

**SUBORDINATION OF POWERS:  
*Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006)**

The scope of presidential authority has always concerned democrats, especially during wartime. Since the advent of the “War on Terror,” many Bush administration policies have sparked fierce debate and, of course, litigation. In *Hamdi v. Rumsfeld*,<sup>1</sup> Justice O’Connor’s plurality opinion held that Congress had authorized the President to detain “enemy combatants”—including U.S. citizens like Hamdi—but avoided addressing whether the President had independent authority to do so.<sup>2</sup> Last Term, in *Hamdan v. Rumsfeld*, the Court held that the President’s establishment of military commissions violated the requirements of Uniform Code of Military Justice (UCMJ) Article 36(b) and the Geneva Convention’s Common Article 3.<sup>3</sup> The Court’s opinion and Justice Kennedy’s concurring opinion are significant not only for their statutory interpretations, but also because they show the inadequacy of the underlying framework for understanding executive authority set out in Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>4</sup>

Salim Ahmed Hamdan was seized in Afghanistan in November 2001, charged with conspiring with Usama bin Laden, and deemed by the President eligible for trial by military commission.<sup>5</sup> The procedures devised for the commissions differed from those for courts-martial, among other respects, in that the former could hear evidence inadmissible in the latter and could exclude defendants from the proceedings.<sup>6</sup>

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1. 542 U.S. 507 (2004).

2. *Id.* at 516–17.

3. 126 S. Ct. 2749, 2793, 2796–98 (2006).

4. 343 U.S. 579 (1952).

5. *Hamdan*, 126 S. Ct. at 2759. The charging document alleged that between February 1996 and November 2001 Hamdan “willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden . . . to commit the following offenses . . . : attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.” Dep’t of Def., Military Commission List of Charges for Salim Ahmed Hamdan, <http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf>.

6. *See Hamdan*, 126 S. Ct. at 2786–87 (“The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the [Secretary of Defense] or

Hamdan filed a habeas corpus petition in the United States District Court for the District of Columbia, which the court granted in part.<sup>7</sup> Judge Robertson held that the Geneva Convention was enforceable in court, that Hamdan's prisoner-of-war status had not been resolved by a "competent tribunal" as required by the Convention, and that Hamdan was entitled to the protections afforded prisoners of war, including trial by court-martial.<sup>8</sup> Judge Robertson also held that, under the UCMJ, the commissions' procedures violated the defendant's right to be present.<sup>9</sup>

The United States Court of Appeals for the D.C. Circuit reversed.<sup>10</sup> Writing for the court, Judge Randolph, joined by then-Judge Roberts, held that Congress had authorized the commissions through the Authorization for Use of Military Force (AUMF) and through UCMJ Articles 21 and 36.<sup>11</sup> Following *Johnson v. Eisentrager*,<sup>12</sup> the court held that the Convention relied on "political and military authorities" for enforcement, not the judiciary.<sup>13</sup> The court explained that, even if the Convention were judicially enforceable, the Convention did not apply because al Qaeda neither was a party to it nor observed its provisions.<sup>14</sup> Although the Convention's Common Article 3 might protect a non-contracting party, the Article applied only to conflicts within a single country, not an international conflict, as the President had determined the war with al Qaeda to be.<sup>15</sup>

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the presiding officer decides to 'close.' Grounds for such closure 'include the protection of information classified or classifiable . . . ; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests.'" (citing Military Commission Order No. 1, § 6(B)(3) (Aug. 31, 2005)); *id.* at 2790–91.

7. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 173–74 (D.D.C. 2004).

8. *Id.* at 158–60, 163–65.

9. *Id.* at 166–72.

10. *Hamdan v. Rumsfeld*, 415 F.3d 33, 44 (D.C. Cir. 2005).

11. *Id.* at 37–38 (citing Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001) and 10 U.S.C. §§ 821, 836(a) (2000)); *id.* at 42–43 (holding that UCMJ Article 36(a) requires commissions to be consistent only with UCMJ provisions governing military commissions, and the right to be present is not guaranteed by such provisions).

12. 339 U.S. 763 (1950).

13. *Id.* at 38–40 (quoting *Eisentrager*, 339 U.S. at 789 n.14).

14. *Id.* at 41.

15. *Id.* at 41–42. *But see id.* at 44 (Williams, J., concurring) (interpreting Common Article 3 to apply to al Qaeda).

The Supreme Court reversed. The Court, in an opinion written by Justice Stevens,<sup>16</sup> held that the commissions were not specifically authorized by Congress and that they violated the requirements of UCMJ Article 36(b) and the Convention, with which UCMJ Article 21 required compliance as part of the law of war.<sup>17</sup> Article 36 provided that:

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions, and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.<sup>18</sup>

The Court explained that Article 36(b) required uniformity among all military tribunals, reflecting past experience when military commissions followed court-martial procedures and “any departure [had to] be tailored to the exigency that necessitate[d] it.”<sup>19</sup> The commissions departed in several respects from court-martial procedures, but the President had not officially determined that court-martial procedures were impracticable.<sup>20</sup>

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16. Justices Kennedy, Souter, Ginsberg, and Breyer each joined most of Justice Stevens’s opinion. Chief Justice Roberts did not participate in the consideration or decision of the case. *Hamdan*, 126 S. Ct. at 2799. In the two parts of his opinion where he did not speak for the Court, Justice Stevens was joined by Justices Souter, Ginsburg, and Breyer. In those parts, Justice Stevens argued that at common law, jurisdiction over military commissions was limited to offenses committed in a “theatre of war,” during wartime, and “in violation of the laws of war.” *Id.* at 2777 (plurality opinion) (citing WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 836–39 (rev. 2d. ed. 1920)). The charge against Hamdan was deficient in all three respects: neither Hamdan’s alleged agreement with al Qaeda nor a single overt act occurred in a theatre of war after September 11, 2001, and conspiracy was not recognized as a war crime. *Id.* at 2777–85. In addition, Justice Stevens argued that, by denying Hamdan the right to be present, the commissions failed to afford Hamdan “all the judicial guarantees which are recognized as indispensable by civilized peoples,” as required by Common Article 3. *Id.* at 2797–98.

17. *Id.* at 2774–75, 2792–93 (majority opinion).

18. 10 U.S.C. § 836 (2000). The codified version of Article 36 was amended by Congress in 2006. See 10 U.S.C.A. § 836 (2007).

19. *Hamdan*, 126 S. Ct. at 2790, 2788–89.

20. *Id.* at 2790–91.

Perhaps more importantly, the Court noted that the President's determination of impracticability under section (b) would not end the matter. Citing Justice Kennedy's concurring opinion, the Court declared that, although the President's decision under section (a) may be entitled to "complete deference," his determination under section (b) that uniformity was impracticable was entitled only to "a measure of deference."<sup>21</sup> In the Court's view, there was no evidence to support the claim that applying court-martial procedures was impracticable: "[t]here is no suggestion, for example, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility."<sup>22</sup> The Court held, therefore, that the President lacked the authority to deviate from court-martial procedures.<sup>23</sup>

The Court further held that the commissions were not "regularly constituted" as required by Common Article 3.<sup>24</sup> That Article prohibited, in relevant part, "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."<sup>25</sup> The Court agreed with Justice Kennedy that courts-martial are the regular military courts, and only "some practical need" could justify deviating from court-martial procedures.<sup>26</sup> Because no such need had been shown in this case, Hamdan's commission violated Common Article 3.<sup>27</sup> Whether or not the Convention by itself was judicially enforceable, the Court stated, UCMJ Article 21 required that commissions comply with the law of war, of which Common Article 3 was a part.<sup>28</sup> Finally, the Court explained that Common Article 3's limitation of its application to conflicts "not of an international character" meant

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21. *Id.* at 2791 & n.51 (citing *id.* at 2801 (Kennedy, J., concurring in part)).

22. *Id.* at 2792.

23. *Id.* at 2792–93.

24. *Hamdan*, 126 S. Ct. at 2793–97 (quoting Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3320 (1955)).

25. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 24, 6 U.S.T. at 3320.

26. *Hamdan*, 126 S. Ct. at 2797 (2006) (quoting *id.* at 2804 (Kennedy, J., concurring in part)).

27. *Id.* at 2797–98.

28. *Id.* at 2794. Article 21 states, "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or law of war may be tried by military commissions, provost courts, or other military tribunals." 10 U.S.C. § 821 (2000).

conflicts not between two or more nations.<sup>29</sup> Because al Qaeda was not a nation, the conflict was “not of an international character” and fell within the ambit of Common Article 3.<sup>30</sup>

Justice Kennedy concurred in part. In an opinion joined by Justices Souter, Ginsburg, and Breyer, he expanded upon the limits that UCMJ Article 36 and Common Article 3 imposed on presidential authority. Justice Kennedy argued that the President’s authority to determine whether uniformity was practicable was limited, as were the circumstances justifying any variations.<sup>31</sup> “Practicable,” he explained, means “‘feasible,’ that is, ‘possible to practice or perform’ or ‘capable of being put into practice, done, or accomplished.’”<sup>32</sup> Practicable did not mean convenient or expedient: only the “practical need” of “logistical constraints, the accommodation of witnesses, the security of the proceedings and the like” could justify departing from court-martial procedures.<sup>33</sup> In addition, Justice Kennedy argued, Common Article 3 imposed a uniformity requirement similar to UCMJ Article 36(b). Courts-martial are the “regular military courts in our system,”<sup>34</sup> he explained, and military commissions have generally adopted their structure and procedures.<sup>35</sup> Under Common Article 3, as under UCMJ Article 36, only “some practical need [could] explain[] deviations from court-martial practice.”<sup>36</sup>

Justice Kennedy then evaluated the commissions in light of this uniformity requirement, pointing out the key differences between commission and court-martial procedures. First, the Secretary of Defense, or his designee, would select a commission’s presiding officer, who need only be a military lawyer, whereas the Judge Advocate General selects a court-martial’s presiding officer, who must be a military judge.<sup>37</sup> Second, inter-

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29. *Hamdan*, 126 S. Ct. at 2795–96.

30. *Id.*

31. *Id.* at 2801 (Kennedy, J., concurring in part).

32. *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1780 (1961)).

33. *Id.*

34. *Hamdan*, 126 S. Ct. at 2803 (Kennedy, J., concurring in part). Justice Kennedy also argued that independence from the President was “necessary to render a commission ‘regularly constituted’ by the standards of our Nation’s system of justice.” *Id.* at 2804.

35. *Id.* at 2804 (explaining that UCMJ Article 36 codified this “presumption of uniformity”).

36. *Id.*

37. *Id.* at 2805–06.

locutory appeals from the commissions would be heard by the Secretary of Defense, whereas appeals from courts-martial are heard by the Court of Criminal Appeals.<sup>38</sup> Third, the military review procedure for commissions, which would precede any judicial review, lacked independent review by the Judge Advocate General, the Court of Criminal Appeals, or the Court of Appeals for the Armed Forces.<sup>39</sup> Fourth, the commissions needed only three members, whereas courts-martial required five.<sup>40</sup> Justice Kennedy also noted that the commissions would not follow court-martial evidentiary rules, especially those addressing hearsay and coerced declarations.<sup>41</sup> Because the government did not demonstrate a practical need for these departures, “nor [was] any such need self-evident,” the commissions “exceed[ed] the bounds Congress has placed on the President’s authority.”<sup>42</sup>

In a brief concurring opinion joined by Justices Kennedy, Souter, and Ginsburg, Justice Breyer explained that the decision rested on congressional limits on the President’s authority.<sup>43</sup> The President could still seek from Congress whatever authority he needed, Justice Breyer suggested, and such consultation “strengthens the Nation’s ability to determine . . . how best [to deal with danger].”<sup>44</sup>

Justice Scalia, whose dissent was joined by Justices Thomas and Alito, criticized the Court for exercising jurisdiction. He argued that the Detainee Treatment Act of 2005 deprived the courts of jurisdiction over pending and future habeas petitions.<sup>45</sup> In addition, he would have abstained under *Schlesinger v. Councilman*,<sup>46</sup> in which the Court declined to hear a subject-matter jurisdiction challenge to a court-martial out of respect for a coordinate judicial system and the military’s need for dis-

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38. *Id.* at 2806.

39. *Hamdan*, 126 S. Ct. at 2807 (Kennedy, J., concurring in part).

40. *Id.* at 2806.

41. *Id.* at 2807–08. Although Justice Kennedy did find the possibility that Hamdan could be convicted on the basis of evidence he had not seen “troubling,” *id.* at 2809, he declined to rule on that issue. “The evidentiary proceedings at Hamdan’s trial have yet to commence, and it remains to be seen whether he will suffer any prejudicial exclusion.” *Id.*

42. *Id.* at 2808.

43. *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring).

44. *Id.*

45. *Id.* at 2810–19 (Scalia, J., dissenting) (discussing the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005)).

46. 420 U.S. 738 (1975).

cipline.<sup>47</sup> “[M]ilitary necessities relating to the disabling, deterrence, and punishment of the mass-murdering terrorists of September 11 require abstention all the more here.”<sup>48</sup>

Justice Thomas also dissented, joined by Justice Scalia and, in part, by Justice Alito. In the domains of foreign affairs and national defense, Justice Thomas argued, the Court should not be reluctant to find authorization for presidential action.<sup>49</sup> He urged deference to the President’s judgment that court-martial procedures were impracticable in light of the war effort, a determination authorized by the AUMF, and one that the judiciary was ill-equipped to dispute.<sup>50</sup> He argued that the uniformity required by UCMJ Article 36(b) was only uniformity across military branches, not among military tribunals.<sup>51</sup> Moreover, the Court’s reading of UCMJ Article 36 as requiring the use of statutorily prescribed court-martial procedures could not be squared with UCMJ Article 21, which preserved commissions as “our common-law war courts,” including the authority of the President to prescribe their procedures.<sup>52</sup>

Justice Thomas criticized the Court’s use of UCMJ Article 21 to get around the holding in *Eisentrager* that the Convention was not judicially enforceable. Even if UCMJ Article 21 mandated compliance with the law of war, he contended, one could not choose to apply Common Article 3 but not the Convention’s exclusive diplomatic enforcement mechanism.<sup>53</sup> Finally, although acknowledging the plausibility of the Court’s interpretation of “armed conflict not of an international character,” Justice Thomas urged deference to the President’s equally plausible reading that Common Article 3 did not apply to al Qaeda.<sup>54</sup>

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47. *Id.* at 2819–22; see also *Schlesinger*, 420 U.S. at 753–61.

48. *Id.* at 2821.

49. *Hamdan*, 126 S. Ct. at 2823–25 (Thomas, J., dissenting).

50. *Id.* at 2842–43 (“The President reached this conclusion because ‘we’re in the middle of a war, and . . . had to design a procedure that would allow us to pursue justice for these individuals while at the same time prosecuting the war most effectively. And that means setting rules that would allow us to preserve our intelligence secrets [and] develop more information about terrorist activities . . . .’” (quoting Dept. of Defense News Briefing on Military Commissions (Mar. 21, 2002) (remarks of Douglas J. Feith, Under Secretary of Defense Pol’y))).

51. *Id.* at 2842.

52. *Id.* at 2839–42 (quoting *Madsen v. Kinsella*, 343 U.S. 341, 346–47 (1952)).

53. *Id.* at 2845.

54. *Hamdan*, 126 S. Ct. at 2846 (Thomas, J., dissenting).

Justice Alito also dissented and, joined by Justices Scalia and Thomas, argued that the commissions were regularly constituted within the meaning of Common Article 3. Regularly constituted meant “properly appointed, set up, or established” under domestic law,<sup>55</sup> and the commissions were properly established under the President’s authority recognized in *Ex Parte Quirin*.<sup>56</sup> If the parties to the Convention wanted to require the use of courts-martial or a uniformity principle in Common Article 3, he observed, they could have included language to that effect used in other provisions of the Convention.<sup>57</sup> Instead, Common Article 3 only meant to prohibit summary justice.<sup>58</sup>

In analyzing the Court’s opinion, Justice Kennedy’s concurring opinion should be read alongside it and studied carefully. The Court’s opinion repeatedly refers to Justice Kennedy’s opinion,<sup>59</sup> and that opinion sheds light on two of the Court’s questionable interpretations and elaborates a justification for them.

One of the problematic interpretations of Justice Kennedy’s concurrence and the Court’s opinion concerns the broad meaning they ascribe to “practicable” in UCMJ Article 36 and the consequently small set of considerations that would render court-martial procedures impracticable. Justice Kennedy cited *Webster’s Third New International Dictionary’s* definition of practicable as “feasible,” “possible to practice or perform,” and “capable of being put into practice, done, or accomplished.”<sup>60</sup> But that dictionary also defines feasible to include “capable of being managed, utilized, or dealt with successfully: suitable,” and “reasonable.”<sup>61</sup> To further complicate the matter, Justice Kennedy added that a “practical need” might render a procedure impracticable.<sup>62</sup> If practicable simply meant possible, the provision as written would make little sense: it is always possible to require district court criminal or court-martial procedures, even if the

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55. *Id.* at 2850–51 (Alito, J., dissenting).

56. *Id.* at 2853 (citing *Ex Parte Quirin*, 317 U.S. 1 (1942)).

57. *Id.* at 2851.

58. *Id.* at 2854 (citing 4 INT’L COMM. OF RED CROSS, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 39 (1958)).

59. *Hamdan*, 126 S. Ct. at 2791–92 nn.51–52, 2797–98 (majority opinion).

60. *Id.* at 2801 (Kennedy, J., concurring in part) (quoting WEBSTER’S, *supra* note 32, at 1780).

61. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 831 (1981).

62. See *Hamdan*, 126 S. Ct. at 2801 (Kennedy, J., concurring in part). The majority states that any departure from court martial procedures must be tailored to “the exigency that necessitates it.” *Id.* at 2790 (majority opinion).



result may be little admissible evidence and few trials.<sup>63</sup> Rather, practicable implies some balancing in light of the aims of military commissions. Justice Kennedy acknowledged as much when he said that “logistical constraints, the accommodation of witnesses, [or] the security of the proceedings” could justify a departure from court-martial procedures.<sup>64</sup> Commissions, however, aim in part at national security—that is, preventing and deterring crime—and look not only to the good of the defendants, but also to the good of victims and the country. The statute’s language allows some flexibility; it does not, as Justice Kennedy and the majority read it, exclude national security as a factor that may render court-martial procedures impracticable.

Justice Kennedy and the Court’s interpretation is especially puzzling in light of the President’s explicit authority in Article 36(a) to make rules for all military tribunals and to determine whether it would be practicable to use district court criminal procedures. As Justice Kennedy explained in *Loving v. United States*,<sup>65</sup> the President acts as commander-in-chief in judging practicability and making those rules,<sup>66</sup> and as commander-in-chief, his aim is national security.<sup>67</sup> Justice Kennedy and the Court thus read the same word, “practicable,” as having two different meanings, one of which encompasses national security as a legitimate factor in determining whether a procedure is practicable, the other of which does not. In an earlier opinion, however, Justice Kennedy noted that “the ‘normal rule of statutory construction’ [is] that ‘identical words used in different parts of the same act are intended to have the same meaning.’”<sup>68</sup>

The argument of Justice Kennedy, on which the Court relies,<sup>69</sup> that the commissions are not “regularly constituted” within the

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63. See *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 171 (D.D.C. 2004).

64. *Hamdan*, 126 S. Ct. at 2801. The court cites similar factors. See text accompanying note 22.

65. *Loving v. United States*, 517 U.S. 748 (1996).

66. *Id.* at 772 (“[T]he delegation [under 36(a)] was to the President in his role as Commander in Chief.”).

67. See, e.g., *id.* at 773 (“[W]ithout further guidance . . . the President can be entrusted to determine what limitations and conditions on punishments are best suited to preserve [the military’s] special discipline.”). According to the *Hamdan* majority, military discipline is needed for the “efficient operation of the Armed Forces.” *Hamdan*, 126 S. Ct. at 2770. Efficiency cannot be understood apart from the military’s aim—national security.

68. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995) (citation omitted).

69. *Hamdan*, 126 S. Ct. at 2797.

meaning of Common Article 3 is confusing and unconvincing. He did not argue that only courts-martial qualify as regularly constituted, nor did he judge military commissions by their own standard. Rather, he judged military commissions by court-martial standards, asserting that Common Article 3 “supports, at the least, a uniformity principle.”<sup>70</sup> Common Article 3 itself, however, contains no uniformity principle, and although commissions have “generally” used procedures “similar” to those used by courts-martial,<sup>71</sup> Justice Kennedy could point to no uniformity principle in the past as strict as the one he advanced here. Military commissions in World War II, for example, were merely required to “hav[e] regard for” court-martial procedures.<sup>72</sup> Justice Kennedy admitted that Common Article 3’s “general standards are yet to be elaborated and further defined” and that “more concrete statutory guidance” was lacking.<sup>73</sup> Only by exaggerating past practice to imply a uniformity principle could he argue that the President contradicted Congress’s will that the commissions conform to the laws of war.

Justice Kennedy explained that “[t]he proper framework for assessing whether Executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.”<sup>74</sup> Under Justice Jackson’s scheme, the President’s power is tied largely to that of Congress. If Congress authorized the President’s action, either expressly or by implication, then that action “would be supported by the strongest of presumptions and the widest latitude of judicial interpretation.”<sup>75</sup> If Congress were silent on the issue, the President could rely on his independent, or inherent,

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70. *Id.* at 2803 (Kennedy, J., concurring in part). In addition, an argument could be made that Justice Thomas has the better interpretation of uniformity in Article 36(b). See, e.g., James N. Boeving, *The Right to Be Present Before Military Commissions and Federal Courts: Protecting National Security in an Age of Classified Information*, 30 HARV. J.L. & PUB. POL’Y 482–86 (2007) (analyzing the UCMJ’s legislative history and arguing in favor of Justice Thomas’s reading). Justice Kennedy and the majority’s reading of uniformity would seem to be in tension with Article 36(a): that section both establishes federal district court criminal procedures as the standard and requires that any rules the President makes be consistent with the UCMJ, which recognizes differences among tribunals.

71. *Hamdan*, 126 S. Ct. at 2803 (Kennedy, J., concurring in part).

72. *Id.* (quoting 1 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 116–17 (1947)).

73. *Id.* at 2803, 2804.

74. *Id.* at 2800. The majority opinion relies on *Youngstown* as well. See *id.* at 2774 n.23.

75. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

authority, and his action would be judged more “on the imperatives of events and contemporary imponderables . . . than on abstract theories of law.”<sup>76</sup> If, however, the President acted against the will of Congress, his “claim to a power at once so conclusive and preclusive [would have to] be scrutinized with caution.”<sup>77</sup> Justice Jackson justified this approach on the grounds that neither the text of the Constitution nor the views of the Framers helped resolve particular conflicts over presidential authority.<sup>78</sup> His solution was to contain the President by using the separation of powers doctrine, which “diffuses power the better to secure liberty,”<sup>79</sup> while still respecting the combined power of Congress and the President to devise “workable” solutions to most exigencies.<sup>80</sup>

Statutory interpretation becomes critical under this scheme, because the Court’s determination of congressional approval largely decides the case. Although congressional approval is supposed to determine the level of scrutiny the Court applies to the President’s claim of authority, the question whether Congress has approved is itself tacitly “scrutinized with caution.” Because independent action threatens “the equilibrium established by our constitutional system,”<sup>81</sup> Justice Jackson’s scheme encourages a skeptical reading of any claim of congressional authorization.<sup>82</sup> This skepticism may account for

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76. *Id.* This standard, to the extent it is a standard, seems very unclear.

77. *Id.* at 638.

78. *See id.* at 634–35.

79. *Id.* at 635. Justice Kennedy similarly explained that “[c]oncentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution’s three-part system is designed to avoid.” *Hamdan*, 126 S. Ct. at 2800 (Kennedy, J., concurring in part).

80. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). Justice Jackson’s view has resonated with many scholars. *See, e.g.*, HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 105–13, 161–81 (1990) (arguing that, according to Justice Jackson’s scheme, “outside of . . . narrow pockets of exclusive presidential authority, . . . Congress must have the opportunity to approve or disapprove actions in foreign affairs” and advocating reforms to facilitate congressional review and combat congressional acquiescence); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1266 (2002) (“[O]ur position is that the Constitution sets up a structure whereby the concurrence of all three branches is normally needed in order to authorize a decisive departure from the legal status quo.”).

81. *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring).

82. *See* Sarah H. Cleveland, *Hamdi Meets Youngstown: Justice Jackson’s Wartime Security Jurisprudence and the Detention of “Enemy Combatants,”* 68 ALB. L. REV. 1127, 1131 (2005) (“Jackson believed that the Constitution gave Congress, not the

Justice Kennedy and the Court's seemingly tendentious interpretations.

*Hamdan* illustrates two problems with Justice Jackson's scheme. First, the scheme's subordination of the President to Congress rests on an incomplete account of the separation of powers. The Framers knew that concentrated power might threaten liberty, but they also knew from their experience with the Articles of Confederation that diffuse power might prove too weak to protect liberty.<sup>83</sup> The Constitution's many aims reflect this complexity: "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty . . ."<sup>84</sup> The separation of powers works to achieve those aims in part by fashioning each branch in such a way that enables it to perform its particular tasks well.<sup>85</sup> "Energy in the executive is a leading character

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Commander in Chief, the authority to limit civil liberties in wartime, and he believed that courts must rigorously scrutinize congressional meaning before finding such authorization . . . . If congressional authorization is to be the touchstone for protecting liberty in times of crisis, however, that authorization must be meaningful."'). But see Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond* 4, 8 (University of Chicago, Public Law and Legal Theory Working Paper No. 134, 2006), available at [http://ssrn.com/abstract\\_id=922406](http://ssrn.com/abstract_id=922406) (arguing that Justice Jackson left open the question of the background rule for interpreting alleged congressional authorization, while the *Hamdan* majority implicitly adopted a clear statement rule requiring explicit authorization). Although the logic of Justice Jackson's scheme calls for a skeptical reading of congressional authorization (which Justice Jackson demonstrated when he found Truman's actions unauthorized in *Youngstown*), the Court has not always applied such scrutiny. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (finding congressional acceptance of the President's authority to suspend claims against Iranian assets pending in U.S. courts despite the absence of clear congressional authorization).

83. See THE FEDERALIST NO. 15, at 89–93 (Alexander Hamilton) (Robert Scigliano ed., 2000) ("The great and radical vice in the construction of the existing Confederation is in the principle of legislation for states or governments, in their corporate or collective capacities, and as contradistinguished from the individuals of whom they consist . . . . The consequence of this is, that . . . resolutions . . . are mere recommendations which the States observe or disregard at their option . . . . In our case, the concurrence of thirteen distinct sovereign wills is requisite, under the Confederation, to the complete execution of every important measure that proceeds from the Union."').

84. U.S. CONST. pmbl; see also THE FEDERALIST NO. 37, at 223–24 (James Madison) (Robert Scigliano ed., 2000) ("Among the difficulties encountered by the convention, a very important one must have lain in combining the requisite stability and energy in government, with the inviolable attention due to liberty and to the republican form."); THE FEDERALIST NO. 51, at 331 (James Madison or Alexander Hamilton) (Robert Scigliano ed., 2000) ("[F]irst enable the government to control the governed; and in the next place oblige it to control itself."').

85. As Justice Kennedy noted in *Loving*, "[d]eterrence of arbitrary or tyrannical rule is not the sole reason for dispersing the federal power among three branches, however. By allocating specific powers and responsibilities to a branch fitted to

in the definition of good government,” and the virtues of unity — “decision, activity, secrecy, and dispatch” — help the President to execute his office with energy.<sup>86</sup> The Constitution’s imprecision when it comes to executive authority may well be a deliberate recognition of the uncertainty of events and consequent need for flexibility,<sup>87</sup> rather than a muddle in need of a clarifying scheme. Moreover, the separation of powers is importantly modified by the provision for checks and balances, and thus a static and perhaps ineffective “parchment barrier”<sup>88</sup> becomes a dynamic and flexible means by which each branch is able to defend itself against encroachments by the others.<sup>89</sup> Justice Jackson recognized the need for flexibility,<sup>90</sup> but he nevertheless turned the separation of powers into a one-dimensional doctrine to be used offensively by the Court to check the President. Justice Kennedy and the majority see executive discretion as a threat to liberty that must be made to submit to the rule of law, or the will of Congress.<sup>91</sup> But the tension between discretion and the law cannot be resolved, and the Constitution seen as a whole attempts to provide for both.

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the task, the Framers created a National Government that is both effective and accountable.” *Loving v. United States*, 517 U.S. 748, 757 (1996).

86. THE FEDERALIST NO. 70, at 447 (Alexander Hamilton) (Robert Scigliano ed., 2000). “That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished. This unity may be destroyed . . . by vesting it ostensibly in one man, subject, in whole or in part, to the control and cooperation of others, in the capacity of counselors to him.” *Id.* at 449.

87. Hamilton’s argument that the war powers of the national government “ought to exist without limitation, because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them” THE FEDERALIST NO. 23, at 140 (Alexander Hamilton) (Robert Scigliano ed., 2000), applies to the division of those powers as well. Hamilton also argued that “[w]ise politicians will be cautious about fettering the government with restrictions that cannot be observed” because of “necessity.” THE FEDERALIST NO. 25, at 156 (Alexander Hamilton) (Robert Scigliano ed., 2000).

88. THE FEDERALIST NO. 48, at 316 (James Madison) (Robert Scigliano ed., 2000).

89. See THE FEDERALIST NOS. 48, 51.

90. See *Youngstown*, 343 U.S. at 635, 645.

91. See *Hamdan*, 126 S. Ct. at 2798 (“[I]n undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.”); see also *id.* at 2800 (Kennedy, J., concurring in part) (“Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution’s three-part system is designed to avoid. It is imperative, then, that when military tribunals are established, full and proper authority exists for the Presidential directive.”).

The second problem the *Hamdan* opinions illustrate is that Justice Jackson's scheme obscures its own foundation in three ways. First, the scheme tacitly encourages a tendentious statutory reading. Second, by placing so much emphasis on statutory interpretation, it diverts attention from the constitutional position on which it rests. *Hamdan* did not avoid the constitutional question of executive authority by only presenting the statutory question so much as push the constitutional question into the background. Finally, as a scheme, it gives a false impression of having comprehended what is in fact a very complicated problem—protecting liberty.

The Court stressed that its decision vindicates the rule of law.<sup>92</sup> But, the rule of law relies on the judgment of men. Legal schemes and doctrines are abstracted from the particulars and stand in their place. In developing, refining, and manipulating such concepts, one is easily left with the impression of having comprehended and mastered the particulars. Judgment, however, comes from experience with particulars and from reflection on the aims of government and human action in general. Justice Jackson's scheme, as Justice Kennedy and the Court demonstrate, rests upon a judgment about executive power's threat to liberty but obscures this fact and the considerations upon which a sound judgment about protecting liberty depends.

Jay D. Dealy

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92. See *id.* at 2798 (majority opinion); see also *id.* at 2799 (Kennedy, J., concurring in part).