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SILENCES AND PECULIARITIES OF THE *HAMDAN* OPINIONS

PETER E. QUINT*

In this Essay, I would like to focus on what I call the two great “silences” of the majority opinion in the *Hamdan*¹ case and also touch upon two peculiarities in the majority opinion and in the concurring opinion of Justice Kennedy.

I. THE TWO GREAT SILENCES

First, the silences. These are points in the Court’s argument at which one might expect to find a sustained discussion of an important theoretical question, but for one reason or another—perhaps justifiable in at least one of the instances—the Court gives us little or no explanation, thus leaving aspects of the theoretical structure unaddressed.

A. *Presidential Power in Jackson’s Third Category*

The first great silence (touched on also by a number of my colleagues in this Workshop²) relates to the separation of powers—or allocation of authority—between the President and Congress. Certainly, with respect to the separation of powers, both the opinion of Justice Stevens for the majority and the separate opinion of Justice Kennedy rely to a greater or lesser extent on the concurring opinion of Justice Jackson in the great *Steel Seizure* case of 1952.³ Indeed, it has already been pointed out in comments at this Workshop that Jackson’s opinion seems to have achieved the status—in terms of citations and general approval—of being the “real” opinion of the Court in that case.

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* Jacob A. France Professor of Constitutional Law, University of Maryland School of Law. This Essay is a revised version of remarks delivered at a Workshop at the University of Maryland School of Law on September 21, 2006. I have attempted to retain the colloquial tone of the original remarks. I am grateful to my colleagues in this Workshop, Michael Greenberger, Jana Singer, and Gordon Young, for valuable comments on earlier drafts of this Essay.

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

2. See Jana Singer, *Hamdan as an Assertion of Judicial Power*, 66 MD. L. REV. 759 (2007); Gordon G. Young, *Youngstown, Hamdan, and “Inherent” Emergency Presidential Policymaking Powers*, 66 MD. L. REV. 787 (2007).

3. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Perhaps it could be argued that the *Youngstown* case, including Jackson's opinion, is applicable to domestic affairs only, and not to the central problems of foreign affairs. But such an argument seems clearly incorrect. Indeed, *Youngstown* itself involved very significant foreign affairs aspects, and a slightly revised version of the core of Jackson's opinion was applied by the Court in the important "pure" foreign affairs case of *Dames & Moore v. Regan*.⁴

Acknowledging the general framework set down by Jackson in *Youngstown*, Justice Stevens's majority opinion in *Hamdan* makes clear that Congress's statutory choice of policy in §§ 821 and 836 of the Uniform Code of Military Justice (UCMJ)⁵ prevails over a contrary decision of the President. The Court interprets § 836(b) of the UCMJ to require general "uniformity" with court martial proceedings, and that decision prevails over the President's decision to create military commissions that do not possess that uniformity.⁶ Moreover, § 821 of the UCMJ (incorporating Common Article 3 of the Geneva Conventions) requires a "regularly constituted court," and that decision prevails over the President's decision to create tribunals that, in the Court's view, are not "regularly constituted."⁷

But why is that the case? Why should Congress prevail over the President in this area? Certainly the President has claimed independent constitutional power as Commander in Chief to establish military commissions.⁸ Why doesn't that power prevail over the decision of Congress? Aside from a conclusory footnote,⁹ the Court gives no explicit answer to this question, and thus we have arrived at the first great "silence" of the *Hamdan* case.

4. 453 U.S. 654, 668–69 (1981).

5. 10 U.S.C. §§ 801–946 (2000).

6. *Hamdan*, 126 S. Ct. at 2790–93.

7. *Id.* at 2795–97.

8. Brief for Respondents at 20–23, *Hamdan*, 126 S. Ct. 2749 (No. 05-184). Indeed, the current Bush Administration has made other broad assertions of unilateral presidential power in a number of related areas. See Neal Kumar Katyal, *The Supreme Court, 2005 Term—Comment: Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 100–03 (2006).

9. *Hamdan*, 126 S. Ct. at 2774 n.23. In this footnote Stevens declares: "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*, 343 U.S. at 637 (Jackson, J., concurring). The Government does not argue otherwise." *Id.*

The Government may not have asserted the power to disregard congressional limits in its argument in *Hamdan*—since it claimed clear statutory authorization for the commissions in any event—but it seems unlikely that the Government has actually conceded this point either. See Brief for Respondents, *supra* note 8, at 23 n.4.

In his concurrence, Justice Kennedy does note that, under Jackson's analysis, when the President acts in a manner inconsistent with a statute of Congress, the case falls into Jackson's famous "third category" and therefore the President's power is "at its lowest ebb."¹⁰ But Jackson's evocative metaphor, in itself, does not give us an explanation or answer in *Hamdan*—because the fact that the President's power is "at its lowest ebb" does not necessarily mean that the President will not prevail.

Indeed, Jackson makes this point perfectly clear when he states that, even under the "severe tests" of the third category, the President can prevail if his exercise of power lies "within [the President's] domain and beyond control by Congress."¹¹ Jackson then further emphasizes this point by proceeding to an examination of the various sources of power claimed by the President in *Youngstown*—including the "executive power" (Article II, Section One), the Commander-in-Chief Clause (Article II, Section Two), and the "Take Care" Clause (Article II, Section Three)—as well as those "nebulous, inherent powers . . . said to have accrued to the office from the customs and claims of preceding administrations."¹²

Of course, Jackson ultimately found that none of these categories of presidential power was weighty enough to override a contrary congressional policy under the circumstances of *Youngstown*. But that sort of examination is precisely what is missing in the majority opinion of Stevens and the concurrence of Justice Kennedy in *Hamdan*. As noted, this is the first great silence of the *Hamdan* case.

But perhaps it is only a quasi-silence—perhaps a careful examination of the opinions may reveal an explanation for the Court's implicit finding that Congress's manifested decision in the UCMJ prevails over the President's choice under these circumstances. I have two candidates for such an explanation—one of them quite general and one of them a little bit more specific. Both of them require the development of ideas—or perhaps just hints—from Justice Kennedy's concurring opinion.

First, the general explanation. In his concurring opinion, Justice Kennedy suggests that congressional lawmaking is more reliable than executive action without statute because a statute results from "a deliberative and reflective process engaging both of the political branches," and statutory standards are "tested over time and insulated from the

10. *Hamdan*, 126 S. Ct. at 2800 (Kennedy, J., concurring in part) (citing *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

11. *Youngstown*, 343 U.S. at 640 (Jackson, J., concurring).

12. *Id.* at 640–55.

pressures of the moment.”¹³ These remarks might appropriately be read together with the comments of Justice Souter in *Hamdi v. Rumsfeld*,¹⁴ the enemy combatant case decided in 2004. In *Hamdi*, Souter emphasized the superiority of legislation—over executive action without statute—in striking a balance between liberty and security:

In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty . . . is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation’s entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. A reasonable balance is more likely to be reached on the judgment of a different branch Hence . . . the need for a clearly expressed congressional resolution of the competing claims.¹⁵

From these theoretical views one might derive the proposition that in the case of a conflict between legislative and executive choices, a statute of Congress will almost certainly prevail if the executive action potentially threatens individual liberties.¹⁶ Because individual rights are potentially threatened in the case of the military commissions, the legislative choice should prevail.

But this is still pretty general, and perhaps there is a narrower and more focused explanation. At the outset of his concurring opinion, Justice Kennedy observed that there is “a long tradition of legislative involvement in matters of military justice,”¹⁷ and that this is “a field with a history of congressional participation and regulation.”¹⁸ Perhaps Kennedy is suggesting that in an area in which there has been a “long tradition” of collaboration between the President and Con-

13. *Hamdan*, 126 S. Ct. at 2799 (Kennedy, J., concurring in part). On a related point, Kennedy also declares that the requirement that war crimes be tried by a “regularly constituted court,” contained in § 821 of the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions, “relies upon the importance of standards deliberated upon and chosen in advance of crisis.” *Id.* at 2799–2800.

14. 542 U.S. 507 (2004).

15. *Id.* at 545 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

16. For an attempt to elaborate and defend a similar proposition, see Peter E. Quint, *The Separation of Powers Under Nixon: Reflections on Constitutional Liberties and the Rule of Law*, 1981 DUKE L.J. 1.

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

18. *Id.* at 2800.

gress, the “living constitution” has been adjusted to incorporate this form of collaboration as a necessary constitutional precondition for action.¹⁹ If a case in this area falls within Jackson’s third category, the required collaboration is absent by definition—because the President is acting in a manner that is contrary to the legislative choice—and thus the President’s action cannot prevail.

If the argument from tradition and custom controls here, it would be an interesting moment in the history of adjudication on the separation of powers. Ordinarily it is the President who seeks to extend executive authority by asserting claims of custom. The case of presidential war powers assertions in the post-World War II period is an eminent example: if the President has sent troops into actual or potential hostilities fifty times in the past, then that custom or tradition—under such an argument—aids in establishing actual constitutional authority for the President to do something along the same lines again.²⁰ In *Hamdan*, however, custom and tradition are arguably being employed by the Justices—very interestingly—to support congressional rather than presidential power.

B. *The Status of the Geneva Conventions*

The second great silence of the *Hamdan* opinion concerns whether the Geneva Conventions are applicable in this case. *Hamdan* argued that the military commissions established by President Bush’s executive order violated Common Article 3 of the Geneva Conventions in a number of ways—particularly because *Hamdan*’s military commission was not a “regularly constituted court” as required by Common Article 3.²¹ Although the Government denied that the mili-

19. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (“The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. . . . It is [inadmissibly narrow to be confined] to the words of the Constitution and to disregard the gloss which life has written upon them.”).

20. *See, e.g.*, Memorandum from Leonard C. Meeker, State Dep’t Legal Adviser, to the Senate Comm. on Foreign Relations, *The Legality of United States Participation in the Defense of Viet-Nam* (Mar. 4, 1966), in 54 DEP’T ST. BULL. 474, 484 (1966) (noting “at least 125 instances” of presidential troop deployment without prior congressional authorization); Memorandum from the Office of the Legal Adviser, U.S. Dep’t of State, *Authority of the President to Repel the Attack in Korea* (July 3, 1950), in 23 DEP’T ST. BULL. 173, 177–78 (1950) (listing 85 such instances). For a similar argument in a different context, see *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915) (upholding presidential withdrawal of oil lands from government sale, in a manner apparently contrary to statute, because of the “long continued practice” of similar presidential orders).

21. Brief for Petitioner at 48–50, *Hamdan*, 126 S. Ct. 2749 (No. 05-184). For historical background and analysis of the four Geneva Conventions of 1949, which provide humanitarian rules for the treatment of wounded and sick combatants, prisoners of war, and civil-

tary commissions violated the Geneva Conventions, its main response was that those conventions were in any event not enforceable in the American courts. Indeed, such a position had been endorsed by the court below in the *Hamdan* case—a panel of the Court of Appeals for the District of Columbia, which included John Roberts, future Chief Justice of the United States.²²

What exactly is the difference between a judicially enforceable treaty and one that is not judicially enforceable, and how did such a distinction arise? If you examine the Supremacy Clause of the Constitution, you immediately see that “Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land.”²³ The Constitution and the laws of the United States are also “the supreme law of the land” and, as such, they are generally enforceable in the American courts in a proper case or controversy. The Geneva Conventions, signed by the President and approved by two-thirds of the Senate, are “treaties made under the authority of the United States,” and therefore it would seem to follow that, as the “supreme law of the land,” they are also enforceable in the American courts.

So it would seem at least. But as far back as 1829, Chief Justice Marshall said, “Wait a minute. Not so fast.” According to Marshall, there are two kinds of treaties of the United States. Some treaties are “self-executing” treaties and are therefore immediately enforceable in American courts without the requirement of any further legislative action. But, in contrast, some treaties are “non-self-executing” and therefore not enforceable in the American courts until they have been brought into United States law—or “executed”—by a statute of Congress.²⁴

ians in wartime, see Anton Schlögel, *Geneva Red Cross Conventions and Protocols*, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 531 (Rudolf Bernhardt ed., 1995).

22. *Hamdan v. Rumsfeld*, 415 F.3d 33, 38–40 (D.C. Cir. 2005).

23. U.S. CONST. art. VI, cl. 2.

24. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829); *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833). Chief Justice Marshall does not actually use the terms “self-executing” and “non-self-executing” in making this distinction—although he does state that, in the second class of cases, “the legislature must *execute* the contract before it can become a rule for the Court.” *Foster*, 27 U.S. at 314 (emphasis added). But numerous modern cases, as well as the *Restatement of Foreign Relations Law*, do employ this vocabulary. See, e.g., *Lidas, Inc. v. United States*, 238 F.3d 1076, 1080 (9th Cir. 2001); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3)–(4), cmt. h (1987).

In some instances there may be a separate question of whether or not a “self-executing” treaty also gives rise to an individual cause of action—for example, an action for damages. But since there is no such damage action in *Hamdan*, and the claimed treaty rights are essentially being asserted as a defense to prosecution, this separate question does not arise. See Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM.

As far as anything in the text of the Constitution is concerned, this distinction seems to have been made up by Marshall out of whole cloth—because, of course, the Constitution speaks only of “treaties made under the authority of the United States” and does not distinguish between them according to their “self-executing” or “non-self-executing” quality. But perhaps Marshall’s position becomes more comprehensible if we accept the view that, in the case of a non-self-executing treaty, the treaty itself has delegated to Congress the task of transforming the treaty’s obligations into judicially enforceable law.²⁵ Thus, even a non-self-executing treaty is the “law of the land,” but the “law” itself says, “Wait for Congress.”

Although Marshall’s language in *Foster v. Neilson*²⁶ may perhaps suggest that this distinction is ordinarily quite easy to draw, in point of fact the question of whether a treaty is self-executing often poses very difficult issues of interpretation—resting apparently on the (perhaps imputed) intention of the American makers of the treaty.²⁷ To take polar opposite cases, a bilateral treaty of great specificity, which grants clearly defined rights to citizens of the treaty partner, may well be found judicially enforceable without further legislation;²⁸ in contrast, a multilateral treaty that sets forth its goals in very general aspirational language is likely to be considered non-self-executing.²⁹ Moreover, it seems clear that if the Senate, in its resolution of approval, expressly states that the treaty is to be considered non-self-executing, the Senate’s resolution will probably be observed.³⁰ But the great range of intermediate cases may raise very difficult issues.

L. REV. 1082, 1085 (1992). In any event, Hamdan’s cause of action was authorized by the habeas corpus statute. See 28 U.S.C. § 2241 (2000).

25. Vázquez, *supra* note 24, at 1125–28.

26. 27 U.S. (2 Pet.) 253 (1829).

27. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4)(a); *id.* § 111 cmt. h and reporters’ note 5.

28. Thus, in *Asakura v. City of Seattle*, 265 U.S. 332 (1924), the Supreme Court invoked a bilateral treaty with Japan to invalidate a Seattle city ordinance requiring pawnbrokers to be citizens of the United States. The treaty gave Japanese citizens residing in the United States the same rights to carry on occupations as possessed by American citizens. There was no statute of Congress “executing” the treaty provision, but the Court assumed that the treaty was self-executing.

29. In *Sei Fujii v. State*, for example, the Supreme Court of California found that general human rights provisions of the United Nations Charter—a treaty of the United States—“lack[ed] the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately upon ratification. Instead, they are framed as a promise of future action by the member nations.” 242 P.2d 617, 621–22 (Cal. 1952).

30. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4)(b). For an important example of such action by the Senate, see United States Senate Resolution of Advice and Consent to Ratification of the International Covenant on

This, then, is the second great silence of the *Hamdan* case, because we have no real discussion in Stevens's opinion for the Court or in Kennedy's concurrence, on the question of whether the Geneva Conventions, or relevant parts of them, are self-executing or create judicially enforceable rights—even though a decision on this question formed a significant part of the holding of the court below.³¹ The reason that we do not have any discussion of this question, is that the Court employs very general language in § 821 of the UCMJ to find that Congress has actually incorporated the Geneva Conventions into domestic law—“executed” the treaty, in Marshall's language—at least with respect to the limitations on military commissions in § 821.

The Court's reasoning on this point runs as follows:

(1) Section 821 in effect grants military commissions “jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions”;³²

(2) Therefore “compliance with the law of war is the condition upon which the authority set forth in [§ 821] is granted”;³³

(3) The provisions of the Geneva Conventions are “part of the law of war”;³⁴

Civil and Political Rights, 138 CONG. REC. S4781, § III (1992) (stating that the substantive provisions of the Covenant are “not self-executing”). Furthermore, the Constitution may require that certain types of provisions—for example, the definition of federal criminal offenses—must be set forth in statute; and therefore the adoption of such provisions by treaty might not be constitutionally sufficient to create an enforceable criminal offense. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4)(c); *id.* § 111 cmt. i.

31. *Hamdan v. Rumsfeld*, 415 F.3d 33, 38–40 (D.C. Cir. 2005). The Supreme Court's only explicit reference in *Hamdan* to the status of the Geneva Conventions as self-executing or not is couched in hypothetical form:

We may assume that “the obvious scheme” of the 1949 Conventions is identical in all relevant respects to that of the 1929 Convention, and even that that scheme would, absent some other provision of law, preclude *Hamdan*'s invocation of the Convention's provisions as an independent source of law binding the Government's actions and furnishing petitioner with any enforceable right.

Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2794 (2006) (footnote omitted). Although this language might possibly be interpreted as tending in the direction of the “non-self-executing” nature of the Conventions, the Court then immediately cites, with apparent approval, an amicus brief and other materials that take the opposite position. *Id.* at 2794 n.58 (citing Brief of Louis Henkin et al. as Amici Curiae Supporting Petitioner, *Hamdan*, 126 S. Ct. 2749 (No. 05-184)). The result is, I believe, that the Court leaves us with nothing significant one way or the other on this point.

32. 10 U.S.C. § 821 (2000).

33. *Hamdan*, 126 S. Ct. at 2794.

34. *Id.*

(4) Therefore, § 821 constitutes a statutory prohibition of any aspect of trial by military commission that is inconsistent with the Geneva Conventions.³⁵

For at least two separate reasons, this statutory interpretation of § 821 seems debatable; in any case, even if it is ultimately justified, it certainly involves something of an interpretative stretch. First, by its terms, § 821 imposes the limitations of “the law of war” only on the “offenders or offenses” that may be tried by military commissions; its language imposes no explicit limitations on the procedure to be employed by those commissions or the circumstances under which the commissions may be established.³⁶

Second, the laconic term “law of war” may or may not have been intended by Congress to incorporate non-self-executing treaties into domestic law; perhaps it was only a reference to the existing domestic American law of war, including self-executing treaties and those non-self-executing treaties that may have been incorporated into domestic law in a more explicit manner.³⁷ In any case, if the Geneva Conventions turned out to be “non-self-executing,” perhaps a more explicit statement of “execution” would be required under the implications of existing doctrine.³⁸ Certainly the asserted incorporation of the Geneva Conventions into domestic law in § 821 is by no means as explicit as the provision in the War Crimes Act of 1996,³⁹ which provided federal criminal penalties for persons who violate Common Article 3 of the Geneva Conventions—specifically referring to that article by name.

But the War Crimes Act may also have given the Court an interpretive tool that could have been employed to good advantage to achieve the Court’s result. One might well argue that a procedure that has been made a criminal offense by federal statute—that is, a

35. As noted below, the Court went on to find that the military commissions, as established by the President, were indeed inconsistent with Common Article 3 of the Geneva Conventions because they were not “regularly constituted courts,” as required by that Article. *Id.* at 2796–97. Moreover, a four-Justice plurality found that Common Article 3 was also violated because the commissions’ procedures—allowing introduction of evidence that was not disclosed to the defendant—failed to afford “all the judicial guarantees which are recognized as indispensable by civilized peoples,” as required by Common Article 3. *Id.* at 2797–98 (plurality opinion).

36. *See id.* at 2845–46 (Thomas, J., dissenting).

37. *Cf. id.* at 2845 (Section 821 “does not purport to render judicially enforceable aspects of the law of war that are not so enforceable of their own accord”).

38. *See* Brief for Respondents, *supra* note 8, at 36 (“[A] statutory reference to the ‘law of war,’ without more, . . . cannot render judicially enforceable a treaty that does not by its terms create judicially enforceable rights.”).

39. 18 U.S.C. § 2441(c)(3) (2000).

violation of Common Article 3 of the Geneva Conventions—certainly cannot be a legitimate component of the structure of a military commission of the United States. Furthermore, as the War Crimes Act expressly makes the interpretation of Common Article 3 justiciable for the purposes of assessing criminal liability, it should follow that Congress also intended that the courts may apply Common Article 3 in order to prevent a procedure that could give rise to criminal liability under the War Crimes Act from becoming part of the judicial structure of the United States in the military commissions. An argument of this sort might have led to the Court’s result on this question in a less circuitous and perhaps more persuasive manner.⁴⁰

II. TWO PECULIARITIES

A. *Doubts on Statutory Authorization*

I would now like to turn briefly to two oddities or peculiarities that appear to be tucked away in the corners of the opinions of Justices Stevens and Kennedy. The first relates to the question of whether the Court conceived that the then-existing statutory regime would have authorized the military commission established to try Hamdan, even if the precise problems identified by the Court were cured. This examination might incidentally throw some light on the Court’s attitude in approaching this case.

This issue arises in the following manner: the majority opinion of Justice Stevens, as well as Justice Kennedy’s concurrence, focused on specific ways in which the military commissions established by presidential executive order are inconsistent with statutory requirements of the UCMJ. Thus, according to the Court, the military commissions were illegal because they did not satisfy the principle of “uniformity” with court martial proceedings contained in § 836(b) of the UCMJ,⁴¹ and because they did not conform to certain requirements of the “law

40. In any event, the Congress that enacted the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600 (2006), appears to have foreseen this possible approach. In statutory language enacted after *Hamdan* was decided, Congress appeared to nullify the force of this and related arguments by narrowing criminal liability for violation of Common Article 3 to “grave breaches” of that Article—e.g., torture, murder, hostage taking, and other violent acts. § 6(b), 120 Stat. at 2633–34. Accordingly, the imposition of punishment by a tribunal whose structure or establishment violated Common Article 3 would no longer be a criminal offense under the War Crimes Act. More broadly, § 5 of the MCA purports to prohibit the application of the Geneva Conventions “as a source of rights in any court of the United States” in habeas corpus and similar actions. § 5, 120 Stat. at 2631. The interpretation and force of these provisions of the MCA are likely to become the subject of future litigation.

41. *Hamdan*, 126 S. Ct. at 2790–93.

of war” set forth in § 821 (incorporating Common Article 3 of the Geneva Conventions⁴²). Moreover, a plurality of four Justices also found that the UCMJ was violated because conspiracy to commit war crimes—the charge filed against Hamdan—is not a violation of the “law of war.”⁴³ The plurality also found that withholding certain evidence from the defendant, as permitted by the commission’s procedures, violated “judicial guarantees which are recognized as indispensable by civilized peoples,” another requirement of Common Article 3.⁴⁴

An initial reading of the opinion might suggest, therefore, that the Justices would find that the military commissions were authorized by statute if these important procedural flaws were cured.

A more careful reading of the opinions, however, indicates at least some uncertainty on this subject. A first note of doubt is raised in Stevens’s opinion for the Court, when he indicates that the military commissions were “not contemplated by Article I, § 8 and Article III, § 1 of the Constitution”⁴⁵ and, as a result, “that authority, *if it exists*, can derive only from the powers granted jointly to the President and Congress in time of war.”⁴⁶

We receive a second hint of uncertainty when Justice Stevens characterizes as “controversial” the holding of the *Quirin*⁴⁷ case that Article of War 15 (the fore-runner of § 821 of the UCMJ) provided congressional authorization for military commissions.⁴⁸ The Court then proceeded to reject the government’s argument that two recent enactments—the Authorization for the Use of Military Force (AUMF)⁴⁹ and the Detainee Treatment Act of 2005 (DTA)⁵⁰—provided a more solid statutory foundation for the military commissions.⁵¹ In sum, therefore, the commissions have no more authority

42. *Id.* at 2794–97.

43. *Id.* at 2777–85 (plurality opinion).

44. *Id.* at 2797–98; *see also supra* note 35.

45. *Hamdan*, 126 S. Ct. at 2773.

46. *Id.* (emphasis added).

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

48. *Hamdan*, 126 S. Ct. at 2774. At this point, moreover, Stevens cites an amicus brief that presented the argument that the reference to “military commissions” in Article 15 did not in fact provide congressional authorization for the commissions, but rather was intended only to preserve the commissions’ previously-existing and considerably narrower jurisdiction. *Id.* (citing Brief of Legal Scholars and Historians as *Amici Curiae* in Support of Petitioner at 12–15, *Hamdan*, 126 S. Ct. 2749 (No. 05-184)).

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

50. 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).

51. *Hamdan*, 126 S. Ct. at 2774–75.

than they had at the time when the Court issued its “controversial” finding of authorization in *Quirin*. That the Court retains some skepticism, at least, about that holding is clearly signaled in the Court’s final words on this question. Stevens concludes: “Together, the UCMJ, the AUMF, and the DTA *at most* acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the ‘Constitution and laws,’ including the law of war.”⁵² The telling phrase “at most” makes clear that the Court is not even conceding presidential authority under the then-existing statutory regime, even if the procedural flaws found by the Court were cured.

It seems to me that the effect of this seemingly trivial phrase “at most”—together with the other signs of uncertainty noted above—is to revive the doubts about general congressional authorization that were raised, but rejected, at the time of the *Quirin* case. One may speculate that it is in such small and subtle ways that the majority’s accumulated mistrust of the present government finds a form of expression—in a reluctance to concede anything at all to the President that is not absolutely necessary. Presumably, it was doubts of this kind that also impelled Congress to attempt to put these military commissions on a stronger legislative footing in the recently adopted Military Commissions Act of 2006 (MCA).⁵³ With the question of statutory authority now apparently cleared away, of course, the underlying constitutional issues relating to the military commissions may now have to be confronted by the courts.

B. *The Status of International Law*

Finally, the most intriguing of the peculiarities in *Hamdan* is found in the concurring opinion of Justice Kennedy. In *Hamdan*, the Court found against the Bush Administration on a very important issue, and—as is sometimes the case in such circumstances—Justices may have felt impelled to explain that the decision was not quite so damaging to the government as it might appear. Thus, in a short concurrence, Justice Breyer emphasized that the decision was based on the inconsistency of the presidential order with existing statutes, and of course the President may go to Congress and ask that those statutes be amended.⁵⁴

52. *Id.* at 2775 (emphasis added).

53. Pub. L. No. 109-366, § 3(a), 120 Stat. 2600 (2006) (“The President is authorized to establish military commissions under this chapter . . .”).

54. *See Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring). Breyer states: “Congress has denied the President the legislative authority to create military commissions of the

Justice Kennedy also says something along these lines, but the way in which he phrases what seems essentially to be the same point may open up some intriguing and unexplored possibilities. Read carefully what Justice Kennedy says: “[Our discussion] returns us to the point of beginning—that domestic statutes control this case. If Congress, after due consideration, deems it appropriate to change the controlling statutes, *in conformance with the Constitution and other laws*, it has the power and prerogative to do so.”⁵⁵

Please read this language over again and then try to answer the following question: What *can* it mean? What possibly can Kennedy mean by the phrase “in conformance with the Constitution and other laws”—and, more specifically, by the phrase “in conformance with other laws?” What “other laws” could Kennedy possibly have in mind?

In order to approach this question, let us return to traditional doctrine and ask ourselves the following question: What binds Congress? In the traditional view, of course, the Constitution of the United States binds Congress, at least since *Marbury v. Madison*.⁵⁶ But what are these “other laws” that, Kennedy suggests, also bind Congress? Certainly Congress is not bound by its own previous statutes—that is clear enough. Moreover, Congress is certainly not bound by any common law doctrines—except to the extent they have been recognized by the courts as also being constitutional principles. Yet Kennedy seems to be saying that Congress has the “power and prerogative” to “change the controlling statutes” only if it acts “in conformance with the Constitution and *other laws*.” Indeed, the only “other laws” that seem to be left are the doctrines of international law—either treaty law or the general principles of international law, or both.

Unless the insertion of this phrase resulted from some sort of slip of the pen and is therefore just a mistake, it would seem that Kennedy is asserting the possibility, at least, that Congress is bound by some sort of international law in the enactment of its statutes. If one casts one’s eye across the constitutions of the world, one will see that this is certainly not an unprecedented position: to take one example, the Basic Law (Constitution) for the Federal Republic of Germany declares that

kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.” *Id.* Justice Breyer of course takes no position on the question of whether that authorization, in the form granted by Congress, would be constitutional.

55. *Id.* at 2800 (Kennedy, J., concurring in part) (emphasis added).

56. 5 U.S. (1 Cranch) 137 (1803).

the general principles of international law are indeed superior to statutes.⁵⁷

Yet, such a position has never been adopted—or, as far as I know, even suggested—by the Supreme Court or any of its Justices.⁵⁸ In the Constitution’s Supremacy Clause (Article VI, cl. 2), statutes precede treaties as “the supreme law of the land,” and, in any case, it has long been prevailing doctrine that statutes and treaties are of equal dignity and, therefore, the later in time controls—as is the case between two statutes. Accordingly, a later statute can nullify the internal effect of an earlier treaty (although such an action may cause the United States to be in violation of international law, as far as the outside world is concerned).⁵⁹

Of course, the general principles of international law are not even mentioned in the Supremacy Clause, even though according to cases like *The Paquete Habana*,⁶⁰ those principles are nonetheless part of the domestic law of the United States.⁶¹ But, under these circumstances, it might seem extremely difficult to assert that this form of international law could override or control a statute of Congress, and the prevailing view has always held to the contrary.⁶²

In this light, the apparently offhand suggestion of Justice Kennedy seems to be intriguing—indeed, in a quiet way, revolutionary—because he seems to be suggesting that some form of “other” law, presumably international law, could limit Congress’s power and prerogative “to change the controlling statutes.”

I would like to note one additional point on the question of the number of Justices concurring in this remark of Justice Kennedy. According to the Court’s rubric, Kennedy’s opinion is joined “as to Parts

57. GRUNDGESETZ [GG] [Constitution] art. 25 (F.R.G.).

58. Several eminent scholars, however, have advocated such a position. See, e.g., Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 872–78 (1987).

59. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(b) (1987).

60. 175 U.S. 677 (1900).

61. *Id.* at 700.

62. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a) (“An act of Congress supersedes an earlier rule of international law” or treaty, if Congress’s purpose to do so is clear); see also *In re Yamashita*, 327 U.S. 1, 16 (1946) (affirming that courts will respect the international laws of war “so far as they do not conflict with the commands of Congress or the Constitution”). On the other hand, it is also accepted that domestic statutes should be interpreted in a manner consistent with international law, if such an interpretation is possible. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

I and II” by Justices Souter, Ginsburg, and Breyer.⁶³ Thus Kennedy is speaking for four Justices (including himself) in the main body of his concurring opinion. Yet the remark just quoted on the subject of the “other laws” is located in a brief prefatory introduction and is itself not part of either Part I or Part II—and therefore, it seems to be the case that Kennedy is speaking here only for himself.

Yet in the last paragraph of Part II, Kennedy returns to something like this point and offers a similar observation—in language, however, that is subtly different. In this last paragraph, Kennedy observes: “In sum, as presently structured, Hamdan’s military commission exceeds the bounds Congress has placed on the President’s authority in §§ 836 and 821 of the UCMJ. Because Congress has prescribed these limits, Congress can change them, *requiring a new analysis consistent with the Constitution and other governing laws.*”⁶⁴

I find this passage completely ambiguous. It could mean something banal: after Congress changes the statutes, the general legal situation must be reassessed in light of the Constitution, those new statutes of Congress, and other “governing laws.” But it could also be intended as a reprise of the apparently more revolutionary language set forth in Kennedy’s introductory section: after Congress enacts new statutes, we must analyze the validity of those statutes not only under the Constitution, but also under “other governing laws”—that is, presumably, under certain principles of international law. Perhaps Kennedy is so alone—in the possible view imputed to him above—that one or more of the other three Justices insisted on this ambiguity in the part of the opinion that represented the views of four Justices.

It is not very easy at this point to know whether there is really anything in this peculiarity of Kennedy’s opinion in *Hamdan*. Only time, and additional adjudication in this area, may clarify Justice Kennedy’s position. Yet, as the intellectual voyages of numerous judges in American history attest, the process of experience can be a powerful educational force on the minds of individuals who—through appointment to the federal judiciary—are freed from many of the pressures of politics and of the workaday world. And it may therefore be the case that the international education of Justice Kennedy—referred to by my colleague Michael Greenberger⁶⁵—is an ongoing process that may yet contain some surprises.

63. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2799 (2006) (Kennedy, J., concurring in part).

64. *Id.* at 2808 (emphasis added).

65. See Michael Greenberger, *You Ain’t Seen Nothin’ Yet: The Inevitable Post-Hamdan Conflict Between the Supreme Court and the Political Branches*, 66 MD. L. REV. 805, 823–28 (2007).