

**A TRIPARTITE BATTLE ROYAL:
HAMDAN V. RUMSFELD AND THE ASSERTION OF
SEPARATION-OF-POWERS PRINCIPLES**

*Sean Mulryne**

I. INTRODUCTION

Traditionally, the Supreme Court of the United States has granted a certain degree of judicial deference to the Executive's decisions concerning war, military and foreign affairs, and national security.¹ The Court, however, began to exercise a more scrutinizing judicial review over these matters in 2004, when it decided *Rasul v. Bush*,² *Hamdi v. Rumsfeld*,³ and *Rumsfeld v. Padilla*.⁴ A reasonable perception drawn from those cases⁵ is that the Court, in defiance of its traditional deferential approach, began asserting a more proactive role for itself inasmuch as it sought to curtail the Executive's unilateral actions during the "war on terror."⁶ This Comment addresses

* J.D. Candidate, Seton Hall University School of Law, 2008; B.A., Gettysburg College, 2003. For all they have done for me and this Comment, respectively, I would like to thank Barbara and Kevin Mulryne, Sr., Kevin Mulryne, Jr., Valerie Silver, and, of course, Professor Baher Azmy and Cristina Finetti.

¹ See *infra* Part III.A.

² 542 U.S. 466 (2004).

³ 542 U.S. 507 (2004).

⁴ 542 U.S. 426 (2004).

⁵ Throughout this Comment, these cases, along with *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), will be collectively referred to as the "war on terror" cases.

⁶ See, e.g., David A. Martin, *Offshore Detainees and the Role of Courts After Rasul v. Bush: The Underappreciated Virtues of Deferential Review*, 25 B.C. THIRD WORLD L.J. 125 (2005). Professor Martin writes at the outset:

The Supreme Court struck an important blow for civil liberties and human rights in its trilogy of enemy combatant decisions It rejected the Administration's remarkably sweeping claims to a unilateral power to detain anyone the executive branch pronounced an enemy combatant in the war on terrorism, a power assertedly beyond the effective review of any court.

Id. at 125–26; see also Jonathan L. Hafetz, *The Supreme Court's "Enemy Combatant" Decisions: Recognizing the Rights of Non-Citizens and the Rule of Law*, 14 TEMP. POL. & CIV. RTS. L. REV. 409, 410 (2005) (arguing that the "war on terror" cases left unresolved

the disputes surrounding our nation's three branches and their appropriate spheres of authority in light of the Court's most recent decision concerning Executive power in a time of active hostilities: *Hamdan v. Rumsfeld*.⁷

In *Hamdan*, the Court struck down the Executive's use of military commissions to try alleged terrorist suspects at the United States Naval Base in Guantanamo Bay, Cuba, thereby culminating this series of cases that question and ultimately rebuke, to some extent, executive power in regard to military affairs during "wartime."⁸ In so doing, the Court implicitly and explicitly emphasized the need for Congress to assert itself in checking and balancing the Executive and its anti-terrorism measures.⁹

At its outset, this Comment assumes that our tripartite national government requires reasonable restraints on the Executive's use of power that must be externally imposed by another branch.¹⁰ This Comment will argue that through *Hamdan* and the "war on terror" progeny of cases, the Court asserted a more pronounced separation-of-powers principle to countervail the Executive's questionable actions.¹¹ While reserving a role for itself, the Court in *Hamdan* has justifiably positioned Congress into the center of the debate.¹² Likewise, this Comment will suggest that, despite Congress's contrary reasoning and initiative, the Court's role in the "war on terror" should be preserved.¹³

Part II of this Comment will outline the factual and procedural background of *Hamdan*, followed by an account of the Court's opinions in the case.¹⁴ Part III will then briefly highlight the separation-of-powers doctrine; the Court's traditional deference to the Executive in war, military and foreign affairs, and national security; and the "war on terror" progeny of cases.¹⁵ Part IV will explore the heightened scrutiny implored by the Court in *Hamdan* and its implications upon

many questions, Hafetz still acknowledges that "these decisions affirmed the important role of the federal courts in limiting executive power in the 'war on terrorism'").

⁷ 126 S. Ct. 2749 (2006).

⁸ See, e.g., Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 66 (2006) ("*Hamdan v. Rumsfeld* is a rare Supreme Court rebuke to the President during armed conflict.") (footnote omitted).

⁹ See *infra* Part IV.B.

¹⁰ See *infra* Justice Souter's *Hamdi* dissent at note 290.

¹¹ See *infra* Part IV.B.

¹² See *infra* Part IV.B.

¹³ See *infra* Part V.

¹⁴ See *infra* Part II.

¹⁵ See *infra* Part III.

our tripartite national government.¹⁶ Thereafter, this Comment will explain why the Court's decision and its invocation for congressional action are justified, especially in light of the "war on terror."¹⁷ Finally, in Part V will briefly examine Congress's response to *Hamdan* and offer several criticisms of the Military Commissions Act of 2006.¹⁸

II. *HAMDAN V. RUMSFELD*

A. *Factual Background*

Like the other Guantanamo Bay cases, *Hamdan v. Rumsfeld* arose in the wake of the tragic events of September 11, 2001, and the consequent hostilities in Afghanistan and Iraq.¹⁹ Following the September 11 attacks, Congress adopted a joint resolution known as the Authorization for Use of Military Force (AUMF),²⁰ which authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."²¹ Pursuant to this authorization, U.S. Armed Forces were deployed to Afghanistan, where they combated the Taliban, an international terrorist organization suspected of aiding al Qaeda, the international terrorist organization responsible for the September 11 attacks.²² During the subsequent battles, Salim Ahmed Hamdan, along with hundreds of others, was arrested by the U.S. Armed Forces and detained in the U.S. Naval Base at Guantanamo Bay, Cuba.²³

On November 13, 2001, President Bush issued a military order declaring that any non-citizen allegedly involved or participating in terrorist activities "shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including

¹⁶ See *infra* Part IV.A.

¹⁷ See *infra* Part IV.B.

¹⁸ See *infra* Part V.

¹⁹ 126 S. Ct. 2749, 2760 (2006).

²⁰ Authorization for Use of Military Force, 107 Pub. L. No. 40, 115 Stat. 224 (2001).

²¹ *Hamdan*, 126 S. Ct. at 2760 (quoting AUMF, § 2, 115 Stat. 224).

²² *Id.*

²³ *Id.*

imprisonment or death.”²⁴ Around February 2004, military counsel was appointed to represent Hamdan, and, in turn, counsel filed applications seeking disclosure of the charges against Hamdan and “for a speedy trial pursuant to Article 10 of the Uniform Code of Military Justice [UCMJ].”²⁵ On February 23, 2004, the legal advisor to the Appointing Authority for Military Commissions (“Appointing Authority”) denied Hamdan’s applications, having determined that Hamdan was not entitled to the protections of the UCMJ.²⁶

In response to the Appointing Authority’s denial of UCMJ protections, Hamdan attempted to challenge his detainment by filing habeas corpus and mandamus petitions in the U.S. District Court for the Western District of Washington.²⁷ Thereafter, the government finally charged Hamdan with a conspiracy offense, specifically alleging that

from on or about February 1996 to on or about November 24, 2001, Hamdan willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with [named members of al Qaeda] to commit the following offenses triable by military commissions: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism.²⁸

The government also accused Hamdan of committing four “overt acts.”²⁹

B. Procedural History

The U.S. District Court for the Western District of Washington transferred Hamdan’s petitions to the U.S. District Court for the District of Columbia.³⁰ During this time, the Combatant Status Review

²⁴ *Id.* (quoting Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833, 57834 (Nov. 13, 2001)).

²⁵ *Id.*; see also 10 U.S.C. § 810 (2006).

²⁶ *Hamdan*, 126 S. Ct. at 2760.

²⁷ *Id.*

²⁸ *Id.* at 2761 (citation omitted) (quotations omitted).

²⁹ *Id.* These acts included (1) “act[ing] as Osama bin Laden’s bodyguard and personal driver, believ[ing] all the while bin Laden and his associates were involved in terrorist acts prior to and including the attacks of September 11, 2001”; (2) arranging for and actually transporting “weapons used by al Qaeda members and bin Laden’s bodyguards”; (3) “[driving] or accompa[n]y[ing] [O]sama bin Laden to various al Qaeda-sponsored training camps, press conferences, or lectures,” at which bin Laden urged terrorist acts against the United States; and (4) “receiv[ing] weapons training at al Qaeda-sponsored camps.” *Id.* (citation omitted) (internal quotations omitted).

³⁰ *Id.*

Tribunal convened and determined that Hamdan's detention at Guantanamo Bay was justified since he was an "enemy combatant."³¹ Nevertheless, the district court granted Hamdan's habeas petition and stayed the military commission's proceedings, concluding that: (1) the President's authority to convene military commissions extends only to "offenders or offenses triable by military [commission] under the law of war";³² (2) the law of war includes Geneva Convention (III) Relative to the Treatment of Prisoners of War;³³ (3) Hamdan is entitled to the Geneva protections;³⁴ and (4) the proposed military commissions violate the UCMJ and Common Article 3 of the Geneva Conventions³⁵ because the military commissions allow for convictions based on evidence that the accused would never see or hear.³⁶

Upon appeal, the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court, concluding that: (1) the Geneva Conventions are not "judicially enforceable" and, two judges believed, would not apply to Hamdan anyway;³⁷ (2) *Ex parte Quirin*³⁸ "foreclosed any separation-of-powers objection to the military commission's jurisdiction";³⁹ and (3) Hamdan's trial by commission would not violate the UCMJ or "U.S. Armed Forces regulations intended to implement the Geneva Conventions."⁴⁰

C. *The Supreme Court's Decision*

On November 7, 2005, the Supreme Court of the United States granted certiorari to Hamdan's appeal⁴¹ in order to decide the narrow questions of "whether the military commission convened to try Hamdan has authority to do so, and whether Hamdan may rely on the Geneva Conventions in these proceedings."⁴²

³¹ *Id.* at 2761. *Enemy combatant* was defined as "an individual who was part of or supporting Taliban and al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." *Id.* at 2761 n.1 (citation omitted).

³² *Hamdan*, 126 S. Ct. at 2761.

³³ *Id.*; see also 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 Common Article 3].

³⁴ *Hamdan*, 126 S. Ct. at 2761-62.

³⁵ See Common Article 3, *supra* note 33.

³⁶ *Hamdan*, 126 S. Ct. at 2762.

³⁷ *Id.*

³⁸ 317 U.S. 1 (1942).

³⁹ *Hamdan*, 126 S. Ct. at 2762.

⁴⁰ *Id.*

⁴¹ *Id.* at 2759, 2762.

⁴² *Id.* at 2762.

With Chief Justice Roberts abstaining from the decision, a majority of the Court, including Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer, held that the military commissions at Guantanamo Bay were not authorized and thus violated the prescribed standards of the UCMJ and the Geneva Conventions.⁴³ Justices Scalia, Thomas, and Alito dissented.⁴⁴

1. Detainee Treatment Act of 2005⁴⁵

The Court began its opinion by denying the government's motion to dismiss the writ of certiorari.⁴⁶ The government's motion claimed that the Detainee Treatment Act of 2005 (DTA) foreclosed the Court's jurisdiction to hear Hamdan's complaint.⁴⁷ Relying on "[o]rdinary principles of statutory construction,"⁴⁸ the Court found that the DTA did not preclude its judicial review in this case because there is a presumption against retroactive statutory effect and a negative inference drawn when particular language included in one statutory provision is excluded from another provision in the same statute.⁴⁹

2. Abstention

The government argued that the Court's precedent in *Schlesinger v. Councilman*⁵⁰ dictated that the Court adhere to the "judge-made rule that civilian courts should await the final outcome of on-going military proceedings before entertaining an attack on those proceedings."⁵¹ In rejecting this argument, the Court noted that two comity considerations warrant judicial abstention: that military discipline and efficiency are best served by the military justice system without interference from civilian courts; and that civilian courts should respect the congressional consideration given to servicemen through the establishment of military courts and appellate review procedures, including the Court of Military Appeals and its independent, unbiased civilian judges.⁵² The Court concluded that neither considera-

⁴³ *Id.* at 2775, 2786, 2793.

⁴⁴ *Id.* at 2810 (Scalia, J., dissenting), 2823 (Thomas, J., dissenting), 2849 (Alito, J., dissenting).

⁴⁵ Detainee Treatment Act of 2005, Pub. L. 109-148, 199 Stat. 2739.

⁴⁶ *Hamdan*, 126 S. Ct. at 2762.

⁴⁷ *Id.* at 2763.

⁴⁸ *Id.* at 2764.

⁴⁹ *Id.* at 2764-66.

⁵⁰ 420 U.S. 738 (1975).

⁵¹ *Hamdan*, 126 S. Ct. at 2769 (citation omitted).

⁵² *Id.* at 2770.

tion applied in the present case, because Hamdan was not a member of the U.S. Armed Forces, and because the military commission neither is a part of the integrated military justice system nor guarantees insulation from military influence.⁵³ Moreover, the Court found that *Ex parte Quirin* provided precedent for hearing Hamdan's case and for refusing to abstain from the issues at bar.⁵⁴

3. Congressional Authorization for Military Commissions

After briefly recounting the history of military commissions and the constitutionally assigned roles of the Executive and the Legislature in matters of war,⁵⁵ the Court examined Article of War 15 ("Article 15") and its contemporary embodiment in Article 21⁵⁶ of the UCMJ.⁵⁷ The Court explained that the *Ex parte Quirin* Court "did not view [Article 15] as a sweeping mandate for the President to invoke military commissions when he deems them necessary," but rather "recognized that Congress had simply preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions—with the express condition that the President and those under his command comply with the law of war."⁵⁸ Therefore, the Court accepted Article 15, and its current incarnation in Article 21, as a congressional preservation of the use of military commissions under certain circumstances.⁵⁹

Turning its attention to the AUMF, the Court concluded:

⁵³ *Id.* at 2771.

⁵⁴ *Id.* at 2772. In relevant part:

That course of action was warranted, [the Court] explained "[i]n view of the public importance of the questions raised by [the cases] and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay."

Id. (quoting *Ex parte Quirin*, 317 U.S. 1, 19 (1942)).

⁵⁵ *Id.* at 2773.

⁵⁶ 10 U.S.C. § 821 (2000). Article 21 reads:

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 such military commissions, provost courts, or other military tribunals.

Id. The Court explained that Article 15 is essentially preserved in the contemporary Article 21. *Hamdan*, 126 S. Ct. at 2774.

⁵⁷ *Hamdan*, 126 S. Ct. at 2774.

⁵⁸ *Id.* (citing *Ex parte Quirin*, 317 U.S. at 28–29) (other citations omitted).

⁵⁹ *See id.*

[W]hile we assume the AUMF activated the President's war powers, . . . and that those powers include the authority to convene military commissions in appropriate circumstances, . . . there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ.⁶⁰

Thereafter, the Court similarly posited that the DTA "contains no language authorizing that tribunal or any other at Guantanamo Bay," but does reserve judgment on the applicability of the Constitution and other U.S. laws to, and thus the constitutionality and legality of, the standards and procedures used in these military commissions.⁶¹ In summary, the Court declared:

Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the "Constitution and laws," including the law of war. Absent a more specific congressional authorization, the task of this Court is, as it was in *Quirin*, to decide whether Hamdan's military commission is so justified.⁶²

4. Legality of Military Commissions

Having established that Hamdan's military commission was not specifically authorized by any congressional action, the Court then examined whether the Executive's unauthorized use of a commission was appropriate in the given context.⁶³ The Court began this evaluation by identifying three historical scenarios for which military commissions are commonly reserved.⁶⁴ Next, the Court looked to the famous work of Colonel William Winthrop to discern the four preconditions necessary to exercise jurisdiction by military commission over a person such as Hamdan.⁶⁵ Conceding that these precon-

⁶⁰ *Id.* at 2775 (citations omitted).

⁶¹ *Id.* (citations omitted).

⁶² *Id.* at 2775.

⁶³ *Hamdan*, 126 S. Ct. at 2774–75.

⁶⁴ *Id.* at 2775–76 (quotations omitted). The three scenarios, identified by the Court, in which military commissions are invoked include: (1) at times and in places where martial law is declared; (2) when temporary military government occupies enemy territory or where civilian government is non-functional; and (3) as "incident to the conduct of war" when there is a need "to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." *Id.*

⁶⁵ *Id.* at 2777 (citing *Reid v. Covert*, 354 U.S. 1, 19 n.38 (1957)). The four preconditions for exercising jurisdiction by military commission are that: (1) the charges are for "offenses committed within the field of the command of the convening commander," or in a "theatre of war"; (2) the offenses charged "must have been commit-

ditions are embodied in the UCMJ and dictate whether military necessity justifies the use of a military commission,⁶⁶ the Court determined that the use of a commission to try Hamdan for his alleged crimes was illegitimate and unlawful.⁶⁷

To begin, the Court articulated at length the inadequacy of the conspiracy charge against Hamdan and the inability of a military commission to try such a claim.⁶⁸ First, the Court doubted whether Hamdan's alleged crimes satisfied Winthrop's temporal and geographic preconditions.⁶⁹ Second, the Court found that Congress did not definitively designate conspiracy as a war crime, nor did precedent or the government's examples suggest that conspiracy is "incorporated by reference" into Article 21.⁷⁰ In addition, the Court clarified that international law, including the Geneva and Hague Conventions, the International Military Tribunal at Nuremberg, and the laws of European countries in general, have not recognized conspiracy as a punishable crime in the law of war.⁷¹

In the end, the Court found the legal insufficiency of Hamdan's charges emblematic of the Executive's utilization of military commissions when "military necessity" was not present.⁷² Thus, the Court held that the circumstances surrounding Hamdan and his military commission did not constitute a situation in which, "by any stretch of the historical evidence or this Court's precedents, a military commission established by Executive Order under the authority of Article 21 of the UCMJ may lawfully try a person and subject him to punishment."⁷³

ted within the period of the war"; (3) the only individuals at trial must be "[i]ndividuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war" and members of one's own army "who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by criminal courts or under the Articles of war"; and (4) the individuals' alleged crimes must be "[v]iolations of the laws and usages of war cognizable by military tribunals only" and which are "[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war." *Id.* (quotations omitted).

⁶⁶ *Id.*

⁶⁷ *Id.* at 2777–86.

⁶⁸ *Id.* at 2778–86.

⁶⁹ *Hamdan*, 126 S. Ct. at 2777–79.

⁷⁰ *Id.* at 2779–84 (citations omitted).

⁷¹ *Id.* at 2780–81, 2784–85.

⁷² *Id.* at 2785 ("The charge's shortcomings are not merely formal, but are indicative of a broader inability on the Executive's part here to satisfy the most basic precondition—at least in the absence of specific congressional authorization—for establishment of military commissions: military necessity.").

⁷³ *Id.* at 2785–86.

Regarding the legality of the military commission's standards and procedures, the Court first outlined the most controversial aspects of the commission, including: (1) the detainee, and possibly his counsel, may have limited—if any at all—access to certain evidence presented against the detainee;⁷⁴ (2) the detainee may be precluded from attending “closed sessions”;⁷⁵ (3) any evidence, including “testimonial hearsay and evidence obtained through coercion” as well as non-sworn statements, may be fully admissible;⁷⁶ and (4) any appeal by the detainee will be heard by a three-judge panel appointed by the Secretary of Defense and comprised of military officers, only one of which need have judicial experience.⁷⁷

Upon dismissing the government's objections and distinguishing *In re Yamashita*⁷⁸ from the military commissions at issue,⁷⁹ the Court explained that the President may promulgate some procedural rules for courts-martial and military commissions, but is restricted by Article 36 of the UCMJ,⁸⁰ which requires that the adopted rules not be “contrary to or inconsistent with” the UCMJ and that the adopted rules for military commissions be “uniform insofar as practicable” to those rules of courts-martial.⁸¹ Ultimately, the Court concluded that the “uniformity” requirement precluded the government from justifying the military commission's variant procedures.⁸² In other words, the President failed to prove why the procedures of courts-martial are impracticable and warrant deviation in the form of the military commission in question.⁸³ The Court was especially skeptical of the com-

⁷⁴ *Id.*

⁷⁵ *Hamdan*, 126 S. Ct. at 2786.

⁷⁶ *Id.* at 2786–87.

⁷⁷ *Id.* at 2787.

⁷⁸ 327 U.S. 1 (1946).

⁷⁹ *Hamdan*, 126 S. Ct. at 2788–89.

⁸⁰ 10 U.S.C. § 836 (2000). Article 36 reads:

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

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

Id.

⁸¹ *Hamdan*, 126 S. Ct. at 2790 (quoting 10 U.S.C. § 836 (2000)).

⁸² *Id.* at 2791.

⁸³ *See id.* at 2792.

mission's jettison of the basic and essential right of a defendant-detainee to be present at his trial.⁸⁴ As a result, the Court held that the standards and procedures of the military commission unjustifiably differed from those of a court-martial, and thus the commission violated Article 36(b).⁸⁵ Thereafter, the Court summarized:

The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter. Exigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections. . . . Article 21 did not transform the military commission from a tribunal of true exigency into a more convenient adjudicatory tool.⁸⁶

5. Geneva Conventions and International Law

After rejecting the military commission's procedures as violative of the UCMJ, the Court also proclaimed that the commission violates the Geneva Conventions.⁸⁷ In reversing the D.C. Circuit's determinations that the Geneva provisions are judicially unenforceable and, alternatively, inapplicable to Hamdan, the Supreme Court held that Hamdan's rights under the Geneva Conventions "are, as the Government does not dispute, part of the law of war[,] . . . [a]nd compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted."⁸⁸ Therefore, the Court found the relevant provisions of the Geneva Conventions judicially enforceable insofar as they, as "part of the law of war," were incorporated into U.S. law by Article 21.⁸⁹ Furthermore, acknowledging the Executive's argument that Hamdan was an alleged member of al Qaeda and that Geneva protections do not extend to the U.S. conflict with al Qaeda,⁹⁰ the Court clarified that Common Article 3 "applies here even if the relevant conflict is not one between signatories."⁹¹ The Court defended this interpretation by explaining that Common Article 3, unlike Common Article 2 of the Geneva Conventions, "affords some minimal protection, falling short of full protection under the

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 2792–93 (citation omitted).

⁸⁷ *Hamdan*, 126 S. Ct. at 2793.

⁸⁸ *Id.* at 2794.

⁸⁹ *Id.*

⁹⁰ *Id.* at 2795.

⁹¹ *Id.* at 2794–95.

Conventions, to individuals associated with neither a signatory nor even a nonsignatory 'Power' who are involved in a conflict 'in the territory of' a signatory."⁹²

Common Article 3, the Court explained, guaranteed Hamdan a trial by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."⁹³ Relying on commentary⁹⁴ to the Geneva Conventions and *Yamashita*,⁹⁵ the Court stated that the "regularly constituted court[s]" prescribed by the Geneva Conventions must be "ordinary military courts," and that Geneva provisions "definitely exclud[e] all special tribunals" including military commissions that do not conform to courts-martial or that are subject to change in mid-trial.⁹⁶ Regarding the "judicial guarantees which are recognized as indispensable by civilized peoples," the Court posited that "it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law."⁹⁷ Citing to Article 75 of Protocol I⁹⁸ to the 1949 Geneva Conventions and to the International Covenant on Civil and Political Rights,⁹⁹ among other sources, the Court concluded that these protections include a detainee's right to be tried in his own presence and the right to have access to evidence against him.¹⁰⁰ Therefore, the Court held that the Executive's military commission implemented to try Hamdan was unlawful insofar as it failed to meet these requirements.¹⁰¹

6. Justice Breyer's Concurrence

Justice Breyer's concise concurrence, joined by Justices Kennedy, Souter, and Ginsburg, directly repudiated Justice Thomas's complaint that the majority's decision would hamper the Executive's abil-

⁹² *Id.* at 2796.

⁹³ *Hamdan*, 126 S. Ct. at 2796 (citation omitted).

⁹⁴ See 4 Int'l Comm. of Red Cross, *Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 21 (1958) [hereinafter Geneva Cmt.].

⁹⁵ 327 U.S. at 44 (Rutledge, J., dissenting).

⁹⁶ *Hamdan*, 126 S. Ct. at 2796–97 (quoting Geneva Cmt., *supra* note 94, at 340).

⁹⁷ *Id.* at 2697.

⁹⁸ 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, June 8, 1977, 1125 U.N.T.S. 3.

⁹⁹ Art. 14, ¶ 3(d), Mar. 23, 1976, 999 U.N.T.S. 171.

¹⁰⁰ *Hamdan*, 126 S. Ct. at 2797–98 (plurality opinion). Justice Kennedy did not entirely agree with the majority on this point. See *infra* note 109 and accompanying text.

¹⁰¹ *Hamdan*, 126 S. Ct. at 2798 (majority opinion).

ity to combat terrorism.¹⁰² In particular, Justice Breyer emphasized the importance of congressional authorization and the role of Congress in justifying the Executive's exercise of powers, especially when an absence of immediate danger allows for consultation between the governmental branches.¹⁰³

7. Justice Kennedy's Concurrence

In his concurrence, Justice Kennedy, joined in part by Justices Souter, Ginsburg, and Breyer, acknowledged the separation-of-powers principles implicated by the Executive's military commissions.¹⁰⁴ In particular, Justice Kennedy agreed with the majority opinion, and posited that Article 21 of the UCMJ imported Common Article 3 into U.S. military law¹⁰⁵ and that Article 36 required uniformity between military commissions and courts-martial barring any exigent circumstances.¹⁰⁶ The military commission at issue, according to Justice Kennedy, exceeded these congressional limitations¹⁰⁷ and had no practicable justifications for its deviations from courts-martial.¹⁰⁸ Finding the military commission unlawful, Justice Kennedy refrained from expounding upon some issues that the majority decided.¹⁰⁹

8. Justice Scalia's Dissent

Joined in his dissent by Justices Thomas and Alito, Justice Scalia criticized the majority's interpretations of the DTA on the grounds that the statute "prohibits *any* exercise of jurisdiction," even by the Supreme Court, over the military commissions at Guantanamo, and that the statute "became effective as to *all* cases" on its date of enactment.¹¹⁰ Justice Scalia concluded that the Court had no jurisdiction absent "an explicit reservation of pending cases," since the DTA expressly and unequivocally ousted the Court's jurisdiction over the present matter and precedent supports statutory jurisdiction ousting for cases pending at the statute's effective date of enactment.¹¹¹

¹⁰² *Id.* at 2799 (Breyer, J., concurring).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 2800 (Kennedy, J., concurring).

¹⁰⁵ *Id.* at 2803-04.

¹⁰⁶ *Id.* at 2801.

¹⁰⁷ *Hamdan*, 126 S. Ct. at 2808.

¹⁰⁸ *Id.* at 2807.

¹⁰⁹ *Id.* at 2809 (refraining from deciding whether the accused has a "right to be present at all stages of a criminal trial," whether Article 75 of Protocol I is binding law, and whether Hamdan's conspiracy charge is valid).

¹¹⁰ *Id.* at 2810 (Scalia, J., dissenting).

¹¹¹ *Id.* at 2810-11.

Responding to the majority's statutory interpretation of a negative inference that would enable the Court to exercise jurisdiction in this case,¹¹² Justice Scalia emphasized that the DTA is clear in its jurisdiction stripping, and that precedent and a "negative inference in the opposite direction" support a "presumption against jurisdiction."¹¹³ Furthermore, Justice Scalia criticized the majority's reliance upon the DTA's legislative history as evidence of Congress's intent for the Court to have jurisdiction over cases such as *Hamdan's*.¹¹⁴ According to Justice Scalia, the congressional debates of the DTA represent views by both legislators who wanted to preclude the Court's jurisdiction and legislators who wanted to preserve it, and that many statements relating to jurisdiction were "undoubtedly opportunistic and crafted *solely* for use in the briefs in this very litigation."¹¹⁵ Likewise, the DTA's drafting history, Justice Scalia argued, "is no more legitimate or reliable an indicator of the objective meaning of a statute than any other form of legislative history."¹¹⁶ In addition, Justice Scalia pointed to several other considerations that disputed the majority's conclusions and underlying assumptions.¹¹⁷

Finally, Justice Scalia disagreed with the majority's refusal to adhere to *Councilman's* precedent and to abstain from adjudicating these ongoing military proceedings.¹¹⁸ Considerations of military necessity, final review bestowed upon the D.C. Circuit and the Supreme Court, and "interbranch comity at the federal level"—between the judiciary and the military—necessitate, in Justice Scalia's opinion, the Court's abstention from interfering with the military commission at issue.¹¹⁹

¹¹² See *Id.* at 2765 (majority opinion).

¹¹³ *Hamdan*, 126 S. Ct. at 2812–13 (Scalia, J., dissenting).

¹¹⁴ *Id.* at 2815–17.

¹¹⁵ *Id.* at 2815–16.

¹¹⁶ *Id.* at 2817.

¹¹⁷ *Id.* at 2817–19. These considerations included: (1) by exercising jurisdiction, the Court would retain jurisdiction over, and burden itself with, "all Guantanamo-related habeas petitions"; (2) Guantanamo Bay is beyond U.S. sovereign "territorial jurisdiction"; and (3) the DTA does not eliminate but merely defers the Court's jurisdiction over habeas petitions from Guantanamo Bay, insofar as the Court may still review the D.C. Circuit's decisions relating to such petitions. *Id.*

¹¹⁸ *Id.* at 2819–22.

¹¹⁹ *Hamdan*, 126 S. Ct. at 2821–22.

9. Justice Thomas's Dissent

To begin his dissent, Justice Thomas, joined by Justice Scalia,¹²⁰ emphasized that the Executive, namely the President, has constitutional and precedential authority to direct national security and foreign affairs,¹²¹ and that congressional authorization is not always necessary for the President to effectuate his actions.¹²² Nevertheless, Justice Thomas assumed that Congress authorized the President to try unlawful combatants when Congress enacted the AUMF.¹²³

Conceding the relevancy of Winthrop's treatise and its four criteria for determining a military commission's jurisdiction,¹²⁴ Justice Thomas concluded that "[t]he Executive has easily satisfied these considerations here," and that "[t]he plurality's contrary conclusion rests upon an incomplete accounting and an unfaithful application of those considerations."¹²⁵ First, in Justice Thomas's assessment, the Executive's determinations that the "theater of the present conflict includes Afghanistan, Pakistan, and other countries where al Qaeda has established training camps, . . . and that the duration of that conflict dates back (at least) to [O]sama bin Laden's August 1996 '*Declaration of Jihad Against the Americans*,'" are justifiably supported by the Executive's inherent authority¹²⁶ and by extrinsic evidence.¹²⁷ Next, Justice Thomas quickly confirmed that Hamdan is a person triable by military commission on account of his being "an unlawful combatant charged with joining and conspiring with a terrorist network dedicated to flouting the laws of war."¹²⁸

Thereafter, Justice Thomas explained that the "nature of the offense charged" against Hamdan survives the plurality's arguments because: (1) such charges involving violations of the law of war need not

¹²⁰ With the exception of several parts including this one, Justice Alito also joined Justice Thomas's dissent. *Id.* at 2823 (Thomas, J., dissenting). Hereafter, unless otherwise noted, all citations to Justice Thomas's dissent will refer to parts in which Justice Alito joined.

¹²¹ *Id.* (citations and quotations omitted). Justice Alito did not join this part of Justice Thomas's dissent. *Id.*

¹²² *Id.* at 2823 (Thomas, J., dissenting) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981)). Justice Alito did not join. *Id.*

¹²³ *Id.* at 2824 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004); *In re Yamashita*, 327 U.S. 1, 11 (1946)). Justice Alito did not join. *Id.*

¹²⁴ *Id.* at 2826. The four criteria include: "(1) time and (2) place of the offense, (3) the status of the offender, and (4) the nature of the offense charged." *Id.* (citations omitted).

¹²⁵ *Hamdan*, 126 S. Ct. at 2826 (Thomas, J., dissenting).

¹²⁶ *Id.* (citations and internal quotations omitted).

¹²⁷ *Id.* at 2828.

¹²⁸ *Id.* at 2829.

be stated as specifically as common law indictments;¹²⁹ (2) the actions of military commissions are to be upheld unless there is “clear conviction that they are” unlawful;¹³⁰ (3) it is inappropriate for the judiciary to intrude upon the Executive’s war management;¹³¹ and (4) “a flexible, evolutionary common-law system is uniquely appropriate” for the amorphous nature of war.¹³² Analyzing the specific charges against Hamdan, Justice Thomas first acknowledged that “membership in a war-criminal enterprise and conspiracy to commit war crimes” is chargeable before military commissions on account of the common law of war.¹³³ Likewise, Justice Thomas again acknowledged that, based on precedent, Hamdan is chargeable with and triable before a military commission for conspiring and agreeing with al Qaeda to commit violent and terroristic acts.¹³⁴ Furthermore, Justice Thomas posited that military necessity, which the plurality sets forth as “the most basic precondition . . . for establishment of military commissions,” is a determination reserved to military judgment and not that of the courts,¹³⁵ and alternatively, the jurisdiction of military commissions is not dependent upon the exigency of the circumstances.¹³⁶

Regarding the UCMJ, Justice Thomas declared repeatedly that Article 21, in and of itself, authorizes the Executive’s use of military commissions.¹³⁷ Insofar as the majority’s interpretations of Article 36 were concerned, Justice Thomas argued that the President alone has the authority and discretion to deviate the military commission’s procedures from those of civilian courts when he has deemed it “practicable” to do so, and that the commission’s procedures are not “contrary to” the UCMJ since these procedures do not implicate any of the few UCMJ provisions concerning such commissions.¹³⁸ In addi-

¹²⁹ *Id.* at 2829 (quoting *In re Yamashita*, 327 U.S. 1, 17 (1946)).

¹³⁰ *Id.* at 2830 (quoting *Ex parte Quirin*, 317 U.S. 1, 25 (1942)).

¹³¹ *Hamdan*, 126 S. Ct. at 2830 (Thomas, J., dissenting) (citation omitted).

¹³² *Id.* (footnote omitted).

¹³³ *Id.* at 2830–31. Justice Thomas pointed to Civil War military trials as examples of tribunals prosecuting persons for similar charges. *Id.* at 2831 n.7. Justice Alito did not join this part of Justice Thomas’s dissent. *Id.* at 2823.

¹³⁴ *Id.* at 2834–36 (Justice Thomas pointed to World War II, the Civil War, Winthrop’s treatise, and the actions of military tribunals in Nuremberg and several European nations as evidence of tribunals prosecuting persons for similar charges.)

¹³⁵ *Id.* at 2838 (Thomas, J., dissenting) (citation and internal quotations omitted).

¹³⁶ *Id.* (“Traditionally, retributive justice for heinous war crimes is as much a ‘military necessity’ as the ‘demands’ of ‘military efficiency’ touted by the plurality, and swift military retribution is precisely what Congress authorized the President to impose on the September 11 attackers in the AUMF.”) (citations omitted).

¹³⁷ *Hamdan*, 126 S. Ct. at 2825, 2840–41, 2845.

¹³⁸ *Id.* at 2840.

tion, Justice Thomas reconciled the procedures of Hamdan's military commission with the "uniformity" requirement of Article 36(b) by holding that requirement as mandating uniform procedures only "across the separate branches of the armed services," and not between military commissions and courts-martial as the majority opined.¹³⁹

Turning his attention to the majority's invocation of the Geneva Conventions, Justice Thomas posited that *Johnson v. Eisentrager*¹⁴⁰ forecloses judicial enforceability of the Conventions, irrespective of Article 21's authorization, because the Conventions require political and diplomatic, and not judicial, relief.¹⁴¹ Moreover, Justice Thomas found that an alleged al Qaeda detainee is not entitled to Common Article 3 protection since the conflict against al Qaeda, as determined by the President pursuant to his inherent authority, is of an "international character," and Common Article 3, by its very language, applies only to "armed conflict not of an international character."¹⁴² Alternatively, even if Common Article 3 was judicially enforceable and applicable to this issue, Hamdan's case would still not be ripe, Justice Thomas argued, since Hamdan has not been subject to a trial by military commission or, consequently, a final judgment and sentence.¹⁴³ Justice Thomas further concluded that "[i]n any event, Hamdan's military commission complies with the requirements of Common Article 3," because it is "regularly constituted," is similar to those commissions that "have been employed throughout our history to try unlawful combatants for crimes against the law of war," and affords "all the judicial guarantees which are recognized as indispensable by civilized peoples."¹⁴⁴ Finally, referring again to the Geneva Conventions' text, Justice Thomas argued that the Third Geneva Conventions do not apply to Hamdan because, as determined by the President pursuant to his inherent authority, al Qaeda is not a "High Contracting Party" as required by the Conventions in order for a party to fall underneath its protections.¹⁴⁵

¹³⁹ *Id.* at 2842–43.

¹⁴⁰ 399 U.S. 763 (1950).

¹⁴¹ *Hamdan*, 126 S. Ct. at 2844–45 (Thomas, J., dissenting).

¹⁴² *Id.* at 2846 (quoting Common Article 3, *supra* note 33, at 3318). Justice Alito did not join this part of Justice Thomas's dissent. *Id.* at 2823.

¹⁴³ *Id.* at 2846–47. Justice Alito joined this and all subsequent parts of Justice Thomas's dissent. *Id.* at 2823.

¹⁴⁴ *Id.* at 2847–48 (quoting Common Article 3, *supra* note 33, at 3319).

¹⁴⁵ *Id.* at 2849 (Thomas, J., dissenting) (citations and quotation omitted).

10. Justice Alito's Dissent

In his brief dissent, joined by Justices Scalia and Thomas, Justice Alito explained why the military commission at issue constituted a “regularly constituted court” as required by Common Article 3, and was therefore lawfully authorized by Article 21.¹⁴⁶ According to Justice Alito, for a court to be “regularly constituted,” the tribunal must have been “appointed, set up, or established in accordance with the domestic law of the appointing country,” but need not be “similar in structure and composition to a regular military court.”¹⁴⁷ Because the military commission here was promulgated by a military order and was to be routinely used, Justice Alito concluded that the commission was, in fact, “regularly constituted.”¹⁴⁸ In addition, Justice Alito held that if the military commission could not satisfy the “uniformity” requirement of Article 36, the commission would still be “regularly constituted,” because it is the commission’s variant procedures that may be unlawful but not the tribunal itself.¹⁴⁹ Likewise, Justice Alito noted that any “procedural improprieties that might occur in particular cases” are subject to appellate review.¹⁵⁰

III. THE ROAD TO *HAMDAN*: THE “WAR ON TERROR” CASES AND DIMINISHING JUDICIAL DEFERENCE

Traditionally, the Court has deferred to the Executive on a range of issues relating to war, military and foreign affairs, and national security.¹⁵¹ Beginning in 2004, however, the Court granted writs of certiorari to hear cases concerning the Executive’s actions in Guantanamo Bay and its practice of indefinite detentions, which are among the most high-profile and contentious aspects of the global “war on terror.”¹⁵² For the most part, the Court’s decisions in these cases, culminating in *Hamdan*, effectively called into question the Executive’s authority to act free of any restraints.¹⁵³

This section of the Comment will begin by briefly setting forth the separation-of-powers principles that underscore our tripartite national government and by highlighting some moments from the

¹⁴⁶ *Id.* at 2849–50 (Alito, J., dissenting).

¹⁴⁷ *Hamdan*, 126 S. Ct. at 2851.

¹⁴⁸ *Id.* at 2852.

¹⁴⁹ *Id.* at 2852–53.

¹⁵⁰ *Id.* at 2853–54.

¹⁵¹ *See infra* Part III.A.

¹⁵² *See infra* Parts III.A–C.

¹⁵³ *See supra* notes 6, 8 and accompanying text.

Court's aforementioned deferential approach to the Executive and the government at large during times of war and crisis.¹⁵⁴ Thereafter, this section will summarize the "war on terror" cases so as to provide the recent context and precedent from which *Hamdan* has arisen.¹⁵⁵

A. *Tradition of Judicial Deference to Executive in War, Military and Foreign Affairs, and National Security*

Within the confines of our tripartite national government, each governmental branch has certain constitutionally prescribed responsibilities and obligations, and certain powers at its disposal to fulfill those responsibilities and obligations.¹⁵⁶ Each branch in turn asserts its powers as a check and balance on the other two branches to protect against the tyranny of accumulated power and to ensure that the three branches operate within their respective spheres of authority.¹⁵⁷ In the interrelated contexts of war, military and foreign affairs, and national security, however, the Judiciary has traditionally deferred to the Executive's judgments¹⁵⁸ so as to enable the Executive to efficiently and effectively fulfill its constitutional responsibilities and obligations as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States."¹⁵⁹ A number of cases and precedents speak to the self-imposed, diminished scrutiny of the Judiciary in these matters.

At the outset of the Civil War, President Lincoln unilaterally suspended the writ of habeas corpus pursuant to his executive war powers and proceeded to detain a U.S. citizen without any possibility of habeas relief.¹⁶⁰ Sitting as a circuit judge in *Ex parte Merryman*,¹⁶¹ Chief

¹⁵⁴ See *infra* Part III.A.

¹⁵⁵ See *infra* Parts III.B–D.

¹⁵⁶ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1 (2d ed. 2002). Chemerinsky writes, in relevant part:

The Constitution creates a national government and divides power among three branches. . . . The division of powers among the branches was designed to create a system of checks and balances and lessen the possibility of tyrannical rule. In general, in order for the government to act, at least two branches must agree.

Id.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 364 ("The Supreme Court often has generally remarked that challenges to the conduct of foreign policy present a nonjusticiable political question. . . . The challenges to foreign policy that are probably most likely to be deemed political questions are those directed to the constitutionality of the president's use of the war powers.").

¹⁵⁹ U.S. CONST. art. II, § 2, cl. 1.

¹⁶⁰ See WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 26–60 (1998).

Justice Taney declared the President's actions unconstitutional insofar as they exceeded the Executive's constitutional powers and encroached upon those duties of Congress.¹⁶² Nevertheless, Chief Justice Taney deferred to the Executive's strength by acknowledging the unenforceability of his holding since his judiciary powers "ha[d] been resisted by a force too strong for [him] to overcome."¹⁶³ Predictably, President Lincoln ignored Chief Justice Taney's ruling, and Congress later authorized Lincoln's unilateral suspension of habeas corpus.¹⁶⁴

The Prize Cases,¹⁶⁵ a conglomeration of Civil War-era cases, involved the condemnation of four ships that violated President Lincoln's self-initiated, congressionally unauthorized blockade.¹⁶⁶ The Court not only legitimated the President's unilateral action but essentially deemed it a necessity by proclaiming that "the President is not only authorized but bound to resist force by force."¹⁶⁷ To allow the President to effectively "resist" active hostilities and insurrections, the Court declared that it must defer to the President's "decisions and acts" and his determinations of "what degree of force the crisis demands."¹⁶⁸ Furthermore, the Court held that if the Executive violated the separation-of-powers doctrine and encroached upon Congress's authority, an ex post facto ratification of the Executive's action by Congress would "perfectly cure the defect."¹⁶⁹

As the United States entered World War I, Congress enacted the Espionage Act of 1917, which "criminalized any speech that might interfere with military recruitment and was used to suppress political dissent during" the war.¹⁷⁰ Through a series of cases, the Court upheld criminal convictions under the Espionage Act against First Amendment challenges.¹⁷¹ Affirming a conviction for defendants who printed and distributed documents that compared conscription to slavery and petitioned for a repeal of the military draft, Justice

¹⁶¹ 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

¹⁶² *Id.* at 149–50.

¹⁶³ *Id.* at 153.

¹⁶⁴ Steven R. Shapiro, *Defending Civil Liberties in the War on Terror: The Role of the Courts in the War Against Terrorism: A Preliminary Assessment*, 29 FLETCHER F. WORLD AFF. 103, 104 (2005).

¹⁶⁵ 67 U.S. 635 (1863).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 668.

¹⁶⁸ *Id.* at 670.

¹⁶⁹ *Id.* at 671.

¹⁷⁰ Shapiro, *supra* note 164, at 104; *see also* REHNQUIST, *supra* note 160, at 173.

¹⁷¹ *See* REHNQUIST, *supra* note 160, at 174, 178–82.

Holmes in *Schenck v. United States*¹⁷² wrote: “[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.”¹⁷³ Likewise, the Court sided with the government and continuously upheld the Espionage Act provisions against other defendants who published and circulated articles and pamphlets that were critical of the government, the war, and the draft law, and who attempted to incite resistance.¹⁷⁴

During World War II, the Court infamously upheld the constitutionality of Japanese-American internment in the case of *Korematsu v. United States*,¹⁷⁵ which followed on the heels of *Hirabayashi v. United States* and its vindication of governmentally imposed curfews for Japanese-Americans.¹⁷⁶ *Korematsu* arose from an Executive Order issued by President Roosevelt that preceded a general’s military order and a congressional enactment that authorized the internment.¹⁷⁷ In light of this authorization, the Court deferred to the judgment of the military and of Congress and conceded to the exigent circumstances surrounding the war as proper justification for the internment of U.S. citizens.¹⁷⁸

In *Ex parte Quirin*¹⁷⁹ and *In re Yamashita*,¹⁸⁰ the Court found permissible, pursuant to congressional authorization manifested in the Articles of War, the Executive’s use of military commissions to try en-

¹⁷² 249 U.S. 47 (1919).

¹⁷³ *Id.* at 52.

¹⁷⁴ See, e.g., *United States v. Bursleson*, 255 U.S. 407 (1921); *Abrams v. United States*, 250 U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Fromwerk v. United States*, 249 U.S. 204 (1919); see also REHNQUIST, *supra* note 160, at 178–82.

¹⁷⁵ 323 U.S. 214 (1944).

¹⁷⁶ 320 U.S. 81 (1943).

¹⁷⁷ *Korematsu*, 323 U.S. at 215–17.

¹⁷⁸ *Id.* at 218. The majority stated:

[W]e cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not be readily isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.

Id. (quoting *Hirabayashi*, 320 U.S. at 99) (internal quotations omitted).

¹⁷⁹ 317 U.S. 1 (1942).

¹⁸⁰ 327 U.S. 1 (1946).

emy combatants.¹⁸¹ In *Ex parte Quirin*, eight German-born U.S. residents were tried for entering the United States during a period of war for purposes of committing hostile acts.¹⁸² They argued that the President's use of military commissions was without statutory or constitutional backing and, in turn, was violative of their constitutional rights inherent within a civil court proceeding.¹⁸³ After holding that Congress authorized the commissions,¹⁸⁴ the Court held that, as unlawful combatants, the prisoners had been charged with a crime against the law of war,¹⁸⁵ and that the Fifth and Sixth Amendments did not extend to military commissions.¹⁸⁶ Similarly, *In re Yamashita*, and its trial by military commission of a Japanese military leader, held that a U.S. military commander properly invoked a military commission in light of a President's order and the Articles of War;¹⁸⁷ that only the political branches may determine to what extent war crimes may be prosecuted prior to a declaration of peace;¹⁸⁸ that the petitioner's alleged violation was a violation of the law of war;¹⁸⁹ and that the defendant's enemy combatant status precluded him from any of the protections of the Articles of War.¹⁹⁰

Analyzing the curtailment of civil liberties in wartime, and the aforementioned episodes in American history, Chief Justice Rehnquist recognized "the reluctance of courts to decide a case against the government on an issue of national security during a war."¹⁹¹ Through his scholarship, Chief Justice Rehnquist concluded, in part, that a court may defer to the government—or, in his words, manifest "[j]udicial reluctance"—by avoiding the adjudication of "an important constitutional question in the midst of a war,"¹⁹² or by deciding "an issue in favor of the government during a war, when it would not have done so had the decision come after the war was over."¹⁹³ These

¹⁸¹ *Id.* at 7, 20 (citing *Ex parte Quirin*, 317 U.S. at 1).

¹⁸² *Ex parte Quirin*, 317 U.S. at 20–23.

¹⁸³ *Id.* at 24.

¹⁸⁴ *Id.* at 28–29.

¹⁸⁵ *Id.* at 35–36.

¹⁸⁶ *Id.* at 40.

¹⁸⁷ *In re Yamashita*, 327 U.S. 1, 10–11 (1946).

¹⁸⁸ *Id.* at 13.

¹⁸⁹ *Id.* at 17.

¹⁹⁰ *Id.* at 19.

¹⁹¹ REHNQUIST, *supra* note 160, at 221.

¹⁹² *Id.* at 221–22. As an example of the Court's constitutional avoidance during wartime, Chief Justice Rehnquist pointed to *Hirabayashi* and the Court's narrow adjudication of the curfew requirement, thereby effectively avoiding any questions concerning the constitutionality of the relocation program. *Id.*; see also *id.* at 198.

¹⁹³ *Id.* at 222. To illustrate this point, Chief Justice Rehnquist explained:

aforementioned episodes both support Chief Justice Rehnquist's propositions and, as such, exemplify the traditional deference adopted by the Judiciary in favor of the judgments of the government—the Executive and the Legislature—during times of war and crisis, and in regard to military and foreign affairs and national security.¹⁹⁴

B. *Rasul v. Bush*¹⁹⁵

In *Rasul*, the Court determined “whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.”¹⁹⁶ The case involved two Australian citizens and twelve Kuwaiti citizens who were captured during hostilities between the United States and the Taliban, and were detained in Guantanamo Bay along with approximately 640 other non-Americans who were similarly captured.¹⁹⁷ In challenging their detentions, the Australian and Kuwaiti detainees brought separate actions seeking, among other things, to know the charges against them and to have access to counsel and to courts.¹⁹⁸

Quirin, decided during the darkest days of World War II, actually cut back on some of the extravagant dicta favorable to civil liberty in *Milligan*. Of the three Japanese internment cases, only *Endo*, decided near the end of World War II, represented even a minor victory for civil liberty. And as for *Duncan*, the good news for the people of Hawaii was that the court held that martial law there during World War II had been unlawful; the bad news was that the decision came after the war was over, and a year and a half after martial law had been ended by presidential order.

Id. at 221.

¹⁹⁴ *Id.* at 222–23. After recounting a number of these episodes in detail, Chief Justice Rehnquist observed:

In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts to some degree in favor of order—in favor of the government's ability to deal with conditions that threaten the national well-being. It simply cannot be said, therefore, that in every conflict between individual liberty and governmental authority the former should prevail. And if we feel free to criticize court decisions that curtail civil liberty, we must also feel free to look critically at decisions favorable to civil liberty.

Id.

¹⁹⁵ 542 U.S. 466 (2004).

¹⁹⁶ *Id.* at 470.

¹⁹⁷ *Id.* at 470–71.

¹⁹⁸ *Id.* at 471–72.

The majority opinion, written by Justice Stevens and joined by Justices O'Connor, Souter, Ginsburg, and Breyer, held that the federal judiciary may exercise jurisdiction to determine the legality of the Guantanamo Bay detainees' detentions.¹⁹⁹ To reach this holding, the Court first distinguished the present case from the facts of *Eisen-trager*,²⁰⁰ in which the Court refused to extend the constitutional writ of habeas corpus and its enforceability by U.S. courts to foreign enemies.²⁰¹ The Court then reasoned that the holding of *Braden v. 30th Judicial Circuit Court of Kentucky*²⁰² "overruled the statutory predicate to *Eisen-trager's* holding."²⁰³ In its place, *Braden* held that a prisoner need not be present within a district court's territorial jurisdiction in order to invoke habeas proceedings, because the federal habeas corpus statute²⁰⁴ predicates its reach over the prisoner's custodian's presence within the jurisdiction and not that of the prisoner.²⁰⁵ Furthermore, the Court found that Guantanamo Bay, by virtue of the United States' agreement with Cuba and its plenary control derived therefrom, is sovereign territory of the United States, and that federal court jurisdiction does extend there.²⁰⁶

C. *Hamdi v. Rumsfeld*²⁰⁷

The Court accepted the case of Hamdi "to consider the legality of the Government's detention of a United States citizen on United States soil as an 'enemy combatant' and to address the process that is constitutionally owed to one who seeks to challenge his classification as such."²⁰⁸ The case stemmed from the arrest and military detain-

¹⁹⁹ *Id.* at 485.

²⁰⁰ 339 U.S. 763 (1950).

²⁰¹ *Rasul*, 542 U.S. at 475–76. Written in relevant part:

Petitioners in these cases differ from the *Eisen-trager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Id. at 476.

²⁰² 410 U.S. 484 (1973).

²⁰³ *Rasul*, 542 U.S. at 479.

²⁰⁴ 28 U.S.C. § 2241 (2000).

²⁰⁵ *Rasul*, 542 U.S. at 478–79 (quoting *Braden*, 410 U.S. at 459–500).

²⁰⁶ *Id.* at 480–81.

²⁰⁷ 542 U.S. 507 (2004).

²⁰⁸ *Id.* at 509.

ment of Yaser Esam Hamdi, an American citizen born in Louisiana.²⁰⁹ As a next friend, Hamdi's father filed a habeas corpus petition, arguing that, despite his son's designation as an "enemy combatant," Hamdi should not be held indefinitely without access to counsel, without evidentiary hearings at which he could contest factual allegations, and without charges.²¹⁰

Writing for the plurality, Justice O'Connor, joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, found that "the AUMF is explicit congressional authorization," so long as the detained citizen is designated an "enemy combatant," that satisfies the requirement in 18 U.S.C. Section 4001(a) that a U.S. citizen's detention be "pursuant to an Act of Congress."²¹¹ Therefore, the Court held that the detention of a U.S. citizen designated an enemy combatant "for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."²¹²

Having established the Executive's authority to militarily detain certain U.S. citizens, the Court turned its attention to what, if any, process those citizen-detainees are entitled to in order to challenge their enemy combatant status.²¹³ Here, the Court adopted the judicial-balancing test of *Mathews v. Eldridge*,²¹⁴ in which a due process conflict is settled by weighing "the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process."²¹⁵ After balancing the competing interests, the Court held that a citizen-detainee challenging his enemy combatant status must receive notice of the factual basis for his classification and be granted a fair opportunity to respond before a neutral decision-maker.²¹⁶ The Court, however, also concluded that exigent circumstances may necessitate a rebuttable presumption in favor of the government and its evidence, and that the government's hearsay evidence may be acceptable.²¹⁷

²⁰⁹ *Id.* at 510.

²¹⁰ *Id.* at 511.

²¹¹ *Id.* at 516–17 (plurality opinion) (quoting 18 U.S.C. § 4001(a) (2000)).

²¹² *Id.* at 518 (quoting AUMF, § 2, 115 Stat. at 224).

²¹³ *Hamdi*, 542 U.S. at 524 (plurality opinion).

²¹⁴ 424 U.S. 319 (1976).

²¹⁵ *Hamdi*, 542 U.S. at 529 (plurality opinion) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

²¹⁶ *Id.* at 533.

²¹⁷ *Id.* at 533–34.

To conclude, Justice O'Connor pointedly rejected the Executive's contention that "separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances."²¹⁸

Justice O'Connor went on to write:

Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. . . . [A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.²¹⁹

D. *Rumsfeld v. Padilla*²²⁰

Padilla involved the arrest and military detention of an American citizen in Chicago who was accused of plotting to detonate a "dirty bomb" and was subsequently designated an "enemy combatant."²²¹ Padilla's counsel challenged the constitutionality of Padilla's detention by filing a petition for habeas corpus.²²² The Court granted a writ of certiorari to decide if "Padilla properly file[d] his habeas petition in the Southern District of New York; and second, [whether] the President possess[ed] authority to detain Padilla militarily."²²³ Chief Justice Rehnquist, writing for a majority consisting of Justices O'Connor, Scalia, Kennedy, and Thomas, held that the respondent wrongly filed his habeas petition in New York, and that he should have filed in the United States District Court for the District of South Carolina.²²⁴ The Court reasoned that the language of the federal habeas statute and the immediate custodian rule of *Wales v. Whitney*²²⁵ require a prisoner to challenge his or her physical confinement against "the warden of the facility where the prisoner is being held."²²⁶ Likewise, federal district courts may only grant habeas relief "within their respective jurisdictions."²²⁷

²¹⁸ *Id.* at 535–36.

²¹⁹ *Id.*

²²⁰ 542 U.S. 426 (2004).

²²¹ *Id.* at 430–31.

²²² *Id.* at 432.

²²³ *Id.* at 430.

²²⁴ *Id.* at 446–47.

²²⁵ 114 U.S. 564, 574 (1885).

²²⁶ *Padilla*, 542 U.S. at 435.

²²⁷ *Id.* at 442 (quoting 28 U.S.C. § 2241(a) (2000)).

IV. *HAMDAN'S* HEIGHTENED SCRUTINY
AND A CONGRESSIONAL CALL-TO-ARMS

Irrespective of their limitations, the previous “war on terror” cases were nonetheless decided in favor of the detainees, and were largely hailed as a rebuke to the Bush administration and its expansive anti-terrorism policies.²²⁸ In accordance with these recent precedents, *Hamdan* shares in the Court’s departure from traditionally deferring to the Executive in times of war, and in regard to military and foreign affairs and national security.²²⁹ *Hamdan*, however, goes even further in scrutinizing the Executive’s actions. Specifically, it creates military commissions to try non-citizen detainees, by essentially requiring a more *specific* congressional authorization²³⁰ and by invoking international law as both applicable and enforceable to the issues at hand.²³¹ Perhaps more significant than *Hamdan*’s non-deferential approach and its enforceable application of international law are the separation-of-powers principles that these holdings invoke.²³² This part of the Comment will look closely at the Court’s non-deferential approach taken in *Hamdan*.²³³ Following that analysis will be a consideration of its implications.²³⁴

A. *Hamdan’s Heightened Scrutiny*

This Comment considers *Hamdan*’s “heightened scrutiny” to primarily refer to the Court’s inquiry into whether Congress offered specific express authorization for the Executive’s actions. In addition, the Court arguably employed “heightened scrutiny” when it applied and enforced the Geneva Conventions against the Executive. Both of these prongs are analyzed in turn.

1. Specific Congressional Authorization

The overarching reason for *Hamdan*’s repudiation of the Executive’s military commission was the Court’s determination that such commissions lack specific congressional authorization and are thus unlawful.²³⁵ In fact, on no fewer than four occasions does the Court

²²⁸ See *supra* notes 6, 153 and accompanying text.

²²⁹ See *supra* note 8 and accompanying text.

²³⁰ See *infra* Part IV.A.1.

²³¹ See *infra* Part IV.A.2.

²³² See *infra* Part IV.B.

²³³ See *infra* Part IV.A.

²³⁴ See *infra* Part IV.B.

²³⁵ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2775, 2779, 2785 (2006); see also Stephen Ellmann, *The “Rule of Law” and the Military Commission*, 51 N.Y.L. SCH. L. REV.

reference the absence of specific congressional authorization and its fatal consequences upon the military commissions.²³⁶ In light of Justice Jackson's influential analysis in *Youngstown Sheet & Tube Co. v. Sawyer* concerning the interplay between presidential powers and congressional pronouncements, the Court's inquiry into whether or not Congress approved the Executive's use of military commissions does not seem particularly unusual or revelatory.²³⁷ Such a probing inquiry, however, becomes more curious when contemplating the Judiciary's traditional deference to the Executive in matters of war, military and foreign affairs, and national security,²³⁸ and the alternative interpretations and precedents that were available to the Court. Contrary to its traditional deference, the Court adopted a more critical approach. It employed a decidedly stricter scrutiny in its precedential and statutory interpretations to determine the lawfulness of the Executive's exercise of military power in a time of active hostilities and struck down the use of military commissions under the attendant circumstances.

If the Court desired to adhere to the tradition of judicial deference, reasonable options would have permitted such an approach. Most assuredly, the Court could have relied upon *Ex parte Quirin's* holding:

By the Articles of War, and especially Article 15 [currently embodied in Article 21], Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which . . . are cogni-

761, 779–80 (2007). Explaining *Hamdan's* significance as it relates to congressional authority, Ellmann writes:

It seems fair to say that besides declaring that the President does not have a blank check, the Court is also saying that Congress needs to get back in the check-writing business before the courts will permit what otherwise appear to be breaches of human rights. The majority Justices repeatedly make clear that the absence of statutory authorization is important to their finding that the commissions are illegal, and reiterate that what is needed is "a more specific congressional authorization" or an "express statutory provision . . ."

Id. (footnote omitted).

²³⁶ See *Hamdan*, 126 S. Ct. at 2775, 2779, 2785.

²³⁷ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636–38 (1952) (Jackson, J., concurring).

²³⁸ See *supra* Part III.A.

zable by such tribunals. . . . By his Order creating the present Commission [the President] has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.²³⁹

A literal reading of *Ex parte Quirin* suggests that Supreme Court precedent supports the proposition that Article 21, in and of itself, constitutes sufficient congressional authorization for the Executive's use of military commissions.²⁴⁰ The Court seemed to acknowledge this proposition when it curtly refused to accept it.²⁴¹ In its stead, the Court recast *Ex parte Quirin*'s treatment of Article 15 as congressional preservation, not authorization, of the Executive's power to convene military commissions, which may only be activated by express congressional authorization.²⁴² Thus, it seems as if *Hamdan* overrules *Ex parte Quirin*'s characterization of Article 21 without explicitly saying so.²⁴³ After *Hamdan* and its heightened standards, the military commissions espoused in Article 21 now appear to be available to the Executive, notwithstanding exigencies, only when expressly granted to it by Congress.²⁴⁴

Further reluctance on behalf of the Court to defer to the Executive is evident in the Court's statutory interpretations. Even after casting limitations upon the Executive per Article 21, the Court could have relied on *Hamdi* and its reading of the AUMF as sufficient to trigger the Executive's use of military commissions.²⁴⁵ In *Hamdi*, the plurality opinion held that Congress's enactment of the AUMF served both to activate the President's war powers and to provide "explicit

²³⁹ *Ex parte Quirin*, 317 U.S. 1, 28 (1942).

²⁴⁰ *See id.*

²⁴¹ *See Hamdan*, 126 S. Ct. at 2774 ("We have no occasion to revisit *Quirin*'s controversial characterization of Article of War 15 as congressional authorization for military commissions."); *see also id.* at 2775 n.24 ("[I]t is noteworthy that the Court in *Ex parte Quirin* . . . looked beyond Congress's declaration of war and accompanying authorization for use of force during World War II, and relied instead on Article of War 15 to find that Congress had authorized the use of military commissions in some circumstances.").

²⁴² *Id.* at 2774.

²⁴³ *See* Samuel Estreicher & Diarmuid O' Scannlain, *The Limits of Hamdan v. Rumsfeld*, 9 GREEN BAG 353 (2006) ("*Hamdan* requires the President to try Guantanamo detainees by court-martial proceedings or seek from Congress express authorization of the use of military commissions or some express alteration of court-martial procedures.").

²⁴⁴ *See id.*

²⁴⁵ *See Hamdi v. Rumsfeld*, 542 U.S. 507, 517–18 (2004).

congressional authorization for the detention of” citizen-detainees.²⁴⁶ The plurality continued by emphasizing that the capture and detention of both lawful and unlawful combatants “is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”²⁴⁷ Therefore, the *Hamdi* plurality authorized the virtually indefinite detention of U.S. citizens, despite the absence of specific and unequivocal language within the AUMF setting forth such express congressional approval.²⁴⁸ Instead of requiring actual statutory words to mandate the detention of enemy combatants, the plurality merely implied congressional authorization from the AUMF’s phrase “necessary and appropriate force,” in connection to other relevant cases and authorities.²⁴⁹

Though detaining an alleged enemy combatant is certainly distinguishable from trying that combatant in a military commission, the *Hamdan* Court could have interpreted the AUMF as broadly as did the *Hamdi* plurality,²⁵⁰ and thus could have deemed the AUMF sufficient congressional authorization for the Executive’s use of such commissions, especially in light of *Ex parte Quirin* and *In re Yamashita*. Just as the AUMF satisfied the express congressional requirements of 18 U.S.C. Section 4001(a) in *Hamdi*,²⁵¹ the AUMF could have triggered the Executive’s congressionally reserved power of 10 UCMJ section 821 to implement military commissions. Supporting this interpretation is *Ex parte Quirin*, which stated:

An important incident to the conduct of war is the adoption of measures by the military command 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.²⁵²

The *Hamdan* Court, however, chose not to find the use of military commissions as an “incident of war” includable within Congress’s

²⁴⁶ *Id.* at 517.

²⁴⁷ *Id.* at 518 (quoting AUMF, § 2, 115 Stat. at 224).

²⁴⁸ *See id.*

²⁴⁹ *See id.* (quoting AUMF, § 2, 115 Stat. at 224).

²⁵⁰ *See supra* notes 211–12 and accompanying text.

²⁵¹ *See Hamdi*, 542 U.S. at 517–18.

²⁵² *Ex parte Quirin*, 317 U.S. 1, 28–29 (1942) (emphasis added); *see also Hamdi*, 542 U.S. at 518 (“The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’”) (quoting *Ex parte Quirin*, 317 U.S. at 28) (emphasis added).

conferral of “necessary and appropriate force” to the Executive.²⁵³ Instead, the Court held that “there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of UCMJ.”²⁵⁴ Again, the Court sought and did not find a definitive congressional intent sufficient to condone the Executive’s action.

Similarly, the Court interpreted the DTA narrowly and, despite its adoption by Congress after the Executive’s creation of the military commissions, found that the statute “contains no language authorizing that tribunal or any other at Guantanamo Bay.”²⁵⁵ The Court conceded that the DTA “recognize[s] the existence of Guantanamo Bay commissions in the weakest sense, . . . because it references some of the military orders governing them and creates limited judicial review of their final decision[s].”²⁵⁶ The Court, however, also found that the statute reserved judgment on whether U.S. law applies to the commissions and whether their standards and procedures are lawful.²⁵⁷ A less deferential Court could have broadly construed Congress’s adoption of the DTA as impliedly authorizing, if not acquiescing to, the Executive’s use of military commissions, especially since the DTA was debated and enacted in light of the commissions’ creation.²⁵⁸ This Court, however, carefully scrutinized the DTA as it did the UCMJ and the AUMF in requiring that Congress specifically and expressly authorize the use of military commissions before the Executive may lawfully implement such an adjudicatory system.²⁵⁹

This heightened scrutiny through which the Court gleaned congressional consent deviates from the traditional deference the Judiciary associates with executive action in matters of war, military and foreign affairs, and national security.²⁶⁰ The explicit and implicit

²⁵³ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2775 (2006).

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* (quotations omitted).

²⁵⁷ *Id.*

²⁵⁸ *See id.* at 2810–11 (Scalia, J., dissenting).

²⁵⁹ *Hamdan*, 126 S. Ct. at 2775. In relevant part:

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

Id.

²⁶⁰ *See supra* Part III.A.

ramifications of this stricter approach will be discussed later in this Comment.²⁶¹

2. Application and Enforceability of the Geneva Conventions and International Law

Having struck down the Executive's military commissions for their lack of specific congressional authorization and their failure to comply with the UCMJ, the Court had an ample opportunity to avoid the issue of the Geneva Conventions' applicability and enforceability in the context of Guantanamo Bay detentions.²⁶² The Court had previously postponed a similar deliberation in *Hamdi*.²⁶³ By requiring "uniformity" between the UCMJ's courts-martial and any proposed military commissions, the Court already established strong standards and procedural protections for Hamdan and other detainees in the event that the Executive attempted to resurrect commissions.²⁶⁴ As such, an extension of Geneva protections was not entirely necessary to insulate Hamdan and other detainees from procedural abuses or adjudicatory insufficiencies.²⁶⁵ Nevertheless, the Court again evaded judicial deference and averred limitations upon the Executive's unilateral exercise of power by applying and enforcing the Geneva Conventions to the Guantanamo Bay detainees.²⁶⁶ The Court held that the Geneva Conventions were part of the law of war, and were thus incorporated and mandated into U.S. military affairs via Article 21.²⁶⁷

In so doing, the Court reversed the deferential approach of the D.C. Circuit.²⁶⁸ The D.C. Circuit's refusal to impose Geneva provisions upon the Executive's military commissions was grounded in a footnote in *Johnson v. Eisentrager* and the notion that the Geneva Conventions are beyond judicial enforceability and may only be enforced by "political and military authorities."²⁶⁹ That decision by the D.C.

²⁶¹ See *infra* Part IV.C.

²⁶² For analogy to the Court's traditional deference, see notes 191–94 and accompanying text.

²⁶³ *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 n.2 (2004) ("Because we hold that Hamdi is constitutionally entitled to the process described above, we need not address at this time whether any treaty guarantees him similar access to a tribunal for a determination of his status.").

²⁶⁴ *Hamdan*, 126 S. Ct. at 2791–93.

²⁶⁵ See *id.*

²⁶⁶ *Id.* at 2793–94.

²⁶⁷ *Id.* at 2794.

²⁶⁸ *Id.*

²⁶⁹ *Id.* (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950)). Recalling the D.C. Circuit's reasoning in *Hamdan*:

Circuit, to which Chief Justice Roberts concurred as a D.C. Circuit judge, provided a viable alternative for a deferential court that sought to restrict its review of the Executive's execution of a "war on terror."²⁷⁰ This Court, however, had no such desire.²⁷¹ Instead, the Court held that, at the very least, Common Article 3 of the Geneva Conventions protects Hamdan and the detainees and guarantees them hearings before a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."²⁷²

In setting forth what "judicial guarantees . . . are recognized as indispensable by civilized peoples," a plurality of the Court accepted the safeguards enumerated in Article 75 of Protocol I ("Article 75") to the 1949 Geneva Conventions along with the International Covenant on Civil and Political Rights.²⁷³ Even Justice Kennedy, who concurred in the majority's opinion, questioned the Court's citation to Article 75, thereby suggesting that the majority's opinion was unnecessarily expansive.²⁷⁴ Both Justice Stevens and Justice Kennedy noted that Article 75 was not expressly ratified by Congress, yet Justice Stevens adopted it as an acceptable and enforceable standard in his opinion for the Court.²⁷⁵

In the end, the Court's enforceable application of the Geneva Conventions further affirms the Court's retreat from judicial deference to the Executive in war, military and foreign affairs, and national security. That the Court even relied upon other international legal provisions beyond Common Article 3 shows the degree to which the Court willingly departed from the Executive's unilateral expectations.

We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, 47 Stat. 2021, concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.

Id. at 2794 (quoting *Johnson*, 339 U.S. at 789).

²⁷⁰ See *Hamdan*, 126 S. Ct. at 2842-49 (Thomas, J., dissenting).

²⁷¹ *Id.* at 2796 (majority opinion).

²⁷² *Id.* (quoting Common Article 3, *supra* note 33, at 3320).

²⁷³ *Id.* at 2797, 2797 n.66 (plurality opinion).

²⁷⁴ *Id.* at 2809 (Kennedy, J., concurring).

²⁷⁵ *Id.* at 2797 (plurality opinion).

B. *Pulling Congress into the Fray*

Underneath the substantive and procedural implications of the “war on terror” decisions, the Court has, both expressly and impliedly, invited separation-of-powers principles into the “war on terror.” *Rasul* was an assertion of judicial prerogative, albeit only procedurally, by extending federal judicial review into the detentions, and thus into the Executive’s actions, at Guantanamo Bay.²⁷⁶ *Hamdi* spoke with broad and vibrant language about the Court’s active role in adjudicating the Executive’s actions.²⁷⁷ Now, *Hamdan*’s contribution to the twenty-first century conception of the American tripartite government may be its resounding call to Congress—its invocation of congressional action and responsibility in a time of war and crisis by positioning the Legislature between the Executive and the Judiciary so as to resolve significant disputes.²⁷⁸

Some scholars note Congress’s persistent inertia and passivity in regard to issues of national security and worried about the abundance of power defaulting unto the Executive.²⁷⁹ Others plead for Congress to re-engage itself with America’s post-September 11 condition and to clarify the legal framework that seems conflicted by the Executive’s unilateral actions in an amorphous global climate.²⁸⁰

²⁷⁶ See *supra* Part III.B.

²⁷⁷ 542 U.S. 507, 535–36 (2004).

²⁷⁸ See Ellmann, *supra* note 235, at 780 (“[I]n *Hamdan*, the Supreme Court has applied the ultimate enforcement weapon—it has barred particular Executive action at least so long as Congress fails to affirmatively endorse it.”).

²⁷⁹ See, e.g., Neal Devins, *Congress, Civil Liberties, and the War on Terrorism*, 11 WM. & MARY BILL RTS. J. 1139, 1145–46 (2003). Professor Devins writes, in relevant part: Against the backdrop of Congress’s declining role in war-making and the diminished status of civil liberties during wartime, it is little wonder that (1) the Bush administration has been the moving force in initiating war on terror-related limitations on civil liberties, (2) Congress has largely facilitated presidential dominion of the war on terror by approving most provisions of legislation introduced by the White House and generally standing on the sidelines when the President claimed that the Constitution or existing law supported one or another initiative, and (3) the public has backed most war-time limitations on civil liberties (especially those of noncitizens).

Id.

²⁸⁰ See, e.g., Jack N. Rakove, *The Constitution in Crisis Times*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 11, 19–20 (2003) (arguing that Congress has a constitutional role to play in our nation’s foreign affairs and national security). Professor Rakove writes, in relevant part:

Rather than rely on a broad and indefinite notion of inherent executive power, mystically compressed in the first sentence of Article II, constitutionalists today, as then, would want Congress to assert its responsibility as well as its power over an array of national security issues. . . . If [military commissions are] the most appropriate way to deal with

Perhaps most notably, John Hart Ely, years before the tragedies of September 11, advocated for a judicial review that would rein in the Executive's unilateral initiation of a war by declaring it unconstitutional in the absence of congressional authorization.²⁸¹ In turn, Ely posited, the Judiciary would "remand" the issue to Congress, thereby forcing the Legislature to discharge its constitutional duties.²⁸² Essentially, the Court's decision agrees with these assertions, and thus serves as a formal invitation for Congress to enter the fray.

A reasonable, if not necessary, inference deriving from *Hamdan's* unrelenting heightened scrutiny is that the Court intended to implicate Congress into legitimizing or condemning the Executive's military commissions by requiring Congress to clarify its intent with precise language henceforth.²⁸³ This contention is more evident when juxtaposing *Hamdan* and *Hamdi*. Contrary to *Hamdi*, the Court in *Hamdan* required specific congressional authorization to enable the Executive to achieve its goals,²⁸⁴ even in light of precedent favorable to the Executive's position.²⁸⁵ Likewise, the *Hamdan* Court, unlike *Hamdi*, would not accept anything less than express and unequivocal congressional authorization in allowing a recent piece of legislation to satisfy the provisions of a federal statute.²⁸⁶ Such distinctions not only serve to differentiate *Hamdan* and *Hamdi's* plurality opinion, but also illustrate the similarities between *Hamdan* and *Hamdi's* dissents. Notwithstanding their specific concerns for citizen-detainees, the *Hamdi* dissents are precursors to *Hamdan's* heightened scrutiny and its mandate for congressional clarity.

Justice Scalia, joined by Justice Stevens, argued adamantly that the detention of a U.S. citizen without the possibility of habeas cor-

the unusual prisoners, such a struggle will produce, so be it. But let the sanctioning of this departure from conventional legal norms enjoy a higher measure of legality than past precedent and presidential fiat can provide.

. . . Congress should step up to the plate, recognizing that the protection of the national security is no less its duty and responsibility than it is that of the president.

Id.

²⁸¹ JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 54 (1993) [ELY, *WAR AND RESPONSIBILITY*].

²⁸² *See id.*

²⁸³ Ellmann, *supra* note 235, at 780 (By requiring "more specific congressional authorization . . . [the Court] is also trying to impel Congress to take a responsibility that Congress itself had not, at least not specifically, chosen to meet.").

²⁸⁴ *See supra* Part IV.A.1.

²⁸⁵ *See supra* Part II.C.9. (discussing Justice Thomas's *Hamdan* dissent); *see also supra* notes 239–44 and accompanying text.

²⁸⁶ *See supra* Part IV.A.1.

pus requires specific congressional authorization in the form of a constitutional suspension of the writ.²⁸⁷ Alternatively, Justice Scalia contended that the AUMF does not provide congressional consent with requisite specificity to justify a U.S. citizen's detention.²⁸⁸

Likewise, Justice Souter, joined by Justice Ginsburg, dissented from the plurality's decision by requiring clear and unequivocal congressional authorization to satisfy 18 U.S.C. § 4001(a), thereby warranting the indefinite detainment of a U.S. citizen, and that such authorization is lacking when the Executive's only "factual justification . . . is a war on terrorism."²⁸⁹ Pointing to his third reason for necessitating specific congressional authorization, Justice Souter reiterated the logic of a tripartite government during times of war:

The defining character of American constitutional government is its constant tension between security and liberty, serving both by partial helpings of each. In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises.²⁹⁰

Justice Souter thereby justified the need for "a clear statement of [congressional] authorization" when stating: "[a] reasonable balance is more likely to be reached on the judgment of a different branch . . . Hence the need for an assessment by Congress before citizens are subject to lockup, and likewise the need for a clearly expressed congressional resolution of the competing claims."²⁹¹

²⁸⁷ Hamdi v. Rumsfeld, 542 U.S. 507, 573 (2004) (Scalia, J., dissenting).

²⁸⁸ *Id.* Justice Scalia writes, in relevant part:

Contrary to the plurality's view, I do not think this statute even authorizes detention of a citizen with the clarity necessary to satisfy the interpretive canon that statutes should be construed so as to avoid grave constitutional concerns[;] . . . with the clarity necessary to comport with [Supreme Court precedent]; or with the clarity necessary to overcome the statutory prescription [of 18 U.S.C. § 4001(a)].

Id. at 574 (citations omitted).

²⁸⁹ *Id.* at 542–45 (Souter, J., dissenting).

²⁹⁰ *Id.* at 545.

²⁹¹ *Id.*

The commonality shared by these four justices through these two dissents is that, under the attendant circumstances, the Executive's actions are unilateral and unlawful unless Congress, in one manner or another, authorizes those actions with definitive, unambiguous consent. This requirement was not relegated to a dissenting opinion in *Hamdan* but, rather, is the implicit bedrock of the majority's opinion.²⁹² Therefore, the Court's message rings clearly in its holding: If the Executive wants military commissions, the Executive must convince Congress and receive the unequivocal endorsement of a second branch of the American tripartite government.

In case these implications remained cryptically buried or misconstrued within the majority opinion, *Hamdan's* concurrences expressly invite Congress to assert itself in the matter of Guantanamo Bay and its role within the tripartite national government.²⁹³ Justice Breyer, joined by Justices Kennedy, Souter, and Ginsburg, dedicated the entirety of his short concurring opinion to the importance of such:

The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a "blank check." . . . Nothing prevents the President from *returning to Congress to seek the authority he believes necessary*.

Where, as here, no emergency prevents consultation with Congress, *judicial insistence upon that consultation* does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.²⁹⁴

C. *Justifications for Hamdan's Congressional Invocation*

As radical as *Hamdan* may seem to its critics, the Court's decision is a moderate, albeit vigorous and important, assertion entirely grounded within the classic separation-of-powers principles that inform our tripartite national government. Though the Court adamantly struck down the Executive's military commissions, it refrained from the sort of decision-making that is often characterized as "judicial activism."²⁹⁵ Instead, the Court expressly and impliedly shifted

²⁹² See *supra* Part II.C.3.

²⁹³ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2799 (Breyer, J., concurring).

²⁹⁴ *Id.* (citation omitted) (emphasis added).

²⁹⁵ "A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu[ally] with the suggestion that adherents of this philosophy tend to find constitutional vio-

the ultimate fate of those commissions to Congress.²⁹⁶ In so doing, the Court not only sustained its involvement in contemporary affairs,²⁹⁷ but it also firmly implanted Congress onto the battlefields of the “war on terror.”²⁹⁸ Whatever may be the wisdom of the legislative response to *Hamdan*, the Court rightfully forced Congress to respond and to be proactive, or—at the very least—forced Congress to take a definitive and unequivocal stand on the issue of military commissions and their entailments.²⁹⁹ Justifications for the Court’s non-deferential approach and its insistence upon congressional action are rooted in Congress’s unique role and capabilities within the American government and the unusual circumstances that comprise the “war on terror.”³⁰⁰

Of course, in justifying the Court’s heightened scrutiny and its congressional invocation, it bears repeating that this Comment assumes the veracity of an underlying premise. That premise, as mentioned by Justice Souter, is that the Executive is ill-equipped in striking a reasonable balance between national security and individual liberties.³⁰¹ Hence, the Executive’s scope of power must be confined within reason, and while the Judiciary can prevent the Executive from unilaterally overextending, the Legislature is ultimately the proper branch to define those limitations.³⁰² Because the Executive’s actions must be held in check and Congress had taken no authoritative stance, the Court was right to uncharacteristically intrude upon the Executive’s actions in *Hamdan*, as the Court has done generally in the “war on terror” cases.³⁰³ The Court’s reasoning in *Hamdan* is justifiable because it implicates Congress into a more active role.³⁰⁴

1. Congress’s Constitutional Role

Hamdan’s decision and its call-to-arms to Congress are justified, first and foremost, by the Constitution and its prescribed role to Congress in matters of war, military and foreign affairs, and national security. The Constitution specifically mandates a number of such

lations and are willing to ignore precedent.” BLACK’S LAW DICTIONARY 862 (8th ed. 2004).

²⁹⁶ See *supra* Part IV.B.

²⁹⁷ See *infra* Part V.A.

²⁹⁸ See *supra* Part IV.B.

²⁹⁹ See *supra* Part IV.B.

³⁰⁰ See *infra* Parts IV.C.1–3.

³⁰¹ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 545 (2004) (Souter, J., dissenting).

³⁰² See *infra* Parts IV.C.1–3.

³⁰³ See *supra* Parts III.B–D.

³⁰⁴ See *infra* Parts IV.C.1–3.

obligations and responsibilities into the hands of Congress, including the enumerated powers to “provide for the common Defence and general Welfare of the United States,”³⁰⁵ to create and punish international crimes and “Offenses against the Law of Nations,”³⁰⁶ to declare war and promulgate laws regarding capture,³⁰⁷ to create and maintain armies and a navy,³⁰⁸ to promulgate laws for the government and the armed forces,³⁰⁹ and to call forth state militias and to govern them into action.³¹⁰ By delegating a number of these awesome—and potentially devastating—powers to Congress, the Constitution bifurcates the initiation and execution of war and other military operations between two branches, thereby minimizing the possibilities for misuse or abuse.³¹¹ Therefore, the Court’s heightened scrutiny and its exhortation for congressional action is vindicated through the Constitution’s design.

2. Institutional Competence and the “War on Terror”

For matters steeped in policy and opposing views, Congress, on account of its institutional competence, has superior decision-making capabilities in comparison to the Judiciary.³¹² In other words, when deliberating an issue, Congress, unlike the Judiciary, may regularly hold hearings and engage in adversarial debates; entertain the testimony of experts, practitioners, and other luminaries within respective fields; and sanction and publish reports, among other things.³¹³ Re-

³⁰⁵ U.S. CONST. art. I, § 8, cl. 1.

³⁰⁶ *Id.* art. I, § 8, cl. 10.

³⁰⁷ *Id.* art. I, § 8, cl. 11.

³⁰⁸ *Id.* art. I, § 8, cls. 12, 13.

³⁰⁹ *Id.* art. I, § 8, cl. 14.

³¹⁰ *Id.* art. I, § 8, cls. 15, 16.

³¹¹ See Louis Fisher, *Point/Counterpoint: Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637, 1637 (2000) (“With studied care and deliberation, the Framers of the Constitution created a structure to prevent presidential wars. . . . Making fundamental judgments about representative government, popular control, and human nature, they placed the power of war and peace with the legislative branch and divided foreign policy between the President and Congress.”); *id.* at 1645 (“The Framers deliberately divided government by making the President the commander-in-chief and reserving to Congress the power to finance military expeditions. The Framers rejected a government in which a single branch could both make war and fund it.”).

³¹² See, e.g., *Patsy v. Bd. of Regents*, 457 U.S. 496, 513 (1982) (“[R]elevant policy considerations do not invariably point in one direction, and there is vehement disagreement over the validity of the assumptions underlying many of them. The very difficulty of these policy considerations, and Congress’s superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable.”).

³¹³ See, e.g., John Yoo, *Enemy Combatants and the Problem of Judicial Competence*, in *TERRORISM, THE LAWS OF WAR AND THE CONSTITUTION: DEBATING THE ENEMY*

quiring specific congressional authorization, and refusing to interpretatively imply legislative consent where it may or may not exist, is one manner in which the Court both respects Congress's institutional competence and also ensures that no lone branch is overreaching its authority without the blessings of another.³¹⁴ *Hamdan's* refusal to defer to the Executive, its unclear statutory support for military commissions, and solicitation for further congressional action, are justified by Congress's institutional competence, and especially its practical relevance as it relates to the "war on terror" and the nature of terrorism in general.

The so-called "war on terror," and its ongoing hostilities between the U.S. Armed Forces and terrorist organizations and individuals, is at best a vague and nebulous encapsulation of the unique present-day armed conflicts in which the United States is engaged. Its indefinite and ill-defined features are in stark contrast to those of traditional warfare.³¹⁵ Justice Souter alluded abstractly to this distinction between terrorism and traditional armed conflict when he wrote: "In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or *war (or some condition in between)* is not well entrusted to the Executive branch of Government"³¹⁶

The differences between combating terrorism and recognizable enemies in traditional warfare are significant. For example, the "war on terror" will likely endure for an indefinite duration because, unlike traditional warfare that is predicated upon battles between nations and in accordance to the law of war and certain historical expectations,³¹⁷ terrorism continuously thrives from often indistinguish-

COMBATANT CASES 69, 91 (Peter Berkowitz ed., 2005) [hereinafter Yoo, *Enemy Combatants*] ("Congress can collect information itself or acquire it from the executive branch or outside groups via relatively inexpensive hearings. Courts, however, cannot proactively collect information on a question before them.").

³¹⁴ See *supra* Part IV.B.

³¹⁵ *Rasul v. Bush*, 215 F. Supp. 2d 55, 68 n.13 (D.D.C. 2002) ("The United States confronts an untraditional war that presents unique challenges in identifying a nebulous enemy. In earlier times when the United States was at war, discerning 'the enemy' was far easier than today.").

³¹⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507, 545 (2004) (Souter, J., dissenting) (emphasis added).

³¹⁷ Rakove, *supra* note 280, at 11. Rakove writes, in relevant part:

War, as conventionally understood, involves either conflicts between nation states, or between insurgencies aspiring to become nation states and the existing politics that dominate them. Such conflicts have finite beginnings and endings, through the surrender or dispersal of one side's armed forces, the occupation of its territory, the collapse of its governing institutions, or the negotiation of a peace.

able or unrecognizable transnational collectives inspired to violence by any number of social, economic, religious, or political indignities.³¹⁸ Because terrorists are often decentralized and have no allegiance to any nationalistic entities, terrorism itself offers little opportunity for finite endings, whether through truce, compromise, or absolute domination and surrender of the enemy.³¹⁹ Likewise, terrorism presents both a domestic and an international threat.³²⁰ Terrorists may be foreign fighters rampaging on the battlefields of Iraq and Afghanistan, or they may be U.S. citizens infiltrating and wreaking havoc upon the American homeland.³²¹

As a whole, the peculiarities of terrorism render Congress the most appropriate branch to effectuate a response and to govern the Executive's actions. Congress's institutional competence enables it to more thoroughly evaluate and weigh the competing, multi-faceted concerns and ramifications of terrorism, and to articulate a comprehensive course of action. Upon its choosing, Congress has the means to return to an issue again and again if it finds circumstances necessitate an altered approach. Certainly, the unprecedented and unpredictable nature of terrorism may be such a circumstance.

On the contrary, the Judiciary is not a policy-making body but is the arbiter of laws.³²² Consequently, the Judiciary's review of terrorism cases depends upon the particularities of facts and the wisdom

Id.

³¹⁸ *Id.* Again, in relevant part:

Terrorism on a massive scale has become, in effect, a condition that arguably will persist as far as we can see. This condition rests upon the capacity of a small number of ideologically committed individuals to exploit the horrifying wonders of technology in order to threaten the security of modern society. . . . [I]t depends solely upon the probability that small bands of fanatics could always wreak havoc on open societies that can never adequately defend their multiple points of vulnerability.

Id.

³¹⁹ *Id.* at 12. ("Terrorism's shadowy nature enables its agents to lie dormant and undetected for prolonged periods. Terrorism lacks a home territory to protect, organized armed forces to disperse, and political authority to dislodge. . . . One negotiates with enemies, but rarely, if ever, with terrorists.").

³²⁰ See Yoo, *Enemy Combatants*, *supra* note 313, at 72 ("In previous modern American conflicts, hostilities were limited to a foreign battlefield, while the U.S. home front remained safe behind the distances of two oceans. In this conflict, however, the battlefield can occur anywhere, and there can be no strict division between the front and home.").

³²¹ See *id.*

³²² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each." *Id.*

and constraints of judicial precedent.³²³ By nature, courts are more restricted in their opportunities and capabilities to examine terrorism and its manifestations,³²⁴ and as a result judicial decisions may have unintended or tragic effects unless Congress intercedes.

For instance, the *Hamdi* Court acknowledged the plaintiff's concerns about potentially indefinite detention.³²⁵ Relying on "long-standing law-of-war principles," Justice O'Connor explained that Hamdi's detention could only endure "for the duration of the relevant conflict," specifically the active hostilities in Afghanistan.³²⁶ Justice O'Connor, however, qualified that conclusion by stating: "If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date."³²⁷ This flexible approach, while commendable, arguably reaches a wrong conclusion. The "practical circumstances" of the "war on terror" do seem unlike previous conflicts.³²⁸ For those reasons, the hostilities in Afghanistan will conceivably endure until terrorists and insurgents—Taliban, al Qaeda, and others—no longer roam the country, or arguably the Middle East.³²⁹ In other words, the "relevant conflict" in Afghanistan could persist for far longer than

³²³ John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 809 (2004) [Yoo, *War, Responsibility*] ("[C]ourts work best at interpreting formal sources of law and applying the law to facts that are easily gathered and understood in the context of a bipolar dispute. They do less well the more a dispute becomes polycentric, in that it involves more actors, more sources of law, and complicated social, economic, and political relationships."); see also Yoo, *Enemy Combtants*, *supra* note 313, at 99. In describing the Judiciary's deficiencies in handling foreign affairs and national security, Yoo writes:

[The Judiciary's] evenhandedness and passivity create problems in gathering and processing information effectively and in coordinating its policies with other national actors. Its procedural fairness and geographic decentralization prevent it from acting swiftly in a unified fashion, and it lacks effective tools for the rapid assimilation of feedback and the correction of errors.

Id.

³²⁴ Yoo, *War, Responsibility*, *supra* note 323, at 809.

³²⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507, 519–20 (2004) (plurality opinion).

³²⁶ *Id.* at 521.

³²⁷ *Id.*

³²⁸ See *supra* notes 317–21 and accompanying text.

³²⁹ Recognizing the differences between previous conflicts and the "war on terror," Steven R. Shapiro, the National Legal Director of the American Civil Liberties Union, acknowledged "the need for closer judicial and political scrutiny" on account of the belief that "[w]e do not have the luxury, therefore, of regarding any restrictions on liberty as temporary expedients, like wartime rationing. Instead, such restrictions must be regarded as potentially permanent transformations in America's constitutional value system." Shapiro, *supra* note 164, at 116.

any other U.S. armed conflict in history, and in the meantime, detainees like Hamdi could remain captive.³³⁰

This scenario alone serves to highlight the ongoing need for congressional intervention to help define the parameters of the “war on terror.” Whereas the Court is confined to specific, isolated circumstances as in *Hamdi* and *Hamdan*, Congress can repeatedly evaluate the amorphous nature of terrorism and the U.S. response in broader swaths.³³¹ Therefore, Congress’s overview and its unique institutional competence, when coupled with its constitutional authority, render Congress the more capable decision-maker to evaluate the “war on terror” and to provide clarity and balance to the Executive’s programs.

3. Transparency

Finally, Congress’s special relationship to the American people also justifies the Court’s decision to rely on, if not force, congressional intervention in matters of Guantanamo Bay and terrorism. Legislators must often answer directly to their constituents and the public at large, and are thus accountable to the nation’s citizenry in a way the Judiciary is not.³³² As such, legislators’ actions are informed and tempered, to some extent, by citizens’ concerns.³³³ In this sense, along with the Executive and the Judiciary, the American people also serve as a check and balance on the Legislature.³³⁴ Justice Scalia likely had this in mind when he wrote in his *Hamdi* dissent: “If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this Court.”³³⁵ Justice Scalia’s dissent, in essence, begs for the transparency of decision-making that accompanies a representative democracy.³³⁶

³³⁰ *See id.*

³³¹ *See supra* note 313 and accompanying note text.

³³² *See* ELY, WAR AND RESPONSIBILITY, *supra* note 281, at 4.

³³³ *See id.* (“Given the way the burdens of war get distributed, it was felt that the people’s representatives should have a say. It was felt further that the involvement of ‘the people’s representatives’ would increase the participation of the people themselves in the debate.”) (parentheses omitted).

³³⁴ *See id.*

³³⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507, 578 (2004) (Scalia, J., dissenting).

³³⁶ *See id.*

V. SIGNING OVER THE “BLANK CHECK”:
CONGRESS’S RESPONSE TO *HAMDAN*

Shortly after the Court concluded its 2005–2006 term with the *Hamdan* decision, Congress heeded the Court’s insistence for congressional action and adopted the Military Commissions Act of 2006 (“Act”).³³⁷ Initial reactions to the Act suggest that Congress handed to the Executive virtually all powers that the Executive originally asserted and subsequently sought.³³⁸ Particularly interesting and relevant to this Comment, and the separation-of-powers doctrine in general, were the Act’s jurisdiction-stripping provisions³³⁹ and its interpretational discretion assigned to the President.³⁴⁰ This brief

³³⁷ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

³³⁸ For instance, soon after the bill was passed by Congress and was awaiting President Bush’s approval, a *New York Times* news analysis characterized the pending Act as follows:

Rather than reining in the formidable presidential powers Mr. Bush and Vice President Dick Cheney have asserted since Sept. 11, 2001, the law gives some of those powers a solid statutory foundation. . . . Taken as a whole, the law will give the president more power over terrorism suspects than he had before the Supreme Court decision this summer in *Hamdan v. Rumsfeld*

Scott Shane & Adam Liptak, *Shifting Power to a President: Bill Creates Legal Basis for Policy on Detainees*, N.Y. TIMES, Sept. 30, 2006, at A1.

³³⁹ Military Commissions Act § 7. Altering the DTA, the Military Commissions Act reads, in pertinent part:

(e) (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) [N]o court, justice, or judge shall have the jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

Id.

³⁴⁰ *Id.* § 6. The Military Commissions Act reads, in pertinent part:

(a) IMPLEMENTATION OF TREATY OBLIGATIONS.—

(3) INTERPRETATION BY THE PRESIDENT.—

(A) As provided by the Constitution and by this section, the President has the authority for the United States to interpret the meaning and

part of the Comment explains that the Act and Congress's actions are injustices to the Court as it stands in the "war on terror."

A. *Respecting the Court's Self-Perceived Role*

By stripping the Court of any judicial review over Guantanamo Bay, Congress blatantly disregarded the Court's recent role and its contributions to the rule of law for all persons within the dominion of the United States. As evinced by the "war on terror" progeny of cases, the Court envisioned itself as having a vital role in determining the legality of the Executive's actions and curtailing a potential, if not actuated, abuse of power.³⁴¹

This observation is most evident in the *Rasul* decision, in which the Court empowered the Judiciary to peek into the Executive's unilateral actions in Guantanamo Bay.³⁴² In this sense, *Rasul* is the embodiment of the Court's jurisprudential view of its contemporary role.³⁴³ Thereafter, *Hamdi* was more pronounced and articulate in its insistence for judicial involvement.³⁴⁴ Upon proclaiming "a state of war is not a blank check for the President,"³⁴⁵ Justice O'Connor set forth a reminder: "Whatever the power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, *it most assuredly envisions*

application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.

(B) The President shall issue interpretations described by subparagraph (A) by Executive Order published in the Federal Register.

(C) Any Executive Order published under this paragraph shall be authoritative (except as to grave breaches of common Article 3) as a matter of United States law, in the same manner as other administrative regulations.

(D) Nothing in this section shall be construed to affect the constitutional functions and responsibilities of Congress and the judicial branch of the United States.

Id.

³⁴¹ Shapiro, *supra* note 164, at 115 ("[I]t seems increasingly clear that the courts in this country are less willing today than they have been in the past to retreat to the sidelines whenever the government raises a national security claim, regardless of its impact on individual rights. That attitude is apparent in *Hamdi* and *Rasul* . . .").

³⁴² *Id.* at 108 ("*Rasul* now stands as a strong affirmation of the judiciary's role as the ultimate safeguard against arbitrary detention, in wartime as well as peacetime, for aliens as well as citizens.>").

³⁴³ *See id.*

³⁴⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507, 535–36 (2004).

³⁴⁵ *Id.* at 536.

a role for all three branches when individual liberties are at stake.”³⁴⁶ Finally, in *Hamdan*, the Court, reprising its *Rasul* approach, narrowly interpreted a potentially jurisdiction-stripping DTA, meanwhile sidestepping precedential obstacles, as to enable the Court to adjudicate the legality of the Executive’s unilateral actions, i.e., military commissions.³⁴⁷

Given the tradition of judicial deference,³⁴⁸ the Court could have reasonably foreclosed its review of matters relating to Guantanamo Bay and the “war on terror.”³⁴⁹ In this unorthodox moment of history, however, the Court rightfully perceived itself as a necessary participant in balancing the powers of the tripartite national government and guaranteeing an adequate application of law.³⁵⁰ Congress’s response to the Court’s solicitation for congressional action in *Hamdan*, effectively stymieing judicial involvement, is disrespectful toward the Court’s self-perceived role in contemporary affairs.³⁵¹ Whereas Congress could have simply legitimized the Executive’s actions and left any remaining questions determinable by the Judiciary, Congress effectively stilted the separation-of-powers principles by essentially eliminating one branch of government, against the better judgment exercised by that very branch.³⁵²

B. *The Court as Protector of Individual Rights*

Though the Court’s self-perception, in and of itself, warrants at least some congressional acknowledgement, other considerations cast doubt upon the wisdom of the Military Commissions Act. Most notably, the Court’s “war on terror” decisions have, in essence, positioned the Court as a protector of individual rights and, in turn, as a polarizing opponent to the Executive’s unilateral actions.³⁵³ These practical

³⁴⁶ *Id.* (emphasis added). The plurality opinion then cited to *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (“[I]t was the ‘central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.’”).

³⁴⁷ See *supra* Part II.B.1.; see also notes 255–59 and accompanying text.

³⁴⁸ See *supra* Part III.A.

³⁴⁹ See, e.g., *supra* Part IV.A.1.

³⁵⁰ See *supra* note 290 and accompanying text.

³⁵¹ See Shane & Liptak, *supra* note 338, at A11 (“Over all, the [Military Commissions Act] reallocates power among the three branches of government, taking authority away from the judiciary and handing it to the president.”). In the same article, Professor Bruce Ackerman warned: “If Congress can strip courts of jurisdiction over cases because it fears their outcome, judicial independence is threatened.” *Id.*

³⁵² See *id.*

³⁵³ Ellmann, *supra* note 235, at 788. For example, Ellmann writes:

effects of the Court's recent jurisprudence justify a congressional embrace of the Court's persistent role for purposes of guaranteeing liberty to all persons and for ensuring informed legislative involvement.³⁵⁴

John Hart Ely expounded an analogous theory of the Court's assumed role.³⁵⁵ Relying upon the famous *Carolene Products Co.* footnote,³⁵⁶ Ely set forth the vision of a "participation-oriented, representative-reinforcing approach to judicial review"³⁵⁷ that would see the Judiciary intervene and constitutionally adjudicate in an effort to rectify any procedural "malfunction" within our representative democracy.³⁵⁸ Ely concluded that this judicial review would seek to correct the procedural and participatory shortcomings in our government's decision-making—and not the substantive decisions themselves—that burden minorities.³⁵⁹

It is hard not to think that in turning to the principles of the rule of law, the Supreme Court's majority in *Hamdan* was moving towards a rights-minded use of the rules of statutory interpretation, and doing so out of a sense that in our conduct of the war against terrorism we may have lost our constitutional bearings and fallen far short of what a fundamentally decent constitutional order requires. The Court clearly hoped that Congress, pressed back into engagement, would vindicate its faith in democracy—but the case also reflects, I think, the Court's fear that of the three branches of government, perhaps it alone was then committed to adhering to the Constitution and laws in the midst of war.

Id.

³⁵⁴ *See id.*

³⁵⁵ *See* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 77 (1980) [ELY, *DEMOCRACY AND DISTRUST*].

³⁵⁶ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Footnote four reads, in relevant part: "[W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.* (citations omitted).

³⁵⁷ ELY, *DEMOCRACY AND DISTRUST*, *supra* note 355, at 87.

³⁵⁸ *See id.* at 103. Ely describes a "malfunction" as occurring when: [T]he process is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.

Id.

³⁵⁹ *Id.* at 181 ("[T]he general theory is one that bounds judicial review under the Constitution's open-ended provisions by insisting that it can appropriately concern

The Court adopted an analogous approach insofar as it values Congress's role but seeks to protect the "discrete and insular minorities" that Congress overlooks, which in this case are the Guantanamo Bay detainees.³⁶⁰ With the exception of *Padilla*, each of the Court's "war on terror" decisions were decided in favor of the detainees and, at least theoretically and notwithstanding congressional repeal, provided some rights or protections to them: *Rasul* guaranteed the detainees' right to have their habeas corpus petitions heard in federal district courts;³⁶¹ *Hamdi* ensured certain due process rights to citizen-detainees seeking to challenge an "enemy-combatant" status;³⁶² and *Hamdan* required that military commissions essentially adhere to those protections enumerated within the UCMJ and the Geneva Conventions and, in effect, provide fair and objective hearings for alleged enemy combatants.³⁶³

Again, *Hamdan* is even more startling in its protection of individual rights because it authoritatively extended the rights and protections of Common Article 3, along with other international law provisions, to the detainees.³⁶⁴ The breadth and impact of that decision is more pronounced by acknowledging that the Court already guaranteed the detainees greater protections by requiring military commissions to adopt the standards and procedures of courts-martial,³⁶⁵ and that the Court cited to specific international law provisions that are not necessarily included within U.S. jurisprudence.³⁶⁶ Especially in its reliance on international law and precedents, the *Hamdan* Court has contributed to what may be perceived as a Supreme Court trend in which the Court invokes international law or exports U.S. law abroad to protect individual rights.³⁶⁷ Beyond Guantanamo Bay, the internationalization of the Court and its concern for

itself only with questions of participation, and not with the substantive merits of the political choice under attack.").

³⁶⁰ This analogy is merely anecdotal and speaks to the observation that neither Congress nor American citizens are particularly concerned about the "enemy combatants," and their rights, locked away in Guantanamo Bay. This Comment does not intend to implicate constitutional doctrines, such as the Equal Protection Clause, in the "war on terror" cases.

³⁶¹ *Rasul v. Bush*, 542 U.S. 466, 485 (2004).

³⁶² *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

³⁶³ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2792–93 (2006).

³⁶⁴ *Id.* at 2794–95, 2797–98.

³⁶⁵ *Id.* at 2792–93.

³⁶⁶ *Id.* at 2797–98.

³⁶⁷ See Harlan Grant Cohen, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, 24 BERKELEY J. INT'L L. 273, 321 (2006).

human rights has reached issues of homosexuality,³⁶⁸ the death penalty,³⁶⁹ and violations of international legal norms.³⁷⁰

Though it has refrained from invoking constitutional principles as contemplated by Ely, the Court relied upon a number of adjudicatory and interpretational nuances to find a way to insert itself into the “war on terror” and to extend the aforementioned protections to the detainees. The Court narrowly construed congressionally enacted, jurisdiction-stripping provisions.³⁷¹ It ignored or reinterpreted precedent unfavorable to the detainees.³⁷² It read statutes in favor of the detainees’ interests.³⁷³ It implored a balancing test to weigh citizen-detainees’ constitutional rights.³⁷⁴ And, of course, most recently, the Court—to use the words of *Carolene Products*’ footnote four—asserted “a correspondingly more searching judicial inquiry”³⁷⁵ by requiring specific congressional authorization³⁷⁶ and enforcing the application of international legal standards and procedures on behalf of the detainees.³⁷⁷

All of these efforts positioned the Court as the most reliable—or, at least, the most likely—protector of individual rights for the Guantanamo Bay detainees and other persons subject to U.S. military action abroad.³⁷⁸ While it remains Congress’s prerogative to defer to

³⁶⁸ See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003).

³⁶⁹ See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

³⁷⁰ See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

³⁷¹ See, e.g., *Hamdan*, 126 S. Ct. at 2764–66 (interpreting DTA to allow Supreme Court review of military commission’s legality).

³⁷² See, e.g., *Rasul v. Bush*, 542 U.S. 466, 476–81 (2004) (holding Guantanamo Bay is part of U.S. sovereign territory, and interpreting *Johnson v. Eisentrager*, 339 U.S. 763 (1950), *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973), and *Ahrens v. Clark*, 335 U.S. 188 (1948), as allowing for federal judicial review of habeas corpus petitions in Guantanamo Bay); *Hamdan*, 126 S. Ct. at 2774, 2788–89 (interpreting *Ex parte Quirin*, 317 U.S. 1 (1942) and *In re Yamashita*, 327 U.S. 1 (1946), as unpersuasive regarding military commissions at issue); *id.* at 2776 n.27, 2783 (distinguishing Civil War precedent from current matters).

³⁷³ See, e.g., *Hamdan*, 142 S. Ct. at 2792 (holding military commissions as unlawful pursuant to Article 36 of the UCMJ); *Rasul*, 542 U.S. at 478–79 (holding federal habeas statute allows for federal judiciary review so long as petition is served within jurisdiction of petitioner’s custodian).

³⁷⁴ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 529, 533 (2004) (holding balancing test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), mandates that citizen-detainee have factual hearing in compliance to due process requirements).

³⁷⁵ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

³⁷⁶ See *supra* Part IV.A.1.

³⁷⁷ See *supra* Part IV.A.2.

³⁷⁸ Diane Marie Amann, *Guantanamo*, 42 COLUM. J. TRANSNAT’L L. 263, 266 (2004). Arguing for the Supreme Court of the United States to assert itself in matters relating

or validate the Executive's wishes, as it did pursuant to the Military Commissions Act, Congress would have been well-advised to let the Court, and the federal judiciary at large, remain an active and robust participant, and a requisite check and balance, in the "war on terror."³⁷⁹ Only mutual appreciation between the Legislature and the Judiciary—an *active* Judiciary—could ensure fairness for all human beings plagued by terrorism, including *alleged* enemy combatants, and to guarantee the protections of law everywhere, including within "lawless enclaves" and "legal black holes" such as Guantanamo Bay.³⁸⁰

VI. CONCLUSION

Following the recent precedent of *Rasul*, *Hamdi*, and *Padilla*, the Court in *Hamdan* departed from a tradition of judicial deference to the Executive in war, military and foreign affairs, and national security. In so doing, the Court reviewed the "war on terror" actions of the Executive, specifically its implementation of military commissions to try alleged enemy combatants at Guantanamo Bay, and ultimately

to the Executive's actions in Guantanamo Bay, and to invoke international law—or "external norms"—as a means to ensure fundamental human rights, Amann writes:

[*Lawrence v. Texas*, 539 U.S. 558 (2003),] is but the latest in which the Court has looked to other sources of law to assure full and fair constitutional interpretation. These external norms, not unlike many of the Court's decisions in the last half-century, accord a central position to the human person. Basic rights vest at birth and admit no derogation absent the most dire emergency. Applied to matters like Guantanamo, those foundational principles require judicial abandonment of outdated deference doctrines that work to strip loathed individuals of fundamental rights.

Id.

³⁷⁹ *Id.* at 319. Amann warns:

Far from standing as Madison's "impenetrable bulwark" against assumption of power, a court that declines [or is congressionally disallowed] to enforce the Constitution [or applicable international law] at Guantanamo helps circumvent the constitutional separation of powers that protects personal liberty. In this particular and most exceptional context, U.S. courts must choose the duty to protect over deference to the President. Searching judicial review should examine whether the executive's policy deprives individuals of basic rights and, if so, whether those deprivations are justified.

Id. (citations omitted).

³⁸⁰ *Id.* at 316. Amann writes:

Human rights abhor a vacuum; specifically, the relegation of human beings to an existence emptied of human rights protection. External norms teach that when state action touches on human rights the courts empowered to review the validity of that state's conduct—in this case, the courts of the United States—must fill the vacuum by protecting personal rights against government abuse.

Id. (citations omitted).

struck down those actions as unlawful.³⁸¹ Beyond its practical implications, the significance of *Hamdan*, as was true for *Rasul* and *Hamdi*, is the Court's assertion of a stronger separation-of-powers doctrine. By requiring specific congressional authorization, the *Hamdan* Court justifiably forced Congress to regulate terrorism, or, more appropriately, to check the Executive's handling of terrorism.

Through the Military Commissions Act, Congress significantly limited the Court's involvement in the "war on terror." Whatever may be said of the Act's legal bases, the Act's underlying policy seems misplaced. Respect for the Court's self-perceived and presumed roles in a tripartite national government and for individual rights would suggest that Congress's legislative response to *Hamdan*, irrespective of its policy decisions regarding the Executive, should include a substantial role for the federal judiciary. The Court's response to the Military Commissions Act and the future of this tripartite battle royal are beyond the scope of this Comment. The Court should continue, where possible, to finesse judicial oversight into matters relating to the "war on terror" and Guantanamo Bay.³⁸² In the "war on terror," the Court's unprecedented contributions, inasmuch as they provide another check and balance upon the other two branches and ensure adequate room within which individual liberties may breathe, are invaluable and irreplaceable.

³⁸¹ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2775, 2786, 2793 (2006).

³⁸² Illustrated by its decision to hear a constitutional challenge to the Military Commissions Act during its 2007–2008 term, the Court seemingly agrees with this proposition. See Linda Greenhouse, *Guantanamo Legal Battle Is Resuming: Rights of Detainees Will Get Third Round Before Supreme Court*, N.Y. TIMES, Sep. 2, 2007, at A14. ("In a surprising about-face the day after it concluded its term in June, the Supreme Court accepted renewed appeals on behalf of two groups of detainees and agreed to decide whether the [Military Commissions Act] is constitutional."). Reporting on this event, Greenhouse astutely observed the significance of the Court's decision to hear this pending case when she wrote: "Now, as the parties prepare for their next Supreme Court confrontation later this fall, the arguments have come full circle to where they began: over the role of the federal courts." *Id.*