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## **Presidential Powers Including Military Tribunals in the October 2005 Term**

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## Presidential Powers Including Military Tribunals in the October 2005 Term

Cover Page Footnote

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## **PRESIDENTIAL POWERS INCLUDING MILITARY TRIBUNALS IN THE OCTOBER 2005 TERM**

*Erwin Chemerinsky\**

### **I. BACKGROUND: THE EVENTS LEADING UP TO *HAMDAN V. RUMSFELD***

In January 2002, the United States Government began sending prisoners from Afghanistan to Guantanamo Bay, Cuba. The news media reported that these individuals were blindfolded, gagged, chained, and drugged.<sup>1</sup> The Guantanamo detainees were reportedly housed in cages measuring less than eight feet by eight feet.<sup>2</sup>

The first lawsuits were brought almost immediately on behalf of the Guantanamo detainees. The Bush Administration took the position that no federal court could review the claims of Guantanamo detainees. In June 2004, the Supreme Court decided *Rasul v. Bush*.<sup>3</sup> In *Rasul*, the Court decided whether the Guantanamo Bay detainees' habeas corpus petitions could be reviewed by federal courts. The Deputy Solicitor General, on behalf of the government, argued that

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\* Professor Erwin Chemerinsky is the Alston & Bird Professor of Law and Political Science, Duke Law School. This Article is based on a transcript of remarks from the Eighteenth Annual Supreme Court Review Program presented at Touro Law Center, Huntington, New York.

<sup>1</sup> Carlotta Gall, *Threats and Responses: Captives; Tales of Despair from Guantanamo*, N.Y. TIMES, June 17, 2003, at A1.

<sup>2</sup> *Id.* ("But the men said that for the first few months, they were kept in small wire-mesh cells, about 6 1/2 by 8 feet, in blocks of 10 or 20.").

<sup>3</sup> 542 U.S. 466 (2004).

Guantanamo detainees could not go to any federal court or any court in the country to bring their claims.<sup>4</sup> The Supreme Court in June 2004 held six-to-three that prisoners held in Guantanamo may petition federal courts for review via writ of habeas corpus.<sup>5</sup>

After this decision, sixty habeas petitions which were pending in federal district court, were consolidated in front of Judge Green, the coordinating judge for all Guantanamo Bay cases. Although Judge Green was the coordinating judge, no judges were required to relinquish their habeas petitions. Yet, all of the judges did relinquish their petitions, except for Judge Richard Leon, who had nine petitions. Judge Green ruled that prisoners held in Guantanamo stated causes of action under the United States Constitution and international law.<sup>6</sup> Conversely, Judge Leon ruled that prisoners in Guantanamo have neither a cause of action under the Constitution, nor under international law.<sup>7</sup> Subsequently, all those cases were

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<sup>4</sup> See Transcript of Oral Argument, *Rasul*, 542 U.S. 466 (No. 03-334). Notably, an interesting exchange concerning torture occurred in a related case argued only a few days after *Rasul*. See *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). During oral argument, the Solicitor General and Justice Ginsburg had the following exchange. Justice Ginsburg said, "Suppose the executive says mild torture, we think, will help get this information. It's not a soldier who does something against the Code of Military Justice, but it's an executive command. Some systems do that to get information." Transcript of Oral Argument at 22, *Padilla*, 542 U.S. 426 (No. 03-1027). The government responded, "Well our Executive doesn't [condone torture]." *Id.* at 23. Ginsburg said, "What's constraining? That's the point. Is it just up to the good will of the Executive, or is there any judicial check?" By coincidence, it was literally the night of that oral argument that the first reports of Abu Ghraib came out. *Id.*

<sup>5</sup> *Rasul*, 542 U.S. at 485. Justice Stevens delivered the opinion of the Court with Justices O'Connor, Souter, Ginsburg, and Breyer, joining. *Id.* at 469. Justice Kennedy concurred with the majority. *Id.* at 485 (Kennedy, J., concurring). Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas dissented. *Id.* at 488 (Scalia, J., joined by Rehnquist, C.J. & Thomas, J., dissenting).

<sup>6</sup> *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 464, 481 (D.D.C. 2005).

<sup>7</sup> *Khalid v. Bush*, 355 F. Supp. 2d 311, 317-18, 321, 327 (D.D.C. 2005).

consolidated and were argued in front of the United States Court of Appeals in the District of Columbia Circuit on September 8, 2005.<sup>8</sup>

Meanwhile, six individuals who were held in Guantanamo were designated for trial before military commissions created by presidential executive order. One of these was Salim Hamdan, a driver for bin Laden. He claimed he was never involved in terrorist activity and that *his* government viewed him differently. His lawyers filed another habeas corpus petition in the Federal District Court for the District of Columbia. Judge James Robertson ruled in Hamdan's favor.<sup>9</sup> Judge Robertson said, under the terms of the Geneva Convention, anyone who is a prisoner of war must be given the same procedural protection that American soldiers receive under the Uniform Code of the Military Justice System.<sup>10</sup> Judge Robertson explained that the Geneva Convention required that there be a competent tribunal to determine whether someone is a prisoner of war.<sup>11</sup> In Hamdan's case, however, no competent tribunal was ever convened to determine whether he, or other individuals in Guantanamo, were prisoners of war.<sup>12</sup>

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<sup>8</sup> *Boumediene v. Bush*, 450 F. Supp. 2d 25, 30 n.10 (D.D.C. 2006).

<sup>9</sup> *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 155 (D.D.C. 2004). Judge James Robertson held that "because Hamdan [was not] . . . determined by a competent tribunal to be an offender triable under the law of war . . . and because . . . the procedures established for the Military Commission by the President's order were 'contrary to or inconsistent' with those that applied to courts-martial, Hamdan's position will be granted in part." *Id.* (citation omitted).

<sup>10</sup> *Id.* at 160 (requiring Hamdan's petition be granted under Article 102 under the Third Geneva Convention which provides that "[a] prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power . . .").

<sup>11</sup> *Id.* at 161 (citing Article 5 of the Third Geneva Convention).

<sup>12</sup> *Id.* at 162 (finding nothing in the record that suggested that a competent tribunal determined Hamdan was not a prisoner-of-war under the Geneva Conventions).

Interestingly, in April of 2002, the former Secretary of State, Colin Powell, said that the United States would require competent tribunals to determine whether these Guantanamo detainees were prisoners of war. To simplify this, anyone in Guantanamo who was fighting for the Taliban was a prisoner of war. On the other hand, those fighting for Al Qaeda could not be considered prisoners of war. Judge Robertson said that there had to be competent tribunals to decide whether the detainees were prisoners of war.<sup>13</sup> Since none were held, Judge Robertson concluded that Hamdan could not be tried before a military tribunal.<sup>14</sup>

In the summer of 2005, the D.C. Circuit, in a three-to-nothing opinion, reversed Judge Robertson.<sup>15</sup> Judge Randolph wrote the opinion for the D.C. Circuit and then-D.C. Circuit Judge John Roberts concurred. The court held that those in Guantanamo cannot claim protections under the Constitution nor the Geneva Convention, and as a result Hamdan could be tried before a military commission.<sup>16</sup>

## II. THE SUPREME COURT DECISION OF *HAMDAN V. RUMSFELD*

Hamdan's lawyers then sought review in the United States Supreme Court. In November of 2005, the Supreme Court granted

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<sup>13</sup> *Id.* (finding that the government must convene a competent tribunal to determine whether Hamdan was a prisoner of war, and until that decision is made, Hamdan must be provided with the full protections of a prisoner of war).

<sup>14</sup> *Hamdan*, 344 F. Supp. 2d at 162, 173 (holding that the Hamdan could not be tried in front of a Military Commission until it was determined by a competent tribunal that he is not entitled to the protections of a prisoner of war).

<sup>15</sup> *Hamdan v. Rumsfeld*, 415 F.3d 33, 44 (D.C. Cir. 2005).

<sup>16</sup> *Id.* at 37-40 (holding that Congress authorized military commissions through a joint

certiorari, with Judge Roberts recusing himself.

In December of 2005, Congress passed the Detainee Treatment Act.<sup>17</sup> The Detainee Treatment Act says, among other things, that those who are held in Guantanamo shall not have access to federal courts through habeas corpus.<sup>18</sup> On March 28, 2006, the Supreme Court heard oral arguments in *Hamdan*. One of the issues was whether the Detainee Treatment Act required dismissal of the action. Another was whether military commissions created by the presidential executive order complied with requirements of the Constitution, federal statutes, and international law. On the last day of the Term, in June of 2006, the Supreme Court handed down its decision in *Hamdan*. Justice Stevens wrote for the majority, joined by Justices Souter, Ginsburg, Breyer, and Justice Kennedy. Justices Scalia, Thomas, and Alito each wrote separate vehement dissents. Of course, Chief Justice Roberts did not participate. The slip opinion is 168 pages long—one of the consequences of having the Supreme Court hear a smaller number of cases each year is an increase in the length of its opinions.

### A. The Court's Major Holdings

I want to highlight what I think are the three most important aspects of the *Hamdan* case, and discuss how each aspect is particularly significant. After that, I will discuss the new law signed

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resolution and two statutes).

<sup>17</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A., tit. X, 119 Stat. 2739 (2005) (to be codified at 42 U.S.C. §§ 2000dd to 2000dd-1).

<sup>18</sup> *Id.* § 1005(e)(1).

by President Bush on October 17, 2006, the Military Commission Act of 2006,<sup>19</sup> and its implications for cases following *Hamdan*, and the current issues in the courts.

### *1. The Refusal to Apply the Detainee Treatment Act Retroactively*

There are three key parts to *Hamdan*. First, the Supreme Court determined that section 1005(e)(1) of the Detainee Treatment Act applies only prospectively; it does not apply retroactively to lawsuits that were already pending at the time that the act was adopted.<sup>20</sup> In making this determination, Justice Stevens explained that the usual presumption is that substantive changes in the law apply only prospectively unless Congress unmistakably says it should apply retroactively.<sup>21</sup> Congress has clearly stated that parts two and three of section 1005(e) apply to lawsuits that are pending.<sup>22</sup> Although it is clear that the legislation substantially changed the law, the legislative intent was ambiguous, in that it seemed that Congress wanted the statute to apply prospectively as well as retroactively.<sup>23</sup> Justice Stevens pointed to different statutory provisions within the

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<sup>19</sup> Military Commission Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (to be codified at 10 U.S.C. §§ 948-50).

<sup>20</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2769 n.15 (2006). Thus, the Court retained appellate jurisdiction to hear *Hamdan*'s case. *Id.*

<sup>21</sup> *Id.* at 2764-65.

<sup>22</sup> *Id.* at 2763. Section 1005(h)(2) states that: "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." Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 at 2743-44.

<sup>23</sup> *Hamdan*, 126 S. Ct. at 2769 ("The omission [of subsection (e)(1)] is an integral part of the statutory scheme that muddies whatever 'plain meaning' may be discerned from blinkered study of subsection (e)(1) alone.").



law that point in opposite directions.<sup>24</sup> He also observed that there were three cosponsors to the law, Senators Graham, Levin, and Kyl.<sup>25</sup> In fact, the bill was actually called the Graham-Levin-Kyl Bill.<sup>26</sup> Two of those three, Graham and Kyl, believed that the bill was meant to apply retroactively;<sup>27</sup> and the third, Senator Levin, said it should apply only prospectively.<sup>28</sup> Justice Stevens said that it is clear Congress wanted the law applied prospectively, although according to the Bush Administration, the law should also apply retroactively.<sup>29</sup>

The reason this is so important, at least at the time of decision, is because there were over sixty lawsuits pending in the D.C. Circuit at the time. Remember these cases were argued in the D.C. Circuit in September of 2005, three months before the Detainee Treatment Act ever came into existence. If the Supreme Court held that the Detainee Treatment Act applied retroactively, then all of these cases would have to be thrown out. In fact, altogether, with the cases pending in federal district court, over a hundred lawsuits filed on behalf of Guantanamo detainees were pending. When *Hamdan* was decided, the ruling allowed these cases to go forward.

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<sup>24</sup> *Id.* at 2763, 2769. The “effective date” provision of § 1005 of the Detainee Treatment Act expressly applies to claims pending at the time of enactment under subsections (e)(2) and (e)(3). However, “[t]he act is silent about whether [subsection (e)(1)] ‘shall apply’ to claims pending on the date of enactment.” *Id.* at 2763.

<sup>25</sup> *Id.* at 2766 n.10.

<sup>26</sup> See Emily Bazelon, *The Get-Out-of-Torture-Free Card: Why is Congress Banning Torture but Allowing the Use of Torture Testimony*, SLATE MAG., Dec. 15, 2005 (discussing the Graham-Levin-Kyl amendment and explaining its exceptions).

<sup>27</sup> *Hamdan*, 126 S. Ct. at 2766 n.10.

<sup>28</sup> *Id.* (“Senator Levin urged adoption of an alternative amendment that ‘would apply only to new habeas cases filed after the date of enactment.’”) (citation omitted).

<sup>29</sup> See *id.* at 2766.

**2. President Bush Did Not Have Statutory Authority to Create Military Commissions by Executive Order**

Second, the Supreme Court held there was no statutory authority for the military commissions created by executive order.<sup>30</sup> During World War II, military commissions were used and upheld by the Supreme Court in a very controversial case called *Ex parte Quirin*.<sup>31</sup> In *Hamdan*, Justice Stevens pointed out that the military commissions that were used in World War II were specifically authorized by statute.<sup>32</sup> Here, he said that no such statute provided the authority for the orders, and, in fact, two statutory provisions limited the President's authority: Articles 21 and 36 of the Uniform Code of Military Justice.<sup>33</sup>

The Bush Administration had argued that there was statutory authority to create military commissions by executive order under the Joint Resolution Authorizing the Use of Military Force ("AUMF"), which was adopted by Congress after September 11, 2001. The Supreme Court held that the AUMF was too general to provide the necessary statutory authority.<sup>34</sup> Congress authorized the use of

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<sup>30</sup> *Id.* at 2775 (explaining that the congressional Acts at issue did not expand "the President's authority to convene military commissions"). The Court held that the President's authorization for military commissions violated the Uniform Code of Military Justice and the Geneva Conventions. *Id.* at 2759.

<sup>31</sup> 317 U.S. 1, 18-20 (1942) (deciding the constitutionality of detention for trial by military commission under an executive order).

<sup>32</sup> *Hamdan*, 126 S. Ct. at 2774 (citing *Quirin*, 317 U.S. at 28).

<sup>33</sup> *Id.* at 2778 n.22, 2790 (stating that Article 21 provides that the President must comply with the law of war in using military commissions and trials are only permitted if the offenses are committed within the period of war; Article 36 limits the President from promulgating rules of procedure that are contrary to or inconsistent with the Uniform Code of Military Justice insofar as it would be practicable).

<sup>34</sup> *Id.* at 2774-75. The Court stated:

military force, but there was no indication that Congress meant to permit presidential executive orders to authorize military commissions.<sup>35</sup>

This is why the *Hamdan* decision is so important. Repeatedly, since September 11, 2001, the Bush Administration has pointed to the AUMF as a statutory basis for its actions. Last December, the New York Times reported that the Bush Administration was engaged in a program of cordless electronic eavesdropping through the National Security Agency.<sup>36</sup> The National Security Agency intercepted a large number of phone conversations and computer e-mail correspondence between those in the United States and those in foreign countries. Even more on point, the Foreign Intelligence Surveillance Act<sup>37</sup> provides that any electronic communications by those in the United States, including those in foreign countries, has to be done in accordance with the procedures of the then statute of 1968.<sup>38</sup> So the argument was made that what the Bush Administration is doing violates statutes. When Attorney General Alberto Gonzales testified before Congress, he said

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Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the "Constitution and laws," including the law of war. Absent a more specific congressional authorization, the task of this Court is, as it was in *Quirin*, to decide whether Hamdan's military commission is so justified.

*Id.* at 2775.

<sup>35</sup> *Id.* at 2775, 2778 n.31.

<sup>36</sup> James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

<sup>37</sup> 50 U.S.C. § 1802 (2006).

<sup>38</sup> *Id.*; see *United States v. Belfield*, 692 F.2d 141, 144-45 (D.C. Cir. 1982) (examining the history of safeguards for wiretapping).

that the Bush Administration had statutory authority for such electronic surveillance under the Joint Resolution Authorizing Military Force, which was adopted after September 11th.

I think the reason *Hamdan* is so important here is that it shows that the Supreme Court is not willing to read the AUMF as a blank check for any presidential actions the Bush Administration would like to take. The AUMF is general and authorizes military force, but under *Hamdan*, it did not authorize military tribunals.<sup>39</sup>

### 3. *The Military Commissions Created by Executive Order Violated the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions*

Third, the Supreme Court held that the military commissions created by executive order violated provisions of the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions.<sup>40</sup> *Hamdan* also challenged the military commissions on the basis that they violated the United States Constitution, but the Supreme Court did not even deal with that issue. Justice Stevens pointed out that since the Court found that the military commissions infringed on the commissions of federal statutes and treaties, it did not need to deal with any constitutional questions.<sup>41</sup> Thus, the Court

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<sup>39</sup> *Hamdan*, 126 S. Ct. at 2775, 2778 n.31. “[T]he AUMF . . . at most acknowledge[s] a general Presidential authority to convene military commissions in circumstances where justified . . . . Absent a more specific congressional authorization, the task of this Court is . . . to decide whether *Hamdan*’s military commission is so justified.” *Id.* at 2775.

<sup>40</sup> *Id.* at 2786, 2798 (holding that the commissions did not meet the requirements of Article 3 of the Geneva Conventions and that the Uniform Code of Military Justice limits the President from creating military commissions).

<sup>41</sup> *Id.* at 2763-64 (noting that *Hamdan* objected to the Detainee Treatment Act of 2005

abided by the historic traditional rule of construction, which provides that the courts will avoid constitutional issues when a case may be decided on nonconstitutional grounds.<sup>42</sup>

Furthermore, Justice Stevens pointed to a number of aspects of President Bush's executive order that violated provisions of the Uniform Code of Military Justice and the Geneva Conventions.<sup>43</sup> For example, defendants could be convicted entirely on the basis of secret evidence.<sup>44</sup> A defendant could be excluded from the entire proceeding or part of the proceeding, and even his lawyer could be excluded.<sup>45</sup> Also, any appeal taken is reviewed by a three-member panel of military officers and only one member needs judicial experience.<sup>46</sup> Justice Stevens explained that there is no limit on admissible evidence, anything could be relevant.<sup>47</sup> There are, however, other aspects of the military commissions that also violated the Uniform Code of Military Justice and the Geneva Conventions.

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upon both constitutional and statutory grounds).

<sup>42</sup> *Id.* at 2769 n.15 (noting that the canons of constitutional avoidance should not necessarily prevent future constitutional challenges to the Detainee Treatment Act of 2005). Generally, if a court can decide "without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons." *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 193 (1909).

<sup>43</sup> *Hamdan*, 126 S. Ct. at 2786-87, 2793-99.

<sup>44</sup> *Id.* at 2786-87 (noting that such evidence would be classified as "protective information").

<sup>45</sup> *Id.* at 2786 (noting that the attorney or the accused could be excluded from proceedings deemed "close[d]" by the presiding officer or the Appointing Authority).

<sup>46</sup> *Id.* at 2787. The Court explained that an appeal is taken to a panel and "the review panel is directed to 'disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the commission.'" *Id.* Once the panel makes its determination then the Secretary of Defense can remand or forward the record to the President, who then makes the final decision. *Id.*

<sup>47</sup> *Id.* at 2786-87 (noting that any evidence may be admitted if it is determined to have a probative value, including "testimonial hearsay and evidence obtained through coercion") (citations omitted).

The Supreme Court's unequivocal holding that the Geneva Conventions do apply to those in Guantanamo, at least with regard to the issue of the military commissions, is important beyond the *Hamdan* decision.<sup>48</sup> The Bush Administration has repeatedly argued that the Geneva Conventions do not apply to those who are enemy combatants, but only to prisoners of war. The Bush Administration said the President can unilaterally determine that none of these individuals are prisoners of war. Yet, the Supreme Court's decision in *Hamdan* explicitly makes it clear that the Geneva Conventions do apply to military commissions.<sup>49</sup>

Additionally, the military commissions' violations of the Uniform Code of Military Justice and the Geneva Conventions are important for another reason as well—the military's credibility. Since September 11, 2001, I have given many speeches about civil liberties and the war on terrorism. I was initially surprised that those in the audience who expressed the strongest agreement with me are those who have served in the military, or who have loved ones serving in the military. Repeatedly, what they have said to me is, "How can the United States expect foreign countries to respect the international law when treating American prisoners, if the United States does not respect international law in the way it treats foreign prisoners?" Many military officials went before Congress and urged

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<sup>48</sup> *Hamdan*, 126 S. Ct. at 2795. The Court states that the UCMJ refers to "prisoners of war in the custody of armed forces"—including areas leased by the United States, such as Guantanamo Bay, and that the UCMJ prohibits President Bush from adopting a procedural rule which is "contrary to or inconsistent with the UCMJ." *Id.* at 2790.

<sup>49</sup> *Id.* at 2786.

them to make sure that the United States follows the Geneva Conventions in the treatment of Guantanamo prisoners. One such official said that when foreign soldiers are taken prisoner, if the United States does not comply with international law when treating such foreign prisoners, the United States will place its own soldiers in danger.

### **B. Hamdan v. Rumsfeld's Impact on Legislation: The Military Commission Act of 2006**

Immediately after the Supreme Court decided *Hamdan*, the Bush Administration proposed legislation to overturn the decision, which Congress subsequently passed, known as the Military Commission Act of 2006.<sup>50</sup> After all, the Supreme Court's decision was based on construction of a federal statute and treaty, so the Bush Administration attempted to overturn *Hamdan* via statute.<sup>51</sup> Moreover, where there is a conflict between a statute and federal treaty,<sup>52</sup> Congress, by statute, can override a treaty. The statute was a result of the Bush Administration asking Congress to adopt legislation that will codify the presidential executive order. Interestingly, the legislation was getting nowhere in Congress, and

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<sup>50</sup> Military Commission Act of 2006, Pub. L. No. 109-336, 120 Stat. 2600 (2006). See Kristine A. Huskey, *Complete Sentence*, THE AMERICAN PROSPECT (2006).

<sup>51</sup> *Hamdan*, 126 S. Ct. at 2797-98 (stating that the commission which President Bush attempted to authorize fails to meet the requirements established in Common Article 3 of the Geneva Conventions).

<sup>52</sup> Compare Geneva Convention Relative to the Treatment of Prisoners of War, Aug 12, 1949, art. 7, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention . . ."), with Military Commission Act § 948b(g) ("No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.").

then President Bush held a press conference in which he announced that the United States was transferring over a dozen individuals from CIA camps around the world to Guantanamo. He said that these individuals are the worst of the worst, and Congress should immediately adopt procedures to provide for the trial of these individuals.<sup>53</sup>

Now, I was disappointed that the media did not focus more on the revelation of the CIA commission camps. How many people are being held by the government in these camps? How are they being treated? Newspapers reported that individuals are being tortured; is that happening? Could that matter? To this point in time, the government still has not told us how many people have been held, or are being detained by the government in the war on terrorism. The Bush Administration's proposal was not just about military commissions; it was used as an occasion to tack on a number of additional measures. For a time, some Republican senators, Senators Graham, McCain, and Warner, objected to the procedures. The reality, though, is that they largely caved in and President Bush received everything he wanted in the Military Commission Act of 2006.

It is not hyperbole to say, from the civil liberties perspective, that this is one of the worst statutes ever adopted by Congress. I say this mindful that many federal laws have been bad for civil liberties.

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<sup>53</sup> President George W. Bush, White House Press Conference, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), *available at* <http://www.state.gov/s/ct/rls/rm/2006/71859.htm>.



Consider the Fugitive Slave Act of 1850,<sup>54</sup> which said that if an individual is accused of being a fugitive slave, the person could be tried, and could not speak up and put on a defense.<sup>55</sup> If the federal commission found somebody was a fugitive slave and returned them, they would get ten dollars, but if the person was not a fugitive they received five dollars.<sup>56</sup> The Military Commission Act of 2006 takes its place alongside these statutes. One provision of the law says that those who are held in Guantanamo shall not have any access to the federal courts by a writ of habeas corpus.<sup>57</sup> Their only opportunity for review would be to go through military tribunals, and then seek review in the United States Court of Appeals. The law makes this retroactive and explicitly provides that it applies to all suits that were filed before or after the Act.<sup>58</sup> It also says that the only opportunity for review is through these tribunals.<sup>59</sup> So, imagine an individual is

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<sup>54</sup> Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850), *repealed by* ch. 166, 13 Stat. 200 (1964).

<sup>55</sup> *Id.* § 6.

<sup>56</sup> *Id.* § 7.

<sup>57</sup> Military Commission Act of 2006 § 7(e)(1) states that:

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

<sup>58</sup> *Id.* § 948d(a) (“A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.”).

<sup>59</sup> *Id.* § 948d(c) states that:

A finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006, by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter.

being held in Guantanamo and the government never chooses to charge the individual in the military proceeding. Nothing in the Military Commission Act requires that the individual must be charged, given a speedy trial, or any trial, for that matter. The person could literally be held forever—for the rest of his or her life—and there is no opportunity then to go to any federal court to ask for a hearing or a proceeding. Now, it may be that these individuals in Guantanamo are terribly dangerous and should be held, but it may also be that some are held completely by mistake. The only way we would ever know is if there is some type of due process or proceeding to determine this. This law says the individual could be held for the rest of their life with no proceeding and no opportunity for judicial review.

Another provision of the Military Commission Act provides that if individuals are tried in the military proceeding and seek review of the D.C. Circuit, the review is limited to claims under the Constitution and federal statutes.<sup>60</sup> Hence, those who are held in Guantanamo can never bring any claims based on the Geneva Conventions or international law. This raises a profound constitutional question: Can Congress restrict federal court jurisdiction in this way? Can Congress say to the federal courts that they cannot exercise their authority under Article III if the claim is arising from a treaty? Related to that, is the restriction on habeas corpus an impermissible suspension of the writ of habeas corpus?

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<sup>60</sup> *Id.* § 950g(c)(2).

Article I Section 9 of the Constitution<sup>61</sup> says that Congress shall not suspend habeas corpus except in cases with validity and with discretion. Isn't this an impermissible suspension of habeas corpus? The statute changes the definition of torture under the Geneva Convention. As the New York Times pointed out in an editorial in the days that followed the passing of the bill, no longer would rape or sexual assault count as torture under the statute.<sup>62</sup> Furthermore, the statute says that the President may redefine the definition of torture.<sup>63</sup> There is no requirement that the President publish this definition in the federal registry or anywhere else.

Another provision of this law says that the President may detain American citizens as enemy combatants if they engage in or assist in terrorist activity, but the definition of a terrorist activity is very broad.<sup>64</sup> This is the first time, which I know of, that Congress has ever passed a law enabling American citizens to be held as enemy combatants for acts occurring in the United States without all of the constitutional protections applying. These are just some of the

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<sup>61</sup> U.S. CONST. art. 1, § 9, cl. 2 states that: "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."

<sup>62</sup> Editorial, *Turning Back the Clock on Rape*, N.Y. TIMES, Sept. 23, 2006, at A1.

<sup>63</sup> Military Commissions Act of 2006 § 6(a)(3)(A) states that: "[T]he President has the authority for the United States to interpret the meaning and application of the Geneva Conventions . . . ."

<sup>64</sup> *Id.* § 950v(25)(A) states that:

Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission

provisions, but certainly some of the worst provisions. Undoubtedly, these provisions will be challenged in court.

### III. CONCLUSION

President Bush signed this Military Commission Act into law on Tuesday, October 17, 2006. Within an hour after the United States government moved, the D.C. Circuit dismissed sixty cases that were argued on September 2, 2005. The D.C. Circuit has asked for briefings on that issue, with Guantanamo detainee briefs being due on November 1, 2006 and the government briefs being due on November 8, 2006. These cases will undoubtedly go to the United States Supreme Court.

Additionally, there are other challenges that are going to be brought as to each of the provisions I mentioned above. It is less likely that any of the provisional challenges will make their way to the Supreme Court this year. The important question, I think, is whether or not the courts will show more courage than members of Congress did in dealing with the Military Commission Act's consequences. I think the Military Commission Act was very much in response to the politics that appeared at the time. Unfortunately, often in American history with these kinds of statutes, the courts have failed to stand up and confront important constitutional issues.

For example, during World War I, Congress passed a statute that made it a federal crime to criticize the draft and the war effort.<sup>65</sup>

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under this chapter may direct.

<sup>65</sup> Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217 (1917) states that: "To punish

When the cases went to the Supreme Court, the Supreme Court refused to strike down the statute.<sup>66</sup> You might remember some of these cases from law school. *Schenck v. United States*<sup>67</sup> involved a man by the name of Chang who was sentenced to ten years in prison for circulating a leaflet which said the draft was unconstitutional. The Supreme Court upheld both his conviction and sentence.<sup>68</sup> Another case, *Debs v. United States*,<sup>69</sup> involved Eugene Debs, who was sentenced to ten years in prison for telling his audience that, “[Y]ou need to know that you are fit for something better than slavery and cannon fodder.”<sup>70</sup> Again, like in *Schenck*, the Supreme Court upheld his conviction and sentence.<sup>71</sup>

During World War II, 110,000 Japanese Americans were uprooted from their lifelong homes, and were placed in places President Franklin Roosevelt referred to as concentration camps. The Supreme Court upheld the evacuation of Japanese Americans, even though not one Japanese American was ever accused or convicted of espionage.<sup>72</sup> Further, the Supreme Court upheld lengthy prison

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acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes.”

<sup>66</sup> See *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919).

<sup>67</sup> *Schenck*, 249 U.S. 47.

<sup>68</sup> *Id.* at 52 (holding that the Espionage Act punishes conspiracies to obstruct as well as actual obstruction, thus affirming *Schenck*’s conviction).

<sup>69</sup> *Debs*, 249 U.S. 211.

<sup>70</sup> *Id.* at 214.

<sup>71</sup> *Id.* at 216 (holding that the verdict for obstructing and attempting to obstruct the recruiting service of the United States must be affirmed).

<sup>72</sup> *Korematsu v. United States*, 323 U.S. 214 (1944) (holding that the exclusion order under which petitioner was convicted was valid, and thus, upholding the conviction even though petitioner did not engage in any act of espionage but merely “remained” in San

sentences administered by military tribunals against individuals who engaged in political activity clearly protected by First Amendment.<sup>73</sup>

The fear is that our courts again are prey again to the politics of fear. On the other hand, there were times where the federal courts lived up to the mandate of the Constitution, such as the courageous federal judges who were responsible for the desegregation of the South in the 1950's and 1960's.<sup>74</sup> I think, at this point, our hope is that when considering the Military Commission Act of 2006, federal judges show courage and say the supreme rule of the land, the Constitution, must be followed, even in a time of war.

Thank you.

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Leandro, California).

<sup>73</sup> *Hirota v. MacArthur*, 338 U.S. 1948 (denying petitioner's motion for habeas corpus to review severe sentences against Japanese residents imposed by military tribunals).

<sup>74</sup> *See Mapp v. Bd. of Educ.*, 203 F. Supp. 843 (E.D. Tenn. 1962) (ordering desegregation of Chattanooga, Tennessee public schools in accordance with defendants suggested plan to do so); *see also Singleton v. Jackson Mun. Separate Sch. Dist.*, 355 F.2d 865 (5th Cir. 1966) (approving of the plans calling for desegregation that met all of the Office of Education's requirements, but disapproving the plans because they did not fully deal with a student's choice to transfer schools or relocation of administration and teachers).