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**Considerations for Congressional Action**

## **The Meaning and Impact of the Supreme Court's *Hamdan* Decision**

On June 29, 2006, the Supreme Court announced its decision in *Hamdan v. Rumsfeld*.<sup>1</sup> This brief paper summarizes the decision, answers common questions, and identifies areas where Executive and Congressional action may be necessary in response to the decision.

### **What the *Hamdan* Decision Said**

The case at hand was initiated by Salim Ahmed Hamdan, a former driver and bodyguard for Osama bin Laden who was captured in Afghanistan and detained at Guantanamo Bay. When the Executive decided to prosecute Hamdan (as opposed to simply holding him for the duration of hostilities), Hamdan filed a habeas corpus petition to challenge the Executive's authority to try him by a military commission. The Supreme Court, by a vote of 5-3, held that military commissions established to try detainee enemy combatants were inconsistent with legal obligations created by the Uniform Code of Military Justice ("UCMJ") and the Geneva Conventions.

First, as an initial matter, the Court found that it had jurisdiction to hear the case. This was an important threshold conclusion because Congress had passed the Detainee Treatment Act ("DTA"),<sup>2</sup> a law that limited the ability of detainees to file habeas petitions such as Hamdan's, in December 2005. Instead, the DTA gave detainees facing adverse judgments in either a military commission or combatant status review tribunal ("CSRT") a single right of appeal to the U.S. Court of Appeals for the D.C. Circuit. In *Hamdan*, the Supreme Court found that Congress had failed to articulate clearly the application of this exclusive remedy to *pending* (versus future) cases. Specifically, the Court held that because Section 1005(h)(2) of the DTA expressly applied Sections 1005(e)(2) and (3) to claims pending on the statute's effective date, a negative inference could be drawn from Congress's failure to include Section 1005(e)(1) within the scope of

<sup>1</sup> *Hamdan v. Rumsfeld*, No. 05-184, 548 U.S. \_\_\_, 2006 WL 1764793 (June 29, 2006). All citations are to the slip opinion of Justice Stevens's plurality opinion, unless otherwise noted.

<sup>2</sup> Detainee Treatment Act of 2005, Pub. L. 109-148, Div. A, Tit. X, 119 Stat. 2739.

Section 1005(h)(2).<sup>3</sup> The Court reached this conclusion despite the fact that traditional canons of construction made that express application unnecessary, as Justice Scalia’s dissent argued.<sup>4</sup> Nevertheless, the Court held that Section 1005(e)(1) did not apply to pending claims, and that Hamdan’s petition could be heard.<sup>5</sup>

Second, on the merits, the Supreme Court invalidated the Guantanamo Bay tribunals under both the UCMJ and Common Article 3 of the Geneva Conventions.

The Court held that Article 36 of the UCMJ requires two things for both courts-martial and military commissions. First, the procedures and rules the President promulgates for courts-martial and military commissions must conform to the procedures of Article III courts “so far as he considers practicable.”<sup>6</sup> The Court accepted the President’s determination that it was impracticable to apply those procedures to enemy combatants.<sup>7</sup> Second, rules for courts-martial and military commissions must be “uniform insofar as practicable.”<sup>8</sup> For this second requirement, the Court found that the President failed to make an official determination that court-martial rules were impracticable for the Guantanamo Bay commissions, and that he also failed to justify the commissions’ deviation from those rules.<sup>9</sup> In particular, the Court took issue with the commissions’ practice of preventing the defendant from attending all trial proceedings and from seeing the prosecution’s evidence, as is usually required by the UCMJ.<sup>10</sup>

The Court also invalidated the commissions under the Geneva Conventions. Generally, the Court held that the Geneva Conventions are part of the laws of war with which UCMJ Article 21 requires compliance.<sup>11</sup> Specifically, the Court held that Common Article 3, a provision requiring judgments to be rendered by “a regularly constituted court affording all the judicial guarantees...recognized as indispensable by civilized peoples,” applies to the conflict with al Qaeda. This was surprising because al Qaeda is not a signatory to the Geneva Conventions.<sup>12</sup> It is important to note that, while four justices opined that Common Article 3 requires that an accused be present during trial and privy to evidence against him,<sup>13</sup> those procedures are *not* required by the majority’s decision.

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<sup>3</sup> *Hamdan*, slip op. at 7-20.

<sup>4</sup> *Hamdan* (Scalia, J., dissenting), slip op. at 1-7.

<sup>5</sup> *Hamdan*, slip op. at 7-20 (construing Detainee Treatment Act § 1005(h)(2)).

<sup>6</sup> UCMJ Art. 36(a), 10 U.S.C. 836(a). The Court also held that these procedural rules must be consistent with the UCMJ, but abjured from evaluating the commissions’ rules with respect to this inquiry.

<sup>7</sup> *Hamdan*, slip op. at 59-60.

<sup>8</sup> UCMJ Article 36(b), 10 U.S.C. 836(b).

<sup>9</sup> *Hamdan*, slip op. at 60.

<sup>10</sup> *Hamdan*, slip op. at 61.

<sup>11</sup> *Hamdan*, slip op. at 64-65 (construing UCMJ Art. 21, 10 U.S.C. 821).

<sup>12</sup> *See Hamdan*, slip op. at 65-70.

<sup>13</sup> *Hamdan v. Rumsfeld*, slip op. at 70-72 (plurality opinion); *Hamdan* (Kennedy, J., concurring) at 18-19 (“I would not decide whether Common Article 3’s standard . . . necessarily requires that the accused have the right to be present at all stages of a criminal trial.”).

## Common Questions Regarding the *Hamdan* ruling

### What are the relevant legal distinctions between detaining and prosecuting an enemy combatant, including those held at Guantanamo Bay?

There are two separate issues of importance pertaining to enemy combatants, detention and trial. *Hamdan* implicates only the latter—trial by military commission—but understanding the overall scheme may prove helpful.

The current detainee policy is a product of the Supreme Court’s 2004 decision in *Hamdi v. Rumsfeld*.<sup>14</sup> Hamdi was a U.S. citizen who challenged the authority of the U.S. government to detain him as an enemy combatant. The Court held that the President is authorized to detain enemy combatants for the duration of hostilities.<sup>15</sup> It also held that Congress authorized the President to detain persons (including U.S. citizens<sup>16</sup>) designated as enemy combatants, without trial for a criminal offense, so long as the enemy combatant has a process to challenge that designation.<sup>17</sup> That process is provided by detainee access to combatant status review tribunals, where detainees may challenge their status designations.

The decision to try a detainee is wholly separate from the decision to detain the individual. The Executive may choose to hold detainees until the end of the conflict, or to prosecute a select number of enemy combatants for violations of the laws of war. The Executive has chosen to prosecute a small number of detainees, but rather than using courts-martial under the UCMJ or federal district courts typically used for civilian criminal activity, the Executive has elected to use specialized military commissions. In *Hamdan*, the defendant challenged the authority of the government to place him on trial in the forum of a military commission.<sup>18</sup>

### Does the President have to put Hamdan on trial?

No. The *Hamdi* Court acknowledged that the international law of armed conflict recognizes by “universal agreement and practice” that the primary purpose behind the capture and detention of enemy combatants is to prevent their return to combat, not as a precursor to a criminal process.<sup>19</sup> The *Hamdan* Court did not question this holding or insist that these unlawful enemy combatants be charged and tried.<sup>20</sup>

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<sup>14</sup> 542 U.S. 507 (2004).

<sup>15</sup> *Hamdi*, 542 U.S. at 521 (holding that the United States may detain enemy combatants “for the duration of these hostilities,” and that this holding is “based on longstanding law-of-war principles”).

<sup>16</sup> *Hamdi*, 542 U.S. at 519 (“There is no bar to this Nation’s holding one of its own citizens as an enemy combatant.”).

<sup>17</sup> *Hamdi*, 542 U.S. at 537 (concluding that “due process demands some system for a citizen detainee to refute his classification” as an enemy combatant).

<sup>18</sup> Hamdan conceded that he could be tried in a court-martial. *Hamdan*, slip op. at 1-2.

<sup>19</sup> See *Hamdi*, 542 U.S. at 518.

<sup>20</sup> *Hamdan*, slip op. at 72 (“It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government’s power to detain him for the duration of active hostilities.”).

### **Are military commissions (prosecutions) now per se illegitimate or unconstitutional?**

No. The Court did not question that military commissions are a legitimate part of the American legal tradition.<sup>21</sup> It merely held that the procedures and structure of the commissions must comply with relevant statutory dictates, most notably the UCMJ.<sup>22</sup> First, the Court interpreted Article 36 of the UCMJ to require that the procedures of those commissions must either be uniform to the procedures of courts-martial, or, in each instance where the rules of the commissions deviate from the rules of the court-martial, the President must explain why uniformity is impracticable.<sup>23</sup> Second, the Court interpreted Article 21 of the UCMJ to require that the commissions comply with the laws of war, and concluded that the Geneva Conventions are part of those laws of war.<sup>24</sup>

### **What happens to the military commissions (prosecutions) in process at the time of the ruling?**

The *Hamdan* ruling effectively halts the 10 prosecutions that had been convened at the time of the ruling.<sup>25</sup> Those prosecutions had begun because the Appointing Authority for Military Commissions, John D. Altenberg, Jr., had referred charges against 10 of the 450 enemy combatants at the Guantanamo Bay facility.<sup>26</sup> (Referral is the step in the military commission process under which the appointing authority designates the presiding officer and panel members who will hear a particular case. It marks the convening of a commission and the beginning of a prosecution.<sup>27</sup>) It is unknown how many of the total number of enemy combatants will be prosecuted. Again, there is no requirement that the government prosecute *any* enemy combatant at Guantanamo Bay.

### **Does the *Hamdan* decision mean the United States must close the Guantanamo Bay detention facility?**

No. As the President said, this ruling “won’t cause killers to be put out on the street.”<sup>28</sup>

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<sup>21</sup> David B. Rivkin, Jr. & Lee A. Casey, *Hamdan*, Wall St. J. A12 (June 30, 2006).

<sup>22</sup> *Hamdan*, slip op. at 72 (“[I]n undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.”).

<sup>23</sup> *Hamdan*, slip op. at 56-61. Congress has the option to overturn the Court’s interpretation of the UCMJ at 10 U.S.C. § 836(b) that the procedures between the court-martial and the military commission be “uniform insofar as practicable.”

<sup>24</sup> *Hamdan*, slip op. at 64-65, 69-70. As will be discussed, Congress, under the last-in-time doctrine, can authorize the creation of military commissions inconsistent with the requirements of Geneva Convention Common Article 3.

<sup>25</sup> Information about particular military commissions is available at <http://www.dod.mil/news/commissions.html>.

<sup>26</sup> Department of Defense Press Release No. 594-06, June 24, 2006 (noting that “[a]pproximately 450 detainees remain at Guantanamo” after the announced transfer of 14 Saudi detainees to Saudi Arabia).

<sup>27</sup> The President first must determine that an individual is subject to trial by military commission. This decision is the jurisdictional basis for prosecution, but it does not require that criminal charges be brought against the individual. That decision is made by the Appointing Authority, when he approves and refers appropriate charges to a military commission and appoints the commission members. Department of Defense Fact Sheet, Military Commissions, Sept. 15, 2005, available at <http://www.dod.mil/news/Sep2005/d20050915factsheet.pdf>.

<sup>28</sup> President George Bush, White House Press Conference, June 29, 2006, available at <http://www.whitehouse.gov/news/releases/2006/06/20060629-3.html>.

### **What does this decision have to say about interrogation methods at the facility?**

The *Hamdan* decision does not address this issue. Some commentators are attempting to draw inferences from the Court's holding that Geneva Convention Common Article 3 applies to the war with al Qaeda. The implications, and reach, of the Court's holding will likely continue to be litigated, primarily in the *al Odah*<sup>29</sup> and *Boumediene*<sup>30</sup> cases pending in the D.C. Circuit.

### **What does this decision have to say about the Terrorist Finance Tracking Program or the National Security Agency Terrorist Surveillance Program?**

The *Hamdan* decision does not address these issues either, although some commentators are speculating about what the decision may mean for these programs.

It is important to note that *Hamdan* is not a constitutional holding, and thus does not provide much guidance for those cases in which the President's exercise of his war powers and conduct of intelligence activities under Article II of the Constitution may appear to conflict with congressional statutes.

*Hamdan* does explore the President's interpretation and application of some congressional statutes in his execution of the war on terror. For example, the Court acknowledged that the President had the authority under the Authorization for the Use of Military Force<sup>31</sup> ("AUMF") to convene military commissions.<sup>32</sup> It then held that the procedures of military commissions the President forms pursuant to that authority must comport with the procedures of courts-martial under the UCMJ, unless impracticable.<sup>33</sup> It rejected the argument that the AUMF provided an overarching authority to create military commissions inconsistent with the demands of the UCMJ.<sup>34</sup>

At the same time, there are occasions in which the AUMF does supersede other statutes. For example, it should be reiterated that *Hamdi* held that the requirement of 18 U.S.C. § 4001(a), that no person be detained except pursuant to an Act of Congress, was satisfied by the AUMF, in that the AUMF served as just such an "Act of Congress."<sup>35</sup>

### **Do these detainees still have intelligence value?**

Yes. Coalition forces in Afghanistan continue to capture al Qaeda, Taliban, and anti-coalition militia fighters. Guantanamo detainees remain a valuable resource to identify these recently captured fighters. Detainees also still provide useful information on locations of training compounds and safe houses, terrain features, travel patterns and routes used for smuggling people and equipment, as well as identifying potential supporters and opponents.<sup>36</sup>

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<sup>29</sup> *Al Odah, et. al. v. United States, et. al.*, D.C. Circuit, Nos. 05-5064, 05-5095 through 05-5116 (oral argument held on Sept. 8, 2005, decision pending).

<sup>30</sup> *Boumediene v. Bush*, D.C. Circuit, Nos. 05-5062, 05-5063 (oral argument held on Sept. 8, 2005, decision pending).

<sup>31</sup> Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>32</sup> *Hamdan*, slip op. at 29-30.

<sup>33</sup> *Hamdan*, slip op. at 59.

<sup>34</sup> *Hamdan*, slip op. at 29-30.

<sup>35</sup> *Hamdi*, 542 U.S. at 517.

<sup>36</sup> Department of Defense, JTF-GTMO Information on Detainees (Mar. 4, 2005), *available at*

It should not be forgotten precisely who the detainee population at Guantanamo is. Many of these enemy combatants are highly trained, dangerous members of the al Qaeda terrorist network, namely terrorist trainers, recruiters, bomb-makers, operatives, and financiers.<sup>37</sup> Even the Court assumed that Hamdan “is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity.”<sup>38</sup>

## Options for Congressional Action

The Court’s opinion clearly leaves room for Congress to act. While the Court seemed to prefer Congressional action over Executive action, Congress would be wise to work with the President to determine how best to respond to the *Hamdan* decision. Though Congress has the power to address these challenges via legislation, the Executive has experience with the issues and ultimately has the obligation to execute whatever Congress decides.

### 1) **Given the experience and knowledge that the Executive has with enemy combatants, military courts, and military commissions, Congress should work with the President to determine how and where enemy combatants should be tried.**

In response to *Hamdan*, it is plausible that the President could decide to pursue prosecution of enemy combatants by traditional courts-martial, established by the UCMJ. That is unlikely, however, given that the “driving concern” behind the creation of special commissions was “to protect national security interests and to be careful about what kind of protected information is presented at trial and at open hearing.”<sup>39</sup> Because courts-martial generally allow defendants to be present at trial proceedings and be privy to prosecution evidence, subjecting Guantanamo Bay detainees to such a mechanism may prove impractical.

Alternatively, the President could attempt to satisfy the Court by independently demonstrating that the use of procedures in military commissions that are uniform vis-à-vis courts-martial would be “impractical.” The Court’s opinion does leave open the door for such a possibility, but, in light of *Hamdan*’s rejection of the President’s first attempt to create these commissions, this course may not prove fruitful.<sup>40</sup>

The most prudent approach may be for Congress to preserve trial by military commission by providing the President with express authority to try detainees in such a forum. If it follows that path, Congress may need to make adjustments to other laws,

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<http://www.defenselink.mil/news/Mar2005/d20050304info.pdf>.

<sup>37</sup> Department of Defense, JTF-GTMO Information on Detainees.

<sup>38</sup> *Hamdan*, slip op. at 72.

<sup>39</sup> John Altenburg, Jr., Appointing Authority for the Office of Military Commissions, Defense Department Briefing on Military Commission Hearings, August 17, 2004, *available at* <http://www.defenselink.mil/transcripts/2004/tr20040817-1164.html>. *See also* Paul Wolfowitz, Testimony before the Senate Armed Services Committee on Military Commissions, 12/13/2001, *available at* <http://www.dod.mil/speeches/2001/s20011212-depsecdef1.html>.

<sup>40</sup> *Hamdan*, slip op. at 60, n. 51 (“[T]he level of deference accorded to a determination made under subsection (b) presumably would not be as high as that accorded to a determination under subsection (a).”); *See also Hamdan* (Kennedy, J., concurring) at 16-18.

such as the UCMJ, to limit detainee access to evidence, as well as to authorize the Executive to make additional deviations from other UCMJ procedures as needed.

In determining the proper forum and procedures for prosecution, Congress and the Executive should keep in mind policy concerns such as: protecting the integrity of U.S. intelligence and methods for gathering it; ensuring the safety of soldiers in the field, citizens at home, and participants in the judicial process; as well as preserving the use of intelligence as crucial evidence against detainees. Special attention should be paid to the risk that prosecutors would be forced to withhold evidence, thus jeopardizing convictions, should an enemy prisoner be present for trial and privy to all information.<sup>41</sup>

**2) Congress and the Executive should evaluate whether the Detainee Treatment Act should be amended to ensure that the revocation of federal court jurisdiction to hear petitions for habeas corpus applies to pending, and not just future, claims.**

The Court in *Hamdan* did not claim that detainees have a constitutional right to file habeas petitions; it held only that the DTA did not deny the Supreme Court jurisdiction to hear those claims in *pending* cases. The DTA already bars current detainees from filing *new* habeas petitions.<sup>42</sup> If Congress wants to make clear that this limitation applies to *both* pending and future claims, it can do so through legislation.

Petitions for habeas relief have been filed on behalf of many Guantanamo Bay detainees.<sup>43</sup> One petition even “[sought] relief on behalf of every Guantanamo detainee who ha[d] not already filed an action.”<sup>44</sup> Should these claims be allowed to proceed, a fair reading of the opinion would suggest that the effect would be to allow al Qaeda enemy combatants the right “to complain[] about the circumstances of their capture and the terms of their confinement.”<sup>45</sup> Indeed, habeas petitions previously filed by detainees include a request for injunction against interrogation or “cruel, inhuman, or degrading” treatment, a medical malpractice claim against military health workers, and a complaint about the speed of mail delivery.<sup>46</sup> Channeling such claims through administrative processes such as military commissions or CSRTs relieves the judiciary of these frivolous claims. If Congress chooses to rein in these habeas petitions, it could still provide an appeal to the D.C. Circuit Court, as it did in the Detainee Treatment Act.

**3) Should the Executive and Congress choose to reaffirm the longstanding policy that the Geneva Conventions do not apply to the conflict with non-signatories such as al Qaeda, legislation could be passed to clarify that the procedures of Guantanamo Bay tribunals need not be consistent with the requirements of Common Article 3 of the Geneva Conventions.**

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<sup>41</sup> See Paul Wolfowitz, Testimony before the Senate Armed Services Committee on Military Commissions, 12/13/2001, available at <http://www.dod.mil/speeches/2001/s20011212-depsecdef1.html>.

<sup>42</sup> See Detainee Treatment Act, §1005, enacted as Pub. L. 109-148 (December 30, 2005).

<sup>43</sup> Respondents’ Motion to Dismiss for Lack of Jurisdiction, at 20, n. 10.

<sup>44</sup> Respondents’ Motion to Dismiss for Lack of Jurisdiction, at 20, n. 10.

<sup>45</sup> *Rasul v. Bush*, 542 U.S. 466, 498 (2004) (holding that enemy combatants had a statutory right to file habeas corpus petitions in U.S. district courts).

<sup>46</sup> Statement of Senator Lindsay Graham, *Congressional Record*, December 21, 2005, S14261. See also *Sliti v. Bush*, 407 F.Supp.2d 116 (D.C. Cir. 2005) (detainee alleging medical malpractice).

The Executive has specifically required that enemy combatants be treated “humanely and ... in a manner consistent with the principles of Geneva.”<sup>47</sup> At the same time, it has also determined that the United States is not technically bound by those Geneva Conventions when dealing with al Qaeda terrorists. Moreover, Congress has never disputed the Executive’s position. In contrast, the Supreme Court concluded that the Geneva Conventions *did* apply to the conflict with al Qaeda, a position at odds with past understandings.

It is important to note that the decision made by the Court was grounded in statutory interpretation, not constitutional demands. Congress and the President, therefore, have the opportunity to decide whether to accept the Court’s new interpretation, or to return the law to the longstanding, pre-*Hamdan* view that al Qaeda terrorists are not formally covered by the Geneva Conventions. Congress and the President can confirm this traditional understanding by making clear, via legislation, that Common Article 3 of the Geneva Conventions does not apply to the conflict with al Qaeda or the detainees held at Guantanamo Bay.

As a matter of history, there is no reason to believe that the Senate intended to afford Geneva Convention protections to suspected al Qaeda terrorists when it ratified those treaties.<sup>48</sup> In fact, in 1977, there was an effort to expand the protections of the Conventions to unlawful combatants. At that time, the parties to the Conventions completed two additional protocols to the Conventions, the first of which sought to apply the same protections afforded soldiers of signatory enemy states to terrorists who do not follow the rules of war. Congress has never questioned President Ronald Reagan’s specific refusal to submit this protocol to the Senate for ratification.<sup>49</sup>

Congress and the President would be on solid ground if they chose to confirm that Common Article 3 will not apply in these circumstances. The Supreme Court has said “when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.”<sup>50</sup> Congress can, pursuant to this “Last-in-Time Rule,” authorize military commission procedures inconsistent with that Article. This is quite different than saying such terrorists should not be treated humanely. As the

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<sup>47</sup> Memo from President to Vice President, et al. regarding Humane Treatment of Al Qaeda and Taliban Detainees ¶ 3 (Feb. 7, 2002). The President wrote, “As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and...in a manner consistent with the principles of Geneva.”

<sup>48</sup> Moreover, the President specifically found that Geneva Convention Common Article 3 did not apply to al Qaeda detainees. Presidential Memo, ¶ 2(c) (Feb. 7, 2002). Not only did the Court not mention this interpretation, the Court did not defer to the “great weight” it traditionally accords the political branches’ interpretation of a treaty. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-185 (1982) (“Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”).

<sup>49</sup> See Ronald Reagan, Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions, January 29, 1987, available at <http://www.reagan.utexas.edu/archives/speeches/1987/012987B.HTM> (noting that this Protocol “would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war”).

<sup>50</sup> *Breard v. Greene*, 523 U.S. 371, 376 (1998) (quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957)).

President said, “[O]ur values as a Nation...call for us to treat detainees humanely, including those who are not legally entitled to such treatment.”<sup>51</sup>

If the Congress chooses to reinstate earlier policy that Geneva’s Common Article 3 does not apply to the war against al Qaeda, it would be on sound footing. Reciprocity is one of the key rationales for treating the enemy by a set of rules. The hope is that if U.S. troops fight according to a set of rules, namely the recognized laws of war, this will provide an incentive for the enemy to fight by that same set of rules.

Al Qaeda assuredly does not fight by these fair rules. The terrorists do not fight on behalf of a state that is a signatory to the Geneva Conventions. They do not wear the uniforms or insignia of such a state, nor do they carry arms openly. Instead, they violate the laws of war as a matter of practice, most notably by intentionally targeting civilians.

Despite all of these facts, the Court held that al Qaeda terrorists merit the protections of Geneva Convention Common Article 3. Congress and the President may wish to evaluate whether legislation that would address this new interpretation of the law is appropriate.

## **Conclusion**

The Supreme Court’s decision did not require the release of any terrorists, but it did complicate their prosecution. While our military could simply choose to hold all detainees rather than prosecute some of them for crimes, it would be preferable for the President and Congress to work together to specify the procedures for those cases the Executive does wish to prosecute.

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<sup>51</sup> Presidential Memo, ¶ 3 (Feb. 7, 2002) (“As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and...in a manner consistent with the principles of Geneva.”).