

Hamdan v. Rumsfeld

___ U.S. ___, (June 29, 2006)

Justice STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I through IV, Parts VI through VI-D-iii, Part VI-D-v, and Part VII, and an opinion with respect to Parts V and VI-D-iv, in which Justice SOUTER, Justice GINSBURG, and Justice BREYER join.

Petitioner Salim Ahmed Hamdan, a Yemeni national, is in custody at an American prison in Guantánamo Bay, Cuba. In November 2001, during hostilities between the United States and the Taliban (which then governed Afghanistan), Hamdan was captured by militia forces and turned over to the U.S. military. In June 2002, he was transported to Guantánamo Bay. Over a year later, the President deemed him eligible for trial by military commission for then-unspecified crimes. After another year had passed, Hamdan was charged with one count of conspiracy "to commit . . . offenses triable by military commission."

Hamdan filed petitions for writs of habeas corpus and mandamus to challenge the Executive Branch's intended means of prosecuting this charge. He concedes that a court-martial constituted in accordance with the Uniform Code of Military Justice (UCMJ) would have authority to try him. His objection is that the military commission the President has convened lacks such authority, for two principal reasons: First, neither congressional Act nor the common law of war supports trial by this commission for the crime of conspiracy—an offense that, Hamdan says, is not a violation of the law of war. Second, Hamdan contends, the procedures that the President has adopted to try him violate the most basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him.

The District Court granted Hamdan's request for a writ of habeas corpus. The Court of Appeals for the District of Columbia Circuit reversed. Recognizing, as we did over a half-century ago, that trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure, *Ex parte Quirin*, 317 U.S. 1, 19 (1942), we granted certiorari.

For the reasons that follow, we conclude that the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions. Four of us also conclude, *See Part V, infra*, that the offense with which Hamdan has been charged is not an "offens[e] that by . . . the law of war may be tried by military commissions." 10 U.S.C. § 821.

I

On September 11, 2001, agents of the al Qaeda terrorist organization hijacked commercial airplanes and attacked the World Trade Center in New York City and the national headquarters of the Department of Defense in Arlington, Virginia. Americans will never forget the devastation wrought by these acts. Nearly 3,000 civilians were killed.

Congress responded by adopting a Joint Resolution authorizing 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 . . . 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). Acting pursuant to the AUMF, and having determined that the Taliban regime had supported al Qaeda, the President ordered the Armed Forces of the United States to invade Afghanistan. In the ensuing hostilities, hundreds of individuals, Hamdan among them, were captured and eventually

detained at Guantánamo Bay.

On November 13, 2001, while the United States was still engaged in active combat with the Taliban, the President issued a comprehensive military order intended to govern the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" (hereinafter November 13 Order or Order). Those subject to the November 13 Order include any noncitizen for whom the President determines "there is reason to believe" that he or she (1) "is or was" a member of al Qaeda or (2) has engaged or participated in terrorist activities aimed at or harmful to the United States. Any such individual "shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including imprisonment or death." The November 13 Order vested in the Secretary of Defense the power to appoint military commissions to try individuals subject to the Order, but that power has since been delegated to John D. Altenberg, Jr., a retired Army major general and longtime military lawyer who has been designated "Appointing Authority for Military Commissions."

On July 3, 2003, the President announced his determination that Hamdan and five other detainees at Guantánamo Bay were subject to the November 13 Order and thus triable by military commission. In December 2003, military counsel was appointed to represent Hamdan. Two months later, counsel filed demands for charges and for a speedy trial pursuant to Article 10 of the UCMJ. On February 23, 2004, the legal adviser to the Appointing Authority denied the applications, ruling that Hamdan was not entitled to any of the protections of the UCMJ. Not until July 13, 2004, after Hamdan had commenced this action in the United States District Court for the Western District of Washington, did the Government finally charge him with the offense for which, a year earlier, he had been deemed eligible for trial by military commission.

The charging document, which is unsigned, contains 13 numbered paragraphs. . . .

Only the final two paragraphs, entitled "Charge: Conspiracy," contain allegations against Hamdan. Paragraph 12 charges that "from on or about February 1996 to on or about November 24, 2001," Hamdan "willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with [named members of al Qaeda] to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism." There is no allegation that Hamdan had any command responsibilities, played a leadership role, or participated in the planning of any activity.

Paragraph 13 lists four "overt acts" that Hamdan is alleged to have committed sometime between 1996 and November 2001 in furtherance of the "enterprise and conspiracy": (1) he acted as Osama bin Laden's "bodyguard and personal driver," "believ[ing]" all the while that bin Laden "and his associates were involved in" terrorist acts prior to and including the attacks of September 11, 2001; (2) he arranged for transportation of, and actually transported, weapons used by al Qaeda members and by bin Laden's bodyguards (Hamdan among them); (3) he "drove or accompanied [O]sama bin Laden to various al Qaeda-sponsored training camps, press conferences, or lectures," at which bin Laden encouraged attacks against Americans; and (4) he received weapons training at al Qaeda-sponsored camps.

After this formal charge was filed, the United States District Court for the Western District of Washington transferred Hamdan's habeas and mandamus petitions to the United States District Court for the District of Columbia. Meanwhile, a Combatant Status Review Tribunal (CSRT) convened pursuant to a military order issued on July 7, 2004, decided that Hamdan's continued detention at Guantánamo Bay was warranted because he was an "enemy combatant." Separately, proceedings before the military commission commenced.

On November 8, 2004, however, the District Court granted Hamdan's petition for habeas corpus and stayed the commission's proceedings. . . .

The Court of Appeals for the District of Columbia Circuit reversed. . . .

On November 7, 2005, we granted certiorari to decide whether the military commission convened to try Hamdan has authority to do so, and whether Hamdan may rely on the Geneva Conventions in these proceedings.

II

[The Government argued that the recently enacted Detainee Treatment Act of 2005 (DTA), which contains several provisions regulating the types of challenges that can be brought by persons tried by military commissions, had the effect of divesting the federal courts of all pending challenges, including Hamdan's. The Government also argued under principles announced in *Schelsinger v. Councilman*, 420 U.S. 738 (1975), that civilian courts should await the outcome of "on-going military proceedings before entertaining an attack on those proceedings." The Court rejected both arguments and proceeded to the merits.]

IV

The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity. *See* W. Winthrop, *Military Law and Precedents* 831 (rev.2d ed.1920) (hereinafter Winthrop). Though foreshadowed in some respects by earlier tribunals like the Board of General Officers that General Washington convened to try British Major John Andre for spying during the Revolutionary War, the commission "as such" was inaugurated in 1847. *Id.* at 832; G. Davis, *A Treatise on the Military Law of the United States* 308 (2d ed.1909) (hereinafter Davis). As commander of occupied Mexican territory, and having available to him no other tribunal, General Winfield Scott that year ordered the establishment of both "*military commissions*" to try ordinary crimes committed in the occupied territory and a "*council of war*" to try offenses against the law of war.

When the exigencies of war next gave rise to a need for use of military commissions, during the Civil War, the dual system favored by General Scott was not adopted. Instead, a single tribunal often took jurisdiction over ordinary crimes, war crimes, and breaches of military orders alike. As further discussed below, each aspect of that seemingly broad jurisdiction was in fact supported by a separate military exigency. Generally, though, the need for military commissions during this period—as during the Mexican War—was driven largely by the then very limited jurisdiction of courts-martial: "The *occasion* for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offences defined in a written code."

Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8 and Article III, § 1 of the Constitution unless some other part of that document authorizes a response to the felt need. And that authority, if it exists, can derive only from the powers granted jointly to the President and Congress in time of war. *See In re Yamashita*, 327 U.S. 1, 11 (1946).

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*, 4 Wall. 2, 139-40 (1866)

"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 *Quirin* that Congress had, through Article of War 15, sanctioned the use of military commissions in such circumstances. Article 21 of the UCMJ, the language of which is substantially identical to the old Article 15 and was preserved by Congress after World War II, reads as follows:

"Jurisdiction of courts-martial not exclusive.

The provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals 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, provost courts, or other military tribunals."

We have no occasion to revisit *Quirin's* controversial characterization of Article of War 15 as congressional authorization for military commissions. Contrary to the Government's assertion, however, even *Quirin* did not view the authorization as a sweeping mandate for the President to "invoke military commissions when he deems them necessary." Rather, the *Quirin* Court recognized that Congress had simply preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions—with the express condition that the President and those under his command comply with the law of war.[FN23] That much is evidenced by the Court's inquiry, *following* its conclusion that Congress had authorized military commissions, into whether the law of war had indeed been complied with in that case.²³

The Government would have us dispense with the inquiry that the *Quirin* Court undertook and find in either the AUMF or the DTA specific, overriding authorization for the very commission that has been convened to try Hamdan. Neither of these congressional Acts, however, expands the President's authority to convene military commissions. First, while we assume that the AUMF activated the President's war powers, *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion), and that those powers include the authority to convene military commissions in appropriate circumstances, *see id.* at 518; *Quirin*, 317 U.S. at 28-29; *See also Yamashita*, 327 U.S. at 11, 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 Article 21 of the UCMJ.

Likewise, the DTA cannot be read to authorize this commission. Although the DTA, unlike either Article

²³ Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). The Government does not argue otherwise.

21 or the AUMF, was enacted after the President had convened Hamdan's commission, it contains no language authorizing that tribunal or any other at Guantánamo Bay. The DTA obviously "recognize[s]" the existence of the Guantánamo Bay commissions in the weakest sense, because it references some of the military orders governing them and creates limited judicial review of their "final decision[s]." But the statute also pointedly reserves judgment on whether "the Constitution and laws of the United States are applicable" in reviewing such decisions and whether, if they are, the "standards and procedures" used to try Hamdan and other detainees actually violate the "Constitution and laws."

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.

V

[Part V is a plurality opinion, in which four justices conclude that the charges against Hamdan—i.e., conspiracy to commit crimes that occurred before the attacks of September 11, 2001 and the enactment of the AUMF—are not triable by military commission.]

VI

Whether or not the Government has charged Hamdan with an offense against the law of war cognizable by military commission, the commission lacks power to proceed. The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the "rules and precepts of the law of nations," *Quirin*, 317 U.S. at 28—including, *inter alia*, the four Geneva Conventions signed in 1949. *See Yamashita*, 327 U.S. at 20-21, 23-24. The procedures that the Government has decreed will govern Hamdan's trial by commission violate these laws.

A

The commission's procedures are set forth in Commission Order No. 1, which was amended most recently on August 31, 2005—after Hamdan's trial had already begun. Every commission established pursuant to Commission Order No. 1 must have a presiding officer and at least three other members, all of whom must be commissioned officers. The presiding officer's job is to rule on questions of law and other evidentiary and interlocutory issues; the other members make findings and, if applicable, sentencing decisions. The accused is entitled to appointed military counsel and may hire civilian counsel at his own expense so long as such counsel is a U.S. citizen with security clearance "at the level SECRET or higher."

The accused also is entitled to a copy of the charge(s) against him, both in English and his own language (if different), to a presumption of innocence, and to certain other rights typically afforded criminal defendants in civilian courts and courts-martial. These rights are subject, however, to one glaring condition: The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to "close." Grounds for such closure "include the protection of information classified or classifiable . . . ; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests." Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer's discretion, be forbidden to reveal to his or her client what took place therein.

Another striking feature of the rules governing Hamdan's commission is that they permit the admission of

any evidence that, in the opinion of the presiding officer, "would have probative value to a reasonable person." Under this test, not only is testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses' written statements need be sworn. Moreover, the accused and his civilian counsel may be denied access to evidence in the form of "protected information" (which includes classified information as well as "information protected by law or rule from unauthorized disclosure" and "information concerning other national security interests,"), so long as the presiding officer concludes that the evidence is "probative" . . . and that its admission without the accused's knowledge would not "result in the denial of a full and fair trial." Finally, a presiding officer's determination that evidence "would not have probative value to a reasonable person" may be overridden by a majority of the other commission members.

Once all the evidence is in, the commission members (not including the presiding officer) must vote on the accused's guilt. A two-thirds vote will suffice for both a verdict of guilty and for imposition of any sentence not including death (the imposition of which requires a unanimous vote). Any appeal is taken to a three-member review panel composed of military officers and designated by the Secretary of Defense, only one member of which need have experience as a judge. The review panel is directed to "disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission." Once the panel makes its recommendation to the Secretary of Defense, the Secretary can either remand for further proceedings or forward the record to the President with his recommendation as to final disposition. The President then, unless he has delegated the task to the Secretary, makes the "final decision." He may change the commission's findings or sentence only in a manner favorable to the accused.

B

Hamdan raises both general and particular objections to the procedures set forth in Commission Order No. 1. His general objection is that the procedures' admitted deviation from those governing courts-martial itself renders the commission illegal. Chief among his particular objections are that he may, under the Commission Order, be convicted based on evidence he has not seen or heard, and that any evidence admitted against him need not comply with the admissibility or relevance rules typically applicable in criminal trials and court-martial proceedings.

The Government objects to our consideration of any procedural challenge at this stage on the grounds that (1) the abstention doctrine espoused in *Councilman*, 420 U.S. 738, precludes pre-enforcement review of procedural rules, (2) Hamdan will be able to raise any such challenge following a "final decision" under the DTA, and (3) "there is . . . no basis to presume, before the trial has even commenced, that the trial will not be conducted in good faith and according to law." The first of these contentions was disposed of in Part III, *supra*, and neither of the latter two is sound.

First, because Hamdan apparently is not subject to the death penalty (at least as matters now stand) and may receive a sentence shorter than 10 years' imprisonment, he has no automatic right to review of the commission's "final decision" before a federal court under the DTA. Second, contrary to the Government's assertion, there *is* a "basis to presume" that the procedures employed during Hamdan's trial will violate the law: The procedures are described with particularity in Commission Order No. 1, and implementation of some of them has already occurred. One of Hamdan's complaints is that he will be, and *indeed already has been*, excluded from his own trial. Under these circumstances, review of the procedures in advance of a "final decision"—the timing of which is left entirely to the discretion of the President under the DTA—is appropriate. We turn, then, to consider the merits of Hamdan's procedural challenge.

C

In part because the difference between military commissions and courts-martial originally was a difference of jurisdiction alone, and in part to protect against abuse and ensure evenhandedness under the pressures of war, the procedures governing trials by military commission historically have been the same as those governing courts-martial. Accounts of commentators from Winthrop through General Crowder—who drafted Article of War 15 and whose views have been deemed "authoritative" by this Court, *Madsen v. Kinsella*, 343 U.S. 341, 353 (1952)—confirm as much. As recently as the Korean and Vietnam wars, during which use of military commissions was contemplated but never made, the principle of procedural parity was espoused as a background assumption.

There is a glaring historical exception to this general rule. The procedures and evidentiary rules used to try General Yamashita near the end of World War II deviated in significant respects from those then governing courts-martial. *See* 327 U.S. 1. The force of that precedent, however, has been seriously undermined by post-World War II developments.

Yamashita, from late 1944 until September 1945, was Commanding General of the Fourteenth Army Group of the Imperial Japanese Army, which had exercised control over the Philippine Islands. On September 3, 1945, after American forces regained control of the Philippines, Yamashita surrendered. Three weeks later, he was charged with violations of the law of war. A few weeks after that, he was arraigned before a military commission convened in the Philippines. He pleaded not guilty, and his trial lasted for two months. On December 7, 1945, Yamashita was convicted and sentenced to hang. *See id.* at 5; *id.* at 31-34 (Murphy, J., dissenting). This Court upheld the denial of his petition for a writ of habeas corpus.

The procedures and rules of evidence employed during Yamashita's trial departed so far from those used in courts-martial that they generated an unusually long and vociferous critique from two Members of this Court. *See id.* at 41-81 (Rutledge, J., joined by Murphy, J., dissenting). Among the dissenters' primary concerns was that the commission had free rein to consider all evidence "which in the commission's opinion 'would be of assistance in proving or disproving the charge,' without any of the usual modes of authentication." *Id.* at 49 (Rutledge, J.).

The majority, however, did not pass on the merits of Yamashita's procedural challenges because it concluded that his status disentitled him to any protection under the Articles of War (specifically, those set forth in Article 38, which would become Article 36 of the UCMJ) or the Geneva Convention of 1929, 47 Stat.2021 (1929 Geneva Convention). The Court explained that Yamashita was neither a "person made subject to the Articles of War by Article 2" thereof, 327 U.S. at 20, nor a protected prisoner of war being tried for crimes committed during his detention, *id.* at 21.

At least partially in response to subsequent criticism of General Yamashita's trial, the UCMJ's codification of the Articles of War after World War II expanded the category of persons subject thereto to include defendants in Yamashita's (and Hamdan's) position, and the Third Geneva Convention of 1949 extended prisoner-of-war protections to individuals tried for crimes committed before their capture. The most notorious exception to the principle of uniformity, then, has been stripped of its precedential value.

The uniformity principle is not an inflexible one; it does not preclude all departures from the procedures dictated for use by courts-martial. But any departure must be tailored to the exigency that necessitates it. That understanding is reflected in Article 36 of the UCMJ, which provides:

"(a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally

recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress."

Article 36 places two restrictions on the President's power to promulgate rules of procedure for courts-martial and military commissions alike. First, no procedural rule he adopts may be "contrary to or inconsistent with" the UCMJ—however practical it may seem. Second, the rules adopted must be "uniform insofar as practicable." That is, the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable.

Hamdan argues that Commission Order No. 1 violates both of these restrictions; he maintains that the procedures described in the Commission Order are inconsistent with the UCMJ and that the Government has offered no explanation for their deviation from the procedures governing courts-martial, which are set forth in the Manual for Courts-Martial, United States (2005 ed.) (Manual for Courts-Martial). Among the inconsistencies Hamdan identifies is that between § 6 of the Commission Order, which permits exclusion of the accused from proceedings and denial of his access to evidence in certain circumstances, and the UCMJ's requirement that "[a]ll . . . proceedings" other than votes and deliberations by courts-martial "shall be made a part of the record and shall be in the presence of the accused." Hamdan also observes that the Commission Order dispenses with virtually all evidentiary rules applicable in courts-martial.

The Government has three responses. First, it argues, only 9 of the UCMJ's 158 Articles—the ones that expressly mention "military commissions"—actually apply to commissions, and Commission Order No. 1 sets forth no procedure that is "contrary to or inconsistent with" those 9 provisions. Second, the Government contends, military commissions would be of no use if the President were hamstrung by those provisions of the UCMJ that govern courts-martial. Finally, the President's determination that "the danger to the safety of the United States and the nature of international terrorism" renders it impracticable "to apply in military commissions . . . the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts," November 13 Order § 1(f), is, in the Government's view, explanation enough for any deviation from court-martial procedures.

Hamdan has the better of this argument. Without reaching the question whether any provision of Commission Order No. 1 is strictly "contrary to or inconsistent with" other provisions of the UCMJ, we conclude that the "practicability" determination the President has made is insufficient to justify variances from the procedures governing courts-martial. Subsection (b) of Article 36 was added after World War II, and requires a different showing of impracticability from the one required by subsection (a). Subsection (a) requires that the rules the President promulgates for courts-martial, provost courts, and military commissions alike conform to those that govern procedures in *Article III courts*, "so far as *he considers practicable*." Subsection (b), by contrast, demands that the rules applied in courts-martial, provost courts, and military commissions—whether or not they conform with the Federal Rules of Evidence—be "uniform *insofar as practicable*." Under the latter provision, then, the rules set forth in the Manual for Courts-Martial must apply to military commissions unless impracticable.

The President here has determined, pursuant to subsection (a), that it is impracticable to apply the rules and principles of law that govern "the trial of criminal cases in the United States district courts," to Hamdan's commission. We assume that complete deference is owed that determination. The President has not, however, made a similar official determination that it is impracticable to apply the rules for courts-martial. And even if subsection (b)'s requirements may be satisfied without such an official determination, the requirements of that subsection are not satisfied here.

Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case. There is no suggestion, for example, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility. Assuming *arguendo* that the reasons articulated in the President's Article 36(a) determination ought to be considered in evaluating the impracticability of applying court-martial rules, the only reason offered in support of that determination is the danger posed by international terrorism. Without for one moment underestimating that danger, it is not evident to us why it should require, in the case of Hamdan's trial, any variance from the rules that govern courts-martial.

The absence of any showing of impracticability is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself: the right to be present. Whether or not that departure technically is "contrary to or inconsistent with" the terms of the UCMJ, the jettisoning of so basic a right cannot lightly be excused as "practicable."

Under the circumstances, then, the rules applicable in courts-martial must apply. Since it is undisputed that Commission Order No. 1 deviates in many significant respects from those rules, it necessarily violates Article 36(b).

The Government's objection that requiring compliance with the court-martial rules imposes an undue burden both ignores the plain meaning of Article 36(b) and misunderstands the purpose and the history of military commissions. The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter. Exigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections. That history explains why the military commission's procedures typically have been the ones used by courts-martial. That the jurisdiction of the two tribunals today may sometimes overlap does not detract from the force of this history; Article 21 did not transform the military commission from a tribunal of true exigency into a more convenient adjudicatory tool. Article 36, confirming as much, strikes a careful balance between uniform procedure and the need to accommodate exigencies that may sometimes arise in a theater of war. That Article not having been complied with here, the rules specified for Hamdan's trial are illegal.

D

The procedures adopted to try Hamdan also violate the Geneva Conventions. The Court of Appeals dismissed Hamdan's Geneva Convention challenge on three independent grounds: (1) the Geneva Conventions are not judicially enforceable; (2) Hamdan in any event is not entitled to their protections; and (3) even if he is entitled to their protections, *Councilman* abstention is appropriate. Judge Williams, concurring, rejected the second ground but agreed with the majority respecting the first and the last. As we explained in Part III, *supra*, the abstention rule applied in *Councilman*, 420 U.S. 738, is not applicable here. And for the reasons that follow, we hold that neither of the other grounds the Court of Appeals gave for its decision is persuasive.

i

The Court of Appeals relied on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), to hold that Hamdan could not invoke the Geneva Conventions to challenge the Government's plan to prosecute him in accordance with Commission Order No. 1. *Eisentrager* involved a challenge by 21 German nationals to their 1945 convictions for war crimes by a military tribunal convened in Nanking, China, and to their subsequent

imprisonment in occupied Germany. The petitioners argued, *inter alia*, that the 1929 Geneva Convention rendered illegal some of the procedures employed during their trials, which they said deviated impermissibly from the procedures used by courts-martial to try American soldiers. *See id.* at 789. We rejected that claim on the merits because the petitioners (unlike Hamdan here) had failed to identify any prejudicial disparity "between the Commission that tried [them] and those that would try an offending soldier of the American forces of like rank," and in any event could claim no protection, under the 1929 Convention, during trials for crimes that occurred before their confinement as prisoners of war.

Buried in a footnote of the opinion, however, is this curious statement suggesting that the Court lacked power even to consider the merits of the Geneva Convention argument:

"We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, 47 Stat.2021, concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention."

The Court of Appeals, on the strength of this footnote, held that "the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court."

Whatever else might be said about the *Eisentrager* footnote, it does not control this case. We may assume that "the obvious scheme" of the 1949 Conventions is identical in all relevant respects to that of the 1929 Convention, and even that that scheme would, absent some other provision of law, preclude Hamdan's invocation of the Convention's provisions as an independent source of law binding the Government's actions and furnishing petitioner with any enforceable right. For, regardless of the nature of the rights conferred on Hamdan, they are, as the Government does not dispute, part of the law of war. *See Hamdi*, 542 U.S. at 520-521 (plurality opinion). And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted.

ii

For the Court of Appeals, acknowledgment of that condition was no bar to Hamdan's trial by commission. As an alternative to its holding that Hamdan could not invoke the Geneva Conventions at all, the Court of Appeals concluded that the Conventions did not in any event apply to the armed conflict during which Hamdan was captured. The court accepted the Executive's assertions that Hamdan was captured in connection with the United States' war with al Qaeda and that that war is distinct from the war with the Taliban in Afghanistan. It further reasoned that the war with al Qaeda evades the reach of the Geneva Conventions. We, like Judge Williams, disagree with the latter conclusion.

The conflict with al Qaeda is not, according to the Government, a conflict to which the full protections afforded detainees under the 1949 Geneva Conventions apply because Article 2 of those Conventions (which appears in all four Conventions) renders the full protections applicable only to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." Since Hamdan was captured and detained incident to the conflict with al Qaeda and not the conflict with the Taliban, and since al Qaeda, unlike Afghanistan, is not a "High Contracting Party"—*i.e.*, a signatory of the Conventions, the protections of those Conventions are not, it is argued, applicable to Hamdan.

We need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories. Article 3, often referred to as Common Article 3 because, like Article 2, it appears in all four Geneva Conventions, provides that in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum," certain provisions protecting "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by . . . detention." One such provision prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being "international in scope," does not qualify as a "conflict not of an international character." That reasoning is erroneous. The term "conflict not of an international character" is used here in contradistinction to a conflict between nations. So much is demonstrated by the "fundamental logic [of] the Convention's provisions on its application." Common Article 2 provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." High Contracting Parties (signatories) also must abide by all terms of the Conventions vis-à-vis one another even if one party to the conflict is a nonsignatory "Power," and must so abide vis-à-vis the nonsignatory if "the latter accepts and applies" those terms. Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory "Power" who are involved in a conflict "in the territory of" a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase "not of an international character" bears its literal meaning.

Although the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of "conflict not of an international character," *i.e.*, a civil war, the commentaries also make clear "that the scope of the Article must be as wide as possible." In fact, limiting language that would have rendered Common Article 3 applicable "especially [to] cases of civil war, colonial conflicts, or wars of religion," was omitted from the final version of the Article, which coupled broader scope of application with a narrower range of rights than did earlier proposed iterations.

iii

Common Article 3, then, is applicable here and, as indicated above, requires that Hamdan be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." While the term "regularly constituted court" is not specifically defined in either Common Article 3 or its accompanying commentary, other sources disclose its core meaning. The commentary accompanying a provision of the Fourth Geneva Convention, for example, defines "regularly constituted" tribunals to include "ordinary military courts" and "definitely exclud[e] all special tribunals." And one of the Red Cross' own treatises defines "regularly constituted court" as used in Common Article 3 to mean "established and organized in accordance with the laws and procedures already in force in a country."

The Government offers only a cursory defense of Hamdan's military commission in light of Common Article 3. As JUSTICE KENNEDY explains, that defense fails because "[t]he regular military courts in our system are the courts-martial established by congressional statutes." *Post* (opinion concurring in part). At a minimum, a military commission "can be 'regularly constituted' by the standards of our

military justice system only if some practical need explains deviations from court-martial practice." As we have explained, *see* Part VI-C, *supra*, no such need has been demonstrated here.

iv

[N.B. Part VI-D-iv is a plurality opinion.]

Inextricably intertwined with the question of regular constitution is the evaluation of the procedures governing the tribunal and whether they afford "all the judicial guarantees which are recognized as indispensable by civilized peoples." Like the phrase "regularly constituted court," this phrase is not defined in the text of the Geneva Conventions. But it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I). Although the United States declined to ratify Protocol I, its objections were not to Article 75 thereof. Indeed, it appears that the Government "regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled." Among the rights set forth in Article 75 is the "right to be tried in [one's] presence." Protocol I, Art. 75(4)(e).

We agree with JUSTICE KENNEDY that the procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by any "evident practical need," *post*, and for that reason, at least, fail to afford the requisite guarantees. We add only that, as noted in Part VI-A, *supra*, various provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 and indisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him. That the Government has a compelling interest in denying Hamdan access to certain sensitive information is not doubted. But, at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him.

v

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.

VII

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.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

THE CHIEF JUSTICE took no part in the consideration or 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." *Post*, (opinion of THOMAS, J.). 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." Cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion). 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.

Justice KENNEDY, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join as to Parts I and II, 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. This is not a case, then, where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority. Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches. Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.

These principles seem vindicated here, for a case that may be of extraordinary importance is resolved by ordinary rules. The rules of most relevance here are those pertaining to the authority of Congress and the interpretation of its enactments.

It seems appropriate to recite these rather fundamental points because the Court refers, as it should in its exposition of the case, to the requirement of the Geneva Conventions of 1949 that military tribunals be "regularly constituted"—a requirement that controls here, if for no other reason, because Congress requires that military commissions like the ones at issue conform to the "law of war." Whatever the substance and content of the term "regularly constituted" as interpreted in this and any later cases, there seems little doubt that it relies upon the importance of standards deliberated upon and chosen in advance of crisis, under a system where the single power of the Executive is checked by other constitutional mechanisms. All of which returns us to the point of beginning—that domestic statutes control this case. If Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so.

I join the Court's opinion, save Parts V and VI-D-iv. To state my reasons for this reservation, and to show my agreement with the remainder of the Court's analysis by identifying particular deficiencies in the military commissions at issue, this separate opinion seems appropriate.

II

In assessing the validity of Hamdan's military commission the precise circumstances of this case bear emphasis. The allegations against Hamdan are undoubtedly serious. Captured in Afghanistan during our Nation's armed conflict with the Taliban and al Qaeda—a conflict that continues as we speak—Hamdan stands accused of overt acts in furtherance of a conspiracy to commit terrorism: delivering weapons and ammunition to al Qaeda, acquiring trucks for use by Osama bin Laden's bodyguards, providing security services to bin Laden, and receiving weapons training at a terrorist camp. Nevertheless, the circumstances of Hamdan's trial present no exigency requiring special speed or precluding careful consideration of evidence. For roughly four years, Hamdan has been detained at a permanent United States military base in Guantánamo Bay, Cuba. And regardless of the outcome of the criminal proceedings at issue, the Government claims authority to continue to detain him based on his status as an enemy combatant.

Against this background, the Court is correct to conclude that the military commission the President has convened to try Hamdan is unauthorized. The following analysis, which expands on the Court's discussion, explains my reasons for reaching this conclusion.

To begin with, the structure and composition of the military commission deviate from conventional court-martial standards. Although these deviations raise questions about the fairness of the trial, no evident practical need explains them.

Under the UCMJ, courts-martial are organized by a "convening authority"—either a commanding officer, the Secretary of Defense, the Secretary concerned, or the President. The convening authority refers charges for trial, and selects the court-martial members who vote on the guilt or innocence of the accused and determine the sentence. Paralleling this structure, under Military Commission Order No. 1 an "Appointing Authority"—either the Secretary of Defense or the Secretary's "designee"—establishes commissions subject to the order, approves and refers charges to be tried by those commissions, and appoints commission members who vote on the conviction and sentence. In addition the Appointing Authority determines the number of commission members (at least three), oversees the chief prosecutor, provides "investigative or other resources" to the defense insofar as he or she "deems necessary for a full and fair trial," approves or rejects plea agreements, approves or disapproves communications with news media by prosecution or defense counsel (a function shared by the General Counsel of the Department of Defense), and issues supplementary commission regulations (subject to approval by the General Counsel of the Department of Defense, unless the Appointing Authority is the Secretary of Defense).

Against the background of these significant powers for the Appointing Authority, which in certain respects at least conform to ordinary court-martial standards, the regulations governing the commissions at issue make several noteworthy departures. At a general court-martial—the only type authorized to impose penalties of more than one year's incarceration or to adjudicate offenses against the law of war—the presiding officer who rules on legal issues must be a military judge. A military judge is an officer who is a member of a state or federal bar and has been specially certified for judicial duties by the Judge Advocate General for the officer's Armed Service. To protect their independence, military judges at general courts-martial are "assigned and directly responsible to the Judge Advocate General or the Judge Advocate General's designee." They must be detailed to the court, in accordance with applicable regulations, "by a person assigned as a military judge and directly responsible to the Judge Advocate General or the Judge Advocate General's designee." Here, by contrast, the Appointing Authority selects the presiding officer; and that officer need only be a judge advocate, that is, a military lawyer.

The Appointing Authority, moreover, exercises supervisory powers that continue during trial. Any

interlocutory question "the disposition of which would effect a termination of proceedings with respect to a charge" is subject to decision not by the presiding officer, but by the Appointing Authority. Other interlocutory questions may be certified to the Appointing Authority as the presiding officer "deems appropriate." While in some circumstances the Government may appeal certain rulings at a court-martial—including "an order or ruling that terminates the proceedings with respect to a charge or specification"—the appeals go to a body called the Court of Criminal Appeals, not to the convening authority. The Court of Criminal Appeals functions as the military's intermediate appeals court; it is established by the Judge Advocate General for each Armed Service and composed of appellate military judges. This is another means in which, by structure and tradition, the court-martial process is insulated from those who have an interest in the outcome of the proceedings.

Finally, in addition to these powers with respect to the presiding officer, the Appointing Authority has greater flexibility in appointing commission members. While a general court-martial requires, absent a contrary election by the accused, at least five members, the Appointing Authority here is free, as noted earlier, to select as few as three. This difference may affect the deliberative process and the prosecution's burden of persuasion.

As compared to the role of the convening authority in a court-martial, the greater powers of the Appointing Authority here—including even the resolution of dispositive issues in the middle of the trial—raise concerns that the commission's decisionmaking may not be neutral. If the differences are supported by some practical need beyond the goal of constant and ongoing supervision, that need is neither apparent from the record nor established by the Government's submissions.

It is no answer that, at the end of the day, the Detainee Treatment Act of 2005 (DTA) affords military-commission defendants the opportunity for judicial review in federal court. As the Court is correct to observe, the scope of that review is limited, and the review is not automatic if the defendant's sentence is under 10 years. Also, provisions for review of legal issues after trial cannot correct for structural defects, such as the role of the Appointing Authority, that can cast doubt on the factfinding process and the presiding judge's exercise of discretion during trial. Before military-commission defendants may obtain judicial review, furthermore, they must navigate a military review process that again raises fairness concerns. At the outset, the Appointing Authority (unless the Appointing Authority is the Secretary of Defense) performs an "administrative review" of undefined scope, ordering any "supplementary proceedings" deemed necessary. After that the case is referred to a three-member Review Panel composed of officers selected by the Secretary of Defense. Though the Review Panel may return the case for further proceedings only if a majority "form[s] a definite and firm conviction that a material error of law occurred," only one member must have "experience as a judge"; nothing in the regulations requires that other panel members have legal training. By comparison to the review of court-martial judgments performed by such independent bodies as the Judge Advocate General, the Court of Criminal Appeals, and the Court of Appeals for the Armed Forces, the review process here lacks structural protections designed to help ensure impartiality.

These structural differences between the military commissions and courts-martial—the concentration of functions, including legal decisionmaking, in a single executive official; the less rigorous standards for composition of the tribunal; and the creation of special review procedures in place of institutions created and regulated by Congress—remove safeguards that are important to the fairness of the proceedings and the independence of the court. Congress has prescribed these guarantees for courts-martial; and no evident practical need explains the departures here. For these reasons the commission cannot be considered regularly constituted under United States law and thus does not satisfy Congress' requirement that military commissions conform to the law of war.

Apart from these structural issues, moreover, the basic procedures for the commissions deviate from procedures for courts-martial, in violation of § 836(b). As the Court explains, the Military Commission Order abandons the detailed Military Rules of Evidence, which are modeled on the Federal Rules of Evidence in conformity with § 836(a)'s requirement of presumptive compliance with district-court rules.

Instead, the order imposes just one evidentiary rule: "Evidence shall be admitted if . . . the evidence would have probative value to a reasonable person." Although it is true some military commissions applied an amorphous evidence standard in the past, the evidentiary rules for those commissions were adopted before Congress enacted the uniformity requirement of 10 U.S.C. § 836(b) as part of the UCMJ. And while some flexibility may be necessary to permit trial of battlefield captives like Hamdan, military statutes and rules already provide for introduction of deposition testimony for absent witnesses and use of classified information. Indeed, the deposition-testimony provision specifically mentions military commissions and thus is one of the provisions the Government concedes must be followed by the commission at issue. That provision authorizes admission of deposition testimony only if the witness is absent for specified reasons—a requirement that makes no sense if military commissions may consider all probative evidence. Whether or not this conflict renders the rules at issue "contrary to or inconsistent with" the UCMJ under § 836(a), it creates a uniformity problem under § 836(b).

The rule here could permit admission of multiple hearsay and other forms of evidence generally prohibited on grounds of unreliability. Indeed, the commission regulations specifically contemplate admission of unsworn written statements; and they make no provision for exclusion of coerced declarations save those "established to have been made as a result of torture." Besides, even if evidence is deemed nonprobative by the presiding officer at Hamdan's trial, the military-commission members still may view it. In another departure from court-martial practice the military commission members may object to the presiding officer's evidence rulings and determine themselves, by majority vote, whether to admit the evidence.

As the Court explains, the Government has made no demonstration of practical need for these special rules and procedures, either in this particular case or as to the military commissions in general, nor is any such need self-evident. For all the Government's regulations and submissions reveal, it would be feasible for most, if not all, of the conventional military evidence rules and procedures to be followed.

In sum, as presently structured, Hamdan's military commission exceeds the bounds Congress has placed on the President's authority in §§ 836 and 821 of the UCMJ. Because Congress has prescribed these limits, Congress can change them, requiring a new analysis consistent with the Constitution and other governing laws. At this time, however, we must apply the standards Congress has provided. By those standards the military commission is deficient.

III

In light of the conclusion that the military commission here is unauthorized under the UCMJ, I see no need to consider several further issues addressed in the plurality opinion by JUSTICE STEVENS and the dissent by JUSTICE THOMAS.

First, I would not decide whether Common Article 3's standard—a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples"—necessarily requires that the accused have the right to be present at all stages of a criminal trial. As JUSTICE STEVENS explains, Military Commission Order No. 1 authorizes exclusion of the accused from the proceedings if the presiding officer determines that, among other things, protection of classified information so requires. JUSTICE STEVENS observes that these regulations create the possibility of a conviction and sentence based on evidence Hamdan has not seen or heard—a possibility the plurality is

correct to consider troubling.

As the dissent by Justice THOMAS points out, however, the regulations bar the presiding officer from admitting secret evidence if doing so would deprive the accused of a "full and fair trial." This fairness determination, moreover, is unambiguously subject to judicial review under the DTA. The evidentiary proceedings at Hamdan's trial have yet to commence, and it remains to be seen whether he will suffer any prejudicial exclusion.

There should be reluctance, furthermore, to reach unnecessarily the question whether, as the plurality seems to conclude, Article 75 of Protocol I to the Geneva Conventions is binding law notwithstanding the earlier decision by our Government not to accede to the Protocol. For all these reasons, and without detracting from the importance of the right of presence, I would rely on other deficiencies noted here and in the opinion by the Court—deficiencies that relate to the structure and procedure of the commission and that inevitably will affect the proceedings—as the basis for finding the military commissions lack authorization under 10 U.S.C. § 836 and fail to be regularly constituted under Common Article 3 and § 821.

I likewise see no need to address the validity of the conspiracy charge against Hamdan—an issue addressed at length in Part V of JUSTICE STEVENS' opinion and in Part II-C of JUSTICE THOMAS' dissent. In light of the conclusion that the military commissions at issue are unauthorized Congress may choose to provide further guidance in this area. Congress, not the Court, is the branch in the better position to undertake the "sensitive task of establishing a principle not inconsistent with the national interest or international justice."

Finally, for the same reason, I express no view on the merits of other limitations on military commissions described as elements of the common law of war in Part V of JUSTICE STEVENS' opinion.

With these observations I join the Court's opinion with the exception of Parts V and VI-D-iv.

Justice SCALIA, with 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 Guantánamo 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.

* * *

For the foregoing reasons, I dissent.

Justice THOMAS, with whom Justice SCALIA joins, and with whom Justice ALITO joins in all but Parts I, II-C-1, and III-B-2, 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.
