Prosecuting Alien Terrorists: Balancing National Security with Due Process for Alleged Terrorists

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The Background

On Christmas Day, 2009, Umar Farouk Abdulmutallab, a Nigerian citizen, en-route from Amsterdam, is alleged to have attempted to blow up a transcontinental airliner, Northwest Airlines Flight 253, near Detroit, Michigan.[1] Upon landing, Abdulmutallab was taken into custody by U.S. Customs agents and local police and spoke freely about receiving terrorist training from members of al Queda in the Asian Peninsula and that other jihadists would follow him.[2] Subsequently, agents of the Federal Bureau of Investigation (FBI) interrogated Abdulmutallab for fifty minutes during which the suspect freely disclosed critical information concerning his terrorist training in Yemen and terrorist operations of al Queda.[3] After the fifty minutes, the FBI stopped the interrogation to allow Abdulmutallab to receive medical care for burns on his legs and groin caused by the defective bomb sewn in his underwear.[4] He agreed to further interrogation by the FBI after receiving medical care.

However, before the interrogation was resumed, the Justice Department made the apparently unilateral decision to extend to the suspect Fifth Amendment rights under *Miranda v. Arizona*[5], and to prosecute Mr. Abdulmutallab as a criminal subject in the federal civilian court system rather than as an unprivileged enemy combatant subject to military law.[6] In response to the U.S. Attorney General's order, the FBI agents read the suspect the Miranda rights, including his right to an attorney and to remain silent, at which point Abdulmutallab ceased divulging any further information and apparently has since remained silent.

The decision by the U.S. Attorney General to prosecute the Christmas Day bomber as a common criminal in a civilian district court raised a hovering national debate centered principally on the constitutional framework that balances the national security with the legal

[1] "Security Chief: Air travel safer; Napolitano cites crackdown, but Republicans criticize officials," Chicago Tribune, Dec. 28, 2009, p. 14.
[2] "Miranda Decision Criticized," Chicago Tribune, Feb. 1, 2010, p. 10.
[3] "Abdulmutallab in 50 Minutes," Wall Street Journal, Editorial, Jan. 26, 2010, p. A16.
[4] *Id.*
[5] 384 U.S. 436 (1966). This case recognized the legal doctrine designed to secure an individual's constitutional privilege against compulsory self-incrimination by requiring police authorities to inform the individual upon their arrest or deprivation of freedom of action in any significant way of their right to consent, to remain silent and that any information provided may be used against them.
[6] "Abdulmutallab in 50 Minutes," Wall Street Journal, Editorial, Jan. 26, 2010, p. A16.

rights of terrorists.[7] The primary issues in the debate dialogue are discerning an appropriate forum where foreign terrorists who commit acts of war may be prosecuted and the extent to which foreign terrorists may be thoroughly interrogated for information necessary to protect the safety of American citizens before the terrorists are provided counsel and the right to remain silent.[8]

The choice of forum for prosecution of an alien enemy combatant is either a federal district court or a military tribunal. Advocates of the former look to uphold the rule of federal law to assure that U.S. counter-terrorists policies and practices adhere to fundamental Constitutional rights of due process. On the other hand, advocates of the military tribunal forum as the proper convening authority, advance the thought that foreign terrorists are unlawful enemy combatants subject to the law of war as it has evolved through the Geneva Convention of 1949, and Congressional authority, as set forth in the Military Commission Acts of 2006 and 2009.[9] The law of war, evidentiary and procedural safeguards are prescripted under the primary tenet of the Geneva Convention of 1949; that is, that enemy combatants should receive just rights dispensable by civilized people.[10] The military tribunal law also permits interrogation of terrorist suspects without administration of the Miranda warnings.

Military commissions and courts martial are distinct from criminal trials in civilian federal courts and each has an independent basis of authority founded on Constitutional theory. Courts martial can generally be said to derive their authority from Article I, Section 8 of the

[7] For instance, the American Civil Liberties Union, in response to Congress' enactment of the Military Commission Act of 2009, inveighed: While this bill contains substantial improvements to the current military commissions, the system remains fatally flawed and contrary to basic principles of American justice. While the bill takes positive steps by restricting coerced and hearsay evidence and providing greater defense counsel resources, it still falls short of providing the due process required by the Constitution. The military commissions were created to circumvent the Constitution and result in quick convictions, not to achieve real justice. On the other hand, Senate Resolution 403 expressed the sense of the Senate that (1) foreign terrorists should not be afforded the same rights as U.S. citizens under the Constitution, (2) foreign terrorists should be tried in military tribunals, and (3) if prosecuted in civilian courts, foreign terrorists should be thoroughly interrogated for information necessary to protect the United States before they are provided with a lawyer and informed of their right to remain silent. The Resolution endorsed by at least eight senators was referred to the Senate Judiciary Committee on February 1, 2010 where it is pending.

[8] A collateral issue which has not been addressed by Congress or ruled on determinatively by the U.S. Supreme Court is the constitutional legitimacy of holding an American citizen arrested in the United States as an unlawful enemy combatant. In *Padilla v. Hanft*, 423 F. 3d 386 (4th Cir., 2005) the Fourth Circuit Court of Appeals held it was permissible to do so. Jose Padilla petitioned for certiorari to the Supreme Court but the Bush administration transferred the defendant from military custody to the civilian justice system. Padilla's petition was eventually denied by the Supreme Court, three justices noting the matter was then hypothetical. In *al-Marri v. Wright*, 487 F. 3d 160 (4th Cir. 2007), Ali Saleh Kahlah al-Marri , a citizen of Yemen enrolled as a graduate student at Bradley University in Peoria, Illinois, was arrested, designated an enemy combatant and held in military custody in a brig in South Carolina. After a series of petitions, the Fourth Circuit Court of Appeals, in 2008, sitting en banc, held that the military Commission Act of 2009 did not deny al-Marri of his constitutional rights and the defendant could be held indefinitely in military confinement. Al-Marri's lawyers then petitioned the Supreme Court to reverse the ruling. The Court granted certiorari but on January 22, 2009 President Obama ordered al-Marri to be transferred to civilian criminal court. The defendant subsequently pled guilty in the Southern Illinois District Court in Peoria to one count.

[9] See 2. supra.

[10] The Geneva Conventions and Protocols are international treaties with 167 signatories.

Constitution, which provides that Congress may "make rules for the government and regulation of land and naval forces."[11] Federal civilian courts derive their authority from Article III of the Constitution, which provides for a federal judiciary. This includes district courts circuit courts of appeal and the United States Supreme Court. A convincing argument may be made that military commissions derive their authority from Articles I and II of the Constitution. Article I, Section 8 of the Constitution, grants Congress power "to provide for the common defence… to define and punish piracies on the high seas and offenses against the Law of Nations, to make rules for the Government and Regulation of the Land and naval forces."[12] Article II describes the power of the executive branch and provides that the President is the "Commander in Chief of the Army and "Navy." The majority of the recent commissions discussed herein below are authorized by Congress and accordingly they are grounded in the Article I authority of Congress.

Military commissions generally include military officers as members. Some of the early commissions, such as the tribunal for the trial of Major Andre, were composed of senior officers. It is not surprising then that such commissions followed procedures generally used in courts martial. Those procedures are spelled out in Article I of the Uniform Code of Military Justice (UCMJ), which has been enacted by Congress.[13] Procedures have been spelled out in the Manual For Courts Martial (MCM).[14] The origins of such manuals can be traced to the middle ages and Sweden's King Gustavus Adolphus, who published *Articles of War* to govern the conduct of his troops.[15]

In fact, paragraph 2(b)(2) of the Preamble of the MCM provides that "Subject to any applicable rule of international law or to any regulations prescribed by the President or by any competent authority, military commissions and provost courts shall be guided by appropriate principles of laws, rules and procedures and evidence prescribed for court martial." Accordingly, military commissions can be expected to follow the procedures for trials set forth in the MCM. An argument can be made that military commissions are not required to follow the MCM in lockstep fashion, but indeed have more flexibility. As pointed out in the ABA Task Force on Terrorism and the Law Report and Recommendations on Military Commissions, many of the provisions set forth in the MCM apply by their express terms only to courts martial and not to military commissions.[16] Indeed, the President's Military Order of 11/13/2001 provides in Section 4, paragraphs (b) and (c) that Secretary of Defense shall issue "rules for the conduct of the proceedings of military commissions, including pretrial, trial and post-trial procedures,

[11] U.S. Const., art. 1, sec.8, cl. 14.
[12] U.S. Const. art 1, sec. 8, cls. 1, 10, 11, 14, 18, cited in Major Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, Army Law., Mar. 2002, 20.
[13] 10 U.S.C. §§ 801-946.
[14] MANUAL FOR COURTS MARTIAL, UNITED STATES. M.L.R. EVID. (2005) [hereinafter MCM].
[15] Maj. Michael Lacey, Military Commissions: a Historical Survey, March 2002 Army Law. 41, 42, FN 12.
[16] ABA TASK FORCE ON TERRORISM AND THE LAW REPORT AND RECOMMENDATIONSON MILITARY COMMISSIONS. P. 12, FN 28.

modes of proof, issuance of process, and qualifications of attorneys...., which shall at a minimum provide for a full and fair trial, the military commission sitting as the triers of both fact and law.

Military Commissions

Military commissions in the United States had their origins prior to the adoption of the U. S. Constitution. During the Revolutionary War, George Washington convened a military commission to try Major John André, a British Army Officer charged with espionage.[17] He had conspired with Benedict Arnold who was then the commanding officer of West Point to transfer control of West Point to the British in exchange for a large sum of money. When arrested, Major André was dressed in civilian clothes and carrying the defensive plans for West Point[18] and was subsequently tried by a board composed of the most distinguished and accomplished officers under Washington's command. The Commission found André guilty and sentenced him to death by hanging. There were several other cases during the Revolutionary War where enemy spies were tried and convicted by military tribunals. Joseph Bettys was convicted of being a spy for General Burgoyne by a Continental General Court Martial held on April 6, 1778 by order of Major General McDougall.[19] The death sentence was confirmed by General Washington as Commander in Chief.[20] British Army Lieutenant Daniel Taylor was convicted as a spy by a general court martial convened by order of Brigadier George Clinton and hanged.[21] Nathan Aherly and Reuben Weeks were two British soldiers who were hanged as spies.[22] Interestingly, they were tried at a General Court martial convened by order of Major General Benedict Arnold.[23]

In 1847, during the Mexican-American War in 1847, General Winfield Scott, the senior officer, declared martial law over large portions of Mexico that the Army occupied.[24] His regulations provided for military commissions and councils of war. Military commissions heard trials for alleged violations of crimes that would normally be heard by civilian courts, such as robbery, theft and rape. Councils of war were war courts that heard alleged violations of the laws of war. Military commissions were generally limited to that theater of war during wartime in that territory controlled by the military commander.[25]

General Andrew Jackson employed military commissions as a matter of course during the War of 1812. He convened the commissions as the Commanding General of the American

[17] *Ex Parte Quirin et al.,* 317 U. S. 1, 42, 63 S. Ct. 2, 87 L. Ed. 3 (1942).
[18] Major Michael Lacey, Military Commissions: a Historical Survey, March 2002 Army Law. 41, 42.
[19] *Ex Parte* Quirin, 317 U.S. 1, 42.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*

forces at New Orleans when he there declared martial law.[26] After the British were defeated and left New Orleans, General Jackson allowed martial law to remain in effect. He was apprehensive that until a formal peace treaty was certain, British forces might return. An article by Louis Louiallier, on March 3, 1815 in a New Orleans newspaper, the *Louisana Courier,* seriously questioned the necessity of such a continuing legal policy. Louiallier, a member of the Louisana legislature, argued that since the British invaders had been driven off, martial law should be lifted. Louiallier, a Frenchman who became a naturalized citizen, also took exception to General Jackson's order that all Frenchmen living in New Orleans should leave within three days and remain at least 120 miles away from the city.[27] Upon learning of this publication, General Jackson had him arrested on March 5, 1815 for initiating mutiny and disaffection in the army. A New Orleans attorney, P.L. Morel, witnessed the arrest and offered to represent Louallier.[28] The attorney presented the petition for the writ of *habeus corpus* to United States District Judge Dominick Hall in New Orleans. Judge Hall granted the petition and issued the writ. When shown a copy of the writ, Jackson ordered that Judge Hall be arrested.[29] He dispatched a detachment of 60 soldiers under the command of a Major Butler of the Third Regiment to seize the judge.[30]

At this point, Louallier had been arrested for inciting mutiny and disaffection in the army and Judge Hall had been arrested for aiding, abetting and exciting mutiny.[31] On the morning of March 6th John Dick, the U.S. Attorney for the District of Louisiana, applied for a writ of *habeus corpus* for the release of Judge Hall before Louisiana state court Judge Seth Lewis, who issued the writ. Upon learning of this, General Jackson promptly ordered the arrest of the U.S. Attorney, who then joined Judge Hall and Mr. Louallier in the guardhouse.[32]

Louallier was acquitted at his trial before the tribunal.[33] The tribunal found he was not a member of an armed force. He was not a spy. He was a civilian who simply expressed his opinion in a newspaper.[34] Undeterred, General Jackson had him held in custody until the peace treaty with England was announced. After being held for six days, Judge Hall was released with instructions to remain outside the city until peace was declared. He did.[35] After the Treaty of Ghent was announced, Judge Hall returned to court and promptly held General Jackson in contempt and fined him $1,000. Andrew Jackson paid the fine.[36] Congress later, near the end of

[26] Louis Fisher, Military Tribunals: Historical patterns and Lessons, CRS Report for Congress RL32458, 3, (2004).
[27] Eberhard P. Deutsch, *The United States Versus Major General Andrew Jackson,* 46 A.B.A. Journal 966, 967)Sept., 1960).
[28] Eberhard P. Deutsch, *The United States Versus Major General Andrew Jackson,* 46 A.B.A. Journal 966, 967)Sept., 1960).
[29] *Id.*
[30] *Id.*, at 969.
[31] Glenn Sulmasy, National Security Court System, 31 (Oxford University Press) (2009).
[32] *Id.*, at 968.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*

Jackson's life, passed a resolution to reimburse him for the amount of the fine.[37] Jackson's reputation as the man who led American forces at the Battle of New Orleans would later propel him into the White House as the seventh president.[38]

The Civil War

President Lincoln employed the use of military commissions or tribunals during the Civil War for violations of the laws of war. State and federal civilian courts were available for trials of most criminal cases. Court martial procedures were available for prosecuting Union soldiers when necessary. Military tribunals were used for trying violations of the laws of war. Lincoln suspended the writ of *habeus corpus*.[39] There were more than 4200 commissions during the war and 1400 during Reconstruction.[40]

Two Civil War cases involving commissions that were heard by the Supreme Court were *Ex Parte Vallandigham* and *Ex Parte Milligan*. Clement Vallandigham was a former Ohio Congressman who spoke out vigorously against the war. On May 5, 1863, Vallandigham was arrested at home and placed in custody at Cincinnati.[41] On the following day, he was arraigned before a military commission on a charge of having uttered, in a speech at a public meeting, disloyal sentiments and opinions, with the object and purpose of weakening the power of the Government in its efforts for the suppression of an unlawful rebellion.[42] Major General Ambrose Burnside, the commander of the Ohio Territory during the Civil War, had issued General Order No. 38 on April 13, 1863, which provided that any person who should commit acts for the benefit of the enemies of our country should be tried as a spy or traitor and could be subject to death for those offenses.[43] By special order No. 135, on April 21, 1863 General Burnside appointed a military commission of officers to sit at Cincinnati.[44] The Commission found Vallandigham guilty and ordered him held in custody until the end of the war. General Burnside approved the finding and sentence. Lincoln approved the finding but commuted the sentence. Lincoln ordered General Burnside to transfer Vallandigham to the custody of General Rosecrans, then in Tennessee to place Vallandigham beyond our military lines.[45] The Supreme Court denied the writ of *certiorari*, finding that the Court did not have jurisdiction to review what it viewed as essentially a military matter.[46] The Court had authority to review federal judicial decisions, but this was not a judicial decision.[47] Also, The Court found it did not have

[37] *Id.*, at 972.
[38] Jon Meacham, American Lion: Andrew Jackson in the White House, 136, Random House (2008).
[39] Glenn Sulmasy, National Security Court System, 37, (Oxford University Press) (2009).
[40] *Id.*, at 38.
[41] *Ex Parte Vallandigham*, 68 U.S. 243, 244, 17 L. Ed. 589 (1863).
[42] *Id.*, 68 U.S. at 244.
[43] *Id.*, 68 U.S. at 243.
[44] *Id.*
[45] *Id.*, 68 U.S. 243 at 247.
[46] *Id.*, 68 U.S. 243, 253.
[47] *Id.*, 68 U.S. at 250-251.

original jurisdiction under the Constitution.[48] The Supreme Court has continued to offer great deference to presidential decisions relating to military matters up to the present.

Ex Parte Milligan. The Supreme Court declared that a civilian United States citizen accused of a war crime could not be tried before a tribunal when the civilian courts were open and operating.[49] Lambdin P. Milligan was accused of plotting to steal weapons and then invade a POW camp and liberate detained Confederate soldiers. Milligan was a member of the American Knights, an organization pledged to overthrow the United States government. He was arrested at home and transported to Indianapolis for trial by a military commission of officers.[50] On October 21, 1864 he was tried before the commission, found guilty and sentenced to be hanged on May 19, 1865. On May 10, 1865, he presented a petition for a writ of *habeus corpus* before the U.S. District Court for the District of Indiana. Three circuit judges heard the petition for the writ. They were unable to agree and submitted the issue to the Supreme Court for adjudication.[51] In a 5-4 decision, with Justice Davis writing for the majority, the United States Supreme Court granted the writ and ordered Milligan to be released from custody. The opinion noted that Indiana was not invaded by Confederate forces.[52] Civilian federal courts were open and available. Justice Davis declared, "If Milligan had conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana…."[53] *Ex Parte Milligan* stands for the proposition that U.S. citizens cannot be detained by armed forces of the United States if they (1) have not joined the enemy, (2) are captured away from the battlefield or (3) are captured when civilian Article III courts are open and in operation. That proposition continues to have relevance today.

Military Commissions during WWII

The matter of ***Ex Parte Quirin*** is perhaps the first unlawful enemy combatant case later referenced by the Geneva Convention drafters. Eight German soldiers were transported by German U-boat submarines to American shores during the summer of 1942 carrying explosives, fuses and timing devices[54] with plans to conduct acts of sabotage in the United States. Four were dropped off on the shores of New York and four off the coast of Florida.[55] Upon their arrival they buried their uniforms, explosives and supplies and changed into civilian clothes.[56] The eight men had been born in Germany but had all lived in the United States at one time or

[48] *Id.*
[49] *Ex Parte Milligan,* 71 U.S. 2 at 131, 102, 18 L. Ed 281 (1865).
[50] *Id.,* 71 U.S. 102.
[51] *Id.,* 71 U. S. 2 at 108-109.
[52] *Id.,* 71 U.S. 2, at 121.
[53] *Id.,* 71 U.S. 2 at 131.
[54] *Ex Parte Quirin,* 317 U.S. 1, 63 S. Ct. 2, 87 L. Ed. 3 (1942).
[55] *Id.*
[56] *Id.*

another.[57] They were all eventually arrested by the FBI in Chicago and New York.[58] On July 2, 1942, President Roosevelt appointed a military commission to try the men for violations of the law of war.[59] The proclamation also declared that persons so charged were denied access to the courts.[60] Their trial was held on July 8, 1942. They filed motions to file petitions for writs of *habeus corpus* to the U.S. District Court in Washington D.C., which were denied.[61] Those rulings were appealed to the United States Court of Appeals and denied.[62] The appeal was then brought to the United States Supreme Court. The Supreme Court found that the charges on which the prisoners were being held are offenses which the President is authorized to order tried before a military commission.[63] The Court found further that the prisoners were being held in lawful custody before the military commission and did not show cause for being discharged by writ of *habeus corpus*.[64] Accordingly, the Court denied the motions for leave to file petitions for writs of *habeus corpus.*[65] As to the President's authority to appoint the commission, the Court found that the appointment of such a commission was a proper exercise of the President's power as Commander in Chief of the armed forces during a time of war and grave public danger, citing Article II, Section 3, clause 1 of the Constitution.[66]

In Re Yamashita. General Yamashita was the Commanding General of the Fourteenth Army Group and military governor of the Philippines.[67] A military commission was duly appointed to try Yamashita on a charge of violation of the law of war. The gist of the charge was that petitioner had failed in his duty as an army commander to control the operations of his troops, "permitting them to commit" specified atrocities against the civilian population and prisoners of war. General Yamashita was found guilty and sentenced to death. He appealed the denial of his petition for a writ of *habeus corpus* to the Supreme Court. The Court found that Yamashita was properly charged with a violation of the law of war.[68] It found that there was no violation of any military regulation or statute during the course of that proceeding.[69] Accordingly, the Supreme Court denied Yamashita's petition for a writ of *habeus corpus*.

The Geneva Conventions and Protocols, 1949. The Geneva Conventions debated and drafted in the aftermath of World War II comprise a significant part of the law of war. The purpose of the conventions' drafters was to establish a universal humanitarian code to identify

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[57] *Id.*, at 20.
[58] *Id., at 21*.
[59] *Id.*
[60] *Id.*
[61] *Id.* at 23.
[62] *Id.*
[63] *Id.* at 48.
[64] *Id.*
[65] *Id.*
[66] *Id.* at 25.
[67] *In re Yamashita,* 327 U. S. 1, 16, 66 S. Ct. 340, 90 L. Ed. 499 (1946).
[68] *Id.* 327 U.S. 1, 25, 66 S. Ct. 340, 353, 90 L. Ed. 949, 515.
[69] *Id.*

who could and who could not engage in armed hostilities and to clarify legitimate boundaries of lawful and unlawful conduct of combatants and noncombatants in waging hostile attacks.[70]

Combatants are defined in the Conventions as members of the armed forces of nations at war who engage in the hostilities. Captured enemy combatants have prisoner-of-war status and are granted immunity from prosecution for their actions not unlawful under the Conventions. If an enemy combatant commits an unlawful act, he is entitled to be prosecuted in the same forum the detainer utilizes to try its own combatants with all the same pertinent rights and procedures.[71] Enemy combatants held by the United States may be prosecuted for unlawful conduct only in a duly convened court-martial proceedings.

Civilians may not engage in war hostilities and their status as noncombatants protects them from intentional harm by enemy combatants. If civilians actively engage in hostilities in violation of the Conventions provisions they are deemed "unlawful combatants" and not entitled to prisoner-of-war status but treated in the same manner as unlawful enemy combatants. Unlawful combatants are entitled to be prosecuted in a forum that complies with the standards set forth in Geneva Conventions Common Article 3 which provides in part: a "regularly constituted court that afford[s] all the judicial guarantees… recognized as indispensable by civilized peoples." This provision tacitly contemplates forums for unlawful combatants that are less enlightened of their rights than the tribunals guaranteed to lawful combatants.

9/11 and Its Aftermath

On September 18, 2001, Congress passed a joint resolution authorizing the deployment of the armed forces of the United States "against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[72] As a result, military commissions were authorized to try terrorists by the Military Order of November 13, 2001, issued by President Bush. The order begins by referencing the terrorist attacks of September 11, 2001 and the capability of terrorists linked to al Qaida to undertake further terrorist attacks against the United States. The order authorized certain procedures for military commissions to try terrorists, including members of al Qaida, apprehended pursuant to the AUMF. Congress also authorized procedures for military tribunals with the enactment of the Detainee Treatment Act of 2005, as discussed below.

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[70] Geneva Convention Relative to the Treatment of Prisoners of War, art. 1, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[71] Geneva Convention Relative to the Treatment of Prisoners of War, art. 49, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[72] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The AUMF was approved by both houses of Congress on September 14, 2001, and signed by the President on September 18, 2001.

The jurisdiction of military commissions is limited by Article 21 of the UCMJ, which limits military commissions to trials for violations of the law of war. The terrorist acts of September 11, 2001 can be described as violations of the law of war. Permitted practices for treatment of prisoners are set forth in the Geneva Convention. Common Article 3 of the 1949 Geneva Convention sets forth protocols for the treatment of civilian prisoners.[73] Absent congressional authority, military commissions do not have authority to try persons for crimes other than law of war violations.

In *Madsen v. Kinsella,*[74] the Supreme Court upheld the jurisdiction of a military commission to try an American citizen for murder in occupied territory in Germany. Yvette Madsen was an American civilian living in American-occupied Germany after the Second World War. She was convicted by a military commission of killing her husband, an American serviceman stationed in Germany. The Supreme Court affirmed the denial of her writ of *habeus corpus,* finding the military commission had jurisdiction to try an American civilian for a crime committed in American-occupied Germany.[75] This has been argued to provide authority for modern military commissions to try United States civilians for terrorist-related acts if arrested in occupied territory abroad.

Article 21 and Article 104 of the UCMJ may be said to provide authority for military commissions in modern times.[76] Article 21 provides that the provisions of the chapter conferring jurisdiction upon courts- martial does not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions.[77] Article 104 extends jurisdiction to "any person" who "aids or attempts to aid the enemy."[78] The law of war applies to persons accused of terrorist acts because it applies to non-state actions, such as insurgents.[79] Clearly, military commissions may be used to try persons seized outside the United States for terrorist acts constituting violations of the law of war.

The Detainee Treatment Act of 2005[80] represented an effort by Congress to set uniform standards for treatment of detainees in the war against terror. It provided standards for interrogation of detainees. It prohibited cruel or degrading treatment of detainees. It provided that Combatant Status Review Tribunals (CSRT's) and Administrative Review boards should

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[73] Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.
[74] 343 U.S. 341 (1952).
[75] *Id.* at 345-355.
[76] American Bar Association Task Force on Terrorism and the law Report and Recommendation, January 4, 2002, Army Law., Mar. 2002, 6.
[77] UCMJ, Art. 21, 10 U.S.C. sec. 904.
[78] UCMJ, Art. 104, 10 U.S.C. sec. 904.
[79] Common Article 3 of the 1949 Geneva Conventions, Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 287, cited in American Bar Association Task Force on Terrorism and the law Report and Recommendation, January 4, 2002, Army Law., Mar. 2002, 7.
[80] Pub. L. No. 109-366, 120 Stat. 2600.

determine the status of individuals held in Guantanamo Naval Base and other locations in Afghanistan and Iraq.

The Act provided that appeal of those decisions by the CSRT should be to the United States District Court for the District of Columbia. It limited the scope of that review to whether the CSRT determination was consistent with the procedures specified by the Secretary of Defense and the United States Constitution. It also provided that appeal from any military commission decisions would also be directly to the District of Columbia Court of Appeals if the alien was sentenced to 10 years or more in prison. It provided in Sec. 1005(e) that no judge would have jurisdiction to hear a petition for a writ of *habeus corpus* filed by an alien detained at Guantanamo Bay.

Supreme Court and Military Commissions

One of the difficulties faced in applying Constitutional law and case law precedent to modern military commission cases is that traditionally one thinks of military prisoners as being soldiers or civilians from a country with which the United States is at war. Most prisoners in Guantanamo are alleged to be members of al Qaeda, which is neither a nation nor is it linked to any particular nation and, under the Geneva Convention of 1949 and Military Commission Act of 2006, are declared "unlawful enemy combatants." A complication is that some of the alleged recruits to al Qaeda that are confined have been revealed to be American citizens, such as Jose Padilla and Yaser Esam Hamdi. As American citizens, they are entitled, as will be discussed, to certain protections under case precedent and constitutional law. Traditionally, the Supreme Court has deferred to the president and military authorities in matters related to courts martial, military tribunals and military commissions, especially during wartime, as can be seen in *Quirin* and *Yamashita* and more recently in *Madsen v. Kinsella.* However, as the immediate threat of September 11th has receded and many of the detainees continue to be held without access to trials or tribunals for six years or longer and perhaps indefinitely, the Supreme Court has become less inclined to show such deference, as will be demonstrated by discussion of *Hamdan* and other cases.

In *Rasul v. Bush*,[81] the United States Supreme Court addressed the issue of whether federal courts have authority to consider *habeus corpus* challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba. In response to the attacks on September 11, 2001, Congress passed a joint resolution authorizing the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons."[82] Acting pursuant to that authorization, the President sent U. S. Armed Forces into Afghanistan to wage a military campaign against al Qaeda and the Taliban regime that had supported it.

[81] 542 U.S. 466 (2004).
[82] Authorization for Use of Military Force, Pub. L. 107-40, §§ 1-2, 115 Stat. 224.

Petitioners in *Rasul* included two Australian citizens and twelve Kuwaiti citizens who were captured abroad during hostilities between the United States and the Taliban.[83] Normally, American courts would not regard themselves as having jurisdiction over foreign enemy combatants held outside the country by American armed forces. The District Court judge took this position, relying on *Johnson v. Eisentrager*,[84] which held that aliens detained outside the sovereign territory of the United States may not invoke a petition for a writ of *habeus corpus*. The Court of Appeals affirmed, following *Eisentrager*. Ultimately, the Supreme Court, in an opinion authored by Justice Stevens, found the writ should be granted. In order to do so, Justice Stevens had to distinguish *Eisentrager*. Accordingly it might be helpful to review the holding in *Eisentrager*.

In *Johnson* v. *Eisentrager*,[85] the Court addressed whether *habeas corpus* jurisdiction extended to enemy aliens who had been convicted of violating the laws of war. The prisoners were detained at Landsberg Prison in Germany during the Allied Powers' postwar occupation. The prisoners were at no time in American territory. The Court stressed the difficulties of ordering the Government to produce the prisoners in a *habeas corpus* proceeding. It "would require allocation of shipping space, guarding personnel, billeting and rations" and would damage the prestige of military commanders at a sensitive time.[86] In considering these factors the Court sought to balance the constraints of military occupation with constitutional necessities.[87] The Court in *Eisentrager* denied access to the writ, noting that the prisoners "at no relevant time were within any territory over which the United States is sovereign, and [that] the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States."[88]

Eisentrager could be distinguished, the majority found, because the detainees were being held on the American naval base in Guantanamo Bay, Cuba. Since early 2002, the U. S. military has held them at Guantanamo, along with approximately 640 other non-Americans captured abroad. The United States occupies the base pursuant to a 1903 Lease Agreement executed with the newly independent Republic of Cuba in the aftermath of the Spanish-American War. Under the agreement, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]," while "the Republic of Cuba consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas."[89] In 1934, the parties entered into a treaty providing that, absent an agreement to modify or abrogate the lease, the lease would remain in

[83] 542 U.S. 466, 470-471 (2004).
[84] 339 U.S. 763, 94 L. Ed. 11255, 70 S. Ct. 936 (1950).
[85] 339 U.S. 763, 70 S. Ct. 936, 94 L. Ed. 1255 (1950).
[86] *Id.*, at 779, 70 S. Ct. 936, 94 L. Ed. 1255.
[87] *Id.*, at 769-779, 70 S. Ct. 936, 94 L. Ed. 1255; see *Rasul*, 542 U.S., at 475-476, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (discussing the factors relevant to *Eisentrager*'s constitutional holding); 542 U.S., at 486, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (Kennedy, J., concurring in judgment) (same).
[88] 339 U.S., at 778, 70 S. Ct. 936, 94 L. Ed. 1255.
[89] 542 U. S. 466, 471.

effect "[s]o long as the United States of America shall not abandon the . . . naval station of Guantanamo."[90] Since the prisoners are being held within the territorial jurisdiction of the United States the federal *habeus corpus* statute can be applied, the Supreme Court held.[91] In addition, the Court noted that unlike the petitioners in *Eisentrager*, which dealt with German nationals during World War II, the petitioners in *Rasul* were not nationals of a country with which the United States is at war.[92] Also, the foreign nationals in *Rasul* denied having engaged in or plotted acts of aggression against the United States and alleged that they were being held in federal custody in violation of the laws of the United States, and that they had been imprisoned without having been charged with any wrongdoing, permitted to consult counsel or provided access to courts or other tribunals.[93] The majority opinion noted that the writ of *habeus corpus* has British origins, citing Blackstone for the proposition that the writ ran to all parts of the king's dominions, because the king was entitled to have an accounting of why the liberty of any of his subjects might be curtailed.[94] The opinion went on to note that the writ in such cases was not confined to British subjects, but also to any person detained within the reach of the writ.[95] Since federal courts have jurisdiction over the custodians of those held at Guantanamo, the majority concluded that confers jurisdiction on the District Court to hear petitioners' *habeus corpus* challenges to their detention at the Guantanamo base.[96]

In his concurring opinion, Justice Kennedy observed the importance of the fact that many of the detainees at Guantanamo were being held indefinitely without benefit of any legal proceeding to determine their status.[97] Justice Scalia issued a spirited dissent. He argued that since the Guantanamo detainees are not located within the territorial jurisdiction of any federal district court, a petition seeking the issuance of a *habeus corpus* writ could not be properly brought in any federal district court.[98] He also disagreed with the majority's argument that their position found support in ancient British common law traditions. Even when British monarchs extended the writ to outlying dominions, they only did so to British subjects, Justice Scalia observed.[99]

Hamdi v. Rumsfield. Pursuant to Congressional authority, President Bush dispatched troops to Afghanistan to pursue al Qaeda forces with the mission of subduing the terrorist group and quelling the Taliban regime that was known to support it.[100] Yasser Esam Hamdi, an American citizen, born in Louisiana in 1980, was taken into custody by American Armed Forces in

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[90] 542 U.S. 466, 471.
[91] *Rasul*, 542 U.S. 466 at 469, citing *Foley Brothers, Inc.*, 336 U.S. 281, 285, 93 L. Ed. 680, 69 S. Ct. 575 (____).
[92] *Id.*, 542 U.S. 466, 476.
[93] *Id.*, 542 U. S. 466, 471-472.
[94] *Id.*, 542 U. S. 466, 482.
[95] *Id.*
[96] *Id.*, at 483.
[97] *Id.*, at 487-488.
[98] 542 U. S. 466, 488-489.
[99] 542 U.S. 466, 503-504.
[100] *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004).

Afghanistan.[101] Yaser Hamdi had moved with his family to Saudi Arabia as a child. By 2001, he resided in Afghanistan. At some point that year, he was seized by members of the Northern Alliance, a coalition of military groups opposed to the Taliban government, and was turned over to the United States military forces in Afghanistan.[102] The Government reported that it detained and interrogated Hamdi in Afghanistan before transferring him to the United States Naval Base in Guantanamo Bay in January 2002.[103] In April 2002, upon learning that Hamdi was an American citizen, authorities transferred him to a naval brig in Norfolk, Virginia, where he remained until being transferred to a brig in Charleston, South Carolina. The Government argued that Hamdi was an "enemy combatant," and that this status justified holding him in the United States indefinitely, without formal charges or proceedings, unless and until it made the determination that access to counsel or further process would be warranted.

Hamdi's father filed a writ of *habeus corpus* on his behalf, alleging that the Government held his son "without access to legal counsel or notice of any charges pending against him."[104] The petition alleged that, "as an American citizen, . . . Hamdi enjoys the full protections of the Constitution," and that Hamdi's detention in the United States without charges, access to an impartial tribunal, or assistance of counsel "violated and continue[s] to violate the Fifth and Fourteenth Amendments to the United States Constitution."[105] The *habeas* petition asked that the court, among other things, (1) appoint counsel for Hamdi; (2) order respondents to cease interrogating him; (3) declare that he is being held in violation of the Fifth and Fourteenth Amendments; (4) "[t]o the extent Respondents contest any material factual allegations in this Petition, schedule an evidentiary hearing, at which Petitioners may adduce proof in support of their allegations"; and (5) order that Hamdi be released from his "unlawful custody."[106] A federal district judge in Virginia appointed the federal public defender and ordered that counsel be given access to Hamdi.

The United States Court of Appeals for the Fourth Circuit reversed, holding that Hamdi's detention was legally authorized and that he was entitled to no further opportunity to challenge his enemy-combatant label. The Court of Appeals found that the District Court had failed to extend appropriate deference to the Government's security and intelligence interests.[107] It directed the District Court to consider "the most cautious procedures first,"[108] and to conduct a deferential inquiry into Hamdi's status.[109] It declared that "if Hamdi is indeed an 'enemy

[101] *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004).
[102] *Id.*
[103] *Id.*
[104] *Hamdi*, 542 U.S. 503, 511.
[105] *Id.*
[106] *Id.*, at 108-109.
[107] 296 F.3d 278, 279, 283 (2002).
[108] *Id*., at 284.
[109] *Id*., at 283

combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one.

The United States Supreme Court vacated that order and remanded the case, holding that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that an American citizen held as an enemy combatant in the Norfolk and Charleston Naval Brigs be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker.[110] The only other American citizen known to be imprisoned in connection with military hostilities in Afghanistan against the United States, John Phillip Walker Lindh, was tried in a federal district court and sentenced to prison pursuant to a guilty plea.[111] In his concurring opinion Justice Souter suggested that since Hamdi was an American being held in illegal custody, the Court should simply grant the writ.[112] The Executive branch should then release him or turn him over to the criminal authorities for prosecution.[113] Justice Thomas dissented that this case allows the government to hold Hamdi under the war powers of the federal government.[114] Justice Thomas argued that broad discretion should be allowed to the President to carry out his constitutional authority to protect national security.[115] Justice Thomas argued that the Government's authority to detain an individual the President has determined to be and enemy combatant complies with the Due Process Clause.[116] Justices Souter and Ginsburg, in a separate concurrence opined that, "The defining character of American constitutional government is its consistent tension between security and liberty, serving both by partial helpings of each."[117] They referenced Madison's Federalist 51 for the proposition that the branch best suited to balance such interests would be the judicial serving as a check on the executive branch.[118]

Hamdan v. Rumsfeld. Among the alleged foreign combatants that American forces captured in Afghanistan in 2001, was Salim Ahmed Hamdan, a Yemeni national who was transported to a United States military prison in Guantanamo Bay, Cuba, for detention.[119] Hamdan was accused of overt acts in furtherance of a conspiracy to commit terrorism: delivering ammunition and weapons to al Qaeda, acquiring trucks for use by Osama bin Laden's bodyguards, providing security services to bin Laden and receiving weapons training at a terrorist camp.[120] A Combatant Status Review Tribunal convened pursuant to a military order issued on July 7, 2004 decided that Hamdan's continued detention was warranted because he was an enemy combatant,

[110] *Hamdi v. Rumsfeld,* 542 U.S. 507, 535 (2004).
[111] 542 U. S. 507, 561, citing *United States v. Lindh,* 212 F. Supp. 2d 541 (ED Va. 2002).
[112] 542 U. S. 507, 576.
[113] *Id.*
[114] 542 U. S. 507, 579.
[115] *Id.*
[116] 542 U. S. 507, 592.
[117] 542 U. S. 507, 545.
[118] *Id.*
[119] *Hamdan v. Rumsfeld,* 548 U. S. 557, 566, 126 S. Ct 2749, 165 L. Ed. 2d 723 (2006).
[120] *Id.,* 548 U. S. 557, 646 (2006).

"an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged against the United States or its coalition partners."[121] He was scheduled to be tried by a military commission. In a petition for a writ of *habeas corpus* and a petition for a writ of mandamus, Hamdan contended that the military commission lacked authority to try him because (1) neither congressional act nor the common law of war supported trial by the commission for conspiracy, an offense that Hamdan asserted 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, including the principle that a defendant should be allowed to see and hear the evidence against him.[122]

The United States District Court for the District of Columbia granted Hamdan's *habeas corpus* petition.[123] However, the United States Court of Appeals for the District of Columbia Circuit held that the accused was not entitled to relief under (a) the Uniform Code of Military Justice (UCMJ)[124] or (b) the four Geneva Conventions (including the Third Geneva Convention, concerning prisoners of war, and reversed the District Court's judgment.[125] On certiorari, the United States Supreme Court reversed and remanded. In the portion of the opinion of Justice Stevens that was joined by Justices Kennedy, Souter, Ginsburg, and Breyer, and which constituted the opinion of the court, it was held that:

(1) The writ of certiorari in the instant case should not be dismissed on the Government's asserted ground of the Detainee Treatment Act of 2005 (DTA)[126], where (a) a DTA provision generally deprived any court, justice, or judge of jurisdiction to consider a *habeas corpus* application filed by or on behalf of an alien detained at Guantanamo Bay; but (b) the DTA was silent about whether this provision applied to claims pending on the date of enactment; and (c) ordinary principles of statutory construction sufficed to rebut the government's theory as to the instant case, which was pending when the DTA was enacted.

It was further held that the military commission convened to try Hamdan lacked power to proceed, as the commission's structure and procedures violated (a) the UCMJ, for the commission's procedures failed to comply with UCMJ Article 36(b)[127], which required that the procedural rules that the President promulgated for military commissions and courts-martial be "uniform insofar as practicable"; and (b) the Geneva Conventions, for (i) the conventions' Common Article 3 (so called because it appeared in all four conventions), for which the Third Geneva Convention required that the detainee be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," and (ii) the commission's procedures did not meet this standard.[128]

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[121] 548 U.S. 557, 570-571.
[122] *Id.*
[123] 344 F. Supp. 2d 152.
[124] 10 U.S.C.S. §§ 801 et seq.,
[125] 367 U.S. App. D.C. 265, 415 F. 3d 33.
[126] 119 Stat. 2739.
[127] (10 U.S.C.S. § 836(b)).
[128] *Id.* at 567.

Justice Kennedy, in a concurring opinion, expressed the view that (1) military commissions carried the risk that offenses would be defined, prosecuted, and adjudicated by executive officials without independent review; (2) such concentration of power put personal liberty in peril of arbitrary action that the Federal Constitution's three-part system was designed to avoid; and (3) the accused's circumstances presented no exigency requiring special speed or precluding careful consideration of evidence, as (a) for roughly four years, the accused had been detained by the United States, and (b) regardless of the outcome of the criminal proceedings at issue, the government claimed authority to continue to detain him on the basis of his status as an enemy combatant.

Justice Kennedy observed that the procedures established by Congress under the DTA lacked procedural safeguards established by Congress for courts martial. For example, while a court martial provides for at least five members, a military commission may be convened with only three, which he suggested could affect the deliberative process and the prosecution's burden of persuasion.[129] Courts martial have built in safeguards that are lacking in commissions, Kennedy observed. The military judge in a court martial must be an officer who is a member of the federal or state bar and has been certified as a military judge by that officer's Judge Advocate General. They are assigned by and report directly to the Judge Advocate General. In contrast, the presiding officer of a commission is selected by the appointing authority and is not required to be trained as a military judge. Accordingly, the presiding officer in a military commission may not be as free from command influence as a military judge who presides over a court martial.[130]

Justice Scalia, joined by Justices Thomas and Alito in dissent, declared that (1) the Supreme Court's DTA conclusion in the instant case, that every court, justice, or judge before whom a *habeas corpus* application by a Guantanamo Bay detainee was pending on December 30, 2005 (the date of the DTA's enactment) had jurisdiction to hear, consider, and render judgment on the application, was (a) contrary to the DTA's plain directive, and (b) patently erroneous; and (2) even if this were not so, the jurisdiction supposedly retained, in an exercise of sound equitable discretion, ought not to be exercised.

Justices Thomas and Scalia dissented that (1) the Supreme Court's opinion in the instant case openly flouted the courts' well-established duty to respect the executive branch's judgment in matters of military operations and foreign affairs; and (2) the Supreme Court's evident belief that it was qualified to pass on the purported military necessity of the Commander in Chief's decision to employ a particular form of force against the nation's enemies was antithetical to the nation's constitutional structure. Chief Justice John Roberts did not participate since he was one of the appellate judges who ruled previously on the case.

In response to this ruling Congress passed the Military Commissions Act of 2006.[131] This statute set up military commissions composed of senior officers to try the detainees. Hamdan

[129] 548 U.S. 557, 649-650.
[130] 548 U. S. 557, 648-649.
[131] 10 U.S.C. § 950g(a)(1).

was subsequently tried by a military commission composed of six senior officers at the Guantanamo Naval Base in August 2008. He was convicted of providing material support to Al Qaeda but acquitted of terrorism conspiracy charges. As a convicted war criminal he was moved from the regular detainees and was held separately from the other detainees because of his new status. He was eventually sentenced to time served and released.

Military Commissions Act of 2006.

This law was enacted by Congress after and apparently in response to the Supreme Court's ruling in *Hamdan v. Rumsfeld*. The Act authorizes the President to establish military commissions and establishes procedures for military commissions to try enemy combatants. The Act provides that no unlawful enemy combatant tried under this act may invoke the protections of the Geneva Convention. The Act authorizes the prosecution of unlawful enemy combatants for violations of this Act or the laws of war. Lawful enemy combatants are not authorized to be prosecuted under this Act. Findings of who are unlawful enemy combatants are to be made by Combat Status Review Tribunals or other similar competent tribunals. Commissions under this Act may impose any lawful penalty, up to and including the death penalty. An unlawful enemy combatant under the Act includes:

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

...

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

*Boumediene V. Bush***.** In this case the Supreme Court held that the writ of *habeus corpus* is available to prisoners from the war on terror being held in Guantanamo.[132] The Court noted that

[132] 553 U. S. 723, 734.

Article One, Section 9 of the Constitution provides that the writ of *habeus corpus* shall not be suspended unless in cases of rebellion, the public safety requires it. The Court found that Section 7 of the Military Commissions Act of 2006 (MCA), which was passed in response to *Hamdan v. Rumsfeld,* effectively suspended the availability of the writ of *habeus corpus* to the prisoners held at Guantanamo and was therefore unconstitutional to that extent.[133] The Act had endeavored to set forth a process by which any requests for writs of *habeus corpus* would be heard by any courts. The Act provided in 28 USCS 2241(e) that "Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider (1) an application for a writ of *habeas corpus* filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who - (A) is currently in military custody; or (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.

The Supreme Court held that the effect of the MCA was to deny the writ of *habeus corpus* to prisoners held at Guantanamo and that that was unconstitutional.[134] As the Court pointed out, in *Hamdan v. Rumsfeld,* the Court had held this provision did not apply to similar cases pending when the DTA was enacted.[135] In a discussion of the writ of habeus corpus the *Boumediene* court pointed out that the clause protects the rights of the detained by affirming the duty and authority of the judiciary to call the jailer to account.[136] The essence of *habeus corpus* is an attack upon the legality of that custody. Accordingly, the writ is directed by the court upon the jailer of the person held in custody to produce that person before the court and explain under what authority he is being detained. As to whether the petitioners' status as aliens should bar them from habeus protection, the Court observed that even at British common law, a petitioner's status was not a categorical bar to habeus protection. The Court cited Somersett's case[137] where an African slave was ordered freed upon finding the custodian's return insufficient.[138]

As to the Government's contention that the United States lacked sovereign control over Guantanamo Bay, the Court observed that this country has exercised uninterrupted control over the bay for more than 100 years.[139] The Court found that the Military Commissions Act of 2006 in conjunction with the Detainee Treatment Act of 2005 is, on its face an inadequate substitute for *habeus corpus*.[140]

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[133] 553 U.S. S. Ct. 723, ___, 128 S. Ct. 2229, 2243.
[134] 553 U. S. 723, ___, 128 S. Ct. 2229, 2242.
[135] *Id.*
[136] 553 U. S. 723, ___, 128 S. Ct 2229, 2247.
[137] 20 How. St. Tr. 1. 80-82 (1772).
[138] 553 U.S. 723, ___, 128 S. Ct. 2248.
[139] 20 How. St. Tr. 1. 80-82 (1772).
[139] 553 U.S. 723, ___, 128 S. Ct. 2258.
[140] 553 U. S. 723, ___, 128 S. Ct. 2229, 2274.

To restate, the purpose of the Military Commissions Act of 2006 was to legislate an appropriate trial forum to prosecute alien terrorists for their destructive acts, attempts and conspiracies that afflicted national security. The Military Commissions authorized by Congress were utilized in a number of military pending trials until the Obama administration holted the proceedings on January 27, 2009 and immediately transferred the cases to civilian federal courts.[141] The reason for cessation of the military commission prosecution was to provide alien terrorists with greater due process rights.

In October, 2009 Congress passed a bill to amend the MCA of 2006 cited as the Military Commission Act of 2009 (hereafter MCA 2009)[142] which enlarges and modifies constitutional due process rights of foreign combatant terrorists.

The main purpose of the MCA 2006 was to create a forum in which to try "alien unlawful enemy combatants" for violation of the law of war.[143] The 2009 MCA changes that character to an "unprivileged enemy combatant" which means an individual who: (A) has engaged in hostilities against the U.S. or its coalition partners; (B) has purposefully and materially supported hostilities against the U.S. or was a part of al Qaeda at the time of an alleged offense. The term "privileged belligerent" means a lawful enemy combatant or civilian enumerated in Article 4 of the Geneva Conventions of 1949.[144]

Substantive and procedural individual rights afforded alien terrorists under the MCA 2009 which replicate, modify or are in addition to the process rights in the MCA 2006 include:

a) The procedures and rules of evidence applicable in trials by general courts-martial shall apply in trials by military commissions.[145]

b) Testimony allegedly obtained through coercion may be admitted only if the military judge finds that the circumstances renders the statement reliable and of probative value and "interests of justice would be served by admission of the statements."[146]

c) Hearsay evidence may be admitted only if the evidence is offered as evidence of a material fact, rules of evidence and justice will be best served and (a) direct testimony is not available or producing a witness would have an adverse impact on military operations.[147]

d) Charges against the accused must be signed under by a charging officer who has personal knowledge or reason to believe the included matters and that the charges are true in fact to the best of signore's knowledge. The signor may be examined by the accused to foundational matters.[148]

[141] Executive Order No. 13.492¶7. 74 Fed. Reg. 4.899 (Jan. 27, 2009).
[142] Military Commission Act of 2009, 10 U.S.C. Ch. 47A, National Defense Authorization Act for Fiscal Year 2010.
[143] Title XVII – Military Commission Act of 2009, Ch. 47a of Title 10, U.S.C. (2009).
[144] Id. at (6).
[145] Id. at §949a.(a).
[146] Id. at 948 (b).
[147] Id. at §949(a) (3) (D).
[148] Id. at §948 a (a)(1)& (2).

e) The accused has a right to legal counsel qualified as competent the service's Judge Advocate General.[149]

f) The accused at trial has the right to present evidence, cross-examine witnesses and examine and respond to evidence admitted against the accused; to compel witnesses to appear and testimony and to produce evidence.[150]

g) Statements obtained by torture or cruel treatment are inadmissible.[151]

h) An accused at trial may assert his right against self-incrimination.[152]

Military commission pre-trial and trial rules and procedures differ but not significantly from civilian judiciary proceeding or court martial. The Military Commission Act of 2009 may be distinguished in the following ways:

- Unlike civilian trials, only two-thirds of the military jury must agree to convict under the MCA.[153]
- Presiding officers are authorized to consider secret information the defense attorney may not refute. This applies to classified secrets laws to be reviewed *in camera.*[154]
- The accused is entitled to use only military attorneys in the Judge Advocate Generals Corps or security certified non-military lawyers.[155]

The first trial of an unprivileged enemy belligerent under the 2009 Act began with jury selection on August 9, 2010.[156] Omar Khadr was captured by American soldiers following a five-hour firefight with enemy combatants in southern Afghanistan. Khadr confessed to interrogators that he was trained in combat activities by al Qaeda, engaged in the firefight and hurled a grenade that killed an American soldier and was duly charged with war crimes in violation of the Military Commission Act of 2009. Khadr's appointed Judge Advocate General defense attorney moved to strike the confession statements as induced by threats of rape but the military commission judge denied the motion on the evidence and testimony of witnesses and allowed the confession articles into evidence. However, the accused's defense lawyer collapsed in court on August 12th, was hospitalized and then returned to the U.S. for medical care.[157] The trial awaits.[158]

[149] Id. at §34996(b), et seq.
[150] Id. at 949 (a)(2) et seq.
[151] Id. at §948r (3).
[152] Id. at §948r. (b).
[153] 10 U.S.C. § 950 v(b) 25-27.
[154] Id.
[155] Id. Also see; Trial Guide for Military Commissions, Department of Defense, August 17, 2004, as amended.
[156] CNN World.com, Charley Keyes, August 11, 2010.
[157] U.S.A. v. Omar Ahmed Khadr (citation not available).
[158] The military commission judge has set October 18, 2010 for the trial to resume (Order, September 4, 2010).

While Omar Khadr's prosecution was the first military commission trial to proceed under the MCA of 2009, a prior case was set for trial before a commission in August, 2010.[159] However, the accused, Ibrahim al Qosi, a Sudanese citizen, entered into a plea agreement with military prosecutor on July 1, 2010, admitting that he provided aid, support and advice to enemy terrorists in Afghanistan. He was also known as the cook and driver for Osama ben Laden. A military jury, on August 11, 2010, sentenced Qosi to fourteen years in prison. He remains incarcerated in Guantanamo while he awaits transfer of his case to the Convening Authority for Military Commission which has the authority to decrease, but not increase, the term of sentencing and decide whether he will receive any credit for the approximately seven years of confinement in Guantanamo prior to the sentencing.

The military commission judge at the conclusion of al Qosi's proceedings recognized that his was the first case under the MCA of 2009 and so accorded the significance of the event, "We have made law and we have made history."[160] The debate continues to determine whether the judge's tribute was words of hope or prediction.

Summary

U.S. military commissions and civilian courts have jurisdiction to hear cases relating to war crimes or terrorist acts where the statutes whose violations they hear would apply. There may be some cases where commissions and civilian courts might have concurrent jurisdiction, e.g., murder, under certain circumstances. For example, Ahmed khalfan Ghailani, a Tanzanian, who was formerly detained at Guantanamo, is scheduled to be tried in U.S. District Court in Manhattan for conspiring in the 1998 bombings of U.S. embassies in Tanzania and Kenya that killed 224 people.[161] In the event that a person is arrested by civilian authorities and charged with a crime to be tried by a civilian court, such a person must generally be read his *Miranda*[162] rights prior to in custody questioning. There is a public safety exception, however, which allows the warnings to be delayed under certain circumstances. In *New York v. Quarles*,[163] the United States Supreme Court created a public safety exception to the *Miranda* warnings where public safety requires authorities to question a criminal suspect immediately. Justice William Rehnquist explained: "It is clear that American civilian courts have jurisdiction to try foreign nationals arrested in the United States for what may be described as terrorist acts. For example, Umar Farouk Abdullah was arrested on Christmas Day 2009 for attempting to detonate an explosive device on a jet plane bound for Detroit. He has been indicted by a federal grand jury and faces trial in a U.S. District court. Similarly, Faisal Shahzad was arrested for leaving a smoking car in Times Square on May 1, 2010, packed with explosives and detonators.[164] He has

[159] U.S.A. v. Ibrahim al Qosi (citation not available).
[160] CNN World.com, Charley Keyes, August 1, 2010.
[161] "Judge backs trial for ex-Gitmo detainee," Chicago Tribune, Jul. 14, 2010, p. 35.
[162] 384 U.S. 436 (1966).
[163] 467 U.S. 649 (1984).
[164] "From Suburban Father to a Terrorism Suspect," by James Barron and Michael Schmidt, New York Times, p. 1, May 5, 2010.

been indicted by a federal grand jury for criminal charges and will likely be tried in a federal civilian court, since he is a naturalized American citizen arrested on American soil, charged with crimes in violation of the laws of the United States.[165] It is clear that foreign nationals from a country with which the United States is at war taken into custody as enemy combatants and held in the theater of operation can be tried by military tribunals or commissions within that foreign theater of operations. This was the situation in *Eisentrager v. Johnson.*[166] In that case the Supreme denied the request for a writ of *habeus corpus* where the prisoners were enemy aliens who had never been or resided in the United States, were captured outside of our territory, held in military custody as prisoners of war, were tried and convicted by a military commission sitting outside the United States for offenses against laws of war committed outside the United States and were at all times imprisoned outside the United States.[167] As discussed above, it is also clear that unlawful enemy combatants seized for violations of the law of war may be tried by military commission.

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[165] "Suspect in Failed Times Square Attack Indicted, Richard A. Serrano, Chicago Tribune, June 18, 2010, p. 18.
[166] 399 U. S. at 777, 94 L. Ed. 1255, 70 S. Ct. 936.
[167] *Id.*