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The Orwellian Military Commissions Act of 2006

Michael C. Dorf*

Abstract

In three decisions in 2004 and 2006, the Supreme Court of the United States rejected the sweeping claims by President Bush that his role as Commander in Chief entitled him to detain persons indefinitely and, if he chose, to subject them to war crimes trials before military commissions that did not have all of the procedural protections of courts martial. The Court's rulings, however, left open the possibility that, notwithstanding the treaty obligations of the United States under the Geneva Conventions, Congress could authorize the President to take the steps that he could not take unilaterally. In the Military Commissions Act (MCA) of 2006, Congress did just that. However, despite its title, the MCA does far more than authorize military commissions. Most significantly, it eliminates the statutory right of aliens declared by the government to be 'unlawful enemy combatants' and detained indefinitely on that basis, to seek a writ of habeas corpus from a federal court. To be sure, the MCA provides some right of access to federal court for persons convicted of war crimes by military commissions or found to be unlawful enemy combatants by a military 'combatant status review tribunal' or equivalent body, but even then, it severely curtails opportunities for judicial relief. In this and other respects, the MCA purports to confer rights that, upon close inspection, prove illusory. For example, it uses the language of the Geneva Conventions, even while forbidding courts to look to international and foreign sources to construe that language. The MCA is, more broadly, an exercise in misdirection. It is, in a word, 'Orwellian'.

1. Prologue: The *Hamdan* Ruling

The United States Supreme Court's decision in *Hamdan v. Rumsfeld*,[1] was a nearly total rebuke of the Bush Administration's assertion that the President had the inherent wartime authority to establish irregular military

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1 126 S. Ct. 2749 (2006).

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commissions to try detainees for war crimes, unconstrained by international law or full judicial oversight.[2] The Court held, *inter alia*, that: (1) it had jurisdiction to hear Hamdan's case;[3] (2) neither the Authorization for Use of Military Force ('AUMF')[4] passed by Congress in the immediate wake of the attacks of 11 September 2001, nor the Detainee Treatment Act ('DTA') of 2005,[5] authorized the President to establish military commissions to try detainees;[6] (3) there existed no military necessity of the sort that would warrant the use of military commissions without congressional authorization,[7] in part because (as four Justices concluded), Hamdan was charged with 'conspiracy', which is not recognized as a war crime under international law;[8] (4) trial by a military commission that lacked the procedural safeguards of courts martial under the Uniform Code of Military Justice ('UCMJ')[9] failed to satisfy the UCMJ's own requirement that such procedural departures be justified by the impracticability of using the same procedures[10] and (5) the procedures for trial by military commission 'violate the Geneva Conventions',[11] which, contrary to the administration's assertions, provide substantial protection to irregular forces under their common Article 3.[12]

Hamdan was also significant for at least two further reasons. First, although the lead opinion by Justice Stevens did not purport to overrule any prior precedents, it substantially narrowed the scope of three World War II-era cases on which the Bush Administration had repeatedly relied as authority for its approach to detainees captured in Afghanistan and elsewhere.

2 The government argued in *Hamdan* that §§ 1005(e)(1) and 1005(h) of the Detainee Treatment Act ('DTA') of 2005, Pub. L. No. 109–148, div. A, tit. X, 119 Stat. 2739 (to be codified at 42 U.S.C. §§ 2000dd – 2000dd-1 and other provisions of the US Code), deprived the Supreme Court of jurisdiction to hear Hamdan's pre-trial challenge to the military commissions. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2763 (2006). Thus, according to the government, Hamdan could only challenge his trial by military commission after conviction, and even then, under the statute upon which the government relied, Hamdan would not be permitted to invoke the protections of international law. See DTA § 1005(e)(3)(D) (permitting post-conviction challenges under the 'Constitution and laws of the United States' to the extent they 'are applicable,' but not authorizing challenges under international law).

3 *See Hamdan*, 126 S. Ct. at 2764–2769.

4 Authorization for Use of Military Force, Pub L 107–40, 115 Stat. 224 (18 September 2001), note following 50 U.S.C.A. § 1541 (2000 edn, Supp. III).

5 'DTA' of 2005, Pub L No. 109–148, div. A, tit. X, 119 Stat. 2739 (to be codified at 42 U.S.C §§ 2000dd – 2000dd-1 and other provisions of the US Code).

6 See *Hamdan*, 126 S. Ct. at 2775 ('Neither of these congressional Acts . . . expands the President's authority to convene military commissions').

7 See *id.*, at 2785 ('Any urgent need for imposition or execution of judgment is utterly belied by the record').

8 See *id.* ('the Government has failed even to offer a 'merely colorable' case for inclusion of conspiracy among those offenses cognizable by law-of-war military commission') (quoting *Ex Parte Quirin*, 317 US 1, 36) (1942).

9 10 U.S.C. § 801 *et seq.* (2000 edn. and Supp. III).

10 See *Hamdan*, 126 S. Ct. at 2790–2793 (construing Article 36(b) of the UCMJ).

11 *Id.*, at 2793.

12 See *id.*, at 2795–2796.

In *Ex Parte Quirin*,[13] *Johnson v. Eisentrager*,[14] and *In Re Yamashita*,[15] the Supreme Court had in one way or another rejected a challenge to the outcome of a military tribunal. Finding that each of these precedents had either been superseded or was narrower than the administration claimed, the *Hamdan* Court asserted the primacy of what it deemed 'the seminal case of *Ex parte Milligan*'.[16] In *Milligan*, a Civil War case, the Court stated, in sweeping terms, that where no military emergency prevents the civilian courts from operating, military courts are unconstitutional.[17]

Second, the Court's opinion in *Hamdan* carried the implication, made express in a concurrence by Justice Kennedy, that harsh treatment of detainees by US officials would also violate common Article 3 of the Geneva Conventions. As Justice Kennedy stated bluntly: 'violations of Common Article 3 are considered "war crimes", punishable as federal offences, when committed by or against US nationals and military personnel'.[18] Suddenly, the Court had the attention of an administration that had once decried various provisions of the Geneva Conventions as 'obsolete' and 'quaint'.[19]

It should have come as no surprise that the President would not permit the Court to have the last word. Indeed, the Justices practically invited the political branches to respond to their *Hamdan* ruling. Speaking for four of the five Justices comprising the *Hamdan* majority, Justice Breyer opined that '[n]othing prevents the President from returning to Congress to seek the authority he believes necessary'.[20] Return he did.

2. 'Orwellian' Defined

The result was the Military Commissions Act ('MCA') of 2006.[21] In a heroic effort to make lemonade from a lemon, Neal Katyal, who successfully represented Hamdan in the Supreme Court, recently wrote that the MCA 'puts the final nail in the coffin of the Administration's pretensions of "inherent authority". It reveals that arguments of executive necessity were overblown, and that Congress stands ready and able to change laws and give the President the tools he needs (and then some)'.[22] True enough, but as Katyal also

13 317 US 1 (1942).
14 339 US 763 (1950).
15 327 US 1 (1946).
16 *Hamdan*, 126 S. Ct. at 2773 (citing *Ex Parte Milligan*, 71 US 2 (1866)).
17 See Milligan, 71 US at 120–121 ('The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances'.).
18 *Hamdan*, 126 S. Ct. at 2802 (Kennedy, J., concurring) (citing 18 U.S.C. § 2441).
19 A.R. Gonzales, Memorandum for the President, 25 January 2002, available at: http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf (visited 5 December 2006).
20 *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring).
21 Pub. L. No. 109–366, 120 Stat. 2600 (2006).
22 N.K. Katyal, 'Comment, *Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice', 120 *Harvard Law Review* (2006) 65, at 70.

acknowledges, 'the MCA was rushed through Congress with no deliberation, and it suffers from myriad constitutional and other legal problems . . .'.[23] Even Pennsylvania Senator Arlen Specter, who voted *for* the MCA, characterized some of its provisions as 'patently unconstitutional'.[24]

Given that the Supreme Court in *Hamdan* pre-cleared Congress to authorize military commissions, how can the MCA be unconstitutional, much less patently so? The answer is that the MCA does much more than simply authorize military commissions. Some of its provisions have nothing whatsoever to do with military commissions.

The MCA is a veritable cornucopia of law school examination questions. Under what circumstances, if any, does an alien not present in the territory of the United States but held by US authorities have a constitutional right to file a petition for a writ of habeas corpus in a US court? If Congress chooses to suspend the privilege of the writ of habeas corpus, can it do so impliedly? Does a country violate its treaty obligations by enacting implementing legislation that expressly forbids its domestic courts from considering international and foreign sources in construing the treaty? And so forth.

Important as these questions are, the balance of this essay focuses not so much on the draconian effect of the MCA as on a pervasive theme of misdirection. In numerous ways, the Act seems to be one thing, yet upon close inspection proves to be something quite different, even the exact opposite. Thus, just as George Orwell's fictional dystopia of Oceana proclaimed that 'war is peace', 'freedom is slavery', and 'ignorance is strength',[25] so the MCA proclaims adherence to international law and the availability of judicial review for detainees, even as it dispenses with both. The balance of this essay explores some of the especially Orwellian features of the MCA.

3. A Wholly Optional 'Right' to Judicial Review

Hamdan was not the Supreme Court's first intervention in the Bush Administration's treatment of detainees. Two years earlier, the Justices decided a pair of cases that also rejected sweeping claims of Presidential authority. In *Rasul v. Bush*,[26] the Court held that the habeas corpus statute as then written entitled aliens captured overseas and detained at the US Naval Base in Guantánamo Bay, Cuba, to file petitions in federal court to challenge the lawfulness of their custody. The Supreme Court said nothing, however, about the substantive merits of the claims pressed by the alien detainees. In *Hamdi v. Rumsfeld*,[27] decided the same day as *Rasul*, the Justices affirmed

23 *Id.*, at 104 n. 158.

24 Editorial, 'Profiles in Cowardice', Washington Post, 1 October 2006, at B6.

25 G. Orwell, *1984* (New American Library edn., 1949), at 7 (describing the three slogans on the façade of the Ministry of Truth).

26 542 US 466 (2004).

27 542 US 507 (2004).

the government's authority to hold American citizens alleged to have fought against the United States in military custody, but rejected the government's assertion that the President's say-so was a sufficient basis for treating such citizens as 'unlawful enemy combatants'.

What would be a sufficient basis for detaining an American citizen as an unlawful enemy combatant? The *Hamdi* plurality opinion relied upon a 1976 precedent that measures compliance with due process by balancing the individual interest against that of the government.[28] At a minimum, the plurality said, a person the government seeks to designate as an unlawful enemy combatant must 'receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker'.[29] He is also entitled to assistance of counsel. At the same time, the Court gave considerable leeway to the government to depart from procedures associated with civilian courts in criminal cases. The government could place the burden of disproving its evidence on the defendant, could introduce hearsay, and could utilize military, as opposed to civilian, tribunals to make the combatant status determination.

Collectively, however, *Rasul* and *Hamdi* left two key questions unanswered. First, are the procedural safeguards outlined in *Hamdi* also constitutionally required for aliens held as unlawful enemy combatants, or does some lesser standard of due process apply? In other contexts, the Supreme Court has held that even where aliens are entitled to due process, the meaning of that requirement may be different for citizens and aliens,[30] and so it is possible that the Court would uphold procedures for classifying aliens as unlawful enemy combatants even though those procedures would be impermissible under *Hamdi* for citizens. Second, if Congress were to amend the habeas statute so as to deny its application to persons held on Guantánamo, would it thereby violate the Constitution? The Bush Administration had argued in *Rasul* that the *Eisentrager* case established that non-resident aliens held outside the United States have no constitutional right to habeas, even if Congress has not suspended the privilege of the writ. However, the *Rasul* Court suggested — but found it unnecessary to decide — that some of the factors that had led the *Eisentrager* Court to find no constitutional right to habeas in the circumstances presented in that case, were absent in the case of Rasul and other Guantánamo Bay detainees.[31]

28 See *Mathews v. Eldridge*, 424 US 319, 335 (1976).

29 *Hamdi v. Rumsfeld*, 542 US 507, 533 (2004).

30 See, e.g. *Mathews v. Diaz*, 426 US 67, 78 (1976) (opining, in the course of rejecting a resident alien's due process challenge to a five-year residency requirement for medicare eligibility, that '[t]he fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship').

31 See *Rasul v. Bush*, 542 US 466, 476 (2004) (noting, *inter alia*, that the *Rasul* petitioners 'are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing').

The MCA puts both of these questions squarely at issue. In approving the detention of aliens pursuant to the findings of 'Combatant Status Review Tribunals' ('CSRTs'), the MCA raises the question whether the procedures that the government has adopted for use in those CSRTs satisfy the Constitution. One district court held that they do not, in so far as CSRTs afford the alien a 'personal representative' but not a lawyer, and make the determination that an alien is an enemy combatant based on classified information to which the detainee does not have access.[32]

The MCA also provides a potential test of the question left open by *Rasul* — the scope of *Eisentrager*'s constitutional holding. The MCA eliminates any statutory right to habeas corpus for aliens determined by the government to be enemy combatants, regardless of where they are detained.[33] Absent a valid suspension of the privilege of the writ of habeas corpus, that provision is surely unconstitutional to the extent that it authorizes the government to, say, detain a permanent resident alien residing in New York City, without ever permitting the alien to file a habeas petition. Even construed for all that it's worth, *Eisentrager* does not give the government this sort of un-reviewable authority on what is indisputably US soil.

To be sure, the MCA reaffirms (and extends to detainees everywhere) the DTA's statutory right to judicial review of the determination that one is in fact an enemy combatant.[34] In some circumstances, this statutory right could be a constitutionally valid substitute for habeas. Certainly nothing compels the government to attach the label 'habeas corpus' to the procedure by which persons can challenge their allegedly unlawful detention, so long as the procedure the government does afford has the essential characteristics of habeas. But in at least two ways, the statutory right of review provided by the DTA and MCA is an inadequate substitute for habaeas.

First, the MCA expressly strips the federal courts of any and all power to entertain challenges to conditions of confinement.[35] Thus, 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.

Second, although the MCA and DTA do provide for some judicial review of the decisions of CSRTs, nothing in either statute requires the government to utilize a combatant status review tribunal or its equivalent. The MCA defines an unlawful enemy combatant as someone to be determined to be thus by

32 See *In Re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 468 (D.D.C. 2005).

33 See MCA § 7.

34 See MCA § 10.

35 Subject to exceptions not relevant on this point, MCA § 7(b) provides that

> 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.

a CSRT or other competent tribunal *or* someone who simply meets the Act's definition of unlawful enemy combatant.[36]

To repeat, the MCA strips the federal courts of jurisdiction even as to resident aliens in the United States, including permanent resident aliens. Thus, 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.

Patently unconstitutional indeed, and yet, because the jurisdiction-stripping provision is joined with a provision that also confers jurisdiction on the federal courts, its import is easy to miss. Ignorance is strength.

4. A Special 'American' Version of International Law

The government had argued in *Hamdan* that the Geneva Conventions did not confer judicially enforceable rights on individuals. The majority did not directly address this claim, finding that the UCMJ's recognition of military commissions beyond courts martial incorporated the international law of war by reference, thereby rendering common Article 3 of the Geneva Conventions justiciable.[37] The MCA reverses that result. It expressly provides:

> No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.[38]

In principle, there is nothing wrong with a nation treating its treaty obligations as non-self-executing, provided that the nation then enacts implementing legislation to give the treaty whatever effect it must have in domestic law. And on its face, the MCA does just that. Section 6 of the MCA and other statutes use the terms of the Geneva Conventions to define offences under US law. But within Section 6 lies another, most peculiar, provision. It states: '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 2441'.[39]

It is not difficult to imagine where this gem comes from. In a number of high-profile cases involving hot-button issues, the Supreme Court has divided over whether it is ever appropriate to rely on foreign or international sources

36 See MCA § 3 (providing for new 10 U.S.C. S 948a(1)).
37 See *Hamdan*, 126 S. Ct. at 2794.
38 MCA § 5(a).
39 MCA § 6(a)(2).

in interpreting the US Constitution.[40] Although I have elsewhere expressed scepticism about the possibility, much less the desirability, of American courts blinding themselves to foreign influences when interpreting US law,[41] at least I understand the argument of those who think such sources irrelevant to construing the US Constitution. The document's meaning, they say, was either fixed at the time of its adoption, or, if it evolves, does so in accordance with the values of the American people, rather than the values of foreign peoples, whose values may be different from ours, and difficult for American courts to discern.[42]

But even those who criticize the use of foreign and international law as sources for interpreting the US Constitution readily acknowledge that such sources are highly relevant to *treaty* interpretation. Here, for example, is Justice Scalia's thoroughly reasonable view of the matter:

> We can, and should, look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties. Moreover, it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently . . .. Finally, even if we disagree, we surely owe the conclusions reached by appellate courts of other signatories the courtesy of respectful consideration.[43]

For the congressional authors of the MCA, however, Justice Scalia was too radical an internationalist.

Accordingly, despite its repeated invocations of the Geneva Conventions, the MCA in fact authorizes the United States to *breach* those Conventions, because it authorizes the opening of a gap between the US-sourced only interpretation of the Conventions and the consensus view of the

40 *Lawrence v. Texas*, 539 US 558, 572–573 (2003) (citing Sexual Offences Act, 1967, ch. 60, § 1 (Eng.) and *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. 52 (1981) in support of the conclusion that a Texas law prohibiting homosexual sodomy is unconstitutional) and *Roper v. Simmons*, 543 US 551, 578 (relying on 'the overwhelming weight of international opinion against the juvenile death penalty' to confirm the Court's decision that it violates the Eighth Amendment) with *id.*, at 622–628 (dissent) (arguing that the majority only invokes foreign sources when they confirm its own views and that such sources should be irrelevant in principle).

41 See M.C. Dorf, *The Use of Foreign Law in American Constitutional Interpretation: A Revealing Colloquy Between Justices Scalia and Breyer*, Findlaw's Writ, 19 January 2005, available at: http://writ.findlaw.com/dorf/20050119.html (visited 4 December 2006).

42 In addition to the legitimacy and honesty worries expressed by Justice Scalia in his *Roper* dissent, one might also worry about the limited capacity of judges in one legal system to understand the nuances of institutions, and thus judgments by courts in, other legal systems. See R.J. Krotosznynski, Jr., '"I'd Like to Teach the World to Sing (in Perfect Harmony)": International Judicial Dialogue and the Muses — Reflections on the Perils and the Promise of International Judicial Dialogue', 104 *Michigan Law Review* (2006) 1321, at 1358 (reviewing R. Badinter and S. Breyer (eds), *Judges In Contemporary Democracy: An International Conversation*, New York, New York University Press, 2004): 'The participants in the dialogue harbored many false assumptions and displayed an alarming lack of familiarity with the composition, institutional powers, and institutional role of the various constitutional courts'.

43 *Olympic Airways v. Husain*, 540 US 644, 660–661 (2004).

international community. 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'.[44]

5. Conclusion

Americans and others who followed the news coverage of the debate that led up to the enactment of the MCA could be forgiven for believing that the Act was a compromise between a White House that sought far-reaching powers, and Senators who sought to restrain the executive. After all, prior to reaching an agreement with the President, three prominent Republican Senators with military service records — Lindsey Graham, John McCain, and John Warner — had drawn a line in the sand, refusing to go along with a measure that would have, in their view, watered down common Article 3's protections against inhumane treatment.[45] No doubt many casual observers believed that because these three courageous senators stood on moral principle, the law that emerged reflected a careful balance between liberty and security.

Even the small sample of provisions of the MCA canvassed in this essay reveals, however, 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 unlawful enemy combatants.

In its *seeming* moderation, its velvet glove encasing what turns out to be an iron fist, the MCA is Orwellian. It uses reassuring-sounding words to mean almost their exact opposite.

The MCA is Orwellian in another, more ominous sense. It is difficult to imagine a greater denial of individual liberty than the prospect of indefinite executive detention without recourse to the judiciary. The MCA does not, of course, transform the United States into Orwell's dystopic Oceana, for it preserves habeas corpus for citizens. In this, as in most respects, the nation remains a constitutional democracy. But the MCA moves the country one step down the road to tyranny — and not just a baby step.

44 See Orwell, *supra* note 25.

45 See C. Hulse et al., 'How 3 G.O.P. Veterans Stalled Bush Detainee Bill', *New York Times*, 17 September 2006, at A1.