

HAMDAN v. RUMSFELD
United States Supreme Court
___ U.S. ___, 126 S.Ct. 2749, ___ L.Ed. 2d ___ (2006)

Author's Note: *Rasul* held that Guantanamo detainees were entitled to access U.S. federal courts via habeas corpus petitions. It did not resolve a host of related issues. One of them is addressed in the following edited version of *Hamdan*. The issue was whether Guantanamo detainees can be tried by the military commissions established by the President (the alternative to trial by military courts-martial or in the civilian criminal justice system). Most of the *Hamdan* court's discussion of the executive and legislative attempt to limit appellate review of habeas applications to only the District of Columbia Court of Appeals—and not the Supreme Court—has been omitted.

This edited version of *Hamdan* thus focuses on the propriety of a military commission proceeding, vis-à-vis military court-martial (or trial in a civilian criminal court). A brief review of the complex procedural history is as follows: Congress reacted the 2004 *Rasul* decision by passing the 2005 Detainee Treatment Act (DTA). It purported to strip the U.S. Supreme Court of its traditional role as final decision-maker regarding habeas corpus applications from any Guantanamo detainees.

In the parallel military proceedings, a Combatant Status Review Tribunal (CSRT) decided that Hamdan's continued detention at Guantanamo Bay was permissible, because he was an "enemy combatant."

A civilian federal trial court subsequently granted Hamdan's petition for habeas corpus. It also stayed Hamdan's military commission proceedings. This court rejected the commission process on a variety of grounds—discussed in the following Supreme Court version of *Hamdan*.

The federal appellate court reversed, rejecting the trial judge's conclusion that Hamdan was entitled to such relief. This judicial panel (including Judge Roberts who would later be appointed to the Supreme Court) unanimously agreed that the Geneva Conventions were not "judicially enforceable" by an individual defendant, while two of these three judges maintained that the Conventions could not, in any event, apply to Hamdan. This intermediate appellate court further concluded that Hamdan's trial before the contemplated military commission would not violate either the UCMJ or the U.S. Armed Forces regulations intended to implement the Geneva Conventions.

The U.S. Supreme Court then decided to hear this case—specifically, to decide whether the military commission convened to try Hamdan: (1) could legitimately do so under U.S. law; and (2) whether Hamdan could properly invoke the protections afforded by the Geneva Convention provisions in this proceeding. The U.S. Supreme Court's Chief Justice Roberts (who ruled in favor of the government, while serving on the lower appellate court) did not participate in the Supreme Court's following five to three decision against the government.

Several editorial enhancements have been added to this edited version of the case (mostly italics), without so specifying. Most citations of authority have been omitted. Finally, the original sixty-nine page decision was reduced to twenty-five pages. The author opted to retain the essential features necessary to yield a succinct, but at least minimally complete, account of the issues presented in this major separation-of-powers case involving all three branches of the U.S. Government.

Majority Opinion: Justice STEVENS announced the judgment of the Court and delivered the opinion of the Court . . . in which Justice SOUTER, Justice GINSBURG, and Justice BREYER join. [Justice KENNEDY's concurring opinion, at page 21 of this file, constitutes the fifth vote within the five-justice *Hamdan* majority.]

Petitioner Salim Ahmed Hamdan, a Yemeni national, is in custody at an American prison in Guantanamo 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 Guantanamo Bay. Over a year later, the President deemed him eligible for trial by military commission for then-undefined crimes. After another year had passed, Hamdan was charged [in 2004] with one count of *conspiracy* "to commit . . . offenses triable by military commission."

Hamdan filed petitions . . . 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 [any] 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.

. . .

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 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."

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 Guantanamo 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 . . . a retired Army major general and longtime military lawyer who has been designated [the] "Appointing Authority for Military Commissions."

[Sixteen months later] the President announced his determination that Hamdan and five other detainees at Guantanamo Bay were subject to the November 13 Order and thus triable by military commission. . . . Not until July 13, 2004, after Hamdan had commenced this [habeas corpus] action in the United States District Court . . . 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 . . . contains 13 numbered paragraphs. The first two paragraphs recite the asserted bases for the military commission's jurisdiction—namely, the November 13 Order and the President's July 3, 2003, declaration that Hamdan is eligible for trial by military commission. . . .

Only the final two paragraphs . . . 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 [as co-conspirators] 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 Qaida-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.

. . .

II

[Congress enacted the intervening Detainee Treatment Act (DTA) which] . . . was signed into law on December 30, 2005, address[ing] a broad swath of subjects related to detainees. It places restrictions on the treatment and interrogation of detainees in U.S.

custody, and it furnishes procedural protections for U.S. personnel accused of engaging in improper interrogation.

. . .

[The Court next addressed the DTA's attempt to oust it of jurisdiction over habeas corpus petitions, by vesting exclusive jurisdiction to hear such matters in the federal District of Columbia Court of Appeals.]³

. . .

Hamdan objects . . . on both constitutional and statutory grounds. Principal among his *constitutional* arguments is that the Government's preferred reading raises grave questions about Congress' authority to impinge upon this Court's appellate jurisdiction, particularly in habeas cases. . . . Hamdan also suggests that, if the Government's reading is correct, Congress has unconstitutionally suspended the writ of habeas corpus.

We find it unnecessary to reach either of these arguments. Ordinary principles of statutory construction suffice to rebut the Government's theory.

. . .

For these reasons, we deny the Government's motion to dismiss.

III

. . . [T]he government argues that, even if we have *statutory* jurisdiction, we should apply the "judge-made rule that civilian courts should await the final outcome of on-going military proceedings before entertaining an attack on those proceedings." Like the District Court and the Court of Appeals before us, we reject this argument.

. . .

Hamdan and the Government both have a compelling interest in knowing in advance whether Hamdan may be tried by a military commission that arguably is without any basis in law and operates free from many of the procedural rules prescribed by Congress for courts-martial [under the UCMJ]—rules intended to safeguard the accused and ensure the reliability of any conviction. While we certainly do not foreclose the possibility that abstention may be appropriate in some cases seeking review of ongoing military commission proceedings (such as military commissions convened on the *battlefield*), the foregoing discussion makes clear that, under our precedent, abstention is not justified here. We therefore proceed to consider the merits of Hamdan's challenge.

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 [beginning with the Revolutionary War's General George Washington] . . . , the commission "as such" was inaugurated in 1847. As commander of occupied Mexican territory, and having available to him no other tribunal, General Winfield Scott that year ordered the establishment of . . . " *'military commissions'* " . . . to try offenses against the law of war.

³ The penultimate subsections of [DTA] § 1005 emphasize that the provision does not "confer any constitutional right on an alien detained as an enemy combatant outside the United States" and that the "United States" does not, for purposes of § 1005, include Guantanamo Bay.

When the exigencies of war next gave rise to a need for use of military commissions, during the Civil War . . . , 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. See . . . also *Quirin*, 317 U.S., at 25, 63 S.Ct. 1 ("Congress and the President, like the courts, possess no power not derived from the Constitution"). And that authority, if it exists, can derive only from the powers granted jointly to the President and Congress in time of war.

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, 121 (1866)]:

The power to make the necessary laws is in Congress. . . . [T]he President . . . [cannot] 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 . . . sanctioned the use of military commissions in such circumstances. ("By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases"). Article 21 of the UCMJ, the language of which is substantially identical to the old Article [of War] 15 and was preserved by Congress after World War II,²² reads as follows:

²² Article 15 was first adopted as part of the Articles of War in 1916. When the Articles of War were codified and re-enacted as the UCMJ in 1950, Congress determined to retain Article 15

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 . . . 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.²³ . . .

The Government would have us dispense with the inquiry that the *Quirin* Court undertook and find in either the AUMF [congressional Authorization for Use of Military Force] or the DTA [Detainee Treatment Act] 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, and that those powers include the authority to convene military commissions in appropriate circumstances, 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 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 Guantanamo Bay. . . .

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

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

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 [*e.g.*, by legislating the UCMJ procedures].

constitutional questions, but is well recognized.²⁵ *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.²⁶

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. Bickers, *Military Commissions are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 *Tex. Tech. L.Rev.* 899, 902 (2002-2003). 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 [approved] President Roosevelt's use of such a tribunal to try [and execute] Nazi saboteurs captured on American soil during the War. And in *Yamashita*, 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. 327 U.S. 1.

Quirin is the model the Government invokes most frequently to defend the commission convened to try Hamdan. That is both appropriate and unsurprising. Since Guantanamo Bay is neither enemy-occupied territory nor under martial law, the law-of-war commission is the only model available. At the same time, no more robust model of executive power exists; *Quirin* represents the high-water mark of military power to try enemy combatants for war crimes.

The [previously mentioned] classic treatise penned by Colonel William Winthrop . . . describes at least *four preconditions* for exercise of jurisdiction by a tribunal of the type convened to try Hamdan. *First*, "[a] military commission, (except where otherwise authorized by statute), can legally assume jurisdiction only of offenses committed within the field of the command of the convening commander." The "field of command" in these circumstances means the "theatre of war." *Second*, the offense charged "must have been committed within the period of the war." No jurisdiction exists to try offenses

²⁵ The justification for, and limitations on, these commissions were summarized in *Milligan*:

If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a *gross usurpation of power*. Martial rule can *never* exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.

²⁶ The limitations on these occupied territory or military government commissions are tailored to the tribunals' purpose and the exigencies that necessitate their use. They may be employed "pending the establishment of civil government," which may in some cases extend beyond the "cessation of hostilities."

"committed either before or after the war." *Third*, a military commission not established pursuant to martial law or an occupation may try only "[i]ndividuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war" and members of one's own army "who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the [civilian] criminal courts or under the Articles of war." *Finally*, a law-of-war commission has jurisdiction to try only two kinds of offense: "Violations of the laws and usages of war cognizable by military tribunals only," and "[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war."

All parties agree that Colonel Winthrop's treatise accurately describes the common law governing military commissions, and that the jurisdictional limitations he identifies were incorporated in Article of War 15 and, later, Article 21 of the UCMJ. It also is undisputed that Hamdan's commission lacks jurisdiction to try him unless the charge "properly sets forth, not only the details of the act charged, but the circumstances conferring *jurisdiction*." The question is whether the preconditions designed to ensure that a military necessity exists to justify the use of this extraordinary tribunal have been satisfied here.

The charge against Hamdan . . . alleges a conspiracy extending over a number of years, from 1996 to November 2001.³⁰ All but two months of that more than 5-year-long period preceded the attacks of September 11, 2001, and the enactment of the AUMF—the Act of Congress on which the Government relies for exercise of its war powers and thus for its authority to convene military commissions.³¹ Neither the purported agreement with Osama bin Laden and others to commit war crimes, nor a single overt act, is alleged to have occurred in a theater of war or on any specified date after September 11, 2001. None of the overt acts that Hamdan is alleged to have committed violates the law of war.

These facts alone cast doubt on the legality of the charge and, hence, the commission; as Winthrop makes plain, the offense alleged must have been committed both in a theater of war and *during*, not before, the relevant conflict. But the deficiencies in the time and place allegations also underscore—indeed are symptomatic of—the most

³⁰ The elements of this conspiracy charge have been defined not by Congress but by the President. See Military Commission Instruction No. 2, 32 CFR § 11.6 (2005).

³¹ Justice THOMAS would treat Osama bin Laden's 1996 declaration of jihad against Americans as the inception of the war. But even the Government does not go so far; although the United States had for some time prior to the attacks of September 11, 2001, been aggressively pursuing al Qaeda, neither in the charging document nor in submissions before this Court has the Government asserted that the President's *war powers* were activated prior to September 11, 2001. Cf. Brief for Respondents 25 (describing the events of September 11, 2001, as "an act of war" that "triggered a right to deploy military forces abroad to defend the United States by combating al Qaeda"). Justice THOMAS' further argument that the AUMF is "backward looking" and therefore authorizes *trial by military commission* of crimes that occurred *prior* to the inception of war is insupportable. If nothing else, Article 21 of the UCMJ requires that the President comply with the law of war in his use of military commissions. As explained in the text, the law of war permits trial only of offenses "committed within the period of the war." Winthrop 837; see also *Quirin* (observing that law-of-war military commissions may be used to try "those enemies *who in their attempt to thwart or impede our military effort* have violated the law of war." The sources that Justice THOMAS relies on to suggest otherwise simply do not support his position. . . .

serious defect of this charge: The offense it alleges is not triable by law-of-war military commission. See *Yamashita*, 327 U.S., at 13 ("Neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge proffered against him is of a violation of the law of war").³²

There is no suggestion that Congress has, in exercise of its constitutional authority to "define and punish . . . Offences against the Law of Nations," U.S. Const., Art. I, § 8, cl. 10, positively identified "conspiracy" as a war crime.³³ As we explained in *Quirin*, that is not necessarily fatal to the Government's claim of authority to try the alleged offense by military commission; Congress, through Article 21 of the UCMJ, has "incorporated by reference" the common law of war, which may render triable by military commission certain offenses not defined by statute.³⁴

At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war. That burden is far from satisfied here. The crime of "conspiracy" has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war.³⁶ Winthrop explains that under the common law governing military

³² Justice THOMAS adopts the remarkable view, not advocated by the Government, that the charging document in this case actually includes more than one charge: Conspiracy *and* several other ill-defined crimes, like "joining an organization" that has a criminal purpose, "[b]eing a guerilla," and aiding the enemy. There are innumerable problems with this approach.

First, the crimes Justice THOMAS identifies were not actually charged. It is one thing to observe that charges before a military commission " 'need not be stated with the precision of a common law indictment;' " it is quite another to say that a crime *not charged* may nonetheless be read into an indictment. *Second*, the Government plainly had available to it the tools and the time it needed to charge petitioner with the various crimes Justice THOMAS refers to, if it believed they were supported by the allegations. As Justice THOMAS himself observes, see *post*, at 2834, the crime of aiding the enemy may, in circumstances where the accused owes allegiance to the party whose enemy he is alleged to have aided, be triable by military commission pursuant to Article 104 of the UCMJ, 10 U.S.C. § 904. Indeed, the Government has charged detainees under this provision when it has seen fit to do so.

³³ Cf. 10 U.S.C. § 904 (making triable by military commission the crime of aiding the enemy); § 906 (same for spying); War Crimes Act of 1996, 18 U.S.C. § 2441 (listing war crimes); Foreign Operations, Export Financing, and Related Appropriations Act, 1998, § 583 (same).

³⁴ While the common law necessarily is "evolutionary in nature," even in jurisdictions where common law crimes are still part of the penal framework, an act does not become a crime without its foundations having been firmly established in precedent. The caution that must be exercised in the incremental development of common-law crimes by the [civilian] judiciary is, for the reasons explained in the text, all the more critical when reviewing developments that stem from military action.

³⁶ By contrast, the Geneva Conventions do extend liability for substantive war crimes to those who "orde[r]" their commission, to impose "command responsibility" on military commanders for acts of their subordinates.

commissions, it is not enough to *intend* to violate the law of war and *commit overt acts* in furtherance of that intention unless the overt acts either are themselves offenses against the law of war or constitute steps sufficiently substantial to qualify as an attempt.

That the defendants in *Quirin* [Nazi saboteur case] were charged with conspiracy is not persuasive, since the Court declined to address whether the offense actually qualified as a violation of the law of war—let alone one triable by military commission. The *Quirin* defendants were charged with the following offenses:

[I.] Violation of the law of war.

[II.] Violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy. "

[III.] Violation of Article 82, defining the offense of spying.

[IV.] Conspiracy to commit the offenses alleged in charges [I, II, and III].

...

If anything, *Quirin* supports Hamdan's argument that conspiracy [alone] is not a violation of the law of war. Not only did the Court pointedly omit any discussion of the conspiracy charge, but its analysis of Charge I placed special emphasis on the *completion* of an offense; it took seriously the saboteurs' argument that there can be no violation of a law of war—at least not one triable by military commission—without the actual commission of or attempt to commit a "hostile and warlike act" [e.g., German soldiers' clandestine wartime mission ashore in New York and Florida].

That limitation makes eminent sense when one considers the necessity from whence this kind of military commission grew: The need to dispense swift justice, often in the form of execution, to illegal belligerents captured on the battlefield. See . . . ([1916] testimony of Brig. Gen. Enoch H. Crowder) (observing that Article of War 15 preserves the power of "the military commander *in the field in time of war*" to use military commissions (emphasis added)). The same urgency would not have been felt vis-à-vis enemies who had done little more than *agree* to violate the laws of war. Cf. 31 Op. Atty. Gen. 356, 357, 361 (1918) (opining that a German spy could not be tried by military commission because, having been apprehended before entering "any camp, fortification or other military premises of the United States," he had "committed [his offenses] outside of the field of military operations"). The *Quirin* Court acknowledged as much when it described the President's authority to use law-of-war military commissions as the power 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."

...

Finally, international sources confirm that the crime charged here is not a recognized violation of the law of war. As observed above, none of the major treaties governing the law of war identifies conspiracy as a violation thereof. And the only "conspiracy" crimes that have been recognized by international war crimes tribunals . . . are conspiracy to commit genocide and common plan to wage aggressive war, which is a crime against the peace and requires for its commission actual participation in a "concrete plan to wage war." The International Military Tribunal at Nuremberg, over the prosecution's objections, pointedly refused to recognize as a violation of the law of war

conspiracy to commit war crimes,³⁹ and convicted only Hitler's most senior associates of conspiracy to wage aggressive war, see S. Pomorski, *Conspiracy and Criminal Organization, in the Nuremberg Trial and International Law* 213, 233-235 (G. Ginsburgs & V. Kudriavtsev eds.1990). As one prominent figure from the Nuremberg trials has explained, members of the Tribunal objected to recognition of conspiracy as a violation of the law of war on the ground that "[t]he Anglo-American concept of conspiracy was not part of European legal systems and arguably not an element of the internationally recognized laws of war." T. Taylor, *Anatomy of the Nuremberg Trials: A Personal Memoir* 36 (1992).⁴⁰

In sum, the sources that the Government and Justice THOMAS rely upon to show that *conspiracy* to violate the law of war is itself a violation of the law of war in fact demonstrate quite the opposite. Far from making the requisite substantial showing, the Government has failed even to offer a "merely colorable" case for inclusion of conspiracy among those offenses cognizable by law-of-war military commission. Because the charge does not support the commission's jurisdiction, the commission lacks authority to try Hamdan.

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. Cf. *Rasul v. Bush*, 542 U.S., at 487, (KENNEDY, J., concurring in judgment) (observing that "Guantanamo Bay is . . . far removed from any 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,⁴¹ but it is not an offense that "by the law of war may be tried by military commissio[n]." 10 U.S.C. § 821. None of the overt acts

³⁹ Accordingly, the Tribunal determined to "disregard the charges ... that the defendants conspired to commit War Crimes and Crimes against Humanity." 22 Trial of the Major War Criminals Before the International Military Tribunal 469 (1947); see also *ibid.* ("[T]he Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war") [there being no Genocide Convention at the time].

⁴⁰ See also 15 United Nations War Crimes Commissions, *Law Reports of Trials of War Criminals* 90-91 (1949) (observing that, although a few individuals were charged with conspiracy under European domestic criminal codes following World War II, "the United States Military Tribunals" established at that time did not "recognis[e] as a separate offence conspiracy to commit war crimes or crimes against humanity"). The International Criminal Tribunal for the former Yugoslavia (ICTY), drawing on the Nuremberg precedents, has adopted a "joint criminal enterprise" theory of liability, but that is a species of liability for the [essential] substantive offense (akin to aiding and abetting), not a crime on its own. . . .

⁴¹ Justice THOMAS' suggestion that our conclusion precludes the Government from bringing to justice those who *conspire to commit acts of terrorism* is therefore wide of the mark. That conspiracy is not a violation of the law of war triable by military commission does not mean the Government may not, for example, prosecute by court-martial or in federal court those caught "plotting terrorist atrocities like the bombing of the Khobar Towers."

alleged to have been committed in furtherance of the agreement is itself a war crime, or even necessarily occurred during time of, or in a theater of, war. Any urgent need for imposition or execution of judgment is utterly belied by the record; Hamdan was arrested in November 2001 and he was not charged until mid-2004. These simply are not the circumstances in which, by any stretch of the historical evidence or this Court's precedents, a military commission established by Executive Order under the authority of Article 21 of the UCMJ may lawfully try a person and subject him to punishment.

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. The procedures that the Government has decreed . . . 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 [military] 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 [of a person not present at the hearing] and evidence obtained through coercion [i.e., torture] 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."⁴³ . . .

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.

. . .

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. . . . As recently as the Korean and Vietnam wars, during which use of military commissions was contemplated but never made, the principle of procedural parity [with UCMJ procedures] was espoused as a background assumption. See Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 Mich. J. Int'l L. 1, 3-5 (2001-2002).

⁴³ As the District Court observed, this section apparently permits reception of testimony from a confidential informant in circumstances where "Hamdan will not be permitted to hear the testimony, see the witness's face, or learn his name. If the government has information developed by interrogation of witnesses in Afghanistan or elsewhere, it can offer such evidence in transcript form, or even as summaries of transcripts."

. . . ⁴⁶

[T]he 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,⁴⁷ and the Third Geneva Convention of 1949 extended prisoner-of-war protections to individuals tried for crimes committed before their capture. See 3 Int'l Comm. of Red Cross,⁴⁸ Commentary: Geneva Convention Relative to the Treatment of Prisoners of War 413 (1960) (hereinafter GCIII Commentary) (explaining that Article 85, which extends the Convention's protections to "[p]risoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture," was adopted in response to judicial interpretations of the 1929 Convention, including this Court's decision in *Yamashita*). 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

⁴⁶ The [*Yamashita*] dissenters' views are summarized in the following passage:

"It is outside our basic scheme to condemn men without giving reasonable opportunity for preparing defense; in capital or other serious crimes to convict on 'official documents . . . ; affidavits; . . . documents or translations thereof; diaries . . . , photographs, motion picture films, and ... newspapers' or on hearsay, once, twice or thrice removed, more particularly when the documentary evidence or some of it is prepared *ex parte* by the prosecuting authority and includes not only opinion but conclusions of guilt. Nor in such cases do we deny the rights of confrontation of witnesses and cross-examination." *Yamashita*, 327 U.S., at 44.

⁴⁷ Article 2 of the UCMJ now reads:

- (a) The following persons are subject to [the UCMJ]:

- (9) Prisoners of war in custody of the armed forces.

- [. . .]

- (12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands." 10 U.S.C. § 802(a). Guantanamo Bay is such a leased area. See *Rasul v. Bush*, 542 U.S. 466, 471.

⁴⁸ The International Committee of the Red Cross is referred to by name in several provisions of the 1949 Geneva Conventions and is the body that drafted and published the official commentary to the Conventions. Though not binding law, the commentary is, as the parties recognize, relevant in interpreting the Conventions' provisions.

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 [commission] 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." 10 U.S.C.A. § 839(c). Hamdan also observes that the Commission Order dispenses with virtually all evidentiary rules applicable in courts-martial.

. . .

[W]e 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 . . . demands that the rules applied in courts-martial . . . and military commissions . . . 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 [UCMJ Art. 36] 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 *argued* 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.⁵² 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. See 10 U.S.C.A. § 839(c). Whether or not that departure technically is "contrary to or inconsistent with" the terms of the UCMJ, 10 U.S.C. § 836(a), 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).

Article 36 . . . 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.⁵⁴

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) . . . [that civilian courts should abstain from hearing this case, to avoid two potentially conflicting judgments from the respective civilian and military tribunals]. 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 [Government and 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,

⁵² Justice THOMAS looks not to the President's official Article 36(a) determination, but instead to press statements made by the Secretary of Defense and the Under Secretary of Defense for Policy. We have not heretofore, in evaluating the legality of Executive action, deferred to comments made by such officials to the media. Moreover, the only additional reason the comments provide—aside from the general danger posed by international terrorism—for departures from court-martial procedures is the need to protect classified information. As we explain in the text, and as Justice KENNEDY elaborates in his separate opinion, the structural and procedural defects of Hamdan's commission extend far beyond rules preventing access to classified information.

⁵⁴ Prior to the enactment of Article 36(b), it may well have been the case that a deviation from the rules governing courts-martial would not have rendered the military commission " *illegal* ." (THOMAS, J., dissenting). Article 36(b), however, imposes a *statutory command* that must be heeded.

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. 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 [*Eisentranger*] 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, 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 *Eisentranger* 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,⁵⁷ 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.⁵⁸ 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. And compliance with the law of war is the condition upon which the authority set forth in [UCMJ] Article 21 is granted.

⁵⁷ But see, *e.g.*, 4 Int'l Comm. of Red Cross, Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War 21 (1958) (hereinafter GCIV Commentary) (the 1949 Geneva Conventions were written "first and foremost *to protect individuals, and not to serve State interests*"); GCIII Commentary 91 ("It was not . . . until the Conventions of 1949 . . . that the existence of 'rights' conferred in prisoners of war was affirmed").

⁵⁸ But see generally Brief for Louis Henkin et al. as *Amici Curiae*; 1 Int'l Comm. for the Red Cross, Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in

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."⁵⁹ 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.⁶⁰

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.⁶¹ 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 Party⁶² 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 in the Field 84 (1952) ("It should be possible in States which are parties to the Convention . . . for the rules of the Convention to be evoked before an appropriate national court by the protected person who has suffered a violation"); GCII Commentary 92; GCIV Commentary 79.

⁵⁹ For convenience's sake, we use citations to the Third Geneva Convention [regarding POWs] only.

⁶⁰ The President has stated that the conflict with the Taliban is a conflict to which the Geneva Conventions apply. See White House Memorandum, Humane Treatment of Taliban and al Qaeda Detainees 2 (Feb. 7, 2002), available at http://www.justicescholars.org/pegc/archive/White_House/bush_memo_20020207_ed.pdf (hereinafter White House Memorandum).

⁶¹ Hamdan observes that Article 5 of the Third Geneva Convention requires that if there be "any doubt" whether he is entitled to prisoner-of-war protections, he must be afforded those protections until his status is determined by a "competent tribunal." See also Headquarters Depts. of Army, Navy, Air Force, and Marine Corps, Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997). Because we hold that Hamdan may not, in any event, be tried by the military commission the President has convened pursuant to the November 13 Order and Commission Order No. 1, the question whether his potential status as a prisoner of war independently renders illegal his trial by military commission may be reserved [for some future case requiring a resolution of this issue].

⁶² The term "Party" here has the broadest possible meaning; a Party need neither be a signatory of the Convention nor "even represent a legal entity capable of undertaking international obligations." GCIII Commentary 37.

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." . . .

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."⁶³ . . .

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." Int'l Comm. of Red Cross, 1 Customary International Humanitarian Law 355 (2005); see also GCIV Commentary 340 (observing that "ordinary military courts" will "be set up in accordance with the recognized principles governing the administration of justice").

The Government offers only a cursory defense of Hamdan's military commission in light of Common Article 3. As Justice KENNEDY explains [in his concurring opinion], that defense fails because "[t]he regular military courts in our system are the courts-martial established by congressional statutes." 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, no such need has been demonstrated here.⁶⁵

⁶³ See also GCIII Commentary 35 (Common Article 3 "has the merit of being simple and clear . . . Its observance does not depend upon preliminary discussions on the nature of the conflict"); GCIV Commentary 51 ("[N]obody in enemy hands can be outside the law"); U.S. Army Judge Advocate General's Legal Center and School, Dept. of the Army, Law of War Handbook 144 (2004) (Common Article 3 "serves as a 'minimum yardstick of protection in all conflicts, not just internal armed conflicts' " (quoting *Nicaragua v. United States*, 1986 I.C.J. 14, ¶ 218, 25 I.L.M. 1023)); *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 102 (ICTY App. Chamber, Oct. 2, 1995) (stating that "the character of the conflict is irrelevant" in deciding whether Common Article 3 applies).

⁶⁵ Further evidence of this tribunal's irregular constitution is the fact that its rules and procedures are subject to change midtrial, at the whim of the Executive. See Commission Order No. 1, § 11 (providing that the Secretary of Defense may change the governing rules "from time to time").

iv

Inextricably intertwined with the question of regular constitution [of all U.S. tribunals] 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." Taft, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 *Yale J. Int'l L.* 319, 322 (2003). Among the rights set forth in Article 75 is the "right to be tried in [one's] presence." Protocol I, Art. 75(4)(e).⁶⁶

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," and for that reason, at least, fail to afford the requisite guarantees. We add only that . . . 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.⁶⁷ 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.

⁶⁶ Other international instruments to which the United States is a signatory include the same basic protections set forth in Article 75. See, e.g., International Covenant on Civil and Political Rights, Art. 14, ¶ 3(d), Mar. 23, 1976, 999 U.N.T.S. 171 (setting forth the right of an accused "[t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing"). . . .

⁶⁷ . . . Cf. *Crawford v. Washington*, 541 U.S. 36, 49 ("It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine"); *Diaz v. United States*, 223 U.S. 442, 455 (describing the right to be present as "scarcely less important to the accused than the right of trial itself"); *Lewis v. United States*, 146 U.S. 370, 372 (exclusion of defendant from part of proceedings is "contrary to the dictates of humanity" (internal quotation marks omitted)); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170, n. 17 ("[t]he plea that evidence of guilt must be secret is abhorrent to free men"). More fundamentally, the legality of a tribunal under Common Article 3 cannot be established by bare assurances that, whatever the character of the court or the procedures it follows, individual adjudicators will act fairly.

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.

...

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." Cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536. 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.

. . . This is not a case . . . 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.

...

I

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.

...

The UCMJ as a whole establishes an intricate system of military justice. It authorizes courts-martial in various forms; it regulates the organization and procedure of those courts; it defines offenses, and rights for the accused; and it provides mechanisms for appellate review. As explained below, the statute further recognizes that special military commissions may be convened to try war crimes. While these laws provide authority for certain forms of military courts, they also impose limitations, at least two of which control this case. . . .

One limit on the President's authority is contained in § 836 of the UCMJ. That section provides:

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

...

In addition to § 836, a *second* UCMJ provision, 10 U.S.C. § 821, requires us to compare the commissions at issue to courts-martial. This provision states:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions . . . or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

...

The Court is correct to concentrate on one provision of the law of war that is applicable to our Nation's armed conflict with al Qaeda in Afghanistan and, as a result, to the use of a military commission to try Hamdan. That provision is Common Article 3 of the four Geneva Conventions of 1949. It prohibits, as relevant here, "[t]he 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 provision is part of a treaty the United States has

ratified and thus accepted as binding law. By Act of Congress, moreover, violations of Common Article 3 are considered "war crimes," punishable as federal offenses, when committed by or against United States nationals and military personnel. See 18 U.S.C. § 2441. There should be no doubt, then, that *Common Article 3 is part of the [U.S.] law of war* as that term is used in § 821.

...

At a minimum a military commission like the one at issue—a commission specially convened by the President to try specific persons without express congressional authorization—can be "regularly constituted" by the standards of our military justice system only if some practical need explains deviations from court-martial practice. . . .

II

...

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.

...

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 Guantanamo Bay detainee [in response to this court's 2004 *Rasul* decision]. 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.

I

A

...

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

...

⁸ The very purpose of Article II's creation of a *civilian* Commander in Chief in the President of the United States was to generate "structural insulation from military influence." See *The Federalist* No. 28 (A. Hamilton); *id.*, No. 69 (same). We do not live under a military junta. It is a disservice to both those in the Armed Forces and the President to suggest that the President is subject to the undue control of the military.

Justice ALITO, with whom Justices SCALIA and THOMAS join in Parts I-III, dissenting.

...
I

The holding of the Court, as I understand it, rests on the following reasoning. A military commission is lawful only if it is authorized by 10 U.S.C. § 821; this provision permits the use of a commission to try "offenders or offenses" that "by statute or by the law of war may be tried by" such a commission; because no statute provides that an offender such as petitioner or an offense such as the one with which he is charged may be tried by a military commission, he may be tried by military commission only if the trial is authorized by "the law of war"; the Geneva Conventions are part of the law of war; and Common Article 3 of the Conventions prohibits petitioner's trial because the commission before which he would be tried is not "a regularly constituted court." I disagree with this holding because petitioner's commission is "a regularly constituted court."

...

Common Article 3 imposes three requirements. Sentences may be imposed only by (1) a "court" (2) that is "regularly constituted" and (3) that affords "all the judicial guarantees which are recognized as indispensable by civilized peoples."

I see no need here to comment extensively on the meaning of the first and third requirements. The first requirement is largely self-explanatory, and, with respect to the third, I note only that on its face it imposes a uniform international standard that does not vary from signatory to signatory.

The second element ("regularly constituted") is the one on which the Court relies.

...

In order to determine whether a court has been properly appointed, set up, or established, it is necessary to refer to a body of law that governs such matters. I interpret Common Article 3 as looking to the domestic law of the appointing country because I am not aware of any international law standard regarding the way in which such a court must be appointed, set up, or established, and because different countries with different government structures handle this matter differently. Accordingly, "a regularly constituted court" is a court that has been appointed, set up, or established in accordance with the domestic law of the appointing country.

II

In contrast to this interpretation, the opinions supporting the judgment today hold that the military commission before which petitioner would be tried is not "a regularly constituted court" (a) because "no evident practical need explains" why its "structure and composition . . . deviate from conventional court-martial standards; and (b) because, contrary to 10 U.S.C. § 836(b), the procedures specified for use in the proceeding before the military commission impermissibly differ from those provided under the Uniform Code of Military Justice (UCMJ) for use by courts-martial.

...

A

...

But even if Common Article 3 recognizes this prohibition on "special tribunals," that prohibition does not cover [this] petitioner's tribunal. . . . Insofar as respondents propose to conduct the tribunals according to the procedures of Military Commission Order No. 1 and orders promulgated thereunder . . . then it seems that petitioner's tribunal, like the hundreds of others respondents propose to conduct, is very much regular and not at all special.

B

I also disagree with the Court's conclusion that petitioner's military commission is "illegal," because its procedures allegedly do not comply with 10 U.S.C. § 836. Even if § 836(b), unlike Common Article 3, does impose at least a limited uniformity requirement amongst the tribunals contemplated by the UCMJ, and even if it is assumed for the sake of argument that some of the procedures specified in Military Commission Order No. 1 impermissibly deviate from court-martial procedures, it does not follow that the military commissions created by that order are not "regularly constituted" or that trying petitioner before such a commission would be inconsistent with the law of war. If Congress enacted a statute requiring the federal district courts to follow a procedure that is unconstitutional, the statute would be invalid, but the district courts would not. Likewise, if some of the procedures that may be used in military commission proceedings are improper, the appropriate remedy is to proscribe the use of those particular procedures, not to outlaw the commissions. I see no justification for striking down the entire commission structure simply because it is possible that petitioner's trial might involve the use of some procedure that is improper.

III

Returning to the three elements of Common Article 3—(1) a court, (2) that is appointed, set up, and established in compliance with domestic law, and (3) that respects universally recognized fundamental rights—I conclude that all of these elements are satisfied in this case.

A

First, the commissions qualify as courts.
Second, the commissions were appointed, set up, and established pursuant to an order of the President, just like the commission in *Ex parte Quirin*, 317 U.S. 1, and the Court acknowledges that *Quirin* recognized that the statutory predecessor of 10 U.S.C. § 821 "preserved" the President's power "to convene military commissions."

[Finally,] [a]lthough Justice KENNEDY concludes that "an acceptable degree of independence from the Executive is necessary to render a commission 'regularly constituted' by the standards of our Nation's system of justice," he offers no support for this proposition (which in any event seems to be more about fairness or integrity than regularity). The commission in *Quirin* was certainly no more independent from the Executive than the commissions at issue here.

As for the standard for the admission of evidence at commission proceedings, the Court does not suggest that this rule violates the international standard incorporated into

Common Article 3 ("the judicial guarantees which are recognized as indispensable by civilized peoples," Rules of evidence differ from country to country, and much of the world does not follow aspects of our evidence rules, such as the general prohibition against the admission of hearsay. See, *e.g.*, Blumenthal, *Shedding Some Light on Calls for Hearsay Reform: Civil Law Hearsay Rules in Historical and Modern Perspective*, 13 *Pace Int'l L.Rev.* 93, 96-101 (2001). If a particular accused claims to have been unfairly prejudiced by the admission of particular evidence, that claim can be reviewed in the review proceeding for that case. It makes no sense to strike down the entire commission structure based on speculation that some evidence might be improperly admitted in some future case.

In sum, I believe that Common Article 3 is satisfied here because the military commissions (1) qualify as courts, (2) that were appointed and established in accordance with domestic law, and (3) any procedural improprieties that might occur in particular cases can be reviewed in those cases.

B

...

It seems clear that the commissions at issue here meet this standard. Whatever else may be said about the system that was created by Military Commission Order No. 1 and augmented by the Detainee Treatment Act, this system—which features formal trial procedures, multiple levels of administrative review, and the opportunity for review by a United States Court of Appeals and by this Court—does not dispense "summary justice."

For these reasons, I respectfully dissent.

Notes and Questions

1. Why did the government charge Hamdan in a civilian criminal proceeding (Nov. 2004), when he was deemed eligible for trial by military commission a year earlier? Did *Rasul* influence this tactic?
2. What were the two key charging allegations against Hamdan?
3. What was the claimed legal basis for charging and incarcerating Hamdan?
4. The December 2005 Detainee Treatment Act was the congressional reaction to *Rasul* (*see, e.g.*, footnote 3). How so?
5. Can the President, or his/her delegated subordinate, establish a military commission without congressional authority? If not, would that preclude the President from doing so on the battlefield in cases of military necessity? Would "necessity" be the only limitation?
6. In what three instances have Presidents generally established military commissions? Which of these bases was the U.S. Government's model allegedly applicable to Hamdan? What four preconditions does the court cite for properly convening this third type of military commission?
7. Section 1.2 of the textbook covers the sources of law, uniformly applied by international tribunals. Which of those sources did the parties and the court rely upon, for establishing the common law governing military commissions and its jurisdictional limitations?

8. Section 8.2 of the textbook focuses on self-executing treaties, which may also create individual rights; for example, the argument raised in the section 7.2 cases involving claims that Article 36 of the Vienna Convention on Consular Relations requires signatories to provide notice to nationals of other parties upon arrest. Reread the *Eisentrager* footnote in the text accompanying the Hamdan court's footnotes 57 and 58. Is the Geneva Convention Article 3, which Hamdan relies upon as his treaty-based defense: (a) self-executing; and/or (b) available to a criminal defendant in any U.S. prosecution? Does the *Hamdan* majority rely on an alternative basis to afford Hamdan his sought-after Geneva Convention "rights?"

9. Who defined the elements of Hamdan's conspiracy charge—Congress, or the President? To which branch of government should that *definition* be entrusted? Which branch should *apply* it?

10. Did the Government allege that Hamdan violated the Laws of War? Is this allegation relevant to the jurisdiction of a military commission? Per the majority opinion, what was the most serious defect of the government's military commission charging allegations (regarding its "conspiracy" allegations) against Hamdan? Is "conspiracy" a war crime? Would it matter, if the allegations were that the defendant were conspiring to commit genocide or an aggressive war?

11. Do military commission procedures have to comply with the U.S. federal Uniform Code of Military Justice? With the Geneva Conventions? What are the "glaring/striking" differences between trial by a U.S. courts-martial and a U.S. military commission? What were Hamdan's specific objections to his military commission trial procedures? Must military commission and courts-martial procedures be uniform in all cases?

12. As you learned earlier in this course, the rules of International Law traditionally apply just between nations. Was Hamdan able to establish that he could use the Geneva Conventions as a defense to the U.S. military commission proceedings?

13. The Supreme Court did not decide whether Hamdan was entitled to a GC III "Article 5 hearing," regarding his status as a POW. Why not?

14. Does the majority opinion effectively bar a prosecution, when the defendant demands sensitive, classified material for his defense? (Reread the Supreme Court's footnotes 52 and 67, and their accompanying text—then, Justice Breyer's concurring opinion. Does this chapter's closing essay, *The Garden*, have any bearing upon your response?) Put a different way, the President knows more about the security needs of the U.S. than does the Supreme Court. Thousands of innocent people died on 9-11. More are being beheaded by radical factions dedicated to facilitating another 9-11 of greater proportions. Does the majority's fair trial concern unnecessarily trump legitimate national security concerns?

15. Does the dissent make more sense, given the realities of modern warfare? Are the U.S. Uniform Code of Military Justice, the Geneva Conventions, and the civilian criminal court alternatives all relics of an era that preceded the contemporary War on Terror?