

Recent Developments

MILITARY COMMISSIONS ACT OF 2006

INTRODUCTION

On October 17, 2006, President Bush signed into law the Military Commissions Act of 2006 (“MCA”).¹ Congress passed the MCA to authorize the trial by military commissions of detained terrorism suspects after the Supreme Court’s decision in *Hamdan v. Rumsfeld*² invalidated the military commissions previously established pursuant to a 2001 military order from President Bush.³ A 5-3 majority of the Court held, *inter alia*, that the Detainee Treatment Act of 2005 (“DTA”)⁴ did not strip the Court of jurisdiction to hear Hamdan’s appeal,⁵ that the military commissions were not expressly authorized by any act of Congress,⁶ and that the commissions were illegal for violating the Uniform Code of Military Justice (“UCMJ”) and the Geneva Conventions of 1949.⁷

The MCA adds chapter 47A to title 10 of the U.S. Code to give statutory authorization for the military commissions.⁸ This Recent Development explores some of the more controversial aspects of the MCA, especially those sections that respond to the Court’s *Hamdan* decision. The discussion that follows is divided into four sections: jurisdiction, procedure, judicial review, and the Geneva Conventions.

1. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (Westlaw [hereinafter MCA]).

2. 126 S. Ct. 2749 (2006).

3. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. § 918 (2001), *reprinted in* 41 I.L.M. 252 (2002). That order has now been superseded by Exec. Order No. 13,425, 72 Fed. Reg. 7737 (Feb. 20, 2007), *available at* <http://www.whitehouse.gov/news/releases/2007/02/20070214-5.html>, which establishes “military commissions to try alien unlawful enemy combatants for offenses triable by military commission as provided in chapter 47A of title 10.”

4. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005) (Westlaw [hereinafter DTA]).

5. *Hamdan*, 126 S. Ct. at 2764–67.

6. *Id.* at 2774–75.

7. *Id.* at 2786–95.

8. MCA § 3. The Department of Defense has released a Manual for Military Commissions, which specifies the comprehensive procedures to be used in the commissions. U.S. DEP’T OF DEFENSE, THE MANUAL FOR MILITARY COMMISSIONS 2007, *available at* <http://www.defenselink.mil/news/d20070118/MCM.pdf>.

I. JURISDICTION

“Any alien unlawful enemy combatant is subject to trial by military commission” under 10 U.S.C. § 948c. U.S. citizens are exempt from trial by military commission.⁹ Lawful enemy combatants are also exempt, as the commissions only have jurisdiction to try violations of the laws of war or offenses made punishable by the MCA “when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.”¹⁰ Lawful enemy combatants who violate the laws of war or commit any crime specified in the MCA are subject to the jurisdiction of courts-martial.¹¹

The Administration’s distinction between lawful and unlawful enemy combatants has attracted heavy scrutiny. The MCA defines “lawful enemy combatant” as one who is:

- (A) a member of the regular forces of a State party engaged in hostilities against the United States;
- (B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or
- (C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.¹²

“Unlawful enemy combatant” is defined as either:

- (i) a person who has engaged in hostilities *or who has purposefully and materially supported hostilities* against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces);
- or

9. 10 U.S.C. § 948a(3) defines “alien” as a non-citizen of the United States. Permanent resident aliens and nonimmigrant aliens living in the United States fall within the ambit of the MCA, raising serious constitutional issues regarding their potential treatment under the MCA. *See* Brief of Professors of Constitutional Law and Federal Jurisdiction as Amici Curiae Supporting Petitioners, *Al-Marri v. Wright*, 443 F. Supp. 2d 774 (2006) (No. 06-7427), 2006 WL 4003614 (arguing that the MCA unconstitutionally abrogates the habeas corpus writ, at least as applied to Al-Marri, a lawfully admitted nonimmigrant alien held as an enemy combatant as determined by the President).

10. 10 U.S.C. §§ 948d(a)–(b). Upon signing the MCA, President Bush indicated a desire to try by military commission terrorism suspects for conduct before September 11, 2001 (including the USS Cole attack and the bombing of U.S. embassies in Kenya and Tanzania). Press Release, The White House Office of the Press Secretary, President Bush Signs Military Commissions Act of 2006 (Oct. 17, 2006), available at <http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html>.

11. 10 U.S.C. § 948d(b).

12. *Id.* § 948a(2). This definition of “lawful enemy combatant” tracks the first three categories of people entitled to prisoner of war status under the Third Geneva Convention. Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

(ii) a person who, before, on, or after the date of enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.¹³

Members of the Taliban, al Qaeda, and “associated forces” are, by MCA definition, unlawful enemy combatants. One does not have to directly engage in hostilities to fall within the military commissions’ jurisdiction—purposeful and material support of hostilities will suffice. U.S. citizens may fall under the unlawful enemy combatant definition, as it applies to a “person” not an “alien.”¹⁴ Further, any alien determined to be an unlawful enemy combatant by either a Combatant Status Review Tribunal (“CSRT”) or *any other* “competent tribunal” established under the authority of the President or Secretary of Defense is subject to military commissions under 10 U.S.C. § 948d(c).

The MCA lists all offenses triable by the military commissions, including torture,¹⁵ cruel or inhuman treatment,¹⁶ terrorism,¹⁷ providing material support for terrorism,¹⁸ wrongfully aiding the enemy,¹⁹ spying,²⁰ and conspiracy.²¹

II. PROCEDURE

The Court in *Hamdan* found various procedural aspects of the original military commissions to be in violation of the UCMJ and Common Article 3 of the Geneva Conventions, particularly the ability to exclude the defendant and the defendant’s civilian counsel from portions of the trial, the use of secret and classified evidence, and liberal evidentiary rules allowing any evidence of probative value to a reasonable person, including evidence elic-

13. 10 U.S.C. § 948a(1) (emphasis added).

14. These definitions are for chapter 47A of title 10 of the U.S. Code, but they could also be used for other purposes.

15. 10 U.S.C. § 950v(b)(11).

16. *Id.* § 950v(b)(12).

17. *Id.* § 950v(b)(24).

18. *Id.* § 950v(b)(25). This crime is very contentious for the expansive definition of “material support or resources” found in 18 U.S.C. § 2339A(b) (2002) (Westlaw).

19. 10 U.S.C. § 950v(b)(26).

20. *Id.* § 950v(b)(27).

21. *Id.* § 950v(b)(28). Four Justices of the U.S. Supreme Court found that conspiracy was not a violation of the law of war. *Hamdan*, 126 S. Ct. at 2779–86. *Hamdan* now has been charged with providing material support for terrorism and conspiracy to violate various laws of war. Memorandum from Office of the Chief Prosecutor, Office of Military Commissions, U.S. Dep’t of Defense, to Detainee Salim Ahmed Hamdan 0149, Guantanamo Bay, Cuba (Feb. 2, 2007), available at <http://www.defense.gov/news/d2007Hamdan%20-%20Notification%20of%20Sworn%20Charges.pdf>.

ited through coercion or torture.²² The MCA resolved some of these objections, but other departures from the UCMJ remain.²³

The procedures adopted in the MCA mirror those used in courts-martial under chapter 47 of title 10 of the U.S. Code, though judicial construction of those statutes is not binding on the commissions.²⁴ Similarly, no precedents from MCA commissions are to be used in any way in chapter 47 courts-martial proceedings.²⁵ The UCMJ provisions relating to speedy trials, compulsory self-incrimination, and pretrial investigations are omitted from the military commissions by 10 U.S.C. § 948b(d). “No person shall be required to testify against himself at a proceeding of a military commission,” but confessions previously obtained may be admissible.²⁶

Statements that are obtained through torture are inadmissible under 10 U.S.C. § 948r(b), except against a person accused of torture. Torture is later defined as a crime punishable by military commission in § 950v(b)(11), but it is not defined for purposes of § 948r(b); thus, it is unclear what amounts to torture for § 948r(b) such that a statement would be excluded.²⁷ Furthermore, the MCA has a more relaxed standard for statements obtained before enactment of the DTA than for post-enactment statements.²⁸ A pre-DTA statement contested on the basis of coercion is admissible if the judge finds that the “totality of the circumstances renders the statement reliable and possessing sufficient probative value” and that the “interests of justice would best be served by admission of the statement into evidence.”²⁹ A

22. *Hamdan*, 126 S. Ct. at 2786–93.

23. MCA § 4; 10 U.S.C. § 948b(d). For a procedural comparison of the original military commissions, the MCA-authorized military commissions, and courts-martial, see Jennifer K. Elsea, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice*, Cong. Res. Service Rep., Oct. 12, 2006, available at <http://www.fas.org/sgp/crs/natsec/RL33688.pdf>.

24. 10 U.S.C. § 948b(c).

25. *Id.* § 948b(e).

26. *Id.* §§ 948r(a)–(c).

27. The applicable definition of torture may be informed by controversial internal memoranda from the Department of Justice Office of Legal Council discussing competing interpretations of “severe physical pain and suffering.” Compare Memorandum from Jay S. Bybee, Asst. Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President, Regarding Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>, with Memorandum from Daniel Levin, Acting Asst. Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to James B. Comey, Deputy Att’y Gen., U.S. Dep’t of Justice, Regarding Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004), available at <http://www.usdog.gov/olc/18usc23402340a2.htm>, and Memorandum from Daniel Levin, Acting Asst. Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to James B. Comey, Deputy Att’y Gen., U.S. Dep’t of Justice, Regarding Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004), available at <http://www.usdoj.gov/olc/dagmemo.pdf> (repudiating and replacing the Bybee memo).

28. 10 U.S.C. §§ 948r(c)–(d). The DTA, enacted on December 30, 2005, established a uniform standard of interrogation techniques for those held in Department of Defense custody and prohibited the use of cruel, inhuman, or degrading (“CID”) treatment against any person held in U.S. custody anywhere. Arsalan M. Suleman, Recent Development, *Detainee Treatment Act of 2005*, 19 HARV. HUM. RTS. J. 257, 259–69 (2006).

29. 10 U.S.C. § 948r(c).

post-DTA statement is subject to the further requirement that the interrogation methods used to obtain the statement did not violate the DTA section 1003 prohibition on the use of cruel, inhuman, and degrading (“CID”) treatment.³⁰ If a statement is not inadmissible under § 948r, then the Secretary of Defense has the discretion to allow the evidence to be admitted.³¹

The Secretary of Defense also has the discretion to allow evidence to be admitted “if the military judge determines that the evidence would have probative value to a reasonable person.”³² Other evidentiary rules that the Secretary “may prescribe” include: 1) no exclusionary rule for evidence seized without authorization,³³ 2) evidence admitted as “authentic” if the military judge finds “sufficient basis . . . that the evidence is what it is claimed to be” and the commission members are instructed to consider any authentication issue in attributing weight to the evidence,³⁴ 3) admissibility of hearsay evidence otherwise excludable in courts-martial so long as the adverse party is given notice sufficient to prepare a defense to the evidence and is unable to prove the evidence “unreliable or lacking in probative value,”³⁵ and 4) exclusion of evidence “the probative value of which is substantially outweighed” by “unfair prejudice, confusion of the issues, or misleading the commission,” or by time considerations.³⁶

Accused detainees subject to trial by military commission are permitted to present evidence in their defense, cross-examine witnesses who *testify* against them, examine and respond to evidence admitted against them, represent themselves,³⁷ and access evidence that reasonably tends to exculpate them.³⁸ They shall receive assistance of counsel and be present at all sessions of the commissions,³⁹ except that the judge may exclude the accused upon a determination that, after being warned, the accused “persists in conduct that justifies exclusion from the courtroom” to ensure the physical safety of persons or prevent disruption of the proceedings.⁴⁰ Furthermore, under 10 U.S.C. § 949d(d), the military judge may close to the public all or part of the commission trial based on a “specific finding,” including one based on *ex parte* or *in camera* presentations, that closure is necessary to protect indi-

30. *Id.* § 948r(d). The MCA definition of CID treatment is the same as the DTA definition, which is rather unclear and subject to judicial interpretation. Suleman, *supra* note 28, at 262–63. The MCA also provides that the President “shall take action to ensure compliance” with MCA § 6(c), which restates the prohibition on CID treatment and its definition as originally provided for in the DTA. MCA § 6(c).

31. 10 U.S.C. § 949a(b)(2)(C).

32. *Id.* § 949a(b)(2)(A). The Court in *Hamdan* criticized this standard, 126 S. Ct. 2749, 2786–87 (2006), though § 948r bars evidence elicited through coercion.

33. 10 U.S.C. § 949a(b)(2)(B).

34. *Id.* § 949a(b)(2)(D).

35. *Id.* § 949a(b)(2)(E).

36. *Id.* § 949a(b)(2)(F).

37. *Id.* §§ 949a(b)(1)(A), (D) (emphasis added).

38. *Id.* § 949j(d).

39. *Id.* §§ 949a(b)(1)(B)–(C).

40. *Id.* § 949d(e).

vidual physical safety or information the disclosure of which could reasonably be expected to cause damage to national security.⁴¹ Classified information,⁴² including “sources, methods, or activities” involved in obtaining evidence, is also privileged from disclosure if disclosure would be “detrimental” to national security, though some alternatives to disclosure are available.⁴³

For procedural issues not specified in the MCA, including “elements and modes of proof,” the Secretary of Defense shall, “in consultation with the Attorney General,” prescribe such procedures in line with those used in courts-martial “so far as the Secretary considers practicable or consistent with military or intelligence activities.”⁴⁴ Article 36 of the UCMJ is amended to exclude military commissions from the article’s uniformity mandate.⁴⁵ A two-thirds vote of the commission members present is required for convictions.⁴⁶ Sentences of confinement for more than ten years require a three-fourths vote, and death penalty sentences require unanimity.⁴⁷ Confinement may be executed “under the control of any of the armed forces,” in any penal or correctional institution under U.S. control, in any penal or correctional institution under the control of a U.S. ally, or in any penal or correctional institution that the United States is allowed to use.⁴⁸

III. JUDICIAL REVIEW

The Court in *Hamdan* avoided the issue of whether the DTA unconstitutionally suspended the writ of habeas corpus by holding that DTA section 1005(e)(1) does not apply to pending habeas cases.⁴⁹ MCA section 7(a) replaced DTA section 1005(e)(1) and amended 28 U.S.C. § 2441 to read:

41. Procedures for claiming the national security privilege during trial are specified in *id.* § 949d(f)(2)(C).

42. *Id.* § 948a(4).

43. *Id.* §§ 949d(f), 949j(c) (examples of alternatives to disclosure include redaction and summaries of the classified information). Procedures for claiming the national security privilege by the head of the concerned executive agency or military department are specified in *id.* § 949d(f)(2).

44. *Id.* § 949a(a).

45. MCA §4(a)(3). For the Court’s discussion of this provision in *Hamdan*, see 126 S. Ct. at 2790.

46. 10 U.S.C. § 949m(a). There must always be at least five members of a military commission present. *Id.* § 948m. Guidelines relating to the composition of the commissions and requirements applicable to counsel are contained in *id.* §§ 948h–948m, 949c.

47. *Id.* §§ 949m(b)–(c). In death penalty cases, there must be twelve members on the commission, though if twelve members “are not reasonably available,” then at least nine members should serve. *Id.*

48. *Id.* § 949u(a). Thus, a detainee convicted by military commission could be held in a facility outside the United States and under foreign control, effectively bypassing the restrictions on CID treatment as mandated by the DTA and MCA section 6(c). Persons held in facilities not under the control of the armed forces are subject to the same treatment as persons “confined or committed by the courts of the United States or . . . of the . . . place in which the institution is situated.” *Id.* § 949u(b) (emphasis added).

49. DTA section 1005(h) did not indicate retroactive application for DTA section 1005(e)(1). *Hamdan*, 126 S. Ct. at 2764–67.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.⁵⁰

This jurisdiction-stripping clause took effect on the date of enactment of the MCA and applies to “all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.”⁵¹ Congress thus legislated away the Court’s ground of avoidance of the habeas-stripping issue in *Hamdan*.⁵² This provision applies equally to lawful and unlawful alien enemy combatants.

Subject to judicial interpretation, the MCA denies Hamdan the right to file a petition for habeas corpus in any American court.⁵³ Any person determined by the United States to have been “properly detained as an enemy combatant,” or who is detained but *awaiting* determination of enemy combatant status, also lacks habeas rights under the MCA.⁵⁴ Detainees who have received a final decision from a CSRT are able to challenge their de-

50. 28 U.S.C. § 2241(e)(1).

51. MCA § 7(b).

52. Petitioners in *Boumediene v. Bush*, which was consolidated with *Al Odab v. United States*, argued that MCA section 7(b)’s retroactivity provision does not apply to habeas petitions because its language did not specifically mention application to the writ of habeas corpus. Brief for Petitioners-Appellants at 3–6, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. denied*, 75 U.S.L.W. 3528 (U.S. Apr. 2, 2007). For support for this argument see, e.g., *Hamdan*, 126 S. Ct. at 2764–65, discussing the presumption against retroactivity. All three reviewing D.C. Circuit judges rejected this argument. *Boumediene v. Bush*, 476 F.3d at 986–88, 999. In a 2–1 decision, the D.C. Circuit held that the MCA stripped jurisdiction to hear the habeas petitions and that it did not unconstitutionally suspend the writ of habeas corpus because the writ as protected by the Constitution does not extend to aliens held overseas at Guantanamo, who are not privy to constitutional protections anyway. *Id.* at 988–94. Judge Rogers, in dissent, would have upheld jurisdiction, finding that the MCA was void for unconstitutionally suspending the habeas writ because the writ would have reached the detainees at common law and because Congress neither met the requirements of the Suspension Clause nor provided an adequate alternative remedy to the habeas writ. *Id.* at 994–1012 (Rogers, J., dissenting). Given the treatment of the habeas issue in the dissent to the denial of certiorari in *Boumediene* authored by Justice Breyer, which was joined by Justices Souter and Ginsburg, it seems likely that the Court will directly address this issue when it eventually grants certiorari to a Guantanamo detainee case that has further exhausted the administrative and judicial review mechanisms discussed in this section. *Boumediene v. Bush*, 75 U.S.L.W. 3528 (U.S. Apr. 2, 2007) (Breyer, J., dissenting).

53. Judge Robertson of the U.S. District Court for the District of Columbia dismissed Hamdan’s case on this jurisdictional ground, though he also found that Hamdan was not *constitutionally* entitled to the habeas writ because he has no geographic or volitional ties to the United States, and that the MCA is not a constitutionally valid suspension of the writ of habeas corpus. *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 11–19 (D.D.C. 2006). Robertson distinguished the Court’s decision in *Rasul v. Bush*, 542 U.S. 466 (2004), because it relied on habeas jurisdiction as granted by 28 U.S.C. § 2241, which has been amended by MCA section 7(a) as discussed above. *See* 28 U.S.C. § 2241(e)(1).

54. MCA § 7(a).

tion.⁵⁵ Section 1005(e)(2)(A) of the DTA, as amended by MCA section 10, grants “exclusive jurisdiction”⁵⁶ to the U.S. Court of Appeals for the D.C. Circuit “to determine the validity of any final decision of a [CSRT] that an alien is properly detained as an enemy combatant.”⁵⁷ Detainees who have been determined to be enemy combatants by means other than a CSRT, who are awaiting determination of their status, or who have not received a final determination from a CSRT apparently lack the opportunity to challenge their detention in court, potentially indefinitely.⁵⁸

The MCA also established an appeal structure for military commission decisions. Errors of law must “materially prejudice[] the substantial rights of the accused” to be held incorrect.⁵⁹ A convicted detainee “may submit to the convening authority matters for consideration . . . with respect to the findings and the sentence” of a military commission.⁶⁰ The convening authority has the “sole discretion and prerogative” to modify the findings and sentence of a military commission.⁶¹ A Court of Military Commission Review (“CMCR”) is established, consisting of one or more panels of three appellate military judges, to hear appeals from commission decisions and some interlocutory appeals.⁶² All cases with guilty findings are referred to the CMCR for review, unless the convicted detainee chooses to waive this right to appeal.⁶³

55. For an analysis criticizing CSRT proceedings, see Mark Debeneaux, *No-Hearing Hearings, CSRT: The Modern Habeas Corpus?* (2006), available at http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

56. This jurisdiction is limited to claims brought by or on behalf of an alien detained by the United States at the time a request for review is filed and for whom a CSRT has been conducted according to the applicable procedures specified by the Secretary of Defense. DTA § 1005(e)(2)(B). Jurisdiction is also limited to considerations of whether the CSRT followed the procedures established by the Secretary of Defense (“including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government’s evidence” and “whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.”) *Id.* § 1005(e)(2)(C).

57. *Id.* § 1005(e)(2)(A).

58. See, e.g., Brief for Professors of Constitutional Law and Federal Jurisdiction as Amici Curiae Supporting Petitioners, *Al-Marri v. Wright*, *supra* note 9. Al-Marri has not been before a CSRT, though the government has issued a directive to provide Al-Marri with a CSRT upon dismissal of his pending habeas litigation. Memorandum from Gordon England, Deputy Sec’y of Defense, to Director of the Office for Administrative Review of the Detention of Enemy Combatants (Nov. 13, 2006), available at <http://natseclaw.typepad.com/natseclaw/files/AlMarriCSRTorder.pdf>.

59. 10 U.S.C. § 950a(a).

60. *Id.* § 950b(b)(1).

61. *Id.* § 950b(c)(1). Such discretion includes approving, disapproving, commuting, or suspending the sentence in whole or in part; dismissing charges; setting aside guilty findings; and changing a guilty finding to a guilty finding on a lesser included offence. *Id.* §§ 950b(c)(2)(C)–950b(c)(3). The convening authority may also order a proceeding in revision or rehearing. *Id.* § 950b(d).

62. *Id.* § 950f. The United States may bring interlocutory appeals to the CMCR. *Id.* § 950d(a).

63. *Id.* § 950c. CMCR review of death penalty convictions cannot be waived. *Id.* § 950c(b)(1). Death penalty sentences also carry other requirements specified in *Id.* § 950i.

Detainees who have received a final decision from a military commission also have the right to appeal their conviction to a civilian court.⁶⁴ Once all other appeals under chapter 47A are either exhausted or waived, a convicted detainee can appeal to the U.S. Court of Appeals for the D.C. Circuit, which has “exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority)”⁶⁵ The final judgment of the D.C. Circuit can be reviewed by the U.S. Supreme Court by writ of certiorari.⁶⁶

Aside from appeals from a final decision of a CSRT or military commission, detainees have no other means of judicial recourse as per 10 U.S.C. § 950j(b):

(b) Provisions of Chapter Sole Basis for Review of Military Commission Procedures and Actions—Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.⁶⁷

Furthermore, any other cause of action relating to a detainee’s detention is also barred by MCA section 7(a), which amended 28 U.S.C. § 2241(e)(2) to read:

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United

64. DTA § 1005(e)(3)(B), as amended by MCA § 9(2). This amended language resolves the deficiency noted by the court in *Hamdan* that Hamdan may never see such a court if his sentence were under ten years. 126 S. Ct. at 2788.

65. 10 U.S.C. 950g(a)(1). This jurisdiction is limited to consideration of “whether the final decision was consistent with the standards and procedures specified in [the MCA,] and to the extent applicable, the Constitution and laws of the United States.” *Id.* § 950g(c). Sections 1005(e)(3)(A)–(C) of the DTA, as amended by MCA § 9, also grant the D.C. Circuit this jurisdiction, with the same limitations. DTA §§ 1005(e)(3)(A)–(C).

66. 10 U.S.C. § 950g(d).

67. *Id.* § 950j(b).

States to have been properly detained as an enemy combatant or is awaiting such determination.”⁶⁸

IV. THE GENEVA CONVENTIONS

The military commissions challenged in *Hamdan* were held to violate Common Article 3 based on the procedures specified for those commissions.⁶⁹ The MCA alters many of those provisions and asserts that its commissions are regularly constituted courts “affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions.”⁷⁰ Such judicial guarantees incorporate “at least the barest of those trial protections that have been recognized by customary international law,” namely the right of accused detainees to be present at their trial and the right to be privy to the evidence used to convict them.⁷¹

Although the Court did not specify whether *Hamdan* could personally invoke Geneva Convention rights,⁷² it found that obedience to the Geneva Conventions was required by the laws of war, compliance with which is required by UCMJ Article 21.⁷³ MCA section 4(a)(2) amends Article 21 to exclude military commissions from its purview.⁷⁴ Moreover, invoking the Geneva Conventions as a source of rights in military commissions is barred by 10 U.S.C. § 948b(g).⁷⁵ The MCA stipulates more broadly that the Geneva Conventions are not a source of judicially enforceable rights in any proceeding against the United States or its officials:

No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States

68. 28 U.S.C. § 2241(e)(2).

69. 126 S. Ct. at 2794–98. The Court in *Hamdan* held that Common Article 3 of the Geneva Conventions “affords some minimal protection . . . to individuals . . . who are involved in a conflict ‘in the territory of a signatory,’” and that it thus applies to *Hamdan*’s case. *Id.* at 2796.

70. 10 U.S.C. § 948b(f).

71. 126 S. Ct. at 2798 (“[V]arious provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 [of Additional Protocol I of the Geneva Conventions] and indisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him.”).

72. The majority cited Professor Henkin’s amicus curiae brief arguing that individuals could invoke Geneva Convention rights. 126 S. Ct. at 2794 n. 58.

73. *Id.* at 2794 .

74. 10 U.S.C. § 821.

75. *Id.* § 948b(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.”).

is a party as a source of rights in any court of the United States or its States or territories.⁷⁶

MCA section 6 defines the exclusive scope and content of “grave breaches” of Common Article 3 prohibited by U.S. law.⁷⁷ Previously, any “violation” of Common Article 3 in a non-international armed conflict was a war crime.⁷⁸ Now, MCA section 6(b)(1)(A) amends 18 U.S.C. § 2441(c)(3), with retroactive application,⁷⁹ to make only “grave breaches” of Common Article 3 war crimes “when committed in the context of and in association with” a non-international armed conflict.⁸⁰ This provision provides amnesty to any violation of Common Article 3 committed in or in association with a non-international armed conflict since November 26, 1997, that does not rise to the level of MCA-specified “grave breaches.” The “grave breaches” that the MCA criminalizes include the following: torture; cruel or inhuman treatment; performing biological experiments; murder; mutilation or maiming; intentionally causing serious bodily injury; rape; sexual assault or abuse; and taking hostages.⁸¹ Torture is defined as:

an act specifically intended to inflict *severe physical or mental pain or suffering* (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.⁸²

“Cruel or inhuman treatment” is defined as “an act intended to inflict *severe or serious physical or mental pain or suffering* (other than pain or suffering inci-

76. MCA § 5(a).

77. *Id.* §§ 6(a)(1)–(2) & 6(b)(1); 18 U.S.C. § 2441(d). Military Commissions Act section 6(a)(2) states that “[i]n]o foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated” in 18 U.S.C. § 2441(d). Military Commissions Act section 6(a)(3)(A) grants the President the authority “to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations *which are not grave breaches* of the Geneva Conventions.” Military Commissions Act § 6(a)(3)(A) (emphasis added). The full scope of Common Article 3 is larger than the Military Commissions Act’s list of grave breaches. 18 U.S.C. § 2441(d)(5) (“The definitions . . . are intended only to define the grave breaches of Common Article 3 and not the full scope of United States obligations under that Article.”).

78. *See id.* § 2441(c)(3). A number of former high-ranking military personnel vigorously objected to defining Common Article 3 as against national security interests. Letter from Retired Military Leaders to Senators John Warner and Carl Levin, Senate Armed Services Committee (Sept. 12, 2006), *available at* <http://www.humanrightsfirst.info/pdf/06913-etn-military-let-ca3.pdf>.

79. MCA § 6(b)(2) (retroactive to Nov. 26, 1997).

80. 18 U.S.C. § 2441(c)(3).

81. *Id.* § 2441(d)(1). The MCA definition of Common Article 3 excludes some serious violations previously criminal under U.S. law. For a more detailed discussion of these differences, see David Schefter, *How the Compromise Detainee Legislation Guts Common Article 3*, Sept. 25, 2005, <http://jurist.law.pitt.edu/forumy/2006/09/how-compromise-detainee-legislation.php>.

82. 18 U.S.C. § 2441(d)(1)(A) (emphasis added).

dental to lawful sanctions), including serious physical abuse, upon another within his custody or control.”⁸³

“Severe physical pain or suffering” is not defined by the MCA,⁸⁴ but “serious physical pain or suffering” is defined as “bodily injury that involves—(i) a substantial risk of death; (ii) extreme physical pain; (iii) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or (iv) significant loss or impairment of the function of a bodily member, organ, or mental faculty.”⁸⁵ “Severe mental pain or suffering” means:

- the prolonged mental harm caused by or resulting from—
- (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
 - (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
 - (C) the threat of imminent death; or
 - (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.⁸⁶

“Serious mental pain or suffering” is given a similar meaning, except that for conduct occurring after MCA enactment, the mental harm does not have to be “prolonged,” but “serious and non-transitory.”⁸⁷

CONCLUSION

In signing the MCA, President Bush stressed that the legislation would allow the CIA to continue interrogating terrorism detainees.⁸⁸ The limitations on court jurisdiction, restrictions on habeas corpus and Geneva Convention rights, exclusive statutory definition of Common Article 3 grave breaches, and other MCA provisions serve to perpetuate Bush’s CIA interrogation program and the unique legal order constructed for the war on ter-

83. *Id.* § 2441(d)(1)(B) (emphasis added).

84. *See supra* note 27. The definitions of torture and cruel or inhuman treatment are broad enough to allow many highly criticized interrogation techniques to continue.

85. 18 U.S.C. § 2441(d)(2)(D).

86. *Id.* §§ 2441(d)(2)(A), 2340(2).

87. *Id.* § 2441(d)(2)(E). For an extended discussion of the “prolonged mental harm” language in the MCA, see Kate Riggs, Richard Blakeley & Jasmine Marwaha, Note, *Prolonged Mental Harm: The Torturous Reasoning Behind a New Standard for Psychological Abuse*, 20 HARV. HUM. RTS. J. 263 (2007).

88. Press Release, The White House Office of the Press Secretary, *supra* note 10.

rorism.⁸⁹ While many of the MCA's provisions may be subject to judicial⁹⁰ and legislative⁹¹ scrutiny, their impact on the American legal system and community is nothing short of monumental.

—Arsalan M. Suleman*

89. See, e.g., Joanne Mariner, *The CIA, the MCA, and Detainee Abuse*, Nov. 8, 2006, <http://writ.news.findlaw.com/mariner/20061108.html> (discussing liability, evidence rules, and the closure of proceedings as means of protecting the CIA).

90. *Al-Marri v. Wright*, No. 06-7427 (4th Cir. argued Feb. 1, 2007), and *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), cert. denied, 75 U.S.L.W. 3528 (U.S. Apr. 2, 2007), challenge the Military Commissions Act's habeas jurisdiction-stripping provisions. This issue will likely be reviewed by the U.S. Supreme Court, despite its recent denial of certiorari in *Boumediene*, which was justified on the basis of allowing further "exhaustion of available remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus." 75 U.S.L.W. 3528.

91. Senator Dodd has proposed S. 4060, the Effective Terrorists Prosecution Act, to reform various aspects of the MCA. S. 4060, 109th Cong. (2006), available at http://www.fas.org/irp/congress/2006_cr/dodd111606.html. The prospect of Congress taking away MCA powers is unlikely in the face of the President's veto power. See Neal Kumar Katyal, Comment, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 94-97 (2006).

* J.D. Candidate, Harvard Law School, Class of 2007; M.Phil., International Peace Studies, Trinity College, Dublin, 2005; B.S.F.S., International Security Studies, Georgetown University, 2003. The author would like to thank Professors Martha Minow and Jack Goldsmith for their comments.