

## DEBATE

### *HAMDAN AND THE MILITARY COMMISSIONS ACT*

Professor Glenn Sulmasy, of the U.S. Coast Guard Academy, and Professor John Yoo, of the University of California, Berkeley, see in the Military Commissions Act of 2006 a timely palliative for the errors they find in the Supreme Court's *Hamdan v. Rumsfeld* decision. That opinion, they maintain, misapplied Common Article 3 of the Geneva Conventions to the United States' "War on Terror," and thereby "created the potential to straightjacket our armed forces well beyond the narrow issue of war crimes trials." Furthermore, in their view, "the MCA provides a laundry list of rights that often go well beyond the procedures and protections of other nations' systems." In contrast, Professor Martin Flaherty of Fordham Law School believes that the same Act "would for the first time in our history result in the United States deliberately violating the very laws of war that this nation pioneered." As for *Hamdan* itself, Flaherty sees it less as an errant decision than an instance in which "the Court has again stood up for first principles against a White House whose misunderstandings of our fundamental constitutional principles are matched only by its miscalculations in foreign policy."

#### OPENING STATEMENT

*The Military Commissions Act: A Bipartisan Congress  
Checks the Judiciary*

Glenn Sulmasy<sup>†</sup> and John Yoo<sup>††</sup>

In its decision in *Hamdan v. Rumsfeld* rejecting President Bush's

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military commissions for the trial of al Qaeda terrorists, the Supreme Court made a number of missteps. Thankfully, many of these errors have been remedied through the bipartisan passage of the Military Commissions Act of 2006 (MCA).

Justice John Stevens, writing for Justices David Souter, Ruth Bader Ginsburg, Stephen Breyer, and the wandering Justice Anthony Kennedy, evaded Congress's order that the Court not decide any cases arising from the detention of enemy combatants at the Guantanamo Bay, Cuba camp. The Justices narrowed Congress's authorization for the President to use all necessary and appropriate force against those responsible for the 9/11 attacks. They overlooked centuries of American history in which Presidents from George Washington to FDR have used military commissions to try enemy combatants for war crimes. They essentially overruled the central lessons of three Supreme Court decisions from World War II upholding the use of military commissions. Worse, they unnecessarily injected themselves into decisions better left, and arguably constitutionally mandated, to the executive branch.

In an effort to interfere with the way the elected branches of our government have chosen to wage war against al Qaeda, the Court interpreted a law recognizing military commissions to require the United States to follow what is known as "Common Article 3" of the Geneva Conventions. While limited only to military trials, *Hamdan* suggests the possibility that the courts will order the United States to apply Common Article 3 to other operations against al Qaeda members, who neither wear uniforms nor display any distinctive signs, who systematically flout the laws of war, and who are neither parties nor signatories to the Geneva Conventions. *Hamdan* created the potential to straightjacket our armed forces well beyond the narrow issue of war crimes trials.

It is critical to clarify where Common Article 3 really applies and what it actually demands. Under the Geneva Conventions, prisoner of war status is reserved for captured soldiers in the regular armed forces of nations that have signed the treaties. POWs receive the gold standard of treatment: they cannot be placed in cells; they need only provide name, rank, and serial number; and they are entitled to a great many privileges and benefits, such as retaining their uniforms, unit structures, and chains of command. These rules have in mind the conflicts between the large conscript armies of World Wars I and II. They provide protections to those who follow the law of war's prohibition on the deliberate targeting of civilians, and its restriction on the employment of violence against only combatants.

The major purpose of these provisions is to ensure, through

treaty, that reciprocity be afforded to all nations and their armed forces once engaged in combat. Al Qaeda did not exist at the time of the drafting of the Conventions, and affording such protections was never in the minds of the signatories—certainly not the United States. Al Qaeda is not a nation-state and could not be, nor will it ever be, party to such treaties. It has no intention of following any of the laws of war. In fact, its primary tactics—targeting and killing civilians, taking hostages, and executing prisoners—are designed specifically to violate any standards of civilized warfare. Therefore, our conflict with al Qaeda cannot trigger the general POW protections of the Geneva Conventions.

Common Article 3 applies to certain fighters who do not qualify as POWs. It sets minimum standards “in the case of armed conflict *not of an international character*.” Its inclusion in 1949 cured a major gap in the Geneva Conventions, as the original Conventions did not set rules for internal civil wars between a government and resistance or rebel groups. Common Article 3 extends minimum protections to detainees who are not fighting on behalf of the armed forces of another nation, but it does not mandate that they receive the same protections as POWs. It requires, for example, that “persons taking no active part in the hostilities,” including the sick, wounded, and captured, “be treated humanely.” They are to be protected against “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.”

The basic purpose of Common Article 3—humane treatment—is already the policy of the United States. But Common Article 3 also contains some ambiguous provisions. It prohibits “outrages upon personal dignity, in particular, humiliating and degrading treatment,” which it does not define. It only allows the use of a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples,” which it again leaves undefined.

An example from *Hamdan* itself illustrates how ambiguous these terms are. Under the Pentagon’s rules on the procedures for military commissions, a court may exclude the defendant from the courtroom if classified information is to be presented. The defense attorney may be present, but not the defendant. This makes a great deal of sense. We would not want al Qaeda operatives directly learning the sources and methods used by American intelligence to track and capture them. Al Qaeda has shown that it quickly adapts to outsmart our strategies and tactics. Is preventing an al Qaeda defendant’s access to such information a violation of “judicial guarantees which are recognized as indispensable by civilized peoples”? The Supreme Court

seemed to think so, but we believe many would agree that the military commission rule is a reasonable compromise that allows for the defendant's interests to be represented but avoids harming national security during an ongoing war.

Our conflict with al Qaeda does not fit within the general Geneva Convention rules for wars between nation-states. Al Qaeda terrorists are not legally eligible for the rights granted to POWs. But the War on Terror does not fall within Common Article 3 either. The United States is not fighting an internal civil war. As Justice Clarence Thomas noted in his vigorous *Hamdan* dissent, the war against al Qaeda and its supporters is clearly one of an "international character." The battlefield reaches beyond Afghanistan and Iraq, to New York City, Washington, London, Bali, and Madrid. The war that began with the attacks on the World Trade Center and the Pentagon on 9/11 is certainly nothing like the internal civil wars that were in the minds of Common Article 3's drafters in 1949. We are not fighting a liberation movement of Americans who want to overthrow the government. We are fighting something that lay completely outside the experience of those who wrote the Geneva Conventions after World War II: an international terrorist organization with the power to inflict destruction on par with the armed forces of a nation.

*Hamdan* disregarded the distinctions between lawful and illegal combatants. The enemy we now fight does not abide by the laws of war. Any incentive to follow the rules of civilized warfare is removed if that enemy receives the same rights as those who scrupulously obey the Geneva Conventions. In applying Common Article 3 to al Qaeda, we now equate illegal combatants with ordinary armed forces. By affording Geneva Convention protections to al Qaeda, we would be legitimizing its form of warfare.

This is a dangerous path to follow. Al Qaeda uses our laws and treaties against us while violating the same humane principles we hold dear. Al Qaeda and those who hate the Western way of life are using our respect for the laws of war against our armed forces and are trying to open the door to claims of war crimes based on ambiguous terms. It is telling that the week after the *Hamdan* decision was handed down, al Qaeda in Iraq offered a video on an Islamist website of two U.S. soldiers captured in Iraq—showing them beheaded with their chests cut wide open. Humane treatment and reciprocity? Never.

In trying to force Common Article 3 onto a conflict that stretches beyond national borders, but is with an international terrorist organization rather than a nation, the Supreme Court is trying to force a round peg into a square hole. We can have a legitimate debate on whether to update the Geneva Conventions to ensure that humane

principles are applied in conflicts with terrorist organizations like al Qaeda. But as it stands now, as a matter of both law and policy, such application to al Qaeda only hurts the United States in its efforts to protect the nation against international terror—both now and in the foreseeable future.

Fortunately, the MCA has, for the most part, cured the faulty and dangerous holding in *Hamdan*. Still, while permitting the executive to function as the Commander-in-Chief, the MCA balanced the myriad perspectives on how to detain enemy combatants and answered many of the concerns raised by the Court. Immediately following the enacted legislation, however, human rights groups and others began attacking the new legislation on a new front—on the grounds that it does not give detainees access to habeas proceedings. The critics claim that the legislation denies any right of the detainees to challenge their detention. This is patently false. Included in the legislation is the review of detention by Combat Status Review Tribunals (CSRTs) and, in some cases, a chance for detainees to bring a challenge in what is considered to be the second-highest court in the nation, the Circuit Court for the District of Columbia. Admittedly, there is a need in this new war to ensure that the many being held are detained lawfully. No one disputes that the United States should confirm (even more so in this generation-long conflict) that the people we are holding are, in fact, members of al Qaeda (or other loosely affiliated jihadists). It should be made clear that the administration agrees with this as well. The key issue is really how best to accomplish this task.

The CSRTs are roughly analogous to the tribunals referred to in Article 5 of the Third Geneva Convention. Like the Article 5 tribunals, the CSRTs make POW status determinations. They do so in three-officer panels which conduct hearings and review evidence indicating whether or not those captured are al Qaeda members. In addition, the detainees can have access to the D.C. Circuit for further review. Thus, they have at least two layers of review of status determinations. Ironically, this is more than even a lawfully detained POW in traditional armed conflict enjoys. Thus, many of the criticisms of a total lack of habeas rights are, de facto, without merit. The MCA ensures that the detainees being held are only those who should be held.

*Hamdan* injected the Supreme Court into an arena in which it has traditionally resisted becoming involved—war and warfare operations. In the global War on Terror, detention is a critical part of the ongoing military operations and the protection of the homeland. Thankfully,

the MCA has removed much of the ambiguity created by *Hamdan* and now permits the humane detention of those who seek the destruction of the rule of law and the ideals of Western civilization.

#### REBUTTAL

#### *A President, Not a Caesar*

Martin S. Flaherty<sup>†</sup>

With its decision in *Hamdan*, the Supreme Court for the third time in the last three years has rejected the White House's unprecedented claims of executive authority in order to uphold the Constitution, our binding treaty commitments, and the rule of law itself. In response, last year's Congress hastily drafted an exceptionally sloppy and contradictory statute in the form of the MCA, a law that, among other things, would for the first time in our history result in the United States deliberately violating the very laws of war that this nation pioneered. Now that the electorate has spoken, the new Congress fortunately has shown signs that it will return the nation to its proud and longstanding traditions.

The Supreme Court has not just done its part; it has done its duty. In *Rasul v. Bush*, it rejected the President's claim that the writ of habeas corpus, a cornerstone of liberty in the English-speaking world, did not extend to detainees in Guantanamo, an assertion that would have made the camp essentially a "law-free zone," in which detainees had neither rights nor recourse. In *Hamdi v. Rumsfeld*, Justice O'Connor, for the plurality, dismissed no less audacious executive arguments to hold that habeas review actually entailed a substantive hearing, including such essential due process rights as the right to know the factual basis for one's detention and the right to rebut such facts.

Now, in *Hamdan*, the Court has again stood up for first principles against a White House whose misunderstandings of our fundamental constitutional principles are matched only by its miscalculations in foreign policy. The Court restored separation of powers by holding that Congress did not inadvertently cede to the executive the authority to depart from two centuries of practice in which military commis-

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sions have been used in strictly confined circumstances. And, notwithstanding the faulty arguments of its critics, the majority upheld the rule of law by interpreting the Geneva Conventions in a manner in which, at least outside the White House, they have been almost universally understood for generations.

Nowhere did the Court more faithfully apply the law than in its handling of Common Article 3. Consider first the majority's cautious approach to a threshold question: how does this or any other provision of the Geneva Conventions apply in U.S. courts? Justice Stevens could have held that the Conventions were directly applicable as "the supreme Law of the Land" under the Supremacy Clause. The Court chose instead to rely on the will of the President and Congress, rather than just the President and Senate, in declaring that the Geneva Conventions were incorporated into domestic military law by federal statute through the Uniform Code of Military Justice.

It is on the merits of Common Article 3, however, that the Court's position is simply unassailable. The Geneva Conventions do indeed establish a two-track system with regard to combatants. In particular, the Third Geneva Convention distinguishes between prisoners of war and unlawful combatants. POW status provides the highest level of humane treatment. It is reserved for soldiers in uniform who fight for sovereign nations that have ratified the treaty and who follow the laws of armed conflict. POWs are not only entitled to retain their uniforms, give only their name, rank, and serial number, and not be placed in cells; they are also expressly entitled to such amenities as adequate underwear and tobacco. Among other things, this high standard reflects two principles made plain over centuries of warfare. As a matter of reciprocity, those engaged in combat have an incentive to treat prisoners well to help ensure that the same treatment will be given to their captured fighters. In addition, according the highest privileges for soldiers in uniform fosters the humanitarian goal of keeping any conflict away from civilian populations.

But what of those who don't fight fair? Who try to blend in with civilians? Whose purpose is to kill civilians? Who don't fight for a nation that has signed the Conventions? Or who don't fight for a recognized nation at all? Military history is filled with such types of irregular fighters. Al Qaeda, is, unfortunately, only the most recent in a long line. Do the Conventions extend any protections to these types of combatants once they are detained? Or do they relegate them to the same type of "law-free zone" that the administration argued domestic law had created for them?

The intuitive, but more importantly, the legal answer to the last

question is: no. The Geneva Conventions first of all presume that captured combatants should be accorded POW status. But if, after a hearing, it is determined that they did not wear uniforms or any sort of insignia, did not carry their arms openly, did not operate under a command structure, or likely violated the laws of armed conflict by, for example, targeting civilians, then they receive lesser protections, but protections nonetheless. This is the role of Common Article 3.

Through its text, its background, and its consistent interpretation, Common Article 3 makes plain that the Geneva Conventions leave no “gap.” The provision states that it applies “in the case of armed conflict not of an international character.” To those unfamiliar with international law, it might seem plausible to argue that the “War on Terror” crosses borders and is thus an international conflict that is expressly excluded. This is exactly the novel argument put forward by the White House in *Hamdan*, and taken up in this Debate by Professors Sulmasy and Yoo. But “international” means exactly that: inter (between) national (nations). First coined by Jeremy Bentham, the word refers to actions between two or more sovereign nation-states. As used in Common Article 3, the word means simply that the Article covers any armed conflict not between such states. That would include civil wars confined to national borders, civil wars that spill over borders, and more diffuse armed conflicts, including the “War on Terror.”

The background materials to Common Article 3 confirm the words. To take an example, one conflict very much on the minds of the drafters of the Article was the Spanish Civil War of the 1930s. This conflict by definition did not directly involve two nation-states. Yet it did, indeed, cross borders. The Soviet Union poured in aid and materiel to the royalists. Nazi Germany did the same for Franco’s Republicans. Even Americans got involved by forming the Abraham Lincoln Brigade to fight the fascists. Under the Bush administration’s misreading of Common Article 3, no detainee in a conflict such as the Spanish Civil War would have been owed any humane treatment. Fortunately, those who drafted the provision thought otherwise.

The same story goes for the way Common Article 3 has been consistently interpreted. The Geneva Conventions give a special role to the International Committee of the Red Cross (ICRC), which monitors and interprets the treaties. The ICRC’s Commentaries on the Conventions have long taken the position that Common Article 3 leaves no gaps, applying to those involved in conflicts that cross borders, those alleged to have committed war crimes, and those who do not fight for sovereign nation-states. Recently established war crimes tribunals, including the International Criminal Tribunal for the For-

mer Yugoslavia, have also consistently taken this position.

Even Justice Thomas in dissent could not really bring himself to hold that the President had the better argument in *Hamdan*. The best he could do was say that either interpretation of Common Article 3 was plausible, but that since the Court had a (chimerical) “duty” to defer to the President’s interpretation of treaties, he would hold that Common Article 3 did not apply.

In short, the consensus interpretation of Common Article 3 is *precisely* that it covers unlawful combatants, no matter how vile, how irregular, or how global in scope. That is why it exists. It covered the Viet Cong; it covered irregular Croat and Serb forces in Bosnia; it covers the genocidal Janjaweed militias in Darfur; it covers Chechen rebels; and it covers the Taliban and al Qaeda.

When a law applies, it is no objection to say one doesn’t like its substantive provisions. But that is just what the critics of *Hamdan* and the Geneva Conventions appear to argue. Actually reading Common Article 3 quickly reveals that its purpose is to protect truly fundamental rights and that it does not defy judicial application any more than does the Bill of Rights.

Here is what the text prohibits: “(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

As with most instruments protecting rights, the language is general. The very nature of the list indicates that its purpose is to protect fundamental rights, not to address trivial matters as some of its critics maintain. Nor are we left to interpret these provisions in a vacuum. Jurisprudence already exists in transnational bodies, ICRC Commentaries, and now in the Supreme Court itself. If anything, the *Hamdan* Court proved itself to be far too cautious. On one hand, it held that military tribunals, created by executive fiat where courts martial were presumptively feasible, were not “regularly constituted.” A majority did not, however, conclude that the possibility of a capital sentence based solely on hearsay evidence from a witness that the defendant might not be able to confront failed to afford “all the judicial guarantees which are recognized as indispensable.” So much for a runaway Court bent on tying the hands of a wartime President through vague treaty provisions.

What the critics of *Hamdan*, and with it Common Article 3, offer are not legal arguments but policy positions. Al Qaeda is so different from genocidal irregular paramilitaries that have killed tens of thousands, the argument may go, that it *should* not receive those protections that Common Article 3 *mandates*. Perhaps. Yet such an argument faces at least three hurdles as high as this nation's former standing as a guardian of international and humanitarian law.

First, if the law requires change, that can come only through lawful processes, not judicial activism. Lawful process does not mean heaping abuse on courts that apply laws that one argues are outmoded simply by repeating the horrors of 9/11. Rather, it means that, at least in domestic law, only Congress can alter what treatment detainees are owed, subject to the Constitution and the presumption that it will not willfully violate our international obligations. In international law, lawful process further means that the Geneva Conventions themselves will have to be repudiated or amended through a global protocol that will reverse the trajectory of humanitarian law. The MCA has effected domestic change; it may yet be undone. But, short of repudiating the Geneva Conventions, Common Article 3 remains our obligation in international law. That means the MCA as it stands will put us in breach of the Geneva Conventions. The new Congress should think long and hard about whether it wants that result to persist.

Second, a more complete view of the facts demonstrates that nothing produces injustice so much as measures based upon wartime fears. The vaunted CSRTs have not reversed any initial determination that a detainee in Guantanamo is an unlawful combatant. But the records left behind belie the notion that all or even most of the detainees were Taliban or al Qaeda operatives caught on the battlefield. Records compiled and analyzed by Seton Hall Law School instead show that in a majority of cases there is little or no evidence of genuine Taliban or al Qaeda activity. In many cases, a detainee's act of surrendering to U.S. or allied forces was classified as an overt hostile act for the purposes of justifying detention. In many cases, detainees were captured, most likely for bounties, in Pakistan. In others, like the case of detained Chinese Uighers, there is no apparent connection to any aspect of the "War on Terror" at all. The nation has come to regret the Alien and Sedition Acts and Japanese-American internment. As these facts come out, it is already coming to regret Guantanamo.

Third, repudiating Common Article 3 will reverse two hundred years of American tradition. Until recently, the United States could proudly claim that no other country had done more to develop the

laws of war. During the American Revolution, the British gave orders to give “no quarter” to American combatants on the grounds that they were lawless, indeed treasonous, and did not fight for any recognized sovereign state. General Washington, by contrast, ordered that British captives be treated with humanity. During the Civil War, Abraham Lincoln presided over the birth of the modern laws of war by adopting the famous Lieber Code, which also provided for human treatment of combatants who were fighting for the destruction of the Union. Over the course of the nineteenth and twentieth centuries, the United States took the lead in codifying the laws of war, culminating in the Geneva Conventions of 1949. And even when those treaties did not so require, consistent U.S. military policy was to accord POW status even to combatants who were no more qualified for such status than al Qaeda, including the Viet Cong.

The *Hamdan* Court applied the law, and in doing so defended this core American tradition. The Congress that enacted the MCA follows in the footsteps of predecessors who have betrayed that tradition. In light of the electorate’s repudiation of that Congress, one can only hope that its replacement will be truer to what once made the nation a superpower not just in arms, but in law and in justice.

#### CLOSING ARGUMENT

Glenn Sulmasy and John Yoo

The MCA passed with strong bipartisan majorities in both the House and the Senate just four months ago. In the House of Representatives, it passed 250-170; in the Senate, 65-34. These numbers can be read as a commitment on the part of both the administration and the Congress to prevent the courts from interfering with the legitimate efforts of the United States to prosecute its war against al Qaeda. Such large majorities undermine the criticisms raised by Professor Flaherty in his Opening Statement.

Prior to formally proposing the legislation, the administration sought input from Congress, the military, and the military judge advocates. There was debate, compromise, and broad congressional support for the MCA. The administration took *Hamdan* seriously, but it also worked with Congress to correct its mistakes.

The administration and Congress understood this to be a new war, one different from others of recent memory. Contrary to Flaherty’s assertions, we have never fought an enemy such as this. Al Qaeda flouts the laws of war, does not wear uniforms, does not operate in

regular armed units, does not respect civilian life, and fights on behalf of no nation state. It is an asymmetric enemy that seeks to attack the West. The enemy is not the same as “irregular fighters” such as the Viet Cong or other groups seeking national liberation. Al Qaeda has not only the desire to attack purely civilian targets by surprise, but also the operational will and ability to do so. This new threat to the international order is further exacerbated by al Qaeda’s enhanced potential to obtain weapons of mass destruction. The MCA adapts the rules of civilized warfare to this new threat. One way it does so is by allowing the military to detain and try an enemy who uses our adherence to the law of armed conflict against us.

Flaherty asserts that the global War on Terror is not an international armed conflict and, as such, calls for the application of Common Article 3. He supports his claim by stating that international armed conflict, by its very definition, can apply only to conflict between two nation-states, and therefore that Common Article 3, which applies to wars “not of an international character,” must apply to everything else, such as a war between a nation-state and a non-nation-state. At the same time, he views the rights embodied in Common Article 3 as being universal—inherent rights held by everyone involved in armed conflict of any kind. Flaherty cites Jeremy Bentham’s definition of international law in support of his view of Common Article 3, even though the same Bentham believed “inherent rights” to be “nonsense on stilts.” It is difficult to believe, and no evidence has been produced by Flaherty or the *Hamdan* Court to suggest, that the drafters of the 1949 Geneva Conventions and, more importantly, the Senate that approved them and the President who ratified them, thought of Bentham when they read the word “international.” Such a reading would render much of contemporary “international” law without meaning, especially in areas such as “international” human rights, or “international” environmental law, which do not truly regulate matters between nations, but rather relations between a nation and its citizens or the global commons.

Common Article 3 on its face applies to “conflict not of an international character.” To claim that the war against al Qaeda, which rages beyond the borders of a single country, is not “international” is to deny reality. The conflict between the United States and al Qaeda spans the globe, with al Qaeda attacks occurring not just in New York and Washington, D.C., but in Africa, Afghanistan, Iraq, Europe, and Southeast Asia. Flaherty ignores the number of nation-states impacted by this new enemy’s ability to strike civilian targets by surprise in many different parts of the world. It goes well beyond the jurisdictional limits of any one particular nation-state, thereby making the conflict one

of global scale. One has to look no further than the bombings in Africa, Bali, Spain, Great Britain, and other successful attacks to see that this fight against al Qaeda is global in nature and, thus, is an international armed conflict.

Flaherty still claims that the MCA, at a minimum, abandons Common Article 3. This is simply not true. After deliberation, congressional hearings, and compromise, for better or worse the legislation embraces the provisions of Common Article 3. There was a conscious determination to ensure that the legislation did not even give the appearance of “tinkering” with our obligations under the Geneva Conventions. The legislation responds to legitimate concerns that U.S. soldiers will be subject to vague and overbroad categories such as “outrages upon our personal dignity” (such “law” would be subject to attack as constitutionally overbroad and vague within our own domestic courts). The MCA provides protections for our servicemen and servicewomen from politically motivated charges while still upholding our international obligations. It represents the interpretation of the Geneva Conventions by the President and Congress, the political branches vested by our Constitution with interpreting and executing the nation’s international obligations.

Flaherty argues that any desire for changes to the Geneva Conventions might require a new protocol to the Geneva Conventions. This may prove to be the ultimate answer. An additional protocol, dealing specifically with the al Qaeda threat (and other international terrorists) might prove to be a good long-term solution. Such a protocol would permit nation-states to argue their positions in an open forum, review the terms to such an agreement, and subsequently sign and/or ratify provisions in accord with the international law of treaties. This new protocol then could answer many of the concerns raised about the rules that apply to terrorists, rather than trying to jam the square peg of the War on Terror into the round hole of the Geneva Conventions.

The Geneva Conventions of 1949 were drafted and adopted to handle the issues arising in large-scale conflicts between nation-states; this is only natural given that they were written in the aftermath of World War II. Their discussion of internal civil wars is almost an aside, and there was no way that the drafters and ratifiers of the Conventions could have anticipated the rise of non-state actors like al Qaeda who wield the destructive power of nation-states. (The United States has not ratified either Additional Protocol I or Additional Protocol II, which attempt to apply rules with greater precision to guerilla fighters and other non-state groups in civil wars.) Al Qaeda fight-

ers are not POWs, are not parties to any treaties dealing with the law of war or to any other international agreement, and are not “irregular fighters” as envisioned by those adopting Additional Protocol I. Al Qaeda operates by violating the international customs of armed conflict. A draft protocol on the rules of warfare as applied to non-state actors is premature. For now, the MCA articulates an American policy to tackle the new phenomenon of a non-state actor that can wage war with the power of a nation-state. But it would make little sense to attempt to set down policy in a broad multilateral international agreement while the war is still in midcourse, at a time when we may not be fully aware of all of the policy choices (or their consequences) that can arise in a war against terrorists.

Flaherty, however, attacks the CSRTs implemented by the U.S. government to ascertain the status of captured al Qaeda fighters. To discredit this allegedly improper or illegal process, he turns to a recent study conducted by the Seton Hall Law School, which condemned the proceeding as not adhering to due process and, in essence, asserted that the CSRTs were a “sham.” Flaherty and other critics maintain that the lack of habeas protections for the al Qaeda detainees is a violation of constitutional and international law—particularly in a war that may in fact be generational. Again, this gets the facts wrong. The CSRTs are short administrative hearings conducted by three military officers to decide whether the detainee being held can actually be classified as an enemy combatant. These are modeled after the same Article 5 tribunals called for in the Geneva Conventions for lawful combatants. They are virtually identical—only with a different name. Further, an alleged al Qaeda fighter can appeal this determination to what is considered to be the second-highest federal court in the United States, the D.C. Circuit. The procedures may be different from what is provided for a U.S. citizen, but al Qaeda detainees now are actually given more access to review than a POW would receive under the Geneva Conventions.

Critics also claim that the MCA takes away our longstanding position on promoting the rule of law. One would think, listening to the more aggressive critics of the MCA, that the United States is unilaterally denying citizens of other nations any rights whatsoever. In fact, the MCA provides a laundry list of rights that often go well beyond the procedures and protections of other nations’ systems. Specifically:

- the right to a full and fair trial;
- the right to know the charges against the detainee as soon as practicable;
- the presumption of innocence;

- the right to government-provided defense counsel (and a civilian lawyer at the defendant's own expense);
- the opportunity to obtain witnesses and other evidence, including government evidence;
- the obligation imposed upon the government to disclose exculpatory evidence to the defense;
- the right to cross-examine witnesses;
- the right not to testify against oneself;
- limitations on the admission of hearsay evidence, focusing on its probity and danger of unfair prejudice;
- a ban on statements obtained by torture;
- limitations on statements obtained through coercion, focusing on their reliability and probity;
- the assurance that no undue influence on, or coercion of, Commission members or a Commission itself, can be exercised;
- the assurance that the proceedings will be open, unless extraordinary circumstances are present;
- the right to, at a minimum, two appeals, one through the military justice system, and the other through the civilian justice system, beginning with the D.C. Circuit; and
- the assurance against double jeopardy

These due process rights are afforded through the MCA, and they were earlier set out in regulations from the Defense Department. They usually go unmentioned by the media or by critics of the legislation and the War on Terror.

Although there remains legitimate debate as to whether *Hamdan* was decided properly and as to the role courts should play in the War on Terror, the bipartisan MCA represents the preferences of the two branches directly elected by the people and charged by the Constitution with managing wartime policy, on the question of the appropriate process afforded to the detainees. The military commissions play a vital role in our prosecution of the war against al Qaeda, and it seems unlikely that even a new Congress would vote to reverse policy decided just a few months ago.

#### CLOSING ARGUMENT

Martin S. Flaherty

Alexander Hamilton, no foe of executive power, stated that “the Constitution is itself, in every rational sense, and to every useful pur-

pose, a Bill of Rights.” The point of a constitution, at least our Constitution, is to enable a people to govern themselves while protecting them when that government undermines the purposes for which it is established. At no time is the threat to those purposes—including, and especially, the protection of fundamental rights—more grave than during times of fear, panic, and terror.

In this round *Hamdan*’s detractors repeat or make four arguments: (1) Congress enacted the MCA, so criticism of the measure is presumptively foreclosed; (2) Common Article 3 does not apply to unlawful combatants in the “global War on Terror”; (3) military commissions, as reformed, do not violate Common Article 3; and (4) the CSRTs afford meaningful procedural protections to detainees. Along the way they press the contention that terrorism presents a situation so novel that the usual rules—whether constitutional or international—must give way.

None of these contentions survives informed scrutiny. Consider first the broad, emotive, theme used to frame any criticism of the “War on Terror.” This is a new conflict, the argument goes, “one different from those of recent memory,” because al Qaeda presents a threat utterly unlike anything the nation has faced before. So stated, the claim misleads with regard to both specific and broad implications. To cite one particular, the Viet Cong, too, flouted the laws of war, did not wear uniforms, did not operate in conventional armed units, and did not respect civilian life. But the problems here are larger. Nearly every conflict in our history has presented a novel and dangerous threat. The Revolution triggered an unprecedented armed invasion on American soil, with substantial depredations against the civilian population. The Civil War was an unprecedented and bloody assault on the very existence of the Union, one that led to more casualties than all other American wars combined. World War II began with an unprecedented surprise attack by a fascist power that violated the laws of war. During the Cold War, the nation faced the novel prospect of instant nuclear annihilation by an empire ideologically committed to global hegemony. With 9/11, the United States has now joined the ranks of numerous countries, including Israel and the United Kingdom, that have had to deal with systematic terrorism for significant periods.

None of this is to say that 9/11 does not present a new kind of threat. No one from New York City who lived through that day and lost former students can minimize the danger that fundamentalist terrorism presents. The point remains that this nation has met dramatically new threats throughout our history. When we have bowed to fear and sharply departed from our traditions, we have regretted it—

from the Alien and Sedition Acts through Japanese-American internment. We have looked back with pride when leaders have upheld or expanded those traditions—as Lincoln did in promulgating the Lieber Code during the worst threat in our history. A more nuanced argument about why al Qaeda is different is not simply that it is a terrorist group, but that it is a terrorist group operating during a time when technology gives it access to weapons of mass destruction. But the case has yet to be made why settled practices, such as trying enemy combatants before courts martial where possible, should be jettisoned in light of *this* novel development.

The four more specific arguments fare no better. Defenders of the MCA stress that Congress passed the statute by significant majorities just four months ago. Yet since that time the electorate has repudiated both houses of that Congress, largely because of current policies in Iraq and the “War on Terror” generally. Already, the new leadership of the incoming Congress has been considering proposals for amendments that would significantly reform MCA. But whether reform succeeds or not, a larger point remains. As Madison observed, legislative majorities do not ensure wise or just policies. More to the point, legislative majorities do not guarantee results that comport with either our Constitution or our obligations under international law.

Which brings up Common Article 3, part one. Professors Sulmasy and Yoo continue to argue that the provision’s reference to “conflicts not of an international character” means its very basic protections apply only to conflicts that do not cross borders rather than those that do not involve two or more sovereign nation-states. Between the *Hamdan* decision and, perhaps ironically, the MCA, all three branches of government have rejected the cross-border interpretation. More importantly, they are correct. Their interpretation comports with the immediate background concerns of the provision, particularly to accord some level of fundamental protection in conflicts not between sovereign states, such as the Spanish Civil War, a conflict rightly perceived to have crossed borders. This interpretation follows the near-universal interpretation (outside of civilian White House lawyers) of Common Article 3 by the ICRC, international war crimes tribunals, and the consistent position of military lawyers in the Judge Advocate General Corps.

Interpreting Common Article 3 to apply to conflicts other than those between two sovereign states also happens to comport with the text: inter (between) national (nations). Professors Sulmasy and Yoo oddly try to dismiss the point that Jeremy Bentham came up with the word in the first place precisely because he believed that “the law of

nations” had too much natural law baggage, and that “international law” would more precisely refer to relations between nation-states. The word’s origins are common knowledge among international legal scholars and practitioners. There is no reason to believe that the drafters of the Geneva Conventions lacked such knowledge. Moreover, Bentham’s rejection of natural rights cuts exactly the other way. Common Article 3’s protections are not free-floating inherent rights. Rather, they are the result of a multilateral treaty given legal force through the consent of the State Parties. That is precisely the type of legal positivism that Bentham championed.

As with Common Article 3’s applicability, the MCA’s advocates misstate issues with regard to the provision’s substance. My previous argument was hardly that Congress “abandoned” Common Article 3. Rather, I applauded the Supreme Court for holding that the *Executive* had violated Common Article 3, as incorporated by the Uniform Code of Military Justice, in proposing to try detainees in courts that were not “regularly constituted” as the provision required. I argued that the military commissions also violated Common Article 3’s requirement that trials of non-POW combatants afford “*all* the judicial guarantees which are recognized as indispensable by civilized peoples” (emphasis added). While the MCA may now take care of the first requirement, it falls far short of the second. What the professors’ impressively misleading set of bullet points doesn’t show is what may still happen under the “reformed” procedures. Even under those procedures, military commissions may still:

- consider otherwise inadmissible hearsay evidence;
- consider classified evidence that would remain undisclosed to the defendant;
- rely on evidence obtained through “a degree of coercion” for statements made before December 30, 2005 (which is to say, the vast majority of statements made by detainees); and
- impose the death penalty based upon all, or any, of these types of evidence.

One doesn’t have to be a strict textualist to conclude that such rules hardly afford all the judicial guarantees recognized as indispensable by civilized peoples—let alone, one would hope, the American people.

Finally, the MCA’s supporters confuse and conflate two distinct criticisms aimed at the CSRTs. One criticism proceeds from international law. To a point, Professors Sulmasy and Yoo are correct in arguing that Article 5 of the Third Geneva Convention mandates only

very perfunctory procedures for determining whether a detainee is an unlawful combatant, and that the CSRTs go much further than is required. With one glaring omission. Article 5 contemplates that a detainee be presumed to merit POW status unless “a competent tribunal” determines otherwise. Until the CSRTs were implemented in July 2004, the Bush administration neither accorded Guantanamo detainees such a presumption nor provided any form of Article 5 hearing. More importantly, for all their other procedural protections, the CSRTs may *not* determine that someone merits POW status. As such, they do not fulfill Article 5’s requirements.

The second problem with the CSRTs is simpler and more American. As the Seton Hall study amply shows, in practice the CSRTs have been a sham. Detainees do not enjoy a presumption of innocence. They are not allowed access to the evidence against, or for, them. Evidence obtained from coercive interrogation is permitted. Evidence obtained through torture of other suspects is allowed. Not surprisingly, not a single detainee has successfully used this process to overturn the initial determination of his unlawful combatant status. The problem here is not violation of Article 5 of the Third Geneva Convention. The problem is, rather, the repudiation of the most basic American norms of due process and fundamental fairness—a repudiation that means that someone can be detained for years, potentially forever, based upon the sorts of procedures that the United States used to criticize when practiced by totalitarian regimes. The laws of armed conflict may not mandate something more akin to habeas. But surely American values do.

Our history is riddled with instances in which the nation has been left unprepared to meet serious threats. The attacks of 9/11 are the latest, and among the most serious, in this line. What history does not show is that failure to meet grave threats has been the price we have paid for our civil liberties. As the 9/11 Commission suggested, those attacks took place not because fundamental rights prevented the gathering of intelligence, but because government agencies could not process the intelligence they had. Conversely, our history is replete with instances in which fundamental freedoms have been needlessly sacrificed out of fear and panic in the name of security. If we have perhaps fared better than other countries in this regard, it is largely thanks to our commitment to the rule of law. With *Hamdan*, the Supreme Court held the line. With the new Congress, I hope that we are a step closer to one day consigning standing military commissions to the junk heap of historic national embarrassments.