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THE MILITARY COMMISSIONS ACT OF 2006: AN ABJECT ABDICATION BY CONGRESS

Roger S. Clark[1]

INTRODUCTION

My thesis is that the Military Commissions Act represents a total failure of Congress to pay attention to some basic propositions of international treaty and customary law and a failure to exercise its powers under the Constitution. The Congress that passed the legislation was led by Republicans, but I have not seen the Democrats rushing to correct the errors.[2] In short, a plague on both their houses! A quotation from Justice Robert Jackson, concurring in the Steel Seizure Case, will set the stage:

> But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress . . . .

[1] Board of Governors Professor, Rutgers University School of Law, Camden. I am grateful for the assistance of A. Hays Butler, Lucy Cox, Marshall Kizner and Milosz Pierwola.

[2] The most comprehensive effort to restore the damage is a February 2007 Bill introduced in the Senate by Senator Dodd and in the House by Representative Nadler entitled "Restoring the Constitution Act of 2007." S. 576, 110th Cong. (2007); H.R. 1415, 110th Cong. (2007). More limited efforts include a March 8, 2007 Bill by Mr. Nadler, "[t]o restore habeas corpus for those detained by the United States and to repeal the prohibition on treaty obligations establishing grounds for certain claims." H.R. 1416, 110th Cong. (2007). *See also* 153 CONG. REC. S8908 (2007) (efforts by Senators Leahy and Specter to attach the Habeas Corpus Restoration Act to the National Defense Authorization Act for Fiscal Year 2008).

> [O]nly Congress itself can prevent power from slipping through its fingers.[3]

In the Military Commissions Act,[4] Congress cheerfully conceded power to the Executive in a context where the rule of law cried out for Congress to exercise its constitutional prerogatives.[5] A "decent respect for the opinions of mankind"[6] – to say nothing of United States obligations under treaties and general international law – suggests that Congress should have asked whether what it was doing corresponded to the requirements of international law. Instead, basic issues of

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[3] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

[4] Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified as amended at 10 U.S.C. §§ 948a-950w and other sections of titles 10, 18, 28, and 42).

[5] At least most of Congress. The vote was 65 to 34 (one not voting) in the Senate, 152 CONG. REC. S10, 420 (daily ed. Sept. 28, 2006), and 253 to 168 (12 not voting) in the House, 152 CONG. REC. H7560 (daily ed. Sept. 27, 2006). Rep. Skelton, who failed in an effort to provide for expedited review in the Courts, commented that "[t]his is a constitutional issue. The debate today will undoubtedly go down in the annals of our country as being one that stands out as a study in constitutional law and duty thereunder. Our duty as Members of Congress is to uphold the Constitution." 152 CONG. REC. H7536 (daily ed., Sept. 27, 2006) (statement of Rep. Skelton). Rep. Ortiz asked pointedly: "Are we prepared for other nations' leaders – such as Iran, Syria, and others – to selectively interpret the [Geneva] Convention's Article 3 in a way that we are [not] comfortable with?" 152 CONG. REC. H7537 (daily ed., Sept. 27, 2006) (statement of Rep. Ortiz). Debate was structured by the Congressional leadership to minimize the moving of amendments. Senator Kennedy had an amendment requiring the Secretary of State to notify other parties to the Geneva Convention that the United States considered it punishable to subject U.S. forces to a number of acts – those that had been the main subject of discussion over Guantanamo and Abu Ghraib and were now banned by the Department of Defense. He discussed cases where the U.S. had prosecuted Japanese soldiers for such actions. *See* 152 CONG. REC. S10378 (daily ed. Sept. 28, 2006) (statement of Sen. Kennedy). The amendment failed 46 to 53. *Id.* at S10398. Senator Byrd proposed a sunset clause prohibiting the establishment of new military commissions after December 31, 2011. It failed by a vote of 47 to 52. *Id.* at S10397-98. Senator Rockefeller moved to have the CIA provide the Congressional Intelligence Committee with information on its detention and interrogation activities. *Id.* at S10396. It failed 46 to 53. *Id.* at 10397.

[6] THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

substance and procedure were cast aside.[7]

After a brief discussion of the background to the Act, I examine several of what I believe to be its major flaws, utilizing the following categories: personal jurisdiction; subject-matter jurisdiction; procedure; and re-working the Geneva Conventions. The denial of habeas corpus was another major feature of the legislation, but I give it only brief attention here, as it has now been held unconstitutional by the Supreme Court.[8]

BACKGROUND TO THE ACT

On November 13, 2001, the President issued an Order concerning "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism."[9] Those subject to the

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[7] For a discussion of the haste with which the bill was adopted on the eve of a legislative recess for elections, see Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT'L L. 73, 75 (2007) (containing many useful comments on substance as well). *See also* David A. Martin, *Judicial Review and the Military Commissions Act: On Striking the Right Balance*, 101 AM. J. INT'L L. 344, 351-52 (2007).

[8] *See* Boumediene v. Bush, 128 S. Ct. 2229 (U.S. 2008) (holding five to four that petitioners have constitutional privilege of habeas corpus and are not barred from seeking the writ or invoking the protections of the Suspension Clause because they have been designated enemy combatants or because of their presence at Guantanamo). For background on this issue, *see* A. Hays Butler, *The Supreme Court's Decision in Boumediene v. Bush: The Military Commissions Act of 2006 and Habeas Corpus Jurisdiction*, 6 RUTGERS J.L. & PUB. POL'Y 149 (2008); A. Hays Butler, The Military Commissions Act of 2006 and Habeas Corpus Jurisdiction (Dec. 2007) (report for the American Association for the International Commission of Jurists) (on file with author). *See also infra* notes 28, 32, 35 and 36 (discussing *Boumediene*).

[9] 66 Fed. Reg. 57,833 (Nov. 16, 2001). It is sometimes hard to tell whether "war against terrorism" is an attempt to create a new legal category or whether, like its counterpart "war against drugs," it is essentially metaphorical. "War" in traditional usage contemplates a resort to arms that reaches a certain scale, typically an international conflict between states, but consider the usage in "War of Independence" (before the U.S. was recognized widely) or "Civil War." The Geneva Conventions of 1949 were structured in terms not of "war" but of international and non-international "armed conflict." The authoritative commentary on the Conventions avoids precise definition of armed conflict, arguing for the widest possible application in light of the humanitarian bent of the Conventions, but the examples given in the discussion of non-international armed conflict suggest that some threshold of organized violence needs to be

Order would be tried by a Military Commission. Details of

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met. *See* INT'L COMM. OF THE RED CROSS, COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD *in* COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 32-33 (Jean S. Pictet ed., unknown trans., 1952) (international armed conflict). *See also id.* at 49-51 (non-international). In *Prosecutor v. Tadic*, the International Criminal Tribunal for the Former Yugoslavia commented that armed conflict involved "a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." Prosecutor v. Tadic, IT-94-1-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995). The Rome Statute of the International Criminal Court, referring to a paragraph on violations in non-international armed conflict modified from the 1977 Protocol II to the Conventions, says that the paragraph:

> . . . [a]pplies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

Rome Statute of the International Criminal Court, art. 8, § (2)(f), U.N. Doc. A/CONF. 183/9 (1998). *But cf. id.* art. 8, § (2)(d) (referring to violations of common Article 3 of the Conventions, which contains the first of these sentences, but not the second, perhaps suggesting a different field of application). Protocol II contained an additional requirement that there be "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [a State's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." INT'L COMM. OF THE RED CROSS, PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS (PROTOCOL II) 8 JUNE 1977, art. 1 ¶ 1. *See also infra* note 50 (discussing the "armed conflict" requirement for offenses subject to trial by military commission, a very difficult legal and factual issue). *But see* Rep. Hunter, supporting the Military Commissions Bill, H.R. 6166:

> This war started in 1996 with the al Qaeda declaration of jihad against our Nation. The Geneva Conventions were written in 1949, and the UCMJ was adopted in 1951. In that sense, what we are required to do after the Hamdan decision is broader than war crimes trials. It is the start of a new legal analysis for the long war.

152 CONG. REC. H7534 (daily ed. Sept. 27, 2006) (statement of Rep. Hunter).

commission procedures were set out in Commission Order No. 1.[10] Notable among those procedures was that the accused and his civilian counsel (although not military counsel) could be excluded from the trial and precluded from learning some of the evidence against him.[11]

Salim Ahmed Hamdan, a Yemeni national in custody in Guantanamo Bay, was charged with one count of conspiracy "to commit . . . offenses triable by military commission."[12] It was

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[10] U.S. Dep't of Defense, Military Commission Order No. 1 (Mar. 21, 2002), 41 I.L.M. 725, *available at* http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf, *superseded by* Military Commission Order No. 1 (Revised) (Aug. 31, 2005), *available at* http://www.defenselink.mil/news/Sep2005/d20050902order.pdf. *See also* U.S. Dep't of Defense, Military Commission Instruction No. 2 (Apr. 30, 2003), *available at* http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf (regarding crimes and elements for trials by military commission); U.S. Dep't of Defense, Military Commission Order No. 3 (Feb. 5, 2004), *available at* http://www.defenselink.mil/news/Sep2005/d20050928ord3.pdf (dealing with special administrative measures for certain communications subject to monitoring); Exec. Order No. 13,425, 72 Fed. Reg. 7737 (Feb. 14, 2007) (superseding Exec. Order of November 13, 2001, 66 Fed. Reg. 57,833, in light of the Military Commissions Act).

[11] *See* Military Commission Order No. 1 (Revised) (Aug. 31, 2005), *available at* http://www.defenselink.mil/news/Sep2005/d20050902order.pdf [hereinafter Commission Order]; Hamdan v. Rumsfeld, 548 U.S. 557, 619-26 (2006). The Commission Order gave broad authority to exclude the accused and his civilian defense counsel (but not military defense counsel) from the proceedings. *See* Commission Order § 6(B)(3). Except with prior authorization of the presiding officer, military defense counsel could not disclose any information presented in a closed proceeding. "Appeal" lay to a "review panel" of three military officers which could include civilians and one of whom was required to have experience as a judge, followed by review to the Secretary of Defense. Final review and decision would lie with the President (unless the President had delegated the Secretary of Defense to exercise this function). *See* Commission Order.

[12] Instruction No. 2, now incorporated into federal regulation, defined a conspiracy thus:

> (A) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;

based on his activities between 1996 and November 2001 as Osama bin Laden's bodyguard and personal driver. In habeas and mandamus proceedings, Hamdan argued that the military commission lacked authority to try him because (1) neither congressional act nor the common law supports trial by commission for conspiracy, an offense he argued was not a violation of the law of war, and (2) the procedures adopted to try him violated basic tenets of military and international law contained, inter alia, in the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions of 1949. In particular, he argued that the procedures breached the principle that a defendant must be permitted to see and hear the evidence against him.

A five to three majority of the Court (Chief Justice Roberts not participating) agreed with the thrust of Hamdan's arguments based on the UCMJ and the Geneva Conventions.[13] It held that, while Congress had acknowledged the propriety of some uses of military commissions under the Constitution and

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> (B) The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined in it willfully, that is, with the intent to further the unlawful purpose; and
>
> (C) One of the conspirators or enterprise members, during the existence of the agreement or enterprise, knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.

Crimes and Elements for Trials by Military Commission, 32 C.F.R. § 11.6(c)(6)(i) (2008).

[13] Hamdan v. Rumsfeld, 548 U.S. 557 (2006). Justice Stevens wrote the opinion which was joined in its entirety by Justices Souter, Ginsburg, and Breyer. Justice Kennedy agreed with the result and much of the reasoning. The district court had granted habeas relief and was reversed by the court of appeals. In reversing the court of appeals, the Supreme Court remanded the case for further proceedings – cold comfort to Mr. Hamdan, who remained (and remains) in Guantanamo. Past U.S. practice includes use of tribunals in three types of situations: law of war commissions, martial law commissions, and occupation commissions. *See generally* Detlev F. Vagts, *Military Commissions: A Concise History*, 101 AM. J. INT'L L. 35 (2007). The Court treated the President's creation as a law of war commission, subject to the constraints applicable to such tribunals. For more on U.S. historical use of military tribunals in various settings, *see* PETER MAGUIRE, LAW AND WAR: AN AMERICAN STORY (2000); LOUIS FISHER, MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM (2005).

the common law of war, it had simply preserved what power the President already had to convene military commissions – with the express condition that he and those under his command comply with the law of war.[14]

One aspect of this was Article 36 of the UCMJ which provides that the procedural rules that the President promulgates for courts-martial and for military commissions must be "uniform insofar as practicable."[15] The President had determined that it was impracticable to apply the rules and principles of law that govern "the trial of criminal cases in the United States district courts," but had made no such determination in respect of the rules for courts-martial.[16] No showing had been made that it was impracticable to apply court-martial rules here. Thus, the Court held that the President's order failed under Article 36.

So far as the Geneva Conventions were concerned, the majority held that the Commission structure ran afoul of Common Article 3 of the four Conventions. That article sets out some minimum standards dealing with conflicts not of an international character (a phrase the Court found apt to describe the situation in Afghanistan when Hamdan was captured).[17]

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[14] The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the 'rules and precepts of the law of nations,' *Quirin*, 317 U.S., at 28 . . . – including, *inter alia*, the four Geneva Conventions signed in 1949. See *Yamashita*, 327 U.S., at 20-21, 23-24.... The procedures that the Government has decreed will govern Hamdan's trial by commission violate these laws.

Hamdan, 548 U.S. at 613 (2006). Anchoring the application of the Geneva Conventions to the UCMJ finesses the issue of whether the Geneva Conventions are self-executing, a proposition that had been denied by the court of appeals (and is still disputed).

[15] 10 U.S.C. § 836(b) (2006).

[16] *Id.* § 836(a) (2006).

[17] Common Article 3 applies, by its terms, to a "conflict not of an international character occurring in the territory of one of the High Contracting Parties . . . ." Convention (First) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31. In the *Nicaragua* case, however, the International Court

Notably, it includes a prohibition on "the passing of sentences . . . without previous judgment . . . by a regularly constituted court affording all the judicial guarantees . . . recognized as indispensable by civilized peoples."[18] Since the procedures deviated from those in the UCMJ in ways not justified by practical need, this standard had not been met.[19]

Four of the majority judges (Justice Kennedy found it unnecessary to reach the point) also held that the conspiracy offense charged was not triable by a law of war military commission. The four noted that "[t]here is no suggestion that Congress has, in the exercise of its constitutional authority to 'define and punish . . . Offences against the Law of Nations,' [U.S. Const. art. I, § 8, cl. 10], positively identified 'conspiracy' as a war crime."[20] That might not be fatal: the UCMJ might have incorporated such an offense as part of the common law of war. "When, however, neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous."[21] After

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of Justice opined that "in the event of international armed conflicts," the Common Article 3 rules "also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts." Cases Concerning Military and Paramilitary Activities in and Against Nicar. (Nicar. v. U.S.), 1986 I.C.J. 14, 114. In *Hamdan*, the Government had argued that the conflict in Afghanistan was an "international" one. As the term international is used in the Conventions, however, it applies to conflicts between states. At least with respect to the conflict with al Qaeda, "conflict not of an international character" occurring in Afghanistan seemed exactly the correct characterization.

[18] *See also infra* note 20.

[19] "The absence of any showing of impracticability is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself: the right to be present. See 10 U.S.C.A. § 839(c) (Supp. 2006)." *Hamdan*, 548 U.S. 624. Four of the judges believed that various provisions of the Order also conflicted with a principle they regarded as undoubtedly part of customary international law – that an accused, absent disruptive conduct or consent, must be present for his trial and privy to the evidence against him. Justice Kennedy saw no need to decide this.

[20] *Hamdan*, 548 U.S. at 601-02. Did Congress try to exercise this authority in the Military Commissions Act? *See infra* notes 89-92. It did not say so.

[21] *Hamdan*, 548 U.S. 602. The court goes on to state:

examining the caselaw and the literature, the four commented:

> Finally, international sources confirm that the crime charged here is not a recognized violation of the law of war. As observed above . . . none of the major treaties governing the law of war identifies conspiracy as a violation thereof. And the only "conspiracy" crimes that have been recognized by international war crimes tribunals (whose jurisdiction often extends beyond war crimes proper to crimes against humanity and crimes against the peace) are conspiracy to commit genocide and common plan to wage aggressive war, which is a crime against the peace and requires for its commission actual participation in

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> The charge's shortcomings are not merely formal, but are indicative of a broader inability on the Executive's part here 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 active hostilities . . . . Hamdan is charged not with an overt act for which he was caught red-handed 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 offense that "by the law of war may be tried by military commissio[n]." 10 U.S.C. § 821. None of the overt acts alleged to have been committed in furtherance of the agreement is itself a war crime, or even necessarily occurred during time of, or in a theater of, war. 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 precedents, a military commission established by Executive Order under the authority of Article 21 of the UCMJ may lawfully try a person and subject him to punishment.

Id. at 612.

a "concrete plan to wage war."[22]

In the Military Commissions Act, Congress responded by largely giving the President what he wanted. Michael Dorf comments:

> Even the small sample of provisions of the MCA canvassed in this essay reveals . . . that the MCA was no moderate compromise. On nearly every issue, the MCA gives the White House everything it sought. It immunizes government officials for past war crimes; it cuts the United States off from its obligations under the Geneva Conventions; and it all but eliminates access to civilian courts for non-citizens – including permanent residents whose children are citizens – that the government, in its potentially unreviewable discretion, determines to be

[22] *Id.* at 610 (citing I TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 Nov. 1945–1 Oct. 1946, 225 (1947)) (footnote omitted). Article III, § b of the 1948 Genocide Convention describes "conspiracy to commit genocide" as "punishable." *Id.* In context, an inchoate or preparatory conspiracy is what is meant. *See infra* notes 44-45 (discussing the different types of conspiracy in U.S. criminal law doctrine). The conspiracy reference in the Genocide Convention is carried forward into the Statute of the Tribunals for Former Yugoslavia and Rwanda, but not into the Rome Statute of the International Criminal Court. Genocide is not one of the crimes over which the commissions established by the President or those established by the Military Commissions Act have jurisdiction. None of the multilateral treaties dealing with various aspects of terrorism, such as those on hijacking and other offenses against aircraft or the U.N. Convention Against Torture require liability for inchoate conspiracies. Several United States federal statutes, in giving effect to multilateral criminal law treaties, add a conspiracy provision to what is made criminal. *See, e.g.*, 18 U.S.C. § 2340A (2001) (torture) (added by USA Patriot Act); 49 U.S.C. § 46501 (1994) (hijacking of aircraft); 18 U.S.C. § 32 (2006) (offenses against aircraft); 18 U.S.C.A. § 1203 (2008) (hostage-taking); 18 U.S.C. § 2332f (2002) (suppression of terrorist bombings); 18 U.S.C. § 2339C (2008) (financing of terrorism). The U.S. practice, in the apparent absence of protest by other states, might carry an argument that creating such conspiracy offenses is not forbidden by international law. This is not the same as saying that a practice of the U.S., alone or nearly so, enforced legislatively by placing jurisdiction in federal district court, supports the proposition that such crimes are part of the law of armed conflict and "traditionally" subject to prosecution before a military tribunal.

unlawful enemy combatants.[23]

I turn, then, to some of the shortcomings of the legislation.

PERSONAL JURISDICTION (AS DETERMINED BY A COMBATANT STATUS REVIEW TRIBUNAL)

Of fundamental importance to understanding the basic impact of the Act is its statement of "purpose" in section 948(b), containing the personal jurisdiction theory on which the Act proceeds:

> This Chapter establishes procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military

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[23] Michael C. Dorf, *The Orwellian Military Commissions Act of 2006*, 5 J. INT'L CRIM. JUST. 10, 18 (2007). *See also* the Military Commissions Act, Pub. L. No. 109-366, sec. 7(2), 120 Stat. 2600, 2636 (2006), which inserted into 28 U.S.C.A. § 2241(e)(2) (2008) the following language aimed at going beyond the removal of habeas corpus for detained aliens:

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

Commenting on this provision, Michael Dorf remarks that "[t]hus, for example, the federal courts must dismiss a lawsuit filed on behalf of a detainee claiming that he has been tortured in violation of federal law, including the MCA itself." Dorf, *supra* at 15. Combining this provision with the applicability of the Act to resident aliens, Dorf adds that "[t]hus, under the MCA, the President could make his own determination that a permanent resident alien is an unlawful enemy combatant, order that permanent resident alien detained and tortured within the United States, and no court would have jurisdiction to hear any complaint filed on that alien's behalf challenging the lawfulness of his custody and treatment." *Id.* at 16.

commission.[24]

These are tribunals before which aliens,[25] not Americans, may be charged. If United States citizens are alleged to have committed similar offenses, they fall to be tried (if at all) before military courts-martial (if members of the military) or the regular federal courts (if they are not, or are no longer members of the military). "Unlawful enemy combatant" is defined to mean:

> (i) a person who has engaged in hostilities or who has purposefully and materially supported[26]

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[24] Military Commissions Act § 948b(a) (headed "PURPOSE"). *See also id.* at § 948d(a) ("jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001."). On subject-matter jurisdiction, *see infra* notes 37-92. Note also the reference to "engaged in hostilities against the United States." "Hostilities" is not defined in the Act. Is it a synonym for "war" or "armed conflict?" What else might it mean?

[25] "Alien" is defined thus in section 948(a)(3): "The term 'alien' means a person who is not a citizen of the United States." Military Commissions Act § 948a(3). Resident aliens – of whom there are some twelve million in the country – are thus included in the class potentially eligible for trial by military tribunals. Neal Katyal, counsel to Hamdan, suggests this is unconstitutionally discriminatory. Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365 (2007).

[26] As to this phrase, note this comment:

> As Congress struggled to rewrite and expand war crimes coverage through the MCA, it also sought to cast an ever-wider net to capture not just alleged terrorists but those who are thought to be giving support to terrorists. In doing so, it redefined a fundamental concept in the law of war and the Geneva Conventions by using the term "unlawful enemy combatant" to include not only a person who directly engaged in hostilities against the United States, but also one "who purposefully and materially supported hostilities against the United States or its cobelligerents who is not a lawful enemy combatant."

Jack M. Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterror Operations*, 101 AM. J. INT'L L. 56, 59 (2007). A footnote adds: "This definition of combatancy removes any requirements for proximity to the battlefield itself and includes individuals supporting hostile actions against any 'co-belligerent' country, not just the United States." *Id.* at 59 n. 24. Beard suggests that the Act could lead both to a *legal* boomerang –

> 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);[27] or
>
> (ii) a person who, before, on, or after the date of the 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.[28]

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affecting the positions that the U.S. might later take in supporting its own interests – and a *political* boomerang – having an adverse effect on the extent to which other countries will cooperate in the support of actions against terrorism. *Id*.

[27]At the time of the U.S. invasion of Afghanistan, the Taliban was the de facto Government. Treating its soldiers as other than combatants in an international armed conflict and thus protected (and privileged) by the Geneva Conventions is dubious at best.

[28]Military Commissions Act § 948a(1). Combat Status Review Tribunals (CSRTs) owe their origin to an "Order Establishing Combatant Status Review Tribunal" issued by Deputy Secretary of Defense Paul Wolfowitz. Memorandum from Paul Wolfowitz, Deputy Secretary of Defense to the Secretary of the Navy (July 7, 2004), http://www.defenselink.mil/news/Jul2004/d20040707review.pdf. *See also* Memorandum from Gordon England, Secretary of the Navy (July 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf (regarding "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba"). The Order applied only to foreign nationals "held as enemy combatants" in Guantanamo. "Enemy combatant" was defined for the purposes of the Order as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." Memorandum from Paul Wolfowitz, *supra* note at 1. The concept of an "enemy combatant" as opposed to an "unlawful enemy combatant" has been the source of much confusion and came back to haunt the process later, *see infra* note 31. A detainee whose case is being considered by a CSRT is not entitled to legal representation but may be assigned a military officer as "personal representative." The purpose of the Tribunal is to determine whether the detainee is properly detained as an enemy combatant. "Preponderance of evidence shall be the standard used in reaching this determination, but there shall be a rebuttable presumption in favor of the

In turn, its correlative, "lawful enemy combatant," is defined as:

> (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

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Government's evidence." Memorandum from Paul Wolfowitz, *supra*, at 3. "The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issue before it. At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances." *Id.* The Detainee Treatment Act of 2005 added some procedural provisions, notably a requirement for review of new evidence and a requirement for assessment, "to the extent practicable," of whether any statement was obtained as a result of coercion, and "the probative value (if any) of any such statement." Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1005(a)(3), 1005(b)(1)(B), 119 Stat. 2680, 2741 (2005). It also provided that the U.S. Court of Appeals for the D.C. Circuit would have "exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." *Id.* at 2742. What seems to have been a prototype version of CSRTs appears in Deputy Secretary Wolfowitz's Order of May 11, 2004, entitled "Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba." Memorandum from Paul Wolfowitz, Deputy Secretary of Defense (May 11, 2004) http://www.defenselink.mil/news/May2004/d20040518gtmoreview.pdf. Administrative Review Boards continue to assess whether a detainee is "a continuing threat to the U.S. or its allies in the ongoing conflict against al Qaida and it affiliates and supporters (e.g. Taliban), and whether there are other factors that could form the basis for continued detention (e.g., the enemy combatant's intelligence value and any law enforcement interest in the detainee)." *See* Memorandum from Gordon England, Deputy Secretary of Defense, for the Secretaries of the Military Departments (July 14, 2006) (entitled "Revised Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba"). While they are creations of the Executive, the CSRTs presumably gained some implied legitimacy from Congress as a matter of domestic (but not international) law by the references to them in the Detainee Treatment Act and the Military Commissions Act. *See infra* note 32. Their whole future is cast into doubt by *Boumediene v. Bush.* 128 S. Ct. 2229 (2008). They appear to be essentially unconstitutional as presently set up. The majority opinion notes pointedly: "Petitioners have met their burden of establishing that the DTA review process is, on its face, an inadequate substitute for habeas corpus." *Id.* at 2274.

> 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.[29]

It is evidently the intent of the Executive and of the Act, that whether or not the accused is an "unlawful enemy combatant" and thus comes within the jurisdiction of a Commission, will not necessarily be decided by the Commission itself. That can be decided in a Combatant Status Review Tribunal.[30] Section 948d

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[29]Military Commissions Act § 948a(2). The definition is based on the definition of those eligible to be prisoners of war in Article 4 of the Third Geneva Convention of 1949, relative to the Treatment of Prisoners of War. *See also* § 948d(b): "Military Commissions under this chapter shall not have jurisdiction over lawful enemy combatants. Lawful enemy combatants who violate the law of war are subject to chapter 47 of this title. Courts-martial established under that chapter shall have jurisdiction to try a lawful enemy combatant for any offense made punishable under this chapter." See, in this context, Article 102 of the Geneva Convention on Prisoners of War:

> A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter [on standards for trials] have been observed.

Geneva Convention Relative to the Treatment of Prisoners of War art. 102, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Note, however, the (dubious) assertion in § 948d(b) of U.S. jurisdiction over lawful combatants, not only in respect of "ordinary" violations of the law of war, but also over the offenses created in the Military Commissions Act. Military Commissions Act § 948d(b). *See infra* notes 37-92 on those.

[30] It can certainly be argued that paragraph (i) of the definition in the Military Commissions Act, *supra* notes 26-27, means that the issue could (at the discretion of the Executive?) be left to a military commission or even decided by the Executive itself, without the aid of a Review Tribunal. Military Commissions Act § 948a(1). It is notable that the two paragraphs are separated by an "or" and are thus probably alternatives. The 2007 *Manual for Military Commissions* comments cryptically:

provides that "[a] finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006, by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission . . . ."[31] Combatant Status Review

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> The M.C.A. does not require that an individual receive a status determination by a C.S.R.T. or other competent tribunal before the beginning of a military commission proceeding. If, however, the accused has not received such a determination, he may challenge the personal jurisdiction of the commission through a motion to dismiss.

DEP'T OF DEFENSE, MANUAL FOR MILITARY COMMISSIONS II-14 (2007), http://www.defenselink.mil/news/d20080213rules.pdf. Relevant to such a motion is Commission Rule 905(c)(2)(B), on motions, which provides that "[i]n the case of a motion to dismiss for lack of jurisdiction, the burden of persuasion shall be upon the prosecution." *Id*. at II-83. Thus, an alien would be in a stronger position procedurally arguing before a Commission than before a Status Review Tribunal. On the other hand, leaving it to the Executive to decide, without reference to a tribunal, runs into some difficulties in light of the decision of the Supreme Court in *Hamdi* that, at the least, "a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker." *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004). Is such a requirement limited to "citizens?" The Third Geneva Convention of 1949, relative to the Treatment of Prisoners of War, provides in Article 5 that "[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories [entitled to prisoner of war status and thus to immunity from punishment for their belligerent acts as such], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." Geneva Convention Relative to the Treatment of Prisoners of War, art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. The standards of "competence" are not spelled out in the Convention. It is doubtful that they are low enough to legitimate the procedures in the Detainee Treatment Act.

[31] Military Commissions Act § 948d(c) (emphasis added). Initially, three persons, David Hicks, Salim Ahmed Hamdan and Omar Ahmed Khadr, were charged pursuant to the Act. A number of additional charges were sworn late in 2007 and early in 2008, including capital charges against Khalid Sheikh Mahommed and others alleged to be associated with September 11th attacks. In each of the first three cases, there was a recitation that the person's status had been determined by a Combatant Status Review Tribunal, Hicks on September 30, 2004, Hamdan on October 3, 2004 and Khadr on September 7, 2004. Hicks pled guilty to one count of "providing material support to terrorism" on March 26, 2007. He was sentenced to seven years in prison, all except nine

months suspended. He was transferred to Australia to serve the sentence. The most serious count against the three was the charge of murder by an unprivileged combatant leveled against the Canadian, Khadr. Khadr was 15 when captured in Afghanistan in July 2002. The author is a signatory to an amicus brief arguing the impropriety of charging "child soldiers." The charges against Hamdan and Khadr were initially dismissed without prejudice by the military judges on the basis that the proper determinations had not been made by a CSRT. Order on Jurisdiction, United States v. Khadr, No. 07-001 (Peter E. Brownback III, Military Judge, June 4, 2007); Decision and Order – Motion to Dismiss for Lack of Jurisdiction, United States v. Hamdan (Keith J. Allred, Military Judge, June 4, 2007). The decision in Hamdan is the clearer of the two, the relevant paragraphs reading:

> 1. The 2004 CSRT determination that the accused is an "enemy combatant" was made for the purposes of determining whether or not he was properly detained, and not for the purposes of determining whether he was subject to trial by Military Commission.
>
> 2. The CSRT finding was made using a different standard than the one the MCA establishes for determining unlawful enemy combatant status. The definition of "enemy combatant" used by the 2004 CSRT is less exacting than the definition of "unlawful enemy combatant" prescribed in the MCA. The CSRT could have found a civilian not taking an active part in hostilities, but "part of" or "supporting" Taliban or al Queda forces that *were* engaged in hostilities to be an "enemy combatant." Yet the MCA limits this Court's jurisdiction to those who actually "engaged in hostilities or who . . . purposefully and materially supported hostilities." The CSRT did not apply this definition, and its finding therefore does not support the jurisdiction of this Tribunal.

Decision and Order – Motion to Dismiss for Lack of Jurisdiction, United States v. Hamdan (Keith J. Allred, Military Judge, June 4, 2007) slip op. at 2-3. On appeal in Khadr, the Government argued both that the Commission could make its own finding and that the discrepancies between the standards can be reconciled by reliance on a presidential determination of February 7, 2002, that "members of al Qaeda and the Taliban were not lawful combatants." The relevant provision of the 2002 Order, paragraph 2(d) reads:

> Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al-Qaida, al-Qaida detainees also do not qualify as prisoners of war.

The United States Court of Military Commission Review rejected the Government's arguments to this effect. Ruling on Motion to Abate, United

Tribunals have their own problems.[32] It is apparent that the

States v. Khadr, No. 07-001 (Ct. Mil. Comm'n Rev., Sept, 24, 2007), *available at* http://www.defenselink.mil/news/Sep2007/Khadr%20USCMCR%20Order%20RE%20Abatement%20(24%20Sept%2007)%20(6%20pages).pdf. It held, however, that a Military Commission was competent to hear evidence and argument itself on whether jurisdiction had been established. Its decision is ambiguous on whether the standard of proof for any factual issues is the preponderance of the evidence or proof beyond reasonable doubt. Compare slip. op. at 7 (beyond reasonable doubt) and 19, 24 and 25 (preponderance). This may ultimately prove to be a useful strategy to finesse the constitutional issues surrounding CSRTs. The beyond reasonable doubt/preponderance of the evidence issue obviously remains in play.

[32] The Detainee Treatment Act of 2005 purported to remove jurisdiction to hear or consider an application for habeas corpus filed by or on behalf of an alien detained at Guantanamo Bay. Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1005(e), 119 Stat. 2680, 2741-42 (2005). The Court of Appeals for the District of Columbia was said to have "exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." *Id.* § 1005(e)(3)(A). This jurisdiction is limited to:

> (i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion . . . be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and
>
> (ii) to the extent the Constitution and laws of the United States are applicable, 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)(3)(C). On this, note the following stark comments by Senator Cornyn setting out (approvingly) his interpretation of what the Act does:

> There is no invitation in the DTA or MCA to reconsider the sufficiency of the evidence. Weighing of the evidence is a function for the military when the question is whether someone is an enemy combatant. Courts simply lack the competence – the knowledge of the battlefield and the nature of our foreign enemies – to judge whether particular facts show that someone is an enemy combatant. By making review exclusive to the DC Circuit, the DTA helps to ensure that the narrow review standards it sets do not somehow grow into something akin to Federal courts' habeas corpus review of State criminal convictions. The court's role under

jurisdictional basis of the commissions, an item that one normally thinks of as one of the elements of a crime,[33] is – absent a successful constitutional or other challenge to this arrangement – to be decided elsewhere and on the basis of something well short of proof beyond reasonable doubt.[34] More

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> the DTA is to simply ensure that the military applied the right rules to the facts. It is not the court's role to interpret those facts and decide what they mean.
>
> Because review under the DTA and MCA will be limited to the administrative record, there is no need for any lawyer to ever again go to Guantanamo to represent an enemy combatant challenging his detention. The military, I am certain, will make the paper record available inside the United States.

152 CONG. REC. S10,354-02 (Sept. 28, 2006) (statement of Sen. Cornyn).

Boumediene et al. v. Bush, 128 S. Ct. 2229 (2008), held this effort unconstitutional. *See also* Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007) (finding exclusion of habeas not applicable to prisoner captured and held in U.S. while legally within the country).

[33] *See* MODEL PENAL CODE § 1.13 (1962) (including "attendant circumstance[]" that "establishes jurisdiction" within elements of crime and thus subject to the requirement of proof beyond a reasonable doubt). *See also* State v. Denofa, 187 N.J. 24 (2006) (same, interpreting New Jersey version of Code). In re Winship, 397 U.S. 358 (1970), and its progeny such as Apprendi v. New Jersey, 530 U.S. 466 (2000), require proof of elements beyond a reasonable doubt. Characterizing this element as "jurisdictional" perhaps carries with it a risk to the uncritical mind of downplaying the significance of the element. However characterized, it is a fundamental part of the "case" against those accused before a Commission. As such, it ought to be subject to determination by proper legal standards. Equally dubious as a constitutional matter is a statement of the military judge in Hamden, *supra* note 31, slip op. at 2 that "[t]he burden is on the Government to show by a preponderance of the evidence that the accused is subject to the jurisdiction of this tribunal. RMC 905(c)(1);(2)(B)." Interpreting the Rules as permitting a lower standard of proof than beyond reasonable doubt for this element of the crime must be wrong. The provisions cited hardly compel the "preponderance of the evidence" interpretation.

[34] There is something very puzzling about the whole concept of an unlawful enemy combatant. Military lawyers Maxwell and Watts argue that "[c]oined previously in the slightly streamlined form of 'unlawful combatant' by the US Supreme Court in 1942 [Ex Parte Quirin, 317 U.S. 1 (1942)], the label has had little formal currency as a term of art in the law of war. . . . We conclude that the term . . . as defined by the MCA, is a term of convenience that mistakenly merges the separate and distinct questions of legal status on the one hand and

questions of the constitutionality and general legality under the law of armed conflict of the Combatant Status Review Tribunals may eventually wend their way to the Supreme Court.[35] I am suggesting here that, in addition to existing challenges, there is another serious argument that such tribunals do not pass muster as fact finders on one of the essential elements of the relevant crimes. Perhaps the issue can be stated as whether Congress can delegate to the Executive the power to determine the existence of one of the elements of an offense on a standard of less than beyond reasonable doubt and by procedures that would never pass constitutional muster in a criminal case.[36]

Did Congress really understand what it was doing in conceding the determination of a substantial part of a criminal offense to the Executive in this way?

SUBJECT MATTER JURISDICTION

Military commissions are said to have subject-matter jurisdiction over "any offense made punishable *by this chapter or the law of war . . . .*"[37] The general reference to "the law of war" presents some open-ended possibilities for prosecutorial creativity in formulating charges,[38] but the main focus seems to

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belligerent culpability on the other." Mark David "Max" Maxwell & Sean M. Watts, *'Unlawful Enemy Combatant': Status, Theory of Culpability, or Neither?*, 5 J. INT'L CRIM. JUST. 19, 19-20 (2007).

[35] That is to say, in addition to those already discussed in *Boumediene*, *supra* note 8.

[36] Whether the ultimate jurisdictional decision is made by a CSRT or a Commission, the matter is so fundamental that the beyond reasonable doubt standard must surely be applied, whether it is based on the Constitution or from the requirement of Geneva common Article 3 for "all the judicial guarantees . . . recognized as indispensable by civilized peoples." Convention (First) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

[37] Military Commissions Act of 2006, Pub. L. No. 109-366, § 948d(a), 120 Stat 2600, 2603 (2006) (emphasis added). *See also* § 948b(a), *supra* note 24 ("violations of the law of war and other offenses triable by military commission").

[38] The disjunctive "or" in "by this chapter *or* by the law of war" (§948d(a)) and the conjunction "and" in "violations of the law of war *and* other offenses triable by military commission" (§ 948b) open up a potential argument that

be on the crimes listed in Subchapter VII of the Act.39 Headed "Punitive Matters," Subchapter VII begins with a proposition that is patently false – a falsity that passed unnoticed during the Congressional debates. Where were the strict constructionists when we needed them?40 Section 950p asserts:

> (a) PURPOSE.– The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.

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offenses not "codified" in the Act could be tried as offenses against customary law. Rule 203 of the 2007 *Manual for Military Commissions* repeats the wisdom that "Military Commissions may try any offense under the M.C.A. or the law of war." MANUAL FOR MILITARY COMMISSIONS, *supra* note 30 at II-14.

39 The definitions set out the "prima facie case" elements of the crimes. These elements are expanded upon in the 2007 *Manual for Military Commissions*. Rule 916 of the manual also fleshes things out a bit beyond the *prima facie* case. MANUAL FOR MILITARY COMMISSIONS, *supra* note 30 at II-106. It contains a number of "Defenses": justification of legal duty, obedience to orders, self defense, defense of another, accident, entrapment, ignorance of mistake or fact, lack of mental responsibility, and voluntary intoxication ("not a defense" but evidence admissible in some cases).

40 *See* Geoffrey S. Corn & Victor Hansen, *Military Commissions: War Crime Courts or Tribunals of Convenience?,* JURIST, Feb.21, 2007, *available at* http://jurist.law.pitt.edu/forumy/2007/02/military-commissions-war-crimes-courts.php:

> The actual enumerated offenses, however, seem to stray far from jurisdictional mooring ["traditionally been triable by military commissions"]. They include not only the offense of conspiracy (considered invalid by a plurality of the Hamdan Court), but other inchoate offenses, offenses against the judicial process, terrorism, hijacking, and material support to terrorism, none of which can legitimately be characterized as "traditional" war crimes, but are instead "traditionally" considered violations of domestic law. Vesting the military commission with jurisdiction over these types of offenses seems inconsistent with the assertion that the statute merely codifies offenses previously triable by military commission. More troubling, vesting the commission with jurisdiction over offenses beyond the special competence of the profession of arms suggests that convenience result facilitation is the principal purpose of the statute.

> (b) EFFECT.– Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.[41]

No doubt some of the material in the subchapter does, indeed "codify offenses that have traditionally been triable by military commissions." Many of the offenses are based on provisions in the Hague and Geneva Conventions, although they do not track precisely the organization or wording of those treaties.[42] A reasonable question is what is meant by "traditionally triable by a military commission" and "declarative of existing law." The combined effect of these criteria must be that (a) there is some well-established basis for the crime in either widely accepted treaty law or in customary law (or both) and that (b) state practice supports some connection to the laws of war, consistent with military practice. How much leeway for developments does "codification" permit? One offense that is plainly *not* a codification is the crime of "conspiracy":

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[41] Military Commissions Act of 2006, Pub. L. No. 109-366, § 950p, 120 Stat 2600, 2624 (2006).

[42] *See id.*§ 950v(b)(1)-(22) (murder of protected persons; attacking civilians; attacking civilian objects; attacking protected property; pillaging; denying quarter; taking hostages; employing poison or similar weapons; using protected persons as a shield; using protected property as a shield; torture and cruel or inhuman treatment (although one might argue about the definition); intentionally causing serious bodily injury; mutilating or maiming; murder in violation of the law of war; destruction of property in violation of the law of war; using treachery or perfidy; improperly using a flag of truce; improperly using a distinctive emblem; intentionally mistreating a dead body; rape; sexual assault or abuse) and (27) (spying)). Even as to several of these, George Fletcher argues cogently that the definitions depart from those currently found in treaty and customary law. *See* George P. Fletcher, *On the Crimes Subject to Prosecution in Military Commissions*, 5 J. INT'L CRIM. JUST. 39, 40-46 (2007). Corn & Hansen, *supra* note 40, remark that the elements of the crime of killing protected persons, spelled out in the 2007 *Manual for Military Commissions*, alters the "traditional" mens rea requirement of knowledge of the protected status to negligence in respect of that element. Shifting definitions raise serious ex post facto issues! *See also* Jack M. Beard, *supra* note 26 at 56, 59-63 (discussing the difficulties of applying what are essentially U.S. domestic rules in the present context).

> Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or any such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.[43]

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[43] Military Commissions Act of 2006 § 950v(b)-(28). I note in passing that the apparently standardless determination to impose the death penalty is just the kind of standardless statute that was struck down by the Court in Furman v. Georgia, 408 U.S. 238 (1972). *See* Fletcher, *supra* note 42 at 47. There is nothing in the Act itself which refers to aggravating and mitigating circumstances which served to render life and death determinations constitutional in Gregg v. Georgia, 428 U.S. 153 (1976) and its progeny. The *Manual for Courts-Martial United States* contains, in Rule 1004, provisions concerning aggravating and mitigating circumstances to be taken into account in cases under the Uniform Code of Military Justice. JOINT SERVICE COMM'N ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL UNITED STATES 128 (2008) http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf. It is hard to rescue the Military Commissions Act by reading these provisions into it, in light of section 948b(c) of the Act:

> The procedures for military commissions set forth in this chapter are based on the procedures for trial by general courts-martial under chapter 47 of this title (the Uniform Code of Military Justice). Chapter 47 of this title does not, by its terms, apply to trial by military commission except as specifically provided in this chapter. The judicial construction and application of that chapter are not binding on military commissions established under this chapter.

The 2007 *Manual for Military Commissions*, however, contains in its Rule 1004 a list of aggravating circumstances, loosely based on the list in the *Manual for Courts-Martial United States*. MANUAL FOR MILITARY COMMISSIONS, *supra* note 30 at II-123-26. It begins with "that the accused was convicted of an offense, referred as capital, that is a violation of the law of war" and contains a number of equally vague ones. One might debate whether this attempt to rescue the constitutionality of the provisions in the Act is a valid exercise of the rule-making power in general, and whether the actual provisions, in particular, do the trick.

It should be noted that United States law contains two types of "conspiracy" doctrine. One is the inchoate (or preparation) type, of which this appears to be an example – agreeing to enter into a crime (sometimes with an overt act committed either by the particular accused or someone else) is an offense in itself.[44] The second type of conspiracy doctrine is that in *Pinkerton v. U.S.*,[45] under which participation in a conspiracy is used as a complicity theory to link a secondary perpetrator with substantive crimes committed by other members of the conspiracy. This second type of conspiracy doctrine does not find a home in the Military Commissions Act,[46] which has fairly

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Times have changed since the propriety of capital punishment was taken for granted in the Nuremberg trials (although vigorously contested at Tokyo). Compare the refusal to countenance capital punishment in any circumstances in the Statutes creating the Tribunals for Former Yugoslavia and Rwanda and the International Criminal Court. The growing consensus against capital punishment in both international humanitarian law and international criminal law is carefully considered in WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW (3d ed. 2003) (discussing international humanitarian law in chapter five and international criminal law in chapter six). I take it that, to the extent Congress applied its collective mind to the issue, it assumed that the laws of armed conflict have no problem with the penalty itself, even if applied arbitrarily. No one in Congress made any effort to address the issue of when it might legitimately be applied. Any abolitionists present bit their tongues.

[44] Might it be argued, on the basis of the references to "victims" in the penalty part of the provision, that more than a simple conspiracy (and an overt act) is needed? Must there be someone who can legitimately be described as a victim? The grammatical meaning of the sentence as a whole seems, however, to be that a victimless conspiracy is all that is required – the rest goes to the gravity of a particular offense.

[45] *Pinkerton v. United States*, 328 U.S. 640 (1946). The real effect of the *Pinkerton* approach is that people on the edges of a conspiracy may be liable for substantive offenses committed by other conspirators on something closer to negligence than to a shared intent with the others. In short, the net gets cast wider.

[46] It does, however, turn up in the MANUAL FOR MILITARY COMMISSIONS, *supra* note 30 at IV-21 cmt. 5 (2007): "Each conspirator is liable for all offenses committed pursuant to or in furtherance of the conspiracy by any of the co-conspirators, after such conspirator has joined the conspiracy and while the conspiracy continues and such conspirator remains a party to it." There is absolutely no basis for this in the Act or in the laws of armed conflict. None of the first three sets of charges made public, *supra* note 31, made such a claim.

traditional complicity provisions that refer to those who aid, abet, counsel, command or procure commission of the offense, accompanied by language dealing with commander responsibility.[47] Be that as it may, the whole point of the plurality opinion in *Hamdan*[48] was that inchoate conspiracy is *not* an offense triable by military commission. An assertion by Congress that it is so does not *make* it so![49]

Dubious also as "traditionally . . . triable" by military commission is the offense of "Hijacking or Hazarding a Vessel or Aircraft."[50] This offense appears to be a combination of the

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Two of them, Hamdan and Khadr, did, however, charge an inchoate conspiracy and inchoate conspiracy charges are fairly standard in later cases.

[47] Military Commissions Act of 2006, Pub. L. No. 109-366, § 950q, 120 Stat. 2600, 2624 (2006), headed "Principals," reads:

> Any person is punishable as a principal under this chapter who –
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> (1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission;
>
> (2) causes an act to be done which if directly performed by him would be punishable by this chapter; or
>
> (3) is a superior commander who, with regard to acts punishable under this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Section 950r of the Military Commissions Act penalizes accessories after the fact. Subsections (1) and (2) of section 950q appear to be derived from 18 U.S.C.A. § 2 (2008). The immediate model for subsection (3) is Article 28 of the Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (1998), although its ultimate antecedent is probably Yamashita v. Styer, 327 U.S. 1 (1946).

[48] *Hamdan v. Rumsfeld*, 548 U.S. 557, 593-612 (2006) (Stevens, J., plurality opinion). *See also supra* note 19.

[49] And retroactively, at that! In the first two conspiracy charges filed, *supra* note 31, Hamdan was alleged to have conspired "from on or about February 1996 to on or about November 24, 2001," and Khadr's conspiracy was said to have been "from on or about June 1, 2002 to on or about July 27, 2002."

[50] Military Commissions Act § 950v(b)(23):

> Any person subject to this chapter who intentionally seizes, exercises unauthorized control over, or endangers the safe navigation of a vessel or aircraft that is not a legitimate military objective shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

The phrase "that is not a legitimate military objective" seems to suggest that not every hijacking or attack on aircraft governed by the relevant conventions will come within the jurisdiction of a Commission. It is only when the action occurs as part of an armed conflict, international or non-international. At least the authors of the "elements" of the crime apparently thought so: the final element of the crime, described in the 2007 MANUAL FOR MILITARY COMMISSIONS, *supra* note 30 at IV–17 as "Hijacking or Hazarding a Vessel or Aircraft," is that "[t]he conduct took place in the context of and was associated with armed conflict." The language "in the context of and . . . associated with armed conflict" comes from the Elements of Crimes adopted pursuant to the Rome Statute of the International Criminal Court of 2002. It would appear that some of the same Pentagon lawyers were involved in both drafting exercises. Evidently writing before the appearance of the 2007 *Manual for Military Commissions*, George P. Fletcher points out that the Department of Defense's *2003 Military Commission Instruction No. 2* of April 30, 2003 was expressly limited to crimes committed in the context of or associated with armed conflict, whereas: "None of the 28 specific crimes listed in § 950v(b) of the Act mentions a nexus with armed conflict. The question is whether there is some other way to generate this limitation." Fletcher, *supra* note 42 at 40. The drafters of the *2007 Manual of Military Commissions* saw fit, sensibly I think, to "generate" the limitation. In fact, the armed conflict element is to be found specifically in all of the manual's elements of offenses derived from § 950v of the Military Commissions Act, except for conspiracy. MANUAL FOR MILITARY COMMISSIONS, *supra* note 30. As to conspiracy, affording jurisdiction to a military tribunal may suggest that there needs to be a nexus to war, or at least to offenses that are connected to or inherent in armed conflict. Moreover, the armed conflict circumstance element is to be found in all the substantive offenses (as defined in the manual) to which the conspiracy charge may lie. There are obvious proof problems in linking what Hamdan, for example, was doing in 1996 to an armed conflict. Justice Stevens noted this in the majority opinion in *Hamdan*, 548 U.S. at 597-602, particularly in his exchange with Justice Thomas at page 600, note 31. It seems clear that the government must carry some such burden: absent a blank check from Congress and a free pass from the courts, the government is otherwise in a bind in arguing that a *military* tribunal, sitting at a time when the regular courts are open, would have jurisdiction over something like a hijacking that was not clearly part of an armed conflict. Of course, there is always the argument that, since there is a "war on terror," this part of the law of armed conflict allows such tribunals to function. *See generally, supra* note 9. This is not an argument that carries much weight. Tom J. Farer, *Military*

offenses contained in the International Civil Aviation Organization's (1970) Hague[51] and (1971) Montreal[52] Conventions and the International Maritime Organization's 1988 Convention on Unlawful Acts against the Safety of Maritime Navigation[53] to all of which the United States is a party. These are offenses that the treaties in question require parties to penalize under their domestic law. They have "traditionally" been characterized as part of the ordinary criminal law rather than part of the law of armed conflict to which military commissions might potentially have application. The assumption in the treaties is that they will find a home in the regular courts, not in the military court system.[54] I have not been able to locate any examples of such offenses being subject to military trial.[55] And the offenses are hardly part of any

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Commissions Act of 2006: The Two Faces of Terror, 101 AM. J. INT'L L. 363, 370 (2007), has some thoughtful comments on the notion of an armed conflict, making use of Latin American analogies.

[51] Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641.

[52] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564.

[53] International Maritime Organization, Rome Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668.

[54] In the United States, see 49 U.S.C. § 46501 (1994) (aircraft hijacking/piracy), 18 U.S.C. § 32 (2006) (offenses against aircraft), 18 U.S.C. § 2280 (1996) (offenses against safety of maritime navigation). Suggestive, in this respect, is U.S. v. Tiede, 86 F.R.D. 227 (U.S. Court for Berlin, 1979). In a hijacking case tried in an unusual jurisdiction, U.S. District Court Judge Herbert Stern insisted on the right to a jury. In addition to constitutional arguments, he noted the language of the Tokyo Convention whereby a person suspected of aircraft offenses is to be afforded by a state taking him into custody "treatment which is no less favorable for his protection and security than that accorded to nationals of such Contracting State in like circumstances." *Id.,* at 260 (citing Convention on Offences and Certain other Acts Committed on Board Aircraft, September 14, 1963, 704 U.N.T.S. 219). *See also* HERBERT J. STERN, JUDGMENT IN BERLIN (1984).

[55]Note also that the United States and other major powers objected vigorously to including such offenses within the jurisdiction of the International Criminal Court, being content with the way they were dealt with in regular national court systems. *See generally* Lucy Martinez, *Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems*, 34 RUTGERS L.J. 1

"traditional" law of armed conflict, having been created as treaty-based crimes in the 1970s and 1980s. I am not, of course, suggesting that these are not serious crimes of international concern. What I am arguing is that they have no "traditional" connection with military commissions. If the suspects in custody are to be tried for them, it should be in federal district court under the traditionally governing law.

The same is true of the offense of "Terrorism" created by the Military Commissions Act.[56] If this offense is somehow to be fitted into the category of being traditionally tried by a military commission, it has to be on a basis other than that suggested by its sponsors. One of them, Representative Saxton, commented:

> We have carefully narrowed and crafted the provisions of this bill to enable the United States to prosecute the perpetrators of the 1998 bombings of the American embassies in Kenya and Tanzania, the 2000 attack on the USS *Cole*, and other crimes that have been committed.

(2002); Patrick Robinson, *The Missing Crimes*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 497 (Antonio Cassese et al. eds., 2002).

[56] Military Commissions Act, Pub. L. No. 109-366, § 950v(b)(24), 120 Stat. 2600, 2629-30 (2006):

> Any person subject to this chapter who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct, shall be punished . . . .

The 2007 MANUAL FOR MILITARY COMMISSIONS, *supra* note 30 at IV-17 adds as an element of this crime (as in the case of others, *see supra* note 50) that the relevant conduct "took place in the context of and was associated with armed conflict." Note also the reference in the first phrase of the subsection to "protected persons" which makes a connection to the laws of armed conflict. "Protected Person" is defined in § 950v(2) of the Act to mean "any person entitled to protection under one or more of the Geneva Conventions." It includes (in language derived roughly from common Article 3) "civilians not taking an active part in hostilities," as well as "military personnel placed hors de combat by sickness, wounds, or detention," and "military medical or religious personnel." *Id.* at (2)(A)-(C).

> Yes, these were suicide attacks and the men who delivered the explosives were killed, along with innocent victims, but the planner, logisticians, and financiers of those operations remain at large.
>
> Importantly, this Bill allows, as all Americans believe it should, the criminal prosecutions of those who purposefully and materially supported these criminal activities. And, of course, the measure covers those responsible for 9/11 as well.[57]

Viewed in this light, the closest analog in United States law appears to be U.S.C. sections 2332(a) and 2332(b).[58] The former deals with killing United States nationals outside the United States. A prosecution requires "written certification of the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions that, in the judgment of the certifying official, such offense was intended to coerce, intimidate, or retaliate against a government or a civilian population."[59] Section 2332(b) deals with "acts of terrorism transcending national boundaries" with effects in the United States that involve attacks on persons and property.[60]

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[57] H.R. REP. NO. 109-688, at H7536 (2006). It is, to say the least, hard both factually and legally to make the armed conflict connections that seem necessary to place all the offenses on the Congressman's list before a military tribunal.

[58] 18 U.S.C. §§ 2332(a), (b) (2006). *See also* 18 U.S.C. §§ 112, 1116 (2006) (crimes against internationally protected persons). Nothing in the Military Commissions Act refers specifically to such persons (as in the embassy bombings) so general terrorism law must be the focus.

[59] 18 U.S.C. § 2332(d).

[60] *Id.* One or more of the following "circumstances" is required:

> (A) the mail or any facility of interstate or foreign commerce is used in furtherance of the offense;
>
> (B) the offense obstructs, delays, or affects interstate or foreign commerce, or would have so obstructed, delayed, or affected interstate or foreign commerce if the offense had been consummated;

Neither of these is quite the same as the offense in the Military Commissions Act.[61] The formulation of the terrorism offense in the Act seems rather to have its origins in the 1937 League of Nations Terrorism Convention[62] that never came into force. Beginning, again, with the Hague Convention in 1970, the international community has endeavored to proscribe various acts that we think of as terroristic and, more recently, to synthesize from them a generic definition of terrorism. It has not been an easy task, although aspects of the 1937 definition have been re-emerging in such conventions as that against the financing of terrorism.[63] Indeed the language in the Act comes

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> (C) the victim, or intended victim, is the United States Government, a member of the uniformed services, or any official, officer, employee, or agent of the legislative, executive, or judicial branches, or of any department or agency, of the United States;
>
> (D) the structure, conveyance, or other real or personal property is, in whole or in part, owned, possessed, or leased to the United States, or any department or agency of the United States;
>
> (E) the offense is committed in the territorial sea (including the airspace above and the seabed and subsoil below, and artificial islands and fixed structures erected thereon) of the United States; or
>
> (F) the offense is committed within the special maritime and territorial jurisdiction of the United States.

Id. § 2332b(b).

[61] Formulating offenses with elements different from any existing ones creates some obvious ex post facto problems. There can be no denying, though, the intent of some in Congress to go back in time. *See*, *e.g.*, Rep. Saxton, *supra* text accompanying note 57.

[62] Convention for the Prevention and Punishment of Terrorism, Nov. 16, 1937, League of Nations Doc. C.546M.383.1937.V (defining acts of terrorism as "criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public"). There are also echoes in the Military Commissions Act terrorism definition of 18 U.S.C. § 2332b (2006), which deals with "acts of terrorism transcending national boundaries."

[63] International Convention for the Suppression of Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270. The scope of the Convention's application is defined in terms of an act which constitutes an offense within the scope of any one of nine terrorism conventions beginning with the Hague and Montreal

close to that in the draft Comprehensive Convention against International Terrorism that is currently stalled in the United Nations General Assembly.[64] While terrorism is clearly a scourge, and some aspects of it are no doubt subject to universal jurisdiction,[65] "traditional" is, it would seem, too strong a word to describe it or its relationship to military commissions.[66] This is especially so where there are ongoing efforts at the United Nations to define the term.

There is, perhaps, another body of law from which the terrorism offense is arguably derived and for which a stronger argument can be made for military jurisdiction. This requires emphasizing the connection to armed conflict which is implicit in the words "protected persons" in the provision and the

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Conventions and including "[a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act." *Id*. at 271.

[64]Terrorism is defined as an act intended to cause death or serious bodily injury to any person, serious damage or damage likely to result in major economic loss to public or private property, including a place of public use, state or government facility, a public transportation system, an infrastructure facility or the environment, "when the purposes of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act." Report of the Ad Hoc Committee established by General Assembly resolution 51/210, art. 2, Sixth Sess., (28 January-1 February 2002) at 6, U.N. Doc. A/57/37 (Dec. 17, 2002). *See generally*, Bruce Broomhall, *State Actors in an International Definition of Terrorism from a Human Rights Perspective,* 36 CASE W. RES. J. INT'L L. 421 (2004); TAL BECKER, TERRORISM AND THE STATE: RETHINKING THE RULES OF STATE RESPONSIBILITY (2006).

[65]RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987) (including, tentatively, as subject to universal jurisdiction "perhaps certain acts of terrorism").

[66]Note also the comment in the plurality opinion in Hamdan v. Rumsfeld, 548 U.S. 557, 612 (2006), about the conspiracy charges failing to "satisfy the most basic precondition – at least in the absence of specific congressional authorization – for establishment of military commissions: military necessity." The terrorist offenses have the same problem. Is this an invitation to Congress simply to ignore "the most basic precondition?" None of the first three cases, *see supra* note 31, charged terrorism as such, but all three alleged the ancillary offense of providing material support for terrorism which is about to be discussed.

reference to "armed conflict" in the 2007 *Manual for Military Commissions*.[67] The body of law in question is contained in Article 51 section 1 of Additional Protocol I and article 13 section 2 of Additional Protocol II of 1977 to the Geneva Conventions. Protocol I deals with international armed conflict and Protocol II with non-international. Both provisions state: "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."[68]

The difficulty with relying on this from a United States point of view is that the United States has not ratified either of these two Protocols. For good measure, the offense in Protocol I is not included in the list of grave breaches which are subject to penal sanction on the basis of universal jurisdiction. On the other hand, in *Prosecutor v. Gali* ,[69] a majority of the Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia held, in a case arising out of the siege of Sarajevo, that these provisions were a part of customary law and that "a breach of the prohibition of terror against the civilian population gave rise to individual responsibility pursuant to customary law at the time of the commission of the offenses [ ] for which Galic was convicted."[70] In reaching this conclusion, the Tribunal relied heavily on material contained in military manuals and national legislation discussed in the International Committee of the Red Cross's study of Customary Humanitarian

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[67] *See supra* note 50.

[68] Geneva Protocol I art. 51, § 1 and Protocol II art. 13, § 2. *See also* Geneva Convention relative to the Protection of Civilian Persons in time of War of 12 August 1949 (Geneva IV) art. 33 (applying in international armed conflict and prohibiting "all measures of intimidation or of terrorism" against civilian population). Art. 33 of Geneva IV is not included in the "grave breach" regime.

[69] *Prosecutor v. Gali* , Case No. IT-98-29-A, Judgment (Dec. 5, 2006).

[70] *Id.* at para. 87. Judge Schomberg agreed with the first part of this, but dissented vigorously on the individual criminal responsibility point. For a good discussion of the Protocol I and II issues written before the decision of the Appeals Tribunal in *Gali* , see BEN SAUL, DEFINING TERRORISM IN INTERNATIONAL LAW ch. 5 (2006). *See also* the trial level decisions of the Special Court for Sierra Leone in AFRC, SCSL-04-16-T, June 20, 2007, and in CDF, SCSL-04-14-T, Aug. 2, 2007.

Law.[71] In support of the customary nature of the prohibition (but apparently not of the criminal nature) the Tribunal cites to 1987 remarks by the Deputy Legal Adviser to the State Department supporting the "principle that the civilian population as such, as well as individual citizens, not be the objects of acts or threats of violence the primary purpose of which is to spread terror among them."[72] The conflict in former Yugoslavia was clearly of a scale that could be characterized readily as an armed conflict and it may be, therefore, that the Military Commissions Act could be salvageable in such a situation. It would appear, however that its sponsors expected something more of it.

Connecting the ancillary offense of providing material support for terrorism[73] to what is traditionally tried by military

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[71] JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK FOR INTERNATIONAL COMMITTEE OF THE RED CROSS, I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005) (cited in Prosecutor v. Gali , Case No. IT-98-29-A at para. 89). The United States government has been critical of the methodology in the ICRC study. *See Letter from John Bellinger III, Legal Advisor, U.S. Dept. of State, and William J. Haynes, General Counsel, U.S. Depart. of Defense, to Dr. Jakob Kellenberger, President, International Committee of the Red Cross, Regarding Customary International Law Study*, 46 I.L.M. 514 (2007). Given the insistence in the Military Commission Act's amendments to the War Crimes Act on criminalizing only what it regards as "grave breaches" of common Article 3 of the 1949 Conventions, to which the U.S. is a party, *infra* notes 129-31, the U.S. would be in an awkward position arguing for criminalization of non-grave features of Protocol I, or any of the provisions of Protocol II, to both of which it is not a party.

[72] Prosecutor v. Gali , Case No. IT-98-29-A at para. 89 (quoting Michael J. Matheson, *Remarks at Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. IN'T L. & POL'Y 419, 426 (1987)).

[73] The Military Commissions Act, Pub. L. No. 109-366, § 950v(b)(25), 120 Stat. 2600, 2630 (2006), a truncated version of 18 U.S.C. §§ 2339(A), (B), provides that:

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

commissions has the same difficulties as the basic terrorism offense itself. It ought perhaps to be an offense under international law, but there appears to be no longstanding customary or treaty law authorizing or requiring criminalization. The closest international instruments on point (neither of which uses the terms "material support") are the

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> punished as a military commission under this chapter may direct.

"Material support" is defined as having the meaning given that term in section 2339(A)(b) of title 18 in the Act. Section 2339(A)(b) of the Act says that it "means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, and other physical assets, except medicine or religious materials." "Training" is defined to mean "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." *Id.* "Expert advice or assistance" is defined to mean "advice or assistance derived from scientific, technical or other specialized knowledge." *Id.* Once again the 2007 MANUAL FOR MILITARY COMMISSIONS, *supra* note 30 at IV-18, includes as one of the elements of the crime that "[t]he conduct took place in the context of and was associated with an armed conflict." Hicks was charged with providing material support "from on or about December 2000 through on or about December 2001;" Hamdan was charged for some events on November 24, 2001 and others "from on or about February 1996 to on or about November 24, 2001;" and Khadr's activities were said to be "from about June 2002 through on or about July 27, 2002." Professor Norman Abrams describes the material support provisions in 18 U.S.C.A. § 2339A (2008) as "the most significant doctrinal developments in the federal criminal law since the enactment of RICO and the other organizational crime statutes, the money laundering statutes and the criminal forfeiture laws." Norman Abrams, *The Material Support Terrorism Offenses: Perspectives from the (Early) Model Penal Code*, 1 J. NAT'L SEC. L. & POL'Y 5, 6 (2005). He notes that:

> These statutes bear some resemblance to criminal liability for complicity, but they are being used like a new kind of conspiracy charge, the familiar "prosecutor's darling." Unlike conspiracy, they are framed with a mens rea of knowledge rather than purpose, and because they are substantive offenses, they can be combined with traditional conspiracy charges. The provisions can be used to impose punishment for conduct remote from the commission of criminal harms, often conduct involving minimal and outwardly non-criminal acts.

Id. (footnotes omitted). *See also supra* notes 43-46 (regarding conspiracy).

International Convention for the Suppression of Financing of Terrorism, of December 9, 1999,[74] and Security Council Resolution 1373, adopted on September 28, 2001.[75]

The 1999 Convention requires states parties to make it a criminal offense to provide or collect funds with the intention that they should be used, or in the knowledge that they should be used, in order to carry out either (a) an act that constitutes an offense under one of a number of United Nations "terrorism" treaties, or (b) "[a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to abstain from doing any act."[76] The Convention has a narrow focus on financing which is hardly broad enough for what the U.S. prosecutors seem to have in mind for those in Guantanamo.[77] Hamdan, for example, is alleged to be a driver and general helper, not a fundraiser![78] It is, moreover, sufficiently recent that it is hard to regard it by 2001 or 2002 as part of international customary law – let alone as traditionally subject to trial by military commission.

Security Council resolution 1373 is perhaps more promising

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[74] International Convention for the Suppression of Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270. The Convention, which came into force on April 10, 2002 with 22 parties, had 160 parties by late April 2008, including the U.S. which ratified it on June 26, 2002. The implementing legislation for it and the International Convention for the Suppression of Terrorist Bombings, Jan. 9, 1998, 37 INT'L LEG. MAT. 249 (1998), was adopted the previous day as the Terrorist Bombings Convention Implementation Act of 2002, Pub. L. No. 107-197, 116 Stat. 721 (2002).

[75] S.C. Res. 1373, U.N. Doc. S/RES/54/109 (Sept. 28, 2001).

[76] International Convention for the Suppression of Financing of Terrorism, art 2, paras. 1(a), (b), Dec. 9, 1999, 39 I.L.M. 270. Article 3 of the Convention limits the treaty to transnational situations.

[77] The implementing legislation, contains a "Disclaimer" to 18 U.S.C. § 2339(C) (2008) that "[n]othing contained in this section is intended to affect the scope or applicability of any other Federal or State law" but this can not have any effect on what is traditionally before military commissions. Terrorist Bombings Convention Implementation Act tit. I, § 2332(f)(c).

[78] *Supra* notes 12-13.

as a way to uphold the material support provisions. Like the Financing Convention, it also obligates states to "prevent and suppress the financing of terrorist acts."[79] It also requires them to "[c]riminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry our terrorist acts,"[80] to "[p]rohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons,"[81] and to "[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measure against them, such terrorist acts are established as serious criminal offences in domestic laws and that the punishment duly reflects the seriousness of such terrorist acts."[82] As a Security Council resolution adopted pursuant to Chapter VII of the Charter, it is binding on members of the United Nations.[83] But it is a thin reed on which to build much beyond territorial and nationality jurisdiction. It is rather plainly talking about jurisdiction in the regular courts, not some

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[79] S.C. Res. 1373, ¶ 1(a), U.N. Doc. S/RES/508 (Sept. 28, 2001).

[80] *Id.* at ¶ 1(b). Note the limitation here to nationals and territory.

[81] *Id.* at ¶ 1(d). Again, application is limited to nationals and territory.

[82] *Id.* at ¶ 1(e). The jurisdictional basis here is, at best, ambiguous. Is it limited to nationality and territoriality, or is it an invitation to be expansive?

[83] There is a significant debate going on about whether the Security Council possesses this general kind of legislative power (which could well forestall the regular process of gradual treaty ratification) or whether it is limited to dealing with specific situations. *See* Axel Marschik, *Legislative Powers of the Security Council*, *in* TOWARDS WORLD CONSTITUTIONALISM 457 (Ronald St. John Macdonald & Douglas M. Johnston eds., 2005).

ad hoc tribunal, and it appears to be prospective in nature.[84] Again, "traditional" is a hard sell.

As a drafting matter, the material support language in the Military Commissions Act is in fact an amalgam of two offenses under United States law: "[p]roviding material support to terrorists"[85] and "[p]roviding material support or resources to designated foreign terrorist organizations."[86] The second of the two provisions, in language added in 2004, speaks expressly of extraterritorial jurisdiction. This may suggest that the former does not have such an effect. On the other hand, the original version of §2339A, dealing with providing material support to terrorists, spoke to acts "within the United States." This phrase was deleted by the USA Patriot Act of 2001,[87] suggesting that the drafters wanted the prohibition to apply globally. The offenses

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[84] *See* the language quoted at *supra* notes 79-82. In it first report to the Counter-Terrorism Committee created by the Security Council pursuant to resolution 1373, the United States noted the material support legislation among various tools as giving partial effect to the resolution. It also noted that it was then planning to ratify and implement the terrorist bombing and financing conventions – as it did the following year. *See* Counter-Terrorism Comm., *Report to the Counter-Terrorism Committee Pursuant to Paragraph 6 of Security Council Resolution 1373 (2001) of 28 September 2001: Implementation of Resolution 1373 (2001)*, 9-10, 23, U.N. Doc. S/2001/1220 (Dec. 21, 2001) (submitted by United States).

[85] 18 U.S.C.A. § 2339A (2008). Enacted in 1994, the statute was amended in 1996, 2001, 2002, 2004 and 2006. *Id.*

[86] 18 U.S.C. § 2339B (2006). Enacted initially in 1996, the statutory penalty was amended by the USA Patriot Act of 2001. A lengthy extraterritorial jurisdiction provision was added in 2004. The "designated organizations" provision, for the most part requires proof of designation by the Government and more knowledge than the other provisions. The requirement for "designation" is not carried forward into the Military Commissions Act.

[87] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, § 805, 115 Stat. 272, 277-78 (2001). In addition to the arguments discussed in the text, it is hard to escape the conclusion that § 950(v)(b)(25) is an unconstitutionally *ex post facto* law as applied to any of the three initial defendants charged pursuant to it. The present form of the crime is created only by the Military Commissions Act; earlier versions in federal law may not have had extraterritorial application at the time of the relevant conduct. *See generally* Independent Legal Advice on the Legality of the Proposed Charges against David Hicks (Mar. 2007) (on file with author). Hicks's plea bargain mooted the argument as far as his individual case is concerned.

are creations of United States law. If the 1999 Convention and the 2001 Security Council resolution are any indication, these crimes may well have been working their way into general international law in the early 2000s. Punishing them in ordinary courts would have international respectability. To suggest, however, that material support for terrorism has traditionally been subject to trial by military commission is to stretch credulity.[88]

One might have thought that the blatant falsity of some of the claims in the Act to reflect what has traditionally been tried before military commissions would have been examined by members of Congress. Alas, that was not the case. Frankly, the evidence of the debates suggests that Congress as a whole did not address its collective mind to analyzing its constitutional basis for acting in this area. What are the chances that the courts will do so? The strongest provision in the Constitution authorizing legislation of this kind is the power of Congress "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."[89] In the few cases turning on this constitutional provision, the Supreme Court proceeded on the basis that the underlying international

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[88] Beard, *supra* note 26 at 61, comments: "On the basis of its unprecedented expansion of the definition of 'combatancy,' the MCA also lists 'providing material support for terrorism' as a war crime . . . ."

[89] U.S. CONST. art. I, § 8, cl. 10. For a thorough analysis of this provision, see Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses against the Law of Nations*, 42 WM. & MARY L. REV. 447 (2000). Perhaps it can also be measured against the war power, *id.* art. I, § 8, cl. 11; the power "[t]o make Rules for the Government and Regulation of the land and naval Forces," *id.* art. I, § 8, cl. 14; and the necessary and proper clause, *id.* art. I, § 8, cl. 18. Is there any mileage also in the commerce clause? Federal law does not contain any general "police power" unless a lot can be gleaned in the foreign affairs area from the necessary and proper clause. Senator Byrd, who ultimately voted against the bill, suggested that the power to create military commissions might be found in that part of the war clause, *id.* art. I, § 8 cl. 11, which grants Congress power to "make Rules concerning Captures on Land and Water." *See* 152 CONG. REC. S10,385 (daily ed. Sept. 28, 2006). He was apparently referring generally to the tribunal structure, rather than the power to create offenses which they might try. He was also on his own in wondering where the power might lie.

law was a matter for scrutiny. In *U.S. v. Arjona,*[90] the issue was whether Congress could make it criminal to counterfeit notes of a foreign bank or corporation. In upholding the legislation, the Court made extensive references to the relevant customary law which it believed obligated the United States to criminalize such activity.[91] Similarly, in *Ex parte Quirin,*[92] the Court looked carefully at whether the kind of sabotage the German accused were alleged to have plotted was an offense under the laws of armed conflict. In both cases, the prosecutions were ultimately upheld. Is there any hope that a court faced with the Military Commissions Act will engage in scrutiny of this kind? It will be noted that the issues are twofold. One is whether Congress has power to enter this area at all; the other is whether the area involves "offenses" against the law of nations that are appropriate for a military tribunal. I suspect that it may be easier to get a court to strike down legislation sending such offenses to a military commission than it would be to have them struck down altogether. All the same, it would be interesting to see an Administration that places little stock in international law relying on it to uphold legislation!

PROCEDURE

While the procedures of the Military Commissions are based to a significant extent on court-martial procedures, there are exceptions.[93] Three are stated up front in the Act as not

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[90] 120 U.S. 479 (1887). For a useful analysis of the "define and punish" clause, see U.S. v. Smith, 18 U.S. (5 Wheat.) 153 (1820), especially the dissent by Justice Livingston

[91] As Professor Stephens notes: "The Court expressed no hesitation in finding that the concept of the law of nations incorporated into the Offenses Clause evolved over time, reflecting new developments of international law." Stephens, *supra* note 89 at 478. My position is that there is simply no treaty or customary law basis for arguing at this time that some of the Military Commissions Act offenses are part of international law.

[92] 317 U.S. 1 (1942). On *Quirin* and its contemporary relevance, *see* Carl Tobias, *Questioning Quirin*, 97 J. CRIM. L. & CRIMINOLOGY 365 (2006) (reviewing LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW (2003)).

[93] They do not always compare favorably with procedures before international tribunals either. *See* Guénaël Mettraux, *Comparing the*

applying: 10 U.S.C. § 810 (2006), relating to speedy trial, including any rule of courts-martial relating to speedy trial; § 831 (a), (b) and (d), relating to compulsory self-incrimination;[94] and § 832, relating to pretrial investigation.[95] None of these changes are favorable to the accused.

Removing the right to a speedy trial has an "obvious effect" according to a military commentator, "evidenced by the detainees currently at Guantanamo Bay . . . that the defendant can be held in confinement indefinitely without a finding of guilt."[96] There is a secondary effect. Court-martial speedy trial

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Comparable: 2006 Military Commissions v. the ICTY, 5 J. INT'L CRIM. JUST. 59 (2007).

[94] Section 831 reads:

> (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
>
> (b) No person subject to this chapter may interrogate, or request any statement from, an accused person or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.
>
> (c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.
>
> (d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

Subsection (c), the least significant of these provisions, apparently survives the 2006 Act. At least it is not specifically rendered irrelevant.

[95] 10 U.S.C. § 948b(d). Lest any *a contrario* implications be drawn from these three specific exclusions, subsection (2) adds, "[o]ther provisions of chapter 47 of this title shall apply to trial by military commission under this chapter [10 U.S.C. §§ 948a-950w] only to the extent provided by this chapter."

[96] Richard Meyer, *When a Rose is not a Rose: Military Commissions v. Courts-Martial*, 5 J. INT'L CRIM. JUST. 48, 54 (2007).

rules can force the government into the courtroom before it is ready; here it has all the time in the world "to perfect its case prior to bringing charges."[97]

The UCMJ's provisions against compulsory self-incrimination[98] are replaced for commissions by 10 U.S.C. § 948r.[99] A broad right not to incriminate oneself anywhere in the process gets narrowed to a right to refuse to testify against oneself at the commission itself. A broad *Miranda* right is simply removed.[100] The rules against coercion are drastically reduced.

As to the right against self-incrimination, § 948r starts with the proposition – much narrower than that in the UCMJ:[101] "No person shall be required to testify against himself at a proceeding of a military commission under this chapter." The

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[97] *Id.*

[98] *See supra* note 94.

[99] 10 U.S.C.A. § 948(r) (2008). This provision was added by the Military Commissions Act, Pub. L. No. 109-366, § 3, 120 Stat. 2600, 2600 (2006).

[100] Rep. Hunter comments:

> In the hearings we had, we had at least one experienced officer in the Judge Advocate Corps state that it was his opinion, having tried hundreds of cases, that if you applied the UCMJ, as a number of members on the Democrat side have said they would like to do, to constitute the body of law under which we are prosecuting terrorists, in this officer's opinion once a corporal had captured a terrorist on the battlefield, maybe seconds after that terrorist had shot at him, and threw that terrorist over the hood of a Humvee, if you used the UCMJ, he would at that point have to give him the Miranda rights and then call up a lawyer and assign that lawyer to that alleged terrorist, and then all of the statements and all of the evidentiary rulings that could flow from that activity would then trigger.

152 CONG. REC. H7535 (daily ed. Sept. 27, 2006) (statement of Rep. Hunter). I doubt that the "Humvee hypo" represents the typical scenario where interrogation takes place. *See generally* Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004) (O'Connor, J., plurality opinion) (holding that initial captures require limited process; "that process is due only when the determination is made to *continue* to hold those who have been seized.") (emphasis in original).

[101] 10 U.S.C. § 948r (2008).

section continues, providing that "[a] statement obtained by use of torture shall not be admissible in a military commission under this chapter [10 USC §§ 948a-950w], except against a person accused of torture as evidence that the statement was made."[102] This is quite emphatic. What is not clear is which definition of torture applies.[103] The admissibility of evidence obtained by forms of coercion short of torture is, at best, confusing. As to statements obtained before the enactment of the Detainee Treatment Act of 2005 (December 30, 2005), a statement "in which the degree of coercion is disputed" is admissible only if the military judge finds that: "(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (2) the interests of justice would best be served by admission of the statement into evidence."[104] In respect of statements obtained after December 30, 2005, there is an added criterion for admission, namely that the judge must find that "(3) the interrogation methods used to obtain the statement do not amount to cruel, inhuman or degrading treatment prohibited by section 1003 of the Detainee

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[102] *Id.* The model for this provision seems to be article 15 of the 1984 United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.

[103] There does not seem to be any specific reference in the current chapter to any of the possible definitions, such as those in the Torture Convention, *see infra* note 141, or § 950(v)(11) of the Military Commissions Act (in the crimes triable provisions). The 2007 MANUAL FOR MILITARY COMMISSIONS, *supra* note 30. assumes that the definition of 18 U.S.C. § 2340 applies. (This is the Torture Convention's definition as narrowed by the U.S. reservations to that treaty. *See infra* note 141.)

[104] 10 U.S.C. § 948r(d) (2007). A quaint concept. The burden of proof of lack of coercion would normally be on the prosecution; here, the issue is simply left open and the argument shifts to other criteria for admission. Michael Reisman sees this as not even absolutely precluding the admissibility of evidence obtained by torture. He sees the whole process as part of a move by which prohibitions, such as that against torture, which once had been absolute, are becoming subject to "justifications" based on military necessity, proportionality and as to discrimination with respect to combatants and noncombatants as the context allows. Michael Reisman, *Holding the Center of the Law of Armed Conflict*, 100 AM. J. INT'L L. 852 (2006).

Treatment Act of 2005."[105] In this case, there is a definition (albeit a narrow one) to refer to.[106]

There is also a general evidentiary rule placing the accused at a disadvantage, namely that evidence is admissible "if the military judge determines that the evidence would have

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[105] 10 U.S.C.A. § 948r(d)(3) (2008). The statutory prohibition on the admission of statements obtained after December 30, 2005 by cruel, inhuman or degrading treatment (as defined, however), is on its face absolute, as is the case for torture. The Torture Convention, *supra* note 102, does not appear to contain a specific requirement for keeping out evidence obtained by cruel, inhuman or degrading treatment.

[106] Section 1003 of the Detainee Treatment Act of 2005 defines these terms, for purposes of that section, as:

> [T]he cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003(d), 119 Stat. 2680, 2740 (2005) The relevant "reservation" (so denominated) in the U.S. instrument of ratification is this:

> That the United States considers itself bound by the obligation under [a]rticle 16 to prevent 'cruel, inhuman or degrading treatment or punishment', only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

136 CONG. REC. S17,486 (1990).

There appears to be nothing relevant among the Declarations and Understandings accompanying the U.S. ratification. Compare this with the "Understanding" on torture, *infra* note 141. There is no question that the treaty standards (left to themselves) grant more protection than the Constitution – not a difficult proposition to grasp, as treaties and statutes often give more than the Constitution might otherwise give. The whole intention behind the reservation was that the U.S. would not raise U.S. legal protections beyond the constitutional floor.

probative value to a reasonable person."[107] There is an exception to this for hearsay, which effectively reverses the burden of proof for admission of the evidence. The relevant provision reads:

> (E)(i) Except as provided in clause (ii), hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission if the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the intention of the proponent to offer the evidence, and the particulars of the evidence (including information on the general circumstances under which the evidence was obtained). The disclosure of evidence under the preceding sentence is subject to the requirements and limitations applicable to the disclosure of classified information in section 949j (c) of this title.
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> (ii) Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial shall not be admitted in a trial by military commission if the party opposing the admission demonstrates that the evidence is unreliable or lacking in probative value.[108]

One commentator sees this as a "noteworthy departure from American jurisprudence," adding that the normal Military Rules of Evidence "mirror the general prohibition against hearsay with

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[107] 10 U.S.C.A. § 949a (2)(A) (2008).

[108] *Id. at* § 949(a)(2)(E). Rule 803, MANUAL FOR MILITARY COMMISSIONS, *supra* note 30, spells out the standard of proof for "demonstrates" and re-works "unreliable or lacking in probative value." It provides that "[h]earsay evidence otherwise admissible under subsection (b)(1) shall not be admitted if the party opposing the admission of the evidence demonstrates *by a preponderance of the evidence* that the evidence is *unreliable under the totality of the circumstances*." *Id.* (emphasis added).

numerous exceptions of the federal rules."[109]

The same commentator describes the denial before commissions of the pre-trial investigation, somewhat akin to grand jury proceedings, available in courts-martial. He suggests that this "may prove to be the most significant difference for practitioners between courts-martial and military commissions"[110] and that its absence "places unlawful combatants at a great disadvantage compared to their counterparts who are tried at courts-martial."[111] They lose important discovery opportunities and other opportunities for preparation.

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[109] Meyer, *supra* note 96.

[110] *Id.* at 52. Meyer gives search and seizure as one example of issues that might emerge at pre-trial. Search and seizure rules applied in courts-martial may, however, be relaxed for commissions. Section 949(a)(2)(B) provides that the Secretary of Defense in establishing procedures and rules of evidence for military commissions proceedings may prescribe that "[e]vidence shall not be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant or other authorization." I can find nothing to this effect in the 2007 *Manual for Military Commissions*. Supporting the Military Commissions Bill, Rep. Hunter commented:

> As I mentioned earlier, we have modified the rules of evidence to adapt to the battlefield. One of the principles used by the judiciary in criminal prosecutions of our citizens is called the fruit of the poisonous tree doctrine. This rule provides that evidence derived from information acquired by police officials or the government through unlawful means is not admissible in a criminal prosecution. I want to make it clear that it is our intent with the legislation not to have this doctrine apply to evidence in military commissions. While evidence obtained improperly will not be used directly against the accused, we will not limit the use of any evidence derived from such evidence.
>
> The deterrent effect of the exclusionary rule is not something that our soldiers consider when they are fighting a war. The theory of the exclusionary rule is that if the constable blunders, the accused will not suffer. However, we are not going to say that if the soldier blunders, we are not going to punish a terrorist. Some rights are reserved for our citizens; some rights are reserved for civilized people.

152 CONG. REC. H7534-35 (daily ed. Sept. 27, 2006) (statement of Rep. Hunter). I cannot find the distinction he makes in the legislation.

[111] Meyer, *supra* note 96, at 54.

The Act limits the grounds on which the defendant may be excluded from the proceedings to two: "(1) to ensure the physical safety of individuals, or (2) to prevent disruption of the proceedings by the accused."[112] The proceedings may be closed to the public in certain narrowly defined situations, to protect information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods or activities, or to ensure the physical safety of individuals.[113] There are also complex provisions on national security privilege[114] which are less generous to defendants than is the case in courts-martial.[115] Nevertheless, this is a significant improvement, especially in respect of the exclusion of the accused from the proceedings, over the earlier Presidential Order which was struck down in *Hamdan*.[116]

In the 2007 *Manual for Military Commissions*, the Secretary of Defense has prescribed rules pertaining to professional responsibility rules for military judges and counsel.[117] The extent to which these are authorized by the Military Commissions Act and consistent with other professional obligations appears to be shaping up as an issue for defense counsel.[118] So too is the whole problem of dealing with access to

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[112] Military Commissions Act, Pub. L. No. 109-366, § 949(d)(e), 120 Stat. 2600, 2611-12 (2006).

[113] *Id.*

[114] *See id.* at § 949(d)(f)(3). Note in particular, paragraph 3 of subsection f: "A claim of privilege under this subsection, and any materials submitted in support thereof, shall, upon request of the Government, be considered by the military judge in camera and shall not be disclosed to the accused." *Id.*

[115] Meyer, *supra* note 96, at 57-58.

[116] *See supra* notes 9-11, and discussion of Hamdan, *supra* notes 12-18.

[117] MANUAL FOR MILITARY COMMISSIONS, *supra* note 30 at II-9.

[118] *See* Martin S. Pinales & Ellen S. Podgor, *Military Commissions' Rules, Catch-22 for counsel*, NAT'L L. J., Apr. 9, 2007, at 27:

> [T]he Department of Defense's latest shenanigan, the Manual for Military Commissions, aims to hamstring [defense] lawyers with an untenable, classic "Catch-22" situation – abide by the military's rules and represent your

suspicious clients in a situation where the Government is determined to be difficult.[119]

> client, or abide by the legal profession's disciplinary rules and be reassigned or quit. Rule 109 of the manual – the commissions' ethics rule – prescribes what to do when the commissions' rules conflict with the ethics rules written by lawyers and approved by courts in the state that licensed the attorney. The manual's simplistic solution: The Department of Defense's rules are "paramount."

The manual, according to the foreword by the Secretary of Defense, "is published in implementation of the Military Commissions Act of 2006 (M.C.A.). 10 U.S.C. §§ 948a, *et. seq* . . . ." MANUAL FOR MILITARY COMMISSIONS, *supra* note 30 at II-9. Closest on point as a legal basis for these provisions is probably section 948(k) on "detail of trial counsel and defense counsel" but it seems hard to tease out of that section a power for the Secretary to put counsel in this position. *See also* William Glaberson, *U.S. Asks Court to Limit Lawyers at Guantanamo. New Clash on Detainees. Plan Would Restrict Visits to Clients and Access to Secret Evidence,* NEW YORK TIMES, April 26, 2007, at 1. There are some serious vires problems here.

[119] On petty (and worse) interference with habeas counsel, see Scott Horton, *State of Exception: Bush's War on the Rule of Law*, HARPER'S MAGAZINE, July 2007, at 74 and Farer, *supra* note 50 at 374-77 (2007). Speaking of the first Commission proceeding in *Hicks*, then American Bar Association President Karen J. Mathis commented in a letter dated April 4, 2007 to Senators Levin and McCain:

> Our Observer reported that the prospects for a fair and just process suffered a serious blow when the presiding military judge reused to allow two of Mr. Hicks' three lawyers to appear on his behalf. The military judge, interpreting a contested provision of the Manual for Military Commissions, dismissed the Assistant Defense Counsel because she was not on active military duty despite the fact that she had been assigned by the Chief Military Defense Counsel to represent Mr. Hicks in June 2006. The second attorney – a civilian lawyer – was barred because he would not sign a notice agreeing to obey regulations governing the conduct of civilian defense counsel that had not yet been promulgated, although he did agree to abide by all existing rules. While Mr. Hicks later decided to plead guilty to one portion of the charges against him at a hastily called evening session of the Commission, the fact that he was first deprived of two-thirds of his defense team can only increase skepticism and further erode any confidence that the process will provide detainees with a full and fair hearing.

"IMPLEMENTING" (OR RE-WORKING) THE GENEVA CONVENTIONS

The Geneva Conventions of 1949 specifically obligate parties to suppress breaches of the Conventions in international armed conflict, using the criminal law. In respect of what the Conventions term "grave breaches," the obligation appears to require parties to take jurisdiction on a universal basis.[120] Article 130 of the Third Convention,[121] for example, provides that grave breaches of it "shall be those involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention." Article 129

Letter from Karen J. Mathis, President, American Bar Review, to Senators Levin and McCain (Apr. 4, 2007), http://www.abanet.org/poladv/letters/antiterror/2007apr04_milcoms_l.pdf.

[120] That is the plain meaning of Articles such as those about to be discussed in the text, the position adopted by many states in their implementing legislation, and the position espoused by the guardians of the Conventions, the International Committee of the Red Cross. *See* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK FOR INTERNATIONAL COMMITTEE OF THE RED CROSS, I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 606 (2005) (discussing the obligation of states party to Geneva Conventions and to Additional Protocol I of 1977 to provide for universal jurisdiction in their national legislation over "grave breaches"). The United States, as explained in the text, has not proceeded on this understanding of universal jurisdiction. The ICRC also takes the position that States have a right (but not a duty) to exercise universal jurisdiction over other war crimes than those described as "grave"– including crimes committed in non-international armed conflict such as breaches of common Article 3 of the Conventions, a provision which will be discussed further shortly. Rule 157 of the ICRC study states that: "States have the right to vest universal jurisdiction in their national courts over war crimes." The Legal Adviser to the Sate Department and the General Counsel of the Department of Defense have criticized the "amorphous" nature of the Rule and "errors in the Study's reasoning regarding its status as customary law." *See Letter from John Bellinger III*, *supra* note 71, at 525.

[121] Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316.

obligates the parties to enact legislation necessary to provide effective penal sanctions for persons committing or ordering to have been committed any of the grave breaches of the Convention. It adds that each party is under an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and to bring such persons, regardless of their nationality, before its own courts. A party may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another party, provided that party has made out a *prima facie* case. In addition, the Article obligates each party to take measures necessary for the suppression of all acts contrary to the provisions of the Convention other than the grave breaches as defined.

On the other hand, common Article 3 of each of the Conventions, which on its face refers only to non-international armed conflict,[122] has no specific reference to universal jurisdiction, but must proceed on the basis that, at a minimum, there is an obligation on each military to penalize transgressions by its own troops.[123] Common Article 3 provides, in relevant part:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

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[122] See *id.*

[123] Some European states, in particular, take the view that there is permissive universal jurisdiction to suppress breaches of common Article 3, either as an interpretation of the Article, as an expression of developing customary law, or under the aegis of the regime set out in the Rome Statute of the International Criminal Court. The Rome Statute (in this respect encouraged by U.S. negotiators) codifies an expansive view of the extent to which humanitarian law (and a penal regime) applies to non-international armed conflict. *See* Rome Statute of the International Criminal Court, art. 8(2)(c), (e), U.N. Doc. A/CONF. 183/9 (1998). Section 8(2)(c) relates to breaches of common Article 3 and section 8(2)(e) sets forth numerous provisions on breaches in non-international armed conflict, many derived ultimately from Hague Rules originally applicable only to international conflict. *See also* the position of the ICRC, *supra* note 120 at 604-07.

> (1) Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
>
> (d) 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.
>
> (2) The wounded and sick shall be collected and cared for.[124]

For many years after it ratified the Geneva Conventions, the United States left their implementation to military law – United States military personnel would be prosecuted under the

[124] Convention (First) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31. The article 3 language is identical in each of the four Geneva Conventions of 1949.

Uniform Code of Military Justice;[125] members of other militaries were theoretically liable to punishment by military commission,[126] although the most recent United States prosecutions of that kind took place after the Second World War.[127] People no longer in the military were not amenable to military jurisdiction for what they did while in the service. Nor was it clear to what extent American civilian superiors might be criminally responsible for breaches carried out by the troops. In 1996 and 1997, Congress legislated to fill some of the gaps. What is now section 2441 of title 18 of the United States Code, headed "War crimes," provided:

> (a) Offense.– Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
>
> (b) Circumstances.– The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

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[125] Technically prosecution under the U.C.M.J. is for offenses such as assault or murder, the U.C.M.J. in this respect being the functional equivalent of a state codification of criminal law. *See generally* Roger S. Clark, *Medina: An Essay on the Principles of Criminal Liability for Homicide*, 5 RUTGERS-CAM. L.J. 59 (1973).

[126] *Id.* at 72.

[127] *See, e.g.*, Application of Yamashita, 327 U.S. 1 (1947); JOSHUA GREENE, JUSTICE AT DACHAU: THE TRIALS OF AN AMERICAN PROSECUTOR (2003); WHITNEY R. HARRIS, MURDER BY THE MILLIONS: RUDOLPH HOESS AT AUSCHWITZ (2005). Many similar trials were held under U.S. military authority in Europe and the Far East. Such trials were purely American affairs, done pursuant to United States military law, as compared with the trials before the International Military Tribunals at Nuremberg and Tokyo and the Allied trials in Germany pursuant to Control Council Law No. 10.

(c) Definition.– As used in this section the term "war crime" means any conduct–

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such conventions to which the United States is a party;

(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) *which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict;*

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.[128]

Section 6 of the Military Commissions Act, beneath the

[128] 18 U.S.C. § 2441 (2006) (current version at 18 U.S.C.A. § 2241 (2008)) (emphasis added to material from 1997 addition which was replaced with fundamentally different language by the Military Commissions Act). It will be noted that, rather than proceeding on the basis that these are crimes subject to universal jurisdiction, the section founds jurisdiction on active and passive personality theories, *i.e.*, on the basis that either the accused or the victim is a U.S. national. The United States is not a party to the two 1977 Protocols to the Geneva Conventions, referred to in subsections (1) and (3). It is a party to the Protocol on Mines, Booby-traps and Other Devices (as amended) referred to in subsection (4).

Orwellian heading "Implementation of Treaty Obligations," revises subsection (c)(3), retroactively,[129] essentially by re-defining and narrowing the content of common Article 3 for purposes of United States law. This amendment is apparently aimed at avoiding potential criminal responsibility for acts carried out by United States personnel in Abu Ghraib, Guantanamo and elsewhere that might well have been illegal under the 1997 version of the section.[130]

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[129] Section (6)(2) of the amendment provides that "[t]he amendments made by this subsection, except as specified in subsection (d)(2)(E), [*see infra* note 142], of section 2441 of title 18, United States Code, shall take effect as of November 26, 1997, as if enacted immediately after the amendments made by section 583 of Public Law 105-118 (as amended by section 4002(e)(7) of Public Law 107-273)." The Foreign Operations, Export Financing, and Related Programs Appropriation Act of 1998, Pub. L. No. 105-118, tit. V, § 583, 111 Stat. 2386, 2436 (1997) added the material on common Article 3 and the 21st Century Department of Justice Appropriations Authorizations Act, Pub. L. No. 107-273, § 4002(e)(7), 116 Stat. 1758, 1810 (2002) corrected a typographical error referring to §2401 instead of § 2441 of title 18.

[130] See the list of actions currently banned by the military, *infra* note 161. In support of the Bill, Rep. Hunter stated:

> This amendment is necessary because section C(3) of the War Crimes Act defines a war crime as any conduct which constitutes a violation of common article 3. Common article 3 prohibits some actions that are universally condemned, such as murder and torture, but it also prohibits outrages upon personal dignity and what is called humiliating and degrading treatment, phrases which are vague and do not provide adequate guidance to our personnel . . . . You don't want to have our troops so paralyzed by what they see as prosecutions arising out of common article 3 that you will have a situation where a female officer in the U.S. military will not interrogate a Muslim male on the basis that she is afraid that the action may be defined or projected as being a humiliation of that particular prisoner . . . .

152 CONG. REC. H7535 (daily ed. Sept. 27, 2006) (statement of Rep. Hunter). Senator John McCain claimed that "nothing could be further than the truth" than that "[this] gives amnesty to U.S. personnel." He argued that:

> The bill does provide needed clarity . . . . For the first time, there will be a list of nine specific activities that constitute criminal violations of Common Article 3, punishable by imprisonment or even death. There has been much public discussion about specific interrogation methods that may be prohibited. But it is unreasonable to suggest that any

Section 6 contains the remarkable statement that follows:

> (2) PROHIBITION ON GRAVE BREACHES.– The provisions of section 2441 of title 18, United States Code, as amended by this section, fully satisfy the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character. No 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 subsection (d) of such section 2241.

The way in which the two disparate thoughts in the first and second sentences of this are run together is bizarre enough, but the content of each sentence is even more so.

As to the first sentence, Article 129 of the Third Convention says nothing about the obligation to "provide effective penal sanctions for grave breaches" in respect of common Article 3. Indeed, common Article 3, itself, does not by its terms rely on a distinction between grave and other breaches. All of the proscribed acts in common Article 3 are equally illegal on the face of the treaty itself.[131] Did nobody in Congress read the relevant treaty material?

The second sentence is no doubt a shot in the war between those who do and those who do not regard international law and

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> legislation could provide an explicit and all-inclusive list of what specific activities are illegal and which are permitted. Still, I am confident that the categories included in this section will criminalize certain interrogation techniques, like waterboarding and other techniques that cause serious pain and suffering that need not be prolonged – I emphasize "that need not be prolonged."

152 CONG. REC. S10413 (daily ed. Sept. 28, 2006) (statement of Sen. McCain).

[131] James G. Stewart aptly describes "grave breaches of common article 3" as "an unprecedented concept." James G. Stewart, *The Military Commissions Act's Inconsistency with the Geneva Conventions: An Overview*, 5 J. INT'L CRIM. JUST. 26, 33 (2007).

comparative law sources as helpful to understanding United States constitutional, statutory or common law.[132] But look what is going on here. We are told that this is an implementation of treaty obligations, but that no international source shall supply a basis for understanding it! Is there to be no recourse to the treaty itself? Or to its preparatory work? To the interpretations put forward in such bodies as the Tribunals for Former Yugoslavia and Rwanda? To the interpretations put forward in military manuals of allies like Canada, Australia, Germany or the United Kingdom? To studies by the International Committee of the Red Cross? Early in the life of the Republic, in *The Charming Betsy,*[133] Chief Justice Marshall held that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ."[134] Has Congress made it clear enough here that it does not care about international law?

As amended, subsection (C)(3) prohibits "grave breaches" of common Article 3 which it collapses as 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.[135] Most striking are the convoluted definitions

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[132] On this debate, see, e.g., Dorf, *supra* note 22 at 16-18, and authorities there mentioned. Dorf notes that even Justice Scalia accepts that foreign and international sources are relevant to treaty interpretation. He adds: "For the Congressional authors of the MCA, however, Justice Scalia was too radical an internationalist." *Id.* at 17.

[133] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

[134] *Id.* at 118.

[135] Notably missing from the list of crimes in common Article 3 carried forward into the Act is "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." Convention (First) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31. Perhaps that is too close to home, in light of the dangers of the Military Commission structure itself. On the responsibility of those who pervert the course of justice, see the Justice case, United States v. Alstoetter (The Justice Case), 3 T.W.C. 1. (1948) and Stanley Kramer's fine 1961 movie based on it, JUDGMENT AT NUREMBERG (United Artists 1961). The Bill introduced by Senator Dodd, *see supra* note 2, would include among the offenses: "DENIAL OF TRIAL RIGHTS - The act of a person who

supplied for torture and cruel or inhuman treatment for the purposes of the new section. The whole thing must be a prosecutor's worst nightmare. Torture is defined as:

> The act of a person who commits, or conspires or attempts to commit, 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.[136]

> Cruel or inhuman treatment is defined as: "The act of a person who commits, or conspires or attempts to commit, an act *intended to inflict severe or serious physical or mental pain or suffering* (other than pain or suffering incidental to lawful sanctions), *including serious physical abuse, upon another within his custody or control.*"[137]

A careful reading of the two provisions reveals some subtle semantic differences between the two. For example, torture requires a "specific" intent to inflict the suffering. It is not immediately apparent what this means. Does it mean that for something to be cruel and inhuman it is enough that the perpetrator intended the particular act, knowing in a general way that it was not pleasant, but did not necessarily make the characterization that the pain or suffering would be severe or serious? On the other hand, does the requirement of specific intent for torture mean that the actor must be shown to have

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intentionally denies one or more persons the right to be tried before a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples as prescribed by common Article 3."

[136] Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 6, 120 Stat 2600, 2632 (2006) (inserting 18 U.S.C. § 2441 (d)(3)(A)) (emphasis added).

[137] *Id.* (inserting (d)(3)(B)) (emphasis added). This must encompass fewer cases in its ambit than either the Geneva Conventions or the Torture Convention.

applied his mind to the actual degree of suffering desired, parsing his conduct along the lines of the statute? This analysis has something of an Alice in Wonderland flavor to it, but it does seem to be suggested by the language.[138]

Note also that for cruel or inhuman treatment, it is enough that the actor intended to inflict *severe or serious* physical or mental pain or suffering, *including serious physical abuse*.[139] For torture, only *severe* physical or mental pain or suffering will suffice; *serious* is not enough! What abuser has the clarity of thought to appreciate these distinctions, before the event at least?

We are told, helpfully (?), that "the term 'severe mental pain or suffering' shall be applied for purposes of paragraph (1)(A) [torture] and (1)(B) [cruel or inhuman treatment] in accordance with the meaning given that term in section 2340(2) of this title."[140] Section 2340(2) in turn, defines it as meaning:

> . . . the prolonged mental harm caused by or resulting from–
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;

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[138] Note also the discussion of "specific intent" in the "torture memos" such as the Memorandum from John Yoo to William J. Haynes II, General Counsel of the Department of Defense, *Military Interrogation of Alien Unlawful Combatants held Outside the United States* 36-37 (Mar. 14, 2003) ("The infliction of such pain must be the defendant's precise objective" and "an individual who acts with a good faith belief that his conduct would not produce the result that the law prohibits would not have the requisite intent.").

[139] Despite a diligent search, I have not been able to locate a definition of "serious physical abuse" in the Act. *See also* John Yoo's interpretation of "severe," using as an analogy statutes defining an "emergency condition" for the purpose of eligibility for health benefits to the effect that "severe pain" must rise to "the level that would ordinarily be associated with a physical condition or injury sufficiently serious that it would result in death, organ failure or serious impairment of bodily functions." *Id.* at 38-39. This, coupled with the specific intent requirement would make prosecution extremely difficult – even if, as Yoo concedes, inferences might be drawn from knowledge.

[140] Military Commissions Act Sec. 6 (inserting U.S. Code, Title 18, § 2441(d)(2)(A)). Section 2340 implements (in part) the U.S. obligations under the 1984 U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N. T. S. 85.

> (B) the administration of 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 of personality.[141]

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[141] 18 U.S.C. § 2340(2) (2006). The language here tracks that of a U.S. "Understanding" (probably functionally a reservation) attached to its ratification of the Torture Convention. Article 1 of the Torture Convention, defines torture thus:

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public officials or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Convention against Torture, *supra* note 140. The relevant U.S. "Understanding" reads:

> (1) (a) That with reference to article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) 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; (3) the

We also learn that:

> (D) the term "serious physical pain or suffering" shall be applied for purposes of paragraph (1)(B) [cruel or inhuman treatment] as meaning 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; and

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threat of imminent death; or (4) 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.

(b) That the United States understands that the definition of torture in article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

(c) That with reference to article 1 of the Convention, the United States understands that "sanctions" includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.

(d) That with reference to article 1 of the Convention, the United States understands that the term "acquiescence" requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.

(e) That with reference to article 1 of the Convention, the United States understands that noncompliance with applicable legal procedural standards does not per se constitute torture.

> (E) the term "serious mental pain or suffering" shall be applied for the purposes of paragraph (1)(B) in accordance with the meaning given the term 'severe mental pain or suffering' (as defined in section 2340(2) of this title), except that–
>
> > (i) the term 'serious' shall replace the term 'severe' where it appears; and
> >
> > (ii) as to conduct occurring after the date of the enactment of the Military Commissions Act of 2006, the term "serious and non-transitory mental harm (which need not be prolonged)" shall replace the term "prolonged mental harm" where it appears.[142]

One of the drafters of the 1997 legislation has asked:

> Do these provisions apply to the various interrogation techniques that have been the subject of so much recent controversy? Do they apply to waterboarding, beatings that do not cause permanent injury, exposure to cold or heat that does not cause permanent impairment, or deprivation of food, water, or medical treatment? It is very difficult to tell from an examination of the text. Even more problematically, does the text apply to forcing a detainee to be naked or to commit sexual acts, or to the threatening use of dogs? The prohibition in common Article 3 against outrages upon personal dignity is not clarified by the new version but simply eliminated from the scope of criminal sanctions. The net effect is not to achieve greater clarity but, rather, to limit in an uncertain way the scope of acts to which criminal sanctions apply. (Since U.S. military personnel remain subject in any event to possible prosecution under the Uniform Code of Military Justice for whatever mistreatment of detainees that would constitute a violation of

[142] *Id.* § 2441(d)(2)(E)(ii).

> common Article 3, the changes appear to affect civilian officials and personnel of the Central Intelligence Agency (CIA) rather than the military.)[143]

The amendment to the 1997 legislation also includes the statement that "[t]he definitions in this subsection are intended only to define the grave breaches of common Article 3 and not the full scope of United States obligations under that Article."[144] It seems, therefore, that something other than criminal law must be the source of United States domestic law modalities for enforcing the remainder of the obligations to respect and ensure respect for the Article. It is apparently no use relying on the courts for help, though. Section 948(b)(g) of the Military Commissions Act asserts that "[n]o alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights."[145] The patent effect of this provision is to try to remove any future implications of the decision in *Hamdan*, where the Supreme Court relied pointedly on the rights in common Article 3 in striking down the President's earlier Order setting up military commissions.[146] As if that were not enough, section 5 of the Military Commissions Act precludes reliance on the Conventions in other proceedings, such as habeas corpus and Alien Tort Act suits as well. It provides that "*[n]o person* may

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[143] Michael J. Matheson, *The Amendment of the War Crimes Act*, 101 AM. J. INT'L L. 48, 52 (2007). For discussion of these amendments as efforts to protect (retroactively) those responsible for techniques such as those used in Guantanamo and Abu Ghraib, see John R. Crook, *Administration and Congress Debate Legislative Responses to* Hamdan *Ruling*, 100 AM. J. INT'L L. 939, 940-42 (2006); Vázquez, *supra* note 7 at 94-95.

[144] 18 U.S.C. § 2441(d)(5).

[145] Military Commissions Act § 948(b)(g). For some creative efforts to escape the literal language of this provision, see Vázquez, *supra* note 7 at 82-87.

[146] Hamdan v. Rumsfeld, 548 U.S. 557 (2006). Indeed, § 948(b)(f) of the Act, in a disingenuous reference to common Article 3 and the holding of *Hamdan*, says: "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." If Congress says it is so, it *is* so, regardless of what the courts (or the rest of the world) may think?

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 is a party as a source of rights in any court of the United States its States or territories."[147] The Supremacy Clause of the Constitution says that treaties are the law of the land.[148] The courts normally have a say on the meaning and enforcement of the law of the land.[149] Did Congress really sit down and decide in a deliberative way that the courts would have no role in applying something as basic as the United States obligations

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[147] Military Commissions Act § 5(a) (emphasis added). "No persons" must include citizens and non-citizens alike. Note also the earlier "protection" for United States Government personnel engaged in authorized interrogations contained in the Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1004, 119 Stat. 2680, 2740 (2005):

> In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent's engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful. Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available to any person or entity from suit, civil or criminal liability, or damages, or to provide immunity from prosecution from any criminal offense by the proper authorities.

[148] U.S. CONST., art. VI, para. 2.

[149] *Marbury v. Madison*, 5 U.S. 137 (1803). *See generally* Vázquez, *supra* note 7 at 77-82.

under treaties that have been universally adhered to by the international community? Did they simply mean to trump them as a matter of United States domestic law and thumb their noses at our treaty partners?[150] Did they really mean to delegate so much to the President? Where *were* our representatives?

However, there is hope – a little. Section 6 of the Military Commissions Act says that "[a]s provided by the Constitution and by this section the President has the authority for the United States 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."[151] The President is to issue interpretations described in this provision by Executive Order published in the *Federal Register*.[152] Any such Executive Order is said to be "authoritative (except as to grave breaches of common Article 3) as matter of United States law, in the same manner as other administrative regulations."[153]

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[150] Dorf comments: "Yet as a later-in-time statute, the MCA clearly prevails over the Geneva Conventions in domestic law. Thus, should US courts find themselves bound by the MCA to interpret the Geneva Conventions more narrowly than the international consensus authorizes, they will put the United States in breach – and there is nothing the courts can do about it. As Orwell might have said 'violation is compliance'." Dorf, *supra* note 22 at 18 (citation to Orwell's 1984 omitted).

[151] Military Commissions Act § 6(a)(3)(A). "Higher" than what?, one might ask.

[152] *Id.* § 6(a)(3)(B). The provision reads: "The President *shall* issue interpretations described by subparagraph (A) by Executive Order published in the Federal Register." *Id.* (emphasis added.) The "shall" could be read as making it mandatory for the President to issue such orders. On the other hand, the statement in (A) that the President "has the authority" suggests that this is a power that he may or may not exercise. If that is correct, (B) could simply mean that if he does act, he has to do so in the *Federal Register*, not secretly or in, say, the *Washington Times*.

[153] *Id.* § 6(a)(3)(C). There is no suggestion in the statute that the President has power to make such infractions criminal. But are his general powers broad enough to include them in the U.C.M.J.? And is the President's authority exclusive, so as to rule out any role for the courts? Subsection (D) adds the curious statement that "[n]othing in this section shall be construed to affect the constitutional responsibilities of Congress and the judicial branch of the United States." In so far as it purports to strip the judicial branch of its normal power to interpret United States treaty obligations, it must be aimed at just that. Of

There is more in the Act on what now becomes "cruel, inhuman, or degrading treatment or punishment" (the phrase used in the United Nations Torture Convention of 1984).[154]

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course, the Executive perhaps regards such interpretative powers as his by virtue of the Constitution. But what was *Congress* thinking? Why concede him this point? Vázquez, *supra* note 7 at 97, offers an interpretation more friendly to the courts than I might:

> Insofar as the section restates what the Constitution provides, it just recognizes the president's authority to interpret the treaty for the United States, subject to review by courts in the context of cases raising issues under the treaty. The president's interpretation is entitled to some deference but is not binding on the courts. Does "this section" give the president any greater power to interpret the Geneva Conventions free of judicial review? I would say no: section 6 merely provides that the president's interpretations are as authoritative as other administrative regulations. "This section" is consistent with review of presidential interpretations of the Geneva Conventions by courts with jurisdiction at the behest of plaintiffs with standing. (Footnote referring to Congressional statements by Senators McCain, Levin and Warner.)

A colloquy between Senators Levin, McCain and Warner strongly supports the position that the three believed that any Presidential interpretation would be valid only if consistent with the Conventions. 152 CONG. REC. S10,399 (daily ed. Sept. 28, 2006). But whether a court would intervene in the teeth of strong legislative statements to keep out is another matter. See also Rep. Skelton: ". . . it is questionable as to whether under article III of the Constitution the Supreme Court would uphold a system that purports to make the President the final arbiter of the Geneva Convention." 152 CONG. REC. H7536 (daily ed. Sept., 27, 2006). Senators McCain, Warner and Graham inserted a delphic "joint statement" in the Record arguing that the suggestion that "this legislation would prohibit litigants from raising alleged violations of the Geneva Convention . . . . is misleading . . ." and concluding that "[e]ven if the Geneva Conventions are not enforceable by individuals in our Nation's courts, the President and his subordinates are bound to comply with Geneva, a set of treaty obligations that forms part of our American jurisprudence." 152 CONG. REC. S10401 (daily ed. Sept. 28, 2006). See also Senator McCain's comment that "[t]hese interpretations will have the same force as any other administrative regulation promulgated by the executive branch and, thus, may be trumped – may be trumped – by law passed by Congress." 152 CONG. REC. S10413 (daily ed. Sept. 28, 2006). Congress as the guardian, not the Courts!

[154] Ill treatment of those rounded up by the military and the CIA alike can impact on obligations under both Geneva common Article 3 and the Torture Convention. The legislation minimizes legal redress on both fronts; sometimes

Section 6(c) also contains what the heading calls an "additional prohibition" on these items:

> (1) IN GENERAL.– No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman or degrading treatment or punishment.
>
> (2) CRUEL INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT DEFINED.– In this subsection, the term 'cruel, inhuman, or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.
>
> (3) COMPLIANCE.– The President shall take action to ensure compliance with this subsection, including through the establishment of administrative rules and procedures.[155]

Subsections (1) and (2) of this are carried forward from the 2005 legislation.[156] Subsection (2) is very revealing. The United

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it is difficult to be sure which exact obligations apply and, equally, which are being circumvented.

[155] Military Commissions Act Sec. 6(c).

[156] Detainee Treatment Act of 2005 §1003 (a), (d). The President's signing statement on the Detainee Treatment Act muddied the waters:

> The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of

States is a party to the United Nations Convention against Torture (noted in the subsection) and to the Covenant on Civil and Political Rights [157] (not mentioned). In both cases, the United States put in reservations at the time of its ratification that were designed to narrow the United States obligations in respect both of torture and of cruel, inhuman and degrading treatment or punishment.[158] Other parties and experts take a broader view of the conduct proscribed by the treaty than does the United States.[159] This piece of the legislation seems designed to push United States officials to make maximum use of the reduced standards provided by the reservations compared with the terms of the treaties themselves.

> protecting the American people from further terrorist attacks. Further, in light of the principles enunciated by the Supreme Court of the United States in 2001 in Alexander v. Sandoval, and noting that the text and structure of Title X do not create a private right of action to enforce Title X, the executive branch shall construe Title X not to create a private right of action. Finally, given the decision of the Congress reflected in subsections 1005(e) and 1005(h) that the amendments made to section 2241 of title 28, United States Code, shall apply to past, present, and future actions, including applications for writs of habeas corpus, described in that section, and noting that section 1005 does not confer any constitutional right upon an alien detained abroad as an enemy combatant, the executive branch shall construe section 1005 to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus, described in section 1005.

Id.

[157] Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

[158] *See supra* notes 106 (cruel, inhuman, or degrading treatment or punishment) and 141 (torture).

[159] See, for example, the responses by the Netherlands and Sweden to United States reservations and understandings to the Torture Convention, in Multilateral Treaties Deposited with the Secretary-General of the United Nations *available at* http://www.untreaty.un.org; Committee against Torture, Conclusions and Recommendations on report of U.S., July, 25 2006 , U.N. Doc. CAT/C/USA/CO/2, at 3-10 (objecting to U.S. position that proscribed acts of psychological torture are limited to "prolonged mental harm" and encouraging U.S. to "consider withdrawing its reservations, declarations and understandings lodged at the time of ratification of the Convention").

Subsection (3) of section 6(c) is, however, new. It entrusts compliance with the prohibition to the President; section 1003 of the Detainee Treatment Act of 2005 appeared to leave this to the Courts.[160] It also seems to have some impact on the way in which members of the Executive other than the military (the CIA, in particular) may treat captives. The Detainee Treatment Act of 2005, section 1002(a) commanded that "[n]o person in the custody and under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation."[161] What of people not in

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[160] I am puzzled, incidentally, how the 2006 Act, notably the delegation of interpretative power to the President, deals with subsection (c) of the 2005 Act, which provides:

> Limitation on Supersedure - The provisions of this section shall not be superseded, except by a provision of law enacted after the date of the enactment of this Act which specifically repeals, modifies, or supersedes the provisions of this section.

I have not found anything in the Military Commissions Act that specifically does one of the above.

[161] Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1002(a), 119 Stat. 2680, 2739 (2005) (referencing U.S. DEP'T OF THE ARMY, FIELD MANUAL FM 34-52, *superseded by* FM 2-22.3 (FM 34-52): HUMAN INTELLIGENCE COLLECTOR OPERATIONS (2006), *available at* http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf). On interrogation techniques, it provides, at 5-21:

> 5.75 If used in conjunction with intelligence interrogations, prohibited actions include, but are not limited to–
>
> Forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner.
>
> Placing hoods or sacks over the head of a detainee; using duct tape over the eyes.
>
> Applying beatings, electric shock, burns, or other forms of physical pain.
>
> "Waterboarding."
>
> Using military working dogs.

the hands of the Department of Defense? Subsection (3) may be read as requiring the President to issue rules and procedures analogous to those applicable to the military to cover this situation.[162] Ultimately, the President did issue a responsive

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> Inducing hypothermia or heat injury.
>
> Conducting mock executions.
>
> Depriving detainee of necessary food, water, or medical care.

HUMAN INTELLIGENCE COLLECTOR OPERATIONS, *supra* at 5-21. John Crook notes that "[t]he interrogation standards established by the field manual apply to all U.S. military services and all Department of Defense personnel, including contractors conducting interrogations in Department of Defense facilities. They do not apply to the Central Intelligence Agency." John R. Crook, *Contemporary Practice of the United States Relating to International Law, New Defense Department and Army Directives on Detainees and Interrogation Techniques*, 100 AM. J. INT'L L. 943, 945 (2006). He adds:

> According to press reports, the manual's release was delayed for more than a year by controversy among senior political and military officials regarding, inter alia, whether to have different standards for prisoners of war and for "illegal combatants," whether to incorporate the standards of Common Article 3 as a minimum for all interrogations, and whether to include a classified index.

Id., at 944 (footnote omitted). The whole document is in the public domain and no distinction is drawn between different classes of detainees for purposes of their "treatment." On the controversial question of medical involvement in interrogations, *see also* John Crook, *Note*, *Department of Defense Instruction Regarding Medical Treatment of Detainees*, 100 AM. J. INT'L L. 945 (2006).

[162] In a letter to Senators Levin and McCain, dated April 4, 2007, American Bar Association President Karen J. Mathis comments that:

> This provision would allow the administration to sanction civilian agencies to engage in harsh interrogation techniques that would be unacceptable for the military to conduct under U.S. law. Departures by the U.S. from a uniform approach to the treatment of detainees under Common Article 3 will affect both the treatment of Americans captured abroad and the credibility of our government in raising objections to the use of torture or other cruel, inhuman or degrading treatment or punishment against our citizens.

Letter from Karen J. Mathis, *supra* note 119. The provision, read along with section 6(a)(3)(B), *see supra* note 152, must have been at the back of an item in

Executive Order on July 20, 2007.[163] The order does not refer explicitly to the techniques forbidden in the Military Field Manual.[164] Two provisions of the Order are, however, relevant. Section 3(b)(i)(E) provides that the "program" must not include:

> willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency, such as sexual or sexually indecent acts undertaken for the purpose of humiliation, forcing the individual to perform sexual acts or to pose sexually, threatening the individual with sexual mutilation, or using the individual as a human shield.

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the press late in March 2007 discussing a debate within the Bush administration over the CIA's detention and interrogation program. The debate was said to have "left the Agency without the authority to use harsh interrogation techniques that the White House said last fall were necessary for questioning terrorism suspects . . . ." The article commented that "[t]he Military Commissions Act states that the president 'shall' issue an executive order setting out broad guidelines for the interrogation of detainees. Administration officials said the Justice Department had already determined that the language did not compel the White House to issue such an order, but that the administration still planned to complete the document". The article adds that "[s]ome lawmakers have expressed anger that the White House, after pushing Congress to pass the Military Commissions Act last year, has yet to issue the executive order." Mark Mazzetti, *C.I.A. Awaits Rules on Interrogation of Terror Suspects*, N.Y. TIMES, March 25, 2007, at 14.

[163] Exec. Order No. 13,440, 72 Fed. Reg. 40707 (July 24, 2007) (providing Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation operated by the Central Intelligence Agency). Early in March 2008, the President vetoed legislation that would have prohibited the CIA from doing what the military is now prohibited from doing. *See Bush Vetoes Bill Banning Waterboarding*, CNN Rep., Mar. 8, 2008, *available at* www.cnn.com/2008/POLITICS/03/08/bush.torture.ap/ (quoting President to effect that the Bill "would take away one of the most valuable tools on the war on terror"). It would appear that there are still "operative" Justice Department memos from as late as 2005 authorizing "severe" interrogations. *See* John R. Crook, *Secret Justice Department Memos Said To Sanction "Severe" Interrogation Tactics*, 102 AM. J. INT'L L. 177 (2008).

[164] *See supra* note 161.

Section 3(b)(iv) insists that:

> detainees in the program receive the basic necessities of life, including adequate food and water, shelter from the elements, necessary clothing, protection from extremes of heat and cold, and essential medical care.

The Director of the CIA is required to issue written policies that, inter alia, ensure "safe and professional operation of the program" and "effective monitoring of the program, including with respect to medical matters, to ensure the safety of those in the program."[165] Comparing this with the Field Manual, one might ask whether it is all right for the CIA to engage in (merely) forcing the detainee to be naked, placing hoods or sacks over the head; using duct tape over the eyes; applying (not too serious) beatings, electric shock, burns, or other forms of physical pain; "waterboarding"; using military working dogs; conducting mock executions. None of these are clearly forbidden. Not such a great effort at "clarification!" A careful August 2007 report by Physicians for Human Rights and Human Rights First examines many of the "enhanced" techniques used in the past and argues that:

> . . . a close analysis of the War Crimes Act and other U.S. law, informed by medical and psychological expertise, reveals that these "enhanced" interrogation techniques, may constitute "torture" and/or "cruel or inhuman treatment" and, consequently, authorization of their use under executive order would place interrogators at serious legal risk of prosecution for war crimes or other violations.[166]

Are the Act's provisions an effort to prohibit activities on the borderline of torture or to empower them?

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[165] *Id.* Sec. 3(c)(i), (iv).

[166] PHYSICIANS FOR HUMAN RIGHTS & HUMAN RIGHTS FIRST, LEAVE NO MARKS: ENHANCED INTERROGATION TECHNIQUES AND THE RISK OF CRIMINALITY 2 (2007).

CONCLUSION

I have tried to explain a number of ways in which our legislators failed to come to grips with what they were doing in terms of fundamental principles of American and international law. These include:

> • Delegating to the Executive the fundamental question of who is subject to the jurisdiction of the commissions – a determination which has significant legal and factual aspects. Jurisdiction in criminal cases is normally a question for the court and the fact-finder.
>
> • Permitting the commissions to exercise subject-matter jurisdiction over a range of offenses that by no stretch of the imagination have been "traditionally" subject to trial by military tribunal. This includes the crime of conspiracy, hijacking and other offenses against aircraft and the terrorism offenses described in the Act.
>
> • Permitting a number of procedures unfavorable to the accused which would not be permissible either in federal district court, or in a military court-martial. This includes convoluted provisions that do not necessarily make it clear that evidence obtained by torture and other harsh means will be excluded.
>
> • Re-working the U.S. legislation which gives effect to the obligations to enforce common Article 3 of the Geneva Conventions in a manner that is designed to water down that enforcement and to give free pass to those who would have been guilty of crimes under the legislation as previously written. The CIA appears ultimately to have been given an even freer pass than the military.

Congress has it in its power to re-visit these matters. While it is possible that the Supreme Court will address some or all of them, Congress owes it to the public to try again.