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More Real than Apparent: Separation of Powers, the Rule of Law, and Comparative Executive ''Creativity'' in *Hamdan v. Rumsfeld*

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I. Introduction

Rarely has the Supreme Court handed a ''wartime'' president a greater defeat, or human rights defenders a greater victory, than it did in *Hamdan v. Rumsfeld*.[1] A common view on the winning side is that the Supreme Court pretty much delivered a knockout blow.[2] The Court, first, kept the case, rejecting the argument that Congress had stripped it of jurisdiction to hear pending cases from Guantanamo Bay. Second, *Hamdan* declared that the president had no authority to constitute the special military tribunals he had set up to detain such ''enemy combatants'' as Salim Ahmed Hamdan, Osama Bin Laden's alleged driver and assistant. Finally, the majority stated that the commissions, as established, violated fundamental protections set out in Common Article 3 of the four Geneva Conventions of 1949. Not since *Youngstown Sheet & Tube Company v. Sawyer*[3] has any decision vindicated law over executive power in more convincing or historic fashion.

All this euphoria makes it easy to overlook the judgment's shortcomings. No one on either side should forget that the margin of victory was in effect no more than one vote. In a historic coincidence, the new chief justice had to recuse himself for having sat on the

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[1] 126 S. Ct. 2749 (2006).

[2] For an approving yet careful initial assessment, see David Cole, Why the Court Said No, 53 N.Y. Rev. of Books 41 (Aug. 10, 2006).

[3] 343 U.S. 579 (1952).

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panel that considered the case before the D.C. Circui[illegible]ne voted for nearly all the government's arguments.[4] The m[illegible]lf, moreover, pulled several punches. To its credit, it did at least allude to potential constitutional problems that would arise had it decided that Congress had intended to deprive the Court of jurisdiction. But it showed more caution on the merits.[5] Justice Stevens did not mention parallel constitutional problems that would have surfaced had the Court ruled that Congress authorized the tribunals.[6] Nor did the majority hold that the Geneva Conventions are either self-executing or provide individuals with judicially enforceable remedies.[7] The Court's prudence may have been a classic exercise of the ''passive virtues,'' a savvy maneuver to deflect negative reaction, or both. The prudence nonetheless comes at a cost, by concealing the strength of the judgment's foundations.

In truth *Hamdan*'s strengths are more real than they are apparent. In every important area, *Youngstown*, along with conventional legal analysis more generally, allows the Court to go at least as far as it did, and to go even further in the future. First, the Court vindicated separation of powers by requiring Congress' focused and deliberate involvement where at best inadvertence had gone before. Far from infringing upon the political branches, the Court did not go as far as its predecessors in exhorting Congress in particular to live up to its responsibilities. Second, the Stevens opinion vindicated the rule of law—above all international law—through its exceptionally close reading of humanitarian custom and the Geneva Conventions. It did not, however, go as far as historical materials would have allowed it, missing an opportunity to reassert the doctrine of self-execution. Finally, the Court again rebuked the executive for its creative attempts to assert a government of men and women rather than laws in the context of the ''war on terror.'' Yet, the Court would have been on stronger ground here, too, had it drawn on examples of executive overreaction in other countries that have confronted domestic or international terror.

This essay will consider *Hamdan* in each of these three areas: separation of powers; the rule of law, especially international law;

[4] Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005).

[5] Hamdan, 126 S. Ct. at 2773.

[6] *Id.* at 2774–75.

[7] *Id.* at 2793–94.

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and the lessons of executive creativity drawn from forei[illegible]-tions. In each instance, it will show that *Hamdan* rests upo[illegible]-tions that could support broader judicial intervention than the Court chose to exercise in the case itself. To make this argument is not to diminish the historic victory that *Hamdan* represents. It is, rather, to help forestall defeat in any of these three areas down a road that the ongoing fight against terrorism will doubtless take us.

II. Separation of Powers

Above all, the Supreme Court's decision in *Hamdan* defended separation of powers. The central part of the Court's ruling not only held that the president lacks authorization to create the military commissions, but also that Congress had prevented him from doing so in the Uniform Code of Military Justice (UCMJ).[8] For the majority, separation of powers arguments were less a means for the assertion of judicial power than an opportunity to fight for the involvement of the legislature, even in dire times. Indeed, the Court fought for legislative involvement with perhaps more obvious resolve than the legislature itself.

Hamdan's insistence on a genuine legislative role finds ample support in sources dating from the Founding through recent wartime precedent. That insistence will matter, however, only to the extent that Congress itself takes advantage of the Court's defense of legislative prerogatives, a point that the Court must now make with the same vigor it has in the past.

A. Hamdan*'s Insistence on Focused Legislative Involvement*

Hamdan's first skirmish on the merits established the majority's firm yet circumscribed stance on behalf of meaningful congressional involvement in addressing terrorism. This skirmish involved the claim that the president could establish the military commissions ''in cases of controlling necessity'' by virtue of Article II, the Executive Vesting Clause, the Commander-in-Chief Clause, or some combination. Claims that executive authority encompasses a broad array of ''inherent'' foreign affairs powers have gained some currency among academics and in this instance were enough to convince the D.C. Circuit.[9] For their part, Justice Thomas, joined by Justice Scalia, relied

[8] Uniform Code of Military Justice, art. 21, 64 Stat. 115, codified at 10 U.S.C. § 821.

[9] Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005).

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on that claim as a basis for presuming that the presid[illegible]ns in the area of national security merit substantial defere[illegible] a clear showing of a congressional prohibition.[10] The Court itself did not reject claims of inherent executive authority outright. The majority did, however, bypass it, stating that Congress, when it enacted the UCMJ and predecessor statutes, preserved the president's power to establish military commissions provided that such commissions comport with the laws of war. The Court nonetheless dealt the notion of inherent foreign affairs power a significant blow in two respects. More narrowly, it held that whatever independent power the president may possess to create military commissions in extraordinary circumstances, that power does not trump an act of Congress, pursuant to its own War Powers, that requires the president to observe humanitarian law. More broadly, neither *Hamdan* nor the previous Guantanamo cases[11] show any inclination to accept the president's assertion of military powers in the absence of legislative authorization.

Hamdan also went further than the Guantanamo cases by clarifying that separation of powers requires meaningful, not just arguable, congressional involvement. Justice Stevens made short work of the president's claims that authorization for the military commissions came either from the Authorization of the Use of Military Force (AUMF)[12] or the Detainee Treatment Act (DTA).[13] With regard to the AUMF, the Court assumed that the enactment acted as a declaration of war and ''activated the President's war powers.''[14] But the majority noted that ''there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth'' in the UCMJ.[15] Of course one could read the AUMF's language authorizing the president to take ''all necessary and appropriate''[16] force to respond to the September 11 attacks to do just that. However, Justice Stevens expressly relied on

[10] Hamdan, 126 S. Ct. at 2823–26 (Thomas, J., dissenting).

[11] Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004).

[12] Pub. L. No. 107-40, 115 Stat. 224, note following 50 U.S.C § 1541 (2001).

[13] Pub. L. No. 109-148, §§ 1001-06, 119 Stat. 2739, codified at 42 U.S.C. § 2000dd.

[14] 126 S. Ct. at 2775.

[15] *Id.*

[16] Pub. L. No. 107-40, *supra* note 12.

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the canon against implicit repeal; implicitly relied on [illegible]d canon favoring specific enactments over general ones; [illegible]y, also relied on the Nazi saboteur case, *Ex Parte Quirin*,[17] in which the Court looked beyond Congress' declaration of war when assessing the scope of presidential power.[18]

Justice Stevens made even shorter work of the DTA, which he read to reserve questions about the military commissions' comportment with the Constitution and federal laws.[19] Though different in particulars, the majority's rejection of these statutes as a source for presidential power shares a common theme. Absent ''a more specific congressional authorization''—one that indicates Congress truly considered granting the president expanded discretion either in general or in response to particular terrorism threats—the Court will not accept a shift in the established limitations under which all the branches have operated.[20]

Separation of powers, defined as genuine legislative involvement in national security matters that bear upon fundamental rights, is central to *Hamdan*'s consideration of the UCMJ, a congressional enactment. Justice Stevens emphasized the need for this involvement, forcefully yet subtly, when addressing how the president derives the authority to establish military commissions at all. Even today, one searches in vain in the United States Code for a clear or even unclear textual provision authorizing the president to establish military commissions. The closest candidate remains article 21 of the UCMJ, which merely states that the conferral of jurisdiction on courts-martial ''shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions. . . .''[21] In *Quirin* the Court controversially treated the predecessor version of this elliptical provision under the Articles of War as an authorization.

[17] 317 U.S. 1 (1942).

[18] *Id.* at 28–29.

[19] Hamdan, 126 S. Ct. at 2775.

[20] *Id.*

[21] Justice Stevens cites to article 21, while Justice Kennedy prefers to cite the codified provision, 10 U.S.C. § 821 (2000).

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The *Hamdan* Court therefore simply could have rel[illegible]re decisis. Or it could have argued that Congress, in [illegible]ne provision in the UCMJ after World War II, at least implicitly endorsed the *Quirin* reading.[22] It did neither. Instead, the majority pointedly refused to uphold *Quirin*'s treatment of authorization, instead reading the case to do no more than recognize ''what power, under the Constitution and the common law of war, the President'' previously had.[23] The *Hamdan* majority did not say whether the Constitution actually permitted the institution of military commissions prior to that congressional preservation. It did, however, stress that article 21 expressly requires military commissions to comply with the laws of war.[24] Once more, the Court refused to read more into an enactment than was plainly there, even in the face of presidential calls to err on the side of executive power.

Hamdan's preference for deliberative legislative action culminates in the Court's consideration of limits Congress placed upon the president's authority. In contrast to every enactment and provision considered up to this point, Congress actually had fulfilled the deliberation requirement in UCMJ article 36.[25] Article 36(b) further states that ''[a]ll rules and regulations made under this article shall be uniform'' with respect to courts-martial, military commissions, and other military tribunals ''insofar as practicable.''[26] Both Justice Stevens for the majority, and Justice Kennedy in his concurrence, read this text as an express uniformity requirement that in effect sets courts-martial as the baseline.[27] Both Stevens' and Kennedy's opinions also read the practicability determination to require independent judicial assessment rather than deference to the president. On these bases, the Court, critically, rejected the president's assertions that terrorism renders uniformity impracticable.

By contrast, the Court's prior analysis of article 36(a) demonstrates that the Court's search for legislative clarity will not always cut

[22] But see Neal K. Katyal and Laurence H. Tribe, Waging War, Deciding Guilt: Trying the Military Tribunals, 111 Yale L.J. 1259, 1288–89 (2002) (arguing that the UCMJ did not incorporate *Quirin*'s position on authorization).

[23] Hamdan, 126 S. Ct. at 2774.

[24] *Id.*

[25] 10 U.S.C. § 836 (2000).

[26] 10 U.S.C. § 836(b) (2000).

[27] Hamdan, 126 S. Ct. at 2790–93; *id.* at 2800–02 (Kennedy, J., concurring).

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against the president. *That* text calls for courts-martial and commissions to apply the procedural and evidentiary rules employed in federal district court ''as far as [*the president*] considers practicable.''[28] Both Stevens and Kennedy read this to expressly require deference to the president's determinations.[29] When Congress clearly commands deference to the president, the Court will likely defer. Conversely, when the two different provisions are juxtaposed, the contrast highlights the majority's grounds for making its own determination about uniformity where, as in article 36(b), Congress has simply set forth an objective standard.

Hamdan's focus on separation of powers also marks its approach to the somewhat different question of jurisdiction. This issue differs from the others, and not just because it precedes the merits. First, it directly implicates the Court's own role. Second, it is a concededly closer question, as witnessed by Justice Scalia's typically strong dissent[30] and a flurry of critiques that appear otherwise resigned to the Court's handling of the substantive issues.[31] Despite these differences, the Court again declined to rely on any constitutional or other argument, other than congressional action or inaction—in this instance the DTA. Citing ''ordinary principles of statutory construction,'' Justice Stevens drew a negative inference from the act's failure to grandfather habeas petitions pending in challenges relating to detention in Guantanamo from its provisions stripping federal courts other than the D.C. Circuit of jurisdiction. As the majority noted, this omission contrasts with Congress' express decision to extend jurisdiction provisions to pending cases challenging final determinations from military commissions and combat status review tribunals.[32]

The Scalia dissent nonetheless rightly noted that the provision omitted from the grandfather clause, with its seeming absolute statement that ''no court, justice, or judge'' shall have jurisdiction to hear

[28] 10 U.S.C. § 836(a) (2000).

[29] 126 S. Ct. at 2791; *id.* at 2801 (Kennedy, J., concurring).

[30] *Id.* at 2810 (Scalia, J., dissenting).

[31] See, e.g., Ramesh Ponnuru, Slate's Hamdan Hoax: Justice Stevens just can't be defended, National Review Online (July 28, 2006), at http://article.nationalreview.com/?q=ZDAxOTBjZmYwYmM4NGEwMDQ2MDliYWRiY2U4NTk2ZjU=&c=1 (criticizing the majority's reading of the DTA).

[32] Hamdan, 126 S. Ct. at 2769.

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Guantanamo cases, can easily be read to preclude the Court's jurisdiction over even the pending *Hamdan* case.[33] It is difficult to imagine the Republican Congress passing the DTA desiring much else. That said, the Court's conclusion remains faithful to the more fundamental conception of separation of powers that characterizes its handling of the merits. The Court simply will refuse to interpret Congress' enactments in a way that aggrandizes the executive branch even in the context of terrorism, so long as it leaves any plausible ambiguity. Such ambiguity encompasses no text, unclear text, or, in the DTA, exceptionally sloppy text.

B. Deeper Foundations

The aspects of *Hamdan* considered so far read like a technical exercise in statutory interpretation. Yet the context for the exercise is thoroughly constitutional. The Court did not impose anything as mechanical as a clear statement rule, but a refusal to countenance radical transfers of power to the president without some fairly convincing showing of congressional approval runs through the majority and concurring opinions. As noted, this effective requirement in turn springs directly from an inclusive vision of separation of powers, one squarely at odds with that put forward by the Bush administration. Despite the specter of terror, the Court's vision, among other things, looks skeptically at executive claims of independent power, preserves traditional notions that the Constitution divides power not just to promote efficiency but to safeguard liberty, and sees broad-based democratic participation as ultimately serving efficiency in any case. Far from activist, the Court's increasingly clear post-9/11 conception is profoundly conservative. In each regard, the Court's affirmation of the doctrine reflects conventional sources of text, history, structure, custom, and precedent. These bases in turn support *Hamdan*'s analysis of the president's authority throughout, and would have and likely will allow the Court to go even further.

Start with the president's now apparently receding contention that he possesses wide-ranging foreign affairs authority by virtue of the Executive Vesting Clause, the Commander-in-Chief Clause, or sources less clear. The majority's evident skepticism, and even

[33] *Id.* at 2810 (Scalia, J., dissenting).

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Justice Thomas's cautious deployment of the claim, at [illegible]t an appropriate realization that there is no there here. As [illegible]f textual analysis, these clauses support the substantial unenumerated powers attributed to them only if overread in a manner that would make the New Deal Court's handling of the Commerce Clause seem modest. More conclusively, neither the Founding nor eighteenth century history more generally provides any but the most isolated evidence to support the idea that the Constitution confers upon the president broad, non-textual grants of foreign affairs or military power.[34] As rightly noted in *Youngstown*, a case that presidentialists tend to avoid, neither custom nor precedent provides assistance for the executive's claim.[35]

Hamdan makes clear that the ''war on terror'' is going to change the way the Court treats the president's claims of direct constitutional authority. As in *Rasul* and *Hamdi*, the *Hamdan* majority looked exclusively to congressional authorization as sanction for presidential action. *Hamdan*, moreover, went further in its repeated presumption against ambiguous delegation, an interpretive stance in direct opposition to both the dissent's contrary presumption and to the dissent's corresponding acceptance of the executive's broad claims of direct constitutional authority. As seen, the Court even went so far as to hold that whatever military authority the president possesses does not trump Congress' valid authority of military matters. The constitutional underpinnings that allowed the Court to do all this could have permitted it to reject the executive's broad claims outright. Though such a statement likely would have appeared as dicta, it would have had the salutary effect of rendering explicit the Court's implicit skepticism. For now, it will suffice that *Hamdan*'s unstated position remains clear enough.

Turn now to *Hamdan*'s presumption against unclear delegation. The Court's doctrinal stance reflects and confirms a functional approach to separation of powers that also rests firmly on conventional interpretive bases. Contrary to many of the judges and commentators who argue for expansive executive authority, neither constitutional text, structure, history, nor even custom suffices to

[34] See Curtis A. Bradley & Martin S. Flaherty, Executive Power Essentialism and Foreign Affairs, 102 Mich. L. Rev. 545 (2004).

[35] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

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resolve ''concrete problems of executive power as they actually present themselves.''[36] Nowhere is this more true than in the history of the Founding, the era presidential advocates assert affords the best guidance. The Founding, in tandem with other interpretive sources, does provide guidance, but at a very general level concerning the functions or purposes of separation of powers.[37] One of these is the efficiency born of the division of labor that the doctrine of separation of powers envisions.[38] Justice Thomas's dissent correctly alludes to this functional goal when noting the Founding view that a single executive would enjoy the advantages of energy, secrecy, and dispatch in discharging its functions.[39] But that is only one part of the story. Founding sources indicate the Founding generation viewed separation of powers as a means to create a balance among the government's branches in the service of liberty—which that generation, in turn, valued no less, and probably much more, than efficiency. No statement reflects this concern better than Madison's famous dictum that ''the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.''[40]

It follows as a general matter that Justice Thomas's concerns for efficiency should at least be offset against the benefits that a balance of power among the branches yields, at least absent some specific assignment of authority to one branch or another. It follows further that concern for such a balance cuts against any presumption that a particular branch wields exclusive power in a contested area, particularly one in which fundamental liberty is at stake. Viewed in this light, Justice Jackson's concurrence in *Youngstown*, in which he created his famous framework, keyed to Congress' specific approval, disapproval, or failure to act with regard to presidential assertions, can be understood to promote this functional ''balance of power'' inquiry.

[36] *Id.* at 634 (Jackson, J., concurring).

[37] See Martin S. Flaherty, The Most Dangerous Branch, 105 Yale L.J. 1725 (1996).

[38] *Id.* at 1781–95.

[39] Hamdan, 126 S. Ct. at 2823–24 (Thomas, J., dissenting).

[40] The Federalist No. 47, at 269 (James Madison) (Clinton Rossiter ed., 1961); see Flaherty, The Most Dangerous Branch, *supra* note 37, at 1766–68.

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Hamdan's preoccupation with manifest congressi[illegible]n reflects these same functional concerns. Given the majori[illegible]s about the president's direct constitutional powers, its approach necessarily focuses on specific legislative authorization, and with it, any specific limitations. Once again, however, the foundation could sustain a greater structure. As Justice Kennedy's concurrence demonstrates, the majority could have easily made *Youngstown* the touchstone for its analysis. In particular, Justice Stevens could have stressed that its reading of the UCMJ placed the president's authority at its ''lowest ebb.''[41] As it is, *Hamdan*'s apparent requirement of specific congressional consideration of a matter outside the president's exclusive control bodes ill for an array of executive claims based upon general authorizations such as the AUMF. As has been noted, *Hamdan* almost certainly has shifted the burden onto those who argue that the AUMF authorizes the NSA phone-tapping program.[42] More express reliance on *Youngstown* would nonetheless have served to make this burden even weightier.

Nor is this all. Eighteenth-century sources indicate that, alongside balance and efficiency, the Founding generation came to view separation of powers as broadly advancing democratic accountability. Such accountability was not seen as the exclusive province of a particular branch, but as a joint conception that mandated participation of both Congress and the president outside their clearly exclusive domains, the better to promote deliberation and reflect genuine societal commitments.[43] Presidential champions such as Justice Thomas, however, argue that when it comes to national security, the need for governmental efficiency matters more, and that any doubts should be resolved on behalf of the executive boasting secrecy, dispatch, and vigor. Not only is this position widely

[41] Hamdan, 126 S. Ct. at 2800 (Kennedy, J., concurring) (citing Youngstown, 343 U.S. at 637).

[42] The Department of Justice provided a controversial defense of the NSA spying program in a letter to the majority and minority leaders of the Senate and House Intelligence Committees dated December 22, 2005 and available at www.nationalreview.com/pdf/12%2022%2005%20NSA%20letter.pdf. For a response from leading academics, see Beth Nolan, Curtis Bradley, David Cole, et al., On NSA Spying: A Letter to Congress, 53 N.Y. Rev. of Books, Feb. 9, 2006, available at http://www.nybooks.com/articles/18650.

[43] See Flaherty, The Most Dangerous Branch, *supra* note 37, at 1767–68.

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assumed, it probably stands at the core of pro-executive arguments in the wake of September 11. Yet the idea of joint accountability and greater democratic participation furnishes a basis to challenge that assumption. And indeed, many from within the national security establishment have done just that, including JAG lawyers who question presidential assertions on power[44] and NSC veterans who argue that greater democratic input facilitates better security planning.[45]

Neither the *Hamdan* majority, nor even Justice Kennedy, builds upon this particular foundation. Justice Breyer's brief concurrence, however, gets at the conclusion almost exactly. As he puts it: ''Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so.''[46]

III. The Rule of (International) Law

After separation of powers, *Hamdan*'s significance lies in its defense of the rule of law, in this case, of international law. Such a defense could not have been more timely in light of numerous assaults, including: recent academic critique stressing the limits of international law;[47] the D.C. Circuit's dismissive treatment of Hamdan's international law claims below;[48] and most of all, the Bush administration's ongoing assertions that international law has little or no applicability to the ''war on terror,'' aimed at creating a ''law free zone'' in which executive discretion would be absolute. Here as before, *Hamdan* achieved its broader result in a narrow fashion. Technically, all the majority did was hold that Congress adopted one substantive set of limits on the president's power to establish

[44] See Adam Liptak, The Struggle for Iraq: Procedures; U.S. Barred Legal Review of Detentions, Lawyer Says, N.Y. Times, May 19, 2004, at A14; Josh White, Military Lawyers Fought Policy on Interrogations, Wash. Post, July 15, 2005, at A1.

[45] See James E. Baker, United States Court of Appeals for the Armed Forces, National Security Process and a Lawyer's Duty: Remarks to the Senior Judge Advocate Symposium, 173 Mil. L. Rev. 124, 130 (2002).

[46] Hamdan, 126 S. Ct. at 2799 (Breyer, J., concurring).

[47] Jack L. Goldsmith & Eric A. Posner, The Limits of International Law (2005).

[48] Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005); but see *id.* at 44 (Williams, J., concurring).

military commissions, and that these came from Common Article 3 of the Geneva Conventions of 1949. But the Court nonetheless took international law seriously in two regards. Most importantly, it took it seriously in itself, interpreting the conventions' protections carefully and without deference to radical interpretations put forward by the president. In addition, the majority paradoxically used the limitations of international law to permit Congress to render the conventions justiciable. Once again, *Hamdan*'s conclusions rest upon compelling bases, international and domestic, that could have vindicated international law even more extensively, and may yet have an opportunity to do so.

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A. Taking International Law Seriously

Overstatement aside, the Court did not quite hold that ''[t]he procedures adopted to try Hamdan also violate the Geneva Conventions.''[49] Rather, the majority decided only that article 21 of the UCMJ incorporates these treaties by conditioning the establishment of military commissions on adherence to the laws of war, which by the time of the UCMJ's passage included the four Geneva Conventions. *Hamdan* in other words did not determine whether the treaties, which the United States duly ratified, would themselves have given Hamdan a defense as self-executing ''supreme Law of the Land''[50] in the absence of Congress' incorporation. Even so, Congress' statutory incorporation of these norms requires judges to interpret treaties and, where the incorporation so extends, to apply customary international law, on the merits. And this the Court did with appropriate respect and care.

Not the first, but by far the most important, issue involved the applicability of Common Article 3. As was once known only to specialists, the four Geneva Conventions provide extensive protections to individuals in cases of armed conflict ''between two or more of the High Contracting Parties,'' that is, sovereign nations that have ratified the treaties.[51] By contrast, Common Article 3, common to all

[49] Hamdan, 126 S. Ct. at 2793.

[50] U.S. Const. art. VI, cl. 2 (''[A]ll treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.''); see also Breard v. Greene, 523 U.S. 371, 375 (1998) (''[T]reaties are recognized by our Constitution as the supreme law of the land.'').

[51] See, e.g., Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 136.

four conventions, provides lesser but still fundamental protections to persons no longer taking part in hostilities: "[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."[52] The administration correctly contended that since al-Qaeda was not a sovereign nation and so not a High Contracting Party, the full scope of the convention's protections did not apply. But it also put forward the radical argument that Common Article 3 did not apply since al-Qaeda's terrorist attacks were international in character. A majority of the D.C. Circuit panel below, including then-Judge Roberts, accepted this argument.

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With rigor and economy, the majority exposed this government's position for the sophistry it is. Given the extensive protections that the conventions set out to apply to conflicts between sovereigns that have ratified them, reasoned Justice Stevens, Common Article 3's baseline protections apply to any conflicts that do not rise to that level. Textually, the majority noted that "international" has been a term of art since first coined by Jeremy Bentham, literally meaning "between countries."[53] A conflict not of an international character thus simply means hostilities not between two nation states, rather than conflict entirely within national borders. The Court confirmed its interpretation with the persuasive commentaries put out by the International Committee of the Red Cross, the body the conventions accord distinctive implementation powers. Likewise, Justice Stevens found further confirmation for his opinion in the holdings of international tribunals, including the International Court of Justice and the International Tribunal for the Former Yugoslavia.[54]

Not only did the Court interpret Common Article 3 with care, it also sustained its authority "to say what the law is."[55] By contrast, Justice Thomas's dissent argued that the Court had a "duty" to defer to the president's interpretation of the treaty both as a general matter and as a function of his role as commander in chief with regard to treaties dealing with armed conflict. His proposed standard, moreover, approached *Chevron* deference insofar as an executive interpretation need only be "reasonable" or "plausible" to be followed. Not

[52] *Id.*

[53] Hamdan, 126 S. Ct. at 2796.

[54] *Id.* at 2794–96.

[55] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

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surprisingly, he concluded that the president's argume[illegible]e "war on terror" was "international" and so beyond th[illegible]f Common Article 3 was sufficiently plausible notwithstanding the textual, structural, persuasive, and comparative evidence to the contrary.[56] For his part Justice Stevens did not address the deference argument expressly, leaving the Court's action to speak for itself.

The Court dealt with Common Article 3's specific requirements more tersely, in part because they are so basic. The violation on which the majority focused centered on the condition that persons be tried "by a regularly constituted court." Relying on analogous treaty provisions and again on the ICRC's commentaries, Justices Stevens and Kennedy both concluded that "[t]he regular military courts in our system are the courts-martial established by congressional statutes."[57] In the light of historic practice, at most the president may convene a commission only when practical need justifies divergence from a court-martial, and no such need had been demonstrated.[58] Justice Stevens argued that the commissions also violated Common Article 3's requirement that the court in question afford "all the judicial guarantees, which are recognized as indispensable by civilized peoples."[59] Of these, he argued, the commissions failed to observe an accused's right to be present at trial and to be privy to the evidence against him or her.[60] This contention, however, commanded only a plurality. Justice Kennedy decided against joining this part of the Stevens opinion—first, because of the possibility that appellate procedures might cure these defects and, second, due to his reluctance to draw upon treaties that the United States has declined to ratify (here Protocol I to the Geneva Conventions), to which Justice Stevens referred.[61]

The other way that the majority took international law seriously was to deem it justiciable. In *Johnson v. Eisentrager*, the Court rejected a claim, made by Nazis tried before a U.S. military tribunal convened in China, that their trial violated the Geneva Conventions on the

[56] Hamdan, 126 S. Ct. at 2823 (Thomas, J., dissenting).

[57] *Id.* at 2797; *id.* at 2803 (Kennedy, J., concurring).

[58] *Id.* at 2804 (Kennedy, J., concurring).

[59] *Id.* at 2795–97.

[60] *Id.* at 2798 & n.67.

[61] *Id.* at 2809 (Kennedy, J., concurring).

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ground that it impermissibly deviated from a court-m[illegible] a footnote, however, *Eisentrager* also stated that the only [illegible] the Geneva Conventions contemplated were diplomatic and political in any case.[63] The Court immediately distinguished this potential hurdle. For the sake of argument, it assumed without deciding that the 1949 conventions, like their 1921 predecessor considered by the *Eisentrager* Court, would not be a basis for judicial enforcement ''absent some other provision of law.''[64] But here, Justice Stevens argued that the ''other provision'' was article 21 of the UCMJ, which conditioned its recognition of authority regarding commissions on compliance with the laws of war. Congress, in short, provided a judicially enforceable remedy for the Geneva Conventions by limiting their authority to adherence to the treaties as a matter of domestic law.[65]

B. *Stronger Foundations*

Hamdan reflects the Court's growing sense of ownership over international law. Both globalization generally, and national security issues more specifically, will continue to provide cases that require interpretation of international legal materials to resolve truly fundamental issues, rather than technical questions about airline liability or illegal drug markets, however important.[66] With questions of basic rights and presidential authority inevitably comes greater focus and

[62] 339 U.S. 763 (1950).

[63] *Id.* at 789 n.14.

[64] 126 S. Ct. at 2794.

[65] If anything, Justice Stevens took customary international law of warfare even more seriously than the treaty law of the Geneva Conventions. His opinion in fact devotes its initial and more extensive efforts to demonstrate that the UCMJ's law of war limitation on presidential action precludes the vague conspiracy to commit terrorist acts for which Hamdan was charged. This effort, however, commanded only a plurality. Hamdan, 126 S. Ct. at 2775–86 (opinion of Stevens, J.). The justice's comprehensive effort to articulate often imprecise international custom nonetheless provides further evidence of the Court's commitment to take international law seriously.

[66] Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 126 S. Ct. 1211, 1224–25 (2006) (interpreting the UN Convention on Psychotropic Substances); Eastern Airlines, Inc. v. Floyd, 499 U.S. 530 (1991) (interpreting the term ''lésion corporelle'' in the (Warsaw) Convention for the Unification of Certain Rules Relating to International Transportation by Air).

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deliberation. While the majority opinion reflects these qua[illegible]-ever, the bases for its conclusions once more are strong[illegible]e arguments it offered, and point to broader conclusions. Entirely conventional methods of treaty interpretation confirm the Court's interpretation of Common Article 3 with almost embarrassing clarity. Yet they also challenge the assumption that the Geneva Conventions only contemplate political enforcement. Beyond the substance of the treaties, international sources combine with Founding understandings about international law to sustain the Court's authority to decide the treaty issues in the first place. The point applies to both the majority's refusal to defer to the executive's interpretations and to its determination that the Geneva Conventions are justiciable.

Nowhere does *Hamdan* make a more convincing case than its holding that Common Article 3 applies in armed conflicts generally. Its persuasiveness rests not only upon an array of sources concisely presented, but also upon the conclusion itself, which reflects as close to a consensus interpretation as is possible outside the White House. At one point, however, Justice Stevens highlighted that one purpose of the provision was to provide protections in civil wars. That mention, fine so far as it goes, could be misread to complement a favorite administration argument that the article was meant to apply to civil wars alone. Although the opinion rejected this view, it did so by reference only to the deletion of a proposed text that would have expressly tied the provision to civil wars, religious wars, and colonial conflicts, wrongly reading the deleted text as a limitation itself.[67]

A broader view of the treaties' context would leave less doubt. The origins of Common Article 3 came from the ICRC's proposal to apply the full protections contemplated for the conventions to conflicts ''not of an international character, especially civil wars, religious war, and colonial conflicts.''[68] This language was widely understood to mandate coverage in a wide range of conflicts, including insurrections, rebellions, the break-up of states, and brigandage.[69] Various national delegations balked at the prospect of full protection

[67] 126 S. Ct. at 2796.

[68] Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 136.

[69] See Jean Pictet, Commentaries of Geneva Conventions of 12 August 1949 (1952), and International Committee of the Red Cross, Commentary on Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987).

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in light of such exceptionally broad coverage. The solution there became the protection of more basic rights, while retaining the area of coverage to all armed conflict.[70] Nor, for that matter, would an emphasis on civil war support a conclusion that the article applied only to conflicts within national boundaries. As the *travaux preparatoires* make clear, the paradigmatic civil war on the minds of the delegates shaping the treaties was the Spanish Civil War. While the actual conflict occurred within Spain's borders, the conflict famously attracted fascist and anti-fascist men and materiel from around the world, including the Abe Lincoln Brigade from the United States.[71]

A more thoroughgoing use of international legal materials might also have kept Justice Kennedy with the rest of the majority on the issue of Common Article 3's substantive requirements. Recall that the justice defected based on uncertainty over whether a right to be present at trial and a right to review relevant evidence qualified as fundamental protections ''recognized by civilized peoples.''[72] That uncertainty stemmed from his concern that a principal source for recognizing these rights was article 75 of Protocol I to the Geneva Conventions, a treaty that the United States has not ratified.[73] Yet, other treaties the nation has ratified do recognize the rights at issue, above all the International Covenant on Civil and Political Rights.[74] So too do measures that the U.S. has supported in the UN Security Council, including: the Statute of International Criminal Tribunal for the Former Yugoslavia[75] and the Statute of the International Criminal Tribunal for Rwanda.[76]

[70] *Id.*

[71] See ICRC Commentaries of Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field 20, 12 August 1944, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (''Geneva I'').

[72] Hamdan, 126 S. Ct. at 2809 (Kennedy, J., concurring).

[73] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (''API''), art. 75, June 8, 1977, 1125 U.N.T.S. 3.

[74] International Covenant on Civil and Political Rights, arts. 9 & 14, 16 December, 1966, 21 U.N. GAOR Supp. (No. 16) at 52, 999 U.N.T.S. 171 (hereinafter ICCPR).

[75] Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 21, S/Res/827, May 25, 1993, U.N. Doc. S/25704 at 36, annex (1993).

[76] Statute of the International Criminal Tribunal for Rwanda, art. 20, S/Res/955, Nov. 8, 1994, U.N. Doc. ITR/3/REV.1 (1995).

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Absent specific statutory repeal, moreover, the relevant question is not whether the nation has declined to recognize the rights, but rather the content of the international law that the UCMJ incorporates. On this point, widely-ratified treaties that the U.S. either would not have an opportunity to join, such as the European Convention for Human Rights,[77] or (as with Protocol I) simply has declined to join, such as the American Convention on Human Rights,[78] are just prominent indications of a global consensus showing that ''civilized peoples'' see the rights at issue as essential. For this reason, President Bush's own former legal advisor at the State Department concludes that article 75 of the unratified Protocol I had achieved the status of customary international law, which requires that type of recognition that Common Article 3 demands.[79]

However well supported, the Court's interpretations of international law matter only so far as it gets to do the interpreting in the first place. The majority asserted this authority both implicitly, by declining to defer to the president's treaty interpretations, and expressly, by finding that the Geneva Conventions are justiciable. International law supports these determinations as well. And in these areas especially, domestic foreign relations law considerations also point to judicial enforcement of treaty obligations absent provisions to the contrary.

The more conventional the sources, the more strongly foreign relations law and international law point away from judicial deference. Or at least they do when deference to the executive interpretations would cause the nation to shirk its international legal obligations or otherwise become a global outlier. Text, evident Founding understandings, and early practice, among other things, confirm this conclusion. First, nothing in constitutional text suggests

[77] Convention for the Protection of Human Rights and Fundamental Freedoms (as amended), arts. 5 & 6, 213 U.N.T.S. 222.

[78] American Convention on Human Rights, arts. 3, 5, 8 & 25, Nov. 21, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143, 9 I.L.M. 99 (1969).

[79] The U.S. regards ''the provisions of article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.'' William Taft IV, The Law of Armed Conflict After 9/11, 28 Yale J. Int'l L. 319, 322 (2003). See Brief of the Association of the Bar of the City of New York and the Human Rights Institute of the International Bar Association as Amici Curiae at 14–19, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184).

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that the president's views on international law should be privileged.[80] To the contrary, any need to apply law in the course of judicial proceedings falls in the very core of *Marbury*'s fundamental holding.[81] Second, an overwhelming mass of historical sources demonstrate that a critical factor that led to the federal constitutional convention was the nation's need to provide domestic judicial enforcement of its international obligations to protect individual rights—specifically, contract and property rights guaranteed to British subjects under the 1783 Treaty of Paris, which ended the Revolutionary War. Among other things, the sources make abundantly clear that this concern led directly to the Supremacy Clause proclaiming treaties to be the ''supreme Law of the Land'' and to the resulting doctrine of self-execution.[82] It also led to the Supreme Court's recognition of the *Charming Betsy* canon, which holds that a statute should not be interpreted to violate international law if another construction is possible.[83] Third, early practice confirmed the expectation that the courts would apply international law independently, free from executive interference. As fresh research by Professor David Sloss shows, between 1789 and 1838, the Supreme Court considered nineteen individual rights claims under treaties in which the U.S. government argued against the claimant on the merits. Despite the executive's position, the Court held for the aggrieved party against the government fourteen times and was evenly divided in another two.[84]

Hamdan's return to first principles, moreover, appears to be the way of the future. Despite various and recent statements in dicta paying lip service to the idea of judicial deference in foreign affairs,

[80] This is a different matter from the president lawfully terminating a treaty.

[81] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173 (1803).

[82] For accounts summarizing this near consensus view, see Martin S. Flaherty, History Right?: Historical Scholarship, Original Understanding, and Treaties as ''Supreme Law of the Land,'' 99 Colum. L. Rev. 2095 (1999); Carlos Manuel Vazquez, Laughing at Treaties, 99 Colum. L. Rev. 2154 (1999). But see John C. Yoo, Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding, 99 Colum. L. Rev. 1955 (1999).

[83] Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 82 (1804).

[84] David Sloss, Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective, 62 NYU Annual Survey of Am. L. (forthcoming 2006), available at http://ssrn.com/abstract=889924.

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the Court this past term further staked out its domain in *Sanchez-Llamas v. Oregon*.[85] There, the justices declined to accord deference to the International Court of Justice and rejected a claim that the Vienna Convention on Consular Relations, a self-executing treaty signed and ratified by the United States, foreclosed use of the state procedural default rules to bar domestic judiciaries from resolving the underlying treaty issues on the merits.[86] The Court's specific interpretation is debatable. The decision, however, helps demonstrate that *Hamdan*'s refusal to defer is not idiosyncratic. Chief Justice Roberts, writing for the majority, engaged in extended and careful international law analysis, as did Justice Breyer in dissent.[87] They did so, moreover, on their own terms, rather than following the lead of the ICJ, the president, or any other pretender to assertions of deference.

The same, likewise understated, combination of international law and internationalist domestic law would have permitted the Court to speak with far greater confidence concerning justiciability. The analysis here begins on the international side. The majority should not have assumed, with the *Eisentrager* Court, that the Geneva Conventions themselves contemplated a scheme of diplomatic and political enforcement exclusively, or even that such a scheme would preclude domestic judicial enforcement absent some other provision of law. At worst, all the treaties do is leave the decision regarding whether a sovereign government should add complementary domestic remedies or defenses to the sovereign national government. In this, the treaties reflect an older conception of international law, which generally did not address how a domestic legal system should provide remedies or otherwise be ordered.[88] Even here, though, our nation's early peacetime treaties often cut the other way, as exemplified by the Treaty of Paris itself, which clearly contemplated some form of domestic judicial enforcement, even if its express terms did not so mandate.[89]

[85] Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006).

[86] *Id.* at 2674.

[87] *Id.* at 2675–88 (Roberts, C.J., concurring); *id.* at 2691–09 (Breyer, J., dissenting).

[88] Bradley & Flaherty, Executive Power Essentialism, *supra* note 34, at 570–71.

[89] Article 4 of the treaty stated that "creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all bona fide debts heretofore contracted," while article 6 declared that there "shall be no future confiscations made nor any prosecutions commenced" against former loyalists.

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Today, however, a requirement that states provide meaningful domestic remedies for individual treaty rights has become a general feature of international law, both as treaty and arguably as custom. In the aftermath of Word War II, the Universal Declaration of Human Rights proclaimed: ''Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.''[90] The ICCPR, which the U.S. has ratified, calls for states to ensure effective remedies before ''competent judicial, administrative or legislative authorities'' and further calls on states ''to develop the possibilities of judicial remedy.''[91]

Combine modern international law's general orientation toward effective and ideal remedies with U.S. law's similarly directed historic stance. Here, at worst, one might concede that the Congress that passed the UCMJ likely did not contemplate domestic judicial enforcement. Even here, the Court's post-World War II considerations of individual claims under the Geneva Conventions' predecessor treaty in *In re Yamashita*[92] and, for that matter, in *Eisentrager* itself suggest otherwise. Congress in 1950 had these precedents before it and offered no statutory language precluding judicial enforcement.

But even assuming no clear legislative guidance one way or the other, an interpretation permitting judicial enforcement better comports with traditional domestic law principles in at least two regards. For one, it accords with the general Founding commitment of vindicating individual treaty claims, as reflected in text and early practice.

The Definitive Treaty of Peace (1783), available at http://www.yale.edu/lawweb/avalon/diplomacy/britain/paris.htm.

[90] Universal Declaration of Human Rights, art. 8, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

[91] ICCPR, art. 2(3)(b), *supra* note 74. Notwithstanding this provision, the U.S. had announced a declaration to the effect that the ICCPR shall not be self-executing. See 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992). This does not change my general point: that international law now generally requires effective domestic remedies of international rights claims and further calls for judicial remedies as the best means toward this end.

[92] In re Yamashita, 327 U.S. 1 (1946). As Justice Kennedy noted, that case also dealt with a claim challenging military commission proceedings, yet there ''the Court likewise considered . . . the merits—without any caveat about remedies under the Convention—a claim that an alleged violation of the 1929 Convention 'establish[ed] want of authority in the commission to proceed with the trial.''' *Id.* at 23–24 (citation omitted).

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This point applies with additional force given that *Ha*[illegible]d on the treaties merely to impose a defense to an illeg[illegible]y way of a habeas petition, a reliance on international law that could scarcely be more modest or circumscribed. For another, interpreting the UCMJ to allow justiciability further comports with the related commitment to follow international law more generally. In this instance, that commitment could be realized through an interpretation that better reflects international law's basic stance in favor of domestic, and ideally, judicial remedies. This second point itself applies with added force given a now largely forgotten international law principle that called for a ''denial of justice'' claim where a nation could not or would not vindicate its citizens' interests through diplomatic means.[93] Since no nation or organization exists to assert the rights of someone in Hamdan's position, his claims fall squarely within this historic paradigm.

IV. Comparative Law

The *Hamdan* decision finds further support in still one more significant source, one on which it barely relied. This source is comparative law. As we have seen, separation of powers principles more than justify the Court's treatment of authorization. International law readily supports the majority's consideration of the rights at issue. Comparative law adds further support for *Hamdan*'s decision to reject deference to the executive as a constitutional mandate not just in treaty interpretation, but in foreign affairs generally.

The battle over comparative law was fought mainly on the margins and between the lines. Justice Thomas's dissent takes the Court to task for hamstringing the president.[94] Outside the Court, so too did Professor Yoo, who bemoaned what the decision would do to undermine the president's ''creativity'' in fighting terrorism.[95] Of course, the first response to these arguments must be that separation of powers and the rule of law in large part exist to check overly creative executives. This argument, however, leaves unchallenged the basic assumption that the executive should get a substantial

[93] See Thomas H. Lee, The Safe-Conduct Theory of the Alien Tort Statute, 106 Colum. L. Rev. 830, 881 n.265 (2006).

[94] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2823–26 (2006) (Thomas, J., dissenting).

[95] Adam Liptak, The Court Enters the War, Loudly, N.Y. Times, July 2, 2006, at § 4, 1.

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benefit of any doubt in the application of these doctr[illegible] it knows more about foreign affairs, especially security, a[illegible] all the global terrorist threat. But a survey of other jurisdictions suggests that there is another side to this issue. Faced with terror, governments around the world tend to overreact and trample basic liberties. Overreaction may also lead to policies that are easy, sloppy, and counterproductive. For all these reasons, future courts would do well to follow Justice Jackson's example in *Youngstown*, look abroad, and decline the invitation of automatic deference to the president expressly.

A. Executive ''Creativity'' and Terrorism

Neither Justice Stevens nor Justice Kennedy showed any inclination to hold the judiciary back in the face of the executive's foreign affairs competence. Unlike the questions concerning authorization and rights, the issue of possible deference did not receive its own rubric, section, or analyses. Instead, the matter runs through the opinions, cropping up at points in which opportunities for the Court to defer arose and were bypassed. Having agreed that the UCMJ requires some practical justification for the creation of military commissions, the majority and concurrence refuse to take the executive's mere establishment of them as a fulfillment of this requirement.[96] As noted, both opinions similarly refuse to give any apparent weight to the president's imaginative interpretation of Common Article 3.[97]

Neither the Stevens nor Kennedy opinion defends its failure to defer. Where they refer to deference at all, the discussion relates purely to a statutory duty to defer imposed by Congress, not a general constitutional imperative. In this regard, each justice notes that UCMJ article 36(a) appeared to call for genuine deference to a presidential determination that practical considerations justify courts-martial and military commissions diverging from procedures in federal district courts.[98] Each opinion also mentioned in passing that ''some deference'' would be owed an actual presidential attempt to justify commission rules diverging from courts-martial under article 36(b).[99] At no point, however, did either one refer to the

[96] Hamdan, 126 S. Ct. at 2790–93; *id.* at 2800–02 (Kennedy, J., concurring).

[97] *Id.* at 2795–97; *id.* at 2802–05 (Kennedy, J., concurring).

[98] *Id.* at 2791–92; *id.* at 2807–08 (Kennedy, J., concurring).

[99] *Id.* at 2791 n.51; *id.* at 2801 (Kennedy, J., concurring).

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possibility that the executive's peculiar foreign affairs e[illegible]s a constitutional matter, should influence the extent of st[illegible]erence or the adequacy of the president's justifications. With regard to this kind of deference, the Court was simply silent.

This silence places *Hamdan* on one of two possible places along an analytic spectrum. At one end is an acknowledged constitutional duty to accord the executive some measure of deference in foreign affairs matters. Next comes a silent acceptance of this imperative. Silence in this instance may be useful should the Court determine that the relevant legal materials rebut any claim of deference, but do not do so compellingly, so any requirement to defer is best left unstated. The point after this is silent rejection of any requirement to give special weight to presidential determinations. Silence here might be advisable to keep on board a justice who is skeptical of the doctrine, but does not yet want to announce its demise in light of previous dicta. The point after this on the spectrum is an express rejection of deference. Beyond this point, finally, lies a reverse presumption, such as the application of a higher level of scrutiny, in which the president must offer a higher than usual justification for his actions. Without more, *Hamdan*'s silence may indicate simply that deference is alive and well, but that separation of powers and international law were strong enough to trump it in this case. Or it might mean that deference itself is in trouble.

Hamdan's context gives reason to suppose that at least five justices are not in the mood to err on the side of the president. First, the Court's silence comes in the face of Justice Thomas's dissent, which speaks of "our duty to defer to the Executive's military and foreign policy judgment," based upon various textual grants of foreign affairs authority to the president, quotations from the Founders, the executive's structural advantages of decisiveness, and dicta culled from case law.[100] Second, the Court's silence extends to its own previous dicta, in cases where it had alluded to the need to defer in matters such as treaty interpretation.[101] Third, *Hamdan* comes in

[100] *Id.* at 2825, 2823–26 (Thomas, J., dissenting).

[101] See, e.g., El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999) (quoting Sumitomo Shoji American, Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982)). See also United States v. Stuart, 489 U.S. 353, 369 (1989) (same); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.").

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the wake of the attacks of September 11. Whether President Bush qualifies as a war-time commander-in-chief, his actions respond to a grave national security threat. Finally, and relatedly, there has been no shortage of imaginative, presidentialist lawyers and scholars who have sought to push the envelope of executive power for these and other reasons.[102] Not least in this regard is Professor Yoo himself, who has consistently argued that the novelty of the terrorist threat compels a broad conception of executive power in order to enable the president to respond to terrorism in effective and creative ways.

Amidst this array of pro-executive assertions, the Court's reticence on deference must rest on something more than the strength of Hamdan's arguments on the UCMJ and Common Article 3 in this specific case. The majority's general avoidance of deference rhetoric—giving no indication that it regretfully must countermand the president because the law gives the court no other choice, for example—suggests that skepticism about deference itself silently drives the opinion. But if *Hamdan* does signal a move in that direction, it should say as much and say why. Comparative law would help it to do so.

B. Wider Foundations

The specific yet still vast area of comparative law that bears upon post 9/11 deference centers upon executive responses to terrorism. Currently, the International Commission of Jurists is undertaking a study of just this topic under the direction of Arthur Chaskelson, former chief justice of the South African Constitutional Court.[103] Pending this comprehensive study, a mountain of information remains available concerning governmental responses to terrorism in reports by bar associations, human rights NGOs, and academic programs. Together, these sources point to the darker side of executive decisiveness, activity, secrecy, and dispatch.[104] They first show that a consistent cost of responding to terrorism is systemic violations

[102] See John C. Yoo, Rejoinder: Treaty Interpretation and the False Sirens of Delegation, 90 Calif. L. Rev. 1305 (2002); John C. Yoo, Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation, 89 Calif. L. Rev. 851 (2001).

[103] Information on the panel conducting this study may be found at: http://ejp.icj.org/article.php3?id_article=6.

[104] Cf. Hamdan, 126 S. Ct. at 2823 (Thomas, J., dissenting) (citations omitted).

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of the most basic rights. They further give grounds to qu[illegible]t this cost brings any countervailing pay-off in the form [illegible]e security responses.

Comparative law first of all suggests that governments confronting terror, above all executives, habitually err on the side of violating fundamental rights. One contemporary and useful measure of this cost comes via international human rights law. A few examples drawn from personal experience must suffice to illustrate how. Of these, perhaps the most pertinent to the United States is the United Kingdom's experience in Northern Ireland. There, for thirty years the U.K. faced a deadly yet relatively small threat from nationalist and loyalist paramilitary groups. Successive U.K. governments responded by obtaining parliamentary enactment of a series of emergency laws and installing a massive security presence of police and army. While the level of violence ebbed and flowed, these policies resulted in violations of international human rights laws across the board. For example, the right against arbitrary arrest and detention fell prey to internment policies and standards permitting seven-day detention without a hearing. The right not to endure torture or cruel, inhuman, or degrading treatment suffered from various extreme techniques applied in prison as well, standards allowing admission of coerced confessions, and a failure to provide preventative monitoring. The right to life itself bowed before well-documented shoot-to-kill policies as well as also well-documented collusion between the security forces and loyalist paramilitaries, including the use of death squads.[105]

The U.K. is one of the more benign examples of executive overreach. Britain also bequeathed to its former colonies the type of emergency response that it employed to deal with earlier bouts of Northern Ireland violence. Further personal experience here includes Malaysia, Kenya, South Africa,[106] and Hong Kong.[107] Whenever governments in

[105] Over a decade of personally documenting these violations in country through numerous human rights missions appear in Lawyers Committee for Human Rights, Human Rights and Legal Defense in Northern Ireland (1993); Lawyers Committee for Human Rights, At the Crossroads: Human Rights and the Northern Ireland Peace Process (1996); Crowley Program in International Human Rights & Lawyers Committee for Human Rights, Obstacles to Reform: Human Rights in Turkey (1999).

[106] See Martin S. Flaherty, Human Rights Violations against Defense Lawyers: The Case of Northern Ireland, 7 Harv. Hum. Rts. J. 87, 88–89 (1994).

[107] Hong Kong stands out as mainly a potential example, since it has not had the occasion to put its colonial security laws in operation to the extent of the other

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these jurisdictions perceived a terrorist threat or some [illegible]nt, their reactions led to the same types of human rights [illegible]s, often on a larger scale. The pattern of violations in some of these countries led to more entrenched violations of certain rights, including the use of counter-terror measures to target political opponents and restrictions on democracy itself. Malaysia, for example, has made detention without trial a permanent feature of its legal landscape with its infamous Internal Security Act. It has used this and other laws to break otherwise lawful opposition movements or parties. It has also used the threat of terror to perpetuate restrictions on freedom of the press and democratic self-government in which the opposition has a meaningful chance to win executive power.[108] And the account can go on. To take just one more example, Turkey's response to Kurdish violence entailed all of the above restrictions, and added a direct assault on judicial independence through the establishment of special state security courts to handle terrorist defendants.[109]

Comparative law's lesson that executives rush to sacrifice rights in the name of security may appear obvious. But proponents of deference to the executive in the ''war on terror'' fail to draw the obvious lesson. It may well be that in any well-ordered government, the executive uses institutional strengths to err on the side of security in the face of threat or attack. Yet the other side of the equation is that it is equally the job of the judiciary to defend fundamental rights that the domestic system has either entrenched or incorporated from international law against executive, or for that matter against legislative, pathologies. Domestic materials may suffice to remind us of this lesson. Foreign materials nonetheless remind us of the need for the courts to play their assigned role in the present context.

Comparative study challenges a submissive attitude to the president in a second way by challenging the assumption that executive

former colonies. See Report of the Committee on International Human Rights of the Association of the Bar of the City of New York and Joseph R. Crowley Program in International Human Rights at Fordham Law School, Legal Analysis of Certain Provisions of the National Security (Legislative Provision) Bill Pending before the Legislative Council of the Hong Kong Special Administrative Region, available at http://www.abcny.org/pdf/report/30637027.pdf (accessed August 9, 2006).

[108] See Nicole Fritz & Martin Flaherty, Unjust Order: Malaysia's Internal Security Act (Crowley Program in International Human Rights 2003).

[109] See Obstacles to Reform, *supra* note 105.

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creativity, left to its own devices, will produce the mo[illegible]e results. To be sure, lawyers have little valuable to say [illegible] point either pro or con. Whether executive authority on its own will be the best means to stop future terrorist attacks, secure vital intelligence, undermine the conditions that allow terrorism to breed, or identify the weapon of mass destruction that terrorists might use are all questions better addressed by political scientists, the police, the military, and security experts. Lawyers can identify violations of constitutional or international rights. Their views on whether the typical actions of an unchecked executive will end violence or backfire and foment it tend to be derivative or plain speculation.

With this caveat in mind, the experience of other jurisdictions can still undercut certain ready assumptions. Mexico, for another example observed first-hand, possesses a criminal justice system that in many relevant respects mimics an emergency law regime, including ease of arrest, unmonitored detention, admissibility of problematic confessions, and a comparatively free hand for police and prosecutors. The net effect has been not merely rights violations, but a phenomenon of ''rounding up the usual suspects,'' in part resulting in the innocent going to jail, the guilty going free, and consistently high crime rates.[110] Northern Ireland illustrates an even more counterproductive example of internment without trial during the early 1970s. Under U.K. policy toward Northern Ireland, employed by an aggressive executive under a longstanding parliamentary authorization, hundreds of mainly young Catholic men were rounded up and interned, ostensibly to defuse the threat posed by the Irish Republican Army. Far from eliminating this threat, the conventional wisdom is that the resentment internment produced proved to be an IRA recruitment boon.

Perhaps not surprisingly, these foreign examples echo domestic voices that question the efficacy of granting the executive too much power. As some security experts have argued, unaccountable executive power, among other things, can lead to a reliance on easy options, such as detention of unpopular individuals, at the expense

[110] Crowley Program in International Human Rights & Centro de Derechos Humanos Agustín Pro Juárez, Presumed Guilty? Criminal Justice and Human Rights in Mexico 805–07 (2000).

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of the harder work of coordinating and analyzing in [illegible].[111] Justice Breyer appears to have had something like these to[illegible] in mind when he stated that ''judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger,'' but rather ''strengthens the Nation's ability to determine—through democratic means—how best to do so.''[112]

Lest actual Supreme Court reliance on comparative law appears fanciful, return to Justice Jackson's robust performance in *Youngstown*. Professor Vicki Jackson (no relation) has usefully recaptured the concurrence's neglected yet timely reliance on foreign constitutional experience.[113] As she notes, Justice Jackson surveyed German, French, and British constitutional practice in the period leading up to World War II.[114] The lesson he drew was that unchecked executive power will threaten freedom, particularly in perceived emergencies. In the words of the concurrence:

> This contemporary foreign experience may be inconclusive as to the wisdom of lodging emergency powers somewhere in a modern government. But it suggests that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. . . . Nothing in my experience convinces me that such risks are warranted by any real necessity, although such powers would, of course, be an executive convenience.[115]

For Jackson, the first line of defense was the legislature. Without it, he famously doubted the ability of the courts to stand in the way. ''I have no illusion,'' he wrote, ''that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems.''[116]

The neglected discussion of foreign experience in the Jackson concurrence shows how much further the current Court could go in

[111] Baker, National Security Process, *supra* note 45.

[112] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2799 (2006) (Breyer, J., concurring).

[113] See generally Vicki C. Jackson, Constitutional Law and Transnational Comparisons, The Youngstown Decision and American Exceptionalism, 29 Harv. J.L. & Pub. Pol'y (forthcoming 2006).

[114] *Id.*

[115] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 652 (1952) (Jackson, J., concurring).

[116] *Id.* at 678.

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substance and method. On the merits, what matters is tha[illegible]s analysis of executive power during emergencies promp[illegible]o exhort the active use of checks upon the president in the first place. With this exhortation, Jackson lands fairly close to the opposite end of the spectrum from express deference, by adopting something like a presumption against the executive with regard to claims of inherent powers. The point is not that this position is correct. It is, rather, that Jackson rightly weighs the less benign aspects of executive authority in the balance. At the very least, to use language Jackson used in another context, insight about the abuse of executive power and the modern praise of executive decisiveness should ''largely cancel each other.''[117] Either way, a better understanding of both the value and dangers of an executive facing a grave security threat necessarily follows from a wider study, including comparative study. As *Youngstown* shows, the Court can and has undertaken exactly this kind of analysis.[118]

V. Conclusion

Hamdan, like *Rasul* and *Hamdi* before it, will be just one legal battle in a long struggle. All concerned in this struggle, regardless of viewpoint, agree that the threat from terrorism is real and grave. All agree that the stakes in responding to this threat are uniquely high. All agree that there is no end to this threat in sight, either soon or ever. Where company parts is that some view terrorism's only casualty to be national security. Others see another target of terrorism to be our systems of ordered liberty and fundamental freedom.

[117] *Id.* at 635.

[118] Comparative law points to another, and more novel, source of concern about executive power by way of globalization. As Anne-Marie Slaughter has demonstrated, international relations increasingly consists of executive officials, judges, and legislators dealing with counterparts from other countries directly rather than in state to state dealings mediated by professional diplomats. See Anne-Marie Slaughter, A New World Order (2004). In this process of direct political contacts, executive officials are far in the lead. The net result in any particular country is the relative enhancement of executive power at the expense of legislatures and courts. Globalization, in short, undermines the inter-branch balance that separation of powers presupposes. In this context, deference doctrines exacerbate a growing problem. For a treatment of this phenomenon with a focus on ways the judiciary might respond, see Martin S. Flaherty, Judicial Globalization in the Service of Self-Government, 20 Ethics & Int'l Affairs (forthcoming 2006).

The brutal truth, though, is that the fear bred of da[illegible]st always trumps any other concern, particularly about lib[illegible]jamin Franklin had exactly this truth in mind when he stated that "any country that would sacrifice its liberty for a little security deserves neither liberty nor security."[119]

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All of which makes *Hamdan* appear even more as an act of courage. But it is a fragile one. The Court is but one appointment away from an opposite result in related cases. The Court itself, not to mention individual justices, has been less than exemplary during times of perceived crisis—from Justice Chase's jury charges on the Alien and Sedition Acts,[120] to *Ex Parte McCardle*,[121] *Schenck v. United States*,[122] *Hirabayashi v. United States*,[123] *Korematsu v. United States*,[124] and *United States v. Dennis*.[125] As many of these cases show, Congress' own record has been just as spotty.[126] To paraphrase Brandeis, the executive feared evildoers and persecuted scapegoats.[127] Too often Congress and the courts went along.

Of course there have been many victories as well, *Hamdan* not least. But to sustain these, the branches constituted to check executive excess will continue to need all the resources that the struggle will require. Some will be familiar, such as separation of powers. Others, such as international law and comparative law, will seem novel, yet are also part of our legal tradition, properly understood. The struggle to prevent liberty as well as security from succumbing to terror will require every one.

[119] Benjamin Franklin, An Historical Review of the Constitution and Government of Pennsylvania, From Its Origin (1759).

[120] See Richard E. Ellis, The Jeffersonian Crisis: Courts and Politics in the Young Republic 78–81 (1974).

[121] 74 U.S. 506 (1869).

[122] 249 U.S. 247 (1919).

[123] 320 U.S. 81 (1943).

[124] 321 U.S. 760 (1944).

[125] 341 U.S. 494 (1951).

[126] As with the Court, Congress will also continue to be a battleground, as witness various proposals for authorization of military commissions in response to *Hamdan*. See David S. Cloud & Sheryl Gay Stolberg, Rules Debated for Trials of Detainees, N.Y. Times, July 27, 2006, at 20A.

[127] Cf. Whitney v. California, 274 U.S. 357, 372 & 375 (1927) (Brandeis, J., concurring).