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Hamdan v. Rumseld: The Legal Academy Goes to Practice

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COMMENT

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Neal Kumar Katyal

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HAMDAN V. RUMSFELD: THE LEGAL ACADEMY GOES TO PRACTICE

Neal Kumar Katyal*

*Hamdan v. Rumsfeld*¹ is a rare Supreme Court rebuke to the President during armed conflict. The time is not yet right to tell all of the backstory of the case, but it is possible to offer some preliminary reflections on how the case was litigated, the decision, and its implications for the oft-noticed divide between legal theory and practice.

In a widely cited article, Judge Harry Edwards lamented “the growing disjunction between legal education and the legal profession,” claiming that “many law schools . . . have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy.”² This observation is truer today than when Judge Edwards penned those words in 1992. Perhaps fueled by an intense desire to move up in published law school rankings,³ many of the nation’s leading law schools have ramped up course offerings and the number of faculty members devoted to legal theory while disparaging practitioners.⁴ Like any excluded group, practitioners have

* Professor of Law, Georgetown University Law Center. For helpful comments, I thank Bruce Ackerman, Alex Aleinikoff, Akhil Amar, Judy Coleman, Jack Goldsmith, Tom Goldstein, Julie Hilden, Vicki Jackson, Christine Jolls, Dan Kahan, Sonia Katyal, Richard Lazarus, David Luban, Liz Magill, Jon Molot, Judith Resnik, Jeff Rosen, Joanna Rosen, Jonathan Siegel, Charles Swift, Carlos Vázquez, Stephen Vladeck, and Kathy Zeiler. Given extremely unusual time pressures for publication, the research of many (Laura Alexander, Jillian Ashley, Jennifer Davitt, Josh Friedman, Brian Hart, Martin Kurzweil, Adam Lawton, and Jay Smith) contributed greatly to the final product.

I served as Counsel of Record in *Hamdan v. Rumsfeld*, and this Comment is dedicated to my co-counsel Lieutenant Commander Charles D. Swift (of the United States Navy); Joseph McMillan, Charles Sipos, and Harry Schneider (of the law firm Perkins Coie); Tom Goldstein and Kevin Russell (then of the firm Goldstein & Howe); and dozens of students from Duke College and Georgetown, Harvard, Michigan, and Yale Law Schools. These men and women represent the best of the public and private bar, both its present and its future.

¹ 126 S. Ct. 2749 (2006).

² Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992).

³ See Paul L. Caron & Rafael Gely, *What Law Schools Can Learn from Billy Beane and the Oakland Athletics*, 82 TEX. L. REV. 1483, 1509–14, 1525–29 (2004) (book review) (describing how *U.S. News and World Report* law school rankings have created market pressure leading to, among other things, “increased course offerings in nontraditional areas” and “a desire to measure individual contributions” of faculty — contributions measured, almost invariably, in terms of scholarly productivity and reputation alone).

⁴ For example, Professor Lawrence Solum has collected data noting “a marked decline of the ‘Trade School’ model,” with more than one-third of new hires possessing advanced doctoral degrees in a discipline other than law. See Legal Theory Blog, http://lsolum.typepad.com/legaltheory/2004/07/hiring_trends_a.html (July 19, 2004, 13:24 EST).

begun disparaging the theoreticians in return.⁵ We are witnessing one of the most significant developments in the history of American law: the majority of professors on many law faculties are now specializing in areas that are of no obvious relevance to their students' activities upon graduation.⁶

This Comment uses *Hamdan* to illustrate why the disparagement of theory is partially wrong. By examining the litigation of the case, it demonstrates some of the benefits of theory to practice. At least three different theoretical tools were involved in *Hamdan*: (1) psychological research on framing effects and bias toward compromise; (2) theoretical inquiry into the timing of Supreme Court litigation and the “passive virtues”; and (3) economic analysis of penalty default rules and political science research on the veto. The study of each in law school is widely — and incorrectly — believed irrelevant to practice.

To take one example, sophisticated Supreme Court practitioners sometimes employ a strategy that turns out to harness what cognitive psychologists call “extremeness aversion.”⁷ An advocate files a certiorari petition based on arguments that push the lower court's logic to the maximum, and then argues that if the opinion becomes the law, a parade of horrors will inevitably follow. The petition then advocates a strong, but seemingly more reasonable, position completely opposite to that lower court opinion, thereby casting the dispute as a fairly extreme one. The sharply opposed positions might persuade the Court to hear the case. At that moment, the advocate changes her goal — from getting the case selected to winning it.

Winning often requires the definition of a narrower rationale. The extreme position announced in the petition becomes not a liability, but rather a useful anchor for the discussion by presenting the advocate as a reasonable friend of the Court who would be content with more limited relief. The advocate comes across not as reversing course, but merely as courting the Court by acceding to the inevitable compromises the Justices will seek. In taking this turn, the lawyer cannot give up on the broader position; instead, she explains that the broad-yet-defensible position is not necessary to reach because of an available, and more limited, rationale in her client's favor. Oral argument both continues this strategy and furthers a second objective. The ad-

⁵ See Rena I. Steinzor & Alan D. Hornstein, *The Unplanned Obsolescence of American Legal Education*, 75 TEMP. L. REV. 447, 457–64 (2002) (describing “tensions” between the bar and the academy and stating that “many practicing lawyers feel varying degrees of impatience with the academy's esoteric pursuits”); see also AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM 3–8 (1992) (similar).

⁶ See Kara Abramson, “Art for a Better Life”: A New Image of American Legal Education, 2006 BYU EDUC. & L.J. 227, 283–84 (describing this disjunction).

⁷ See *infra* pp. 76–83.

vocate must now explain why the other side's position is extreme, and how its purported compromises (if any) remain extreme (unlike her own, which are of course entirely reasonable).

This pattern, from petition to oral argument, repeats itself all the time. Take the Pentagon Papers case, the last strong Supreme Court rebuke of the President during armed conflict.⁸ Alexander Bickel, the lawyer for the *New York Times*, opened his brief with the broad claim that virtually all prior restraints on publication were impermissible.⁹ He then took a more modest position: “[S]uch narrow exceptions to the rule against prior restraints, if any, . . . arise . . . in connection with the redress of individual or private wrongs.”¹⁰ His brief concluded more narrowly still, claiming that the government needed a statutory basis for its prior restraint, one not present in the case.¹¹ Yet Bickel's oral argument focused on this narrowest position — so much that, with just a few moments remaining after the great professor had condemned the government's “inherent authority” argument in a dozen different ways, one Justice interrupted to ask whether the First Amendment even had anything to do with the case.¹² Bickel won.¹³

Despite the recurrence of this pattern, legal scholarship has given no systematic attention to its implications for Supreme Court decisionmaking. Cognitive psychologists, meanwhile, have examined similar patterns in a variety of other contexts.¹⁴ They have found that the presentation of extreme positions defines the location of the “middle position” in a way that skews rational decisionmaking by making particular compromises appear more favorable. This is just one example of how theory can inform practice, and vice versa.

At the same time, it is easy to overstate the case for theory, as law schools frequently do. The truth is that very few law schools today prepare students to be lawyers: this responsibility is shunted off to law firms, the judges for whom students clerk, prosecutors' offices, and others. The obvious exception is law clinics, which do offer crucial lessons in the art of good lawyering. But clinics, despite their many

⁸ See *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

⁹ Brief for Petitioner, *N.Y. Times Co.*, at 31, *N.Y. Times*, 403 U.S. 713 (Nos. 1873, 1885), 1971 WL 134368.

¹⁰ *Id.* at 32 (capitalization omitted).

¹¹ *Id.* at 39.

¹² See Transcript of Oral Argument, *N.Y. Times*, 403 U.S. 713 (Nos. 1873, 1885), reprinted in 71 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 213, 241–42 (Philip B. Kurland & Gerhard Casper eds., 1978) (reprinting questions); see also *id.* at 231–43 (reprinting Bickel's argument, which did not emphasize prior restraint or the First Amendment and instead focused on the absence of a statute).

¹³ See *N.Y. Times*, 403 U.S. at 714.

¹⁴ See *infra* pp. 76–78.

virtues, still do not reach most law students, and their connection to the theoretical law taught elsewhere in the school is often left murky.

The cost of this educational failure is massive, forcing employers to spend their limited resources on training new lawyers in the basics of their jobs.¹⁵ The harm to indigent criminal defendants, whose very freedom may depend upon recently graduated attorneys lacking lawyering skills, is particularly acute. Litigating *Hamdan* gave me a sense of just how much law schools are failing. To pluck out one illustration: Before the oral argument, I spent a day with an instructor from the Gerry Spence Trial Lawyers' College who taught me about presence and how to interact and communicate directly in a courtroom. These skills are essential to litigating, yet modern law schools do not emphasize them. Combining theoretical and practical skills was eye-opening, allowing me to see the ways in which practice shapes theory and theory shapes practice.

Not all legal theory is good, however. Some is downright dangerous, as *Hamdan* itself attests. The Administration was sold a wild-eyed theory, masquerading as a "unitary executive" concept,¹⁶ that purported to allow it to defy and creatively reinterpret even the will of Congress — all supposedly entirely consistent with the Constitution. This virulent strain of the unitary executive, which emphasized the President's "inherent authority" to act, gained traction and led to a number of exceptionally dangerous policies, culminating in the so-called "torture memorandum."¹⁷ The success of this theory, over a pe-

¹⁵ Law firms are estimated to spend between \$200,000 and \$400,000 per new associate on training. See Elizabeth Millard, *Keeping Careers on Track Mommy or Not*, ABA J. E-REPORT, Oct. 14, 2005; Lisa G. Sherman, *Sisters in Law: Variations on the Full-Time Gig*, NEV. LAW., Aug. 2004, at 17.

¹⁶ The unitary executive theory of the presidency typically refers to the idea that the President controls the executive branch, and the corollary proposition that Congress cannot dictate how the President supervises or directs subordinates who exercise executive power. See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165–66 (1992). That claim has little to do with the sweeping theory adopted by the Administration that the President has the power to set aside statutes as unconstitutional in secret memos when he deems them an interference with his Commander-in-Chief power. The unitary executive theory merely means that truly executive power is concentrated in the President; the theory alone does not specify what counts as executive power in the first place. As to that latter question, the Administration has been far too exuberant in defining executive power at the expense of legislative and judicial power. See *infra* section II.A, pp. 97–105. Moreover, a chief normative reason for the unitary executive is to avoid blurred lines of political accountability, not to sidestep accountability altogether, which is what the Administration's secretive memos attempted to do.

¹⁷ See Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A, 2002 OLC LEXIS 19 (Aug. 1, 2002) [hereinafter 2002 Memorandum], available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/doj/bybee80102mem.pdf>.

riod of some years, is an unfortunate but powerful answer to those who believe theory irrelevant to modern practice.¹⁸

The most important doctrinal lesson of *Hamdan* is its repudiation of the claim that the President is entitled to act alone. Indeed, *Hamdan* stands as a defining moment in constitutional law because it integrates the modern communication and transportation revolution into constitutional analysis. At the Founding, it may have been plausible to say that the President had to be empowered to act without waiting for explicit legislative sanction. Members of Congress were flung across a country with no cell phones, e-mail, Blackberries, airplanes, automobiles, or trains. *Hamdan* underscores just how much the world has changed. In this respect, the recent passage of the Military Commissions Act of 2006¹⁹ (MCA), while heralded as a political victory for the Administration, puts the final nail in the coffin of the Administration's pretensions of "inherent authority." It reveals that arguments of executive necessity were overblown, and that Congress stands ready and able to change laws and give the President the tools he needs (and then some). In this way, practice reined in theory.

Indeed, practice itself provides one way to test whether a theory is good or bad. Generally speaking, one measure of a theory's validity is whether it comports with the values, traditions, and practices of the nation. Practitioners, as that term implies, often have sensible instincts on such questions. As such, they may provide useful insight into why something is done a certain way, or why a new theory might destabilize other areas of law.²⁰ The strain of the unitary executive theory adopted by the Administration was not simply dangerous, it was also revolutionary.²¹ When legal revolutions such as these are proposed, the explicit vetting and support of practitioners can often prove essential.

This Comment oscillates, with any luck instructively, between *Hamdan*'s implications for legal education and its implications for the law. Part I discusses how broad theoretical research sheds light on the

¹⁸ Grossly speaking, it may be the case that "conservative" theory (from the unitary executive to originalism to law and economics) has had more of an impact on legal practice than "liberal" theory has had.

¹⁹ S. 3930, 109th Cong. (enrolled as agreed to or passed by both House and Senate, Sept. 29, 2006).

²⁰ The logic of relying on practitioners is replete in our law, both international and domestic. For example, one of the rationales for administrative deference is listening to what practitioners think. See *infra* section II.B, pp. 105–14. The Geneva Conventions require a determination of whether someone is a prisoner of war to be made by practicing members of the military, not politicians who might be tempted to adopt a creative interpretation. See *infra* pp. 110–12.

²¹ As one architect of these theories complains: "What the [*Hamdan*] court is doing is attempting to suppress creative thinking." Adam Liptak, *The Court Enters the War, Loudly*, N.Y. TIMES, July 2, 2006, §4, at 1 (quoting John Yoo) (internal quotation marks omitted).

litigants' strategic moves. The art of Supreme Court persuasion is not one traditionally thought to be informed by knowledge of psychology, economics, and political science; even "Brandeis briefs" tend to be more empirical than theoretical, using the findings of other disciplines more than their insights and methods. However, the study of these disciplines has significant payoffs. This Part is intended to be a corrective to those who criticize the move to theory in U.S. law schools. While that criticism has been somewhat overstated, the traditional defense of theory (perhaps in good practitioners' fashion) has been intentionally overstated as well.²²

Part II explains the implications of the *Hamdan* decision. The case's practical meaning is clear: military trials have to take place with essential elements of military justice intact and must comply with the minimal protections enshrined in Common Article 3 of the Geneva Conventions. It is easy to get lost in the details of 177 pages of opinions filled with dueling interpretations of subparagraph after subparagraph of the Uniform Code of Military Justice²³ (UCMJ). But when one rises above the fray, the Court's opinion stands for two central ideas: (1) the President cannot set aside or creatively interpret laws of Congress under claims of "inherent authority," and (2) treaties ratified by the Senate constrain the exercise of executive power, and the President does not have unfettered ability to interpret such treaties as he chooses. The Court might have been concerned, I argue, that the President lacked support not only from Congress, but also from the executive branch's own experts. *Hamdan* second-guessed the President's interpretations perhaps because those interpretations had not earned the approval of the bureaucracy, including the Judge Advocates General and the State Department. Through bypassing the interagency process, and squelching expertise under the aegis of political accountability, the Administration weakened the rationale for deference all on its own.

Part III looks to the future of both the bar and the academy. It considers the legislation recently enacted in response to *Hamdan* and suggests that the legislative process was fundamentally broken. It also outlines some possible reforms in law schools to integrate the benefits of theory and practice. Bringing readers behind some of the scenes of *Hamdan*, this Part attempts to spark conversation around the preparation our nation's law schools provide — and, more controversially, fail to provide — to lawyers. Law schools obviously must continue to teach analytic reasoning, close reading, and writing skills. But successful lawyers need to know more. The Part considers three skill sets

²² Ironically, once the continuum is defined, the middle position is best.

²³ 10 U.S.C.A. §§ 801-946 (West 1998 & Supp. 2006).

beyond the standard law school curriculum: productively working in groups, speaking and communicating effectively, and ensuring that legal practice never provides a pretext for jettisoning one's moral compass. The typical law school's lack of emphasis on teaching these skill sets may ultimately be justified by institutional-competence limitations or some other rationale. But the profession as a whole will suffer if we do not reflect upon and study the issue to make sure that contemporary legal education has it right.

Finally, a word of caution is appropriate. It has been only a few months since the *Hamdan* decision came down. The case might signal a new way of approaching executive power issues, or it might not. And I am acutely aware of another phenomenon psychologists study, hindsight bias, which might lead an advocate such as myself, the lawyer in the case, to think he did things right when in fact they were irrelevant, or perhaps even counterproductive. So just as the story of *Hamdan* is not yet written, neither is its legacy. These are preliminary observations.

I. *HAMDAN*: HOW THEORY INFORMED PRACTICE

The most obvious relationship between theory and practice when it comes to *Hamdan* is that the case grew out of a law review article penned with Professor Laurence Tribe.²⁴ Such scholarship is not my focus here, however. Law review articles on concrete subjects frequently inform litigation; indeed, several law review articles were essential to litigating *Hamdan*, such as Professor Henry Hart's Dialogues²⁵ and Professor Akhil Amar's Article III analysis²⁶ (both concerning jurisdiction-stripping); Professor Carlos Vázquez's work (concerning the defensive use of treaties as an alternative to their self-execution);²⁷ and Professor Derek Jinks's examination of the Geneva Conventions.²⁸ That style of scholarship has obvious payoffs for the practitioner and is not controversial. Instead, I want to defend here a broader claim: some purely theoretical work that at first does not seem particularly useful can turn out to be quite important to the practice of law.

²⁴ Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002).

²⁵ Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

²⁶ Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985).

²⁷ Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082 (1992).

²⁸ Derek Jinks, *The Applicability of the Geneva Conventions to the "Global War on Terrorism,"* 46 VA. J. INT'L L. 165 (2005). Judge Edwards himself recognized the benefits of some theoretical scholarship. See Edwards, *supra* note 2, at 35, 50, 56.

Some practitioners unconsciously employ methods derived from theory, but bringing them into the open may help; using methods more deliberately opens a path for using them more effectively and pointedly. Law faculties, often divided between the old practitioners and the modern scholars, might then begin to appreciate the value each group brings to the table. Although the gap between these two distinct professions is currently growing, the potential for arbitrage is strong.

A. *Framing Effects*

Hamdan followed the same well-worn pattern of broad-to-narrow argumentation that we saw in the Pentagon Papers case. Immediately upon learning that it had lost in the district court, the government issued a press release stating:

We vigorously disagree with the court's decision, and will seek an emergency stay of the ruling and immediately appeal. We believe the President properly determined that the Geneva Conventions have no legal applicability to members or affiliates of al Qaeda, a terrorist organization that is not a state and has not signed the Geneva Conventions. We also believe that the President's power to convene military commissions to prosecute crimes against the laws of war is inherent in his authority as Commander in Chief of the Armed Forces, and has been memorialized by Congress in statutes governing the military.

By conferring protected legal status under the Geneva Conventions on members of al Qaeda, the Judge has put terrorism on the same legal footing as legitimate methods of waging war.²⁹

Attorney General Ashcroft then went on to raise the stakes: "The danger I see here is that intrusive judicial oversight and second-guessing of presidential determinations in these critical areas can put at risk the very security of our nation in a time of war."³⁰

The government did not restrict its rhetoric to public relations. The Solicitor General's brief in the D.C. Circuit continued to push the most extreme arguments, including the frequent refrain that the President possesses "inherent authority" — implicit, and not referred to anywhere in the text of Article II — to convene commissions even without statutory authorization,³¹ and that "[b]y permitting captured enemies to continue their fight in our courts, the district court's hold-

²⁹ Press Release, U.S. Dep't of Justice, Statement of Mark Corallo, Director of Public Affairs, on the *Hamdan* Ruling (Nov. 8, 2004), available at http://www.usdoj.gov/opa/pr/2004/November/04_opa_735.htm.

³⁰ Terry Frieden, *Ashcroft: "Activist" Judges Can Put Nation's Security at Risk*, CNN.COM, Nov. 12, 2004, <http://www.cnn.com/2004/ALLPOLITICS/11/12/ashcroft.judges/index.html> (quoting John Ashcroft) (internal quotation marks omitted).

³¹ Brief for Appellants at 56–61, *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005) (No. 04-5393), available at <http://www.law.georgetown.edu/faculty/nkk/documents/Hamdan-opening-brief2.pdf>.

ing threaten[ed] to undermine the President's power to subdue those enemies" and constituted "an extraordinary intrusion into the Executive's power to conduct military operations to defend the United States."³² This rhetoric made it sound rather as if the district court had invaded the Executive's rightful province, thereby providing a *casus belli* for the Executive to declare war on the courts.

At oral argument before the D.C. Circuit, though, the government emphasized the narrowest part of its argument, that all of the merits issues could be avoided by reversing the district court on the ground of abstention alone.³³ Again, this was the claim that the federal courts had no right to intrude, but phrased more respectfully, that the courts' self-imposed federal jurisdiction doctrines were what kept the judiciary out: good court-imposed fences make good neighbors, as it were.

The government also toned down its claims on the merits before the circuit court, suggesting, for example, that every effort would be made to avoid the defendant's exclusion from the courtroom and that substitution procedures would be used to permit Mr. Hamdan to confront classified evidence.³⁴ There was no talk about the "inherent authority" of the President.

And the government won.

It was then our turn to respond in the Supreme Court. Here, and elsewhere in this Comment, I don't want to suggest I had much to do with the ultimate victory, which I attribute to a variety of factors, including most of all a terrific team of pro bono lawyers from Perkins Coie, uniformed military attorneys, and scores of law student volunteers.³⁵ Indeed, I had always thought that, simply as a matter of law, the *Hamdan* case would not be difficult to win on the merits,³⁶ even with me as the advocate. I did not think I needed a fancy litigation strategy: these commissions looked unlike any trials in American his-

³² *Id.* at 12, 9.

³³ See Transcript of Oral Argument at 5, *Hamdan*, 415 F.3d 33 (No. 04-5393), available at <http://www.law.georgetown.edu/faculty/nkk/documents/HamdanDCCircuitTranscript.PDF> ("We disagree with each of these rulings, but we think the first error the District Court made was in addressing those issues at all, because we believe the proper course was for the District Court to dismiss the case on the basis of abstention."). The government's rebuttal led with abstention as well. *Id.* at 66-67.

³⁴ See *id.* at 18-22.

³⁵ Indeed, the Court did not even reach many of the issues raised in *Katyal & Tribe*, *supra* note 24. Litigation success is often the product of many, not one, and that was particularly true in *Hamdan*. Not only the co-counsel and students, but also the Georgetown Law Center, whose entire faculty spirit is devoted to the idea of taking the lessons of theory and applying them to the real world, were essential to how the case unfolded. This "Georgetown model" of legal education comes closest to tracking the ideals discussed in section III.B, *infra* pp. 116-22.

³⁶ A brief outline of why appears in my remarks in *With Humility and Justice for All: Four Advocates Weigh the Meaning of Hamdan and the Future of the Roberts Court*, LEGAL TIMES, July 31, 2006, at 22.

tory and were taking place without congressional approval. But the Solicitor General's litigation tactics, which painted an extreme picture of what would happen to national security should Mr. Hamdan's position be adopted, called for a forceful response.

The petition for certiorari took the broad view that commissions were not authorized at all.³⁷ But it also emphasized several narrower grounds for reversal, such as the commissions' noncompliance with the Geneva Conventions and the UCMJ.³⁸ The merits brief continued to offer this range of options, placing particular emphasis on paths for decisions with limited forms of relief.³⁹ And the oral argument honed in on that limited, middle path, while mentioning that the broader argument was available to the Court.⁴⁰

The Solicitor General, for his part, continued the same extremeness-aversion strategy used in the D.C. Circuit. He opposed certiorari, arguing that the case was interlocutory and should not be heard until after the trial.⁴¹ And he argued that the President had the authority to convene military commissions:⁴² Congress "has recognized and approved the President's historic use of military commissions as he

³⁷ Petition for Writ of Certiorari, *Hamdan*, 126 S. Ct. 2749 (No. 05-184), 2005 WL 1874691, at *6, *10-12 (arguing that Mr. Hamdan's commission violated separation of powers and the Authorization for Use of Military Force resolution).

³⁸ See *id.* at *16-20 (arguing that Mr. Hamdan's commission violated the UCMJ); *id.* at *20-27 (arguing that it violated the Geneva Conventions).

³⁹ The reply brief argued:

The inescapable fact is that the conflict with al Qaeda is not equivalent to the only war in which this Court approved commissions. Congress has not declared war; the laws of war have not been extended to these nonstate, nonterritorial actors; the conflict is in its fifth year; and Congress stands ready to act. So far, Congress has only authorized "force," conditioning even that grant by requiring it to be "necessary and appropriate" to promote specific (not general) deterrence. The Court need not decide whether these differences with World War II are sufficient to prohibit *all* commissions since *Hamdan's* commission is impermissible. Only if the Court rejected this limited position would it be necessary to confront the broader question of whether commissions as a whole are authorized today.

Reply Brief for the Petitioner at 4, *Hamdan*, 126 S. Ct. 2749 (No. 05-184), 2006 WL 684299 (citations omitted); see also Brief for Petitioner Salim Ahmed Hamdan at 5-7, 13-14, *Hamdan*, 126 S. Ct. 2749 (No. 05-184), 2006 WL 53988 [hereinafter Brief for Petitioner] (similar).

⁴⁰ See Transcript of Oral Argument at 3, *Hamdan*, 126 S. Ct. 2749 (No. 05-184), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-184.pdf (emphasizing, in opening lines of argument, UCMJ and Geneva Convention violations); *id.* at 30 ("Suppose [the Detainee Treatment Act] did ratify some sort of military commission. I don't believe that it authorized this military commission with this charge, conspiracy, in this conflict, a stateless, territoryless conflict, with these procedures, procedures that violate the UCMJ."); *id.* at 31 (arguing that there is a "conceivable argument" that the Detainee Treatment Act authorized commissions but that "the reason why I think this Court, if it did decide to reach that ultimate question, should reach it against the Government, is that that kind of back-door . . . approval by inference has never been sufficient").

⁴¹ See Brief for the Respondents in Opposition, *Hamdan*, 126 S. Ct. 2749 (No. 05-184), 2005 WL 2214766, at *10-15.

⁴² See *id.* at *23-24.

deems necessary,” and the UCMJ and Geneva Conventions⁴³ impose no constraints on commissions at all.⁴⁴ He then filed a brief that offered the Court the full variety of options, from the narrowest (do not decide the merits at all, simply abstain)⁴⁵ to the broadest (the President has “inherent authority” to create military commissions even without Congressional approval).⁴⁶ And he sought to characterize Mr. Hamdan’s arguments as extreme ones that lacked credibility.⁴⁷ Yet at oral argument, the Solicitor General strove to avoid pushing the extreme arguments about inherent authority, instead explaining that the Justices “don’t have to reach” that “very difficult question that this Court has never squarely addressed.”⁴⁸ He then added that his position on that “difficult issue” was that the President did have that “pure constitutional power,” and he urged that the Court’s acceptance of his narrower grounds would preclude the need to reach his broader contention.⁴⁹

It is worth reflecting on the implications of this recurring pattern of argumentation for judicial decisionmaking. I have no doubt that advocates who employ this strategy, including the Solicitor General and private advocates such as Professor Bickel, advance it in good faith. They are simply performing their job as advocates by offering the Court a variety of options, from broad to narrow. For my part, I was not consciously thinking, at any point, about psychological effects such as extremeness aversion. The point has only come to me upon reflection, after the intense hustle and bustle of litigation ceased. But one can see the moves by both parties in the *Hamdan* case as playing into those effects, consistent with the moves in many other Supreme Court cases.

The advocate’s smorgasbord of choices, and the predictable tendency to walk a narrow path at oral argument, is at its core a psychological tool that can skew judicial decisionmaking. An understanding of the psychological literature can be helpful to litigants who encounter

⁴³ See *id.* at *24–27.

⁴⁴ *Id.* at *24.

⁴⁵ See Brief for Respondents at 12–15, *Hamdan*, 126 S. Ct. 2749 (No. 05-184), 2006 WL 460875.

⁴⁶ *Id.* at 8 (“[T]he President has the inherent authority to convene military commissions to try and punish captured enemy combatants in wartime — even in the absence of any statutory authorization.”); see also *id.* at 20–23 (similar).

⁴⁷ See, e.g., *id.* at 34 (asserting that Mr. Hamdan’s claim about the enforceability of the Geneva Conventions “would severely encumber the President’s authority as Commander in Chief” and lead to “absurd consequences”); *id.* at 23 (arguing that Mr. Hamdan’s law of war claims are “seriously mistaken”); *id.* at 26 (calling Mr. Hamdan’s Geneva Convention argument “baseless”); *id.* at 44 (stating that Mr. Hamdan’s reading of the UCMJ was “manifestly incorrect” and “rests on a fundamental misunderstanding”).

⁴⁸ Transcript of Oral Argument, *supra* note 40, at 38.

⁴⁹ *Id.* at 38–39.

their adversaries using these tactics, to judges who might be subject to these biases, and to academics who might use them to shed light on both legal theory and doctrine, from judicial minimalism to the standing requirement.⁵⁰ A broader integration of theory and practice in law schools might therefore produce benefits, particularly for lawyers who then will not have to stumble upon these lessons haphazardly.

In making these observations, I take as incontrovertible that the nine members of the Supreme Court are among the most rational actors inside or outside of our government, who come into the Court each day bent on finding the right answer and who strive mightily to avoid any undue influences. Indeed, a hallmark of our legal system is our faith that the Justices of our highest Court will act rationally — deciding cases on the basis of the strength of the arguments presented to them. Criticisms of course come along all the time, and some or all of the Justices are called partisans, biased in favor of the rich (or poor), too protective of criminal defendants (or prosecutors), discriminatory against African Americans (or whites). But these criticisms fail to resonate, and with good reason.

Justices are human, however, and thus susceptible to biases of types that psychologists have studied for years. In particular, cognitive psychologists have found that the ways in which choices are “framed,” or presented, can skew decisions. One example of a framing effect is that giving people extreme options can make compromise options easier to support. “Extremeness aversion” predicts, for example, that within an offered set, options with extreme values are relatively less attractive than those with intermediate values.⁵¹ The addition of an otherwise irrelevant extreme alternative may thus enhance the desirability of an original — and now seemingly moderate — option.

This work by psychologists tends to focus on negotiations between two parties, rather than on judicial decisionmaking, particularly by the Supreme Court.⁵² Nevertheless, examples of extremeness aversion that

⁵⁰ It is also possible that the litigation pattern in *Hamdan*, as well as doctrines such as standing, may be examples of the observation that human beings engage in optimal behavior even if they are not aware of what they are doing. See LEDA COSMIDES & JOHN TOOBY, EVOLUTIONARY PSYCHOLOGY (1997), <http://www.psych.ucsb.edu/research/cep/primer.html>.

⁵¹ See Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2463–64 (1997) (discussing studies); Eldar Shafir et al., *Reason-Based Choice*, 49 COGNITION 11, 25 (1993); Itamar Simonson, *Choice Based on Reasons: The Case of Attraction and Compromise Effects*, 16 J. CONSUMER RES. 158 (1989). Even professionals with training and individuals who face dire circumstances in real-world settings fall susceptible to such forms of cognitive bias. See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 782–83 & nn. 26–27, 820 (2001) (providing several examples).

⁵² Occasionally an article has noted the influence of cognitive bias on judicial decisionmaking, but no analysis has focused on the Supreme Court or the way litigants frame issues. For example, Guthrie et al., *supra* note 51, gave 167 magistrates a description of a serious tort suit. Those without an anchor were asked to award compensatory damages. Those with an anchor were first

could inform our understanding of litigation and judicial decisionmaking abound. For example, in one study, Professors Mark Kelman, Yuval Rottenstreich, and Amos Tversky gave subjects a summary of facts about a homicide.⁵³ One group was told that the two options for conviction were manslaughter and murder, and 47% in that group chose manslaughter.⁵⁴ A second group was given a third choice, "special circumstances murder," such as killing for financial gain or in an especially cruel manner. In that group, only 19% chose manslaughter, with many more selecting a form of murder than those in the control group.⁵⁵ The availability of the more extreme option, the authors surmise, may have skewed the decisions made by the subjects.⁵⁶

Unlike studies such as these, of course, litigation has two or more parties. As a result, a party encountering an extremeness-aversion strategy can react to it by pitching an extreme argument in the other direction and reframing the degree of difference between positions. And the party can also try to blunt the other side's extreme argument in two ways. First, the party can paint the opponent's position as such an extreme claim that it casts doubt on the litigant's credibility more generally. In the standard studies, credibility to an impartial decisionmaker is not an issue: the scenario is predominantly framed as a two-party negotiation. Wildly implausible anchoring has been shown to skew decisions in these two-party studies so that, for example, students will guess that a textbook will cost more on average when they are asked beforehand whether the book costs over \$7128.53 than when that question is not posed.⁵⁷ But in a litigation setting, a key element is to preserve the reputation of the litigant (and his counsel). A strategy of offering an overly extreme option will fail in the Supreme Court because a litigant's decision to advance implausible claims will un-

asked to rule on a motion to dismiss because the accident did not meet the jurisdictional minimum in diversity cases of \$75,000. The latter motion should have been irrelevant, in the sense that virtually no judges granted the motion. *Id.* at 786–87, 790–91. But "asking the judges to rule on this frivolous motion depressed average damage awards by more than \$350,000 (or 29.4%)." *Id.* at 792. Their finding suggests that even irrelevant information, and even among a sophisticated audience, can skew decisions.

⁵³ See Mark Kelman, Yuval Rottenstreich & Amos Tversky, *Context-Dependence in Legal Decision Making*, 25 J. LEGAL STUD. 287, 290 (1996).

⁵⁴ *Id.* at 290–91.

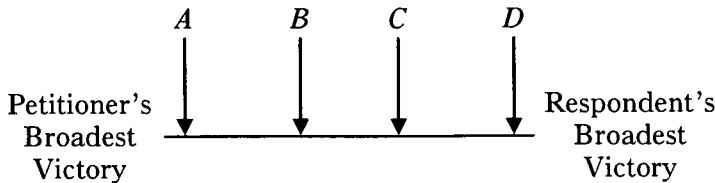
⁵⁵ *Id.*

⁵⁶ *Id.* It is possible that studies such as these contain errors or misinterpretations, see, e.g., Charles R. Plott & Kathryn Zeiler, *The Willingness To Pay–Willingness To Accept Gap, the "Endowment Effect," Subject Misconceptions, and Experimental Procedures for Eliciting Valuations*, 95 AM. ECON. REV. 530 (2005), or that they do not translate outside of the laboratory, particularly to lawyers and judges. That is, of course, yet another reason why legal scholarship's pursuit of these inquiries is important.

⁵⁷ Guthrie et al., *supra* note 51, at 788 (discussing an unpublished study by George Quattrone and colleagues).

determine his credibility more generally. Second, an opposing litigant can try to paint the moderate option as similar to the extreme one, asserting that the two options are actually the same thing.

Put graphically, a litigant at the Court is likely to advance argument *A* — a strong disagreement with the decision by the lower court — in the petition seeking certiorari.⁵⁸



If certiorari is granted, the argument in the merits brief and orally will likely push toward a middle position, designated *B*. The litigant won't give up *A*; in fact, skillful retention of the possibility of *A* can make *B* look better through extremeness aversion. But in sophisticated litigation, the other side knows this. The other side will likely articulate, in its brief in opposition to certiorari, a moderate defense of the decision below. It does not have an incentive to cast the decision below as extreme, for to do so plays into the hands of the party seeking certiorari. Instead, the tendency is to say that the court below exercised a reasoned and moderate judgment, designated *C*, quite unlike the extreme characterization of the petitioner. Then, if certiorari is granted, a skilled advocate for a respondent might advance an even broader position than that of the lower court, saying that the court did not go far enough. That claim, designated *D*, will be deployed by respondents to reframe the area of disagreement, hopefully mitigating the reference-point skew engendered by *A*'s being on the table.

Again, the sophisticated respondent will also seek to use *A* against the petitioner in two ways. First, she will use *A* to undermine the credibility of the litigant, claiming that *A* is so extreme that an advocate who does not denounce it has no credibility in his other claims. Second, she will paint *B* as really *A*, saying that *B* is an extreme option masquerading as a moderate one. The removal of the petitioner's moderate option means that there is only one compromise option left for the decisionmaker, *C*, which is being advanced by the respondent. And because the respondent appreciates that extreme options are less

⁵⁸ An Assistant to the Solicitor General, for example, has noted (speaking unofficially) that in his experience some sophisticated private-practice advocates take "dog" cases that initially look fact-bound and make them appear very important by emphasizing the extremeness of the implications of the lower court's holding. Interview with Assistant to the Solicitor General, U.S. Dep't of Justice, Office of Legal Counsel, in Wash., D.C. (May 11, 2006).

likely to be adopted than moderate ones, she can then predict that the Court will follow *C*.

If the choices of Justices are being skewed through extremeness aversion, tensions begin to afflict the underlying premise of Fullerian judicial adjudication. Professor Lon Fuller's model presupposes, as its linchpin, an underlying rationality of the decisionmaker.⁵⁹ But the extremeness aversion scenario suggests that we may not be able to take objective rationality for granted. Adversarial litigation may skew reference points and thereby lead judges to places where they might not otherwise end up.

It might be that the arms race of competing adversarial counsel nullifies the advantages of employing cognitive biases, so that the two sides cancel each other out. But there are at least three reasons why this may not be the case. First, resources and expertise vary tremendously, even among well-heeled law firms and clients. Knowledge about how issues are framed, and techniques to combat an opponent's framing techniques, might justify going to a Supreme Court specialist, for example, and it is possible that only one side will take this step. In this setting, serious problems would emerge when counsel for one party appreciates the cognitive bias and the other does not — such a mismatch can be skillfully exploited by a seasoned advocate. The creation of a repeat-player Supreme Court bar is one way to minimize this potential imbalance. Indeed, attention to such techniques may partially explain the emergence of that bar, and it renders particularly dubious the practice of some trial counsel — especially those representing criminal defendants — of retaining their cases through oral argument. (Indeed, it may be notable that the number of repeat oral advocates grew considerably during the tenure of Justice O'Connor, a jurist widely known for preferring compromise positions.⁶⁰)

Second, the ability to argue from both extreme and compromise positions is not inherent to both sides in all litigation. Certain parties, by virtue of the circumstances, will not be able to invoke an extreme option before the Court, and others will not be able to point to a compromise option. In criminal cases, for example, the government will often be able to argue that the defendant's premature release would threaten public safety. These sky-is-falling claims present a more cognizable risk than the amorphous arguments advanced by the defense

⁵⁹ See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978) (“[P]articipation through reasoned argument loses its meaning if the arbiter of the dispute is inaccessible to reason because he is insane, has been bribed, or is hopelessly prejudiced.”).

⁶⁰ See E-mail from Richard Lazarus, Professor of Law, Georgetown Univ. Law Ctr., to Neal Katyal, Professor of Law, Georgetown Univ. Law Ctr. (Oct. 7, 2006) (on file with the Harvard Law School Library) (providing data showing many more repeat advocates in the 2000 and 2005 Terms than in 1980).

about individual rights. Many cases potentially involve this kind of asymmetry between the parties.

In *Hamdan*, for example, we could (and did) try to cast the Solicitor General's position as implausible by taking the position that the government's reasoning would permit military trials for United States citizens and take away valuable liberties. The Solicitor General, in response, could (and did) argue that following Mr. Hamdan's reasoning would lead the Court to interfere with the President's war efforts, undermine deterrence of war crimes, and possibly permit terrorists to act with impunity — each scenario risking potentially thousands of lives. Criminal defendants, in both the civilian and military systems, face greater difficulty when they frame their case with extreme options than when the government does the same.

Third, both parties are interested in painting extreme versions of each other's arguments, but with a single goal in mind: promoting their clients' interests. As a result, they may lead the Court to a compromise, minimalist option that is better for their clients but worse for society. Here again, Professor Fuller's model of the adjudicative system yields complicated results. He claims that adjudication differs from negotiation because of its social welfare calculus:

If we asked one party to [a] contract, "Can you defend that contract?" he might answer, "Why yes. It was good for me and it was good for him." If we then said, "But that is not what we meant. We meant, can you defend it on general grounds?" he might well reply that he did not know what we were talking about. Yet this is precisely the kind of question we normally direct toward the decision of a judge or arbitrator. The results that emerge from adjudication are subject, then, to a standard of rationality that is different from that imposed on the results of an exchange.⁶¹

The parties to a lawsuit do not focus on general welfare; they focus only on their own. Accordingly, they have an incentive to push decisionmaking in a particular way: toward their clients. So even when options between *A* and *B*, or between *C* and *D*, might produce greater social welfare, counsel may not advocate for them. The result may well be that courts are less likely to reach such results, and instead embrace compromise options that are good for the parties but not necessarily for social welfare.

This phenomenon may have all sorts of interesting consequences. It might mean, for example, that Court decisions are likely to be minimalist because the parties converge on compromise positions instead of broader ones. If so, the extremeness-aversion problem may partially undergird the inherent conservatism of courts. On this view, judicial minimalism might be woven into the tapestry of litigation it-

⁶¹ Fuller, *supra* note 59, at 367.

self — it results from the way parties define their competing visions.⁶² If minimalism is a problem, and if we want to encourage broader guidance and attention to general social welfare in the courts, then greater consideration to amicus briefs may enable the Court to hear these broader positions.⁶³ Perhaps, in addition, the Court should allow more amici to participate at oral argument.

This potential role for amici raises the question of whether existing judicial structures mitigate extremeness aversion. Justices have specialized legal training,⁶⁴ hear all cases together in stable panels, and employ a formal structure of decisionmaking in the closed-door conference, each of which may permit colleagues to dispel the irrelevant extreme choices.⁶⁵ The political question doctrine might be justified as a method to eliminate jurisdiction over those cases that are too susceptible to framing effects and manipulation.⁶⁶ The standing doctrine might help ensure that litigants with concrete injuries that they need remedied, instead of organizations with more generalized grievances, bring cases and frame the issues.⁶⁷ Each doctrine might exemplify

⁶² This tendency toward compromise might also explain why another psychological phenomenon from group settings, polarization, may not apply as much to the Supreme Court. See Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1316–19 (2003) (discussing how groups can become polarized). The fact that the advocates' most heavily emphasized options involve middle positions may reduce the otherwise present tendency to push toward extremes within a group. That tendency is already lowered for many other reasons, such as the Justices' typical inability to see themselves as part of a single "group" or stable set of "groups."

⁶³ Of course, amicus briefs might also be deployed strategically for extremeness purposes. Consider, for example, the Cato Institute's brief in *Hamdan*, which surprised me when it was filed. See Brief of the Cato Inst. as Amicus Curiae in Support of Petitioner, *Hamdan*, 126 S. Ct. 2749 (No. 05-184), 2006 WL 53978. The brief argued there was a right to jury trial at Guantánamo Bay, see *id.* at 4–8, and its broad position might have helped offset the Solicitor General's extreme framing of the issues.

⁶⁴ Some evidence suggests that framing effects influence lawyers less than those in other professions. See Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 99–101 (1997).

⁶⁵ The formalized nature of the conference, and the fact that coalitions of Justices are constantly shifting from case to case, may also blunt the psychological phenomenon of polarization. See Katyal, *supra* note 62. That is yet another example, already mined by others, of how the study of group behavior in psychology might have payoffs for law.

⁶⁶ Political questions include cases without "judicially discoverable and manageable standards." *Baker v. Carr*, 369 U.S. 186, 217 (1962). A plurality in *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004), stated that "law pronounced by the courts must be principled, rational, and based upon reasoned distinctions"; when the nature of an issue makes such "reasoned distinctions" impossible, the issue is not the Court's to decide. *Id.* at 1777 (plurality opinion). When standards are incomplete, and when the litigants themselves might be thought prone to excessive positions, avoiding a judicial decision may therefore be appropriate.

⁶⁷ For example, the Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), denied standing to an organization that sought to challenge the Secretary of the Interior's interpretation that certain provisions of the Endangered Species Act were inapplicable abroad, because "[s]tanding is not 'an ingenious academic exercise in the conceivable,' but . . . requires . . . a factual showing of perceptible harm." *Id.* at 566 (citation omitted) (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688 (1973)). The Court's repeated emphasis on con-

how legal rules accommodate biases, sometimes even unconsciously.⁶⁸ And, of course, drawing attention to the extremeness-aversion technique might lead the Court to adopt debiasing strategies that help ward off its effects.⁶⁹

In *Hamdan*, one might locate extremeness-aversion strategies not only in the claims of the parties, but also in the lower court opinions themselves. Judges, after all, might be producers, not just consumers, of such strategies. Professor Bickel, whose influence on *Hamdan* plays a starring role in the next section, observed that the reason Justice Black was such a First Amendment absolutist was not because he believed in such absolutism, but because he saw taking such an extreme position as necessary to move the doctrine to the middle ground that he actually thought was correct.⁷⁰ The district court opinion in *Hamdan* found strong Geneva Convention and UCMJ rights, whereas the court of appeals entirely rejected these claims along with most everything else on the merits that Mr. Hamdan put forward. These two diametrically opposed opinions might have set a frame for the issues as the case went before the Supreme Court.

Attention to how extremeness aversion might alter adjudication, and how a skillful advocate can work to combat the biases it creates, is important both for any given litigation and for the law generally. With greater knowledge about extremeness aversion, both lawyers and judges might be able to ward off its negative consequences for society and for the Court as an institution. At the very least, this phenomenon might help us understand why certain judicial doctrines and institutions function the way that they do.

crete, particular, and perceptible injury could be said to further a goal of framing cases narrowly from the outset, so that even the most extreme position will be limited in its extremeness and the two sides' compromise positions may lie closer to one another. For example, the Court suggested it was "plausible" that "a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision" might have standing. *Id.* If such an individual were the plaintiff, a compromise position that would have the effect of protecting *the particular species* of his or her concern might be possible (in fact, such a suit might have been framed quite differently from the outset, perhaps aiming at a third party who had directly caused the harm), whereas an organization such as Defenders of Wildlife's ideological position might lead it to push only for the more extreme solutions targeted at ordering the Secretary to revise the interpretive regulation altogether.

⁶⁸ For a similar (and excellent) analysis with respect to hindsight bias, see Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998), which notes that the fact that "corporate managers are immune from liability and other professionals are not" is best understood as an unconscious correction for hindsight bias. *Id.* at 623.

⁶⁹ For examples of such strategies, see Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 203-24 (2006), and Dan Orr & Chris Guthrie, *Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis*, 21 OHIO ST. J. ON DISP. RESOL. 597, 625-28 (2006).

⁷⁰ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 112 (2d ed. 1986).

B. *The Passive Virtues*

Professor Alexander Bickel's groundbreaking work on the timing of adjudication appeared in these pages over forty years ago.⁷¹ Bickel's innovation was to understand how the Court employed procedural and jurisdictional doctrines to produce a useful "time lag between legislation and adjudication, as well as shifting the line of vision."⁷² Such doctrines have the effect, Bickel argued, of promoting comity among the branches because politicians do not feel the sting of an immediate rebuke from the Court.⁷³ He called these values of patient and distant decisionmaking the Court's "passive virtues."⁷⁴

Undoubtedly, the Court uses these doctrines to defer adjudication in a variety of cases, including in separation-of-powers challenges. The Court, for example, waited decades before it decided to strike down the legislative veto at issue in *INS v. Chadha*.⁷⁵ Similarly, it did not review the statute establishing an independent counsel for an entire decade, despite several high-profile investigations.⁷⁶ And, most relevant, in war powers cases, the passive virtues operate at their height to defer adjudication, sometimes even indefinitely.⁷⁷

An understanding of how the passive virtues operate was essential to getting the *Hamdan* case heard on the merits. At each level of the federal courts, the Solicitor General employed every possible device to defer adjudication, starting at the district court where he argued that federal courts must abstain from interfering with ongoing military tribunal proceedings.⁷⁸ The Supreme Court had approved this *Younger v. Harris*⁷⁹-like abstention doctrine for courts-martial in 1975.⁸⁰ Working with allies in Congress, the President also pushed through legislation that attempted to divest or delay federal jurisdiction over

⁷¹ See Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

⁷² BICKEL, *supra* note 70, at 116.

⁷³ See *id.* (stating that the time lag "cushions the clash between the Court and any given legislative majority and strengthens the Court's hand in gaining acceptance for its principles").

⁷⁴ Bickel, *supra* note 71, at 40.

⁷⁵ 462 U.S. 919, 934 (1983) (noting that the challenged provision of law had been enacted thirty years before); see also *id.* at 967-68 (White, J., dissenting) (stating that the decision "sounds the death knell for nearly 200 other statutory provisions" that had been enacted "over the past five decades").

⁷⁶ See *Morrison v. Olson*, 487 U.S. 654, 659-60 (1988) (holding that independent counsel provisions originally established in 1978 were constitutional).

⁷⁷ See JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 56 (1993).

⁷⁸ Respondents' Cross Motion To Dismiss at 14-22, *Swift v. Rumsfeld*, No. Co4-0777RSL (W.D. Wash. 2004).

⁷⁹ 401 U.S. 37 (1971).

⁸⁰ *Schlesinger v. Councilman*, 420 U.S. 738, 746 (1975).

cases brought from Guantánamo Bay.⁸¹ This legislation was introduced and passed in the days following the Court's grant of certiorari in *Hamdan*, and the Solicitor General used it as the basis of his motion to dismiss the case from the Supreme Court.⁸²

Our response took three forms. *First*, because the passive virtues were informed by a desire for the Court not to confront matters of grave concern without previous exposure to them,⁸³ we began the process of educating the Court about President Bush's Military Order⁸⁴ for trials early. The moment the Supreme Court granted certiorari in a Guantánamo case in 2003,⁸⁵ for example, I took on the task of representing uniformed military defense attorneys and urging them to file an amicus brief in the case. This representation took place at a time when no one had even been charged in the commissions. Despite serious resistance from the Pentagon leadership and senior White House officials, these military attorneys signed a brief telling the Court why the President's Military Order was unconstitutional and how the case under review should be decided in a way that did not eliminate the Court's jurisdiction over the President's Military Order.⁸⁶ The task was to begin familiarizing the Court with the variety of different issues tangled up at Guan-tánamo Bay, and to alert the Justices to the fact that while the case before them concerned temporary detentions, a far more serious — criminal — set of cases was on the horizon that involved the most awesome powers of government: life imprisonment and the death penalty.⁸⁷

⁸¹ See Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (to be codified at 42 U.S.C. §§ 2000dd to 2000dd-1).

⁸² Respondents' Motion To Dismiss for Lack of Jurisdiction, *Hamdan*, 126 S. Ct. 2749 (No. 05-184), 2006 WL 77694.

⁸³ See BICKEL, *supra* note 70, at 176 ("A sound judicial instinct will generally favor deflecting the problem in one or more initial cases, for there is much to be gained from letting it simmer, so that a mounting number of incidents exemplifying it may have a cumulative effect on the judicial mind as well as on public and professional opinion.")

⁸⁴ Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001), *reprinted in* 10 U.S.C. § 801 (Supp. IV 2004).

⁸⁵ See *Rasul v. Bush*, 540 U.S. 1003, 1003 (2003) (granting certiorari on the question of "[w]hether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba"). The case was consolidated with *Al Odah v. United States*, 540 U.S. 1003 (2003).

⁸⁶ See Brief of Military Attorneys Assigned to the Def. in the Office of Military Comm'ns as Amicus Curiae in Support of Neither Party, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (No. 03-334, 03-343), 2004 WL 96765.

⁸⁷ See *id.* at *20 ("The Government's argument in this case has no logical stopping point. If there is no right to civilian review, the government is free to conduct sham trials and condemn to death those who do nothing more than pray to Allah. The President's claim is for the absence of any legal restraint whatsoever on the government, commensurate with absolute duties and subjugation for those at Guantanamo.") (footnote omitted).

We then took the rare step, after winning the *Hamdan* case in federal district court, of asking the Supreme Court to bypass the court of appeals and hear the case directly.⁸⁸ Petitions for writ of certiorari before judgment are always difficult to get granted, particularly when they are filed by the winning side. But certiorari before judgment is not unheard of — indeed, the government's main precedent on the merits, *Ex parte Quirin*,⁸⁹ was such a case. Particularly in realms such as foreign affairs and military trials, these petitions have found success.⁹⁰ Again, this type of petition had a strong upside not readily appreciated by practitioners, many of whom claimed that I was wasting time writing these papers. But in light of the several similar cases that had bypassed the courts of appeals, such as *Quirin* and *Youngstown Sheet & Tube Co. v. Sawyer*,⁹¹ there was a chance of a grant. And moreover, the papers were furthering the process of educating the Court about our issues — even if the Justices declined to review the case then, as they ultimately announced. Put differently: what might have seemed to be an effort to repudiate Professor Bickel, given the unlikelihood of a certiorari grant, actually served the Bickellian function. (Respecting the Court's passive virtues turns out to be a very active process for the advocate.)

In this way, our strategy was informed by Professor Bickel's analysis of *Brown v. Board of Education*,⁹² a case that he noted could have been decided on far narrower grounds:

[T]here was room for choice in the *School Segregation Cases*, as there had been in their predecessors. In several cases, starting in the late 1930's, the Supreme Court ordered that Negroes be admitted to white universities, on the ground that other facilities provided for them were not equal. In doing so, the Court did not by a word reaffirm what was assumed to be the applicable constitutional rule — namely, the doctrine of separate-but-equal facilities. . . . In the *School Segregation Cases* of 1954, the Court might have reached the same result with respect to the parties before it, again without undertaking either to overrule or reassert the separate-but-equal doctrine The Kansas case presented many special features, including the fact that only elementary schools were segregated. Its findings of present equality, themselves not unqualified, could have been treated as less conclusive or less adequate than they were actually made to appear. The Court did not do so because, in the fullness of prior cases and of that liti-

⁸⁸ The Petition for Writ of Certiorari Before Judgment is available at <http://www.law.georgetown.edu/faculty/nkk/documents/SL043240.098.nk9.pdf>.

⁸⁹ 317 U.S. 1 (1942).

⁹⁰ E.g., *Reid v. Covert*, 351 U.S. 487 (1956) (challenge to court martial for a civilian); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (steel seizure case); *The Three Friends*, 166 U.S. 1 (1897) (admiralty and foreign affairs case).

⁹¹ 343 U.S. 579.

⁹² 347 U.S. 483 (1954).

gation, it had ripened the principle that was in fact announced. Surely this judgment must be made by the Court, not by the parties to a litigation. There is enough fortuity in this as in other processes of government, and almost no matter what the basis on which the Court makes such judgments (provided that it acts, when it does, only in response to the pressure of concrete litigation), it is surely likely to take a larger view of interests and of affairs than private parties will bring to bear.⁹³

Professor Bickel rightly observed that no one party is likely to have the requisite interests at stake to convince the Court to disentangle itself from the passive virtues and decide the time is right to reach the merits. However, our strategy was to do what we could, as one party, to begin the process of letting the Court's familiarity with the issues mature to the point at which it felt comfortable delving into them. The fact that it had already heard three war-on-terror cases and developed certain principles in them became our springboard for a frontal assault on the temptation to employ the passive virtues once the court of appeals ruled in *Hamdan*.

Second, because the employment of the passive virtues is also informed by the preference for a fully developed factual record,⁹⁴ we sought to use each step of the case to develop that record. Certiorari is nearly impossible if the record below does not sufficiently present a clear problem for the Court to resolve. Developing a complete record, however, would have meant going to trial, revealing our overall strategy in the process. A criminal defendant who believes his trial is unconstitutional does not want to make moves, such as presenting evidence of his innocence, that could come back to haunt him at retrial. If the initial trial is held unconstitutional, he will have previewed his evidence for the prosecution and may have generated material that could be used to impeach his credibility if there were any deviations in testimony given in a second trial.⁹⁵ Development of a factual record in this context is therefore quite tricky.

And the design of President Bush's military commissions looked to make the task no less tricky. As students of Madison,⁹⁶ we believed

⁹³ BICKEL, *supra* note 70, at 171–72.

⁹⁴ See *id.* at 124 (“[I]f litigation is postponed, the Court will have before it and will be able to use, both in forming and in supporting its judgment, the full rather than merely the initial impact of the statute or executive measure whose constitutionality is in question.”).

⁹⁵ See, e.g., *Rafeedie v. INS*, 880 F.2d 506, 517 (D.C. Cir. 1989) (“Rafeedie will suffer a judicially cognizable injury in that he will . . . be deprived of a ‘substantial practical litigation advantage.’ Rafeedie spells out this dilemma: if he presents his defense in a § 235(c) proceeding, and a court later finds that section inapplicable to him, the INS will nevertheless know his defense in advance of any subsequent § 236 proceeding.”).

⁹⁶ See THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (“Ambition must be made to counteract ambition. . . . If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”).

that a trial system run by one branch would ultimately produce a lopsided system designed to ensure convictions, not justice. And that is what happened. The Pentagon put out a list of procedural protections available to defendants but made clear that these limited protections, including the presumption of innocence, were not “right[s]” that were in any way “enforceable,” and that they could be withdrawn at any time.⁹⁷ Not that the “protections” amounted to much anyway. They permitted the accused to be kicked out of portions of his trial,⁹⁸ permitted the admission of unsworn statements in lieu of testimony,⁹⁹ and allowed the Secretary of Defense to terminate the proceedings.¹⁰⁰

The need to avoid going to trial was therefore particularly acute in *Hamdan*. Because of this need, we had to be especially vigilant in identifying opportunities to develop facts pretrial to inform collateral litigation. That moment crystallized in the very first pretrial hearing, when the voir dire of the commission members took place. Five individuals and one alternate were initially selected to be on the panel, and it was possible that one of those commission members, who served in Afghanistan, had been involved in aspects of Mr. Hamdan’s capture. There were potential conflicts with other members as well. In the proceedings to assess conflicts of interest, however, Mr. Hamdan was kicked out of the voir dire on grounds of national security.

Kicking a defendant out of his own trial (including voir dire) when he is not being intentionally disruptive violates a classic prohibition in Anglo-American criminal law.¹⁰¹ The presence of counsel is not enough.¹⁰² Indeed, we could only find one example of such an exclusion in American history, and the Judge Advocate General in that case

⁹⁷ U.S. Dep’t of Def., Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (Aug. 31, 2005), at paras. 10, 11 [hereinafter MCO], available at <http://www.defenselink.mil/news/Sep2005/d20050902order.pdf>.

⁹⁸ *Id.* para. 6.B.3.

⁹⁹ *Id.* para. 6.D.

¹⁰⁰ *Id.* para. 6.H.1–6.

¹⁰¹ “In cases of felony our courts, with substantial accord, have regarded [the right to be present] as extending to every stage of the trial, inclusive of the empanelling of the jury and the reception of the verdict, and as being scarcely less important to the accused than the right of trial itself.” *Diaz v. United States*, 223 U.S. 442, 455 (1912); see also *Lewis v. United States*, 146 U.S. 370, 372 (1895) (“A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner.”); *id.* at 372, 375 (maintaining that the right to be present is of “peculiar sacredness” and it would be “contrary to the dictates of humanity” to allow defendant to waive it).

¹⁰² See, e.g., *Lewis*, 146 U.S. at 373–74 (addressing specifically exclusion from voir dire, stating that defendant’s “life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and to triers in selection of jurors” and that “[t]he necessities of the defense may not be met by the presence of his counsel only”).

reversed the conviction on those grounds.¹⁰³ In cases such as *Ex parte Quirin*, even with exceptionally sensitive national security information at stake, the defendants were permitted in the courtroom. The fact that Mr. Hamdan was kicked out during voir dire did not bode well for the rest of the trial, since voir dire is in fact the trial stage in which it is easiest to sidestep such problems — at that moment the members of the commission are entirely fungible with any other eligible person, and any potentially conflicted “juror” can simply be replaced.

The episode, however, became even sorer. The Appointing Authority, the head administrator of the commission, ultimately agreed to remove some of the commission members, but then refused to replace them, contrary to the rules. The result was horrendous. The voting rule for commissions required a two-thirds verdict to convict. When there were five members on the commission, therefore, the prosecution would have needed to win four of the five votes, all but one member. But by refusing to replace the two members of the commission, the prosecution carried a much easier burden — it simply had to win two out of the three. The result of the stricken members was something that could only hurt Mr. Hamdan: he struck (or rather, his counsel struck) “jurors” that could only have helped ensure his acquittal, changing the prosecution’s burden from carrying 80% of the votes to 66%. Our very first move in the commission proceedings after this decision, therefore, was to ask for these biased commission members back, stating that if they had a pulse then they statistically were votes that could only help Mr. Hamdan.

All of this detail turned out to be crucial to our federal case, because it epitomized the entire spirit of military commissions. The delicate necessity was to give the Court a fractal of what the commission would be like, should a trial take place, without actually letting that trial happen and previewing Mr. Hamdan’s defense. With Pentagon missteps like these, it was inevitable that, at some point, conscientious military prosecutors would grow uncomfortable with the commissions. Indeed, one week before we filed the petition for certiorari, front-page

¹⁰³ In the Civil War era appeal of one Mary Clemmens, Judge Advocate General Joseph Holt overturned the judgment of her trial by military commission, explaining:

[I]t is stated that the Commission was duly sworn — but does not add “in the presence of the accused,” — Nor does the Record show that the accused had any opportunity of challenge afforded her. — These are particulars, in which it has always been held that the proceedings of a Military Commission should be assimilated to those of a Court Martial. And as these defects would be fatal in the latter case, they must be held to be so in the present instance.

MARK E. NEELY, JR., *THE FATE OF LIBERTY* 163 (1991) (quoting Case MM618, Registers of the Records of the Proceedings of the U.S. Army General Courts-Martial, 1809–1890, *microformed on Records of the Office of the Judge Advocates General (Army) Record Group 153 (Nat’l Archives Microfilm Publ’ns)*).

news stories reprinting statements from these prosecutors appeared, and the statements said that the prosecutors believed the system was fundamentally unfair to defendants.¹⁰⁴

There was one other crucial strategic tool we employed at this stage, a tool that had to do with predicting the way government bureaucracy post–September 11 would react to the certiorari petition. For four years, the Pentagon and the White House had developed a very hard-line position on detainee policy, with the support of the Office of Legal Counsel. The only time such positions were ever reined in by other executive branch forces appeared to be when the government had to defend the positions in Court. In those settings, and only in those settings, the voices of the Solicitor General and State Department seemed to be heard. For example, the government created annual review procedures for Guantánamo detainees only on the day that its merits brief in *Rasul v. Bush*¹⁰⁵ was due at the Supreme Court.¹⁰⁶ And the government permitted Jose Padilla to meet with a lawyer just before its *Rumsfeld v. Padilla*¹⁰⁷ brief was due at the Court.¹⁰⁸ It was therefore not at all surprising that the government, after Mr. Hamdan’s petition for certiorari was filed, decided to change the rules for military commissions entirely.

The government’s strategy, once again, was to tempt the Court with the passive virtues. The gist was: “We’ve changed the rules, so let’s let the trials proceed and see how they turn out, since these new rules have never actually been reviewed by a court.” But that was precisely the move we had hoped for, because we understood that Professor Bickel’s core respect for the rule of law ultimately trumped the

¹⁰⁴ See Jess Bravin, *Two Prosecutors at Guantánamo Quit in Protest*, WALL ST. J., Aug. 1, 2005, at B1; Neil Lewis, *Two Prosecutors Faulted Trials for Detainees*, N.Y. TIMES, Aug. 1, 2005, at A1. Air Force Captain John Carr wrote that in his experience, the commission system was “a half hearted and disorganised effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged.” Leigh Sales, *Leaked Emails Claim Guantanamo Trials Rigged*, ABC NEWS, Aug. 1, 2005, <http://www.abc.net.au/news/newsitems/200508/s1426797.htm> (quoting e-mail from Carr). Another prosecutor, Air Force Major Robert Preston, lamented that “writing a motion saying that the process will be full and fair when you don’t really believe it is kind of hard — particularly when you want to call yourself an officer and a lawyer.” *Id.*

¹⁰⁵ 124 S. Ct. 2686 (2004).

¹⁰⁶ See John Mintz, *U.S. Outlines Plan for Detainee Review*, WASH. POST, Mar. 4, 2004, at A10.

¹⁰⁷ 124 S. Ct. 2711 (2004).

¹⁰⁸ *Granting Padilla Access to Attorneys a Strategic Move by Bush Administration*, Duke Law Professor Says, ASCRIBE NEWSWIRE, Feb. 12, 2004 (quoting Professor Scott Sillman as saying that “[i]t was not until the Supreme Court agreed to hear Hamdi’s case that the government opted to ‘reverse’ its decision and allow him to consult with his lawyer, albeit with severe security restrictions” and “[n]ow the government has made the same reversal of policy with regard to Padilla”).

institutional choreography he envisioned.¹⁰⁹ Bickel believed that legal principles, while not the only meaningful factors going into a certiorari decision, played a significant role.¹¹⁰ In effect, we sought to show the Court that a period of delay would enable further rule changes that would only exacerbate the root problem with the President's commissions — that they were not grounded in law.

Our strategy therefore attempted to flip the valence of delay from a prudential goal into a concrete harm. Our ultimate challenge to the commissions, after all, was that they were a criminal trial system set up by executive whim, with rules that changed by executive whim. By constantly changing the rules, and saying that there were no sources of constraint, international or domestic, the government's actions highlighted our main point. Accordingly, the rule changes were the entire focus of our reply brief on certiorari:

With constantly shifting terms and conditions, the commissions resemble an automobile dealership instead of a legal tribunal dispensing American justice and protecting human dignity.

The rule changes expose the central problem: the commission is not founded on law; it is a contrived system subject to change at the whim of the President. If he can change the rules this way today, he can change them back tomorrow, and then change them again the day after, with the Petitioner's life (and death-penalty eligibility) hanging in the balance. . . . If the rule of law means anything, it means that rules are known in advance, generally applied, and not subject to change, particularly after the presiding officer and factfinder have been empanelled. . . . The Government's attempt to evade certiorari through herky-jerky late changes merely demonstrates the system's inherent instability and the constitutional need for immediate judicial review and legislation establishing rules.¹¹¹

It was therefore unsurprising that the Pentagon announced, on the eve of oral argument in *Hamdan*, that it had changed the rules so that evidence obtained by torture could not be admitted at trial. But it was not surprising that, by then, the skilled Solicitor General never mentioned this rule change at oral argument the next morning. To do so would have underscored the central problem with the commission scheme — that it was governed by whim, not law.

¹⁰⁹ After defending the passive virtues, Professor Bickel clarifies: “[T]his is not to concede unchanneled, undirected, uncharted discretion. . . . The antithesis of principle in an institution that represents decency and reason is not whim or even expediency, but prudence.” BICKEL, *supra* note 70, at 132–33.

¹¹⁰ Such decisions involve prudential considerations, but the content of those considerations is “in substantial part a function of a judge’s estimate of the merits of the constitutional issue.” *Id.* at 169.

¹¹¹ Reply Brief for Petitioner, *Hamdan*, 126 S. Ct. 2749 (No. 05-184), 2005 WL 2238121, at *5–6.

Of course, as with many cases, unexpected developments arise during periods of litigation delay that have the effect of developing crucial facts. For example, Mr. Hamdan's Geneva Convention challenge took on heightened significance after the April 28, 2004, revelations at Abu Ghraib. Indeed, those revelations were first broadcast on the very night of the oral argument in the *Padilla* and *Hamdi v. Rumsfeld*¹¹² cases at the Supreme Court.¹¹³ The counsel in these cases faced a complicated question in whether and how much to mention background events that impact their litigation claims. Because high-impact cases at the Supreme Court are bound to attract the attention of a diverse group of amici, however, such questions are typically resolved by deferring to those amici, who may mention these events in their briefs or other submissions.

After certiorari was granted in *Hamdan*, two major events produced such background facts. The government decided to try Jose Padilla in Miami and attempted to moot his new petition for certiorari shortly before its opposition to the petition was due in the Supreme Court.¹¹⁴ The indictment underscored the government's ability to try complicated international terrorism cases in civilian courts, and more tellingly was perceived to be a slight to the judiciary.¹¹⁵ Separately, before our brief on the merits was filed, the *New York Times* revealed that the President had authorized the National Security Agency (NSA) to monitor Americans, in seeming violation of the Foreign Intelligence Surveillance Act of 1978¹¹⁶ (FISA).¹¹⁷ The President's action underscored, once again, his radical constitutional agenda, an agenda that he claimed permitted him to disregard and creatively interpret statutes duly enacted by Congress. We decided not to make much of these two developments, knowing that their high-profile status would ensure that they were going to be known regardless of our invocation of them.

Third, because the passive virtues rest to some degree on a desire not to interfere with the Executive unless it is absolutely necessary,¹¹⁸ we sought to develop facts that would demonstrate to the Court that

¹¹² 124 S. Ct. 2633 (2004).

¹¹³ See *Abuse of Iraqi POWs by GIs Probed*, CBS NEWS, Apr. 28, 2004, <http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml>.

¹¹⁴ See *Terror Suspect Padilla Charged*, CNN.COM, Nov. 22, 2005, <http://www.cnn.com/2005/LAW/11/22/padilla.case1>.

¹¹⁵ See *Padilla v. Hanft*, 432 F.3d 582, 585 (4th Cir. 2005) (stating that the government's action has "given rise to at least an appearance that the purpose of these actions may be to avoid consideration of our decision by the Supreme Court").

¹¹⁶ 50 U.S.C. §§ 1801–1862 (2000 & Supp. III 2003).

¹¹⁷ James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

¹¹⁸ See BICKEL, *supra* note 70, at 132 ("[The passive virtues] mark the point at which the Court gives the electoral institutions their head and itself stays out of politics . . .").

the degree of interference would be minimal. Crucial among our claims was the fact that no trials had taken place in the nearly five years since the President's Military Order, and that no commission trials had taken place in the previous half century. As such, we were asking the Court to preserve the status quo — a point that became the opening line of the oral argument.¹¹⁹ To highlight our position, we wanted to show the Court that these trials were not likely to proceed anytime soon, and that the President's need for them was not immediate and could await congressional action following a Court decision. This approach required filing the case only on behalf of Mr. Hamdan. The government was free to try the rest of the defendants at any time, but we anticipated that these trials would not take place because the government didn't really have a need to conduct them. All of the defendants were indefinitely detained as enemy combatants, so a trial was not a necessity, unlike in the civilian context. This strategy underscored the weakness of the purported government interest, both because commission trials could take place after congressional action and because the individuals who faced them were detained indefinitely anyway. The trial delays made clear that there was nothing immediately at stake in the commission trials.

One final, unrelated piece of knowledge emerged from our understanding of the passive virtues. The government spent much of its opposition to certiorari on the argument that abstention was appropriate and that these issues could all return to the Supreme Court if Mr. Hamdan was convicted. That is the paradigmatic argument for delaying adjudication — so much so that once certiorari was granted, it was not difficult to predict that at least four Justices were deeply concerned about the legality of the commissions. Because the Solicitor General was telling the Court that all of Mr. Hamdan's legal challenges would return to the Justices later, their decision to grant certiorari signaled that they were not inclined to employ the passive virtues. For that reason, unlike the Solicitor General, we did not spend much time on abstention in our briefs and instead focused more on the merits of the lawsuit. And this approach, incidentally, is textbook Bickel, who claimed, for example, that the passive virtues should have been employed to deny certiorari in *Youngstown*, but that, once certiorari was granted, the proper course was to adjudicate the case on the merits.¹²⁰

In sum, we sought to use the facts and the law to diminish the motivating principles that might otherwise have led the Court to adopt

¹¹⁹ Transcript of Oral Argument, *supra* note 40, at 3 (“We ask this Court to preserve the status quo”); see also Brief for Petitioner, *supra* note 39, at 8 (“This is the rare case where invalidating the government’s action preserves the status quo, a carefully crafted equilibrium in place for many decades.”).

¹²⁰ See BICKEL, *supra* note 70, at 132.

Professor Bickel's passive virtues. Whereas Bickel feared a Court that would rule on an issue of first impression, we sought to educate the Court about the issue repeatedly to ensure that it was not an issue of first impression. Whereas Bickel feared a Court that would rule on a matter without a developed factual record, we sought to develop that factual record in a few key moves that did not compromise Mr. Hamdan's interests in a subsequent trial. And whereas Bickel feared a Court that would lose its legitimacy by undermining the political branches, we sought to show that the Court's action would only invalidate a trial system that had never actually been used.

The benefit of understanding framing effects and the passive virtues, therefore, is an appreciation for how litigants and courts may alter the dimensions of both time and space in an effort to achieve a certain result.

C. *Default Rules and the Veto*

In their groundbreaking work, Professors Ian Ayres and Robert Gertner explain why judges should sometimes set a counterintuitive default rule when interpreting vague terms in a contract (in that case, against the party that is more informed).¹²¹ This work has centrally influenced how I think about legal scholarship,¹²² and it also influenced the way *Hamdan* was litigated. The key move was to make the Court aware that the harm from an erroneous interpretation of the relevant law was asymmetric: if the Court sided with Mr. Hamdan, its harm could be corrected in a way that it could not be if the Court sided with the government.

To do this required two subsidiary moves. First, we had to make clear to the Court that our claim was only about default rules — we were not asking the Court to make it impossible for Congress to authorize military commissions. Rather, we were arguing that without explicit congressional authorization, the commissions were illegal because they violated both U.S. military law and the Geneva Conventions. As it was put at oral argument, “of course, this is just all . . . default rules. . . . [I]f the Congress wants to pass a law to exempt

¹²¹ See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 97–100 (1989). Asymmetric default rules also appear in process-oriented scholarship and appear to be derived from economics. See PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 816 (5th ed. 2006) (relying on Coase); GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (incorporating ideas from economics).

¹²² See, e.g., Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1117–18 (2002) (advocating penalty defaults for landlords who harbor private information about criminal activity in leasing transactions); Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003, 1056–57 & n.150 (2001) (advocating a penalty default rule for encrypted communications used to commit crimes).

military commissions from Article 36 [of the UCMJ] . . . they are free to do so.”¹²³ Many organizations did not like this approach and wanted me to argue that military commissions were unconstitutional. But such claims seemed quite premature. One day the Court may need to reach them, but for purposes of *Hamdan*, it was appropriate to say that the Court could strike down the commissions and invite corrective action, if necessary. This move, incidentally, brought another part of legal theory to bear: Professor Bickel’s work on what might be called the “active passive virtues.” Professor Bickel claimed that the Supreme Court in some settings should force legislative deliberation through the guise of statutory interpretation instead of imposing a rigid constitutional rule.¹²⁴ That is precisely what we emphasized.

The second move was to explain why an error that favored the government would have dire consequences. Here, we incorporated knowledge about how the veto operates, particularly in light of the modern political party structure. We argued that a Court decision in the President’s favor was not easily correctable by the legislature. Any proposed legislation to reverse or limit the President’s powers would be subject to a veto, so much so that even if Senator McCain persuaded each of his ninety-nine colleagues to pass such a law, he still would not succeed without also persuading a supermajority of the House of Representatives. And although such supermajorities are sometimes possible, finding one on a politically divisive issue in the modern, tight political party environment is next to impossible.¹²⁵ The Article I, Section 7 veto power thus functions as a potent barrier to legislative revision, and in this context it meant that Congress would not be able to regulate commissions even if a majority of legislators had wanted to do so all along.

This point also helped answer the government’s argument that Congress had approved the military commissions by letting them stand for nearly five years without regulating them. Justice Thomas’s dissent focused on this claim, arguing that Congress’s silence showed that it had acquiesced in the commissions’ legality and authorization.¹²⁶

¹²³ Transcript of Oral Argument, *supra* note 40, at 28–29.

¹²⁴ See BICKEL, *supra* note 70, at 152 (describing the vagueness doctrine as a passive-virtue mechanism that “asks that the legislature” clarify its statute); *id.* at 148 (using desuetude in this way); see also Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1713–14 & n.15 (1998) (discussing these aspects of Bickel’s conception of the Court’s role).

¹²⁵ Cf. Richard S. Conley & Amie Kreppel, *Toward a New Typology of Vetoes and Overrides*, 54 POL. RES. Q. 831, 850 (2001) (finding, with respect to contested vetoes, that “Presidents are generally adept at marshalling enough partisan support to halt overrides” even when the legislation initially passed with a supermajority of the House).

¹²⁶ *Hamdan*, 126 S. Ct. at 2823 (Thomas, J., dissenting) (“[S]uch failure of Congress . . . does not, ‘especially . . . in the areas of foreign policy and national security,’ imply ‘congressional dis-

However, because it was, as a practical matter, impossible to gain supermajorities in both houses to reverse the President's Military Order, the absence of legislation did not necessarily reflect the will of Congress as much as it reflected the inertia generated by the President's veto power. (This point also explains why statutory precedents that expand executive power should not necessarily receive special stare decisis consideration, as Presidents will be reluctant to permit legislation that reverses such precedents.)

In short, the President's veto power became a potent weapon to advocate for a specialized default rule. The government repeatedly claimed that the Court should interfere only if it was wholly convinced that the military commissions were illegal.¹²⁷ This was not an implausible view: *Quirin* had said exactly that.¹²⁸ But we used the veto to explain why *Quirin* had it backwards, and why in this unique setting it would be appropriate to set the default rule against the Executive, since it could always come back to Congress for additional authority if it wished.

Accordingly, when Congress passed the Detainee Treatment Act of 2005¹²⁹ (DTA), legislation that the Solicitor General argued should have removed the *Hamdan* case from the Supreme Court's docket, we were able to turn that legislation to our advantage by casting it as further evidence of the proper default rule:

The DTA is a sober reminder that a sense of proportion is essential in assessing the merits of petitioner's claims and that Congress stands ready to react to this Court's rulings. All that is at stake in this case is the default rule about the legality of military commissions without further congressional action. If this Court rules for petitioner, Congress can then authorize commissions or some other trial system. The government's representations should not mislead the Court into thinking that more is at stake in ruling for Petitioner than actually is.¹³⁰

As the next Part argues, this move of emphasizing the ease of legislative revision in the face of a Supreme Court ruling against the Executive will be one of the most important doctrinal legacies of *Hamdan*. It has put to rest the claim that the Executive does not have time

approval' of action taken by the Executive." (omissions in original) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981)) (internal quotation marks omitted).

¹²⁷ See, e.g., Brief for Respondents, *supra* note 45, at 23.

¹²⁸ See *Ex parte Quirin*, 317 U.S. 1, 25 (1942) ("[T]he detention and trial of petitioners — ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger — are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.").

¹²⁹ Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (to be codified at 42 U.S.C. §§ 2000dd to 2000dd-1).

¹³⁰ Petitioner's Opposition to Respondents' Motion To Dismiss at 40 n.40, *Hamdan*, 126 S. Ct. 2749 (No. 05-184), 2006 WL 259989.

to wait for Congress to authorize particular forms of executive conduct in the legal war on terror.

In sum, the study of penalty default rules, originally for us a theoretical inquiry from contract law, had significant payoff in an area entirely peripheral to that subject. Naturally, not all theoretical work will have practical payoffs, but it is possible, as *Hamdan* demonstrates, that those payoffs sometimes arise in complicated and unpredictable ways.¹³¹ For these reasons, I believe that the study of theory, while often derided by law students (and practitioners and judges) as irrelevant, may have immense practical applications.

II. *HAMDAN*: HOW PRACTICE REINED IN THEORY

Theory can be influential without being right. Although the decision on its face is narrow and technical, *Hamdan* had the effect of rejecting two of the government's broad theoretical assertions in the wake of the September 11 attacks. First, the government continually stressed the need for a radically revised balance of power between Congress and the President, permitting the latter to creatively interpret or even disregard laws passed by the former. Second, the government argued that the President's interpretations of statutory and treaty law were entitled to extreme deference. One striking feature of *Hamdan* is that it barely acknowledged these arguments even though its reasoning clearly rejected both.

A. *Inherent Authority*

Now that Congress has passed a law authorizing military commissions, it is tempting to think that the *Hamdan* case will have no practical effect. But that suggestion is wrong for narrow reasons regarding military commissions, modest reasons involving international law, and broad reasons concerning the future path of constitutional law.

Narrowly, the military commissions President Bush set up differ in a number of ways from those established by Congress after the decision in *Hamdan*.¹³² For example, President Bush's tribunals allowed the commission to kick criminal defendants out of their own trials.

¹³¹ Indeed, it might be said that *Hamdan* bears out Professor George Priest's response to Judge Edwards, insofar as Professor Priest claims that interdisciplinary research is crucial to "very hard" cases" because these cases are the ones in which "the societal effects of the legal ruling are hardest to determine, the social values implicated by the ruling in greatest conflict, or the public interest served by the resolution most difficult to define." George L. Priest, *The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards*, 91 MICH. L. REV. 1929, 1935 (1993).

¹³² For reasons outside the scope of this Comment, none of these changes is likely to make the system fair or permit it to pass constitutional muster.

The legislation forbids that.¹³³ It also adopts a stronger prohibition on use of testimony obtained by torture of a witness.¹³⁴ The legislation further codifies a right to “examine and respond to” the evidence,¹³⁵ and it provides for broader discovery rights than the President’s tribunals.¹³⁶ One of the problems with the old system, as commission prosecutors themselves complained, was that defendants had no right to exculpatory evidence — in any form — if it was in the hands of the intelligence community.¹³⁷ Perhaps most importantly, the legislation may place the trials under a system of law, with rules fixed in advance, not subject to change at the whim of the Executive. All actors in the system stand to benefit from fixed rules: defendants can consider pleas against a matrix of known procedures should they go to trial, prosecutors can evaluate their cases with reference to a stable set of rules, and commission judges do not have to fear that any ruling they make may be altered by a political actor.

Modestly, the *Hamdan* decision rejected the Administration’s dubious claim that Common Article 3 of the Geneva Conventions does not protect detainees. As the next section discusses, the Administration asserted that this Article did not protect anyone detained at Guantánamo or elsewhere in the legal war on terror, and the Court wisely rejected that interpretation. The result is that all detainees, around the world, now receive the protections of Common Article 3.¹³⁸

But the real significance of *Hamdan* lies in its repudiation of the Administration’s radical theory that the President has the ability to interpret creatively, and even set aside, statutes that he claims interfere with his war powers. In *Hamdan*, the government did not argue that

¹³³ Military Commissions Act of 2006 (MCA), S. 3930, 109th Cong., sec. 3, § 949a(b)(1)(B) (enrolled as agreed to or passed by both House and Senate, Sept. 29, 2006).

¹³⁴ *Id.* sec. 3, § 948r.

¹³⁵ *Id.* sec. 3, § 949a(b)(1)(A).

¹³⁶ Compare *id.* sec. 3, § 949j(b) (“Process issued in a military commission . . . to compel witnesses to appear and testify and to compel the production of evidence — shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue . . .”), with MCO, *supra* note 97, para. 5.H (“The Accused may obtain witnesses and documents for the Accused’s defense, to the extent necessary and reasonably available as determined by the Presiding Officer.”).

¹³⁷ Neil A. Lewis, 2 *Prosecutors Faulted Trials for Detainees*, N.Y. TIMES, Aug. 1, 2005, at A1 (stating that a commission prosecutor complained that “any exculpatory evidence — information that could help the detainees mount a defense in their cases — would probably exist only in the 10 percent of documents being withheld by the Central Intelligence Agency for security reasons”).

¹³⁸ However, the MCA provides that “the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.” MCA sec. 6(a)(3).

it could set aside such statutes; it instead emphasized its vast power to interpret them. The Court nevertheless rejected both possibilities.¹³⁹

The Court's reasoning has led some to think that *Hamdan* is not a constitutional case, just a statutory one. To be sure, much action took place at the level of statutory interpretation. But this fact is itself constitutionally significant, for it showcases just how much of an empty vessel Justice Jackson's three canonical categories in his famous *Youngstown* concurrence¹⁴⁰ are. *Youngstown's* framework has become the gold standard, perhaps because its all-things-to-all-people quality can provide arguments favoring any branch of government under many circumstances.¹⁴¹ (Both then-Judge Roberts and then-Judge Alito professed extreme reverence for the framework at their confirmation hearings.¹⁴²) Under *Youngstown*, whether a given case falls within a particular zone depends on statutory construction. But the Court can toggle between categories depending on its stinginess or generosity with any given statute and how it reads legislative silence. In *Youngstown* itself, for example, the dissenters (Chief Justice Vinson and Justices Reed and Minton) did not necessarily object to the way many of the Justices in the majority (Frankfurter, Jackson, Burton, and Clark) read the Constitution. Instead, they disagreed with whether the relevant statutes placed the case in Category One or Two, and how much legislative specificity was required to move a case into the zone of prohibition in Category Three.¹⁴³

Justice Stevens's quiet signature move in *Hamdan* was to read statutes such as the UCMJ and the DTA against the President to place the case in Category Three. In his separate opinion, Justice Kennedy openly acknowledged the statutory ambiguity that lay at the heart of his application of *Youngstown*: the UCMJ, in his view, could put the President in either Category One or Category Three, depending how

¹³⁹ See *Hamdan*, 126 S. Ct. at 2774 n.23 ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). The Government does not argue otherwise." (parallel citations omitted)).

¹⁴⁰ See *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

¹⁴¹ See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 668–74 (1981) (holding that even when Congress had not explicitly authorized presidential action, congressional silence was the equivalent of authorization for the purposes of evaluating that action under *Youngstown's* most deferential standard).

¹⁴² See *Transcript: Day Two of the Roberts Confirmation Hearings*, WASH. POST, Sept. 13, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300876.html>; *Transcript: U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court*, WASH. POST, Jan. 10, 2006, <http://washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011000781.html>.

¹⁴³ See *Youngstown*, 343 U.S. at 667 (Vinson, C.J., dissenting).

closely he read it.¹⁴⁴ The dissenting Justices, for their part, read the statutes to place the case in Category One. To them, Justice Stevens was not just taking on the President, he was also taking on Congress by reading the relevant statutes narrowly. *Youngstown's* categories ultimately did not help determine what the Court should do. Instead, that decision had to be informed by statutory interpretation and, if the statutes were vague, then by background principles such as penalty defaults, the risks to national security, and deference.

The Executive's gambit, of shoehorning activity into Category Two, or pretending that Category Three cases are in fact Category One cases, has taken place repeatedly, and not quite persuasively, many times during the past five years. The Administration has tried to place statutes in one box or another by claiming that any other reading (including a commonsense one) would interfere with the President's Commander-in-Chief power. It has further contended that, should its creative readings fail, the statutes could be set aside as unconstitutional in secret memos. This section sets out the Administration's moves at some length. Although example after example will no doubt become tedious, this evidence is necessary to demonstrate the Administration's depth of commitment to this reactionary ideology, an ideology that has pervaded its activity in the past five years and that is now defunct. In the first legal analysis to be publicly released, for example, the Administration argued:

First, it is clear that the Constitution secures all federal executive power in the President to ensure a unity in purpose and energy in action. "Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number." . . .

Second, the Constitution makes clear that the process used for conducting military hostilities is different from other government decision-making. In the area of domestic legislation, the Constitution creates a detailed, finely wrought procedure in which Congress plays the central role. In foreign affairs, however, the Constitution does not establish a mandatory, detailed, Congress-driven procedure for taking action. . . .

Third, the constitutional structure requires that any ambiguities in the allocation of a power that is executive in nature — such as the power to conduct military hostilities — must be resolved in favor of the executive branch.¹⁴⁵

This view of constitutional law led to the startling conclusion that Congress had not, and could not, regulate the President's activity:

¹⁴⁴ See *Hamdan*, 126 S. Ct. at 2800–01 (Kennedy, J., concurring in part).

¹⁴⁵ The President's Constitutional Authority To Conduct Military Operations Against Terrorists and Nations Supporting Them, 2001 OLC LEXIS 35, at *11–14 (Sept. 25, 2001) (quoting THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 96, at 423).

Military actions need not be limited to those individuals, groups, or states that participated in the attacks on the World Trade Center and the Pentagon: the Constitution vests the President with the power to strike terrorist groups or organizations that cannot be demonstrably linked to the September 11 incidents, but that, nonetheless, pose a similar threat to the security of the United States and the lives of its people, whether at home or overseas. In both the War Powers Resolution and the Joint Resolution, Congress has recognized the President's authority to use force in circumstances such as those created by the September 11 incidents. Neither statute, however, can place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make.¹⁴⁶

The Administration returned to this theoretical claim and gave it practical application time and again. To take one high-profile recent example, the Administration justified its NSA activity against United States citizens on these grounds:

[C]rucial to the Framers' decision to vest the President with primary constitutional authority to defend the Nation from foreign attack is the fact that the Executive can act quickly, decisively, and flexibly as needed. For Congress to have a role in that process, it must be able to act with similar speed, either to lend its support to, or to signal its disagreement with, proposed military action. Yet the need for prompt decisionmaking in the wake of a devastating attack on the United States is fundamentally inconsistent with the notion that to do so Congress must legislate at a level of detail more in keeping with a peacetime budget reconciliation bill.¹⁴⁷

Again, that startling view of executive power led to the conclusion that a contrary reading of FISA would make it unconstitutional:

The President has determined that the speed and agility required to carry out the NSA activities successfully could not have been achieved under FISA. Because the President also has determined that the NSA activities are necessary to the defense of the United States from a subsequent terrorist attack in the armed conflict with al Qaeda, FISA would impermissibly interfere with the President's most solemn constitutional obligation — to defend the United States against foreign attack.

Indeed, if an interpretation of FISA that allows the President to conduct the NSA activities were not "fairly possible," FISA would be unconstitutional as applied in the context of this congressionally authorized armed conflict.¹⁴⁸

¹⁴⁶ *Id.* at *62 (footnote omitted).

¹⁴⁷ U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 25 (2006) [hereinafter NSA White Paper], available at <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/nsa/dojnsa11906wp.pdf>.

¹⁴⁸ *Id.* at 34-35 (footnote omitted).

The Administration's defense of the detention of United States citizens without explicit statutory authorization, and in possible contravention of the Non-Detention Act,¹⁴⁹ followed the same logic:

The Framers appreciated the importance of giving the Executive unquestioned authority to defend against foreign attack. As Hamilton wrote in *The Federalist* No. 70, "[d]ecision, activity, secrecy, and dispatch" are characteristic of a unitary executive power and are "essential to the protection of the community against foreign attacks." . . .

. . . .

Petitioners argue that "Congress alone" has the power to authorize the detention of a captured enemy combatant who is a presumed American citizen. That is incorrect. Especially in the case of foreign attack, the President's authority to wage war is not dependent on "any special legislative authority." . . . Petitioners . . . argue that once a "citizen is removed from the area of actual fighting," the Executive cannot detain the citizen without "statutory authorization." That argument is misguided.¹⁵⁰

Or, in the case of torture, the Administration previously argued that the criminal prohibition was unconstitutional:

Even if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign. . . . Any effort to apply Section 2340A in a manner that

¹⁴⁹ 18 U.S.C. § 4001(a) (2000).

¹⁵⁰ Brief for the Respondents, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696), 2004 WL 724020, at *13 n.4, 19 (alteration in original) (citations omitted) (quoting *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863); *THE FEDERALIST* NO. 70 (Alexander Hamilton), *supra* note 96, at 423; Brief for Petitioners, *Hamdi*, 124 S. Ct. 2633 (No. 03-6696), 2004 WL 378715, at *12, *13, *29). *See also* Brief for the Petitioner, *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (No. 03-1027), 2004 WL 542777, at *28 ("The capture and detention of enemy combatants is an essential aspect of warfare, and represents a core exercise of the President's constitutional powers as Commander in Chief."); *id.* at *49 ("The substantial constitutional doubts raised by a construction of [the Non-Detention Act] that would limit the President's authority as Commander in Chief to detain enemy combatants can be avoided . . .").

Such concerns were replete in the Administration's *Rasul* brief as well:

Deviating from the principles recognized in [*Johnson v. Eisentrager*, 339 U.S. 763 (1950),] in this case would raise grave constitutional concerns. The Constitution commits to the political branches and, in particular, the President, the responsibility for conducting the Nation's foreign affairs and military operations. Exercising jurisdiction over claims filed on behalf of aliens held at Guantanamo would place the federal courts in the unprecedented position of micro-managing the Executive's handling of captured enemy combatants from a distant combat zone where American troops are still fighting; require U.S. soldiers to divert their attention from the combat operations overseas; and strike a serious blow to the military's intelligence-gathering operations at Guantanamo.

Brief for the Respondents, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334, 03-343), 2004 WL 425739, at *12-13 [hereinafter Government's *Rasul* Brief]; *see also id.* at *16-17 ("[J]udicial review of claims filed on behalf of aliens captured by the U.S. military and detained in connection with an armed conflict would directly interfere with the President's authority as Commander in Chief, which 'has been deemed, throughout our history, as essential to war-time security.'" (quoting *Eisentrager*, 339 U.S. at 774)).

interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional.¹⁵¹

Like a bad caricature of Chief Justice Marshall,¹⁵² the Administration adopted creative constitutional and statutory interpretations to nullify statutes in each setting instead of asking Congress to modify the statutes themselves. (The irony that these statutes were purportedly being read to "avoid" constitutional questions should not be lost on anyone.¹⁵³) A key underpinning of these interpretations was the Administration's belief that the Executive has speed and dispatch available to it, and that our national security cannot wait for Congress to give the President the tools he needs.

Hamdan shows all of this to be false. By rejecting the Administration's creative statutory claims about the UCMJ, and by openly stating that the proper course is to seek legislative revision, the Court put to rest the notion that the President can simply nullify or interpret legislation away. Even if there were a legitimate debate about whether

¹⁵¹ 2002 Memorandum, *supra* note 17, at *31; *see also id.* at *39 ("Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President. . . . Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield."). The Administration later reformulated its position regarding the restrictions imposed by §§ 2340–2340A. *See* Legal Standards Applicable Under 28 U.S.C. §§ 2340–2340A, 2004 OLC LEXIS 4, at *4 (Dec. 30, 2004), available at <http://f1.findlaw.com/news.findlaw.com/cnn/docs/terrorism/doj torture123004mem.pdf> ("Because the discussion in that [August 1, 2002,] memorandum concerning the President's Commander-in-Chief power and the potential defenses to liability was — and remains — unnecessary, it has been eliminated from the analysis that follows."). Nonetheless, it did not change its position regarding the substantive conclusions that the 2002 memorandum reached. *See id.* at *5 n.8 ("While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.").

A Department of Defense Working Group reached similar conclusions to those in the 2002 memorandum. *See* DEP'T OF DEFENSE, WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS 24 (2003), available at http://online.wsj.com/public/resources/documents/military_0604.pdf ("Any effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President."); *id.* at 21 ("In order to respect the President's inherent constitutional authority to manage a military campaign, 18 U.S.C. § 2340A (the prohibition against torture) must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority.").

¹⁵² *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (interpreting section 13 of the Judiciary Act of 1789 and Article III to create a constitutional confrontation).

¹⁵³ *See, e.g.*, NSA White Paper, *supra* note 147, at 35 ("Application of the avoidance canon would be especially appropriate here for several reasons beyond the acute constitutional crises that would otherwise result."). This argument was also made in *Rasul*, *Hamdi*, and the torture memoranda, among other places.

Congress should intervene before a bureaucratic second look,¹⁵⁴ Congress is undoubtedly capable of legislating to fill any gaps in the President's existing authority. To be sure, the Administration's view may have resonated to some at the Founding, when it was exceptionally difficult for Congress to convene.¹⁵⁵ Before automobiles, airplanes, trains, or other modern forms of transportation, it was not easy for Congress to gather in emergency session.¹⁵⁶ The transportation problem was exacerbated by the lack of real-time communication. But these constraints no longer exist. Barring catastrophe, members of Congress can be reached within moments and can fly to Washington from any point on the globe.¹⁵⁷ In this modern age, it is inappropriate to think that the President can simply remove legislative constraints through secret decisions. Instead, in nonemergency situations when Congress is capable of action, the President should ask that body to repeal or modify relevant statutes.

The enactment of the Military Commissions Act proves the point. The Administration claimed national security would be threatened if it lost *Hamdan*, but in the end nothing happened. In fact, the trials are now going forward.¹⁵⁸ The extension of the writ of habeas corpus to Guantánamo Bay likewise caused no national security crisis. The government claimed in *Rasul* that it would endanger national security to permit habeas actions,¹⁵⁹ but again, that threat never materialized. Congress, of course, modified access to the writ in both the DTA and the MCA.

In sum, the lesson of *Hamdan* and *Rasul* is that the Court will not accept the Executive's revolutionary claim that it needs to act quickly even if it means running roughshod over congressional statutes. The

¹⁵⁴ See *infra* section II.B, pp. 105–14.

¹⁵⁵ For example, in the Founding-era emergency power statutes, Congress delegated broad authority to the President when Congress was not in session and reposed that power in the President until thirty days after the commencement of the next session of Congress. Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 160 (2004) (citing Act of May 2, 1792, ch. 28, § 2, 1 Stat. 264, 264).

¹⁵⁶ See ERNEST LUDLOW BOGART, *Transportation and Communication, in THE ECONOMIC HISTORY OF THE UNITED STATES* 348 (3d ed. 1916); ROSEMARIE ZAGARRI, *THE POLITICS OF SIZE* 20–23 (1987).

¹⁵⁷ Of course, if an attack threatened transportation and communication, the President's powers would be dramatically heightened because of Congress's inability to act until those threats to the infrastructure subsided.

¹⁵⁸ Sadly, the MCA was rushed through Congress with no deliberation, and it suffers from myriad constitutional and other legal problems that are beyond the scope of this Comment.

¹⁵⁹ See Government's *Rasul* Brief, *supra* note 150, at *43 ("Any judicial review of the military's operations at Guantanamo would directly intrude on those important intelligence-gathering operations. Moreover, . . . [it] would in all likelihood put an end to those operations — a result that not only would be very damaging to the military's ability to win the war, but no doubt be 'highly comforting to enemies of the United States.'" (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950))).

reason the Administration fought *Hamdan* so hard, and why it refused to seek congressional approval for its tribunals in November 2001 when it had Congress strongly on its side, is that military commissions per se have never been the motivating principle. Rather, the commissions were an exemplar of a reactionary constitutional ideology: that the President's speed, unity, and dispatch mean that he can ignore statutes, or interpret them away, under his inherent power. The true legacy of *Hamdan* will be, I believe, to eviscerate this dangerous, anti-constitutional reasoning.

B. Deference

One way of understanding *Hamdan* is through the lens of administrative law. The Justices consciously refused to award deference to the presidential determinations at issue because they lacked support from the bureaucracy, and in particular the Judge Advocates General and the State Department. The Court in this way rejected a view of some academics that had taken root in the Administration: that the President's interpretations automatically were entitled to the strong deference of *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*¹⁶⁰ In cases such as *Hamdan*, in which the litigants' claims pit the powers of Congress against those of the President, deference to the latter may be appropriate when the Executive can present its interpretation as the product of deliberative and sober bureaucratic decision-making. After all, the bureaucracy is the only actor in the political branches with a time horizon long enough to provide expertise without heavy political interference.¹⁶¹ But the absence of these relatively apolitical review processes weakens the case for deference. And in those circumstances, the only other structural actor with a long-term perspective is the judiciary.¹⁶²

To the detriment of American governance, today's debates in foreign affairs tend to posit a zero-sum choice among Congress, the President, and the courts. The potential emergence of the institutionalized bureaucracy as a fourth actor in this matrix can shed new light on *Hamdan's* meaning and its limitations. Indeed, it may suggest that

¹⁶⁰ 467 U.S. 837 (1984). For suggestions that the President's interpretations of international law are entitled to *Chevron* deference, see, for example, John Yoo, *Courts at War*, 91 CORNELL L. REV. 573, 600–01 (2006) (suggesting deference under *Chevron*), and John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 874 & n.77 (2001) (book review) (similar).

¹⁶¹ See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2345 (2006).

¹⁶² See Katyal, *supra* note 124, at 1711–12 (“As the only federal officials with life tenure and guaranteed salary, federal judges have structural advantages that enable them to stand above the political fray and provide other officials with a detached, perhaps unpopular, perspective.” (footnote omitted)).

Hamdan might have the perverse effect of diminishing some government decisionmaking by experts. *Hamdan*'s open solicitation of a legislative solution enabled the President once again to bypass the bureaucracy in favor of a quick and inevitably messy quilting bee in Congress. The sad result, once again, was that the experts in the bureaucracy never had a chance to implement their views.

This section proceeds in three parts. It first explains how expertise has been a key component of deference inquiries in administrative law. It then considers some of the failures of the executive process at issue in *Hamdan*. It wraps up by suggesting that the bureaucracy has the potential, as a fourth actor, to help resolve some interpretive questions in a way that *Hamdan*'s call for legislation may have short-circuited.

Historically, when courts decide whether to award deference to an executive interpretation, they have considered three factors: expertise, whether there has been a delegation from Congress, and political accountability.¹⁶³ To some extent, *Chevron* increased the importance of the last factor, but expertise remains a touchstone of the inquiry. As then-Judge Breyer, writing two years after *Chevron*, stated, "courts will defer more when the agency has special expertise that it can bring to bear on the legal question."¹⁶⁴

There are a number of reasons why accountability may not matter in the unique setting of *Hamdan* despite its importance to *Chevron* deference in other contexts.¹⁶⁵ After all, the initial policy decisions were made in secret and directly affected only people who cannot vote in U.S. elections.¹⁶⁶ And accountability might not work the same way

¹⁶³ See, e.g., *Chevron*, 467 U.S. at 843-44, 865-66.

¹⁶⁴ Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

¹⁶⁵ See Katyal, *supra* note 161, at 2317 ("[T]he executive is the home of two different sorts of legitimacy: political (democratic will) and bureaucratic (expertise)."); see also John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 191 (1998) ("[T]he Court [in *Chevron*] ultimately supported its deference principle with two intertwined policy reasons — agency expertise and democratic accountability . . ."). But see Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 432 (2006) (asserting that *Chevron* deference is grounded "primarily (but not exclusively) in notions of political accountability").

The scope of deference under *Chevron* is contested precisely because its basis is so contested among these two or three rationales. Future analysis may profit considerably from examining the interrelationship between rationale and scope in *Chevron* and its progeny.

¹⁶⁶ See Katyal, *supra* note 161, at 2341-43 & n.103 (questioning whether accountability provides a convincing account in foreign affairs decisions); Katyal & Tribe, *supra* note 24, at 1302-03 (describing how military commission exemption for U.S. citizens eviscerates political accountability); cf. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) ("[T]he democratic majority [must] accept for themselves and their loved ones what they impose on you and me."); *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring) ("[N]othing opens the door to arbitrary action so effectively as to allow . . . officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.").

for second-term Presidents after the enactment of the Twenty-Second Amendment.¹⁶⁷ Indeed, the second-term status of the President during *Hamdan* underscores an earlier point about litigation timing,¹⁶⁸ suggesting that the case would have been more difficult to win in 2004 than it was in 2006. If a commission trial were ever to take place and that trial turned out to be a disaster, the President would not be politically accountable.¹⁶⁹ But we can leave all of this to one side, because even if accountability is part of the rationale for deference, so too is expertise. *Hamdan* suggests that when such expertise is lacking or ignored, the Court will stand on stronger ground when second-guessing an executive interpretation.

Under both the Administrative Procedure Act¹⁷⁰ (APA) and *Chevron*, courts reviewing an agency's decisions look for signals that an agency both had and used its expertise. This inquiry is explicit under the APA and, despite being forced a bit into the background by *Chevron*, is now becoming increasingly visible in contemporary cases. As part of this inquiry, courts often emphasize the agency's *methods*, which courts have the institutional competence to monitor, as a proxy for the agency's *expertise*.¹⁷¹

Under the APA, courts may set aside agency action if it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."¹⁷² Under this so-called "hard-look" standard, courts openly consider whether an agency's action is "the product of reasoned decisionmaking."¹⁷³ Under the APA, then, courts openly embrace agency expertise as a rationale for deference and overturn action when the external manifestations of that expertise are insufficient. When agencies

¹⁶⁷ "No person shall be elected to the office of the President more than twice . . ." U.S. CONST. amend. XXII, § 1.

¹⁶⁸ See *supra* section I.B, pp. 84–94.

¹⁶⁹ See Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1085 (1988) ("If reelectability is the democratic touchstone, a second term President is no different from federal judges."). But see Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 930 (2005) ("Even second-term presidents evidently care so much about staying in line with public opinion that their approach to governing often seems indistinguishable from an ongoing political campaign."); Harry H. Wellington, *Term Limits: History, Democracy and Constitutional Interpretation*, 40 N.Y.L. SCH. L. REV. 833, 852 (1996) ("The Twenty-second Amendment removes electoral accountability from a second term president But the President of the United States is one of the most highly visible people in the world. The media keep him accountable.").

¹⁷⁰ 5 U.S.C. §§ 551–559, 701–706 (2000 & Supp. IV 2004).

¹⁷¹ Administrative law is not the first field of law in which courts have relied on evaluation of method as a proxy for the evaluation of substance. See, e.g., *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579, 592–94 (1993).

¹⁷² 5 U.S.C. § 706(2)(A) (2000).

¹⁷³ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

rely solely on post hoc rationalizations for their actions, therefore, they curry little favor with courts.¹⁷⁴

Chevron's partial grounding in expertise flowed from two observations: first, that the case involved a "regulatory scheme [that was] technical and complex, [for which] the agency considered the matter in a detailed and reasoned fashion," and second, that "[j]udges are not experts in the field."¹⁷⁵ Indeed, *Chevron's* second step, which asks courts to evaluate whether the agency has developed a permissible construction of the statute,¹⁷⁶ is essentially an investigation into the methods of agency decisionmaking. Courts and scholars alike have analogized this stage of review to the "arbitrary and capricious" standard under the APA with its emphasis on reasoned analysis.¹⁷⁷

Even though it was decided before *Chevron*, *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*¹⁷⁸ is frequently cited as an illustration of the principle that a lack of deliberative procedures can condemn agency rulemaking under *Chevron's* Step Two.¹⁷⁹ In *State Farm*, the National Highway Traffic Safety Administration rescinded a requirement that all motor vehicles be equipped with passive restraints. The Court found severe flaws in the agency's reasoning and cost-benefit analysis — providing a clear example of when a failure to demonstrate "reasoned analysis," informed by proper methods, overcomes the presumption of deference.¹⁸⁰

Formal process and expertise may also prove critical in determining which cases fall outside of *Chevron* deference altogether. *United States v. Mead Corp.*,¹⁸¹ for example, established that rules made pursuant to delegated powers are entitled to comprehensive deference under *Chevron*, but that interpretations issued outside that scope receive more skepticism.¹⁸² To determine whether Congress has delegated power, *Mead* said the reviewing court should look to the formality of

¹⁷⁴ *Id.* at 50.

¹⁷⁵ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (footnote omitted).

¹⁷⁶ *Id.* at 843.

¹⁷⁷ See, e.g., Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHIKENT L. REV. 1253, 1254 (1997); Richard W. Murphy, *A New "Counter-Marbury": Reconciling Skidmore Deference and Agency Interpretive Freedom*, 56 ADMIN. L. REV. 1, 7 n.26 (2004), and cases cited therein.

¹⁷⁸ 463 U.S. 29.

¹⁷⁹ See, e.g., *Ala. Educ. Ass'n v. Chao*, 455 F.3d 386, 397 (D.C. Cir. 2006) (enjoining enforcement of a rule because the agency failed to provide adequate reasons); *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999) (same).

¹⁸⁰ See *State Farm*, 463 U.S. at 50–57.

¹⁸¹ 533 U.S. 218 (2001).

¹⁸² See *id.* at 227–31 (discussing deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

the adjudication process and whether notice-and-comment rulemaking procedures were created and observed.¹⁸³

Most recently, *Gonzales v. Oregon*¹⁸⁴ rejected the Attorney General's interpretation of the Controlled Substances Act to preclude doctors from prescribing drugs for use in assisted suicide.¹⁸⁵ The Court's reasoning was explicitly grounded on the relative lack of expertise possessed by the Attorney General. The Court pointedly remarked, "the structure of the [statute], then, conveys unwillingness to cede medical judgments to an Executive official who lacks medical expertise."¹⁸⁶

The presidential orders at issue in *Hamdan* can be seen in a similar light, as executive action taken without the prior involvement of experts. The Administration, when it designed the commissions, ignored Secretary of State Colin Powell and National Security Adviser Condoleezza Rice and their staffs.¹⁸⁷ It was also well known that the commission plan was pushed through over the disagreement of members of the military's top brass.¹⁸⁸ The informality of many of the determina-

¹⁸³ See *id.* at 230 ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."). For similar reasons, *Christensen v. Harris County*, 529 U.S. 576 (2000), earlier held that an interpretation of the Fair Labor Standards Act contained in an agency opinion letter was not entitled to *Chevron* deference. The agency's interpretation was not, the Court pointed out, the result of a formal adjudication or notice-and-comment period and therefore lacked the force of law. *Id.* at 587.

¹⁸⁴ 126 S. Ct. 904 (2006).

¹⁸⁵ See *id.* at 920.

¹⁸⁶ *Id.* at 921. Deference would be appropriate only if the administrative action "reflected the considerable experience and expertise the [agency] had acquired over time with respect to the complexities of the [statute]." *Id.* at 915.

¹⁸⁷ The military commission trial "plan was considered so sensitive that senior White House officials kept its final details hidden from the president's national security adviser, Condoleezza Rice, and the secretary of state, Colin L. Powell, officials said. It was so urgent, some of those involved said, that they hardly thought of consulting Congress" and the longstanding "interagency debate" process was discarded. Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, § 1, at 1.

¹⁸⁸ The *New York Times* reported that even those military lawyers who were consulted about the plan ultimately saw their advice swept aside:

Many of the Pentagon's experts on military justice, uniformed lawyers who had spent their careers working on such issues, were mostly kept in the dark. . . .

A group of experienced Army lawyers had been meeting with Mr. Haynes repeatedly on the process, but began to suspect that what they said did not resonate outside the Pentagon, several of them said.

On Friday, Nov. 9, Defense Department officials said, Mr. Haynes called the head of the team, Col. Lawrence J. Morris, into his office to review a draft of the presidential order. He was given 30 minutes to study it but was not allowed to keep a copy or even take notes.

The following day, the Army's judge advocate general, Maj. Gen. Thomas J. Romig, hurriedly convened a meeting of senior military lawyers to discuss a response. The group worked through the Veterans Day weekend to prepare suggestions that would have moved the tribunals closer to existing military justice. But when the final

tions concerned the *Hamdan* majority. It dismissed the Administration's arguments that press statements by cabinet members were valid "determinations" entitling the President to deference.¹⁸⁹ Just as in *State Farm*, the Court wanted to see rigorous support, or any support, rather than incomplete conjecture.

The expertise deficit ran particularly deep in the Administration's interpretation of Common Article 3 of the Geneva Conventions.¹⁹⁰ Common Article 3 sets forth the most rudimentary requirements of the law of war, and it has bound the United States for a half-century without incident. Nevertheless, the Solicitor General, relying on a presidential determination from 2002, took the view in *Hamdan* that the Article did not cover the conflict with Al Qaeda.

It was not surprising that so many former diplomats and military flag officers disagreed with the Administration's hurried conclusion that the Article did not apply.¹⁹¹ (Later events made clear that the most respected members of our military, including General John Vessey and Colin Powell, disagreed as well.¹⁹²) The Court understood that Common Article 3 establishes a minimal set of rules that its drafters anticipated would apply to all conflicts, anywhere in the world. The Official Commentary to the Convention, upon which the Solicitor General placed much reliance, made this point abundantly clear.¹⁹³

document was issued that Tuesday, it reflected none of the officers' ideas, several military officials said. "They hadn't changed a thing," one official said.

Id.

¹⁸⁹ *Hamdan*, 126 S. Ct. at 2792 & n.52. By contrast, Justice Thomas not only treated the media statements as evidence, but he also found broad-based authority for the President's action under the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001). *Hamdan*, 126 S. Ct. at 2824, 2842-43 (Thomas, J., dissenting). A close look at Justice Thomas's rich and detailed opinion, however, suggests that the AUMF actually mattered little to his analysis. His dissent begins by offering a rationale for a "heavy measure of deference," *id.* at 2824, that looks somewhat similar to Justice Breyer's rationale for deference in *Barnhart v. Walton*, 535 U.S. 212 (2002) — subject matter and congressional acquiescence. Because congressional silence, in Justice Thomas's view, was equivalent to approval, the AUMF was not determinative. *See Hamdan*, 126 S. Ct. at 2825 (Thomas, J., dissenting) (suggesting that AUMF was not "necessary" to the disposition). Indeed, Justice Thomas treated as the relevant moment of delegation not the passage of the AUMF, which he construed to be "backward looking," *id.* at 2827 n.3, but the start of the conflict with Al Qaeda, *id.* at 2826-28.

¹⁹⁰ Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

¹⁹¹ *See, e.g.*, Brief of Amici Curiae Madeleine K. Albright & 21 Former Senior U.S. Diplomats in Support of Petitioner Salim Ahmed Hamdan at 17-18, *Hamdan*, 126 S. Ct. 2749 (No. 05-184), 2006 WL 53976; Amicus Curiae Brief of Retired Gens. & Admirals & Milt Bearden in Support of Petitioner at 22-24, *Hamdan*, 126 S. Ct. 2749 (No. 05-184), 2006 WL 42063.

¹⁹² *See* Letter from Gen. Colin L. Powell to Senator John McCain (Sep. 13, 2006) (on file with the Harvard Law School Library); Letter from Gen. John W. Vessey to Senator John McCain (Sep. 12, 2006), available at <http://www.humanrightsfirst.info/pdf/06914-etn-Vessey-geneva-ltr.pdf>.

¹⁹³ Article 3 was premised on the view that it was "equally applicable to civil and to international wars." INT'L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 33 (Oscar Uhler et

Indeed, the paradigmatic case to catalyze the drafting of Common Article 3 was the undoubtedly transnational Spanish Civil War.¹⁹⁴ The view that the Article applied to all conflicts was consistent with American military practice and doctrine as well.¹⁹⁵ Finally, there were practical reasons underlying this view — for example, a nation-state could otherwise avoid the dictates of the Article by letting a conflict spill over its borders. (Over half of all civil wars do spill over borders, a fact that, under the President's interpretation, would render the Article meaningless in a great number of conflicts.¹⁹⁶)

There might have been strong arguments to justify the President's interpretation of Common Article 3, but they were not advanced in the litigation. It was even questionable whether that interpretation had the support of any bureaucratic experts.¹⁹⁷ The Solicitor General nevertheless placed heavy emphasis on the claim that "the President's determination [of the meaning of Common Article 3] is dispositive or, at a minimum, entitled to great weight."¹⁹⁸

Viewed in light of the Solicitor General's approach, *Hamdan* might stand for the proposition that the Administration's interpretation of Common Article 3 was not the product of a proper process. This may be one way of reading the portion of Justice Kennedy's concurrence that appears to elevate careful, tradition-bound decisionmaking:

al. eds., Ronald Griffin & C.W. Dumbleton trans., 1958). Accordingly, the Article's "observance does not depend upon preliminary discussions on the nature of the conflict." INT'L COMM. OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 35 (Jean S. Pictet ed., A.P. de Heney trans., 1960); *see also id.* at 36 ("[T]he scope of application of the Article must be as wide as possible."); *id.* at 38 ("Representing, as it does, the minimum which must be applied in the least determinate of conflicts, its terms must a fortiori be respected in the case of international conflicts proper, when all the provisions of the Convention are applicable. For the greater obligation includes the lesser" (internal quotation marks omitted)).

¹⁹⁴ G.I.A.D. Draper, *The Geneva Conventions of 1949*, 114(I) RECUEIL DES COURS 57, 83 (1965).

¹⁹⁵ *See* U.S. DEP'T OF THE ARMY, LAW OF WAR HANDBOOK 144 (2005) ("This expanded view of Common Article 3 is consistent not only with U.S. policy (which extends its application even into non-conflict operations other than war . . .), but also with the original understanding of its scope as expressed in the official commentary . . .").

¹⁹⁶ *See* Brief of Professors Ryan Goodman, Derek Jinks, and Anne-Marie Slaughter as Amicus Curiae Supporting Reversal (Geneva-Applicability) at 22, *Hamdan*, 126 S. Ct. 2749 (No. 05-184), 2006 WL 53970.

¹⁹⁷ *See, e.g.*, Memorandum from Colin Powell to Counsel to the President and Assistant to the President for National Security Affairs 5 (Jan. 26, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.26.pdf> ("[W]hile no-one anticipated the precise situation that we face, the GPW was intended to cover all types of armed conflict and did not by its terms limit its application."); Memorandum from William H. Taft, IV, State Department Legal Adviser, to John C. Yoo 22 (Jan. 11, 2002), available at <http://www.cartoonbank.com/newyorker/slideshows/01TaftMemo.pdf> (stating that Common Article 3 applies).

¹⁹⁸ Brief for Respondents, *supra* note 45, at 48.

Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.¹⁹⁹

Although it admits many interpretations, this passage can be read as Justice Kennedy's belief that the "customary operation" of the Executive — embodied in its bureaucrats — offers a better repository of expertise than that presented by modern-day politicians. The fact that the President is accountable does not, Justice Kennedy might say, make him an expert. In this way, the conservative, Burkean move was to adopt the bureaucratic position instead of the more revolutionary one asserted by the Solicitor General.

Such a rationale might be difficult for the Justices to embrace any more openly than this concurrence did. Brazenly advocating for a different executive branch process could potentially undermine the legitimacy of the Court — particularly if the Court was seen as empowering itself to measure the executive branch support of any future legal interpretation by the President. Any second-guessing of the Executive could take place, if at all, only between the lines of a judicial opinion, for fear of treading on executive ground.²⁰⁰

On the other hand, a long tradition of cases indicates that the Court can at least suggest that executive determinations be made through formal processes. The Court may be able to openly require well-considered, formal processes as a precondition to deference in this area. Internal processes would by no means be mandatory; if the Administration wanted to forgo the benefits of judicial deference then it could decide not to use them.

Of course, the Court's announcement of such a rule would quickly spur development of these processes. Deference could then be awarded on the basis of a well-reasoned and well-debated policy decision reviewed by a variety of different actors, some with a long-term perspective. Without such a process in place, however, deference is reduced to a doctrine rewarding Presidents for short-term, politically motivated decisions that do not redound to the long-term interests of America.

That sad result is something that the federal judiciary — the only other entity structurally focused on the long term — cannot accept. This predicament places tectonic pressure on the Justices to ensure that policy is the product of both democratic deliberation and careful reflection by experts — and pressure to do so in a clandestine way. At a time when constitutional law has permitted the Executive to squelch

¹⁹⁹ *Hamdan*, 126 S. Ct. at 2799 (Kennedy, J., concurring in part).

²⁰⁰ See GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 21–28 (1978) (discussing advantages of subterfuge).

expertise by virtue of its accountability, courts have to make do and serve their long-term objectives by ultimately reposing their faith in the legislative process.

In *Hamdan*, the Court announced just such a preference for legislative action, stating that the commissions were impermissible “at least in the absence of specific congressional authorization.”²⁰¹ As Justice Breyer’s concurrence put it, “[n]othing prevents the President from returning to Congress to seek the authority he believes necessary.”²⁰² The upshot, as previously discussed, was that members of Congress pointed to these statements as evincing a need for legislation²⁰³ and passed a lightning-fast bill to provide the President the authority to convene military commissions and even to define the Geneva Conventions.²⁰⁴ Soundbite politics, not expertise, characterized decisionmaking. This form of legislative action looks little like the idyllic conception of lawmaking embraced by *Hamdan*.²⁰⁵

While Congress always remains free to legislate within the constraints set by the Constitution, the Court’s open embrace of legislation in *Hamdan* may have short-circuited a longer debate that could have taken place within the executive branch. It was obvious, for example, that the Judge Advocates General and State Department officials had

²⁰¹ *Hamdan*, 126 S. Ct. at 2785 (plurality opinion).

²⁰² *Id.* at 2799 (Breyer, J., concurring).

²⁰³ *See, e.g.*, 152 CONG. REC. H7936–37 (daily ed. Sept. 29, 2006) (statement of Rep. Hunter) (“We were not only requested to do this by the President, but the Supreme Court in the *Hamdan* case . . . in fact said that we were an essential part of the construct of any tribunal legislation that would set up the new tribunal process; that it had to be a construct that was participated in by Congress. So you could say . . . that we have been charged not just by the President but by the Supreme Court with doing our job and putting together this process.”); *id.* at H7559 (daily ed. Sept. 27, 2006) (statement of Rep. Hunter) (“[T]he Supreme Court not only gave permission but invited the Congress to put together this new system to try terrorists. And I want to direct my colleagues to the opinion of Justice Breyer . . .”); *id.* at H7944 (daily ed. Sept. 29, 2006) (statement of Rep. Sensenbrenner) (“In this legislation, we accomplish precisely what a majority of the Supreme Court, and particularly Justice Breyer, invited us to do in the *Hamdan* case: construct a full set of rules for conducting military commissions that meet the fundamental test of fairness under our Constitution.”); *id.* at H7547 (daily ed. Sept. 27, 2006) (statement of Rep. Lundgren) (“Let me just read from the concurring opinion of Justice Breyer in the *Hamdan* case when he basically said that their decision rested upon a single ground, that Congress had not issued the executive a blank check, that the President had to go back to us to get authority for this. Then they go ahead and say nothing prevents the President from returning to Congress to seek the authority he believes necessary.”).

²⁰⁴ *See* Editorial, *Profiles in Cowardice*, WASH. POST, Oct. 1, 2006, at B6 (describing the “the artificial emergency Mr. Bush created”); Editorial, *A Sudden Sense of Urgency*, N.Y. TIMES, Sept. 7, 2006, at A30 (describing the “phony” sense of urgency around the bill).

²⁰⁵ *Cf.* WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 2–23 (3d ed. 2001) (summarizing the intensive, deliberative, and drawn-out process by which the Civil Rights Act of 1964 became law); *see also id.* at 24–38 (discussing the legislative process more generally).

doubts about the proposed legislation.²⁰⁶ These officials tried, in the short time they had, to rein in some of the features of the legislation, but to little avail.²⁰⁷

Had the Court discussed the virtues of internal bureaucratic debate, it could have sown the seeds for a more informed discussion of the issues by experts. Congress simply does not have the appropriate staff, resources, or long-term perspective to make thoughtful and quick judgments on matters of such gravity without relying on the bureaucratic experts in the executive branch. Of course our system gives Congress primacy in this area, but that primacy does not preclude its decisions from first being informed by the considered opinions of different long-term agency players. Building that type of bureaucracy is no doubt complicated, and will not be accomplished solely by the words of five Justices etched on parchment. If the Court were more openly sensitive to the need to develop a bureaucracy in this area, though, its decisions could work together with other reforms initiated by Congress and the President himself to lay the foundation for an institution producing better, or at least more credible, executive decisionmaking.²⁰⁸ The Executive, for its part, might begin to understand that political accountability is a safeguard against, not a justification for, disregarding expertise. Such a system ultimately might produce more, not less, deference to the Executive in the courts.

III. FUTURE REFORM

For legal educators, these episodes in Part II demonstrate one reason why law schools should continue to teach theory, even controversial theory. The only remedy for bad theory is good theory. By fleshing out concepts in the classroom, educators can ensure that theory faces some vetting before it enters the “real world” of policy.²⁰⁹ A relatively closed law review readership, by contrast, cannot provide the same breadth and depth of examination.

But that does not end our task as legal educators, or as practitioners. Theory alone accomplishes nothing. For the fruits of theory to be realized fully and appropriately outside of the classroom and the pages of law reviews, at least two other fundamental changes must oc-

²⁰⁶ See, e.g., Tim Golden, *Detainee Memo Created Divide in the White House*, N.Y. TIMES, Oct. 1, 2006, § 1, at 1; Richard Simon & Julian E. Barnes, *Defense Lawyers Assail Legislation on Detainees*, L.A. TIMES, Sept. 23, 2006, at A14.

²⁰⁷ See sources cited *supra* note 206; R. Jeffrey Smith, *Top Military Lawyers Oppose Plan for Special Courts*, WASH. POST, Aug. 3, 2006, at A11; Kate Zernike & David E. Sanger, *Lawyers and G.O.P. Chiefs Resist Proposal on Tribunal*, N.Y. TIMES, Sept. 8, 2006, at A1.

²⁰⁸ These other reforms are discussed in Katyal, *supra* note 161, at 2324–42.

²⁰⁹ For one account of such benefits, see CHARLES E. LINDBLOM, *INQUIRY AND CHANGE* (1990).

cur. First, our government must establish mechanisms for meaningful consideration of constitutional and other legal constraints to inform decisionmaking in all branches. Second, law schools must imbue their students not only with theoretical knowledge, but also with the practical skills that will allow them to utilize theory in their work outside the academy. Only then will theory truly meet practice.

A. *In the Government*

Both Congress and the President have lessons to learn from theory. The best constitutional law casebook of the past decade²¹⁰ begins with a set of constitutional analyses from the early days of the Republic, none of them court opinions: James Madison's 1791 speech, delivered when he was a member of the House of Representatives, declaring unconstitutional the proposed Bank of the United States; Attorney General Randolph's agreement with Madison; and Secretary of the Treasury Alexander Hamilton's rejoinder and defense of the legality of the Bank.

Today, however, the degree of attention to constitutional and legal issues in Congress and the Administration is at its nadir. Instead of engaging in a sober debate about the meaning of constitutional text, history, and precedent, Congress rushed the MCA through without much thought to the constitutional consequences. Congress hoped, as Senator Specter memorably put it, that despite the MCA's "patently unconstitutional" provisions, the courts would "clean it up."²¹¹ So, for example, the MCA takes the radical step of eliminating habeas corpus for aliens who are detained on American soil, something that would not survive even the most deferential judicial review.

The executive branch previously employed a careful institution to interpret the Constitution and provide unvarnished legal advice: the Office of Legal Counsel (OLC). But that entity has failed miserably in recent years, now telling the President only what he wants to hear. In other work, I have proposed splitting the OLC into two separate entities, one to advise and the other to adjudicate.²¹² That split, which tracks the division of functions previously reposed in the Solicitor General (who used to both advise and litigate), is one way to restore some of the OLC's independence.

Even if the President and Congress are under political pressure to appear tough in the war on terror, they should recognize that abdicating their oaths to the Constitution and rushing legislation through for political gain will unfairly deposit the entire weight of constitutional

²¹⁰ BREST ET AL., *supra* note 121, at 28–37, 74–77.

²¹¹ *Profiles in Cowardice*, *supra* note 204.

²¹² Katyal, *supra* note 161, at 2336–40.

compliance on the courts. As the one branch insulated from political pressures, the judiciary is called upon to singlehandedly rein in excesses. That degree of reliance on a single branch is unhealthy for both the government and the war on terror. Instead, attention to constitutional issues must be restored to primacy in the political branches. A number of devices might contribute to this restoration, including not only a split in the OLC, but also such measures as revitalizing the practice of constitutional points of order in Congress.²¹³

At the same time, courts must continue the practice invigorated by *Hamdan*: close scrutiny of executive claims, and particularly of assertions that the structural features of his office permit the President to disregard Congress. These overblown assertions have weakened, not strengthened, the presidency and risk lawlessness in the name of national security. When time permits, legislation should be the default, not presidential say-so. So, too, must courts carefully police executive interpretations of treaties, which are part of the “supreme Law of the Land.”²¹⁴ In fact, the Court, in an opinion by Chief Justice Roberts, has recently made its role in this respect clear: “If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law ‘is emphatically the province and duty of the judicial department,’ headed by the ‘one supreme Court’ established by the Constitution.”²¹⁵

Hamdan’s rejection of the Administration’s Common Article 3 interpretation tracks this pronouncement by the Chief Justice. And that development is crucial for the future path of international law envisioned as a body of *law*, instead of as a series of unenforceable, amorphous aspirations.²¹⁶

B. In Law Schools

The revolution in legal education over the past few decades, incorporating greater theoretical awareness in the classroom and in scholarship, is on the whole a healthy development. As the experience of litigating *Hamdan* has shown, teaching innovative thinking skills and methods has the potential for benefits beyond those immediately obvious to the law student (or, I dare say, to the professor). At the same time, an obsessive focus on theory yields diminishing returns. As schools have increased investment in theory, they have neglected the

²¹³ Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1378 n.147 (2001) (discussing such devices).

²¹⁴ U.S. CONST. art. VI, cl. 2.

²¹⁵ *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2684 (2006) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

²¹⁶ Customary international law raises different, and more complicated, issues. See Derek Jinks & Neal Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. (forthcoming 2007).

practice of law. Consider, in this respect, three practical skills that were at least as important as any form of theory to the litigation of *Hamdan*.

1. *Oral Advocacy*. — When I graduated from law school, I had said about 100 words in a court, most of them to contest a traffic ticket. There is an art to oral advocacy, and law schools do not emphasize its teaching, relegating it often to student-directed programs like moot court or to small trial advocacy classes not available to the mass of students.

So, before my oral argument, I felt the need for some practical training. I spent a day with a teacher from the Gerry Spence Trial Lawyers' College. He did not have a J.D.; rather, he had been an actor on the TV program *Cheers*. I can still vividly recall the image of him walking into my office, with his bolo tie and long hair and slow speech, and I also remember deciding within three minutes that I wanted nothing to do with him. But he looked at me, read my body language, and said, "Neal, just practice your oral argument with me. Just once." I agreed. A long pause ensued. He then added, "And hold my hand, outstretched, when you do it." It was, needless to say, uncomfortable. I was later led to practice my oral argument in front of stuffed animals and to do a variety of other bizarre things to help me connect with the audience. But these methods taught me how to break down layers of formality and distance and have a conversation, even in the most structured setting, with the Court.

Unfortunately, law schools do not make teachers like mine easily available to students. It is possible that some law firms do, but it drains resources to provide such training and, of course, not all students wind up at firms that can afford the expenditure. Law schools should not become the Gerry Spence College, nor should they become BAR/BRI. But they should consider it part of their mission to train lawyers, which includes arming them with practical skills as well as tools derived from the study of theory.

The process of teaching students how to be lawyers ideally takes place in the classroom, yet recent classroom trends, such as the decline in the Socratic method, have undermined the development of advocacy skills. A chief advantage of Socratic education is its ability to teach lawyering skills simultaneously with the substantive material of a law school course. But that waning method has been replaced by a set of informal practices that, in general, do not train for advocacy. Perhaps the decline in Socratic education is a positive force for other reasons, but it nonetheless necessitates devoting more attention to shaping a replacement that teaches advocacy skills. At the very least, schools should invest more in their oral advocacy programs so that their graduates do not cram the learning of these skills into already jam-packed workdays or forget to learn them at all, which serves neither courts nor clients.

2. *Working in Groups.* — The *Hamdan* case required intense coordination and management of team members (both students and lawyers), along with affected nongovernmental organizations, executive branch officials, members of Congress and their staffs, diplomats and foreign leaders, retired generals and admirals, and other lawyers scattered across the globe.

Outside organizations often have interests that are not those of your client. Such divergences present opportunities in cases such as *Hamdan* because these groups will present their views in friend-of-the-court briefs that do not duplicate the party's brief. Of course, some organizations are dedicated to advancing their own theories without concern for undercutting your arguments, or sometimes they are simply seeking publicity to use in later fundraising efforts. This problem is worsened by the modern etiquette of consenting to all amicus briefs filed on behalf of your party.²¹⁷ There are strategies to reduce the number of filings; we employed every one to ensure that the Court was hearing only from a far-flung and diverse set of amici, represented by the best advocates, with the most affected clients, with the most expertise on the issues, and with no repetition. Ultimately, thirty-nine amicus briefs were filed in support of Mr. Hamdan, the vast majority of them fitting that bill. (There were over 150 proposed briefs, and I spent hundreds of hours convincing groups not to submit them.) We also pioneered, with the permission of the Clerk of the Court, the use of a short label on the cover of each amicus brief that announced the unique substantive issue it addressed.

In total, there were well over 1000 people working on the *Hamdan* case in one capacity or another, as student volunteers, as law firm attorneys pro bono, and as representatives of organizations. Although modern technology such as e-mail and Blackberries help, ultimately to work with, manage, motivate, coordinate, and inspire such a large team requires a specialized skill set. Again, these skills were not something I learned in law school. (Quite the opposite.) Rather, I learned them through the guidance of a mentor — and sometimes the hard way — in the time I spent at the Justice Department after law school.

Law schools today instruct students in how to read a case, how to research, and how to think about legal rules. All of this instruction is fine and good, but it does not teach students how to work together in a group.²¹⁸ In fact, law schools persistently avoid such lessons; instead, the message is an individualistic one. A student, alone, is “cold-called” by a professor in class, is expected to answer the question without as-

²¹⁷ See ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 658 (8th ed. 2002) (describing this etiquette).

²¹⁸ See Neal Katyal, *Beyond the Law of One*, LEGAL TIMES, Sept. 9, 2002, at 27.

sistance (obvious help from a classmate generally elicits smirks), and ultimately will take the exam (and perhaps prepare for it) alone.

Outside of the classroom, too, law school sends the message that to succeed one has to work as an island unto himself. Law schools today continue to reward professors on the basis of their individual publications, and some even frown upon co-authored papers. As a result, many professors do not work in any substantial capacity with other people. But this model of isolated achievement is not appropriate for most law students, who will not enter the world of legal academia. Rather, they will be employed in law firms, government offices, or other forms of practice in which people skills are at a premium.

Law schools could look to other professional schools for guidance on how to better prepare their students to work with others. Business schools, for example, often design their curricula around group activities and projects that instruct students in the difficult and nuanced skills of teamwork. There are a number of ways that law schools can start to emulate this business school model, from group-oriented litigation projects to classroom skits that illustrate the complexities of the reading assignments.²¹⁹ By encouraging students to work together, law schools can both better prepare students for the challenges of lawyering and begin to break the societal image of lawyers as individuals who care about nothing more than themselves.

3. *A Moral Compass.* — Morality, like religion, is hard to talk about in law school. Some people are deontologists, others utilitarians. Some have no idea what they believe. And everyone knows that in the hard cases, individuals can come to different judgments and yet still hold themselves out as moral.

As a result, law schools can go in two directions. They can buy into pluralism and decide it is better not to say anything about morality. Or they can attempt to talk about these differences, study them, and underscore that — regardless of where one ultimately comes down on these questions — the process of coming to a moral judgment is a deeply important one for the individual, not just as a lawyer, but as a human being.

Law schools prefer the former direction, perhaps because the latter places them onto uncertain and uncomfortable terrain. But the silence that many law students hear is costly. It teaches the students that law and morality are distinct, and that one's bar license acts as a shield from moral judgments. It teaches the public that lawyers care more

²¹⁹ Such skits bring the legal issues to life and force students to work in a manner that more closely emulates what lawyers actually do. In so doing, this classroom method generates friendships, occasional frictions, and heated discussions.

about money than about being decent people. And it teaches certain clients that lawyers can be hired to help them pursue malevolent ends.

Although some view the practice of law as entirely divorced from the practice of morality, the Model Rules of Professional Conduct say otherwise. For attorneys acting as counselors, for example:

In representing a client, a lawyer shall exercise *independent professional judgment* and render *candid advice*. In rendering advice, a lawyer may refer not only to law but to other considerations such as *moral*, economic, social and political factors, that may be relevant to the client's situation.²²⁰

Comments to this Rule add that legal advice "often involves unpleasant facts and alternatives" that clients "may be disinclined to confront" or find "unpalatable," but conclude that lawyers "should not be deterred from giving candid advice" by that prospect.²²¹ Indeed, they observe that "[a]lthough a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied."²²² For these and other reasons, law schools should spend some time discussing the moral obligations that lawyers have to their clients and to society.

This kind of teaching forces law schools onto difficult terrain. When legal education was simply about doctrine and lawyering skills, law schools never had to confront questions such as: Do we teach a "right" theory? Do we teach a method for deciding which theory is "right"? If we do teach such a method, just how do we go about that task? Doesn't teaching a method require teaching even more theory

²²⁰ MODEL RULES OF PROF'L CONDUCT R. 2.1 (2002) (emphases added).

²²¹ *Id.* at R. 2.1 cmts.1-2.

²²² *Id.*; see also Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641, 655-61 (2005) (arguing that some executive branch attorneys violated their role after September 11, 2001); David Luban, *Selling Indulgences*, SLATE, Feb. 14, 2005, <http://www.slate.com/toolbar.aspx?action=print&id=2113447> (making a similar criticism).

I break with these analyses in certain respects. As someone who did national security work for a previous administration, I have some sense of the pressures individuals face in these settings. Such pressures must have been particularly acute after September 11. And we have no idea whether government lawyers in the OLC or elsewhere voiced moral objections, or whether they spent time themselves thinking through the moral arguments. (There is, of course, a utilitarian tradition that might permit torture in some circumstances.) At least one attorney appears, by his account, not to have voiced such objections, but even in that instance, the facts are not nearly complete enough to make any sort of judgment. See *Frontline Interview with John Yoo* (PBS television broadcast Oct. 18, 2005) (transcript available at <http://www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html>) ("The department is there to interpret the law so that people who make policy know the rules of the game, but you're not telling them what plays to call, essentially. . . . I don't feel like lawyers are put on the job to provide moral answers to people when they have to choose what policies to pursue.").

My point is not to cast blame on these attorneys; it is simply to make sure that law school educators are counseling students to ask these questions and to reflect upon them.

(such as philosophy and ethics) to enable students to pick among theories?

These hard questions, which deserve much consideration in future work, lead us full circle back to Judge Edwards. For regardless of whether Judge Edwards was entirely correct in his criticism of the disjunction between practice and the legal academy, he was absolutely right about the need for law schools to start a moral conversation and to encourage students to practice law in an “ethical” manner.²²³

* * * *

These three traits are not generally discussed at leading law schools, but they are far more important to what our students go on to do than the latest variant on Calabresi and Melamed’s brilliant property/liability rules framework.²²⁴ Some of the reason for silence has to do with institutional constraints: it is not clear that a law school could succeed in cultivating traits like friendliness and personal morality. But we will not know until we experiment with such objectives at various law schools. And, at the very least, law school professors could avoid conduct and commentary that set a bad example for students, such as disparaging teamwork.

The above description of law school failings is not meant to group all law schools together reductively, or even to suggest that they describe fully any one law school. After all, I have not even begun to discuss in this Comment the obvious exception to the trends identified in this section: the growth of the legal clinic.²²⁵ But clinical programs “remain at the periphery of law school curricula.”²²⁶ In many law schools, the majority of students do not even participate in them.²²⁷ It is well known in top law schools, for example, that students doing clinical work remain divided both academically and socially from students editing law reviews. And the standard clinical model, while important, reinforces an artificial divide between the classroom and practice, which presupposes that clinicians are not able to talk about theoretical concepts and theoreticians are increasingly unable to discuss the practice of law. Therefore, the trend toward more clinical education, although an overwhelmingly positive development, coun-

²²³ Edwards, *supra* note 2, at 66–67, 73.

²²⁴ Guido Calabresi & Douglas A. Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

²²⁵ By the late 1990s, “law school clinical programs had become a part of the curriculum at virtually every law school in the United States.” Margaret Martin Barry et al., *Clinical Education for This Millenium: The Third Wave*, 7 CLINICAL L. REV. 1, 21 (2000).

²²⁶ *Id.* at 32.

²²⁷ See Peter A. Joy, *The Ethics of Law School Clinic Students as Student-Lawyers*, 45 S. TEX. L. REV. 815, 822 (2004) (finding that thirty-five percent of students take clinics).

terproductively reifies a divide that ultimately is not healthy for law students or for the practice of law more generally.

In the end, what *Hamdan* has shown is that law students — who volunteered tirelessly on the case from the complaint in the district court all the way up to the Supreme Court — can play a vital role in raising the level of debate in our most important constitutional law cases. The experience suggests that students are particularly well situated to play an important role even in the “big” cases, just as they have in some other high-profile cases in recent years, such as *Sale*²²⁸ and *Eldred*.²²⁹ What students lack in experience and expertise they more than make up for in enthusiasm, idealism, and passion. Law schools fail the profession by not embracing this quality in their students and, outside of clinics, not developing outlets through which to channel it.

The problem with law schools, therefore, may be the alienation of the school from the student rather than, as Judge Edwards posed it, the alienation of educators from practitioners. This problem lies not simply with the purely legal education the schools are providing, but with the means by which they are (or are not) challenging their students to put that education to meaningful use.

IV. CONCLUSION

Hamdan v. Rumsfeld challenges law schools, courts, the President, and Congress to rethink their practices of the past several years. It would be fitting for each entity to begin thinking about a response worthy of what the Court did on June 29, 2006. For on that day, the Court said something profound about America. A man with a fourth-grade education from Yemen, accused of conspiring with one of the world’s most evil men, sued the most powerful man in the nation (if not the world), took his case to the highest court in the land, and won. The Court’s profound commitment to the rule of law is a beacon for other countries around the world. In no other country would such a thing be possible.

The *Hamdan* decision reflects the genuine promise of America — a promise embodied in the words of Justice Rutledge, dissenting in the last great military commission case, *In re Yamashita*²³⁰:

²²⁸ See Victoria Clawson et al., *Litigating as Law Students: An Inside Look at Haitian Centers Council*, 103 YALE L.J. 2337 (1994) (discussing student participation in *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993)); see also BRANDT GOLDSTEIN, *STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS SUED THE PRESIDENT — AND WON* (2005) (same).

²²⁹ See Brenda Sandburg, *Student Counsel*, RECORDER, Apr. 25, 2002, at 4, available at <http://www.law.com regionals/ca/stories/edto425a.shtml> (discussing student participation in *Eldred v. Ashcroft*, 537 U.S. 186 (2003)).

²³⁰ 327 U.S. 1 (1946).

More is at stake than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law. In this stage of war's aftermath it is too early for Lincoln's great spirit, best lighted in the second inaugural, to have wide hold for the treatment of foes. It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late.

This long-held attachment marks the great divide between our enemies and ourselves. Theirs was a philosophy of universal force. Ours is one of universal law, albeit imperfectly made flesh of our system and so dwelling among us. Every departure weakens the tradition, whether it touches the high or the low, the powerful or the weak, the triumphant or the conquered.²³¹

In 1956, a young former law clerk to Justice Rutledge quoted these very words in a book chapter about his former boss.²³² His name was John Paul Stevens. And exactly fifty years later, he made good on Justice Rutledge's promise.

In due course, each of us will be called upon to make Justice Rutledge's promise more of a reality. Law schools can think harder about how to train students to be lawyers and how to arm them with both knowledge about the practice of law and about its theory. Courts can continue the *Hamdan* tradition of carefully scrutinizing executive branch claims of speed and dispatch and policing treaty interpretations that go beyond the pale. The President and Congress both must come to realize that the Constitution is our most sacred document, not a document of convenience. It demands hard study and faithful adherence to its text, purpose, and structure. Neither the Court nor those who stand up for these basic rights should be accused of "coddling terrorists." In fact, there is no tradition more central to the American experiment, or more critical to its continuing power to inspire.

²³¹ *Id.* at 41-42 (Rutledge, J., dissenting).

²³² John Paul Stevens, *Mr. Justice Rutledge*, in *MR. JUSTICE* 177, 199-200 (Allison Dunham & Philip B. Kurland eds., 1956).

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