

An Imperial Judiciary at War: *Hamdan v. Rumsfeld*

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A president responds to a war like no other before with unprecedented measures that test the limits of his constitutional authority. He suffers setbacks from hostile Supreme Court justices, a critical media, and a divided Congress, all of which challenge his war powers.

Liberal pundits and editorial pages believe this describes George W. Bush after the Supreme Court's decision in *Hamdan v. Rumsfeld* rejected the Bush administration's regulations governing military commissions for the trial of terrorists.¹ But the narrative of an executive wielding "unchecked" executive branch powers just as easily fits Abraham Lincoln when he issued the Emancipation Proclamation and freed the slaves, or FDR when he made the United States the great "arsenal of democracy" in the lead-up to World War II.²

While the Court's intervention into war will be greeted in some quarters as a vindication of the "rule of law," the *Hamdan* decision ignores the basic workings of the American separation of powers and will hamper the ability of future presidents to respond to emergencies and war with the forcefulness and vision of a Lincoln or an FDR. Instead of heralding a return to checks and balances, *Hamdan* signals an unprecedented drive by a five-justice majority on the Supreme Court to intervene in military affairs while war is still

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¹*Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

²FDR's Fireside Chats 170–72 (Russell D. Buhite & David W. Levy eds., 1992).

ongoing. Bush administration critics no doubt believe JD SUPRA's-
<http://www.uscourts.com/pubs/documents/Powers.aspx?DocID=990251&DocTitle=4431927-148&1162006>
 are restoring the separation of powers after a five-year period in which the president exercised unilateral discretion to respond to the 9/11 attacks. But they are proceeding on the mistaken assumption that the separation of powers works in the same way in foreign affairs as it does in domestic affairs. What makes *Hamdan* remarkable is not the actions of the president and Congress, but the intrusive role of the Supreme Court in attempting to superimpose a domestic lawmaking framework upon the management of national security matters.

To develop these points more fully, Part I of this essay examines the character of military commissions and sets forth a brief history of their use by previous administrations. Part II discusses the Court's refusal to obey the directive of Congress and the president that it not decide pending habeas cases from Guantanamo Bay. Part III explains that *Hamdan* misconstrued statutes, treaties, and Supreme Court precedent to essentially overturn decades, if not centuries, of judicial practice in deferring to the president and Congress on wartime policy.

I. Character and History of Military Commissions

Contrary to the claims of critics, policy on military commissions is not a story of a unilateral power-grab by President Bush. Rather, military commissions are the product of a consistent constitutional practice and cooperation between the political branches of government. Until *Hamdan*, the Supreme Court remained respectful of the president and Congress' efforts to set wartime policy on the prosecution and punishment of enemy war crimes. Rather than attempting to require that Congress issue a clear statement regulating every aspect of military commissions, the Court deferred to the working arrangement between the other branches to protect national security and carry out war.

Long American practice recognizes that the president, as commander-in-chief, plays the leading role in wartime. Presidents have started wars without congressional authorization, and they have exercised complete control over military strategy and tactics.³ Of

³See generally John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (2006).

course, whether the president has the constitutional authority to begin wars has been one of the most controversial academic issues in the history of the United States. But even those who argue that wars that do not receive congressional approval are unconstitutional do not and cannot seriously dispute that presidents have often used force abroad on their own authority. The two bookends to the Cold War—the Korean War and the Kosovo War—were both waged by presidents without any declaration of war or other congressional authorization.

The advantages of executive control over war have been understood as far back as British political philosopher John Locke, who argued that foreign affairs are “much less capable to be directed by antecedent, standing, positive laws,” while the executive could act quickly to protect the “security and interest of the public.”⁴ Presidents can act with a speed, unity, and secrecy that the other branches of government cannot match. Because executives are always on the job, they can adapt quickly to new situations. By contrast, legislatures are large, diffuse, and slow. Their collective design may make them better for deliberating over policy, but at the cost of delay and lack of resolve.

September 11, 2001, was exactly such a moment. The September 11 attacks succeeded in part because our government was mired in a terrorism-as-crime approach⁵ that worried less about preventing terrorist attacks and more about hypothetical threats to civil liberties—hence the “wall” that prevented our law enforcement and intelligence agencies from sharing information. Our laws considered war as conflict only between nations and failed to anticipate the rise of a non-state terrorist organization that could kill 3,000 Americans, destroy the World Trade Center, and damage the Pentagon in a single day.

In response to the 9/11 attacks, President Bush ordered the creation of military commissions to try members of the enemy who commit war crimes.⁶ Military commissions are an example of the

⁴John Locke, *Second Treatise on Government* § 147 (1690).

⁵See John Yoo, *National Security and the Rehnquist Court*, 74 *Geo. Wash. L. Rev.* 1701, 1726 (2006).

⁶Military Order of Nov. 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 *Fed. Reg.* 57,833, § 4 (Nov. 13, 2001) (hereinafter “Bush Military Order”).

laws and institutions needed to adapt to the war against al Qaeda. Unlike regular courts, military commissions can close proceedings when classified material is involved or an enemy leader might testify.⁷ A fair trial is still guaranteed because the defense attorneys are present.⁸ Defense attorneys must have appropriate security clearances. Assurances are obtained that neither they nor the defendant will leak any classified information.

A military commission can also use more flexible rules of evidence.⁹ Our criminal trials impose a very high standard on what information reaches a jury. Witnesses generally must testify in person, hearsay evidence typically must be excluded, and the reliability of evidence must meet high procedural hurdles. That is because our jury is supposed to be kept ignorant of certain types of evidence that might sway the novice. Juries are not trusted to make difficult judgments about the reliability of broad, contextual information. Military commissions, however, are staffed by professionals versed in the reliability of hearsay evidence, or whether an item of evidence is more probative than prejudicial.¹⁰ Rules of courtroom procedure like the exclusionary rule's bar on evidence that was obtained without a warrant seek to discipline police conduct and have less to do with the relevance or credibility of evidence. We should not apply those rules to war because courtroom outcomes should not "discipline" or affect how the military does its job on the battlefield.

Our military does not play the same role in our society that the police do. Police must follow the exclusionary rule and the Miranda warnings or courts let the suspect go free. Courts use those rules to encourage the police and prosecutors to respect the defendant's rights and because the costs to society of the occasional error are deemed low. Those rules make no sense in the war situation, where the primary purpose of the armed forces is to defeat the enemy. If the military had to abide by a host of legal rules, it would interfere drastically with their ability to fight effectively. As has been said, the job of the 82nd Airborne is to vaporize, not Mirandize.

⁷ *Id.* § 4(c)(4).

⁸ See, e.g., *id.* §§ 4(c)(2), (5).

⁹ See, e.g., *id.* §§ 1(f), (4)(c)(3)–(4).

¹⁰ See, e.g., *id.* § 4(c)(3).

Civilian courts would not allow important military (JD SUPRA¹¹ at least two cases.¹¹ Suppose Osama bin Laden called bin al-Qaenah to warn her of the 9/11 attacks and she told a friend. A civilian court would exclude that as hearsay testimony. But a military commission could allow it. A *Wall Street Journal* reporter found a hard drive filled with al Qaeda documents in a Kabul market. That information would likely not be admitted in civilian court because its chain of custody from al Qaeda to the Kabul market could not be verified. A military commission could review the information if it thought it was reasonably reliable.¹² Another example is information gained through interrogations, intelligence intercepts, and informants. None of that information complies with the Fourth Amendment's warrant requirement or *Miranda*, but if it is reasonably relevant, the military will act upon it.

In fact, thoughtful civil libertarians ought to welcome military commissions. Military commissions have the benefit of limiting to enemy combatant cases any compromises between national security and civil liberties. Civil libertarians, most recently Geoffrey Stone in his *Perilous Times*, warn that courts historically bend too far to accommodate the needs of national security in wartime.¹³ Such patterns drawn from the past don't necessarily describe the present or predict the future, of course, particularly in the face of unprecedented change. The main worry ought to be, however, that compromises that favor national security will permanently affect our domestic criminal law in time of peace. Military commissions, in fact, have a civil libertarian function, by confining the more flexible rules for national security cases where they will not seep over to civilian cases. Trying enemy combatants in civilian courts could have the opposite effect, particularly in periods just after a major enemy assault like 9/11.

Military commissions are also more secure. Civil trials of terrorists in the U.S. make an inviting target for al Qaeda. Even before 9/11, our government recognized the threat to judicial personnel by placing heavy security in the New York City federal court building and

¹¹Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 Am. J. Int'l L. 328, 330-31 (2002).

¹²*Id.*

¹³Geoffrey Stone, *Perilous Times: Civil Liberties in Wartime* (2004).

putting federal judges who tried the al-Qaeda cases under constant protection.¹⁴ Civilian trials tend to be in such places as New York City or Washington, D.C., compounding potential loss of life if they were targeted for attack. In this war military tribunals are conducted at Guantanamo Bay, a well-defended military site beyond our shores.

Some critics believe the military can't run a fair trial. They claim that they are too secretive and unfair because they operate without juries and presume the guilt of the defendant.¹⁵ Civil libertarians think military officers can't be effective defense attorneys because they are susceptible to "command influence"—swayed by their superior officers' desire to convict. In short, they argue that military commissions are inherently flawed because their rules and procedures are just too different from the standard criminal trial system.

That view displays a serious lack of understanding of the military justice system. Millions of American servicemen and women serve today under the Uniform Code of Military Justice (UCMJ).¹⁶ That system, developed over many decades, provides a fair and open trial. Unlike our criminal trials, in which jurors are selected for their ignorance, military tribunals are staffed by officers who are college graduates with extensive professional knowledge. The system requires defense attorneys to do their best to represent their clients free from command influence. On the military commissions to date, defense attorneys have succeeded in challenging the very constitutionality of the commissions all the way to the Supreme Court. President Bush did not order the military to convict whomever he wanted but to provide each defendant a "full and fair trial."¹⁷ The military is bound to carry out his orders.

Civil libertarians, members of the media, and academics portray military commissions as some Frankenstein creation of the Bush administration. According to the *New York Times*, "[i]n the place of

¹⁴Wedgwood, *supra* note 11, at 331.

¹⁵See, e.g., Barbara Olshansky, *Secret Trials and Executions: Military Tribunals and the Threat to Democracy* (2006); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 *Notre Dame L. Rev.* 1335, 1362–64 (2004).

¹⁶10 U.S.C. §§ 801–946 (2006).

¹⁷See Bush Military Order, *supra* note 6, § 4(c)(2).

fair trials and due process," President Bush "has substituted ^{Document hosted at JD SUPRA[®]} and unaccountable system that any dictator would admire." ^{http://www.justice.com/press/2005/01/050101a.htm#050101a-092b-ed-8a21160c-ef} are anything but. Only pundits with little knowledge of American history or no contact with the military and its legal system would voice such a view.

Military commissions are the customary form of justice for prisoners who violate the laws of war. They have also served as courts of justice during occupations and in times of martial law. American generals have used military commissions in virtually every significant war from the Revolutionary War through World War II.¹⁹ As commander of the revolutionary armies, George Washington put John Andre on trial for spying in 1780 before a military commission.²⁰ Major Andre had been found, out of uniform, carrying the plans for West Point that he had received from Benedict Arnold. Washington's military "Court of Inquiry" convicted Andre and sentenced him to hanging. During the War of 1812, General Andrew Jackson employed military commissions in the areas under his command and used them again in an 1818 Indian War. These special military courts did not assume the name "commission" until the Mexican-American War, when General Winfield Scott established two types, one to help maintain law and order in the occupied parts of Mexico, the other to try violations of the laws of war, such as guerrilla warfare.

Military commissions were heavily used in the Civil War. Union generals established military commissions in early 1862 to try suspected Confederate operatives behind Union lines, to prosecute violations of the laws of war, and to administer justice in occupied areas. Later that year, President Lincoln proclaimed that "all rebels

¹⁸ Editorial, *A Travesty of Justice*, N.Y. Times, Nov. 16, 2001, at A24.

¹⁹ For a critical review of the history, see Louis Fisher, *Military Tribunals & Presidential Power: American Revolution to the War on Terrorism* (2005). A valuable source is Brian C. Baldrate, *The Supreme Court's Role in Defining the Jurisdiction of Military Tribunals: A Study, Critique, & Proposal for Hamdan v. Rumsfeld*, 186 Mil. L. Rev. 1 (2005). See also American Bar Association Task Force on Terrorism and the Law, *Report and Recommendations on Military Commissions* (Jan. 4, 2002). Law professors have written on both sides of the issue. See, e.g., David J. Bederman, *Article II Courts*, 44 Mercer L. Rev. 825 (1993); Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 Green Bag 2d 249 (2002); Harold Hongju Koh, *The Case Against Military Commissions*, 96 Am. J. Int'l L. 337 (2002).

²⁰ William Winthrop, *Military Law and Precedents* 832 (2d ed. 1920).

and insurgents, their aiders and abettors within the Union, and anyone "guilty of any disloyal practice affording aid and comfort to rebels" would be subject to martial law "and liable to trial and punishment by courts martial or military commissions."²¹ Congress gave the commissions jurisdiction over several other violations of law in the following year. After the North prevailed, Congress authorized the use of military commissions as courts of occupation in the military districts of the conquered South. Military commissions were used most notably to try Lincoln's assassins and the commander of the Andersonville prisoner of war camp. According to a definitive study of military law, military commissions tried about 2,000 cases during the Civil War, and about 200 during Reconstruction.²²

Several cases involving military commissions made their way to the Supreme Court during the Civil War. In *Ex Parte Vallandigham*,²³ the Supreme Court held that it did not have the jurisdiction to hear a challenge to a sentence imposed by a military commission,²⁴ and the Supreme Court did not hear another such challenge while the war went on. In *Ex Parte Milligan*,²⁵ the Court also addressed the legality of military commissions. The Court held that the government could not try civilians on loyal Union territory by military commission, if the civil courts were open and if the civilians had not associated with the enemy.²⁶ By implication, if Milligan had been an enemy combatant, not a civilian, a military commission *could* have tried him for war crimes. Lincoln's assassins were tried by a military commission convened by President Andrew Johnson and approved by an opinion of the attorney general, and a federal court rejected a challenge to its use.²⁷ The attorney general's opinion stated that

²¹ Proclamation Suspending the Writ of Habeas Corpus Because of Resistance to Draft (Sept. 24, 1862), in 6 *Life & Works of Abraham Lincoln* 203 (Marion Mills Miller ed., 1907).

²² Winthrop, *supra* note 20, at 834, 853.

²³ 68 U.S. (1 Wall.) 243 (1863).

²⁴ *Id.* at 251–53.

²⁵ 71 U.S. (4 Wall.) 2 (1866).

²⁶ *Id.* at 118–24.

²⁷ *Ex Parte Mudd*, 17 F. Cas. 954 (S.D. Fla. 1868) (unreported).

long practice under the rules of warfare permitted, ass²⁸ tried and executed by military commission.²⁸ Document hosted at JDSUPRA²⁸
<http://www.jdsupra.com/post/documentViewer.aspx?id=126f-b0ba-4483-992b-a48a21162cef>

With the end of Reconstruction, military commissions disappeared, though they were used sporadically in the Spanish-American War and World War I. World War II, however, witnessed the use of military commissions on an unprecedented scale, both to try war criminals and administer justice in occupied Germany and Japan. Military commissions administering law and order in occupied Germany heard hundreds of thousands of cases.²⁹ Military commissions were also extensively used to try enemy combatants for violating the laws of war, the most famous examples being the Nuremberg Tribunal that tried Nazi leaders after the war, and the International Military Tribunal for the Far East that tried Japanese leaders for war crimes. American military commissions tried 3,000 defendants in Germany and 1,000 defendants in Japan for war crimes.³⁰ Military commissions tried members of the enemy for “terrorism, subversive activity, and violation of the laws of war.”³¹

It is important to note that World War II military commissions operated both abroad and in the United States. FDR’s commission order sparked a lawsuit, and the resulting Supreme Court opinion supports the Bush military commissions today.³² Indeed, FDR took far more liberties with the constitutional law of the day than the current administration.

In June 1942, eight Nazi agents with plans to sabotage factories, transportation facilities, and utility plants landed in Long Island, New York, and Florida.³³ All had lived in the United States before

²⁸Military Commissions, 11 Op. Att’y Gen. 297 (1865).

²⁹See Eli E. Nobleman, *Military Government Courts: Law and Justice in the American Zone of Germany*, 33 A.B.A. J. 777, 777–80 (1947); Pitman B. Potter, *Legal Bases and Character of Military Occupation in Germany and Japan*, 43 Am. J. Int’l L. 323 (1949).

³⁰War Crimes, War Criminals, and War Crimes Trials 5–6 (Norman E. Tutorow ed., 1981).

³¹A. Wigfall Green, *The Military Commission*, 42 Am. J. Int’l L. 832, 833 (1948).

³²Ex Parte Quirin, 317 U.S. 1 (1942).

³³The facts of the Nazi saboteur case are recounted in *id.* at 19–22; Louis Fisher, *Nazi Saboteurs on Trial: A Military Tribunal & American Law* (2003); Eugene Rachlis, *They Came to Kill: The Story of Eight Nazi Saboteurs in America* (1961); Michael R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 Mil. L. Rev. 9 (1980); David Danelski, *The Saboteurs’ Case*, 1 J. S. Ct. Hist. 61 (1996).

the war, and two were American citizens. One decider was an informant. After first dismissing his story, the FBI soon thereafter created the plotters.³⁴ When their capture was revealed, members of Congress and the media demanded the death penalty, even though no law authorized capital punishment for their crime. FDR decided to try them by military commission.³⁵ He issued executive orders establishing the commission, defining the crimes, appointing its members, and excluding federal judicial review. The first executive order created the commission and defined its jurisdiction over aliens or foreign residents “who give obedience to or act under the direction of” an enemy nation, and attempt to enter the United States “preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war.”³⁶ He also ordered that the Nazis be barred from any other court.³⁷ FDR’s second order established the procedures for the military commissions. It was only one paragraph long. It required “a full and fair trial,” allowed the admission of evidence that would “have probative value to a reasonable man,” and required a two-thirds vote for conviction and sentence.³⁸

Because the Bush administration patterned its order on FDR’s, the critics of military commissions only have FDR to blame. But in truth, FDR’s handiwork intruded more on civil liberties than Bush’s, and under the law of the time was of more questionable constitutionality. In 1942, the governing case on the books was *Ex Parte Milligan*, requiring the government to use federal courts if the defendant had not associated with the enemy and the civilian courts were open.³⁹ Military counsel for the Nazi saboteurs challenged the commissions on just that ground—that the military commission could not exercise jurisdiction because courts were open, the defendants were not in a war zone, and a military commission violated the Articles of War enacted by Congress.⁴⁰

³⁴ See Danelski, *supra* note 33, at 64–65.

³⁵ *Id.* at 65.

³⁶ 7 Fed. Reg. 5,101 (1942).

³⁷ *Id.*

³⁸ *Id.* at 5,103.

³⁹ See *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 118–24 (1866).

⁴⁰ See Danelski, *supra* note 33, at 68–69.

different required elements—that the defendant in war is SUPRA ht
 to “collect certain information” concerning it to the enemy as
 “lurking or acting clandestinely, while acting under false pre-
 tensions.”⁴⁶ Extensive comments explain different terms and situations
 that might arise.⁴⁷ Civil libertarians might cavil about the details,
 but the Bush administration’s effort goes much farther than FDR’s
 orders to protect defendants’ civil liberties.

When the Court issued its unanimous opinion in *Ex Parte Quirin*
 months later, it narrowed *Milligan* and upheld FDR’s use of military
 commissions.⁴⁸ Unlike in *Milligan*, the saboteurs clearly had joined
 the Nazi armed forces.⁴⁹ Chief Justice Stone’s opinion found that
 Congress’ creation of the existing courts-martial system, and the
 lack of any legal code specifying the laws of war, did not preclude
 the use of military commissions.⁵⁰ He read the Articles of War—the
 precursor to today’s UCMJ—as authorization for military commis-
 sions, but didn’t reach the question whether FDR could have created
 them on his own. “By the Articles of War, and especially article 15,
 Congress has explicitly provided, so far as it may constitutionally
 do so, that military tribunals shall have jurisdiction to try offenders
 or offenses against the law of war in appropriate cases.”⁵¹

In later World War II cases, the Supreme Court continued to approve
 of military commissions. In *In re Yamashita*, General McArthur
 ordered a military commission to try the commanding Japanese
 general in the Philippines for failing to prevent his troops from
 committing brutal atrocities and war crimes.⁵² Appealing his convic-
 tion, General Yamashita sought a writ of habeas corpus from the
 Supreme Court, as he could because the trial was held on American
 territory in the Philippines. In 1946, Chief Justice Stone again rejected
 the challenge and found military commissions authorized by Con-
 gress in the Articles of War.⁵³ In two other cases, the Supreme Court

⁴⁶ 32 C.F.R. § 11.6(b)(6).

⁴⁷ *Id.* § 11.6.

⁴⁸ *Ex Parte Quirin*, 317 U.S. 1, 45–48 (1942).

⁴⁹ *Id.* at 21.

⁵⁰ *Id.* at 25.

⁵¹ *Id.* at 28.

⁵² *In re Yamashita*, 327 U.S. 1 (1946).

⁵³ *Id.* at 11–12.

refused to step in to review the convictions of Japanese an international war crimes tribunal run by McArthur of the sentences of Germans captured in China after the end of hostilities and tried by military commission.⁵⁴

Several issues decided in *Ex Parte Quirin*, *In re Yamashita*, and *Johnson v. Eisentrager* are worth noting because they bear on the Court's opinion in *Hamdan*.

First, claims that Bush's military commissions violate the Constitution because Congress has not approved them have little merit. It is true that Congress has not passed a law specifically authorizing military commissions in the war on terrorism, but it never did in World War II either. Instead, the *Quirin* Court relied on article 15 of the Articles of War, which Congress enacted in a 1916 overhaul of the rules of military justice. Article 15 is still on the books today and continues to authorize military commissions.⁵⁵ Now section 821 of the UCMJ, article 15 declared that the creation of courts-martial for the trial of American servicemen for violating military rules of discipline did not "deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that . . . by the law of war may be tried by military commissions."⁵⁶ In enacting section 821 in 1916 and again in 1950 as part of the UCMJ, Congress probably meant nothing more than to reserve to the president his existing authority to establish military commissions, rather than to specifically authorize them. Nonetheless, the *Quirin* Court read article 15 as direct congressional authorization of commissions. Congress

⁵⁴See *Hirota v. McArthur*, 338 U.S. 197 (1948); *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In a 1952 case in which a wife of an American serviceman in occupied Germany was tried by military tribunal for murdering her husband, the Supreme Court again upheld military commissions as authorized by Congress. See *Madsen v. Kinsella*, 343 U.S. 341, 348–49 (1952).

⁵⁵In fact, Congress reiterated the point again in 1996 in the legislative history to the War Crimes Act. The act, Congress observed, "is not intended to affect in any way the jurisdiction of any court-martial, military commission, or other military tribunal under any article of the Uniform Code of Military Justice or under the law of war or the law of nations." H.R. Rep. No. 104-698, at 12 (1996), reprinted in 1996 U.S.C.C.A.N. 2166, 2177.

⁵⁶10 U.S.C. § 821 (1956) ("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.").

chose not to disturb *Quirin* when it re-enacted article I, ^{Document hosted at JDSUPRA} of the UCMJ. <http://www.jdsupra.com/post/documentViewer.aspx?fid=991a12ef-b0ba-4483-992b-a48a21162cef>

Second, *Yamashita* rejected a claim that the federal courts ought to review whether military commissions, and their procedures, were militarily “necessary.” This claim arose in two ways. General Yamashita claimed that his military commission trial was illegal because it took place away from the battlefield and after active hostilities had ceased. The Court held that the decision whether to proceed with a military commission in those circumstances was a decision for the political branches.⁵⁷ Yamashita then argued that the procedures used in his trial were so different from those used in courts-martial as to be illegal. He relied on article 38 of the Articles of War, later re-enacted as section 38 of the UCMJ, which requires that procedures used in military commissions, “in so far as [the president] shall deem practicable,” use the rules of evidence used in federal district court. The *Yamashita* Court rejected this claim because the Articles of War did not apply to members of the enemy on trial for war crimes.⁵⁸ More important, the Court found that judicial review did not extend to the president’s determination of procedural rules for military commissions.⁵⁹

Third, *Eisenrager* rejected the claim that the Geneva Conventions governed the operation of military commissions. In their petition for a writ of habeas corpus, the German prisoners claimed that their trial violated the provisions of the 1929 Geneva Conventions. While the Court observed that the petitioners might be entitled to rights under the conventions, it found that “the obvious scheme of the Agreement is that responsibility for observance and enforcement of these rights is upon political and military authorities.”⁶⁰ The Geneva Conventions, according to the *Eisenrager* majority, could not be enforced by the federal courts. “Rights of alien enemies are vindicated under [the Geneva Conventions] only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.”⁶¹

⁵⁷ See *Yamashita*, 327 U.S. at 12–13.

⁵⁸ *Id.* at 18–19.

⁵⁹ *Id.* at 23.

⁶⁰ *Johnson v. Eisenrager*, 339 U.S. 763, 789 n.14 (1950).

⁶¹ *Id.*

Bush administration critics who are fans of *Youngstown* to explain their constitutional problems with military commissions. They believe that presidential power is at its height when acting with congressional support, which is clearly present in the UCMJ and then in Congress' Authorization for Use of Military Force (AUMF)⁶³ enacted in the days after 9/11. If the latter implicitly authorizes the detention of enemy combatants, it should also permit their trial. Congress supplemented those two sources of approval with the 2005 Detainee Treatment Act,⁶⁴ which allows an appeal to the federal appeals court in Washington, D.C., of the verdict of a military commission.⁶⁵ If Congress never approved of commissions in the first place, why would it create a review process for them? Congress has never shown any hostility toward military commissions, either historically, or in the war on terrorism.

Even if Congress had not authorized military commissions in the UCMJ, President Bush would still have authority to establish them under his constitutional authority as commander-in-chief.⁶⁶ Congress, of course, has its own authority to establish military courts under its constitutional authority to "define and punish . . . Offences against the Law of Nations" and to "make Rules for the Government and Regulation of the land and naval Forces."⁶⁷ Article II of the Constitution grants the president the "executive Power" and the job of commander-in-chief. While Congress has sometimes authorized military commissions itself, American history affords many examples of presidents and our military commanders creating them without congressional legislation.

The purpose of military commissions makes clear that they should remain within the discretion of the commander-in-chief. Waging war is not limited only to ordering which enemy formations to strike and what targets to bomb. It also involves forming policy on how to fight, how to detain enemy combatants, and how to sanction the

⁶²See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 869 (1952) (Jackson, J., concurring).

⁶³Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

⁶⁴Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2739, 2742 (2005).

⁶⁵*Id.* § 1005(e)(3)(A).

⁶⁶U.S. Const. art. II, § 2, cl. 1.

⁶⁷*Id.* art. I, § 8, cl. 10, 14.

enemy if it violates the rules of civilized warfare. Allow commanders to try and punish violators in order to assure the enemy to follow the rules in the future and assures our own troops that war crimes will not be tolerated. As the Supreme Court recognized in *Yamashita*, "An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war."⁶⁸ Military commissions also help commanders properly restore order in the aftermath of a conflict, and this can be an important way of making sure fighting does not flare up again.

This is not to license an anything-goes attitude, by any means. Important limitations restrict the scope of military commissions. The most significant is the limitation of their jurisdiction to war crimes. Military commissions have no constitutional authority to try Americans or non-Americans for garden variety crimes, civil wrongs, or any other offense unrelated to war. They can hear only prosecutions for violations of the laws of war. President Bush also exempted American citizens—previous military commissions tried everyone who violated the laws of war.⁶⁹ In *Quirin*, at least one of the Nazi saboteurs was an American citizen, but recall that the Supreme Court concluded that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful."⁷⁰ President Bush consciously chose to reject the breadth of military commissions as used in World War II and the Civil War.

This landscape changed when *Rasul v. Bush*⁷¹ reversed *Eisentrager* and held that federal jurisdiction extended to petitions for writs of habeas corpus brought by alien enemy combatants held abroad.⁷² But *Rasul* ultimately only served to illustrate the level of cooperation between the executive and legislative branches. In late 2005, pursuant to its authority to regulate the jurisdiction of the federal courts,⁷³

⁶⁸In re *Yamashita*, 327 U.S. 1, 11 (1946) (citing *Ex Parte Quirin*, 317 U.S. 1, 28 (1942)).

⁶⁹See Bush Military Order, *supra* note 6, § 2(a).

⁷⁰*Quirin*, 317 U.S. at 37.

⁷¹*Rasul v. Bush*, 542 U.S. 466 (2004).

⁷²*Id.* at 483–84.

⁷³U.S. Const. art. III, § 2, cl. 2.

Congress enacted the Detainee Treatment Act, *supra* note 64, § 1005(e)(1), which expressly overruled *Rasul*.⁷⁴ The act declared that “no court, officer, or judge shall have jurisdiction to hear or consider” any habeas or other actions that “related to any aspect of detention” of an alien detained at Guantanamo Bay, Cuba.⁷⁵

Instead, the Detainee Treatment Act created an appeals process for military commissions to civilian federal courts. It allows a defendant to appeal a verdict to the federal appeals court in Washington, D.C., and presumably from there to the Supreme Court.⁷⁶ If a defendant is sentenced to ten years or more, he can appeal as a matter of right; if the sentence is lower, the D.C. Circuit may take the appeal as a matter of its own discretion. But the act only allows for reversal if a military commission disobeys Defense Department regulations, and it permits challenges to the legality of the procedures themselves.⁷⁷ Congress ordered that the review procedures would apply to all cases “pending on or after the date of the enactment of this Act.”⁷⁸

II. Jurisdiction-Stripping and Military Commissions

Constitutional practice shows that there has been a substantial history of political branch interaction and cooperation on the subject of military commissions. Rather than a story of unilateral executive branch action, Congress has supported presidential use of commissions in at least three different ways: a) section 821 of the UCMJ, which recognizes military commissions;⁷⁹ b) the AUMF enacted on September 18, 2001, which authorized the president to use all necessary and appropriate force against those responsible for the September 11 attacks;⁸⁰ and c) the Detainee Treatment Act of 2005,⁸¹ which created a carefully crafted review process for military commission verdicts. Again, that is not to say that President Bush could not use

⁷⁴ Detainee Treatment Act, *supra* note 64, § 1005(e)(1).

⁷⁵ *Id.*

⁷⁶ *Id.* § 1005(e)(3)(A).

⁷⁷ *Id.* § 1005(e)(3)(D).

⁷⁸ *Id.* § 1005(h)(2).

⁷⁹ See 10 U.S.C. § 821.

⁸⁰ See *supra* note 63.

⁸¹ See *supra* note 64.

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 military commissions on his own authority, once war broke out, several presidents had employed them as a matter of course without any specific congressional authorization. But it was unnecessary for the Court to reach the issue of the president's constitutional powers since Congress was on record as supporting military commissions.

And until this year, the courts have generally deferred to the political branches in the use of military commissions. To summarize, in *Quirin*, the Court construed the identical predecessor to section 821 of the UCMJ as an affirmative congressional authorization for military commissions,⁸² which Congress could have changed when it enacted the UCMJ after World War II. In *Yamashita*, the Court held it could not review the procedures used by military commissions.⁸³ In *Eisentrager*, the Court found that any standards imposed by the Geneva Conventions were not to be enforced by the federal courts, but by the political branches.⁸⁴ And in *Hamdi*, the Court had even read the AUMF in a broad manner to include the detention of enemy combatants without criminal trial until the end of hostilities, even though its authorization to use force did not specifically enumerate the power to detain.⁸⁵ If the power to use force against the enemy includes the power to detain, certainly it would include the authority to conduct a war crimes trial by military commission.

Nevertheless, the Supreme Court in *Hamdan* rejected all of that history, political branch cooperation, and judicial precedent. Here, I wish to focus on the extent to which the Court was so intent on blocking military commissions that it exercised its judicial power in unprecedented ways. A sign of how "activist" or outcome oriented a decision is might be seen in the violence it does to the existing body of constitutional principles and precedents. On this score, the *Hamdan* Court displayed a lack of judicial restraint that would have shocked its predecessors, signaling a dangerous judicial intention to intervene in wartime policy.

The first area where the Court put its intentions on display was its treatment of the Detainee Treatment Act's effort to remove federal

⁸² *Ex Parte Quirin*, 317 U.S. 1, 28 (1942).

⁸³ *In re Yamashita*, 327 U.S. 1, 23 (1946).

⁸⁴ *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950).

⁸⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004).

jurisdiction over habeas cases, like *Hamdan's* origin. Document hosted at <http://www.jdsupra.com/post/00congressivespeakerclears-terms-83-us-274-4821162> ⁸⁵ *Guantanamo Bay, Congress speaker in clear terms*, 83 U.S. 274, 482 (1862), that the Court had previously interpreted to immediately terminate jurisdiction over pending and future cases. A removal of jurisdiction eliminates the power of the Court to issue a final judgment in a case. If a case is still pending at any level of trial or appeal when Congress strips jurisdiction, a court must immediately dismiss it. In “an ancient and unbroken line of authority,” in Justice Scalia’s words, the Court had customarily applied provisions removing jurisdiction immediately to pending cases.⁸⁶ Rather than presume jurisdiction to remain in such cases, the Court has usually required Congress to clearly reserve when it wishes the courts to continue to exercise jurisdiction in pending cases. As the Court had said in dismissing a case where a jurisdiction-stripping provision was enacted after the Court had granted certiorari, “[t]his rule—that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law—has been adhered to consistently by this Court.”⁸⁷

Ex Parte McCordle remains the foundational case in this area, one with clear analogies to the Detainee Treatment Act. McCordle had been imprisoned during Reconstruction by the military government in Mississippi for publishing libelous and incendiary articles that incited violence.⁸⁸ In 1867, before McCordle’s imprisonment, Congress had vested the federal courts with the authority to issue writs of habeas corpus when a petitioner was detained in violation of federal law. McCordle appealed to the circuit court, where he lost, and to the Supreme Court. After the Supreme Court heard argument but before any decision had issued, Congress enacted a statute repealing the Supreme Court’s appellate jurisdiction over cases brought under the 1867 Act.⁸⁹ Congress was concerned that the Court might use *McCordle* as the vehicle for finding Reconstruction

⁸⁶ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2810 (2006) (Scalia, J., dissenting) (citing *Bruner v. United States*, 343 U.S. 112, 114–17 (1952)).

⁸⁷ *Bruner*, 343 U.S. at 116–17.

⁸⁸ *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506 (1868).

⁸⁹ See *id.* at 512.

unconstitutional, a result hinted at by its decision in *EJLB SUPRA* ⁹⁰ that “Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”⁹¹

What was good enough for the Court in *McCardle*, and every Supreme Court since, apparently was not good enough for the *Hamdan* majority. Justice Stevens found that the removal of jurisdiction was ambiguous, because the provision in the Detainee Treatment Act creating the new appeals process for military commissions and detention decisions expressly applied to all cases “pending on or after the date of . . . enactment.”⁹² Stevens held that Congress’ failure expressly to apply this language to the stripping of jurisdiction over habeas claims originating from Guantanamo Bay amounted to a rejection of this language.⁹³ If Congress had really wanted to strip jurisdiction over Hamdan’s case, Justice Stevens’ logic went, then it should have included the “pending on or after the date of enactment” language to all three provisions: jurisdiction stripping; review of military commission appeals; and review of detention decisions.

The problem is that the Court had never imposed such a requirement before on a jurisdiction-stripping provision. In an unchallenged line of cases, the Court had required a clear statement when Congress chose to *exclude* pending cases from a jurisdiction-stripping provision, rather than the opposite presumption favored by Justice Stevens.⁹⁴ As Justice Scalia observed, there does not appear to be a single case in Anglo-American legal history in which a court refused to give immediate effect to a jurisdiction-stripping statute in pending cases.⁹⁵ Ironically, Justice Stevens had written in one of the Court’s more recent jurisdiction-stripping discussions that “[w]e have regularly applied intervening statutes conferring or ousting jurisdiction,

⁹⁰ See Jesse H. Choper et al., *Constitutional Law—Cases, Comments, Questions* 42 (10th ed. 2006).

⁹¹ *McCardle*, 74 U.S. at 514.

⁹² See Detainee Treatment Act, *supra* note 64, §§ 1005(h)(2), (e)(2)–(3).

⁹³ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2762–69 (2006).

⁹⁴ See *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994) (citing *Bruner v. United States*, 343 U.S. 112, 116–17 (1952)); *Hallowell v. Commons*, 239 U.S. 506 (1916); *Republic of Austria v. Altmann*, 541 U.S. 677, 693 (2004).

⁹⁵ *Hamdan*, 126 S. Ct. at 2812 (Scalia, J., dissenting).

whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed.⁹⁶ The better view is that Congress included the “pending on or after the date of enactment” language because there was no settled case law, as there was for jurisdiction-stripping, on whether the creation of a new appellate review system would apply to pending as well as future cases.

III. Military Commissions and the Laws of War

Refusal to obey a clear congressional command against deciding *Hamdan* was not the only example of the Court’s rush to judgment and rejection of settled practice. The *Hamdan* majority held that Bush’s military commissions did not meet the procedural standards set out in the UCMJ. The justices found that while the UCMJ recognizes the president’s ability to create military commissions, it also requires the president to make a finding explaining why a deviation from courts-martial is needed. In issuing his November, 2001, order establishing military commissions, President Bush had found that the rules for district courts and courts-martial were impracticable, tracking the language in article 36 of the UCMJ.⁹⁷ The Court held that “the ‘practicability’ determination the president has made is insufficient to justify variances from the procedures governing courts-martial.”⁹⁸ The Court observed that “[n]othing 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.”⁹⁹ Justice Stevens was particularly disturbed by the rule permitting a military commission to exclude a defendant from a hearing involving classified information. The “jettisoning of so basic a right” as the right to be present, he wrote, “cannot lightly be excused as ‘practicable.’”¹⁰⁰

Hamdan’s holding on this point is clearly in conflict with *Quirin* and *Yamashita*. In *Quirin*, the Court rejected challenges to the illegality of

⁹⁶ Landgraf, 511 U.S. at 274.

⁹⁷ See Bush Military Order, *supra* note 6, § 1(f); 10 U.S.C. § 836(a) (1990) (UCMJ art. 36(a)).

⁹⁸ *Hamdan*, 126 S. Ct. at 2791.

⁹⁹ *Id.* at 2792.

¹⁰⁰ *Id.*

the military commission used to try the Nazi saboteur, *JD SUPRA* id not review FDR's procedures. It limited its review to whether the commission could properly exercise jurisdiction over the case, and went no farther. It certainly did not demand that FDR issue rules that were consistent with those for courts-martial, or make a sufficient showing of impracticability as to individual commission procedures. *Yamashita* also refused to exercise any review over military commission procedures, but instead limited its inquiry to whether the military commission had jurisdiction over the case.¹⁰¹

The Court's refusal to accept the president's determination of the need for military commission procedures points to a deeper refusal by the *Hamdan* majority to follow the Court's customary deference to the political branches in wartime. Justice Stevens put on display his intent to ignore the political branches' formal and functional superiority in setting war policy in his rejection of the government's claim that conspiracy in war crimes is a chargeable offense. The defects in *Hamdan*'s charges "are indicative of a broader inability on the Executive's part here to satisfy the most basic precondition—at least in the absence of specific congressional authorization—for establishment of military commissions: military necessity."¹⁰² The majority substituted its own view that the rights of an al Qaeda terrorist suspected of war crimes to see all the evidence should come first. It then decided for itself that the demands of the war on terrorism did not require the use of military commissions outside an active battlefield to try enemy combatants for crimes committed before 9/11.

This runs counter to long-held understandings of the allocation of the power to prosecute wars. The text, structure, and history of the Constitution establish that the Founders entrusted the president with the primary responsibility, and therefore the power, to use military force in situations of emergency. Article II, Section 2 states that the "President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." He is further vested with all of "the executive Power" and the duty to

¹⁰¹See *supra* notes 57–59 and accompanying text.

¹⁰²*Hamdan*, 126 S. Ct. at 2785.

execute the laws.¹⁰³ Those powers give the president broad constitutional authority to use military force in response to threats to national security and foreign policy of the United States. The power of the president is at its zenith under the Constitution when directing military operations of the armed forces, because the power of commander-in-chief is assigned solely to the president.

Several significant Framers during the ratification period observed that one of the chief virtues of the presidency was its ability to effectively wage war. As Hamilton wrote in *The Federalist*, “[e]nergy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks.”¹⁰⁴ This point applies directly to the war context. Wrote Hamilton: “Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms an usual and essential part in the definition of the executive authority.”¹⁰⁵ Future Supreme Court Justice James Iredell argued that “[f]rom the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, d[i]spatch, and decision, which are necessary in military operations, can only be expected from one person.”¹⁰⁶ While the issue of whether the president or Congress can start a war remains controversial today, with both sides of the debate appealing to the original understanding, there does not seem to have been any dispute that once war had begun, the president as commander-in-chief was best suited to fight it.

Until *Hamdan*, it had been the consistent practice of the federal courts to stay out of disputes over wartime policy. In *The Prize Cases*, for example, the Court explained that, whether the president “in

¹⁰³U.S. Const. art. II, §§ 1, 3.

¹⁰⁴The Federalist No. 70, at 471 (Jacob E. Cooke ed., 1961) (Alexander Hamilton).

¹⁰⁵The Federalist No. 74, at 501 (Alexander Hamilton).

¹⁰⁶Jonathan Elliot, ed., 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 107 (1836); see also 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1491 (1833) (in military matters, “[u]nity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power”).

fulfilling his duties as Commander-in-chief” was justified in the southern States as belligerents and instituting a military government over them as a question “to be decided by him.”¹⁰⁷ The Court could not question the merits of his decision, but must leave evaluation to “the political department of the Government to which this power was entrusted.”¹⁰⁸ As the Court also observed, the president enjoys full discretion in determining what level of force to use. *Hamdan* rejects the traditional deference that courts have observed toward decisions of military necessity and threatens to make, as Justice Thomas observed, the Court “the ultimate arbiter of what is quintessentially a policy and military judgment, namely, the appropriate military measures to take against those who ‘aided the terrorist attacks that occurred on September 11, 2001.’”¹⁰⁹

The five justices in *Hamdan* compounded these mistakes by declaring that military commissions must comply with Common Article 3 of the Geneva Conventions. They rejected out of hand the usual judicial deference to presidential interpretation of treaties.¹¹⁰ It does not appear that the Court has ever rejected an executive branch’s interpretation of a law of war treaty, especially during wartime itself. Justice Stevens did not cite any examples to the contrary. The Court’s substantive analysis of the conventions was, quite frankly, weak. It did not come to grips with the basic fact that al Qaeda has never signed the Geneva Conventions and therefore does not benefit from its protections. Rather, the Court simply declared that when Common Article 3 says it applies to conflicts “not of an international character,” that means all wars not involving nations, rather than internal civil wars.¹¹¹ It did not examine the events surrounding the adoption of the 1949 conventions, the substantial commentary observing that the Geneva Conventions did not apply to international terrorist groups, or President Reagan’s decision to reject the additional 1977 protocols to the conventions because they provided

¹⁰⁷The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862) (emphasis in original).

¹⁰⁸*Id.*

¹⁰⁹*Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2838 (2006) (Thomas, J., dissenting) (quoting AUMF, 115 Stat. 224).

¹¹⁰*Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982); *United States v. Stuart*, 489 U.S. 353, 369 (1989).

¹¹¹*Hamdan*, 126 S. Ct. at 2795–96.

protections to terrorists.¹¹² Instead, the *Hamdan* majority cited Bentham's use of the word "international" to mean "between nations," rather than to refer to global issues distinct from domestic ones.¹¹³ But there is no evidence, and the Court did not refer to any, that this understanding of the word was held by those American officials who signed or ratified the conventions. Interpreting "international" in this way is also at odds with common understandings of the word today. According to Stevens' logic, for example, "international" environmental law would encompass only environmental issues between nations, but not issues related to global commons. And "international" human rights would be an utter contradiction in terms.

Again, the Court trampled its own precedents to block military commissions. *Johnson v. Eisentrager* had found that the president and Senate had never intended the 1929 Geneva Conventions to provide benefits to enemy combatants in our own courts, but instead any violations would be cured by political and diplomatic means.¹¹⁴ Even if the Geneva Conventions might provide protection to al Qaeda, the Court once believed that this was a question for the president and Congress, not the courts, to decide. The Supreme Court had never found the Geneva Conventions to be self-executing treaties.

To get around *Eisentrager*, the five justices in the *Hamdan* majority made some serious and basic errors. For the Court to decide that Common Article 3 of the conventions—which requires that the trials of a detainee are "pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples"—applies to military commissions, it must have concluded either that the Geneva Conventions themselves changed, or that the UCMJ changed the applicability of the conventions. The Court seemed to suggest that since *Hamdan* relied on the 1949 Geneva Conventions, rather than the 1929 Geneva Conventions, that *Eisentrager* did not control.¹¹⁵ The 1949 Geneva Conventions, however, contain exclusive, non-judicial, enforceability provisions just as the 1929 conventions did, and do not require any mechanism

¹¹² *Id.* at 2795–98.

¹¹³ *Id.* at 2796.

¹¹⁴ *Id.* at 2794 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950)).

¹¹⁵ *Id.* at 2794.

for domestic judicial enforcement.¹¹⁶ The *Hamdan* Court SUPRA at the Geneva Conventions are incorporated through section 821 of the UCMJ, which recognizes the jurisdiction of military commissions over “offenses that by statute or by the law of war may be tried by such commissions.”¹¹⁷ But this raises the question why the Geneva Conventions’ reliance on political and diplomatic, and not judicial, remedies also is not considered part of the laws of war for purposes of section 821.

Perhaps because of this difficulty, the Court assumed for purposes of argument that the 1949 Geneva Conventions entailed the same remedial mechanisms as the 1929 Geneva Conventions.¹¹⁸ But if the Geneva Conventions held constant, then any change in the application of Common Article 3 must have been the result of a difference in Congress’ understanding when it enacted section 821. Neither *Quirin*, nor *Yamashita*, nor *Eisentrager* construed section 821’s predecessor to impose any Geneva Convention standards upon the operation of military commissions. As the Court incorporated Common Article 3 through section 821, the key moment of decision on the part of Congress must have been when it enacted the UCMJ, which the Court must have inferred was a rejection of *Eisentrager*.

The problem with the Court’s approach, however, is that events could not have happened that way. Congress enacted the UCMJ on May 5, 1950.¹¹⁹ When it did so, it re-enacted section 821’s recognition of military commissions unchanged from its text at the time of *Quirin*.¹²⁰ The Court presented no evidence *at all* that Congress understood in 1950 that the UCMJ overruled *Eisentrager* and applied Geneva Common Article 3 to non-state actors. This would have been impossible, because *Eisentrager* was decided on June 5, 1950.¹²¹ In other words, Congress could not have understood the UCMJ to

¹¹⁶See generally Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Between the United States of America and Other Powers Relating to Prisoners of War, July 27, 1929, 47 Stat. 2021.

¹¹⁷See *Hamdan*, 126 S. Ct. at 2778–80.

¹¹⁸*Id.* at 2794.

¹¹⁹Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (May 5, 1950) (UCMJ).

¹²⁰UCMJ ch. 169, § 1 (art. 21), 64 Stat. 115 (May 5, 1950).

¹²¹*Johnson v. Eisentrager*, 339 U.S. 763 (1950).

reject *Eisentrager's* rule on the non-enforceability of the Geneva Conventions, because *Eisentrager* did not announce a rule that Congress had acted. Further, Congress could not have intended to incorporate Common Article 3 because it had not yet become a treaty obligation of the United States by the time Congress had enacted the UCMJ. While the Geneva Conventions were signed in 1949, the United States did not ratify them until 1955.¹²² This glaring mistake of simple chronology shows how far the five justices in *Hamdan* were willing to go to impose their preferred policies on the war on terrorism.

Hamdan itself is certainly not the broad constitutional defeat for the Bush administration's terrorism policies that many in the media claimed in its immediate aftermath. The Court was addressing only the use of military commissions. It did not hold them unconstitutional, nor did it revisit its *Hamdi* decision two years ago, which allows the government to hold terrorists until the end of fighting. Even if no military commissions were held, no al Qaeda terrorists at Guantanamo Bay would be back on the street. Justice Stevens' majority opinion carefully did not address the president's inherent constitutional authority. It limited itself to interpreting two provisions of the UCMJ, one that declared that passage of the UCMJ was not meant to deprive military commissions of their usual jurisdiction, and the second that required the use of courts-martial procedures except where not practical.¹²³ None of the justices doubted that Congress could restore the place of military commissions by passing a more explicit authorization than the one it passed on September 18, 2001.

The question, however, is why Congress should have to enact an enumerated law in the war powers area. The Court considered the AUMF's broad authorization to use all necessary and appropriate force sufficient to uphold the detention of enemy combatants without criminal charge, even though the law did not specifically grant the power of detention and the Anti-Detention Act appeared to prohibit

¹²²The United States signed the Geneva Conventions on August 12, 1949 and ratified them on August 2, 1955. See 6 U.S.T. 3316.

¹²³See generally *Hamdan*, 126 S. Ct at 2749–99 (limiting its analysis to executive authority under UCMJ art. 21 (10 U.S.C. § 821 (1956)) and UCMJ art. 36 (10 U.S.C. § 836 (1990))).

non-criminal detention.¹²⁴ Obviously, Congress cannot anticipate every circumstance that may arise in the future. It is one of the reasons, along with the executive branch's advantages in expertise and structural organization, why Congress delegates authority in the first place. Those who consider themselves legal progressives generally support the administrative state and vigorously defend broad grants of authority from Congress to the agencies of the executive branch. Agencies such as the Federal Communications Commission or the Environmental Protection Agency exercise powers over broad sectors of the economy under the vague congressional mandate that they regulate to protect the public interest or "public health."¹²⁵ Those agencies make decisions with enormous effects, such as which parts of the radio spectrum to sell, or how much pollution to allow into the air, all with little formal guidance from Congress.

Yet, when Congress delegates broad authority to the president to defend the nation from attack, the defenders of the administrative state demand that Congress list every power it wishes to authorize. While the threats to individual liberty may be greater in this setting, it makes little sense to place Congress under a heavier burden to describe every conceivable future contingency that might arise when we are fighting war, perhaps the most unpredictable and certainly most dangerous of human endeavors. Rather, we would expect and want Congress to delegate power to that branch, the presidency, that is best able to act with speed to threats to our national security. War is too difficult to plan for with fixed, antecedent legislative rules. War also is better run by the executive, which is structurally designed to take quick, decisive action. If the AUMF authorized the president to detain and kill the enemy, it ought to include the power to try the enemy for war crimes as well. *Hamdan* shows an inconsistent approach to review of delegation from Congress to president, one that seems oddly inverted given the stakes at issue for the nation's security.

Hamdan portends much more than whether the administration can subject ten or twenty al Qaeda suspects to military commission trial. It clearly announces that the imperial judiciary respects few

¹²⁴Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

¹²⁵See, e.g., Whitman v. American Trucking Association, 531 U.S. 457, 472 (2001).

limits on how far it is willing to extend its powers of judicial review. Justices used to understand the inherent uncertainties of war, and the limits of their own abilities. No longer. But here, unlike with abortion or religion, the Supreme Court does not have the last word. Congress and the president can enact a simple law putting the Court back in its traditional place, and our war effort will probably go forward with its usual combination of presidential initiative and general congressional support. The Supreme Court may believe it is protecting the Constitution by requiring Congress to pass a law signaling its support for Bush's antiterrorism policies, but all it has done is interfered with the working arrangement that the president and Congress had already reached. As with the 2005 Detainee Treatment Act, the justices will have merely forced the president and Congress to expend significant political time and energy to overrule them—time and energy better spent on taking the fight to al Qaeda.

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