HAMDAN v. RUMSFELD

SUPREME COURT OF THE UNITED STATES
126 S. Ct. 2749
June 29, 2006

Let's get out the toolbox, take off all the nuts, washers and bolts and see if we can make this case understandable. Of course, to do that, we have to (1) recognize the issues, (2) admit to confusion or lack of knowledge where that is so and (3) dig until our temporary state of ignorance is cured. Only then can we solve the puzzle. We are going to do this one "by the numbers."

OPINION: Justice Stevens...Petitioner Salim Ahmed Hamdan, a **Yemeni national**, is in custody at an American prison in Guantanamo Bay, Cuba. In November 2001, during hostilities between the United States and the Taliban (which then governed Afghanistan), Hamdan was captured by militia forces and turned over to the U.S. military. In June 2002, he was transported to Guantanamo Bay. Over a year later, **the President deemed him eligible for trial by military commission for then-unspecified crimes**. After another year had passed, Hamdan was **charged with one count of conspiracy "to commit...offenses triable by military commission."**

Hamdan filed [a] petition for writ of habeas corpus...to challenge the Executive Branch's intended means of prosecuting this charge. **He concedes that a court-martial constituted in accordance with the Uniform Code of Military Justice (UCMJ) would have authority to try him. [He contends] that the military commission the President has convened lacks such authority for two principal reasons:**

First: **Neither congressional Act nor the common law of war supports trial by this commission for the crime of conspiracy -- an offense that, Hamdan says, is not a violation of the law of war; and,**

Second: **The procedures the President has adopted to try him violate the most basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him.**

The District Court granted Hamdan's request for a writ of habeas corpus. The Court of Appeals for the District of Columbia...reversed...[W]e granted certiorari...and **conclude that the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions.** Four of us also conclude that the offense with which Hamdan has been charged is not an "offense that by...the law of war may be tried by military commissions."

Basics: I give. Prior cases seem to indicate that a "military commission" is synonymous with a "military tribunal" and that neither is the same as a "court-martial." I am not sure there is a difference. But, if there is, nothing we have read gives us a clue about what that difference might be. Do any of you know the answer?

So...Hamdan (1) is a non-U.S. citizen (2) captured in Afganistan (3) held at GTMO (4) who was charged with "conspiracy" and (5) was going to be tried by a "military commission." We do not yet know the details of the actual charges.

Hamdan **would agree** to a court-martial authorized by the Uniform Code of Military Justice (UCMJ), but **objects** to this "military commission" as not authorized by the UCMJ because (1) neither Congress nor the law of war recognizes the crime of "conspiracy" and (2) the rules of the game are not appropriate.

He filed a petition for writ of habeas corpus which was (1) granted by the District Court, (2) reversed by the Court of Appeals and reversed again by the Supreme Court, ultimately holding that this "military commission" violates the UCMJ and the Geneva Conventions. Also, four of the Justices believe that "conspiracy" is not an appropriate charge.

Let's continue.

I

This Part I of the majority opinion, authored by Justice Stevens, is joined by Justices Kennedy, Souter, Ginsburg and Breyer. As far as I can tell, it just provides us with the details of how the case gets to the Supreme Court.

...Congress responded [to 911] by adopting a Joint 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...in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force (AUMF)**...[The President, pursuant to the AUMF, ordered the invasion of Afghanistan.]

[Here is the dateline, paraphrased and in chronological order. "Question marks" indicates that I do not know the date; however, the item is still chronological as it relates to the other items in the list.]

November 13, 2001	The President issued a **military order** — "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" (the "November 13 Order" or "Order"). The Order applies to any **non-citizen for whom the President determines "there is reason to believe" (1) "is or was" a member of al Qaeda or (2) has engaged or participated in terrorist activities aimed at or harmful to the United States.** The Order says that such individuals are to be tried by a military commission for any and all offenses "triable" by military commission.
July 3, 2003	The President announced his determination that **Hamdan and five other detainees** at GTMO were subject to the Order.
December, 2003	Military counsel was appointed to represent Hamdan.
February, 2004	Hamdan's counsel filed **demands for charges and for a speedy trial** pursuant to Article 10 of the UCMJ.
February 23, 2004	The Government **denied the applications, ruling that Hamdan was not entitled to any of the protections of the UCMJ**.
???	Hamdan filed his petition for writ of habeas corpus in Washington State.
July 13, 2004	The Government formally charges Hamdan.
???	The District Court in Washington transferred Hamdan's petitions to the U.S. District Court for the District of Columbia.
???	A Combatant Status Review Tribunal (CSRT) (convened pursuant to a military order issued on July 7, 2004) decided that Hamdan's continued detention at Guantanamo Bay was warranted because he was an "**enemy combatant**."

An "enemy combatant" is defined by the military order as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners."

??? Proceedings before the military commission commenced.

Soapbox time. Hamdan agrees he is not a U.S. citizen. He does not deny he was an "enemy combatant." Therefore, at a minimum, if the Government never prosecutes him for "war crimes," Salim Ahmed Hamdan is a true "prisoner of war" subject to detention at GTMO "**until hostilities cease.**" That is likely going to be a very long time. So...

Unless there is some law of which I am not yet aware that obligates the government to timely bring charges against a POW after being placed on the military commission list, **I do not appreciate the tone of Justice Stevens' Opinion**.

For example, Justice Stevens states: "**Not until** July 13, 2004, after Hamdan had commenced this action in the United States District Court for the Western District of Washington, did the Government **finally charge** him with the offense for which, a year earlier, he had been deemed eligible for trial by military commission." When I read such, I, for one, do not forget American lives lost and put at risk to capture Bin Laden's bodyguard, Salim Ahmed Hamdan. You can just tell that Justice Stevens is doing everything he can to protect this man, unlike the Supreme Court Justices of past wars. I can not say that I appreciate the political tone.

[So, what are the charges against Hamdan? They are presented in 13 paragraphs by the government and are set forth here in paraphrased form.]

Paragraphs 1 and 2: These paragraphs set forth the November 13 Order and the President's July 3, 2003, declaration that Hamdan is eligible for trial by military commission.

Paragraphs 3 to 11: These "General Allegations" describe al Qaeda's activities from its inception in 1989 through 2001 and identify Osama bin Laden as the group's leader.

Paragraph 12: This paragraph charges that from February 1996 to November 24, 2001, Hamdan willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with [named members of al Qaeda] to commit the following offenses triable by military commission:

1. attacking civilians;
2. attacking civilian objects;
3. murder by an unprivileged belligerent; and,
4. terrorism.

The Court states: “There is no allegation that Hamdan had any command responsibilities, played a leadership role, or participated in the planning of any activity.”

Why is our Supreme Court going out of its way to emphasize the lack of allegations of “command responsibilities” or “leadership role” or “planning”? In 1947 the Supreme Court let stand a conviction of one of our own citizens for housing his son and helping him get a job and a car. *Haupt v United States.* I realize that charge was for treason; however, I cannot help but wonder why the Court seems to be working hard at sugarcoating the activities of admitted al Qaeda. He is not a citizen and has never been “in uniform.” I am betting the 1947 Court would have doomed Mr. Hamdan for aiding and abetting bin Laden by getting him a cup of coffee.

Paragraph 13: Four "overt acts" are listed that Hamdan is alleged to have committed sometime between 1996 and November 2001 in furtherance of the "enterprise and conspiracy":

1. he acted as Osama bin Laden's "bodyguard and personal driver," "believing" all the while that bin Laden "and his associates were involved in" terrorist acts prior to and including the attacks of September 11, 2001;
2. he arranged for transportation of, and actually transported, weapons used by al Qaeda members and by bin Laden's bodyguards (Hamdan among them);
3. he "drove or accompanied Osama bin Laden to various al Qaida-sponsored training camps, press conferences, or lectures," at which bin Laden encouraged attacks against Americans; and
4. he received weapons training at al Qaeda-sponsored camps.

[The chronology continues (paraphrased).]

November 8, 2004 The District Court granted Hamdan's petition for habeas corpus and stayed the commission's proceedings, concluding that...

1. the President's authority to establish military commissions extends only to "offenders or offenses triable by military commission **under the law of war**"*;*
2. the law of war includes the Geneva Convention (III);
3. that Hamdan is entitled to the full protections of the Third Geneva Convention until adjudged not to be a prisoner of war; and
4. whether or not Hamdan is properly classified as a prisoner of war, the military commission convened to try him was established in violation of both the UCMJ and the Third Geneva Convention because it had the power to convict based on evidence the accused would never see

or hear.

??? The Court of Appeals **reversed** and...

1. agreed with the District Court that Hamdan's petitions should be heard;
2. but rejected the District Court's conclusion that Hamdan was entitled to relief under the Third Geneva Convention;
3. held that *Quirin* foreclosed any separation-of-powers objection to the military commission's jurisdiction;
4. and held that Hamdan's trial before the contemplated commission would not violate the UCMJ or the U.S. Armed Forces regulations inintended to implement the Geneva Conventions.

In other words, based on *Quirin*, Bush was right.

November 7, 2005 The Supreme Court granted certiorari.

December 30, 2005 **The Detainee Treatment Act of 2005 (DTA) was signed into law.**

[End of paraphrasing.]

II

This Part II of the majority opinion, authored by Justice Stevens, is joined by Justices Kennedy, Souter, Ginsburg and Breyer. It concerns statutory interpretation of the DTA.

[The Government contended that the Supreme Court should dismiss Hamdan's writ of certiorari because the Detainee Treatment Act (DTA) **denied the Supreme Court jurisdiction** to hear it. The Supreme Court disagreed. **That is where the substance of this opinion begins.**]

Now, we need to wade through some legislation...patience is needed! However, **a good effort will likely be rewarded with understanding**! Who knew Americans could actually do this for themselves? Answer: Thomas Jefferson knew we could and hoped we would!

[The DTA (again, signed into law on **12/30/05**) places restrictions on the treatment and interrogation of detainees in U.S. custody, furnishes procedural protections for U.S. personnel accused of improper interrogation practices and sets forth procedures to review the status of detainees held outside the U.S. §1005(a)-(d) direct the Secretary of Defense to report to Congress the procedures being used

by Combatant Status Review Tribunals (CSRTs) to determine the proper classification of detainees held at GTMO, Iraq and Afghanistan, and to adopt certain safeguards as part of those procedures.]

We have previously discussed the concept of Congress potentially limiting the jurisdiction of the Supreme Court. As we have learned, there are very few types of cases the Supreme Court can hear that are "originally" filed with them. See Article III, §2, paragraph 2: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, **the supreme Court shall have original Jurisdiction**. **In all other Cases...**, **the supreme Court shall have appellate Jurisdiction**...with such Exceptions, and under such Regulations **as the Congress shall make**." Therefore, almost all cases before the Supreme Court are by way of appeal; i.e., by "appellate jurisdiction." It is Congress, by statute, who creates Federal District Courts and Federal Courts of Appeal and the rules by which cases are filed and appealed on up to the Supreme Court.

If you recall, we discussed the fact that when the Supreme Court hands down a very controversial decision, on occasion Congressmen speak of limiting the Court's jurisdiction. I posed the question: Could Congress pass a law that prohibited any case involving abortion issues from going to the Supreme Court? That would mean that we would be potentially left with many different jurisdictions deciding such issues many different ways. Nevertheless, could it be done? I believe so. Welcome to the world of ELL. **Congress** apparently has attempted to "toy" with jurisdiction here. Let's see what happens. Please hang on – clarification is within reach!

☛ Subsection (e) of §1005, which is entitled "Judicial Review of Detention of Enemy Combatants," supplies the basis for the Government's **jurisdictional argument**. **The subsection contains three numbered paragraphs**: The **first paragraph** amends the judicial code as follows:

"(1) IN GENERAL. – Section 2241 of title 28, United States Code, is amended by adding at the end the following:

(e) **Except as** provided in section 1005 of the Detainee Treatment Act of 2005, **no court, justice, or judge shall have jurisdiction** to hear or consider –

(1) an application for a writ of habeas corpus filed by...an **alien** detained [at GTMO]; or

(2) any other action against the United States or its agents relating to any aspect of the detention...of an **alien** at [GTMO] who –

(A) is currently in military custody; or

(B) has been determined by the U. S. Court of Appeals for the District of Columbia...in accordance with...1005(e) of the [DTA] to have been

properly detained as an **enemy combatant**."

[Paragraph (2) vests in the Court of Appeals for the District of Columbia Circuit with]...the "exclusive jurisdiction to determine the validity of any final decision of a [CSRT] that an alien is properly designated as an **enemy combatant**"...[and] delimits the scope of that review.

Paragraph (3) mirrors paragraph (2) in structure, but governs judicial review of final decisions of military commissions, not CSRTs. It vests in the Court of Appeals for the District of Columbia ...[with] "exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order)." Review is as of right for any alien sentenced to death or [prison for ≥ 10 years], but is at the Court of Appeals' discretion in all other cases. The scope of review is limited to the following inquiries:

> "(i) whether the final decision [of the military commission] was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and
>
> (ii) at the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States."

§1005(h) contains an "effective date" provision, which reads as follows:

> (1) In General. -- This section shall take effect **on the date of the enactment** of this Act.
>
> (2) Review of Combat Status Tribunal and Military Commission Decisions.-- **Paragraphs (2) and (3) of subsection (e) shall apply** with respect to any claim whose review is governed by one of such paragraphs and that is **pending on or after the date of the enactment** of this Act.

The Act is silent about whether paragraph (1) of subsection (e) "**shall apply**" to claims pending on the date of enactment. [Subsection (f) and (g) of §1005 emphasize that §1005 does not "confer any constitutional right on an alien detained as an enemy combatant outside the United States" and that **the "United States" does not, for purposes of §1005, include Guantanamo Bay**.] **The Government argues that §§1005(e)(1) and 1005(h) had the immediate effect, upon enactment, of repealing federal jurisdiction not just over detainee habeas actions yet to be filed but also over any such actions then pending in any federal court -- including this Court. Accordingly, it argues, we lack jurisdiction to review the Court of Appeals' decision below.**

OK, you can do this. I contend this journey to clarity and knowledge is fundamentally no different than baking a pie. If you have never baked a pie, what do you need? Right - the recipe. The Court is giving us the recipe. If you see an ingredient in a recipe you do not recognize, do you give up? NO. You go to the grocery store and look or ask until you find it. Same here. If we don't understand the recipe in the Opinion, we need to go to the source. In this instance, we need to go to the **Detainee Treatment Act of 2005** (a few pages back). Please refer to it and I will show you what I mean. **I promise the fog will clear.**

Please go back a page or two in this material to where I place this graphic symbol..."☛". The Court refers to subsection (e) of §1005, says it contains **three** numbered paragraphs and quotes the first paragraph. You may not have been confused. I was. When the Court speaks of subsection (e), states it contains three paragraphs and purports to quote the first paragraph, but it begins with (1) immediately followed by (e), I was a bit lost. What "(e)" are we talking about? Normally, when you indent, you start with (a) – not (e). Anyway, I was confused right out of the chute. Plus, normal human beings don't think of lengthy "subsections" of an indented document as a "paragraph." I wanted to see for myself what they were talking about, so I went to the "grocery store" and got a copy of the "Detainee Treatment Act of 2005." Let's take a look.

Please note that the DTA has six sections (§§ 1001 - 1006). The Court is focused on §1005 and, specifically, subsection (e) of §1005. The Court said that "subsection (e) of §1005" is entitled "Judicial Review of Detention of Enemy Combatants." Go back and find that heading in the DTA and **we have found our starting point. <u>Let the journey begin</u>!**

First, I feel the Court's statement that "The subsection (referring to "e") contains three numbered paragraphs" is a bit misleading. For, while that is true, (1) it nevertheless implies that the subsection contains **only** three paragraphs when, in fact, it contains four "paragraphs" and (2) I find the term "paragraph" confusing under the circumstances. So, just to start us off on the right track, please note that there are **four** numbered **subsections** under (e). They are titled (1) "IN GENERAL," (2) "REVIEW OF DECISIONS OF COMBAT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION," (3) "REVIEW OF FINAL DECISIONS OF MILITARY COMMISSIONS" and (4) "RESPONDENT."

Seeing the entire Act on paper somehow makes it easier to understand why the "first paragraph" of (e) starts with (1)(e) instead of (1)(a). What is the answer? The material I have highlighted in the Act is not meant to be a subsection of §1005(e)(1) at all. It is merely a quote of an amendment made to Title 28 by this Act that **coincidentally** begins with section "e" of §2241 of that Title.

Perhaps the foregoing was not an issue with you, but it was for me and now I fully understand what the Court meant. If you were in the same boat, together we have found the clue to that part of the "recipe."

Also note that the amendment to Title 28 (the quoted material in (e)(1)) begins by saying "except as provided in section 1005 of the Detainee Treatment Act..." Of course, that is referring to the very section we are reading, but it is referring to the **entire** section 1005. If confusing, I hope that is clear for you now.

[Hamdan objects to the Government's theory that the Supreme Court lacks jurisdiction to hear his case per the DTA] on both constitutional and statutory grounds. Principal among his constitutional arguments is that the Government's preferred reading **raises grave questions about Congress' authority to impinge upon this Court's appellate jurisdiction**, particularly in habeas cases.

There you have it...pretty exciting stuff...a question we raised months ago: Can Congress limit the appellate jurisdiction of the Supreme Court of the United States?

Support for this argument is drawn from *Ex parte Yerger* (1869), in which, having explained that "the denial to this court of appellate jurisdiction" to consider an original writ of habeas corpus would "greatly weaken the efficacy of the writ," we held that Congress would not be presumed to have effected such denial absent an **unmistakably clear statement to the contrary**. [See *Yerger* and *Felker v Turpin* (1996) and *Durousseau v. United States (1810)*] (opinion for the Court by Marshall – The "appellate powers of this court" are not created by statute but are "given by the constitution")...*Ex parte McCardle (1869)* (holding that Congress had validly foreclosed one avenue of appellate review where its repeal of habeas jurisdiction...could not have been "a plainer instance

of positive exception"). Hamdan also suggests that, if the Government's reading is correct, Congress has unconstitutionally suspended the writ of habeas corpus.

Time out. Let's analyze these cases just to clear any smoke that may be lingering in the air. Let's start with the oldest and proceed to the most recent. To save you some considerable time, I have read them all. Here are my findings —

Durousseau v. United States (1810). The *Hamdan* Court quotes Chief Justice John Marshall as saying: "The 'appellate powers of this court' are not created by statute but are 'given by the constitution.'" The reason I had to read these cases is that the foregoing quote did not seem to make sense, given my conclusion that the Supreme Court's appellate power is created when Congress passes statutes that give it the right to hear appeals. What I found is that the quote of Marshall is both accurate and, in my estimation, misleading, because it is taken out of context. The *Durousseau* case involved an appeal from the Territory of Orleans. Based upon a reading of the statute creating courts within the Louisiana Purchase, one of the parties contended that the Supreme Court did not have jurisdiction to hear such an appeal, similar to the Government's contention in *Hamdan* based upon a reading of the DTA. Here is the full context of what Justice Marshall said:

> "[Paragraph 2 of Article III, §2 of the Constitution provides that] in some few cases the supreme court possesses original jurisdiction. The constitution then proceeds thus: 'In all the other cases...the supreme court shall have appellate jurisdiction...with such exceptions, and under such regulations, as the congress shall make.' It is contended that the words of the constitution vest an appellate jurisdiction in this court, which extends to every case not excepted by congress; and that if the court had been created without any express definition or limitation of its powers, a full and complete appellate jurisdiction would have vested in it, which must have been exercised in all cases whatever...**The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject.**"

In other words, while it is true that the Supreme Court's appellate power is derived from the Constitution, Congress can, nevertheless, constitutionally limit and regulate such powers. The *Hamdan* Court conveniently forgot to include Justice Marshall's qualifying last sentence. The additional importance of the *Durousseau* case is that Justice Marshall held that the Supreme Court's appellate jurisdiction cannot be limited **unless** Congress does so **in express terms**.

Ex parte McCardle (1869). This is an extraordinarily important case. McCardle, although he was not in the military, was held in custody by the military (allegedly per the authority of certain acts of Congress) for trial before a military commission on charges that he published articles in his newspaper that were incendiary and libelous. He filed a writ of habeas corpus. **After oral argument in the Supreme Court, but before decision, Congress passed a statute which "expressly" repealed a prior statute upon which McCardle had based jurisdiction in the Supreme Court to hear his writ.** The Supreme Court held that they could not rule on a matter which had been specifically removed from their appellate jurisdiction by Congress!!!

Ex parte Yerger (1869). This case just emphasized that in order to deny appellate jurisdiction to the Supreme Court, any such Congressional intent, especially where habeas corpus is concerned, would have to be unmistakably clear. ***Felker v Turpin* (1996)**. Same as *Ex parte Yerger*.

We find it unnecessary to reach either of these [Constitutional] arguments. Ordinary principles of statutory construction suffice to rebut the Government's theory -- at least insofar as this case, which was pending at the time the DTA was enacted, is concerned.

They are saying that they do not need to rule on whether the DTA can constitutionally limit their jurisdiction or whether Congress has unconstitutionally suspended the writ of habeas corpus because, whether or not either of the foregoing is true, **under "ordinary principles of statutory construction," the DTA does not apply to this case and, therefore, they do have jurisdiction to hear Hamdan's petition.** We assume they are now going to tell us about those "ordinary principles of statutory construction" and why they believe the DTA does not apply to Hamdan.

The Government acknowledges that only paragraphs (2) and (3) of subsection (e) are expressly made applicable to **pending cases**, but argues that the omission of paragraph (1) from the scope of that express statement is of no moment. This is so, we are told, because Congress' failure to expressly reserve federal courts' jurisdiction over pending cases erects a presumption against jurisdiction, and that presumption is rebutted by neither the text nor the legislative history of the DTA.

That this is even an issue, better described below, is entirely the fault of Congress. One would think that Congress would be able to clearly define when they intend their own legislation to "be effective." I find it appalling that there would ever be an ambiguity embedded in legislation of this nature. I realize how difficult it can be to put ideas in writing; but, come on, it should be a piece of cake for our elected legislators to tell us when they intend their own legislation to take effect!!! Just witness the fallout from the failure of Congress to be clear as we proceed to see how the Court handles this.

To understand the issue, take a look at §1005(e)(1) and §1005(e)(2) and §1005(e)(3) and §1005(h) of the DTA.

§1005(e)(1) provides, in general, that no court shall have jurisdiction to hear applications for writs of habeas corpus or any other actions from such detainees or detained aliens or enemy combatants except as provided within the terms of §1005 of the DTA.

§1005(e)(2) gives the D.C. Court of Appeals exclusive jurisdiction to review final decisions of Combatant Status Review Tribunals on the limited question of whether a detainee is properly detained as an "enemy combatant," together with some additional rules concerning that issue.

§1005(e)(3) gives the D.C. Court of Appeals exclusive jurisdiction to review the final decisions of a Military Commission, together with some additional rules concerning same. If the detainee is sentenced to death or imprisonment for ≥ 10 years, the detainee has a right to such an appeal. As to a lesser sentence, the appeal is discretionary.

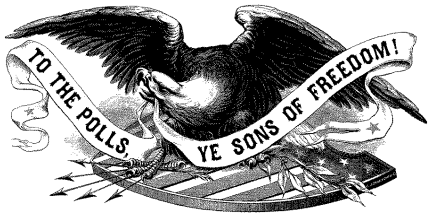
Remember that (1) the Supreme Court granted certiorari to take Hamdan's case on appeal on **November 7, 2005**, and (2) the **Detainee Treatment Act of 2005** was signed into law on **December 30, 2005.**

Do the provisions of the DTA apply to Hamdan's petition for habeas corpus or not? If they do, the Court would then determine the constitutional issues raised by Hamdan. But, if they do not, the Court has jurisdiction whether or not the DTA is constitutional, so they would not need to make that determination.

Wouldn't you think Congress could have and should have made this clear?

[Please continue.]

§1005(h) provides that (1) "this section" shall take effect "on the date of the enactment of this Act" and (2) review of enemy combatant status and final decisions of military commissions applies to any such issue "pending on or after the date of the enactment of this Act." But, what does §1005(h) mean?



Before we look at the reasoning of the majority or the dissent on this question, the following issues stand out:

1. I would think that the phrase "this section" in **§1005(h)(1)** would apply to the entirety of Section 1005 (hence, the section symbol "§" in §1005). If so, that would seem to include the habeas corpus limited review provisions of **§1005(e)(1)**.

2. I would think that the "date of enactment" would be the date the President signs a bill into law; however, I suppose there could be other definitions of even that phrase. Why on earth couldn't Congress make it abundantly clear and simply say, "on the date the President signs the bill into law." Is there any doubt about that date?

3. Then, again, even if "date of enactment" means "date signed into law by the President," that still begs the question, "Do its terms apply to all appeals brought by detainees after that date or do they apply to then-pending claims as well?

4. And, when Congress goes out of its way to specifically make review of enemy combat status decisions (**§1005(e)(2))** and final decisions of military commissions (**§1005(e)(3))** applicable to claims **pending** "on or after the date of enactment," do we conclude that because the habeas corpus issue (**§1005(e)(1))** was left out of **§1005(h)(2)**, that Congress meant something different as to the writ of habeas corpus? And, if so, what?

ALTOGETHER NOW — WHAT A MESS — TRULY UNFORGIVABLE.
CONGRESS CANNOT EVEN TELL THE JUDICIARY WHEN ITS LAWS APPLY.
THIS IS UTTER NEGLIGENCE FOR LEGISLATION OF THIS MAGNITUDE.
HAS ANYONE HEARD THE MEDIA COMPLAIN OF **THIS** OVERSIGHT?
ONE WOULD THINK CONGRESS WOULD HAVE A CHECKLIST
WHEN FINALIZING LEGISLATION, SUCH AS:
"Check when complete: _____ Has anyone determined when the Act applies? Duh!!!"

I want to make sure that all of you clearly understand the first issue in this case in laymen's terms. We begin with a clear proposition: If the DTA is constitutional and it applies to cases pending but not yet decided when the President signed it into law, clearly the Supreme Court would not have jurisdiction to even hear Hamdan's claims. His appeal to the Supreme Court would be dismissed. And, since the Court of Appeals ruled in the Government's favor, their ruling would be the end of Hamdan's case. Government wins!

On other hand, if the terms of the DTA itself are interpreted to mean that it does not apply to pending cases and only applies to cases **initially filed after** it was signed into law by the President, then, with respect to Mr. Hamdan, it does not matter if the jurisdiction-stripping provisions of the DTA are constitutional or not — it simply does not apply to Mr. Hamdan and, therefore, the Supreme Court does have jurisdiction to hear Hamdan's claims. The constitutional questions of "jurisdiction stripping" and suspension of the writ of habeas corpus would have to wait for a case filed after the DTA came into effect.

The majority interprets the DTA such that it's attempt to strip jurisdiction does not apply to Hamdan's case because Hamdan's claims were pending at the time it became law and the majority holds that the DTA only applies to claims filed after that date. Therefore, they do have jurisdiction.

[The majority then spends six pages discussing various rules of statutory construction gleaned from prior case precedent. The most persuasive argument in favor of the majority is: Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress intended to treat the sections differently. Therefore, "If...Congress was reasonably concerned to ensure that §§1005(e)(2) and (3) be applied to pending cases, it should have been just as concerned about §1005(e)(1), unless it had the different intent that the latter section not be applied to the general run of pending cases."]

[**Dissent by Justice Scalia on this issue (joined by Thomas and Alito):** So as to make it easier to understand all issues presented in this lengthy case, I will summarize Justice Scalia's dissent on this issue of statutory interpretation now, instead of waiting until the end of the majority opinion. He spends eight pages on the topic, so that is a total of 14 pages devoted to an issue Congress could have foreclosed, one way or the other, with careful drafting. He contends there is only one way to read the Act: When §1005(h)(1) says "this section shall take effect on the date of enactment," that is what it means; i.e., "as of the date the Act was signed into law, *no* court had jurisdiction to hear and consider the merits of Hamdan's habeas application, including the Supreme Court." **For him, there is no ambiguity.** He states: "[The Court] cannot cite a single case in the history of Anglo-American law...in which a jurisdiction-stripping provision was denied immediate effect in pending cases, absent an explicit statutory reservation. By contrast, the cases granting such immediate effect are legion..." He then cites at least 14 cases in his favor. Justice Scalia points out that **over 600** habeas petitions were on file by GTMO detainees when the DTA took effect and that "the Court's interpretation transforms a provision abolishing jurisdiction over *all* Guantanamo-related habeas petitions into a provision that retains jurisdiction over cases **sufficiently numerous to keep the courts busy for years to come**."]

Personally, I feel both the majority and the dissent make good arguments on this narrow statutory interpretation issue. Congress is now (August '06) debating a legislative response to the *Hamdan* case. **I have a burning question:** Why doesn't Congress consider a simple amendment to the DTA to now make it clear that **every pending case** is to be controlled by all parts of the DTA? Does anyone care to venture an answer to this most perplexing question?

[Before proceeding to the next issue decided by the Court, we must look at another discussion by Scalia in dissent, below.]

Dissent: [Because Scalia would have held that the DTA unambiguously terminates the jurisdiction of all courts to "hear or consider" pending habeas applications, he, unlike the majority, felt compelled to confront Hamdan's claim that such jurisdiction-stripping would violate the Suspension Clause. He proceeds:]

This claim is easily dispatched. We stated in *Johnson v. Eisentrager*[1]*:*

> "We are cited to no instance where a court...has issued [a writ] on behalf of an **alien enemy** who, **at no relevant time and in no stage of his captivity**, has been within its **territorial jurisdiction**. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes."

Notwithstanding the ill-considered dicta in the Court's opinion in *Rasul*[2]*,* it is clear that Guantanamo Bay, Cuba, is outside the sovereign "territorial jurisdiction" of the United States. **[Hamdan], an enemy alien detained abroad, has no rights under the Suspension Clause**. [Scalia goes on to defend DTA constitutionality on the writ of habeas corpus issue, even assuming that an enemy alien abroad had such rights. Given the Court's ruling (i.e., that it did not even reach that constitutional question), Scalia's complete argument is omitted here.]

[Now, back to the majority opinion, next issue.]

III

This Part III of the majority opinion, authored by Justice Stevens, is joined by Justices Kennedy, Souter, Ginsburg and Breyer. It concerns the concept of "abstention."

Relying on our decision in *Schlesinger v Councilman* (1975), the Government argues that, **even if**

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[1]Case 2-12 on this website.

[2]Case 2-18 on this website.

we have statutory jurisdiction, we should apply the "judge-made rule that civilian courts should await the final outcome of on-going military proceedings before entertaining an attack on those proceedings."...[W]e reject this argument.

So, the Government is saying to the Supreme Court: Even if you do not apply the DTA to cases pending at the time it was passed and, therefore, even if this case would eventually get to you through the normal appellate process, you should wait until the military procedures have run their course before entertaining Mr. Hamdan's concerns. This is sometimes referred to as an "exhaustion of remedies rule" or "abstention." Let's see if they explain it better, below.

In *Councilman*, an army officer on active duty was referred to a court-martial for trial on charges that he violated the Uniform Code of Military Justice [again, the UCMJ] by selling, transferring, and possessing marijuana. Objecting that the alleged offenses were not "service connected," the officer filed suit in Federal District Court to [stop the court-martial proceedings]. He neither questioned the lawfulness of courts-martial or their procedures nor disputed that, as a serviceman, he was subject to court-martial jurisdiction. His sole argument was that the subject matter of his case did not fall within the scope of court-martial authority. The District Court [agreed with him, the Court of Appeals affirmed, we granted certiorari and reversed.] We did not reach the merits of whether the marijuana charges were sufficiently "service connected" to place them within the subject-matter jurisdiction of a court-martial. Instead, **we concluded that...federal courts should normally abstain from intervening in pending court-martial proceedings against members of the Armed Forces, and further that there was nothing in the particular circumstances of the officer's case to displace that general rule.**

Just to be clear, the Court is saying that federal courts normally abstain from "intervening" — not that they would never hear the issue eventually on appeal from the military court — just that they would not step in before the military process was finished.

Councilman identifies two considerations of **<u>comity</u>** that together favor **<u>abstention</u>** pending completion of ongoing court-martial proceedings against service personnel.

Okay. Here, we have two new legal terms.

Comity — when one court **defers** to the jurisdiction of another in a case in which both would have the right to handle the case.

Abstention — the act of abstaining, if only temporarily, from taking jurisdiction in a case while it is being handled by another tribunal.

"**First**, **<u>military discipline</u> and, therefore, the <u>efficient operation</u> of the Armed Forces** are best

served if the military justice system acts without regular interference from civilian courts. **Second**, federal courts should respect the balance that Congress struck between military preparedness and fairness to individual service members when it created 'an integrated system of military courts and review procedures, a critical element of which is the **Court of Military Appeals, consisting of civilian judges completely removed from all military influence or persuasion**...' Abstention in the face of ongoing court-martial proceedings is justified by our expectation that the military court system established by Congress – with its substantial procedural protections and provision for appellate review – will vindicate servicemen's constitutional rights." *Councilman*.

The same cannot be said here; indeed, neither of the considerations identified in *Councilman* weighs in favor of abstention in this case. First, Hamdan is not a member of our Nation's Armed Forces, so concerns about military discipline do not apply. Second, **the tribunal convened to try Hamdan is not part of the integrated system of military courts, complete with independent review panels, that Congress has established.** Unlike the officer in *Councilman*, Hamdan has no right to appeal any conviction **to the civilian judges of the Court of Military Appeals** (now called the United States Court of Appeals for the Armed Forces). Instead, under Department of Defense Military Commission Order No. 1..., any conviction would be reviewed by a panel consisting of **three military officers** designated by the Secretary of Defense. Commission Order No. 1 provides that appeal of a review panel's decision may be had only to the Secretary of Defense himself, §6(H)(5), and then, finally, to the President, §6(H)(6).

We have no doubt that the various individuals assigned review power under Commission Order No. 1 would strive to act impartially and ensure that Hamdan receive all protections to which he is entitled. Nonetheless, these review bodies clearly lack the structural insulation from military influence that characterizes the Court of Appeals for the Armed Forces, and thus bear insufficient conceptual similarity to state courts to warrant invocation of abstention principles.

You have no doubt? **Obviously, you have serious doubt** that a military review panel will "do the right thing." You don't trust "military officers" like you do "civilians." No problem, but why not be honest about it? **You have a lifetime appointment** — no need for you to be "politically correct" if, in fact, that is how you feel about military justice.

And, in fundamentally **overturning 50+ years of law**, this enlightened "majority of one" believes we must go to far greater lengths to provide al Qaeda with our Constitutional rights and protections than we did for WWII German saboteurs and Japanese Generals. I do not suggest, for now, that *Quirin* or *Yamashita* were correctly decided. However, although Congress could have legislatively done something to alter those results for future wars, they have not done so. Question: **Given that Congress did nothing, would it be reasonable for the Commander in Chief (Bush) to conclude that Congressional silence for over 50 years might at least prove beneficial to him in choosing to proceed much like his predecessors had in WWII?**

In sum, neither of the two comity considerations underlying our decision to abstain in *Councilman* applies to the circumstances of this case. Instead, this Court's decision in *Quirin*[3] is the most relevant precedent. In *Quirin*,...the President convened a military commission to try the saboteurs, who then filed habeas corpus petitions...challenging their trial by commission. We granted the saboteurs' petition for certiorari to the Court of Appeals **before judgment [in the military courts]**. **Far from abstaining pending the conclusion of military proceedings**, which were ongoing, we convened a special Term to hear the case and expedited our review. That course of action was warranted, we explained, "in view of the public importance of the questions raised by [the cases] and of the duty which rests on the courts, in time of war as well as in time of peace, to reserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the pub lic interest required that we consider and decide those questions without any avoidable delay."

The *Quirin* defendants' convictions were affirmed with dispatch and ease. It is more likely true that the *Quirin* Court wanted to be a player in contributing to the demise of our enemy! Of course, that was WWII.

..While we certainly do not foreclose the possibility that abstention may be appropriate in some ases seeking review of ongoing military commission proceedings (such as military commissions convened on the battlefield), the foregoing discussion makes clear that, **under our precedent, abstention is not justified here.**

So, here is where this stands. Hamdan had not yet been tried in the military commission. The Government argues that the civilian courts (in this case, the Supreme Court), in accordance with its own past precedent (*Councilman*), should resist the temptation to intervene. If the civilian courts ultimately take this case on appeal [remember, we are assuming, for the sake of this issue, that appellate jurisdiction in the civil courts is ultimately available to Hamdan], they will have the advantage of seeing how the military handled Hamdan's trial in the military commission.

Let's see if the Supreme Court was correct in the manner they distinguished the *Councilman* case, for **in spite** of the principles adopted by the Court in *Councilman* (decided in 1975), **this Court did intervene**. In order to maintain clarity, we shall now proceed with Justice Scalia's response (in dissent) to the majority's decision not to abstain.

Dissent: Justice Scalia joined by **Justices Thomas and Alito**. Even if Congress had not clearly and constitutionally eliminated jurisdiction over this case, neither this Court nor the lower courts ought to exercise it. Traditionally, equitable principles govern [claims of this nature]. In light of Congress's provision of an alternate avenue for petitioner's claims in §1005(e)(3), those equitable principles counsel that we abstain from exercising jurisdiction in this case.

[3]Case 2-9 on this website.

In requesting abstention, the Government relies principally on *Councilman*...[which admittedly does not squarely control [this] case,] but it provides the closest analogue in our jurisprudence...[The Court errs in finding that the two "considerations" applicable in *Councilman* are not applicable here.] Both of them, and a third consideration not emphasized in *Councilman*, all...favor...abstention here.

First, the Court observes that *Councilman* rested in part on the fact that "**military discipline** and, therefore, the efficient operation of the Armed Forces are best served if the military justice system acts without regular interference from civilian courts," and concludes that "Hamdan is not a member of our Nation's Armed Forces, so concerns about military discipline do not apply." This is true enough. But for some reason, the Court fails to make any inquiry into whether military commission trials might involve *other* "military necessities" or "unique military exigencies," comparable in gravity to those at stake in *Councilman*. **To put this in context**: The charge against the respondent in *Councilman* was the off-base possession and sale of marijuana while he was stationed in Fort Sill, Oklahoma. The charge against the petitioner here is joining and actively abetting the murderous conspiracy that slaughtered thousands of innocent American civilians without warning on September 11, 2001. While *Councilman* held that the prosecution of the former charge involved "military necessities" counseling against our interference, the Court *does not even ponder the same question* for the latter charge [and the reason they do not]...is not hard to fathom. The principal opinion on the merits makes clear that it does not believe that the trials by military commission involve any "military necessity" *at all:* "The charge's shortcomings...are indicative of a broader inability on the Executive's part here to satisfy the most basic precondition...for establishment of military commissions: **military necessity**." **This is quite at odds with the views on this subject expressed by our political branches.**

By our political branches and *Quirin* and *Yamashita* and countless Civil War cases and...etc.

Because of "military necessity," a joint session of Congress authorized the President to "use all necessary and appropriate force," **including military commissions**, "against those nations, organizations, or persons [such as petitioner] he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." AUMF.

Of course, Justice Scalia knows that the phrase "military commissions" does not appear in the AUMF. That is why the phrase is not in quotes. Rather, he uses the phrase in the context that "all necessary and appropriate force" means "all" means inclusive of "military commissions."

In keeping with this authority, the President has determined that "to protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order...to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals." Order of Nov. 13. It is not clear where the Court derives the authority -- or the audacity -- to contradict this determination. **If "military necessities" relating to "duty" and "discipline" required abstention in**

***Councilman,* military necessities relating to the disabling, deterrence, and punishment of the mass-murdering terrorists of September 11 require abstention all the more here.**

The Court further seeks to distinguish *Councilman* on the ground that "the tribunal convened to try Hamdan is not part of the integrated system of military courts, complete with independent review panels, that Congress has established." To be sure, *Councilman* emphasized that "Congress created an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals consisting of **civilian judges** completely removed from all military influence or persuasion, who would gain over time thorough familiarity with military problems." The Court contrasts this "integrated system" insulated from military influence with the review scheme established by Order No. 1 [in this case], which "provides that appeal of a review panel's decision may be had only to the Secretary of Defense himself, §6(H)(5), and then, finally, to the President, §6(H)(6)." Even if we were to accept the Court's extraordinary assumption that the President "lacks the structural insulation from military influence that characterizes the Court of Appeals for the Armed Forces," the Court's description of the review scheme here is anachronistic. As of December 30, 2005, the "final" review of decisions by military commissions is now conducted by the **D.C. Circuit** pursuant to §1005(e)(3) of the DTA, **and by this Court** under *28 U.S.C. §1254*(1). This provision for review by Article III courts creates, if anything, a review scheme *more* insulated from Executive control than that in *Councilman*. At the time we decided *Councilman*, Congress had not "conferred on any Article III court jurisdiction directly to review court-martial determinations." The final arbiter of direct appeals was the Court of Military Appeals (now the Court of Appeals for the Armed Forces), an Article I court whose members possessed neither life tenure, nor salary protection, nor the constitutional protection from removal provided to federal judges in Article III, §1.

This is extraordinarily important. In layman's terms, one of the reasons the *Councilman* Court abstained was that the military review procedures entitled Councilman to a review by **civilian judges**. Because the review procedures available to Hamdan do not include a panel of **civilian judges**, the *Hamdan* majority concludes that "these review bodies clearly **lack the structural insulation from military influence**" that characterized the review available to Councilman, "and thus bear insufficient conceptual similarity to state courts to warrant invocation of abstention principles."

It seems as though Justice Scalia blows that conclusion to "smithereens." He points out that:

1. There was no right to a direct appeal to any Article III civilian court in place for Councilman as there is in the DTA (i.e., to the Court of Appeals for the D.C. Circuit); and,

2. The final arbiter for Councilman was the Court of Military Appeals. Although that was a **three judge civilian panel**, such is not nearly the "insulation from military influence" that the D.C. Court of Appeals and the Supreme Court are for Hamdan, given that jurisdiction-stripping does not apply to him.

Moreover, a third consideration counsels strongly in favor of abstention in this case... [C]onsiderations of *interbranch* comity at the federal level weigh heavily against our exercise of equity jurisdiction in this case. Here, **apparently for the first time in history, a District Court enjoined ongoing military commission proceedings, which had been deemed "necessary" by the President "to protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks.**" Military Order of Nov. 13. **Such an order brings the Judicial Branch into direct conflict with the Executive in an area where the Executive's competence is maximal and ours is virtually nonexistent. We should exercise our equitable discretion to *avoid* such conflict. Instead, the Court rushes headlong to meet it...**

In the face of such concerns, the Court relies heavily on *Ex parte Quirin*[4], [although **it] is likely that the Government in *Quirin*, unlike here, preferred a hasty resolution of the case in this Court, so that it could swiftly execute the sentences imposed**. But the Court's reliance on *Quirin* suffers from a more fundamental defect: Once again, it ignores the DTA, which creates an avenue for the consideration of petitioner's claims that did not exist at the time of *Quirin*. Collateral application for habeas review was the *only* vehicle available. And there was no compelling reason to postpone consideration of the *Quirin* application until the termination of military proceedings, because the only cognizable claims presented were general challenges to the authority of the commissions that would not be affected by the specific proceedings. In the DTA,...**Congress has expanded the scope of Article III review...**[and]...*Quirin* is no longer governing precedent [on the abstention issue]. I would abstain from exercising our equity jurisdiction...

[This marks the end of the **dissent** authored by Justice Scalia
in which Justices Thomas & Alito joined.]

Although cited for a limited reason (i.e., non-abstention), I find it odd the majority would cite *Quirin*, a case that did not even permit a **U.S. citizen** arrested on U.S. soil the right to a civil jury trial!!!

Now, we are finally going to look at the merits of Hamdan's claims.
The majority opinion continues.

IV

This Part IV of the majority opinion, authored by **Justice Stevens**, is joined by **Justices Kennedy, Souter, Ginsburg and Breyer.** As far as I can tell, all it does is provide the majority version of the history of military commissions (also known as military tribunals).

The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was

[4]Case 2-9 on this website.

born of military necessity. See Winthrop, Military Law and Precedents (1920). Though foreshadowed in some respects by earlier tribunals...[General Washington tried British Major John Andre for spying during the **Revolutionary War**], the commission "as such" was inaugurated in 1847. As commander of occupied **Mexican territory**, and having available to him no other tribunal, General Winfield Scott that year ordered the establishment of both **"*military commissions*"** to try ordinary crimes committed in the occupied territory and a **"*council of war*"** to try offenses against the law of war.

When the **exigencies** of war next gave rise to a need for use of military commissions, during the **Civil War**, the dual system favored by General Scott was not adopted. Instead, a single tribunal often took jurisdiction over ordinary crimes, war crimes, and breaches of military orders alike... [E]ach aspect of that seemingly broad jurisdiction was in fact supported by a separate military **exigency**. Generally, though, the need for military commissions during this period...was driven largely by the then very limited jurisdiction of courts-martial: "The *occasion* for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offences defined in a written code." Winthrop.

...The Constitution makes the President the "Commander in Chief" of the Armed Forces, but vests in Congress the powers to "declare War...and make Rules concerning Captures on Land and Water," to "raise and support Armies," to "define and punish...Offences against the Law of Nations" and "to make Rules for the Government and Regulation of the land and naval Forces." The interplay between these powers was described by Chief Justice Chase in...*Ex parte Milligan*[5]:

> "...[N]either can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President ...**Congress cannot direct the conduct of campaigns, nor can the President..., without the sanction of Congress, institute tribunals for the trial and punishment of offences...unless in cases of a controlling necessity, which justifies what it compels**..."

I'm not a military expert, but here is another question that has not been answered on this journey: Just what situation ever "justifies" the "military necessity" of convening a "tribunal" "**on the field of battle**"? I thought we could hold a prisoner of war until the war is over. So, if we convene a "militarily exigent commission" to try a POW for war crimes "in the field" and convict him, we just do what we could have done anyway, right? Jail him. Or, do we convene tribunals "in the field" just so we can put a convicted war criminal to death and, thus, avoid having to jail him? Perhaps this sounds a bit off the deep end, but I will bet many of you have the same questions. What situation could ever be so "exigent" that it "requires" immediate charges and some form of due process **during** war?

[5]Case 2-7 on this website.

Time out! I don't know about you, but for several cases, now, I have had burning questions no one seems willing to address: What is "military necessity"? What is "military exigency"? The phrases seem to be tossed about amidst the haze of uncertainty.

Well, it comes as no great surprise that the dictionary defines "exigency" as "a state of affairs that makes urgent demands." I guess we are no better off now than before, but when Justice Chase says, in *Milligan*, that "**the President [cannot institute tribunals for trial and punishment of offences without the sanction of Congress] unless in cases of a controlling necessity which justifies what it compels**...", where does that leave us? Where does it leave any President?

Justice Jackson's concurrence was right: **"Just what authority goes with the name [Commander in Chief] has plagued presidential advisers who would not waive or narrow it by non-assertion yet cannot say where it begins or ends."** *Youngstown Sheet and Tube.*

Whether Chief Justice Chase was correct in suggesting that the President may constitutionally convene military commissions "without the sanction of Congress" in cases of "controlling necessity" is a question this Court has not answered definitively, and need not answer today.

It would appear that Justice Chase has answered the question definitively. Don't you have to distinguish that ruling or overrule it to proceed?

For we held in *Quirin* that Congress had, through Article of War 15, sanctioned the use of military commissions in such circumstances. ("By the Articles of War, and especially Article 15, Congress has **explicitly** provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases." *Quirin.*). **Article 21 of the UCMJ**, the language of which **is substantially identical to the old Article 15** and was preserved by Congress after World War II, reads as follows:

> "Jurisdiction of courts-martial not exclusive.
>
> The provisions of this code conferring jurisdiction upon courts-martial **shall not be construed as depriving military commissions...of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions...**"

In fact, it would appear that, for purposes of determining "Congressional authority," Article 21 of the UCMJ is **identical** to Article 15 of the Articles of War. This should be easy. **If Article 15 justified the Quirin Commission, Article 21 surely justifies the** *Hamdan* **Commission... right? What am I missing?**

We have no occasion to revisit *Quirin*'s controversial characterization of Article of War 15 as congressional authorization for military commissions.

> Hold on! I thought you just said that Article 21 of the UCJM is "substantially identical" to old Article 15 and, apparently, it is very clear that Article 21 (which is still in existence) could just as readily be cited as congressional authorization for the Hamdan commission. Is that how you dispose of cases in your way? Call them "controversial" and move on?

Contrary to the Government's assertion, however, even *Quirin* did not view the authorization as a sweeping mandate for the President to "invoke military commissions when he deems them necessary." Rather, the *Quirin* Court recognized that Congress had simply preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions -- with the express condition that the President and those under his command comply with the law of war. That much is evidenced by the Court's inquiry, *following* its conclusion that Congress had authorized military commissions, into whether the law of war had indeed been complied with in that case. *Quirin*.

> So what? Doesn't everyone agree that an Article 21 Commission, like an Article 15 Commission, must comply with the "law of war"? In other words, if it does, then no additional congressional authority is needed, at least as I read *Quirin* and *Yamashita.*

The Government would have us dispense with the inquiry that the *Quirin* Court undertook and find in either the **AUMF** or the **DTA** specific, overriding authorization for the very commission that has been convened to try Hamdan. **Neither of these congressional Acts, however, expands the President's authority to convene military commissions.** First, while we assume that the AUMF activated the President's war powers (see *Hamdi v. Rumsfeld*[6]) and that those powers include the authority to convene military commissions **in appropriate circumstances** *(Quirin; Yamashita*[7]), 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.

> The "light" has finally come on. I think I get it. Apparently, the Administration is arguing that the AUMF and the DTA grant authority to form a military commission if the Administration merely finds it "necessary" to do so, given the Congressional mandate to go after the terrorists. I was not reading into this an attempt by the Administration to get around having to prove the commission is also justified by the **law of war**, but it appears that is the case. We shall see.

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[6]Case 2-17 on this website.

[7]Case 2-11 on this website.

On this point, it is noteworthy that the *Quirin* Court looked beyond Congress' declaration of war and accompanying authorization for use of force during World War II, and relied instead on Article of War 15 to find that Congress had authorized the use of military commissions **in some circumstances**. Justice Thomas' assertion that we commit "error" in reading Article 21 of the UCMJ to place limitations upon the President's use of military commissions, ignores the reasoning in *Quirin*.

> I went back to *Quirin*...again. FDR's order setting up the Quirin Commission directed it to "try petitioners for offenses against the 'law of war' and the Articles of War" which, in my estimation, would appear to be the same thing. See Article 15. The *Quirin* Court then looked into whether the charges were for violations recognized by the "law of war." Perhaps the majority is hung up on the Bush Order directing his commission to try Hamdan for all offenses "triable by commission." So far, I just have not read this as an attempt by the Administration to suggest that it did not have to follow the "law of war," whatever that is. We shall see.
>
> I found something of even greater interest at the end of the *Quirin* opinion where it states: "**We need not inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents.** For the Court is unanimous in its conclusion that the Articles in question could not at any stage of the proceedings afford any basis for issuing the writ. But a majority of the full Court are not agreed on the appropriate grounds for decision. Some members of the Court are of opinion that Congress did not intend the Articles of War to govern a Presidential military commission convened for the determination of questions relating to admitted enemy invaders, and that the context of the Articles makes clear that they should not be construed to apply in that class of cases. [In other words, some believed the President's hands were not tied by the Articles of War.] Others are of the view that -- even though this trial is subject to whatever provisions of the Articles of War Congress has in terms made applicable to "commissions" -- the particular Articles in question, rightly construed, do not foreclose the procedure prescribed by the President..." ***Quirin* does not foreclose the possibility of unrestricted Constitutional power in the President to "deal with enemy belligerents," does it?**

Likewise, **the DTA cannot be read to authorize this commission.** Although the DTA, unlike either Article 21 or the AUMF, was enacted after the President had convened Hamdan's commission, it contains no language authorizing that tribunal or any other at Guantanamo Bay. **The DTA obviously "recognizes" the existence of the Guantanamo Bay commissions in the weakest sense, because it references some of the military orders governing them and creates limited judicial review of their "final decisions."** §1005(e)(3). But the statute also pointedly reserves judgment on whether "the Constitution and laws of the United States are applicable" in reviewing such decisions and whether, if they are, the "standards and procedures" used to try Hamdan and other detainees actually violate the "Constitution and laws."

I believe the last sentence is unfortunate and ill-advised political "spin." Take a look at §1005(e)(3)(D) of the DTA – Scope of Review of Final Commission Decisions. The statute **does not** "pointedly reserve judgment" on the legality of the Commission's standards and procedures in the sense meant by the majority. Justice Stevens cynical attitude actually permits him the unfortunate leeway to suggest that even Congress left open the possibility that what they were doing with the DTA was unconstitutional "within the four corners of the Act itself." Don't misunderstand. Certainly, a congressman can pass an Act and fear it will go down under the weight of the Constitution. But, to suggest that the Act itself spells out that fear is disingenuous. The Act simply provides an opportunity to review its legality "to the extent" the Constitution and laws of the United States are even applicable. That is simply an acknowledgment that there is at least some authority for the conclusion that enemy belligerents accused of war crimes abroad do not have any "rights" that U.S. citizens have in the laws of the United States.

Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the "Constitution and laws," including the law of war. Absent a more specific congressional authorization, the task of this Court is, as it was in *Quirin*, to decide whether Hamdan's military commission is so justified. It is to that inquiry we now turn.

If the majority ultimately decides that the Bush GTMO commission "is not justified," then one thing is clear – the major culprit is Congress! For heaven's sake, here we have the DTA referencing Presidential commissions all over the lot. One would think that a Congress who makes law applicable to military commissions it thought it had approved could have made sure that the formation of the commissions had actually been authorized by them!

Yet, I don't see the mainstream media holding the feet of Congress to the fire! Instead, the headlines seek the impeachment of the President. In my estimation, this is truly remarkable. I have not taken the time to look at the Congressional voting record on the DTA, but I am betting there are Congressmen who voted for it who now cast blame on the President in the wake of this decision! Here is the mystery! Why does the President take the fall? I don't see the Administration adequately explaining any of this to the American Public!

V

This Part V of the opinion authored by Justice Stevens is joined by Justices Souter, Ginsburg and Breyer. Justice Kennedy did not join in it. It appears as though this section will answer the question of whether or not "conspiracy" is a violation of the law of war.

The common law governing military commissions may be gleaned from past practice and what

sparse legal precedent exists. Commissions historically have been used in three situations.

The Court at least acknowledges they don't have much to go on.
Neither did the Bush Administration.

First, they have substituted for civilian courts at times and in places where martial law has been declared...**Second**, commissions have been established to try civilians "as part of a temporary military government over occupied enemy territory..." *Madsen v. Kinsella* (1952). The **third** type of commission, convened as an "incident to the conduct of war" when there is a need "to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war" (*Quirin*) has been described as "utterly different" from the other two. Bickers, Military Commissions are Constitutionally Sound: A Response to Professors Katyal and Tribe, 34 Texas Tech Law Review (2002-2003). Not only is its jurisdiction limited to offenses cognizable during time of war, but its role is primarily a factfinding one -- to determine, typically on the battlefield itself, whether the defendant has violated the law of war. **The last time the U.S. Armed Forces used the law-of-war military commission was during World War II. In *Quirin*, this Court sanctioned President Roosevelt's use of such a tribunal to try Nazi saboteurs captured on American soil during the War.** And in *Yamashita*, we held that a military commission had jurisdiction to try a Japanese commander for failing to prevent troops under his command from committing atrocities in the Philippines.

Try the *Quirin* challenge. If *Quirin* is the Administration's "most recent" model, I challenge all of you to go back and read it. Aside from the other *Quirin* defendants, the Supreme Court approved of the conviction of a U.S. citizen by military tribunal! Plus, regardless of the legal concepts involved, it is quite evident that the *Quirin* Court does not bleed for those saboteurs quite like the *Hamdan* majority does for this **admitted al Qaeda member.** You remember them. They rejoiced at killing 3,000 civilians on September 11, 2001.

Lest you think I have let my emotions get to me with the foregoing "bleeding" statement, please reconsider. I am the one who berates the Court when they use language that makes their politics transparent. I do not believe they should engage in such drafting on either side of the political aisle. Nevertheless, it is true that the *Quirin* Court does not search far and wide for a way to protect WWII war criminals, but the *Hamdan* Court, while seemingly working as hard as they can to find a way to protect al Qaeda, at the same time uses words that chastize when it comes to actions of their President when they know full well that these are difficult legal issues and much of their criticism is irrelevant to the issues at hand.

Quirin is the model the Government invokes most frequently to defend the commission convened to try Hamdan. That is both appropriate and unsurprising. **Since Guantanamo Bay is neither enemy-occupied territory nor under martial law, the law-of-war commission is the only model available.** At the same time, no more robust model of executive power exists; *Quirin* represents the

high-water mark of military power to try enemy combatants for war crimes.

Sounds like resounding support for "the Government"! Why shouldn't they rely on *Quirin*? Isn't it a case decided by the Supreme Court of the United States that went entirely in the Government's favor?

The classic treatise penned by Colonel William Winthrop, whom we have called the "Blackstone of Military Law," describes at least four preconditions for exercise of jurisdiction by a tribunal of the type convened to try Hamdan.

First, "a military commission, (except where otherwise authorized by statute), can legally assume jurisdiction only of offenses committed within the field of the command of the convening commander." The "field of command" in these circumstances means the "theatre of war."

I don't know where the majority is going with this. I fear they will criticize the charges brought against Hamdan as "not being within the theatre of war," when the "theatre of the war against terror" in my estimation, unlike any other war we have known, is "the world." Is this Court about to rule against this Administration because the enemy is not a recognized "State" and operates all over the planet **out of uniform**? I hope not. But, if so, I fear that this majority has lost all sense of reason.

Second, the offense charged "must have been committed within the period of the war." No jurisdiction exists to try offenses "committed either before or after the war."

More alarm bells!!! We must wait and see where this is going, as well. The premonition I get is that Justices Stevens, Breyer, Ginsburg and Souter would not permit Osama bin Laden himself to be tried by a military commission because his cowardly act of 911 occurred **before** Congress responded with the AUMF. Is that possible?

Third, a military commission not established pursuant to martial law or an occupation may try only "individuals of the enemy's army who have been guilty of **illegitimate warfare** or **other offences in violation of the laws of war**" and members of one's own army "who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war."

Finally, a law-of-war commission has jurisdiction to try only two kinds of offense: "**Violations of the laws and usages of war cognizable by military tribunals only**" and "**breaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war**."

All parties agree that Colonel Winthrop's treatise accurately describes...the jurisdictional limitations he identifies were incorporated in Article of War 15 and, later, Article 21 of the UCMJ. It also is undisputed that Hamdan's commission lacks jurisdiction to try him unless the charge "properly sets forth, not only the details of the act charged, but the circumstances conferring *jurisdiction*." **The question is whether the preconditions designed to ensure that a military necessity exists to justify the use of this extraordinary tribunal have been satisfied here.**

The charge against Hamdan...alleges a conspiracy extending...from 1996 to November 2001. **All but two months of that more than 5-year-long period preceded the attacks of September 11, 2001**, **and the enactment of the AUMF** -- the Act of Congress on which the Government relies for exercise of its war powers and thus for its authority to convene military commissions. **Neither the purported agreement with Osama bin Laden and others to commit war crimes, nor a single overt act, is alleged to have occurred in a theater of war or on any specified date after September 11, 2001. None of the overt acts that Hamdan is alleged to have committed violates the law of war.**

My, my. I shall reserve judgment on these conclusions until we see what Justice Thomas has to say in dissent.

These facts alone cast doubt on the legality of the charge and, hence, the commission; as Winthrop makes plain, the offense alleged must have been committed both in a theater of war and *during*, not before, the relevant conflict. But...the most serious defect of this charge [is that] the offense it alleges **is not triable by law-of-war military commission**...

There is no suggestion that Congress has, in exercise of its constitutional authority to "define and punish...Offences against the Law of Nations" (U.S. Const., Art. I, §8, cl. 10), positively identified "conspiracy" as a war crime. As we explained in *Quirin*, that is not necessarily fatal to the Government's claim of authority to try the alleged offense by military commission; Congress, through Article 21 of the UCMJ, has "incorporated by reference" the common law of war, which may render triable by military commission certain offenses not defined by statute. When, however, neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous. To demand any less would be to risk concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution...

Soapbox commentary – not a legal response – just a provocative thought, if you will. The Court is concerned about the "concentration of too much 'adjudicative and punitive power' in the military." That, of course, would be the very same military that has far more concentrated power in the hands of a pilot who drops a bomb on bin Laden. The pilot of course, becomes the prosecutor, judge, jury and executioner. The pilot, if you will, is the agent of the Commander in Chief who is the agent of Congress per the AUMF. If we arrest bin Laden, on the other hand, **we must err on the side of protecting him** against concentration of power in our President whom we (all but two in Congress) authorized to **"use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks...in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." AUMF.** Fascinating!

This high standard was met in *Quirin;* the violation there alleged was, by "universal agreement and practice" both in this country and internationally, recognized as an offense against the law of war...

At a minimum, the Government must make a substantial showing that the [charge]...is acknowledged to be an offense against the law of war. That burden is far from satisfied here. The crime of "conspiracy" has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions -- the major treaties on the law of war. Winthrop explains that under the common law governing military commissions, **it is not enough to intend to violate the law of war and commit overt acts in furtherance of that intention unless the overt acts either are themselves offenses against the law of war or constitute steps sufficiently substantial to qualify as an attempt...**

Sounds like a lawyer! Seriously, apparently Winthrop believes that somewhere between (1) "an overt act filled with evil intent to commit an overt evil war violation act" and (2) "an actual overt evil war violation act," there is a line called "sufficiently substantial qualified attempt to commit an actual overt evil war violation act." Of course, that would be somewhere "over the rainbow" between Kansas and Oz.

When (1) the common law of war definitions of "war violations" are this screwed up and (2), but for Justice Roberts' recusal, this would have been a 5-4 decision and (3) past Supreme Courts have provided little guidance and (4) neither has Congress and (5) especially in the face of the *Quirin* and *Yamashita* precedents, how can anyone cast this Bush defeat in terms of blame or having an excess appetite for power or something impeachable! **There is far more blame to be found in Congress and Supreme Courts past and present for their utter failure to provide more guidance to the Executive Branch.**

The Government cites three sources that it says show otherwise.

First, it points out that the Nazi saboteurs in *Quirin* were charged with conspiracy.

Second, it observes that Winthrop at one point in his treatise identifies conspiracy as an offense "prosecuted by military commissions."

Finally, it notes that another military historian, Charles Roscoe Howland, lists conspiracy "to violate the laws of war by destroying life or property in aid of the enemy" as an offense that was tried as a violation of the law of war during the Civil War.

On close analysis, however, these sources at best lend little support to the Government's position and at worst undermine it. By any measure, they fail to satisfy the high standard of clarity required to justify the use of a military commission.

That the defendants in *Quirin* were charged with conspiracy is not persuasive, since the Court declined to address whether the offense actually qualified as a violation of the law of war -- let alone one triable by military commission. The *Quirin* defendants were charged with the following offenses:

I. Violation of the law of war.
II. Violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy.
III. Violation of Article 82, defining the offense of spying.
IV. **Conspiracy** to commit the offenses alleged in charges I, II, and III.

The Government...argued that the conspiracy alleged "constituted an additional violation of the law of war." The saboteurs disagreed; they maintained that "the charge of conspiracy can not stand if the other charges fall." The Court, however, declined to resolve the dispute. It concluded, first, that the specification supporting Charge I adequately alleged a "violation of the law of war"...The facts... deemed sufficient for this purpose were that the defendants, admitted enemy combatants, entered upon U.S. territory in time of war without uniform "for the purpose of destroying property used or useful in prosecuting the war." That act was "a hostile and warlike" one. The Court was careful in its decision to identify an overt, "complete" act. Responding to the argument that the saboteurs had "not actually committed or attempted to commit any act of depredation or enter the theatre or zone of active military operations" and therefore had not violated the law of war, the Court responded that they had actually "passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose." "The offense was complete when with that purpose they entered -- or, having so entered, they remained upon -- our territory in time of war without uniform or other appropriate means of identification."

I cannot help but conclude that "if" this majority wanted to find a violation of the law-of-war, they would. For example, the mere act of "guarding the body" of the admitted mastermind of 911 so as to help enable 911 to occur is likely legally sufficient. Would this majority permit a tribunal prosecution of bin Laden himself? Surely, intentionally killing 3,000 civilians is a violation of the law of war. But, this majority apparently would not permit him to be prosecuted because it would have occurred before a "war" began!?!?!

Turning to the other charges alleged (in *Quirin*), the Court explained that "since the first specification of Charge I sets forth a violation of the law of war, **we have no occasion to pass on the adequacy of the...[remaining charges.]"** No mention was made at all of Charge IV-- the conspiracy charge.

If anything, *Quirin* supports Hamdan's argument that conspiracy is not a violation of the law of war. Not only did the Court pointedly omit any discussion of the conspiracy charge, but its analysis of Charge I placed special emphasis on the *completion* of an offense; it took seriously the saboteurs' argument that there can be no violation of a law of war -- at least not one triable by military commission -- without the actual commission of or attempt to commit a "hostile and warlike act." That limitation makes eminent sense when one considers the necessity from whence this kind of military commission grew: **The need to dispense swift justice**, often in the form of execution, to illegal belligerents captured on the battlefield...The same urgency would not have been felt vis-a-vis enemies who had done little more than agree to violate the laws of war. 31 Op.Atty.Gen. 356 (1918) (opining that a German spy could not be tried by military commission because, having been apprehended before entering "any camp, fortification or other military premises of the United States," he had "committed [his offenses] outside of the field of military operations"). The *Quirin* Court acknowledged as much when it described the President's authority to use law-of-war military commissions as the power to "seize and subject to disciplinary measures those enemies *who in their attempt to thwart or impede our military effort* have violated the law of war."

Winthrop and Howland are only superficially more helpful to the Government. Howland, granted, lists "conspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy" as one of over 20 "offenses against the laws and usages of war" "passed upon and punished by military commissions." But while the records of cases that Howland cites following his list of offenses against the law of war support inclusion of the other offenses mentioned, they provide no support for the inclusion of conspiracy as a violation of the law of war. Winthrop, apparently recognizing as much, excludes conspiracy of any kind from his own list of offenses against the law of war.

I get the impression that it just does not matter what ammunition "the Government" has to throw at them, this Court's majority is bound and determined not to let anything stick!

Winthrop does, unsurprisingly, include "criminal conspiracies" in his list of "crimes and statutory

offenses cognizable by State or U.S. courts" and triable by martial law or military government commission. And, in a footnote, he cites several Civil War examples of "conspiracies of this class, *or of the first and second classes combined*." The Government relies on this footnote for its contention that conspiracy was triable both as an ordinary crime (a crime of the "first class") and, independently, as a war crime (a crime of the "second class"). But the footnote will not support the weight the Government places on it. As we have seen, the military commissions convened during the Civil War functioned at once as martial law or military government tribunals and as law-of-war commissions. Accordingly, they regularly tried war crimes and ordinary crimes together. Indeed, as Howland observes, "not infrequently the crime, as charged and found, was a combination of the two species of offenses" [and not...stand-alone offenses against the law of war]...

Justice Thomas cites as evidence that conspiracy is a recognized violation of the law of war, the Civil War indictment against Henry Wirz, which charged the defendant with "maliciously, willfully, and traitorously...combining, confederating, and **conspiring** with others to injure the health and destroy the lives of soldiers in the military service of the United States...to the end that the armies of the United States might be weakened and impaired, in violation of the laws and customs of war." As shown by the specification supporting that charge, however, Wirz was alleged to have *personally committed* a number of atrocities against his victims, including torture, injection of prisoners with poison, and use of "ferocious and bloodthirsty dogs" to "seize, tear, mangle, and maim the bodies and limbs" of prisoners, many of whom died as a result. Crucially, Judge Advocate General Holt determined that one of Wirz's alleged co-conspirators, R. B. Winder, should *not* be tried by military commission because there was as yet insufficient evidence of his own personal involvement in the atrocities...

Finally, international sources confirm that the crime charged here is not a recognized violation of the law of war. As observed above, none of the major treaties governing the law of war identifies conspiracy as a violation thereof. And the only "conspiracy" crimes that have been recognized by international war crimes tribunals (whose jurisdiction often extends beyond war crimes proper to crimes against humanity and crimes against the peace) are conspiracy to commit genocide and common plan to wage aggressive war, which is a crime against the peace and **requires...actual participation in a "concrete plan to wage war**." Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 1945-1946. The International Military Tribunal at Nuremberg, over the prosecution's objections, pointedly refused to recognize as a violation of the law of war conspiracy to commit war crimes, and convicted only Hitler's most senior associates of conspiracy to wage aggressive war. Nuremberg Trial and International Law. As one prominent figure from the Nuremberg trials has explained, members of the Tribunal objected to recognition of conspiracy as a violation of the law of war on the ground that "the Anglo-American concept of conspiracy was not part of European legal systems and arguably not an element of the internationally recognized laws of war." Taylor (observing that Francis Biddle, who as Attorney General prosecuted the defendants in *Quirin*, thought the French judge had made a "persuasive argument that conspiracy in the truest sense is not known to international law").

So what! If this majority wished to label the detailed allegations against Mr. Hamdan as "**actual participation in a concrete plan to wage war**," I am confident they could do so with credibility. They just do not wish to do so.

In sum, the sources that the Government and Justice Thomas rely upon to show that conspiracy to violate the law of war is itself a violation of the law of war in fact demonstrate quite the opposite...**Because the charge does not support the commission's jurisdiction, the commission lacks authority to try Hamdan.** The charge's shortcomings are not merely formal, but are indicative of a broader inability on the Executive's part here to satisfy the most basic precondition -- at least in the absence of specific congressional authorization -- for establishment of military commissions: **military necessity**.

I "don't necessarily" deny the lack of "military necessity" to try Hamdan by military commission. I just don't know what it is. What was the "military necessity" that justified trying the Quirin defendants or Yamashita **by commission**?

Hamdan's tribunal was appointed not by a military commander in the field of battle, but by a retired major general stationed away from any active hostilities. *Rasul v Bush* (observing that Guantanamo Bay is far removed from any hostilities).

Where were the *Quirin* defendants tried? Answer: Washington, D.C. I suppose the *Hamdan* Court would have us believe that our naval base at GTMO is not considered as a place of "active hostility" in the "war on terror," but D.C. was such a place during WWII? Remarkable, when one considers that the 911 attacks not only killed Americans in New York and Pennsylvania, but also in Arlington, Virginia, just outside of Washington, D.C., AT THE PENTAGON!!!

Hamdan is charged not with an overt act for which he was **caught redhanded** in a theater of war and which military efficiency demands be tried **expeditiously**, but with an *agreement* the inception of which long predated the attacks of September 11, 2001 and the AUMF.

Frustration is really setting in. The Court, again, says that "military efficiency" does not demand that Hamdan be tried expeditiously, but it neither defines "military efficiency" nor cites one case that meets such a test, in spite of the fact that there are several confirmed convictions by military commission on the books. Is the lack of guidance on this apparently very important element of proof possibly due to the fact that, in truth, heretofore **these facts** would have justified trial by military commission? Why can't the majority do better than this? And, by the way, what was General Yamashita doing when he was caught redhanded? I remember. He was doing "nothing" when he should have been doing "something."

[The charge] may well be a crime, but it is not an offense that "by the law of war may be tried by military commission." None of the overt acts alleged to have been committed in furtherance of the agreement is itself a war crime, or even necessarily occurred during time of, or in a theater of, war. Any urgent need for imposition or execution of judgment is utterly belied by the record; Hamdan was arrested in November 2001 and he was not charged until mid-2004.

I am totally unaware of any case affirming conviction by military tribunal where the span of time between arrest and charge was measured by any court. This must be a brand new element of "trial by commission," but, if so, Congress has not defined that necessarily narrow span. I am cynical only because no court (and, certainly not this Court) has defined "military necessity." Even if one considers the tribunals established literally on the field of battle during the Revolutionary War and other early wars, no court has ever explained why it was "militarily necessary" to have a trial "on the battlefield." For example, no court has ever said that military commanders may lose key witnesses to death or disease unless tried right away on the field of battle. That I could understand, but no Court has "put any meat on those bones." Yet, this President and future Presidents (in reality, their advisors) are supposed to look to Supreme Court opinions to help guide their decisions in times of war! They have utterly failed.

It appears to me that this majority believes that it not only has the necessary Constitutional power of the Judicial Branch to render its judgment here, but it also believes it has some degree of "war powers." At least, it seems like the majority has to do an awful lot of tap dancing to overcome the AUMF (voted in by Congress), the DTA (voted in by Congress) and *Quirin* (precedent established by a WWII Supreme Court).

These simply are not the circumstances in which, by any stretch of the historical evidence or this Court's precedents, a military commission established by Executive Order under the authority of Article 21 of the UCMJ may lawfully try a person and subject him to punishment.

VI

With the exception of Part VI(D)(iv), this Part VI of the majority opinion authored by Justice Stevens is joined by Justices Kennedy, Souter, Ginsburg and Breyer. Justice Kennedy does not joint in Part VI(D)(iv). Part VI, as a whole, deals with the Court's conclusion that the procedures decreed by the Government for trial by military commission violate numerous laws. Let's see what the majority has to say about that.

Whether or not the Government has charged Hamdan with an offense against the law of war cognizable by military commission, the commission lacks power to proceed. The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the "rules and precepts of the law of nations" (*Quirin*) -- including the four Geneva Conventions signed

in 1949. The [Government's trial procedures it has established for such a military commission to try Hamdan] violate these laws.

A

The commission's procedures are set forth in Commission Order No. 1...[The Court briefly indicates some of the rights afforded to the accused therein.] **These rights are subject, however, to one glaring condition: The accused and his civilian counsel may be excluded from...ever learning what evidence was presented during any part of the proceeding that...the presiding officer decides to "close."** Grounds for such closure "include the **protection of information classified or classifiable...**; information **protected by law or rule from unauthorized disclosure**; the **physical safety of participants**..., including prospective witnesses; **intelligence and law enforcement sources, methods, or activities**; and other national security interests." Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer's discretion, be forbidden to reveal to his or her client what took place therein.

There is no question that these "rules" seem contrary to our normal sense of American constitutional justice. However, we are dealing with the laws of "war." We have seen, for example, that non-U.S. citizen enemy combatants captured abroad and charged with crimes of war do not have the same Constitutional rights that you and I have. That is the law. We are exploring the law, not what we might like the law to be. Some, for example, may wish the entire world to be afforded our brand of Constitutional rights. Others may not feel quite that generous. At any rate, I will reserve judgment until I learn the details of what the Court is getting at.

Another striking feature of the rules governing Hamdan's commission is that they permit the admission of ***any*** evidence that, in the opinion of the presiding officer, "would have probative value to a reasonable person." Under this test, not only is **testimonial hearsay** and evidence obtained through **coercion** fully admissible, but **neither live testimony nor witnesses' written statements need be sworn**.

Admittedly pretty rough. Let's continue.

Moreover, the accused and his civilian counsel may be denied access to evidence in the form of "protected information" (which includes classified information as well as "information protected by law or rule from unauthorized disclosure" and "information concerning other national security interests") so long as the presiding officer concludes that the evidence is "probative"...and that its admission without the accused's knowledge would not "result in the denial of a full and fair trial." Finally, **a presiding officer's determination that evidence "would not have probative value to a reasonable person" may be overridden by a majority of the other commission members.**

Once all the evidence is in, the commission members (not including the presiding officer) must vote

on the accused's guilt. A two-thirds vote will suffice for both a verdict of guilty and for imposition of any sentence not including death (the imposition of which requires a unanimous vote). Any appeal is taken to a three-member review panel composed of military officers and designated by the Secretary of Defense, only one member of which need have experience as a judge. The review panel is directed to "disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission."

It is my understanding that even for courts-martial of our own military personnel, it has always taken a 2/3 vote to convict. There is certainly nothing in the Constitution that mandates a particular vote count for conviction.

Once the panel makes its recommendation to the Secretary of Defense, the Secretary can either remand for further proceedings or forward the record to the President with his recommendation as to final disposition. The President then, unless he has delegated the task to the Secretary, makes the "final decision."...

B

[Hamdan's]...general objection is that [because the commission procedures admittedly differ from those governing courts-martial, that alone] renders the commission illegal. Chief among his particular objections are that he may...be convicted based on evidence he has not seen or heard, and that any evidence admitted against him **need not comply** with the admissibility or relevance rules typically applicable in criminal trials and court-martial proceedings.

The Government objects to our consideration of any procedural challenge at this stage on the grounds that (1) the **abstention doctrine** espoused in *Councilman* precludes pre-enforcement review of procedural rules, (2) Hamdan will be able to raise any such challenge following a "final decision" under the **DTA** and (3) "there is...no basis to presume, before the trial has even commenced, that the trial will not be conducted in good faith and according to law." The first of these contentions was disposed of in Part III and neither of the latter two is sound.

First, because Hamdan apparently is not subject to the death penalty...and may receive a sentence shorter than 10 years' imprisonment, **he has no automatic right to review** of the commission's "final decision" before a federal court under the DTA. **Second**, contrary to the Government's assertion, there *is* a "basis to presume" that the procedures employed during Hamdan's trial will violate the law...**We turn, then, to consider the merits of Hamdan's procedural challenge.**

C

...[T]he procedures governing trials by military commission historically have been the same as those governing courts-martial...As recently as the Korean and Vietnam wars, during which use of military commissions was contemplated but never made, the principle of procedural parity was espoused as

a background assumption.

Are you conveniently overlooking *Quirin* and *Yamashita*?

There is a glaring historical exception to this general rule. The procedures and evidentiary rules used to try General Yamashita near the end of World War II deviated in significant respects from those then governing courts-martial. The force of that precedent, however, has been seriously undermined by post-World War II developments...[The *Yamashita* dissenters' primary concerns were] that the commission had free rein to consider all evidence "which in the commission's opinion 'would be of assistance in proving or disproving the charge,' without any of the usual modes of authentication."

The majority, however, did not pass on the merits of Yamashita's procedural challenges because it concluded that his status disentitled him to <u>any</u> protection under the Articles of War (specifically, those set forth in Article 38, which would become Article 36 of the UCMJ) <u>or</u> the Geneva Convention of 1929. The Court explained that Yamashita was neither a "person made subject to the Articles of War by Article 2"...nor a protected prisoner of war being tried for crimes committed **during his detention**.

At least partially in response to [Yamashita], the UCMJ's codification of the Articles of War after World War II expanded the category of persons subject [to it] to include defendants in Yamashita's (and Hamdan's) position and the Third Geneva Convention of 1949 extended prisoner-of-war protections to individuals tried for crimes committed **before their capture**...The most notorious exception to the principle of uniformity, then, has been stripped of its precedential value.

I have been critical of the *Hamdan* Court to this point; however, changes in the law post-*Quirin* and *Yamashita* could certainly make a difference. We shall see.

Article 2 of the UCMJ **<u>now</u>** reads:

(a) The following persons are subject to the UCMJ:
- (9) Prisoners of war in custody of the armed forces.
- (12) Subject to any [U.S.] treaty...or to any accepted rule of international law, **persons within an area leased** by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

Guantanamo Bay is such a leased area.

OK...I am still wondering whether Hamdan is covered. Article 2 does not address the ambiguity of "when" war crimes are alleged to take place: **while POW's** or **before capture** or **either**?

The uniformity principle is not an inflexible one; it does not preclude all departures from the procedures dictated for use by courts-martial. But **any departure must be tailored to the exigency that necessitates it**. That understanding is reflected in Article 36 of the UCMJ, which provides:

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

"So far as **he** considers practicable." The law, even as amended, is no doubt vague due to a myriad of unforeseeable circumstances. For example, if an undercover agent's testimony is necessary to convict, but revealing his name will place his life in jeopardy and otherwise take him out of commission in the field, would it be "practicable" for the President to adopt a rule that protects the witness's name and precludes cross-examination as we normally envision it?

Article 36 places two restrictions on the President's power to promulgate rules of procedure for courts-martial and military commissions alike. **First**, no procedural rule he adopts may be "contrary to or inconsistent with" the UCMJ -- however practical it may seem. **Second**, the rules adopted must be "uniform insofar as practicable." That is, the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable.

Is that the only possible meaning of "uniformity"?

Hamdan...maintains that the [commission's] procedures...are inconsistent with the UCMJ...Among the inconsistencies he identifies is that between §6 of the Commission Order (which permits exclusion of the accused from proceedings and denial of his access to evidence in certain circumstances) and the UCMJ's requirement that "all...proceedings" other than votes and deliberations by courts-martial "shall be made a part of the record and shall be in the presence of the accused." Hamdan also observes that the Commission Order dispenses with virtually all evidentiary rules applicable in courts-martial.

The Government [contends]:

First,... [that Commission Order No. 1 sets forth no procedure that is "contrary to or inconsistent with" the provisions of the UCMJ, only 9 of which (out of 158) mention “military commissions.”]

Second,...[that] military commissions would be of no use if the President were hamstrung by those provisions of the UCMJ that govern courts-martial.

Finally, the President's determination that "the danger to the safety of the United States and the nature of international terrorism" renders it impracticable "to apply...the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts" is...explanation enough for any deviation from court-martial procedures.

Hamdan has the better of this argument. Without reaching the question whether any provision of Commission Order No. 1 is strictly "contrary to or inconsistent with" other provisions of the UCMJ, **we conclude that the "practicability" determination the President has made is insufficient to justify variances from the procedures governing courts-martial.** Subsection (b) of Article 36 was added after World War II, and requires a different showing of impracticability from the one required by subsection (a). Subsection (a) requires that the rules the President promulgates for courts-martial...and military commissions alike conform to those that govern procedures in *Article III courts*, "so far as *he considers* practicable." Subsection (b), by contrast, demands that the rules applied in courts-martial...and military commissions -- whether or not they conform with the Federal Rules of Evidence -- be "uniform *insofar as practicable*." Under the latter provision, then, the rules set forth in the Manual for Courts-Martial must apply to military commissions unless impracticable.

The President...has determined, pursuant to subsection (a), that it is impracticable to apply the rules and principles of law that govern "the trial of criminal cases in the United States district courts" to Hamdan's commission. **We assume that complete deference is owed that determination. The President has not, however, made a similar official determination that it is impracticable to apply the rules for courts-martial**. **And even if subsection (b)'s requirements may be satisfied without such an official determination, the requirements of that subsection are not satisfied here.**

Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case. There is no suggestion, for example, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility. Assuming *arguendo* that the reasons articulated in the President's Article 36(a) determination ought to be considered in evaluating the impracticability of applying court-martial rules, **the only reason offered...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**...Under the circumstances, then, the rules applicable in courts-martial must apply. Since it is undisputed that Commission Order No. 1 deviates in many significant respects from those rules, it necessarily violates Article 36(b).

The Government's objection that requiring compliance with the court-martial rules imposes an undue

burden both ignores the plain meaning of Article 36(b) and misunderstands the purpose and the history of military commissions. The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as **a tribunal of necessity** to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter. **Exigency lent the commission its legitimacy**, but did not further justify the wholesale jettisoning of procedural protections. That history explains why the military commission's procedures typically have been the ones used by courts-martial. That the jurisdiction of the two tribunals today may sometimes overlap does not detract from the force of this history; Article 21 did not transform the military commission from a tribunal of true exigency into a more convenient adjudicatory tool. Article 36, confirming as much, strikes a careful balance between uniform procedure and the need to accommodate exigencies that may sometimes arise in a theater of war. That Article not having been complied with here, the rules specified for Hamdan's trial are illegal.

Prior to the enactment of Article 36(b), it may well have been the case that a deviation from the rules governing courts-martial would not have rendered the military commission "illegal." Article 36(b), however, imposes a statutory command that must be heeded.

D

The procedures adopted to try Hamdan also violate the **Geneva Conventions,** [but the] Court of Appeals dismissed Hamdan's Geneva Convention challenge on three independent grounds:

(1) the Geneva Conventions are not judicially enforceable;
(2) Hamdan...is not entitled to their protections; and
(3) even if he is..., *Councilman* abstention is appropriate.

...As we explained in Part III, the abstention rule...is not applicable here. And for the reasons that follow,...the other grounds the Court of Appeals gave for its decision [are not] persuasive.

i

The Court of Appeals relied on *Johnson v. Eisentrager* to hold that Hamdan could not invoke the Geneva Conventions to challenge the Government's plan to prosecute him in accordance with Commission Order No. 1. *Eisentrager* involved a challenge by 21 German nationals to their 1945 convictions for war crimes by a military tribunal convened in Nanking, China, and to their subsequent imprisonment in occupied Germany. The petitioners argued that the 1929 Geneva Convention rendered illegal some of the procedures employed during their trials, which they said deviated impermissibly from the procedures used by courts-martial to try American soldiers. We rejected that claim on the merits because the petitioners (unlike Hamdan here) had failed to identify any prejudicial disparity "between the Commission that tried [them] and those that would try an offending soldier of the American forces of like rank," and in any event could claim no protection, under the 1929 Convention, during trials **for crimes that occurred before their confinement as prisoners of war**.

Buried in a footnote of the opinion, however, is this curious statement suggesting that the Court lacked power even to consider the merits of the Geneva Convention argument:

> We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.

In other words, the *Eisentrager* Court held that the Geneva Convention could not be enforced by individual prisoners in American Courts, but only by the POW's government bringing forth a claim. Interestingly, we really don't have a "country" representing al Qaeda, do we?

The Court of Appeals, on the strength of this footnote, held that "the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court."

Whatever else might be said about the *Eisentrager* footnote, it does not control this case. We may assume that "the obvious scheme" of the 1949 Conventions is identical in all relevant respects to that of the 1929 Convention, and even that that scheme would, **absent some other provision of law**, preclude Hamdan's invocation of the Convention's provisions as an independent source of law binding the Government's actions and furnishing petitioner with any enforceable right. For, regardless of the nature of the rights conferred on Hamdan, they are, as the Government does not dispute, **part of the law of war**. And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted.

ii

...[The Court of Appeals concluded that the Geneva Conventions did not apply to Hamdan as he was captured in connection with the United States' war with al Qaeda, a different war from the one with the Taliban in Afghanistan, and that the war with al Qaeda evades the reach of the Geneva Conventions. We...disagree...]

The conflict with al Qaeda is not, according to the Government, a conflict to which the full protections afforded detainees under the 1949 Geneva Conventions apply because Article 2 of those Conventions (which appears in all four Conventions) renders the full protections applicable only to "all cases of declared war or of any other armed conflict which may arise **between two or more of the High Contracting Parties**." Since Hamdan was captured and detained incident to the conflict with al Qaeda and not the conflict with the Taliban, and since al Qaeda, unlike Afghanistan, is not

a "High Contracting Party" -- *i.e.*, a signatory of the Conventions, the protections of those Conventions are not, it is argued, applicable to Hamdan.

We need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories. Article 3, often referred to as Common Article 3 because, like Article 2, it appears in all four Geneva Conventions, provides that **in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum," certain provisions protecting "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by...detention."** One such provision prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a **regularly constituted court** affording all the judicial guarantees which are **recognized as indispensable by civilized peoples**."

The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, **being "international in scope," does not qualify as a "conflict not of an international character."** That reasoning is erroneous. The term "conflict not of an international character" is used here in contradistinction to a conflict between nations... Common Article 2 provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." High Contracting Parties (signatories) also must abide by all terms of the Conventions vis-a-vis one another even if one party to the conflict is a non-signatory "Power," and must so abide vis-a-vis the non-signatory if "the latter accepts and applies" those terms. Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a non-signatory "Power" who are involved in a conflict "in the territory of" a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase "not of an international character" bears its literal meaning...

Comment reserved at this time.

iii

Common Article 3, then, is applicable here and...requires that Hamdan be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as **indispensable by civilized peoples**." While the term "regularly constituted court" is not specifically defined in either Common Article 3 or its accompanying commentary, other sources disclose its core meaning. The commentary accompanying a provision of the Fourth Geneva Convention, for example, defines "regularly constituted" tribunals to include "ordinary military courts" and "definitely excludes all special tribunals." GCIV Commentary 340 (defining the term "properly constituted" in Article 66,

which the commentary treats as identical to "regularly constituted")...

...As Justice Kennedy explains, [the Government's] defense fails because "the regular military courts in our system are the courts-martial established by congressional statutes." At a minimum, a military commission "can be 'regularly constituted' by the standards of our military justice system only if some practical need explains deviations from court-martial practice." As we have explained in Part VI-C, no such need has been demonstrated here.

iv

This is the only subsection of Part VI that Justice Kennedy does not join.

Inextricably intertwined with the question of regular constitution is the evaluation of the procedures governing the tribunal and whether they afford "all the judicial guarantees which are recognized as **indispensable by civilized peoples**." Like the phrase "regularly constituted court," this phrase is not defined in the text of the Geneva Conventions. But it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977. **Although the United States declined to ratify Protocol I**, its objections were not to Article 75 thereof. Indeed, it appears that the Government "regards the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled." Among the rights set forth in Article 75 is the "**right to be tried in one's presence.**"

We agree with Justice Kennedy that the procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by any "evident practical need" and for that reason, at least, fail to afford the requisite guarantees. We add only that, as noted in Part VI-A, various provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 and indisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him. **That the Government has a compelling interest in denying Hamdan access to certain sensitive information is not doubted.** But, **at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him**.

Comment reserved.

v

Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But *requirements* they are nonetheless. The commission that the President has convened to try Hamdan does not meet those requirements.

VII

This Part VII of the majority opinion authored by Justice Stevens is joined by Justices Kennedy, Souter, Ginsburg and Breyer. This Part is a short conclusion with some added hints.

We have assumed, as we must, that the allegations made in the Government's charge against Hamdan are true. We have assumed, moreover, the truth of the message implicit in that charge -- i.e., that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. **It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm.** But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

So, the Court leaves open the possibility of detaining Hamdan "for the duration" as a POW. They are only addressing the procedures in place for what amounts to trial and punishment of criminal violations of the law of war.

CONCURRENCE: Justice Breyer with whom Justices Kennedy, Souter and Ginsburg join...The dissenters say that today's decision would "sorely hamper the President's ability to confront and defeat a new and deadly enemy." They suggest that it undermines our Nation's ability to prevent future attacks of the grievous sort that we have already suffered....The Court's conclusion ultimately rests upon a single ground: **Congress has not issued the Executive a "blank check."** Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. **Nothing prevents the President from returning to Congress to seek the authority he believes necessary...**

Apparently, according to five folks without military expertise, Presidential authority from Congress **"to use all necessary and appropriate force against those...persons he determines planned, authorized, committed, or aided the terrorist attacks [on 911] or harbored such...persons, in order to prevent any future acts of international terrorism against the United States by such...persons"** (the AUMF) **is insufficient**.

I suggest a certain "arrogance of power" in Justice Breyer. Even he agrees that Article 21 grants power in the President to form military commissions. But, because **the majority, including himself,** requires "specific Congressional authority" to engineer commissions with rules that differ from courts-martial, that does not mean, as he so haughtily and falsely concludes, that "Congress has denied the President the legislative authority to create military commissions of the kind at issue here." **Congress has no more "specifically denied authority" than it has specifically granted same.**

CONCURRENCE: Justice Kennedy...and Souter, Ginsburg and Breyer as to Parts I and II... Commission Order No. 1...exceeds limits that certain statutes, duly enacted by Congress, have placed on the President's authority to convene military courts. **This is not a case, then, where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority**. Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches. Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.

This is just so much fiction. Show me where "Congress has considered the subject...and has set limits on the President's power." That is so only because the majority, including Justice Kennedy, says it is so. Just because they conclude that, in their eyes, the authority granted is not "enough" to justify the nature of the commission Bush formed, **that does not mean that Congress seriously considered anything having any bearing on the rules of evidence to be used by a commission. This, again, is fiction designed to belittle the President in a time of war. Justices Scalia, Thomas and Alito (and, no doubt, Chief Justice Roberts, if he could) use unusually harsh language in their criticism of the majority. I differ with some of their results, but concur in their overall appraisal.**

These principles seem vindicated here, for a case that may be of extraordinary importance is resolved by ordinary rules. **The rules of most relevance here are those pertaining to the authority of Congress and the interpretation of its enactments**.

It seems appropriate to recite these rather fundamental points because the Court refers...to the requirement of the Geneva Conventions of 1949 that military tribunals be "regularly constituted" -- a requirement that controls here, if for no other reason, because Congress requires that military commissions like the ones at issue conform to the "law of war."

So did the *Quirin* and *Yamashita* Courts.

Whatever the substance and content of the term "regularly constituted" as interpreted in this and any later cases, there seems little doubt that it relies upon the importance of standards deliberated upon and chosen in advance of crisis, under a system where the single power of the Executive is checked by other constitutional mechanisms. All of which returns us to the point of beginning -- that domestic statutes control this case. **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.**

I join the Court's opinion, save Parts V and VI-D-iv. To state my reasons for this reservation, and to show my agreement with the remainder of the Court's analysis by identifying particular deficiencies in the military commissions at issue, this separate opinion seems appropriate.

I

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. Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid. **It is imperative, then, that when military tribunals are established, full and proper authority exists for the Presidential directive.**

The proper framework for assessing whether Executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.[8] "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate...When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain...And when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."

[8]Case 2-13 on this website.

How can it be that the AUMF somehow fails to at least justify implied authorization to the President? Its words come awfully close to absolute power.

In this case...the President has acted in a field with a history of congressional participation and regulation. In the UCMJ, which Congress enacted...in 1950...and later amended,...Congress has set forth governing principles for military courts. The UCMJ...authorizes courts-martial in various forms; it regulates the organization and procedure of those courts; it defines offenses and rights for the accused; and it provides mechanisms for appellate review [and it]...recognizes that special military commissions may be convened to try war crimes...[These laws also] impose limitations, at least two of which control this case. If the President has exceeded these limits, this becomes a case of conflict between Presidential and congressional action -- a case within Justice Jackson's third category, **not the second or first**.

One limit on the President's authority is contained in §836 of the UCMJ. That section provides:

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

[This provision]...allows the President to implement and build on the UCMJ's framework by adopting procedural regulations, subject to three requirements: (1) Procedures for military courts must conform to district-court rules insofar as the President "considers practicable"; (2) the procedures may not be contrary to or inconsistent with the provisions of the UCMJ; and (3) "insofar as practicable" all rules and regulations under §836 must be uniform, a requirement, as the Court points out, that indicates the rules must be the same for military commissions as for courts-martial **unless such uniformity is impracticable.**

[Even assuming (1) and (2) are satisfied -- a matter of some dispute -- the third requires us to compare the military-commission procedures with those for courts-martial and determine, to the extent there are deviations, whether greater uniformity would be practicable. Although we can assume the President's practicability judgments are entitled to some deference, the Court observes that Congress' choice of language in the uniformity provision...suggests...a lower degree of deference [to the President] for [uniformity] determinations. **The rules for military courts may depart from federal-court rules whenever the President "considers" conformity impracticable, but the statute requires procedural uniformity across different military courts "insofar as uniformity is practicable," not insofar as the President considers it to be so**...Further,...the term "practicable"

cannot be construed to permit deviations based on mere convenience or expedience. "Practicable" means "feasible," that is, "possible to practice or perform" or "capable of being put into practice, done, or accomplished." [Webster's Dictionary]. Congress' chosen language, then, is best understood to allow the selection of procedures based on logistical constraints, the accommodation of witnesses, the security of the proceedings, and the like. [Procedural deviations between commissions and court-martials must be explained by some such practical need].

Does anyone truly believe that Congress thought through their choice of words in the manner the majority concludes they did?

...[A] second UCMJ provision requires us to compare the commissions at issue to courts-martial.

§821 states:

> The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions...of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions...

In §821 Congress has addressed the possibility that special military commissions...may at times be convened. At the same time, however, the President's authority to convene military commissions is limited: It extends only to "offenders or offenses" that "by statute or by the law of war may be tried by" such military commissions. The Government does not claim to base the charges against Hamdan on a statute; instead **it invokes the law of war.** That law, as the Court explained in *Quirin,* derives from "rules and precepts of the law of nations"; it is the body of international law governing armed conflict. If the military commission at issue is illegal under the law of war, then an offender cannot be tried "by the law of war" before that commission.

...Common Article 3 of the four Geneva Conventions of 1949...prohibits..."the passing of sentences and the carrying out of executions without previous judgment pronounced by a **regularly constituted court** affording all the judicial guarantees which are recognized as **indispensable by civilized peoples**." The provision is part of a treaty the United States has ratified and thus accepted as binding law. By Act of Congress, moreover, violations of Common Article 3 are considered "war crimes," punishable as federal offenses, when committed by or against United States nationals and military personnel. There should be no doubt, then, that Common Article 3 is part of the law of war as that term is used in §821.

The dissent by Justice Thomas argues that Common Article 3 nonetheless is irrelevant to this case because in *Johnson v. Eisentrager* it was said to be the "obvious scheme" of the 1929 Geneva Convention that "rights of alien enemies are vindicated under it only through protests and intervention of protecting powers," *i.e.*, signatory states. As the Court explains, this language from *Eisentrager* is not controlling here. Even assuming the *Eisentrager* analysis has some bearing upon

the analysis of the broader 1949 Conventions and that, in consequence, rights are vindicated "under those Conventions" only through protests and intervention, Common Article 3 is nonetheless relevant to the question of authorization under §821. Common Article 3 is part of the law of war that Congress has directed the President to follow in establishing military commissions. Consistent with that view, the *Eisentrager* Court itself considered on the merits claims that "procedural irregularities" under the 1929 Convention "deprived the Military Commission of jurisdiction."

...Assuming the President has authority to establish a special military commission to try Hamdan, the commission must satisfy Common Article 3's requirement of a "**regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples**." The terms of this general standard are yet to be elaborated and further defined, but Congress has required compliance with it by referring to the "law of war" in §821. The Court correctly concludes that the military commission here does not comply with this provision.

Common Article 3's standard of a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," supports, at the least, a uniformity principle similar to that codified in §836(b). The concept of a "regularly constituted court" providing "indispensable" judicial guarantees requires consideration of the system of justice under which the commission is established, though no doubt certain minimum standards are applicable. See Int'l Committee of the Red Cross (2005) (courts are "regularly constituted" under Common Article 3 if they are "established and organized in accordance with the laws and procedures already in force in a country").

This is precisely my point. The Court needs to resort to Red Cross Committee "interpretations" to draw conclusions about what "Congress has **so clearly enacted**." Give me a break. It appears that we have many, many disputes that wind up in the Judiciary precisely because Congress fails to act; that is, fails to **act with care**.

Try this principle on for size:

IF CONGRESS, WHETHER INTENDED OR NOT,
EITHER FAILS TO CLEARLY LIMIT PRESIDENTIAL WAR POWERS OR
ENABLES THE PRESIDENT TO ACT IN HIS DISCRETION,
CLOSE QUESTIONS GO TO THE EXECUTIVE BRANCH.

ANY PRESIDENT WHO FAILS TO ACT UNDER SUCH CIRCUMSTANCES;
ANY COURT WHO FAILS TO DEFER UNDER SUCH CIRCUMSTANCES;
FAILS THE COUNTRY.

AND, IF BY SO ACTING, THE EXCESSES OF THE EXECUTIVE BRANCH
HARM THE COUNTRY,
PERHAPS THE LEGISLATIVE BRANCH SHOULD SHARE IN THE BLAME.

Since the Court is prone to discussing "military policy," I simply find it hard to
condemn any President for doing what it takes, in his opinion, to win
if Congress has given him leeway to do so.

It far more fair to insist that Congress clearly communicate through its legislation,
than it is to blame the President for acting when the Congressional limits he has been handed
are not clearly defined, are in many ways "fuzzy" and are in still many more ways "silent."

The regular military courts in our system are the courts-martial established by congressional statutes. Acts of Congress confer on those courts the jurisdiction to try "any person" subject to war crimes prosecution....[And,] while special military commissions have been convened in previous armed conflicts -- a practice recognized in §821 -- those military commissions generally have adopted the structure and procedure of courts-martial...Absent more concrete statutory guidance, this historical and statutory background -- which suggests that some practical need must justify deviations from the court-martial model -- informs the understanding of which military courts are "regularly constituted" under United States law...

The guidance Congress has provided with respect to courts-martial indicates the level of independence and procedural rigor that Congress has deemed necessary, at least as a general matter, in the military context.

At a minimum..., a commission specially convened by the President to try specific persons without express congressional authorization -- can be "regularly constituted" by the standards of our military justice system only if some practical need explains deviations from court-martial practice. In this regard the standard of Common Article 3, applied here in conformity with §821, parallels the practicability standard of §836(b). Section 836, however, is limited by its terms to matters properly characterized as procedural -- that is, "pretrial, trial, and post-trial procedures" -- while Common

Article 3 permits broader consideration of matters of structure, organization, and mechanisms to promote the tribunal's insulation from command influence. Thus the combined effect of [§§836 and 821]...is that considerations of practicability must support departures from court-martial practice. Relevant concerns...relate to logistical constraints, accommodation of witnesses, security of the proceedings, and the like, not mere expedience or convenience. This determination...must be made with due regard for the constitutional principle that congressional statutes can be controlling, including the congressional direction that the law of war has a bearing on the determination.

These principles provide the framework for an analysis of the specific military commission at issue here.

II

...The allegations against Hamdan are undoubtedly serious...[He] **stands accused of overt acts in furtherance of a conspiracy to commit terrorism**: delivering weapons and ammunition to al Qaeda, acquiring trucks for use by Osama bin Laden's bodyguards, providing security services to bin Laden, and receiving weapons training at a terrorist camp. **Nevertheless, the circumstances of Hamdan's trial present no exigency requiring special speed or precluding careful consideration of evidence**. For roughly four years, Hamdan has been detained at a permanent United States military base in Guantanamo Bay, Cuba. And regardless of the outcome of the criminal proceedings at issue, the Government claims authority to continue to detain him based on his status as an **enemy combatant**. Against this background, the Court is correct to conclude that the military commission the President has convened to try Hamdan is unauthorized...

...[T]he structure...of the military commission deviates from conventional court-martial standards..., [thus raising] questions about the fairness of the trial – no evident practical need explains them...As compared to the role of the convening authority in a court-martial, the greater powers of the Appointing Authority here...raise concerns that the commission's decisionmaking may not be neutral. If the differences are supported by some practical need beyond the goal of constant and ongoing supervision, that need is neither apparent from the record nor established by the Government's submissions.

It is no answer that, at the end of the day, the DTA affords military-commission defendants the opportunity for judicial review in federal court...[T]he scope of that review is limited (§1005(e)(3)(D)) and the review is not automatic...(§1005(e)(3)(B)). Also, provisions for review of legal issues after trial cannot correct for structural defects, such as the role of the Appointing Authority, that can cast doubt on the factfinding process and the presiding judge's exercise of discretion during trial...

These structural differences between the military commissions and courts-martial...remove safeguards that are important to the fairness of the proceedings and the independence of the court. Congress has prescribed these guarantees for courts-martial; and no evident practical need explains the departures here. For these reasons the commission cannot be considered regularly constituted

under United States law and thus does not satisfy Congress' requirement that military commissions conform to the law of war.

Apart from these structural issues, moreover, the basic procedures for the commissions deviate from procedures for courts-martial, in violation of §836(b). As the Court explains, the Military Commission Order abandons the detailed Military Rules of Evidence, which are modeled on the Federal Rules of Evidence in conformity with §836(a)'s requirement of presumptive compliance with district-court rules.

Instead, the order imposes just one evidentiary rule: "Evidence shall be admitted if...the evidence would have probative value to a reasonable person..." Although it is true some military commissions applied an amorphous evidence standard in the past,...the evidentiary rules for those commissions were adopted before Congress enacted the uniformity requirement of *§836*(b) as part of the UCMJ. And while some flexibility may be necessary to permit trial of battlefield captives like Hamdan, military statutes and rules already provide for introduction of deposition testimony for absent witnesses, *10 USC §849*(d); and use of classified information, Military Rule Evid. 505. Indeed, the deposition-testimony provision specifically mentions military commissions and thus is one of the provisions the Government concedes must be followed by the commission at issue. That provision authorizes admission of deposition testimony only if the witness is absent for specified reasons, §849(d) -- a requirement that makes no sense if military commissions may consider all probative evidence. Whether or not this conflict renders the rules at issue "contrary to or inconsistent with" the UCMJ under §836(a), it creates a uniformity problem under §836(b)...

As the Court explains, the Government has made no demonstration of practical need for these special rules and procedures, either in this particular case or as to the military commissions in general; nor is any such need self-evident. For all the Government's regulations and submissions reveal, it would be feasible for most, if not all, of the conventional military evidence rules and procedures to be followed.

In sum, as presently structured, Hamdan's military commission exceeds the bounds Congress has placed on the President's authority in §§836 and 821 of the UCMJ. Because Congress has prescribed these limits, Congress can change them, requiring a new analysis consistent with the Constitution and other governing laws. At this time, however, we must apply the standards Congress has provided. By those standards the military commission is deficient.

III

Justice Kennedy stands alone for this Part III of his concurrence.

In light of the conclusion that the military commission here is unauthorized under the UCMJ, I see no need to consider several further issues addressed [elsewhere]...

First, I would not decide whether Common 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. As Justice Stevens explains, MCO No. 1 authorizes exclusion of the accused from the proceedings if the presiding officer determines that, among other things, protection of classified information so requires. Justice Stevens observes that these regulations create the possibility of a conviction and sentence based on evidence Hamdan has not seen or heard -- a possibility the plurality is correct to consider troubling...

As the dissent by Justice Thomas points out, however, the regulations bar the presiding officer from admitting secret evidence if doing so would deprive the accused of a "full and fair trial." MCO No. 1. This fairness determination, moreover, is unambiguously subject to judicial review under the DTA. §1005(e)(3)(D)(I) (allowing review of compliance with the "standards and procedures" in MCO No. 1). The evidentiary proceedings at Hamdan's trial have yet to commence, and it remains to be seen whether he will suffer any prejudicial exclusion.

There should be reluctance, furthermore, to reach unnecessarily the question whether, as the plurality seems to conclude, Article 75 of Protocol I to the Geneva Conventions is binding law notwithstanding the earlier decision by our Government not to accede to the Protocol. For all these reasons, and without detracting from the importance of the right of presence, I would rely on other deficiencies noted here and in the opinion by the Court -- deficiencies that relate to the structure and procedure of the commission and that inevitably will affect the proceedings -- as the basis for finding the military commissions lack authorization under *§836* and fail to be regularly constituted under Common Article 3 and §821.

I likewise see no need to address the validity of the conspiracy charge against Hamdan...In light of the conclusion that the military commissions at issue are unauthorized Congress may choose to provide further guidance in this area. 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."...

DISSENT: Justice Thomas...For reasons set forth in Justice Scalia's dissent, it is clear that this Court lacks jurisdiction to entertain [Hamdan's] claims. The Court having concluded otherwise, it is appropriate to respond to the Court's resolution of the merits of [Hamdan's] claims because its opinion **openly flouts our well-established duty to respect the Executive's judgment in matters of military operations and foreign affairs**. The Court's evident belief that *it* is qualified to pass on the "military necessity" of the Commander in Chief's decision to employ a particular form of force against our enemies is so **antithetical** to our constitutional structure that it simply cannot go unanswered...

I

Part I: Justice Thomas joined by Justice Scalia.

Like I say, whether you agree with the outcome here or not,
given the case law preceding Bush II's administration...Justice Thomas appears correct!
This Court has, indeed, openly flouted well-established respect for the Executive in matters of military operations and foreign affairs.

Perhaps what is more important is that when the media criticizes
Bush for, in their opinion, "flouting the Constitution,"
they do not also print the historical record or contrary views such as this dissent.

I should think that both sides of the political fence would deem "selective media reporting"
as dangerous in a democracy.

Our review of petitioner's claims arises in the context of the President's wartime exercise of his commander-in-chief authority **in conjunction with the complete support of Congress**. Accordingly, it is important to take measure of the respective roles the Constitution assigns to the three branches of our Government in the conduct of war...When "the President acts pursuant to an **express or implied** authorization from Congress," his actions are "supported by the **strongest of presumptions and the widest latitude** of judicial interpretation, and the burden of persuasion...rests heavily upon any who might attack it." *Youngstown Sheet & Tube Co. v. Sawyer*. Accordingly, in the very context that we address today, this Court (in *Quirin*) has concluded that "the detention and trial of petitioners -- ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger -- are not to be set aside by the courts without the **clear conviction** that they are in conflict with the Constitution or laws of Congress constitutionally enacted."

Under this framework, the President's decision to try Hamdan before a military commission for his involvement with al Qaeda is entitled to a heavy measure of deference. In the present conflict, Congress has authorized 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...in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." (AUMF). As a plurality of the Court observed in *Hamdi*, the "capture, detention, and ***trial*** of unlawful combatants, by 'universal agreement and practice,' are 'important incidents of war'" (quoting *Quirin*) and are therefore "an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Hamdi*'s observation that military commissions are included within the AUMF's authorization is supported by this Court's previous recognition that "an important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war." *Yamashita; Quirin; Madsen*.

Although the Court concedes the legitimacy of the President's use of military commissions in certain circumstances, it suggests that the AUMF has no bearing on the scope of the President's power to utilize military commissions in the present conflict. Instead, the Court determines the scope of this power based exclusively on Article 21 of the UCMJ, the successor to Article 15 of the Articles of War, which *Quirin* held "authorized trial of offenses against the law of war before military commissions."...**Article 21 alone supports the use of commissions here**. Nothing in the language of Article 21, however, suggests that it outlines the entire reach of congressional authorization of military commissions in all conflicts -- quite the contrary, the language of Article 21 presupposes the existence of military commissions under an independent basis of authorization. Indeed, consistent with *Hamdi*'s conclusion that the AUMF itself authorizes the trial of unlawful combatants, the original sanction for military commissions historically derived from congressional authorization of "the initiation of war" with its attendant authorization of "the employment of all necessary and proper agencies for its due prosecution." **Accordingly, congressional authorization for military commissions pertaining to the instant conflict derives not only from Article 21 of the UCMJ, but also from the more recent, and broader, authorization contained in the AUMF.**

I note the Court's error respecting the AUMF not because it is necessary to my resolution of this case -- **Hamdan's military commission can plainly be sustained solely under Article 21** -- but to emphasize the **complete congressional sanction** of the President's exercise of his commander-in-chief authority to conduct the present war. In such circumstances, as previously noted, our duty to defer to the Executive's military and foreign policy judgment is at its **zenith**; **it does not countenance the kind of second-guessing the Court repeatedly engages in today**. Military and foreign policy judgments "are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which 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." *Hamdi* (Justice Thomas, dissenting)...

II

...I do not dispute that military commissions have historically been "used in three different situations" and that the only situation relevant to the instant case is the use of military commissions "to seize and subject to disciplinary measures those enemies who...have violated the law of war." Similarly, I agree...that Winthrop's treatise sets forth the four relevant considerations for determining the scope of a military commission's jurisdiction, considerations relating to the (1) time and (2) place of the offense, (3) the status of the offender and (4) the nature of the offense charged. The Executive has easily satisfied these considerations here. The plurality's contrary conclusion rests upon an incomplete accounting and an unfaithful application of those considerations.

A

Part II(A): Justice Thomas joined by Justices Scalia and Alito.

The first two considerations are that a law-of-war military commission may only assume jurisdiction of "offences committed **within the field of the command...**" and that such offenses "must have been committed **within the period of the war**." Here,...the Executive has determined that the theater of the present conflict includes "Afghanistan, Pakistan and other countries" where al Qaeda has established training camps and that the duration of that conflict dates back (at least) to bin Laden's August 1996 "*Declaration of Jihad Against the Americans*." Under the Executive's description of the conflict, then, every aspect of the charge, which alleges overt acts in "Afghanistan, Pakistan, Yemen and other countries" taking place from 1996 to 2001, satisfies the temporal and geographic prerequisites for the exercise of law-of-war military commission jurisdiction. And these judgments pertaining to the scope...and duration...are committed solely to the President's...commander-in-chief authority. See *Prize Cases* (concluding that the President's commander-in-chief judgment about the nature of a particular conflict was "a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.".)

Nevertheless, the plurality concludes that the legality of the charge against Hamdan is doubtful because "Hamdan is charged not with an overt act for which he was caught redhanded in a theater of war...but with an *agreement* the inception of which long predated...the [relevant armed conflict]." The plurality's willingness to second-guess the Executive's judgments ...constitutes an unprecedented departure from the traditionally limited role of the courts with respect to war and an unwarranted intrusion on executive authority...

As an initial matter, the plurality relies upon the date of the AUMF's enactment to determine the beginning point for the "period of the war," thereby suggesting that petitioner's commission does not have jurisdiction to try him for offenses committed prior to the AUMF's enactment. But this suggestion betrays the plurality's unfamiliarity with the realities of warfare and its **willful blindness to our precedents**. **The starting point of the present conflict (or indeed any conflict) is not determined by congressional enactment, but rather by the initiation of hostilities.** See *Prize Cases* (recognizing that war may be initiated by "invasion of a foreign nation," and that such initiation, and the President's response, usually *precedes* congressional action). Thus, Congress' enactment of the AUMF did not mark the beginning of this Nation's conflict with al Qaeda, but instead authorized the President to use force in the midst of an ongoing conflict. Moreover, while the President's "war powers" may not have been activated until the AUMF was passed, the date of such activation has never been used to determine the scope of a military commission's jurisdiction. Instead, the traditional rule is that "offenses committed before a formal declaration of war or before the declaration of martial law may be tried by military commission." Green, The Military Commission; Howland, Digest of Opinions of the Judge-Advocates General of the Army ("A military commission...exercising...jurisdiction...under the laws of war...may take cognizance of offenses committed during the war, *before* the initiation of the military government or martial law"; *Yamashita* ("The extent to which the power to prosecute violations of the law of war shall be exercised before peace is declared rests, not with the courts, but with the political branch of the Government"). Consistent with this principle, on facts virtually identical to those here, a military commission tried Julius Otto Kuehn for conspiring with Japanese officials to betray the United States

Fleet to the Imperial Japanese Government prior to its attack on Pearl Harbor. Green.

By contrast, on the plurality's logic, the AUMF would not grant the President the authority to try bin Laden himself for his involvement in the events of September 11, 2001.

So, what do you think so far?

Moreover, the President's determination that the present conflict dates at least to 1996 is supported by overwhelming evidence. According to the State Department, al Qaeda *declared war* on the United States as early as August 1996. *Prize Cases* (recognizing that a state of war exists even if "the declaration of it be *unilateral.*" In February 1998, al Qaeda leadership issued another statement ordering the indiscriminate -- and, even under the laws of war as applied to legitimate nation-states, plainly illegal -- killing of American civilians and military personnel alike. See Jihad Against Jews and Crusaders ("The ruling to kill the Americans and their allies -- civilians and military -- is an individual duty for every Muslim who can do it in any country in which it is possible to do it"). This was not mere rhetoric; even before September 11, 2001, al Qaeda was involved in the bombing of the World Trade Center...1993, the bombing of the Khobar Towers...1996, the bombing of the U.S. Embassies in Kenya and Tanzania...1998, and the attack on the USS Cole...2000. In response to these incidents, the United States "attacked facilities belonging to bin Ladin's network" as early as 1998. Based on the foregoing, the President's judgment -- that the present conflict substantially predates the AUMF, extending at least as far back as al Qaeda's 1996 declaration of war on our Nation, and that the theater of war extends at least as far as the localities of al Qaeda's principal bases of operations -- **is beyond judicial reproach**. And the plurality's unsupportable contrary determination merely confirms that "**the Judiciary has neither aptitude, facilities nor responsibility**" for making military or foreign affairs judgments. *Hamdi* (Justice Thomas, dissenting).

B

Part II(B): Justice Thomas joined by Justices Scalia and Alito.

The third consideration identified by Winthrop's treatise for the exercise of military commission jurisdiction pertains to the persons triable before such a commission. Law-of-war military commissions have jurisdiction over "individuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war." They also have jurisdiction over "**irregular armed bodies or persons not forming part of the organized forces of a belligerent**" "who would not be likely to respect the laws of war." Indeed, according to Winthrop, **such persons are not "within the protection of the laws of war"...**This consideration is easily satisfied here, as **Hamdan is an unlawful combatant charged with joining and conspiring with a terrorist network dedicated to flouting the laws of war.**

C

The fourth consideration [is]...the nature of the offense charged...[S]uch commissions have jurisdiction to try "violations of the laws and usages of war cognizable by military tribunals only." In contrast to the preceding considerations, this Court's precedents establish that judicial review of "whether any of the acts charged is an offense against the law of war cognizable before a military tribunal" is appropriate. *Quirin.* However, "charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment." *Yamashita...*

[T]his Court has recognized that the "jurisdiction" of "our common-law war courts" has not been "prescribed by statute," but rather "has been adapted in each instance to the need that called it forth." *Madsen.* Second,...Congress has generally "left it to the President, and the military commanders representing him, to employ the commission, *as occasion may require*, for the investigation and punishment of violations of the law of war." *Madsen*.

In one key respect, the plurality departs from the proper framework for evaluating the adequacy of the charge against Hamdan under the laws of war. The plurality holds that where, as here, "neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent [establishing whether an offense is triable by military commission] **must be plain and unambiguous**." **This is a pure contrivance...**It is contrary to the presumption we acknowledged in *Quirin*, namely, that the actions of military commissions are "**not to be set aside by the courts without the *clear conviction* that they are" unlawful**. It is also contrary to *Yamashita*, which recognized the legitimacy of that military commission notwithstanding a substantial disagreement pertaining to whether Yamashita had been charged with a violation of the law of war...

It does seem quite clear that the majority did a flip flop when it comes to the “test” set up in *Quirin*.

The plurality's **newly minted clear-statement rule** is also fundamentally inconsistent with the... nature of warfare, which...evolves and changes over time, and for which a flexible, evolutionary common-law system is uniquely appropriate. Though the charge against Hamdan easily satisfies even the plurality's manufactured rule, the plurality's inflexible approach has dangerous implications for the Executive's ability to discharge his duties as Commander in Chief in future cases. We should undertake to determine whether an unlawful combatant has been charged with an offense against the law of war with an understanding that the common law of war is flexible, responsive to the exigencies of the present conflict, and deferential to the judgment of military commanders.

Indeed,...the President has found that “the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm – ushered in not by us, but by terrorists – requires new thinking in the law of war.” Under the Court’s approach, the President’s ability to address this “new paradigm” of inflicting death and mayhem

would be completely frozen by rules developed in the context of conventional warfare.

1

Part II(C)(1): Justice Thomas joined by Justice Scalia.

Under either...approach, Hamdan has been charged with conduct constituting two distinct violations of the law of war cognizable before a military commission: membership in a war-criminal enterprise and conspiracy to commit war crimes. The charging section of the indictment alleges both that Hamdan "willfully and knowingly joined an enterprise of persons who shared a common criminal purpose" and that he "conspired and agreed with al Qaeda to commit... offenses triable by military commission."

The common law of war establishes that **Hamdan's willful and knowing membership in al Qaeda is a war crime** chargeable before a military commission. Hamdan, a confirmed enemy combatant and member or affiliate of al Qaeda, has been charged with willfully and knowingly joining a group (al Qaeda) whose purpose is "to support violent attacks against property and nationals (both military and civilian) of the United States." Moreover, the allegations specify that Hamdan joined and maintained his relationship with al Qaeda even though he "believed that bin Laden and his associates were involved in the attacks on the U.S. Embassies in Kenya and Tazania,...the attack on the USS Cole..., and the attacks on the United States on September 11, 2001." These allegations, against a **confirmed unlawful combatant**, are alone sufficient to sustain the jurisdiction of [this] commission.

For well over a century it has been established that "to unite with banditti, jayhawkers, guerillas, or any other unauthorized marauders is a high offence against the laws of war; the offence is complete when the band is organized or joined. The atrocities committed by such a band do not constitute the offence, but make the reasons...why such banditti are denounced by the laws of war." *11 Op. Atty. Gen.312*. In other words, unlawful combatants, such as Hamdan, violate the law of war merely by joining an organization, such as al Qaeda, whose principal purpose is the "killing and disabling...of peaceable citizens or soldiers." Winthrop... This conclusion is unsurprising, as it is a "cardinal principle of the law of war...that the civilian population must enjoy complete immunity."

Committee of Red Cross... "Numerous instances of trials, for 'Violation of the laws of war,' of offenders of this description, are published in the General Orders of the years 1862 to 1866." Accordingly, on this basis alone, "the allegations of Hamdan's charge, **tested by any reasonable standard**, adequately allege a violation of the law of war." *Yamashita.*

The conclusion that membership in an organization whose purpose is to violate the laws of war is an offense triable by military commission is confirmed by the experience of the military tribunals convened by the United States at **Nuremberg**...[T]he United States convened military tribunals "to bring individuals to trial for membership" in "a group or organization...declared criminal by the International Military Tribunal." The IMT designated various components of four Nazi groups -- the Leadership Corps, Gestapo, SD, and SS -- as criminal organizations. "A member of such an organization could be...convicted of the crime of membership and be punished for that crime by death." Under this authority, the United States Military Tribunal at Nuremberg convicted numerous individuals for the act of knowing and voluntary membership in these organizations. For example,...Karl Brandt, Karl Gebhardt, Rudolf Brandt, Joachim Mrugowsky, Wolfram Sievers, Viktor Brack, and Waldemar Hoven were convicted and sentenced to death for the crime of membership in an organization declared criminal by the IMT; Karl Genzken and Fritz Fischer were sentenced to life imprisonment for the same; and Helmut Poppendick was...sentenced to a 10-year term of imprisonment [for the same]. **This Court denied habeas relief** and the executions were carried out at Landsberg prison on June 2, 1948.

Moreover, the Government has alleged that Hamdan was not only a member of al Qaeda while it was carrying out terrorist attacks on civilian targets in the United States and abroad, but also that Hamdan aided and assisted al Qaeda's top leadership by supplying weapons, transportation, and other services. These allegations further confirm that Hamdan is triable before a law-of-war military commission for his involvement with al Qaeda. See H.R.Doc. No. 65, 55th Cong. (1894) ("There are numerous rebels...that...furnish the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents are banding together in several of the interior counties for the purpose of assisting the enemy to rob, to maraud and to lay waste to the country. All such persons are by the laws of war in every civilized country liable to capital punishment." Winthrop... Undoubtedly, the conclusion that such conduct violates the law of war led to the enactment of Article 104 of the UCMJ, which provides that "any person who...aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things...shall suffer death or such other punishment as a court-martial or military commission may direct."

2

Part II(C)(2): Justice Thomas joined by Justices Scalia and Alito.

Separate and apart from the offense of joining a contingent of "uncivilized combatants who are not... likely to respect the laws of war" (Winthrop), Hamdan has been charged with "conspiring and agreeing with...the al Qaeda organization...to commit...offenses triable by military commission."

Those offenses include "attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism." This, too, alleges a violation of the law of war triable by military commission.

"The experience of our wars" (Winthrop) is rife with evidence that establishes beyond any doubt that **conspiracy to violate the laws of war is itself an offense cognizable before a law-of-war military commission.** World War II provides the most recent examples of the use of American military commissions to try offenses pertaining to violations of the laws of war. In that conflict, the orders establishing the jurisdiction of military commissions in various theaters of operation provided that conspiracy to violate the laws of war was a cognizable offense...1 United Nations War Crimes Commission (recounting that the orders establishing World War II military commissions in the Pacific and China included "participation in a common plan or conspiracy" pertaining to certain violations of the laws of war as an offense triable by military commission). Indeed, those orders authorized trial by military commission of participation in a conspiracy to commit "murder...or other inhumane acts...against any civilian population" which is precisely the offense Hamdan has been charged with here. And conspiracy to violate the laws of war was charged in the highest profile case tried before a World War II military commission (*Quirin*) and on numerous other occasions...

To support its contrary conclusion, the plurality attempts to evade the import of *Quirin* (and the other World War II authorities) by resting upon this Court's failure to address the sufficiency of the conspiracy charge in the *Quirin* case. But the common law of war cannot be ascertained from this Court's failure to pass upon an issue, or indeed to even mention the issue in its opinion; rather, it is ascertained by the practice and usage of war.

The Civil War experience provides further support for the President's conclusion that conspiracy to violate the laws of war is an offense cognizable before law-of-war military commissions. Indeed, in the highest profile case to be tried before a military commission relating to that war, namely, the trial of the men involved in the assassination of President Lincoln, the charge provided that those men had "combined, confederated, and conspired...to kill and murder." H. R. Doc. No. 314, 55th Cong.

In addition to the foregoing high-profile example, Winthrop's treatise enumerates numerous Civil War military commission trials for conspiracy to violate the law of war. The plurality attempts to explain these examples away by suggesting that the conspiracies listed by Winthrop are best understood as "a species of compound offense," namely, violations both of the law of war and ordinary criminal laws, rather than "stand-alone offenses against the law of war." But the fact that, for example, conspiracy to commit murder can at the same time violate ordinary criminal laws and the law of war, so that it is "a combination of the two species of offenses," does not establish that a military commission would not have jurisdiction to try that crime solely on the basis that it was a violation of the law of war. Rather, if anything, and consistent with the principle that the common law of war is flexible and affords some level of deference to the judgments of military commanders, it establishes that military commissions would have the discretion to try the offense as (1) one against the law of war, or (2) one against the ordinary criminal laws, or (3) both.

In any event, the plurality's effort to avoid the import of Winthrop's footnote through the smokescreen of its "compound offense" theory cannot be reconciled with the particular charges that sustained military commission jurisdiction in the cases that Winthrop cites. For example, in the military commission trial of Henry Wirtz, Charge I provided that he had been

> "maliciously, willfully, and traitorously...*combining, confederating, and conspiring...* [with others] to injure the health and destroy the lives of soldiers in the military service of the United States, then held and being prisoners of war within the lines of the so-called Confederate States, and in the military prisons thereof, to the end that the armies of the United States might be weakened and impaired, *in violation of the laws and customs of war*." H. R. Doc. No. 314.

Likewise, [more examples provided]...Hamdan has been charged with the overt acts of providing protection, transportation, weapons, and other services to the enemy, acts which in and of themselves are violations of the laws of war.

3

Part II(C)(3): Justice Thomas joined by Justices Scalia and Alito.

Ultimately, the plurality's determination that Hamdan has not been charged with an offense triable before a military commission rests not upon any historical example or authority, but upon the plurality's raw judgment of the "inability on the Executive's part here to satisfy the most basic precondition...for establishment of military commissions: **military necessity**." **This judgment starkly confirms that the plurality has appointed itself the ultimate arbiter of what is quintessentially a policy and military judgment, namely, the appropriate military measures to take against those who "aided the terrorist attacks that occurred on September 11, 2001**." AUMF §2(a). The plurality's suggestion that Hamdan's commission is illegitimate because it is not dispensing swift justice on the battlefield is unsupportable. Even a cursory review of the authorities confirms that law-of-war military commissions have wide-ranging jurisdiction to try offenses against the law of war **in exigent and non-exigent circumstances alike**. *Yamashita* (military commission trial after the cessation of hostilities in the Philippines); *Quirin* (military commission trial in Washington, D. C.). Traditionally, 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 the President to impose on the September 11 attackers in the AUMF.

This is the first attempt to define "military necessity" I have seen. The plurality indicated that this case is not appropriate for a commission because the requirement of "swift justice on the battlefield" won't fly. Although many cases have discussed this concept, as Justice Thomas points out and as I have been questioning, many cases that have been tried by commission would not have qualified under the majority's test, to wit: *Yamashita* (military commission trial after the cessation of hostilities in the Philippines) and *Quirin* (military commission trial in Washington, D. C.). **Finally, someone has at least discussed what others left hanging.** Justice Thomas suggests that retribution for heinous war crimes is a "military necessity" and "swift" is what Congress had in mind in the AUMF. I don't know that the AUMF can be stretched that far, but at least Thomas is candid about commissions being formed, both exigent and non-exigent.

Today a plurality of this Court would hold that conspiracy to massacre innocent civilians does not violate the laws of war. This determination is unsustainable. The judgment of the political branches 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 is supported by virtually every relevant authority, including all of the authorities invoked by the plurality today. It is also supported by the nature of the present conflict. **We are not engaged in a traditional battle with a nation-state, but with a worldwide, hydra-headed enemy, who lurks in the shadows conspiring to reproduce the atrocities of September 11, 2001, and who has boasted of sending suicide bombers into civilian gatherings, has proudly distributed videotapes of beheadings of civilian workers, and has tortured and dismembered captured American soldiers**. But according to the plurality, when our Armed Forces capture those who are plotting terrorist atrocities like the bombing of the Khobar Towers, the bombing of the USS Cole, and the attacks of September 11 -- even if their plots are advanced to the very brink of fulfillment -- our military cannot charge those criminals with any offense against the laws of war. Instead, our troops must catch the terrorists "redhanded" in the midst of *the attack itself*, in order to bring them to justice. Not only is this conclusion fundamentally inconsistent with the cardinal principal of the law of war, namely protecting non-combatants, but it would sorely hamper the President's ability to confront and defeat a new and deadly enemy.

Actually, Justice Thomas probably saw an easy target and drove the "redhanded" phrase home. In truth, I don't think the majority, in spite of using that word, meant to require quite that much "overtness" to prosecute, but they certainly require far more than Justice Thomas would.

After seeing the plurality **overturn longstanding precedents** in order to seize jurisdiction over this case, and after seeing them disregard the clear prudential counsel that they abstain in these circumstances from using equitable powers, it is no surprise to see them go on to **overrule one after another of the President's judgments** pertaining to the conduct of an ongoing war...The plurality's willingness to second-guess the determination of the political branches that these conspirators must be brought to justice is both **unprecedented and dangerous**.

III

The Court holds that [even if the Government has brought a proper charge,]...the commission lacks power to proceed" because of its failure to comply with the terms of the UCMJ and the four Geneva Conventions signed in 1949. This position is untenable.

A

Part III(A): Justice Thomas joined by Justices Scalia and Alito.

As with the jurisdiction of military commissions, the procedure of such commissions "has not been prescribed by statute," but "has been adapted in each instance to the need that called it forth." *Madsen.* Indeed, this Court has concluded that "in the absence of attempts by Congress to limit the President's power, it appears that, as Commander in Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions." *Madsen*. This conclusion is consistent with this Court's understanding that military commissions are "our common-law war courts." As such, "should the conduct of those who compose martial-law tribunals become a matter of judicial determination subsequently before the civil courts, those courts will give great weight to the opinions of the officers as to what the customs of war in any case justify and render necessary."

The Court nevertheless concludes that at least one provision of the UCMJ amounts to an attempt by Congress to limit the President's power. This conclusion is not only contrary to the text and structure of the UCMJ, but it is also inconsistent with precedent of this Court...Article 36 of the UCMJ authorizes the President to establish procedures for military commissions "which shall, ***so far as he considers practicable***, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States **district courts**, but which may **not be contrary** to or inconsistent with this chapter." Far from constraining the President's authority, Article 36 recognizes the President's prerogative to depart from the procedures applicable in criminal cases whenever *he alone* does not deem such procedures "practicable." While the procedural regulations promulgated by the Executive must not be "contrary to" the UCMJ, only a few provisions of the UCMJ mention "military commissions" and **there is no suggestion that the procedures to be employed by Hamdan's commission implicate any of those provisions.**

Justice Thomas takes the narrow view of the term "contrary." I presume, for example, that <u>if</u> the rules of evidence for courts-martial in the UCMJ disallowed hearsay evidence, but none of the nine sections of the UCMJ that mention commissions did so, an Executive order to the contrary would not be "contrary to or inconsistent with" the UCMJ. The majority, on the other hand, takes the broad view that commission evidentiary rules cannot be "contrary or inconsistent with" any theory adopted by the UCMJ.

Notwithstanding the foregoing, the Court concludes that Article 36(b) of the UCMJ, which provides that "all rules and regulations made under this article shall be **uniform** insofar as practicable" requires the President to employ the **same rules and procedures in military commissions as are employed by courts-martial** *"insofar as practicable."* The Court further concludes that Hamdan's commission is unlawful because the President has not explained why it is not practicable to apply the same rules and procedures to Hamdan's commission as would be applied in a trial by court martial.

This interpretation of §836(b) is unconvincing. As an initial matter, the Court fails to account for our cases interpreting the predecessor to Article 21 of the UCMJ -- Article 15 of the Articles of War -- which provides **crucial context** that bears directly on the proper interpretation of Article 36(b). Article 15 of the Articles of War provided that:

> "The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions...of concurrent jurisdiction in respect of offenders...that by statute or by the law of war may be triable by such military commissions..."

In *Yamashita*, this Court concluded that Article 15 of the Articles of War preserved the President's unfettered authority to prescribe military commission procedure. The Court explained, "by thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction...to *any use* of the military commission contemplated by the common law of war."...And this Court recognized that Article 15's preservation of military commissions as common-law war courts preserved the President's commander-in-chief authority to both "establish" military commissions and to "prescribe their procedures." *Madsen* (explaining that Congress had "refrained from legislating" in the area of military commission procedures, in "contrast with its traditional readiness to...prescribe, with particularity, the jurisdiction and procedure of United States courts-martial"); Green ("The military commission exercising jurisdiction under common law authority is usually appointed by a superior military commander and is **limited in its procedure only by the will of that commander**. Like any other common law court, in the absence of directive of superior authority to the contrary, the military commission is free to formulate its own rules of procedure").

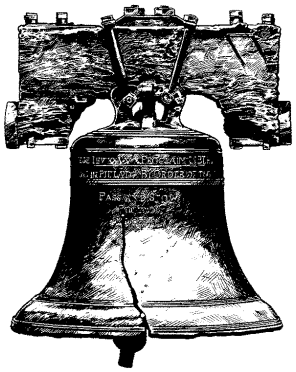
Given these precedents, the Court's conclusion that Article 36(b) requires the President to apply the same rules and procedures to military commissions as are applicable to courts-martial is unsustainable. When Congress codified Article 15 of the Articles of War in Article 21 of the UCMJ it was "presumed to be aware of...and to adopt" this Court's interpretation of that provision as preserving the common-law status of military commissions, inclusive of the President's unfettered authority to prescribe their procedures. The Court's conclusion that Article 36(b) repudiates this settled meaning of Article 21 is not based upon a specific textual reference to military commissions, but rather on a one-sentence subsection providing that "all rules and regulations made under this article shall be **uniform** insofar as practicable." This is little more than an **impermissible repeal by implication**...[that is not favored in the law.] *Branch v. Smith, 538 U.S. 254 (2003).*

Moreover, the Court's conclusion is **flatly contrary to its duty not to set aside Hamdan's commission "without the *clear* conviction that it is in conflict with the...laws of Congress constitutionally enacted." *Quirin*.**

Nothing in the text of Article 36(b) supports the Court's sweeping conclusion that it represents an unprecedented congressional effort to change the nature of military commissions from common-law war courts to tribunals that must presumptively function like courts-martial. And such an interpretation would be strange indeed. The vision of uniformity that motivated the adoption of the UCMJ, embodied specifically in Article 36(b), is nothing more than **uniformity across the separate branches of the armed services**. [The preamble to the UCMJ explains] that the UCMJ is an act "to unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard"). **There is no indication that the UCMJ was intended to require uniformity in procedure between courts-martial and military commissions, tribunals that the UCMJ itself recognizes are different**...Thus, Article 36(b) is best understood as establishing that, so far as practicable, the rules and regulations governing tribunals convened by the **Navy** must be uniform with the rules and regulations governing tribunals convened by the **Army**. But, consistent with this Court's prior interpretations of Article 21 and over a century of historical practice, it cannot be understood to require the President to conform the procedures employed by military commissions to those employed by courts-martial.

Two different ways of interpreting what Congress meant by "uniformity." I think they both make sense, but they certainly have vastly different implications.

Even if Article 36(b) could be construed to require procedural uniformity among the various tribunals contemplated by the UCMJ, Hamdan would not be entitled to relief. Under the Court's reading, the President is entitled to prescribe different rules for military commissions than for courts-martial when he determines that it is not "practicable" to prescribe uniform rules. The Court does not resolve the level of deference such determinations would be owed, however, because, in its view, "the President has not...[determined] that it is impracticable to apply the rules for courts-martial." **This is simply not the case**. On the same day that the President issued MCO No. 1, the Secretary of Defense explained that "the president decided to establish military commissions because he wanted the option of a process that is different from those processes which we already have, namely the federal court system. . and the military court system," Dept. of Defense News Briefing on Military Commissions (Mar. 21, 2002) (remarks of Donald Rumsfeld)...and that "the commissions are intended to be different...because the President recognized that there **had to be differences to deal with the unusual situation we face...**" The President reached this conclusion because



> "we're in the middle of a war, and...had to design a procedure that would allow us to pursue justice for these individuals while at the same time prosecuting the war most

> effectively. And that means setting rules that would allow us to **preserve our intelligence secrets [and] develop more information about terrorist activities** that might be planned for the future so that we can take action to prevent terrorist attacks against the United States...There was a constant balancing of the requirements of our war policy and the importance of providing justice for individuals...and ***each* deviation** from the standard kinds of rules that we have in our criminal courts was **motivated by the desire to strike the balance between individual justice and the broader war policy**."

The Court provides no explanation why the President's...[explanation] is...inadequate to satisfy its newly minted "practicability" requirement. On the contrary, this determination is precisely the kind for which 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.'" *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp. (1948).* And, in the context of the present conflict, it is exactly the kind of determination Congress countenanced when it authorized the President to use **all necessary and appropriate force** against our enemies. Accordingly, the President's determination is sufficient to satisfy any practicability requirement imposed by Article 36(b).

The plurality further contends that Hamdan's commission is unlawful because it fails to provide him the right to be present at his trial, as recognized in *§839*. But § 839(c) applies to courts-martial, not military commissions. It provides:

> "**When the members of a court-martial** deliberate or vote, only the members may be present. **All other proceedings**, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and, in cases in which a military judge has been detailed to the court, the military judge."

In context, "all other proceedings" plainly refers exclusively to **"other proceedings" pertaining to a court-martial**...Section 839(c) simply does not address the procedural requirements of military commissions.

This is the only fair reading of §839 and proves the dissent's other point; i.e., that "clearly the commission's rules are not 'inconsistent' with court-martial rules because the rules in §839 apply only to courts-martial."

B

The Court [wrongly] contends that Hamdan's military commission is also unlawful because it violates [the]...Geneva Conventions...

1

Part III(B)(1): Justice Thomas joined by Justices Scalia and Alito.

As an initial matter, and as the Court of Appeals concluded, both of Hamdan's Geneva Convention claims are foreclosed by *Johnson v. Eisentrager* [where this Court held]...that the respondents could "not assert...that anything in the Geneva Convention makes them immune from prosecution or punishment for war crimes"...[because]: "Rights of alien enemies are vindicated under [the Geneva Convention] **only through protests and intervention of protecting powers** as the rights of our citizens against foreign governments are vindicated only by Presidential intervention."...[T]he provisions of the 1929 Geneva Convention were not judicially enforceable because that Convention contemplated that diplomatic measures by political and military authorities were the exclusive mechanisms for such enforcement. Nor does the Court suggest that the 1949 Geneva Conventions departed from this framework...

Instead, the Court concludes that [Hamdan] may seek judicial enforcement of the provisions of the Geneva Conventions because "they are...part of the law of war. And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted." But Article 21 authorizes the use of military commissions; it does not purport to render judicially enforceable aspects of the law of war that are not so enforceable of their own accord. See *Quirin* (by enacting Article 21, "Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war"). The Court cannot escape *Eisentrager*'s holding merely by observing that Article 21 mentions the law of war; indeed, though *Eisentrager* did not specifically consider the Court's novel interpretation of Article 21, *Eisentrager* involved a challenge to the legality of a World War II military commission, which, like all such commissions, found its authorization in Article 15 of the Articles of War, the predecessor to Article 21 of the UCMJ. Thus, the Court's interpretation of Article 21 is foreclosed by *Eisentrager*.

In any event, the Court's argument is too clever by half. The judicial non-enforceability of the Geneva Conventions derives from the fact that those Conventions have exclusive enforcement mechanisms (*Eisentrager*) and this, too, is part of the law of war. **The Court's position thus rests on the assumption that Article 21's reference to the "laws of war" selectively incorporates only those aspects of the Geneva Conventions that the Court finds convenient, namely, the substantive requirements of Common Article 3, and not those aspects of the Conventions that the Court, for whatever reason, disfavors, namely the Conventions' exclusive diplomatic enforcement scheme...**

2

Part III(B)(2): Justice Thomas joined by Justice Scalia.

In addition to being foreclosed by *Eisentrager*, Hamdan's claim under Common Article 3...is meritless. Common Article 3 applies to "armed conflict **not of an international character occurring in the territory of one of the High Contracting Parties**." "Pursuant to his authority as Commander in Chief and Chief Executive of the United States," the President has "accepted the legal conclusion of the Department of Justice...that common Article 3 of Geneva does not apply to...al Qaeda...detainees, because, among other reasons, **the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character**.'" Under this Court's precedents, "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *United States v. Stuart.* Our duty to defer to the President's understanding of the provision at issue here is only heightened by the fact that he is acting pursuant to his constitutional authority as Commander in Chief and by the fact that the subject matter of Common Article 3 calls for a judgment about the nature and character of an armed conflict...

The President's interpretation of Common Article 3 is reasonable and should be sustained. The conflict with al Qaeda is international in character in the sense that it is occurring in various nations around the globe. Thus, it is also "occurring in the territory of" more than "one of the High Contracting Parties." The Court does not dispute the President's judgments respecting the nature of our conflict with al Qaeda, nor does it suggest that the President's interpretation of Common Article 3 is implausible or foreclosed by the text of the treaty. Indeed, **the Court concedes that Common Article 3 is principally concerned with "furnishing minimal protection to rebels involved in...a civil war," precisely the type of conflict the President's interpretation envisions to be subject to Common Article 3.** [The Court's interpretation is also plausible, but where]...an ambiguous treaty provision ("not of an international character") is susceptible of two plausible, and reasonable, interpretations, our precedents require us to **defer** to the Executive's interpretation.

3

Part III(B)(3): Justice Thomas joined by Justices Scalia and Alito.

But even if Common Article 3 were judicially enforceable and applicable to the present conflict,... any claim petitioner has under Common Article 3 is not ripe. The only relevant "acts" that "are and shall remain prohibited" under Common Article 3 are "the *passing of sentences* and the *carrying out of executions* without previous judgment pronounced by a **regularly constituted court** affording all the judicial guarantees which are recognized as indispensable by civilized peoples." As its terms make clear, **Common Article 3 is only violated...by the act of "passing of sentence,"** and thus Hamdan will only have a claim *if* his military commission convicts him and imposes a sentence. Accordingly, as Hamdan's claim is "contingent [upon] future events that may not occur as anticipated, or indeed may not occur at all," it is not ripe for adjudication. Indeed, even if we assume he will be convicted and sentenced, whether his trial will be conducted in a manner so as to deprive him of "the judicial guarantees which are recognized as indispensable by civilized peoples" is entirely **speculative**...

In any event, Hamdan's military commission complies with the requirements of Common Article 3. **It is plainly "regularly constituted"** because such commissions have been employed throughout our history to try unlawful combatants for crimes against the law of war...

The Court concludes Hamdan's commission fails to satisfy the requirements of Common Article 3 not because it differs from the practice of previous military commissions but because it "deviates from the procedures governing courts-martial." But **there is neither a statutory nor historical requirement that military commissions conform to the structure and practice of courts-martial.** A military commission is a different tribunal, serving a different function, and thus operates pursuant to different procedures. The 150-year pedigree of the military commission is itself sufficient to establish that such tribunals are "regularly constituted courts."

Similarly, the procedures to be employed by Hamdan's commission afford "all the judicial guarantees which are recognized as indispensable by civilized peoples."...[Hamdan] is entitled to...legal counsel [and]...the presumption of innocence [and]...proof beyond a reasonable doubt and the right to remain silent. He may confront witnesses against him and may subpoena his own witnesses, if reasonably available. Petitioner may personally be present at every stage of the trial unless he engages in disruptive conduct or the prosecution introduces classified or otherwise protected information for which no adequate substitute is available and whose admission will not deprive him of a full and fair trial. If petitioner is found guilty, the judgment will be reviewed by a review panel, the Secretary of Defense, and the President, if he does not designate the Secretary as the final decisionmaker. The final judgment is subject to review in the Court of Appeals for the District of Columbia Circuit and ultimately in this Court.

...[T]he plurality concludes that Hamdan's commission is unlawful because of the possibility that Hamdan will be barred from proceedings and denied access to evidence that may be used to convict him. But, under the commissions' rules, the Government may not impose such bar or denial on Hamdan if it would render his trial unfair, a question that is clearly within the scope of the appellate review contemplated by regulation and statute.

Moreover,...the procedures themselves make clear that Hamdan would only be excluded (other than for disruption) if it were necessary to protect classified (or classifiable) intelligence, including the sources and methods for gathering such intelligence. The Government has explained that "we want to make sure that these proceedings, which are going on in the middle of the war, do not interfere with our war effort and...because of the way we would be able to handle interrogations and intelligence information, may actually assist us in promoting our war aims." And this Court has concluded, in the very context of a threat to reveal our Nation's intelligence gathering sources and methods, that "**it is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation**," *Haig, 453 U.S., at 307* and that "measures to protect the secrecy of our Government's foreign intelligence operations plainly serve these interests." *Haig...*This interest is surely compelling here. According to the Government, "because al Qaeda operates as a clandestine force relying on sleeper agents to mount surprise attacks, one of the most critical fronts in the current war involves gathering intelligence about future terrorist attacks and how the terrorist

network operates -- identifying where its operatives are, how it plans attacks, who directs operations, and how they communicate." We should not rule out the possibility that this compelling interest can be protected, while at the same time affording Hamdan (and others like him) a fair trial.

In these circumstances, "civilized peoples" would take into account the context of military commission trials against unlawful combatants in the war on terrorism, including the need to keep certain information secret in the interest of preventing future attacks on our Nation and its foreign installations so long as it did not deprive the accused of a fair trial. Accordingly, the President's understanding of the requirements of Common Article 3 is entitled to "great weight."

4

Part III(B)(4): Justice Thomas joined by Justices Scalia and Alito.

[Additionally],...Hamdan...claims that he is entitled to the protections of the Third Geneva Convention which applies to conflicts between two or more High Contracting Parties. There is no merit to Hamdan's claim.

Article 2 of the Convention provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." "Pursuant to his authority as Commander in Chief and Chief Executive of the United States," the President has determined that the Convention is inapplicable here, explaining that "none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world, because, among other reasons, al Qaeda is not a High Contracting Party." The President's findings about the nature of the present conflict with respect to members of al Qaeda operating in Afghanistan represents a core exercise of his commander-in-chief authority that this Court is bound to respect...

DISSENT: Justice Alito...joined by Justices Scalia and Thomas...

I

The holding of the Court...rests on the following reasoning. A military commission is lawful only if it is authorized by *§821;* this provision permits the use of a commission to try "offenders or offenses" that "by statute or by the law of war may be tried by" such a commission; because no statute provides that an offender such as petitioner or an offense such as the one with which he is charged may be tried by a military commission, he may be tried by military commission only if the trial is authorized by "the law of war"; the Geneva Conventions are part of the law of war; and Common Article 3 of the Conventions prohibits petitioner's trial because the commission before which he would be tried is not "a regularly constituted court." **I disagree with this holding because petitioner's commission is "a regularly constituted court."** Common Article 3 provides as follows:

> "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) The following acts are and shall remain prohibited...:
>
> (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by ***a regularly constituted court*** affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Common Article 3 thus imposes three requirements. Sentences may be imposed only by (1) a "court" (2) that is "regularly constituted" and (3) that affords "all the judicial guarantees which are recognized as indispensable by **civilized peoples**."

...The first requirement is largely self-explanatory, and, with respect to the third, I note only that on its face it imposes a uniform international standard that does not vary from signatory to signatory. ...I interpret [the second element ("regularly constituted")] to require that the court be appointed or established in accordance with the appointing country's domestic law. I agree with the Court that, as used in Common Article 3, the term "regularly" is synonymous with "properly." The term "constitute" means "appoint," "set up," or "establish," (Webster's Dictionary) and therefore "regularly constituted" means properly appointed, set up, or established...

In order to determine whether a court has been properly appointed, set up, or established, it is necessary to refer to a body of law that governs such matters. I interpret Common Article 3 as looking to the domestic law of the appointing country because I am not aware of any international law standard regarding the way in which such a court must be appointed, set up, or established, and because different countries with different government structures handle this matter differently. Accordingly, "a regularly constituted court" is a court that has been appointed, set up, or established **in accordance with the domestic law of the appointing country**.

II

In contrast...[the majority holds] that the military commission before which petitioner would be tried is not "a regularly constituted court" (a) because "no evident practical need explains" why its "structure and composition...deviate from conventional court-martial standards"; and (b) because, contrary to *§836*(b), the procedures specified for use in the proceeding before the military commission impermissibly differ from those provided under the UCMJ for use by courts-martial. I do not believe that either of these grounds is sound.

A

...If Common Article 3 had been meant to require trial before a country's military courts or courts that are similar in structure and composition, the drafters almost certainly would have

used language that expresses that thought more directly...

B

I also disagree with the Court's conclusion that [Hamdan's] military commission is "illegal" because its procedures allegedly do not comply with *§836*. Even if §836(b), unlike Common Article 3, does impose at least a limited uniformity requirement amongst the tribunals contemplated by the UCMJ...and even if it is assumed for the sake of argument that some of the procedures specified in MCO No. 1 impermissibly deviate from court-martial procedures, it does not follow that the military commissions created by that order are not "regularly constituted" or that trying petitioner before such a commission would be inconsistent with the law of war. 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. I see no justification for striking down the entire commission structure simply because it is possible that petitioner's trial might involve the use of some procedure that is improper.**

Hooray!!! That's what I've been looking for! Reason!

III

Returning to the three elements of Common Article 3 -- (1) a court, (2) that is appointed, set up, and established in compliance with domestic law, and (3) that respects universally recognized fundamental rights -- I conclude that all of these elements are satisfied in this case.

A

First, the commissions qualify as courts. **Second**, the commissions were appointed, set up, and established pursuant to an order of the President, just like the commission in *Quirin* and the Court acknowledges that *Quirin* recognized that the statutory predecessor of *§821* "preserved" the President's power "to convene military commissions." Although Justice Kennedy concludes that "an acceptable degree of independence from the Executive is necessary to render a commission 'regularly constituted' by the standards of our Nation's system of justice," he offers no support for this proposition (which in any event seems to be more about fairness or integrity than regularity). The commission in *Quirin* was certainly no more independent from the Executive than the commissions at issue here, and *§§821* and 836 do not speak to this issue.

Finally, the commission procedures, taken as a whole, and including the availability of review by a United States Court of Appeals and by this Court, do not provide a basis for deeming the commissions to be illegitimate. The Court questions the following two procedural rules: the rule allowing the Secretary of Defense to change the governing rules "'from time to time'" (which does

not rule out mid-trial changes); and the rule that permits the admission of any evidence that would have "'probative value to a reasonable person'" (which departs from our legal system's usual rules of evidence). Neither of these two rules undermines the legitimacy of the commissions.

Surely the entire commission structure cannot be stricken merely because it is possible that the governing rules might be changed during the course of one or more proceedings. *If* a change is made and applied during the course of an ongoing proceeding and *if* the accused is found guilty, the validity of that procedure can be considered in the review proceeding for that case. After all, **not every midtrial change will be prejudicial. A midtrial change might amend the governing rules in a way that is inconsequential or actually favorable to the accused.**

As for the standard for the admission of evidence at commission proceedings, the Court does not suggest that this rule violates the **international standard** incorporated into Common Article 3 ("the judicial guarantees which are recognized as indispensable by civilized peoples.") **Rules of evidence differ from country to country, and much of the world does not follow aspects of our evidence rules, such as the general prohibition against the admission of hearsay**...If a particular accused claims to have been unfairly prejudiced by the admission of particular evidence, that claim can be reviewed in the review proceeding for that case. **It makes no sense to strike down the entire commission structure based on speculation that some evidence might be improperly admitted in some future case.** In sum, I believe that Common Article 3 is satisfied here because the military commissions (1) qualify as courts, (2) that were appointed and established in accordance with domestic law, and (3) any procedural improprieties that might occur in particular cases can be reviewed in those cases.

B

The commentary on Common Article 3 supports this interpretation [which] states: "...[sentences and executions without a proper trial]...are...shocking to the civilized mind...Sentences and executions without previous trial are too open to error. 'Summary justice' may be effective on account of the fear it arouses..., but it adds too many further innocent victims to all the other innocent victims of the conflict. All civilized nations surround the administration of justice with safeguards aimed at eliminating the possibility of judicial errors. The Convention has rightly proclaimed that it is essential to do this even in time of war. *We must be very clear about one point: it is only 'summary' justice which it is intended to prohibit.* No sort of immunity is given to anyone under this provision. There is nothing in it to prevent a person presumed to be guilty from being arrested and so placed in a position where he can do no further harm; and it leaves intact the right of the State to prosecute, sentence and punish according to the law." It seems clear that the commissions at issue here meet this standard. Whatever else may be said about the system that was created by MCO No. 1 and augmented by the Detainee Treatment Act, §1005(e)(1), **this system** -- which features formal trial procedures, multiple levels of administrative review, and the opportunity for review by a United States Court of Appeals and by this Court -- **does not dispense "summary justice."** For these reasons, I respectfully dissent.