

## CASE NOTE

### SALIM AHMED HAMDAN, PETITIONER v DONALD H RUMSFELD, SECRETARY OF DEFENSE\*

#### HAS THE BUSH ADMINISTRATION'S EXPERIMENT WITH MILITARY COMMISSIONS COME TO AN END?

#### CONTENTS

- I Background
- II The Decision
  - A The Detainee Treatment Act of 2005
  - B Authorisation to Convene the Military Commission
    - 1 'Sanction of Congress'
    - 2 'Controlling Necessity'
  - C The Commission's Structure and Procedures
    - 1 Arguments of the Parties
    - 2 Procedural Parity between Courts-Martial and Military Commissions
    - 3 Common Article 3 of the Geneva Conventions
- III Impact of the Decision
  - A Separation of Powers
  - B Has Anything Changed on the Ground at Guantánamo?
  - C Restoring the Balance between Authority and Obligation under the Law of War
- IV Where to from Here?
  - A Giving the Commissions the Rubber-Stamp of Approval
  - B Using the Court-Martial Model
  - C Back Where We Started
- V A Fork in the Road

We witnessed an extraordinary event three weeks ago in the Supreme Court, where a man with a fourth-grade Yemeni education accused of conspiring with one of the world's most evil men sued the President in the nation's highest court — and won.

— Professor Neal Katyal<sup>1</sup>

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\* 548 US \_\_ (2006) 1 ('*Hamdan*').

<sup>1</sup> Evidence to the Senate Armed Services Committee Hearing, *Military Commissions in light of the Supreme Court Decision in Hamdan v Rumsfeld*, 109<sup>th</sup> Congress, Washington DC, 19 July 2006, 21 (testimony of Professor Neal Katyal, Georgetown University Law Center) ('Senate Armed Services Committee Hearing'). Professor Katyal was lead counsel for Salim Hamdan before the Supreme Court.

## I BACKGROUND

The United States Congress responded to the terrorist attacks of September 11, 2001 by adopting a joint resolution which provided that the President

is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism ...<sup>2</sup>

Acting pursuant to the *Authorisation for Use of Military Force* ('AUMF'), and having determined that the Taliban regime in Afghanistan had harboured and supported al Qaeda, the terrorist organisation responsible for the attacks, US President George W Bush ordered the US Armed Forces to invade Afghanistan. In the ensuing hostilities, hundreds of individuals, including Yemeni national Salim Ahmed Hamdan, were captured and detained by Coalition Forces.

On 13 November 2001, while the US Armed Forces were still actively involved in Afghanistan, a Presidential order designed to regulate the detention, treatment and trial of individuals detained in the war against terrorism was issued.<sup>3</sup> In that *Military Order*, the President made a number of findings, including that:

- 'International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States *on a scale that has created a state of armed conflict* that requires the use of the United States Armed Forces';
- for the effective conduct of military operations and prevention of terrorist attacks, 'it is necessary for individuals subject to this order ... *to be detained, and, when tried, to be tried* for violations of the laws of war and other applicable laws *by military tribunals*';
- given the danger to the safety of the US and the nature of international terrorism, it is 'not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts'.<sup>4</sup>

Section 3 of the *Military Order* provides that any 'individual subject to this order' shall be 'detained at an appropriate location designated by the Secretary of Defense outside or within the United States'.<sup>5</sup> For more than 700 individuals,

<sup>2</sup> *Authorization for Use of Military Force Resolution of 2001*, SJ Res 23, 107<sup>th</sup> Cong (2001).

<sup>3</sup> *Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism*, 66(222) Fed Reg 57833 (16 November 2001) ('*Military Order*').

<sup>4</sup> *Ibid* s 1 (emphases added).

<sup>5</sup> The term 'individual subject to this order' is defined in s 2(a) to mean 'any individual who is not a United States citizen with respect to whom [the President] determine[s] from time to time in writing' that:

- (1) there is reason to believe that such individual, at the relevant times,
  - (i) is or was a member of the organization known as al Qaida;

this ‘appropriate location’ would be the US Naval Base at Guantánamo Bay, Cuba. Having been detained by Afghan militia and then transferred to US forces in November 2001, Hamdan was transported to the Guantánamo Naval Base in June 2002. Over a year later, on 3 July 2003, President Bush announced his determination that Hamdan and five other detainees at Guantánamo Bay were subject to his *Military Order*, and were therefore eligible for trial by military commission. After another year had passed, on 13 July 2004 Hamdan was charged with one count of conspiracy to commit offences triable by military commission.

The Charge Sheet alleges that between February 1996 and November 2001, in Afghanistan, Pakistan, Yemen and other countries, Hamdan

willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden ... and other members and associates of the al Qaeda organization ... to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.<sup>6</sup>

Further, it alleges that Hamdan met bin Laden in Kandahar, Afghanistan in 1996 and became his bodyguard and personal driver, a position he held until his capture in November 2001.<sup>7</sup> During this five year period, Hamdan allegedly committed a number of overt acts, including: delivering weapons, ammunition or other supplies to al Qaeda members and associates; driving bin Laden and other high-ranking al Qaeda members and associates throughout Afghanistan; accompanying bin Laden to various al Qaeda-sponsored training camps; and undergoing training in handling rifles, handguns and machine guns at the al Qaeda-sponsored al Farouq training camp.<sup>8</sup>

While the Charge Sheet contains ‘no allegation that Hamdan had any command responsibilities, played a leadership role, or participated in the planning of any activity’,<sup>9</sup> it does allege that he believed that bin Laden and his associates were involved in the August 1998 attacks on the US embassies in Kenya and Tanzania, the October 2000 attack on the *USS Cole* in Yemen, and the attacks of September 11.<sup>10</sup>

Prior to this charge being laid, Hamdan’s legal representatives had filed a petition for mandamus or habeas corpus in the District Court for the Western

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- (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
  - (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) ... and
  - (2) it is in the interest of the United States that such individual be subject to this order.

<sup>6</sup> *United States of America v Salim Ahmed Hamdan*, Military Commission Charge Sheet (13 July 2004) [12], available at <<http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf>> at 1 October 2006 (‘Charge Sheet’).

<sup>7</sup> *Ibid* [13a].

<sup>8</sup> *Ibid* [13b]–[13d].

<sup>9</sup> *Hamdan*, 548 US \_\_ (2006) 1, 5 (Opinion of the Court).

<sup>10</sup> Charge Sheet, above n 6, [13a].

District of Washington, challenging the US Government's efforts to prosecute him before a military commission. On 2 September 2004, the case was transferred to the District Court for the District of Columbia. Meanwhile, military commission proceedings had begun at Guantánamo Bay.<sup>11</sup> Oral argument was heard before the District Court on 25 October 2004, and Judge James Robertson granted Hamdan's petition for habeas corpus on 8 November 2004.<sup>12</sup> Judge Robertson held, among other things, that Hamdan could not be tried by a military commission unless and until a competent tribunal determined that he was not a prisoner of war under the *Geneva Convention Relative to the Treatment of Prisoners of War*.<sup>13</sup> The District Court therefore enjoined the Secretary of Defense, Donald Rumsfeld, from conducting any further military commission proceedings against Hamdan.

An appeal followed, and the Court of Appeals for the District of Columbia Circuit unanimously reversed the first instance decision on 15 July 2005.<sup>14</sup> On 7 November 2005, the US Supreme Court granted certiorari to decide whether the military commission convened to try Hamdan had the authority to do so.<sup>15</sup> The case was argued before eight Justices on 28 March 2006; the newly appointed Chief Justice, John Roberts, took no part in the Supreme Court decision due to his participation in the decision of the Court of Appeals as a Circuit Judge the previous year. Judgment was handed down on 29 June 2006.

## II THE DECISION

In a 5–3 split decision, the Supreme Court found in favour of Hamdan, the petitioner. Justice Stevens delivered the opinion of the Court, which Justices Souter, Ginsburg and Breyer joined in full, and which Justice Kennedy joined in part. Justices Scalia, Thomas and Alito each appended dissenting opinions.

The Court held that the military commission convened to try Hamdan lacked power to proceed because its structure and procedures violated both the *Uniform Code of Military Justice* ('UCMJ')<sup>16</sup> and Common Article 3 of the *Geneva*

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<sup>11</sup> Voir dire proceedings were held before the military commission convened to try Hamdan at Guantánamo Bay on 24 August 2004. A pre-trial motions hearing was in process on 8 November 2004, the day the Court of Appeals handed down its decision.

<sup>12</sup> *Salim Ahmed Hamdan v Donald H Rumsfeld, Secretary of Defense*, 344 F Supp 2d 152 (2004).

<sup>13</sup> *Ibid* 162. *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) ('*Geneva Convention III*').

<sup>14</sup> *Salim Ahmed Hamdan v Donald H Rumsfeld, Secretary of Defense*, 415 F 3d 33 (2005). Three circuit judges sat on the case: Judges Randolph, Roberts and Williams. Circuit Judge Randolph filed the opinion for the Court, and Senior Circuit Judge Williams filed a concurring opinion.

<sup>15</sup> *Salim Ahmed Hamdan v Donald H Rumsfeld, Secretary of Defense*, 546 US \_\_\_ (2005) 1.

<sup>16</sup> 10 USC §§ 821 (art 21), 836 (art 36).

*Conventions*.<sup>17</sup> Four Justices also concluded that the offence with which Hamdan was charged is not an offence that may be tried by military commission.

#### A The Detainee Treatment Act of 2005

On 30 December 2005, while Hamdan's case was pending before the Supreme Court, Congress enacted the *Detainee Treatment Act of 2005* ('DTA').<sup>18</sup> The DTA is best known for the restrictions it places on the treatment and interrogation of detainees in US custody, and the procedural protections it provides for US personnel accused of engaging in improper interrogation. However, in § 1005(e), it also addresses judicial review of the detention of enemy combatants. This section sets strict limits on the ability of Guantánamo Bay detainees to bring actions in the federal courts challenging their confinement or the procedures used to adjudicate their guilt.

On 13 February 2006, the US Government filed a motion to dismiss the writ of certiorari on the basis of that recently enacted statute. The Supreme Court postponed its ruling on that motion pending argument on the merits, but the motion was ultimately denied.

Paragraph 1 of § 1005(e) purports to amend the federal habeas corpus statute<sup>19</sup> to the effect 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 Department of Defense at Guantanamo Bay, Cuba'. Paragraph 3 of § 1005(e) vests in the Court of Appeals for the DC Circuit the 'exclusive jurisdiction to determine the validity of any final decision rendered' by the military commissions. Review is automatic for any alien sentenced to death or a term of imprisonment of 10 years or more, but is granted at the Court's discretion in all other cases. The scope of review is limited to the consideration of:

- (i) whether the final decision was consistent with the standards and procedures specified in [*Military Commission Order No 1*]<sup>20</sup>; and
- (ii) to the extent the *Constitution* and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the *Constitution* and laws of the United States.<sup>21</sup>

The DTA contains an 'effective date' provision in § 1005(h), which provides that in general, § 1005 will take effect on the date of its enactment (that is, 30 December 2005). However, with regard to review of military commission

<sup>17</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention III*, above n 13; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (collectively, '*Geneva Conventions*').

<sup>18</sup> *Detainee Treatment Act of 2005*, 42 USC (2000).

<sup>19</sup> See 28 USC § 2241 (2000). Chapter 153 of the *US Code* relates to habeas corpus while § 2241 provides for the power to grant the writ.

<sup>20</sup> US Department of Defence, *Military Commission Order No 1: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War against Terrorism* (issued 21 March 2002, rescinded and reissued 31 August 2005).

<sup>21</sup> DTA 42 USC § 1005(e)(3)(D) (2000).

decisions, § 1005(h) provides that § 1005(e)(3) ‘shall apply with respect to any claim whose review ... is *pending* on or after the date of the enactment of this Act’.<sup>22</sup>

The threshold issue before the Supreme Court, therefore, was whether the purported amendment to the habeas corpus statute in § 1005(e)(1) — which was *not* expressly stated to apply with respect to any pending claim — affected habeas petitions that were already filed and pending as of 30 December 2005.

The Government argued that § 1005(e) had ‘the immediate effect, upon enactment, of repealing federal jurisdiction not just over detainee habeas actions yet to be filed but also over any such actions then pending in any federal court’, including the Supreme Court.<sup>23</sup> Accordingly, it argued that the Court had no jurisdiction to review the Court of Appeals’ decision.

Justice Ginsburg expressed concern about the implications of this assertion in oral argument:

This law was proposed and enacted some weeks after this Court granted cert in this very case. It is an extraordinary act, I think, to withdraw jurisdiction from this Court in a pending case. Congress didn’t say, explicitly, it was doing that. ... So, why should we assume that Congress withdraw our jurisdiction to hear this case once the case was already lodged here?<sup>24</sup>

Hamdan objected to the Government’s theory on both constitutional and statutory grounds.<sup>25</sup> The Court found it unnecessary to consider Hamdan’s constitutional arguments, as they found ordinary principles of statutory construction sufficient to rebut the Government’s theory that Hamdan’s case, which was pending at the time of enactment, was affected by the *DTA*. Rather, the Court found that the *DTA* preserved jurisdiction over pending habeas cases.<sup>26</sup> In his dissenting opinion, Justice Scalia, joined by Justices Thomas and Alito, strongly disagreed with the Court’s reading of the *DTA*, describing it as ‘patently

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<sup>22</sup> (Emphasis added).

<sup>23</sup> *Hamdan*, 548 US \_\_ (2006) 1, 10 (Opinion of the Court).

<sup>24</sup> Transcript of Oral Argument, *Salim Ahmed Hamdan v Donald H Rumsfeld* (US Supreme Court, 28 March 2006) 64–5.

<sup>25</sup> Hamdan’s constitutional arguments related to questions concerning ‘Congress’ authority to impinge upon the Supreme Court’s appellate jurisdiction, particularly in habeas cases’. Hamdan relied on *Ex parte Yerger*, 75 US 85 (1869), where it was held that Congress would not be presumed to have effected a denial of appellate jurisdiction to consider an original writ of habeas corpus ‘absent an unmistakably clear statement to the contrary’: *Hamdan*, 548 US \_\_ (2006) 1, 10 (Opinion of the Court). In the alternative, Hamdan argued that if the Government’s reading of the section was correct, it would amount to an unconstitutional suspension of the writ of habeas corpus: at 11 (Opinion of the Court).

<sup>26</sup> *Hamdan*, 548 US \_\_ (2006) 1, 19. However, the Court noted that while it had concluded that the *DTA* did not strip federal courts of jurisdiction over cases *pending* on the date of enactment, it made no finding as to whether, if a habeas petition was brought *after* the date of enactment, the Supreme Court would nonetheless retain jurisdiction to hear an appeal: at 20 (fn 15).

erroneous'.<sup>27</sup> He considered that as of the date of enactment

*no* court had jurisdiction to 'hear or consider' the merits of petitioner's habeas application. This repeal of jurisdiction is simply not ambiguous as between pending and future cases. It prohibits *any* exercise of jurisdiction, and it became effective as to *all* cases last December 30.<sup>28</sup>

He concluded that 'the Court has made a mess of this statute',<sup>29</sup> stating that:

The Court's interpretation transforms a provision abolishing jurisdiction over *all* Guantanamo-related habeas petitions into a provision that retains jurisdiction over cases sufficiently numerous to keep the courts busy for years to come.<sup>30</sup>

In addition, Justice Scalia stated that even if the Court's reading is correct and Congress 'had not clearly and constitutionally eliminated jurisdiction over this case',<sup>31</sup> equitable principles counsel that the Court abstain from exercising any jurisdiction 'supposedly retained'.<sup>32</sup> In doing so, he accepted the Government's position that the Court should apply the rule that civilian courts should await the final outcome of ongoing military proceedings before entertaining an attack on those proceedings.<sup>33</sup>

Like the District Court and the Court of Appeals before it, the Supreme Court rejected the Government's argument that the Court should abstain from exercising jurisdiction over Hamdan's habeas corpus petition. Abstention is normally justified in the face of ongoing court-martial proceedings on the basis of both military necessities relating to military discipline, and faith in the fairness of the military court system established by Congress.<sup>34</sup> The Court held that neither of these bases for abstention existed with respect to the military commission convened to try Hamdan.<sup>35</sup> First, Hamdan was not a member of the US Armed Forces, so concerns about military discipline did not apply. Second,

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<sup>27</sup> Ibid 1 (Justice Scalia).

<sup>28</sup> Ibid 2 (emphases in original).

<sup>29</sup> Ibid 15.

<sup>30</sup> Ibid 2 (emphasis in original).

<sup>31</sup> Ibid 19.

<sup>32</sup> Ibid 1.

<sup>33</sup> This general rule is derived from *Schlesinger v Councilman*, 420 US 738 (1975) ('*Councilman*').

<sup>34</sup> In *Councilman*, the Supreme Court identified two considerations of comity that together favour abstention pending completion of ongoing court-martial proceedings against service personnel:

- (a) military discipline (and therefore the efficient operation of the Armed Forces) are best served if the military justice system acts without regular interference from civilian courts; and
- (b) federal courts should respect the balance that Congress struck between military preparedness and fairness to individual service members when it created 'an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals, consisting of civilian judges "completely removed from all military influence or persuasion": *Councilman*, 420 US 738, 757–8 (1975).

These two considerations of comity therefore favour abstention as they provide an expectation that the military court system will vindicate the constitutional rights of service personnel (such as due process): at 752–8. In *Hamdan*, neither of the comity considerations was considered to weigh in favour of abstention: *Hamdan*, 548 US \_\_ (2006) 1, 21–3 (Opinion of the Court).

<sup>35</sup> *Hamdan*, 548 US \_\_ (2006) 1, 21–3 (Opinion of the Court).

Hamdan's military commission was not part of the integrated system of military courts, which provides substantial procedural protections, strict rules of evidence, and appellate review by independent civilian judges. Rather, Hamdan had no right to appeal any conviction to the civilian judicial system or any other body that is structurally insulated from military influence.<sup>36</sup>

With regard to those same bases for abstention, Justice Scalia found that the Court had failed to make any inquiry into 'whether military commission trials might involve *other* "military necessities" or "unique military exigencies" comparable in gravity to those at stake in *Councilman*', which would counsel against the Court's interference.<sup>37</sup> He considered that like the military necessities relating to duty and discipline which required abstention in *Councilman*, military necessities relating to the 'disabling, deterrence, and punishment of the mass-murdering terrorists of September 11 require abstention all the more here'.<sup>38</sup> He also disagreed with the second basis for abstention, finding that the *DTA* creates an avenue for consideration of Hamdan's claims.<sup>39</sup> Finally, Justice Scalia cited a third consideration in favour of abstention: that the Court's interference in this case could bring

the Judicial Branch into direct conflict with the Executive in an area where the Executive's competence is maximal and ours is virtually nonexistent. We should exercise our equitable discretion to *avoid* such conflict. Instead, the Court rushes headlong to meet it.<sup>40</sup>

Against Justice Scalia's objections, the Court held that in view of the public importance of the questions raised by the case, and the compelling interest of both parties 'in knowing in advance whether Hamdan may be tried by a military commission that arguably is without any basis in law and operates free from many of the procedural rules prescribed by Congress for courts-martial', it would decide on those questions without any avoidable delay.<sup>41</sup>

Having determined this threshold issue in favour of Hamdan, the Court proceeded to assess the merits of the case: whether the military commission convened to try Hamdan was authorised.

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<sup>36</sup> Ibid 22–3.

<sup>37</sup> Ibid 20 (Justice Scalia) (emphasis in original) (citations omitted).

<sup>38</sup> Ibid 21.

<sup>39</sup> Ibid 24.

<sup>40</sup> Ibid 23 (emphasis in original). Justice Scalia's desire to defer to the Executive branch in areas of national security and foreign affairs is a recurring theme in the opinions of the dissenting Justices: see below Part III(A).

<sup>41</sup> Ibid 25 (Opinion of the Court), relying on its decision in *Ex parte Quirin*, 317 US 1 (1942) ('*Quirin*'), where instead of abstaining pending the conclusion of military commission proceedings (which were ongoing), the Court convened a special term to hear the case. The Supreme Court in *Hamdan* accepted the Court of Appeals' characterisation of *Quirin* as 'a compelling historical precedent for the power of courts to entertain challenges that seek to interrupt the processes of military commissions': *Salim Ahmed Hamdan v Donald H Rumsfeld, Secretary of Defense*, 415 F 3d 33, 36 (2005), as cited in *Hamdan*, 548 US \_\_ (2006) 1, 24 (Opinion of the Court). As in *Quirin*, the circumstances of the present case simply did not 'implicate the "obligations of comity" that, under appropriate circumstances, justify abstention': *Hamdan*, 548 US \_\_ (2006) 1, 25 (Opinion of the Court).

### B *Authorisation to Convene the Military Commission*

The Court began by noting that the military commission — an institution used from time to time in American military history — is ‘a tribunal neither mentioned in the *Constitution* nor created by statute’.<sup>42</sup> Rather, it ‘was born of military necessity’.<sup>43</sup> It described the use of such commissions during both the Mexican War of the 1840s and the American Civil War as being ‘driven largely by the then very limited jurisdiction of courts-martial’.<sup>44</sup> However, the Court held that military exigency alone will not justify the establishment of penal tribunals not authorised by the *United States Constitution*; that authority, if it exists, flows from the powers granted jointly to the President and to Congress in time of war.<sup>45</sup>

The *Constitution* makes the President the Commander-in-Chief of the Armed Forces,<sup>46</sup> but vests in Congress the powers to declare war, make rules concerning captures on land and water, and to define and punish offences against the law of nations.<sup>47</sup> The Court quoted the following description of the ‘interplay between these powers’:

The power to make the necessary laws is in Congress; the power to execute in the President. ... [N]either can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. ... Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the *sanction of Congress*, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, *unless in cases of a controlling necessity*, which justifies what it compels ...<sup>48</sup>

#### 1 ‘Sanction of Congress’

In convening the military commissions at Guantánamo Bay, the Government sought to rely on a provision of the *UCMJ* as the necessary ‘sanction of Congress’. Article 21 provides that the vesting of jurisdiction in courts-martial by Congress under the *UCMJ* shall not be construed as ‘depriv[ing] military commissions ... of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by [such] commissions’.<sup>49</sup>

In *Quirin*, the Supreme Court had interpreted art 21 as providing the necessary Congressional sanction for the use of military commissions in the circumstances of that case.<sup>50</sup> Contrary to the Government’s assertion, however, the Supreme Court in *Hamdan* held that this precedent did not support an interpretation of art 21 that provides ‘a sweeping mandate for the President to

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<sup>42</sup> *Hamdan*, 548 US \_\_ (2006) 1, 25 (Opinion of the Court).

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.* 26.

<sup>45</sup> *Ibid.* 26–7.

<sup>46</sup> *United States Constitution* art II, § 2.

<sup>47</sup> *United States Constitution* art I, § 8.

<sup>48</sup> *Hamdan*, 548 US \_\_ (2006) 1, 27 (Opinion of the Court), quoting *Ex parte Milligan*, 71 US 2, 139–40 (1866) (emphases added).

<sup>49</sup> *UCMJ* 10 USC § 821 (2000).

<sup>50</sup> *Quirin*, 317 US 1, 28 (1942). Article 21 was then enacted as Article of War 15.

“invoke military commissions when he deems them necessary.”<sup>51</sup> Instead, the Court held that *Quirin* recognised that Congress had simply preserved the power, conferred by the *Constitution* and the common law of war, that the President already had to convene military commissions prior to the article’s enactment.<sup>52</sup>

The Government therefore pointed to the *AUMF* and/or the *DTA* as providing this specific, overriding authorisation for the very commission that was convened to try Hamdan. However, the Court held that neither of these Congressional Acts expanded the President’s power to convene military commissions beyond that which was preserved by the *UCMJ*.

Assuming the *AUMF* activated the President’s war powers under the *Constitution*, ‘and that those powers included authority to convene military commissions in appropriate circumstances’, the Court found nothing in the *AUMF*’s text or legislative history that demonstrated a Congressional intention to expand or alter the authorisation set forth in art 21 of the *UCMJ*.<sup>53</sup> Although the *DTA*, unlike either the *AUMF* or art 21 of the *UCMJ*, was enacted *after* the President convened Hamdan’s military commission, it contains no language explicitly sanctioning the Guantánamo Bay military commissions. The Court therefore concluded that ‘[t]ogether, 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 the laws [of war]”’.<sup>54</sup>

Justice Thomas, joined by Justice Scalia, considered that under the framework of the *AUMF*, the President’s decision to try Hamdan before a military commission for his involvement with al Qaeda is entitled to a ‘heavy measure of deference’.<sup>55</sup> As a plurality of the Supreme Court recognised in *Hamdi v Rumsfeld*,<sup>56</sup> he noted, the capture, detention *and trial* of unlawful combatants are, by universal agreement and practice, important incidents of war, and are therefore ‘an exercise of the necessary and appropriate force Congress has authorized the President to use’.<sup>57</sup> Furthermore, Justice Thomas noted that nothing in the language of art 21 suggests ‘that it outlines the *entire* reach of Congressional authorization of military commissions’.<sup>58</sup> Quite the contrary, Justice Thomas considered that it ‘presupposes the existence of military commissions under an independent basis of authorization’.<sup>59</sup> Therefore, Congressional authorisation for Hamdan’s commission derives from both art 21 of the *UCMJ* and ‘also the more recent, and broader, authorization contained in the *AUMF*’.<sup>60</sup>

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<sup>51</sup> *Hamdan*, 548 US \_\_ (2006) 1, 29 (Opinion of the Court).

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.* 30.

<sup>55</sup> *Ibid.* 3 (Justice Thomas).

<sup>56</sup> 542 US 507, 518 (2004) (*‘Hamdi’*).

<sup>57</sup> *Hamdan*, 548 US \_\_ (2006) 1, 4 (Justice Thomas). Justice Thomas considered that the observation in *Hamdi* 542 US 507, 518 (2004) that military commissions are included within the *AUMF*’s authorisation is supported by the Supreme Court decision of *In re Yamashita*, 327 US 1 (1945).

<sup>58</sup> *Hamdan*, 548 US \_\_ (2006) 1, 5 (Justice Thomas) (emphasis added).

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

## 2 'Controlling Necessity'

In the absence of a specific sanction from Congress, the Court viewed its task as requiring consideration, as occurred in *Quirin*, of the common law governing military commissions so as to determine whether Hamdan's military commission was warranted by a 'controlling necessity' or military exigency.

Justice Stevens, joined by Justices Souter, Ginsburg and Breyer ('the plurality'),<sup>61</sup> recognised that 'past practice and what sparse legal precedent exists'<sup>62</sup> demonstrates that commissions were historically used in three situations:

- 1 where *martial law* has been declared, requiring that military commissions be substituted for civilian courts;<sup>63</sup>
- 2 where military commissions are required to try civilians 'as a part of a *temporary military government* over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function';<sup>64</sup> and
- 3 where, *as an incident to the conduct of war*, commissions are required in order to 'seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war'.<sup>65</sup>

The third type of commission, the 'law-of-war commission', was last used during World War II, and gave rise to the litigation in *Quirin*. This was the model invoked by the Government as precedent.

The plurality identified four preconditions that must exist for the exercise of jurisdiction by a law-of-war commission.<sup>66</sup> First, the commission (except where otherwise authorised by statute) can legally assume jurisdiction only over offences committed within the field of command of the convening commander (that is, within the 'theater of war'). Second, the offence charged must have been committed within the period of the war. No jurisdiction exists to try offences committed either before or after the war. Third, a law-of-war commission may

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<sup>61</sup> Justice Kennedy did not decide on a number of issues. Accordingly, parts of Justice Stevens' judgment represent only the opinion of 'the plurality' of four Justices, that is, of Justices Stevens, Souter, Ginsburg and Breyer. As five Justices are required to constitute a majority, the findings of the plurality cannot be given the same weight as the findings of the Court.

<sup>62</sup> *Ibid* 31 (Justice Stevens).

<sup>63</sup> See, eg, *Ex parte Milligan*, 71 US 2 (1866) (forbidding the use of military commissions for civilians when civil courts are open and functioning). See also *Duncan v Kahanamoku*, 327 US 304 (1946) and *Ex parte Zimmerman*, 132 F 2d 442 (9<sup>th</sup> Cir, 1942), which both involved appeals following military commission trials held while Hawaii was under martial law during World War II.

<sup>64</sup> *Hamdan*, 548 US \_\_ (2006) 1, 31 (Justice Stevens), quoting *Duncan v Kahanamoku*, 327 US 304, 314 (1946) (emphasis added). See, eg, *Madsen v Kinsella*, 343 US 341, 348, 355 (1952) ('*Madsen*') (upholding the jurisdiction of military commissions to try civilians in occupied foreign territory); *In re Yamashita*, 327 US 1, 4 (1945) (confirming the authority of the President to try accused war criminals in occupied territories even though hostilities had ceased).

<sup>65</sup> *Hamdan*, 548 US \_\_ (2006) 1, 32 (Justice Stevens), quoting *Quirin*, 317 US 1, 28–9 (1942) (upholding the jurisdiction of the military commission convened by President Roosevelt to try several German saboteurs in the US).

<sup>66</sup> *Hamdan*, 548 US \_\_ (2006) 1, 33–4 (Justice Stevens).

generally only try individuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war.<sup>67</sup> Fourth, a law-of-war commission has jurisdiction to try offences arising only from violations of the laws and usages of war cognisable by military tribunals.

The plurality held that these preconditions, which represent the common law governing military commissions, were incorporated as jurisdictional limitations in art 21 of the *UCMJ*.<sup>68</sup> The question for the Court, then, was whether these preconditions — designed to ensure that a military necessity exists to justify the use of 'this extraordinary tribunal'<sup>69</sup> — had been satisfied here. Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, concluded that they had not.

The dissenting Justices (in a separate opinion authored by Justice Thomas, who was joined by Justices Scalia and Alito) did not dispute that military commissions have historically been used in those three different situations, or that the only situation relevant to the instant case was the law-of-war commission.<sup>70</sup> The dissenting Justices also agreed with the plurality's position that there are four relevant considerations for determining the scope of a military commission's jurisdiction, relating to the time and place of the offence, the status of the offender, and the nature of the offence charged.<sup>71</sup> However, the dissenting Justices disagreed with the plurality's application of the considerations to the facts of the case, instead finding that the Executive had easily satisfied them.<sup>72</sup> The plurality's contrary conclusion, Justice Thomas considered, 'rests upon an incomplete accounting and an unfaithful application of those considerations'.<sup>73</sup>

(a) *Time and Place of the Offence*

Both the plurality and Justice Thomas dealt with the first and second preconditions together. Justice Stevens interpreted the charge against Hamdan as alleging a conspiracy that extended over a five year period, only two months of which preceded the September 11 attacks and the enactment of the *AUMF*.<sup>74</sup> Further, he held that 'neither the purported agreement with Osama bin Laden and others to commit war crimes, nor a single overt act, is alleged to have occurred in a theater of war or on any specified date after September 11, 2001'.<sup>75</sup> The plurality therefore held that as the offences alleged 'must have been committed both in a theater of war and *during*, not before, the relevant conflict',<sup>76</sup> the first two preconditions had not been met.

Contrary to the plurality, Justice Thomas took a fundamentally different view of the nature of the conflict with al Qaeda: 'We are not engaged in a traditional battle with a nation-state, but with a worldwide, hydra-headed enemy, who lurks

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<sup>67</sup> They may also try certain categories of members of the commander's own army who, in time of war, become chargeable with crimes or offences not cognisable, or triable, by the criminal courts or courts-martial under the *UCMJ*.

<sup>68</sup> *Hamdan*, 548 US \_\_ (2006) 1, 34 (Justice Stevens).

<sup>69</sup> *Ibid*.

<sup>70</sup> *Ibid* 6 (Justice Thomas).

<sup>71</sup> *Ibid*.

<sup>72</sup> *Ibid*.

<sup>73</sup> *Ibid*.

<sup>74</sup> *Ibid* 35 (Justice Stevens).

<sup>75</sup> *Ibid* 35–6.

<sup>76</sup> *Ibid* 36 (emphasis in original).

in the shadows conspiring to reproduce the atrocities of September 11, 2001'.<sup>77</sup> The Executive, as evidenced in Hamdan's Charge Sheet, had 'determined' that the theatre of the conflict includes Afghanistan, Pakistan and other countries 'where al Qaeda has established training camps', and that the duration of the conflict 'dates back (at least) to Usama bin Laden's August 1996 "*Declaration of Jihad against the Americans*"'.<sup>78</sup> Under the Executive's description of the conflict, therefore, Justice Thomas concluded that 'every aspect of the charge ... satisfies the temporal and geographic prerequisites for the exercise of law-of-war military commission jurisdiction'.<sup>79</sup>

Justice Thomas also cited what he considered to be 'overwhelming evidence' supporting the President's determination, including:<sup>80</sup>

- (a) al Qaeda's 1996 declaration of war on the US;
- (b) a statement issued by al Qaeda leadership in February 1998, ordering the indiscriminate killing of American civilians and military personnel;
- (c) a number of terrorist attacks perpetrated by al Qaeda prior to 11 September 2001;<sup>81</sup> and
- (d) US attacks on facilities belonging to bin Laden's network.

Based on this evidence, Justice Thomas considered, the Executive's judgement 'is beyond judicial reproach'.<sup>82</sup>

Justice Stevens took note of Justice Thomas' approach and responded that although the US had for some time prior to the attacks of September 11 been 'aggressively pursuing al Qaeda', the Government had not asserted that the President's war powers were activated prior to September 11, either in the Charge Sheet or in submissions before the Court.<sup>83</sup>

*(b) Status of the Offender and Nature of the Offence*

Justice Thomas held that the third consideration for the exercise of jurisdiction by a law-of-war commission was easily satisfied, as Hamdan is 'an unlawful combatant charged with joining and conspiring with a terrorist network dedicated to flouting the laws of war'.<sup>84</sup> While Justice Stevens did not directly address the third precondition in his judgment, he disagreed with the finding that Hamdan had been charged with a violation of the laws of war.<sup>85</sup>

The four Justices of the plurality would have ruled the indictment invalid on the ground that conspiracy, standing alone and without any charge of overt acts

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<sup>77</sup> Ibid 29 (Justice Thomas).

<sup>78</sup> Ibid 7.

<sup>79</sup> Ibid. Justice Thomas considered that 'these judgments pertaining to the scope of the theater and duration of the present conflict are committed solely to the President in the exercise of his commander-in-chief authority': at 7.

<sup>80</sup> Ibid 10–11.

<sup>81</sup> Those referred to include: the 1993 bombing of the World Trade Center in New York City; the 1996 bombing of the Khobar Towers in Saudi Arabia; the 1998 bombings of the US embassies in Kenya and Tanzania; and the 2000 attack on the *USS Cole* in Yemen.

<sup>82</sup> *Hamdan*, 548 US \_\_ (2006) 1, 11 (Justice Thomas).

<sup>83</sup> Ibid 35 (fn 31) (Justice Stevens).

<sup>84</sup> Ibid 12 (Justice Thomas).

<sup>85</sup> Ibid 48 (Justice Stevens).

committed during the wartime period, is not a recognised war crime. According to Justice Stevens, Congress has not positively identified ‘conspiracy’ as a war crime, nor is it an offence under the common law of war.<sup>86</sup> He relied on the high standard set in *Quirin* that the offence alleged must be recognised, by ‘universal agreement and practice’ both in the US and internationally, as an offence against the law of war.<sup>87</sup> He concluded that this burden was ‘far from satisfied here’.<sup>88</sup>

Justice Stevens dismissed the early domestic precedents on which the Government (and the dissenting Justices) relied, finding that the crime of conspiracy has rarely, if ever, been tried as such in the US by any law-of-war military commission *not exercising some other form of jurisdiction*.<sup>89</sup> He concluded that on closer analysis, these sources, at best, lend little support to the Government’s position and, at worst, undermine it.<sup>90</sup>

Justice Stevens also relied on the fact that conspiracy does not appear in either the *Geneva Conventions* or the *International Convention concerning the Laws and Customs of War on Land*,<sup>91</sup> which he considered to be the major treaties on the law of war.<sup>92</sup> According to Justice Stevens, the only ‘conspiracy’ crimes that have been recognised by international war crimes tribunals are conspiracy to commit genocide and common plan to wage aggressive war.<sup>93</sup> He noted that the International Military Tribunal at Nuremberg pointedly refused to recognise as a violation of the law of war conspiracy to commit war crimes, and convicted only Hitler’s most senior associates of conspiracy to wage aggressive war.<sup>94</sup>

Justice Thomas relied on the principle that ‘charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment’.<sup>95</sup> The violations alleged in the Charge Sheet should therefore be given a flexible reading. Justice Thomas’ interpretation of the Charge Sheet was that Hamdan had in fact been charged with conduct constituting two distinct violations of the law of war: membership in a war-criminal enterprise, and conspiracy to commit war crimes.<sup>96</sup> According to Justice Thomas, the common law of war establishes that Hamdan’s wilful and knowing membership in al Qaeda is a war crime chargeable before a military commission.<sup>97</sup> He considered that unlawful combatants, such as Hamdan,

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<sup>86</sup> Ibid 38.

<sup>87</sup> Ibid 39, quoting *Quirin*, 317 US 1, 30, 35–6 (1942).

<sup>88</sup> *Hamdan*, 548 US \_\_ (2006) 1, 40 (Justice Stevens).

<sup>89</sup> Ibid.

<sup>90</sup> Ibid 41.

<sup>91</sup> Opened for signature 18 October 1907, 205 ConTS 277 (entered into force 26 January 1910) (*‘Hague Convention IV’*).

<sup>92</sup> *Hamdan*, 548 US \_\_ (2006) 1, 40 (Justice Stevens).

<sup>93</sup> Ibid 46.

<sup>94</sup> Ibid 47.

<sup>95</sup> Ibid 12 (Justice Thomas), quoting *In re Yamashita*, 327 US 1, 17 (1945).

<sup>96</sup> Justice Thomas cited as precedent the International Military Tribunal at Nuremberg, which designated various components of four Nazi groups (the Leadership Corps, Gestapo, SD and SS) as criminal organisations: ‘Under this authority, the United States Military Tribunal at Nuremberg convicted numerous individuals for the act of knowing and voluntary membership in these organizations’: *Hamdan*, 548 US \_\_ (2006) 1, 19. Justice Alito did not join in this part of Justice Thomas’ separate opinion.

<sup>97</sup> Ibid 16.

‘violate the law of war merely by joining an organization, such as al Qaeda, whose principal purpose is the “killing [and] disabling ... of peaceable citizens or soldiers”’.<sup>98</sup>

Justice Thomas, joined by the other dissenting Justices, also disputed the test applied by the plurality, on the basis that the common law of war is ‘flexible and evolutionary in its nature, building on the experience of the past and taking account of the exigencies of the present’.<sup>99</sup> As such, the jurisdiction of the common law-of-war commissions ‘has been adapted in each instance to the need that called it forth’.<sup>100</sup>

the President has found that ‘the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm — ushered in not by us, but by terrorists — requires new thinking in the law of war.’ ... Under the Court’s approach, the President’s ability to address this ‘new paradigm’ of inflicting death and mayhem would be completely frozen by rules developed in the context of conventional warfare.<sup>101</sup>

In addition, the common law of war affords a measure of respect for the judgement of military commanders: the actions of military commissions are therefore ‘not to be set aside by the courts without the *clear conviction* that they are [unlawful]’.<sup>102</sup> On that basis, Justice Thomas concluded that the Court

should undertake to determine whether an unlawful combatant has been charged with an offense against the law of war with an understanding that the common law of war is flexible, responsive to the exigencies of the present conflict, and deferential to the judgment of military commanders.<sup>103</sup>

(c) *The Military Commission Lacks Authority to Try Hamdan*

On the basis of the foregoing analysis, the plurality concluded that the Executive had failed

to satisfy the most basic precondition — at least in the absence of specific congressional authorization — for establishment of military commissions: military necessity. Hamdan’s tribunal was appointed not by a military commander in the field of battle, but by a retired major general stationed away from any active hostilities. ... Hamdan is charged not with an overt act for which he was caught redhanded in a theater of war and which military efficiency demands be tried expeditiously, but with an *agreement* the inception of which long predated the attacks of September 11, 2001 and the *AUMF*. That may well be a crime, but it is not an offence that ‘by the law of war may be tried by military commissio[n].’ ... Any urgent need for imposition or execution of judgment is utterly belied by the record; Hamdan was arrested in November 2001 and he was not charged until mid-2004. These simply are not the circumstances in which, by any stretch of the historical evidence or this Court’s

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<sup>98</sup> Ibid 17.

<sup>99</sup> Ibid 13.

<sup>100</sup> Ibid, quoting *Madsen*, 343 US 341, 347–8 (1952).

<sup>101</sup> *Hamdan*, 548 US \_\_ (2006) 1, 14–15 (fn 6) (Justice Thomas).

<sup>102</sup> Ibid 14, quoting *Quirin*, 317 US 1, 25 (1942) (emphasis added by Justice Thomas).

<sup>103</sup> *Hamdan*, 548 US \_\_ (2006) 1, 15 (Justice Thomas).

precedents, a military commission ... may lawfully try a person and subject him to punishment.<sup>104</sup>

However, as Justice Kennedy did not consider it necessary to address the validity of the conspiracy charge against Hamdan nor the merits of the other limitations on military commissions described as elements of the common law of war,<sup>105</sup> this aspect of the judgment does not represent the finding of the Court.

### C *The Commission's Structure and Procedures*

The Court held that 'whether or not the government has charged Hamdan with an offence against the law of war cognizable by military commission, the commission [nevertheless] lacks power to proceed'.<sup>106</sup>

The Court confirmed the position in *Quirin* that Congress, in preserving within the *UCMJ* the President's power to convene military commissions under the *Constitution* and the common law of war, did so with the express condition that the President and those under his command comply with the *UCMJ* itself, and with the laws of war.<sup>107</sup> The Court stated that:

Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. ... The Government does not argue otherwise.<sup>108</sup>

Therefore, even if the President may have constitutional authority to establish military commissions under art II, § 2 of the *Constitution*, when he claims to act under the guise of Commander-in-Chief, he must do so within the legislative constraints which Congress has set.<sup>109</sup> The Court went on to discuss two statutory provisions which established those constraints: arts 21 and 36 of the *UCMJ*.<sup>110</sup> The processes that the Government had decreed would govern Hamdan's trial by military commission were found to exceed those limitations.<sup>111</sup>

#### 1 *Arguments of the Parties*

Hamdan argued that the procedures governing his commission (as set out in *Military Commission Order No 1*) deviated from those governing courts-martial, which of itself rendered the commission illegal. More specifically, Hamdan objected to commission rules which provided that he could be convicted based on evidence he had not seen or heard. Hamdan also objected to the rules of evidence, which provided that any evidence admitted against him need not

<sup>104</sup> Ibid 48–9 (Opinion of the Court) (emphasis in original) (citation omitted).

<sup>105</sup> Ibid 20 (Justice Kennedy).

<sup>106</sup> Ibid 49 (Opinion of the Court).

<sup>107</sup> Ibid 29, quoting *Quirin*, 317 US 1, 28–9 (1942).

<sup>108</sup> *Hamdan*, 548 US \_\_ (2006) 1, 29 (fn 23) (Opinion of the Court) (citations omitted), citing *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 637 (1952) (Justice Jackson, concurring).

<sup>109</sup> I am grateful to one of the anonymous referees for sharing views on the particular importance of the Court's statement in this footnote: *Hamdan*, 548 US \_\_ (2006) 1, 29 (fn 23).

<sup>110</sup> 10 USC §§ 821, 836 (2000).

<sup>111</sup> *Hamdan*, 548 US \_\_ (2006) 1, 49 (Opinion of the Court).

comply with the admissibility or relevance rules typically applicable in federal criminal trials and court-martial proceedings.

The Government, in addition to the abstention arguments,<sup>112</sup> objected to the Court's consideration of any procedural challenge at that stage of the proceedings because

Hamdan [would] be able to raise any such challenge following a 'final decision' under the *DTA*, and ... 'there [was] ... no basis to presume, before the trial [had] even commenced, that the trial [would] not be conducted in good faith and according to law.'<sup>113</sup>

The Court held that neither of the Government's contentions were sound. First, Hamdan had no automatic right to review under the *DTA* unless sentenced to more than 10 years' imprisonment. Moreover, he would have to wait for a 'final decision',<sup>114</sup> the timing of which is left entirely to the discretion of the President — as counsel for Hamdan put it, the President holds 'the keys to the Federal courthouse' under the provisions of the *DTA*.<sup>115</sup> Second, and contrary to the Government's assertion, there *was* a basis to presume that the procedures employed during Hamdan's trial would violate the law; Hamdan had already been excluded from his own trial.<sup>116</sup> Under those circumstances, review of the procedures in advance of a final decision was considered appropriate.

## 2 *Procedural Parity between Courts-Martial and Military Commissions*

Turning to the merits of Hamdan's procedural challenges, the Court noted that the procedures governing trials by military commission historically have been the same as those governing courts-martial. This procedural parity existed 'because the difference between military commissions and courts-martial originally was a difference of jurisdiction alone, and in part to protect against abuse and ensure evenhandedness under the pressures of war'.<sup>117</sup> The Court held that this history of procedural parity (which it referred to as the 'uniformity principle') is reflected in art 36 of the *UCMJ*.<sup>118</sup> Article 36 places two restrictions on the President's power to promulgate rules of procedure for courts-martial and military commissions alike. First, art 36(a) provides that no procedural rule the President adopts may be 'contrary to or inconsistent with' the

<sup>112</sup> See above n 33 and accompanying text.

<sup>113</sup> *Hamdan*, 548 US \_\_ (2006) 1, 52 (Opinion of the Court).

<sup>114</sup> *Ibid* 53.

<sup>115</sup> Transcript of Oral Argument, *Salim Ahmed Hamdan v Donald H Rumsfeld* (US Supreme Court, 28 March 2006) 81.

<sup>116</sup> *Hamdan*, 548 US \_\_ (2006) 1, 53 (Opinion of the Court).

<sup>117</sup> *Ibid*.

<sup>118</sup> Article 36 of the *UCMJ* 10 USC § 836 provides:

- (a) Pretrial, trial, and post trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, *so far as he considers practicable*, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, *but which may not be contrary to or inconsistent with this chapter*.
- (b) All rules and regulations made under this article *shall be uniform insofar as practicable* (emphases added).

*UCMJ*, however practical it may seem. Second, art 36(b) provides that the rules adopted must be ‘uniform insofar as practicable’. In other words, ‘the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable’.<sup>119</sup> Justice Kennedy, in his concurring opinion, viewed this second limitation as requiring the Court to compare the military commission procedures with those used for courts-martial and to ‘determine, to the extent there are deviations, whether greater uniformity would be practicable’.<sup>120</sup>

However, the Court noted that ‘the uniformity principle is not an inflexible one; it does not preclude all departures from the procedures dictated for use by courts-martial. But any departure must be tailored to the exigency that necessitates it.’<sup>121</sup> For example, ‘the term “practicable” cannot be construed to permit deviations based on mere convenience or expedience’.<sup>122</sup> Justice Kennedy viewed the language employed by Congress as allowing ‘the selection of procedures based on logistical constraints, the accommodation of witnesses, the security of the proceedings, and the like’; in other words, they ‘must be explained by some practical need’.<sup>123</sup>

The Court concluded that nothing on the record before it demonstrated that it would be impracticable to apply court-martial rules in this case:

There is no suggestion, for example, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility. ... [T]he only reason offered in support of that determination is the danger posed by international terrorism. Without for one moment underestimating that danger, it is not evident to us why it should require, in the case of Hamdan’s trial, any variance from the rules that govern courts-martial.<sup>124</sup>

Since it was undisputed that *Military Commission Order No 1* deviated in many significant respects from the rules applicable to courts-martial, the Court held that it necessarily violated art 36(b).<sup>125</sup> Article 36 not having been complied with, the Court held that the rules specified for Hamdan’s trial were illegal.<sup>126</sup>

### 3 Common Article 3 of the Geneva Conventions

The second statutory provision that limits the President’s exercise of his war

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<sup>119</sup> *Hamdan*, 548 US \_\_ (2006) 1, 57 (Opinion of the Court). These rules are set forth in the *UCMJ*, and in more detail in Joint Service Committee on Military Justice, *Manual for Courts-Martial United States* (2005).

<sup>120</sup> *Hamdan*, 548 US \_\_ (2006) 1, 5 (Justice Kennedy). The Court, therefore, did not accept the Government’s argument that the President’s determination — that the nature of international terrorism meant that it would be impracticable to apply the principles of law and rules of evidence generally recognised in the trial of criminal cases — was sufficient on its own to fulfil the requirements of *UCMJ* art 36.

<sup>121</sup> *Ibid* 56 (Opinion of the Court).

<sup>122</sup> *Ibid* 5 (Justice Kennedy).

<sup>123</sup> *Ibid*.

<sup>124</sup> *Ibid* 60–1 (Opinion of the Court).

<sup>125</sup> *Ibid* 61.

<sup>126</sup> *Ibid* 62.

powers is art 21 of the *UCMJ*.<sup>127</sup> According to the Court, art 21 reserves for the President the authority to convene military commissions on the condition that such authority will be exercised in compliance with the law of war. The Court held that the term ‘law of war’, as used in art 21, refers to that body of international law governing armed conflict.<sup>128</sup>

The four *Geneva Conventions* are part of that body of law. Regardless of whether ratification of those conventions by the US Government gives rise to judicially enforceable rights in the accused under US domestic law,<sup>129</sup> the *Geneva Conventions* are relevant to the question of authorisation under art 21; they are part of the law of war that Congress has directed the President to follow in establishing military commissions. Therefore, as Justice Kennedy put it, an alleged violation of the *Geneva Conventions* could establish a want of authority in the commission to proceed with the trial; procedural irregularities could deprive the commission of jurisdiction.<sup>130</sup>

In applying the *Geneva Conventions* to the present conflict, the Court took the position of Circuit Judge Williams who, in the decision of the Court of Appeals, had disagreed with the conclusion reached by that Court that the war with al Qaeda evades the reach of the *Geneva Conventions*.<sup>131</sup> That conclusion was based on a narrow reading of Common Articles 2 and 3 to the *Geneva Conventions*, so that the conflict was not considered to be an international armed conflict under the former nor an armed conflict ‘not of an international character’ under the latter.

The *Hamdan* Court held that there was no need to decide upon the merits of the argument that the armed conflict with al Qaeda fulfils the definition under Common Article 2, thereby rendering the full protections of the *Geneva Conventions* applicable to al Qaeda.<sup>132</sup> This was because the Court considered that the conflict with al Qaeda qualifies as a ‘conflict not of an international character occurring in the territory of one of the High Contracting Parties’ under Common Article 3 to the *Geneva Conventions*. The Court considered that the phrase ‘not of an international character’ was used ‘in contradistinction to a conflict between nations’.<sup>133</sup> Such a conflict is distinguishable from that described in Common Article 2 ‘chiefly because it does not involve a clash

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<sup>127</sup> Article 21 of the *UCMJ* 10 USC § 821 provides:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses *that by statute or by the law of war may be tried* by military commissions, provost courts, or other military tribunals (emphasis added).

<sup>128</sup> *Hamdan*, 548 US \_\_ (2006) 1, 65 (Opinion of the Court). See also *Hamdan*, 548 US \_\_ (2006) 1, 6 (Justice Kennedy), citing *Quirin*, 317 US 1, 28 (1942).

<sup>129</sup> The Court of Appeals relied on *Johnson v Eisentrager*, 339 US 763 (1950) for the proposition that *Geneva Convention III* did not confer upon Hamdan a right to enforce its provisions in court: see *Hamdan*, 548 US \_\_ (2006) 1, 64–5 (Opinion of the Court).

<sup>130</sup> *Hamdan*, 548 US \_\_ (2006) 1, 7–8 (Justice Kennedy), referring to *In re Yamashita*, 327 US 1, 23–4 (1945) and *Johnson v Eisentrager*, 339 US 763, 789–90 (1950).

<sup>131</sup> *Hamdan*, 548 US \_\_ (2006) 1, 67 (Opinion of the Court); *Salim Ahmed Hamdan v Donald H Rumsfeld, Secretary of Defense*, 415 F 3d 33, 44 (2005) (Justice Williams).

<sup>132</sup> *Hamdan*, 548 US \_\_ (2006) 1, 66 (Opinion of the Court).

<sup>133</sup> *Ibid* 67.

between nations'.<sup>134</sup> Common Article 3, the Court held,

affords some minimal protection, falling short of full protection under the *Conventions*, to individuals associated with neither a signatory nor even a nonsignatory 'Power' who are involved in a conflict 'in the territory of' a signatory.<sup>135</sup>

Application of Common Article 3 therefore meant that certain minimum standards bind the US in its conduct of military commission trials with respect to members of al Qaeda and the Taliban. The most important of those is the prohibition on

the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.<sup>136</sup>

This provision, the Court held, supports a uniformity principle similar to that codified in art 36(b) of the *UCMJ*. Similar to the requirement in art 36(b), the Court considered that

Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But *requirements* they are nonetheless.<sup>137</sup>

Referring to the customary international humanitarian law study of the International Committee of the Red Cross,<sup>138</sup> the Court observed that a court will be regularly constituted if it is 'established and organized in accordance with the laws and procedures already in force in a country' in advance of crisis.<sup>139</sup> In the US, the court-martial system under the *UCMJ* therefore provides the relevant benchmark by which to judge the commissions.

Against this benchmark, Justice Kennedy observed that by the standards of the US justice system, a military commission must have an acceptable degree of independence from the Executive.<sup>140</sup> Any suggestion of executive interference in ongoing judicial process, he considered, would raise concerns about the proceedings' fairness.<sup>141</sup> 'The guidance Congress has provided with respect to courts-martial indicates the level of independence and procedural rigor that Congress has deemed necessary'.<sup>142</sup> On examination of the specific rules set out

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134 Ibid.

135 Ibid.

136 *Geneva Conventions*, above n 17, Common Article 3(d). This prohibition applies to persons taking no active part in the hostilities, including members of armed forces placed hors de combat by detention: Common Article 3(1).

137 *Hamdan*, 548 US \_\_ (2006) 1, 72 (Opinion of the Court) (emphasis in original).

138 International Committee of the Red Cross, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (2005) vol 1, 355.

139 *Hamdan*, 548 US \_\_ (2006) 1, 69 (Opinion of the Court).

140 Ibid 9–10 (Justice Kennedy).

141 Ibid 10.

142 Ibid.

in *Military Commission Order No 1*, Justice Kennedy concluded that

the concentration of functions, including legal decisionmaking, in a single executive official; the less rigorous standards for composition of the tribunal; and the creation of special review procedures in place of institutions created and regulated by Congress — remove safeguards that are important to the fairness of proceedings and the independence of the court.<sup>143</sup>

These structural characteristics of the commission, in addition to the lack of any evident practical need for departing from conventional military evidence rules and procedures, mean that Hamdan's commission 'cannot be considered regularly constituted under United States law and thus does not satisfy Congress' requirement that military commissions conform to the law of war'.<sup>144</sup>

The plurality went beyond Justice Kennedy to consider the meaning of 'judicial guarantees which are recognized as indispensable by civilized peoples'.<sup>145</sup> They found that this requirement incorporates at least the barest of those fair trial protections recognised by customary international law<sup>146</sup> (many of which are described in art 75 of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*<sup>147</sup>). While recognising that the US has declined to ratify *Additional Protocol I*, the plurality noted that the US Government has not objected to art 75 itself, and indeed appears to regard its provisions 'as an articulation of safeguards to which all persons in the hands of an enemy are entitled'.<sup>148</sup> The plurality would therefore have added to the Court's conclusion that various provisions of *Military Commission Order No 1* 'dispense with the principles, articulated in Article 75 and indisputably part of the customary international law,' which relate to the right to be present at one's own trial and the right to confrontation.<sup>149</sup>

### III IMPACT OF THE DECISION

#### A *Separation of Powers*

The Bush Administration's strategy for dealing with alleged terrorists detained at Guantánamo Bay began by dusting off age-old precedents for the use of military commissions that dated back to the American Civil War. The military commission established by President Roosevelt to try eight German saboteurs during World War II provided the strongest authority for the Administration's

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<sup>143</sup> Ibid 16.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid 69 (Opinion of the Court).

<sup>146</sup> Ibid 70 (Justice Stevens).

<sup>147</sup> Opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (*Additional Protocol I*).

<sup>148</sup> *Hamdan*, 548 US \_\_ (2006) 1, 70 (Justice Stevens).

<sup>149</sup> Ibid 71. In particular, the plurality considered that these safeguards would include the right to be present at one's own trial, and therefore would have found the military commissions to be defective on the basis that they have the power to permit portions of the trial to occur outside the presence of the accused. Although Justice Kennedy shared the plurality's disapproval of this and other procedural differences between the military commissions and courts-martial, he did not consider it necessary to reach the plurality's conclusion that the commissions were defective for this further reason.

plans. The President's *Military Order* of November 2001 was in fact modelled on President Roosevelt's *Military Order* of 2 July 1942,<sup>150</sup> which was ultimately upheld by the Supreme Court in *Quirin*.<sup>151</sup> Despite the drastic changes in international humanitarian and human rights law that have occurred since 1942, the text of President Bush's *Military Order* echoes much of the language used by Roosevelt, leaving the basic structure of the commission unaltered.

The Supreme Court, in the *Hamdan* decision, did not ignore those changes in the law. The plurality viewed the *Quirin* precedent as 'represent[ing] the high-water mark of military power to try enemy combatants for war crimes'.<sup>152</sup> Justice Stevens' judgment treated the Court's World War II era jurisprudence as having outlived its relevance because changes in the legal landscape had reduced earlier rulings to dead letter laws.

While accepting the premise that the US is a country at 'war' with terrorists, the Court affirmed the primacy of ordinary civilian courts and military courts-martial, and returned the leading role in establishing the rules and procedures for trial of detainees to Congress. *Hamdan* therefore represents a significant blow to the Bush Administration's broad assertion that the President, as Commander-in-Chief of the Armed Forces, has inherent executive authority to act unilaterally in the war on terror.<sup>153</sup> The Court noted that the *Constitution* expressly gives Congress the power to enact laws concerning the detention of individuals during armed conflict and the trial of individuals for violations of the law of war,<sup>154</sup> a power which Congress exercised in enacting the Articles of War, and later the *UCMJ*.

In response to the Government's argument that military commissions would be of no use if the President were 'hamstrung' by those provisions of the *UCMJ* that govern courts-martial,<sup>155</sup> the Court emphasised that the military commission

was not born of a desire to dispense with a more summary form of justice than is afforded by courts-martial ... Exigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections.<sup>156</sup>

The institution of military commissions should not, therefore, be regarded as simply a 'more convenient adjudicatory tool' than courts-martial.<sup>157</sup> The military commission in this case, stated Justice Kennedy, 'raises separation-of-powers

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<sup>150</sup> *Appointment of a Military Commission*, 7 Fed Reg 5103 (2 July 1942).

<sup>151</sup> *Quirin*, 317 US 1, 48 (1942).

<sup>152</sup> *Hamdan*, 548 US \_\_ (2006) 1, 33 (Justice Stevens).

<sup>153</sup> See John C Yoo, Deputy Assistant Attorney General, US Department of Justice, Office of the Legal Counsel, 'Memorandum Opinion for Timothy Flanigan, the Deputy Counsel to the President: The President's Constitutional Authority to Conduct Military Operations against Terrorists and Nations Supporting Them' (25 September 2001).

<sup>154</sup> *Constitution* art I, § 8, cll 10, 11, 14.

<sup>155</sup> The Government's argument is summarised by Justice Stevens: *Hamdan*, 548 US \_\_ (2006) 1, 58 (Opinion of the Court).

<sup>156</sup> *Ibid* 61.

<sup>157</sup> *Ibid* 62.

concerns of the highest order':<sup>158</sup>

Located within a single branch, these courts carry the risk that offences will be defined, prosecuted, and adjudicated by executive officials without independent review. ... Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the *Constitution's* three-part system is designed to avoid. It is imperative, then, that when military tribunals are established, full and proper authority exists for the Presidential directive.<sup>159</sup>

The dissenting Justices were, however, more sympathetic to the Government's efforts to justify broad Presidential war powers unconstrained by laws designed to protect the rights of Americans, not terrorists. While recognising that Congress has a substantial and essential role to play in the areas of national security and defence, the dissenting Justices demonstrated their concern that Congress cannot anticipate and legislate with regard to every possible situation the President may face as Commander-in-Chief. Thus, the judicial branch should not infer that Congress has intended to *deprive* the President of particular powers not specifically enumerated.<sup>160</sup> Instead, it is the Court's duty to defer to the Executive's military and foreign policy judgement, rather than engaging in 'second-guessing' judgements in which it is wholly lacking institutional competence.<sup>161</sup> Such judgements, they considered,

should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.<sup>162</sup>

The emphasis that the dissenting Justices place on the primacy accorded to the President by the *Constitution* in matters of national security and defence is justified, in their view, by the structural advantages of the executive branch in the conduct of war, namely, the decisiveness, activity, secrecy and dispatch that flow from the executive's unity.<sup>163</sup> It was with this framework in mind that the dissenting Justices would examine the lawfulness of Hamdan's military commission, whereas the Court's 'inflexible approach' was considered to have 'dangerous implications' for the President's ability to discharge his duties as Commander-in-Chief.<sup>164</sup>

In Justice Thomas' eyes, the Court's 'evident belief that *it* is qualified to pass on the "[m]ilitary necessity" of the Commander in Chief's decision to employ a particular form of force against our enemies is ... antithetical to our constitutional structure'.<sup>165</sup> This assessment of the appropriate military measures (that is, military commissions) to take against those responsible for the

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<sup>158</sup> Ibid 2 (Justice Kennedy).

<sup>159</sup> Ibid 2–3.

<sup>160</sup> Ibid 3 (Justice Thomas).

<sup>161</sup> Ibid 6.

<sup>162</sup> Ibid, quoting *Hamdi*, 542 US 507, 582–3 (2004), in turn quoting *Chicago & Southern Air Lines, Inc v Waterman SS Corp*, 333 US 103, 111 (1948).

<sup>163</sup> *Hamdan*, 548 US \_\_ (2006) 1, 2 (Justice Thomas).

<sup>164</sup> Ibid 15.

<sup>165</sup> Ibid 1 (emphasis in original) (citations omitted).

September 11 attacks is ‘quintessentially a policy and military judgment’.<sup>166</sup> The plurality’s willingness to overrule ‘one after another of the President’s judgments’ pertaining to the conduct of the ongoing war on terror is therefore ‘both unprecedented and dangerous’.<sup>167</sup>

Justice Breyer addressed these criticisms in the following passage:

The dissenters say that today’s decision would ‘solely hamper the President’s ability to confront and defeat a new and deadly enemy.’ ... They suggest that it undermines our Nation’s ability to ‘preven[t] future attacks’ of the grievous sort that we have already suffered. ...

The Court’s conclusion ultimately rests upon a single ground: Congress has not issued the Executive a ‘blank check.’ Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.

Where as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation’s ability to deal with danger. To the contrary, that insistence strengthens the Nation’s ability to determine — through democratic means — how best to do so. The *Constitution* places its faith in those democratic means. Our Court today simply does the same.<sup>168</sup>

Similarly, Justice Kennedy considered that respect for the laws ‘gives some assurance of stability in time of crisis’, and that the *Constitution* ‘is best preserved by reliance on standards tested over time and insulated from the pressures of the moment’.<sup>169</sup> For these reasons, the Court ultimately concluded that ‘in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction’.<sup>170</sup>

In this way, the concurring and dissenting opinions of the Supreme Court Justices in *Hamdan* represent conflicting attitudes regarding the role to be played by the various branches of government in the war on terror. While the dissenting Justices largely viewed the restraint that law places on the President’s ability to conduct the war on terror as a liability, the Court viewed it as an asset.

#### B *Has Anything Changed on the Ground at Guantánamo?*

There is no doubt that the Supreme Court’s decision in *Hamdan* represents a major setback to the Bush Administration’s efforts to try Guantánamo detainees before a military commission which operates outside the constraints of the rule of law. But what effect will the decision have on the ground at Guantánamo? Will it have any substantive impact on Salim Hamdan’s situation? What of the

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<sup>166</sup> Ibid 28.

<sup>167</sup> Ibid 29–30.

<sup>168</sup> Ibid 1 (Justice Breyer) (citations omitted).

<sup>169</sup> Ibid 1 (Justice Kennedy).

<sup>170</sup> Ibid 72 (Opinion of the Court).

other 490 detainees who have never been charged or even designated for trial by military commission?<sup>171</sup> How does this result impact on the war on terror?

The questions brought before the Supreme Court in the *Hamdan* litigation were narrow. The Court was only required to examine the legality of the military commission process employed by the Department of Defense in the trial of 10 Guantánamo detainees. It was not directly concerned with other Presidential strategies in the war on terror.<sup>172</sup>

The limited nature of the Court's inquiry has led those who support the Administration's policies to quickly point to a number of aspects of the war on terror which were not called into question by the Supreme Court.<sup>173</sup> For example, the *Hamdan* decision in no way disturbs the Supreme Court's earlier ruling that the President has the authority to detain enemy combatants at Guantánamo Bay without any trial at all.<sup>174</sup> The Court conceded that enemy combatants could be held until the cessation of hostilities, without trial of any sort.<sup>175</sup> So, for at least as long as active combat continues in Afghanistan (leaving aside the question of how long hostilities will continue in the broader 'war on terror'), such detention will have the tacit approval of the US Supreme Court.<sup>176</sup> Thus, the 'decision does not require [the Administration] to close the detention facilities at Guantánamo Bay or release any terrorist held by the United States'.<sup>177</sup> The fact that the decision has the potential to consign detainees to

<sup>171</sup> A list released by the Pentagon on 19 April 2006 indicates that at that time, there were still approximately 490 detainees held at Guantánamo Bay. The list is available at BBC News, 'US Releases More Guantanamo Names' (2006) <<http://news.bbc.co.uk/2/hi/americas/4925030.stm>> at 1 October 2006. The only aspect of the decision that has direct relevance to these detainees is the discussion of the *DTA*. That *Act* represented an attempt 'to rein in some of the avalanche of litigation invited by the *Rasul* decision': Evidence to the Senate Committee on the Judiciary, *Hamdan v Rumsfeld: Establishing a Constitutional Process*, 109<sup>th</sup> Congress, Washington DC, 11 July 2006 (Statement of Paul 'Whit' Cobb Jr, Former Deputy General Counsel (Legal Counsel), Department of Defense) ('Senate Judiciary Committee Hearing'). The Court's interpretation of the *DTA* renders it largely moot, as it leaves on foot more than 100 habeas challenges brought before 30 December 2005 by detainees who have been held without charge.

<sup>172</sup> See, eg, Senate Judiciary Committee Hearing, above n 171 (Statement of Daniel P Collins, Former Associate Deputy Attorney General, Partner, Munger Tolles & Olson).

<sup>173</sup> See, eg, Evidence to the House Armed Services Committee, *The Supreme Court's Decision in Hamdan v Rumsfeld*, 109<sup>th</sup> Congress, Washington DC, 12 July 2006 (Statement of Steven G Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice) ('House Armed Services Committee Hearing').

<sup>174</sup> Michael C Dorf, *The Hidden — and Obvious — Lessons in the Supreme Court's Divided Ruling Invalidating Military Commissions* (2006) <<http://writ.news.findlaw.com/dorf/20060630.html>> at 1 October 2006. In *Hamdan*, 548 US \_\_ (2006) 1, the Court emphasised that:

Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities ... But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction: at 72 (Opinion of the Court).

See also *Quirin*, 317 US 1, 28 (1942); *Hamdi*, 542 US 507, 517 (2004) (Justice O'Connor).

<sup>175</sup> *Hamdan*, 548 US \_\_ (2006) 1, 72 (Opinion of the Court).

<sup>176</sup> While human rights organisations have already seized upon the ruling as a ground for renewing calls to close the prison, and while the decision has certainly lent moral authority to this argument, the decision has provided the argument no legal support *per se*: Dorf, above n 174.

<sup>177</sup> Senate Judiciary Committee Hearing, above n 171 (Statement of Steven G Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice).

legal limbo indefinitely has therefore led some commentators to describe the outcome as ‘worse than a pyrrhic victory’.<sup>178</sup>

Therefore, in some respects, nothing has changed on the ground at Guantánamo Bay at all. Nevertheless, the potential long-term impact of the decision holds more promise. In fact, the decision is considered to have far-reaching implications for the ‘analysis of executive power; the obligation to comply with customary international law; and the role of Congress in war-related decisions’.<sup>179</sup>

### C Restoring the Balance between Authority and Obligation under the Law of War

The Court’s ruling with respect to Common Article 3 of the *Geneva Conventions* is considered by a number of military law experts to be of much greater practical significance than the Court’s ultimate holding. It is true that the finding on the scope of that provision was only made within the context of interpreting the phrase ‘law of war’ in art 21 of the *UCMJ*, and did not alter the position that the *Geneva Conventions*, standing alone, are not judicially enforceable in US courts. In this sense, the Court’s holding on the application of the *Geneva Conventions* to individuals detained at Guantánamo Bay is fairly limited — it is only directly implicated in cases where the US Government seeks to put a detainee on trial.

Notwithstanding the limited nature of this holding, the Supreme Court’s support for an interpretation of Common Article 3 that is ‘as wide as possible’<sup>180</sup> will have consequences that reach far beyond the particular case at issue. One commentator has described this aspect of the opinion as ‘transcend[ing] the question of the legality of the military commission and extend[ing] to every aspect of military operations conducted against al Qaeda’.<sup>181</sup> The decision is therefore celebrated by military lawyers as a restoration of the broad approach that guided the US military in its operations for at least three decades prior to the attacks of September 11 — that Common Article 3 should be interpreted in such a way that ensures no ‘armed conflict’ falls beyond the reach of the law.<sup>182</sup>

The Court refused to accept the US Government’s interpretation of the

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<sup>178</sup> Dorf, above n 174. As Dorf explains:

Imagine you were told that the government cannot put you on trial for a crime because the court was defective, but that it could hold you without trial indefinitely. You would no doubt feel that your ‘victory’ had taken you out of the frying pan and thrown you into the fire.

<sup>179</sup> Geoffrey S Corn, Lt Col US Army (Ret), *Hamdan, Common Article 3 and the True Spirit of the Law of War* (2006) <<http://jurist.law.pitt.edu/forumy/2006/07/hamdan-common-article-3-and-true.php>> at 1 October 2006. Professor Corn is a retired Lieutenant Colonel in the US Army, and former Special Assistant to the Judge Advocate General for Law of War Matters.

<sup>180</sup> *Hamdan*, 548 US \_\_ (2006) 1, 68 (Opinion of the Court).

<sup>181</sup> Corn, above n 179.

<sup>182</sup> *Ibid.*

language of Common Article 3, which

would create an inexplicable regulatory gap in the *Geneva Conventions*. On this reading, the *Conventions* would cover international armed conflicts proper and wholly internal armed conflicts, but would not cover armed conflicts between a state and a foreign-based (or transnational) armed group or an internal armed conflict that spills over an international border into the territory of another state. There is no principled (or pragmatic) rationale for this regulatory gap.<sup>183</sup>

In holding that al Qaeda members fall under the protection of Common Article 3, the Court boldly rejected a determination made by President Bush on 7 February 2002 that the *Geneva Conventions* (including Common Article 3) did not apply to such individuals.<sup>184</sup> In doing so, the Court has been criticised for having ‘effectively signed a treaty with al Qaeda for the protection of its terrorists’.<sup>185</sup> Indeed, as the Court recognised, Common Article 3 can provide protections to parties (terrorist or otherwise) who have *not* themselves agreed to be bound by the *Geneva Conventions*.<sup>186</sup> Non-reciprocity is no excuse for non-compliance within the framework established by the *Geneva Conventions*.

The Administration’s artificial reading of the *Geneva Conventions*, which ‘essentially invoked the authority of the law of war without accepting the limits established by this law’, had been decisively overruled: ‘Necessity cannot be invoked without accepting the constraint of humanity, which is exactly how the Bush administration has interpreted the law’.<sup>187</sup> This finding was foreshadowed in oral argument when Justice Souter interrupted Solicitor General Paul D Clement, in his submissions on behalf of the Government:

For the purposes of determining the domestic authority to set up a commission, you say, the President is operating under the laws of war recognized by Congress, but for the purposes of a claim to [combatant or civilian] status, and, hence, the procedural rights that go with that status, you’re saying the laws of war don’t apply. And I don’t see how you can have it both ways.<sup>188</sup>

Thus, the Bush Administration can no longer maintain its position that while it invokes the law of war to establish military commissions, it is not required to

<sup>183</sup> Derek Jinks, ‘September 11 and the Laws of War’ (2003) 28 *Yale Journal of International Law* 1, 40–1.

<sup>184</sup> President George W Bush, ‘Memorandum: Humane Treatment of al Qaeda and Taliban Detainees’ (7 February 2002) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 134, 134–5.

<sup>185</sup> Editorial, ‘An Outrage’, *National Review Online* (US), 30 June 2006 <<http://article.nationalreview.com/?q=ZTYwOTYzMWY5NGZINDM0MTg2MDc3ZjkxYmI4ZmY4NmU=>> at 1 October 2006.

<sup>186</sup> *Hamdan*, 548 US \_\_ (2006) 1, 67 (Opinion of the Court).

<sup>187</sup> Corn, above n 179.

<sup>188</sup> Transcript of Oral Argument, *Salim Ahmed Hamdan v Donald H Rumsfeld* (US Supreme Court, 28 March 2006) 42. For a clever discussion of the ‘smoke and mirrors’ employed by the government in oral argument before the Court, see Dahlia Lithwick, ‘Because I Say So: The Supreme Court Takes the Military Tribunals Out for a Spin’, *Slate* (US), 28 March 2006 <<http://www.slate.com/id/2138841>> at 1 October 2006. For example, Lithwick states:

This war is like every other war except to the extent that it differs from those other wars. We follow the laws of war except to the extent that they do not apply to us. These prisoners have all the rights to which they are entitled by law, except to the extent that we have changed the law to limit their rights. In other words, there is almost no question for which the government cannot find a circular answer.

abide by the obligations of that same law in the conduct of those commissions. By requiring that the Government ‘accept “the bitter with the sweet”’, one commentator has stated, the Court has restored the symmetry of the law of war.<sup>189</sup> The application of Common Article 3 requires a serious rethinking on the part of the Administration with respect not only to the trial of enemy combatants, but also to conditions of detention and to interrogation techniques.<sup>190</sup>

#### IV WHERE TO FROM HERE?

In the weeks following the *Hamdan* decision, the US Congress — which had, to date, taken ‘little notice’ of issues relating to military commissions<sup>191</sup> — responded through various Congressional Committees which conducted hearings into an appropriate legislative response to the Supreme Court’s decision.<sup>192</sup> A number of military law experts testified before the Committees on the options available to Congress. Some of those options are discussed here.

##### A Giving the Commissions the Rubber-Stamp of Approval

The Supreme Court made clear that its decision rested only on an interpretation of current statutory law: ‘[D]omestic statutes control this case. If Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the *Constitution* and other laws, it has the power and prerogative to do so.’<sup>193</sup> Both Justice Kennedy and Justice Breyer emphasised in their respective concurring opinions that if the President truly needs the powers he asserted in *Hamdan*, Congress can give them to him.<sup>194</sup> As the Court made no explicit ruling on whether the President’s choice of military commission structure violated any constitutional limit, it remained possible, then, that

<sup>189</sup> Corn, above n 179.

<sup>190</sup> In addition to the provision relating to ‘regularly constituted’ courts which was considered by the Court, Common Article 3 also requires that detainees ‘shall in all circumstances be treated humanely’. This provision likely prohibits the ‘enhanced interrogation techniques’ (such as ‘waterboarding’, which simulates the experience of drowning) that the Administration is widely believed to have authorised, under the supposition that the *Geneva Conventions* do not apply. Moreover, by Act of Congress — the *War Crimes Act of 1997*, 18 USC § 2441 (2000) — violations of Common Article 3 are considered ‘war crimes’, punishable as federal offences when committed by or against US nationals and military personnel. A direct reference to the *War Crimes Act of 1997* by Justice Kennedy has therefore left a number of Administration officials in a state of alarm. In fact, Counsel to the President, Alberto Gonzales, considered that a determination that the *Geneva Conventions* do not apply to al Qaeda ‘[s]ubstantially reduces the threat of domestic criminal prosecution [of interrogators] under the *War Crimes Act*’: Alberto Gonzales, ‘Memorandum for the President: Decision re Application of the *Geneva Convention on Prisoners of War* to the Conflict with al Qaeda and the Taliban’ (25 January 2002).

<sup>191</sup> Eugene R Fidell, ‘Military Commissions and Administrative Law’ (2003) 6 *Green Bag* 379, 386, referring to ‘perfunctory hearings in 2001’ (only Secretary of Defense Rumsfeld and Deputy Secretary of Defense Wolfowitz testified before the Senate Armed Services Committee hearing on Military Commissions on 12 December 2001).

<sup>192</sup> The Senate Committee on the Judiciary held one hearing on 11 July 2006; the Senate Armed Services Committee held three hearings on 13 and 19 July, and on 2 August 2006; and the House Armed Services Committee held four hearings on 12 and 26 July, and on 7 and 13 September 2006.

<sup>193</sup> *Hamdan*, 548 US \_\_ (2006) 1, 2 (Justice Kennedy, concurring in part).

<sup>194</sup> *Ibid.* ‘Nothing prevents the President from returning to Congress to seek the authority he believes necessary’: *Hamdan*, 548 US \_\_ (2006) 1, 1 (Justice Breyer, concurring opinion).

assuming all necessary legislative amendments were made, Hamdan's military commission could be reconstituted without any changes whatsoever.

On this basis, Administration witnesses urged Congress to authorise essentially the same commissions created by the President by codifying the relevant Military Commission Orders and Instructions, with some minor amendments where necessary. As one witness put it, 'there is nothing in *Hamdan* that this Congress does not have the power to fix'.<sup>195</sup>

This argument for 'putting everything back in place the way it was'<sup>196</sup> assumed that Congress could simply eliminate the requirement for a 'regularly constituted court' under Common Article 3 by effectively 'trumping' the *Geneva Conventions* in their application to military commissions by statute. This would represent quite an extraordinary step, as the *Geneva Conventions* are the most widely ratified international conventions, boasting universal acceptance by 194 states parties.<sup>197</sup> The standards of Common Article 3 itself are part of US military doctrine, policy and training, and have long been treated as standard operating procedure.<sup>198</sup>

Were Congress to repudiate in some way the application of Common Article 3 to this or any conflict, it would be reversing decades of U.S. law and policy and sending a message to U.S. troops that is diametrically opposed to their training.<sup>199</sup>

Furthermore, a number of witnesses warned Congress that doing so would make the US the first country in the world to formally renounce its obligations under Common Article 3.<sup>200</sup>

Even if Congress is able to navigate the political and legal minefield that 'trumping' the *Geneva Conventions* would entail, such a course of action would

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<sup>195</sup> Senate Judiciary Committee Hearing, above n 171 (Statement of Daniel P Collins, Former Associate Deputy Attorney General, Partner, Munger Tolles & Olson). The same view was expressed to the Committee by Steven G Bradbury, who stated: 'All of the issues with military commissions identified by the Supreme Court can be addressed and resolved through legislation. The Administration stands ready to work with Congress to do just that': Senate Judiciary Committee Hearing, above n 171 (Statement of Steven G Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, US Department of Justice).

<sup>196</sup> See, eg, Senate Armed Services Committee Hearing, above n 1, 4 (Statement of Scott L Silliman, Professor of the Practice of Law and Executive Director, Center on Law, Ethics and National Security, Duke University).

<sup>197</sup> See International Committee of the Red Cross, *International Humanitarian Law: States Parties / Signatories* (2006) <<http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P>> at 1 October 2006.

<sup>198</sup> See Gordon England, 'Memorandum for Secretaries of the Military Departments concerning Application of Common Article 3 of the *Geneva Conventions* to the Treatment of Detainees in the Department of Defense' (7 July 2006), stating that:

It is my understanding that, aside from the military commission procedures, existing DoD orders, policies, directives, execute [sic] orders, and doctrine comply with the standards of Common Article 3 and, therefore, actions by DoD personnel that comply with such issuances would comply with the standards of Common Article 3.

<sup>199</sup> Senate Armed Services Committee Hearing, above n 1, 4 (Statement of Katherine Newell Bierman, Counterterrorism Counsel, US Program, Human Rights Watch).

<sup>200</sup> See, eg, *ibid* 5 (Statement of Katherine Newell Bierman, Counterterrorism Counsel, US Program, Human Rights Watch); Senate Armed Services Committee Hearing, above n 1 (Statement of Michael Mernin, Chair of the Committee on Military Affairs and Justice, New York City Bar Association); Senate Armed Services Committee Hearing, above n 1 (Statement of Professor Neal Katyal, Georgetown University Law Center).

certainly result in further litigation.<sup>201</sup> Some hoped the risk that military commission proceedings would once again be delayed while legal challenges work their way through the federal courts might, however, be enough to ensure this option would be abandoned.<sup>202</sup>

Rather than simply overruling the Supreme Court's decision by statute, others sought to establish new military commissions from scratch, which would go some way to remedying the deficiencies identified by the Court. A number of legislative proposals were put forward.<sup>203</sup> While accepting that 'certain procedural minima from which no derogation will be permitted' might be considered appropriate by Congress, witnesses strongly urged Congress to 'resist the temptation to micro-manage military commission procedure in advance, thereby eliminating the very flexibility that makes this tool so important'.<sup>204</sup>

Efforts to retain the basic military commission structure appear to have been founded on an unwillingness to accept *any* possibility that one of these 'guilty people' might go free.<sup>205</sup> The military commission system provides a forum willing to accept evidence gathered by military interrogation, which would simply be inadmissible in any court or court-martial; a forum where ultimate control over the outcome is preserved in the hands of the Administration. It is

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<sup>201</sup> Katyal, in his testimony before Congress, stated that 'any attempt to resuscitate the military commissions by tinkering with their precise procedures will get bogged down in litigation that may continue for years': Senate Armed Services Committee Hearing, above n 1, 6 (Statement of Professor Neal Katyal, Georgetown University Law Center).

<sup>202</sup> See, eg, *ibid.*

<sup>203</sup> In the last week of July 2006, the Administration's draft Bill to authorise military tribunals was leaked in Washington DC. The Bill, entitled Enemy Combatant Military Commissions Act of 2006, sought to put the previous military commission orders and instructions back in place. A number of other Bills were introduced in Congress following the ruling in *Hamdan*, 548 US \_\_ (2006) 1. They included:

- Unprivileged Combatant Act of 2006, S 3614, 109<sup>th</sup> Cong (2006).
- Bringing Terrorists to Justice Act of 2006, S 3861, 109<sup>th</sup> Cong (2006).
- A Bill to Authorize Military Commissions to Bring Terrorists to Justice, to Strengthen and Modernize Terrorist Surveillance Capabilities, and for Other Purposes, S 3886, 109<sup>th</sup> Cong (2006).
- Military Commissions Act of 2006, S 3901, 109<sup>th</sup> Cong (2006); and
- Military Commissions Act of 2006, HR 6054, 109<sup>th</sup> Cong (2006).

<sup>204</sup> Senate Judiciary Committee Hearing, above n 171 (Statement of Daniel P Collins, Former Associate Deputy Attorney General, Partner, Munger Tolles & Olson).

<sup>205</sup> This is the sense one gets from listening to the testimony given before the Congressional committees and the questions asked of witnesses. In fact, from this evidence, there appear to be two dominant positions: (i) Congress should start with the military commission system set up by the Administration, and change the rules to the extent that that system will fulfil the requirements set out by the Supreme Court in *Hamdan*, but not so far as to risk any acquittals; or (ii) Congress should start with the court-martial system under the *UCMJ* and the Manual for Courts-Martial, and change the rules to the extent that that system will be able to ensure convictions, but not so far as to risk coming into conflict with the Supreme Court's decision. Major Michael Mori, US military-appointed defence counsel to Australian David Hicks, has facetiously summed it up as follows: 'We need to set up a system to convict these guilty people!': Major Michael Mori, 'Legal Update on David Hicks' (Speech delivered at the Law Institute of Victoria, Melbourne, Australia, 21 August 2006).

therefore the only option which can *guarantee* that the guilty will be convicted:

there are those who believe the military commission system rules must *ensure* convictions. I believe they must ensure *fairness*. If that means some who are guilty may not ultimately be convicted, that is the price we pay for having a legal system.<sup>206</sup>

Those who opposed the use of military commissions pointed to a number of defects in the Guantánamo commissions that ‘illuminate why any attempt to start with or ratify the President’s Order would be a serious mistake’.<sup>207</sup> The military commissions, they say, have consistently failed to meet the proud traditions of American military justice, ‘both in design and in execution’.<sup>208</sup> In addition to the procedural and structural flaws identified by the Supreme Court, the rules governing military commissions were subject to constant change.<sup>209</sup> Even military commission prosecutors resigned in protest, calling the system ‘a half-hearted and disorganized effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged’.<sup>210</sup> Furthermore, it was argued that the practical benefits of

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<sup>206</sup> Senate Armed Services Committee Hearing, above n 1, 3 (Statement of Eugene R Fidell, President, National Institute of Military Justice) (emphases in original).

<sup>207</sup> Ibid 3 (Statement of Professor Neal Katyal, Georgetown University Law Center).

<sup>208</sup> Senate Judiciary Committee Hearing, above n 171 (Statement of Lt Commander Charles Swift, Office of the Chief Defense Counsel, Office of Military Commissions, United States Department of Defense, JAGC, USN). See also Senate Armed Services Committee Hearing, above n 1 (Statement of Professor Neal Katyal, Georgetown University Law Center).

<sup>209</sup> After the Court of Appeals decision in *Salim Ahmed Hamdan v Donald H Rumsfeld, Secretary of Defense*, 415 F 3d 33 (2005), *Military Commission Order No 1* was reissued, requiring all commission proceedings to begin again from scratch. The Department of Defense also issued a new *Order* restructuring the military commissions just one week before the Government was due to submit a brief in opposition of certiorari in the *Hamdan* case. One change came literally on the eve of oral argument in the Supreme Court, no doubt in response to one of the most damning criticisms of the commissions (that they permitted admission of evidence obtained by torture). See Senate Armed Services Committee Hearing, above n 1, 5 (Statement of Eugene R Fidell, President, National Institute of Military Justice). As Fidell explains, the military commissions have not benefited from the usual administrative practices in rule-making, which seek to maintain public confidence in governmental processes by ‘maximizing public participation and transparency and minimizing departures from normal governmental practice’. He gives the example of changes to military commission instructions which

were simply made in the version posted on the Department of Defense’s website, and made known informally to a handful of journalists covering the Pentagon. The website version in no way disclosed the fact that changes had been made ... The date shown on the affected Military Commission Instruction was also not changed.

This informal manner of rule-making, Fidell explains, ‘only serves to erode public confidence both [in the US] and abroad in the soundness and regularity of commission-related decision-making’: Fidell, above n 191, 379–88.

<sup>210</sup> Leaked email from John Carr, Air Force Captain, to Colonel Fred Borch (15 March 2004) (copy on file with author).

the commissions that the Administration promised have failed to materialise.<sup>211</sup> Almost five years have passed, with no evident progress.<sup>212</sup>

### B Using the Court-Martial Model

Others testified before Congress that ‘the existing court-martial system provides a battle-tested way to try terrorists today’.<sup>213</sup> The Supreme Court implicitly endorsed the use of courts-martial to try Guantánamo detainees, effectively handing Congress and the Administration a ‘road map to follow’ in the form of the *UCMJ*.<sup>214</sup> In the words of one witness, the President ‘need only make the policy decision to use them’.<sup>215</sup>

Courts-martial already have the authority to try individuals for war crimes.<sup>216</sup> Moreover, they offer an established judicial structure accustomed to handling the inherent security risks and logistical problems posed by adjudicating crimes against the laws of war. They already command international respect, and a vast body of case law developed by courts-martial commands the deference of the federal courts that the Government seeks.

While Administration witnesses testified that the use of courts-martial would require ‘drastic modifications’ as ‘[r]igid application of evidentiary rules that have been developed for prosecuting domestic crimes would foreclose most if not all war crimes prosecutions in the war with al Qaeda’,<sup>217</sup> there is little evidence to justify this scepticism. The rules that apply to courts-martial do in

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<sup>211</sup> Senate Judiciary Committee Hearing, above n 171 (Statement of Lt Commander Charles Swift, Office of the Chief Defense Counsel, Office of Military Commissions, US Department of Defense, JAGC, USN). Lt Commander Swift is detailed defence counsel to Salim Hamdan.

<sup>212</sup> It was noted in testimony that in fact, not a single military commission trial has been completed, when, by contrast, during the same period, the US Army alone has held 373 courts-martial on the battlefields of Iraq and Afghanistan. No one was even indicted until June 2004, and only 10 individuals in all have been charged to date: Senate Armed Services Committee Hearing, above n 1, 5 (Statement of Professor Neal Katyal, Georgetown University Law Center).

<sup>213</sup> Senate Judiciary Committee Hearing, above n 171 (Statement of Lt Commander Charles Swift, Office of the Chief Defense Counsel, Office of Military Commissions, United States Department of Defense, JAGC, USN).

<sup>214</sup> House Armed Services Committee Hearing, above n 173 (Statement of John D Hutson, President and Dean, Franklin Pierce Law Center, RADM, JAGC, USN (ret)).

<sup>215</sup> Senate Judiciary Committee Hearing, above n 171 (Statement of Scott L Silliman, Professor of the Practice of Law and Executive Director, Centre on Law, Ethics and National Security, Duke University).

<sup>216</sup> *UCMJ* 10 USC § 818 (art 18) gives general courts-martial jurisdiction to prosecute violations of the law of war.

<sup>217</sup> Senate Judiciary Committee Hearing, above n 171 (Statement of Paul ‘Whit’ Cobb, Jr, Former Deputy General Counsel (Legal Counsel) of the US Department of Defense). One of the arguments put forward to support this position is that detainees may attempt to gain access to highly sensitive classified information in an attempt to derail the prosecution, and may misuse attorney-client privilege in order to pass sensitive information to other detainees or terrorists, thereby jeopardising the war effort. On this point, Cobb cites the example of *United States v Sattar* (Superseding Indictment) 02 Cr 395 (JGK), US Attorney, Southern District of New York, 9 November 2003. In that case, Lynne Stewart, defence counsel to the blind Egyptian sheik Omar Abdel Rahman, was charged with conspiring to defraud the US; conspiring to provide and conceal material support to terrorist activity; providing and concealing material support to terrorist activity; and two counts of making false statements. On 10 February 2005, Stewart was found guilty on all five counts for her part in enabling communications between the imprisoned sheikh and his network.

fact have tremendous flexibility, allowing them to handle the complexities and jurisdictional difficulties that terrorism cases pose. Those rules permit closure of the courtroom for sensitive national security information, authorize trials on secure military bases far from civilians, enable substitutions of classified information by the prosecution, and permit withholding of witnesses' identities.<sup>218</sup> There is no reason to assume that such a system cannot handle the unique circumstances presented by the Guantánamo cases.

Finally, the Supreme Court did not require that there be *no* deviation from the rules of the *UCMJ*. The court-martial system, which fully conforms to international law, could therefore be used as a starting point from which Congress could consider what changes might be necessary to accommodate these trials (for example, by amending standards for the admission of evidence, and rules regarding hearsay and chain of custody). While full application of the rules by which courts-martial operate might be overly burdensome and potentially unfeasible, so long as essential safeguards are maintained, the system would be capable of providing a fair trial and complying with the requirement for a 'regularly constituted court'.

### C Back Where We Started

It was noted during Congressional hearings that the various Committees were picking up where they started off five years ago in November and December of 2001, when they urged the President to work with Congress to construct a just system of military commissions.<sup>219</sup> Instead, the President's *Military Order* 'was adopted in haste without the active participation of the Judge Advocates, consultation with Congress or public comment'.<sup>220</sup> Despite the initial haste, five years later, the commissions have yet to try a single case, and in the interim, 'precious time, effort and resources have been wasted'.<sup>221</sup>

For this reason, witnesses such as Professor Neal Katyal (who argued the case on behalf of Hamdan before the Supreme Court) urged Congress to proceed with caution, to ensure that this time the Government would get it right. He implored the Senate Armed Services Committee to examine closely the different

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<sup>218</sup> See Senate Armed Services Committee Hearing, above n 1, 7 (Statement of Professor Neal Katyal, Georgetown University Law Center).

<sup>219</sup> See, eg, Senate Judiciary Committee Hearing, above n 171 (Statement of the Hon Patrick Leahy, United States Senate, Vermont).

<sup>220</sup> Senate Armed Services Committee Hearing, above n 1, 1–2 (Statement of Michael Mernin, Chair, Committee on Military Affairs and Justice, New York City Bar Association). The possibility of using military commissions was first raised by two veterans of Bush senior's Administration, William Barr and George Terwilliger. Their suggestions ultimately led to a White House Counsel's Office session to draft the President's *Military Order*, with no opportunity for public participation. The first *Military Commission Order* — setting out procedures for trials by military commissions — was prepared and signed by Secretary of Defense Rumsfeld after private consultation with nine private citizens. Any advice provided to Rumsfeld has not been made public: Steven Brill, *After: How America Confronted the September 12 Era* (2003) 125–6, 266, 393. I am grateful to one of the referees for alerting me to this source. For a comprehensive discussion of the serious flaws in the informal process of rule-making for the military commissions, and the way in which military commissions have been carved out of the sweep of US administrative law relating to processes for rule-making, see Fidell, above n 191, 379–88.

<sup>221</sup> Senate Judiciary Committee Hearing, above n 171 (Statement of the Hon Patrick Leahy, US Senate, Vermont).

existing avenues for prosecution of Guantánamo detainees before concluding that there is a need for further legislation.<sup>222</sup> Congress needs to be sure, he argued, that we need a new system ‘before gambling once again on an unproven one’.<sup>223</sup> Many of the pragmatic problems that plagued the Guantánamo commissions arose because the Administration was forced to make things up as it went along. ‘Inventing an entirely new legal architecture out of whole cloth’, argued Professor Katyal, ‘takes a tremendous amount of time and should only be done when absolutely necessary’.<sup>224</sup> This Congress, he stated, ‘should not resort to military commissions unless it is convinced that the gravity of the threat truly requires such a momentous step’.<sup>225</sup>

Reminding the Senate Committee that only 10 individuals are presently designated for trial before the military commissions — and that the charges brought against them took over four years to prepare — Professor Katyal testified that enacting legislation for this handful of individuals would be unwise:

To create an entirely new legal system for these ten individuals — and to attempt to do it reasonably promptly — is unprecedented. ... This is, in short, one of the worst factual contexts for new legislation. The legislation would be created for only a small number of people, all of whom have already been confined for years, and all of whom will continue to be locked up regardless of any legislation that Congress passes. To boot, each of those men is already amenable to trial in court-martial and in a federal district court.<sup>226</sup>

In Professor Katyal’s view, ‘whatever purported benefits might be gained by some new system must be weighed against the inevitable litigation risk’.<sup>227</sup> If Congress and the Administration attempt to work their way around *Hamdan* to create another substandard tribunal, ‘the tribunal system will remain on trial, instead of the terrorists’.<sup>228</sup> Congress was therefore urged to ‘consider whether [the] decision to create a new trial system will set back the war on terror by inviting litigation, and the overturning of criminal convictions in terrorism cases’.<sup>229</sup>

## V A FORK IN THE ROAD

Administration officials recognised that after the *Hamdan* decision they faced a fork in the road, and that much would depend on how they, and Congress, reacted to the decision. They were given a fresh opportunity to work together in establishing an appropriate system of justice. Congress could have ‘compound[ed] the damage of the past five years’ by rushing through ‘legislation

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<sup>222</sup> Senate Armed Services Committee Hearing, above n 1, 3 (Statement of Professor Neal Katyal, Georgetown University Law Center).

<sup>223</sup> *Ibid* (Statement of Professor Neal Katyal, Georgetown University Law Center).

<sup>224</sup> Neal Katyal, ‘Sins of Commissions: Why Aren’t We Using the Courts-Martial System at Guantanamo?’ *Slate* (US) 8 September 2004 <<http://www.slate.com/id/2106406/>> at 1 October 2006.

<sup>225</sup> Senate Armed Services Committee Hearing, above n 1, 21 (Statement of Professor Neal Katyal, Georgetown University Law Center).

<sup>226</sup> *Ibid* 7.

<sup>227</sup> *Ibid* 12.

<sup>228</sup> *Ibid* 1 (Statement of Katherine Newell Bierman, Counterterrorism Counsel, US Program, Human Rights Watch).

<sup>229</sup> *Ibid* 13 (Statement of Professor Neal Katyal, Georgetown University Law Center).

that would rubber-stamp the regime that the Court rejected',<sup>230</sup> or it could have begun fixing an Administration policy that had gone terribly wrong.

At the time of writing, in late September 2006, a bill to authorise trial by military commission for violations of the law of war, and for other purposes, has been passed by the Senate and the House, and cleared for the White House.<sup>231</sup> The Military Commissions Act of 2006 authorises the President to establish military commissions, and establishes procedures governing their use. To this end, it inserts a new chapter (ch 47A) into title 10 of the *US Code*. Perhaps most importantly, § 948b provides that:

- (f) Status of Commissions Under Common Article 3 — A military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the *Geneva Conventions*.
- (g) Geneva Conventions Not Establishing Source of Rights — No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the *Geneva Conventions* as a source of rights.

Whether the constitutionality of this Military Commissions Act of 2006 will be challenged in the federal courts, and whether any military commissions convened pursuant to it will represent an improvement on the pre-*Hamdan* commissions, is yet to be seen. In the meantime, the Guantánamo detainees will continue their waiting game.

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<sup>230</sup> Editorial, 'Congress's Turn', *The Washington Post* (Washington DC, US) 9 July 2005, B06.

<sup>231</sup> Military Commissions Act of 2006, S 3930, 109<sup>th</sup> Cong (2006); Military Commissions Act of 2006, HR 6166, 109<sup>th</sup> Cong (2006).

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