

# **Military Commissions Act of 2006: Striking the Right Balance**

by

David B. Rivkin, Jr.  
Lee A. Casey  
Andrew C. McCarthy  
Glenn M. Sulmasy



*The Federalist Society  
for Law and Public Policy Studies*

*The Federalist Society takes no position on particular legal or public policy initiatives. All expressions of opinion are those of the author or authors. We hope this and other white papers will help foster discussion and a further exchange regarding current important issues.*

## **Military Commissions Act of 2006: Striking the Right Balance**

David B. Rivkin, Jr., Lee A. Casey, Andrew C. McCarthy, and Glenn M. Sulmasy\*

The Bush Administration's Military Commissions Act of 2006 ("MCA"), put forward partially in response to the *Hamdan v. Rumsfeld*<sup>1</sup> decision handed down by the Supreme Court in May 2006 and also to provide a more politically durable foundation for USG's legal policies in the ongoing war on terror, fully comports with both the U.S. Constitution and international law – specifically, international law of armed conflict.<sup>2</sup> After a vigorous debate on both sides of the political spectrum, large bi-partisan majorities in both the House and the Senate supported the enactment of this legislation. Significantly, instead of rubberstamping the Administration's original legislative proposal, there was considerable give and take between the Congress and the President, with a particularly negotiation between the White House representatives and a group of Senators, including John Warner (R-VA), John McCain (R-AZ), and Lindsey Graham (R-NC).

---

\* Messrs. Rivkin and Casey are Partners in the Washington, D.C. office of Baker & Hostetler LLP, and Members of the UN Sub-Commission on the Promotion and Protection of Human Rights. They have served in a variety of legal positions in the Reagan and George H.W. Bush Administrations. Mr. Rivkin is also a Visiting Fellow at the Nixon Center and a Contributing Editor to the *National Review* and the *National Interest* magazines. Andrew C. McCarthy is a former federal prosecutor, a Senior Fellow at the Foundation for the Defense of Democracies, and a Contributor to the *National Review On-Line*. Glenn Sulmasy is a professor of law and a frequent commentator on military law and national security matters.

<sup>1</sup> *Hamdan v. Rumsfeld*, 548 U. S. \_\_\_\_, 126 S. Ct. 2749 (2006).

<sup>2</sup> There continues to be considerable confusion with nomenclature in this arena. The law of armed conflict, also known as the law of war, embodies the principles and laws associated with conducting warfare operations. However, some in academia prefer to use the term, international humanitarian law, thereby often confusing the law of armed conflict with a separate (and growing) body of law known as human rights law. It is important to distinguish between the law of armed conflict and human rights law – the two are separate bodies of law and yet, are often still confused and misinterpreted as synonymous disciplines. This has often created confusion for policy makers looking to apply certain laws to ongoing armed conflict. The law of armed conflict exists to regulate the activities of combatants engaged in warfare and to protect civilians during such operations. By contrast, human rights law encompasses issues regarding the environment, labor standards, individual nation state's treatment of their own citizens, etc. Thus, it is critical to ensure such distinctions are made when discussing the Military Commissions.

Some human rights groups and left-leaning organizations have now condemned the MCA. The anti-MCA sentiment has ranged from criticisms of the allegedly unseemly speed of which the legislation was enacted,<sup>3</sup> to the claims that Congress should have just dealt with the Military Commission-related procedures, struck down by the *Hamdan* case, instead of coming up with a comprehensive legislation.<sup>4</sup>

Substance-wise, the critics found the bill thoroughly wanting, portraying it as the very embodiment of tyrannical governance. The most oft-cited concerns with the MCA include the following claims: the introduction of classified material without the accused being able to see the material in its entirety deprives him of a fair trial and violates both the U.S. Constitution and international law; the introduction of hearsay evidence denies the accused the right to confront witnesses against him; the use of evidence obtained by torture or under duress will be admissible, thereby both prejudicing the accused's right to a fair trial and, at least implicitly, legitimizing coercive interrogation techniques; the interrogation standards do not adhere to Common Article 3 to the Geneva Conventions. More generally, most of the critics maintain that the Commissions should be a mirror image of the U.S.'s own court-martial system.

These criticisms are largely unpersuasive. A large majority of Congress concluded that the legislation strikes the proper balance between upholding U.S. international law obligations and taking into account the realities of the ongoing conflict with al Qaeda and affiliated groups. These realities include the fact that the U.S. and its allies confront mostly unlawful enemy

---

<sup>3</sup> This claim ignores the fact that there have been extensive consultations and discussions about the key provisions of the MCA, at least since May 2006. These discussions involved the Executive Branch, Congress, and were extensively reported in the media. Meanwhile, the debate about at least one of MCA's major strictures – how to interrogate captured unlawful enemy combatants and what level of judicial review they should be entitled to – has been going on for well over a year, as was reflected in the passage of the Detainee Treatment Act of 2005.

<sup>4</sup> One of the authors of this paper was personally confronted with this criticism, when debating the representatives of various human rights groups, including Human Rights First. His response was that, coming after years-worth of clamoring by the very same critics for a comprehensive congressional involvement in these issues, to replace what they had perceived as the unilateral, Executive Branch-only engagement, these criticisms rung remarkably hollow.

combatants, and the need for human intelligence, much of which can be derived only from the interrogation of captured enemy personnel, is paramount. The MCA strictures provide more due process and more judicial involvement in the various aspects of the war on terror-related policies than is required by either the U.S. Constitution or American international law obligations. In fact, the MCA-featured protections exceed the due process standards provided by many of the democratic countries in their own domestic court systems.<sup>5</sup>

The MCA also ensures that interrogations of captured unlawful enemy combatants remain effective and capable of yielding actionable intelligence, while fully comporting with U.S. international law obligations – by banning torture and cruel or inhuman treatment – and with the relevant constitutional requirements, as reflected in the 5<sup>th</sup>, 8<sup>th</sup>, and 14<sup>th</sup> Amendments. The legal issues aside, it is highly significant that Congress in general, and such Members as McCain in particular, have publicly embraced the notion that, while most of the harsh interrogation techniques should not be used even against a ruthless foe like al Qaeda that eschews any compliance with the laws and customs of war, it is both moral and necessary to retain the option of using some coercive interrogation techniques, particularly when dealing with high-value detainees. The fact that this difficult and, for many people, distasteful subject has been debated with an extraordinary level of candor and transparency, and that a reasonable compromise has been reached reflects well on the vigor and strength of American democracy. Henceforth, the critics of the U.S. interrogation regime should acknowledge that their disagreement is not just with the President and the Executive Branch, but with the combined policy and legal judgment of both of the political branches of the U.S. Government.

---

<sup>5</sup> For example, Great Britain has deployed sweeping powers as part of its counter-terrorism efforts. These include: detention of terrorist suspects without notice of charges, issuance of “control orders” that limit the ability of suspected terrorists to travel, receive visitors, etc., extensive use of “profiling” of suspected terrorists and of data

Proponents of the legislation concluded that the arguments that the MCA falls short of international law requirements either misstate what these requirements are or seek to hold the U.S. bound by international instruments, *e.g.*, Protocol I Additional of 1977 to the Geneva Conventions of 1949, which it has specifically rejected and which, therefore, do not apply to it. Meanwhile, Congress determined in passing the legislation that assertions that the MCA is constitutionally deficient are predicated upon an inherently flawed assumption that captured unlawful enemy combatants, held overseas, are entitled to the same level of constitutional protections as criminal defendants, tried through the U.S. civilian justice system. Indeed, Congress and the President made policy choices, reflected in the MCA, to grant unlawful enemy combatants benefits beyond the legally required floor; what the critics, while casting their arguments in the language of the law, really objected to is that even more was not done and that, at the end of the day, unlawful enemy combatants were not accorded the rights of either honorable prisoners of war (“POWs”) or of criminal defendants in the U.S. civilian justice system.

**BRIEF HISTORY OF MILITARY COMMISSIONS** – Critics have asserted the Military Commissions are a novel and flawed instrument and should not be used in this conflict. The critics also downplay, or even deny outright, the extent to which Military Commissions have been used by the United States in numerous past conflicts. Some of them suggest, either openly or tacitly, that the Commissions were concocted by several Department of Justice lawyers and

---

mining. *See*, John Yoo, “Our Civil Protections Need Protecting,” *Los Angeles Times*, p. B10, August 24, 2006; David B. Rivkin, Jr. and Lee A. Casey, “The British Way,” *The Wall Street Journal*, p. A8, August 14, 2006.

the White House Counsel's Office in an improper effort to increase the power of the Executive Branch.<sup>6</sup>

Historically, numerous Military Commissions were convened to prosecute unlawful enemy combatants, *e.g.*, spies, saboteurs, persons fighting out of uniform, during George Washington's tenure, during the Civil War, and during the Second World War.<sup>7</sup> The most notable early case was Washington's use of the Commissions during the Revolution against Major Andre after the Benedict Arnold plot was uncovered. During the Civil War, President Lincoln also employed them on numerous occasions to adjudicate crimes committed by illegal belligerents. The most notable modern episode involving Military Commissions was the 1942 *Ex Parte Quirin* case, featuring prosecutions of captured German saboteurs.<sup>8</sup> In a unanimous decision, the Supreme Court held that such Commissions were lawful, in compliance with the laws of armed conflict, and were the prerogative of the Executive Branch in times of war. In fact, President Franklin Roosevelt ordered that Military Commissions be employed, even though at least one of the captured German saboteurs was a U.S. citizen. As acknowledged by the Supreme Court on numerous occasions, most recently in the *Hamdan* case, they have been, and continue to be, a part of the American legal system.

The original Military Commission-related orders given by President Bush were in reaction to the horrific acts of 9/11 – attacks on the territory of the United States of a level and intensity that clearly amounted to war. In fact, the United Nations agreed that the level of attacks carried out on 9/11 constituted an aggression against the United States and warranted, under

---

<sup>6</sup>Phillippe Sands, "Policy Makers on Torture take note – Remember Pinochet," San Francisco Chronicle, November 13, 2005. For a useful discussion of how the Administration policy has actually evolved by one of the key participants in this process, *see, e.g.*, John Yoo, "The War by Other Means," *Atlantic Monthly Press*, (2006),

<sup>7</sup> Sean Watts, "History of Military Commissions," Law of War Deskbook for 54<sup>th</sup> Judge Advocate Graduate Course (2005).

Chapter 51 of the UN Charter, a military response in self-defense.<sup>9</sup> It became evident to most, if not all, U.S. policymakers, that a fresh look at how to combat this new asymmetric threat was necessary.<sup>10</sup> The employment of the law enforcement model, that had been the sole tool used by the United States against the jihadists prior to 9/11, had manifestly failed to protect America from attack.<sup>11</sup> Additional attacks were anticipated and were even considered inevitable. Thus, after receiving from Congress authority to attack al Qaeda and the Taliban, coupled with the President's inherent powers as the Commander-in-Chief under Article II of the Constitution, it was entirely appropriate for him to move quickly to create a system for detaining and trying captured unlawful enemy combatants. Through this lens, and taking into account the history and previous case law on the employment of Military Commissions, the original orders of November 13, 2001 were promulgated.<sup>12</sup>

Significantly, the jihadists against whom the U.S. fights in this war, by their established and publicly professed doctrine, flout all provisions of the laws of war. Each and every member of al Qaeda and affiliated entities are dedicated to destroying Western civilization, and, with complete disregard for the Geneva Conventions, never wear a standard uniform, do not bear arms openly, are not part of an organization with an established and transparent chain of command, are not affiliated with any nation state, and indiscriminately attack civilian targets.<sup>13</sup>

Thus, the enemy combatants the U.S. confronts on every level of this war are all illegal

---

<sup>8</sup> *Ex Parte Quirin*, 317 U.S. 1 (1942). Interestingly, the entire incident from the capture of the German saboteurs, their detention, habeas proceedings, trial by military commission, conviction, appeal, and execution took place in just under 60 days.

<sup>9</sup> S.C. Res. 1368, U.N. SCOR, 56<sup>th</sup> Session, 4370 mtg., U. N. Doc. S/RES/1368 (2001); Article 51, U.N. Charter of the United Nations.

<sup>10</sup> *Authorization for the Use of Military Force*, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>11</sup> For a discussion in support of the use of law enforcement response, see, Kenneth Roth, *The Law of War in the War on Terror*, Foreign Affairs, Jan-Feb. 2004, at 2.

<sup>12</sup> Military Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War against Terror, issued by President W. Bush, November 13, 2001.

<sup>13</sup> See Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949 and Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949.

belligerents. As such, they fully qualify for, and are liable to be subjected to, trial in Military Commissions. Indeed, to try them by courts-martial, or even under courts-martial-like procedures, would effectively vitiate distinctions between lawful and unlawful combatants. Far from being a humanitarian gesture, this approach would undermine respect for the laws and customs of war and would legitimize unlawful belligerency. In truth, and often lost in the debate, the impetus behind the Geneva Conventions is to encourage civilized warfare, such that to reward al Qaeda's inhumanity gravely undermines Geneva's principal purpose.

**INTRODUCTION OF CLASSIFIED MATERIAL** – There has been much controversy about the introduction of classified material as evidence in the Military Commissions. There is concern that such evidence will not be seen by the accused in its entirety, and thus, the accused would be denied the right to a fair trial. During congressional testimony, several military lawyer-witnesses declared this was inappropriate. There is no doubt that impeding the accused's right to confrontation raises troubling questions, particularly because preventing the accused from even knowing the identity of a witness may well handicap the ability of his lawyers to mount the most effective cross-examination of that witness or introduce evidence that can impeach him.<sup>14</sup>

There is no doubt that the sharing of classified material with the accused could very well pose a serious risk to national security, especially if the accused is acquitted and released prior to the end of hostilities, or if, as is even more likely, the accused capitalizes on his privileged access to counsel and investigators to pass messages to his confederates on the outside – as experience

---

<sup>14</sup> Assuming that the constitutional requirements applied fully to Commission proceedings held overseas, a Commission proceeding in which the verdict was reached entirely, or even largely, based upon evidence that the accused has been prevented from seeing, may violate the Constitution's 5<sup>th</sup> Amendment. This, however, is a big assumption, given the fact that the relevant Supreme Court's jurisprudence continues to assert that aliens held outside the United States do not have any constitutionally-based rights. In this regard, because the MCA limits the eligibility for Military Commission trials to unlawful enemy combatants who are also aliens, the question of what constitutional protections similarly situated U.S. persons are entitled to, does not need to be reached.



tells us terrorists are wont to do. This concern is reinforced by the fact that al Qaeda has demonstrated in the past its ability to obtain information gathered during judicial proceedings, *e.g.*, the trial of parties who carried out the first World Trade Center bombing, and incorporate it into its operational planning of new attacks.

Significantly, the MCA requires that the admission of classified evidence, out of the presence of the accused, “not deprive the accused of a full and fair trial.” This prescription, coupled with an extensive review of the results of Military Commission proceedings, both through the military and the civilian justice systems, ensures that the use of classified evidence would be exceedingly rare and that such evidence could not possibly be the sole basis upon which the accused is found guilty. Furthermore, the accused’s military lawyer (who would have the requisite clearance) would be permitted to view the classified material in its entirety, as would the military jury and the judge. Additional protections for the accused involve the fact that the classified information-related provisions cannot be triggered easily or casually. Rather, the federal agency that classified the material in issue would have to certify that such material needed to remain classified; the judge would have to certify that a redacted version of that material would not suffice; and the accused would be provided a redacted copy of the transcript so as to be generally aware of the evidence being introduced.

In any case, this whole issue was extensively debated during the congressional consideration of the MCA and, largely as a result of the efforts by Senator Lindsey Graham, the Administration’s original language underwent a significant change. Thus, the MCA, as enacted, reveals that a careful balance has been struck between the legitimate desire of the government to protect classified information and the accused’s due process rights. This balancing must, of course, take into account the fact that the Commission trials would not be taking place at the end

of this conflict, but would occur while the war is still underway.<sup>15</sup> In this regard, the MCA, reflecting the recognition that the potential damage caused by the revelation of classified material during the Commission proceedings can be quite severe and greatly handicap the U.S. ability to prosecute the war, provides **in extraordinary circumstances** for the possibility of using classified evidence, without the accused being privy to all of the material, but requires that he see a redacted version of this material.

**INTRODUCTION OF HEARSAY EVIDENCE** – The MCA’s provisions for the introduction of hearsay evidence, as has traditionally been the case with Military Commissions on American soil, provide for the introduction of all probative evidence during the Commission proceedings, recognizing the fact that, given the ongoing nature of this war, many witnesses will not be available to testify. Significantly, in the past and currently, most international tribunals provide for the introduction of hearsay evidence as well in those situations where witnesses are unavailable or for certain other reasons. Indeed, the introduction of hearsay evidence is not an unheard of event even in regular judicial proceedings in federal courts. Incorporated into Federal Rules of Evidence (and Military Rules of Evidence), there are nearly 24 exceptions to what is known as the “hearsay rule.” This allows for a trial to proceed and justice to be served in circumstances where a witness will be unavailable to testify – due to myriad reasons, including death. Indeed, it is worth observing that these rules are generally reciprocal: defendants who can satisfy their admissibility predicates may also exploit them to present evidence favorable to them that would otherwise be unavailable. This reliance on hearsay is even more crucial in this war, because many witnesses are likely to be foreign nationals who might be difficult to compel to appear at the Commission, and many will be unavailable due to imprisonment or even death.

---

<sup>15</sup> Hearings on Military Commissions and the proposed Code of Military Commissions, House Armed Services Committee, September 13, 2006; *see also* David Welna, “All Things Considered,” National Public Radio,

While cognizant of these circumstances, the MCA still provides protections to the accused by ensuring that the judge must believe such introduction of evidence is probative.

**JUDICIAL REVIEW** - The critics have alleged that the MCA effectively abolishes the writ of habeas corpus, in violation of the Suspension Clause of the Constitution.<sup>16</sup> But the statute provides captured unlawful enemy combatants with judicial review opportunities that exceed the constitutional requirements. The MCA builds upon and works with the judicial review procedures set forth in the Detainee Treatment Act of 2005 (“DTA”). Together, they provide a set of judicial review strictures that are streamlined, yet fair, and provide detainees with sufficient due process opportunities. These provisions comport with the United States Constitution and will withstand judicial review.

The DTA makes the D.C. Circuit the exclusive venue for handling any legal challenges by detainees and limits the United States Court of Appeals for the District of Columbia Circuit’s jurisdiction to two sets of circumstances: (1) review of the validity of the final decision of a Combatant Status Review Tribunal (“CSRT”) that an alien has been properly detained as an enemy combatant, and (2) review of the validity of the final decision by a Military Commission.

In both instances, the scope of review is precisely defined and limited to essentially two questions. The first question is whether the CSRT or Military Commission operated in a way that was consistent with the standards and procedures adopted by these respective bodies. The second question is whether the use of such standards and procedures by either the CSRT or a Military Commission “to reach the final decision is consistent with the Constitution and laws of the United States,” to the extent that the Constitution and laws of the United States apply.

---

September 7, 2006.

<sup>16</sup> The discussion that follows draws on Testimony of David B. Rivkin, Jr., Hearings on Military Commissions, Senate Committee on the Judiciary, September 25, 2006.

There has been some debate about the meaning of this language – specifically, whether any factual issues arising out of the CSRT or Military Commissions proceedings can be reviewed by the D.C. Circuit (and, ultimately, by the Supreme Court). There is arguably at least a possibility that one key factual issue may be amenable to review. Because under the teaching of *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), it is unconstitutional to bring civilians before Military Commissions if the Article III courts are open and functioning, an enemy civilian who has been subjected to the Military Commissions procedures is, arguably, in a situation where the application of such procedures to him is inconsistent with the United States Constitution. This, by the way, is what the Court did in *Ex Parte Quirin*, 317 U.S. 1 (1942), by rejecting the petitioners’ contention that they were civilians, not subject to military jurisdiction.

To be sure, the *Milligan* case dealt with an American citizen who was tried by a military commission on American soil. By contrast, even in the aftermath of *Rasul v. Bush*, 542 U.S. 466 (2004), an enemy alien, held at Guantanamo or elsewhere outside of the United States, should not be deemed to be subject to the substantive constitutional protections implicated by *Milligan*, as distinct from being merely eligible under 28 U.S.C. § 2241 for access to a federal court in the context of a habeas proceeding.<sup>17</sup> It is also certainly not settled whether this statutorily-driven habeas opportunity is limited only to detainees held in Guantanamo or is applicable to all detainees, no matter where they were held. In any case, the judicial review options featured in

---

<sup>17</sup> It is important to emphasize that, insofar as the access to a habeas-type process for aliens held overseas as enemy combatants is entirely driven by statute, the congressional decision in the MCA to provide them with at least two opportunities to gain review by the D.C. Circuit should be viewed as an example of a generous policy call, rather than, as the critics claim, an impairment of the detainees’ constitutionally protected rights. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (non-resident alien subjected to search by American agents in a foreign country unable to claim privacy rights under the Fourth Amendment); *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950) (the Constitution and its Bill of Rights protections do not have extraterritorial application); also cf. *Zadvydas v. Davis*, 533 U.S. 678, 695-96 (2001) (alien lawfully admitted into the U.S. may challenge indefinite immigration detention pending removal, but Court caveats that this rule does not extend to “terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security”).

the DTA are consonant with the constitutional requirements, as construed by the Supreme Court in such leading cases as *Milligan*, *Quirin*, and *In re Yamashita*, 327 U.S. 1 (1946).

Under the MCA, while the CSRT procedures remain unchanged, the Military Commission-related procedures have been greatly refined. The MCA establishes a new body – the Court of Military Commission Review – as the final entity within the military establishment for reviewing and confirming the decisions of Military Commissions and specifies that the D.C. Circuit’s jurisdiction to determine the final validity of the Military Commission’s judgment does not arise until all of the intra-military system appeals have been exhausted, or possibly waived. This is quite reasonable and is designed to enable the D.C. Circuit to step in after the military system has finished its work.<sup>18</sup>

The MCA also has language – in Section 6 – reaffirming the proposition that, outside of the DTA-provided judicial review system, “[n]o 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,” provided that he has been determined to be an enemy combatant – presumably, through a CSRT-based process. The bill also removes any jurisdiction to hear cases for damages or injunctive relief against the U.S. or any of its agents arising out of any aspect of detention, transfer, trial, or conditions of confinement of an enemy combatant. This provision effectively vitiates any prospect of civil liability in this area by either the U.S. or its

---

<sup>18</sup> The critics claim that a statute, featuring a meaningful judicial review opportunity by the D.C. Circuit, amounts to a suspension of habeas corpus. In this regard, the Supreme Court has held that what matters when dealing with a person challenging his detention by the United States is not the label that is attached to the judicial review or its precise modalities. Rather, as long as there is a meaningful opportunity in such a situation, the constitutional requirements have been preserved. *Swain v. Pressley*, 430 U.S. 372, 381 (1977). (“The substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person’s detention does not constitute a suspension of the writ of habeas corpus.”) Meanwhile, in *INS v. St. Cyr*, 533 U.S. 289, 314 & n.38 (2001), the court specifically acknowledged that “Congress could without raising any constitutional questions, provide an adequate substitute [for a traditional district court-level habeas petition] through the courts of appeals.” For an excellent discussion of this set of issues, see Testimony of Bradford A. Berenson, Hearings on Military Commissions, Senate Committee on the Judiciary, September 25, 2006. See also Adam J. White, “The Constitution, Writ or Wrong,” *The Weekly Standard.Com*, October 5, 2006.

agents, and, when combined with the revised War Crimes Act provisions, ensures legal immunity for CIA interrogators or anyone else involved in the interrogation process, provided they comply with these revised War Crimes Act provisions.

In an understandable response to the *Hamdan* Court's decision that the DTA's jurisdiction limiting provisions were not sufficiently clear on the issue of retroactive application, the MCA comes up with pretty air tight language – “shall apply to all cases, without exception, pending on or after the date of the enactment of this Act” – on the retroactivity issue. It is difficult to imagine how any U.S. court would find this language to be insufficient to ensure retroactive application.

The MCA, also partially in response to the *Hamdan* decision and partially to the way in which this decision was interpreted by the media and academy, contains language indicating that “[n]o person may invoke the Geneva Conventions, or any protocols thereto, in any habeas” action brought against the United States or any of its agents. As intended, this language renders the Geneva Conventions judicially unenforceable. However, since this has for over a half-century since Geneva's ratification, and since the *Hamdan* court has introduced Common Article 3 only in the very narrow and limited context – military commission proceedings – and has done so in the context of Congress' alleged legislative incorporation of that Article through the UCMJ, the MCA's reaffirmation of this venerable principle is entirely appropriate.

The bottom line is that the DTA and MCA combined provide judicial review, eliminating repetitive challenges and banning forum shopping, yet preserving the necessary essentials of a judicial review for detained unlawful combatants, going both to the issue of their status and their prosecution.

**INTERNATIONAL LAW** – The MCA survived debate over whether it complies with the relevant international law standards. In this regard, under both customary international law and in accordance with the Third Geneva Convention, only those warriors who comply with the requirements of lawful combatancy are accorded prisoner-of-war status upon capture. These provisions, granting POW status to captured lawful enemy combatants, are predicated upon important policy imperatives. These imperatives are the need to treat captured honorable enemy soldiers with the respect they deserve and the desire to ensure that a reciprocal treatment is accorded to captured U.S. soldiers.

In the current war, unfortunately, the enemy combatants evidence neither honor nor the slightest desire to treat captured U.S. soldiers with respect. Indeed, jihadists reject, both in word and deed, any notion of compliance with the laws of war and view reciprocity as a weakness. They torture U.S. personnel when captured, behead Americans on videos which are then publicly distributed and deny them any protections whatsoever. Thus, the jihadists, *de jure belli*, are not themselves entitled to POW-level protections. They are not warriors in the traditional sense and thus, the MCA, in accordance with established military jurisprudence, does not provide them with such status. This, of course, should not impact the treatment, accorded by states signatories to the Geneva Conventions, of those who fight wars as lawful combatants, and, thereby, qualify for POW protections.

**TORTURE CONVENTION** – Congress, in passing the MCA, considered whether it complies with the U.S. obligations under the International Convention Against Torture. In this regard, the MCA explicitly incorporates language, originally articulated in the McCain amendment (eventually embodied in the Detainee Treatment Act of 2005), which ensures that detainees cannot be tortured. Specifically, the McCain amendment prohibited “cruel, inhuman, or

degrading torture or punishment.” The MCA supports these obligations and clearly spells out that no evidence obtained through the use of torture will be admissible in Commission proceedings.

In addition, the MCA goes even further and limits the introduction of coerced statements. Alleged coerced evidence must be scrutinized by the judge to determine whether it is, in fact, reliable and probative before admitting it. This process is extremely important, both to protect the rights of the accused and to instill respect for the integrity of the Commission proceedings. The latter is essential, since it is virtually certain that many jihadists will claim they were subjected to torture. In fact, as part of al Qaeda’s training manuals, when captured, the jihadist is ordered, by established doctrine, to claim he was the subject of torture.

**DUE PROCESS** – The MCA affords numerous protections to the accused and goes well beyond the procedures used in domestic courts of many countries. Specifically, the accused is provided with:

- right to a full and fair trial
- right to know the charges against him as soon as practicable
- presumption of innocence
- right to counsel, government-provided defense counsel, and civilian counsel (at own expense)
- opportunity to obtain witnesses, and other evidence, including government evidence
- obligation on the government to disclose exculpatory evidence to the defense
- right to cross-examine witnesses
- right to not testify against himself



- limitations on the admission of hearsay evidence, focusing on its probity and the danger of unfair prejudice
- ban on statements obtained by torture
- limitations on statements obtained through coercion, focusing on their reliability and probity
- assurance that no undue influence or coercion of a Commission itself or members of a Commission can be exercised
- assurance that Commission proceedings will be open, unless extraordinary circumstances are present
- right to, at a minimum, two appeals, one through the military justice system, and the other through the civilian justice system, beginning with the D.C. Circuit
- assurance against double jeopardy – accused cannot be tried twice for the same offense

**MIRROR OF THE UCMJ** -- During the congressional consideration of the MCA, there were many efforts to import into the Military Commission system provisions virtually analogous to those found in the UCMJ. In fact, many of the congressional proposals went so far as to attempt to mirror the provisions of the UCMJ. Had they been adopted, this would have elevated the status of the illegal belligerent to a level well beyond his stature envisioned by international law. In fact, by applying what would be applied to our own men and women in the armed forces, these proposals would have raised the legal status of a person who kills civilians indiscriminately, flouts the laws of armed conflict, and engages in torture to that of a lawful combatant. The fact that the MCA adopted most, but not all, of the UCMJ procedures, far from

being a valid basis for criticism, reflected a balancing of the imperatives of according fairness and due process to unlawful enemy combatants, and the need not to legitimize their conduct.

**COMMON ARTICLE 3 TO THE GENEVA CONVENTIONS** – The Supreme Court in the *Hamdan* case stated that Common Article 3 should be applicable to the Commission process, because Congress incorporated that Article into the UCMJ provisions dealing with Military Commissions. While the Court’s decision arguably rests upon a flawed reading of the UCMJ, the MCA language reflects the decision by the Administration to comport with Common Article 3’s requirements. In this regard, the Administration has proposed detailed language, defining what constitutes compliance with the various requirements of Common Article 3. The need for such definitions is quite palpable, since Common Article 3 contains some well-defined terms, *e.g.*, “taking of hostages,” “murder,” and some capacious language, *e.g.*, “outrages upon personal dignity, in particular, humiliating and degrading treatment.” It is also significant that, while many of Article 3’s provisions have a universal or near-universal meaning, the concept of humiliation is inherently shaped by one’s culture.

For example, in American culture (and in most Western cultures) for a person to be interrogated by a woman is not viewed as a humiliating occurrence. It is certainly no more humiliating than an interrogation conducted by a man. By contrast, under the radical versions of Islam, which treat women with disdain, to be interrogated by a woman is viewed as a highly humiliating event, no matter how civil the interrogation procedures might be. Many other well-accepted aspects of an interrogation regime, *e.g.*, the standard “good cop/bad cop” routine, while acceptable in Western cultures, may well be viewed as humiliating in a culture that eschews open confrontation. Accordingly, given the inherent subjectivity of such terms as humiliation or “outrages against personal dignity,” it is entirely appropriate for each state signatory to the

Geneva Conventions to translate this language into a constitutionally- and culturally-appropriate domestic law parlance. Doing so certainly does not amount to repudiation of U.S. international law obligations.

The MCA language essentially defines Common Article 3's interrogation-related strictures as being coterminous with the relevant provisions of the Constitution's Bill of Rights, namely, the 5<sup>th</sup>, 8<sup>th</sup>, and 14<sup>th</sup> Amendments. These Amendments, and the U.S. domestic jurisprudence that construes them, lie at the very heart of the American system of ordered liberty. The argument that the U.S. is being stingy or unduly harsh in construing its international law obligations is difficult to credit.

Congress found that the MCA's harmonization of U.S. international and domestic law obligations, essentially conforming the War Crimes Act's provisions to its interpretation of Common Article 3's requirements, was reasonable as well as necessary. There is a broad belief, both within the Executive Branch and among the American people, that while torture, cruel or inhuman treatment ought not to be deployed, some use of intense interrogation techniques should be continued. Indeed, even the Administration's strongest critics in the Senate have essentially acknowledged that they also support the continuation of aggressive interrogation techniques, at least by the Central Intelligence Agency ("CIA"). Yet, to ensure that CIA interrogation programs can continue, it is necessary to assure CIA personnel that their conduct fully comports with the relevant U.S. domestic and international legal obligations. Indeed, the President, upon the advice of his senior intelligence officials, has concluded that a mere affirmation that CIA interrogators cannot be prosecuted in the future is not sufficient in the current legal and political climate; what is needed is a clear and compelling public affirmation that the interrogators' conduct is both lawful and appropriate.

By contrast, the Senate Armed Services Committee bill, while providing largely the same degree of domestic legal protections to the CIA interrogators (by modifying the existing War Crimes Act language) did not define what conduct would constitute full compliance with U.S. obligations under Common Article 3. As such, it did nothing to protect CIA interrogators from potential future prosecutions in foreign courts or international tribunals.

Indeed, one can argue that the very fact that a debate has ensued in the United States, in which some parties espoused the view that even full compliance with the U.S. domestic law, as measured by the revised War Crimes Act, may not constitute compliance with international law, as measured by Common Article 3, made future foreign prosecutions of CIA interrogators all the more likely. This is the case because the proponents of such prosecutions have always argued that they are most appropriate in situations where the home state of the accused has manifested an unwillingness to handle the matters itself. Inculcated with this approach, a foreign tribunal may well conclude that the revised War Crimes Act has improperly immunized CIA interrogators from their obligation to comply rigorously with Common Article 3 strictures. By contrast, while harmonizing U.S. international and domestic law obligations does not absolutely guarantee that no foreign prosecutions will be pursued, it makes such prosecutions less likely. For a foreign tribunal to prosecute a CIA officer based upon a reading of Common Article 3 that departs from an interpretation, that has been publicly and explicitly adopted by both political branches of the United States Government, would be a very tall order. Significantly, the final “compromise” language of the MCA accomplishes this goal.<sup>19</sup>

---

<sup>19</sup> The Administration’s initial MCA draft featured a full definition of the totality of U.S. international law obligations under Common Article 3. In the compromise reached with Senators Warner, Graham, and McCain, the Administration agreed to define statutorily the most serious violations of Common Article 3 – the so-called “grave breaches.” The final statutory language also acknowledges the President’s right to develop standards for compliance with the rest of Common Article 3-related obligations, i.e., “non-grave breaches.” Thus, the only difference between what the Administration originally wanted and what it ended up getting from Congress is that, instead of

**CONCLUSION** – The enactment of the Military Commissions Act is historic. It confirms within American law and jurisprudence that military tribunals, in a time of war, are lawful and just. Maybe even more importantly, the enactment confirms that this conflict with international terror is, in fact, a war and thus all laws and actions stemming from the armed conflict must incorporate this fact. The MCA puts to rest the debate over whether this conflict requires a law enforcement response. In *Hamdi* and *Hamdan*, the Supreme Court confirmed this was a war, and now Congress has reaffirmed the war on international terror is a war – and one that is unique, and different with distinct rules for illegal combatants, and *habeas corpus*, introduction of evidence, and other issues. Thus, all three branches of the United States Government have spoken in harmony on the key legal issues involved in this war.

---

defining statutorily the totality of Common Article 3-related obligations, the statute defines the most important ones and acknowledges that the President will define the rest of them publicly through a regulatory process.