Hamdan v. Rumsfeld: A Check on Executive Authority in the War on Terror

I. OVERVIEW

Afghani Militia forces captured Yemeni national Salim Hamdan during the hostilities in Afghanistan following the terrorist attacks on September 11, 2001, and handed him over to the U.S. military.[1] In 2002, the U.S. military transported Hamdan to the prison at Guantanamo Bay Naval Base in Cuba.[2] On July 3, 2003—over a year after his initial transport—President Bush determined that Hamdan was subject to the Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Military Order) because there was reason to believe that Hamdan was a member of al-Qaeda or had engaged in acts of international terrorism directed against the United States.[3] A year after this determination, Hamdan was officially charged with conspiracy "to commit . . . offenses triable by military commission."[4] Hamdan filed habeas and mandamus petitions asserting that the military commission had no jurisdiction over him because (1) the charge of conspiracy was not supported by a congressional act or by the law of war

1. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2759 (2006).
2. *Id.*
3. *Id.* at 2760.
4. *Hamdan*, 126 S. Ct. at 2761.

and, therefore, was not an offense in violation of the law of war; and (2) the commission's procedures violated military and international law, and in particular, the fundamental requirement that a defendant must be present to confront the evidence against him.[5]

The United States District Court for the District of Columbia held that Hamdan was entitled to habeas relief and stayed the commission's proceedings.[6] The district court found that the President's power to establish military commissions was limited to establishing commissions for those individuals who have committed offenses triable by commissions under the law of war, including the Geneva Convention (III) Relative to the Treatment of Prisoners of War (Third Geneva Convention).[7] It further found that Hamdan was entitled to the Third Geneva Convention's full protections until such time that he was adjudged not to be a prisoner of war and, whether or not he was classified as such, the military commission convened to try him was unlawful under the Uniform Code of Military Justice (UCMJ) and Common Article 3 of the Geneva Conventions[8] because of the commission's power to exclude him from hearing evidence that might result in his conviction.[9]

The United States Court of Appeals for the District of Columbia Circuit reversed.[10] Declining the government's invitation to abstain, the D.C. Circuit ruled that the Geneva Conventions were not "judicially enforceable" and, therefore, Hamdan was not entitled to habeas relief.[11] It further held that any judicial exception to the jurisdiction of the military commission based on the separation-of-powers doctrine was precluded and that the establishment of the commission did not violate the UCMJ or the armed forces regulations that implemented the Geneva Conventions.[12]

The United States Supreme Court granted certiorari.[13] The Court *held* that (1) the Detainee Treatment Act (DTA) did not deprive the Court

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5. *Id.* at 2759.

6. *Id.* at 2761.

7. *Id.* (citing Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 158 (D.D.C. 2004); Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

8. Article 3 of the Geneva Conventions is referred to as Common Article 3 because it appears in all four Geneva Conventions.

9. *Id.* at 2761-62 (citing *Hamdan*, 344 F. Supp. 2d at 158-72).

10. *Id.* at 2762.

11. *Id.* (quoting *Hamdan*, 415 F.3d at 38).

12. *Id.* (citing *Hamdan*, 415 F.3d at 38, 42-43 (referencing the Supreme Court's decision in *Ex parte* Quirin, 317 U.S. 1 (1942))).

13. *Id.*

of jurisdiction over Hamdan's habeas petition; (2) abstention was neither required nor appropriate in this case; (3) although the Authorization for Use of Military Force (AUMF) activated the President's war power, neither it nor the DTA expanded upon his ability to create military commissions; (4) the commissions created by the Military Order unacceptably deviated from the procedures prescribed by the UCMJ; and (5) the military commissions were in direct violation of U.S. obligations under the Geneva Conventions. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2762-99 (2006).

II. BACKGROUND

Nearly 3000 Americans were killed as a result of the al-Qaeda terrorist attacks of September 11, 2001.[14] Following the attacks, the United States Congress passed the AUMF, a joint resolution granting the President authority to use "all necessary and appropriate force . . . in order to prevent any future acts of international terrorism against the United States."[15] Pursuant to the AUMF, U.S. armed forces invaded Afghanistan to strike at the Taliban regime, which the President determined had supported al-Qaeda.[16] On November 13, 2001, the President issued the Military Order.[17] The Military Order granted power to the United States Secretary of Defense to establish military tribunals in order to try any individual named by the President for violations of the laws of war.[18] The President cited his constitutional power as Commander in Chief of the armed forces, the AUMF, and §§ 821 and 836 of title 10 of the United States Code as the instruments vesting this power in him.[19] The United States Constitution impliedly empowers Congress to create an independent system of military justice in courts-martial.[20] As a part of the UCMJ, 10 U.S.C. § 821 confers concurrent jurisdiction on courts-martial and military commissions to try offenses against the law of war, while 10 U.S.C. § 836 gives the President the power to prescribe procedural regulations by which to apply the "principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States."[21] The DTA expanded upon

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14. *Id.* at 2760.
15. Authorization for Use of Military Force § 2(a), 50 U.S.C. § 1541 (Supp. III 2005).
16. *Hamdan*, 126 S. Ct. at 2760.
17. *Id.*; *see* Military Order of November 13, 2001, 3 C.F.R. 918 (2002).
18. 3 C.F.R. at 918-20.
19. *Id.* at 918; *see* U.S. CONST. art. II, § 2, cl. 1; 50 U.S.C. § 1541.
20. *See* U.S. CONST. arts. I, § 8, cls. 10-11, III, § 1.
21. 10 U.S.C. §§ 821, 836 (2000).

the President's order by setting forth "procedures for status review of detainees outside the United States."[22]

Among other things, the DTA provides procedures for the review of the status of detainees from outside of the United States.[23] Subsection (e) of the DTA addresses judicial review of the detention of enemy combatants.[24] Paragraph (1) of subsection (e) states that no court, judge, or justice may entertain "an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba," except as provided by the statute.[25] Paragraph (2) grants exclusive jurisdiction to the D.C. Circuit to review the decisions of the review tribunals that designate aliens as enemy combatants.[26] Paragraph (3) mirrors the structure of the previous paragraph, but pertains to judicial review of the final decisions of military commissions rendered pursuant to Military Commission Order No. 1 dated August 31, 2005, or any successive order.[27] Review is automatic for any alien sentenced to death or to imprisonment for ten years or more, while any other review is discretionary and limited to the subject of whether or not the commission's decision was consistent with (1) the standards and procedural requirements of the Military Order or (2) the standards and procedural requirements of the Constitution and the laws of the United States.[28] The statute reads that it shall apply to all claims pending on or after its date of enactment whose review is governed by paragraphs (1) and (2).[29]

The authority of military commissions has consistently been upheld in order to deny petitions of habeas corpus in civilian courts throughout the twentieth century. In 1942, the Supreme Court upheld the jurisdiction of military tribunals in *Ex parte Quirin*.[30] *Quirin* concerned the military trial of eight Nazi saboteurs found on U.S. soil during World War II.[31] Shortly after the saboteurs were caught, President Roosevelt issued an Executive Order authorizing their trial before a military commission on charges authorized by Congress.[32] In *Quirin*, the Court

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22. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2739.
23. *Id.*
24. *Id.* § 1005(e).
25. *Id.* § 1005(e)(1).
26. *Id.* § 1005(e)(2).
27. *Id.* § 1005(e)(3)(A).
28. *Id.* § 1005(e)(3)(B), (D).
29. *Id.* § 1005(h).
30. 317 U.S. 1, 48 (1942).
31. Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1280 (2002) (citing *Ex parte Quirin*, 317 U.S. 1 (1942)).
32. *Id.* at 1281-82.

granted certiorari, citing the "public importance" of the preservation of Constitutional safeguards in times of war and stating that it was in the public's interest to resolve these issues without delay.[33] The Court denied the habeas petitions on the grounds that the charges were based on offenses that the President was authorized to order tried before a military commission, that the commission was lawfully created, and that the saboteurs were lawfully in custody.[34]

The Court cited *Quirin* in its opinion in *In re Yamashita*, which denied the habeas corpus petition of a former Japanese officer during World War II.[35] Yamashita filed a habeas petition based on his claim that the military commission appointed to try him was without jurisdiction and authority to do so.[36] The Court reasoned that it was "[a]n important incident to the conduct of war . . . to seize and subject to disciplinary measures those enemies who . . . have violated the law of war."[37] The Court further endorsed the military commission as being in total conformity within an act of Congress, even if it took place after the cessation of hostilities.[38]

Madsen v. Kinsella noted the expansion, in 1952, of the jurisdiction of military commissions to civilians.[39] The Court stated that military commissions had historically been "common-law war courts" whose procedure and jurisdiction had not been prescribed by statute.[40] The Court pointed out that the President had the power to "establish and prescribe the jurisdiction and procedure of military commissions" in the absence of limitations passed by Congress.[41] But in 1955, Congress did just that by ratifying the Third Geneva Convention.[42] Article 4 defines the term "prisoner of war" for the purposes of the treaty.[43] Article 5 states that if the status of the persons detained was in doubt, they should enjoy the protection of the Third Geneva Convention until their status has been determined by a "competent tribunal."[44] Article 102 goes on to guarantee prisoners of war the same judicial protections as "members of the armed forces of the Detaining Power," thereby limiting the President's power to

33. *Quirin*, 317 U.S. at 19.
34. *Id.* at 48.
35. 327 U.S. 1, 5, 7-11 (1946).
36. *Id.* at 5-6.
37. *Id.* at 11 (citing *Quirin*, 317 U.S. at 28).
38. *Id.* at 12.
39. 343 U.S. 341, 350 (1952).
40. *Id.* at 346-47.
41. *Id.* at 348.
42. Third Geneva Convention, *supra* note 7.
43. *Id.* art. 4.
44. *Id.* art. 5.

dictate the procedure and jurisdiction of military commissions.[45] Regarding the Convention's applicability to U.S. law, the *Restatement (Third) of Foreign Relations Law of the United States* states that "[i]f a rule of customary international law has become a part of United States law, a domestic remedy may be available for its enforcement."[46]

The Supreme Court provided a basis in *Schlesinger v. Councilman*, in 1975, for the noninvolvement of civilian courts in ongoing military justice proceedings.[47] *Councilman* concerned an active duty army officer referred to a court-martial on drug charges.[48] The defendant challenged the jurisdiction of the court-martial based on the argument that the scope of the court-martial's authority did not encompass the subject matter of his particular case.[49] The Court reversed the decision of the court of appeals that granted habeas relief.[50] Justice Powell's opinion did not address the merits of the case, but rather abstained from making a decision based on the notion of comity.[51] The Court cited two major concerns in favor of abstention: (1) military justice, and therefore military discipline, is best served by minimal interference from civilian courts; and (2) it is incumbent upon federal courts to respect the equilibrium created between military fairness and preparedness through the creation of the military justice system.[52]

New v. Cohen also helped to define protections afforded members of the U.S. military in terms of habeas corpus by denying a soldier's habeas petition as *Councilman* had—on the grounds of preserving comity.[53] The D.C. Circuit stated that "comity aids the military judiciary in its task of maintaining order and discipline."[54] The D.C. Circuit qualified this stance by stating that "service members subject to military discipline must exhaust their military remedies before seeking collateral review in federal court."[55] The only stated exception to this rigorous standard was if the military court did not have jurisdiction over the individual in question to begin with.[56]

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45. *Id.* art. 102.
46. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (1987).
47. *See* 420 U.S. 738 (1975).
48. *Id.* at 739.
49. *See id.* at 741.
50. *Id.* at 761.
51. *Id.* at 740.
52. *See id.* at 758.
53. 129 F.3d 639, 643 (D.C. Cir. 1997).
54. *Id.*
55. *Id.* at 641.
56. *Id.* at 644.

III. THE COURT'S DECISION

In the noted case, the Supreme Court relied on statutory interpretation to determine that it did, in fact, have jurisdiction over Hamdan's habeas petition.[57] In its analysis of the establishment and jurisdiction of military commissions in domestic and international customary law, the Court made use of historical precedent to reach its conclusion that the military commissions in question were illegitimate and had no jurisdiction over Hamdan's case.[58] The Court held that (1) the DTA did not deprive it of jurisdiction; (2) abstention from hearing Hamdan's case was neither required nor appropriate; (3) although the AUMF activated the President's war power, neither it nor the DTA expanded upon his congressionally granted ability to create military commissions; (4) the commissions created by the President's Military Order were in opposition to the procedural guidelines required by the UCMJ; and (5) the military commissions were in violation of the United States' obligations under the Geneva Conventions.[59]

A. Supreme Court Jurisdiction Under the DTA

The Court first addressed the government's argument that the DTA stripped it of jurisdiction over Hamdan's habeas petition.[60] The Court observed that "[t]he Act is silent about whether paragraph (1) of subsection (e) 'shall apply' to claims pending on the date of enactment."[61] The Court rejected the government's argument that section 1005(e)(1) and (h) of the DTA stripped federal courts of jurisdiction over habeas actions by detainees that had not yet been filed, as well as actions currently pending.[62] The Court found it unnecessary to reach Hamdan's argument that Congress unconstitutionally suspended Supreme Court review of habeas petitions and focused instead on the DTA's statutory construction as a means for addressing its applicability.[63] The Court observed that there was precedent for the application of intervening statutes concerning jurisdiction, but the presumption in favor of their application is not applied to cases pending at the time of their enactment "absent clear congressional intent favoring such a result."[64] In the instant

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57. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2769 (2006).
58. *See id.*
59. *Id.* at 2762-99.
60. *Id.*
61. *Id.* at 2763.
62. *Id.* at 2763-64.
63. *Id.* at 2764.
64. *Id.* at 2764-65 (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994)).

case, the statutory provision stripping judicial jurisdiction over habeas actions was omitted from the section that applied the statute to all cases pending at the time of its enactment.[65] The Court pointed out that while jurisdiction-stripping statutes may still apply to cases pending at the time of their enactment, because they do not eliminate any substantive right, the rules of statutory construction "may dictate otherwise."[66] By applying those rules in this case, the Court reasoned that Congress's deliberate omission of habeas petitions from the statutory application to cases pending at the time of enactment in subsection (h) paragraph (2) of the DTA was significant.[67] In particular, the omission gave rise to a negative inference that Congress did not intend for the statute to include habeas cases pending at the time of enactment.[68] The Court also noted that this view was reinforced by the fact that Congress rejected earlier drafts of the statute that would have included paragraph (1) within the scope of the directive.[69] The Court further rejected the government's contention that its reading would produce "an absurd result" by granting "dual jurisdiction" when the statute grants the District of Columbia exclusive jurisdiction.[70] The Court pointed out that the relevant paragraph (1) and paragraphs (2) and (3) pertain to different subject matters.[71]

B. Abstention from Hearing Hamdan's Appeal Neither Required Nor Appropriate

The Court then moved onto the government's argument that, even if the Court did have statutory jurisdiction over Hamdan's habeas petition, the judge-made rule in *Councilman*—that civilian courts should defer to ongoing military proceedings until their final outcome—would preclude jurisdiction in this case.[72] The Court agreed with both the district court and the court of appeals and rejected this argument.[73] It distinguished the

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65. *Id.* at 2763 (citing Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1), (h)(2), 119 Stat. 2763).

66. *Id.* at 2765 (citing Lindh v. Murphy, 521 U.S. 320, 326 (1997)).

67. *Id.* at 2765-66.

68. *Id.* at 2766.

69. *Id.*

70. *Id.* at 2768-69 (citing Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1), (3), 119 Stat. 2742-43).

71. *Id.* ("[S]ubsections (e)(2) and (e)(3) grant jurisdiction only over actions to 'determine the validity of any final decision' of a [Combatant Status Review Tribunal (CSRT)] or commission. Because Hamdan, at least, is not contesting any 'final decision' of a CSRT or military commission, his action does not fall within the scope of subsection (e)(2) or (e)(3). There is, then, no absurdity.").

72. *Id.* at 2769.

73. *Id.*

rationale of *Councilman*'s holding from the facts in the instant case in rejecting comity as an appropriate rationale for abstention.[74] The Court pointed out that *Councilman* identified two considerations that supported its holding in favor of abstention in the interest of comity: (1) the duty to refrain from undermining the effectiveness of military discipline through constant interference by civilian courts, and (2) the notion that "federal courts should respect the balance that Congress struck between military preparedness and fairness to individual service members when it created 'an integrated system of military courts and review procedures.'"[75] The Court disposed of the Government's argument by pointing out that neither of these concerns is present in this case because (1) Hamdan is not a member of the United States armed forces and (2) the military commission convened to try Hamdan was not part of the integrated system of military justice established by Congress.[76]

Instead, the Court looked to its decision in *Quirin* as the controlling precedent dictating the requirement to undertake a review of this case.[77] The Court agreed with the court of appeals that *Quirin* "provide[d] a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions" and that Hamdan's case held the same public importance dictating the need to resolve its issues without delay.[78] The Court further observed that neither of the two comity considerations in *Councilman* applied to *Quirin*.[79] The decision stated that the government had not identified any interest that would allow it to deviate from its congressionally mandated duty to exercise jurisdiction over Hamdan's case.[80] Finally, the Court added the caveat that there may be circumstances where its review of an ongoing military commission may be inappropriate; however, the Court felt compelled to exercise jurisdiction in advance here, because the commission was free of many of the procedural rules prescribed by Congress for courts-martial and, therefore, arguably unlawful.[81]

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74. *Id.* at 2771.
75. *Id.* at 2770 (quoting Schlesinger v. Councilman, 420 U.S. 738, 752, 758 (1975)).
76. *Id.* at 2771.
77. *Id.*
78. *Id.* at 2772 (quoting Hamdan v. Rumsfeld, 415 F.3d 33, 36 (D.C. Cir. 2005)).
79. *Id.* at 2771.
80. *Id.* at 2772 (citing Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996)).
81. *Id.*

C. The Legitimacy of the Military Commissions Under the AUMF, DTA, and UCMJ

Next, the Court moved on to the legality of the military commission itself and the legality of its charges against Hamdan. The Court observed that military commissions were not created by statute or contemplated by the Constitution, but rather were a product of military necessity.[82] The notion of exigency, the Court stated, is not itself a justification for the establishment of tribunals not provided for by the Constitution; if the authority to establish military commissions does exist, the Court held, it can only stem from "powers granted jointly to the President and Congress in time of war."[83] In further support of this claim, the Court quoted *Ex parte Milligan*, which stated that "the President [cannot] without the sanction of Congress, institute tribunals for the trial and punishment of offences . . . unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature."[84] The Court found it unnecessary to reach the truth of this proposition because of its holding in *Quirin* that stated that Congress had indeed authorized the creation of military commissions.[85] The Court was quick to note, however, that this judicial endorsement was not a "sweeping mandate" for the President to convene military commissions whenever he deemed necessary.[86] Rather, *Quirin*'s holding was merely a preservation of his power under the Constitution and the common law of war under the condition that he and his subordinates comply with the law of war.[87] With this is mind, the Court concluded that, although the AUMF had activated the President's war powers,[88] which include his ability to convene military commissions, nothing in the language of the AUMF or the DTA had expanded his ability to do so, and, absent clear congressional authorization, he could not do so in this case.[89]

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82. *Id.* at 2772-73.

83. *Id.* at 2773 (citing *Ex parte* Quirin, 317 U.S. 1, 26-29 (1942); *In re* Yamashita, 327 U.S. 1, 11 (1946)); *see* U.S. CONST. arts. I, § 8, cls. 10-11, III, § 1 (granting Congress the power to punish offenses against the law of war and make laws concerning enemies captured on land or on the high seas).

84. *Id.* at 2773-74 (quoting *Ex parte* Milligan, 4 Wall. 2, 139-40 (1866)).

85. *Id.* at 2774 (citing *Quirin*, 317 U.S. at 28).

86. *Id.*

87. *Id.* (citing *Quirin*, 317 U.S. at 28-29).

88. *Id.* at 2775 (citing Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (plurality opinion)).

89. *Id.*

The Court based this ruling on the history of military tribunals and the crimes traditionally triable by them.[90] The Court stated that "[t]he common law governing military commissions may be gleaned from past practice and what sparse legal precedent exists" and that "[c]ommissions historically have been used in three situations."[91] Dismissing two of those situations as inapplicable to Hamdan's case, the Court turned to the third, which was the situation the government had most often invoked in order to plead its case: a commission convened "incident to the conduct of war" where it is necessary to try enemies who have violated the law of war while attempting to frustrate our military efforts.[92] The Court listed four elements necessary for jurisdiction of this type of tribunal: (1) the offenses charged must be in the convening commander's field of command; (2) the offense must have occurred during the period of the war; (3) with regard to members of the enemy's army, the offense must be in violation of the laws of war; and (4) the offenses against the law of war must be cognizable by military tribunals *only*.[93]

Based on these preconditions, the Court determined that Hamdan was not eligible to be tried by a military commission because none of the overt acts he was alleged to have committed "occurred in a theater of war or on any specified date after September 11, 2001," and, even if they had, none of these acts was in violation of the law of war.[94] In support of the latter contention that Hamdan had not violated the law of war, the Court noted that Congress has never defined the charge of conspiracy as a war crime.[95] The Court acknowledged that this was not necessarily fatal to the charge's legitimacy based on article 21 of the UCMJ, which allows the common law of war to render nonstatutorily defined crimes triable by military commissions.[96] However, the Court did state that when the offense to be tried is not defined by treaty or statute, the precedent that allows its charging "must be plain and unambiguous" and that "[t]o demand any less would be to risk concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated

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90. *Id.* at 2775-86.

91. *Id.* at 2775 (citing Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2048, 2132-33 (2005); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831-46 (rev. 2d ed. 1920); *Hearings on H.R. 2498 Before the Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess. 975 (1949)).

92. *Id.* at 2776 (quoting *Quirin*, 317 U.S. at 28-29).

93. *Id.* at 2777 (citing WINTHROP, *supra* note 91, at 836-39).

94. *Id.* at 2778.

95. *Id.* at 2779.

96. *Id.* at 2779-80 (citing *Quirin*, 317 U.S. at 30).

either by statute or by the Constitution."[97] The Court was unable to discover any U.S. or international authority that supported the charge of conspiracy as an offense against the law of war in the absence of any overt acts.[98] It concluded that "[b]ecause the charge does not support the commission's jurisdiction, the commission lacks authority to try Hamdan."[99] Furthermore, the Court stated that the formal shortcomings of the charge were "indicative of a broader inability on the Executive's part . . . to satisfy the most basic precondition—at least in the absence of specific congressional authorization—for establishment of military commissions: military necessity."[100]

Eschewing the commission's inability to try Hamdan because of the absence of a triable offense, the Court held that the commission would nonetheless lack the power to proceed because of the UCMJ condition that Presidential use of military commissions must comply, not only with the U.S. common law of war, but with the provisions of the UCMJ itself and the law of nations.[101] In order to reach this conclusion, the Court examined the procedures set forth in Commission Order No. 1, which most notably include the tenets that (1) the accused and his counsel may be excluded from ever learning what evidence was presented against him during parts of the proceeding on the grounds of safety or secrecy; (2) the commission may admit any evidence deemed to have probative value, including hearsay, evidence obtained through coercion, and unsworn testimony; and (3) the President has final review of any decision of the commission.[102] Rejecting the government's arguments to the contrary, the Court determined that consideration of Hamdan's procedural challenges was warranted because he had no automatic right of review.[103] Furthermore, not only was there a "basis to presume" that the procedures at Hamdan's trial would violate the law, they in fact already had, as he had already been excluded from his trial.[104]

The Court concluded that, because of the above three aspects of procedure set down in Commission Order No. 1, the military commission set to try Hamdan was in violation of the UCMJ and was

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97. *Id.* at 2780.
98. *Id.* at 2784-85.
99. *Id.* at 2785.
100. *Id.*
101. *Id.* at 2786 (citing *Quirin*, 317 U.S. at 28).
102. *Id.* at 2786-87 (citing Military Commission Order No. 1 §§ 6(B)(3), 6(D), 6(H)(6) (Aug. 31, 2005)).
103. *Id.* at 2787-88.
104. *Id.* at 2788.

therefore illegal.[105] The Court reached this conclusion based on article 36(a) and (b) of the UCMJ, which states that the procedures for courts-martial and military commissions must be consistent with the those of criminal cases tried in U.S. district courts and "uniform insofar as practicable"—meaning that the procedures of courts-martial and military commissions must be identical.[106] Hamdan argued that the UCMJ requires that all proceedings (with the exception of deliberations by courts-martial) be on the record and in the presence of the accused and that the procedures in Commission Order No. 1 ran contrary to this.[107] The Court found it unnecessary to reach the merits of Hamdan's claim and instead focused on the "practicability" aspect of the UCMJ provision, finding that the President had made an insufficient determination to justify his variance from the rules of courts-martial.[108] The Court reasoned that, although the President had determined the impracticability of applying the standards of district courts pursuant to subsection (a), he had made no such showing with regard to subsection (b), which required uniformity with the procedural guidelines of courts-martial and, therefore, the commission's procedural standards were in violation of article 36(b) of the UCMJ.[109] The Court refuted the government's contention that adherence to the rules of courts-martial imposed an undue burden by stating that this argument ignores the meaning of article 36(b) and misunderstands the reason for military commissions.[110] The Court stated that, while exigency was the root of the commissions' legitimacy, it did not "justify the wholesale jettisoning of procedural protections."[111]

D. Procedural Rules for Military Commissions Under the Geneva Conventions

The Court next applied the procedures of Hamdan's trial to international law, namely the Geneva Conventions, and concluded that they were in violation of that treaty as well.[112] The Court overturned the court of appeals ruling that "(1) the Geneva Conventions are not judicially enforceable; (2) Hamdan in any event is not entitled to their protections; and (3) even if he is entitled to their protections, *Councilman*

105. *Id.* at 2791-93.
106. *Id.* at 2790 (citation omitted).
107. *Id.*
108. *Id.* at 2791.
109. *Id.* at 2791-92.
110. *Id.* at 2792.
111. *Id.*
112. *Id.* at 2793.

abstention is appropriate."[113] The Court had already held against *Councilman* abstention and further stated that the precedent relied upon by the appellate court in determining that Hamdan could not invoke the Geneva Conventions on his behalf was not controlling.[114] The Court pointed out that the Geneva Conventions are part of the law of war and that article 21 of the UCMJ (which authorizes the use of military commissions) is conditioned upon compliance with the law of war.[115] For the court of appeals, however, the debate did not stop there.[116] The appeals court concluded that, even if the Geneva Conventions could be judicially enforced, Hamdan could not avail himself of their protections because they did not "apply to the armed conflict during which [he] was captured."[117] The appellate court came to this conclusion because of its acceptance of the Executive's assertion that the conflict with al-Qaeda, which it reasoned was not covered by the Geneva Conventions, was independent of the conflict with the Taliban in Afghanistan.[118] The Court found the appellate court's reasoning to be unpersuasive.[119] Article 2 of the Geneva Conventions[120] states that its protections apply to armed conflicts between two or more High Contracting Parties (a designation that applies to both the United States and Afghanistan).[121] The court of appeals stated that because Hamdan was captured during the conflict with al-Qaeda and not the Afghan conflict *and* because al-Qaeda was not a "High Contracting Party," the Conventions' protections did not apply.[122] The Court did not approach the merits of this argument and focused instead on Common Article 3, which provides that in

> "conflict[s] not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum," certain provisions protecting "[p]ersons taking no active part in the hostilities, including members of armed forces . . . placed *hors de combat* by . . . detention." One such provision prohibits "the passing of sentences and the carrying out of executions without

113. *Id.*

114. *Id.*; *see* Johnson v. Eisentrager, 339 U.S. 763, 789 n.14 (1950) ("Rights of alien enemies are vindicated under [the Geneva Convention of 1929] only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.").

115. *Hamdan*, 126 S. Ct. at 2794 (citing Hamdi v. Rumsfeld, 542 U.S. 507, 520-21 (2004) (plurality opinion)).

116. Hamdan v. Rumsfeld, 415 F.3d 33, 40 (D.C. Cir. 2005).

117. *Hamdan*, 126 S. Ct. at 2794 (citing *Hamdan*, 415 F.3d at 41-42).

118. *Id.* (citing *Hamdan*, 415 F.3d at 41-42).

119. *Id.* at 2795.

120. Article 2 of the Geneva Conventions appears in all four Geneva Conventions.

121. Third Geneva Convention, *supra* note 7, art. 2.

122. *Hamdan*, 415 F.3d at 41.

> previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[123]

The Court found that the logic applied by the appellate court in its holding—that the Third Geneva Convention did not apply because the conflict with al-Qaeda was "international in scope" and therefore not a noninternational armed conflict—was an erroneous reading of the treaty.[124] It held that the reading was faulty because the treaty itself states that the High Contracting Parties must apply at least *some* protections to individuals not associated with either of the warring powers, but who are nonetheless involved in a conflict in the territory of a signatory.[125]

Having shown that the Geneva Conventions did apply to Hamdan's case, the Court looked to the language of Common Article 3 which requires that Hamdan's trial must be conducted by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[126] Justice Kennedy's concurrence in part explained that "[t]he regular military courts in our system are the courts-martial established by congressional statutes" which does not apply to the military commissions in this case.[127] The Court stated that the procedures adopted for the military commissions deviate from the judicial guarantees referenced in Common Article 3 without any "evident practical need" to do so.[128] The Court therefore concluded that although Common Article 3 "tolerates a great degree of flexibility in trying individuals captured during armed conflict[,] its requirements are general ones, crafted to accommodate a wide variety of legal systems," but they are *requirements* nonetheless, and "[t]he commission that the President has convened to try Hamdan does not meet those requirements."[129] Based on the above holdings, the Court reversed the court of appeals decision and remanded Hamdan's case for further proceedings consistent with its opinion.[130] Chief Justice Roberts took no part in the decision based on his involvement with the decision of the court of appeals.[131]

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123. *Hamdan*, 126 S. Ct. at 2795 (quoting Third Geneva Convention, *supra* note 7, art. 3).
124. *Id.* at 2795 (quoting *Hamdan*, 415 F.3d at 41).
125. *Id.* at 2796 (citing Third Geneva Convention, *supra* note 7, art. 3).
126. *Id.* (quoting Third Geneva Convention, *supra* note 7, art. 3, para. 1(d)).
127. *Id.* at 2803 (Kennedy, J., concurring).
128. *Id.* at 2797-98 (majority opinion).
129. *Id.* at 2798.
130. *Id.*
131. *Id.* at 2799.

E. Concurrences with the Majority Opinion

Justice Breyer concurred in the opinion and was joined by Justices Kennedy, Souter, and Ginsburg in finding that the Court's conclusion rested solely on the ground that "Congress has not issued the Executive a 'blank check'" in order to create the military commissions in the instant case.[132] Justice Breyer did not foreclose the possibility that the President may return "to Congress to seek the authority he believes necessary," but where no emergency necessitates unilateral action on his part, consultation with Congress preserves the ability to determine through democratic means what course of action will best serve the national interest in protecting the country from danger.[133]

Justice Kennedy was joined by Justices Souter, Ginsburg, and Breyer in concurring with the decision in part.[134] Justice Kennedy voiced concerns over the vesting of control over all elements of a case in a single branch of government.[135] The concurrence states that "[t]rial by military commission raises separation-of-powers concerns of the highest order. Located within a single branch, these courts carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review."[136] Justice Kennedy then compared the procedures of the military commissions in question with the procedures required by the UCMJ to emphasize the illegitimacy of the military commissions as formed.[137] He added one caveat, however, by stating that, because Congress created the rules by which commissions can be convened, it is free to change them consistent with the limits placed upon it by the Constitution.[138] Finally, Justice Kennedy's opinion hedged on whether the United States should rely on article 75 of Protocol I to the Geneva Conventions of 1949, to which it has not acceded.[139] Rather, he stated that the Court should rely on the deficiencies of the commissions as related to the UCMJ and Common Article 3 in order to determine that the commissions are not valid.[140]

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132. *Id.* at 2799 (Breyer, J., concurring) (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (plurality opinion)).
133. *Id.*
134. *Id.* (Kennedy, J., concurring).
135. *Id.* at 2799-2804.
136. *Id.* at 2800.
137. *Id.* at 2804-08.
138. *Id.* at 2808.
139. *Id.* at 2809.
140. *Id.*

F. Dissenting Opinions

Justice Scalia wrote a dissenting opinion that was joined by Justices Thomas and Alito.[141] He criticized the Court's decision to hear the case as being "patently erroneous" based on his reading of the DTA.[142] Justice Scalia highlighted the difference he saw in the immediate application of jurisdiction-stripping statutes pertaining to pending cases in support of this argument.[143] Justice Scalia also invoked the *Councilman* abstention doctrine in order to attack the Court for intervening in the process of military justice.[144]

Justice Thomas's dissent, which was joined by Justice Scalia in full and Justice Alito in part, rehashed Justice Scalia's jurisdictional arguments and favored a strong deference to the judgment of the Commander in Chief because of the congressional grant of power in the AUMF.[145] He further attacked the Court's historical understanding of the law of war and its relation to the charges against Hamdan. Justice Thomas believed that Hamdan was charged with crimes committed prior to the AUMF because the inception of the conflict with al-Qaeda dated back at least to Osama Bin Laden's 1996 declaration of a jihad against the United States.[146] Justice Thomas also objected to the Court's inflexible approach toward military commissions, adding: "We should undertake to determine whether an unlawful combatant has been charged with an offense against the law of war with an understanding that the common law of war is flexible, responsive to the exigencies of the present conflict, and deferential to the judgment of military commanders."[147] Thomas closed by attacking the Court's holding that Hamdan could invoke article 3 of the Geneva Conventions as "untenable."[148]

Justice Alito's dissent, joined in part by Justices Scalia and Thomas, agreed with the jurisdictional arguments previously set forth and concentrated on the legality of military commissions.[149] Justice Alito found no grounds for determining that the military commissions were not "regularly constituted court[s]" for the purposes of Common Article

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141. *Id.* at 2810 (Scalia, J., dissenting).
142. *Id.*
143. *Id.* at 2810-19.
144. *Id.* at 2819-22.
145. *Id.* at 2823-25 (Thomas, J., dissenting).
146. *Id.* at 2826-28.
147. *Id.* at 2830.
148. *Id.* at 2844.
149. *Id.* at 2849-55 (Alito, J., dissenting).

3.[150] He also disagreed with the Court's interpretation that the military commissions were illegal because they did not comply with the UCMJ.[151] Justice Alito asserted that (1) the commissions qualified as courts; (2) similar to those in *Quirin*, the commissions were "regularly constituted" by the Executive through domestic law for the purposes of Common Article 3; and (3) the commission's procedures did not provide a basis for the Court's finding that they were illegitimate solely based on improprieties that "might occur."[152]

IV. ANALYSIS

With the exception of its statutory interpretation of the DTA—which appears to be logically sound notwithstanding its manipulation of a potentially ambiguous construction based on an unabashedly policy-based agenda—the Court seemed to track much of the reasoning used in the district court's decision in order to decide this case.[153] The court of appeal's opinion in *Hamdan* threw up broad procedural bars to the power of civilian courts to grant relief in cases involving military justice, and the Supreme Court was correct in overturning it. The appellate court's reasoning probed the very edges of the relevant precedents in order to achieve its result—a result which, if let stand, would have sapped the Geneva Conventions' power to provide a remedy to foreign citizens whose rights have been violated.

The Supreme Court, as recently as 2004, upheld the jurisdiction of federal courts to hear habeas petitions.[154] In *Rasul v. Bush*, the Court ruled that federal district courts had jurisdiction over the habeas petitions of detainees in Guantanamo Bay.[155] The Court's ruling in the noted case and *Rasul* follow the precedent set by *New v. Cohen* more accurately than the appellate court's decision did. *New* quoted a previous decision in its application of the notion of comity.[156] *Parisi v. Davidson* stated that although courts have found that petitioners must exhaust their military remedies before seeking relief in federal court, the doctrine is more often understood as based on the "appropriate demands of comity between two

150. *Id.* at 2851.
151. *Id.* at 2852.
152. *Id.* at 2853-54.
153. It is worthwhile to note that the DTA had not been enacted at the time of the district court's opinion in 2004.
154. Rasul v. Bush, 542 U.S. 466 (2004).
155. *See id.*
156. New v. Cohen, 129 F.3d 639, 644 (D.C. Cir. 1997) (citing Parisi v. Davidson, 405 U.S. 34 (1972)).

separate judicial systems."[157] The district court's decision in *Hamdan* was much more in line with this idea when it pointed out that the policy concerns supporting the notion of comity in *New*—which were first enumerated in *Councilman*—are not present in this case.[158] Most notably the Supreme Court pointed out that Hamdan is not a soldier and, therefore, review of his habeas petition by a federal court would not affect the ability of the military to maintain order and discipline.[159] Neither would it forswear respect for the autonomous military justice system created by Congress, because, according to the district court, "whatever else can be said about the Military Commission established under the President's Military Order, it is not autonomous, and it was not created by Congress."[160]

The appellate court's opinion that the President's creation of the military commissions did not violate the separation of powers doctrine[161] flew in the face of previous readings of the Constitution to create a frightening new precedent. Regrettably, the Supreme Court's plurality opinion did not deal with this issue in the heavy-handed way that it should have. The Court gave it only a cursory glance in its discussion of exigency and its relation to the President's power to create military commissions.[162] By "assuming" that "complete deference" is owed to the President's determination that the rules and principles of law that govern criminal cases are impracticable when it comes to military commissions in the "War on Terror" without any showing of reasonableness, the Court seemed to leave the door wide open for the President to make a similar unsupported determination applicable to courts-martial.[163] This deference renders a major piece of the Court's holding, that the military commissions in this case violate the UCMJ, wide open for circumvention by the White House. The omission of any serious discussion of the separation-of-powers doctrine (with the exception of Justice Kennedy's concurrence) lets an important and serious Constitutional issue slide without the rancor that the policies that threaten it deserve. The basic constitutional structure of the government is that the concurrence of all three branches of government is needed to make a serious departure from the status quo.[164] The only exception to this precept occurs when

157. *Parisi*, 405 U.S. at 40.
158. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 157 (D.D.C. 2004).
159. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2771 (2006).
160. *Hamdan*, 344 F. Supp. 2d at 157 (citing *Parisi*, 405 U.S. at 40).
161. Hamdan v. Rumsfeld, 415 F.3d 33, 37-38 (D.C. Cir. 2005).
162. *Hamdan*, 126 S. Ct. at 2791-93.
163. *See id.*
164. Katyal & Tribe, *supra* note 31, at 1266.

congressional delay would threaten irreparable damage to the nation or Constitution.[165] The Commander in Chief power gives the President the power to detain enemy combatants during times of conflict for offenses against the laws of war, but when he moves past this to adjudicating guilt and meting out punishments, he is no different than a president who seeks to try and punish anyone for any crime against any body of law.[166] Even if an exigency did exist to give the President broad war powers as Commander in Chief, he should still not be able "to do in this country what he could never do in merely executive dress," regardless of what kind of determinations he makes.[167]

The Court also rightly held that the Geneva Conventions were judicially enforceable. The court of appeals' holding that the Geneva Conventions were not judicially enforceable is contrary to precedent and recognized understandings of U.S. treaty law. A treaty is not judicially enforceable if it is "non-self-executing"—meaning that it requires enactment of implementing legislation.[168] On the other hand, if a treaty's provisions "prescribe a rule by which the rights of the private citizen or subject may be determined," it is self-executing and becomes the law of the land.[169] The purpose of the Geneva Conventions is to prescribe the rights of the individual. Legislative history points out that Congress gave thought to what, if any, legislation was required in order to give effect to the Geneva Conventions, but found that only four provisions required legislation in order to be implemented.[170] Even the *Restatement (Third) of Foreign Relations Law of the United States* cited by the appellate court implies a domestic remedy based on the applicability of customary international law adopted by the United States.[171] Treaties are one of the sources of customary international law, and as such, the Geneva Conventions fall under this exception. The Supreme Court's analysis of the treaty's structure rightly applied it to Hamdan. A treaty meant to protect the fundamental procedural rights of individuals captured by a warring power should be interpreted broadly in order to give the best possible protection to the individual's humanity.

Based on this view of the applicability of the Geneva Conventions shown by their own language and by precedent, the section of article 5 of

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165. *Id.*
166. *See id.* at 1271.
167. *Id.* at 1275.
168. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 164 (D.D.C. 2004).
169. *Id.* (citing *In re* Head Money Cases, 112 U.S. 580, 598 (1884)).
170. *Id.* (citing S. REP. NO. 84-9, at 30 (1955)).
171. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (1987).

the Third Geneva Convention, which states that if the status of a detained person is in doubt, that person should enjoy the protection of the Convention until their status had been determined by a "competent tribunal," would be applicable to Hamdan.[172] Having pointed out that the separation of powers doctrine calls the competency of the military commissions into question, the implications that another remedy must be open to detainees are obvious. This issue is driven home even further by the necessary implication that, unlike the Nazi saboteurs who hid their uniforms in *Quirin*, any determination of the status of Hamdan as a terrorist member of al-Qaeda or as a legitimate prisoner of war is necessarily bound up with the commission's determination of his guilt on the merits; any attempt to separate them would simply be begging the question.[173]

The Court's interpretation of the Geneva Conventions' applicability to Hamdan's situation holds even if the appellate court's rationale that the United States was in a separate conflict with al-Qaeda is sound. The district court stated that the structure of the Geneva Conventions dictate that they are triggered by the *place* of the conflict and not by the faction with which a particular fighter allies himself; the reasoning of the Supreme Court is in accord with this notion.[174] In this case, the place is Afghanistan—a high contracting party to the Geneva Conventions.

Even with a careful reading of the *Hamdan* decision, one is likely to gloss over one of the opinions' most damning points contained in Justice Kennedy's concurrence—that the trial of Hamdan, and others like him, by military commission may be a war crime in and of itself. Such an inference may be drawn from the Court's holding that, because Hamdan is considered a prisoner of war under the Third Geneva Convention and the military commissions violated the procedural guarantees of the Third Geneva Convention, the commissions themselves are illegal under U.S. and international law. The concurrence stated that "violations of Common Article 3 are considered 'war crimes,' punishable as federal offenses when committed by or against United States nationals and military personnel."[175] Because the Court's decision arrested the progress of the military commission before its trial of Hamdan was complete, it was justified in not pursuing this point further; nonetheless, the gravity of

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172. Third Geneva Convention, *supra* note 7, art. 5.

173. Katyal & Tribe, *supra* note 31, at 1286.

174. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 161 (D.D.C. 2004).

175. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2802 (2006); *see also* George K. Walker, *Responses to Humanitarian Law Violations in Non-International Armed Conflicts: Historical Perspectives and Considerations on Conflicts of Jurisdiction*, 30 ISR. Y.B. HUM. RTS. 79, 93-94 (2000) ("[F]ailure to provide a fair trial for those accused of war crimes is itself a war crime.").

such an indictment must give us pause to consider the potential ramifications of any trial subsequently authorized by Congress.

V. CONCLUSION

The court of appeals denied Hamdan's petition for habeas corpus, leaving him to fight the charges in a military tribunal created by the President's order. This decision, contrary to most precedents, treaties, and the Constitution had implications for the due process rights of hundreds, if not thousands, of individuals. In haste to agree with the constitutionality of the Presidential order and its resulting implications for Hamdan, the court of appeals stomped on one of the most influential human rights instruments in our history: the Geneva Conventions. This blatant disregard robbed the treaty of its power, leaving no remedy for those whose rights may have been violated. Additionally, by upholding the President's ability to *make* himself judge, jury, *and* executioner to individuals that he determines, by no reviewable standard, to be terrorists, the appellate court opened the door for the Executive to encroach on the powers of both the legislative and judicial branches.

The Supreme Court's decision is particularly noteworthy because of the ever-expanding role that terrorism plays in our world. How the United States deals with terrorism and terrorists is not only at the forefront of our own political debates at home, but also plays an incredibly disproportionate role in how the United States is perceived by both our allies and enemies abroad. Our country's treatment of terror suspects has played a central part in the steady decline of the United States' public image among citizens and noncitizens alike. The *Hamdan* decision is a landmark case because it finally reigns in the seemingly unchecked Executive power previously flexed in the "War on Terror." Its relevance to international law is immense. In an era where the United States has retracted its signature on the treaty that created the International Criminal Court (ICC) and where our ambassador to the United Nations stated that the ICC is a challenge to the legitimacy of the United States,[176] the Supreme Court holding that the United States and, in particular, its President must remain faithful, not only to our domestic laws governing the treatment of suspected terrorists, but also to our international agreements (namely the Geneva Conventions) is a step

176. Jim Lobe, *Bush 'Unsigns' War Crimes Treaty*, May 6, 2002, http://www.alternet.org/story/13055/; John R. Bolton, Under Sec'y for Arms Control & Int'l Sec., Legitimacy in International Affairs: The American Perspective in Theory and Operation, Remarks to the Federalist Society (Nov. 13, 2003) (transcript *available at* http://www.state.gov/t/us/rm/26143.htm).

towards a far more reasoned approach towards our actions against foreign nationals suspected of crimes against the United States. The Court's power to affect such a change has interesting ramifications relating to the scope of the President's war and foreign policy powers as well as the steps that Congress may take to delegate more power to the president in the international arena or reign in some of his excesses.

This decision makes it patently obvious that if Congress attempts to authorize expressly the military commissions to try Hamdan and those like him, that authorization will have far-reaching ramifications for those responsible for the commissions—not the least of which may be to render all of the parties involved liable for war crimes.

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