HAMDAN v. RUMSFELD: THE FUNCTIONAL CASE FOR FOREIGN AFFAIRS DEFERENCE TO THE EXECUTIVE BRANCH

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Handed down on the last day of the 2005 Term, the Supreme Court's decision in *Hamdan v. Rumsfeld*[1] was the most eagerly anticipated decision of the year. The Court's decision garnered banner headline treatment in *The New York Times* and *Washington Post*, and initial reactions of legal commentators emphasized the decision's historic significance. One prominent commentator has even called *Hamdan* "the most important decision on presidential power and the rule of law ever."[2]

While *Hamdan* is an important decision, it is doubtful that the Court's opinion will have the long-term significance of a *Youngstown Sheet & Tube Co. v. Sawyer*[3] or *United States v. Nixon*.[4] Unlike *Youngstown* or *Nixon*, *Hamdan* largely avoided momentous questions of constitutional separation of powers. Rather, Justice Stevens's opinion for the Court invalidating military commissions rested solely on the interpretation of three kinds of non-constitutional law: federal statutes relating to military justice, treaties relating to the treatment of military detainees, and the customary international laws of war. The non-constitutional basis for the *Hamdan* decision means that Con-

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1. 126 S. Ct. 2749 (2006).

2. *See, e.g.*, Walter Dellinger, *A Supreme Court Conversation*, SLATE, June 29, 2006, *available at* http://www.slate.com/id/2144476/entry/2144825/.

3. 343 U.S. 579 (1952).

4. 418 U.S. 683 (1974).

gress may reinstate pre-*Hamdan* military commissions by simply passing a statute that more explicitly approves them. Congress largely did this when it enacted the Military Commissions Act of 2006.[5]

This is not to say *Hamdan* has no jurisprudential significance. As a formal matter, Justice Stevens's opinion for the Court not only departed substantially from past judicial precedents supporting the use of military commissions, but it also failed to defer to the executive's reasonable interpretations of the relevant statutes, treaties, and customary international law on war. Despite longstanding judicial recognition of a duty to defer to the executive's reasonable interpretations in the foreign affairs and warmaking arena, the Court as a whole did not justify its failure to give such deference. This non-deference, we argue, is the most surprising and disturbing aspect of the Court's decision.

The doctrines requiring judicial deference to executive interpretations of laws affecting foreign affairs, especially during wartime, have a solid and undisputed formal pedigree. But these doctrines also have a strong functional basis. The executive branch has strong institutional advantages over courts in the interpretation of laws relating to the conduct of war. *Hamdan*'s refusal to give deference to the executive branch, if followed in the future, will further disrupt the traditional system of political cooperation between Congress and the President in wartime. It will raise the transaction costs for policymaking during war without any serious benefit and potentially at large cost. Congress expressed its displeasure with *Hamden* by stripping federal courts of jurisdiction and reducing their interpretive freedom over foreign affairs statutes and international law.

This paper proceeds in three parts. In Part I, we criticize the formal basis for the Court's decision in *Hamdan*, especially its failure to follow doctrines requiring deference to executive interpretations of foreign affairs laws. In Part II, we offer a functional justification for deference doctrines based on the executive's comparative institutional advantages over the federal judiciary in the conduct of foreign affairs, especially in times of war. Finally, in Part III, we discuss the consequences of *Hamdan* on cooperation between the President and Congress in the conduct of this and future wars.

5. Pub. L. No. 109-366 (signed by President Bush on October 17, 2006).

I.

This Part critiques the formal basis for *Hamdan*'s rejection of the use of military commissions to try enemy combatants in the war on terrorism. Justice Stevens's opinion for the Court did not identify a constitutional defect in the military commission system established by the President's November 13, 2001 executive order.[6] Rather, the Court's holding rested solely on its interpretation of two forms of non-constitutional law: federal statutes relating to military justice and federal treaties governing the treatment of wartime detainees. Justice Stevens also found that the commission violated the customary international law of war, but he lost Justice Kennedy's vote on that portion of the opinion. This Part argues that these arguments were unpersuasive on formal grounds, especially in light of past judicial precedents on military commissions. The Court's approach is even less persuasive when considered in light of well-settled doctrines requiring judicial deference to executive interpretations of statutes relating to foreign affairs, treaties, and customary international law.

A. *HAMDAN*'S CASCADE OF ERRORS

On September 11, 2001, members of the al Qaeda terrorist organization crashed two civilian airliners into the World Trade Center in New York City, a third into the Pentagon in Arlington, Virginia, while a fourth headed toward Washington, D.C., crashing in Pennsylvania due to the resistance of the passengers. Approximately 3,000 civilians were killed, billions of dollars in property destroyed, and the nation's transportation and financial systems were temporarily closed. In part, the United States responded by sending forces to Afghanistan, where the ruling Taliban militia had harbored al Qaeda for several years.

An important aspect of the war on terrorism focuses on the detention and trial of captured al Qaeda members. Military commissions try captured members of the enemy for violations of the laws of war. American generals have used military commissions from the Revolutionary war through World War II.[7] They are not created by the Uniform Code of Military Justice

6. Military Order of Nov. 13, 2001: *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

7. For a critical review of the history, see LOUIS FISHER, MILITARY TRIBUNALS & PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM (2005) [hereinafter FISHER, MILITARY TRIBUNALS].

(UCMJ), which governs courts-martial,[8] but instead have been established by Presidents and military commanders in the field. In a November 13, 2001 order, President Bush established military commissions to try members of al Qaeda. Bush's military commissions apply to any individual for whom there is "reason to believe" is or "was a member of the organization known as al Qaida" and has engaged in or planned to commit terrorist attacks against the United States.[9] Al Qaeda had carried out attacks on the United States which had "created a state of armed conflict."[10]

Military commissions traditionally had operated according to the customary international law of war. They did not have a specific code of procedure, nor did they punish a statutory listing of offenses. Procedures were flexible to accommodate the demands of warfare, and crimes were those recognized by a common law of war which was not reduced to a single text. Under President Bush's military order, the Defense Department exercised delegated authority to issue two lengthy codes, one defining the elements of the crimes triable by commission, the other setting out the procedures. The Defense Department's regulations, for example, set the standard for conviction at proof beyond a reasonable doubt and provide defense counsel with access to exculpatory evidence in the hands of the prosecution. They also recognize the right against self-incrimination and the right of cross-examination, and require a unanimous vote of the commission members for the death penalty.[11] Similarly, the Defense Department's articulation of the crimes subject to trial by military commission went well beyond past practice, such as FDR's definition of the jurisdiction of military commissions as

8. See 10 U.S.C. § 821 (2000) ("The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.").

9. Military Order of Nov. 13, 2001: *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism* § 2(a)(1)(i)-(ii), 66 Fed. Reg. 57,833 at 57,833. The order also applies to those who knowingly harbor al Qaeda members who plan to commit terrorist attacks against the United States. *Id.* § 2(a)(1)(iii).

10. *Id.* § 1(a).

11. *See* Crimes and Elements for Trials by Military Commissions, 32 C.F.R. 11.3 (2006); U.S. Dep't of Defense, Mil. Comm'n Order No. 1, Procedures for Trials by Mil. Comm'ns of Certain Non-U.S. Citizens in the War Against Terrorism paras. 5-6 (Mar. 21, 2002), *available at* http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf [hereinafter Mil. Comm'n Order No. 1].

reaching "sabotage, espionage, hostile or warlike acts, or violations of the law of war."[12]

The Court's analysis began by finding that military commissions must comply with procedural requirements set forth in the Uniform Code of Military Justice, a federal statute codifying rules governing military justice in the United States.[13] The Court focused its analysis on two UCMJ provisions—Articles 21[14] and 36[15]—which it then interpreted to constrain and prohibit President Bush's use of military commissions.

1. Article 36's "practicability" and "uniformity" requirement

Article 36 of the UCMJ authorizes the President to issue regulations governing the "procedures, including modes of proof, for cases arising under [the UCMJ] triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry."[16] When making such regulations, the President "shall, so far as he considers practicable, apply the principles of law and the rules of evidence" generally used in civilian criminal trials in federal courts. Article 36 also requires that the rules and regulations be "uniform insofar as practicable."

Article 36's plain language delegates to the President a broad authority to "determine" the procedural rules governing military commissions. Nevertheless, the Court interpreted Article 36 to require the President to make a finding explaining why

12. Take, for example, the Bush Department of Defense effort to define spying:
(6) Spying—(i) Elements. (A) The accused collected or attempted to collect certain information;
(B) The accused intended to convey such information to the enemy;
(C) The accused, in collecting or attempting to collect the information, was lurking or acting clandestinely, while acting under false pretenses; and
(D) The conduct took place in the context of and was associated with armed conflict.
(ii) Comments. (A) Members of a military organization not wearing a disguise and others who carry out their missions openly are not spies, if, though they may have resorted to concealment, they have not acted under false pretenses.
(B) Related to the requirement that conduct be wrongful or without justification or excuse in this case is the fact that, consistent with the law of war, a lawful combatant who, after rejoining the armed force to which that combatant belongs, is subsequently captured, can not be punished for previous acts of espionage. His successful rejoining of his armed force constitutes a defense.
68 C.F.R. 11.6 (2006).

13. 10 U.S.C.S. §§ 801–947 (2006).

14. 10 U.S.C.S. § 821 (2006).

15. 10 U.S.C.S. § 836 (2006).

16. 10 U.S.C.S. § 836(a) (2006).

it is not "practicable" to use courts-martial instead of military commissions. No practice revealed in any legislative history, subsequent congressional enactments, or presidential decisions, seems to support this requirement.

President Bush's November 2001 order finding that using civilian criminal trials against unlawful enemy combatants was impracticable, the Court held, may satisfy Article 36(a).[17] But the Court required the President to make another official determination explaining the impracticability of using court-martial procedures. It doubted that such a determination could be sustained. "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."[18] Similarly, the Court found a rule permitting a military commission to exclude a defendant from a hearing involving classified information "cannot lightly be excused as 'practicable.'"[19]

Hamdan's interpretation of Article 36 does not square with the Supreme Court's treatment of military commissions during World War II in *Ex parte Quirin*[20] and *In re Yamashita*.[21] In *Quirin*, the Court rejected challenges to the military commission used to try the Nazi saboteurs. It did not suggest that FDR's procedures in those commissions had to resemble those for courts-martial, but instead limited its review to whether the commission could properly exercise jurisdiction over the case, and went no farther. It certainly did not demand that FDR issue rules that were consistent with those for courts-martial, or make a sufficient showing of impracticability as to individual commission procedures. *Yamashita* also refused to exercise any review over military commission procedures, but instead limited its inquiry to whether the military commission properly exercised jurisdiction. Neither decision claimed that the President's procedures for military commissions had to follow court-martial procedures.

Hamdan rejected its earlier precedent on the ground that Article 36 was enacted after World War II to change the rules used in military commissions. Article 36, however, does not ap-

17. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2791 (2006).
18. *Id.* at 2792.
19. *Id.*
20. 317 U.S. 1 (1942).
21. 327 U.S. 1 (1946).

pear to do anything of the sort. It vests the authority to issue procedures for military commissions to the President. It requires that the procedures and principles mirror civilian courts so far as practicable. Neither of these provisions required the President to use the procedural rules of courts-martial; if anything, they attempt to impose the standards of civilian courts, but gave the President the discretion to opt out of them. *Hamdan* based its holding instead on the third element of Article 36, that "all rules and regulations . . . shall be uniform insofar as practicable."[22] This provides a thin textual basis for requiring military commission procedures to conform to courts-martial. Again, this provided the "practicable" exception, but it also does not make clear whether the rules and regulations must be uniform between different types of military tribunals. It could just as easily be read to mean that the rules and regulations must be uniform within each tribunal system—military commissions, for example, did not operate according to a common set of procedures in World War II. As Justice Thomas pointed out in his dissent, the uniformity requirement appears to have referred to uniformity between different military services because the broad statutory purpose of the UCMJ was to unify the rules governing the Army and the Navy.[23]

As the Court conceded, Article 36(a) delegates broad authority to create procedures for military commissions to the President and to determine the practicability of departures from civilian criminal procedures. The Court even assumed that "complete deference" was owed to President Bush's determination that civilian trials were impracticable. But the Court gave no deference to the President's procedural rulemaking in *Hamdan*'s case because Article 36(b) uses the phrase "insofar as practicable" rather than Article 36(a)'s "so far as *he considers* practicable." *Hamdan* provided no evidence to show that courts, Congress, or the executive branch had previously believed this difference in language to herald a tectonic shift in the attitude of deference toward the executive branch, particularly over matters involving war.

The Court's refusal to give deference to the President's interpretation of his delegated rulemaking authority stands in sharp contrast with the broad deference regularly given to the presidential interpretations in other kinds of rulemaking. In-

22. 10 U.S.C.S. § 836(b) (2006).
23. *Hamdan*, 126 U.S. at 2842 (Thomas, J., dissenting).

deed, Justice Stevens's opinion in *Chevron v. Natural Resources Defense Council* adopted a broad rule requiring judicial deference to agency interpretations of law, even where the statute contained no specific language granting the President or agency the power to interpret or "determine."[24] Yet the Court summarily rejected the President's determination here, despite the fact that it was made pursuant to a specific statutory delegation of power and involved the exercise of his core constitutionally delegated powers as Commander in Chief.[25] As we will explain in part II, this result conflicted with functional and historical reasons for the practice of judicial deference to executive branch decisions in wartime.

2. Section 821 (Article 21) and the "law of war"

In addition to finding that President Bush's military commission procedures failed to comply with Article 36, the Court found that Article 21 of the UCMJ limits military commission jurisdiction to cases in compliance with the law of war. Article 21 is titled "Jurisdiction of courts-martial not exclusive."[26] It declares that

> [t]he provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.[27]

Although Article 21's plain language is mainly concerned with preserving the concurrent jurisdiction of military commissions and other military tribunals, the Court construed Article 21 to condition any such military commission trials on compliance with the law of war. This is an odd reading. Article 21's text refers to the law of war to mark out the jurisdiction of military commissions. There is no indication that Article 21 was intended to regulate the procedures and operations of military commissions once jurisdiction was established.

The Court, however, read Article 21 to require that military commissions follow the laws of war in regard to their procedures

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24. 467 U.S. 837 (1984).

25. For discussion of the application of *Chevron* to foreign affairs, see Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000).

26. 10 U.S.C.S. § 821 (2006).

27. *Id.*.

and the elements of the substantive crimes charged. The Court held that the phrase "law of war" incorporated two sources of international law into U.S. law: the 1949 Geneva Conventions, particularly focusing on the third Geneva Convention regulating the treatment of Prisoners of War, and the Hague Conventions.[28] But the Court's heavy reliance on the Geneva Conventions suggests that it failed to understand that much of the law of war remains customary. There is no international agreement, for example, which defines the elements of criminal violations of the laws of war. Rather, that common law is composed of treaties (such as the 1907 Hague Regulations, the Geneva Conventions, and the Statute of Rome establishing the International Criminal Court), state practice (such as domestic criminal legislation defining and punishing war crimes), and judicial decisions (such as the opinions of the Nuremburg Tribunal or the International Criminal Tribunal for the Former Yugoslavia). Indeed, the Geneva Conventions explicitly describe themselves as "complementary" to some of the 1907 Hague Regulations and the Hague Regulations, in turn, explicitly incorporate customary law.[29] The Court's construction of the phrase "law of war,",therefore, should have surveyed all of these materials as well as American practice itself because the United States has perhaps been involved in the most armed conflicts since World War II. Although Justice Stevens did consider these broader sources of law in his plurality opinion on the law of war's treatment of conspiracy, his opinion for the Court relied almost exclusively on the Geneva Conventions to give content to the law of war.

a. *The 1949 Geneva Conventions*

As an initial matter, the Court had to confront the argument that the Geneva Conventions are not judicially enforceable. Indeed, the Court's own prior decision in *Johnson v. Eisentrager*[30] squarely held that the Geneva Conventions could not be enforced in domestic courts. German soldiers, convicted by military commission for continuing to fight in China after the end of

28. *Hamdan*, 126 U.S. at 2780–81 (plurality opinion). The Court focused on the Third Geneva Convention. Geneva Convention Relative to the Treatment of Prisoners of War Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

29. *See* Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 28, art. 135, 6 U.S.T. at 3422, 75 U.N.T.S. at 240 (describing Third Geneva Convention as "complementary" to regulations in Hague Convention respecting the Laws and Customs of War on Land); Hague Convention respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.

30. 339 U.S. 763 (1950).

the war with Germany, claimed that their trial violated the Geneva Conventions. *Eisentrager* found that the 1929 Geneva Conventions, which were largely identical to the 1949 Conventions, placed the "responsibility for observance and enforcement of these rights . . . upon political and military authorities" only.[31] *Hamdan* found that *Eisentrager* did not control because "compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted."[32]

The Court must have assumed either that Article 21 of the UCMJ had effectively overruled *Eisentrager*, or that the 1949 Geneva Conventions called for domestic judicial enforcement in a way that the 1929 Conventions did not. The enforceability of the Geneva Conventions could not have resulted from any change in Article 21 itself. When *Eisentrager* was decided, the statutory predecessor to Article 21 contained exactly the same language regarding "the law of war."[33] Thus, when the *Eisentrager* Court held that the Geneva Conventions were not judicially enforceable, military commissions were *already bound* by statute to comply with the laws of war. *Eisentrager* did not find that the laws of war, incorporated through Article 21, required anything more than an inquiry into whether the military commission properly exercised jurisdiction over the defendants.

Even if the Court believed that the new Article 21 was intended to override *Eisentrager*, events could not have happened that way. Congress enacted the UCMJ, and Section 821's unchanged recognition of military commissions, on May 5, 1950. It would have been impossible for Congress to have understood that the UCMJ overruled *Eisentrager* and made the Geneva Conventions judicially enforceable in domestic courts because *Eisentrager* was not decided until June 5, 1950. In other words, Congress could not have understood the UCMJ to reject *Eisentrager*'s rule on the non-enforceability of the Geneva Conventions, because *Eisentrager* did not announce its rule until after Congress had enacted the new UCMJ.

If Section 821 did not change, then the Geneva Conventions must have changed. The majority, however, was unable to show that the 1949 Geneva Conventions reversed the rule of the 1929 Conventions—enforcement was still to come from political or military channels. There was no textual difference indicating that

31. *Id.* at 789 n.14.
32. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2794 (2006).
33. *See* 10 U.S.C. 1486 (1946) (Article 15 is the predecessor provision).

those who negotiated, signed, or ratified the treaties on behalf of the United States believed the 1949 agreements to be self-executing. No federal court had ever held that the 1949 treaties were self-executing.[34] The executive branch, which generally interprets international law on behalf of the United States, had never interpreted the 1949 Conventions to be self-executing either. Without some signal from the political branches, federal courts usually have not interpreted international agreements to bestow judicially-enforceable individual rights.[35]

i. "[C]onflict not of an international character"

Having found that Article 21 incorporated the Geneva Conventions, the Court held that Common Article 3 of the Geneva Conventions applied to the U.S. conflict with al Qaeda, even though al Qaeda is not a signatory to the treaties. The Court concluded that the war with al Qaeda in Afghanistan (where Hamdan was captured) qualifies as a "conflict not of an international character occurring in the territory of one of the High Contracting Parties."[36] Because Afghanistan is a "High Contracting Party" to the Geneva Conventions, the Court held that *Hamdan* was entitled to the protection of Common Article 3, which prohibits the humiliating and degrading treatment of detainees and requires the use of "regularly constituted court[s] affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[37] The Geneva Conventions themselves do not define any of these obviously ambiguous terms.

The government, however, had argued that the war with Al Qaeda did not fall into the category of a "conflict not of an international character." On February 7, 2002, President Bush had determined that al Qaeda detainees were not legally entitled to

34. One federal court did apply the Geneva Conventions on the assumption that they were judicially enforceable, although the issue of self-execution was not raised and the defendant himself was found to have no remedies under the Conventions. *See* United States v. Noriega, 746 F. Supp. 1506, 1525–29 (S.D. Fla. 1990).

35. For discussion of the non-self-execution issue, see John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999). For a different view, see Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999); Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999).

36. *Hamdan*, 126 S. Ct. at 2795.

37. Geneva Convention Relative to the Treatment of Prisoners of War, *surpa* note 28, at art. 3, 6 U.S.T. at 3320, 75 U.N.T.S. at 136-37.

prisoner of war status because al Qaeda had not signed the Geneva Conventions nor voluntarily accepted its obligations.[38] Yet, al Qaeda fighters did not fall within Common Article 3, which the administration read as applying only to internal civil wars. The government argued that the war with al Qaeda stretched far beyond Afghanistan and was a quintessentially international, rather than localized, conflict.[39] The D.C. Circuit agreed with this position.[40]

The Court rejected this interpretation. Citing Jeremy Bentham for support, it argued that international "bears its literal meaning" as referring only to matters between nations.[41] It treated Common Article 3 as a general catch-all provision, including all armed conflicts not involving clashes between nations. Although it acknowledged that the commentaries written at the time of the Geneva Conventions' drafting suggested otherwise, the *Hamdan* majority relied on changes to Common Article 3's text during the drafting process and upon developments in the laws of war post-ratification.

The Court's reasoning here was weak. While Bentham was one of the first writers to conceive of "international" law, rather than the law of nations, the Court presented no reason to think that this understanding was held by those who drafted or ratified the 1949 Conventions. Such a reading would not comport with modern understandings of "international" today, which extends beyond "between nations" to include matters of global scope or affairs that go beyond the borders of a single nation. "International" human rights law would be an oxymoron under the *Hamdan* majority's definition, as would the regulation of global commons, such as the space and the seas, under "international" environmental law. Nor did the Court identify any materials from a primary touchstone for the interpretation of treaties—the understandings of the treaty text held by the President and Senate at the time of the latter's advice and consent—which supported its reading of Common Article 3.[42] The drafters of the

38. Memorandum on Humane Treatment of al Qaeda and Taliban Detainees from George Bush, U.S. President (Feb. 7, 2002), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf.

39. For a discussion of the administration's reasoning, see John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207 (2003).

40. *Hamdan v. Rumsfeld*, 415 F.3d 33, 41 (D.C. Cir. 2005), *rev'd*, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

41. *Hamdan*, 126 S. Ct. at 2796.

42. For discussion of the method of interpreting treaties, see John Yoo, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11,

Geneva Conventions would have had the Spanish or Chinese civil wars in mind in expanding protections to conflicts "not of an international character." Thinking on the law of war at that time simply had not developed to the point where it could consider the status of conflicts fought by non-state actors such as al Qaeda. Finally, the Court ignored subsequent executive branch decisions, which rejected amendments to the Geneva Conventions, known as the 1977 Additional Protocols, that would have extended certain Geneva Convention protections to non-state actors such as terrorist groups.[43] The fact that the drafters of the Geneva Conventions would have felt a need to add protocols in order to encompass non-state actors like terrorist groups strongly suggests that the original Geneva Conventions did not apply to such groups.

ii. *"Regularly constituted court"*

The Court faced one final interpretive obstacle to finding *Hamdan*'s military commission invalid. Common Article 3 requires that *Hamdan* be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[44] The Court construed the phrase "regularly constituted courts" to require the use of courts-martial.[45] Military commissions might qualify as "regularly constituted courts" only if such commissions complied with Article 21's practicability and uniformity requirements. In this way, the Court was able to use its interpretation of Article 21 to give substance to its interpretation of Common Article 3.

But as Justice Alito pointed out in his separate dissent, the phrase "regularly constituted court" is more naturally construed to require that the "court be appointed or established in accordance with the appointing country's domestic law."[46] Given the majority's own admission that military commissions had long been established or appointed by the President pursuant to executive orders and recognized by federal statute, the military

ch. 7 (2005) [hereinafter YOO, POWERS OF WAR AND PEACE].

43. *See* Message from George W. Bush, President, U.S., to the U.S. Senate (Jan. 29, 1987), *reprinted in* 133 Cong. Rec. S1428 (1987) (rejecting Protocol II Additional to the 1949 Geneva Conventions); *see also* Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

44. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 28, 6 U.S.T. at 3320, 75 U.N.T.S. at 136–37.

45. *Hamdan*, 126 S. Ct. at 2797.

46. *See id.* at 2850 (Alito, J., dissenting).

commissions seem to satisfy Common Article 3's "regularly constituted court" requirement. Any problem with the procedures *applied* by the military commission does not speak to the manner in which the court was *constituted.* At the very least, the Court's interpretation of "regularly constituted" departed from that phrase's natural meaning. Nor did the Court offer any case law from other courts interpreting this phrase, evidence from the official commentaries, or other extrinsic sources to support its interpretation.

b. *The Customary International Law of War*

Four members of the Court had an even more fundamental objection to *Hamdan*'s military commission trial. According to these four Justices, the government's charge against *Hamdan* for conspiring to commit the September 11, 2001 attacks is not a violation of the law of war. Because conspiracy is not recognized as a violation of the law of war, the four Justices held, *Hamdan* could not be validly tried by a military commission.

Justice Kennedy's refusal to join these portions of this opinion by Justice Stevens deprived this view of a majority. But the Stevens opinion still is worth discussing because it illustrates how at least four members of the Court have asserted broad authority to interpret (and reject) presidential interpretations of the customary international law relating to the conduct of war.

Hamdan was charged with participating in a conspiracy extending from 1996 to November 2001 to attack the United States on September 11, 2001. As the plurality noted, none of the overt acts Hamdan was alleged to have committed occurred in a theater of war nor did any occur on any date after September 11, 2001.[47] According to the plurality, violations of the law of war require activity in a war zone and after the conflict has actually begun. The Court found that the conflict with Al-Qaeda did not begin until September 11, 2001.[48]

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47. *Hamdan*, 126 S. Ct. at 2785.

48. This determination itself is controversial given the case law suggests that the question of whether a state of war has been authorized by Congress is a political question. *See* Massachusetts v. Laird, 451 F.2d 26, 34 (1st Cir. 1971) ("All we hold here is that in a situation of prolonged but undeclared hostilities, where the executive continues to act not only in the absence of any conflicting congressional claim of authority but with steady congressional support, the Constitution has not been breached."); Orlando v. Laird, 443 F.2d 1039, 1043 (2d Cir. 1971) (concluding that whether the Vietnam conflict required a declaration of war was a political question); Berk v. Laird, 429 F.2d 302 (2d Cir. 1970) (denying a preliminary injunction against dispatch of a soldier to Vietnam because whether Congress had authorized a conflict was a political question).

Justice Stevens also argued for a high standard of acceptance before recognizing violations of the law of war. "When . . . neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous."[49] Although conspiracy had sometimes been tried in law-of-war courts in the U.S., it had never been the sole basis for a military court's jurisdiction.

This standard for recognizing a violation of the law of war departs substantially from the Court's prior precedents. In *In re Yamashita*, for instance, the Court upheld a conviction (and execution) of a Japanese commander for war crimes despite substantial doubts over whether he had been properly charged with a violation of the law of war.[50] The new Stevens standard resembles the Court's more recent decision in *Sosa v. Alvarez-Machain*, requiring broad and universal acceptance before a federal court could recognize a violation of customary international law.[51]

If Justice Stevens was applying the difficult *Sosa* standard in the analysis of conspiracy as a law of war violation, it is strange that he utterly failed to apply that high standard to his other major interpretation of customary international law. In another part of his opinion that Justice Kennedy refused to join, Justice Stevens held the right of an accused to be privy to all of the evidence against him is an "indisputabl[e] part of customary international law."[52] But rather than conduct the kind of searching, skeptical inquiry into the status of this right under customary international law demanded by both *Sosa* and Stevens's own analysis of conspiracy, Justice Stevens merely cited to Article 75 of the Protocol I to the Geneva Conventions and a number of U.S. cases endorsing the importance of this right. None of the U.S. cases claim to be expounding a rule of customary international law, and most seem to be explicating the U.S. constitutional right which Justice Stevens did not claim applied here. Article 75 of Protocol I to the Geneva Conventions does provide evidence for a rule of customary international law,[53] but nothing

49. *Hamdan*, 126 S. Ct. at 2780.

50. 327 U.S. 1 (1946).

51. 542 U.S. 692 (2004). Whether that standard is really so difficult to meet is debatable. *See* Julian G. Ku & John C. Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 169–70.

52. *Hamdan*, 126 S. Ct. at 2797 (plurality opinion.).

53. The U.S. government appears to have recognized Article 75 as an "articulation of safeguards to which all persons in the hands of an enemy are entitled." William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L

in that provision actually requires an accused to be privy to all evidence against him.[54]

In sum, Justice Stevens's foray into the interpretation of customary international law lacked a consistent interpretive methodology. In doing so, his opinion failed to offer a persuasive basis for rejecting conspiracy as a violation of the law of war but accepting the "right to be present" as a rule of customary international law (or vice versa). It also demonstrates the majority's lack of capacity in a highly technical area long given to the political branches. Justice Stevens missed the fundamental point that much of the law of war is customary, not written. Prosecutions of Nazi leaders at the Nuremburg war crimes trial for the crime of aggression did not violate any written international criminal code. Rather, American officials such as Justice Robert Jackson said the aggressive war was an international common law crime. Justice Stevens failure to understand that the crime of conspiracy might be part of the customary laws of war undermines the precedent of Nuremburg and the main engine of development for the law of war.

B. THE MISSING DEFERENCE DOCTRINES

Even putting to one side the weaknesses of the Court's holdings, it should be clear that its readings of the substantive law are hardly the only plausible interpretations that exist. Against each of Justice Stevens's interpretations of the UCMJ, the Geneva Conventions, and customary international law, the government offered a reasonable (and often a more than reasonable) alternative interpretation.

The existence of such reasonable alternatives should have tipped the balance in favor of the government. Well-settled doctrines require the deference of courts to executive interpretations of the certain laws relating to foreign affairs. Yet Justice Stevens's opinion barely acknowledges the existence or relevance of these doctrines much less justify his departure from them.

L. 319, 322 (2003).

54. Article 75 does require an accused to have the right to examine witnesses, but it does not suggest that any and all evidence used against him must be disclosed. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75 para. 4, June 8, 1977, 1125 U.N.T.S. 3, 37–38.

1. Statutory Deference

For instance, the core of Justice Stevens's opinion rests on his interpretations of Articles 21 and 36 of the UCMJ, a federal statute. But those provisions are plainly the kind of statute to which the executive's interpretations should be given broad deference. There is a formal doctrine explaining why.

Since at least the Supreme Court's seminal decision in *Chevron v. Natural Resources Defense Council*, courts have given deference to reasonable executive interpretations of ambiguous statutes.[55] As the Supreme Court has explained more recently, courts will give the executive branch agencies two kinds of interpretive deference. Where the executive has not been delegated lawmaking power under a statute, executive branch interpretations of the statute will be granted "respect according to its persuasiveness."[56] The level of such deference depends on whether the executive branch is specially charged with administering the statute.

But where Congress has intended for the executive agency's interpretations to have the "force of law," courts will give absolute deference to an executive agency's reasonable interpretations of an ambiguous statute.[57] Even if Congress has not expressly delegated lawmaking authority, courts may be required to give *Chevron* deference if it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law."[58] In *Chevron* itself, for instance, the Court gave absolute deference to the Environmental Protection Agency's interpretation of an ambiguous statutory provision despite the fact that the statute did not expressly delegate any interpretive authority to that agency.

Chevron deference is particularly necessary, courts have recognized, when statutory delegations overlap with the executive's inherent constitutional powers. For instance, courts have interpreted statutes to avoid conflicts with the President's general power to conduct foreign and military affairs.[59] As the Court

55. For discussion of the linkage between *Chevron* and foreign affairs doctrines, see Bradley, *supra* note 25.

56. *See* United States v. Mead Corp., 533 U.S. 218, 221 (2001).

57. *Id.* at 229.

58. *Id.*

59. *See* Carlucci v. Doe, 488 U.S. 93, 102–03 (1988) (reading statutory removal procedures to avoid limiting executive authority to remove employees for national security reasons); Department of the Navy v. Egan, 484 U.S. 518, 529–30 (1988) (deferring to Ex-

has recognized, "the generally accepted view [is] that foreign policy was the province and responsibility of the Executive."[60] Moreover, the President is designated by the Constitution as the "Commander in Chief" of the military. As courts have recognized, statutes intruding on these inherent constitutional powers should be construed to avoid encroaching or limiting these inherent powers.[61] Indeed, Cass Sunstein has even suggested, for statutes relating to the use of armed force, that the executive should receive a "kind of super-strong deference" deriving from a combination of *Chevron* and his constitutional responsibilities to command the U.S. armed forces.[62]

There is little doubt that the executive's interpretations of the UCMJ provisions here deserved substantial deference under the *Chevron* doctrine. The plain text of Article 36(a) delegates lawmaking authority with respect to the rules and procedures governing military commissions to the President. Even without this express delegation, the President's power to interpret this statute would deserve deference due to his inherent constitutional powers as Commander in Chief. Moreover, Article 36(b) does not revoke or limit this lawmaking authority. Following *Chevron*, the President's reasonable interpretations of Article 36(b)'s ambiguous phrases "practicable" and "uniform" would normally have received the highest level of judicial deference.

2. Treaty Deference

Chevron deference might also be owed to the President's interpretation of Article 21's limitation of military commission jurisdiction to violations of the "law of war." But even if no deference is owed to the interpretation of a jurisdictional provision, there are other formal doctrines requiring deference to treaty interpretations which the Court ignored.

The Court has long recognized that when interpreting treaties, the executive branch's interpretation deserves "great weight."[63] The formal basis for this doctrine follows from the

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ecutive in security clearance decisions); United States v. Johnson, 481 U.S. 681, 690–91 (1987) (deferring to military with respect to suits for injuries related to military services).

60. Haig v. Agee, 453 U.S. 280, 293–94 (1981).

61. *See, e.g.*, Orloff v. Willoughby, 345 U.S. 83, 93–94 (1953); Burns v. Wilson, 346 U.S. 137, 142–44 (1953)

62. Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2672 (2005).

63. Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

President's unique constitutional power as the maker of treaties under Article II. Unlike federal statutes, the President is primarily responsible for drafting and negotiating a treaty subject only to the Senate's advice and consent. The executive branch's position is reinforced by its constitutional responsibility as the "sole organ"[64] of the United States in its foreign relations, which require it to interpret international law, including treaties, on a daily basis.

Scholars have debated the extent of deference owed to executive branch interpretations of treaties.[65] As David Bederman has pointed out, the views of the executive appear to be the greatest single predictor of the outcome of Supreme Court treaty interpretations since World War II.[66] But even scholars who argue for limited judicial deference appear to concede that the President is owed greater deference for treaties over which he has an inherent constitutional responsibility, such as military affairs.[67]

The Geneva Conventions appear to be just such a treaty because they clearly implicate the President's inherent authority as commander in chief to administer the detention of enemy combatants. Unlike private law treaties which are intended to foster private transactions, the Geneva Conventions are intended to be administered and implemented by state-to-state or military-to-military contacts. This is reflected both in the plain text of the Geneva Conventions, and also in the fact that the treaties had never been directly applied by the Supreme Court or any other federal court prior to *Hamdan*.

3. Customary International Law

In addition to giving deference to reasonable presidential interpretations of treaties, courts have generally provided an even greater level of deference to presidential interpretations of customary international law. The formal basis for such deference

64. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

65. *Compare* Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CAL. L. REV. 1263 (2002), *with* John Yoo, *Politics as Law?: The Anti-Ballistic Missle Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851 (2001) (reviewing FRANCES FITZGERALD, WAY OUT THERE IN THE BLUE: REAGAN, STAR WARS AND THE END OF THE COLD WAR (2000)).

66. David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953 (1994).

67. Van Alstine, *supra* note 65, at 1301 ("On delicate matters of international diplomacy and national defense, the structural advantages and resultant expertise of the executive may support substantial deference on treaty interpretation matters.").

is two-fold. First, unlike statutes and treaties, customary international law's status as a form of federal or supreme law has been uncertain and contested for much of U.S. history. Indeed, in many instances, courts have treated customary international law as a form of common law, even state common law, which may not bind the federal government. Second, the Court has recognized that the President's structural position as the chief interlocutor of foreign policy on behalf of the United States gives him a unique control over the development of customary international law. In particular, the Court has held that customary international law may be overridden by a statute, treaty, or "controlling executive or legislative act."[68]

For this reason, courts have often deferred to presidential determinations under customary international law. The most powerful example of such judicial deference can be found in the area of head of state immunity. Courts have generally given presidential determinations of head of state immunity absolute deference.[69] Such deference was only ended by a subsequent congressional statute.

The Court's most recent decision in *Sosa v. Alvarez-Machain* preserved a substantial and important role for federal courts in the interpretation of customary international law in the context of lawsuits brought by aliens.[70] The Court's holding in that case did not address the "controlling executive act" doctrine. It did, however, suggest that presidential determinations of the foreign policy effects of accepting certain customary international law cases is due "substantial weight."

The Justices who sought to interpret customary international law as the law of war, therefore, should have discussed its duty to defer to executive interpretations of customary international law. As we explained, above, however, the four Justices who sought to interpret customary international law failed to even acknowledge these longstanding precedents.

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Justice Stevens's opinion for the Court and for the plurality could and should have acknowledged these widely-accepted duties of deference to executive branch interpretations of foreign

68. *See* The Paquete Habana, 175 U.S. 677, 700–01 (1900).

69. For a discussion of the court's deference in head of state immunity determinations, see Ku & Yoo, *supra* note 51, at 206 n.204.

70. 542 U.S. 692 (2004).

affairs law. It did not do so, suggesting either that such doctrines will no longer be observed by the Court or the lengths to which the *Hamdan* majority was willing to go to reach its desired result. But the duty of deference to executive interpretations of foreign affairs law has a sound functional as well as formal basis.

II.

This Part offers a functional justification for doctrines requiring deference to the executive's interpretation of foreign affairs laws. It argues that the design and operation of the judiciary gives it a comparatively weak institutional vantage point from which to make decisions in the area of foreign affairs. This does not mean that the executive branch is infallible or that federal courts have no role. Rather, we are making the second-order argument that as a matter of institutional competence, the federal judiciary suffers significant disadvantages in resolving ambiguities in laws relating to foreign affairs when compared to the Executive Branch.

A. INSTITUTIONAL COMPETENCE: THE JUDICIARY

While courts are the primary institutions in the U.S. system for interpreting and applying laws, some of their key institutional characteristics undercut their ability in the foreign affairs law context. In particular, courts have access to limited information in foreign affairs cases and are unable to take into account the broader factual context underlying the application of laws in such areas.

These limitations are not a failing. They are part of the inherent design of the federal court system, which is intended to be independent from politics, to allow parties to drive litigation in particular cases, and to receive information in highly formal and limited ways. While these characteristics are helpful for the purposes of neutral decisionmaking, they also may render courts less effective tools in resolving ambiguities in laws designed to achieve national goals in international relations.

Courts do not actively gather information about a particular case or a particular law. Rather, that information is provided to them by the contending parties, in many cases through the expensive process of discovery. Any information provided to the court for evidentiary purposes must survive rules that impose tests for relevance, credibility, and reliability that are designed to ensure fairness toward the contending parties. In the criminal

context, such information is further limited to prevent violating a defendant's constitutional rights.

By contrast, the executive branch itself collects a wide variety of information through its own institutional experts and a wide global network of contacts without the necessity of strict rules of evidentiary exclusion. While this information may be presented to the executive branch at any time, a court generally cannot account for new information except in the context of a new case.[71] Courts also cannot update statutory mandates to reflect new information, but instead must continue to enforce policies even when they are no longer appropriate. For instance, once the political branches have enacted a statute or approved a treaty, the courts cannot alter or refuse to execute those laws, even if the original circumstances that gave rise to the statute or treaty have changed or even if the national interest would be harmed.[72]

Aside from the judiciary's information-gathering limitations, there are strong reasons to doubt the ability of the members of the federal judiciary to resolve effectively foreign affairs laws ambiguities. Judges are not chosen based on their expertise in a particular field. Federal judges, with a few minor exceptions, handle a wide variety of cases without any subject matter specialties. None, for instance, is chosen because of his or her expertise on matters relating to foreign affairs or foreign affairs laws.

Courts are also highly decentralized. With 94 district courts and 667 judges, differing interpretations of ambiguous foreign affairs laws could result in broad conflicts between different judicial districts. Although the appellate process can eventually unify inconsistent interpretations, the process is notoriously slow and limited. The Supreme Court itself hears about 70-85 cases a year compared to the estimated 325,000 appeals that are filed from district court decisions annually. As a result, the system is poorly designed for achieving a speedy and unified interpretation of an ambiguous statute, treaty, or rule of customary international law.

Such inflexibility surely advances the goals of a domestic legal system in uniformity, predictability, and stability in the interpretation and application of federal law. For these reasons, def-

71. *See, e.g.*, Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643 (2000).

72. For a contrary view, see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

erence doctrines do not require judicial abdication to the executive branch. Rather, they typically allow the courts to make the initial judgment about the proper meaning of a statute or treaty. Where such statutes or treaties are ambiguous or broadly phrased, however, a continued resort to a rigid, slow, inflexible and decentralized decisionmaking process based upon limited information is hard to justify.

This is not to say that courts could not interpret ambiguous statutes if necessary. Rather, the central question is, from a comparative institutional perspective, whether there is reason to think that courts would be *equal or superior* to other branches of government in resolving ambiguities in laws designed to achieve national foreign policies.

B. EXECUTIVE BRANCH COMPETENCE

If the judiciary is not the ideal institution for resolving ambiguities in foreign affairs laws, the deference doctrines may still not be worth following if the executive branch does not possess any advantages over the courts. We believe, however, that the executive branch has superior institutional competence that justifies the existence of the deference doctrines.

As *Chevron* recognized,[73] the executive branch possesses two institutional characteristics that make it superior to courts in the interpretations of certain kinds of laws. First, executive agencies usually possess expertise in the administration of certain statutes, particularly those in complex areas. Second, the executive branch is subject to greater political accountability than the judiciary, and the electorate could ultimately change unwanted interpretations.[74] As Justice Stevens himself explained in *Chevron*, "Judges are not experts in the field, and are not part of either political branch of the Government."[75] While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

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73. 467 U.S. 837 (1984).

74. On this point, see Laurence H. Silberman, Chevron—*The Intersection of Law and Policy*, 58 GEO. WASH. L. REV. 821 (1990).

75. 467 U.S. at 865.

One way to think about the executive branch's comparative advantage is in terms of the likelihood of errors. Agencies which possess greater expertise over a complex and technical statute are less likely to depart from Congressional intent in their interpretations of those statutes, especially ambiguous provisions in those statutes. While agencies may well incur greater costs in making those decisions, such costs reflect the likelihood that they will seek a broader set of information about their legal interpretation than that presented to courts. Indeed, unlike courts, the executive branch is designed to develop specialized competence. In the area of foreign policy, the executive branch is composed of large bureaucracies solely focused on designing and implementing foreign policy.

The more common criticism of the executive branch is that it is likely to manipulate its expertise in the service of political goals. While this may seem like a criticism, it is actually a virtue in the context of resolving ambiguities in laws implicating foreign affairs. Such laws nearly always implicate broad policy decisions or political values and the political nature of the executive branch gives it advantages in making such decisions. If Congress leaves ambiguities in a foreign affairs statute, for instance, it is reasonable to assume it would prefer such ambiguities to be resolved by the more politically responsive institution. Indeed, it is doubtful that there is substantial popular support for transferring authority to the judiciary in cases where the law relates to how to deal with a serious external threat.[76]

C. THE *HAMDAN* COURT'S INSTITUTIONAL INCOMPETENCE

The *Hamdan* Court's refusal to follow (or acknowledge) the deference doctrines only further illustrates the institutional weaknesses of courts in resolving ambiguities in foreign affairs law. In each of its interpretive moves, the Court resolved the ambiguity in a statute, treaty, or customary international law against the government and in favor of the enemy combatant detainee.

For instance, the Court found that the President's use of military commissions failed the "practicability" test as used in Article 36(b) of the UCMJ. The Court held that "[n]othing in the record before us demonstrates that it would be impracticable

76. For an extended discussion of this point, see Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 990 (2004).

to apply court-martial rules in this case."[77] The Court brushed aside the claim that "the danger posed by international terrorism" could justify variance from court-martial procedures.[78]

But the Court itself could give no serious content to the practicability requirement. It cited no precedents explaining why the courts allowed variance from court-martials in the past and what the standard for determining practicability might be in this context. In other words, it could not reduce the inherent ambiguity in a phrase like "practicability" in this context and essentially relied on its own assessment of the "dangers posed by international terrorism" to reach its decision. But the Court was in no position to evaluate the level of that danger because it had no access to information about the scope and nature of that danger in the context of military trials. Given its comparative institutional incompetence in making that difficult assessment, the Court's refusal to give deference to the government's construction of "practicability" seems based less on facts and information and more on the majority's general impressions about the course of the war on terrorism.

Similarly, the Court's non-deference to the executive branch's interpretation of Common Article 3 required it to assess whether or not the war with Al Qaeda is an "armed conflict of an international character." The Court admitted that the phrase appeared to apply to civil wars and other purely domestic conflicts but relied on commentaries suggesting that the article should be interpreted as broadly as possible. But the nature of the war with Al Qaeda and its international versus domestic character requires more than an assessment of the meaning of the phrase "international character." It requires an analysis of the nature of the military conflict engaged in by the U.S. government against Al Qaeda and the likely effect of its compliance with Common Article 3 on its ability to wage that conflict. It seems obvious to conclude that the Court has little competence or access to information that would allow it to make such a determination.

Hamdan's enforcement of Common Article 3 also intrudes upon the political and diplomatic methods that had traditionally been used to implement the Geneva Conventions, and that were contemplated in the text of the treaties itself. The Geneva Conventions rely upon the ICRC, not courts, to perform various ser-

77. *Hamdan*, 126 S. Ct. at 2792.
78. *Id.*

vices in monitoring state performance and helping to mediate disputes. Geneva also specifically contemplates that the state parties will "bring into force" its terms through "special agreements." Again, the Conventions rely on political and diplomatic means, not judicial. Finally, some of the terms in Common Article 3 are so vague and imprecise that they would have implied future executive and legislative interpretation. Geneva nowhere explicitly calls upon direct enforcement by domestic judiciaries of its terms; such an approach would have been, at the time, utterly revolutionary.

Finally, the Court's contribution to the development of customary international law regarding conspiracy and the "right to be privy to all evidence" was an inherently difficult and complex enterprise. Despite the Court's efforts to present the "right to be privy to all evidence" as indisputable, its failure to cite any serious evidence of state practice concerning this right in the context of a military trial suggests that right is hardly well-settled as a matter of customary international law. Indeed, Congress rejected both of the Court's CIL interpretations by confirming the authority of military commissions to try crimes of conspiracy and by allocating to military commission judges broad powers to review and limit the disclosure of classified evidence used against a defendant.[79] More broadly, the U.S. executive branch, which is largely responsible for directing U.S. state practice with respect to the law of war, is likely to have more expertise, information, and ability when assessing the effect of rejecting or accepting conspiracy as a war crime or the right to be privy to evidence on larger U.S. efforts to develop the law of war.

None of this analysis, it bears repeating, suggests that the executive cannot make mistakes or poor judgments in the interpretations of laws relating to foreign affairs. The question is whether it will make *more* mistakes or *poorer* judgments and whether it is less costly to correct its mistakes. Both institutions can make mistakes, but our analysis suggests courts are more likely to make mistakes and that the costs of reversing those mistakes will be substantial. As the next Part explains, the failure to defer to executive interpretations in the *Hamdan* case could sig-

79. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 10 U.S.C. § 950v(28) (authorizing military commissions to try offenders on charges of conspiracy) and 10 U.S.C. § 949j(c) (authorizing military commission judge to delete "specified items of classified information made available to the accused" and the substitution of summaries or statements admitting relevant facts that the classified information would tend to prove).

nificantly raise the costs for adjusting or conforming U.S. national policy toward the war on terrorism.

III.

Military commissions are the product of a consistent constitutional practice and cooperation between the political branches of government. Until *Hamdan*, the Supreme Court remained respectful of the President and Congress's efforts to set wartime policy on the prosecution and punishment of enemy war crimes. Rather than require that Congress issue a clear statement regulating every aspect of military commissions, the Court used to defer to the working arrangement between the other branches to protect national security and carry out war by deferring to the executive's interpretation of foreign affairs laws.

Not any more. The *Hamdan* Court is attempting to force a clear statement rule upon congressional delegations of authority to the President. While *Hamdan* could be read narrowly as applying only to military commissions, its approach essential effect, it requires Congress to enumerate every specific element of its war powers it wishes to delegate to the President. It is unlike any other delegation rule applied to the operations of the administrative state, which often issue regulations to advance "the public interest" or balance several vague statutory factors. Indeed, if applied to the administrative state, a rule like *Hamdan*'s requiring the specific enumeration of every specific power would grind the government to a halt. The Court provides no explanation for its unique imposition of a clear statement requirement on delegated powers in the war context, and we argue that such a rule is inappropriate when the future circumstances of war remain unpredictable and Congress has other tools to control executive power.

A. *HAMDAN*'S MISGUIDED ASSUMPTION OF EXECUTIVE-LEGISLATIVE CONFLICT

Hamdan makes the mistake of assuming that the Bush administration's military commissions are the result of a lack of cooperation between the President and Congress in wartime policy. It did not address the issue whether Bush could establish the tribunals under his constitutional authority as Commander-in-Chief, but limited itself to concluding that congressional authorization was lacking and posed as defenders of congressional prerogatives. Indeed, Justice Breyer authored a concurrence signed

by Justices Kennedy, Souter, and Ginsburg stating that the military commissions required only an explicit statute to pass constitutional muster. "Nothing prevents the President from returning to Congress to seek the authority he believes necessary."[80] As we have noted, Congress provided just such a statute less than four months later. But what matters for our purposes is that four Justices insisted that the President needed such a statute in the first place[81]

This conclusion stems from a misunderstanding of the manner in which the President and Congress make national security policy. Of course, there remains serious dispute among scholars about whether the President can exercise independent foreign affairs and national security powers, with the majority view among foreign affairs scholars that the President must act pursuant to congressional authorization and that Congress has the upper hand in setting policy.[82] But putting to one side the normative element of this debate, it should be undisputed that as a descriptive matter the President exercises broad power in these areas, far broader than those he has in domestic affairs.[83] Presidents not only control diplomatic communications with other nations, but they generally determine what the foreign policy of the United States shall be during their terms in office. They have used force abroad without congressional permission, including significant wars such as Korea and Kosovo, and exercise complete control over the deployment of the armed forces, and their strategy and tactics. They sit at the head of an enormous foreign affairs and national security bureaucracy, with stations throughout the world, staffed by millions of officials and soldiers with a budget of more than $400 billion a year.

This does not mean that Congress's role is an empty one. It exercises a significant check on presidential initiatives in foreign affairs. Through its power of the purse and its control over the shape and size of the armed forces and the intelligence agencies, Congress can end presidential initiatives or promote them. If it does not agree with a war, it can cut off funds. If it does not agree with a long-term strategy, it can choose not to pay for the

80. *Id.* at 2799 (Breyer, J., concurring).

81. *Id.* ("Congress has denied the President the legislative authority to create military commissions of the kind of issue here.").

82. *See, e.g.*, HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWERS AFTER THE IRAN-CONTRA AFFAIR (1990); MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY (1990).

83. For a discussion, see YOO, POWERS OF WAR AND PEACE, *supra* note 42, at 11–29.

military and equipment necessary to realize it. Congress has authority over the rules governing the discipline of the military. It exercises powers of oversight, and the Senate confirms the promotion of officers. It can enact legislation in its areas of enumerated powers, the most relevant here being Congress's power "[t]o define and punish . . . offenses against the law of nations,"[84] to "make rules concerning captures on land and water,"[85] and "[t]o make rules for the government and regulation of the land and naval forces."[86] But while Congress exercises significant powers, it commonly plays a reactive role. Foreign policy and national security initiatives generally begin with the President, but require congressional cooperation to make them real.

1. Historical Congressional-Executive Cooperation in the Use of Military Commissions

Military commissions fall within the traditional patterns of cooperation between the President and Congress in war and national security affairs. In fact, presidential initiative and congressional cooperation in establishing military commissions has a long pedigree in American history. Military commissions have served as the customary form of justice for prisoners who violate the laws of war. They have also acted as courts of justice during occupations and in times of martial law. American generals have used military commissions in virtually every significant war from the Revolutionary War through World War II.[87]

World War II witnessed the use of military commissions on an unprecedented scale, both to try war criminals and administer justice in occupied Germany and Japan. Military commissions administering law and order in occupied Germany heard hundreds of thousands of cases.[88] Military commissions were also ex-

84. U.S. CONST. art. I, § 8, cl. 10.

85. U.S. CONST. art. I, § 8, cl. 11.

86. U.S. CONST. art. I, § 8, cl. 14.

87. For a critical review of the history, see FISHER, MILITARY TRIBUNALS, *supra* note 7. *See also* Captain Brian C. Baldrate, *The Supreme Court's Role in Defining the Jurisdiction of Military Tribunals: A Study, Critique, & Proposal for* Hamdan v. Rumsfeld, 186 MIL. L. REV. 1 (2005); AM. BAR ASS'N TASK FORCE ON TERRORISM AND THE LAW, REPORT AND RECOMMENDATIONS ON MILITARY COMM'NS (Jan. 4, 2002). Law professors have written on both sides of the issue. *Compare* David J. Bederman, *Article II Courts*, 44 MERCER L. REV. 825 (1993), *and* Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249 (2002), *with* Harold Hongju Koh, Agora: Military Commissions, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 320, 337 (2002).

88. *See* Eli E. Nobleman, *Military Government Courts: Law and Justice in the American Zone of Germany*, 33 A.B.A. J. 777, 777–80 (1947); Pitman B. Potter, Editorial

tensively used to try enemy combatants for violating the laws of war, the most famous examples being the Nuremburg Tribunal that tried Nazi leaders after the war, and the International Military Tribunal for the Far East that tried Japanese leaders for war crimes. American military commissions tried 3,000 defendants in Germany and 1,000 defendants in Japan for war crimes.[89] Military commissions tried members of the enemy for "terrorism, subversive activity, and violation of the laws of war."[90] World War II military commissions operated both abroad and in the United States. Congress did not enact any statute specific to World War II authorizing the use of military commissions.

In contrast to the *Hamdan* Court, the courts during World War II did not upset the arrangements established by the political branches to govern military commissions, even though the Roosevelt administration acted with far less concern for procedural fairness. In the case of the Nazi saboteurs, which reached the Supreme Court as *Ex parte Quirin*,[91] FDR issued executive orders establishing the commission, defining the crimes, appointing its members, and excluding federal judicial review. The first executive order created the commission and defined its jurisdiction over aliens or foreign residents "who give obedience to or act under the direction of" an enemy nation, and attempt to enter the United States "preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law or war."[92] He also ordered that the Nazis be barred from any other court.[93] FDR's second order established the procedures for the military commissions. It was only one paragraph long. It required "a full and fair trial," allowed the admission of evidence that would "have probative value to a reasonable man," and required a two-thirds vote for conviction and sentence.[94]

Comments, *Legal Bases and Character of Military Occupation in Germany and Japan*, 43 AM. J. INT'L L. 312, 323 (1949).

89. WAR CRIMES, WAR CRIMINALS, AND WAR CRIMES TRIALS 5–6 (Norman E. Tutorow ed., 1986).

90. A. Wigfall Green, *The Military Commission*, 42 AM. J. INT'L L. 832, 833 (1948).

91. *Ex parte* Quirin, 317 U.S. 1, 19–22 (1942). The history of the case is described in LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL & AMERICAN LAW (2003). *See also* EUGENE RACHLIS, THEY CAME TO KILL: THE STORY OF EIGHT NAZI SABOTEURS IN AMERICA (1961); Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59 (1980); David J. Danelski, *The Saboteurs' Case*, 1 J. S. CT. HIST. 61 (1996).

92. Proclamation No. 2561, 7 Fed. Reg. 5101 (July 7, 1942).

93. *Id.*

94. Appointment of a Military Commission, 7 Fed. Reg. 5103 (July 7, 1942).

FDR's commissions operated under Roosevelt's two executive orders alone. There were no regulations such as those developed by the Defense Department in 2003 to define the elements of the crimes that a commission can hear. A second Defense Department regulation established rules on the admissibility of evidence, the right of cross-examination, the right against self-incrimination, proof beyond a reasonable doubt as the standard for conviction, and the right of defense counsel to examine any exculpatory evidence the prosecution possesses.[95] Under the Bush commissions, unlike FDR's, a unanimous vote was required to impose the death penalty.[96] Defense Department regulations specifically detail the crimes that can be tried. FDR stated only the general prohibition of "sabotage, espionage, hostile or warlike acts, or violations of the law or war," which could be interpreted to mean a lot of things.[97] Spying today, for instance, includes four different required elements—that the defendant in wartime sought to "collect certain information," convey it to the enemy, and was "lurking or acting clandestinely, while acting under false pretenses."[98]

Ex parte Quirin upheld these procedures and narrowed *Milligan*. Unlike Milligan, the saboteurs clearly had joined the Nazi armed forces. Chief Justice Stone's opinion found that Congress's creation of the existing courts-martial system, and the lack of any legal code specifying the laws of war, did not preclude the use of military commissions.[99] He read the Articles of War—the precursor to today's UCMJ—as authorization for military commissions, but didn't reach the question whether FDR could have created them on his own. "By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases."[100] Article 15 is identical to Section 821 of the UCMJ, enacted in 1950.

In later World War II cases, the Supreme Court continued to defer to the way in which the President and Congress had acted with regard to military commissions. In *In re Yamashita*,

95. *See generally* Mil. Comm'n Order No. 1, *supra* note 11.
96. *See* Crimes and Elements for Trials by Military Commissions, 32 C.F.R. § 11.3 (2003); Mil. Comm'n Order No. 1, *supra* note 11, at paras. 5–6.
97. *See* Proclamation No. 2561, 7 Fed. Reg. 5101 (July 7, 1942).
98. *See* 32 C.F.R. § 11.6 (b)(6) (2003).
99. *Ex parte* Quirin, 317 U.S. 1, 25 (1942).
100. *Id.* at 28.

General MacArthur ordered a military commission to try the commanding Japanese general in the Philippines for failing to prevent his troops from committing brutal atrocities and war crimes.[101] Chief Justice Stone again rejected the claim that the commissions were illegal and found military commissions authorized by Congress in the Articles of War.[102] In two other cases, the Supreme Court refused to step in to review the convictions of Japanese leaders by an international war crimes tribunal run by MacArthur, or to review the sentences of Germans captured in China after the end of hostilities and tried by military commission.[103]

During World War II, this level of inter-branch cooperation on military commissions was sufficient to survive constitutional review. Congress never passed a law specifically authorizing military commissions in World War II. Still, the *Quirin* and *Yamashita* Courts found military commissions to be approved by Congress. In *Quirin*, Chief Justice Stone wrote for a unanimous Court that Article 15 of the Articles of War, which Congress enacted in a 1916 overhaul of the rules of military justice, provided sufficient constitutional authorization.[104] Now Section 821 of the UCMJ, Article 15 declared that the creation of courts martial for the trial of American servicemen for violating military rules of discipline did not "deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that . . . by the law of war may be tried by military commissions."[105] In enacting this provision as Article 15 of the Articles of War in 1916 and again in 1950 as part of the UCMJ, Congress probably meant nothing more than to reserve to the President his existing

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

102. *Id.* at 11–12.

103. Johnson v. Eisentrager, 339 U.S. 763 (1950); Hirota v. MacArthur, 338 U.S. 197 (1948). In a 1952 case in which a wife of an American serviceman in occupied Germany was tried by military tribunal for murdering her husband, the Supreme Court again upheld military commissions as authorized by Congress. Madsen v. Kinsella, 343 U.S. 341, 360–62 (1952).

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

105. *See* 10 U.S.C. § 821 (1956) ("The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.").

authority to establish military commissions, rather than to specifically authorize them. Nonetheless, the *Quirin* Court read Article 15 as direct congressional authorization of commissions. Congress chose not to disturb *Quirin* when it re-enacted Article 15 as part of the UCMJ. *Yamashita* did nothing to undermine this holding.

In these cases, the Court not only deferred to the working relationship between the branches, but it also refused to review the procedures and other standards used by the commissions. *Yamashita*, for example, rejected a claim that the federal courts ought to determine whether military commissions, and their procedures, were militarily "necessary." This claim arose in two ways. General Yamashita claimed that his military commission trial was illegal because it took place away from the battlefield and after active hostilities had ceased. The Court held that the decision whether to proceed with a military commission in those circumstances was a decision for the political branches.[106] Yamashita then argued that the procedures used in his trial were so different from those used in courts-martial as to be illegal. He relied on Article 38 of the Articles of War, later re-enacted as Section 38 of the UCMJ, which requires that procedures used in military commissions, "in so far as [the President] shall deem practicable," use the rules of evidence used in federal district court. The *Yamashita* Court rejected this claim because the Articles of War did not apply to members of the enemy on trial for war crimes.[107] The Court found that judicial review did not extend to the President's determination of procedural rules for military commissions.[108] This analysis comports with the Court's later decision in *Eisentrager* to allow the federal courts to measure the operation of military commissions against the U.S.'s obligations under international law.[109] One way to understand *Eisentrager* and *Yamashita* is to see these cases as examples of deference to the political branches on the issue of treaty implementation. The Court understood that the President and Congress, which could always enact a specific statute carrying out the Geneva Conventions, had the superior institutional competence to determine best how to implement treaties that govern military justice and wartime detention policies.

106. *See Yamashita*, 327 U.S. at 12–13.
107. *Id.* at 18–19.
108. *Id.* at 23.
109. Johnson v. Eisentrager, 339 U.S. 763, 789 & n.14 (1950).

2. Modern Congressional-Executive Cooperation on Use of Military Commissions

Fans of Justice Jackson's *Youngstown* concurrence[110] have yet to explain their constitutional problems with military commissions. They believe that presidential power is at its height when acting with congressional support, which is present in the UCMJ (as interpreted in *Quirin* and *Yamashita*) and in Congress's AUMF.[111] If the latter implicitly authorizes the detention of enemy combatants, as it did in *Hamdi,* it should also permit their trial by military commission. In the former, the Court read the AUMF as permitting the executive branch to detain enemy combatants in the war on terrorism without criminal charge, even though the AUMF's text speaks only to the use of force and not to detention. No specific authorization was necessary, however, "because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war."[112] But detention seems to require no more enumeration than trials for war crimes. Enforcing the laws of war against the enemy, which is the purpose of military commissions, would seem equally to be "a fundamental incident of waging war" and hence included within the AUMF.

But the case for congressional support for military commissions is even stronger than the case for military detention in *Hamdi.* In the case of commissions, Congress supplemented the AUMF and the UCMJ with the 2005 Detainee Treatment Act.[113] The Act allows an appeal to the federal appeals court in Washington, D.C. of the verdict of a military commission.[114] It establishes the standard of review that the federal courts are to use in reviewing commission decisions and the substantive legal standards. If Congress never approved of commissions in the first place, why would it create a review process for them? Congress has never shown any hostility toward military commissions, either historically, or in the war on terrorism. Indeed, the Detainee Treatment Act goes well beyond the silent acquiescence that the Court has accepted in other cases as sufficient congres-

110. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

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

112. *Hamdi*, 542 U.S. at 519 (plurality opinion).

113. Detainee Treatment Act of 2005, Pub. L. No. 109-148 § 1005(e)(1), 119 Stat. 2680, 2742 (2005).

114. *Id.* § 1005(e)(3)(A).

sional authorization for executive action in foreign affairs,[115] and approaches the *ex post* congressional authorization for Lincoln's extraordinary acts at the outset of the Civil War.

Even if Congress had not authorized military commissions in the UCMJ, President Bush would still have authority to establish them under his constitutional authority as Commander-in-Chief.[116] Article II of the Constitution grants the President the "executive power" and the job of Commander-in-Chief. While Congress has sometimes authorized military commissions itself, American history affords many examples of Presidents and military commanders creating them without congressional legislation. The purpose of military commissions makes clear that they should rest within the discretion of the Commander-in-Chief. Waging war is not limited only to ordering which enemy formations to strike and what targets to bomb. It also involves forming policy on how to fight, how to detain enemy combatants, and how to sanction the enemy if it violates the rules of civilized warfare. Allowing military commanders to try and punish violators creates incentives for the enemy to follow the rules in the future and assures our own troops that war crimes will not be tolerated. As the Supreme Court recognized in *Yamashita*:

> An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war.[117]

Military commissions help commanders properly restore order in the aftermath of a conflict, and this can be an important way of making sure fighting does not flare up again.

These considerations may rest even more at the heart of the Commander-in-Chief power during the war on terrorism than in a conventional war between nation-states. In the latter, the United States wages war against an enemy with territory, population, and regular armed forces. The fighting takes place according to rules defined by the laws of war; the laws of war generally rely upon diplomatic and political methods to enforce

115. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981).

116. U.S. CONST. art. II, § 2, cl. 1. There is ample historical support for a presidential power to convene military commissions in the absence of congressional authorization. The harder question is whether Congress could constitutionally prohibit the President from convening military commissions.

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

their terms. The object is to gain control of the enemy's territory and population and defeat its forces in order to achieve an acceptable political settlement. Al Qaeda, however, confronts the United States with an enemy that bears none of these traditional characteristics of a nation-state. Nor does it seem interested in engaging in political or diplomatic communications and negotiations over curing any violations of the laws of war. Indeed, al Qaeda's main tactics—intentionally targeting civilians, taking and killing hostages, disguising themselves as civilians—deliberately violate the rules of warfare. Enforcing the laws of war not only punishes violators, but also helps counter al Qaeda's tactical advantage in surprise attacks on civilians. Such tactics are usually in the hands of the battlefield commanders and ultimately the President, rather than Congress. Academics may continue to debate whether the President or Congress should decide whether to begin war, but once war has begun, our constitutional system has usually been content to allow the President as Commander-in-Chief to decide the best strategies and tactics to defeat the enemy.

But one need not take sides in the war powers debate between the President and Congress to see that the Court has unnecessarily interfered in the political branches' management of war. Constitutional practice shows that there has been a substantial history of inter-branch interaction and cooperation on the subject of military commissions. Rather than a story of unilateral executive branch action, Congress has supported presidential use of them in at least three different ways: a) Section 821 of the UCMJ, which recognizes military commissions; b) the Authorization to Use Military Force enacted on September 18, 2001, which authorized the President to use all necessary and appropriate force against those responsible for the September 11 attacks; and c) the Detainee Treatment Act of 2005, which created a carefully crafted review process for military commission verdicts. This is not to say that President Bush could not use military commissions on his own authority once war broke out; several Presidents had employed them as a wartime measure without any specific congressional authorization. But it was unnecessary for the Court to reach the issue of the President's constitutional powers since Congress was on record as supporting military commissions. Indeed, Congress's swift action to largely reinstate the pre-*Hamdan* military commissions simply confirms that there was no real conflict between executive and legislative policy in the use of military commissions.

B. HAMDAN'S UNIQUE AND COSTLY CLEAR STATEMENT RULE

In effect, *Hamdan* raises the transaction costs for the making of policy in wartime, and in fact raises them higher than exists for domestic policymaking. Courts tolerate the broad delegations by Congress to the administrative state, where executive branch agencies sometimes make rules with legislative effect based only on the command that they advance the public interest. Courts have yet to invalidate any such delegation as too vague or too broad since the days of the Supreme Court's resistance to the New Deal.[118] Yet, *Hamdan* suggests that similarly broad delegations will not survive in foreign affairs. This reverses the stance that the Court had adopted in national security and foreign affairs for decades. In the well-known *United States v. Curtiss-Wright Export Corp.*, for example, the Court upheld Congress's delegation of authority to FDR in foreign affairs that it suggested that it might not in domestic affairs. In order to avoid serious embarrassment in foreign affairs and promote national goals, the Court found, "congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."[119]

The *Curtiss-Wright* Court identified a number of reasons for judicial deference in the foreign affairs field, particularly to delegations of authority to the executive. First, the Court observed, the President often acts in the foreign realm not just under legislative authorization, "but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."[120] Because the President has his own independent for-

118. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936). For recent scholarly debate over the death of the non-delegation doctrine, see Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003); Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-Mortem*, 70 U. CHI. L. REV. 1331 (2003); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

119. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). Of course, *Curtiss-Wright* has received substantial academic criticism, especially of its historical theory of extra constitutional powers. *See* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 94 (1990) (summarizing "withering criticism of Curtiss Wright"). But such criticism, even if valid, does not take away from the practical and functional persuasiveness of the Court's decision.

120. *Curtiss-Wright*, 299 U.S. at 319–20.

eign affairs power, the *Curtiss-Wright* majority believed, courts ought to adopt a deferential stance when the President and Congress are acting together in an area of foreign affairs, and not be punctilious about which branch's power was being exercised. Second, the Court found that functionally that the President "has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war."[121] Presidents can act, the Court suggested, more effectively in response to secret information, which demonstrates "the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed."[122] Third, the Court found a "uniform, long-continued and undisputed legislative practice"[123] of granting the President in foreign affairs power to use "his unrestricted judgment" or which "provide a standard far more general than that which has always been considered requisite with regard to domestic affairs."[124]

A more generous attitude toward the broad delegation of power in the foreign affairs area is not just an artifact of the inter-war period. *Dames & Moore v. Regan* also relied on a posture of judicial deference toward the actions of the political branches in foreign affairs.[125] In *Dames & Moore*, the Court upheld President Carter's order suspending claims against Iran pending in U.S. courts to fulfill an agreement releasing US hostages in Iran. Justice Rehnquist, writing for the majority, found that the International Emergency Economic Powers Act (IEEPA) specifically authorized the President to order several of the actions required by the agreement with Iran, such as the nullifying the attachment of Iranian assets and transferring them out of the country.[126] But IEEPA contained no similar provision providing for the suspension of claims. Nonetheless, the Court upheld the President's exercise of that power based on an absence of specific congressional disapproval and its enactment of IEEPA and related statutes in the general area.

> Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of

121. *Id.* at 320.
122. *Id.* at 321–22.
123. *Id.* at 329.
124. *Id.* at 323–24.
125. Dames & Moore v. Regan, 453 U.S. 654 (1981).
126. *Id.* at 669–74.

> Congress specifically to delegate authority does not, "especially . . . in the areas of foreign policy and national security," imply "congressional disapproval" of action taken by the Executive.[127]

Rather than require specific congressional authorization, the Court found that "the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to 'invite' 'measures on independent presidential responsibility.'"[128]

Hamdan upsets the Court's traditional doctrine of deferring to the delegation of authority, or power-sharing, in foreign affairs and national security. It makes little sense to increase transaction costs to cooperation between the branches in war and foreign affairs. First, from a formal perspective, the President has greater independent constitutional powers when foreign affairs and war are concerned than during peacetime. The September 11 attacks triggered the President's Commander-in-Chief power, which would provide him with broader authority to make policy decisions, of both the strategic and tactical level, than in peacetime. Even if one believes that only Congress can authorize wars, Congress authorized this one when it enacted the AUMF. At the very least, it seems that the need for a clear statement rule weighted against delegations of authority is out of place in an area, such as war and national security, where the President possesses greater constitutional authority and the dividing line between the branches' authorities is unclear.

Second, the goals of the separation of powers are not advanced by more intrusive judicial review over warmaking. In the domestic context, the Court has identified the preservation of individual liberty as an important goal of the separation of powers. As the Court observed in *Bowsher v. Synar*, the Framers believed that the separation of powers would prevent any single branch of the government from expanding its power to threaten the freedoms of its citizens.[129] "Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty."[130] This echoed James

127. *Id.* at 678 (quoting Haig v. Agee, 453 U.S. 280, 291 (1981)).
128. *Id.* (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).
129. Bowsher v. Synar, 478 U.S. 714, 721–22 (1986).
130. *Id.* at 722.

Madison's explanation in *The Federalist* for the interlocking nature of the separation of powers and federalism. Due to the division of power between the branches of the federal government, and then between the federal government and the states, "a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself."[131]

Threats to individual freedoms, especially the individual freedoms of enemy aliens, are not the primary concern when the government is fighting a foreign enemy that threatens the basic security of the nation. In wartime the government may reduce the individual liberties of even citizens in order to more effectively fight the war, and it has longstanding authority to dramatically curtail the rights of non-citizens. A wartime government may even pursue policies that, in retrospect, appear to be an over-reaction to the threat. But our constitutional system places the interest in effectively waging war first. As Alexander Hamilton wrote in *The Federalist*, because "the circumstances which may affect the public safety are [not] reducible within certain determinate limits; . . . it must be admitted, as a necessary consequence, that there can be no limitation of that authority, which is to provide for the defence and protection of the community, in any matter essential to its efficacy."[132] James Madison agreed that the federal government had to possess all of the powers necessary to defend the country. "Security against foreign danger is one of the primitive objects of civil society. . . . The powers requisite for attaining it, must be effectually confided to the federal councils."[133] The limits of this power could not be defined precisely. Wrote Hamilton: the federal government should possess "an indefinite power of providing for emergencies as they might arise."[134] The Framers did not appear to believe that a strict reading of the separation of powers ought to be applied to the federal government's decisions in wartime, when the benefit to the nation as a whole in defeating the enemy would be advanced by cooperation between the branches.

Third, the Court is not protecting Congress's prerogatives in demanding that it specifically authorize presidential action in

131. THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).
132. THE FEDERALIST NO. 23, at 147–48 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
133. THE FEDERALIST NO. 41, at 269 (James Madison) (Jacob E. Cooke ed., 1961).
134. THE FEDERALIST NO. 34, at 211 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

war. As positive political theorists have argued, Congress's collective action problems and the rational self-interests of its members in re-election make it difficult for the legislature to act in certain areas where uncertainty is high, information and expertise are expensive, and there may be costly political repercussions from the decision.[135] Political scientists have found that the greatest degree of delegation will occur in the area of foreign affairs and national security, and that this is also an area where we would expect to see more unilateral presidential action accompanied by congressional acquiescence. Legislators are more likely to set no policy of their own or to delegate broadly to the executive branch when high risks are involved over which they have little control, which perhaps better describes war than any other area of human conduct. Because of these political imperatives, the executive and legislative branches have settled on a stable system that provides broad delegation to the President in foreign affairs and national security. *Hamdan* identifies no benefits for United States war policies in overthrowing this arrangement, fails to grapple with the costs in higher transaction costs and greater uncertainty it has created, and does not ask whether its new clear statement rule will actually correct mistakes in identifying popular wishes. If they were to be consistent, fans of functionalism in separation of powers analysis ought to rue a decision like *Hamdan*.

Fourth, enforcing a strict approach to delegation does not adequately address the situation presented by war. *Hamdan*'s clear statement rule essentially chooses a rule over a standard in delegating power.[136] A typical rule is a speed limit of 55 miles per hour. Rules reduce decision costs because they are clear and easy to apply; they create legal certainty because of greater predictability; and they require less information to implement. Rules, however, do not allow a careful application of law to all relevant facts, and so they are inevitably overinclusive or underinclusive.[137] A standard that aimed at the same goal as a speed limit could simply prohibit driving unreasonably fast under the

135. *See, e.g.*, DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 73–77 (1999). *See generally* WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION (2003).

136. *See, e.g.*, RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 30–36 (1995); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L REV. 74, 91 n.68 (2000) (collecting sources).

137. *See* Vermeule, *supra* note 136, at 91.

conditions. Standards, which allow for consideration of more factors and facts, increase decision costs, but reduce error costs. Consideration of a greater variety of factors will reduce the underinclusiveness or overinclusiveness of the law, but it will require more information to apply and lead to less predictability and more uncertainty ex ante.

Rules and standards also bear differences in the discretion available to the decisionmaker at the time of implementation. The delegator of power may choose a rule if it believes future decisionmakers will make mistakes or will not have access to good information.[138] A rule gives more authority to those who write the law by narrowing the discretion of future decisionmakers. A standard is superior when the decisionmaker enjoys greater competence and has access to better information at the time an actual case arises. Standards vest more authority in those who apply the law to a given case, rather than those who wrote the law.

Under this approach, narrow delegations governed by strict rules and clear statement requirements make the most sense when Congress enjoys superior decisionmaking abilities and has access to superior information at the time it writes the law. It should use a rule when narrowing discretion will not produce large numbers of errors, or when it believes that the President has poor decisionmaking abilities. Such an approach will save decision-making costs once power is delegated because the executive branch will not have to expend significant resources in application of the delegation power. But it requires Congress to predict with high certainty the universe of future cases, and draft rules in anticipation of them. Broad delegations, on the other hand, will make more sense if Congress cannot foresee the possible situations. A President acting within wide boundaries of delegated power will be able to better fit policy to the circumstances at hand, though at higher decisionmaking costs.

Employing a strict rule over a standard has certain costs and benefits, ones that are mismatched for wartime. War is perhaps the most extreme example of an issue where the executive branch will have available superior information than the legislature, and it will be able to make decisions swiftly, in contrast to a Congress that will suffer from collective action problems and will be averse to making politically risky choices. War is also perhaps the most inherently unpredictable of human activities. Unless

138. *See id.* at 92–93.

Congress is confident that it can predict the enemy's strategies and tactics, a rule based delegation makes little sense. Finally, the costs of errors in war are extremely high. Delegation by strict rule will produce higher rates of error than a standard. Given the lives that could be lost and the damage to national security that could be suffered from mistaken policies, it seems clear that the area of war requires delegations which provide the executive branch with broad discretion.

Hamdan, by contrast, applies the opposite principle. It imposes a requirement that Congress act through rules when it attempts to delegate its powers in war to the President. It effectively rejected the standards approach exemplified by the AUMF and *Hamdi*. The Court's clear statement rule, however, does not appear to promote any specific policy which is explained as being more important or valuable than flexibility in wartime. As William Eskridge and Philip Frickey have observed, clear statement rules embody policy choices by the Court, such as the rule of lenity's protection for criminal defendants.[139] If anything, they have argued, in past cases the Court had applied clear statement rules to protect the executive's prerogatives in managing foreign affairs.[140] *Hamdan* fails to explain what policy value is enhanced by reversing this rule to impose a clear statement rule on wartime policy, and why that value outweighs the benefits of flexibility in war decisions.

Hamdan does not bode well for the United States's ability to wage war effectively. It increases the costs of conducting hostilities by making it more difficult for the President and Congress to cooperate. Congress may enumerate powers more specifically, but at the cost of flexibility—presidential ability to shape decisions to the circumstances at hand will be constrained. Or, as it did in the Military Commissions Act of 2006, Congress may largely restore the President's discretion to run military commissions, but it will do so at the cost in time and energy of developing and enacting complicated legislation. Indeed, without congressional action, *Hamdan* would have simply resulted in blocking war crimes trials altogether, leaving enemy combatants detained for the duration of the conflict.

139. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

140. *Id.* at 615–19.

C. THE MILITARY COMMISSIONS ACT OF 2006: CONGRESS RETURNS TO THE STATUS QUO

Congressional disagreement with *Hamdan* is reflected in the drastic measures it took to quickly overrule the decision. Not only does the Military Commissions Act of 2006 (MCA) reject *Hamdan*'s reading of the relevant statutes, treaties, and customary international laws of war, but the MCA also strips federal courts of any future jurisdiction over cases challenging the use of military commissions while at the same time re-confirming its intent to delegate broad powers to the executive branch. The MCA's efforts to remove courts from the business of interpreting foreign affairs laws suggest that Congress is seeking to return to the pre-*Hamdan* system of presidential-legislative cooperation in the administration of wartime policies.

Thus, the MCA reversed, without almost no debate, the *Hamdan* court's insistence that military commissions must follow court-martial procedures unless impracticable and the limitation of such commissions to offenses against the law of war. Instead, the MCA specifically authorizes the President to convene commissions as authorized by the chapter as well as in violation of the law of war.[141] It also prohibits courts from using court-martial procedures to bind or limit military commissions.[142]

Additionally, Congress reversed all of the *Hamdan* court's interpretations of the international law save one. As discussed, Congress rejected with almost no debate the Hamdan plurality's extended and complex analysis of the customary international law of war in the context of conspiracy charges and defendants' rights. While Congress did accept the *Hamdan* court's application of Common Article 3 to the war with Al Qaeda, Congress announced that, contrary to the *Hamdan* court's interpretations, military commissions satisfied Common Article 3's requirement of a regularly constituted court. It codified "grave breaches" of that article for purposes of the War Crimes Act but then dele-

141. *See* 10 U.S.C. § 948(b) ("The President is authorized to establish military commissions under this chapter for offenses triable by military commission . . ."). *See also* 10 U.S.C. § 948d ("A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.").

142. *See* 10 USC § 948b(c) ("Chapter 47 [governing court-martials] . . . does not by its terms apply to trial by military commission except as specifically provided in this chapter.)

gated the exclusive authority to define other breaches of Common Article 3 to the President.[143]

Most importantly, congressional reaction to *Hamdan* went far beyond reversing the Court's substantive result. Instead, Congress took unusually aggressive measures to ensure that the Court would no longer interfere with executive-legislative cooperation in the administration of military commissions. Thus, in addition to delegating to the President broad and exclusive authority to define non-grave breaches of Common Article 3, the MCA prohibits the use of the Geneva Conventions as a source of rights for alien enemy combatants in a military commission trial. The MCA further prohibits courts from using "foreign or international law" as a rule of decision in the interpretation of the Geneva Convention obligations.[144] Finally, in the MCA's most controversial provision, Congress removed the jurisdiction of federal courts to "hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."[145]

This last provision is almost certainly going to be subject to extended litigation to the extent it purports to suspend the writ of habeas corpus for aliens detained as enemy combatants within the territorial United States.[146] But whether or not it is ultimately upheld, it reflects Congress' strong desire to eliminate judicial interference in the administration of wartime laws and policies. It is hard to imagine such an aggressive effort to remove federal court jurisdiction and to limit judicial interpretive powers would have occurred had the *Hamdan* Court not departed so dramatically from the traditional doctrines of judicial deference to executive-legislative wartime policies.

CONCLUSION

Courts have long recognized a duty to defer to the executive branch's reasonable interpretations of statutes relating to foreign affairs, treaties, and customary international law. Such deference

143. *See* Military Commissions Act of 2006, Pub. L 109-, Section 7(a)(2) and (3).
144. Id.
145. Id. at Section 7(a)(e)(1).
146. Cf. Hamdi v. Rumsfeld, 542 U.S. 507 (2004) ("All agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States.").

doctrines have a solid formal pedigree in well-settled precedents as well as the Constitution's structural allocation of foreign affairs and warmaking powers to the executive branch. The *Hamdan* decision represents a remarkable and troubling departure from these longstanding precedents. Instead of deferring to the executive branch's reasonable interpretations, the Court adopted its own barely reasonable interpretations in order to invalidate the President's existing system of military commissions.

The Court did not offer a justification, either formal or functional, for its new approach to the interpretation of foreign affairs laws. Even putting aside the very strong formal basis for the deference doctrines, the functional basis for requiring judicial deference to executive interpretations of foreign affairs laws is even stronger. Courts are poorly positioned, from the standpoint of institutional competence, to resolve ambiguities in statutes, treaties, and customary international law that govern the conduct of national policy in times of war. Courts lack expertise and access to crucial information when acting in these areas. Perhaps most importantly, courts lack the flexibility to adjust or revise decisions when the factual context for its decision has changed. In all of these circumstances, the Executive has greater (although not infallible) abilities to resolve ambiguities in the interpretation of these laws.

The *Hamdan* Court may have believed it was upholding the position of Congress by imposing a clear statement rule requiring specific congressional delegations of authority to the President in the conduct of military affairs. Such a clear statement rule, however, actually disrupted the normal and longstanding pattern of congressional-executive cooperation in the use of military commissions. Congress acted on numerous occasions to delegate broad authority to the President to conduct the war against Al Qaeda and to try alleged terrorists through military commissions. Congress acted against a background of many similarly broad delegations to Presidents in the use of military commissions throughout U.S. history. Yet the Court decided that this uninterrupted pattern of political cooperation was no longer sufficient, and that clear statements are now required for every particular presidential action in the war on terrorism. Congress acted once again after *Hamdan* to reiterate its support for the use of military commissions and, perhaps in exasperation with the Court, largely stripped the federal courts of jurisdiction to hear further challenges to the military commission system.

The long-term jurisprudential significance of *Hamdan* is still difficult to assess. The decision's non-constitutional basis, followed by its quick repudiation by Congress, makes it unlikely it will reach the canonical heights of *Youngstown* or *Nixon*, but it will no doubt be remembered as one of the two leading cases arising out of the war against terrorism. It should also be remembered as a rare example of judicial interference into the political branches' conduct of a war that proves an exception rather than a rule, especially after the President and Congress, in the course of expending significant political time and energy, overruled much of *Hamdan*'s reasoning and result.