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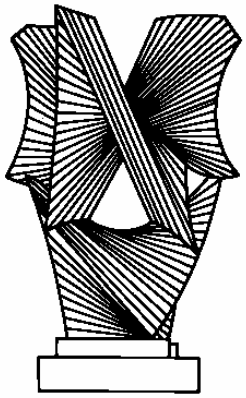

CLEAR STATEMENT PRINCIPLES AND NATIONAL SECURITY: *HAMDAN* AND BEYOND

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Abstract

In resolving conflicts between individual rights and national security, the Supreme Court has often said that Congress must unambiguously authorize presidential action; the Court has also attempted to ensure that defendants are not deprived of their liberty except pursuant to fair trials. These decisions, a form of liberty-promoting minimalism, reject claims of unilateral or exclusive presidential authority. The Court's decision in Hamdan v. Rumsfeld reflects a distinctive clear statement principle, one that bans the President from convening a military commission, or otherwise departing from the standard adjudicative forms, unless Congress explicitly authorizes him to do so. The Court's conclusion diverges sharply from a plausible alternative view, which is that in view of the President's role as Commander-in-Chief, he should be permitted to construe ambiguous enactments as he see fits. The Court's approach has implications for numerous other problems involved in the war on terror. Most generally, it suggests the need for clear congressional authorization for presidential action that intrudes on liberty or departs from well-established historical practices. More specifically, it significantly weakens the President's argument on behalf of the legality of warrantless wiretapping by the National Security Agency.

The Supreme Court has often declined to answer the most fundamental questions about the relationship between individual rights and national security. Instead it has said that if the executive seeks to enter into constitutionally sensitive domains, or to depart from standard adjudicative forms, clear congressional permission is required. This approach reflects a form of what I shall call *liberty-promoting minimalism*. It is liberty-forcing insofar as it gives liberty the benefit of interpretive doubt. It is minimalist insofar as it avoids the most fundamental issues of constitutional law and to that extent reflects a form of judicial self-restraint.

Liberty-promoting minimalism can be found at diverse stages of American history. The oldest example was during the Civil War period, when President Lincoln suspended the writ of habeas corpus; Chief Justice Roger Taney ruled that the President could not suspend the writ on his own.[1] During World War I, Justices Brandeis and Holmes argued not only for use of the first amendment to invalidate legislation, but also

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[1] See William H. Rehnquist, All the Laws But One 36-38 (1999).

for narrow construction of congressional authorizations to the executive.[2] Justice Holmes insisted that "it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man."[3] During World War II, the Court struck down the detention of a concededly loyal Japanese-Americans on the West Coast,[4] relying on the absence of unambiguous statutory authorization for the detention.[5] The Court said, somewhat remarkably, that "[i]n interpreting a wartime measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war."[6]

During the Korean War, the Court refused to allow President Truman to seize the nation's steel mills, notwithstanding his claim that steel was an indispensable component in nearly all weapons and war materials. In The Steel Seizure Case,[7] the Court emphasized that there "is no statute that expressly authorizes the President to take possession of the property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied."[8] A similar approach prevailed at the height of the Cold War, when the Court protected speech through an aggressive clear statement approach in Yates v. United States.[9]

The requirement of fair adjudicative procedure, backed by a clear statement principle, was crucial in Duncan v. Kahanamoku,[10] involving the imposition of martial law in Hawaii during World War II. Civilians in Hawaii had been imprisoned after a trial in military tribunals; the central question was whether those tribunals had the legal authority to try civilians. In its narrow ruling, the Court held that they did not. The Court acknowledged that the statutory language and history were unclear and stressed, as relevant to the interpretive question, "the birth, development, and growth of our political institutions."[11] Because "courts and their procedural safeguards are indispensable to our system of government," the Court would not construe an ambiguous statute to authorize the displacement, by the executive, of ordinary courts with military tribunals.[12]

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[2] US v. Bureleson, 255 US 407, 417 (1921) (Brandeis, J., dissenting); id. at 436 (Holmes, J., dissenting).

[3] Id. at 437.

[4] 320 US 81 (1943).

[5] Id. at 297.

[6] Id. at 300.

[7] Youngstown Sheet & Tube Co. v. Sawyer, 343 US 579 (1952).

[8] Id. at 585. It would be possible to understand the majority opinion not as demanding clear congressional authorization, but simply as saying that the relevant statutes are not fairly interpreted to grant the relevant authority to the President. Unlike the other cases I am discussing, The Steel Seizure Case need not be seen as reflecting a clear statement principle.

[9] 354 US 298 (1957).

[10] 327 US 304 (1946).

[11] Id. at 319.

[12] Id. at 323.

In its initial encounter with the war on terror, the Court did not invoke a clear statement principle, but a plurality of the Supreme Court did emphasize fair procedure.[13] In the key part of the prevailing opinion in the *Hamdi* case, the plurality said that an enemy combatant must be supplied with "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[14] What is most noteworthy about the plurality's reasoning is its insistence on the right to a fair hearing before a deprivation of freedom, one of the "essential liberties that remain vibrant even in times of security concerns."[15]

Since the attacks of 9/11, clear statement principles, demanding explicit authorization to the executive, have been under exceedingly severe pressure, above all from those who insist on the broad constitutional prerogatives of the President. The pressure has taken two different forms. On one view, the document, as originally understood, gave "the war power" to the President and essentially authorized him to do whatever must be done to protect the nation.[16] On a more functional view, the particular circumstances of the war on terror justify an especially strong role for the executive and a weak one for the judiciary—and also make it hazardous to require specific congressional authorization for presidential action.[17] For those who emphasize these points, legislative enactments should be construed generously to the President, so as to fit with contemporary needs or to avoid the constitutional problems that might be produced by intrusions on his authority. At its most extreme, the resulting view calls for a kind of presidential unilateralism, authorizing the Commander-in-Chief to act entirely on his own.[18]

The Supreme Court's various opinions in Hamdan v. Rumsfeld are highly technical; they focus on numerous legal provisions, including the Detainee Treatment Act,[19] the Authorization for the Use of Military Force,[20] the Uniform Code of Military Justice,[21] and the Geneva Conventions.[22] The Court was closely divided on the interpretation of these provisions—with disagreements manifesting themselves on no fewer than seven major points. Indeed, it is not easy to find an opinion, in the Court's

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[13] Hamdi v. Rumsfeld, 542 U.S. 507 (2004). Note that Justices Souter and Ginsburg did invoke a clear statement principle, calling for unambiguous congressional authorization for a detention of an American citizen. See id. at 544-45 (Souter, J., dissenting in part).

[14] Id. at 2651 ("There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal").

[15] Id. at 2652.

[16] A version of this view can be found in John Yoo, The Powers of War and Peace (2005).

[17] A version of this view is defended in Eric Posner and Adrian Vermeule, Terror in the Balance (forthcoming 2006).

[18] See Richard Pildes and Samuel Issacharoff, Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Right During Wartime, Vol. 5, *Theoretical Inquiries in Law (Online Edition):* No. 1, Article 1 (2004). http://www.bepress.com/til/default/vol5/iss1/art1; Cass R. Sunstein, Minimalism At War, 2004 Supreme Court Review 47.

[19] Pub. L. 109-148, 119 Stat. 2739.

[20] 115 Stat. 224, note following 50 USC 1541 (2000 ed., Supp. III).

[21] 10 USC 101-1805.

[22] 1977 U.S.T. LEXIS 465; 6 U.S.T. 3114; 6 U.S.T. 3114; 6 U.S.T. 3217; 6 U.S.T. 3316; 6 U.S.T. 3516. (The US is not a party to Protocol I). Full text available at www.genevaconventions.org.

entire history, in which the justices divided on so many points; I hereby nominate *Hamdan* as the all-time champion on this count. But as the sheer number of specific disagreements suggests, the underlying split within the Court was far more general, and had nothing to do with any particular provision.

In essence, the prevailing view in *Hamdan* can be captured in a single idea: *If the President seeks to depart from standard adjudicative forms through the use of military tribunals, the departure must be authorized by an explicit and focused decision from the national legislature*. This idea has considerable importance. If it is generalized, the analysis in *Hamdan* can be taken as a wholesale repudiation of the view of those who claim, on originalist or functionalist grounds, that something like the "war power" is concentrated in the president. And if that view is repudiated, the requirement of clear congressional authorization might well apply in many other domains, at least where the executive seeks to intrude into the realm of liberty or departs from practices that are historically entrenched. After *Hamdan,* presidential unilateralism stands on very shaky ground.

By contrast, the view of at least two dissenters, and possibly three, is this: *If the Commander-in-Chief seeks to interpret ambiguous provisions in a way that he deems necessary to protect national security, he is entitled to do so, at least if his judgment is not plainly foreclosed by historical understandings.* This view embodies a clear statement principle of its own—a principle that requires an explicit statement from the national legislature if it seeks to cabin the President's power to protect national security in a time of war.

The difference between the two views points out a serious gap in the canonical opinion of Justice Robert Jackson in The Steel Seizure Case[23]—an opinion on which both the prevailing opinion and the dissenters rely.[24] Jackson famously distinguished among three kinds of cases: those in which the President has acted with express or implied congressional authorization; those in which the President has acted amidst congressional silence; and those in which the President has acted in defiance of congressional limits on his authority.[25] Here is the question that Justice Jackson did not ask (and whose importance he appears not to have noticed): When legislative enactments are susceptible to more than one interpretation, what is the appropriate background rule? Should the President's interpretations of ambiguous terms prevail? Or should a clear statement be required from Congress, at least in certain domains? In which domains?

My principal goal here is to demonstrate that the underlying disagreement in *Hamdan* has everything to do with the appropriate clear statement principle. As we shall see, the Court's opinion necessarily if opaquely answered certain questions about the constitutional power of the President, in a way that went well beyond anything the Court has done in the past. For this reason too, the Court's reasoning has immense importance.

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[23] 343 US at 593 (Jackson, J., concurring).

[24] Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2774 n.23; 126 S.Ct. at 2800 (Kennedy, J., concurring); 126 S.Ct. at 2824 (Thomas, J., dissenting) (2006).

[25] 343 US at 609.

If it continues to be followed, it is likely to have implications for many other questions, including the legality of wiretapping by the National Security Agency.

I attempt to offer a sympathetic understanding of the Court's requirement of clear congressional authorization, not to evaluate it. But I shall offer two objections to the Court's approach. First, the best course might well have been to abstain. The underlying provisions presented quite difficult questions; much could be said on behalf of a refusal to resolve those questions until a trial had been completed. Second, the Court's decision would have been greatly strengthened if it had been able to invoke the Avoidance Canon. The Court did not contend that it was interpreting the relevant provisions so as to ensure that the President did not intrude on constitutionally sensitive interests on his own; if it had been able to do so, its ruling would have been much more secure. The Court's conclusion would have been better supported if it had invoked due process concerns in order to rule, very narrowly, that the President was obliged to provide Hamdan with a right to see the contrary evidence unless (a) compelling reasons required otherwise and (b) a fair trial was possible without conferring that right. Without the Avoidance Canon, the dissenters probably had the better view on the merits, because the president is entitled to deference in the face of ambiguity in the relevant legal provisions.

Notwithstanding my objections to the Court's analysis, the general requirement of clear congressional authorization has considerable appeal. It deserves judicial endorsement in other domains in which liberty is seriously threatened, at least where the threat raises serious constitutional questions.

I. Multiple Paths

Salim Ahmed Hamdan was captured by militia forces in Afghanistan in November 2001, amidst hostilities between the United States and the Taliban. Turned over to the United States military shortly after his capture, Hamdan was taken to Guantanamo Bay in June 2002. In 2003, the President concluded that he was eligible for trial by military commission. In 2004, Hamdan was charged with only one count, involving a conspiracy to commit offenses triable by military commission, including violations of the law of war. He filed petitions for writs of mandamus and habeas corpus, raising multiple objections to the proposed trial. Hamdan acknowledges that he was bodyguard and driver for Osama Bin Ladin, but he denies a role in the attacks of September 11, 2001.

A. Options

As we shall see, the Court had many options, and it will provide a helpful orientation to outline them at the outset. To hold in the President's favor, the Court had six principal routes:

1. It could have refused to reach the merits, on the ground that the Detainee Treatment Act of 2005 (DTE) deprived the Supreme Court of jurisdiction (and

provided a special procedure that Hamdan was required to follow to challenge his detention and trial).

2. It could have refused to reach the merits, on the ground that principles of abstention required federal courts to allow the case to proceed to trial.
3. It could have held that military commissions were authorized by some act of Congress; candidates include the Authorization for the Use of Military Force and the Uniform Code of Military Justice.
4. It could have held that in light of the President's constitutional authority as Commander-in-Chief, the relevant acts of Congress and the Geneva Conventions should be construed to permit the President to create military commissions. Under this approach, the constitutional backdrop permits the President to construe ambiguous provisions as the President sees fit.
5. It could have invoked principles of administrative law to conclude that in light of the President's expertise and accountability, he should be allowed to interpret ambiguous provisions in the relevant statutes, so long as his interpretations are reasonable.[26]
6. It could have held that even if Congress has said otherwise, the President's has the constitutional authority to create military commissions—authority that Congress cannot eliminate or even significantly restrict.

To hold against the President, the Court had two principal options:

1. It could have held that fairly interpreted, the relevant statutes or the Geneva Conventions (or both) prohibit the President from creating and using military commissions of this kind.
2. It could have held that Congress must give unambiguous authorization to enable the President to convene military commissions, and that the relevant sources of law failed to provide such authorization. The requirement of unambiguous authorization might have been based on background principles calling for adherence to the ordinary standards of criminal justice. Alternatively, the requirement might have been based on a desire to avoid a possible constitutional problem (though Hamdan did not raise an objection under the due process clause or the confrontation clause).

The government argued for options (3) and (4). It contended that the relevant sources of law "recognized" the President's authority to create military commissions—and hence that the President's authority was not a creation of Congress at all. Indeed, the government argued as Commander-in-Chief, the President could try Al Qaeda combatants in military commissions even in the face of legislative silence. The "President's war power under Article II, Section 2 of the Constitution includes the inherent authority to create military commissions even in the absence of any statutory authorization, because that authority is a necessary and longstanding component of his war powers."[27]

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[26] See Eric A. Posner and Cass R. Sunstein, Chevronizing Foreign Relations Law (unpublished manuscript 2006).

[27] 2005 U.S. Briefs 184, at page 21.

The most obvious precedent, apparently offering a great deal of help to the government, was the Court's unanimous decision in Ex Parte Quirin.[28] In that case, the Court authorized President Roosevelt to try Nazi saboteurs in military commissions. It did so with reference to Article 15 of the laws of war, which, in its view, was best read to authorize such commissions. Article 15, the precursor of Article 36 of the Uniform Code of Military Justice, says that "the provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals." Pointedly declining "to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation," the Court said that with this provision, "Congress has authorized trial of offenses against the law of war before such commissions."[29]

The reading of Article 15 in Ex Parte Quirin was highly vulnerable on the text; Article 15 need not be read as specifically authorizing trial before military commissions. The Court's reading was evidently inspired by a belief that at least in some circumstances, the President may well have the power to create military commissions on his own. Thus the Court said that an "important incident to the conduct of war is the adoption of measures by the military command . . . 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."[30] After Ex Parte Quirin, it would be reasonable to think that Article 36 of the Uniform Code of Military Justice essentially authorizes the President to create military commissions to try suspected terrorists, at least when there has been a declaration of war or an authorization for the use of military force. But in *Hamdan*, the Court rejected this view.

The *Hamdan* decision was issued in the midst of a broad and far-reaching debate about presidential power to protect the nation's security, and the dispute within the Court cannot be appreciated without reference to that debate, of which the justices were surely aware. On the one hand, Justice Jackson's concurring opinion in The Steel Seizure Case has had a dominant role in public discussion and indeed set its basic terms, having played a key role in the confirmation hearings for Chief Justice Roberts and Justice Alito.[31] On the other hand, the Bush Administration has made some aggressive claims about the President's power to act unilaterally. In a much-discussed memorandum in 2002, the Office of Legal Counsel of the Department of Justice contended that as Commander-in-

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[28] 317 U.S. 1 (1942).

[29] Id. at 29.

[30] Id. at 28-29.

[31] Note, for example, the large place of Justice Jackson's concurrence in the confirmation hearings of Chief Justice Roberts and Justice Alito. Cites to be added. (Roberts hearings available at See, e.g. Morning Session of a Hearing of the Senate Judiciary Committee: Nomination of Samuel A. Alito, Jr. to be Associate Justice of the Supreme Court, D.C. Federal News Service January 12, 2006 Thursday; U.S. Senator Arlen Specter (R-PA) Holds a Hearing on Roberts Nomination, CQ Transcriptions, September 15, 2005. (Roberts hearings available online at http://www.asksam.com/ebooks/releases.asp?file=JGRHearing.ask&dn=Contents) (Alito hearings available at http://www.asksam.com/ebooks/releases.asp?file=Alito_Hearing.ask).

Chief, the President has inherent authority to torture suspect terrorists—authority that Congress might well not be permitted to override.[32] In other contexts, the executive offered exceedingly broad arguments about the President's power to act on his own to protect the nation, and some lower courts explicitly suggested that something like "the war power" had been vested in the President. [33]

At the same time, a range of disputes involved the appropriate presumption, or clear statement principle, to apply in the face of ambiguous legislation.[34] What was unsettled was the direction in which any clear statement principle should run. Should the President, as Commander-in-Chief, be presumed to have the authority to act to protect national security, at least when Congress has not said otherwise? Or should principles of constitutional liberty, or liberty in general, forbid the President from acting unless he can claim clear congressional permission? Justice Jackson's concurrence does not answer these questions, which will be decisive in many actual and imaginable controversies.

B. Justice Stevens: Clear Statements and Fair Trials

The prevailing opinion, and in most respects the majority opinion, was written by Justice Stevens. For the most part, the Court did not explicitly embrace clear statement principles at all. It purported to adhere closely to the text, context, and history of the relevant provisions. Nonetheless, we shall see that the Court's approach is best understood as rooted, at all crucial points, in a clear statement principle of an identifiable kind—one that requires congressional authorization to be explicit rather than implicit, and that rejects claims of unilateral or exclusive presidential authority.

1. The Detainee Treatment Act. The first issue was whether the writ of certiorari should be dismissed under the authority of the Detainee Treatment Act (DTA), which provided a special procedure for judicial review of detention of enemy combatants. Under the DTA, the United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction "to determine the validity of any final decision" of a military commission.[35] Review is limited to specified grounds, including compliance with federal law, statutory and constitutional.

While the relevant section is said to "take effect on the date of enactment," it does not specify whether it applies to pending claims.[36] The government contended that the text of the statute applies to all claims, including pending ones, and that under established doctrine, Congress' failure to exempt pending cases creates a presumption against the

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[32] See Office of Legal Counsel, Memorandum for Alberto Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 USC 2340-2340A (August 1, 2002) (copy on file with author).

[33] Al Odah v. United States, 321 F3d 1134 (DC Cir 2003); Center for National Security Studies v. U.S. Department of Justice, 331 F.3d 918 (DC Cir 2003); US v. Moussaoui, 382 F3d 453 (4th Cir. 2004).

[34] See, e.g., Posner and Vermeule, supra note; Pildes and Issacharoff, supra note.

[35] Hamdan, 126 S.Ct. at 2763 (2006) (quoting Detainee Treatment Act, Pub. L. No. 109-148, § 1005(e)(2), 119 Stat. 2739, 2740 (2005)).

[36] Hamdan, 126 S.Ct. at 2763 (quoting Pub. L. No. 109-148, § 1005(h)(1), 119 Stat. 2739, 2743 (2005)).

Court's exercise of jurisdiction.[37] The Court rejected the argument. It emphasized that other provisions of the DTA expressly proclaim their applicability to pending cases, and there was no such express proclamation in the disputed section here. In the Court's view, Congress' failure to include such a provision in that section suggested that it did not mean to apply that section to pending cases.[38]

2. Abstention. The government argued that even if the Court had jurisdiction, it should abstain and thus refuse to address the merits until Hamdan's trial was complete. In the government's view, abstention was mandatory under principles of comity, ensuring against a premature attack on an ongoing military proceeding.[39] The Court responded that comity principles did not apply. It emphasized two points. First, Hamdan is not a member of the armed forces of the United States, and hence military discipline was not at issue.[40] Second, the military commission was not part of an integrated system of military courts, and hence Hamdan could not use a system of appeal to civilian courts.[41] The Court found it relevant that the pertinent "review bodies clearly lack the structural insulation from military influence" that would make abstention principles applicable.[42]

It is worth pausing over this point. In refusing to abstain, the Court suggested that comity principles would call for abstention only when appellate review ensured a degree of protection against "military influence." This suggestion, reflecting an unmistakable concern for procedural fairness, animates other parts of the Court's opinion as well.

3. Conspiracy and the law of war. Did the President have the authority to convene a military commission here? On this question, the Court said a great deal, offering far more analysis and detail than it had in Ex Parte Quirin. The Court began with the important conclusion that the AUMF did not affect the President's authority under preexisting statutes. Implied repeals are disfavored, and the general and abstract language of the AUMF, giving the President the power to use force, should not be taken to overcome specific limitations in existing law, including the limitations in the UCMJ.[43] As we shall see, this conclusion has general implications.

The Court acknowledged that military commissions have a long history. In its view, that history was a product of "military necessity," and limited to that context.[44] Nor was the authority to create such tribunals purely a presidential prerogative; hence any form of presidential unilateralism, intimated by Justice Thomas' dissent, misdescribed the law. In the Court's view, the relevant authority "can derive only from the powers granted jointly to the President and Congress in time of war."[45] In a pointed paragraph, the Court noted that while the President is Commander-in-Chief of the Armed Forces, the

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[37] See Hamdan, 126 S.Ct. at 2763.
[38] 126 S.Ct. at 2769.
[39] *Id*. at 2769.
[40] *Id.* at 2771.
[41] *Id.*
[42] *Id.*
[43] *Id.* at 2775.
[44] *Id*. at 2773.
[45] *Id*. at 2773.

Constitution explicitly grants a number of war-related powers of Congress, including the authority to declare war, to make rules concerning captures on land and water, to raise and support armies, and to define and punish offenses against the law of nations.[46] This paragraph seemed to be a clear rejection of general claims of a distinctly presidential "war power," or broad executive authority to protect the nation's security.

The Court declined to resolve the question whether the President could, under circumstances of "military necessity," create military commissions "without the sanction of Congress."[47] And the Court went out of its way to suggest that it had "no occasion to revisit" the Quirin Court's conclusion that Article 15 authorized military commissions—a conclusion that it described as "controversial."[48] In its view, however, Ex Parte Quirin gave no "sweeping mandate" to the President to create commissions whenever he wished.[49] At most, Quirin allowed the President to convene such commission "where justified under the 'Constitution and laws,'" including the law of war.[50]

All this led to the central question: Did the law of war justify trying Hamdan in a military commission? On this point, Justice Kennedy refused to speak, and hence Justice Stevens wrote for a 4-3 plurality. He began the analysis by pointing to the common law, which allowed for military commissions in only three circumstances. The first involved places in which martial law had been declared; the second involved temporary military government over occupied territories. The third, and the relevant context here, involved commissions "convened as an 'incident of 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.'"[51] For the executive, the problem was that Hamdan was charged not with a violation of the law of war itself, but with "conspiracy" to violate the law of war, over a period from 1996 to November 2001. Most of this period preceded the attacks of 9/11 and the enactment of the AUMF. In the plurality's view, the offense of "conspiracy" to violate the law of war is not itself triable by military commission.

In reaching this conclusion, the plurality did not deny that Congress has the power to characterize conspiracy as a war crime; the difficulty was that it had not done so. By itself, this objection was not fatal, for the common law of war could suffice to justify trial in a military commission even if Congress had not spoken. But to support prosecution in such a commission, the plurality said that the historical precedent on that point "must be plain and unambiguous,"[52] so to avoid the concentration of adjudicative and punitive power in military hands. In Ex Parte Quirin, the violation of the law or war was plain. With respect to conspiracy, however, history provided no such plain support.

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[46] *Id*. at 2773-2774.
[47] *Id*. at 2774.
[48] *Id.*
[49] *Id.*
[50] *Id.* at 2775.
[51] *Id.* at 2776.
[52] *Id*. at 2780.

This point was "indicative of a broader" problem, which was the executive's failure to "satisfy the most basic precondition" for military tribunals, which is "military necessity."[53] Hence the plurality emphasized that the record showed that that there was no urgent need for imposition or execution of judgment; recall that Hamdan had been arrested in 2001 and charged only in 2004. These are not the circumstances that call for use of a military commission. In the plurality's view, Hamdan could not be tried for conspiracy.

4. The UCMJ and fair procedures. Now speaking for the Court, Justice Stevens went on to conclude that even if Hamdan had been legitimately charged with an offense against the law of war, the commission could not proceed, because the specified procedures violated the UCMJ. A key point here is that under the regulations governing the commission, both Hamdan and his lawyer could be excluded from part of the proceeding if either the appointing authority or the presiding officer so decided—for reasons of national security or other reasons specified in the regulations. And if the proceedings were closed, Hamdan and his lawyer could be prevented from learning the evidence against him. In addition, hearsay and other evidence could be included whenever it "would have probative value to a reasonable person," and various kinds of information could be deemed "protected," and hence withheld from the defense, if it concerned "national security interests."[54] Hence some of the standard rules, calling for fairness to the defense, might not be followed in the military tribunal.

The Court concluded that to this extent, the rules governing the tribunal were inconsistent with the UCMJ. Under that statute, military tribunals are supposed, "so far as practicable," to "apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[55] In addition, rules and regulation "shall be uniform insofar as practicable."[56] Any procedural rules must therefore be consistent with the UCMJ; and the rules in military commissions must be the same as those in court-martial proceedings unless such uniformity is shown to be impracticable. The Court acknowledged that a sufficient determination of "impracticability" could justify a departure from the usual rules.[57] But here the President's determination was inadequate. There was, in fact, no official determination that it would be impracticable to follow the rules for courts-martial. In any event nothing in the record explained why those rules would not be practicable. The Court said that the general danger of international terrorism, by itself, would not require a variance from the ordinary rules.[58]

Here again the Court emphasized that a military commission must be a "tribunal of true exigency" rather than "a more convenient adjudicatory tool"; and it read the UCMJ in this light.[59] One implication is that Congress could expressly authorize military

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[53] *Id*. at 2785.
[54] *Id*. at 2786-2787.
[55] *Id.* at 2790 (quoting Unif. Code Mil. Justice art. 36, 10 U.S.C.S. § 836(a)).
[56] 126 S.Ct. at 2790 (quoting Unif. Code Mil. Justice Art. 36, 10 U.S.C.S. § 836(b)).
[57] 126 S.Ct. at 2791.
[58] *Id*. at 2792.
[59] *Id*. at 2793.

commissions even in the circumstances in which the President sought to try Hamdan. Another implication is that the analysis would be very different in a genuine emergency. But without explicit authorization or an emergency, a military tribunal, not following the standard procedures, would be unacceptable.

5. The Geneva Conventions. The Court's final conclusion was that the procedures violated the Geneva Conventions and in particular Common Article 3. The Court began by concluding that the Conventions are subject to judicial enforcement. The reason is that the UCMJ conditions the authority to create military commissions on compliance with the law of war; to that extent, the Geneva Conventions are a part of the law of war and enforceable as such. The Court added that the key provision of the Geneva Conventions—Common Article 3—does in fact apply to the conflict with Al Qaeda. Common Article 3 applies in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties."[60] The executive construed Common Article 3 not to apply because the conflict with Al Qaeda is indeed international in character and scope. The Court responded that the words "not of an international character" refer to conflicts that are not between or among nations—and hence that the war with Al Qaeda, reflecting a conflict between a nation and a terrorist organization, does fall within the literal language.[61]

Finally, the Court reached the merits. The key provision of Common Article 3 requires that Hamdan be tried before a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[62] The Court concluded that this provision was violated, because the military commission was not "regularly constituted."[63] The regular military courts are the courts-martial, not military commissions. This point does not mean that Common Article 3 always bans military commissions as such. But in order for them to be legitimate, the executive much show that a practical need justifies departure from the use of court-martial proceedings. Hence the Court's analysis of Common Article 3 tracked its analysis of the UCMJ: The executive may use the procedures of military commissions only if it demonstrated some kind of necessity.[64]

A plurality also concluded that "the judicial guarantees recognized as indispensable by civilized peoples" require the procedural safeguards afforded by customary international law, and that those safeguards include the right to be tried in one's presence and to be privy to the evidence.[65] Here again, no practical need had been shown to justify a departure from the requisite guarantees. The plurality said that at least in the absence of "express statutory provision to the contrary, information used to convict

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[60] *Id*. at 2795.
[61] *Id*. at 2795.
[62] *Id.* at 2796 (quoting 6 U.S.T., at 3320 (Art. 3, 1(d))).
[63] 126 S.Ct. at 2796.
[64] There is an evident puzzle here. If a military commission is not "regularly constituted," and hence violates Common Article 3, why would it be legitimate under circumstances of necessity? Why would it become "regularly constituted" simply because necessity required it?
[65] *Id.* at 2797 (quoting 6 U.S.T., at 3320 (Art. 3, 1(d))).

a person of a crime must be disclosed to him."[66] Thus Common Article 3 required both "regular" courts and a right to see the evidence on which a conviction might be based.

C. Justice Breyer and Active Liberty

Justice Breyer, joined by Justices Kennedy, Souter, and Ginsburg, offered a revealing one-page concurrence, designed to specify the theme of the Court's holding. In his view, that holding "rests upon a single ground: Congress has not issued the Executive a 'blank check.'"[67] Because there was no emergency, judicial insistence on consultation with Congress was entirely proper. The task was to decide how to deal with the current danger through democratic means.

Justice Breyer's separate opinion is worth noting for three reasons. First, he underlines a general point that might be lost in the details of Justice Stevens' opinion, which is that the President must ask Congress, in express terms, for "the authority he believes necessary."[68] I shall have more to say about this point below, which seems to organize the central message of the Court. Second, there is an evident connection between Justice Breyer's plea for congressional specification and his recent argument that hard cases should be assessed with close reference to the ideal of "active liberty," which calls for democratic self-government.[69] Justice Breyer appears to believe that this ideal requires a degree of democratic engagement, involving the national legislature, on the appropriate response to danger of terrorism, at least when there is no emergency. The *Hamdan* decision is difficult to understand without an emphasis on this point, which is central to the Court's liberty-promoting minimalism. Third, there is no question that five members of the Court are in agreement with Justice Breyer's brief opinion. Recall that it was signed by four members of the Court, and Justice Stevens would undoubtedly have signed it if not for the fact that by doing so, he would have ensured the existence of not one but two majority opinions.

D. Justice Kennedy As (Relative) Minimalist

Justice Kennedy wrote separately—essentially to agree with the prevailing opinion, but to offer a greater degree of caution. His principal claim was that under both the UCMJ and the Geneva Conventions, the President must use the ordinary procedures for courts-martial unless there is some demonstrated need to do otherwise. Here no such need had been shown. On his view, Common Article 3 requires an inquiry very much like that required by the UCMJ, with "at the least, a uniformity principle similar to that codified in" domestic law.[70] More particularly, a military commission would be "regularly constituted" only if "some practical need explains deviations from court-martial practice."[71] The military commission was significantly different from courts-

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[66] 126 S.Ct. at 2798.
[67] *Id*. at 2799.
[68] *Id*.
[69] See Stephen Breyer, Active Liberty (2005).
[70] 126 S.Ct. at 2803.
[71] *Id*. at 2804.

martial in terms of its composition and structure, and the relevant differences could not be justified by reference to practicability.

Justice Kennedy declined to offer his view on several questions, most prominently whether a conspiracy charge could be tried before a military commission and whether Common Article 3 requires the presence of the accused at all stages of a criminal trial.

E. Justice Scalia: The Passive Virtues?

Justice Scalia's opinion, joined by Justices Thomas and Alito, was restricted to the two justiciability issues.

First, Justice Scalia contended that the DTA eliminated the Court's jurisdiction. He emphasized that by its plain terms, it said that "no court, justice, or judge" shall have jurisdiction to consider habeas applications from Guantanamo Bay detainees except through the specified routes.[72] Hence the Supreme Court had been deprived of jurisdiction—particularly in view of the established principle requiring clear exemptions for pending cases. Having found a denial of jurisdiction, he concluded that there was no constitutional problem with the DTA under the Suspension Clause. The first reason was that Hamdan, as an enemy alien detained abroad, lacked rights under that clause. The second reason was that Congress had not eliminated judicial review entirely, but merely created a substitute remedy, and an adequate one, through the postdecision review process in the D.C. Circuit.

Second, Justice Scalia contended that whatever the meaning of the DTA, the Court should exercise its equitable discretion and decline to hear the merits. Considerations of comity required this course, especially because of the need for "*interbranch* comity at the federal level."[73] The order of the district court, enjoining proceedings deemed necessary, by the President, for the protection of American citizens against terrorist attacks, "brings the Judicial Branch into direct conflict with the Executive in an area where the Executive's competence is maximal and ours is virtually nonexistent."[74] While the obligation is to "avoid such conflict[,] the Court rushes headlong to meet it."

Justice Scalia's opinion is not implausibly understood as a tribute to the passive virtues[75]—the idea that the Court should decline, when it can, to resolve especially contentious and difficult issues. It would have been interesting, and in a way elegant, if Justice Scalia had simply stopped there. Ironically, however, Justice Scalia did not rest content with his own argument. Instead he joined, in full, Justice Thomas' dissenting opinion, which expressed a view on the merits of every issue in the case.

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[72] *Id.* at 2810 (quoting § 1005(e)(1), 119 Stat. at 2742).

[73] 126 S.Ct. at 2822.

[74] *Id.*

[75] See Alexander Bickel, The Least Dangerous Branch (1965). Note, however, that Justice Scalia's pronouncements about the Suspension Clause reach into constitutionally sensitive territory.

F. Justice Thomas: The President's "Broad Constitutional Authority"

Justice Thomas' dissenting opinion began with a distinctive understanding of the President's constitutional authority. In his view, the "primary responsibility" to protect national security rests with the President.[76] Indeed, the Constitution "confer[s] on the President broad constitutional authority to protect the Nation's security as he sees fit."[77] Shifting from the Constitution to governing statutes, he emphasized the AUMF, which, in his view, independently authorizes the use of military commissions, because that authority is included within the power to use force.

After this ambitious start, Justice Thomas proceeded to explain his particuluar disagreements with the Court. The common law of war, far from being frozen in time, "is flexible and evolutionary in nature," and it "affords a measure of respect for the judgment of military commanders."[78] In his view, membership in Al Qaeda—a group of war criminals—is itself legitimately punishable under the laws of war, and the same is certainly true of conspiracy to commit war crimes. As a matter of history, Justice Thomas rejected Justice Stevens' claim that conspiracy was not so punishable. In addition, he emphasized the need to respect "what is quintessentially a policy and military judgment, namely, the appropriate military measures to take against those" involved in the 9/11 attacks.[79] The punishment of conspiracy was fully supported by the nature of the conflict against international terrorism, for we "are not engaged in a traditional battle with a nation-state, but with a worldwide, hydra-headed enemy, who lurks in the shadows conspiring to reproduce the atrocities of September 11, 2001."[80] Thus the plurality's view—forbidding use of military commissions against conspiracies—"would sorely hamper the President's ability to confront and defeat a new and deadly enemy."[81]

Justice Thomas also concluded that the UCMJ does not limit the President's inherent power to convene military commissions. On the contrary, it expressly recognizes that power. What the Court reads as a restriction is, in Justice Thomas' view, a grant of discretion. Thus Article 36 of the UCMJ tells the President to use ordinary principles and rules, but only "so far as he considers practicable."[82] Hence Article 36 is best taken to allow the President "to depart from the procedures applicable in criminal cases whenever he alone does not deem such procedures 'practicable.'"[83] Far from limiting the President's options, Article 3 gives him "unfettered authority to prescribe military commission procedure."[84] And even if Article 36 could be construed to require procedural uniformity in the absence of some relevant finding of impracticability, that finding could be discerned in public statements of the Secretary of Defense, explaining why military commissions were needed.

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[76] 126 S.Ct. at 2823.
[77] *Id*.
[78] *Id*. at 2829.
[79] *Id*. at 2838.
[80] *Id*.
[81] *Id.*
[82] *Id.* at 2840 (quoting 10 U.S.C. § 836(a)).
[83] 126 S.Ct. at 2840.
[84] *Id.*

Finally, Justice Thomas contended that the Geneva Conventions were unhelpful to Hamdan, and for multiple reasons. First, they did not provide the basis for justiciable claims at all; "diplomatic measures by political and military authorities were the exclusive mechanisms for" their enforcement.[85] In addition, Common Article 3 applies only to "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."[86] The executive reasonably concluded that this article does not apply to al Qaeda detainees, because the relevant conflicts are international in nature. In Justice Thomas' view, that reasonable conclusion deserved deference form the Court.

In any case, Hamdan's commission was in full compliance with Common Article 3. The commission was "regularly constituted" in light of the fact that military commissions had been used at many stages in the nation's history. Moreover, the anticipated procedures provided "the judicial guarantees which are recognized as indispensable by civilized peoples."[87] It is true that Hamdan might be barred from the proceedings and denied access to certain evidence; but the exclusion or denial would occur only for specific reasons, including a desire to protect classified intelligence. In any case, no such bar or denial would be acceptable, under the existing regulations, if it would make the trial unfair. Hence there was no denial here of what "civilized peoples" would accept. In Justice Thomas' view, "the President's understanding of the requirements of Common Article 3 is entitled to 'great weight.'"[88] Most generally, the President's "findings about the nature of the present conflict . . . represent a core exercise of his commander-in-chief authority that this Curt is bound to respect."[89]

G. Justice Alito's (Relative) Minimalism

Justice Alito's separate opinion had essentially the same relationship to that of Justice Thomas as Justice Kennedy's had to that of Justice Stevens—broad agreement but a plea for greater caution. Justice Alito contended that it was unnecessary to reach several of the questions explored by Justice Thomas—including the constitutional power of the President, whether membership in Al Qaeda was a violation of the law of war, and whether Common Article 3 was enforceable. Most of his opinion patiently explained his conclusion that whether or not it was enforceable, Common Article 3 had not been violated. He contended that the words "regularly constituted" mean not "usually in place" but properly constituted under domestic law—and the military commissions here were so constituted.[90] With respect to the guarantees "recognized as indispensable by civilized peoples," he suggested that it was speculative, and therefore premature, to conclude that Hamdan might be prejudiced by the exclusion of certain evidence. Any such possibility should be assessed in the review proceeding for Hamdan's case in particular.

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[85] *Id.* at 2844.
[86] *Id.* at 2846 (quoting 6 U.S.T., at 3318).
[87] 126 S.Ct. at 2847.
[88] *Id.* at 2849.
[89] *Id.*
[90] See *id.* at 2851.

II. Clear Statements and Clear Principles

My goals in this section are twofold. First and foremost, I attempt to explain the real division in the Court—a division that involved the appropriate presumption, or clear statement principle, with which to approach the technical issues. Second, I shall attempt a sympathetic reconstruction of the Court's approach. Despite the sympathetic character of the reconstruction, I do not believe that the Court was correct. Because of the complexity and delicacy of the underlying issues, it would probably have been best if the Court had simply abstained. There would be clear advantages in waiting for Hamdan's trial and seeing, rather than speculating about, the relevant procedure before resolving the merits. But I am here not to press this point, but to understand the broader ideas that lie beneath the surface of the Court's opinion. As we shall see, those broader ideas have considerable appeal.

A. Technicalities

One of the most remarkable features of the *Hamdan* decision is the sheer number of issues on which the Court divided—by margins of 5–3, 4–3, or 4–2. The justices divided over (1) the Court's jurisdiction (5–3); (2) abstention (5–3); (3) the legality of using military commissions to try a conspiracy charge (4–3); (4) the legality of using a military commission lacking the rules and procedures of courts-martial (5–3); (5) the enforceability of the Geneva Conventions (5–2); (6) the applicability of Common Article 3 to the war with Al Qaeda (5–2); and (7) the meaning of Common Article 3 (5–3). Each of these questions is highly technical and complex. In many of them, and plausibly in all of them, the legal materials were ambiguous. For at least some of the seven issues, the legal materials would surely leave an objective reader unsure, concluding that the standard interpretive sources made both positions plausible. For other issues, one of the two positions was stronger, but it would be hard to argue that the alternative view was utterly implausible and not susceptible to a good-faith defense.

I shall not attempt to demonstrate these points by parsing all the technical questions in detail, but I shall shortly turn to the most important of them. By way of background, let us pause over the differences between military commissions and courts-martial—differences that obviously concerned both the President and the Court. As noted, the governing regulations allow a military commission to be closed, and evidence to be withheld from the defendant and his lawyer, if the appointing authority or the presiding officer decides to do so in order to protect classified or classifiable information, the physical safety of participants, intelligence and law enforcement activities, or other national security interests.[91] In addition, evidence is admissible in military commissions so long as it "would have probative value to a reasonable person."[92] Hearsay evidence, evidence obtained through coercion, and unsworn testimony may therefore be admitted. The defendant and his counsel may also be deprived of access to "protected information,"

[91] Id. at 2786.
[92] Id.

including classified information, if it is "probative" and if its admission would not deny the defendant " a full and fair trial."[93]

In military commissions, decisions are to be made by a panel consisting of at least three and possibly seven or more members, all of them officers in the United States Armed Forces (and not necessarily with judicial experience). A verdict of guilty need not be supported by a unanimous panel; a two-thirds vote would suffice for guilt and for any sentence except for the death penalty.[94] An appeal can be taken to a three-member panel consisting of military officers and chosen by the Secretary of Defense; only one member is required to have judicial experience.[95] The panel is asked to make a recommendation to the Secretary of Defense, who can remand for further proceedings or forward the record to the President with a recommendation for final disposition. The President makes the "final decision" unless he has delegated that task to the Secretary.[96] In all these ways, the commission's proceedings depart from the generally recognized principles and rules for courts-martial.

Article 36 of the UCMJ, emphasized by the Court, tells the President to apply those principles and rules in military tribunals "so far as he considers practicable," and it asks for uniform regulations "insofar as practicable."[97] The Court was evidently concerned about the disparities between procedures in military commissions and procedures in courts-martial. But it would be possible to read the "practicability" provisions to say that the President is allowed to depart from the usual principles essentially as he pleases, subject to something akin to arbitrariness review. On this view, the President may establish distinctive rules and principles if he wishes, so long as he is making a good-faith (and not unreasonable) judgment about practicability. And on this view, the unique circumstances of the war on terror—and of trials of those allegedlyt associated with Al Qaeda—easily support a judgment that the standard rules are simply not practicable. The fact that the word "practicable" is preceded by "so far as he considers" lends strength to this interpretation. After all, the President, and no one else, is entitled to make judgments about what is, in fact, "practicable."

The competing position is also possible to sketch. On that view, the word "practicable" does not merely mean as the President reasonably sees fit. On the contrary, it imposes a serious constraint. In ordinary language, the suggestion that one must follow a certain course of action insofar as it is "practicable" operates as a restriction, not a license. Perhaps the President is obliged to make and to support a finding of genuine impracticability—and perhaps he failed to do so here. At first glance, this position seems somewhat weaker than the alternative view, defended by Justice Thomas; a potentially closed trial of Osama Bin Ladin's driver and bodyguard—closed only to the extent that national security so requires—appears to satisfy whatever restriction is imposed by the

[93] Id. at 2787.
[94] Id.
[95] Id.
[96] Id.
[97] 10 U.S.C. § 836(a).

words, "so far *as he considers* practicable." But reasonable people can differ on this point.

Or consider the question whether Common Article 3 applies to the war with Al Qaeda. At first glance, that war is certainly a conflict "of international character"—and hence Common Article 3 does not apply. On the other hand, perhaps a conflict has an international character only if it is a conflict among or between nations. This conclusion on the ground that the President has interpreted this ambiguous phrase not to apply to the conflict with Al Qaeda; it is standard to defer to presidential interpretations of ambiguous provisions in treaties. But if the words "of international character" are read in their context, perhaps the President's interpretation is inconsistent with them. At least if we consider the principle of deference to executive interpretations, the dissenters seem to have the stronger argument here as well. But the standard legal tools do not foreclose the conclusion, on this question, of either the Court or the dissent.

While I cannot demonstrate the point here, I believe that something of this kind can be said about all of the issues that divide the justices in *Hamdan*. Is "conspiracy" to violate the law of war itself a violation of the law of war? The plurality is right to say that the historical materials do not unambiguously justify an affirmative answer; but Justice Thomas is right to say both that the common law of war need not be fixed and rigid and that the President's position is not without historical support. Would the proposed procedure violate guarantees recognized as indispensable by civilized peoples? Hamdan would be subjected to a genuine trial, not to a summary proceeding, and he was entitled to counsel. Justice Alito had a fair point in suggesting that it "makes no sense to strike down the entire commission structure based on speculation that some evidence might be improperly admitted in some future case." On the other hand, the right to see the evidence is among the most fundamental guarantees of a fair system of criminal justice, and perhaps the divergences between ordinary procedures, and those laid out for military commission, raise serious problems of unfairness.

B. The Real Division

We should now be able to see that the real division in the Court involved not the technicalities, but two intimately related and much more general issues: the appropriate clear statement principles and the constitutional background. This claim is easiest to establish for Justice Thomas' dissenting opinion, which comes close to acknowledging its general motivation. But a clear statement principle is even more central to Justice Stevens' opinion, which cannot possibly be understood without it.

Recall that Justice Thomas begins with a sustained treatment of the constitutional allocation of power, emphasizing that the founding document "confer[s] upon the President broad constitutional authority to protect the Nation's security in the manner he deems fit."[98] Thus his analysis is undergirded by a distinctive understanding of the Commander-in-Chief power, one that recognizes presidential authority, at least when it has not been clearly limited by Congress. Consider too the fact that at several key

[98] 126 S.Ct. at 2823.

moments, Justice Thomas emphasizes that courts should defer to the interpretive judgments of the President. In suggesting that the President is entitled to depart from the standard procedural rules, Justice Thomas offers the language of deference, suggesting the need to accept the informed judgments of the Chief Executive. And in calling for deference to the President's interpretation of Common Article 3, Justice Thomas invokes the conventional view that the executive receives deference with respect to ambiguous treaty provisions. He adds that the Court's "duty to defer . . . is only heightened by the fact that he is acting pursuant to his constitutional authority as Commander in Chief and by the fact that the subject matter of Common Article 3 calls for a judgment about the nature and character of an armed conflict."[99]

We might therefore understand his opinion in the following way: *In light of the President's position as Commander-in-Chief, and his distinctive expertise in the domain of national security, he is entitled to interpret ambiguous statutes as he sees fit. If Congress wants to cabin his power, it must do so explicitly*. We might even say that Justice Thomas is suggesting a kind of *Chevron* principle for the war on terror—one that accords the President the same power, with respect to ambiguous statutory provisions, that regulatory agencies have with respect to the statutes that they administer.[100] If the Environmental Protection Agency is permitted to interpret ambiguous provisions of the Clean Air Act (so long as its interpretation are reasonable), perhaps the President has the same power with respect to the AUMF, the UCMJ, and Common Article 3, at least insofar as the question is how to handle the war with Al Qaeda.

Justice Stevens' opinion, emphasizing the legal details, is less transparent in its treatment of the constitutional backdrop and relevant clear statement principles. But it is evidently motivated by a particular view about that backdrop and those principles. Recall that at a key moment, Justice Stevens acknowledges the President's power as Commander-in-Chief, but goes on to specify, in pointed terms, a wide range of war-related powers that the founding document gives to Congress, not the President. Recall too that in exploring whether the charge of conspiracy can be tried in military commissions, Justice Stevens requires that the precedent "be plain and unambiguous"—so as to avoid concentrating both adjudicative and punitive power "in military hands."[101] And in emphasizing the absence of an adequate showing that ordinary procedures are not "practicable," Justice Stevens seems to be calling for clear congressional permission for any departure from those principles. Justice Breyer's brief opinion—asking the President to go to Congress "to seek the authority he believes necessary"—signals the underlying idea.[102]

On this view, *Hamdan* reflects a kind of narrow nondelegation principle, one that will not lightly take ambiguous statutes to grant the President broad authority to create military commissions as he sees fit (at least when there is no emergency). More particularly, the basic claim is that Congress must speak exceedingly clearly if it seeks to

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[99] *Id*. at 2825.
[100] For general discussion, see Posner and Sunstein, supra note.
[101] 126 S.Ct. at 2780.
[102] *Id.* at 2799.

allow the executive to depart from the usual methods for conducting criminal trials. Unless Congress has unambiguously said otherwise, and if history or circumstances of emergency do not clearly warrant, the government is forbidden to deprive people (including enemy combatants) of their liberty except through the ordinary channels and procedures, with their numerous guarantees against error and unfairness. The outcome in *Hamdan*—the diverse conclusions on seven difficult questions of law—cannot plausibly be explained without resort to a principle of this kind. It is in this respect that the ruling reflects a form of liberty-promoting minimalism, closely connected with an identifiable strand of decisions in the Court's past.

Two clarifications are important here. First, the Court's ruling was far from minimalist; the Court did not issue a narrow, incompletely theorized opinion. On the contrary, the Court resolved questions to which it did not need to speak, and it showed a degree of theoretical ambition. When I say that the decision reflects liberty-promoting minimalism, I mean only to suggest that it fits easily with other decisions in which the Court protected individual rights, in the face of national security concerns, by requiring clear legislative authorization.

Second, the clear statement principle in *Hamdan* could be understood narrowly or broadly. Most narrowly, the principle merely requires congressional authorization for a departure from standard adjudicative forms, at least where there is no emergency and where tradition does not clearly support the departure. Most broadly, the principle requires clear congressional authorization whenever the executive intrudes into the domain of individual liberty.[103] By contrast, the breadth of the dissenting view is plain; it suggests that when a legal provision is ambiguous, the executive is permitted to offer a reasonable interpretation of his choice.

C. Which Clear Statement?

The two sides in *Hamdan* thus disagreed on the question that Justice Jackson did not answer—and that turns out to be crucial to the application of his tripartite framework. In the face of genuine ambiguity in the governing provisions, we cannot say whether Congress should be taken to have authorized presidential action, or forbidden it, without specifying the appropriate background principles. Much of the time, legislative enactments will be relevantly ambiguous, because Congress will not have anticipated the particular questions. (Both *Hamdi* and *Hamden* attest to the pervasiveness of ambiguity; as we shall see, the debate over wiretapping by the National Security Agency falls in the same category.[104]) Which side is right? What, if any, is the appropriate clear statement principle?

1. Constitutional avoidance. We can approach these questions by observing that the Court's approach would be easiest to defend if it were undergirded by a constitutional provision that protects individual rights, such as the Due Process Clause or the

[103] This reading creates some tension with *Hamdi*, as discussed below; a possible reconciliation is that the authorization was clear in that case.

[104] See infra.

Confrontation Clause. We have see that in dealing with conflicts between national security and rights, the Court has often used a principle of constitutional avoidance, insisting that unless Congress has been clear, the executive may not enter into constitutionally sensitive domains.[105] The Avoidance Canon is fundamental to the whole area, and we should be able to agree that this canon is properly used to prevent the President from raising serious due process or confrontation problems without clear congressional authorization. The least controversial form of liberty-promoting minimalism is a simple use of the idea of constitutional avoidance.

But the Court did not explicitly point to due process or confrontation clause concerns in *Hamdan*. It did not fortify its argument by pointing to the potential problems in convicting people of a criminal offense without allowing them to attend the hearing and to see the evidence on which conviction rests. And in fact, Hamdan did not even argue that the proposed trial would raise serious constitutional questions—or that relevant statutes should be construed so as to make it unnecessary to resolve those questions.

An argument to this effect would not have been unimaginable. If tried by a United States court on territory controlled by the United States, Hamdan would be entitled to claim that he has not been provided with the process that is "due." Under *Hamdi*, the requisite amount of process would depend on the familiar balancing test of *Mathews v. Eldridge*.[106] This test calls for attention to three factors: the defendant's interest; the likelihood of error and the probable value of additional safeguards; and the government's interest in avoiding more extensive procedures. Under this test, it is not at all clear that Hamdan could be tried without access to the evidence against him. At the very least, the government would have to muster an extremely good reason for denying him such access—and even if it could do so, it would probably have to show that the trial was otherwise fair. Alternatively, Hamdan might have been able to contend that he had a right to attend the trial under the Confrontation Clause.

The Court did not discuss these possibilities—perhaps because Hamdan did not raise them. But the Court's emphasis on Hamdan's right to see the evidence against him, and to attend the trial, suggest that a concern about due process, if only writ small, played a large role in its decision. Because the Avoidance Canon was not in play, the Court's ruling must be understood as resting on the implicit assumption that a departure from the standard adjudicative forms is impermissible unless clearly authorized by Congress (or justified by tradition or necessity). That idea lacks the support of a constitutional concern; but it certainly does not lack appeal.

2. *Avoidances*. Whatever the nature of the clear statement principle, it runs into a competing argument, grounded in the President's own claims of constitutional authority. Suppose that the President has a legitimate argument that a limitation on his discretion would violate the Commander-in-Chief clause. If so, then there are two applicable clear statement principles, not merely one. Perhaps ambiguous statutes should be construed favorably to the President, so as to avoid the constitutional issue that would otherwise

[105] See supra; Pildes and Issacharoff, supra note.
[106] 424 US 319 (1976).

arise; perhaps Congress should be asked to speak clearly if it seeks to intrude on what might well be the constitutional prerogatives of the Commander-in-Chief. And indeed, *Ex Parte Quirin* seems to be animated by a clear statement principle in the President's favor—with the apparent thought that the commission procedure there at issue raised no serious question of individual rights. We can certainly imagine cases in which the individual rights claim has no constitutional backing, whereas the President's claim is plausible; this was apparently the view of Justice Thomas in *Hamdan*.

If competing clear statements are in play, there are two possibilities. Perhaps the competing principles are offsetting; if so, neither is helpful, and the decision must be resolved on some other ground. More plausibly, the individual rights claim deserves a kind of interpretive priority and thus defeats the President's claim so long as the statutory provision is ambiguous. In support of this view, consider the fact that the due process clause has priority over the exercise of executive power under the Commander-in-Chief clause, or for that matter the exercise of congressional power under the Commerce Clause. Under the founding document, individual rights operate as a trump on government authority; a similar idea justifies the interpretive primacy of clear statement principles on behalf of such rights.

3. *Hamdan without avoidance*. But if constitutional avoidance was not involved in *Hamdan* (and recall that the Court did not contend that it was), the Court's approach is far more vulnerable, and there is much to be said for Justice Thomas' approach. This is not because of his (extravagant and implausible[107]) claims about the constitutional allocation of authority to the President, but because it makes sense to allow the President to interpret ambiguous statutory terms, so long as his interpretations are reasonable. At the very least, ambiguous treaty provisions are subject, under the most conventional of principles, to executive interpretation—a point that greatly undermines the Court's treatment of the Geneva Conventions.

Perhaps the UCMJ is not analogous. Perhaps the UCMJ is analogous to the Administrative Procedure Act or the Freedom of Information Act; for the latter statutes, executive interpretations do not receive deference.[108] Perhaps the UCMJ imposes general limits on what the executive may do, so that executive interpretations are neither here nor there. On this view, Congress is not probably read, in the UCMJ, to have given the executive the power to interpret its ambiguities. But even if this is so, recall that the key provision authorizes the President to follow ordinary principles "so far as he considers practicable." Very plausibly, that provision should, above all in the circumstances of the war on terror, be taken to permit him to convene military commissions of the kind contemplated here. At least this is so if constitutional avoidance does not argue otherwise.

The best response would take the following form. Perhaps the Court was not motivated by constitutional concerns, but instead by a more general unwillingness to allow a departure from traditional adjudicative institutions and procedures unless

[107] See Sunstein, Minimalism At War, supra note.
[108] See id.

Congress explicitly authorizes the departure. On this view, the clear statement principle is defended by reference to a commitment to the standard judicial forms—no matter the identity or the nationality of the defendant. Because of the centrality of those standard forms to Anglo-American law, and to the most basic principles of individual liberty, the President must adhere to them unless they are explicitly displaced by the national legislature. On this view, the Court's approach is essentially Burkean[109]; it requires respect for traditional institutions, designed to protect liberty, unless traditions themselves justify a departure from them (and do so unambiguously).

This idea is not without appeal.[110] But it should be clear that thus understood, *Hamdan* is in a different conceptual universe from Ex Parte Quirin, which required no such clear statement—and which, on the contrary, seemed to construe the relevant statute aggressively in a way that would fit with the President's claim of constitutional authority. Under emergency conditions, or when individual liberty is not at stake, the approach in Ex Parte Quirin is most plausible. In *Hamdan*, the Court was evidently motivated by a belief that there was no emergency and that an invalidation of the procedure could not possibly compromise national security—perhaps because it believed that if a military commission were truly indispensable, Congress would authorize it. What is clear is that at least in a particular domain, *Hamdan* resolves the unanswered question in Justice Jackson's tripartite framework by requiring an explicit statement from Congress.

4. *Legal process*? There is an alternative interpretation of the prevailing opinion in *Hamdan*. The idea of clear statement principles played a role in Justice Thomas' dissenting opinion, but perhaps the majority was not thinking in terms of those principles at all. Perhaps the plurality, or the majority, was operating in the terms of the "legal process" approach to interpretation—taking Congress to consist of reasonable people with reasonable purposes, and understanding the legal materials accordingly.[111] On this view, the question is how to see the statutes as a sensible or coherent, or how to cast them in the best constructive light. Perhaps this approach—less axiomatic or formalized than one that speaks in terms of clear statements—is what is actually animating the result, or the results, in *Hamdan*.

There is no reason to doubt that some of those who signed the Court's opinion were thinking at least roughly in these terms. The problem with this view is that it is necessary to explain why the prevailing understanding is, in fact, the most reasonable one to attribute to Congress. If so, the idea must be that the standard adjudicative forms should be assumed to apply—unless an emergency is involved. And if that is the idea, it must be because clear congressional authorization should be required if the executive is to be permitted to depart from those forms. Justice Breyer's separate opinion came close

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[109] See Cass R. Sunstein, Burkean Minimalism, Mich L Rev (forthcoming 2006).

[110] Note, however, Justice Thomas' two-fold response: In fact traditions support use of military commissions to try conspiracy to violate the law of war; and the war with Al Qaeda is unprecedented, and the common law of war must adapt to fit with that unprecedented war.

[111] See Henry Hart and Albert Sacks, The Legal Process1374, 1378 (William Eskridge and Philip Frickey eds. 1994)

to endorsing this point. Hence the legal process approach must ultimately depend on a kind of clear statement principle, even if it is not articulated.[112]

5. *Abstention*. In view of the novelty and delicacy of the underlying questions, a great deal can be said on behalf of a genuinely minimalist course: abstention. That course would have made it unnecessary to resolve disputed questions about the AUMF, the UCMJ, and the Geneva Conventions. To the extent that the Supreme Court should demonstrate the passive virtues, there are advantages to leaving those questions undecided. There is a further point, emphasized by Justice Alito and with considerable importance. If the Court had abstained, it would have had an opportunity to resolve the central questions after a trial, and thus after learning about the actual (rather than hypothesized) nature of the particular procedures. Recall that the Court was concerned that Hamdan might have been tried without an opportunity to be present or to hear some of the evidence against him. But the Court did not know if, in fact, Hamdan would have been denied these rights. Perhaps the Court's concerns would turn out to be irrelevant to Hamdan's actual trial, in a way that would bear on both the UCMJ and the Geneva Conventions. A trial may or may not have offered the safeguards deemed indispensable by civilized peoples. If the Court had abstained, it would have known a great deal more.

Abstention might also have had the additional advantage of making it unnecessary to resolve complex questions about the DTA. To be sure, the question of jurisdiction would ordinarily have to be resolved first, and it would have been awkward to abstain without resolving the jurisdictional question. But the Court would have been within its legitimate bounds in saying that a decision to abstain, and hence not to exercise jurisdiction, would make it unnecessary to rule on whether the DTA applied to pending claims.[113] Certainly comity does have its claims; by refusing to abstain, the Court intervened in ongoing military procedures at an exceedingly early stage.

But there are reasonable counterarguments. In this unconventional setting, not involving standard military practices, perhaps the Court was right to assess Hamdan's claim that he would be subject to a procedure that was potentially unlawful and unfair. A decision to abstain would have subjected Hamdan to a long delay—one year? two years?—before obtaining an authoritative ruling on the legality of the trial. If the illegality of the commission procedure were clear, the argument for abstention would be weak. In addition, it might be desirable for the Court to tell the executive in advance what procedures it should use, rather than making the executive guess. No one denies that it awkward for the Court to abstain and then to overturn the conviction and require a new proceeding, after Hamdan had been convicted by the commission (on the basis of a trial involving national security issues, informants, and so forth). But in view of the difficulty and novelty of those issues, and the difficulty of resolving them without seeing the actual procedure in action, the course of abstention would have had many virtues.

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[112] Note that Hart and Sacks themselves emphasize the importance of clear statement principles. See id.

[113] A possible objection is that a failure to rule on this point would create excessive uncertainty; surely it is useful to know whether the DTA applies to pending claims. But because the number of pending claims is so small, the concern here is minor.

D. Of Hamdi and Hamdan

I have understood *Hamdan* to be rooted most narrowly in a clear statement principle that requires express congressional authorization for a departure from standard adjudicative forms. This understanding has the advantage of reducing the evident tension between the outcome there and the outcome in *Hamdi*.[114]

Recall that in *Hamdi*, Justice Souter, in an opinion joined by Justice Ginsburg, contended that the AUMF should not be construed to overcome the Nondetention Act—and hence that explicit congressional authorization was required for the detention of Hamdi. This approach embodied a kind of clear statement principle, asking Congress to amend the Nondetention Act if it saw fit. The plurality plainly rejected this position, ruling that the AUMF is best read (implicitly) to include the power of detention. In *Hamdan*, by contrast, the Court took a position evidently akin to that of Justice Souter in *Hamdi*, refusing to read the AUMF broadly and finding that explicit authorization was required for the use of military commissions. Here are the obvious questions: Why was a repeal by implication found in *Hamdi* but rejected in *Hamdan*? If *Hamdi* is correct, mustn't *Hamdan* be wrong, and vice-versa?

If the two outcomes are to be reconciled, there are several possibilities.

1. Perhaps it is clear that by tradition and necessity, detention is incidental to the authority to use force—whereas neither tradition nor necessity clearly supports the use of military commissions, at least not in the distinctive circumstances of *Hamdan*. This view is not implausible in the abstract. But is it clearly right? This is a question about historical understanding, and the answer is not obvious.
2. Perhaps the key point is that the President did not make an adequate finding about practicability, and that the UCMJ requires such a finding—and the AUMF does not alter the UCMJ insofar as it so requires. No such problem can be found in *Hamdi*. But is it so clear that the President's finding was inadequate? It would be easy to say that the departures from standard procedures are well-suited to the war with Al Qaeda, and that to this extent, adherence to those procedures would hardly be practicable.
3. Perhaps the best reconciliation is that *Hamdan* rests on a distinctive and quite narrow clear statement principle, governing the use of nontraditional institutions for adjudicating guilt or innocence. Perhaps this principle does not apply to detentions. An approach of this sort might particularly appeal to justices who are reluctant to second-guess military decisions, such as those involving detention, but who are more willing to insist on the traditional adjudicative forms. But this idea has problems of its own. After all, detention is a deprivation of liberty too. Why should a clear statement be required for military commissions but not for detentions?

[114] I am grateful to Eric Posner for discussions of this point.

To this last question, the best answer must incorporate my first attempt at reconciliation. It emphasizes that as a matter of history and logic, an authorization to use force includes the power to detain enemy combatants. The creation of military commissions is different. At the very least, this argument certainly seems reasonable.

III. Beyond *Hamdan*: The Wiretapping Controversy

Hamdan has implications for a wide range of questions involving the President's authority in connection with the war on terror. In many circumstances, Congress has not spoken clearly, and if an unambiguous statement is required, the President will not be authorized to act.

As an obvious example, consider the intense controversy over the warrantless wiretapping by the National Security Agency (NSA). During the period from 2001 to the present, the NSA has engaged in foreign surveillance, without a warrant, of communications involving Al Qaeda. Many people contend that this surveillance is unlawful, on the ground that it violates either the Foreign Intelligence Surveillance Act (FISA) or the Fourth Amendment.[115] The executive branch argues otherwise.[116] The simple question is this: Is the President permitted to engage in foreign surveillance without a warrant?

At first glance, the question would seem to be negative, because the FISA regulates the area, and it generally requires the President to obtain a warrant from the special court created by FISA.[117] But two arguments are available to the executive branch. First, the AUMF might be taken to permit the President to engage in warrantless surveillance of communications involving Al Qaeda. On this view, surveillance is permitted by any statute that authorizes the use of force; if the President is permitted to use force against al Qaeda, surely he is permitted to monitor their communications.

To see the point, suppose that the President authorized surveillance of Al Qaeda on the battlefields of Afghanistan. Under the AUMF, such authorization would plainly be lawful. Is it so clear that the President is not authorized, by the AUMF, to monitor a conversation from Osama Bin Laden to (say) Los Angeles? If he is so authorized, is he not permitted to monitor conversations from any member of Al Qaeda to the United States? This argument might well be supported by reference to *Hamdi*, which (as we have seen) understood the power to detain to be an aspect of the authority to use force, notwithstanding the claim that the Nondetention Act provided the governing law. Perhaps the AUMF has the same relationship to FISA that it has to the Nondetention Act. Perhaps it displaces both of them, so long as the President is operating within its terms.

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[115] See, e.g., Beth Nolan et al., NSA Spying: A Letter to Congress, available at http://www.nybooks.com/articles/18650 (Feb. 9. 2006).

[116] See Department of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (Jan. 19, 2006).

[117] 50 USC 1803-1804.

Second, it might be urged that as Commander-in-Chief, the President has the inherent power to engage in foreign surveillance under the Constitution. On the most extreme version of this view, Congress cannot limit that power even if it chooses to do so. Foreign surveillance is a presidential prerogative, akin to dictation of the movement of troops, and perhaps Congress cannot limit that prerogative—at the very least, after a declaration of war or an authorization for the use of force. On a less extreme version of this argument, legislative enactments such as FISA should be interpreted, if fairly possible, to conform with, rather than to intrude on, the President's constitutional authority. On this view, the AUMF should be taken to authorize the President to engage in foreign surveillance, and FISA should not be understood to dictate otherwise, at least insofar as the conversations involve Al Qaeda or others connected with the attacks of 9/11. This view offers a clear statement principle: Ambiguous congressional enactments must be construed to fit with a plausible claim of constitutional authority.

Before *Hamdan*, these arguments were vulnerable but hardly frivolous. To be sure, the AUMF does not, in terms, give the President the authority to engage in foreign surveillance; it is not specific on this point. But as we have seen, the *Hamdi* plurality ruled that as a matter of history and necessity, detention is incidental to the power to use force; and it is plausible to see foreign surveillance in the same terms. It is true that the Commander-in-Chief clause does not specifically empower the president to engage in foreign surveillance. But several lower courts have held that the President does, in fact, have that power.[118] As a matter of text, it is not at all clear that foreign surveillance is included within the President's constitutional authority. But the law seems to be in his favor.

The best argument to the contrary would point to FISA. As noted, that statute specifically governs foreign surveillance; perhaps the specific statute should prevail over the more general one, which is the AUMF. In any case implied repeals are disfavored, and AUMF should not lightly be taken to repeal FISA. Indeed, FISA's text specifically anticipates circumstances of war and makes provision for how the executive branch must proceed under those circumstances[119]—an apparently serious obstacle to the NSA program. The executive's strongest response is that the AUMF may be the more specific statute insofar as it deals with Al Qaeda and that the AUMF and FISA should be read, if fairly possible, to fit with the President's plausible claim of constitutional authority. But perhaps this reading is not fairly possible; and perhaps FISA, even if applicable, does not intrude on any constitutional power that the President might have. If the Fourth Amendment raises serious doubts about warrantless foreign surveillance, the Avoidance Canon would offer an additional argument in favor of a narrow construction of the President's power. But perhaps there is no serious fourth amendment objection.

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[118] See, e.g., In re Sealed Case, 310 F3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002); United States v. Truong Dinh Hung, 629 F2d 908 (4th Cir. 1980); US v. Brown, 484 F2d 418 (5th Cir 1973); Us v. Butenko, 484 F2d 418 (5th Cir 1973). For a contrary view, see Zweibon v. Mitchell, 516 F2d 594 (DC Cir 1975).

[119] 50 USC 1811.

Whatever the proper analysis before *Hamdan*, the President's claims have been seriously weakened. The *Hamdan* Court said that even though Commander-in-Chief, the President lacks the authority to countermand the judgments of Congress with respect to the uses of military commissions. The Court did not reject the possibility that the President could create such commissions on his own, without any statute at all; but the Court made it clear that the President must follow any relevant congressional enactment. Indeed, the Court specifically referred to the presumption against implied repeals in refusing to hold that the UCMJ had been altered by the AUMF. As with military commissions, so too, plausibly, with foreign surveillance: just as the AUMF does not affect the UCMJ, so does it leave FISA unaltered.

After *Hamdan*, then, it would be easy to write an opinion suggesting, very simply, that whatever the constitutional authority of the President, he cannot override the procedures specified in FISA, and that the AUMF is too general to displace those procedures. Even if the President has inherent authority to engage in foreign surveillance, that authority is not exclusive and hence is subject to congressional restrictions as embodied in FISA—restrictions that grant the executive considerable flexibility to procure a warrant, so long as it has probable cause.[120] Such an opinion would simply track the Court's analysis in *Hamdan*.

To be sure, we could imagine other possibilities. Justice Thomas might well be tempted to adapt some version of his *Hamdan* dissent to this context. Such an analysis might begin with the constitutional understandings on which Justice Thomas relies, seeing national security as the President's distinctive domain. It might rely on the AUMF, informed by the emphasis in *Hamdi* on what normally accompanies the power to use force; foreign surveillance might be seen as a normal accompaniment of that power, no less than the power to detain. The difficulty is to preserve *Hamdan* while also ruling in the President's favor in connection with wiretapping. There are two options here. Perhaps foreign surveillance fits more easily within the President's constitutional authority than does the convening of military commissions, at least in nonemergency circumstances and of the kind created in *Hamdan*. Or perhaps the AUMF is a better source for a power to wiretap than for convening such commissions; perhaps the power to engage in surveillance of those against whom force has been authorized, such as Al Qaeda members, is more akin to the detention upheld in *Hamdi* than the commissions struck down in *Hamdan*. Or perhaps *Hamdan* really had everything to do with the need to ensure the standard forms of adjudication, allowing a departure only when Congress, or some kind of emergency, clearly required it.

In its analysis of these questions in the immediate aftermath of *Hamdan*, the Department of Justice attempted to argue along these general lines, contending that its previous analysis was unaffected by the Court's ruling.[121] The Department emphasized that under section 109 of FISA, electronic surveillance is banned "excepted as authorized by statute"[122]—a recognition that statutory provisions might permit such surveillance.

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[120] See, e.g., 50 USC 1842

[121] See Letter to The Honorable Charles Schumer, July 10, 2006 (on file with the author).

[122] 50 USC 1809(a)(1).

The relevant provisions of the UCMJ have no analogous exception. In this respect, FISA might seem to be more closely akin to the Nondetention Act, which expressly allows detention "pursuant to an Act of Congress."[123] Moreover, the UCMJ is specifically focused on armed conflict and wars, while FISA makes separate provision for wartime.[124] The Department contends that it is more natural to read the AUMF to provide authority to engage in electronic surveillance than to override the UCMJ, designed as the latter is for wartime. Finally, Congress is specifically authorized, by the Constitution, to define and punish offenses against the law of nations, at issue in *Hamdan*, and to make rules for the regulation of the armed forces; with respect to foreign surveillance, the Constitution gives no similar power to Congress. In the Department's view, the power to collect foreign surveillance is "a direct corollary" of the President's power to conduct military campaigns. In the context of surveillance, the President might even be able to show that congressional limitations could prevent him from performing his constitutional duty.

Arguments of these sorts are not entirely implausible. After all, the Court was badly divided in *Hamdan*, and it would not exactly be amazing to see a future decision cabining the reach of the Court's analysis. But at least it can be said that after *Hamdan*, the President's claims on behalf of warrantless wiretapping are significantly weakened, and any defense of those claims faces a serious uphill battle. To be sure, FISA contains an exception, from its criminal prohibitions, for other laws that authorize surveillance, but after *Hamdan*, the AUMF is probably too abstract and general to provide that authorization. FISA does not generally exempt war from its orbit; on the contrary, it makes express provision for war, allowing a fifteen-day period of warrantless surveillance.[125] Even if the power to engage in foreign surveillance is a legitimate inference from the power to conduct military campaigns, it is hard to show that the restrictions in FISA would impermissibly interfere with that power. Perhaps the President can argue that in order to conduct such campaigns, he needs to be able to engage in foreign surveillance even when he cannot such probable cause. But to the extent that FISA requires a warrant for wiretapping communications that involve the United States, it is hard to see how this argument can be made into a persuasive constitutional challenge to FISA.

The broadest point is that in *Hamdan*, the Court declined to give deference to the President's interpretation of ambiguous provisions. It rejected presidential unilateralism. It refuses to embrace clear statement principles favoring executive discretion. It declined to defer to what the President claimed to be his greater expertise. For these reasons, any presidential action, not vindicated by history or required by emergency, is likely to need clear congressional authorization, at least if it intrudes into the domain of liberty. Under the approach in *Hamdan*, the warrantless wiretapping is in serious trouble, and the same point could be made by many other presidential efforts to construe ambiguous statutes in a way that jeopardizes interests that have a plausible claim to protection by reference to constitutional principles or longstanding traditions.

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[123] 18 USC 4001(a).
[124] 50 USC 111.
[125] 50 USC 1811.

Conclusion

In *Hamdan*, the Court had several options. Exercising the passive virtues, it might have refused to reach the merits at all. A committed minimalist would be especially drawn to abstention—on the ground that such an approach would leave all of the central issues undecided, including the meaning and the validity of the DTA. Reaching the merits, the Court might have followed *Quirin* to rule that military commissions were authorized by Congress and that no provision of law precluded the President's action here. Speaking more ambitiously, the Court might have relied on the President's power as Commander-in-Chief, most plausibly to suggest that all of the (ambiguous) provisions, in federal statutes and the Geneva Conventions, should be construed as he (reasonably) saw fit. On this approach, a clear statement principle might have operated in the President's favor.

Instead the Court ruled that key provisions of domestic and international law banned the President from convening the proposed commission. Those provisions were certainly ambiguous. I have suggested that the Court's opinion is best understood as undergirded by a simple clear statement principle: If the President is going to try people in military commissions, and thus depart from the standard procedures governing adjudication, it must be pursuant to unambiguous authorization from Congress. This suggestion, supported by Justice Breyer's concurring opinion, borrows from, and extends, a number of past decisions in which the Court demanded a clear statement from Congress to permit intrusions on constitutionally sensitive interests.

But *Hamdan* was nonetheless distinctive. The prevailing opinion reached far and wide; it is not plausible characterized as minimalist. No constitutionally sensitive interest was involved, or at least the Court did not say that it was; and the operative clear statement principle was (mostly) implicit, not on the surface of the opinion. At the same time, the Court necessarily offered a limited reading of the President's powers as Commander-in-Chief; and it did so without anything like a sustained discussion. Both the majority and the principal dissent invoked Justice Jackson's tripartite framework from The Steel Seizure Case. But they resolved, if only implicitly, a question that Justice Jackson did not pose: What is the appropriate presumption in the face of congressional ambiguity? The Court's answer, at least in the context of a criminal trial, was that the presumption would operate against presidential authority. The dissenting view was that in light of the distinctive constitutional position of the Commander-in-Chief, the President may construe ambiguities as he reasonably sees fit.

Hamdan was concerned, of course, with the President's power to convene military commissions, and for this reason it need not resolve other issues, such as the President's power to engage in warrantless wiretapping. But it is reasonable to read the decision to embrace a narrow reading of the AUMF and to indicate that outside of the context of military necessity, inherent presidential powers will generally be subject to legislative limitations. Even more significantly, *Hamdan* might be taken to suggest that when military necessity and genuine emergencies are not involved, the Court will not invoke a clear statement principle so as to read legislation sympathetically to presidential

prerogatives. In this way, *Hamdan* is written in an altogether different spirit from Ex Parte Quirin, and may well mark a large-scale difference between the Court's posture in World War II and its posture in the war on terror.

To evaluate the Court's decision, it would be necessary to parse the relevant provisions in some detail; that has not been my goal here. But if the governing provisions are generally taken as ambiguous, we can say that the views of the dissenters would certainly be convincing *if* the President has a plausible claim of constitutional authority to create military commissions *or* if the distinctive competence of the executive justified deference to its interpretations. And indeed, Justice Thomas offered reasonable arguments to this effect. It would be easiest to respond to those arguments if the result would be to raise serious constitutional questions—a genuine problem in previous cases involving national security and individual rights. If the President's interpretation of an ambiguous provision raised a serious constitutional problem, it should be rejected. And we could imagine a trial that would indeed raise due process questions—by, for example, convicting Hamdan on the basis of evidence not disclosed to him or his counsel. But no constitutional objection was offered in *Hamdan*.

I have suggested that a great deal could be said on behalf of abstention and a refusal to assess the merits at all. But it is hard to deplore a decision insisting that if there is no emergency, and if American institutions seek to try a suspected terrorist in a military commission lacking the standard guarantees of procedural fairness, it must be a result of a clear and focused decision by the national legislature.

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