic definition of “enemy combatant;” eliminates habeas corpus for those detained as “enemy combatants;” renders the Geneva Conventions unenforceable; and limits the liability of U.S. officials for past torture and other abuse. These changes

presage far-reaching consequences, including continued militarization of counterterrorism detention operations, the creation of a second-class justice system for aliens throughout the world, and the dilution of the procedural and substantive constraints that have checked executive overreaching since September 11.

This Article examines the Supreme Court's *Hamdan* decision and the role of courts and the law in the struggle against al-Qaeda and other terrorist groups. It explores how *Hamdan* reinforces the rule of law, the importance of judicial review, and uncertainties in the future. It also examines the backlash that *Hamdan* has promoted. Nonetheless, *Hamdan* remains an important decision in instilling the rule of law in terrorism operations, though its full legal and political impact remain to be seen.

### HAMDAN V. RUMSFELD

In *Hamdan*, the Supreme Court considered a challenge to the military commissions established by the President to try individuals for war crimes at Guantánamo Bay, Cuba. The President's order of November 13, 2001<sup>4</sup> establishing these commissions asserted broad jurisdiction to try offenses by any non-citizen who is or was a member of al-Qaeda, or who has engaged or participated in terrorist activities aimed at the United States. Procedurally, the commissions deviated from both federal criminal trials and military courts-martial convened under the Uniform Code of Military Justice (UCMJ)<sup>5</sup> by denying defendants the right to be present throughout their trial; permitting the use of testimonial hearsay and evidence obtained by coercion; and precluding review by civilian judges. The commissions, in short, sought to establish an alternative system of military justice of unprecedented scope, devoid of these and other important safeguards that ensure the accuracy and integrity of the result.

The challenge to the military commissions emerged from the detention of prisoners at the U.S. naval base at Guantánamo, Cuba. Since early 2002, the administration has held more than 700 detainees at Guantánamo, and approximately 430 remain.<sup>6</sup> Nearly all of the detainees have been held without charge as "enemy combatants." Ten detainees, however, were charged before military commissions under the President's November 13, 2001 order. One such individual was Salim Hamdan, a citizen of Yemen and alleged personal driver of Osama bin Laden. Captured in Afghanistan in late 2001, Hamdan was accused of conspiracy to commit offenses triable by military commission. In a previous case, *Rasul v. Bush*,<sup>7</sup> the Supreme Court had established that prisoners at Guantánamo have the right to test

the lawfulness of their detention in federal court by writ of habeas corpus. *Rasul*, in which two groups of prisoners (one from England and Australia, and the other from Kuwait),<sup>8</sup> marked the first legal challenge to the detentions at Guantánamo. Following that decision, Hamdan challenged the legality of the military commission established to try him. Hamdan argued that the commission exceeded congressional limits and violated international law, particularly the Geneva Conventions. Specifically, he argued that the commissions did not adhere to the required standards under the UCMJ and under the law of war, which the statute incorporated. The district court ruled in favor of Hamdan,<sup>9</sup> but the court of appeals reversed.<sup>10</sup> After the Supreme Court announced that it would review the decision, Congress passed the Detainee Treatment Act of 2005 (DTA), threatening to strip the Court of jurisdiction over *Hamdan* and similar cases by eliminating habeas corpus for all Guantánamo detainees.<sup>11</sup> The DTA represented a response by the administration and its allies in Congress to thwart Supreme Court review of the President's system of military trials and, similarly, to terminate meaningful judicial review of its overall detention operations in cases that were pending in the court of appeals.

Thus, when *Hamdan* was argued on March 28, 2006, the Supreme Court confronted not only the question of whether the military commission established to try Hamdan was lawful, but also whether the Court retained jurisdiction to hear that challenge in light of the DTA. On June 29, 2006, the Supreme Court concluded in a 5-3 decision that federal courts retain jurisdiction over pending cases brought by Guantánamo detainees and invalidated the commissions on two principal grounds.<sup>12</sup> First, the Court found that the commissions violated the UCMJ because they impermissibly deviated from courts-martial procedure by denying defendants their right to be present at trial<sup>13</sup> and allowing for the use of hearsay (second- and third-hand statements), including evidence obtained through coercion.<sup>14</sup> Second, the Court determined that the commissions violated the Geneva Conventions. Specifically, it held that the commissions violated Common Article 3 of the Conventions, which requires all trials to be conducted by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."<sup>15</sup> Because "regularly constituted [military] courts" in the United States are courts-martial, the Supreme Court concluded that the President's commissions ran afoul of Common Article 3.<sup>16</sup> In addition, four Justices determined that the commissions contradicted Common Article 3 because they denied a defendant the right to be present at trial,<sup>17</sup> and the UCMJ because the offense charged (conspiracy) was not triable under the law of war.<sup>18</sup> As

these Justices noted, “none of the major international treaties governing the law of war identifies conspiracy as a violation thereof.”<sup>19</sup>

*Hamdan’s* significance cuts across several lines. Above all, the decision marked a triumph for the rule of law. The Supreme Court rejected the administration’s asymmetrical use of the law of war, which invoked a wartime paradigm to assert sweeping military jurisdiction over terrorism cases while studiously avoiding the very limits that the law of war imposes on the trial and treatment of detainees. Thus, the Court ruled that the Executive cannot bypass the civilian justice system without at least affording the safeguards of the Geneva Conventions and adhering to the restrictions that Congress itself has set under the UCMJ. *Hamdan* also marked a victory for the constitutional system of checks and balances. It reaffirmed Congress’s role as a coordinate branch of government, cautioning that even during wartime the President cannot “disregard limitations that Congress has, in the proper exercise of its own war powers, placed on [the president’s] powers.”<sup>20</sup> As a result, military commissions have to conform to the congressionally mandated standards of the UCMJ and those of the Geneva Conventions, which the UCMJ incorporates.

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By invalidating the President’s military commissions, moreover, the Supreme Court reaffirmed the broader policy goal of preserving the rule of law. The decision may be read as a rejection of the notion that al-Qaeda and other terrorist organizations can cause America to abandon its basic legal values and traditions. Indeed, *Hamdan’s* implications extend beyond the specific context of military trials and call into question other efforts by the administration to avoid the law, such as detainee treatment and domestic surveillance.

#### BEYOND GUANTÁNAMO: NO PRISON BEYOND THE LAW

Like the Supreme Court’s 2004 decisions in *Rasul v. Bush*<sup>21</sup> and *Hamdi v. Rumsfeld*,<sup>22</sup> *Hamdan* illustrates the Court’s increasing skepticism towards the Bush administration’s claim that unbridled executive power is necessary to protect national security. In *Rasul*, the Court rejected the contention that the nation’s safety would be imperiled by allowing Guantánamo detainees to seek habeas corpus review in federal court. *Hamdi* struck a similar note, concluding that military necessity did not justify denying a meaningful

hearing in court to a U.S. citizen who had been captured in Afghanistan and who had allegedly fought with the Taliban there against America and its allies. *Hamdan's* rebuke to the President was equally forceful. The Court found no legal basis for departing from established prohibitions on hearsay or for denying a defendant's right to be present at the trial, suggesting that these shortcomings provide a way to launder coerced evidence, which would be "fully admissible" under the military commissions' rules.<sup>23</sup> *Hamdan* thus rejected the administration's attempt to create a new, ad hoc system of military justice that lacks the basic safeguards of the civilian and court-martial systems.

*Hamdan's* impact extends beyond military trials. The decision invalidated the central justifications for the administration's post-9/11 detention policy at Guantánamo and at other offshore prisons where the

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United States is holding and interrogating prisoners without charge. Until *Hamdan*, the President maintained that detainees at Guantánamo were not entitled to the protections of the Geneva Conventions because they were "unlawful combatants."<sup>24</sup> The Bush administration maintained that detainees would be treated humanely, but only to the extent consistent with military necessity. Such terms were designed to offer interrogators the room necessary to

apply coercive techniques that are prohibited by the Geneva Conventions and U.S. law. Meanwhile, top Department of Justice lawyers crafted a series of secret memoranda intended to provide legal cover for torture, by effectively gutting the term of all meaning.<sup>25</sup> One notorious memorandum, for example, said the infliction of pain constitutes torture only if it is as severe as that accompanying "death, organ failure, or serious impairment of bodily functions."<sup>26</sup> The memorandum also asserted that applying federal criminal prohibitions against torture to interrogations authorized by the President in the exercise of his commander-in-chief authority would be unconstitutional.<sup>27</sup> These memoranda contributed to the creation of what one scholar has described as "a torture culture" that sanctioned the use of coercive interrogation tactics on detainees in U.S. custody.<sup>28</sup> In the words of one CIA official, the "gloves came off" during interrogations.<sup>29</sup>

These decisions had significant ramifications for U.S. detention policy. The creation of a policy designed to avoid established legal rules and

facilitate coercive interrogations led to the torture and mistreatment that occurred at Guantánamo, in secret CIA-run prisons or “black sites,” and, ultimately, in Iraq where military officials engaged in widespread torture and detainee abuse. The desire to conduct interrogations in a law-free zone drove the establishment of the detention center at Guantánamo and the use of coercive interrogation tactics there,<sup>30</sup> some of which are described in Federal Bureau of Investigation documents obtained under the Freedom of Information Act.<sup>31</sup> These techniques soon migrated to Abu Ghraib, as Major General Geoffrey Miller was ordered “to Gitmoize” intelligence gathering operations there.<sup>32</sup> The administration’s creation of a policy that avoided prohibitions on torture also prompted the development of CIA “black sites,” where the harshest interrogation techniques have been used, and the increasing use of “extraordinary rendition,” in which individuals are outsourced to countries like Egypt and Saudi Arabia, known to commit torture.<sup>33</sup> Detainee abuse, in short, spread like a virus through a global-wide detention system shorn of legal rules and protections by the President’s invocation of a new paradigm to confront terrorist threats like al-Qaeda.

*Hamdan* helped halt the virus’s spread by making clear that no prison is beyond the law. Specifically, the Supreme Court determined that, even if Hamdan were detained in a non-international conflict with al-Qaeda (or what the administration terms a global war on terror), he would remain entitled to the protections of Common Article 3 of the Geneva Conventions. Common Article 3 does not just require fair trials; it also prohibits “cruel treatment and torture”<sup>34</sup> as well as “[o]utrages upon personal dignity, in particular, humiliating and degrading treatment.”<sup>35</sup> These provisions, as military lawyers and advisors repeatedly reminded the President, protect not only America’s enemies but also its own servicemen and women by establishing universal norms against torture and other abuse. The President, however, had ignored the advice of these career military officials in creating his military commissions and detention system at Guantánamo.<sup>36</sup>

*Hamdan*’s holding makes clear that all prisoners in U.S. custody are entitled to Common Article 3 protection. The ruling also subjects U.S. officials who mistreat detainees in violation of Common Article 3 to prosecution under the War Crimes Act,<sup>37</sup> a 1996 statute that criminalizes breaches of Common Article 3 and grave breaches of the Conventions. *Hamdan*, then, not only establishes a baseline of protections governing the treatment of suspected terrorists in U.S. custody, but it encourages compliance with those protections through the potential threat of criminal liability.

## IMPLICATIONS FOR OTHER DETENTION SITES, TORTURE AND DOMESTIC SURVEILLANCE

*Hamdan's* decision to apply Common Article 3 to alleged al-Qaeda members has reverberated beyond Guantánamo, affecting U.S. operation of secret CIA detention centers or "black sites," where numerous individuals have been held *incommunicado* and tortured,<sup>38</sup> and the treatment of detainees in U.S. custody everywhere. It has been reported, for example, that CIA officials engaged in "enhanced interrogation techniques" against al-Qaeda suspects such as Khalid Shaikh Mohammed at these secret prisons, including threats of violence to detainees and their families, prolonged sleep deprivation, hypothermia, and water-boarding, a technique that simulates drowning.<sup>39</sup> At least some of those measures, as well as other forms of abuse, have been employed at Guantánamo, including against Mohammed al Qahtani, the alleged "twentieth hijacker," whose prolonged interrogation is documented in log books leaked to the press.<sup>40</sup>

In the wake of *Hamdan*, the President acknowledged for the first time the existence of secret CIA detention centers and announced that the remaining 14 prisoners at those centers had been transferred to Department of Defense custody at Guantánamo to face trial. The President asserted that it might be necessary in the future to revive this secret detention program to gain "life-saving information."<sup>41</sup> To that end, he helped engineer passage of the MCA, which not only establishes new military commissions but also limits interrogators' liability under the War Crimes Act by replacing the Act's categorical criminalization of Common Article 3 violations with a specific list of "grave breaches" described in the legislation.<sup>42</sup> Under the new law, torture and cruel and inhuman treatment qualify as "grave breaches," but other forms of degrading and humiliating treatment do not. It remains to be seen whether the administration will interpret the MCA to provide legal cover for reviving its secret CIA detention and use of "enhanced" interrogation techniques, like water-boarding and prolonged standing. However, *Hamdan's* interpretation of the applicability of Common Article 3 to al-Qaeda members and others captured in the war on terror remains binding. That holding, along with the Court's focus on the relationship between torture and the absence of legal rules, continues to stand as a check against the extraterritorial law-free zones that form the crux of the administration's post-9/11 detention and interrogation policy.

*Hamdan* has also undermined the administration's position on the legality of its warrantless domestic surveillance program. In December 2005, *The New York Times* revealed that the National Security Agency (NSA) was



operating a program of warrantless electronic surveillance of Americans' international telephone and Internet communications.<sup>43</sup> In response to lawsuits challenging the NSA program's legality, the government has argued that the program is authorized by the Authorization for Use of Military Force (AUMF),<sup>44</sup> the joint congressional resolution passed after September 11 providing for U.S. military intervention in Afghanistan. In *Hamdan*, the Court concluded that, while the AUMF generally activated the President's war powers, it did not authorize the President's military commissions. If the AUMF failed to override the implicit limits on

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military commissions contained in the UCMJ, it cannot satisfy the express statutory restrictions on electronic surveillance under Foreign Intelligence Surveillance Act of 1978 (FISA), which, along with the federal criminal wiretapping statute, provides the "exclusive means" of engaging in such surveillance.<sup>45</sup> Indeed, one district court has already struck down the NSA program, concluding that it violates both FISA and the Constitution.<sup>46</sup> The district court's decision enjoining the program from continuing has been stayed pending appeal.<sup>47</sup>

Like the military commissions invalidated in *Hamdan*, the administration's warrantless domestic surveillance program has undermined the rule of law in the United States. Confronted with a threat to the Nation's security, the administration opted for a policy that avoids and flouts the law rather than one that seeks to work within it. And, once again, the only meaningful resistance to this policy has come from the courts, not Congress.

*Hamdan*, in sum, demonstrates the continued judicial resistance to the President's excessive claims of executive power and disregard for the rule of law. The decision builds on groundwork laid in *Rasul* and *Hamdi*, where the Supreme Court made clear that a state of war is not a blank check for the President. Like those decisions, *Hamdan* shows that law is not silent during war, particularly not in the administration's war on terror, where there is no identifiable enemy or end to hostilities, and where the entire world is considered a battlefield. Indeed, as Supreme Court Justice Sandra Day O'Connor suggested more than two years ago in her plurality opinion in *Hamdi*, there is a heightened need for judicial scrutiny of the trial, detention, and treatment of prisoners in such situations, where long established understandings of rules governing armed conflict have "unravel[ed]."<sup>48</sup>

### LINGERING QUESTIONS IN U.S. DETENTION AND INTERROGATION POLICY AND THE LEGISLATIVE RESPONSE TO HAMDAN

As the latest legislation suggests, *Hamdan* left open a number of important questions that will shape the scope of executive power and future direction of U.S. counterterrorism policy. Many of these questions will now be addressed in the context of the MCA, which not only establishes new military commissions of dubious legality,<sup>49</sup> but also contains many other restrictions on detainee rights, including provisions repealing habeas corpus jurisdiction for aliens held as “enemy combatants;”<sup>50</sup> precluding any other actions challenging detention or abuse (including, for example, suits directed at remedying torture by U.S. officials);<sup>51</sup> and making the Geneva Conventions unenforceable in court,<sup>52</sup> insulating military detentions and trials from necessary scrutiny and oversight. Given that these questions will be addressed in future litigation, *Hamdan* will inform future decisions about the limits of executive power and the importance of judicial review.

One important issue concerns the nature of the conflict in which Hamdan was captured, a determination with significant consequences for the legal framework governing the detention and treatment of individuals held at Guantánamo and elsewhere. In *Hamdan*, the administration argued from the outset that the Geneva Conventions did not apply to Hamdan because he was captured in connection with the United States’ war with al-Qaeda, a conflict that it insisted was distinct from its war with the Taliban in Afghanistan. The administration further contended that the war with al-Qaeda was not subject to the Geneva Conventions because it fell outside Article 2 of the Conventions, which renders the Conventions’ full protections applicable expressly to wars between signatories in international armed conflicts (i.e., a war between two nation states that have ratified the Conventions). The Supreme Court did not decide whether the United States was engaged in a conflict with al-Qaeda distinct from the war in Afghanistan—in other words, whether or not there was an armed conflict with a transnational terrorist organization. Instead, the Court found that, regardless of how the conflict was defined, Hamdan was at a minimum protected by Common Article 3 of the Conventions, which prohibited his trial by the President’s military commissions.

Recognizing the existence of a separate armed conflict with al-Qaeda and/or other terrorist groups to which only Common Article 3 applies could lead to a significant gap between the Third and Fourth Geneva Conventions, which protect prisoners of war and civilians detained during armed conflict, respectively. Individuals detained as “enemy combatants”

outside these treaties' specific rules governing detention and treatment are left only with the protections of Common Article 3, international human rights treaties, and customary international law, none of which the administration has acknowledged as binding. This regulatory gap could entrench a system of indefinite detention without sufficient procedural safeguards.

*Hamdan* also did not address the closely related issue of indefinite detention without trial. As of November 2006, approximately 450 prisoners remained at Guantánamo, including Hamdan and the handful of other detainees previously charged before the now-invalidated military commissions. The Supreme Court had previously ruled in *Rasul*<sup>53</sup> that Guantánamo detainees have the right to seek review of their detention in federal court by habeas corpus. The administration, nevertheless, insisted that the detainees have no substantive legal rights to exercise in court under either domestic or international law, essentially making the remedy of habeas corpus a meaningless formality. At the same time, the administration created an *ad hoc* tribunal, called the Combatant Status Review Tribunal (CSRT) to determine whether detainees are "enemy combatants." The CSRT, however, suffered from dramatic shortcomings, including its sweeping definition of "enemy combatant" that could encompass "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities,"<sup>54</sup> and inadequate procedural safeguards, such as denial of detainees' access to counsel, reliance on secret evidence, and use of evidence secured by torture and other coercion. In numerous cases, for example, detainees were accused of being associated with al-Qaeda, but never told the name of the person with whom they were linked or the source of the information, making it impossible for them to defend themselves.<sup>55</sup> In other cases, detainees were detained based upon statements obtained through torture, including one individual who was rendered to Egypt where he was suspended from a wall with his feet resting on the side of a large electrified cylindrical drum, forcing him either to suffer pain from hanging from his arms or pain from electric shocks to his feet.<sup>56</sup> With these defects, and without a neutral decisionmaker, the CSRT predictably found that nearly 95 percent of the detainees whose cases it reviewed were "enemy combatants."<sup>57</sup>

Two federal district courts have divided sharply over the CSRT's validity,<sup>58</sup> and the U.S. Court of Appeals for the District of Columbia Circuit is now considering the appeals of those decisions. Thus, notwithstanding *Rasul* and *Hamdan*, questions remain about the rights of Guantánamo detainees to challenge the lawfulness of their confinement. Since, as the administration argues, "enemy combatants" may be held indefinitely in

its global war on terrorism, a fair process must be established. Put another way, if the United States is going to institutionalize a system of indefinite preventive detention, it must establish sufficiently fair and adequate procedures to ensure that it is detaining the right people. Indeed, the rule of law and safeguards against illegal detention are not just ideals to strive for but important strategic tools in fighting terrorism because they enable the administration to ensure that it is detaining the correct people. These protections also give legitimacy to and help create public support for counterterrorism operations, both at home and abroad.

*Hamdan* did not address indefinite detention, though it provided some guidance in framing the issue. As noted above, the Supreme Court made clear that the President's exercise of his war powers is constrained by acts of Congress and by the limits of the law of war itself. Also, the same flaws that caused the Court to invalidate the military commissions at Guantánamo—the use of hearsay, exclusion of defendants from trial, and reliance on evidence obtained through coercion—pervade the CSRT. Furthermore, the CSRT lacks the few safeguards provided by the President's commissions, such as the presumption of innocence and the right to assistance of counsel. Indeed, if the commissions' flaws were "glaring," as the Supreme Court wrote in *Hamdan*,<sup>59</sup> the CSRT's problems are positively blinding. So, while *Hamdan* addressed only the validity of the existing trial system (the military commissions), its reasoning demonstrates why the system for determining a detainee's status (the CSRT) is fundamentally flawed. To conclude otherwise would provide a perverse incentive for the administration to continue to indefinitely detain individuals at Guantánamo without charge, rather than affording them the safeguards required under a lawful military or civilian trial.

The MCA may affect the resolution of these issues. Most importantly, the Act appears to restrict access to habeas corpus for aliens detained by the United States. The appeals court hearing the Guantánamo detainee cases must therefore now also decide the weighty question of whether detainees may be stripped of this fundamental right under the Suspension Clause of the U.S. Constitution, which limits Congress's ability to abrogate habeas corpus for individuals in U.S. custody.<sup>60</sup> The implications of the MCA's habeas repeal extend beyond Guantánamo, and could preclude meaningful judicial review over detentions at other offshore prisons like Bagram Air Base as well as in the United States. As *Rasul* and *Hamdan* show, habeas corpus has provided the one meaningful check on the administration's post-9/11 detention and interrogation policy, a check the MCA now critically jeopardizes.

Furthermore, by establishing new military commissions, the MCA

will be the subject of future challenges by defendants charged under the Act. While the MCA helps rectify problems in the previous commissions, such as allowing a defendant to examine and respond to evidence seen by the commission,<sup>61</sup> it still contains significant flaws that could undermine the fairness and integrity of the result. For example, the MCA limits a defendant's access to exculpatory evidence;<sup>62</sup> permits the use of evidence gained by cruel, inhuman, and degrading treatment committed before the DTA's passage;<sup>63</sup> allows for the use of hearsay;<sup>64</sup> and shields the CIA's abusive interrogation practices from scrutiny by allowing them to be classified as "sources, methods, or activities."<sup>65</sup> In the end, the new commissions present the same problem as the former commissions that *Hamdan* invalidated: the development of a second-class justice system for aliens that lacks fundamental safeguards of the both the civilian and military criminal justice systems.

## CONCLUSION

*Hamdan* reaffirms that the President's exercise of military power in fighting terrorism remains subject to the constraints imposed by the separation of powers and rule of law. The President, as Justice Kennedy explained, is not free to exceed the restraints that Congress has placed on his authority, and the courts remain open to ensure that those limits are properly observed. While Congress responded to *Hamdan* by establishing new commissions and imposing significant restrictions on detainee rights, *Hamdan* will remain a significant triumph for the rule of law. Like *Rasul* and *Hamdi*, *Hamdan* shows that national security does not give the President a blank check to detain, interrogate, and try prisoners. It also reaffirms the continuing involvement of the Judiciary as a necessary check on the Executive branch, particularly given Congress's demonstrated reluctance to act and, when it acts, its potential for sanctioning rather than cabining excessive claims of presidential power. Given the nature of the fight against terrorism—a conflict that resists traditional geographic and temporal limits—this enhanced role by the other branches of government remains vital. ■

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## ENDNOTES

- 1 \_\_\_ U.S. \_\_\_, 126 S. Ct. 2749 (2006).
- 2 See, e.g., *United States v. Yousef*, 327 F.3d 56 (2d. Cir. 2003) (affirming convictions of defendants involved in 1993 World Trade Center bombing and conspiracy to bomb airliners); *United States v. Rahman*, 189 F.3d 88, 123 (2d Cir. 1999) (affirming convictions of Sheikh Omar Abdel Rahman and his followers for, *inter alia*, plotting a “day of terror” against New York City landmarks).
- 3 Pub. L. No. 109-366, 120 Stat. 2600 (2006).
- 4 “Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism,” 66 Fed. Reg. 57833 (Nov. 13, 2001).
- 5 10 U.S.C. § 801 *et seq.*
- 6 See U.S. Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs), News Release, *Detainee Release Announced* (Nov. 17, 2006), available at <<http://www.globalsecurity.org/military/library/news/2006/11/mil-061117-dod04.htm>>.
- 7 542 U.S. 507 (2004).
- 8 The detainees in *Rasul* were from England and Australia. When the case went to the Supreme Court, it was consolidated with the case of *Al Odah v. United States*, which involved detainees from Kuwait.
- 9 *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004).
- 10 *Hamdan v. Rumsfeld*, 418 F.3d 33 (D.C. Cir. 2005).
- 11 Pub. L. No. 109-148, 119 Stat. 2680 (2005).
- 12 The five Justices who voted to strike down the military commissions were Justices John Paul Stevens, Stephen G. Breyer, David H. Souter, Ruth Bader Ginsburg, and Anthony M. Kennedy. The three Justices who dissented from the decision were Justices Antonin G. Scalia, Clarence Thomas, and Samuel A. Alito. Chief Justice John G. Roberts did not participate in the Supreme Court decision because he had served on the panel of the court of appeals that had decided the case below.
- 13 *Hamdan*, 126 S. Ct. at 2786-93 (finding that the commissions failed to satisfy UCMJ Article 36(b)’s requirement that their rules be “uniform insofar as practicable”).
- 14 *Id.* at 2786, 2792.
- 15 Geneva Conventions, 1949, art. 3, § 1(d).
- 16 *Id.* at 2796.
- 17 *Id.* at 2797-98. The four Justices were Justices Stevens, Souter, Ginsburg, and Breyer.
- 18 *Id.* at 2785-86.
- 19 *Id.* at 2784.
- 20 *Id.* at 2774 n.23.
- 21 542 U.S. 466 (2004).
- 22 542 U.S. 507 (2004).
- 23 *Hamdan*, 126 S. Ct. at 2786.
- 24 Memorandum from President Bush to Vice-President and other officials, Feb. 7, 2002, in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 136 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).
- 25 See, e.g., Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice Office of Legal Counsel to Alberto R. Gonzalez, Counsel to the President (Aug. 1, 2002), in *THE TORTURE PAPERS*, *supra* note 24, at 172.
- 26 *Id.* at 176.
- 27 *Id.* at 173.
- 28 David Luban, *Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1452-60 (2005).
- 29 John Barry et al., *The Roots of Torture*, Newsweek (May 24, 2004), available at <<http://www.msnbc.msn.com/id/4989422/#storyContinued>>.
- 30 See Joseph Margulies, *GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER* (2006).
- 31 See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 474 (describing documents).

- 32 Seymour M. Hersh, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB* 31 (2004).
- 33 See David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123, 124-25 (2006).
- 34 Geneva Conventions, 1949, art. 3, § 1(a).
- 35 *Id.* § 1(c).
- 36 See, e.g., Louis Fisher, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER*, at xi (2005); Jeanne Cummings, *Gonzales Rewrites Laws of War*, Wall St. J., Nov. 22, 2004, at A4.
- 37 18 U.S.C. § 2441.
- 38 Dana Priest, *Two Dozen Nations Help CIA Fight Terrorism; Secret Facilities*, Wash. Post, Nov. 18, 2005.
- 39 See, e.g., Brian Foss & Richard Esposito, "CIA's Harsh Interrogation Techniques Described," *ABC News* (Nov. 18, 2005), available at <<http://abcnews.go.com/WNT/print?id=1322866>>; Douglas Jehl, *Report Warned C.I.A. on Tactics In Interrogation*, N.Y. Times, at A1 (Nov. 9, 2005).
- 40 See Adam Zagorin & Michael Duffy, *Inside the Interrogation of Detainee* 063, Time, June 12, 2005. The interrogation log is available at <<http://www.time.com/time/2006/log/log.pdf>>.
- 41 President Discusses Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), <<http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>>.
- 42 MCA, *supra note* 3, § 6(b).
- 43 James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers without Courts*, N.Y. Times (Dec. 16, 2005).
- 44 Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001).
- 45 18 U.S.C. § 2511(2)(f).
- 46 *American Civil Liberties Union v. National Security Agency*, 483 F. Supp. 2d 754 (E.D. Mich. Aug. 17, 2006), *appeal pending*.
- 47 *ACLU v. NSA*, 467 F.3d 590 (6th Cir. Oc. 4 2006).
- 48 *Hamdi*, 542 U.S. at 521.
- 49 MCA, *supra note* 3, § 3(a) (adding new chapter 47A of 10 U.S.C.).
- 50 *Id.* § 7(a).
- 51 *Id.*
- 52 *Id.*, § 5.
- 53 542 U.S. 466 (2004).
- 54 *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005).
- 55 *Id.* at 468-71.
- 56 *Id.* at 473-74.
- 57 Defense Department Special Briefing on Combatant Status Review Tribunals (Mar. 29, 2005), available at <<http://www.defenselink.mil/transcripts/2005/tr20050329-2382.html>> (noting that of "the 558 CSRT hearings conducted, the enemy combatant status of 520 detainees was confirmed").
- 58 *Id.* (finding detainees have enforceable rights and invalidating CSRT), with *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005) (finding detainees have no rights to enforce and affirming their continued detention).
- 59 *Hamdan*, 126 S. Ct. 2787.
- 60 U.S. Const., art. I., § 9, cl. 2.
- 61 MCA, *supra note* 3, § 3 (adding new 10 U.S.C. §949a).
- 62 *Id.* (adding new 10 U.S.C. § 949j(d)).
- 63 *Id.* (adding new 10 U.S.C. § 948r).
- 64 *Id.*
- 65 *Id.* (adding new 10 U.S.C. § 949d).

