Symposium

A HAMDAN QUARTET: FOUR ESSAYS ON ASPECTS OF HAMDAN v. RUMSFELD

On the last day of its 2005 Term, the Supreme Court issued a major separation of powers decision. In *Hamdan v. Rumsfeld*, the Supreme Court ruled, by a 5-3 margin, that a military commission created by executive order lacked the authority to try a detainee held at Guantanamo Bay "because its structure and procedures violated both the Uniform Code of Military Justice and the Geneva Conventions." Four Justices also held that the tribunal lacked authority because the offense with which Hamdan had been charged—conspiracy to commit war crimes—was not an "offens[e] that by . . . the law of war may be tried by military commissions." The same four Justices also found that, by permitting the exclusion of the defendant from hearing certain secret evidence, the tribunal failed to afford the guarantees "recognized as indispensable by civilized peoples."

Justice Stevens wrote the majority opinion in *Hamdan*, which was joined by Justices Souter, Ginsburg, and Breyer and, in part, by Justice Kennedy.⁵ Justices Kennedy and Breyer wrote separate concurring opinions; each was joined by all members of the majority except Stevens.⁶ Thus five Justices held that, in this context, Congress has the power to limit presidential authority by statute, and that it had done so here. Justices Scalia, Thomas, and Alito each dissented separately and also joined each other's dissents.⁷ Chief Justice Roberts did not participate because he was a member of the D.C. Circuit panel that had previously heard the case.⁸

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- 1. 126 S. Ct. 2749 (2006).
- 2. Id. at 2759.

- 4. Id. at 2797-98 (plurality opinion).
- 5. Id. at 2758.
- 6. Id. at 2799 (Breyer, J., concurring); id. (Kennedy, J., concurring in part).
- 7. Id. at 2810 (Scalia, J., dissenting); id. at 2823 (Thomas, J., dissenting); id. at 2849 (Alito, J., dissenting).
 - 8. Id. at 2799; see also Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005).

^{3.} Id. at 2759-60 (alteration in original) (quoting 10 U.S.C. § 821 (2000)); see also id. at 2775-86 (plurality opinion).

THE ESSAYS

The four essays that follow grew out of a faculty workshop on the Hamdan decision held at the University of Maryland School of Law on September 21, 2006. The essays explore how *Hamdan* fits into and possibly clarifies the doctrine of the famous Youngstown case, and what the decision may suggest about the interplay of statutory, constitutional, and international law and the likely role of the judiciary in future national security cases. Professor Singer finds, in Hamdan, suggestions that the Supreme Court is likely to engage in particularly vigorous judicial review, deferring less to Congress and asserting its own views of the proper relationship between the political branches and of the scope of the protections for individual liberty, even in the face of joint congressional and presidential action.9 Professor Quint discusses the "silences" of the majority opinion in Hamdan—areas in the majority opinion where the Court seems to omit a discussion of important doctrinal themes—and he also seeks to elucidate the meaning of certain peculiar turns of phrase in the majority opinion and the concurring opinion of Justice Kennedy. 10 Professor Young's essay explores the famous concurring opinion of Justice Robert Jackson in Youngstown—an opinion that formed much of the doctrinal background of *Hamdan*, and he reflects on the implications of *Youngstown* and Hamdan for the existence of presidential emergency powers, both in the absence of an authorizing statute and in the presence of a forbidding statute. 11 Finally Professor Greenberger's essay takes us from the Hamdan decision in the summer of 2006 up to the present date under the Military Commission Act, which became law shortly after the faculty workshop. Looking toward the future, Professor Greenberger outlines and analyzes the difficult constitutional questions raised by that statute.¹²

THE HAMDAN OPINIONS

Writing for a 5-3 majority, Justice Stevens first held that the Supreme Court had jurisdiction to consider the merits of Hamdan's claim.¹³ In doing so, the majority rejected the Government's argu-

^{9.} Jana Singer, Hamdan as an Assertion of Judicial Power, 66 Mp. L. Rev. 759 (2007).

^{10.} Peter E. Quint, Silences and Peculiarities of the Hamdan Opinions, 66 Mp. L. Rev. 772 (2007).

^{11.} Gordon G. Young, Youngstown, Hamdan, and "Inherent" Emergency Presidential Policymaking Powers, 66 Mp. L. Rev. 787 (2007).

^{12.} Michael Greenberger, You Ain't Seen Nothin' Yet: The Inevitable Post-Hamdan Conflict Between the Supreme Court and the Political Branches, 66 Mp. L. Rev. 805 (2007).

^{13.} Hamdan, 126 S. Ct. at 2762-69.

ment that the Detainee Treatment Act of 2005 (DTA)¹⁴ deprived the Court of jurisdiction over Hamdan's appeal. The DTA, passed while Hamdan's case was pending in the Supreme Court, purported to withdraw federal court jurisdiction to hear habeas corpus petitions filed by or on behalf of Guantanamo Bay detainees and vested in the Court of Appeals for the District of Columbia Circuit "exclusive jurisdiction" to review the determinations of military commissions.¹⁵ The Government argued that this provision applied to pending habeas actions such as Hamdan's, as well as to future cases. Hamdan opposed this argument on both constitutional and statutory grounds. The majority found it unnecessary to reach Hamdan's constitutional objections because it concluded, based on "ordinary principles of statutory construction," that Congress did not intend this provision of the DTA to apply to pending actions.¹⁶ Justice Scalia, in dissent, disagreed sharply with the majority's reading of the DTA.¹⁷

Justice Stevens next rejected the Government's argument that, even if the Court had statutory jurisdiction to hear Hamdan's appeal, it should abstain from exercising that jurisdiction until after Hamdan's military commission had rendered a final decision. Although the majority acknowledged "the possibility that abstention may be appropriate in some cases seeking review of ongoing military commission proceedings," it concluded for several reasons that such abstention was not justified. Again, Justice Scalia took strong issue with the majority's abstention analysis. 21

Turning to the merits of Hamdan's appeal, Justice Stevens focused on whether Congress had authorized the type of military commissions convened by the President. The majority rejected the Government's arguments that the Authorization for the Use of Military Force (AUMF)²² and the DTA constituted such authorization.²³ The AUMF, a Joint Congressional Resolution passed shortly after the 9/11 attacks, authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he deter-

^{14.} Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (2005) (to be codified at 42 U.S.C. §§ 2000dd to 2000dd-1).

^{15.} Hamdan, 126 S. Ct. at 2763.

^{16.} Id. at 2764-69.

^{17.} Id. at 2810-15 (Scalia, J., dissenting).

^{18.} Id. at 2769 (majority opinion).

^{19.} Id. at 2772.

^{20.} Id. at 2770-72.

^{21.} Id. at 2819-22 (Scalia, J., dissenting).

^{22.} Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (Supp. III 2003)).

^{23.} Hamdan, 126 S. Ct. at 2774-75.

mines planned, authorized, committed, or aided the terrorist attacks."²⁴ The Court concluded that nothing in the text or legislative history of the AUMF suggested that Congress intended to expand or alter the limits on military commissions provided by the Uniform Code of Military Justice (UCMJ).²⁵ Similarly, the Court concluded that, although the DTA "obviously recognizes the existence of the Guantanamo Bay commission in the weakest sense," it could not be read to authorize the particular tribunals convened by the President.²⁶

The heart of the majority's analysis focused on the UCMJ. Citing Ex parte Quirin,²⁷ the Court acknowledged that the UCMJ sanctioned the use of military commissions.²⁸ However, it found that "[t]he UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the 'rules and precepts of the law of nations.' The Court emphasized that the UCMJ requires that the procedures applied in courts-martial and military commissions must be "uniform insofar as practicable," and that departures from this "uniformity principle" must be tailored and justified.³⁰

The majority held that several aspects of Hamdan's commission violated this uniformity requirement. In particular, the accused and his civilian lawyer could be excluded from portions of the commission's proceedings—something that had already happened to Hamdan³¹—and thus they could be precluded from knowing the evidence presented during those portions of the proceedings.³² Grounds for exclusion included the protection of classified or classifiable information, intelligence and law enforcement information gathering techniques, and other national security interests.³³ The accused and the civilian counsel could be denied access to protected information used as evidence as long as the presiding officer concluded that the admission of such evidence without the accused's knowledge

^{24. 50} U.S.C. § 1541 note. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), a majority of the Supreme Court concluded that the AUMF authorized the initial detention of U.S. citizens captured in Afghanistan, whom the executive branch classified as enemy combatants. *Id.* at 521 (plurality opinion); *id.* at 587 (Thomas, J., dissenting).

^{25.} Hamdan, 126 S. Ct. at 2775 (citing 10 U.S.C. §§ 801–946 (2000)).

^{26.} Id. at 2775 (internal quotation marks omitted).

^{27. 317} U.S. 1 (1942).

^{28.} Hamdan, 126 S. Ct. at 2775 n.24.

^{29.} Id. at 2786 (quoting Ex parte Quirin, 317 U.S. at 28).

^{30.} Id. at 2790.

^{31.} Id. at 2788.

^{32.} Id. at 2786.

^{33.} See id.

"would not result in the denial of a full and fair trial." The majority also noted that commission rules permitted the admission of any evidence that, in the opinion of the presiding officer, would have probative value to a reasonable person—a test that could allow both testimonial hearsay and evidence obtained through coercion. The majority concluded that while the UCMJ's uniformity principle is not inflexible, the President had failed to provide an official justification for these significant deviations from court-martial procedures and that "[n]othing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case."

In addition to invoking the UCMJ's uniformity requirement, the majority held that Hamdan's military commission violated Common Article 3 of the Geneva Conventions.³⁷ The majority characterized Common Article 3 as part of "the law of war" that Congress had incorporated into the UCMJ. Common Article 3 provides certain minimum protections to persons involved in conflicts to which the full provisions of the Geneva Conventions do not apply. One of those protections is that detainees be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."38 Echoing Justice Kennedy's view that "[t]he regular military courts in our system are the courts-martial established by congressional statutes,"39 the majority held that, at a minimum, a military commission is "'regularly constituted' . . . only if some practical need explains deviations from court-martial practice."40 For the reasons explained above, the Court found that "no such need has been demonstrated here."41

The majority's holding with respect to Common Article 3 rejected two arguments made by the Government and adopted by the court of appeals below: that Common Article 3 did not apply to the conflict against al Qaeda, and that the requirements of the Geneva Conventions were not judicially enforceable.⁴² As commentators and others have noted, the Court's holding that Article 3 of the Geneva

^{34.} See id. at 2787 (internal quotation marks omitted).

^{35.} Id. at 2786.

^{36.} Id. at 2792.

^{37.} Id. at 2793.

^{38.} Id. at 2795 (quoting 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. 125).

^{39.} Id. at 2803 (Kennedy, J., concurring in part).

^{40.} Id. at 2797 (majority opinion) (quoting Hamdan, 126 S. Ct. at 2804 (Kennedy, J., concurring in part)).

^{41.} Id.

^{42.} Id. at 2795-97.

Conventions applies to the conflict with al Qaeda has implications that go far beyond the authority of military commissions.⁴³

Writing for a plurality of the Court, Justice Stevens also concluded that Hamdan's trial by a military commission was improper because the only offense with which Hamdan had been charged—conspiracy to commit war crimes—was not itself a war crime triable by military commission,⁴⁴ and because Hamdan's exclusion from portions of his trial would violate Common Article 3's requirement that a tribunal afford "all the judicial guarantees which are recognized as indispensable by civilized peoples."⁴⁵ Justice Kennedy declined to join these portions of Justice Stevens's opinion.

Justice Breyer wrote a very brief concurring opinion that was joined by Justices Kennedy, Souter, and Ginsburg.⁴⁶ Responding to the dissent's claim that the Court's decision would undermine the nation's ability to prevent future terrorist attacks, Breyer emphasized that the Court's core holding was that Congress had not authorized the President's actions and that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary."⁴⁷

Justice Kennedy's concurrence, also joined by Justices Breyer, Souter, and Ginsburg, was more substantial. It emphasized that the proper framework for assessing the constitutionality of the President's actions in this case was the three-part scheme adopted by Justice Jackson in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer.* Kennedy emphasized that where, as here, the President acts in the face of congressional disapproval, his power is at its lowest ebb. Kennedy also noted that trial by military commissions "raises separation-of-powers concerns of the highest order" because such commissions, located entirely within a single branch, "carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review." 50

Justice Scalia dissented on the ground that the Court lacked jurisdiction to hear Hamdan's appeal.⁵¹ Scalia forcefully disagreed with the majority's conclusion that the DTA did not apply to pending

^{43.} Singer, supra note 9, at 765.

^{44.} *Hamdan*, 126 S. Ct. at 2775–86 (plurality opinion).

^{45.} Id. at 2797-98 (internal quotation marks omitted).

^{46.} Id. at 2799 (Breyer, J., concurring).

^{47.} Id.

^{48.} Id. at 2800 (Kennedy, J., concurring in part).

^{49.} See id. at 2800-01.

^{50.} Id. at 2800.

^{51.} Id. at 2810 (Scalia, J., dissenting).

cases. He argued that "[a]n ancient and unbroken line of authority attests that statutes ousting jurisdiction unambiguously apply to cases pending at their effective date." Scalia also took issue with the majority's reading of the legislative history of the DTA, much of which he claimed had been manufactured with precisely this litigation in mind. He also criticized the majority's legislative history analysis for failing to consider President Bush's signing statement, "which explicitly set forth [the President's] understanding that the DTA ousted jurisdiction over pending cases." Moreover, Scalia argued that, even if the DTA had not eliminated jurisdiction, abstention principles dictated that the Court should refrain from intervening in ongoing military proceedings.

Justice Thomas authored a separate dissent that focused on the majority's merits analysis. Thomas argued that the Court's decision "flouts our well-established duty to respect the Executive's judgment in matters of military operations and foreign affairs" and constituted an illegitimate "judicial intrusion onto core executive prerogatives in the waging of war, where executive competence is at its zenith and judicial competence at its nadir." Moreover, he concluded that Congress had authorized the President's actions under both the AUMF and the UCMJ. Disagreeing with the majority's statutory analysis, Thomas claimed that the procedures set forth in the UCMJ are not exclusive and do not limit the President's power. He interpreted the UCMJ's reference to uniformity as requiring "nothing more than uniformity across the separate branches of the armed services."

Justice Thomas also criticized the majority's refusal to defer to the President's determination that the use of court-martial procedures would hamper the country's war effort.⁶¹ He complained that "this determination is precisely the kind for which the '[j]udiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.' "⁶²

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52. Id.
53. Id. at 2816.
54. Id.
55. Id. at 2819-22.
56. Id. at 2823 (Thomas, J., dissenting).
57. Id. at 2830.
58. Id. at 2838, 2840.
59. Id. at 2840.
60. Id. at 2842.
61. Id. at 2843.
62. Id. (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).
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Justice Thomas also took issue with the majority's interpretation of the Geneva Convention, finding that the Convention's provisions are not judicially enforceable because the Convention "contemplated that diplomatic measures by political and military authorities were the exclusive mechanisms for such enforcement." Thomas also counseled deference to the President's determination that Article 3 of the Geneva Convention does not apply to the conflict with al Qaeda, noting that "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." Even if the provisions of Article 3 were judicially enforceable, Thomas would characterize the military commissions as "'regularly constituted' because such commissions have been employed throughout our history to try unlawful combatants for crimes against the law of war."

Finally, Justice Thomas took strong issue with the plurality's determination that conspiracy is not an offense against the laws of war. Pointing to past military commission proceedings that had included charges of conspiracy, Thomas argued that the Court "should undertake to determine whether an unlawful combatant has been charged with an offense against the law of war with an understanding that the common law of war is flexible, responsive to the exigencies of the present conflict, and deferential to the judgment of military commanders." 66

Justice Alito filed a brief dissent, which echoed many of Justice Thomas's conclusions, but with less emphasis on the need for deference to the Executive. Alito asserted that Hamdan's military commission satisfied Common Article 3's requirement of a regularly constituted court because it was "a court that has been appointed, set up, or established in accordance with the domestic law of the appointing country." Alito found no basis for the majority's view that a court differing in organizational design from an ordinary military court is automatically improperly constituted. He claimed that "[i]f Common Article 3 had been meant to require trial before a country's military courts or courts that are similar in structure and composition, the drafters almost certainly would have used language that expresses

^{63.} *Id.* at 2844–45.

^{64.} *Id.* at 2846 (quoting Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982)).

^{65.} Id. at 2847.

^{66.} Id. at 2830.

^{67.} See id. at 2851 (Alito, J., dissenting).

that thought more directly."⁶⁸ Alito concluded with the assertion that, whatever else may be said about the military commission system created by the President and augmented by the DTA, that system "does not dispense 'summary justice.'"⁶⁹

^{68.} *Id*.

^{69.} Id. at 2854-55.