

**THE FUTURE OF JUDICIAL REVIEW FOR THE
DETAINEES OF THE WAR ON TERRORISM AFTER
HAMDAN V. RUMSFELD
MEHMET MÜNÜR***

I. INTRODUCTION

Following the events of September 11, 2001, and the invasion of Afghanistan, the detainment of suspected terrorists in Guantanamo Bay Naval Base became necessary.¹ After years of detention at these camps, the United States military finally started trying those suspected of terrorism.² Among those tried was Salim Ahmed Hamdan, a Yemeni national,³ and the bodyguard and driver of Osama bin Laden.⁴ His case not only determined the future of the Guantanamo detainees in but also reestablished the balance of power between the branches of the federal government.

The United States Supreme Court achieved very little in *Hamdan*⁵—simply signaling to the President that he needs Congressional approval to try the detainees of the War on Terrorism. The immediate effect of *Hamdan* was the finding of unconstitutionality for the military commissions set up by the President to try the detainees of the War on Terrorism.⁶ The short-term effect of the ruling was the hasty creation of the Military Commissions Act (MCA) of 2006 to govern detainee trials.⁷ In the long term, *Hamdan* effectively decreases the detainees' rights because the Court has taken itself out of the equation. Furthermore,

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¹ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2759 (2006).

² *Id.*

³ *Id.*

⁴ *Id.* at 2761.

⁵ *Hamdan* is a seminal case. It has led to at least two symposia, one panel, and countless articles. This Article is one of the few criticizing the Supreme Court on how little it has accomplished.

⁶ *Hamdan*, 126 S. Ct. at 2759 (“the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions.”).

⁷ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, and 28 U.S.C.).

challenges to the constitutionality of the MCA will likely not succeed due to the deference given to the combined actions of the President and Congress under the *Youngstown Sheet & Tube, Co. v. Sawyer*⁸ three-part test.⁹

Part II of this Note examines the legislation and cases leading to *Hamdan*. Part III discusses the facts in the case as it progressed through the trial and appellate stages. Part IV examines the strengths and weaknesses of the majority, plurality and dissenting opinions. Part V analyzes *Hamdan*'s significance, the legislation that followed in its wake, and the continuation of *Hamdan*'s saga in the federal courts. Finally, Part VI will conclude this Note.

II. BACKGROUND

A. Separation of Powers Argument under *Youngstown*.

In *Youngstown Sheet & Tube*, the Court was faced with judging the constitutionality of President Truman's order to take over and operate the steel mills that were indispensable for the Korean War.¹⁰ Justice Black, writing for the majority, argued that "tak[ing] possession of private property in order to keep labor disputes from stopping production . . . is a job for the Nation's lawmakers, not for its military authorities."¹¹

Justice Jackson, however, took a more flexible approach to the dilemma between the balance of powers in the federal government. His concurrence continues to influence the Supreme Court's view on how our democracy must reconcile the conflict between security and liberty in times of national insecurity.¹² Justice Jackson advocated for a "symbiotic relationship" between the branches of government and rejected Justice Black's formalistic view.¹³ Instead, he proposed a three-tiered continuum of presidential power in which the President's power is: (1) at its strongest when Congress impliedly or expressly authorized him;¹⁴ (2) in the "zone of twilight" when the President acts "in absence of either a congressional

⁸ 343 U.S. 579 (1952).

⁹ *Id.* at 634–55 (Jackson, J., concurring).

¹⁰ *See id.* at 582 (majority opinion).

¹¹ *Id.* at 587.

¹² Sarah H. Cleveland, *Wartime Security and Constitutional Liberty: Hamdi Meets Youngstown: Justice Jackson's Wartime Security Jurisprudence and the Detention of Enemy Combatants*, 68 ALB. L. REV. 1127, 1127–28 (2005).

¹³ *Id.* at 1129.

¹⁴ *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J. concurring).

grant or denial of authority”;¹⁵ or (3) at its lowest ebb when acting contrary to the “express[] or implied will of Congress.”¹⁶ However, Justice Jackson referred to this tripartite continuum as an “over-simplified grouping of practical situations” for good reason—it is unlikely to make up for all the possible scenarios.¹⁷

Justice Jackson’s concurrence summarized the “pragmatic” and “flexible view of differentiated governmental power,”¹⁸ which “enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”¹⁹ This reciprocity may require the “coordinate Branches [to] converse with each other on matters of vital common interest.”²⁰ However, congressional communication to the President must be meaningful, clear, explicit, and unambiguous.²¹ Therefore, communication between the branches is required and, in its absence, the Court may have to prod the two branches to converse.

Furthermore, Justice Jackson compared the American method of distributing power to European constitutional systems.²² He cautioned against the dangers inherent in a system where the President could suspend individual rights.²³ Though it is unlikely that the fate of the American democracy will follow that of the Weimar Republic’s,²⁴ such dangers are more pronounced when the President is in office with his political party acquiescing to his every move without keeping his powers in check. However, such a situation is not beyond the realm of possibilities because Justice Jackson argued that free government is preserved when “the Executive [is] under the law, and that the law [is] made by parliamentary

¹⁵ *Id.* at 637.

¹⁶ *Id.*

¹⁷ *Id.* at 635.

¹⁸ *Mistretta v. United States*, 488 U.S. 361, 381 (1989).

¹⁹ *Id.* (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring)).

²⁰ *Id.* at 408.

²¹ Cleveland, *supra* note 12, at 1131–32.

²² *Youngstown Sheet & Tube Co.*, 343 U.S. at 652. “Finally, Hitler persuaded President Von Hindenberg to suspend all such rights, and they were never restored.” *Id.* at 651.

²³ *Id.*

²⁴ See PETER C. CALDWELL, POPULAR SOVEREIGNTY AND THE CRISIS OF GERMAN CONSTITUTIONAL LAW: THE THEORY AND PRACTICE OF WEIMAR CONSTITUTIONALISM 5 (1997) (discussing the demise of the Weimar Republic).

deliberations.”²⁵ Take parliamentary deliberations out of the equation and the Executive is no longer under the law.

B. Pre-World War II Era Case with Military Commissions.

In *Ex Parte Milligan*,²⁶ the issue was whether the military tribunal, which sentenced Milligan to be hanged, had the power and authority to try and to sentence him.²⁷ Milligan was a citizen of the United States, lived for twenty years in Indiana, and, during that time, allegedly conspired to violently overthrow the government.²⁸

The Court made a number of assertions vital to the Court’s decision in *Hamdan*. First, the Court reiterated the importance of the Constitution and the Bill of Rights to a fair trial.²⁹ The Court further argued that when civil courts were open for the administration of criminal justice, military commissions by the President could not be justified.³⁰

While the majority held that the Constitution forbade military tribunals in the absence of war or the threat of war,³¹ Chief Justice Samuel Chase’s dissent argued that military tribunals could be convened to try citizens if Congress authorized them.³² The majority not only argued that military commissions were confined to times when it would be impossible to administer criminal justice but that it should also be limited in duration and limited to the theatre of war.³³ The arguments of duration, location, and authorization by Congress will play a major role in *Hamdan*, as well as in future detainee cases.

²⁵ *Youngstown Sheet & Tube Co.*, 343 U.S. at 655.

²⁶ 71 U.S. 2 (1866).

²⁷ *Id.* at 107, 118.

²⁸ *Id.* at 107, 118, 130.

²⁹ *Id.* at 119–20 (“By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people.”).

³⁰ *Id.* at 121 (“[L]aws and usages of war’ . . . can never be applied to citizens in states which have upheld the authority of the government, and where the Courts are open and their process unobstructed.”).

³¹ *Id.* at 126–27.

³² *Id.* at 136–37 (Chase, J., dissenting).

³³ *See id.* 127 (majority opinion). “As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the Courts are reinstated, it is a gross usurpation of power.” *Id.*

C. *World War II Cases with Military Commissions.*

1. *Ex parte Quirin.*

Possibly the most important case in this era is *Ex parte Quirin*.³⁴ Here, the Court adjudicated the constitutionality of the detention of eight petitioners for a trial by military commission appointed by the order of the President.³⁵ Each petitioner was born in Germany but lived in the United States before returning to Germany from 1933 to 1941.³⁶ In addition, the petitioners trained in a sabotage school near Berlin soon after the start of World War II; traveled to New York in a submarine; carried explosives to sabotage ammunition factories; and discarded their German uniforms upon landing in the United States.³⁷ They were charged with a violation of the law of war; specifically, spying and conspiracy.³⁸ The government argued that, according to the President's order, they must be denied access to the federal courts because they were enemy aliens and had entered U.S. territory as enemy belligerents.³⁹

The Court ruled that the exercise of the powers of the President should not be set aside "in time of war and of grave public danger . . . without clear conviction that they are in conflict with the Constitution or laws of Congress."⁴⁰ The Court relied on the laws enacted by Congress—10 U.S.C. §§ 1471–1593 and the Espionage Act of 1917—which gave the President the right to create military commissions.⁴¹ The Court stated that it was not concerned with a case where Congressional approval was not present.⁴² Therefore, if we were to apply the *Youngstown* tripartite system to *Quirin*, the powers of the President would be in the first category where they are the strongest.

Furthermore, the Court also pointed out that the conduct of war and the seizure, detention, and trial of enemies attempting to stop the war efforts

³⁴ 317 U.S. 1 (1942).

³⁵ *Id.* at 18–20.

³⁶ *Id.* at 20.

³⁷ *Id.* at 21.

³⁸ *Id.* at 23.

³⁹ *Id.* at 24–25.

⁴⁰ *Id.* at 25.

⁴¹ *Id.* at 26–27.

⁴² *Id.* at 29 (“[C]ongress has authorized trial of offenses against the law of war before such commissions. We are concerned only with the question whether it is within the constitutional power of the National Government to place petitioners upon trial before a military commission for the offenses with which they are charged.”).

were intricately linked.⁴³ It noted that the law of war made a distinction between those wearing uniforms and those that did not, which ultimately determined whether they would be tried in military tribunals or civil court.⁴⁴ Ultimately, the holding that these eight men were enemy belligerents instead of lawful combatants carried the day and precluded constitutional protections.⁴⁵

In addition, the Court construed the Act of Congress of April 10, 1806, and concluded that the Fifth and Sixth Amendments may be used in death penalty cases against spies when not associated with the American Armed Forces.⁴⁶ Furthermore, the Court concluded that the military commission was lawfully construed and the eight men were lawfully held in custody.⁴⁷ Therefore, *Quirin* rightly stands for the proposition that when Congress authorizes military commissions for use by the President, enemy belligerents without uniforms can be tried in military commissions instead of civil courts.

2. *In re Yamashita*.

Another important World War II case is *In re Yamashita*.⁴⁸ Yamashita was the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippines.⁴⁹ He was charged with violating the law of war because he failed to his failure to control the operations of the members of the Japanese Army from committing atrocities under his command.⁵⁰ At trial, six United States Army lawyers represented Yamashita; nevertheless, he was still found guilty and sentenced to death by hanging.⁵¹ Yamashita argued in his habeas appeal

⁴³ *Id.* at 28–29, 31.

⁴⁴ *Id.* at 30–31 (“[L]aw of war draws a distinction between . . . those who are lawful and unlawful combatants. Unlawful combatants are . . . subject to trial and punishment by military tribunals.”).

⁴⁵ *Id.* at 31.

⁴⁶ *Id.* at 41–45 (“We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury.”).

⁴⁷ *Id.* at 48.

⁴⁸ 327 U.S. 1 (1946).

⁴⁹ *Id.* at 5.

⁵⁰ *Id.* at 13–14.

⁵¹ *Id.* at 5.

that the military commission was not lawfully created, since the hostilities were over; the charge against him did not show a violation of the law of war; and the commission that tried him lacked authority and jurisdiction because its procedures of evidence were in violation of the Articles of War and the Geneva Convention.⁵²

The Court held, similar to *Quirin*, that the military commission had the proper authority from the President, was in conformity with legislation sanctioning the creation of tribunals for trying enemy combatants, and Yamashita's remaining contentions were without merit.⁵³ Furthermore, the Court stated that the authority to convene a military commission after the cessation of hostilities depended on the political branches, and that an opposite result would create problems with "the practical administration of the system of military justice under the law of war."⁵⁴ In other words, the Court was not willing to interfere in the conduct of war and trials of military personnel when the coordinate branches were in agreement. Therefore, under a *Youngstown* analysis, the *Yamashita* decision would rank in the first category—much like *Quirin*.

The majority also ruled that the use of hearsay evidence and opinion evidence used by the prosecution against Yamashita did not violate the Articles of War since they applied to American military personnel and not to enemy combatants.⁵⁵ The Court further held that the Geneva Convention would not apply to make Yamashita's proceedings of the same quality as those given to American military personnel because the section of the Convention that Yamashita argued applied to "offenses committed while a prisoner of war," and not before capture—as was the case with General Yamashita.⁵⁶ Therefore, the Court found it easy to conclude that the procedure used in the admission of evidence against General Yamashita did not violate Congressional authority, but was up to the military authorities.⁵⁷ The Court, therefore, declined to give some fundamental rights to military personnel captured in war.

The case is important not just for the majority opinion but also for the vehement dissent by Justice Rutledge. He argued that "due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents" should be protected against

⁵² *Id.* at 5–6.

⁵³ *Id.* at 25.

⁵⁴ *Id.* at 12.

⁵⁵ *Id.* at 18–20.

⁵⁶ *Id.* at 22.

⁵⁷ *Id.* at 23.

“unbridled power.”⁵⁸ Justice Rutledge criticized not just the admissibility of evidence, but also the competency of the military commission to try and punish consistently with the Constitution.⁵⁹ Justice Rutledge pointed out that the case was different from *Quirin* in that military necessity no longer existed and that those captured in war had a greater need for the protections of the American judicial system.⁶⁰ He argued that the evidence offered at trial did not go to show that General Yamashita had knowingly or intentionally contributed or allowed the atrocities in the Philippines; therefore, there was no “proof of knowledge of the crimes and proof of the specifications in the bills,” which created a flagrant departure from American tradition.⁶¹

Justice Rutledge further argued that Yamashita was not given adequate time to prepare a defense,⁶² and that the commission lacked the authority to try Yamashita in the first place, let alone sentence him, since Article 25 of the law of war made no exceptions in terms of applicability to military tribunals or commissions—it had to be applied in all capital cases.⁶³

Also, Article 38 of the law of war limited the power of the President by prescribing the use of rules of evidence recognized by the district courts of the United States.⁶⁴ If the Articles of War did not apply by their own force, then they would be made applicable by the Geneva Convention because that document did not contain the restrictions the majority applied thereto.⁶⁵

Lastly, Justice Rutledge argued that the Due Process Clause of the Fifth Amendment applied to Yamashita and that the only way he could be deprived of constitutional rights was if he was branded an enemy belligerent—not the case here.⁶⁶ Justice Rutledge countered and picked apart every argument set forth in the majority opinion, but his arguments did not carry the day.

⁵⁸ *Id.* at 41–42 (Rutledge, J., dissenting).

⁵⁹ *Id.* at 45.

⁶⁰ *Id.* at 46.

⁶¹ *Id.* at 51–55.

⁶² *Id.* at 56–61.

⁶³ *Id.* at 61–62.

⁶⁴ *Id.* at 62–63.

⁶⁵ *Id.* at 72–78.

⁶⁶ *Id.* at 78–81.

3. *Johnson v. Eisentrager*.

In *Johnson v. Eisentrager*,⁶⁷ twenty-one German nationals—who were captured, convicted in China, and expatriated to a prison in Germany—petitioned for a writ of habeas corpus.⁶⁸ Justice Jackson, writing for the majority, argued that there was no precedent for the argument that the writ could benefit an alien who had not been under the territorial jurisdiction of the United States.⁶⁹ While arguing for the benefit of citizenship, Justice Jackson made it painfully obvious that the same rights would not be afforded to aliens, especially at times of war.⁷⁰ Further, he stated, “[e]xecutive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security.”⁷¹ Justice Jackson argued that at times of war, a resident alien was “constitutionally subject to summary arrest, internment and deportation whenever a ‘declared war’ exists.”⁷² Nevertheless, a resident enemy alien had access to the courts, while a nonresident enemy alien did not even have a qualified access.⁷³

Justice Jackson convincingly argued that an enemy alien prisoner could not be given the protection of the writ if he: (1) never stepped on U.S. soil; (2) was tried and convicted outside of the U.S. for violating the law of war outside of the U.S.; and (3) was imprisoned outside of the U.S.⁷⁴ Even the labor involved in allowing the prisoners to be brought to court in the U.S. would provide comfort to the enemy and make the war effort harder.⁷⁵ Justice Jackson distinguished *Quirin* because there, the military commission took place in the District of Columbia and was headed by a civilian prosecutor.⁷⁶ He also distinguished *Yamashita* due to Yamashita’s petition to the Supreme Court of the Philippines and because his offenses were committed on U.S. soil, he was tried under American jurisdiction, and he was imprisoned on U.S. soil.⁷⁷

⁶⁷ 339 U.S. 763 (1950).

⁶⁸ *Id.* 765–68.

⁶⁹ *Id.* at 768.

⁷⁰ *Id.* at 768–77 (“It is war that exposes the relative vulnerability of the alien’s status.”).
Id. at 771.

⁷¹ *Id.* at 774.

⁷² *Id.* at 775.

⁷³ *Id.* at 776.

⁷⁴ *Id.* at 777.

⁷⁵ *Id.* at 778–79.

⁷⁶ *Id.* at 779–80.

⁷⁷ *Id.* at 780.

Furthermore, Justice Jackson was unwilling to give the prisoners constitutional rights due to two main reasons. First, the broad application of “person” under the Fifth Amendment would create a problem when construing the Sixth Amendment, which requires the criminal to be tried where the crime was committed—prohibiting jurisdiction to civil courts in the United States for any alien enemy.⁷⁸ Second, giving Fifth Amendment protections to alien enemies would put them in a better position than American soldiers, who may not be given that right in military commissions.⁷⁹ Justice Jackson also argued that the Geneva Convention was inapplicable—arising only in crimes associated with offenses during captivity as it did in *Yamashita* and *Quirin*.⁸⁰ In sum, *Eisentrager* would be the modern day equivalent of prisoners in the Abu Ghraib prison, who have no ties to the U.S., filing for a writ of habeas corpus.

On the other hand, the dissent, led by Justice Black, relied on *Yamashita* and *Quirin* to argue that courts could inquire whether a military commission had lawful authority to try an enemy and uphold habeas jurisdiction in a military commission of competent jurisdiction.⁸¹ Territoriality was indefensible if it permitted the Executive to imprison a person anywhere in the world to deprive federal courts of jurisdiction.⁸² This argument is key because it shows judicial activism when the Executive attempts to seize, detain, and try prisoners outside of U.S.—primarily to keep them out of civil courts. Justice Black further argued that habeas could not be suspended by the Executive or the Legislature.⁸³ These two arguments are prescient in light of current events such as the detention of prisoners in Guantanamo Bay and the suspension of habeas by Congress through the MCA.⁸⁴

⁷⁸ *Id.* at 782. Justice Jackson also rebuked the Court of Appeals for citing extensively from the *Yamashita* dissent. *Id.* at 783.

⁷⁹ *Id.* This argument is further extended to its limits by Justice Jackson stating that enemy aliens would later demand freedom of speech and security against unreasonable searches and seizures. *Id.* at 784.

⁸⁰ *Id.* at 789–90.

⁸¹ *Id.* at 794–95 (Black, J., dissenting).

⁸² *Id.* at 795. This insight by Justice Black is almost prescient in the face of extraordinary renditions taking place today.

⁸³ *Id.* at 798 (“Its use by courts cannot in my judgment be constitutionally abridged by Executive or by Congress. I would hold that our Courts can exercise it whenever any United States official illegally imprisons any person in any land we govern.”).

⁸⁴ Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(e)(1), 120 Stat. 2600, 2636 (codified as amended at 28 U.S.C. § 2441(e) (Supp. V 2005)).

(continued)

In sum, World War II era cases make a strong argument for the use of military commissions when Congress and the President have agreed and the prisoners have no ties to the United States. However, the dissenting opinions in those cases carried the day in *Hamdan*.

D. Doctrine of Abstention from Courts Martial.

*Schlesinger v. Councilman*⁸⁵ is a trump card the government uses when it would like the federal courts to defer to the military justice system before allowing petitioners access. Here, Captain Councilman was charged with the sale, transfer and possession of marijuana.⁸⁶ Both the district court and the appeals court enjoined his “impending court-martial” because the offenses were not connected to his service.⁸⁷ The Supreme Court reversed, and it held that “the balance of factors governing exercise of equitable jurisdiction by federal courts normally weighs against intervention, by injunction or otherwise, in pending court-martial proceedings.”⁸⁸ Though *Councilman* involved a U.S. service member, and not an alien, it was another case that divided the Court in *Hamdan*.⁸⁹

E. Authorization for Use of Military Force and Detainee Treatment Act.

On September 18, 2001, Congress passed the Authorization for Use of Military Force (AUMF), authorizing the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”⁹⁰ Both the broad and narrow reading of this statute created another split between the *Hamdan* Court.⁹¹

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an 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.

Id.

⁸⁵ 420 U.S. 738 (1975).

⁸⁶ *Id.* at 739.

⁸⁷ *Id.* at 739–40.

⁸⁸ *Id.* at 740.

⁸⁹ See discussion *infra* Parts IV.A.2, IV.D and IV.G.

⁹⁰ Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224–25 (2001).

⁹¹ See discussion *infra* Parts IV.A.3 and IV.E.

On December 30, 2005, Congress passed the Detainee Treatment Act of 2005 (DTA) as a response to the Iraqi prisoner abuses in Abu Ghraib.⁹² The legislation was divided into four sections: (1) standards for interrogation, (2) prohibition on inhuman treatment, (3) protection of U.S. military personnel from prosecution related to interrogations, and 4) training of Iraqi forces on treatment of detainees.⁹³ Most importantly, the DTA stripped jurisdiction for habeas actions by Guantanamo detainees.⁹⁴ The effective date of the DTA was ambiguously split into two sections: one applying to sections 1005(e)(2) and 1005(e)(3),⁹⁵ and the other one applying to section 1005(e)(1).⁹⁶ This ambiguity also split the *Hamdan* Court on the issues of whether it had jurisdiction to hear the case, and whether Congress authorized the military commissions trying Hamdan by referring to them.⁹⁷

F. Detainee Cases after September 11, 2001.

The earlier Guantanamo detainee cases affected the *Hamdan* decision as well.⁹⁸ The first case to consider the legality of detention was *Rasul v. Bush*,⁹⁹ where two Australian citizens and twelve Kuwaiti citizens filed for a writ of habeas corpus.¹⁰⁰ The Court reversed the district court, which relied on *Eisenstrager*, and held that aliens outside the sovereign territory of the United States could not petition for a writ of habeas corpus.¹⁰¹ The Court, citing to *Milligan*, *Quirin*, and *Yamashita*, held that federal courts must be given broad latitude to review petitions for the writ in times of

⁹² Arsalan M. Suleman, *Detainee Treatment Act of 2005*, 19 HARV. HUM. RTS. J. 257, 257–58 (2006). Chronologically, the DTA falls between Hamdan’s trial and the appeal to the D.C. Circuit.

⁹³ Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1002–06, 119 Stat. 2680, 2739–44.

⁹⁴ *Id.* § 1005(e).

⁹⁵ *Id.* § 1005(h)(2) (stripping jurisdiction for pending and future cases).

⁹⁶ *Id.* § 1005(h)(1) (stripping jurisdiction on future cases).

⁹⁷ *See infra* Parts IV.A.1 and IV.D.

⁹⁸ *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), is another case where the President sought to detain a citizen without judicial review. Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1, 9 n.31 (2006). The narrow holding of the case was that Padilla needed to file his petition in another jurisdiction. *Padilla*, 542 U.S. at 442.

⁹⁹ 542 U.S. 466 (2004).

¹⁰⁰ *Id.* at 470–71.

¹⁰¹ *Id.* at 472–73.

war, as well as peace.¹⁰² Justice Stevens, writing for the majority, distinguished this case from *Eisentrager* and held that there were constitutional and statutory grounds for the writ.¹⁰³ Perhaps, one detail that distinguished the case from *Eisentrager* was that the detainees were held in Guantanamo, where the U.S. authorized “complete jurisdiction and control.”¹⁰⁴ Ultimately, this allowed the detainees to invoke the federal courts’ authority.¹⁰⁵

Also of importance is the case of *Hamdi v. Rumsfeld*.¹⁰⁶ There eight justices held that Hamdi, an American citizen held as an enemy combatant, must be given the opportunity to contest the factual basis for his detention before a neutral decision maker.¹⁰⁷ The Court also distinguished *Milligan* because Milligan was arrested while residing at his home in Indiana.¹⁰⁸ The Court reiterated that during the period of ongoing combat, the nation’s will was tested; but that along with citizenship, came liberties and privileges.¹⁰⁹ The Court also suggested that hearsay evidence might be used against Hamdi and that the burden to rebut that evidence would rest on the petitioner.¹¹⁰

Furthermore, the Court agreed that Congress authorized Hamdi’s detention through the AUMF.¹¹¹ However, this detention could not be indefinite because neither the Geneva Convention nor the AUMF authorized it.¹¹² Though the opinion was fractured, the Court sent a strong message to the President that American citizens required some sort of due process to be detained for such long periods.¹¹³ The Court was also willing to admit that despite the powers the Constitution gave the President at

¹⁰² *Id.* at 474–75.

¹⁰³ *Id.* at 475–81.

¹⁰⁴ *Id.* at 480.

¹⁰⁵ *Id.* at 481.

¹⁰⁶ 542 U.S. 507 (2004).

¹⁰⁷ *Id.* at 509, 533.

¹⁰⁸ *Id.* at 521–22.

¹⁰⁹ *Id.* at 532.

¹¹⁰ *Id.* at 533–34.

¹¹¹ *Id.* at 517. The AUMF was “a resolution authorizing the President to ‘use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks’ or ‘harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States.’” *Id.* at 510.

¹¹² *Id.* at 521.

¹¹³ Chemerinsky, *supra* note 98, at 10.

times of conflict, “it most assuredly envisions a role for all three branches when individual liberties are at stake.”¹¹⁴ Furthermore, the Court admitted that the writ “play[ed] a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions.”¹¹⁵

In sum, the previous Guantanamo detainee cases stand for the proposition that the Court will allow habeas petitions by both aliens and citizens, and will interfere with the conduct of war if it infringes on the rights of the people under its jurisdiction. The issue for the next detainee case, which is *Hamdan*, will change from whether the detainees can be detained, to how they can be tried. Before moving to the facts of *Hamdan*, a few words on the Justices that had tremendous effect on the decision are necessary.

G. The influence of Justice Jackson and Justice Rutledge.

Justice Jackson’s views are important for *Hamdan* because his interpretation of *Youngstown*’s three-part test should be the one to carry the day. Before Justice Jackson came to his balanced *Youngstown* approach, he once deferred to the wisdom of the President and compartmentalized the separation of powers.¹¹⁶ However, four years later, though willing to give the President “the widest latitude of interpretation to sustain his exclusive function to command,”¹¹⁷ he wanted to make sure that courts “rigorously scrutinize congressional meaning before finding such authorization.”¹¹⁸ Thus, he was not willing to find such authorizations when fundamental liberties were under consideration.¹¹⁹ He endorsed a “legal process approach” where the role of the Court was to protect fundamental rights

¹¹⁴ *Hamdi*, 542 U.S. at 536.

¹¹⁵ *Id.*

¹¹⁶ *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111–12 (1948). Justice Jackson, writing for the majority, held that “the very nature of executive decisions as to foreign policy is political, not judicial.” *Id.* His view of the separation of powers at the time was less elastic where “[s]uch decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative.” *Id.* He further argued that “the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.” *Id.*

¹¹⁷ *Youngstown Sheet & Tube, Co. v. Sawyer*, 343 U.S. 579, 645 (1952) (Jackson, J., concurring).

¹¹⁸ Cleveland, *supra* note 12, at 1131.

¹¹⁹ *Id.*

“by rigorously enforcing a bilateral institutional decision-making process between the President and Congress, rather than to make independent judgments about the substantive content of constitutional liberties in times of emergency.”¹²⁰ However, his assumption was that Congress and the President were less likely to collude, which is also the downside to his interpretation.¹²¹

Justice Rutledge, on the other hand, is important not just because Justice John Paul Stevens was his clerk, but also because the majority adopted some of his views from the *Yamashita* dissent.¹²² He found Yamashita’s trial so lacking in fundamental fairness that it could not withstand constitutional scrutiny.¹²³ Surprisingly, the adoption of Rutledge’s point of view by his former-clerk (and the majority) did not result in a clamor from the dissenters.¹²⁴ Though Rutledge’s dissent was adopted in *Hamdan*, his methodical style was not, which can be explained with the necessity of writing for a tentative majority.¹²⁵ Surprisingly, Rutledge’s dissent was also an inspiration for Professor, and Hamdan attorney, Neal Katyal.¹²⁶ Justice Rutledge’s arguments for the rights of those accused can be summed in one quotation: ““He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.””¹²⁷

III. DISCUSSION

A. *Facts of the Case at the Trial Stage.*

After the terrorist attacks of September 11, 2001, United States military forces began operations in Afghanistan.¹²⁸ U.S. forces captured Salim Ahmed Hamdan in Afghanistan late in 2001.¹²⁹ In 2002, Hamdan

¹²⁰ *Id.* at 1132–33.

¹²¹ *Id.* at 1135.

¹²² Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 WASH. U. L. REV. 99, 112, 114 (2006). Interestingly enough, when writing for the majority in *Rasul*, Stevens also adopted Rutledge’s *Ahrens v. Clark*, 335 U.S. 188 (1948), dissent, which he helped draft as a judicial clerk. *Id.* at 118.

¹²³ *Id.* at 155.

¹²⁴ *Id.* at 168.

¹²⁵ *Id.* at 121–23, 168.

¹²⁶ *Id.* at 167.

¹²⁷ *In re Yamashita*, 327 U.S. 1, 81 n.42 (1946) (Rutledge, J., dissenting) (quoting 2 THE COMPLETE WRITINGS OF THOMAS PAINE (Foner ed., 1945) 588).

¹²⁸ *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 155 (D.D.C. 2004).

¹²⁹ *Id.*

was transferred to the Defense Department detention facility at Guantanamo Bay Naval Base.¹³⁰ The President, in July 2003, designated Hamdan for trial by military commission due to the finding that he was either a member of al-Qaeda or suspected of terrorism against the United States.¹³¹ After the appointing authority ruled the Uniform Code of Military Justice (UCMJ) did not apply to him, Hamdan petitioned for habeas corpus in the United States District Court for the Western District of Washington.¹³²

The case was finally heard by the District Court for the District of Columbia in October 2004,¹³³ following the rulings of *Rasul* and *Gherebi v. Bush*.¹³⁴ The district court, in resolving the issues as a matter of law, used only three facts: (1) Hamdan was captured in Afghanistan during the hostilities; (2) Hamdan asserted prisoner-of-war status under the Geneva Convention, and (3) the government convened a tribunal to determine this status.¹³⁵ In applying those facts, the court held that abstention was not required nor appropriate,¹³⁶ the determination that Hamdan was an offender triable by military commission under the law of war was not proper,¹³⁷ and the procedures of the commission were inconsistent with the UCMJ.¹³⁸

B. Facts of the Case at the Appellate Stage.

The Court of Appeals for the District of Columbia Circuit, of which Chief Justice Roberts was a member,¹³⁹ reversed the district court.¹⁴⁰ While the Columbia Circuit agreed that abstention was not required,¹⁴¹ it held that the commissions were authorized through Congress' joint resolutions authorizing the use of force in Afghanistan,¹⁴² and that the

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 156.

¹³⁴ *Id.*; *Gherebi v. Bush*, 374 F.3d 727, 739 (9th Cir. 2004) (holding that Guantanamo Bay detainees' habeas petitions must be heard in the District Court of the District of Columbia.).

¹³⁵ *Hamdan*, 344 F. Supp. 2d at 156.

¹³⁶ *Id.* at 158.

¹³⁷ *Id.* at 165.

¹³⁸ *Id.* at 172.

¹³⁹ *Hamdan v. Rumsfeld*, 415 F.3d 33, 35 (D.C. Cir. 2005).

¹⁴⁰ *Id.* at 44.

¹⁴¹ *Id.* at 37.

¹⁴² *Id.* at 37–38.

Geneva Conventions were not judicially enforceable.¹⁴³ The court further held that even if the Conventions were applicable, they would not apply to Hamdan—since al-Qaeda was not a signatory to the convention—and the President was given a level of deference in foreign affairs.¹⁴⁴ Specifically, the appeals court reversed the district court’s determination that Common Article 3 of the Geneva Convention applied to Hamdan.¹⁴⁵ In other words, the Columbia Circuit wanted to leave the interpretation of the Convention to the President because it was more a matter of foreign policy than judicial interpretation.¹⁴⁶

Hamdan argued that the commission’s failure to require his presence in the proceedings fell short of the Convention’s requirements.¹⁴⁷ The court held that this argument was jurisdictional and, therefore, such a determination should be delayed until the military remedies were exhausted—under *Councilman*.¹⁴⁸ Ultimately, the Columbia Circuit wanted to wait for Hamdan’s military trial to end before judging the procedures used, such as his inability to be present.¹⁴⁹

C. *Majority and Concurring Opinions of the Supreme Court.*

The opinion of the Supreme Court was fractured, at times leaving only a plurality for certain sections of Justice Stevens’ opinion.¹⁵⁰ Nevertheless,

¹⁴³ *Id.* at 39. The court argued that *Eisentrager* was still good law and that it required the adherence of the Columbia Circuit. *Id.*

¹⁴⁴ *Id.* at 41.

¹⁴⁵ *Id.* There, Judge Randolph, joined by Judge Roberts, argued that Common Article 3 applies to an “‘armed conflict not of an international character occurring in the territory of one of the High Contracting Parties’ . . . prohibit[ing] ‘the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court.’” *Id.* (quoting Geneva Convention Relative to the Treatment of Prisoners of War arts. 2 and 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135). Judge Williams, writing in his concurrence, disagreed and stated that “‘the logical reading of ‘international character’ is one that matches the basic derivation of the word ‘international,’ i.e., *between nations*. Thus, I think the context compels the view that a conflict between a signatory and a non-state actor is a conflict ‘not of an international character.’” *Id.* at 44 (Williams, J., concurring).

¹⁴⁶ *Id.* at 41–42 (majority opinion).

¹⁴⁷ *Id.* at 42. Basically, Hamdan argued that Article 3 of the Geneva Convention applied to him and that he should be given “all the judicial guarantees which are recognized as indispensable by a civilized people.” *Id.* at 41.

¹⁴⁸ *Id.* at 42.

¹⁴⁹ *Id.*

¹⁵⁰ *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2758 (2006).

the majority found jurisdiction despite the DTA, decided that there was no need for abstention, ruled that the President may not convene military commissions against the law of war without Congressional assent, held that this particular tribunal lacked the power to proceed, and declared that the Geneva Convention applied to Hamdan.¹⁵¹ However, the plurality opinion held that Hamdan could not be tried for conspiracy, and that a regularly constituted court must include the right to be present as a fundamental concept of justice even though it is not defined under the Geneva Convention.¹⁵²

The concurrence argued that there was a separation of powers issue of the “highest order.”¹⁵³ The concurrence further argued that the UCMJ and the Geneva Convention stood as a limit on the Executive’s power.¹⁵⁴

D. The Dissent.

Justice Scalia, joined by Justices Thomas and Alito, would have held that the DTA precluded jurisdiction to hear the habeas petition.¹⁵⁵ Most importantly, Justice Thomas’ dissent would have deferred to the President regarding the handling of the detainees during a time of war because it is ultimately a foreign policy judgment.¹⁵⁶

IV. ANALYSIS

A. The Arguments of the Majority.

1. Finding of Jurisdiction to Hear the Case.

The majority held that the DTA did not apply to the present case plainly due to statutory construction.¹⁵⁷ The Court held that “a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.”¹⁵⁸ The Court also cited to the legislative record to bolster its conclusion that the DTA was not meant to apply to pending cases.¹⁵⁹ This result was certainly

¹⁵¹ See *infra* Part IV.

¹⁵² *Hamdan*, 126 S. Ct. at 2798.

¹⁵³ *Id.* at 2800 (Kennedy, J., concurring).

¹⁵⁴ *Id.* at 2802–03.

¹⁵⁵ *Id.* at 2810 (Scalia, J., dissenting).

¹⁵⁶ *Id.* at 2825 (Thomas, J., dissenting).

¹⁵⁷ *Id.* at 2764 (majority opinion).

¹⁵⁸ *Id.* at 2765.

¹⁵⁹ *Id.* at 2766–67.

intended by the Hamdan team through their congressional lobbying.¹⁶⁰ The majority argued that Justice Scalia's dissent would have construed the jurisdiction stripping sections of the DTA by itself and not without reference to the other sections, which would have granted jurisdiction for the pending cases.¹⁶¹ Though the positive inference to allow jurisdiction for the case was not there, the Court is justified in finding jurisdiction in a contrived fashion by what little it accomplished in the rest of the opinion.

2. *Whether Abstention is Appropriate.*

In turning to whether the Supreme Court should abstain from the case, the majority argued that *Councilman* was not on point, but that *Quirin* was.¹⁶² The majority argued that Hamdan was not a member of the American Armed Forces; therefore, concerns about military discipline within the United States forces did not apply, which was the concern in *Councilman*.¹⁶³ Furthermore, the tribunal convened to try Hamdan did not have independent review panels such that any review he may have gotten would not have been insulated from the military structure.¹⁶⁴ While the majority was willing to accept that abstention may be appropriate in circumstances where the commission was convened in the battlefield, this was not such a case.¹⁶⁵ The Court was certainly justified in not deferring to the military process since Hamdan, like many detainees, was held for years without a trial.¹⁶⁶ The sooner the Court ruled for—or against—the constitutionality of the commission's procedures, the better it was for the Executive.

¹⁶⁰ Nina Totenberg, 'Hamdan v. Rumsfeld': *Path to a Landmark Ruling*, NPR, Sept. 5, 2006, <http://www.npr.org/templates/story/story.php?storyId=5751355> ("Katyal, went into high gear to get the language in the bill changed to exempt pending cases, so that the Hamdan case would stay alive. The Senate did in fact change the language in the bill.")

¹⁶¹ *Hamdan*, 126 S. Ct. at 2769.

¹⁶² *Id.* at 2771.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 2772.

¹⁶⁶ *Id.* at 2760 (explaining that one year passed from July 2003 to July 2004 before the Government finally charged Hamdan with the offense). Hamdan was in custody after being captured in late 2001 in Afghanistan. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 155 (D.D.C. 2004).

3. *Authorization for the Commissions through the DTA or the AUMF.*

The Court then turned to the most important issue of the case: whether the DTA or the AUMF gave the President the authority to try the detainees.¹⁶⁷ Citing to Justice Chase's opinion in *Milligan* and to Articles I, section 8 and III, section 1 of the Constitution, the majority held that "exigency alone" could not satisfy the "establishment and use of penal tribunals"¹⁶⁸ and that the President "without the sanction of Congress, institute tribunals . . . unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature."¹⁶⁹ The Court reiterated Justice Chase's argument to show the importance of separation of powers in the Constitution and to show that the Executive's powers were always checked by Congress—even in times of war.¹⁷⁰

The Court, citing to *Quirin*, argued that the legislature "explicitly provided" the President the ability to convene tribunals through the enactment of Article 15 of the Articles of War in 1916, and the "substantially identical" Article 21 of the UCMJ, which was enacted after World War II.¹⁷¹ The majority argued, however, that this was not a sweeping mandate for the President to invoke military commissions whenever he found it necessary, and that *Quirin* shared this view.¹⁷² The Court, in effect, re-characterized *Quirin* under *Youngstown* and suggested that it fit nicely under the first tier, where Congress explicitly gave the President the power to act. In doing so, the Court made sure that the Congressional approval of the President's actions would have to be reviewed for clarity.

Therefore, the Court rejected the government's position that the AUMF and the DTA authorized the military commissions by stating, "there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ."¹⁷³ The Court required a "more specific congressional authorization" for the commission of military tribunals

¹⁶⁷ *Hamdan*, 126 S. Ct. at 2775.

¹⁶⁸ *Id.* at 2773.

¹⁶⁹ *Id.* at 2773–74.

¹⁷⁰ *Id.* at 2773–74.

¹⁷¹ *Id.* at 2774 n.22.

¹⁷² *Id.* at 2774.

¹⁷³ *Id.* at 2775.

especially since DTA was enacted after the commissions had convened.¹⁷⁴ The Court conceded that the DTA acknowledged the military commissions in use at Guantanamo, but this did not rise to the level of Congressional approval the Court expected.¹⁷⁵ In one fell swoop, the Court held that the President did not have implicit powers to use commissions and that Congressional approval must be very explicit to pass *Youngstown-Quirin* muster.¹⁷⁶

4. *Procedures of the Military Commission.*

Then the majority analyzed the military commissions based on existing Congressional directions such as the UCMJ and the laws of nations, including the Geneva Convention.¹⁷⁷ In doing so, the Court found deficiencies in the military commission procedures. Although Hamdan was given access to counsel and a three-judge commission, he could be excluded from his own trial if the presiding officer decided to close the proceedings.¹⁷⁸ Furthermore, the commission could also exclude the accused or his counsel from accessing protected information, which was information concerning “national security interests.”¹⁷⁹

Another deficiency, according to the Court, was that only a two-thirds majority was required for a guilty verdict and sentencing.¹⁸⁰ Though an appeals process was set up all the way to the President, the immediate appeal was made to a three-member review panel—only one of whom was required to be a judge.¹⁸¹ The majority certainly found that the lack of access to one’s own trial and an appeals process tied so closely to the military was problematic.

The government, however, objected to the Court’s review of the procedures because *Councilman* required abstention by the Court.¹⁸² The government also contended that no review was necessary because Hamdan could raise challenges following a final decision under the DTA. Finally, the government asserted there was no basis to presume before the trial that the proceedings would be anything but in good faith and according to the

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 2774, 2775 n.23.

¹⁷⁷ *Id.* at 2786.

¹⁷⁸ *Id.* at 2786.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 2787.

¹⁸¹ *Id.*

¹⁸² *Id.*

law.¹⁸³ The Court rejected all arguments holding that Hamdan's sentence would not be subject to automatic review due to its short length, and that there was also a "basis to presume" that the procedures employed violated the law since Hamdan had already been excluded from his trial.¹⁸⁴ The Court, thus, turned to the procedural challenges Hamdan made.¹⁸⁵

5. *The Court Overrules In re Yamashita.*

The Court then held that military commissions and courts-martial procedures were substantially the same in order to "ensure evenhandedness under the pressures of war."¹⁸⁶ The only exception to this general rule was General Yamashita's trial, subject to "vociferous critique" by Justices Rutledge and Murphy, which was later "undermined by post-World War II developments."¹⁸⁷ Partially due to this criticism, the UCMJ and the Third Geneva Convention "extended prisoner-of-war protections to individuals tried for crimes committed before their capture in 1949."¹⁸⁸ Thus, "stripped of its precedential value,"¹⁸⁹ the Court rightfully placed *Yamashita* in its grave.

The Court then went on to explore the uniformity principle under Article 36 of the UCMJ, which gives the President the ability to deviate from the requirement to "apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts . . ." so long as it is practicable.¹⁹⁰ Article 36, therefore, required the President to work within the framework of the UCMJ, or show reasons why it was impracticable to do so.¹⁹¹ It seems that Justice Stevens placed this requirement of uniformity on the third level of the *Youngstown* three-part framework where the President acted in opposition to Congressional direction.

The government's response to Hamdan's showing of non-uniformity between the military commissions and the courts-martial was inadequate.¹⁹² Among its arguments, the government asserted that the

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 2788.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 2788.

¹⁸⁷ *Id.* at 2788–89.

¹⁸⁸ *Id.* at 2789.

¹⁸⁹ *Id.* at 2790.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 2790–91.

¹⁹² *Id.* at 2790–93.

military commissions would be useless if the provisions of the UCMJ governing courts-martial applied.¹⁹³ The government even blatantly made a “thaumaturgic invocation”¹⁹⁴ by stating that the nature of international War on Terrorism made it impractical to comply.¹⁹⁵ Regardless, the Court held that the government failed its burden of showing an impracticability to deviate from the required procedures.¹⁹⁶

The Court found that the danger of international terrorism, though not to be underestimated, was not enough to justify the departure from the requirements of Article 36.¹⁹⁷ The Court confirmed that military commissions, though born out of exigency, were legislated to strike a balance between uniform procedure and exigency in a theatre of war, and not to dispose of the requirements of justice.¹⁹⁸ In sum, the Court’s strict construction of Articles 21 and 36 of the UCMJ is very similar to a third level *Youngstown* construction, where the President’s powers are at its lowest. Furthermore, the Court’s focus on Hamdan’s right to be present at his trial is heroic in the face of the arguments of international terrorism¹⁹⁹—the Executive’s longest running trump card.

6. *Applicability of the Geneva Convention to Hamdan.*

The Supreme Court then moved to Hamdan’s arguments on the applicability of the Geneva Convention.²⁰⁰ It rejected the Court of Appeals’ reliance on a footnote in *Eisentrager*, arguing that the Geneva Convention could not be enforced, and that those rights are only vindicated

¹⁹³ *Id.* at 2791.

¹⁹⁴ Thomas M. Franck, *Rethinking War Powers: By Law or By “Thaumaturgic Invocation”?*, 83 AM. J. INT’L L. 766, 767 (1989). Quoting Judge Tamm, Professor Franck argued “that neither ‘the term ‘national security’ nor ‘emergency’ is a talisman, the thaumaturgic invocation of which should, *ipso facto*, suspend the normal checks and balances on each branch of Government.”” *Id.* (quoting *Algonquin SNG, Inc. v. Federal Energy Admin.*, 518 F.2d 1051, 1062 (D.C. Cir. 1975).

¹⁹⁵ *Hamdan*, 126 S. Ct. at 2791.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 2792.

¹⁹⁸ *Id.* at 2792–93.

¹⁹⁹ *Id.* at 2792. The court stated, “the only reason offered in support of that determination is the danger posed by international terrorism. Without 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 rules that govern courts-martial.” *Id.* (footnote omitted).

²⁰⁰ *Id.* at 2793.

“through protests and intervention of protecting powers.”²⁰¹ The majority ruled that *Eisentrager* did not control because the Geneva Convention was still part of the law of war under UCMJ, Article 21.²⁰²

The Court then rejected the Columbia Circuit’s two arguments that the Geneva Convention did not apply to Hamdan. First, al-Qaeda was not a “High Contracting Party” to the Geneva Convention; second, Hamdan was captured during hostilities against al-Qaeda, not Afghanistan.²⁰³ This, the Court argued, did not need to be resolved because it already concluded that Article 3 of the Geneva Convention, the scope of which is to be construed widely, applied to Hamdan to give him minimum protections.²⁰⁴ These protections were “all the judicial guarantees which are recognized as indispensable by civilized peoples” in a “regularly constituted court.”²⁰⁵

Having found that Article 3 of the Geneva Convention applied to Hamdan, the Court moved to what a regularly constituted court may require. It argued that such a regularly constituted court, though not defined in the Geneva Convention, could include an ordinary military court, but not a special tribunal.²⁰⁶ The plurality proceeded to define what such guarantees offered by civilized peoples were; but, Justice Kennedy would not go that far.²⁰⁷ The majority then pointed out that the President could change the rules of the commission at his whim—even midtrial—and that the military commissions detracted from courts-martial.²⁰⁸ Therefore, the Court cursorily held that the President’s tribunals did not comply with the requirements of the UCMJ or the Geneva Convention.²⁰⁹

²⁰¹ *Id.* at 2794 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950)).

²⁰² *Id.* at 2794.

²⁰³ *Id.* at 2795.

²⁰⁴ *Id.* at 2795–96. By doing so, the Court agreed with the District Court Judge Robertson and Judge Williams of the D.C. Circuit Court of Appeals in interpreting a conflict not of an international character. *See supra* note 145.

²⁰⁵ *Hamdan*, 126 S. Ct. at 2796 (citing Geneva Convention Relative to the Treatment of Prisoners of War art. 3, ¶ 1(d), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135).

²⁰⁶ *Id.*

²⁰⁷ *See* discussion *infra* Parts IV.B–IV.C.

²⁰⁸ *Id.* at 2797 n.65 (stating, “[f]urther evidence of this tribunal’s irregular constitution is the fact that its rules and procedures are subject to change midtrial, at the whim of the Executive.”).

²⁰⁹ *Id.* at 2797–98.

B. The Plurality.

Justice Kennedy broke from the majority under two parts of the case. First, under Part V, he was unwilling to hold that conspiracy was a charge Hamdan could be tried for in a military commission.²¹⁰ Second, he would not plunge into the argument of whether Article 3's standard—a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples—necessarily requires that the accused have the right to be present at all stages of a criminal trial.”²¹¹

Under Part V of the opinion, the plurality identified three instances when military commissions were employed: (1) substitute for civilian courts under martial law, (2) substitute for civilian courts in occupied enemy territory, (3) incident to war.²¹² Since the first two alternatives were not at issue, Hamdan's military commission was the third one, which the court found similar to the World War II era commissions, and the one used in *Quirin*.²¹³

Such a military commission had four preconditions for trying an enemy. The military commission: (1) must be for offenses within the theatre of war; (2) must be for offenses within the time of war; (3) must try those pursuant to violation of law of war if not under occupation; and (4) must try offenses for “[v]iolations of the laws and usages of war cognizable by military tribunals only.”²¹⁴ At this point, the plurality found it persuasive that none of the acts that Hamdan was alleged to have committed violated the law of war.²¹⁵ The plurality further argued that the vagueness of the conspiracy charge, and the deficiencies in the time and place, made the charge one “not triable by a law-of-war military commission.”²¹⁶

On the other hand, the plurality conceded that Congress included conspiracy as a charge triable by military commissions through Article 21 of the law of war.²¹⁷ However, the Court required that when “neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and

²¹⁰ *Id.* at 2809 (Kennedy, J., concurring).

²¹¹ *Id.* (citation omitted).

²¹² *Id.* at 2775–76 (majority opinion).

²¹³ *Id.* at 2776–77.

²¹⁴ *Id.* at 2777.

²¹⁵ *Id.* at 2778.

²¹⁶ *Id.* at 2779.

²¹⁷ *Id.* at 2779–80.

unambiguous.”²¹⁸ The plurality argued that to require any less would be to concentrate in the hands of the military more power than the legislature intended.²¹⁹ While the plurality conceded that the government’s burden of showing that “the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war” was met in *Quirin* and *Yamashita*; it was not met here.²²⁰ The Court further rejected the government’s citations to authority supporting the ability to try Hamdan for conspiracy by finding that they did not meet the Court’s “high standard of clarity required to justify the use of a military commission.”²²¹ The Court, referring to the Nuremberg trials, also found it persuasive that conspiracy in the Anglo-American sense was “not known in international law.”²²² This, once again, is an example of asking for a clear and unambiguous support from Congress for Presidential action in the *Youngstown* framework—placing his powers at the lowest ebb.

Therefore, the plurality found it easy to conclude that the commission lacked jurisdiction because the charge itself did not support the commission’s jurisdiction.²²³ Furthermore, the commission was further illegal because the necessity that usually existed in the theatre of war did not exist in Guantanamo.²²⁴

The second part of the plurality opinion included reference to other procedures employed by the commission. The plurality simply concluded that a regularly constituted court under the Geneva Convention would include the ability of the accused to be present and be privy to the evidence against him.²²⁵ This was one of the “barest of those trial protections that have been recognized by customary international law.”²²⁶

C. *The Concurring Opinions.*

Justices Breyer and Kennedy started out by confronting the dissent’s argument that the majority’s holding hampers the President’s ability to

²¹⁸ *Id.* at 2780.

²¹⁹ *Id.*

²²⁰ *Id.* at 2780–81.

²²¹ *Id.* at 2781.

²²² *Id.* at 2784–85.

²²³ *Id.* at 2785.

²²⁴ Hamdan’s tribunal was appointed by a retired major general stationed away from any hostilities, instead of a military commander in the field of battle. *Id.*

²²⁵ *Id.* at 2798.

²²⁶ *Id.* at 2797.

conduct the war.²²⁷ Moreover, Justice Breyer argued, there is “no emergency prevent[ing] consultation with Congress, [and] judicial insistence upon that consultation does not weaken our Nation’s ability to deal with danger.”²²⁸ Justice Kennedy’s concurrence recognized this was not a case where Congress was silent and the President could fill the void through the use of his war powers, instead Congress had legislated limits on the powers of the President to convene military tribunals.²²⁹ This Congressional disapproval squarely placed the legislative intent at the third level of presidential authority under *Youngstown*, where the President’s powers are at its lowest ebb.²³⁰ Therefore, the concurrence found it appropriate to suggest that Congress could change the rules of the game through legislation and create power in the President for military commissions.²³¹

Kennedy then dove into the *Youngstown* framework and argued that the separation of powers is implied in the very essence of military tribunals due to the concentration of power in the hands of the Executive.²³² Since military tribunals are an area of law historically regulated by Congress, the President’s power has been appropriately limited through the UCMJ provision, 10 U.S.C. § 836, requiring rules of evidence so long as “practicable.”²³³ This is essentially the same conclusion the majority reached.

In response to Justice Thomas’ dissent that *Eisentrager* controls and that Geneva Convention Article 3 is not applicable, Justice Kennedy argued that both *Eisentrager* and *Yamashita* considered the applicability of the Convention and did not dismiss it offhand.²³⁴

²²⁷ *Id.* at 2799 (Breyer, J., concurring); *id.* (Kennedy, J., concurring).

²²⁸ *Id.* (Breyer, J., concurring). This was the lone issue addressed in Justice Breyer’s two paragraph concurrence.

²²⁹ *Id.* (Kennedy, J., concurring).

²³⁰ *Id.* at 2800–01.

²³¹ *Id.* at 2800 (“If 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.”).

²³² *Id.* at 2800 (“Trial by military commission raises separation-of-powers concerns of the highest order. Located within a single branch, these Courts carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review.”).

²³³ *Id.* at 2800–02.

²³⁴ *Id.* at 2802–03.

More importantly, Justice Kennedy argued that § 836(b) was enacted after *Yamashita* and *Quirin* were decided, creating a requirement of uniformity at the pretrial stage.²³⁵ He was more than disturbed by the ability of the Executive to change procedures mid-trial noting that “an acceptable degree of independence from the Executive” is necessary to eliminate doubts regarding the fairness of the proceedings.²³⁶ Justice Kennedy proceeded to examine areas where the military commissions deviated from regularly constituted courts-martial: (1) the ability to have only three members instead of five, which “may affect the deliberative process and the prosecution’s burden of persuasion”²³⁷; (2) limited judicial review for the commissions’ judgment; (3) low threshold for the acceptance of probative evidence²³⁸; and (4) lack of practical need for a departure from the regularly constituted rules applicable to courts-martial.²³⁹ The concurrence expanded on the deficiency analysis of the majority by comparing the court-martial appeal process to the process available to Hamdan, and concluded that it “lack[ed] structural protections designed to help ensure impartiality.”²⁴⁰ Justice Kennedy reiterated that “Congress has prescribed these limits, Congress can change them, requiring a new analysis consistent with the Constitution and other governing laws.”²⁴¹ This is yet another signal by the Supreme Court to the Congress to change the rules of the game.

Having concluded that the military commissions that tried Hamdan are deficient, Justice Kennedy opined that there was no need to consider the requirements of the Geneva Convention Article 3—or a determination of the need to consider the validity of a conspiracy charge.²⁴² Hamdan’s inability to attend his own trial and observe the evidence against him was troubling to Justice Kennedy.²⁴³ However, he agreed with the dissent that Hamdan’s inability to participate and observe evidence was countered by his entitlement to a full and fair trial, which was judicially reviewable under the DTA.²⁴⁴ Having found the commissions unfit under the UCMJ,

²³⁵ *Id.* at 2803–04.

²³⁶ *Id.* at 2804.

²³⁷ *Id.* at 2805–06.

²³⁸ *Id.* at 2807–08.

²³⁹ *Id.* at 2808.

²⁴⁰ *Id.* at 2807.

²⁴¹ *Id.* at 2808.

²⁴² *Id.* at 2808–09.

²⁴³ *Id.*

²⁴⁴ *Id.*

Justice Kennedy argued there should be reluctance to go any further.²⁴⁵ Then, as if it was not painfully clear already, Justice Kennedy once again suggested that Congress is free to offer guidance to the Court and the President after this opinion.²⁴⁶

Furthermore, Justice Kennedy sent yet another signal that he will be unwilling to consider how the detainees are to be treated in the future by stating, “Congress, not the Court, is the branch in the better position to undertake the ‘sensitive task of establishing a principle not inconsistent with the national interest or international justice.’”²⁴⁷ In sum, he was willing to limit Executive power in a time of war, but not when Congressional approval was present. Justice Kennedy will likely be unwilling to question the combined forces of the Executive and Congress in future detainee cases.²⁴⁸

D. Justice Scalia’s Dissent.

Justice Scalia, writing in dissent, joined by Justices Alito and Thomas, argued that Congress withdrew appellate jurisdiction from the Court with the DTA, and the Court should have never ruled on the issue of the military commissions’ constitutionality.²⁴⁹ He stated that because Congress had not made any reference to pending cases, Congress repealed jurisdiction to hear all cases, and that this was an established rule.²⁵⁰ Furthermore, Justice Scalia argued that the majority did not cite to a single case where jurisdiction stripping was not given immediate effect.²⁵¹ He

²⁴⁵ *Id.*

²⁴⁶ *Id.* (“In light of the conclusion that the military commissions at issue are unauthorized Congress may choose to provide further guidance in this area.”).

²⁴⁷ *Id.* (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964)).

²⁴⁸ Justice Kennedy has shown a willingness to defer matters within the “exclusive province of the Executive, or the Executive and Congress.” *Rasul v. Bush*, 542 U.S. 466, 486 (2004) (Kennedy, J., concurring). However, Justice Kennedy has also argued that “[i]ndefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus.” *Id.* at 488. He further argued that “as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.” *Id.* Therefore, there is still a possibility he may stand up for the rights of the detainees under limited circumstances.

²⁴⁹ *Hamdan*, 126 S. Ct. at 2810 (Scalia, J., dissenting).

²⁵⁰ *Id.* at 2810–18.

²⁵¹ *Id.* at 2812.

urged for a presumption against jurisdiction and found the majority's negative inference approach inappropriate.²⁵² Scalia further berated the majority for using legislative history and floor debates, then playfully cited to the majority doing the exact opposite in the past.²⁵³ Justice Scalia has the better argument here, for the jurisdiction seems contrived.²⁵⁴ Nonetheless, for what little the Court has accomplished in its holding, once again, the breach seems unimportant.

Then, Justice Scalia, quoting *Eisentrager*, argued that the Hamdan was at no point within American jurisdiction and, therefore, could not file a habeas petition.²⁵⁵ Furthermore, the DTA did not create any suspension of habeas problems because the D.C. Circuit ultimately retained jurisdiction to consider any review after the military commissions concluded.²⁵⁶ Justice Scalia signaled that any future suspension of habeas might not be problematic because "the exclusive-review provisions provide a substitute for habeas review adequate to satisfy the Suspension Clause."²⁵⁷

Next, Justice Scalia asserted that the courts should abstain from exercising jurisdiction under *Councilman*.²⁵⁸ Citing the war powers of the President, Justice Scalia argued that the President's determination of a state of war after September 11, and Congress' authorization for the use of force, plays against any action the Court might take.²⁵⁹ He was adamant that any court's ability to enjoin ongoing military proceedings to protect United States citizens from terrorist attacks would "bring[] the Judicial Branch into direct conflict with the Executive in an area where the Executive's competence is maximal and ours is virtually nonexistent."²⁶⁰ It is obvious that Justice Scalia imagines a passive role for the Judiciary at a time of war when the Congress and the President have sided together.

²⁵² *Id.* at 2812–15.

²⁵³ *Id.* at 2816. Justice Scalia cites to Justice Stevens arguing, "legislative history discloses some frankly partisan statements about the meaning of the final effective date language, but those statements cannot plausibly be read as reflecting any general agreement." *Id.* (citing *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 262 (1994)).

²⁵⁴ See discussion *supra* Part IV.A.1.

²⁵⁵ *Id.* at 2818.

²⁵⁶ *Id.* at 2819.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 2820–22.

²⁵⁹ *Id.* at 2820–21 ("It is not clear where the Court derives the authority—or the audacity—to contradict this determination.").

²⁶⁰ *Id.* at 2822.

The ramifications of Justice Scalia's argument in a prolonged international war with many detainees are unclear.

E. Justice Thomas' Dissent.

Justice Thomas' dissent generally argued that the Court, while lacking jurisdiction to consider the case in the first place, should not substitute its own definition of "necessity" for that of the President's at a time of war.²⁶¹ Arguing for the Executive's extensive war powers, Justice Thomas concluded that the President's determination in a time of war is due a "heavy measure of deference."²⁶² He further argued that the AUMF not only authorized the detainment of those the President deemed hostile to the United States, but also authorized their trial through military commissions.²⁶³ He argued that the UCMJ should be construed with the broader powers given it by the AUMF; thus, equipping the President with the power to detain and try the detainees through military commissions that deviate from the norm.²⁶⁴

Where the concurrence argued that the President's acts regarding commissions are in a field largely legislated and controlled by Congress, Justice Thomas opined that it is "our duty to defer to the Executive's military and foreign policy judgment [when it] is at its zenith."²⁶⁵ Therefore, Justice Thomas would place the commissions under the first level of the *Youngstown* framework, where the President is acting with Congressional approval. However, Justice Thomas is mistaken because the *Youngstown* framework requires that the Congressional authorization be explicit and unambiguous.²⁶⁶ Since the AUMF and the DTA do not explicitly authorize the military commissions, the majority has the better argument.²⁶⁷

While Justice Thomas agreed with the plurality's common law test of war, he believed the plurality's application was incomplete.²⁶⁸ Therefore, Justice Thomas would make the Orwellian determination that there has been an ongoing global War on Terrorism since 1996, as well as the determination that the scope of the theatre and duration of this war are

²⁶¹ *Id.* at 2823–25 (Thomas, J., dissenting).

²⁶² *Id.* at 2824.

²⁶³ *Id.* at 2825.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ See *supra* notes 118–19 and accompanying text.

²⁶⁷ See *supra* note 173 and accompanying text.

²⁶⁸ *Hamdan*, 126 S. Ct. at 2826.

“solely” for the President to consider as commander-in-chief.²⁶⁹ He further argued that hostilities start when military force is used, not when it is authorized.²⁷⁰ If the Executive defines the War on Terrorism as broadly as it wants, then this unchecked discretion will certainly infringe on many liberties.

Justice Thomas would also hold that Hamdan’s charge comported with the common law of war, and that he could be tried for conspiracy.²⁷¹ Justice Thomas further criticized the plurality’s requirement for the “plain and unambiguous” precedent for an offense by quoting *Quirin* and *Yamashita*, where military commissions are not to be set aside without a clear conviction that they are unlawful.²⁷² Thus, Justice Thomas generally argues for flexibility with the use of common law of war and little interference by the Judiciary in the Executive’s waging of war.²⁷³ It seems as if both the plurality and Justice Thomas’ dissent are mistaken and Justice Kennedy’s concurrence makes the better argument for not considering the conspiracy charge to begin with.

More disturbingly, Justice Thomas found Hamdan and others confined in Guantanamo guilty of the charge of conspiracy, even before any side had the chance to see the evidence against him.²⁷⁴ Furthermore, Justice Thomas stated the majority’s holding hampered the President’s ability to conduct a War on Terrorism, and that this war is not like any other war; therefore, the trial of those accused should not be held to international standards.²⁷⁵

Then, Justice Thomas dove into the majority’s interpretation of the UCMJ Article 36.²⁷⁶ Relying on *Yamashita* and *Quirin*, he stated the

²⁶⁹ *Id.* Justice Thomas contended that acts in Afghanistan, Pakistan, and Yemen from 1996 through 2001 satisfied the “temporal and geographic prerequisites for the exercise of law-of-war military commission jurisdiction.” *Id.*

²⁷⁰ *Id.* at 2826–27.

²⁷¹ *Id.* at 2831–33.

²⁷² *Id.* at 2830.

²⁷³ *Id.* at 2830.

²⁷⁴ *Id.* at 2838. Justice Thomas argued that “retributive justice for heinous war crimes is as much a ‘military necessity’ as the ‘demands’ of ‘military efficiency’ touted by the plurality, and swift military retribution is precisely what Congress authorized.” *Id.* Furthermore, he concluded that “Hamdan, and others like him, must be held accountable before military commissions for their involvement with and membership in an unlawful organization dedicated to inflicting massive civilian casualties.” *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 2840.

commission comports with the UCMJ § 836b because the President must comply so long as he deems compliance “practicable”—with the obvious caveat that compliance is not practicable here.²⁷⁷ Furthermore, the uniformity principal contained in Article 36 of the UCMJ, he argued, means “uniformity across the separate branches of the armed services”, not uniformity between courts-martial and military commissions.²⁷⁸ Justice Thomas further cited to considerations offered by the President when creating the commissions to bolster his conclusion that the judiciary has no business judging the practicability notion in Article 36.²⁷⁹

Lastly, Justice Thomas turned to Hamdan’s Geneva Convention Article 3 claims.²⁸⁰ First, he argued for *Eisentrager*, which the majority did not find persuasive, to hold that the Geneva Convention was not judicially applicable.²⁸¹ Turning to the issue of whether the conflict in Afghanistan was “not of an international character,” he found the Geneva Convention inapplicable and would defer to the President’s reasonable interpretation.²⁸² Justice Thomas further found that Hamdan’s commission complies with Article 3 anyway, and that his inability to attend and observe evidence is understandable under the government’s compelling interest for secrecy.²⁸³ Justice Thomas’ deference to the President on almost every subject in a time of war makes one wonder whether there is any need for the Supreme Court in a time of war.

F. Justice Alito’s Dissent.

Justice Alito, joined by Justices Thomas and Scalia argued that Hamdan’s commission complied with the Geneva Convention.²⁸⁴ Thus, Justice Alito argued that Article 3’s second requirement of regularly constituted court is part of domestic law because there is no international body of law that dictates the requirements.²⁸⁵ Therefore, most courts, though “differently constituted” are “regularly constituted.”²⁸⁶ Because the

²⁷⁷ *Id.* at 2840, 2842.

²⁷⁸ *Id.* at 2842.

²⁷⁹ *Id.* at 2842–43. The President stated that a new system, different from federal courts and military courts-martial, was needed in order to seek justice while waging the war. *Id.*

²⁸⁰ *Id.* at 2844.

²⁸¹ *Id.* at 2845–46.

²⁸² *Id.* at 2846.

²⁸³ *Id.* at 2847–49.

²⁸⁴ *Id.* at 2849–50 (Alito, J., dissenting).

²⁸⁵ *Id.* at 2850–51.

²⁸⁶ *Id.* at 2851.

military commission that was constructed to try Hamdan will try hundreds like him, it is not special, and must be regular.²⁸⁷ However, this play on semantics ignores the fact that the military commissions are specially constructed to try prisoners of the War on Terrorism and, more specifically, to try those especially from Afghanistan, and not those from Iraq. This logic does not change the conclusion that the commissions are special and not regular.

Next, Justice Alito disparaged the majority for striking the entire commission instead of striking the provisions of the conclusion.²⁸⁸ However, Justice Alito's logic²⁸⁹ is faulty for two reasons. In his example, Congress modifies court procedures, but the federal courts are themselves created by Congressional statute.²⁹⁰ Therefore, in the event of illegal modification of the federal courts, the default is to go back to the method statutorily prescribed.²⁹¹ The trouble here is that Congress has not prescribed a default method for trying these detainees.²⁹² Second, the changes prescribed by the President's whim²⁹³ prevent the court from ever returning to a default mode of operation. Therefore, the correct remedy is to have Congress write new rules for trying the detainees, which is what the majority recommends.²⁹⁴

Justice Alito also played down the fact that commission procedures could be changed by the whim of the President.²⁹⁵ However, this argument further detracts from Justice Alito's regularly constituted courts argument because the fact that the military commissions change from time to time

²⁸⁷ *Id.* at 2852.

²⁸⁸ *Id.* at 2852–53.

²⁸⁹ *Id.* at 2853.

If Congress enacted a statute requiring the federal district courts to follow a procedure that is unconstitutional, the statute would be invalid, but the district courts would not. Likewise, if some of the procedures that may be used in military commission proceedings are improper, the appropriate remedy is to proscribe the use of those particular procedures, not to outlaw the commissions.

Id.

²⁹⁰ See 28 U.S.C. § 43 (2000) (“Creation and composition of courts”).

²⁹¹ See *id.*

²⁹² See *supra* note 173 and accompanying text.

²⁹³ See *supra* note 208 and accompanying text.

²⁹⁴ See *supra* Parts IV.B–C.

²⁹⁵ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2854 (2006).

makes them at least irregular compared to what they were before the change. In sum, Justice Alito concluded that the military commissions met the Geneva Convention's Article 3 requirements.²⁹⁶

G. The Effect of Chief Justice Roberts.

Chief Justice Roberts did not participate in *Hamdan*. However, his opinion on the matter was clear in the appellate opinion.²⁹⁷ He would have held that the AUMF authorized the commissions put into place by the President;²⁹⁸ that Article 3 of the Geneva Convention did not apply to *Hamdan*;²⁹⁹ and that, even if it did, *Councilman* demanded that deference be given to the military proceedings.³⁰⁰ Therefore, in the next detainee case, Chief Justice Roberts will surely side with the *Hamdan* dissenters and defer to the President.³⁰¹

V. SIGNIFICANCE

A. How the Court signaled Congress and the President to thwart Youngstown.

The Court's courage to stand up to a President during a time of a war is commendable. Though *Hamdan* may be a seminal case in terms of the balance of power in the federal government, it ultimately erodes the balance created by *Youngstown*. Both the majority and concurrence point out multiple times that Congress has not approved the President's actions, and if that were the case, the Court would have reached a different conclusion.³⁰² This simply the Court sending a message to Congress that it will bow down and exit the stage if Congress and the President agree.³⁰³

Doctrinally, this message is not problematic because the detentions are a result of the War on Terrorism, which the President is fully authorized to conduct.³⁰⁴ However, the War on Terrorism is not like other wars.³⁰⁵ It is

²⁹⁶ *Id.* at 2854–55.

²⁹⁷ *See supra* Part III.B.

²⁹⁸ *See supra* note 142 and accompanying text.

²⁹⁹ *See supra* note 143 and accompanying text.

³⁰⁰ *Hamdan v. Rumsfeld*, 415 F.3d 33, 42 (D.C. Cir. 2005).

³⁰¹ *See infra* note 314.

³⁰² *See supra* notes 228, 241, 246 and accompanying text.

³⁰³ The author realizes that had Congress and the President realized this earlier, the Court would not have had to prod the two to communicate. The Court has not revealed any secrets. However, the Court's unwillingness, as a coordinate and coequal branch of the government, to set concrete protections based on the Constitution is disturbing.

³⁰⁴ *See supra* note 111 and accompanying text.

possible that the War on Terrorism will never be won.³⁰⁶ Furthermore, even if the states harboring terrorists were invaded and cleansed, it is possible that terrorists would rise in other places around the world, where vacuums in power exist.³⁰⁷ Military operations in these locations will likely result in a constant influx of detainees to camps like Guantanamo and possibly infinite detention of those deemed—and longer detention of those not yet deemed—dangerous.³⁰⁸ The Bush administration has already suggested that the U.S. would keep “a large proportion of detainees in Guantánamo Bay for many years, perhaps indefinitely.”³⁰⁹

However, the Supreme Court has not ruled on the issue of whether the U.S. can indefinitely detain the suspects on the War on Terrorism.³¹⁰ The Court is blameless for not ruling on an issue not raised in litigation. However, it could have sent a stronger message to Congress with a majority decision that detailed the constitutional requirements for military commission procedures—instead of those required by the UCMJ or the Geneva Convention.³¹¹ Possibly, the decision’s downfall is that it is based on statutory interpretation instead of Constitutional protection for the

³⁰⁵ Commentators note that wars have “typically been fought against proper nouns (Germany, say) for the good reason that proper nouns can surrender and promise not to do it again.” Grenville Byford, *The Wrong War*, 81 FOREIGN AFFAIRS 34, 34 (2002). However, “Wars against common nouns (poverty, crime, drugs) have been less successful” because they never give up. *Id.*

³⁰⁶ Fareed Zakaria, *The Enemy Within*, N.Y. TIMES, Dec. 17, 2006, § 7 (Magazine), at 8 (explaining that declaration of victory over such wars is unlikely to be easy).

³⁰⁷ *Id.* (noting that “fringe groups” are likely to rise elsewhere in the world even if peace were to exist in the Middle East); see Ismail Khan, *Pakistan Sends Tribal Leaders to Salvage Truce Broken by Taliban*, N.Y. TIMES, July 17, 2007, at A10 (detailing the rise of the Taliban in the tribal parts of Northern Pakistan); see also Carlotta Gall & Ismail Khan, *Pakistani Army Says Its Forces Are Gaining in Tribal Lands*, N.Y. TIMES, Apr. 13, 2007, at A8 (describing the power struggle and the involvement of al-Qaida in northern Pakistan).

³⁰⁸ Since January 2002, 300 of the 760 suspected terrorists have been released and only 10 have been charged. *The Supreme Court and Guantánamo: What Bush can do, and what he can't*, ECONOMIST, July 8, 2006, at 28, 29.

³⁰⁹ *Id.*; see William Glaberson, *Hurdles Frustrate Effort to Shrink Guantanamo*, N.Y. TIMES, Aug. 9, 2007, at A1 (“[G]oal is to release as many as 150 of the 360 men currently there, which would leave about 210 who they say could be eligible for war crimes trials or should be held indefinitely.”).

³¹⁰ Hamdan did not challenge and the court did not “address, the Government’s power to detain him for the duration of active hostilities in order to prevent such harm.” Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2798 (2006).

³¹¹ See *supra* Part IV.A.3–6.

detainees, which was quickly overridden by Congress.³¹² This result was certainly intended by Justice Kennedy, since he hinted that the Court had no business deciding the fates of the detainees.³¹³

Unfortunately, due mainly to the Court's division among ideological lines,³¹⁴ the Court has demoted itself to the position of an "umpire[]" from a "co-ordinate branch of *government*."³¹⁵ Though this lack of judicial activism is understandable due to the events of September 11, it is not acceptable. It is not just the privilege of the Court to be the final arbiter of the Constitution, but "it is emphatically the province and duty of the judicial department to say what the law is,"³¹⁶ instead of sitting on the sidelines without actively participating in the debate. In effect, the Court has de-clawed *Youngstown*, once again,³¹⁷ and botched an opportunity to

³¹² The MCA was signed by the President on October 17 2006, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, and 28 U.S.C.), and *Hamdan* was decided on June 29, 2006. *Hamdan*, 126 S. Ct. at 2749.

³¹³ See *supra* note 246 and accompanying text.

³¹⁴ *The Supreme Court: Modesty and Majesty*, ECONOMIST, July 1, 2006, at 25. Furthermore, Justices Thomas, Alito, and Roberts tend to "defer blankly to executive power," while Justice Scalia sticks to his own views instead of building consensus. Scott Turow, *Scalia the Civil Libertarian?*, N.Y. TIMES, Nov. 26, 2006, § 6 (Magazine), at 22.

³¹⁵ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 595 (1980) (Brennan, J., concurring) ("Under our system, judges are not mere umpires, but, in their own sphere, lawmakers—a coordinate branch of *government*."). Note that others have referred to the umpiring function of the co-equal branches of the government, but in a different sense. See David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. INT'L L. & POL. 363, 368–69 (2003) (noting that international law scholar Professor Thomas M. Franck, "devoted an entire book to advocating the courts to be more assertive in carrying out their umpiring function," in response to arguments favoring judicial passivity in foreign affairs); Robert J. Delahunty, *Presidential Power and International Law in a Time of Terror*, 4 REGENT J. INT'L L. 175, 186–87 (2006) (arguing that international law may not be "on the same plane or a higher plane than the Constitution itself," in response to claims that courts should play in the foreign relations field). However, this fixation with precedent trivializes the human factor: the detainees in Guantanamo may or not be guilty of any crimes even though they have been jailed for years.

³¹⁶ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

³¹⁷ Cleveland, *supra* note 12, at 1141–44. Cleveland argues "the *Youngstown* concurrence . . . is often misapplied, as it was in *Hamdi*, by judges purporting to invoke it." *Id.* at 1144. She disparages the court for misapplying *Youngstown* without seeking clear congressional approval. *Id.* at 1141–44.

protect those who deserve full-fledged fair trials, regardless of guilt. Though the majority finally stripped *Yamashita* of its precedential value,³¹⁸ the protections Justice Rutledge imagined for the accused non-citizen springing from the Constitution have yet to be fulfilled.³¹⁹

Unfortunately, the Court's position becomes more problematic in the face of reports showing Central Intelligence Agency black sites³²⁰ and "extraordinary rendition"³²¹ where torture and detention without access to legal counsel is rampant. By turning a blind eye to these events, when the Court had the chance to give an ultimatum, the Court invites more transgressions from the Executive. Furthermore, having given Congress homework with little direction, the Court is setting the stage for incompetent legislation drafting.

B. Military Commissions Act of 2006.

Congress, at the behest of the President, passed the MCA shortly after *Hamdan*'s holding was announced.³²² However, mainly due to the short amount of time spent writing the legislation, the MCA is full of ambiguities.³²³ Furthermore, the MCA limits the application of the Geneva

³¹⁸ See *supra* Part IV.A.5.

³¹⁹ See *supra* notes 58–66 and accompanying text.

³²⁰ Dan Bilefsky, *Report Faults Europe in C.I.A. Detainee 'Web'*, N.Y. TIMES, June 8, 2006, at A8 ("Fourteen European countries worked with the Central Intelligence Agency in the secret transfer of terrorism suspects, and two of them—Romania and Poland—probably harbored secret C.I.A. detention centers, the Council of Europe contends in a report issued Wednesday."); Sheryl Gay Stolberg, *President Signs New Rules to Prosecute Terror Suspects*, N.Y. TIMES, Oct. 18, 2006, at A20 ("Last month, [the President] announced he was moving 14 high-level terrorism detainees out of C.I.A. custody and to the detention center at Guantanamo Bay. He called on Congress to pass a bill setting up military commissions and establishing new standards for interrogation so the C.I.A. program could go forward.").

³²¹ David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123, 127 (2006). The authors define extraordinary rendition as "combining elements of arbitrary arrest, enforced disappearance, forcible transfer, torture, denial of access to consular officials, and denial of impartial tribunals." *Id.* It is "the state-sponsored abduction of a person in one country" and "the subsequent transfer of that person to another country for detention and interrogation." *Id.*

³²² Stolberg, *supra* note 320. See *supra* note 312 and accompanying text.

³²³ Carlos Manuel Vazquez, *Agora: Military Commissions Act of 2006: The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT'L L. 73, 73–76, 97 (2007).

Convention, and may “boomerang” to hurt American anti-terrorist efforts³²⁴—even if one were to dismiss its negative impact on the detainees.

However, the MCA was a complete victory for the President because it clearly authorizes the President³²⁵ to try unlawful alien enemy combatants for any offense.³²⁶ Both critics³²⁷ and supporters³²⁸ of the *Hamdan* decision recognize Congress agreed with the Court that the Geneva Convention applied to the detainees.³²⁹ However, enemy combatants may not “invoke the Geneva Conventions as a source of rights,”³³⁰ even though a military commission “established under this chapter is a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples for purposes of common Article 3 of the Geneva Conventions.’”³³¹ It is troublesome that Congress declared that the commissions abide by the Geneva Convention but did not allow the detainees to raise it as a source of rights. These provisions were probably placed into the MCA to prevent the *Hamdan* majority from questioning whether the commission actually afforded those protections. The protections offered in the MCA do not seem as robust as those the *Hamdan* plurality would have liked or even close to those offered by civilized peoples.³³²

³²⁴ Jack M. Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterrorism Operations*, 101 AM. J. INT’L L. 56, 56–57 (2007).

³²⁵ Military Commissions Act of 2006, Pub. L. No. 109-366, § 3, 120 Stat. 2600, 2602 (to be codified at 10 U.S.C. § 948b).

³²⁶ *Id.* (to be codified at 10 U.S.C. § 948b(a)).

³²⁷ Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 222 (2006) (“Congress did accept the *Hamdan* court’s application of Common Article 3 to the war with al-Qaeda.”).

³²⁸ Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 98 (2006) (“[D]ecision rejected the Administration’s dubious claim that Common Article 3 of the Geneva Conventions does not protect detainees.”).

³²⁹ *See supra* notes 327, 328 and accompanying text.

³³⁰ Military Commissions Act of 2006, § 3, 120 Stat. 2600, 2602 (to be codified at 10 U.S.C. § 948b(g)).

³³¹ *Id.* (to be codified at 10 U.S.C. § 948b(f)).

³³² The majority and, especially the plurality, were alarmed by the inability of the detainee to be present or observe the evidence against him. *See supra* note 225. Some would argue, “The MCA provides detainees with more substantive and procedural protections than any military commission or tribunal has provided to any defendant in history.” Tim Bakken, *The Prosecution of War Crimes: Military Commissions and the* (continued)

The MCA was later complemented by published Pentagon guidelines for courtroom procedures to prosecute detainees held as terrorist.³³³ These procedures explicitly forbid the use of evidence obtained through torture, but make a distinction between coercion and torture.³³⁴ However, the detainees' previous statements, which may have been obtained through torture, only have to satisfy an easy two-part test in order to be used at trial against them.³³⁵ Giving only the defendant's counsel, and not the defendant, the right to see the classified documents is surprising, even though the use of hearsay evidence is not.³³⁶ Furthermore, the MCA abandons certain provisions of the UCMJ that offer protections for a speedy trial, self-incrimination and pretrial investigation.³³⁷ The accused is entitled to counsel³³⁸ and is made aware of the charges against him "as soon as practicable,"³³⁹ which is not a stringent measure. This could possibly set the stage for indefinite detentions if Congress does not rebuke the Executive for not hurrying with the trials. After all, one positive aspect of the MCA is that Congress is to receive reports before December 31, of each year about any trials conducted by military commissions.³⁴⁰

Because the Supreme Court has not sent a strong enough message about the kind of procedures they would like to see in military tribunals, Congress found it fit to exclude not just the accused from his own trial, but also made it easy to close the trial to the public.³⁴¹ Furthermore, there is an appeal process built into the system, but it is military in character as well

Procedural and Substantive Protections Beyond International Law, 30 FORDHAM INT'L L.J. 553, 574 (2007).

³³³ Mark Mazzetti, *Pentagon Revises Its Rules on Prosecution of Terrorists*, N.Y. TIMES, Jan. 19, 2007, at A18.

³³⁴ *Id.*

³³⁵ Military Commissions Act of 2006, § 3, 120 Stat. 2600, 2607 (to be codified at 10 U.S.C. § 948r(d)). For admissibility, a military judge must first find that the totality of circumstances renders the statement reliability and sufficient probative value. *Id.* Second, the interests of justice must be best served with the admission of statement into evidence. *Id.*

³³⁶ *Id.* at 2608–09 (to be codified at 10 U.S.C. § 949a(b)). The Court ruled in *Yamashita* and *Hamdi* that hearsay evidence could be used. *See supra* notes 55, 110.

³³⁷ *Id.* at 2602 (to be codified at 10 U.S.C. § 948b(d)(1)).

³³⁸ *Id.* at 2605 (to be codified at 10 U.S.C. § 948k(a)(3)).

³³⁹ *Id.* at 2607 (to be codified at 10 U.S.C. § 948q(b)).

³⁴⁰ *Id.* at 2603 (to be codified at 10 U.S.C. § 948e(a)).

³⁴¹ *Id.* at 2611–12 (to be codified at 10 U.S.C. § 949d(d)–(e)). However, as one judge noted, "Democracies die behind closed doors." *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

and may only make findings of law.³⁴² Review by the Court of Appeals for the District of Columbia Circuit is authorized only after all the other military appeals have been waived or exhausted.³⁴³ Furthermore, the MCA “reenacts a crime of conspiracy without actually defining it,”³⁴⁴ which split the Court in *Hamdan*.³⁴⁵ Lastly, it suspends habeas corpus petitions noting that “no court” has jurisdiction by an alien to hear them.³⁴⁶ Now that Congress has turned in sloppy homework, it is time for the Court to grade it.

C. Unconstitutional Suspension of Habeas Corpus and the Next Detainee Case.

Shortly after the Supreme Court handed down *Hamdan*, and Congress responded with the MCA, Hamdan’s petition for habeas corpus with the District Court for the District of Columbia was denied.³⁴⁷ Judge Robertson, who in 2004 granted Hamdan’s habeas petition by ruling his detention unconstitutional,³⁴⁸ denied Hamdan’s 2006 petition for habeas corpus, citing to the MCA.³⁴⁹

The only other issues that arose were whether habeas corpus was unconstitutionally suspended and whether Hamdan was entitled to the protection of the writ.³⁵⁰ Therefore, the issue of whether the methods used to try the detainees are constitutional will not be raised in the appeal.³⁵¹ After providing a historical background Judge Robertson ruled that the writ was not suspended by the MCA because Congress had not made a finding

³⁴² Military Commissions Act of 2006, § 3, 120 Stat. 2600, 2621 (to be codified at 10 U.S.C. § 950f(a)).

³⁴³ *Id.* at 2622 (to be codified at 10 U.S.C. § 950g(a)(1)(B)).

³⁴⁴ George P. Fletcher, *Hamdan Confronts the Military Commissions Act of 2006*, 45 COLUM. J. TRANSNAT’L L. 427, 464 (2007).

³⁴⁵ *See supra* Parts IV.A, B, D–F.

³⁴⁶ *See supra* note 84. This is the section of the MCA that has taken the most criticism. Daniel Michael, *Recent Development, The Military Commissions Act of 2006*, 44 HARV. J. ON LEGIS. 473, 478 (2007).

³⁴⁷ *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 19 (D.D.C. 2006).

³⁴⁸ *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 155 (D.D.C. 2004).

³⁴⁹ *Hamdan*, 464 F. Supp. 2d at 11–19.

³⁵⁰ *Id.*

³⁵¹ *Id.* at 10 (omitting a discussion on the methods used to try detainees because the issue was whether Hamdan’s petition for a writ of habeas corpus should be dismissed due to the jurisdiction-stripping provisions of the Military Commissions Act, thus any appeal will consider whether Judge Robertson’s erred in his analysis in dismissing the petition).

of rebellion or invasion.³⁵² On the other hand, if Congress suspended habeas, it would have been unconstitutional.³⁵³

Unfortunately, that finding did not help Hamdan since Judge Robertson was quick to point out that he was not entitled to the common law or constitutional writ because he did not reside on U.S. soil.³⁵⁴ Predictably, Hamdan argued that his detention in Guantanamo brought him under the protection of the writ; however, the court rejected that argument because his presence was involuntary, therefore, he was not entitled to the constitutional protection of the writ of habeas corpus.³⁵⁵ Sadly, this means that Hamdan, and others like him, could spend decades in Guantanamo without obtaining any constitutional protections.

However, Hamdan is not the only one challenging the MCA.³⁵⁶ Other challengers are raising issues about the constitutionality of the protections offered by the MCA, which will take years to get to the Supreme Court.³⁵⁷ At least, however, the appeal process for the habeas issue has been placed on the fast track.

In April of 2007, Justices Stevens and Kennedy declined to review a habeas petition of the detainees because they deferred to the “practice of requiring the exhaustion of available remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus.”³⁵⁸ Justices Breyer, Souter and Ginsburg dissented, arguing that the “‘province’ of the Great Writ, ‘shaped to guarantee the most fundamental of all rights, is to provide an effective *and speedy* instrument by which judicial inquiry may be had into the legality of the detention of a person;’ Yet, the petitioners have been held for more than five years.”³⁵⁹ The

³⁵² *Id.* at 16.

³⁵³ *Id.*

³⁵⁴ *Id.* at 17.

³⁵⁵ *Id.* at 18.

³⁵⁶ Neil A. Lewis, *Judge Sets Back Guantánamo Detainees: Rules That New Law Strips Them of Habeas Corpus Challenges*, N.Y. TIMES, Dec. 14, 2006, at A32.

³⁵⁷ Note that Hamdan’s District of Columbia case was decided on November 8, 2004. *Hamdan*, 344 F. Supp. 2d at 152, and the Supreme Court did not hear it until March 28, 2006. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2749 (2006).

³⁵⁸ *Boumediene v. Bush*, 127 S. Ct. 1478 (2007).

³⁵⁹ *Id.* at 1479 (Breyer, J., dissenting) (citations omitted).

impatience of the *Hamdan* plurality with the delays urged by the government is apparent.³⁶⁰

However, on June 29, the Court reversed its previous decision,³⁶¹ thus, setting the stage for a review of *Boumediene v. Bush*³⁶² in the October 2007 term. The issue will be “whether the [MCA] deprives courts of jurisdiction to consider their habeas claims, and, if so, whether that deprivation is constitutional” or “whether the DTA provides a constitutionally adequate substitute.”³⁶³ This issue is narrower than the issue in *Hamdan*, and does not include the procedures employed by the military commissions used to try the detainees.³⁶⁴

Regardless, assuming that one of the detainee cases reach the Supreme Court with the three issues—constitutionality of the procedures of the MCA, the constitutionality of the suspension of habeas, and the detainees’ entitlement to it—the outcome can be estimated by simple arithmetic. First, the four Justices of the plurality³⁶⁵ will be the only ones to dwell upon the methods used in the commissions, while Justices Kennedy,³⁶⁶

³⁶⁰ *Id.* at 1481 (“Moreover, I would expedite our consideration. In the past, this Court has expedited other cases where important issues and a need for speedy consideration were at stake.”).

³⁶¹ *Boumediene v. Bush*, 127 S. Ct. 3078 (2007). *See also Legal Affairs: Supreme Court to Review Guantánamo Cases*, NPR, June 29, 2007, <http://www.npr.org/templates/story/story.php?storyId=11601680>. Note that the justices did not explain the reasons for the change; however, a week prior to the announcement, the “lawyers for the detainees filed a statement from a military lawyer in which he described the inadequacy of the process the administration has put forward as an alternative to a full-blown review by civilian courts.” *Id.* The impatience of the *Hamdan* plurality may be affecting Justices Stevens and Kennedy as well.

³⁶² *Boumediene*, 127 S. Ct. at 3078. *See also* Linda Greenhouse, *Guantánamo Legal Battle Is Resuming*, N.Y. TIMES, Sept. 2, 2007, (Magazine), at 14.

³⁶³ *Boumediene*, 127 S. Ct. at 1479, 1480 (Breyer, J., dissenting).

³⁶⁴ *Id.* (considering availability for detainees to use habeas corpus and not the procedures used to try detainees by military commissions); *see also Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 11 (D.D.C. 2006) (considering *Hamdan*’s ability to use habeas corpus and not the procedures used to try him by military commissions).

³⁶⁵ *See supra* Part IV.B.

³⁶⁶ Green, *supra* note 122, at 172 (“Even if Congress simply approved these pre-*Hamdan* procedures wholesale, it seems preponderantly likely that Kennedy (*Hamdan*’s fifth vote) would uphold them as constitutionally valid.”). *See also supra* note 247. However, there is also the slight probability that Kennedy may vote the other way. *See supra* note 248. *See also* Michael Greenberger, *A Hamdan Quartet: Four Essays on Aspects of Hamdan v. Rumsfeld: You Ain’t Seen Nothin’ Yet: The Inevitable Post-Hamdan* (continued)

Alito,³⁶⁷ Roberts,³⁶⁸ Scalia,³⁶⁹ and Thomas,³⁷⁰ will likely rule that Congressional approval is given to the President, and the Court has no business judging the constitutionality of the treatment of the detainees. Even if the Court were to agree with the lower courts about the unconstitutional suspension of the writ, it will likely hold that the detainees are not entitled to habeas corpus.³⁷¹ This will be problematic because the court will be setting itself up for another detainee case—most of them could be imprisoned for decades.³⁷² As Judge Robertson noted, “Hamdan’s lengthy detention beyond American borders but within the jurisdictional authority of the United States is historically unique.”³⁷³ The Supreme Court should ultimately find a unique solution to that problem—give them constitutional rights.³⁷⁴

There are other good reasons for judicial activism in this area. Congress obligingly concentrating power in the hands of the President is a problem to some Americans. Others have even protested that the Supreme

Conflict Between The Supreme Court and the Political Branches, 66 MD. L. REV. 805, 823–28 (2007) (detailing Justice Kennedy’s impact on the *Hamdan* decision as the swing vote and his worldview).

³⁶⁷ See *supra* Part IV.F.

³⁶⁸ See *supra* Part IV.G.

³⁶⁹ See *supra* Part IV.D.

³⁷⁰ See *supra* Part IV.E.

³⁷¹ Justice Scalia argued in his dissent that, ultimately, habeas would not be precluded since the Columbia Circuit was given final right of appeal. See *supra* notes 256–57 and accompanying text. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2036 (2007) (“This [MCA], we conclude, is constitutionally valid as applied to most cases in which the substitute review mechanism is available, but invalid insofar as it deprives detainees of any opportunity to bring their complaints of unlawful detention or unconstitutional treatment before any civilian court.”); see also Alissa J. Kness, *The Military Commissions Act of 2006: An Unconstitutional Response to Hamdan v. Rumsfeld*, 52 S.D. L. REV. 382, 386 (2007) (arguing that the MCA is unconstitutional due to the suspension of habeas corpus for the detainees).

³⁷² See *supra* note 309 and accompanying text.

³⁷³ *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 18 (D.D.C. 2006).

³⁷⁴ Shortly before the publication of this Article the Court decided *Boumediene* with Justice Kennedy writing for the majority and held that Congress improperly suspended the privilege of habeas corpus—proving my predictions wrong and Professor Beattie’s right. *Boumediene v. Bush*, Nos. 06-1195, 06-1196, 2008 WL 2369628, *31 (U.S. June 12, 2008).

Court has been making a mess of things in a time of war.³⁷⁵ But, this argument overlooks simple facts about the recent history of the Iraqi War. When Congress fails to deliberate and investigate,³⁷⁶ but simply rallies behind the President, innocent people suffer.³⁷⁷ The Supreme Court, insulated from the pressures of election, is in the preeminent position to give the give the necessary consideration to the fate of prisoners in Guantanamo, when co-ordinate branches of the government will not. If the stories about the sale of detainees to American forces in Afghanistan are true,³⁷⁸ then grave injustices have been committed to those released from Guantanamo, and graver injustices to those not yet released or tried.³⁷⁹ Therefore, the Court must find the constitutional right for habeas corpus

³⁷⁵ In his recent book *Not a Suicide Pact: The Constitution in a Time of National Emergency*, Judge Richard Posner argued the Constitution should be bent in times of emergency. Michiko Kakutani, *Constitution Bending: A Jurist's Argument*, N.Y. TIMES, Sept. 19, 2006, at E1. Furthermore, he argued, "when power is concentrated, so is responsibility." *Id.* at E7. Judge Posner and others that trade haste for reason and do not pay much heed to the maxim "power tends to corrupt; absolute power corrupts absolutely." NEW DICTIONARY OF CULTURAL LITERACY 324 (E.D. Hirsch, Jr., et al. eds., 2002). See also David Cole, *The Poverty of Posner's Pragmatism: Balancing Away Liberty After 9/11*, 59 STAN. L. REV. 1735, 1736–37 (2007) (book review) (finding Posner's treatment of the "Constitution as little more than an invitation to pragmatic policy judgment" as being "quite dangerous.").

³⁷⁶ The Senate unanimously passed a resolution to support the troops and commend the President's leadership in the War in Iraq, while the House adopted it by a vote of 392 to 11, after Defense Secretary Donald Rumsfeld defined the overall goal of the war as "eliminat[ing] Iraq's weapons of mass destruction." Thom Shanker & Eric Schmitt, *Pentagon: Rumsfeld Says Iraq Is Collapsing, Lists 8 Objectives of War*, N.Y. TIMES, Mar. 22, 2003, at B1. Later, Rumsfeld said, "It appears that there were not weapons of mass destruction there." Opinion, *The Intelligence Business*, N.Y. TIMES, May 7, 2006, § 4, at 11.

³⁷⁷ Department of Defense shows that 2,258 Americans were killed in combat in Iraq. Thom Shanker & David S. Cloud, *U.S. Military Deaths in Iraq Still Mostly Outside Capital*, N.Y. TIMES, Nov. 1, 2006, at A14. The United Nations estimated the civilian death toll exceeded 34,000. Sabrina Tavernise, *Iraqi Death Toll Exceeded 34,000 In 2006*, U.N. SAYS, N.Y. TIMES, Jan. 17, 2007, at A1.

³⁷⁸ See Abdul Waheed Wafa, *Freed From Guantanamo Bay, 7 Afghans Arrive In Kabul*, N.Y. TIMES, Dec. 17, 2006, at A27.

³⁷⁹ See Neil A. Lewis, *Freed From Guantanamo But Stranded Far From Home*, N.Y. TIMES, Aug. 15, 2006, at A15 (discussing the personal issues facing released detainees who are unable to return to their home country and unwelcome in others, and the political and legal ramifications for both United States foreign relations and detention policies).

with the detainees still in Guantanamo and further scrutinize the trial procedures for compliance with constitutional rights found in the Fifth and Sixth Amendments.

VI. CONCLUSION

Hamdan is a simple attempt by the Court to send a message to the President and Congress to play by the rules. The majority and the plurality are perfectly aware that Congress will statutorily overrule *Hamdan* and that the President will have all the power he needs in order to detain terrorist suspects indefinitely. Though the plurality concluded the Geneva Convention created requirements that the President must abide by in order to try the detainees, and the majority had the courtesy to state that *Yamashita* no longer has any precedential value, the Court's holding sets the tone for what is to come. There will likely not be a five-justice majority to stand up to the combined powers of the President and Congress to protect our enemies from oppression in order to protect ourselves.