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Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice/Infamous Crimes and Criminals/The War on Terror

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Hamdan v. Rumsfeld, 548 U.S. 557 (2006)

Salim Ahmed Hamdan was a Yemini national who was captured in Afghanistan and, in 2002, transported to the U.S. military prison in Guantanamo Bay, Cuba. More than a year later, the president declared Hamdan eligible for trial by military commission for then-unspecified crimes; another year passed before he was charged with conspiracy to commit offenses triable by military commission. Hamdan filed a petition for habeas corpus contending that the military commission lacked authority to try him because (1) neither congressional act nor the common law of war supported trial by the commission for conspiracy, an offense that the detainee asserted was not a violation of the law of war, and (2) the procedures adopted to try the detainee violated basic tenets of military and international law, including the principle that a defendant was required to be permitted to see and hear the evidence against the defendant. The United States responded that these actions were supported by inherent executive powers and a congressional joint resolution authorizing the president to use all necessary and appropriate force against those nations, organizations, or persons determined to have planned, authorized, committed, or aided the September 11, 2001, al-Qaeda terrorist attacks. The United States District Court for the District of Columbia granted Hamdan's petition. The United States Court of Appeals for the District of Columbia Circuit reversed, holding that he was not entitled to relief under either the Uniform Code of Military Justice (UCMJ) or the Geneva Conventions. While Hamdan's case was being appealed to the Supreme Court, Congress passed the Detainee Treatment Act of 2005, depriving any court of jurisdiction to consider a habeas corpus petition filed by a detainee at Guantanamo Bay.

The Supreme Court by a 5-3 vote reversed the Court of Appeals. Justice Stevens's opinion for the court maintained that the Detainee Treatment Act did not apply to cases pending on the date of enactment (thus allowing the Court to hear the case) and that the proposed military commissions violated the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions, especially the requirement of Common Article 3 (CA3) that detainees be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." In a separate opinion, Justices Breyer, Kennedy, Souter, and Ginsburg expressed the view that military commissions carried the risk that offenses would be defined, prosecuted, and adjudicated by executive officials without independent review and that this concentration of power was a threat to liberty that was inconsistent with the Constitution's fundamental commitment to separation of powers. Justices Scalia, Thomas, and Alito dissented. They argued that (1) the Detainee Treatment Act's stripping of habeas corpus jurisdiction should apply to this case, (2) the justices have a duty to respect the judgment of the executive branch in matters of military operations, and (3) all key elements of Common Article 3 of the Geneva Convention were satisfied by the structure of the military commissions at issue in this case. Chief Justice Roberts, who had sat on the case as member of the D.C. Circuit Court, did not participate in the case in the U.S. Supreme Court.

*The five-member majority rejected strong claims of unilateral executive authority during wartime. When Congress, exercising Article I authority to regulate military justice, imposes certain requirements under the UCMJ, then the president must abide by these regulations even if they limit executive discretion over the treatment of persons captured on the battlefield. Law professor (and former solicitor general) Walter Dellinger celebrated this dimension of the Supreme Court's decision when he declared that "*Hamdan *is simply the most important decision on presidential power and the rule of law ever. Ever." Writing in the* New York Times*, Linda Greenhouse called the decision "A historic event, a defining moment in the ever-shifting balance of power among branches of government that ranked with the court's order to President Richard M. Nixon in 1974 to turn over the Watergate tapes, or with the court's rejection of President Harry S. Truman's seizing of the nation's steel mills, a 1952 landmark decision from which Justice Anthony M. Kennedy quoted at length."*

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On the other hand, Hamdan *left open the possibility that the president could ask Congress to change the UCMJ so that military commissions at Guantanamo Bay could be conducted outside the laws of war. This is precisely what happened in the weeks before the 2006 midterm congressional elections. Republican majorities in both Houses of Congress passed the Military Commission Act of 2006, which broadened the definition of illegal enemy combatant, restricted the use of habeas corpus by people in military detention, and authorized the use of non-traditional military commissions (which, for example, could use coerced and secret evidence against detainees). This is why law professor Jack Balkin characterized the* Hamdan *decision, not as "countermajoritarian" (since it was just applying existing congressional statutes to the executive), but as "democracy forcing" (since the justices were insisting that deviations from the existing statutory scheme be supported, not just by the executive branch, but also by the Congress).*

Finally, the Court's holding that Common Article 3 of the Geneva Convention applies as a matter of treaty obligation to all armed conflicts, even the war against al-Qaeda, had consequences for another aspect of the post-9/11 constitutional debate—namely, the controversy surrounding the use of torture and other interrogation techniques that would be seen as contrary to the Geneva Convention's prohibitions against "violence to life and person" and "outrages upon personal dignity, in particular humiliating and degrading treatment" toward any person held "out of combat as a result of detention." In February 2002 President Bush unilaterally declared that the Geneva Conventions did not apply to al-Qaeda and, thus, that the U.S. government would act consistent with the principles of Geneva only "to the extent appropriate and consistent with military necessity." As noted in Volume I (and the supplementary material for Volume II), in August 2002 the Office of Legal Counsel in the Justice Department wrote a classified memo (known subsequently as the "torture memo") authorizing the use of up to twenty previously prohibited "enhanced interrogation techniques," including waterboarding and hypothermia. Because these techniques could never be reconciled with long-standing interpretations of the Geneva Convention, the Hamdan *decision essentially declared this interrogation program illegal. Consequently, the administration also asked Congress to change the law in order to accommodate the sort of "enhanced interrogation techniques" that had been used for years. In the resulting Military Commission Act, interrogation techniques would only be prohibited if they involved "(1) a substantial risk of death; (2) extreme physical pain; (3) a burn or physical disfigurement of a serious nature, not to include cuts, abrasions, or bruises; or (4) significant loss or impairment of the function of a bodily member, organ, or mental faculty." Waterboarding, sleep deprivation, refrigerated rooms, dousing with ice water to trigger hypothermia, shackling to a wall, threats to rape and kill members of a detainee's family, pretending to bury someone alive, and similar methods of torture were arguably authorized by law, at least as applied against non-citizens.*

In August 2008 Hamdan was acquitted by a military tribunal of conspiracy but convicted of the less serious charge of material support for terrorism. Despite requests for a severe sentence a panel of military officers sentenced him to five and a half years in prison. Because the tribunal gave Hamdan credit for the sixty-one months he had already been imprisoned, this amounted to an additional sentence of just five months. Before leaving the courtroom, Judge Allred, who had developed a friendly relationship with the defendant, said, "Mr. Hamdan, I hope the day comes that you are able to return to your wife and daughters and your country."

When reading the excerpt below, consider the following questions. To what extent was Hamdan *a great triumph for constitutional liberty? To what extend did the decision merely require Congress to become more involved if liberties were to be deprived? In* Hamdi v. Rumsfeld *(2004) an 8-1 judicial majority rejected Bush administration positions on the war against terror. The split in* Hamdan *was more ideological. Why might that have been the case?*

JUSTICE STEVENS delivered the opinion of the Court.

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The Constitution makes the President the "Commander in Chief" of the Armed Forces, Art. II, § 2, cl. 1, but vests in Congress the powers to "declare War . . . and make Rules concerning Captures on Land and Water," Art. I, § 8, cl. 11, to "raise and support Armies," *id.*, cl. 12, to "define and punish . . . Offences against the Law of Nations," *id.*, cl. 10, and "To make Rules for the Government and Regulation of the land and naval Forces," *id.*, cl. 14. The interplay between these powers was described by Chief Justice Chase in the seminal case of *Ex parte Milligan* (1866):

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> The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. . . . Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.

Whether Chief Justice Chase was correct in suggesting that the President may constitutionally convene military commissions "without the sanction of Congress" in cases of "controlling necessity" is a question this Court has not answered definitively, and need not answer today. For we held in *Ex parte Quirin* (1942) that Congress had, through Article of War 15, sanctioned the use of military commissions in such circumstances [and in accord with the laws of war]. . . .

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Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the "Constitution and laws," including the law of war. Absent a more specific congressional authorization, the task of this Court is, as it was in *Quirin*, to decide whether Hamdan's military commission is so justified. It is to that inquiry we now turn.

The common law governing military commissions may be gleaned from past practice and what sparse legal precedent exists. Commissions historically have been used in three situations. First, they have substituted for civilian courts at times and in places where martial law has been declared. Their use in these circumstances has raised constitutional questions, . . . but is well recognized. Second, commissions have been established to try civilians "as part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function." Illustrative of this second kind of commission is the one that was established, with jurisdiction to apply the German Criminal Code, in occupied Germany following the end of World War II.

The third type of commission, convened as an "incident to the conduct of war" when there is a need "to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war," has been described as "utterly different" from the other two. . . . Not only is its jurisdiction limited to offenses cognizable during time of war, but its role is primarily a factfinding one—to determine, typically on the battlefield itself, whether the defendant has violated the law of war. The last time the U. S. Armed Forces used the law-of-war military commission was during World War II. In *Quirin*, this Court sanctioned President Roosevelt's use of such a tribunal to try Nazi saboteurs captured on American soil during the War. And in *In re Yamashita* (1946), we held that a military commission had jurisdiction to try a Japanese commander for failing to prevent troops under his command from committing atrocities in the Philippines

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The charge's shortcomings are not merely formal, but are indicative of a broader inability on the Executive's part here to satisfy the most basic precondition—at least in the absence of specific congressional authorization—for establishment of military commissions: military necessity. Hamdan's tribunal was appointed not by a military commander in the field of battle, but by a retired major general stationed away from any active hostilities. . . . Hamdan is charged not with an overt act for which he was caught redhanded in a theater of war and which military efficiency demands be tried expeditiously, but with an *agreement* the inception of which long predated the attacks of September 11, 2001, and the AUMF. That may well be a crime, but it is not an offense that "by the law of war may be tried by military commissio[n]." . . .

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Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But *requirements* they are nonetheless. The commission that the President has convened to try Hamdan does not meet those requirements.

We have assumed, as we must, that the allegations made in the Government's charge against Hamdan are true. We have assumed, moreover, the truth of the message implicit in that charge—viz., that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm. But in 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.

CHIEF JUSTICE ROBERTS took no part in the decision of this case.

JUSTICE BREYER, with whom JUSTICE KENNEDY, JUSTICE SOUTER, and JUSTICE GINSBURG join, concurring.

The dissenters say that today's decision would "sorely hamper the President's ability to confront and defeat a new and deadly enemy." They suggest that it undermines our Nation's ability to "preven[t] future attacks" of the grievous sort that we have already suffered. That claim leads me to state briefly what I believe the majority sets forth both explicitly and implicitly at greater length. The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a "blank check." Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.

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. The Constitution places its faith in those democratic means. Our Court today simply does the same.

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JUSTICE KENNEDY, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join in part, concurring in part.

Military Commission Order No. 1, which governs the military commission established to try petitioner Salim Hamdan for war crimes, exceeds limits that certain statutes, duly enacted by Congress, have placed on the President's authority to convene military courts. . . . If Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so.

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Trial by military commission raises separation-of-powers concerns of the highest order. Located within a single branch, these courts carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review. 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.

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JUSTICE SCALIA, whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

On December 30, 2005, Congress enacted the Detainee Treatment Act (DTA). It unambiguously provides that, as of that date, "no court, justice, or judge" shall have jurisdiction to consider the habeas application of a Guantanamo Bay detainee. Notwithstanding this plain directive, the Court today concludes that, on what it calls the statute's *most natural* reading, *every* "court, justice, or judge" before whom such a habeas application was pending on December 30 has jurisdiction to hear, consider, and render judgment on it. This conclusion is patently erroneous. And even if it were not, the jurisdiction supposedly retained should, in an exercise of sound equitable discretion, not be exercised. . . .

An ancient and unbroken line of authority attests that statutes ousting jurisdiction unambiguously apply to cases pending at their effective date. . . .

Because I would hold that § 1005(e)(1) unambiguously terminates the jurisdiction of all courts to "hear or consider" pending habeas applications, I must confront petitioner's arguments that the provision, so interpreted, violates the Suspension Clause. This claim is easily dispatched. We stated in *Johnson v. Eisentrager* (1950):

> We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.

Notwithstanding the ill-considered dicta in the Court's opinion in *Rasul v. Bush* (2004), it is clear that Guantanamo Bay, Cuba, is outside the sovereign "territorial jurisdiction" of the United States. Petitioner, an enemy alien detained abroad, has no rights under the Suspension Clause.

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Even if Congress had not clearly and constitutionally eliminated jurisdiction over this case, neither this Court nor the lower courts ought to exercise it. . . .

I would abstain from exercising our equity jurisdiction, as the Government requests.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, and with whom JUSTICE ALITO joins in part, dissenting.

For the reasons set forth in Justice Scalia's dissent, it is clear that this Court lacks jurisdiction to entertain petitioner's claims. The Court having concluded otherwise, it is appropriate to respond to the Court's resolution of the merits of petitioner's claims because its opinion openly flouts our well-established duty to respect the Executive's judgment in matters of military operations and foreign affairs. The Court's evident belief that *it* is qualified to pass on the "[m]ilitary necessity," of the Commander in Chief's decision to employ a particular form of force against our enemies is so antithetical to our constitutional structure that it simply cannot go unanswered. I respectfully dissent.

Our review of petitioner's claims arises in the context of the President's wartime exercise of his commander-in-chief authority in conjunction with the complete support of Congress. Accordingly, it is important to take measure of the respective roles the Constitution assigns to the three branches of our Government in the conduct of war.

As I explained in *Hamdi v. Rumsfeld* (2004), the structural advantages attendant to the Executive Branch—namely, the decisiveness, "'activity, secrecy, and dispatch'" that flow from the Executive's "'unity'"—led the Founders to conclude that the "President ha[s] primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation's foreign relations." Consistent with this conclusion, the Constitution vests in the President "[t]he executive Power," Art. II, § 1, provides that he "shall be Commander in Chief" of the Armed Forces, § 2, and places in him the power to recognize foreign governments, *§ 3*. This Court has observed that these provisions confer upon the President broad constitutional authority to protect the Nation's security in the manner he deems fit. . . .

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Congress, to be sure, has a substantial and essential role in both foreign affairs and national security. But "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act," and "[s]uch failure of Congress . . . does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive." *Dames & Moore v. Regan* (1981). . . .

When "the President acts pursuant to an express or implied authorization from Congress," his actions are "'supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion . . . rest[s] heavily upon any who might attack it.'" Accordingly, in the very context that we address today, this Court has concluded that "the detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." *Ex parte Quirin* (1942).

Under this framework, the President's decision to try Hamdan before a military commission for his involvement with al-Qaeda is entitled to a heavy measure of deference. In the present conflict, Congress has authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons *he determines* planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force (AUMF). As a plurality of the Court observed in *Hamdi*, the "capture, detention, and *trial* of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war,'" and are therefore "an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Hamdi*'s observation that military commissions are included within the AUMF's authorization is supported by this Court's previous recognition that "[a]n important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war." *In re Yamashita* (1946). . . .

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Ultimately, the plurality's determination that Hamdan has not been charged with an offense triable before a military commission rests not upon any historical example or authority, but upon the plurality's raw judgment of the "inability on the Executive's part here to satisfy the most basic precondition . . . for establishment of military commissions: military necessity." This judgment starkly confirms that the plurality has appointed itself the ultimate arbiter of what is quintessentially a policy and military judgment, namely, the appropriate military measures to take against those who "aided the terrorist attacks that occurred on September 11, 2001." . . .

Today a plurality of this Court would hold that conspiracy to massacre innocent civilians does not violate the laws of war. This determination is unsustainable. The judgment of the political branches that Hamdan, and others like him, must be held accountable before military commissions for their involvement with and membership in an unlawful organization dedicated to inflicting massive civilian casualties is supported by virtually every relevant authority, including all of the authorities invoked by the plurality today. It is also supported by the nature of the present conflict. We are not engaged in a traditional battle with a nation-state, but with a worldwide, hydra-headed enemy, who lurks in the shadows conspiring to reproduce the atrocities of September 11, 2001. . . . Not only is this conclusion fundamentally inconsistent with the cardinal principal of the law of war, namely protecting non-combatants, but it would sorely hamper the President's ability to confront and defeat a new and deadly enemy.

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The Court contends that Hamdan's military commission is also unlawful because it violates Common Article 3 of the Geneva Conventions. Furthermore, Hamdan contends that his commission is unlawful because it violates various provisions of the Third Geneva Convention. These contentions are untenable.

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JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join in part, dissenting.

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