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Stephen Ellmann
New York Law School, stephen.ellmann@nyls.edu

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STEPHEN ELLMANN

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ABOUT THE AUTHOR: Stephen Ellmann is the Associate Dean for Faculty Development and Professor of Law at New York Law School. The author wishes to thank Robert Blecker, Camille Broussard of the New York Law School Mendik Law Library, and his research assistant, Anna Smushkovich, for their help.

The September 11, 2001 attacks by Al Qaeda subjected the United States to a level of atrocity we had long escaped. The response was swift. The President sought, and Congress quickly passed, an Authorization for the Use of Military Force ("AUMF") against all those the President determined were responsible for the attacks.[1] We toppled the Taliban, who as rulers of Afghanistan had given Al Qaeda a home, and captured a large number of suspected Al Qaeda or Taliban members. Standard law of war principles say that we can hold these prisoners at least as long as active hostilities continue in Afghanistan, as they still do.[2] Authoritative precedent from World War II also declares that we can try those prisoners who have committed war crimes against us, and that we can do so in military commissions set up for that purpose rather than in either ordinary courts-martial or civilian courts.[3]

Within months of September 11, the President issued a "comprehensive military order"[4] providing for such trials by military commission.[5] Then time passed. There has yet to be a military commission trial, and only a handful of detainees have been designated for such trials.[6] One of them is Salim Ahmed Hamdan. Allegedly Osama bin Laden's driver and on some accounts a rather minor, hapless figure,[7] Hamdan was captured during hostilities with the Taliban in November, 2001.[8] President Bush announced in July 2003 that Hamdan was subject to trial by military commission, but it was not until July 2004 — almost six months after his lawyer had filed demands for charges and for a speedy trial, and these demands had been denied — that he was charged.[9] The charge was conspiracy to attack civilians and civilian objects, to murder, and to commit terrorism.[10] More time passed, as a district court granted Hamdan's habeas corpus

1. Authorization for Use of Military Force (AUMF), 115 Stat. 224 (2001) (codified at note following 50 U.S.C. § 1541 (Supp. III 2003)).

2. Hamdi v. Rumsfeld, 542 U.S. 507, 520–21 (2004) (plurality opinion of O'Connor, J.).

3. *Ex parte* Quirin, 317 U.S. 1, 25–31 (1942); *see Hamdi*, 542 U.S. at 518–24 (plurality opinion of O'Connor, J.).

4. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2760 (2006). Except where necessary for clarity, I will cite those portions of Justice Stevens' opinion which constituted the opinion of the Court without further identification; those portions of his opinion which spoke only for a plurality, and all of the other opinions in the case (Justice Breyer's concurrence, Justice Kennedy's partial concurrence, and the dissents of Justices Scalia, Thomas, and Alito) will be identified as such.

5. Military Order, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57,833 (Nov. 13, 2001).

6. *See Hamdan*, 126 S. Ct. at 2760. A detainee named David Hicks pleaded guilty in March 2007.

7. *See* Jonathan Mahler, *The Bush Administration vs. Salim Hamdan*, N.Y. TIMES, Jan. 8, 2006, § 6 (Magazine), at 44.

8. *Hamdan*, 126 S. Ct. at 2759.

9. *Id.* at 2760.

10. *Id.* at 2760–61. Whether the charge against Hamdan was only conspiracy, or also embraced substantive offenses such as membership in Al Qaeda and aiding its leaders, is an issue sharply debated by the Justices in the decision. *See id.* at 2779 n.32 (plurality opinion of Stevens, J.); 2830–34 (Thomas, J., dissenting). In labeling the charge as "conspiracy" here, I mean only to adopt the title ("Charge: Conspiracy") used in the charging papers and not to resolve this issue of interpretation.

petition in November 2004 and stayed the proceedings.[11] It was not until the summer of 2006 that the Supreme Court answered the question of whether the commission trial planned for Hamdan was lawful.

The passage of time between 2001 and 2006 is an important part of the story of this case. When the military commission system was first being developed, the fear and anger generated by Al Qaeda's attacks were at their peak. So was the Administration's sense of the reach of its powers. It was in 2002, in a memo appraising the risk of liability for torture of terrorism detainees, that the Department of Justice's Office of Legal Counsel asserted that any interference by Congress with the President's decisions about interrogation techniques, or about detention of prisoners more generally, would be an unconstitutional invasion of the President's authority as Commander-in-Chief.[12]

But in the years that followed, as the shock of 9/11 eased somewhat, the shape of U.S. war and terrorism policies came under more skeptical scrutiny. While the Administration gradually developed and refined the rules by which it planned to conduct military commission trials, many hundreds of detainees were held at Guantánamo. Conditions there became the subject of international outcry.[13] The war in Iraq forfeited much of the sympathy the United States had received in the wake of September 11, and ultimately became intensely controversial at home as well as abroad. Conditions at our prisons in Iraq, apparently shaped in part by people trained in Guantánamo techniques, deteriorated into torture and sexual humiliation.[14] Our policy of "extraordinary rendition," by which some prisoners in U.S. custody were transferred into the hands of other nations, seemingly in order to subject them to torture, became a scandal as well.[15] Meanwhile, other issues of anti-terror power also grew controversial, as news

11. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005).

12. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Dep't of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, *re:* Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A 35 (Aug. 1, 2002), *available at* http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf; *see also* Memorandum from John Yoo, Deputy Assistant Att'y Gen. & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, U.S. Dep't of Justice, to William J. Haynes II, General Counsel, U.S. Dep't of Defense, *re*: Application of Treaties and Laws to al Qaeda and Taliban Detainees 11 (Jan. 9, 2002), *available at* http://www.yirmeyahureview.com/archive/documents/prisoner_abuse/doj_interrogation.pdf. For a cogent analysis of these memoranda, see Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213 (2005).

13. *See, e.g.*, Scott Shane, *Seeking an Exit Strategy for Guantánamo*, N.Y. TIMES, Jun. 18, 2006, § 4, at 41.

14. *See, e.g.*, Neil A. Lewis, *Court in Iraq Prisoner Abuse Case Hears Testimony of General*, N.Y. TIMES, May 25, 2006, at A19; Eric Schmitt, *The Reach of War: Detainee Treatment; Official Declines to Pin Blame for Blunders in Interrogation*, N.Y. TIMES, Mar. 11, 2005, at A10.

15. *See, e.g.*, Stephen Grey & Elizabetta Povoledo, *Inquiry in 2003 Abduction Rivets Italy*, N.Y. TIMES, July 8, 2006, at A8.

gradually leaked out of the Administration's use of additional intrusive steps, with or without direct statutory authorization.[16]

The Administration's boldest claims of power did not fare well in the Supreme Court. In two important cases, the Supreme Court made clear that both constitutional protections and statutory provisions *did* have meaningful roles to play in determining the law that would apply to the people we had captured. *Hamdi* found that American citizens held in the United States were entitled to substantial constitutional protections despite being deemed enemy combatants.[17] *Rasul* decided that the federal habeas corpus statute applied to non-citizens held outside the United States, at Guantánamo.[18]

By the time Hamdan's case reached the Supreme Court, it seemed that the Administration was intent on avoiding authoritative decisions on its treatment of enemy combatants. In the notorious case of Jose Padilla, a U.S. citizen held as an enemy combatant after being arrested at O'Hare Airport, the government ultimately returned him to the civilian legal system as the Supreme Court was preparing to hear his challenge.[19] Meanwhile, in the Detainee Treatment Act, the government accepted a clear statutory prohibition on torture, but won the elimination of habeas corpus review for Guantánamo detainees.[20] Whether that elimination of habeas applied to cases such as Hamdan's, by then already accepted for review by the Supreme Court,[21] was one of the principal issues the Supreme Court had to face.

I expected that the Supreme Court would resist the government's effort to read the Detainee Treatment Act to deprive it of jurisdiction over Hamdan's case, and it did.[22] I did not expect that the Court would grant substantial relief on the merits — but it did that as well.[23] The decision is a courageous and valuable development of the jurisprudence that first took shape in *Hamdi* and

16. *See, e.g.*, ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *stay granted*, 467 F.3d 590 (6th Cir. 2006) (holding NSA surveillance program unlawful); *see also* Eric Lichtblau & James Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1.

17. *Hamdi*, 542 U.S. at 533–39 (plurality opinion of O'Connor, J.); *see id.* at 533–34 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment) (agreeing with some of the plurality's decisions concerning the process due to such citizen detainees).

18. Rasul v. Bush, 542 U.S. 466 (2004).

19. *See* Padilla v. Hanft, 126 S. Ct. 1649 (2006); Hanft v. Padilla, 126 S. Ct. 978 (2006).

20. Detainee Treatment Act of 2005 (DTA), Pub.L. 109-148, Div. A, Title X, 119 Stat. 2739 (codified in scattered sections of 10, 28 & 42 U.S.C.).

21. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2762 (2006) (certiorari granted on Nov. 7, 2005; DTA became law on Dec. 30, 2005).

22. *See id.* at 2762–69.

23. The Court was split 5-3 (on some issues, 4-1-3). Chief Justice Roberts did not participate because he had been part of the panel that decided the case in the D.C. Circuit before his appointment to the Supreme Court. *See* Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005). Since Roberts concurred in the Circuit Court decision that the Supreme Court reversed, it is safe to assume that he would have been a fourth dissenting vote had he participated.

Rasul. My purpose here, however, is not primarily to praise it, but rather to understand it. An article is not the place to dissect every aspect of a decision that covers one hundred pages of the Supreme Court Reporter, and I will focus on one core set of issues — the meaning and application of two sections of the Uniform Code of Military Justice ("UCMJ"), Articles 21 and 36,[24] on the basis of which the Supreme Court decided that Hamdan's military commission was "illegal."[25] As I will seek to show, the Supreme Court's interpretation of these Articles cannot rest solely on an analysis of their text, but instead reflects the shaping of profound judicial commitments as the Supreme Court decides what role the courts should play in the long war against terrorism. To see why this is so, I begin with a brief summary of the majority's understanding of these two Articles, and then turn to an analysis of the textual questions raised by the Court's readings and to the deeper considerations that sustain its understanding. I will find the foundations of the Court's decision in its intention to protect congressional authority and to press Congress to exercise that power; in its commitment to maintaining the rule of law; and in a nascent, perhaps better a preliminary, recognition by the Court that it must play a role in shaping the law of war.

I. THE COURT'S READING OF THE UCMJ

It was not a foreordained conclusion that the *Hamdan* case would turn on an interpretation of provisions of the UCMJ, for there was another relevant statute at issue. This was the AUMF, and the first step in Justice Stevens' argument is to insist that the AUMF did not confer on the President any power to establish military commissions unless they complied with the UCMJ. The majority agreed that the AUMF, despite containing no explicit reference to military commissions, should be read to activate the President's war powers, including his wartime authority to employ military commissions.[26] That the President's war powers did include the power to establish military commissions had been largely

24. 10 U.S.C. §§ 821, 836 (2000).

25. Thus this article does not look closely at the Court's preliminary decisions on jurisdiction and abstention. *Hamdan*, 126 S. Ct. at 2762–72. Nor does it focus on the plurality's view that the conspiracy charge against Hamdan was not cognizable under the law of war and hence could not be tried before a military commission. *Id.* at 2772–86. On this point, the four Justices of the plurality (Justice Stevens, joined by Justices Breyer, Ginsburg and Souter) were not joined by Justice Kennedy, who provided the fifth vote for the majority on most of the statutory questions I will consider. Kennedy declined to reach this issue, and urged Congress to provide more statutory guidance. *Id.* at 2809 (Kennedy, J., concurring in part). Since the remaining Justices all dissented on this point, *id.* at 2834–39 (Thomas, J., dissenting, joined by Justices Scalia and Alito), the Court was in effect deadlocked on it. I return to this issue briefly, *infra* note 153.

26. *Id.* at 2774–75 (opinion of the Court). For a scholarly argument to similar effect, see Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2127–32 (2005).

established in the *Hamdi* decision.[27] But the majority treats the notion that the AUMF somehow swept beyond the UCMJ, in the absence of text or legislative history to that effect, as an implausible claim of repeal by implication.[28]

The two sections of the UCMJ at issue[29] read as follows:

Article 21:

> The provisions of this chapter conferring jurisdiction upon courts-martial do 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, provost courts, or other military tribunals.[30]

Article 36:

> (a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
> (b) All rules or regulations made under this article shall be uniform insofar as practicable.[31]

Of the two, the second article is somewhat less far-reaching, and I will begin my analysis with it. Article 36, as read by the Court, embodied three requirements for military commissions: that the rules governing commission procedure follow those used in criminal cases in the U.S. district courts "so far as [the President] considers practicable"; that none of these rules be "contrary to or inconsistent with" other provisions of the UCMJ; and that these rules shall be "uniform insofar as practicable."[32]

The last of these requirements is the most significant, for as read by the Court it means that the rules the President prescribes for military commissions

27. *See Hamdan*, 126 S. Ct. at 2775 (citing *Hamdi*, 542 U.S. at 518 (plurality opinion of O'Connor, J.), as well as *Ex parte* Quirin, 317 U.S. 1, 28–29 (1942), and *In re* Yamashita, 327 U.S. 1, 11 (1946), on this point).

28. *Hamdan*, 126 S. Ct. at 2775. The majority also makes short shrift of a claim that the Detainee Treatment Act authorized the commissions here, noting that this Act explicitly leaves open the possibility of legal challenges to the commissions. *Id.*

29. Other provisions of the UCMJ were also of some significance, for example, in connection with arguments based on Article 36(a) over whether any of the military commission rules were "contrary to or inconsistent with" the UCMJ (the Court did not decide whether any were; *see id.* at 2790–91).

30. 10 U.S.C. § 821 (2000).

31. 10 U.S.C. § 836 (2000).

32. *See Hamdan*, 126 S. Ct. at 2790–91.

must be the same as those used in courts-martial, "insofar as practicable."[33] The *Hamdan* Court rephrases this requirement to mean that commission rules must be the same as court-martial rules unless uniformity is impracticable.[34] Moreover, the Court observes that while some deference may be due to the President's judgment that uniformity is impracticable, this deference is by no means complete.[35] In fact, the Court argues that Article 36 reflects a longstanding, strict tradition of uniformity, from which exceptions are permitted only when *necessary*:

> The uniformity principle is not an inflexible one; it does not preclude all departures from the procedures dictated for use by courts-martial. But any departure must be tailored to the exigency that necessitates it.[36]

The exigency that can justify a departure from uniformity, under Article 36, is impracticability. What is that? The Court answers by illustration rather than by definition, saying that:

> Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case. There is no suggestion, for example, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility.[37]

This passage appears to embrace the position that Justice Kennedy articulates more explicitly:

> "Practicable" means "feasible," that is, "possible to practice or perform" or "capable of being put into practice, done, or accomplished." . . . Congress' chosen language, then, is best understood to allow the selection of procedures based on logistical constraints, the accommodation of witnesses, the security of the proceedings, and the like.[38]

But "the term 'practicable' cannot be construed to permit deviations based on mere convenience or expedience,"[39] for the military commission was invented as, and remains, "a tribunal of true exigency" rather than "a more convenient adju-

33. *Id.* at 2791.

34. *Id.*

35. *Id.* at 2791–92 n.51 (citing *id.* at 2801 (Kennedy, J., concurring in part)). The Court also notes that the President did not actually make a formal determination of impracticability under Article 36(b) (though he did make one in terms of Article 36(a)). The Court leaves open the question of whether an "official determination" is required to invoke Article 36(b)'s exception from the uniformity command. *Id.* at 2791–92.

36. *Id.* at 2790.

37. *Id.* at 2792.

38. *Id.* at 2801 (Kennedy, J., concurring in part).

39. *Id.*

dicatory tool."[40] Even the government's assertion of the profound danger of terrorism does not suffice to justify non-uniformity: "Without for one moment underestimating that danger," says the Court, "it is not evident to us why it should require, in the case of Hamdan's trial, any variance from the rules that govern courts-martial."[41]

None of the Justices disputed that there were significant departures from court-martial procedures in the military commission rules. Two were particularly important. First, Justice Stevens, writing for a plurality which did not include Justice Kennedy, emphasized that the military commission rules permitted the exclusion of the defendant from his own trial in some circumstances, whereas the UCMJ required all proceedings, except court-martial votes and deliberations, to take place in the defendant's presence.[42] Second, the Court majority argued that the UCMJ rules of evidence followed the Federal Rules of Evidence, but the military commission rules permitted the presiding officer to admit any evidence that would have probative value for a reasonable person, potentially including unsworn statements, hearsay, and even evidence obtained by coercion short of torture.[43] Since these commission rules *did* depart from the rules governing courts-martial, and since (as noted above) the Court found no impracticability to justify the differences, it followed that these rules were "illegal."[44] That (together with the Article 21 violations discussed below) in turn meant that the Commission "lacks power to proceed," because the "statutory command . . . must be heeded."[45]

Article 21 imposed even more far-reaching requirements on military commissions. As the Court read this provision, its recognition of the continued, concurrent jurisdiction of military commissions in certain cases embodied important boundaries on what those cases were. Only "offenders or offenses that by statute or by the law of war may be tried by military commissions" could be so tried.[46] Moreover, because the statute recognized jurisdiction only in accordance with the law of war, a military commission could not exercise this jurisdiction unless the commission, itself, was a tribunal that complied with the law of war.

What is the "law of war"? The answer appears to be that it is a composite of the "American common law of war," statutes, and international law, including,

40. *Id.* at 2793 (opinion of the Court).

41. *Id.* at 2792.

42. *Compare id.* at 2790, *with id.* at 2809 (Kennedy, J., concurring in part).

43. *Id.* at 2786–87 (opinion of the Court); *id.* at 2807–08 (Kennedy, J., concurring in part).

44. *Id.* at 2793 (opinion of the Court).

45. *Id.* at 2786, 2793 n.54.

46. The "law of war" limits on triable offenses were the focus of the Justices' debate over whether conspiracy was a cognizable charge before a military commission. *See supra* note 25.

in particular, treaties that regulate war, such as the Geneva Conventions.[47] On this basis, the Court skirts a World War II precedent, *Johnson v. Eisentrager*,[48] which had declared that "the obvious scheme of the [1929 Geneva Convention was] that responsibility for observance and enforcement of these rights is upon political and military authorities," rather than the courts.[49] Whether or not that case was decided correctly in the first place, and whether or not it holds equally true for the present Geneva Conventions, adopted in 1949, the Court decides that the provisions of the current conventions have been incorporated into enforceable U.S. law by the choice of Congress, embodied in Article 21 of the UCMJ.[50]

Even so, almost all of the Geneva Convention provisions dealing with captured fighters apply only to "prisoners of war" taken in conflicts between the "High Contracting Parties" to the Conventions, and the majority chooses not to resolve the question of whether Hamdan has any rights under these provisions.[51] Instead, the Court looks to Common Article 3,[52] which protects "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by . . . detention."[53] When this Article applies, and what rights it secures, are reflected in the subsections quoted by Justice Alito:

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

47. On this point the majority and the dissent seem largely in agreement. *Compare Hamdan*, 126 S. Ct. at 2786 (quoting *Quirin*, 317 U.S. at 28) (Article 21 of UCMJ "conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the 'rules and precepts of the law of nations'"), *with Hamdan*, 126 S. Ct. at 2829 (Thomas, J., dissenting) (quoting 11 Op. Atty. Gen. 297, 310 (1865) (opinion of Attorney General James Speed, approving the trial before a military tribunal of those charged with assassinating President Lincoln)) ("The common law of war as it pertains to offenses triable by military commission is derived from the 'experiences of our wars' and 'the laws and usages of war as understood and practiced by the civilized nations of the world'"). *See also id.* at 2802 (Kennedy, J., concurring in part; Justice Kennedy also joined the majority's opinion on this matter) ("[T]he law of war . . ., as the Court explained in *Ex parte Quirin* . . ., derives from 'rules and precepts of the law of nations'; it is the body of international law governing armed conflict.").

48. 339 U.S. 763 (1950).

49. *Id.* at 789 n.14.

50. *Hamdan*, 126 S. Ct. at 2794.

51. *Id.* at 2795 & n.61; *cf. id.* at 2849 (Thomas, J., dissenting) (concluding that Hamdan has no such rights). For brief discussion of this issue, see *infra* note 55.

52. This provision is referred to as "Common Article 3" because it appears in each of the four Geneva Conventions of 1949. Following the Court, I will cite only to its location in the most generally apposite of the Conventions, the Third Geneva Convention. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Common Article 3].

53. *Hamdan*, 126 S. Ct. at 2795 (quoting Common Article 3, *supra* note 52, 6 U.S.T. at 3318).

> (1) [T]he following acts are and shall remain prohibited . . . :
> (d) [T]he 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.[54]

The opening language here immediately poses a question: Was Hamdan captured in an "armed conflict not of an international character"?[55] The Administration maintained, and two of the three judges of the Court of Appeals had ruled, that he was not — our armed conflict with Al Qaeda, though not a conflict with another *nation*, was definitely of "an international character." The *Hamdan* majority rejects this argument, agreeing with the third member of the Court of Appeals panel that "conflict not of an international character" is a term of art, embracing all conflicts other than those between nations, so long as they take place in the territory of a signatory state (such as Afghanistan), and therefore applying to our war with Al Qaeda.[56]

So, at last, we come to the question of what concrete rights are actually conferred by Article 21's incorporation of the requirement that trials take place only before a regularly constituted court.[57] The term "regularly constituted court"

54. *Hamdan*, 126 S. Ct. at 2850 (Alito, J., dissenting) (quoting Common Article 3, *supra* note 52, 6 U.S.T. at 3318–20).

55. Common Article 3 applies only to detainees from conflicts "not of an international character." This Article is a fallback provision. In "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties," the much more elaborate provisions of the remainder of the Convention apply. *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S 135. The Administration position, however, was that Hamdan had been captured in the course of an armed conflict not with Afghanistan, a High Contracting Party, but with Al Qaeda. Since Al Qaeda is neither a High Contracting Party nor even a State (and also is not fighting by the laws of war), the Administration maintained that Geneva Convention provisions dealing with conflicts between High Contracting Parties were inapplicable. *See Hamdan*, 126 S. Ct. at 2795; Memorandum from the White House to the Vice President, et al., *re:* Humane Treatment of Taliban and al Qaeda Detainees (Feb. 7, 2002), *available at* http://www.justicescholars.org/pegc/archive/White_House/bush_memo_20020207_ed.pdf.

56. *Hamdan*, 126 S. Ct. at 2795–96.

57. Though Common Article 3 also requires that the tribunal "afford[ ] all the judicial guarantees which are recognized as indispensable by civilized peoples," this provision was not central to the majority's reasoning, perhaps because it is so hard to determine what judicial guarantees *are* "recognized as indispensable by civilized peoples," given not only the diversity of legal systems in the world but also the distinctly wide range of nations, presumably "civilized," that are signatories to the Geneva Conventions. *See id.* at 2848 (Thomas, J., dissenting) (referring to the "nebulous standards" of this aspect of Common Article 3). A plurality of the Court would have found violations of this requirement both in the unjustified departure from uniformity with the rules governing courts-martial and in the military commission rules' authorization of the exclusion of the defendant from portions of his trial in order to keep certain evidence from him. *Id.* at 2797–98 (plurality opinion of Stevens, J.). Although the plurality appears to view Justice Kennedy as agreeing that the departures from uniformity amount to a "fail[ure] to afford the requisite guarantees," *id.* at 2798 (plurality opinion of Stevens, J.) (citing Kennedy's separate opinion), Justice Kennedy did not join in this section of Justice Stevens' opinion and so the plurality's resolution of these issues did not command a majority on the Court. *See Hamdan*, 126 S. Ct. at 2800, 2809 (Kennedy, J., concurring in part).

is not defined in the Convention, but the Court describes, without quite defining, its "core meaning."[58] "[S]pecial tribunals" are not regularly constituted;[59] courts not "established and organized in accordance with the laws and procedures already in force in a country" are not regularly constituted.[60] These propositions point to the conclusion, expressly articulated by Justice Kennedy in his concurring opinion and by Justice Alito for the three dissenters, that what is "regularly constituted" must ultimately be judged largely by reference to the legal system of the country in which the challenged tribunal is operating.[61] In other words, the Geneva Convention requirement of "regular constitution," having been incorporated into U.S. law through Article 21, now must be interpreted from a U.S. perspective. The military commissions would count as "regularly constituted" if they were regularly constituted in terms of the U.S. legal system.

The majority concludes, embracing Justice Kennedy's view on this point, that "[t]he regular military courts in our system are the courts-martial established by congressional statutes."[62] But that does not in itself demonstrate that the military commission is an "irregular" court, for there might be more than one regularly constituted court system in a country — and in fact in the United States this is the case, since the civilian courts of the United States are undoubtedly "regularly constituted" too.[63] The reason that the military commissions are in the end "irregular" is, for the majority, the same reason that they are in breach of Article 36(b): their procedures depart from those of the regular military courts (not to mention the civilian courts), and without any "practical need [that] explains deviations from court-martial practice."[64] In a sense, Article 36(b) applies twice: Its uniformity requirement applies of its own force, of course, but it also makes up part of the background legal principles that determine whether a tribunal is, as Article 21 and Common Article 3 combine to require, "regularly constituted."[65]

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58. *Hamdan*, 126 S. Ct. at 2796 (opinion of the Court).

59. *Id.* at 2796–97 (quoting Int'l Comm. of the Red Cross [ICRC], *Commentary on the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War* 340 (1958) [hereinafter *GC IV Commentary*] (discussing Article 66 of the Fourth Geneva Convention of 1949). The Court notes that the International Committee of the Red Cross "is the body that drafted and published the official commentary to the Conventions. Though not binding law, the commentary is, as the parties recognize, relevant in interpreting the Conventions' provisions." *Hamdan*, 126 S. Ct. at 2789 n.48.

60. *Hamdan*, 126 S. Ct. at 2797 (quoting ICRC, 1 *Customary International Humanitarian Law* 355 (2005)).

61. *Hamdan*, 126 S. Ct. at 2803 (Kennedy, J., concurring in part, joined by Souter, Breyer & Ginsburg, JJ.); *id.* at 2850–51 (Alito, J., dissenting, joined by Scalia & Thomas, JJ.).

62. *Id.* at 2797 (opinion of the Court) (quoting *id.* at 2803 (Kennedy, J., concurring in part)).

63. *Id.* at 2851 (Alito, J., dissenting).

64. *Id.* at 2797 (opinion of the Court) (quoting *id.* at 2804 (Kennedy, J., concurring in part)).

65. Justice Kennedy suggests, though he does not quite spell out, this point. *Id.* at 2804 (Kennedy, J., concurring in part).

Justice Kennedy also argues (on behalf of Justices Souter, Ginsburg, Breyer, and himself)[66] that our system provides another benchmark. "[A]n acceptable degree of independence from the Executive is necessary to render a commission 'regularly constituted' by the standards of our Nation's system of justice."[67] A structure, created without express statutory authority, that provides less independence than our regular military courts — and the military commissions were manifestly under greater direct executive control than courts-martial are[68] — is unacceptable, unless "at a minimum" its departures from court-martial practice are explained by "some practical need."[69] And, as the Court had already explained in discussing Article 36, that practical need had not been shown.[70]

The Court does not deny that Common Article 3's requirements embody a "great degree of flexibility."[71] It insists, however, that this flexibility does not mean that Common Article 3, or Article 21 of the UCMJ incorporating it, are without content. "[I]ts requirements are general ones. . . . But *requirements* they are nonetheless."[72] Because both Article 21 and Article 36, provisions of the United States Code, are violated, the commissions are illegal and cannot proceed.

II. A DISSENTING INTERPRETATION OF THE STATUTES

Although the Justices of the majority maintain that normal principles of statutory construction lead to the interpretations they endorse,[73] it is clear that there were at least plausible alternative readings of the provisions at issue. Here are several of the most salient:

Article 36(b)'s requirement of uniformity insofar as practicable:

(1) The legislative history of Article 36(b) evidently makes clear that the primary focus of this section's uniformity rule is on the uniformity of court-martial procedures between the different branches

66. Justices Souter, Ginsburg and Breyer concurred in all of Justice Kennedy's opinion except Part III, *id.* at 2808–09, in which Justice Kennedy identified the issues discussed by Justice Stevens for the plurality which he (Justice Kennedy) did not reach. *See id.* at 2799.

67. *Id.* at 2804.

68. *Id.* at 2805–07.

69. *Id.* at 2804. Justice Kennedy emphasizes here that the Common Article 3 requirement "permits broader consideration of matters of structure, organization, and mechanisms to promote the tribunal's insulation from command influence," whereas Article 36(b)'s uniformity rule "is limited by its terms to matters properly characterized as procedural — that is, '[p]retrial, trial, and post-trial procedures.'" *Id.*

70. The majority Justices also commented on the military commission rules' authorization of revision of their own contents in the course of trial, a feature the Justices suggested, without definitely holding, might be inconsistent with "regular constitution." *Id.* at 2797 n.65 (opinion of the Court); *see id.* at 2804 (Kennedy, J., concurring in part).

71. *Id.* at 2798 (opinion of the Court).

72. *Id.*

73. *Id.* at 2764 (opinion of the Court); *id.* at 2799 (Kennedy, J., concurring in part). I return to these comments later in the text. *See infra* text accompanying notes 115–128.

of the armed services. The Justices cite no mention of uniformity between military commissions and courts-martial.[74]

(2) Article 36(b)'s requirement of uniformity "insofar as practicable" could easily be read as a general guideline, which the President has broad discretion in implementing.[75] Certainly it contains no textual requirement of formal determinations of impracticability, the absence of which the Court puts some emphasis on.[76]

(3) The crucial Article 36 term "practicable" is undefined in the statute. It could plausibly have been read to encompass not just logistical concerns but concerns of national security. Those concerns bore most immediately, perhaps, on the risk that defendants would gain access to secret information if they were entitled to be present throughout their trials.[77] More broadly, within a framework that extended a considerable range of rights protections[78] — though by no means all that a court-martial or civilian defendant would have enjoyed — it might have been said that a system conferring even more rights on defendants was impracticable because it jeopardized the chance of just punishment of war criminals.

Article 21 and the enforceability of Common Article 3:

(4) As for Article 21, the majority's view that it effectively makes the Geneva Convention enforceable in court is not easy to square with the *Eisentrager* case. Article 21's language is naturally read to incorporate the "law of war," but that was equally true of Article 21's predecessor statute at the time that *Eisentrager* was decided,[79] and *Eisentrager* disclaimed the judicial enforceability of the 1929 Geneva Convention then in force.[80] To be sure, after the framing of the 1949 Geneva Conventions, the UCMJ was extensively revised and re-enacted, but there was no change in the relevant language of what became Article 21.[81]

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74. *See id.* at 2842 n.17 (Thomas, J., dissenting); *id.* at 2791 n.50 (opinion of the Court).

75. *See id.* at 2840–41 (Thomas, J., dissenting).

76. *See id.* at 2791–92 (opinion of the Court); Justice Thomas contends that the President *did* make a determination. *Compare id.* at 2842–43 (Thomas, J., dissenting), *with id.* at 2792 n.52 (opinion of the Court).

77. *See id.* at 2843 (Thomas, J., dissenting) (quoting statement by Douglas J. Feith, Under Secretary of Defense for Policy, that "*each* deviation from the standard kinds of rules that we have in our criminal courts was motivated by the desire to strike the balance between individual justice and the broader war policy").

78. *See id.* at 2848 (Thomas, J., dissenting).

79. Articles of War, Art. 15, 39 Stat. 619, 653 (1916) (codified as amended at 10 U.S.C. § 821 (2000)).

80. *Eisentrager*, 339 U.S. at 789 n.14 (discussing Geneva Convention Relating to Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 342).

81. There was a change in another provision of the UCMJ, extending its coverage, a change that the Court interpreted as overriding a World War II military commission decision, *In re* Yamashita, 327 U.S. 1 (1946). *See Hamdan*, 126 S. Ct. at 2789 (opinion of the Court). Moreover, the Court argues, the 1949

(5) Assuming Article 21 *does* make the Geneva Conventions enforceable, at least in part, it does not automatically follow that all of the Conventions' provisions are enforceable. Article 21, as Justice Thomas notes, refers to those "offenders" and "offenses" triable by military commissions according to the law of war. Justice Thomas argues that this language, at most, incorporates the Geneva Convention provisions determining who can be tried, and for what, but does not incorporate those portions of the Conventions, notably Common Article 3, dealing only with "how" — by what procedures — these trials should be conducted.[82]

The interpretation of Common Article 3:

(6) If Common Article 3 is incorporated and made enforceable by Article 21, it is still open to question whether the conflict in which Hamdan was captured was a "conflict not of an international character," to which Common Article 3 would apply. Since our conflict with Al Qaeda obviously is "of an international character" in a common-sense use of that phrase, the President's assertion of that interpretation arguably is entitled to deference based on the Executive branch's special responsibilities in foreign affairs and war.[83] The majority's contrary interpretation is also plausible, as Justice Thomas admitted,[84] but the majority adopts it without any discussion of whether deference to the President's interpretation was required.[85]

(7) The Justices agreed that the Common Article 3 requirement that the military commission be "regularly constituted" called for reference to U.S. law on the constitution of courts. Undoubtedly, courts-martial are "regularly constituted courts," but that does not mean that courts-martial are the only regularly constituted military

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Geneva Conventions also responded to *Yamashita* with language extending their coverage. *Id.* Even if Congress intended to extend the UCMJ's reach, however, and even if it fully accepted the applicability of the Geneva Conventions in such circumstances as well, it might not have intended also to extend the *means* of enforcing the Geneva Conventions beyond what *Eisentrager* permitted. Still, if that is so, what it indicates is that Congress agreed with the Supreme Court's decision in *Eisentrager before* it was issued, because the revised UCMJ was enacted on May 5, 1950, exactly a month before *Eisentrager* was decided. *See* Madsen v. Kinsella, 343 U.S. 341, 351 n.17 (1952); *Eisentrager*, 339 U.S. at 763. Therefore, whatever else Congress might have taken into consideration and intended when it retained the language of the old military code concerning the "law of war" in Article 21, it could not have been legislating based on an implied acceptance of the Supreme Court's decision in *Eisentrager*.

82. *Hamdan*, 126 S. Ct. at 2845 (Thomas, J., dissenting).

83. *See id.* at 2846.

84. *Id.*

85. *Id.* at 2795–96 (opinion of the Court).

courts in the United States.[86] Although there had been no military commissions since World War II, the military commission has a "150-year pedigree," in Justice Thomas' words.[87] It had a statutory basis in Article 21 and an even older basis in the "American common law of war."[88] In these respects, it was not "special," and instead rested on law that amply predated the current war.

(8) Justice Kennedy's further gloss on the concept of "regular constitution," that it embodied a principle of judicial independence from the executive, is arguably inconsistent with the common law of war applicable to military commissions. As construed by Justice Thomas, the common law vested broad, if not unlimited, discretion in the military commander to establish military commissions suited to the exigency he perceived.[89] The Justices debate whether, in fact, military commission procedures have historically been essentially the same as those of courts-martial, or merely very similar to them.[90] Whatever the correct resolution of that point, however, if the military commission is fundamentally a creature of the common law, then it is always possible to invoke the adaptable, evolution-

86. Justice Alito also takes issue with the idea that Common Article 3 means to make ordinary military courts the norm, since this Article does not explicitly refer to the military courts, in contrast to other Geneva Convention provisions that do make such explicit reference. *Id.* at 2851–52 (Alito, J., dissenting).

87. *Id.* at 2847 (Thomas, J., dissenting).

88. *See id.* at 2775 (plurality opinion of Stevens, J.) ("The common law governing military commissions may be gleaned from past practice and what sparse legal precedent exists."); *id.* at 2829 (Thomas, J., dissenting) (referring to "'the system of common law applied by military tribunals'").

89. Addressing the issue of the charges cognizable before military commissions, Justice Thomas comments:

> [T]he common law of war affords a measure of respect for the judgment of military commanders. Thus, "[t]he commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles. His authority in each case is from the law and usage of war."

Id. at 2829 (Thomas, J., dissenting) (quoting 11 Op. Att'y. Gen. 297, 305 (1865)) (opinion of Attorney General James Speed, approving the trial before a military tribunal of those charged with assassinating President Lincoln). Elsewhere, Justice Thomas characterizes the President as having "unfettered authority to prescribe [military commission] procedures." *Hamdan*, 126 S. Ct. at 2841 (Thomas, J., dissenting).

Justice Thomas puts considerable weight on language in the case of *Madsen v. Kinsella*, 343 U.S. 341 (1952), in which the Court observed that "[i]n the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions." *Hamdan*, 126 S. Ct. at 2839 (Thomas, J., dissenting) (quoting *Madsen*, 343 U.S. at 348). The majority distinguishes *Madsen* on several grounds, among them the fact that Madsen's trial took place before the revised UCMJ, including Article 36(b), became effective. *Hamdan*, 126 S. Ct. at 2792–93 n.53 (opinion of the Court). Justice Thomas, for his part, maintains that Article 36(b) should be read as impliedly accepting the pre-existing common law of war. *Id.* at 2841 (Thomas, J., dissenting).

90. *See Hamdan*, 126 S. Ct. at 2788–90 (opinion of the Court); *id.* at 2803 (Kennedy, J., concurring in part); *id.* at 2839–40 n.15 (Thomas, J., dissenting).

ary character of the common law to justify the procedures adopted in the current commission system.[91]

(9) The majority Justices' interpretations of "regularly constituted" may also sharply go beyond the original intent of Common Article 3. Justice Alito quotes a passage from the Commentary to this Article which declares that "it is only 'summary' justice which it is intended to prohibit."[92] The commissions have many troubling features, but they are not a system of summary justice.

The illegality of the commissions:

(10) The Court's conclusion that the commission lacks jurisdiction to proceed and is "illegal" does not follow automatically from its finding of violations of Articles 21 and 36. Let us put aside the possibility that the rules the Court finds unlawful might not actually be applied in fact, or might be applied in ways that would not be unfair.[93] If there were violations of these two Articles, the Court might simply have struck down the unlawful provisions, or even imposed alternate rules that it viewed as mandated by the law, while leaving the legality of the commission itself unaffected.[94]

The fact that alternative arguments can be advanced in response to the majority's statutory readings, of course, does not prove that the alternatives are more persuasive than those the majority offered. Nor is it my purpose to parse the many issues on which the Justices divided. I hope, however, that this sketch of a contrary reading of the statutes makes clear that there were a host of challenges to the majority's reading of these laws, and that, at least in aggregate, these challenges were substantial. I think it is clear that what drove the majority's ulti-

91. Justice Thomas argues that "as with the common law generally, [the common law of war] is flexible and evolutionary in nature, building on the experience of the past and taking account of the exigencies of the present." *Id.* at 2829 (Thomas, J., dissenting).

92. *Id.* at 2854 (Alito, J., dissenting) (quoting *GC IV Commentary*, *supra* note 59, at 39).

93. Commission rules permitted the exclusion of the defendant from portions of his trial, but expressly prohibited such exclusions if they would "deprive the accused of a 'full and fair trial.'" *Hamdan*, 126 S. Ct. at 2809 (Kennedy, J., concurring in part) (quoting DEP'T OF DEF., MILITARY COMMISSION ORDER NO. 1, § 6(D)(5)(b) (2005), *available at* http://www.defenselink.mil/news/Sep2005/d20050902order.pdf #search=%22Military%20Commission%20Order%20No.%201%22 [hereinafter MILITARY COMMISSION ORDER NO. 1]. For this reason, Justice Kennedy did not join the plurality in finding this rule unlawful, and the dissenters make a similar point. *Hamdan*, 126 S. Ct. at 2848–49 (Thomas, J., dissenting). The rule permitting the admission of any evidence deemed to have probative value for a reasonable person is clearly a vast departure from normal American rules of evidence. But Justice Alito observes that many nations do not use our rules of evidence. *Id.* at 2854 (Alito, J., dissenting). Any given departure from those rules might or might not be unfair, either from an international perspective or simply judged in American terms. Similarly, the commission rule authorizing further changes in the rules themselves in the course of proceedings might be applied to adopt rules benefiting defendants, as Justice Alito also notes. *Id.*

94. So Justice Alito argued, specifically with respect to possible violations of Article 36(b)'s uniformity requirement. *Hamdan*, 126 S. Ct. at 2852–53 (Alito, J., dissenting).

mate interpretive choices was not the "plain meaning" of the statutory language, but rather fundamental value choices about the role of the courts, of Congress, and of liberty in the war against terrorism. It is to those choices that I now turn.

III. THE VALUES THE COURT CHOSE

We have had, for fifty years, a structure for resolving separation of powers issues, given to us by Justice Jackson in the *Steel Seizure* case.[95] Justice Jackson sought a framework for weighing conflicting claims of congressional and presidential power, without attempting a definitive measurement of the strength of each of these sets of assertions. As is well known, he concluded that when the President acts with express or implied congressional authorization, his or her power is at its zenith (zone 1); when the President acts in violation of congressional will, his or her power is most limited (zone 3); and between these two poles there is an area of ambiguity (zone 2) where power may turn more on the play of events than on principle.[96]

The natural question here, then, is "which zone are we in"? Justice Stevens, writing for the majority, seems almost to jump past this question. He writes, citing *Steel Seizure*, that:

> Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. . . . The Government does not argue otherwise.[97]

While this statement is an emphatic rejection of some of the more extravagant notions of Presidential war powers, it is problematic as an interpretation of the *Steel Seizure* approach. Justice Jackson did not say that the President had no power to violate statutes passed by Congress in the exercise of its constitutional powers; rather, the President's claim of such zone 3 power would be "scrutinized with caution" because it amounted to a denial of congressional authority.[98] Despite this scrutiny, in Jackson's schema, the President's exercise of "zone 3" power *could* be constitutional. If Justice Stevens' assertion that the President cannot "disregard" the limitations of a statute in zone 3 is meant to say that the President cannot *disobey* these limitations, it goes further than Justice Jackson would have.[99]

95. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952).

96. *Id.* at 635–38 (Jackson, J., concurring).

97. *Hamdan*, 126 S. Ct. at 2774 n.23.

98. *Steel Seizure*, 343 U.S. at 637–38 (Jackson, J., concurring).

99. Though Justice Kennedy carefully elaborates the three-zone schema, and explains that if the President has exceeded limits placed by Congress' statutes — as he later concludes is the case — then this is a zone 3 situation, like Justice Stevens he does not explicitly address the possibility that even in zone 3 the President's decisions might prevail. *See Hamdan*, 126 S. Ct. at 2800–01 (Kennedy, J., concurring in part).

It turns out, in any case, that Justice Jackson's framework provides less a solution than another field of contestation. To Justice Thomas the *Hamdan* case is actually in zone 1.[100] Thomas maintains that

> "especially . . . in the areas of foreign policy and national security" . . . the fact that Congress has provided the President with broad authorities does not imply — and the Judicial Branch should not infer — that Congress intended to deprive him of particular powers not specifically enumerated.[101]

That proposition might be understood as a guide to interpretation in cases where Congress has neither granted nor revoked authority (zone 2), but Justice Thomas appears to see it as also a guide to marking the boundaries of zone 1, the zone in which Congress and the President are of one mind. Justice Thomas would surely argue that in this delicate sphere of national self-defense, the authorities Congress has explicitly provided to the President should be understood flexibly and deferentially. As a result, the sphere of what Congress will be found to have authorized (as well as the sphere of what Congress might be found not to have forbidden) will rightly expand.

In short, we cannot easily determine the limits of the President's authority by determining which "zone" this case falls in, because what authority the President has may itself partly determine which zone is implicated. As a result, Justice Jackson's formula could not really function as the foundation of the Court's reasoning. The question is: what could? I suggest that three factors deserve special emphasis: the Court's effort to protect, and catalyze, congressional authority; the Court's understanding of its own role in maintaining the rule of law in this country; and the Court's still very tentative realization that it must play a role in shaping the law of war for the war we now are fighting.

A. Protecting, and Invoking, Congressional Authority

The first of these factors, and perhaps the most overtly declared, is the Court's insistence on the role of Congress. Justice Breyer's brief concurring opinion, joined by all the majority Justices except for Justice Stevens, emphasizes that "[t]he Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check.'"[102] This was a central lesson of *Hamdi* and

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Perhaps Justice Stevens meant only to say that statutes that are valid — because they were passed by Congress "in proper exercise of its own war powers" — could not be disobeyed. Since a valid statute is presumably one whose authority cannot be denied, the President's violation of it would clearly fail under Jackson's zone 3 approach. But this analysis appears to avoid the resolution of the problem of clashing powers only by subsuming it in the determination of statutory "validity," and so seems simply to transfer the underlying, difficult separation of powers issues to the rubric of "validity."

100. *Id.* at 2823–25 (Thomas, J., dissenting) (writing on this issue only for himself and Justice Scalia).

101. *Id.* at 2823–24 (quoting Dames & Moore v. Regan, 453 U.S. 654, 678 (1981)).

102. *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring).

Rasul as well, and it is worth remembering that the language of the AUMF could have been read differently. This statute authorizes 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 that occurred on September 11, 2001."[103] How much force is "necessary and appropriate"? How broad is the President's discretion, utilizing the combination of this statutory authorization and his own authority as Commander-in-Chief, to decide the dimensions of what is "necessary and appropriate"? And if establishing military commissions is one form of necessary and appropriate force — and this point almost all of the Justices accepted, or at least were prepared to assume[104] — how much discretion does the President have to structure the rules governing the commissions' work in ways he sees fit? Over the years since 2001, the Executive has at times asserted that it had received (or perhaps had always held, directly from the Framers of the Constitution) something close to a blank check.[105] The Court has repeatedly rejected this claim, and it may well be that *Hamdan* marks the most serious interference by the Court with the Executive's notions of how to exercise its war powers.

Yet there is more going on here than simply the Court implementing congressional decisions. It is quite clear, after all, that in the nearly five years following the enactment of the AUMF, Congress itself had not seen fit to enact into law the restrictions on military commissions that the Court discerns here. The Court maintains, to be sure, that Congress had *already* enacted these restrictions into law when it revised the UCMJ half a century ago. Even if that is an absolutely faithful reading of the UCMJ provisions' language and intent, however, the Congresses of the 21st century had not chosen to reiterate it. The weight of the Executive's veto power might have helped dissuade Congress, of course, and there should be no requirement that Congress must pass laws *twice* to clarify their meaning.[106] Even so, there have been no congressional resolutions deploring the military commission system, though such resolutions can be passed without the need for presentment to the President.

It seems fair to say that besides declaring that the President does not have a blank check, the Court is also saying that Congress needs to get back in the check-writing business before the courts will permit what otherwise appear to be breaches of human rights. The majority Justices repeatedly make clear that the

103. AUMF § 2(a), 115 Stat. at 224.

104. *See Hamdan*, 126 S. Ct. at 2774–75 (opinion of the Court) ("[W]e assume that the AUMF activated the President's war powers . . . and that those powers include the authority to convene military commissions in appropriate circumstances."); *id.* at 2824 (Thomas, J., dissenting) (writing on this issue only for himself and Justice Scalia).

105. *See* sources cited *supra* note 12.

106. *Cf.* STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 318 (3d ed. 2002) (quoting similar argument by Richard P. Conlon concerning enforcement of the War Powers Resolution).

absence of statutory authorization is important to their finding that the commissions are illegal, and reiterate that what is needed is "a more specific congressional authorization" or an "express statutory provision"[107] — not the vague language of the AUMF, then, but the kind of statutory language that would result from Congress directly focusing on and resolving the profound choices involved in employing military commission trials. In other words, the Court is not merely protecting the legislative branch, but is also attempting to impel Congress to take a responsibility that Congress itself had not, at least not specifically, chosen to meet. In this sense, *Hamdan* is reminiscent of the War Powers Resolution,[108] whose provisions barring the continuation of U.S. engagement in hostilities in the absence of affirmative, specific congressional authorization clearly meant not only to limit the President, but also to task the Congress with responsibility in the area of war.[109] The courts have not been quick to enforce the system of war decision-making set out in the War Powers Resolution, but here, in *Hamdan*, the Supreme Court has applied the ultimate enforcement weapon — it has barred particular Executive action at least so long as Congress fails to affirmatively endorse it.

But it is important to recognize that the Supreme Court did not declare that whatever Congress might legislate it would approve. Of course, no court would ever say that in so many words, because the Constitution always is supreme. But it is perfectly possible to approach decisions made jointly by Congress and the President with so much deference as to virtually guarantee those decisions will be held constitutional. The majority Justices, however, do not promise that. Justice Breyer's opinion may approach this posture, emphasizing as it does that "[t]he Constitution places its faith in . . . democratic means. The Court today simply does the same."[110] But what he has just told the President is simply that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary."[111] Whether the President will get what he seeks, and if so, whether the results will be upheld in Court, are left for the future. Meanwhile, Justice Kennedy writes that "[b]ecause Congress has prescribed these lim-

107. *Hamdan*, 126 S. Ct. at 2775 (opinion of the Court) ("[a]bsent a more specific congressional authorization" of Presidential discretion to shape military commissions); *id.* at 2785 (plurality opinion of Stevens, J.) ("the most basic precondition — at least in the absence of specific congressional authorization — for establishment of military commissions: military necessity") (addressing the issue of whether conspiracy is a cognizable charge); *id.* at 2798 (plurality opinion of Stevens, J.) ("at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him"); *id.* at 2804 (Kennedy, J., concurring in part) ("[a]bsent more concrete statutory guidance"); *id.* ("a commission specially convened by the President to try specific persons without express congressional authorization").

108. 50 U.S.C. §§ 1541–48 (2000).

109. John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1379–80 (1988).

110. *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring).

111. *Id.*

its, Congress can change them, requiring a new analysis consistent with the Constitution and other governing laws" — rather less than a promise of affirmance, though certainly not the opposite either.[112]

Finally, what Justice Stevens says, for the Court, is quite striking. He writes that "in 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."[113] These words could be taken quite narrowly, as no more than a summation of the Court's decision, which does not characterize the military commission as unconstitutional but only as illegal. But they may also carry another meaning: that our country does not seek just to be a democracy (as Justice Breyer emphasizes) but also to be a society governed by the "Rule of Law." If this value is part of the Constitution itself, then the next case — the one that assesses the constitutionality of the new military commission statute Congress has chosen to enact[114] — will apply the Constitution so as to maintain the rule of law.

B. Defending the "Rule of Law"

This focus on the rule of law — or, to follow Justice Stevens' quite unusual capitalization of the phrase, the "Rule of Law" — is the second theme that I suggest helps us to understand why the Court decided this case as it did. The emphasis on the "Rule of Law" is odd not only as a matter of orthography but as a matter of jurisprudence, for in this country it is surely more characteristic to appeal to the Constitution and its explicit, written injunctions than to the unwritten guidelines of the rule of law. But in this case, the Constitution is not directly in play in most aspects of the Justices' debates, and the "Rule of Law" turns out to be a powerful idea in its own right. It plays three functions here: first, as a conceptually modest but practically potent source of judicial authority; second, as a protector, and perhaps mentor, of democratic judgment; and, third, as a surprisingly powerful source of guiding principle in a time of doctrinal uncertainty.

1. The modesty and power of rule of law jurisprudence

Courts have no armies and little direct popular mandate. For judges to regulate the decisions of the political branches is always an enterprise that must rest on the consent of the regulated. That consent turns, at least to some extent, on the judges' ability to dispel the natural suspicion that they are usurping the prerogatives of the rest of the government and setting themselves up as philoso-

112. *Id.* at 2808 (Kennedy, J., concurring in part). Justice Kennedy also writes that "[i]f Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so." See *id.* at 2800 for a similarly guarded comment.

113. *Id.* at 2798 (opinion of the Court).

114. *See infra* text accompanying notes 164–200.

pher-kings. This is, moreover, not by any means simply a matter of appearances; judges themselves no doubt generally share the nation's commitment to democratic rule and so they must prefer to understand their own authority in more confined terms. In this context, a central function of rule of law jurisprudence is to sustain sometimes far-reaching judicial decisions within a framework of legitimacy that the nation and the judges have come to accept.

The implementation of the rule of law can be seen as a modest judicial undertaking, even as the legal conclusions it generates turn out to be dramatic and far-reaching. No grand leaps of nation-making or philosophy are directly required. In Justice Kennedy's words, "a case that may be of extraordinary importance is resolved by ordinary rules."[115] Similarly, Justice Stevens wrote for the Court that "[o]rdinary principles of statutory construction suffice to rebut the Government's theory" that the Detainee Treatment Act deprived the Court of jurisdiction over Hamdan's case.[116]

I do not mean to characterize the Justices' claim to be performing a relatively cabined judicial function as at all insincere. The power to "say what the law is," is at once a limited and a potent authority, as has been clear since *Marbury v. Madison*.[117] Rather, my point is that the relatively undramatic appearance of this potentially very dramatic authority is itself a source of its legitimacy and its efficacy. For a court entering a hotly contested field of national debate, that protection is important.

It is all the more important because, undramatic or even prosaic as the ordinary rules may sometimes be, they are as subject to debate and as flexible in application as any other legal rules. As a result, they are not likely to provide objective, neutral, and modest standards by which the law can be discerned (though the Justices here seem to suggest otherwise).[118] Indeed, even if the members of the majority have the better of the argument over the meaning of the "ordinary rules" — a debatable point, in my opinion, but one I don't need to resolve here — their claim that those rules resolve this case is still, inevitably, open to question, precisely because this case is an extraordinary one and extraordinary cases might need to be resolved by extraordinary standards.

Moreover, the "ordinary rules" the Court employs turn out to be infused with constitutional values. Justice Kennedy, in particular, leaves little doubt on this score. He writes that "[t]he rules of most relevance here are those pertaining

115. *Hamdan*, 126 S. Ct. at 2799 (Kennedy, J., concurring in part).

116. *Id.* at 2764 (opinion of the Court); *see id.* at 2765 ("'[N]ormal rules of construction.'").

117. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

118. Two other decisions from the October 2005 Term of the Supreme Court reflect how dramatically the Justices now disagree on questions of statutory interpretation. *See* Rapanos v. United States, 126 S. Ct. 2208 (2006) (examining application of the Clean Water Act to wetlands and similar areas); Gonzalez v. Oregon, 546 U.S. 243 (2006) (testing authority of Attorney General under the Controlled Substances Act to preclude operation of Oregon's physician-assisted suicide law).

to the authority of Congress and the interpretation of its enactments."[119] The authority of Congress, as familiar a feature of our legal system as it may be, is of course directly measured by the Constitution itself. Even the rules governing statutory interpretation have many constitutional overlays, embodied, for example, in a range of clear statement rules meant to require congressional explicitness when constitutional values are threatened.[120] Justice Kennedy's statutory interpretation clearly responds to the extraordinary character of this case; he tells us, explicitly, that his reading of what constitutes a "regularly constituted" tribunal addresses "a military commission like the one at issue — a commission specially convened by the President to try specific persons without express congressional authorization."[121] Those features, suggesting as they do separation of powers and due process concerns, help shape the "ordinary" process of statutory interpretation.

It is worth emphasizing how very far the Court travels in this case from what might be considered its normal domain in its effort to apply the ordinary principles of the rule of law. In reading Article 36 of the UCMJ, Justice Stevens finds for the Court that the requirement of uniformity between military commission rules and court-martial procedures "is not an inflexible one; it does not preclude all departures from the procedures dictated for use by courts-martial. But any departure must be tailored to the exigency that necessitates it."[122] Why is this? Because uniformity "protect[s] against abuse and ensure[s] evenhandedness"[123] — clearly goals with a constitutional component — and because "exigency" or "military necessity" is, it appears, essential to support the constitutionality of this "tribunal neither mentioned in the Constitution nor created by statute."[124]

"Exigency" is a broad term, at least potentially, and the government clearly felt that "the danger posed by international terrorism" justified the commission's procedures. That danger sounds like a form of exigency, but the Court responds that "[w]ithout for one moment underestimating that danger, it is not evident to us why it should require, in the case of Hamdan's trial, any variance from the

119. *Hamdan*, 126 S. Ct. at 2799 (Kennedy, J., concurring in part).

120. For example, Justice Stevens notes that Hamdan invoked the requirement of "an unmistakably clear statement" from Congress to demonstrate its intent to restrict the Supreme Court's jurisdiction in habeas cases, before saying that lesser, "ordinary" statutory interpretation rules suffice to resolve this case. *Id.* at 2764 (opinion of the Court).

121. *Id.* at 2804 (Kennedy, J., concurring in part).

122. *Id.* at 2790 (opinion of the Court).

123. *Id.* at 2788.

124. *Id.* at 2772–73. The Court goes on to say that "[e]xigency *alone*, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8 and Article III, § 1 of the Constitution unless some other part of that document authorizes a response to the felt need." *Id.* at 2773 (emphasis added). It finds that authority in "the powers granted jointly to the President and Congress in time of war." *Id.*

rules that govern courts-martial."[125] Although this language hardly asserts a judicial power to make battlefield decisions, the sense it conveys is that the Court has undertaken to say whether the danger of international terrorism does or does not justify a certain category of military action, namely the selection of rules to govern the procedures of military commissions set up to try charges of violation of the laws of war. Courts rarely assess military necessity, but the *Hamdan* Court comes very close.

This is not a criticism.[126] The government's ready invocation of military necessity to justify a host of executive actions, some of them extremely troubling, essentially means that if a court is to hold any of these steps unlawful it will have to reckon with the claim that it is endangering national security in the process. A court may not directly discuss this point, but it can hardly decide the matter without some concern for it. Any decision to reject what the government claims is necessary is, explicitly or implicitly, a judicial dissent from those claims — at least to the extent of saying, as here, that the heavens will not fall if the Executive is required first to obtain congressional authorization. The *Steel Seizure* case is perhaps the most vivid example; there the evidence of emergency was *uncontested*,[127] yet the Court refused to permit the plant takeover that President Truman had undertaken. (That case is also the classic illustration of how exaggerated such claims can be, for as it turned out the nation was quite able to continue the Korean War effort even when, after *Steel Seizure*, the steel strike the President had hoped to avoid took place.)[128] Rather than a criticism, therefore, my point is that the obligation to preserve the rule of law provides the Court with a justification for dramatically assertive rejection of executive claims made from what might seem the core area of executive responsibility, national defense.

2. *The rule of law as protection and guide for democratic decision-making*

A second function of the rule of law in this case is to promote, and at the same time temper, democratic judgment. I do not want to make too much of the distinction between enforcing the "rule of law" and enforcing the Constitution, for democratic judgment is of course a central constitutional value. But when the Court, in Justice Breyer's terms, "insist[s]" that military commissions must rest on

125. *Id.* at 2792. The Court's argument on Article 36 carries over to its argument on Article 21, for it sees the Geneva Convention's "regularly constituted court" requirement, incorporated into Article 21, as "[a]t a minimum" requiring "'some practical need [that] explains deviations from court-martial practice.'" *Id.* at 2797 (quoting *id.* at 2804 (Kennedy, J., concurring in part)).

126. The *Hamdan* dissenters, however, were sharply critical on this score. *See id.* at 2842–43 (Thomas, J., dissenting); *cf. id.* at 2820–22 (Scalia, J., dissenting) (arguing that the Court should have abstained from exercising jurisdiction over this case in light of the political branches' perception of military necessity).

127. *Steel Seizure*, 343 U.S. at 679 (Vinson, J., dissenting).

128. *See* DYCUS ET AL., *supra* note 106, at 55.

the usual process of lawmaking, it is invoking this "rule of law-making" to "strengthen the Nation's ability to determine — through democratic means — how best to" respond to the danger of terrorism.[129] Justice Kennedy similarly reasons that "[w]here a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches."[130]

But Justice Kennedy's appreciation for democratic deliberation is not necessarily an endorsement of whatever the political branches may do. Justice Kennedy adds another perspective, one that puts a particular "rule of law" emphasis on the value of laws produced through normal processes:

> Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.[131]

Like the Constitution itself, this passage appreciates democratic judgment, but also seeks to insure that that judgment is exercised in circumstances that will make it reflective and wise. The role of courts, in this context, is to maintain a form of conservatism: where possible, "standards tested over time" should be followed and those standards should be "insulated from the pressures of the moment."[132] That emphasis on the orderliness of lawmaking and the accumulated wisdom of the law argues against permitting innovation by the executive alone. The same concerns, however, argue against too compliant an interpretation even of changes approved by both branches, if that approval is the result of impulsive passion rather than tempered reflection.

3. The rule of law as a criterion of judgment

Justice Kennedy's emphasis on "standards tested over time and insulated from the pressures of the moment" points to a third element of the rule of law's power in this case: the force of the "rule of law" as an idea, and a judicial technique, in itself. I do not mean to cast the rule of law as extra-constitutional in any way, but at the same time I want to highlight the ways that the enforcement of the rule of law can transcend what otherwise might seem to be limitations on the judicial role. We live, after all, in a moment when dramatic claims of executive power have been advanced, as a matter of constitutional interpretation and as a matter of practical response to national need. The idea of the rule of law can

129. *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring).

130. *Id.* at 2799 (Kennedy, J., concurring in part).

131. *Id.* Justice Kennedy makes these comments in the introduction to his opinion, a section not joined by any of the other Justices.

132. Justice Kennedy's emphasis reflects the Burkean conception of the judicial role that Cass Sunstein explores in his essay, Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006).

offer a framework for responding to such claims, and for resolving the ambiguities of our old constitutional text. No, a rule of law court might say, executive power is not as great as has been claimed, because the Constitution seeks to establish a rule of law, and power as great as that sought by the executive is incompatible with the principles of the rule of law. In short, a third function of rule of law jurisprudence is to provide a foundation for the protection of human rights.

Needless to say, invoking the rule of law does not magically establish the ground for assertive human rights decisions. The principles of the rule of law are themselves as open to dispute as any other aspect of the nation's fundamental law, and perhaps more so since the phrase "rule of law" is not, itself, a term the Constitution uses. "Due process of law" is, certainly, a constitutional term, but it is not quite the same one; Justice Stevens said that the Executive was "bound to comply with the Rule of Law," rather than with "due process." I do not mean, however, to make too much of the difference in these phrases, both of which can be construed either narrowly or broadly, and it seems fair to understand Justice Stevens as invoking the "Rule of Law" as a broad charter of ordered liberty. In doing so, he might have had in mind the approach to due process that Justice Harlan articulated,[133] an approach that seems to resonate in Justice Kennedy's constitutional jurisprudence as well.[134] A court committed to this understanding of the rule of law has a perspective from which to assess the validity of the law-making efforts of the other branches of government.

For the majority in *Hamdan*, the government's position seems to be quite another thing than the rule of law: Rule *by* Law. The difference between the two was a pointed element of the legal critique of apartheid injustice in South Africa.[135] Apartheid was, in many respects, a legalistic system, as apparently many grotesquely oppressive systems are.[136] But in South Africa, which in those

133. Harlan described due process, as articulated over the years in the decisions of the Court, as "the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society." Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

134. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 277–78 (1990) (Kennedy, J., concurring) (citing Reid v. Covert, 354 U.S. 1, 74–75 (Harlan, J., concurring in the result)); *cf. Rasul*, 542 U.S. at 485–88 (Kennedy, J., concurring) (deciding issue of availability of habeas corpus based on broad constitutional weighing).

135. *See* JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 44 (1978); ANTHONY S. MATHEWS, FREEDOM, STATE SECURITY AND THE RULE OF LAW: DILEMMAS OF THE APARTHEID SOCIETY 1 (1986). On the character of South African law in that era, see, for example, Sydney Kentridge, *The Pathology of a Legal System: Criminal Justice in South Africa*, 128 U. PA. L. REV. 603 (1980). Kentridge, a leader of South Africa's anti-apartheid bar for many years, observes that the philosophy of this pathological system was "simply that the more serious the crime, the easier it should be to convict the accused. This view has its adherents in all countries. It has often prevailed, especially in the case of political offenders." *Id.* at 612. It is hard not to see an echo of this view in the construction of our current military commissions.

136. STEPHEN ELLMANN, IN A TIME OF TROUBLE: LAW AND LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY 173 (1992). South Africa was certainly not always legalistic; indeed, its state of emergency rules

days had scarcely any source of enforceable constitutional rights, almost anything could be done *by* law. All that was required was the legislature's decision to embody into statute a particular rule, say of racial segregation or detention without trial, and the new rule was law.

In the face of the frightening combination of Parliamentary supremacy and Parliamentarians' contempt for human rights, some South African courts evolved a striking way to protect the rule of law. Effectively disregarding the likely subjective intentions of the legislators, these courts employed the many tools of ordinary statutory interpretation to resist legislative desire and discern, instead, rules that were consistent with background principles of equality and liberty.[137] These principles could always be overridden, of course, for a supreme Parliament can do *anything*. But it is not easy, politically or linguistically, altogether to override principles of ordered liberty,[138] and if they were not absolutely ruled out, South African judges would, on occasion, find these principles remarkably alive and present.[139]

Shortly after the end of apartheid, one of the leading practitioners of this judicial approach, John Didcott,[140] sat, as a member of the new Constitutional Court, on a case raising the question of whether a particular provision of apartheid-era legislation should be struck down on the ground that it worked a delegation of legislative authority not permitted by the new Constitution.[141] Justice Didcott responded that the validity of the statute was established by another provision, which continued legislation in force from the old era subject to the Constitution itself. But this language could have been read to invalidate the statute in question after all, if the statute did delegate power in a way the new Constitution would not permit in the future. Didcott unhesitatingly rejected that interpretation, writing that:

> The explanation for that was obviously the impracticality of dismantling all our old statutory law in one fell swoop when nothing had yet been constructed to replace it, a treatment which would have thrown the governmental, administrative and economic infrastructure and functioning of the country into immediate chaos. Those who cannot

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were sharply challenged as essentially aimed at shielding lawlessness from any kind of legal scrutiny. Nicholas Haysom, *States of Emergency in a Post-Apartheid South Africa*, 21 COLUM. HUM. RTS. L. REV. 139, 146–49 (1989). In this too, however, South Africa's system may not seem wholly unlike some aspects of our response to terrorism.

137. *See* ELLMANN, *supra* note 136, at 47–48.

138. *Id.* at 53–54.

139. *See generally id.* at 26–56.

140. For a striking instance of Judge Didcott's response to apartheid legislation, see Ndabeni v. Minister of Law & Order, 1984 (3) SA 500 (D & CLD) (S. Afr.), discussed in ELLMANN, *supra* note 136, at 37 n.55.

141. Ynuico Ltd. v. Minister of Trade & Indus. and Others, 1996 (3) SA 989 (CC), 1996 (6) BCLR 798 (CC) (S. Afr.).

> readily imagine that the framers of the Constitution intended even in the interests of stability to perpetuate measures of the particular kind now under discussion should remind themselves of something else, of a flaw much worse and more fundamental in every statute then in force which was nevertheless thought not to disqualify it from retention. I refer, of course, to its enactment by a Parliament that had been elected undemocratically and was not representative of all our people. The genesis of a statute and its contents give rise, to be sure, to conceptually separate criticisms. It seems scarcely surprising all the same that, having swallowed the camel of illegitimate origin, those concerned saw no need to strain at the gnat of unbridled delegation. Nor do we in turn have any reason to shrink from attaching to the words of section 229 their natural and ordinary meaning.[142]

I quote this passage at length because of its clear suggestion that the critical intensity of a court's interpretation of statutes can depend on the court's view of those statutes' fundamental justice or injustice.

It is hard not to think that in turning to the principles of the rule of law, the Supreme Court's majority in *Hamdan* was moving toward a rights-minded use of the rules of statutory interpretation, and doing so out of a sense that in our conduct of the war against terrorism we may have lost our constitutional bearings and fallen far short of what a fundamentally decent constitutional order requires. The Court clearly hoped that Congress, pressed back into engagement, would vindicate its faith in democracy — but the case also reflects, I think, the Court's fear that of the three branches of government, perhaps it alone was then committed to adhering to the Constitution and laws in the midst of war.

C. Shaping the Law of War

The sense that *Hamdan* is, importantly, not just a case about protecting Congress' authority, but also one about maintaining the rule of law, points to the third element that may have contributed to the Court's willingness to hold the military commissions unlawful: the Court's sense that it may have to play a role in shaping the law of war for the conflict we now are waging. This prospect has existed at least since *Hamdi*. There the plurality observed that the law of war permitted the detention of enemy combatants until the end of hostilities. Responding to the possibility that hostilities in the war on terrorism might go on for generations, and detentions therefore could last equally long, the plurality said that "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date."[143]

142. *Id.* ¶ 7.

143. Hamdi v. Rumsfeld, 542 U.S. 507, 519–21 (2004) (plurality opinion of O'Connor, J.).

Yet, according to some of the comments of the Administration, that is the situation we are in. Alberto Gonzalez, then counsel to the President and now Attorney General, wrote shortly after September 11 that some elements of the Geneva Convention have become "quaint."[144] It is true, I believe, that there are difficult problems in determining what proof should be required to deprive a captured combatant of prisoner-of-war status under the Geneva Conventions, and what conditions of confinement enjoyed by prisoners of war should also be guaranteed to those shown to be unlawful combatants, particularly if these detainees face potentially life-long confinement as the war on terrorism drags on.[145] But the Administration maintained for years that none of the provisions of the Geneva Convention applied to the prisoners it held at Guantánamo.[146] *Hamdan* rejects that position, but only to the extent of determining that Common Article 3, with its protections of all detainees in conflicts not of an international character, does apply.[147] Common Article 3's protections are very important, but they are less detailed and less extensive than those provided for prisoners of war, or in other words, for the enemy combatants whom we have been accustomed to facing.[148] If we do now confront the prospect of an unending war against combatants who are not in uniform and consider themselves unbound by any laws of war — a "global war against terrorism"[149] — it does seem

144. *See* Memorandum from Alberto R. Gonzales, U.S. Att'y Gen., to President George W. Bush, *re:* Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban 2 (Jan. 25, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf.

145. Thus it may be debated, for example, whether unlawful combatants must "be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area," as prisoners of war must be under the Geneva Convention. Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) art. 25, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. But it may also be debated whether the Convention's provision for determination of prisoner-of-war status "by a competent tribunal" ensures the process that should be due for a decision that might shape a detainee's future for decades. *See id.* art. 5; Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 440 n.392 (2004). Whether life-long detention as an enemy combatant can be lawful or justifiable is of course also critically important.

146. *See Hamdan*, 126 S. Ct. at 2795, n.60.

147. *Id.* at 2795.

148. The Third Geneva Convention has 143 Articles; Common Article 3's text takes up less than a page. Derek Jinks, however, in an essay he himself characterizes as "contrary to conventional wisdom," maintains that "[t]he Geneva Conventions protect unlawful combatants, and this protection very closely approximates that accorded POWs." Jinks, *supra* note 145, at 374–75, 440.

149. This phrase has not just rhetorical but also legal content, as Mary Ellen O'Connell has insightfully shown. *See* Mary Ellen O'Connell, *The Legal Case Against the Global War on Terror*, 36 CASE W. RES. J. INT'L L. 349, 349–52 (2004). As a legal term, it describes a war in which enemy combatants may be found and attacked by military means anywhere in the world, at any time — including, for example, on city streets in friendly nations. *See id.* at 352.

that the laws of war now in place speak only partially to the question of how we may lawfully fight.[150]

In such a situation, how are we to evolve a law of war to govern this conflict? We might choose to resist the framework of war powers altogether except when actual war — such as the fighting in Afghanistan — breaks out.[151] From a very different perspective, we might conclude that not just elements, but core guarantees of the law of war have become untenable, and that this is, to a large extent, a war without rules, or a war in which the only rules are those we shape for ourselves.

The Court's disposition so far has been quite different. It has not challenged the war power framework, nor has it accepted the fundamental idea that the established understanding of the law of war has unraveled. Instead, it insists in *Hamdan* that the existing law of war still provides meaningful guidance and enforceable obligations in the conduct of the war on terror. It insists, as well, that the law of war is in good part a creation of international lawmaking, and that this international law of war binds us because it is, in fact, part of our own statutory law.[152] Finally, in its elucidation of the meaning of the Geneva Convention's "regularly constituted court" requirement in the context of U.S. law and practice, the Court offers a response to the charge that international law is no more than a vague body of rules or aspirations susceptible to arbitrary, imposed application: the Court gives meaning to this rule of international law by reading it together with U.S. domestic law. The impression we are left with is that the *Hamdan* Court is seeking both to heed the international law of war and to develop it.[153] How far the Court will be prepared to go in expanding these

150. *See generally* Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1 (2004).

151. Bruce Ackerman, notably, has argued emphatically that "this ['war on terror'] is not a war," though he agrees that distinct military engagements such as the fighting against the Taliban in Afghanistan do amount to wars. BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 13–38 (2006). If the struggle against terrorism is not a war, perhaps it should be fought only with the normal tools of the criminal law; Ackerman, however, maintains that terrorist attacks do require special government responses, to be regulated by an "emergency constitution." *See id.* at 77–100. My own view is that for the United States, "war" has, historically, encompassed a range of conflicts. I am inclined to see our global response to Islamic fundamentalist terror as broadly comparable to some of those past conflicts, and hence an exercise of war powers, and to focus on resisting the implication that those responsible for exercising those powers are largely beyond legal limitation.

152. This cannot be an irrevocable limit, however, since no one doubts that, by new legislation, Congress can override even the obligations of treaties.

153. International authority also played a part in the plurality's conclusion that the law of war did not permit a charge of conspiracy to be brought before a military commission, though the plurality placed more weight on its reading of American military commission precedent. *See Hamdan*, 126 S. Ct. at 2784–85 (plurality opinion of Stevens, J.) (using "international sources"); *id.* at 2780–84 (using domestic precedent). This view did not command a majority of the Court, as Justice Kennedy preferred to seek congressional guidance on the point, *id.* at 2809 (Kennedy, J., concurring in part), while the dissenters maintained that conspiracy was a proper charge, *id.* at 2834–38 (Thomas, J., dissenting). Like the plurality, Justice Thomas found support for his position primarily in U.S. practice, *id.*, while also invoking international

principles remains to be seen. Certainly the Justices have mixed feelings about the proper weight of international law in our domestic life.[154] But perhaps because our conduct in the war has produced so many shocking reports of behavior that no legitimate legal order could accept,[155] the Court has moved to shape a law of war that combines elements of international and domestic legal principles.

V. CONCLUSION: THE COURT'S EFFORT AND CONGRESS' RESPONSE

In the first two sections of this essay, I sought to show that the arguments of statutory interpretation on which the Justices divided were by no means easy or clear-cut. In that light, it is important to try to understand what considerations led the Justices to decide as they did. Doing so is important, not just to solve an interesting problem, but for a more profound reason as well: courts do not readily oppose the decisions of their government on issues of national security in the midst of an emergency. However much it is the role of courts to protect the liberties of individuals, the courts are part of the same society the executive seeks to protect, and the Justices are not insulated from the same perils that threaten their fellow citizens.

Yet, sometimes, judges conclude that these claims on their sympathy and judgment are unpersuasive. This was so in apartheid South Africa,[156] but it is also true in societies whose legal orders are far more just than South Africa's was. We need to understand what considerations lead judges sometimes to reject the

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law support. *Id.* at 2837 n.14. If the plurality is correct, then under the law as it stood when *Hamdan* was decided, it would apparently have been impossible to try anyone for conspiracy to carry out the 9/11 attacks (though concrete violations of the law of war committed during those attacks might be triable). *See id.* at 2838. To my mind, this is a startling conclusion, considered in light of the AUMF's explicit focus on the use of force against those who "planned, authorized, committed, or aided" those attacks. AUMF §2(a), 115 Stat. at 224; *cf. Hamdan*, 126 S. Ct. at 2827 n.3 (Thomas, J., dissenting) ("The text of the AUMF is backward looking," focused on "bringing the September 11 conspirators to justice.").

154. *Compare, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004) (construing the Alien Tort Statute, 28 U.S.C. § 1350 (2000), to permit suits in federal court based on international law, but only if the claims "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized"), *with* Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2674 (2006) (concluding, *inter alia*, that state's violation of consular notification provision of Vienna Convention on Consular Relations did not entitle defendant to suppression of statements made after the violation took place, "even assuming the Convention creates judicially enforceable rights").

155. The federal courts' entry into the regulation of mental hospital and prison conditions similarly rested in part on the sheer horror that judges realized existed in those institutions so long as they remained beyond the reach of the Constitution. *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 681–83 (1978) (quoting Holt v. Sarver, 309 F. Supp. 362, 381 (E.D. Ark. 1970) (describing the Arkansas prisons as "a dark and evil world completely alien to the free world"); Wyatt v. Aderholt, 503 F.2d 1305, 1310–12 (5th Cir. 1974) (detailing conditions in Alabama facilities for mentally ill and mentally retarded people)).

156. I explored the possible sources of this perhaps surprising judicial resistance in ELLMANN, *supra* note 136, and argued that in the midst of apartheid's injustice and oppression a tradition of adherence to the law, as well as a special human rights tradition within the bench and bar, helped sustain an impulse to justice. *Id.* at 163–247.

claims of national security. We might approach that question in terms of individual judicial biography, of course, but here I have tried to look at factors that go beyond individual sentiment. In *Hamdan*, I suggest, we can see the Supreme Court, in the midst of a war that has proceeded slowly and brutally and may last a very long time, taking stock. The Court looks to the role of Congress first; behind that is a concern for the rule of law and the judiciary's special responsibility for preserving it; and behind both of those is, it seems, a hesitant recognition that law must be made to govern the war we find ourselves in.

The analysis I have offered here intersects with Cass Sunstein's incisive synthesis of national security law in his essay, *Minimalism at War*.[157] Certainly the Court's emphasis on the need for legislative authorization for intrusions on liberty is a salient feature of minimalism as Professor Sunstein describes it.[158] So, too, the modesty of "Rule of Law" jurisprudence employing ordinary interpretive principles is consistent with his perception of minimalism's reliance on "narrow and incompletely theorized rulings."[159]

In the end, however, I see the Court's stance in *Hamdan* as more assertive than the term "minimalism" might connote, as Professor Sunstein also concludes in a forthcoming article.[160] Sunstein is troubled by the Court's departures from minimalism, though he is sympathetic to the conclusions the Court reaches on the merits.[161] I applaud the Court's decision, and my aim here has been to provide an account of the Court's reasoning, explicit and implicit, that explains the foundation the Court found, or built, for its judgment. What is most striking about this case, I suggest, is how profound the Court's underlying concerns seem to be, and how far those concerns take the Court into a rejection of Executive assertions of authority.[162] In *Hamdan*, building on *Hamdi* and *Rasul*, the Court sought to reshape the legal landscape in a way that the other branches showed little sign of undertaking. In that sense, perhaps, this case is rightly seen as somewhat analogous to *Brown v. Board of Education*,[163] another modestly theorized decision that asked the country to honor rights it had long chosen to disregard.

We will know better what role the Court is charting for itself if there are more occasions for it to assess troubling invasions of normal legal protections un-

157. Cass R. Sunstein, *Minimalism at War*, 2004 S. CT. REV. 47 (2004).

158. *Id.* at 77–99.

159. *Id.* at 55, 103–08.

160. Cass R. Sunstein, *Clear Statement Principles and National Security:* Hamdan *and Beyond* (Univ. of Chicago Law Sch. Pub. Law & Legal Theory, Research Paper Series, Paper No. 134, Jul. 2006), *available at* http://ssrn.com/abstract_id=922406 (forthcoming in S. CT. REV., 2007).

161. *See id.* at 25, 31–32.

162. The far-reaching character of the *Hamdan* Court's reasoning resembles the reach of the Supreme Court's judgment requiring the liberation of loyal Japanese-Americans from World War II detention camps, in *Ex parte* Endo, 323 U.S. 283 (1944), as read by Patrick Gudridge in his essay, *Remember* Endo?, 116 HARV. L. REV. 1933 (2003).

163. 349 U.S. 294 (1954).

dertaken in the name of the war on terrorism. We might hope there will be no more cases of this character. Unfortunately, that seems impossible. We can certainly hope that if such cases do persist, the Supreme Court will address them with the same sensitivity to the fundamental concerns at stake that it showed in *Hamdan*.

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At the end of September 2006, both Houses of Congress passed the "Military Commissions Act of 2006," which seems bound to present the Supreme Court with the kind of test the previous paragraph envisioned.[164] This Act, signed into law by the President on October 17, 2006,[165] lays out — in what will become chapter 47A of title 10 of the U.S. Code — elaborate rules to govern military commission trials of alien unlawful enemy combatants.[166] It also eliminates both of the statutory bases on which the Supreme Court rested its rejection of the system previously established by the President. Article 21 of the UCMJ, in which the *Hamdan* Court discerned the applicability of Common Article 3 as part of the "law of war" governing the trial of cases before military commissions, will be amended to add the following sentence: "This section does not apply to a military commission established under chapter 47A of this title."[167] The new law will also declare that military commissions established under chapter 47A satisfy Common Article 3 and that "[n]o alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights."[168] Similarly, Article 36, in which the *Hamdan* majority found a requirement that military commission rules be the same as those in courts-martial, unless uniformity was not merely inconvenient but impracticable, is amended to insert in both its subsections provisos exempting chapter 47A commissions.[169]

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164. Military Commissions Act (MCA) of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified principally in various sections of 10 U.S.C.).

165. Though passed by both Houses at the end of September, the Act was not formally "presented" to the President until October 10, 2006. For the chronology of the Act's passage, see The Library of Congress, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN03930:@@@X (last visited Mar. 11, 2007).

166. MCA § 3(a)(1). Section 3(a)(1)'s subsections are numbered as they will be codified in title 10 of the United States Code, and will be identified below by parentheticals following citations to § 3(a)(1).

167. MCA § 4(a)(2).

168. MCA § 3(a)(1) (subsections to be codified at 10 U.S.C. §§ 948b(f)-(g)); *see also* MCA § 5(a) (providing that "[n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action [involving the government or its agents] . . . as a source of rights").

169. Specifically, Article 36(a), 10 U.S.C. § 836(a) (2000), which *inter alia* barred rules "contrary to or inconsistent with" the other provisions of the UCMJ, will now end with the words "except as provided in chapter 47A of this title." Article 36(b), 10 U.S.C. § 836(b) (2000), which required all rules made under the UCMJ to be "uniform insofar as practicable," will now end with the words "except insofar as applicable to military commissions established under chapter 47A of this title." MCA §§ 4(a)(3)(A)-(B). Oddly, another section of the MCA, § 3(a)(1) (subsection to be codified at 10 U.S.C. § 949a(a)), authorizes "the

Congress's purpose in adopting these changes was not to reject wholly the specific rights concerns on which the Supreme Court focused in *Hamdan*. In many respects, the substantive and procedural rules established for military commissions by the new law seem reasonably calculated to produce fair adjudication. As it bears on the issues that most concerned the *Hamdan* Court, the new statute is certainly not perfect, but it does make some improvements. Yet the overall impact of the new rules remains deeply troubling.

Most notably, the new statute appears to significantly — though not completely — improve the structural protections for the independence and impartiality of commission trials and appeals, the weakness of which Justice Kennedy (for a plurality) had emphasized as a basis for finding the tribunals not regularly constituted.[170] In particular, the presiding officer at a military commission must now be a military judge rather than just a military lawyer.[171] Interlocutory appeals by the government now go to a Court of Military Commission Review, composed of military appellate judges,[172] rather than to the Secretary of Defense or his designee who convened the commission.[173] The commissions must have at least five members, rather than three.[174] Specific provisions bar the "convening authority" from any involvement in the military's fitness evaluation of a military judge relating to his or her service on a commission,[175] and from reprimanding "any member, military judge, or counsel" of a military commission with respect to

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Secretary of Defense, in consultation with the Attorney General," to make regulations prescribing "[p]retrial, trial, and post-trial procedures, including elements and modes of proof," for military commission cases, and provides that "[s]uch procedures shall, so far as the Secretary considers practicable or consistent with military or intelligence activities, apply the principles of law and the rules of evidence in trial by general courts-martial." This language seems to be meant to encourage uniformity, but not to demand it.

170. *See supra* text accompanying notes 66–70. For Justice Kennedy's discussion of the specific features of the military commission system that limited its structural independence, including most of the elements I focus on in text here, see *Hamdan*, 126 S. Ct. at 2805–07 (Kennedy, J., concurring in part).

171. MCA § 3(a)(1) (subsections to be codified at 10 U.S.C. §§ 948j(a)–(b)); for the rule as it stood prior to *Hamdan*, see MILITARY COMMISSION ORDER NO. 1, *supra* note 93, at § 4(4). Justice Kennedy was also concerned that "the Appointing Authority selects the presiding officer," *Hamdan*, 126 S. Ct. at 2806 (Kennedy, J., concurring in part). The statute appears to permit the Secretary of Defense to continue this system if he wishes. MCA § 3(a)(1) (subsection to be codified at 10 U.S.C. § 948j(a)). The Secretary (more precisely, the "convening authority") also continues to select the members of the commission other than the presiding officer. MCA § 3(a)(1) (subsection to be codified at 10 U.S.C. § 948i(b)).

172. MCA § 3(a)(1) (subsection to be codified at 10 U.S.C. § 950f(a)). The judges may also be "civilian[s] with comparable qualifications." MCA § 3(a)(1) (subsection to be codified at 10 U.S.C. § 950f(b)). The judges are assigned to the court by the Secretary of Defense. *Id.*

173. MCA § 3(a)(1) (subsection to be codified at 10 U.S.C. § 950d(a)(1)); for the rule prior to *Hamdan*, see MILITARY COMMISSION ORDER NO. 1, *supra* note 93, at § 4(5)(e).

174. In capital cases, the minimum is now 12, rather than 7. *Compare* MCA § 3(a)(1) (subsections to be codified at 10 U.S.C. §§ 948m(a), 949m(c)), *with* MILITARY COMMISSION ORDER NO. 1, *supra* note 93, at §§ 4A(2), 6G.

175. *See* MCA § 3(a)(1) (subsection to be codified at 10 U.S.C. § 948j(f)).

their decisions or actions in the commission's proceedings.[176] (These provisions would be more reassuring if Lt. Cmdr. Charles Swift, the military lawyer who represented Hamdan, had not been passed over for promotion, thus ending his military career, shortly after the Supreme Court's decision in favor of his client.)[177] Finally, appeal to the Court of Appeals for the District of Columbia Circuit is now of right in all cases, instead of just in those cases where the sentence is at least ten years imprisonment.[178]

On the other hand, the new statute only partially remedies the problem of exclusion of defendants from their own trials while classified evidence is presented against them, a feature that Justice Stevens (for a plurality) found invalid.[179] The statute does not allow the exclusion of the defendant to permit classified evidence to be presented,[180] and, in fact, guarantees the defendant the opportunity to "examine and respond" to the evidence against him.[181] But the statute does permit the redaction of evidence prior to its introduction at trial,[182] and it does not expressly condition such redaction on a finding that the defendant can challenge or use the redacted material as effectively as he might have if redaction had not been permitted.[183] In fact, language from the Military Commis-

176. MCA § 3(a)(1) (subsection to be codified at 10 U.S.C. § 949b(a)(1)). Any coercion of, or unauthorized influence on, the members of the commission, trial counsel or defense counsel is also prohibited. MCA § 3(a)(1) (subsection to be codified at 10 U.S.C. § 949(b)(2)).

177. *See* Editorial, *The Cost of Doing Your Duty*, N.Y. TIMES, Oct. 11, 2006, at A26. Regrettably, this incident is not the only case of apparent Administration pressure aimed at enemy combatants' lawyers. *See* Raymond Bonner, *Terror Case Prosecutor Assails Defense Lawyer*, N.Y. TIMES, Mar. 5, 2007, at A10; *Official Quits After Remark on Lawyers*, N.Y. TIMES, Feb. 3, 2007, at A12.

178. *See* MCA § 9 (amending Detainee Treatment Act of 2005, Pub. L. No. 109-148, Div. A, Title X, § 1005(e)(3)(B), 119 Stat. 2739, 2740 (codified at 28 U.S.C. § 2241)).

179. *See supra* text accompanying note 42.

180. Exclusion is permitted only "upon a determination that, after being warned by the military judge, the accused persists in conduct that justifies exclusion from the courtroom — (1) to ensure the physical safety of individuals; or (2) to prevent disruption of the proceedings by the accused." MCA § 3(a)(1) (subsection to be codified at 10 U.S.C. § 949d(e)). Whether the first of these two subsections could authorize exclusion so as to prevent a defendant from learning the identity of a witness against him is not clear.

181. MCA § 3(a)(1) (subsection to be codified at 10 U.S.C. § 949a(b)(1)(A)).

182. MCA § 3(a)(1) (subsections to be codified at 10 U.S.C. § 949d(f), 949j(c)–(d)).

183. MCA § 3(a)(1) (subsection to be codified at 10 U.S.C. §949d(f)(2)(B)) authorizes nondisclosure of "the sources, methods, or activities by which the United States acquired" evidence admitted before the commission, based on findings by the commission's military judge that the sources and methods are classified and that the evidence is reliable. In such circumstances "[t]he military judge *may* require [government] trial counsel to present to the military commission and the defense, *to the extent practicable and consistent with national security*, an unclassified summary of the sources, methods, or activities by which the United States acquired the evidence." *Id.* (emphasis added). Where classified information is exculpatory, the defendant must receive an "adequate substitute," *see id.* (subsection to be codified at 10 U.S.C. § 949j(d)), but it is not clear whether this substitute must be equal in value to the original material. In contrast, in civilian federal criminal trials, if the government seeks to prevent a defendant from presenting classified information, the court may approve the use of substituted, unclassified admissions or summaries on a finding that the substituted material used in court "provide[s] the defendant with substantially the same

sion Order that protected the defendant from unfair use of redacted material does not appear in the new statute.[184] Presumably, the Secretary of Defense is free to reinstate this protection by regulation, but Congress chose not to insist upon it.[185]

Finally, the new law does little to address the majority's concern that the commissions were not bound by the normal rules of evidence, including rules prohibiting the use of hearsay or coerced testimony.[186] The new statute expressly permits regulations allowing the admission of hearsay "if the military judge determines that the evidence would have probative value to a reasonable person."[187] It also authorizes the admission of statements obtained through coercion provided that the coercion did not rise to the level of torture or, for statements obtained after the enactment of the Detainee Treatment Act of 2005, to the level of "cruel, inhuman, or degrading treatment" prohibited by that Act.[188]

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ability to make his defense as would disclosure of the specific classified information." Classified Information Procedures Act, 18 U.S.C. app. 3 § 6 (2000).

184. MILITARY COMMISSION ORDER NO. 1, *supra* note 93, § 6D(5)(b) had provided, in part, that if the accused and Civilian Defense Counsel were denied access to "Protected Information" (including but not limited to classified material) "and an adequate substitute for that information . . . is unavailable, the Prosecution shall not introduce the Protected Information as evidence without the approval of the Chief Prosecutor; and the Presiding Officer, notwithstanding any determination of probative value . . . , shall not admit the Protected Information as evidence if the admission of such evidence would result in the denial of a full and fair trial."

185. The statute does require the military judge of the commission to "exclude any evidence the probative value of which is substantially outweighed . . . by the danger of unfair prejudice," MCA § 3(a)(1) (subsection to be codified at 10 U.S.C. § 949a(b)(2)(F)). But this provision offers no guidance on the particular problem of undisclosed, classified information.

186. *See supra* text accompanying note 43.

187. *See* MCA § 3(a)(1) (subsection to be codified at 10 U.S.C. § 949a(b)(2)(A)(E)(ii)). The Act does create certain procedural prerequisites for the use of hearsay. MCA § 3(a)(1) (subsection to be codified at 10 U.S.C. § 949a(2)(E)(i)).

188. MCA § 3(a)(1) (subsection to be codified at 10 U.S.C. § 948r). Besides determining whether torture or cruel, inhuman, or degrading treatment produced the statement, the commission's military judge must determine that "the totality of the circumstances renders the statement reliable and possessing sufficient probative value" and that "the interests of justice would best be served by admission of the statement into evidence." MCA § 3(a)(1) (subsections to be codified at 10 U.S.C. §§ 948r(c)–(d)).

The Detainee Treatment Act defined "cruel, inhuman or degrading treatment" as "the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States." Detainee Treatment Act of 2005, § 1003(d), 42 U.S.C. § 2000dd(d) (Supp. IV 2006). The Military Commissions Act of 2006 reiterates that no one held by the United States anywhere shall be subject to such treatment. MCA § 6(c). Just what conduct might be considered coercive but not so flagrant as to violate these constitutional standards remains to be seen. A separate section of the Military Commissions Act specifies the conduct that constitutes a criminal "grave breach of Common Article 3" on the part of U.S. nationals or soldiers; among the prohibited acts are torture and "cruel or inhuman treatment," the latter defined as "an act intended to inflict severe or serious physical or mental pain or suffering . . . including serious physical abuse" on a person within the actor's "custody or control." MCA § 6(d)(1)(B). This definition clearly leaves room for the infliction of physical or mental pain or suffering that is less than severe or serious. *See also* MCA §§ 6(d)(2)(A), (D), (E) (defining "severe" and "serious" mental pain or suffering and "serious physical pain or suffering"). If such conduct is not viewed

The new statute's most fundamental revisions of our law, however, may lie elsewhere. The statute eliminates the writ of habeas corpus for any "alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."[189] The statute leaves little doubt that this prohibition applies not only to future cases but to those already pending; had it been on the books in time, this bar would apparently have applied to the *Hamdan* case itself.[190] Any alien, even a lawful permanent resident, is seemingly subject to this power.[191] Moreover, the definition of "enemy combatant" is extremely broad: it contains no geographic or temporal limits,[192] and encompasses not only actual fighters, but also people whose offense was to intentionally provide "material support" for hostili-

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as a war crime, perhaps evidence obtained by such means will also be found admissible in military commissions.

While the new law also authorizes the President to "promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions," MCA § 6(a)(3)(A), the President is not obliged to do so. His discretion to decide what more the Geneva Conventions may require is buttressed by the same section's declaration that "[a]s provided by the Constitution and by this section, the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions," *id.*, though a later subsection provides that this provision shall not "be construed to affect the constitutional functions and responsibilities of Congress and the judicial branch of the United States." MCA § 6(a)(3)(D). Quite aside from the question of what evidence will be admissible before military commissions, these provisions — as has been widely noted — create the deeply troubling prospect that American interrogators will be able to continue to use blunt or sophisticated techniques of coercion as long as those methods fall below the threshold of "cruel, inhuman or degrading treatment."

189. MCA § 7(a) (amending 28 U.S.C. § 2241(e)). The habeas provisions of the statute were sharply criticized in open letters submitted during Congress's consideration of the Act. *See* Letter from John J. Gibbons et al., to Members of Congress (n.d.) (on file with the New York Law School Law Review); Letter from legal scholars to Members of Congress (Sept. 20, 2006) (on file with the New York Law School Law Review). I signed or was a supporter of both these letters.

190. MCA § 7(b).

191. MCA § 3(a)(1) (subsection to be codified at 10 U.S.C. § 948a(3)) ("The term 'alien' means a person who is not a citizen of the United States.")

192. In *Hamdi*, in which the Supreme Court upheld the constitutionality of detaining U.S. citizens as enemy combatants, the plurality used a far narrower definition of "enemy combatant," one that required the detainee to have been "part of or supporting forces hostile to the United States or coalition partners in Afghanistan" and to have engaged in an armed conflict against the United States there." *Hamdi*, 542 U.S. at 516 (plurality opinion of O'Connor, J.) (internal quotation marks omitted). The Military Commissions Act definition, in contrast, is not limited to any particular geographic area, and in fact appears to encompass aliens who are enemy combatants solely by virtue of their acts against "co-belligerents" of the United States, those States or armed forces "joining and directly engaged with the United States in hostilities or directly supporting hostilities against a common enemy." MCA § 3(a)(1) (subsection to be codified at 10 U.S.C. § 948a(1)(B)). The statute also makes clear that it applies to crimes committed "before, on, or after September 11, 2001." MCA § 3(a)(1) (subsection to be codified at 10 U.S.C. § 948d(a)). It seems fair to say that this Act seeks to treat as enemy combatants all those against whom the "global war on terrorism" might be directed.

ties.[193] In addition, the statute contains no language limiting the application of this power to people arrested, and/or detained, outside the borders of the United States; if no such limit is inferred, then it will be possible for any alien to be held, anywhere in the United States, while awaiting a determination of his or her status as an enemy combatant.

Finally, the new law is perhaps most dismaying when seen as a response by Congress to the *Hamdan* Court's effort to enlist Congress in sustaining the rule of law in a time of terror. Congress did take up the Court's invitation. But it chose to circumscribe rather than embrace the Court's efforts. This response is reflected less in the particulars of the legislation's response to the specific concerns the Court emphasized, than in its overall approach to future judicial decision-making. Congress seeks to preclude the courts from independently interpreting, or applying, Common Article 3.[194] It seeks to end any mandate of uniformity between commission rules and the rules of general courts-martial.[195] In the same vein, the Act declares that while the rules for military commissions are based on those for general courts-martial, "[t]he judicial construction and application" of the Uniform Code of Military Justice court-martial rules "are not binding on military commissions" created under this Act.[196] Nor may military commission precedents be used in courts martial: "The findings, holdings, interpretations, and other precedents of military commissions under this chapter may not be introduced or considered in any hearing, trial, or other proceedings of a court-martial."[197] Lastly, Congress directed federal courts reviewing military commission

193. *See* MCA § 3(a)(1) (subsection to be codified at 10 U.S.C. § 948a(1)) (defining "unlawful enemy combatant" as, *inter alia*, "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States"); MCA § 3(a)(1) (subsection to be codified at 10 U.S.C. § 950v(25)) (defining crime of "providing material support for terrorism" triable before military commission to encompass not only deliberately assisting a terrorist act but also knowingly supporting "an international terrorist organization engaged in hostilities against the United States," arguably even without an intent to support its terrorist acts). Section 950v(25) also incorporates the broad definition of "material support or resources" from 18 U.S.C.A. § 2339A (2006). *See generally* Scott Shane & Adam Liptak, *Shifting Power to a President*, N.Y. TIMES, Sept. 30, 2006, at A1. For discussion of section 2339, see Randolph N. Jonakait, *The Mens Rea for the Crime of Providing Material Resources to a Foreign Terrorist Organization*, 56 BAYLOR L. REV. 861 (2004).

It is worth noting that the new law also resolves the question, sharply debated but not resolved in *Hamdan*, *see supra* note 153, of whether conspiracy is a cognizable charge before a military commission. The statute makes clear that it is, *see* MCA § 3(a)(1) (subsection to be codified at 10 U.S.C. § 950v(b)(28)), and moreover declares that its provisions specifying what crimes can be tried before the commissions "codify offenses that have traditionally been triable by military commissions" and are "declarative of existing law." MCA § 3(a)(1) (subsections to be codified at 10 U.S.C. §§ 950p(a)-(b)). On that basis, the statute declares — though the courts will have to assess this claim — that the new provisions "do not preclude trial for crimes that occurred before" the statute's enactment. MCA § 3(a)(1) (subsection to be codified at 10 U.S.C. § 950p(b)).

194. *See supra* text accompanying notes 167–168.

195. *See supra* text accompanying note 169.

196. MCA § 3(a)(1) (subsection to be codified at 10 U.S.C. § 948b(c)).

197. *Id.* § 3(a)(1) (subsection to be codified at 10 U.S.C. § 948b(e)).

judgments to consider only "whether the final decision was consistent with the standards and procedures specified in this chapter," and "*to the extent applicable*, the Constitution and the laws of the United States."[198] In a system that envisions the prosecution not only of foreign fighters but of lawful permanent resident aliens arrested at their homes in the United States and charged with materially supporting hostilities, the statute does not go so far as to declare that the Constitution or any other laws of the United States are, in fact, "applicable."

This statute, in short, seeks to create a statutory apparatus governing military commissions, and then to cut that apparatus off — as far as possible — from the processes of judicial interpretation and development of human rights that are a part of "the Rule of Law that prevails in this jurisdiction."[199] The first legal challenge aimed at this statute has already been decided by the Court of Appeals for the District of Columbia Circuit, in a decision upholding the statute's cut-off of the right to seek habeas corpus, and a petition for certiorari has already been filed in the Supreme Court.[200] We will now see how far the Supreme Court is prepared to go to protect alleged enemy combatants' rights without the encouragement of Congress, simply in the name of the Rule of Law and the Constitution.

198. *Id.* § 3(a)(1) (subsections to be codified at 10 U.S.C. § 950g(c)(1)–(2)) (emphasis added).

199. *Hamdan*, 126 S. Ct. at 2798.

200. *See* Boumediene v. Bush, Nos. 05-5062 to 05-5064, 05-5095 to 05-5116, 2007 U.S. App. LEXIS 3682 (D.C. Cir. Feb. 20, 2007), *petition for cert. filed* (U.S. Mar. 5, 2007) (Nos. 06-1195 & 06-1196), *available at* http://ccr-ny.org/v2/legal/september_11th/docs/2006_Boumediene_v_%20Bush_Cert_Pet_Mar_2007.pdf. After this article went to proofs, the Supreme Court denied certiorari, Boumediene v. Bush, 127 S. Ct. 1478 (2007).

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