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Hamdan as an Assertion of Judicial Power

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HAMDAN AS AN ASSERTION OF JUDICIAL POWER

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Most pundits and academic commentators have viewed the *Hamdan* decision as primarily about executive power. These commentators have emphasized the Court's forceful rejection of the Bush Administration's claims of broad inherent executive authority and the Court's reaffirmation of Congress's central role in formulating national security policy.[1] Viewed from this perspective, the *Hamdan* decision is a relatively straightforward extension of the Court's seminal decision in *Youngstown Sheet & Tube Co. v. Sawyer*[2] and, in particular, of the tripartite framework articulated by Justice Jackson in that case for assessing the constitutionality of executive actions.[3] Because the President was acting without congressional authorization when he created Hamdan's military commission, and because Congress, in enacting the Uniform Code of Military Justice (UCMJ),[4] had promulgated an alternative and comprehensive system of military courts, the President's power was at its lowest ebb.[5]

On this view, the primary constitutional problem in *Hamdan* was that the Executive had acted unilaterally in an area where the Constitution required the involvement—or at least the acquiescence—of both political branches. The solution to this constitutional deficiency is for the President to return to Congress to obtain the authorization

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1. *See, e.g.*, Neal Kumar Katyal, *The Supreme Court, 2005 Term—Comment:* Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 71 (2006) (claiming that *Hamdan* "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"); Posting of Walter Dellinger, http://www.slate.com/id/2144476/entry/2144825 (June 29, 2006, 17:59 EST) (asserting that the *Hamdan* majority rejected the "astonishingly broad category" of executive power asserted by the Bush Administration).

2. 343 U.S. 579 (1952).

3. *See id.* at 635–38 (Jackson, J., concurring). For a more extensive discussion of the *Youngstown* decision, see Gordon G. Young, Youngstown, Hamdan*, and "Inherent" Emergency Presidential Policymaking Powers*, 66 MD. L. REV. 787 (2007).

4. 10 U.S.C. §§ 801–946 (2000).

5. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2800–01 (2006) (Kennedy, J., concurring in part).

that the *Hamdan* Court found lacking.[6] Indeed, Justice Breyer's concurring opinion is explicit on this point:

> The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a "blank check." Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.[7]

The President has now done exactly what Justice Breyer suggested. With the passage of the Military Commissions Act of 2006 (MCA),[8] Congress appears to have given the President something very close to the "blank check" to which Justice Breyer refers.[9] Congress also appears to have acceded to the President's desire to insulate the military commission system from meaningful judicial scrutiny.[10] If the Court's decision in *Hamdan* rests exclusively on the constitutionally mandated relationship between Congress and the President, then these developments should fully satisfy the Court. If, on the other hand, the *Hamdan* decision also represents an assertion of judicial au-

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6. *See* Julian Ku & John Yoo, Hamdan v. Rumsfeld*: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 179–80 (2006) (asserting that "[t]he non-constitutional basis for the *Hamdan* decision means that Congress may reinstate pre-*Hamdan* military commissions by simply passing a statute that more explicitly approves them").

7. *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring) (citation omitted).

8. Pub. L. No. 109-366, 120 Stat. 2600 (2006).

9. The military commissions authorized by Congress differ in some ways from those created by President Bush. For example, President Bush's tribunals allowed the commission to exclude defendants from their own trials, while the system authorized by Congress forbids such action. *Id.* § 3, 120 Stat. at 2608. The system authorized by Congress also contains a stronger prohibition than President Bush's tribunals on the use of testimony obtained by the torture of a witness. *Id.* § 3, 120 Stat. at 2607. Moreover, the MCA codifies a defendant's right to "examine and respond to evidence," *id.* § 3, 120 Stat. at 2608, and it grants more expansive discovery rights than the President's tribunals. *Id.* § 3, 120 Stat. at 2614. *See also* Katyal, *supra* note 1, at 97–98 (comparing differences between the military commission structures).

10. On December 13, 2006, Judge James Robertson of the U.S. District Court for the District of Columbia ruled that the MCA precluded Salim Hamdan from continuing to challenge his detention in federal court. Hamdan v. Rumsfeld, 464 F. Supp. 2d 9, 19 (D.D.C. 2006). Robertson, who granted Hamdan's original habeas petition in November 2004, ruled that the MCA reflected clear congressional intent to prevent noncitizen detainees from invoking the federal habeas statute. *Id.* at 11–12. Robertson also ruled that Hamdan could not bring a habeas challenge directly under the Constitution because noncitizens at Guantanamo did not meet "the geographical and volitional predicates necessary to claim [the] right." *Id.* at 18; *see* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir.) (holding that MCA deprived federal courts of jurisdiction to hear habeas claims brought by noncitizen detainees held at Guantanamo Bay), *cert. denied*, 127 S. Ct. 1478 (2007); *see also* Neal A. Lewis, *Judge Sets Back Guantanamo Detainees*, N.Y. TIMES, Dec. 14, 2006, at A32.

thority, the Court is likely to view the MCA with considerably more skepticism.[11]

My reading of the *Hamdan* decision—particularly when combined with the Court's 2004 decision in *Hamdi v. Rumsfeld*[12]—suggests that the Court will follow the latter path. In other words, I believe that the majority's decision in *Hamdan* says as much about *judicial* authority as it does about the respective roles of Congress and the President in national security matters. At least where national security policy implicates issues of individual liberty, *Hamdan* suggests that the Supreme Court views the federal judiciary as an indispensable player, not merely a passive onlooker, or even a neutral umpire. Articulating the contours of this judicial role is likely to take the Court into uncharted territory and raise difficult separation of powers issues that go well beyond those addressed in *Youngstown*.

Several aspects of the *Hamdan* decision support this more expansive reading. First, it is notable that the Court even reached the merits of Hamdan's constitutional claims. As some commentators have noted, there were a number of ways that the Court could easily have avoided addressing the merits.[13] The fact that the *Hamdan* Court did not avail itself of any of these avoidance mechanisms suggests that it may be wary of political compromises crafted by the other two branches that minimize the role of the federal courts.

First, the Court could have avoided the merits by interpreting the exclusive jurisdiction provisions of the Detainee Treatment Act of 2005 (DTA)[14] to apply to pending cases, such as Hamdan's appeal. The language of the DTA was less than clear on this point. Indeed, there was strong evidence that Congress had deliberately punted on this issue and had left the question open for judicial determination. Moreover, as Justice Scalia pointed out in dissent, there were a number of statutory interpretation canons and precedents that seemed to favor the government's position that the jurisdiction-stripping provi-

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11. Indeed, there is evidence that at least one member of Congress who voted for the MCA is expecting judicial skepticism. *See* Editorial, *Careless Congress*, L.A. TIMES, Nov. 3, 2006, at A28 (noting that Senator Arlen Specter justified his vote in favor of the MCA, despite doubts about its constitutionality, because the Supreme Court would clean up any constitutional infirmities on appeal); Editorial, *Profiles in Cowardice*, WASH. POST, Oct. 1, 2006, at B6 (same).

12. 542 U.S. 507 (2004).

13. *See* Panel Discussion on the Supreme Court Decision in the Case of *Hamdan v. Rumsfeld* at Georgetown University Law Center 4–5 (June 30, 2006), *available at* http://www.law.georgetown.edu/news/documents/hamdanTranscript.pdf [hereinafter *Hamdan* Panel Discussion] (remarks of Mark Tushnet).

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).

sions of the DTA applied to pending cases, such as Hamdan's.[15] To be sure, there were also competing canons and precedents, which the majority discussed at length, but my point is simply that the majority's holding in favor of jurisdiction was far from self-evident.

The basis for the Court's jurisdictional holding may also be significant. As Professor Burt Neuborne has pointed out, the *Hamdan* majority chose not to rest its jurisdictional holding on the narrow, but well-established canon of construction requiring an "unmistakably clear" congressional statement in order to eliminate the Court's appellate jurisdiction over a pending appeal.[16] "Instead, the majority chose the more difficult path of construing the complex statute as retaining jurisdiction over all pending Guantanamo cases without the tailwind of the clear statement canon."[17] The import of this doctrinal choice was to preserve federal jurisdiction (at least temporarily) over several hundred habeas corpus petitions from Guantanamo detainees then pending in the lower federal courts.[18]

The majority's reading of the legislative history of the DTA is similarly open to dispute. Indeed, as Justice Scalia acerbically pointed out, much of that legislative history seemed to have been manufactured with an eye toward this very litigation.[19] If Justice Scalia is correct, then he made a valid point when he chided the majority for ignoring President Bush's signing statement, which quite explicitly set forth the President's understanding that the DTA ousted jurisdiction over pending cases.

So, at best, the jurisdictional question was a close one. Of course, had the Court interpreted the DTA to withdraw habeas jurisdiction over pending cases, it would have had to address the question of

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15. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2810–12 (2006) (Scalia, J., dissenting). Indeed, the majority acknowledged that the government's position "is not entirely without support in our precedents." *Id.* at 2764 (majority opinion).

16. *Id.* at 2763–64; *see* Burt Neuborne, *Spheres of Justice: Who Decides?*, 74 GEO. WASH. L. REV. 1090, 1098–99 (2006).

17. Neuborne, *supra* note 16, at 1099.

18. *Id.* Whether the MCA eliminates federal jurisdiction over these cases is currently being litigated. *See* Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005), *rev'd sub nom.* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir.), *cert. denied*, 127 S. Ct. 1478 (2007). In *Boumediene*, the D.C. Circuit in a 2-1 decision held that the MCA eliminated federal court jurisdiction over these pending habeas petitions and that Congress's doing so did not violate the Suspension Clause of the Constitution, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *Boumediene*, 476 F.3d at 988–94; *see also* U.S. CONST. art. I, § 9, cl. 2.

19. *Hamdan*, 126 S. Ct. at 2815–17 (Scalia, J., dissenting). *But see id.* at 2767 n.10 (majority opinion) (discussing conflicting statements made by DTA's congressional cosponsors).

whether such a withdrawal was constitutional—one of the precise questions posed by the MCA.[20]

Even if the DTA did not withdraw jurisdiction, there were a number of grounds on which the Court could have justified abstaining from hearing the merits of Hamdan's appeal, at least until after the military tribunal had reached a decision. Both the majority and Justice Scalia's dissent discussed at length the Court's holding in *Schlesinger v. Councilman*,[21] on which the government based its argument "that civilian courts should await the final outcome of ongoing military proceedings before entertaining an attack on those proceedings."[22] The majority identified two comity concerns that justified abstention in *Councilman*—the need to respect military discipline and the deference owed to an integrated system of military courts and review procedures—but concluded that neither justification applied to Hamdan's case.[23] Justice Scalia contended that both justifications applied and that the additional important consideration "of *interbranch* comity at the federal level" weighed heavily in favor of abstention.[24] Again, my purpose is not to argue that the abstention doctrine clearly dictated one result or the other, but instead to emphasize that the jurisprudence was unclear and that abstention was another "off ramp" that the Court could have taken to avoid reaching the merits, had it been so inclined.

Taking one of those off ramps would have been consistent with the Court's reluctance in other post-*Youngstown* cases to override presidential decisionmaking in foreign affairs, either by deferring to the Executive's interpretation of statutes or by declining to reach the merits of separation of powers challenges to executive actions.[25] The fact

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20. In his *Hamdan* dissent, Justice Scalia argued that the abolition of jurisdiction over pending habeas corpus petitions, including Hamdan's appeal, would not constitute a suspension of the writ of habeas corpus because Congress had established an alternative method of judicial review in the D.C. Circuit. *Id.* at 2818–19 (Scalia, J., dissenting). The D.C. Circuit recently found that the detainees were not eligible for Suspension Clause protections. *See Boumediene*, 476 F.3d at 988–94.

21. 420 U.S. 738 (1975).

22. *Hamdan*, 126 S. Ct. at 2769 (quoting Brief for Respondents at 12, *Hamdan*, 126 S. Ct. 2749 (2006) (No. 05-184)).

23. *Id.* at 2770–71.

24. *Id.* at 2819–22 (Scalia, J., dissenting).

25. *See, e.g.*, Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988) (noting the reluctance of courts "to intrude upon the authority of the Executive in military and national security affairs"); *see also* Katyal, *supra* note 1, at 84 (noting that "in war powers cases, the passive virtues operate at their height to defer adjudication, sometimes even indefinitely"); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1313–17 (1988) (discussing the Court's use of justiciability doctrines to refuse to hear challenges to the President's authority in cases involving foreign

that the Court did not follow the cautious approach that it has taken in previous foreign affairs disputes indicates that the Court not only wanted to recalibrate the balance between Congress and the Executive, but also that the Court wanted to establish *itself* as an important player in future national security disputes—at least where those disputes involve claims of individual liberty.[26]

The second aspect of *Hamdan* that supports this more court-focused reading is the way the Court addressed the merits of Hamdan's claims—in particular, the fact that the majority based its decision, in part, on Common Article 3 of the Geneva Conventions, which the Court found had been incorporated into the UCMJ.[27] What is significant about this is that the Court did not need to invoke Common Article 3 in order to invalidate the military commissions. Instead, the Court could have relied exclusively on the so-called "uniformity requirement" contained in the UCMJ—the requirement that the procedures employed by military commissions mirror the procedures used in courts-martial proceedings unless the Executive demonstrates that deviations from uniformity are necessary—a showing that the Executive had failed to make.

Instead of stopping there, however, the five-Justice majority went on to hold that the military commission procedures *also* violated Common Article 3's requirement that detainees be tried "by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[28] To reach this conclusion, the Court had to find not only that the UCMJ incorporated the Geneva Conventions but that Common Article 3 applied to the conflict with al Qaeda—a position that the government vigorously opposed and that the court of appeals had rejected.[29] Moreover, the Court construed the phrase "regularly constituted courts" in Common

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affairs); Gregory E. Maggs, *The Rehnquist Court's Noninterference with the Guardians of National Security*, 74 GEO. WASH. L. REV. 1122, 1124–38 (2006) (discussing the Rehnquist Court's general policy of nonintervention in cases concerning actions of governmental agencies and political entities in national security matters); Peter E. Quint, *Reflections on the Separation of Powers and Judicial Review at the End of the Reagan Era*, 57 GEO. WASH. L. REV. 427, 433–34 (1989) (discussing the use of the political question doctrine as a means to avoid judicial restrictions on presidential power in cases involving military force).

26. *See* Adam Liptak, *The Court Enters The War, Loudly*, N.Y. TIMES, July 2, 2006, § 4, at 1.

27. *See Hamdan*, 126 S. Ct. at 2759 (concluding that "the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions").

28. 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 [hereinafter Common Article 3].

29. Hamdan v. Rumsfeld, 415 F.3d 33, 41 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749, 2795–97, 2798 (2006).

Article 3 to include only those tribunals that complied with the practicability and uniformity requirements of the UCMJ.[30] In this way, the majority linked its interpretation of Common Article 3 to its interpretation of domestic law.

As international law scholars were quick to suggest, the majority's holding that Common Article 3 applies to the conflict with al Qaeda (and hence our treatment of persons captured as a result of that conflict) has implications that go far beyond the illegality of the military commissions created by President Bush.[31] For example, another provision of Common Article 3 prohibits the "torture" of prisoners,[32] and yet another provision prohibits the "humiliating and degrading treatment" of prisoners.[33] And, at the time *Hamdan* was decided, the War Crimes Act of 1996 made violations of Common Article 3 by United States personnel a serious felony.[34] So, the Court's decision upped the ante considerably for CIA military personnel involved in "alternative" interrogation techniques.[35]

Moreover, the fact that the *Hamdan* Court based its decision, at least in part, on its interpretation of an international treaty raises some very sticky questions about the ability of the political branches to override the Court's holding. While most (but not all) scholars would agree that Congress has the authority to override the Court's interpretation of Common Article 3 by abrogating the Geneva Conventions[36]—not a politically popular solution—there is far less agreement about the effect of congressional actions that fall short of abrogation. Suppose, for example, that Congress passed a statute purporting to

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30. *Hamdan*, 126 S. Ct. at 2796–97. Justice Alito, in his separate dissent, took issue with this interpretation, arguing that the phrase "regularly constituted" should be interpreted to require only that "the court be appointed or established in accordance with the appointing country's domestic law." *Id.* at 2850–51 (Alito, J., dissenting).

31. *Hamdan* Panel Discussion, *supra* note 13, at 18 (remarks of Carlos Vazquez); *id.* at 26–28 (remarks of David Luban).

32. Common Article 3, *supra* note 28, art. 3(1)(a).

33. *Id.* art. 3(1)(c).

34. 18 U.S.C. § 2441 (2000); *see also Hamdan* Panel Discussion, *supra* note 13, at 26–27 (remarks of David Luban).

35. *See Hamdan* Panel Discussion, *supra* note 13, at 26–29 (remarks of David Luban). The MCA attempts to erase some of these implications. It narrows the range of activities that could constitute a violation of Common Article 3 for purposes of domestic law, including the War Crimes Act of 1996. Pub. L. No. 109-366, § 6, 120 Stat. 2600, 2632–35 (2006). The MCA also prevents any individual from invoking the Geneva Convention as a source of rights in any habeas corpus or other civil action to which the United States or any of its current or former officers are a party. *Id.* § 5, 120 Stat. at 2631–32.

36. *See generally* Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319, 334–35 (2005) (explaining that the last-in-time rule permits an act of Congress to supersede a prior treaty).

"reaffirm" the United States' commitment to the Geneva Conventions, but rejecting the Supreme Court's interpretation of Common Article 3 as applying to the conflict with al Qaeda.[37] Would such a statute override the *Hamdan* Court's contrary determination under the last-in-time principle, or would it contravene the federal judiciary's core function of interpreting federal law? Chief Justice Roberts suggested the latter view, albeit in a different context, in his recent opinion in *Sanchez-Llamas v. Oregon*.[38] As the Chief Justice put it: "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."[39] Such statements suggest that the Supreme Court may be reluctant to cede responsibility to the political branches to determine how the United States will carry out its treaty obligations.

Juxtaposing the majority's analysis in *Hamdan* with the Court's 2004 decision in *Hamdi v. Rumsfeld* reinforces my conviction that *Hamdan* represents an assertion of *judicial* authority as well as a pronouncement on the appropriate constitutional relationship between Congress and the President. In *Hamdi*, a United States citizen captured during hostilities in Afghanistan challenged his detention as an enemy combatant by military officials on United States soil.[40] Unlike in *Hamdan*, a majority of Justices agreed that Congress *had* authorized the Executive to detain Hamdi for the duration of the relevant conflict.[41] However, the Court went on to hold that the due process guarantees of the Fifth and Fourteenth Amendments required the Government to provide Hamdi with "notice of the factual basis for his classification" and a "fair opportunity" to challenge that classification "before a neutral decisionmaker."[42] The Court arrived at this conclu-

37. The MCA arguably moves in this direction. It 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." § 6(a)(3)(A), 120 Stat. at 2632.

38. 126 S. Ct. 2669 (2006).

39. *Id.* at 2684 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173, 177 (1803)). Chief Justice Roberts also referred to the Court's concomitant duty to interpret federal law. *See id.* ("At the core of [the judicial] power is the federal courts' independent responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law." (quoting Williams v. Taylor, 529 U.S. 362, 378–79 (2000) (Stevens, J., concurring in the judgment))).

40. Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004) (plurality opinion).

41. *Id.* at 521; *id.* at 587 (Thomas, J., dissenting).

42. *See id.* at 533 (plurality opinion).

sion by applying the familiar balancing test from *Mathews v. Eldridge*,[43] which the *Hamdi* Court characterized as "[t]he ordinary mechanism that we use for balancing . . . competing interests, and for determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law.'"[44]

Two aspects of the *Hamdi* Court's reasoning seem particularly noteworthy. First, the fact that Congress authorized Hamdi's detention was not the end of the Court's inquiry; rather, the Court had an independent role to play in articulating the constitutionally required procedures that would determine the continuing legality of that detention. Second, the test that the Court invoked to determine what process was constitutionally due was the "ordinary" and quintessentially judicial task of weighing and balancing competing interests. To be sure, the Court acknowledged that this judicial balance should take into account the government's "weighty and sensitive" national security interests,[45] but it emphasized that those interests should be incorporated into the balancing process rather than provide a justification for abandoning—or fundamentally altering—that process.[46]

Finally, *Hamdan* sheds some interesting light on the Court's seminal decision in *Youngstown*, particularly on Justice Jackson's well-known concurring opinion. On the one hand, *Hamdan* affirms the continued viability of Jackson's three-part framework for resolving separation of powers disputes concerning the scope of executive power. Although it is Justice Kennedy's concurring opinion that relies most explicitly on Jackson's *Youngstown* framework, the structure of Stevens's majority opinion also incorporates Jackson's most important insight—that the constitutionality of executive action depends critically on the stance that Congress has taken toward the issue in question.[47] This is significant because some recent, pre-*Hamdan* scholarship had suggested that the *Youngstown* framework applied only in the domestic context, and not to disputes involving foreign affairs or war powers.[48] The *Hamdan* Court went out of its way to re-

43. 424 U.S. 319 (1976).

44. *Hamdi*, 542 U.S. at 528–29 (plurality opinion) (quoting U.S. CONST. amend. V).

45. *Id.* at 531.

46. *Id.* at 532–35.

47. *See* Young, *supra* note 3, at 796–98.

48. *See, e.g.*, Neal Devins & Louis Fisher, *The Steel Seizure Case: One of a Kind?*, 19 CONST. COMMENT. 63, 75 (2002) (noting that "[i]n the years since *Youngstown*, judicial pronouncements relating to the war powers have diminished to the point of being virtually nonexistent"); Roy E. Brownell II, *The Coexistence of* United States v. Curtiss-Wright *and* Youngstown Sheet & Tube v. Sawyer *in National Security Jurisprudence*, 16 J.L. & POL. 1, 78–80 (2000) (discussing the view that *Youngstown* does not govern national security or foreign affairs cases); Harold Edgar & Benno C. Schmidt, Jr., Curtiss-Wright *Comes Home: Executive Power*

but this position by repeatedly noting that the *Hamdan* case could be decided by reference to "ordinary" principles of constitutional and statutory interpretation.[49]

On the other hand, *Hamdan* illustrates the limitations of the *Youngstown* framework, particularly when considered in conjunction with *Hamdi*. That is because, while *Youngstown* establishes that the legality of executive action turns largely on whether Congress has approved, disapproved, or remained silent with respect to that action, *Hamdan* and *Hamdi* highlight the difficulty of determining which of those courses Congress has taken. In both cases, the Justices splintered sharply on whether Congress had authorized or prohibited the challenged executive action—a disagreement that would situate the action in opposite tiers of the Jackson framework. Moreover, in both cases, the disputing Justices emphasized different congressional enactments, further complicating the interpretive inquiry.

Thus, in *Hamdi*, a majority of the Court found that Congress had "clearly and unmistakably" authorized Hamdi's detention when it passed a resolution—the Authorization for Use of Military Force (AUMF)[50]—which empowered the President to use "all necessary and appropriate force" against any person or entity that had "planned, authorized, committed, or aided" in the September 11, 2001 terrorist attacks.[51] Justice O'Connor, writing for a plurality, reasoned that it was "of no moment" that the resolution did not specifically mention detention, since "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war."[52] Because the

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and National Security Secrecy, 21 HARV. C.R.-C.L. L. REV. 349, 352 (1986) (stating that *Youngstown* "is generally taken to be the dominant influence on the domestic front, while *Curtiss-Wright* dominates with respect to foreign policy"); John E. Nowak & Ronald D. Rotunda, *A Comment on the Creation and Resolution of a "Nonproblem":* Dames & Moore v. Regan*, the Foreign Affairs Power, and the Role of the Court*, 29 UCLA L. REV. 1129, 1154 (1982) (stating that "the Court's action in *Youngstown* was seen as fitting only in a domestic power compartment of constitutional theory"). The reaction of many commentators at the time *Youngstown* was decided was even more dismissive. For example, one scholar placed the decision in "the same class as a restricted railroad ticket, good for this day and train only." Jerre Williams, *The Steel Seizure: A Legal Analysis of Political Controversy*, 2 J. PUB. L. 29, 34 (1953) (internal quotation marks omitted) (quoting Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting)). Another scholar claimed that the case was "destined to be ignored." Glendon A. Schubert, Jr., *The Steel Case: Presidential Responsibility and Judicial Irresponsibility*, 6 W. POL. Q. 61, 65 (1953).

49. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2764 (2006); *id.* at 2799 (Kennedy, J., concurring in part).

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

51. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 518–19 (2004) (plurality opinion) (quoting § 2(a), 115 Stat. at 224); *id.* at 587 (Thomas, J., dissenting).

52. *Id.* at 519 (plurality opinion).

AUMF authorized Hamdan's detention, O'Connor reasoned that the detention did not contravene a second relevant congressional enactment—the Non-Detention Act[53]—which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[54]

By contrast, Justices Souter and Ginsburg, concurring and dissenting in part, focused primarily on the strictures of the Non-Detention Act, which the Justices found "has to be read broadly to accord the statute a long reach and to impose a burden of justification on the Government."[55] Such a broad interpretation was mandated, Justice Souter explained, by the history and purpose of the Non-Detention Act, and by the "interpretive regime that subjected enactments limiting liberty in wartime to the requirement of a clear statement."[56] The AUMF failed to satisfy this standard:

> [The AUMF] never so much as uses the word detention, and there is no reason to think Congress might have perceived any need to augment Executive power to deal with dangerous citizens within the United States, given the well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit.[57]

Thus, according to Justice Souter, far from authorizing the President's actions—as the plurality had claimed—Congress had explicitly denied the President the authority to detain Hamdi.

Hamdan involved a similar interpretive split, but with a majority of Justices reaching the opposite conclusion on the question of congressional intent. The majority in *Hamdan* rejected the government's claim that Congress had authorized the military commissions created

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53. 18 U.S.C. § 4001(a) (2000).

54. 542 U.S. at 517 (plurality opinion) (quoting 18 U.S.C. § 4001(a)).

55. *Id.* at 542 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

56. *Id.* at 542–44.

57. *Id.* at 547. Justice Souter's opinion also cited the subsequent passage of the USA PATRIOT Act, which authorized detention of alien terrorists for up to seven days without the commencement of criminal charges or removal proceedings. *Id.* at 551 (citing Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, § 412(a), 115 Stat. 272, 351 (2001) (codified at 8 U.S.C. § 1226a (Supp. I 2001))). The specificity of these provisions belied the Government's reliance on implied powers in the AUMF, as Justice Souter observed that "[i]t is very difficult to believe that the same Congress that carefully circumscribed Executive power over alien terrorists on home soil would not have meant to require the Government to justify clearly its detention of an American citizen held on home soil incommunicado." *Id.*

by the President. Instead, five members of the Court determined that the UCMJ explicitly contravened the authority claimed by the President. Justice Kennedy's concurrence, joined by three other Justices, placed the case in Justice Jackson's third category—where the President acts in the face of congressional disapproval and his power is therefore "at its lowest ebb."[58] Two dissenting Justices vigorously disagreed. They argued that congressional authorization for the President's military commissions derived not only from the UCMJ itself, "but also from the more recent, and broader, authorization contained in the AUMF."[59] In the face of such congressional authorization, the Court's "duty to defer to the Executive's military and foreign policy judgment is at its zenith."[60]

Thus, the disagreement between the majority and the dissent in *Hamdan*—like the disagreement between the plurality and the concurring Justices in *Hamdi*—turned largely on the Justices' very different views of what Congress had authorized. But neither the *Youngstown* decision itself nor Justice Jackson's tripartite framework provides the tools to resolve this interpretive disagreement.[61] Rather, that analysis requires resort to all of the familiar—and contested—techniques of statutory interpretation and administrative law, including judgments about the type and amount of authority that Congress may delegate and the extent to which the Court should defer to the Executive's interpretation of ambiguous statutory language.[62] Moreover, the way in which individual Justices deploy these interpretive tools is likely to depend on their underlying theories and baseline assumptions about the appropriate constitutional balance between executive and legisla-

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58. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2800–01, 2808 (Kennedy, J., concurring in part) (internal quotation marks omitted) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

59. *Id.* at 2825 (Thomas, J., dissenting).

60. *Id.*

61. *See* Katyal, *supra* note 1, at 99 ("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.").

62. For example, scholars disagree about whether Congress may delegate greater authority to the Executive in foreign affairs than in domestic matters and whether courts should give greater deference to the Executive's interpretation of a statute in cases that touch on foreign affairs. *Compare* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 680, 683 (2000) (suggesting that deference may apply "with special force" to foreign affairs statutes), *with id.* at 650 & n.2, 664–65 (noting other commentators' criticism of judicial deference to the Executive in foreign affairs matters), *and* Patricia L. Bellia, *Executive Power in* Youngstown*'s Shadows*, 19 CONST. COMMENT. 87, 133 (2002) ("Nothing in Justice Jackson's discussion indicates whether courts should construe delegations in favor of or against the Executive.").

tive authority—precisely the constitutional issue that the *Youngstown* framework is supposed to resolve. Thus, to the extent that future separation of powers disputes about the scope of executive power turn on the Court's ability to discern congressional will, even a robust version of Jackson's tripartite framework offers precious little to guide the Court's inquiry.