A New Era for the Supreme Court After *Hamdan v. Rumsfeld*?

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I. Introduction 2
II. Decision Summary 2
1. Case History 2
2. Majority and Plurality Decision 4
2.1. Justice Stevens' Majority Decision 5
2.2. Justice Stevens' Plurality Opinion 8
2.3. Justice Kennedy 9
3. Dissidence 9
3.1. Justice Scalia 9
3.2. Justice Thomas 10
3.3. Justice Alito 12
III. Analysis 13
1. Line of Cases in the War on Terror 13
1.1. General Remarks 13
1.2. *Rasul v. Bush and Al Odah v. United States* 13
1.3. *Hamdi v. Rumsfeld* 15
1.4. The Relationship of the Two Cases to *Hamdan v. Rumsfeld* 18
2. The National Security Constitution After *Hamdan* 19
2.1. Presidential War Powers 19
2.1.1. Constitutional Framework and Case Law 19
2.1.2. The Practice of the Bush Administration 21
2.1.3. The New Approach in the *Hamdan* Case 23
2.2. World War II Case Law: A Tradition of Judicial Deference 24
2.2.1. The Traditional View of Deference 24
2.2.2. The New Approach in the *Hamdan* Case 28
3. The Importance of *Hamdan* for the Reception of International Law by the Supreme Court 30
IV. *Ceterum Censeo*: What Was Left Out in the *Hamdan* Case 33
1. The Prohibition of Torture 33
1.1. Prohibition of Torture in International Law 33
1.2. Prohibition of Torture on the Constitutional Level 34
1.3. Prohibition of Torture on the Federal Law Level 34
1.4. Disastrous By-Passing Tactics by the Bush Administration 36
2. Enemy Combatant Status 38
3. Impracticability 40
V. Conclusion 41

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I. Introduction

The landmark *Hamdan v. Rumsfeld*[1] decision, issued by the Supreme Court on June 29, 2006, introduces significant changes in the American tradition of judicial deference. At the same time, it sheds new light on the separation of powers doctrine, the role of the Supreme Court, the application of international humanitarian law as well as the rights of Guantanamo detainees within the framework of the war on terror. It is a rather rare incident that a decision of the Supreme Court makes its way to the daily newspapers all over the world and has such tremendous international resonance. Not only the daily press in the United States, but also in Europe, dedicated its front pages and commentaries to *Hamdan*.[2] The fact that Justice Thomas read parts of his dissent from the bench (something he has not done in 15 years on the Court) also marks the importance of this decision. It is against this background that the significance of the *Hamdan* decision needs to be gauged.

Part II of this study provides a summary of the proceedings and opinions of the Supreme Court Justices in the *Hamdan* case. Part III, sub-section 1 analyses the line of cases decided by the Supreme Court within the context of the war on terror. It also shows how the judges have reached their conclusions in *Hamdan.* Part III, sub-section 2 presents an overview of the separation of powers doctrine and how it has been interpreted by the Bush Administration. It further demonstrates how the Supreme Court has deferred in the past to Presidential assertions of war power, and that the *Hamdan* decision, in this context, clearly departs from this earlier approach. Part III, sub-section 3 analyses the impact of the decision on the interpretation of international humanitarian law by the Supreme Court. In part IV of this study, other relevant questions not considered in the seminal judgment are discussed.

II. Decision Summary

1. Case History

Following the terrorist attacks of September 11, 2001, Congress adopted a Joint Resolution authorising the President to "use all necessary and appropriate force

[1] *Hamdan v. Rumsfeld*, Supreme Court of the United States, 126 S.Ct. 2749 (2006).

[2] See for the United States: High Court Throws out GITMO Tribunal, The Washington Times; High Court Curbs War Powers, Chicago Tribune; High Court Rejects Detainee Tribunals, The Washington Post. See for Europe: La Cour suprême inflige un camouflet à M. Bush, Le Monde; Supreme Court Rejects Bush Terror Powers, The Guardian; Bush's Claim to Unfettered Power is Curbed, Daily Telegraph; La Cour surpême déclare illégaux les tribunaux de Guantanamo, Le Figaro; Abus de pouvoir, Le Temps; Sternstunde für Amerika, Tages Anzeiger; Die Militärtribunale in Guantánamo für unrechtmässig erklärt, Neue Zürcher Zeitung; Kein "Blankoscheck" für Guantánamo, Frankfurter Allgemeine Zeitung; Stoppschild für Bush, Die Zeit; Guantanamo-Tribunale sind illegal, Süddeutsche Zeitung (all articles date from June 30, 2006).

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 of America by such nations, organizations or persons"[3]. Pursuant to this Resolution, the President ordered the Armed Forces of the United States to intervene in Afghanistan.

On November 13, 2001, the President also issued a military order (the November 13 Order) which was intended to govern the detention, treatment and trial of non-US citizens.[4] This order allows to try by military commission any non-citizen for whom the President determined that there is reason to believe that he or she was or is a member of al Qaeda or has engaged or participated in terrorist activities aimed at the United States. The military commission can order imprisonment or death of a detainee.

Salim Ahmed Hamdan, a Yemeni national, was caught in November 2001 during hostilities between the United States and the Taliban in Afghanistan. He was captured by Afghani militia and turned over to the U.S. military. He was then transported to the U.S. Naval Base at Guantanamo Bay in June 2002, and a year later, the President considered that pursuant to the November 13 Order he should be subjected to trial by military commission.

In December 2003, a military counsel was appointed to represent him and he filed demands for charges and a speedy trial pursuant to Article 10 of the Uniform Code of Military Justice (UCMJ)[5]. These applications were denied by the legal adviser to the Appointing Authority who found that Hamdan is not entitled to the protection of the Uniform Code of Military Justice. On July 13, 2004, Hamdan filed *habeas corpus* and *mandamus* petitions in the United States District Court for the Western District of Washington.

Following this, he was charged with one count of conspiracy. The charging document clarified that from on or about February 1996 to on or about November 2001 Hamdan wilfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with certain members of al Qaeda to commit terrorist acts.[6] There was no allegation that Hamdan had any command responsibilities, played a leadership role or participated in planning any activity. Rather, the charging document determined that Hamdan acted as bodyguard and personal driver for Osama bin Laden, arranged transport and transported al Qaeda weapons, drove and accompanied Osama bin Laden during his visits and received training at al Qaeda sponsored camps.[7]

The United States District Court for the Western District of Washington transferred Hamdan's petitions to the United States District Court for the District of

[3] Authorisation for the Use of Military Force (AUMF), 115 Stat. 224 (2001).

[4] Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (2001).

[5] Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801, 802, 893, and 924 (1956).

[6] *Hamdan v. Rumsfeld* (note 1) *supra*, 2761.

[7] Ibid.

Columbia. Furthermore, a Combatant Status Review Tribunal was convened and decided that Hamdan should continue to be detained at Guantanamo Bay as he was an "enemy combatant".

While in the meantime proceedings before the military commission commenced, the District Court granted Hamdan's petition for *habeas corpus* and stayed the proceedings before the commission. It was found that the Third Geneva Convention Relative to the Treatment of Prisoners of War[8] applies to Hamdan, and that he is entitled to prisoner of war status until adjudged otherwise. It was also concluded that the military commission was established in violation of the Uniform Code of Military Justice and Common Article 3 of the same Geneva Convention because the accused would never hear nor see the evidence against him.[9]

The Court of Appeals for the District of Columbia reversed by ruling that the Geneva Conventions[10] were not judicially enforceable and that they did not apply to Hamdan.[11] It was also held that Hamdan's trial before the military commission would violate neither the Uniform Code of Military Justice[12] nor the U.S. Armed Forces regulations intended to implement the Geneva Conventions.

On November 7, 2005, the Supreme Court issued a writ of *certiorari* to decide whether the military commission convened to try Hamdan has the authority to do this and whether the Geneva Conventions apply to this case. Chief Justice Roberts recused himself as he had ruled on this case, at lower instance, in the Court of Appeals for the District of Columbia.

2. Majority and Plurality Decision

The Supreme Court reversed the ruling of the Court of Appeals and Justice Stevens delivered the judgment for the Court. He also delivered the plurality judgement in which Justice Kennedy did not join his opinion.

[8] Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force October 21, 1950, for the United States February 2, 1956.

[9] *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.C. 2004).

[10] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, entered into force October 21, 1950, for the United States February 2, 1956; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, entered into force October 21, 1950, for the United States February 2, 1956; Convention Relative to the Treatment of Prisoners of War (note 8); Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force October 21, 1950, for the United States February 2, 1956.

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

[12] UCMJ (note 5) *supra*.

2.1. Justice Stevens' Majority Decision

In the majority judgement, it was held that the military commission created to try Hamdan did not comply with U.S. military law and the Third Geneva Convention Relative to the Treatment of Prisoners of War[13]. In relation to jurisdictional issues, the US Government's motion to dismiss the case under Section 1005 of the Detainee Treatment Act of 2005 (DTA)[14], which gave the Court of Appeals for the District of Columbia exclusive jurisdiction to review decisions of cases tried by military commission, was denied. The Court found that Congress did not include any language in the Act which would indicate that its jurisdiction is precluded.[15]

The Court rejected the Government's argument, based on *Schlesinger v. Councilman*,[16] that abstention is appropriate in this case. In *Councilman*, it was concluded that federal courts should normally abstain from intervening in pending courts-martial against service members.[17] It was found that this reasoning did not apply in the circumstances of this case. Justice Stevens was more persuaded by *Ex parte Quirin*[18], where the Court decided to intervene "[i]n view of the public importance of the question raised by [the case] and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay"[19]. As the Government did not raise any countervailing interest, the Court decided to exercise its jurisdiction as provided in the Constitution of the United States.

Moving on to the substantive issues of the case, the Court stated that "[t]he military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity"[20]. Considering briefly the history of military commissions, the Court concluded however that "[e]xigency 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"[21]. According to the Court, "(…) that authority, if it exists, can derive only from the powers granted jointly to the President and Congress in time of war"[22]. Quoting *Ex Parte Milligan*[23], the Court

[13] Third Geneva Convention (note 8) *supra*.

[14] Detainee Treatment Act (DTA), P.L. 109-148, 119 Stat. 2680 (2005).

[15] The jurisdictional issues discussed in the *Hamdan* case are not the main focus of this article and they will not be considered here in great detail.

[16] *Schlesinger v. Councilman*, 420 U.S. 738 (1975).

[17] Ibid., 740 and 758.

[18] *Ex Parte Quirin*, 317 U.S. 1 (1942).

[19] Ibid., 19; *Hamdan v. Rumsfeld* (note 1) *supra*, 2772.

[20] *Hamdan v. Rumsfeld* (note 1) *supra*, 2772-2773.

[21] Ibid., 2773.

[22] Ibid., 2773.

clarified that "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"[24]. The Court abstained, however, from ruling on whether the President may constitutionally convene a military commission without prior agreement from Congress in cases of controlling necessity.

It was reminded that, following *Ex Parte Quirin*[25], Article 21 of the Uniform Code of Military Justice[26] does not provide a sweeping mandate to the President to convene military commissions when he deems necessary. Furthermore, the *Hamdan* court explained that there is nothing in the Authorisation for Use of Military Force (AUMF)[27] and the Detainee Treatment Act 2005[28] which seems to indicate that Congress intended to expand the existing power of the President. It was considered that "[t]ogether, 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"[29].

Subsequently, the Court concluded that the military commission lacks power to proceed because its structure and procedures violate the Uniform Code of Military Justice[30] and the Geneva Conventions[31]. As part of the proceedings before the military commission, the accused and his civilian counsel may be excluded from the trial. The counsel may be precluded from discussing certain evidence with the accused. The accused and the counsel may be denied access to certain evidence. Any evidence which has in the opinion of the presiding officer probative value to a reasonable person is admitted, which includes hearsay and unsworn testimonies. Moreover, appeals are heard by a panel of military officers, only one of which needs to have experience as a judge. The panel makes its recommendation to the Secretary of Defence, who can either remand the case for further proceedings or submit the record to the President to take the final decision. According to the Court, these procedures violate the common law of war, the Uniform Code of Military Justice and the law of nations, including the four Geneva Conventions.

The Court considered that, according to the principle of uniformity, the procedures governing trials by military commission should be the same as those govern-

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[23] *Ex Parte Milligan*, 71 U.S. 2 (1866).

[24] Ibid., 139-140.

[25] *Ex Parte Quirin* (note 18) *supra*.

[26] UCMJ (note 5) *supra*.

[27] AUMF (note 3) *supra*.

[28] DTA (note 14) *supra*.

[29] *Hamdan v. Rumsfeld* (note 1) *supra*, 2775.

[30] UCMJ (note 5) *supra*.

[31] Geneva Conventions (note 10) *supra*.

ing courts-martial. A departure from this principle is allowed, but it "(…) must be tailored to exigency that necessitates it"[32]. Article 36 of the Uniform Code of Military Justice[33] places two restrictions on the President's power to promulgate procedural rules for courts-martial and military commissions: "(a) [t]he procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commission, 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 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."[34] Thus, it appears that the procedures used in military commissions should be the same as the ones used in courts-martial, unless there is sufficient proof that uniformity would be impracticable. According to the Court, the President's determination that it is impracticable to apply the rules and procedures governing the trial of criminal cases in U.S. district courts to the military commission deserves complete deference. However, the majority concluded that "[n]othing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case"[35]. The Court even found that the only reason in support of impracticability, namely the danger posed by international terrorism, was not sufficient to apply rules different from those governing courts-martial. Hence, the rules specified for Hamdan's commission were found to be illegal and it was deemed that the rules governing courts-martial should apply.

The proceedings adopted to try Hamdan also violate the Geneva Conventions[36]. The Court found that the Court of Appeals for the District of Columbia erroneously held that Hamdan could not invoke the Geneva Conventions in this case. It clarified that the Geneva Conventions are indisputably part of the law of war, and compliance with the law of war is the condition upon which the authority of the military commissions set forth in Article 21 of the UCMJ[37] is based. Common Article 3 provides that, in a conflict not of an international character, occurring on the territory of a signatory, each signatory is bound to respect, as a minimum, certain provisions protecting "persons taking no active part in the hostilities, including members of armed forces who laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause (…)"[38].

The majority also rejected the Court of Appeal's alternative holding that Common Article 3 does not apply because the conflict with al Qaeda is international in

[32] *Hamdan v. Rumsfeld* (note 1) *supra*, 2790.
[33] UCMJ (note 5) *supra*.
[34] Ibid. (italics inserted by the authors).
[35] *Hamdan v. Rumsfeld* (note 1) *supra*, 2792.
[36] Geneva Conventions (note 10) *supra*.
[37] UCMJ (note 5) *supra*.
[38] Geneva Conventions (note 10) *supra* (italics in the original).

scope rather than a "conflict not of an international character". It explained that the expression "not of an international character" bears its literal meaning and it can be distinguished from the former conflict which involves a clash between nations. Also, Common Article 3, which applies here, affords at least some minimal protection to individuals associated with neither a signatory nor a non-signatory involved in a conflict on the territory of a signatory.

In addition, the Court concluded that various sources confirm that the expression "regularly constituted court" mentioned in Common Article 3 includes ordinary military courts (in the U.S., these are the courts-martial established by congressional statutes). A military commission can be established according to the standards of US military justice if there is some practical need. However, no evident practical need was demonstrated here.

Finally, the Court stated that Hamdan may be a dangerous individual, but the Executive is bound to respect the rule of law prevalent in the United States.

2.2. Justice Stevens' Plurality Opinion

In his plurality opinion, Justice Stevens clarified that historically three sorts of military commissions have been used and that the commission used to try Hamdan is a law-of-war commission. According to Winthrop's treatise[39], the preconditions for the exercise of jurisdiction by such a commission are that, among others, it must be limited to trying offences committed within the theatre of war and the offence must have been committed during the war. Hamdan's case does not fulfil these conditions. Furthermore, Hamdan has not committed an offence which can be tried by a law-of-war military commission. There is no support in either statute, precedent or the Geneva and Hague Conventions for law-of-war commissions trying conspiracy offences. Moreover, conspiracy is not recognised as a violation of law of war by international sources, such as the International Military Tribunal at Nuremberg.

Significantly, the plurality concluded that "[t]he 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 the establishment of military commissions: military necessity"[40]. It was pointed out that the 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"[41]. Furthermore, Hamdan was not even charged with an offence "(…) for which he was caught red-handed in a theatre 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

[39] William Winthrop, Military Law and Precedents, War Department, Office of the Adjutant General, Washington D.C., rev. 2nd ed. 1920, 831.

[40] *Hamdan v. Rumsfeld* (note 1) *supra*, 2785.

[41] Ibid.

AUMF"[42]. It was also emphasised that "[a]ny urgent need for imposition or execution of judgement is utterly belied by the record; (…)"[43].

Finally, the plurality found that the expression "all the judicial guarantees which are recognised as indispensable by civilized peoples" contained in Common Article 3 includes the minimum trial protections recognised by customary international law. Although the United States refused to ratify Protocol I to the Geneva Conventions[44], the Court referred to its Article 75 which describes many of these protections. It was argued that the Government approved of the safeguards contained in this Article. Nonetheless, the procedures used by the military commission implicated in this case fell far short from the protections of Article 75.

2.3. Justice Kennedy[45]

Justice Kennedy wrote another concurring opinion where he indicated that trial by military commission raises important separation of power issues. He stated that there is a risk "(…) that offences will be defined, prosecuted and adjudicated by executive officials without independent review"[46]. He further agreed with the plurality of the Court that the military commission is unauthorised and contravenes the Uniform Code of Military Justice[47]. However, he saw no further need to determine whether Common Article 3 requires the presence of the accused at all stages of the trial.[48] Also, according to his view, the plurality should not have concluded that Article 75 of Protocol I to the Geneva Conventions is binding despite the Government's decision not to ratify it.

3. Dissidence

3.1. Justice Scalia

In his dissenting opinion, Justice Scalia was joined by Justices Thomas and Alito. First, he clarified why the Court does not have jurisdiction in this case, and rejected, on this point, the arguments of the majority. He further considered that

[42] Ibid. (italics in the original).

[43] Ibid.

[44] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1123 U.N.T.S. 3, entered into force December 7, 1978.

[45] It should also be noted that Justice Breyer wrote a short opinion in which he was joined by Justices Kennedy, Suter and Ginsberg. He considered that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary". See *Hamdan v. Rumsfeld* (note 1) *supra*, 2799.

[46] Ibid., 2800.

[47] UCMJ (note 5) *supra*.

[48] *Hamdan v. Rumsfeld* (note 1) *supra*, 2808-2809.

Hamdan, an enemy alien detained abroad, has no rights under Article I, Section (9) (2) of the Constitution which requires that the right to the writ of *habeas corpus* shall not be suspended (unless public safety requires it in cases of rebellion or invasion).

Justice Scalia also noted that equitable principles govern the exercise of *habeas corpus* and injunctive jurisdiction. Pursuant to Article 1005(e)(3) of the Detainee Treatment Act[49] where Congress provided for an alternative jurisdiction, the principles of equity dictate that the Supreme Court should not intervene in this case. According to his view, the majority found erroneously that the comity reasons in favour of abstention mentioned in *Schlesinger v. Councilman*[50] do not apply here. Also, the majority did not give due consideration to the question whether there are any military necessities against interference. Furthermore, the Court should avoid getting "(…) into direct conflict with the Executive in an area where the Executive's competence is maximal and ours is virtually nonexistent. We should exercise our equitable discretion to *avoid* such conflict. Instead, the Court rushes headlong to meet it".[51]

3.2. Justice Thomas

Justice Thomas affirmed the judgement of the Court of Appeals. As Justice Scalia, he considered that the Supreme Court lacks jurisdiction to try Hamdan's claims. The President's decision to try Hamdan before a military commission, included in the Authorisation for Use of Military Force[52] and Article 21 of the Uniform Code of Military Justice[53], is entitled to deference. He explained that in circumstances where there is express or implied authorisation from Congress, the President's actions are "(…) supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion (…) rest[s] heavily upon any who might attack it"[54]. He considered that, in such circumstances, the Court's "(…) duty to defer to the Executive's military and foreign policy judgement is at its zenith: it does not countenance the kind of second-guessing the Court repeatedly engages in today"[55]. These are "(…) decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry"[56]. Furthermore, he found that the Executive fully sat-

[49] DTA (note 14) *supra*.

[50] *Schlesinger v. Councilman* (note 16) *supra*.

[51] *Hamdan v. Rumsfeld* (note 1) *supra*, 2822 (italics in the original).

[52] AUMF (note 3) *supra*.

[53] UCMJ (note 5) *supra*.

[54] *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579, 637 (1952); *Hamdan v. Rumsfeld* (note 1) *supra*, 2824.

[55] *Hamdan v. Rumsfeld* (note 1) *supra*, 2825.

[56] *Hamdi v. Rumsfeld,* 542 US 507, 582-583 (2004).

isfied the pre-conditions for exercise of jurisdiction mentioned in Winthrop's treatise[57].

He also disagreed with the Court's finding that the commission lacks power to proceed because of its failure to comply with the Uniform Code of Military Justice[58] and the Geneva Conventions[59]. Thomas argued referring to *Madsen v. Kinsella*[60] that the procedure of military commissions is not prescribed by statute but "(…) adapted in each instance to the need that called it forth"[61]. In contrast to the Court's finding, he argued further that Article 36 of the Uniform Code of Military Justice[62] is not an attempt on part of Congress to limit the President's power. This perception is contrary to the text and structure of the Uniform Code of Military Justice[63] as well as to the precedents.

Justice Thomas rejected the Court's contention that Hamdan's military commission is unlawful because it violates Common Article 3 of the Geneva Conventions[64] and Hamdan's argument that it violates various provisions of the Third Geneva Convention Relative to the Treatment of Prisoners of War [65]. He considered that these arguments are foreclosed by *Johnson v. Eisentrager*[66], where the Court found that the respondents cannot assert that "(…) anything in the Geneva Conventions makes them immune from prosecution and punishment for war crimes"[67].

According to Thomas, "[t]he judicial nonenforceability of the Geneva Conventions derives from the fact that those Conventions have exclusive enforcement mechanisms (…) and this, too, is part of the law of war"[68]. The Court's interpretation of Article 21 of the Uniform Code of Military Justice[69] "selectively incorporates only those aspects of the Geneva Conventions that the Court finds convenient, namely, the substantive requirements of Common Article 3, and not those aspects of the Conventions that the Court, for whatever reason, disfavors, namely

[57] Winthrop's Treatise (note 39) *supra*. Justice Thomas also opined that Hamdan's wilful and knowing membership of al Qaeda is, pursuant to the common law of war, a crime chargeable by military commission. According to him, this is further confirmed by the experiences of the military tribunals convened by the United States at Nuremberg and by the examples enumerated in Winthrop's Treatise. See *Hamdan v. Rumsfeld* (note 1) *supra*, 2831-2836.

[58] UCMJ (note 5) *supra*.

[59] Geneva Conventions (note 10) *supra*.

[60] *Madsen v. Kinsella,* 343 US 341 (1952).

[61] Ibid., 347-348; *Hamdan v. Rumsfeld* (note 1) *supra*, 2829.

[62] UCMJ (note 5) *supra*.

[63] Ibid.

[64] Geneva Conventions (note 10) *supra*.

[65] Third Geneva Convention (note 8) *supra*.

[66] *Johnson v. Eisentrager,* 339 U.S. 763 (1950).

[67] Ibid., 789.

[68] *Hamdan v. Rumsfeld* (note 1) *supra*, 2845.

[69] UCMJ (note 5) *supra*.

the Conventions' exclusive diplomatic enforcement scheme"[70]. Furthermore, Thomas considered that Hamdan's claim is without merit as the President has accepted the opinion of the Department of Justice that Common Article 3 does not apply to al Qaeda detainees because the relevant conflict is international in scope. The President's interpretation should be sustained and the Court should not interfere. In any case, Thomas concluded that Hamdan's military trial complies with Common Article 3 and that it has been regularly constituted in accordance with historical precedents. Moreover, it affords "(...) all the judicial guarantees which are recognized by civilized peoples (...)"[71]. Hamdan would not be excluded from his trial if this would render it unfair, but rather only if it is necessary to protect classified intelligence. Thomas also stated that the Third Geneva Convention Relative to the Treatment of Prisoners of War does not apply here as, following the President's determination, the conflict with al Qaeda is not international in scope (as al Qaeda is not a signatory to the Geneva Conventions).

3.3. Justice Alito

In a separate dissenting opinion, Justice Alito considered that Common Article 3 constitutes the relevant body of law that governs the question whether a court has been properly appointed. He explained that Common Article 3 must be interpreted in light of domestic law, and that a "regularly constituted court" is a court that conforms to the law of the appointing country. Also, according to him, Common Article 3 imposes three requirements which are all fulfilled by Hamdan's military commission: (1) it must be a court; (2) it must be regularly constituted and (3) it must afford " (…) all the judicial guarantees which are recognized as indispensable by civilized peoples (…)"[72]. He considered that there is no reason to conclude that a court which differs from a regular military court is improperly constituted. A municipal court, a state trial court of general jurisdiction or an international court are all differently constituted, but they are also regularly constituted courts.

Alito argued that Common Article 3 does not preclude the jurisdiction of military commissions. He noted that Article 66 of the Fourth Geneva Convention Relative to the Treatment of Civilian Persons in Time of War[73] allows an occupying power to try civilians in its "properly constituted, non-political military courts"[74]. Recognising that Common Article 3 and Article 66 prohibit the existence of a special tribunal, he explained that this prohibition does not cover the military

[70] *Hamdan v. Rumsfeld* (note 1) *supra*, 2845.
[71] Ibid., 2846.
[72] Ibid., 2850.
[73] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, see note 10 *supra*.
[74] Geneva Conventions (note 10) *supra*.

commission implicated in this case. This particular military commission is regular and not at all special.

Moreover, the military commission qualifies as a court and it was constituted pursuant to an order of the President, just as in *Ex Parte Quirin*[75]. According to Justice Alito, Justice Kennedy erroneously concluded that it is necessary to have an acceptable degree of independence from the Executive to render the commission "regularly constituted". Justice Alito argued that Hamdan's commission was not less independent than the one in *Ex Parte Quirin.* Also, the commission procedures which allow the Secretary of Defence to change the governing rules from time to time and which permit the admission of any evidence of probative value do not undermine its legitimacy.

III. Analysis

1. Line of Cases in the War on Terror

1.1. General Remarks

Despite the Supreme Court's traditional tendency to abstain from interfering with the Executive's war time decisions, the post 9/11 Court actively affirms its unwillingness to follow this direction further. The Court is increasingly attempting to limit Presidential powers not mandated by Congress in the war on terror and refuses to accept the Government's argument that persons designated as enemy combatants can be detained indefinitely at Guantanamo Bay. *Hamdan v. Rumsfeld*[76] constitutes another encouraging occurrence in the Supreme Court's quest for restoring the rule of law and due process in the case of Guantanamo detainees.

Two earlier decisions of the Supreme Court shed further light on the context of *Hamdan v. Rumsfeld* and elucidate how the Justices arrived at their current positions. In these cases, the Supreme Court started to interpret executive war powers narrowly and to intervene more in situations where national security interests were at stake. In balancing both national security needs and civil rights, the Court applied a higher standard of scrutiny in the evaluation of the arguments presented by the Executive.

1.2. *Rasul v. Bush and Al Odah v. United States*

On June 28, 2004, the Supreme Court held in *Rasul v. Bush and Al Odah v. United States*[77] that United States courts had jurisdiction to examine challenges regarding the legality of foreign nationals' detention at the Guantanamo Naval Base.

[75] *Ex Parte Quirin* (note 18).

[76] *Hamdan v. Rumsfeld*, see note 1 *supra*.

[77] *Rasul v. Bush and Al Odah v. United States*, 124 S. Ct. 2686 (2004).

The plaintiffs in the case were two British citizens, two Australians, and twelve Kuwaitis. Significantly, the two British detainees, Shafiq Rasul and Asif Iqbal, were repatriated to the United Kingdom, where they were released without charge. All the suspects were captured abroad during hostilities between the United States and the Taliban.

The six to three ruling established that the U.S. Naval Base at Guantanamo Bay is under U.S. jurisdiction and control, although Cuba had sovereignty over this territory. It was also found that Congress had granted federal district courts, under the federal *habeas corpus* statute[78], the authority to hear *habeas corpus* applications from Guantanamo detainees. The Court rejected government's contention that *Johnson v. Eisentrager*[79], where it was held that U.S. courts had no jurisdiction over German war criminals held in a U.S. administered German prison, should control the case. The Court distinguished the case from *Eisentrager*[80] by noting, *inter alia*, that the detainees were not nationals of countries at war with the U.S., that they deny to have engaged in aggression against the U.S. and that they have never had access to a tribunal. The Court further added that in any case the statutory predicate of *Eisentrager*[81] had been overruled already by a previous decision[82], and therefore did not preclude the exercise of *habeas corpus* jurisdiction. The Court also considered other bases for jurisdiction, namely the Federal Question Act[83] and the Alien Tort Claims Act[84]. It held that since *Eisentrager*[85] did not bar jurisdiction over the plaintiffs' *habeas corpus* claims, it did not bar any other types of claims relating to their detention.

Although the Court emphatically reminded that "Executive imprisonment has been considered oppressive and lawless since John, at Runneymede, pledged that no free man should be imprisoned, dispossessed, outlawed or exiled save by the judgement of his peers or by the law of the land"[86], it expressly refrained from addressing the merits of the case and focused on purely jurisdictional issues. Without any further guidance or suggestions, the question of determining the procedural rights of the detainees was left entirely up to the lower courts. It should be emphasised however, that the *Rasul* decision represented at the time a significant progress for the detainees of Guantanamo Bay, as the Court finally rejected the Executive's argument that Presidential war powers cannot be subject to judicial review. From

[78] The Habeas Corpus Act, 28 U.S.C. § 2241 (1994).

[79] *Johnson v. Eisentrager* (note 66) *supra*.

[80] Ibid.

[81] Ibid.

[82] *Braden v. 30th Judicial Circuit Court of Ky.,* 410 U.S. 484 (1973).

[83] The Federal Question Act, 28 U.S.C. § 1331 (1948).

[84] The Alien Tort Claims Act, 28 U.S.C. § 1350 (1948).

[85] *Johnson v. Eisentrager* (note 66) *supra*.

[86] *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206, 218-219 (1953) (dissenting opinion); quoted in *Rasul v. Bush and Al Odah v. United States* (note 77) *supra* at 2692.

now on, the President would have to justify his detention policy in courts[87] and the Guantanamo detainees would have a meaningful access to them. This was an important first step which eventually paved the way to the *Hamdan* decision, and made it easier for the Court to find that it had jurisdiction in the case. As Shapiro accurately concluded, "*Rasul* now stands as a strong reaffirmation of the judiciary's role as the ultimate safeguard against arbitrary detention, in wartime as well as peacetime, for aliens as well as citizens"[88].

1.3. *Hamdi v. Rumsfeld*

On June 28, 2004, the Court also decided *Hamdi v. Rumsfeld*[89] which further restrained the Executive's assertions of power in the war on terror. In that case, the Court held that although Congress authorised the detention of combatants, due process required that they be given a meaningful day in court to contest their detention.

Yasser Hamdi was seized in Afghanistan in November 2001 by members of the Northern Alliance and he was handed over to the American armed forces. The government suspected that he was a Taliban soldier and classified him as an enemy combatant. He was first detained at Guantanamo Bay, and when the government discovered that he was an American citizen, Yasser Hamdi was transferred to a naval brig in Norfolk, Virginia and then to Charleston, North Carolina.

Justice O'Connor, writing on behalf of a plurality, considered that the Authorisation for the Use of Military Force[90] provided sufficient authority for the Executive to detain suspects within the limited circumstances of the case and for the duration of the conflict. This issue of congressional authorisation also arose in the *Hamdan* decision, where the majority was reluctant to find any implicit approvals on part of Congress. It should be noted however that, in *Hamdi,* the plurality limited its holding by finding that Congress did not allow the indefinite detention of suspects. It was reminded that, pursuant to the third Geneva Convention Relative to the Treatment of Prisoners of War[91], detention may last no longer than active hostilities. The decision also made clear that indefinite detention for the purpose of interrogation is not authorised.

Subsequently, the plurality rejected the Government's contention that an enemy combatant does not have a right to a hearing to contest his detention, and went on to decide what process is due to Yasser Hamdi. Using the balancing test of *Mathews v. Eldridge*[92], the plurality weighed Hamdi's private interest in free-

[87] Stephen R. Shapiro, The Role of the Courts in the War Against Terrorism: A Preliminary Assessment, 29 W.T.R. Fletcher F. World Aff. 103 (2005), 108.

[88] Ibid.

[89] *Hamdi v. Rumsfeld* (note 56) *supra*.

[90] UCMJ (note 5) *supra*.

[91] Third Geneva Convention (note 8) *supra*.

[92] *Mathews v. Eldridge,* 424 U.S. 319 (1976).

dom from physical detention and the government's interest in conducting war successfully. The plurality considered the unacceptably high risk of erroneous deprivation of liberty as well as the burden imposed upon the military by additional procedures, and concluded that a detainee-citizen must receive notice of the factual basis for his classification as enemy combatant and he must be able to contest it before a neutral decision maker.[93] On the other hand, when considering the substance of the procedures to be used, the plurality observed that they may "(…) be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict"[94]. The plurality explained that in those circumstances, hearsay and a presumption in favour of the Government's evidence could be accepted. This finding stands in great contrast with the conclusion reached by the majority in *Hamdan* regarding the inadequacy of the procedural guarantees applicable by the military commission.[95]

The *Hamdi* plurality avoided the question of application of international treaties by stating that "[b]ecause we hold that Hamdi is constitutionally entitled to the process described above, we need not address at this time whether any treaty guarantees him similar access to a tribunal for a determination of his status".[96] This differs greatly from Justice Stevens' significant reliance on the Geneva Conventions in his majority and plurality opinions in *Hamdan*.[97]

In addition, the plurality rejected the Government's assertion that courts should only determine the legality of the broader detention scheme and not examine individual cases. Significantly, Justice O'Connor stated that "[i]n so holding, we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances"[98]. Finally, the plurality restated the famous phrase from *Youngstown Sheet & Tube Co v. Sawyer*[99] and emphatically affirmed that "[w]e have long since made clear that a state of war is not a blank cheque for the President when it comes to the rights of the Nation's citizens"[100]. More surprisingly, one of the most conservative Justices, Antonin Scalia, issued a dissenting opinion that was joined by John Paul Stevens. It made no difference, Scalia argued, whether the Authorisation for Use of Military Force[101] could be read broadly enough to infer congressional approval of Hamdi's detention. He explained that Congress had not suspended the writ of *habeas corpus*, that the federal courts were functioning, and that President Bush

[93] *Hamdi v. Rumsfeld* (note 56) *supra*, 532.

[94] Ibid., 533.

[95] See *supra* Part II, Section 2.1. on Justice Stevens' majority opinion, page 5.

[96] *Hamdi v. Rumsfeld* (note 56) *supra* at 534 (footnote 2).

[97] See *supra* Part II, Section 2.1. on Justice Stevens' majority opinion, page 5 and Section 2.2. on Justice Stevens' plurality opinion, page 8.

[98] *Hamdi v. Rumsfeld* (note 56) *supra* at 535.

[99] *Youngstown Sheet & Tube Co v. Sawyer* (note 54) *supra*.

[100] *Hamdi v. Rumsfeld* (note 56) *supra* at 536.

[101] AUMF (note 3) *supra*.

had no inherent power to detain citizens without charges or access to counsel.[102] In his view, "[i]f civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this Court"[103].

Although not as significant as the *Hamdan* decision, *Hamdi v. Rumsfeld* was certainly a step in the right direction, as it further reinforced the Supreme Court's role within the framework of the war on terror. Justice O'Connor expressly opposed the Government's view of the separation of powers where power is condensed in a single branch of government. She opined that when individual liberties are at stake, the Constitution envisions a role for the three branches of government. Justice Thomas was the only one to accept that the Executive legitimately exercised its war powers and that its decision should not be second-guessed by the Supreme Court.

Unfortunately, the *Hamdi* court left many questions open. It did not consider the scope of the definition of "enemy combatant", the appropriate length of detention of an "enemy combatant" before he or she is given access to counsel, the length of detention of an "enemy combatant" in the war on terrorism and the degree to which military hearings are sufficient.[104] Furthermore, its consideration of international humanitarian law was scanty and less than appropriate. Although, the plurality referred on occasion to the four Geneva Conventions[105], there was an evident reluctance on its part to engage in an active consideration of its provisions and to examine the relationship between them and U.S. law.[106] There was no meaningful consideration as to how the Geneva Conventions may apply to Yasser Hamdi in this case. In addition, through an expansive interpretation of the Authorisation for Use of Military Force[107], the plurality found a basis for the detention and it no longer needed an explicit provision on part of Congress. Also, the Court provided guidelines for due process which favour the government rather than citizens attempting to challenge their classification as "enemy combatants".[108] These inadequacies eventually undermine the strong position advocated by the plurality.

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[102] Finally, it should be added that "[t]hree months after the Supreme Court's decision, Hamdi was allowed to rejoin his family in Saudi Arabia on October 11, 2004. In exchange, Hamdi agreed to relinquish his U.S. citizenship". See Shapiro (note 87) *supra*, 114.

[103] *Hamdi v. Rumsfeld* (note 56) *supra*, 578.

[104] Jenny S. Martinez, *Hamdi v. Rumsfeld*. 124 Sct. 2633, United States Supreme Court, June 28, 2004, 98 Am. J. Int'l L. (2004), 782 at 785.

[105] Geneva Conventions (note 10) *supra*.

[106] Martinez (note 104) *supra*, 785.

[107] AUMF (note 3) *supra*.

[108] Nicholas G. Green, A "Blank Check": Judicial Review and the War Powers in Hamdi v. Rumsfeld, 56 S.C.L.Rev. (2005), 581 at 601.

1.4. The Relationship of the Two Cases to *Hamdan v. Rumsfeld*

In the case law of the Supreme Court relating to the war on terror there is a continuous development which paves the way to the *Hamdan*[109] decision. In *Rasul*[110], the Court affirmed its jurisdiction to hear the case, and in *Hamdi*[111], the Court went further to rule that, although Congress authorised the detention of combatants, due process required that they be given a meaningful access to courts to contest their detention. In *Hamdan*, the Supreme Court went beyond *Hamdi* by holding that the type of military commission created to try Hamdan is illegal.

In the context of these two decisions, *Hamdan v. Rumsfeld* represents an important, albeit not sufficient, advancement in procedural rights for the Guantanamo Bay detainees. The majority held that the structure and the procedures of the military commission violate the Uniform Code of Military Justice[112] and the Geneva Conventions[113]. It did not specify the exact content of these procedural rights, but it considered that they should not differ from those governing courts-martial and that they should be in accordance with the Geneva Conventions. The Court did not consider that it was difficult for the Government to design procedures which conform to the Constitution. This contrasts with *Hamdi,* where the Court found that procedural rights should be designed to avoid imposing any excessive burden on the Executive. In *Rasul*, the Court did not consider the scope of these rights as it focused on purely jurisdictional issues. The standard of procedural rights advocated by the Supreme Court in the *Hamdan* decision is therefore higher than the one in *Hamdi* and *Rasul*. However, the important drawback of the Court's opinion is that it did not explicitly articulate the substance of these procedural rights in the *Hamdan* decision.

In addition, the *Hamdan* decision made a substantial advancement for the application of international humanitarian law in the United States. The majority explicitly affirmed that Common Article 3 of the Geneva Conventions is applicable to the case and that it affords at least some minimal protections to Guantanamo detainees. As discussed earlier, in *Hamdi* the Court made references to the Geneva Conventions[114] *en passant*, but it resolved the case on the basis of U.S. law. The *Rasul* Court did not even mention the Geneva Conventions. The *Hamdan* Court, on the other hand, explained that the Geneva Conventions are part of U.S. law and that they are enforceable in the U.S. Finally, in support of its interpretation of Common Article 3, the Court also made an impressive reference to customary international law as codified in Article 75 of Additional Protocol I to the Geneva Conventions.

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109 *Hamdan v. Rumsfeld* (note 1) *supra*.
110 *Rasul v. Bush and Al Odah v. United States* (note 77) *supra*.
111 *Hamdi v. Rumsfeld* (note 56) *supra*.
112 UCMJ (note 5) *supra*.
113 Geneva Conventions (note 10) *supra*.
114 Ibid.

In terms of separation of powers issues, the Court not only affirmed its jurisdiction in considering the case, but it also explained further the role that Congress should play in this context. The majority concluded that Congress must give its approval to the creation of this type of military commission, and that there was no such approval in this case. The Court adopted here a much more active stand towards Congress' involvement in Presidential war time decisions. Although the *Hamdi* Court had no difficulties in finding sufficient basis for the detention of suspects in the Authorisation for the Use of Military Force[115], the *Hamdan* Court considered that the same document did not warrant the creation of a military commission of this type to try the detainees. This way, the Court cautiously refrained from finding implicit congressional authorisations, and thereby reinforced Congress' role within the framework of the war on terror.

It is also interesting to note that the *Hamdan* decision involved a non-citizen subjected to trial by military commission. This was not the case of Yasser Hamdi, a U.S. citizen, who was repatriated to the United States and had a more meaningful access to the courts. The *Hamdan* decision was therefore all the more ground breaking, as it implicated a non-citizen whose access to U.S. courts was not self-evident.

Finally, the Court's role and self-conception in the war on terror appear to have acquired a new meaning. In *Hamdan*, the Court attempted to reassert its legitimate role assigned by the Constitution and re-appropriated some of its power to adjudicate civil rights cases in times of war and peace. The Court also started to interpret Executive powers more narrowly and to ensure that Congress has given its approval. Furthermore, the level of scrutiny applied by the Court in the context of alleged abuse of detainees' rights is substantially higher. Perhaps the most significant innovation is that the Court is also starting to question the merits of the Executive's war-related decisions. As mentioned previously, the plurality noted in *Hamdan* that military necessity was lacking to convene the type of military commission created to try Hamdan. More than before, the Court is increasingly refusing to abstain from intervening whenever the Executive raises a national security claim.

2. The National Security Constitution After *Hamdan*

2.1. Presidential War Powers

2.1.1. Constitutional Framework and Case Law

The theory of separation of powers in the United States is derived from the Constitution which enumerates specific and exclusive powers for each branch of government. The intent behind this scheme was to provide for a system of "checks

[115] AUFM (note 3) *supra*.

and balances" among the three branches, so that a single branch would not be able to abuse its power at the expense of another branch or of the American population.

In the context of war powers, Article II, Section 2 of the Constitution states that the President shall serve as "(…) Commander in Chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual Service of the United States (…)". In addition, Article II, Section 1 states that "[t]he executive Power shall be vested in a President of the United States of America". Pursuant to Article II, Section 3, the President shall also "(…) take Care that the Laws be faithfully executed (…)". Article I, Section 8 authorises Congress to declare war, to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the land and naval forces, to provide for calling forth the militia as well as to provide for organising, arming and disciplining the militia.

These powers are not always exclusive and in many cases they overlap to the point of becoming concurrent. Such concurrence would occur, for instance, when the President's authority as Commander-in-Chief overlaps with the power of Congress to make rules for the regulation of land and naval forces during a war.[116] It has now become accepted that there is some concurrent authority for the Congress and the President.[117] It is far from being clear what may be part of this category and the courts have provided little guidance on the topic.[118] It is also difficult to determine which branch prevails in case of conflicting assertions of power.[119]

More importantly, the Court has developed a test which sheds further light on the question of concurrent power and which is usually used to verify whether one branch has overstepped its powers, namely the one suggested by Justice Jackson in *Youngstown Sheet & Tube v. Sawyer*[120]. Justice Jackson explained that executive powers vary according to three different situations. In the first situation, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate"[121]. In the second situation, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain"[122]. In the third situation, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its

[116] Louis Henkin, Foreign Affairs and the U.S. Constitution, 2nd ed., Oxford 1996, 94.

[117] Ibid.

[118] Ibid.

[119] Ibid.

[120] *Youngstown Sheet & Tube v. Sawyer* (note 54) *supra*. In *Youngstown*, President Truman seized steel mills from citizens to avoid a strike during the Korean War. He relied on Article II of the Constitution, including his authority as Commander-in-Chief. The Supreme Court held that this was a violation of the separation of powers doctrine.

[121] Ibid., 636-637.

[122] Ibid., 637.

lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject"[123]. This analysis reveals that executive power is closely intertwined with the power of the Congress, and Justice Jackson suggests that there is some concurrent authority in a so-called "zone of twilight".

2.1.2. The Practice of the Bush Administration

In contrast to the framework outlined above, President Bush seems to rely on a unitary theory of executive power under which all executive branch power is vested in the President and any incursion on it by Congress should be resisted.[124] This finds support in the signing statements[125] issued by President Bush when he approves a new law. For instance, when the President approved the McCain Amendment[126] he declared that: "[t]he executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks"[127]. He has used on many occasions similar statements constantly emphasising that he interprets law in accordance with his authority to supervise the unitary executive and his power as Commander-in-Chief.[128] President Bush seems to have resorted to the signing statements in order to enforce his own interpretation of the law and to increase the power of the executive within the

[123] Ibid., 637-638.

[124] For further information on the Unitary Executive theory, see Christopher Yoo/Steven G. Calabresi/Anthony J. Colangelo, The Unitary Executive in the Modern Era, 1945-2004, 90 Iowa L. Rev. 601 (2005).

[125] A signing statement is a written statement issued by the President that accompanies the signing of a law passed by Congress.

[126] Text of Amendments, Senate, October 3, 2005, S.A. 1977. McCain, S.10908-S.10909, available at: <http://thomas.loc.gov> (accessed August 18, 2006). It became the Detainee Treatment Act of 2005, (note 14) *supra*, as Title X of the Department of Defense Appropriations Act, 2006, P.L. 109-148 (H.R. 2863).

[127] Bush Reserves Right to Bypass Torture Ban in Spending Bill Signing Statement, The Jurist, January 04, 2006, available at: <http://jurist.law.pitt.edu/paperchase/2006/01/bush-reserves-right-to-bypass-torture.php> (accessed August 8, 2006). See also: Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Presidential Signing Statements, The American Presidency Project, University of California, Santa Barbara, U.S.A., December 30, 2006, available at: <http://www.presidency.ucsb.edu/ws/index.php?pid=65259> (accessed August 8, 2006).

[128] See further signing statements: Presidential Signing Statements, The American Presidency Project, University of California, Santa Barbara, U.S.A, available at: <http://www.presidency.ucsb.edu/signingstatements.php?year=2006&Submit=DISPLAY> (accessed August 8, 2006). See also: Bush Challenges Hundreds of Laws, The Boston Globe, April 30, 2006.

legislative context. He used his veto once[129] but usually preferred to issue signing statements to circumvent legal requirements and bypass Congress.[130]

In addition, President Bush's reliance on the theory of unitary executive finds support in the Memoranda issued by the government in an attempt to explore the legal boundaries of the use of unusual interrogation techniques during the war on terror. The 1 August 2002 Memorandum[131] maintained that the President had complete discretion in his actions as Commander-in-Chief and that these did not need to be approved by Congress[132]. The Memorandum of December 30, 2004[133] issued by the Department of Justice was meant to supersede the previous 1 August 2002 Memorandum and another Memorandum issued on 4 April 2003[134]. However, the new Memorandum did not address nor reject the scope of the President's Commander-in-Chief powers described in the 1 August 2002 Memorandum[135] dismissing it as unnecessary[136]. In addition, it appears that subsequent Memoranda issued by the Department of Justice have followed the same approach.[137]

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[129] Stem Cell Bill Gets Bush's First Veto, The Washington Post, July 20, 2006.

[130] The debate over presidential signing statements is quite heated at the moment. For a full account of the debate and further recommendations, see Neal R. Sonnett, American Bar Association. Task Force on Presidential Signing Statements and the Separation of Powers Doctrine – Report, August 2006, available at: <http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf> (accessed August 8, 2006).

[131] Jay Bybee, Memorandum for Alberto R. Gonzales. Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A, U.S. Department of Justice, Office of Legal Council & Office of Assistant Attorney General, Washington D.C., August 1, 2002, available at: <http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%20Gonz_.pdf> (accessed July 28, 2006).

[132] Ibid., 36-37.

[133] Daniel Levin, Memorandum for James B. Comey, Deputy Attorney General, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A, Office of Legal Counsel, U.S. Department of Justice & Office of Assistant Attorney General, Washington D.C., December 30, 2004, available at: <http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/levin-memo-123004.pdf> (accessed August 2, 2006).

[134] Bybee (note 131) *supra* and U.S. Department of Defense, Working Group Report, Re: Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations, April 4, 2003, available at: <http://www.washingtonpost.com/wp-srv/nation/documents/040403dod.pdf> (accessed August 2, 2006).

[135] Bybee, ibid.

[136] "Because the discussion in that memorandum concerning the President's Commander-In-Chief power and the potential defences to liability was – and remains – unnecessary, it has been eliminated from the analysis that follows. Consideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture." See Levin (note 133) *supra*, 2.

[137] "For example, a January 19, 2006, unsigned memorandum, issued on Department of Justice letterhead, relied upon a similar expansive and controversial view of presidential power to justify the use of warrantless domestic wiretaps in seeming contravention of the federal statutory safeguards imposed by the Foreign Intelligence Surveillance Act." See [no author], Guidelines for the President's Legal Advisors, 81 Ind. L.J. 1345, 1347 (2006). See also U.S. Department of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President, January 19, 2006, available at: <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf> (accessed August 8, 2006).

2.1.3. The New Approach in the *Hamdan* Case

The merits of the unitary executive theory have been vigorously questioned by scholars. An alternative and more legally sound theory suggests that "[t]he historical examination of constitutional structure and relationship that follows suggests that our National Security Constitution rests upon a simple notion: that generally speaking, the foreign affairs power of the United States is a power shared among the three branches of the national government"[138]. All three branches play integral roles in both making and validating foreign-policy decisions[139]. In this process, the President plays a predominant role, but he benefits from a limited scope of exclusive powers in relation to diplomatic relations and the recognition of governments and nations.[140] At the same time, "(…) governmental decisions regarding foreign affairs must transpire within a sphere of concurrent authority, under presidential management, but bounded by the checks provided by congressional consultation and judicial review"[141]. The National Security Constitution therefore rests on a principle of balanced institutional participation[142] which ensures that the powers are shared by the three branches.

Against this background, it can be argued that the majority in the *Hamdan* decision relied on this principle of balanced institutional participation in interpreting the separation of powers enshrined in the Constitution. In fact, between the lines of the majority's opinion, it is apparent that Justice Stevens attempted to resuscitate the delicate balance of powers between the branches through its finding that the President lacked power to create this type of military commission and by refusing to find an implicit congressional authorisation. At the same time, the Court re-appropriated some of its legitimate power to control both branches in this context. This also finds support in the language and arguments used by the Court.[143] More than before, its view depicts the powers of all three

[138] Harold Hongju Koh, The National Security Constitution: Sharing Power After the Iran-Contra Affair, New Haven/London 1990, 69.

[139] Ibid.

[140] Ibid.

[141] Ibid.

[142] Ibid.

[143] For instance, Justice Stevens indicated at 2773 of the *Hamdan* decision (note 1) *supra*, quoting *Yamashita v. Styer,* 327 U.S. 1, 11 (1946) that the President and Congress have been granted joint powers in times of war: "And that authority, if it exists, can derive only from the powers granted *jointly* to the President and Congress in time of war" (italics inserted by the authors). In addition, the Court enumerated (at the same page) the powers of the President and Congress in times of war to demonstrate that they interact in this context: "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*: (…)".

branches as being shared and it forecloses the President's theory of unitary executive.

As demonstrated in Parts I and II of this paper, the Supreme Court has been trying to curb Presidential assertions of power in the *Hamdan* decision. However, this is a new tendency, as historically, the courts have generally demonstrated their deference to Presidential claims of power. The following sub-section illustrates and discusses the tradition of judicial deference, as exemplified in three cases decided at the time of World War II. It then attempts to contrast these cases with the decision in *Hamdan*, in order to demonstrate how the Supreme Court has recently breached this long-established tradition.

2.2. World War II Case Law: A Tradition of Judicial Deference

2.2.1. The Traditional View of Deference

In the context of war, judges have usually refrained from intervening in decisions taken by the Executive or from passing judgements about the wisdom of a given policy. It was thought that the matter was within the expertise, domain, province or discretion of the government and that it should not be second-guessed by justices unable to form an informed opinion on the topic.[144] It was also conceived that the Executive needed to have substantial discretion in order to wage war successfully. This judicial approach, now called "judicial deference" or "judicial tolerance"[145] has become widely accepted to the point of becoming a tradition.[146] It is especially apparent in the decisions delivered by the Court in the World War II era, namely in *Ex Parte Quirin*[147], *Toyosaburo Korematsu v. United States*[148] and *Johnson v. Eisentrager*[149].

In *Ex Parte Quirin*[150], the Court upheld the jurisdiction of a military commission over eight Germans who travelled to the United States to carry out sabotages.[151] It also upheld the government's determination that the eight men were

[144] Daniel D. Solove, The Darkest Domain: Deference, Judicial Review and the Bill of Rights, 84 Iowa L. Rev. 941, 948 (1999).

[145] Koh (note 138) *supra*.

[146] It could also be argued that, as part of this tradition, cases have become *de facto* non-justiciable. See C. Thomas Dienes, When the First Amendment Is Not Preferred: The Military and Other "Special Contexts", 56 U. Cin. L. Rev. 779, 819 (1988).

[147] *Ex Parte Quirin* (note 18) *supra*.

[148] *Toyosaburo Korematsu v. United States*, 323 U.S. 214 (1944).

[149] *Johnson v. Eisentrager* (note 66) *supra*.

[150] *Ex Parte Quirin* (note 18) *supra*.

[151] The eight Germans were: Ernest Burger, George John Dasch, Herbert Haupt (also American), Heinrich Heinck, Edward Keiling, Herman Neubauer, Richard Quirin and Werner Thiel. They had lived in the United States and returned to Germany between 1933 and 1941. After the declaration of war between the United States and the German Reich, they were trained in Germany to carry out sabotage. They travelled by submarine from Occupied France and arrived to Long Island, New York and Jacksonville Florida in June 1942. They wore German uniforms in order to be

unlawful combatants, deprived of prisoner of war status and the protection of the Fifth and Sixth Amendments and Article III, Section 2. *Ex Parte Quirin* is generally viewed as a typical example of judicial deference to the decisions of the Executive in times of war.[152] The Court very promptly found Congressional authorisation for creating military tribunals in the Articles of War and decided that the President had the necessary statutory authority. It distanced itself from the decision in *Ex Parte Milligan*[153] where the Court was reluctant to recognise that citizens can be tried by a military commission. It simply assumed that proceeding by military commission in this case was an appropriate solution. In addition, it appears to have considered that "unlawful combatants" or "enemy combatants" can be deprived of various procedural safeguards found in the Constitution without questioning the merits of such a contention. The Supreme Court circumscribed the role of federal courts in cases where the exercise of Presidential war powers was involved. At the same time, this lack of interference allowed the President to have more room for manoeuvre in his war time decisions.

The Court's use of deference continued and was further demonstrated during the internment of Americans of Japanese descent. Many internees contested their detention and this gave rise to controversial court decisions. One such decision was *Toyosaburo Korematsu v. United States*[154] where the Court decided six to three that an exclusion order allowing the internment of Americans of Japanese ancestry was constitutional. It was found that military necessity and the need to protect against espionage outweigh the rights of Americans of Japanese ancestry.

The Court merely reiterated the government's contention that the exclusion was based on military necessity: "Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group."[155] While it was noted that exclusion from one's home carries with it

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treated as prisoners of war if they were captured upon arrival. However, promptly after that, they put on civil clothes. All had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government. All were taken into custody in New York or Chicago, Illinois by agents of the Federal Bureau of Investigation. By an Order issued on July 2, 1942, President Franklin D. Roosevelt convened a military tribunal which sentenced the eight men to death. On the same day, he also issued a Proclamation which, among other things, denied them access to the courts. The President later commuted the death sentences of two men, as they had assisted in capturing the others. The remaining six were executed on August 8, 1942.

[152] Christopher Bryant/Carl Tobias, Quirin Revisited, Wis. L. Rev. 309, 361-363 (2003); Juliet Stumpf, Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen, 38 U.C. Davis L. Rev. 79, 108 (2004).

[153] *Ex Parte Milligan* (note 23) *supra*.

[154] *Toyasaburo Korematsu v. United States* (note 148) *supra*.

[155] Ibid., 218.

great hardship, the Court found that this was one of the burdens that citizens must endure during war.[156]

For Justice Black, this was not a case of racism, but rather a carefully thought out strategy in times of military necessity: "To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race."[157] Finally, giving the full benefit of doubt to the Executive, Justice Black noted that: "There was evidence of disloyalty on part of some, the military authorities considered that the need for action was great, and time was short. We cannot – by availing ourselves of the calm benefit of hindsight – now say that at that time these actions were unjustified."[158] Curiously, Justice Black announced at the beginning of his judgement that he would apply a strict standard of scrutiny, but none of the Government's claims were really scrutinised.[159] This blind faith in Government became tragic when it was later found that the Government had misrepresented information regarding the military necessity of interning Americans of Japanese descent.[160]

Unfortunately, the tendency of judges to abdicate their duties continued beyond *Korematsu*[161]. In 1950, the Supreme Court decided in *Johnson v. Eisentrager*[162] that 21 Germans held in custody by the U.S. Army in Germany after having engaged in espionage in China and having been convicted there by a military commission, had

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[156] Ibid., 219.

[157] Ibid., 223.

[158] Ibid., 223-224.

[159] According to Dean Hashimoto, the *Korematsu* decision stands for the principle of judicial abstention. See Masaru Hashimoto, The Legacy of Korematsu v. United States: A Dangerous Narrative Retold, 4 Asian Pac. Am. L.J. 72, 124 (1996). Joseph Margulies also writes in his recent book that "[t]he decision in *Korematsu* is a judicial embarassment. The Supreme Court has never cited the result with approval". See Joseph Margulies, Guantanámo and the Abuse of Presidential Power, New York/London/Toronto/Sydney 2006, 149.

[160] In 1982, Mr. Korematsu petitioned for a writ of *coram nobis* to vacate his 1942 conviction on the grounds of governmental misconduct. Granting the petition, the court noted that the "[p]etitioner offers another set of documents showing that there was critical contradictory evidence known to the government and knowingly concealed from the courts. These records present another question regarding the propriety of judicial notice. They consist of internal government memoranda and letters. Their authenticity is not disputed." See *Korematsu v. United States,* 584 F. Supp. 1406, 1417 (N.D. Cal. 1984). It should also be added that Lieutenant Commander Kenneth D. Ringle, a naval intelligence officer, wrote a report in December 1941 commissioned by his superiors on the loyalty of Americans with Japanese descent. He found, "[t]hat, in short, the entire 'Japanese Problem' has been magnified out of its true proportion, largely because of the physical characteristics of the people; that it is no more serious than the problems of the German, Italian, and Communistic portions of the United States population, and, finally that it should be handled on the basis of the individual, regardless of citizenship, and not on a racial basis". See Lieutenant Commander K.D. Ringle USN., Report on the Japanese Question, Serial No. 01742316 30, December 1941, I Opinions (h), available at: <http://www.history.navy.mil/library/online/jap%20intern.htm> (accessed August 11, 2006). The government was aware of this Report at the time of the *Korematsu* case (note 148) *supra*.

[161] *Toyosaburo Korematsu v. United States* (note 148) *supra*.

[162] *Johnson v. Eisentrager* (note 66) *supra*.

no right to a writ of *habeas corpus* to contest their detention.[163] It was found that these prisoners were at no relevant time on U.S. territory, and that their trial was beyond the territorial jurisdiction of any U.S. court.

In relation to the separation of powers doctrine, the Court noted that the "[e]xecutive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security"[164]. It was also opined that "[c]ertainly it is not the function of the Judiciary to entertain private litigation – even by a citizen – which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in spending our armed forces abroad of to any particular region"[165]. Also, reviewing whether the military commission had jurisdiction or not in the absence of hostilities and martial law[166] "(…) involves a challenge to conduct of diplomatic and foreign affairs, for which the President is exclusively responsible"[167]. The Court left the consideration of the 27 July 1927 Geneva Convention[168] to the end and quickly found that there was no violation of Articles 60 and 63. Thus, having established that granting jurisdiction over this case would create military concerns, the Court preferred to leave the question to the Executive.

In this decision, the majority has paid great deference to the Executive's factual findings. As Justice Kennedy accurately pointed out, "[t]he decision in *Eisentrager* indicates that there is a realm of political authority over military affairs where the judicial power may not enter"[169]. Under the label of extraterritoriality, the Court circumvented its legal duty to adjudicate the case. Once again, the Court put all its faith in the factual basis presented by the government. Applying a pragmatic reasoning, the Court thought that it would open the flood gates if it granted the relief sought to the petitioners, which would in return undermine the military's ability to conduct war. It was also concerned about the image of the U.S. Army and about the hardship that it would suffer as a result of such a decision. Clearly, in this case, the Court's motive was not the protection of individual rights and liberties. The Court could have considered that an increased workload should have

[163] Justice Jackson, writing on behalf of the majority, noted that citizenship provided jurisdiction to the court, and in the case of aliens, it was their presence in the United States. Ibid., 771. However here "these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offence, the capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States". Ibid., 777.

[164] Ibid., 774.

[165] Ibid., 789.

[166] One of the four reasons specified in the petition in support of the argument that the Military Commission's jurisdiction was *ultra vires* was that "(…) [i]n the absence of hostilities, martial law or American military occupation of China, and in view of treaties between the United States and China dated February 4, 1943 and May 4, 1943, and between Germany and China dated May 18, 1921, the Military Commission was without jurisdiction". Ibid., 785.

[167] Ibid., 789.

[168] Convention between the United States of America and other powers, relating to prisoners of war, July 27, 1929, 47 Stat. 2021, T.S. 846.

[169] *Rasul v. Bush and Al Odah v. United States* (note 77) *supra*, 487.

no bearing on this case and it could have emphasised that the military should also abide by the Constitution abroad (extraterritoriality should be no shield in cases of human rights abuse). Unfortunately, none of these arguments were mentioned in the majority's opinion.

There are several reasons which might explain why the Supreme Court decided to pay deference to the Executive in the three cases discussed above. First, the Court was concerned about its institutional competence.[170] Judges are not trained in military affairs, and they have been reluctant to overrule governmental decisions based on intelligence and complex policy issues. In these three cases, the Court simply trusted the Government that there was sufficient military necessity to justify the decisions taken. Justices felt that they lacked the necessary experience and expertise to second guess the Executive in this area. Second, the Court seems to have construed the powers of the President as Commander-in-Chief very broadly so that they include a wide range of war-related decisions.[171] These powers seem to include the right to override civil rights and liberties when the President claims that there was a military necessity. Third, the Court could also have resorted to judicial deference because of its concern for institutional credibility. Ultimately, the authority of the Supreme Court, just as the one of any other judicial body, depends on the acceptance of its decisions by the other branches. Fourth, the Court may have abstained from intervening because some information was misrepresented or withheld.[172]

2.2.2. The New Approach in the *Hamdan* Case

The *Hamdan*[173] decision clearly differs from the three cases discussed in this section. In fact, it seems to break away from the tradition of judicial deference and to reaffirm the Court's legitimate role in cases involving national security questions. The reasons for which the Court deferred to the Executive's decision 50 years ago are not necessarily applicable today and they were not so convincing to the *Hamdan* Court. The Court did not feel anymore that it lacked expertise to intervene in the case or that it should wait to intervene until the final outcome of ongoing military proceedings is known. Instead, the Court's main consideration was the public importance of the question raised and its duty to uphold civil rights in times of war and peace.[174]

Furthermore, in contrast to the three cases discussed, the *Hamdan* Court construed Presidential powers as Commander-in-Chief narrowly. As there was no ex-

[170] Shapiro (note 87) *supra* at 106.

[171] Jonathan Masur, A Hard Look or Blind Eye: Administrative Law and Military Deference, 56 Hastings L.J. 441, 447 (2005).

[172] Ibid. As became apparent following the *Korematsu* decision, the government had provided false information regarding the military necessity of interning Americans of Japanese descent.

[173] *Hamdan v. Rumsfeld* (note 1) *supra*.

[174] Ibid., 2772; *Ex Parte Quirin* (note 18) *supra* at 19.

press Congressional authorisation to convene the type of military commission created to try Hamdan, the Court had to conduct an inquiry to verify whether the Commission is legally justified. It was found that the President's Commander-in-Chief powers do not include the authority to create this particular type of body. In reaching its conclusion, the majority was not concerned whether the Administration would respect its decision, although this may have been the case in the past. The plurality even stated that there was no military necessity to create a military commission. Perhaps it should also be added that the *Hamdan* decision was decided under different military circumstances than the three cases mentioned, which may explain the different approach taken by the Court. Here, there was no war in the traditional sense, but rather an indefinite conflict with unknown enemies and boundaries.

A further important innovation is Justice Stevens' reminder that Congress has important powers in times of war which interact closely with those of the President. Through a citation of *Ex Parte Milligan*[175] he reminded that "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 controlling necessity (…)"[176]. Justice Stevens abstained, however, from defining what may constitute a controlling necessity and left the question open. In addition, the Supreme Court seems to have opted for a procedural approach by requiring the Executive to substantiate the existence of such a necessity. Thus, it was clear for the Court that in this area the Executive shares the burden of proof.

Following the *Hamdan* decision, the role of the Court in cases involving Presidential war powers has changed significantly. The Court is now more willing to scrutinise the evidence presented by the Government and to find that it is insufficient or lacking. It is no longer a rubber stamp for any of the President's war-related decisions. Furthermore, in evaluating national security interests competing with civil rights and liberties, the Court carefully balances both of them. The Court seems to have reaffirmed its role and duty, conferred by Congress, to uphold civil rights and liberties in times of war and peace. More than previously, it is also guided by considerations of public interest and refuses to trade in clear abuse of civil liberties for unproven national security concerns or military necessity.[177]

[175] *Ex Parte Milligan* (note 23).

[176] Ibid., 139-140.

[177] It would have been easy for the Court in *Hamdan* (note 1) *supra*, to rely on the same arguments as in *Korematsu* (note 148) *supra*, but fortunately it did not.

3. The Importance of *Hamdan* for the Reception of International Law by the Supreme Court

Shortly after the Supreme Court has ruled on *Hamdan*, the decision was generally commented in the daily newspapers as a victory for the rule of law and the Geneva Conventions. Besides the fact that the *Hamdan* decision is one of the most significant rulings on presidential power since World War II, the Supreme Court expressed also its attitude towards a corpus of the most important international law treaties – the *ius in bello,* the humanitarian law as codified in the Geneva Conventions. Generally, the Supreme Court is not known for integrating international law or rulings of international decision making bodies in its case law.[178] Therefore, the question arises whether the *Hamdan* decision marks a new era in the reception process.

The Court rejected the argument that the Geneva Conventions are not directly applicable. This clarification was important and obviously not self-evident.[179] Concerning the method of the Court for the interpretation of the Geneva Conventions it is worth mentioning that the Court based its finding on the International Commentary of the Geneva Conventions[180].

The Court left open the important question of whether the war between al Qaeda and the United States is a conflict in the meaning of Common Article 2 of the Geneva Conventions. By that, the Court avoided a statement on the controversial question whether the Guantanamo prisoners have the status of prisoners of war.[181] However, the Salomonian dictum by the Supreme Court confers to the

[178] See Helen Keller/Daniela Thurnherr, Taking International Law Seriously, Bern 2005, 46 et seq. and 147 et seq. For a criticism of the generally introverted approach of the Supreme Court, see Ruth B. Ginsburg, Looking Beyond Our Borders. The Value of a Comparative Perspective in Constitutional Adjudication, 22 Yale Law & Policy Review, 329-337, 330 (2004) or Ruth B. Ginsburg, Gebührender Respekt vor den Meinungen der Menschheit: Der Wert einer vergleichenden Perspektive in der Verfassungsrechtsprechung, 32 Europäische Grundrechte-Zeitschrift 341, 342 et seq. and 345 et seq. (2005).

[179] See the summary of arguments of the Court of Appeals, *Hamdan v. Rumsfeld* (note 1) *supra*, 2793 et seq.

[180] Ibid., 64; Oscar M. Uhler/Henri Coursier/Frédéric Siordet/Claude Pilloud/Roger Boppe/René-Jean Wilhelm/Jean-Pierre Schoenholzer, Commentary: IV Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, International Committee of the Red Cross, Geneva, 1958 (first reprint in 1994).

[181] See Michael Bothe, Töten und getötet werden – Kombattanten, Kämpfer und Zivilisten im bewaffneten Konflikt, in: Klaus Dicke et al. (ed.), Weltinnenrecht, Kiel 2005, 67-84, 68 et seq. and 79 et seq. There is an ongoing debate as to whether (and to what extent) international terrorists are protected by the Geneva Conventions. For further information see: Marco Sassòli, The Status of Persons Held in Guantanámo Bay Under International Humanitarian Law, 2 J. Int'l Crim. Just. 96 (2004); Dinah Shelton, The Legal Status of the Detainees at Guantanamo Bay: Innovative Elements in the Decision of the Inter-American Commission on Human Rights of 12 March 2002, 23 Hum. Rts. L.J. 13 (2002) and Judith Wieczorek, Der aktuelle Fall: Der völkerrechtliche Status der Gefangenen von Guantanámo nach dem III. Genfer Abkommen über die Behandlung der Kriegsgefangenen vom 12. August 1949, 15 Humanitäres Völkerrecht 88 (2002). See also *infra*, Part IV, Section 2 on 2. Enemy Combatant Status, page 38.

Guantanamo prisoners at least the minimal protection of Common Article 3 of the Geneva Conventions.

As regards the methodological approach, the Court's interpretation of fair trial is even more astonishing. Here, the Court relied on Article 75 of Protocol I to the Geneva Convention – although the United States have not ratified Protocol I.[182] The Court stressed that Article 75 of the Protocol I codifies customary international law.[183] In the concluding remarks the Court made abundantly clear that the military commission was not in conformity with Common Article 3: "Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, carted to accommodate a wide variety of legal systems. But *requirements* they are nonetheless"[184].

The ease with which Justice Stevens argued for the majority in favour of international law is deceptive. In his concurring opinion, Justice Kennedy made a general comment: "There should be reluctance (...) to reach unnecessarily the question whether (...) 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."[185] Moreover, Justice Thomas' dissenting opinion makes clear that the international law issue was difficult: "The President's interpretation of Common Article 3 is reasonable and should be sustained. (...) Instead, the Court, without acknowledging its duty to defer to the President, adopts its own, admittedly plausible, reading of Common Article 3. But where, as here, an ambiguous treaty provision is susceptible of two plausible, and reasonable, interpretations, our precedents require us to defer to the Executive's interpretation."[186] Finally, Justice Alito takes, contrary to the majority of the Court, an approach which ultimately rests on domestic law: "I interpret Common Article 3 as looking to the domestic law of the appointing country (...). 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."[187]

Generally speaking, several aspects interact in the reception process.[188] We have to bear in mind that every judge is in a difficult situation confronted with a clash between international and national law. Normally, judges – especially those of the highest constitutional court – think of themselves as guardians of the national legal order and not as custodians of international law. In those cases in which the relationship between international and national law is combined with a horizontal

[182] *Hamdan v. Rumsfeld* (note 1) *supra*, 2797 et seq.

[183] Ibid.

[184] Ibid., 2798 (italics in the original).

[185] Ibid., 2809.

[186] Ibid., 2846.

[187] Ibid., 2851.

[188] Helen Keller, Rezeption des Völkerrechts. Eine rechtsvergleichende Studie zur Praxis des U.S. Supreme Court, des Gerichtshofes der Europäischen Gemeinschaften und des schweizerischen Bundesgerichts in ausgewählten Bereichen, Berlin etc. 2003, 753 et seq.

separation of powers question, the Supreme Court tends to support the Executive prerogatives and to decide in favour of the domestic law.[189] This attitude would have been possible if the Court only had wanted to uphold the Government's position in the case at hand. Given this background, the *Hamdan* decision is not self-evident.

Certain aspects in the *Hamdan* decision favoured the "international law-friendly" result. First, the international rules in question are not disputed, well established and generally accepted in the international scene. This holds true for the Geneva Conventions. Second, the Supreme Court is familiar with the use and meaning of a certain rule defined on the international level. Concretely, the Court could rely on the important commentaries to the Geneva Conventions[190]. This shows the importance of such opera. Third, the Supreme Court was able to base its decision not only on international, but also on domestic law. The implementation of the guarantees granted in Common Article 3 in the UCMJ[191], paved the way for the "international law-friendly" result. Fourth, the absence of a congressional authorisation for a breach of the international law obligation is important as well. The Supreme Court made it clear: As soon as Congress will authorise the President's approach for the trial commission, despite opposing international law obligations, the Court would consider to be bound by such a national decision.

The circumstances in which *Hamdan* was decided also facilitated the "international law-friendly result". However, there is little hope that the *Hamdan* decision marks a new era for the attitude of the Supreme Court towards international law in general. This holds in particular true when *Hamdan* is read in connection with the decision in *Sanchez-Llamas v. Oregon*[192], decided a day earlier, where the Supreme Court gave a rebuke to the International Court of Justice and the Vienna Convention on Consular Relations[193].

[189] See, e.g., *Goldwater v. Rossi*, 444 U.S. 996 (1979).

[190] Uhler/Coursier/Siordet/Pilloud/Boppe/Wilhelm/Schoenholzer (note 180) *supra*.

[191] UCMJ (note 5) *supra*.

[192] *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669 (2006), decided June 28, 2006, opinion of the Court (Chief Justice Roberts): "Nothing in the structure or purpose of the ICJ suggests that its interpretation were intended to be conclusive on our courts." (2684) and: "Although these cases involve the delicate question of the application of an international treaty, the issues in many ways turn on established principles of domestic law." (2687).

[193] Vienna Convention, April 24, 1963, 21 U.S.T. 77, TIAS 6820, in force since March 19, 1967, for the United States December 24, 1969.

IV. *Ceterum Censeo*: What Was Left Out in the *Hamdan* Case

1. The Prohibition of Torture

The *Hamdan* Court did not consider the legality of using unusual interrogation techniques at Guantanamo Bay, as there was no allegation of such practices in this case. Such an enquiry would have been dangerous and beyond the scope of the decision. However, it should be reminded that this is yet another fundamental question which needs to be resolved in order to improve the treatment of prisoners held at Guantanamo Bay. Given the Court's finding that Hamdan benefits from the protections of Common Article 3, the question arises whether other Guantanamo detainees who were allegedly tortured could also invoke its provisions in a court of law.

1.1. Prohibition of Torture in International Law

The prohibition of torture is enshrined in the Universal Declaration of Human Rights[194] (Article 5), the International Covenant on Civil and Political Rights[195] (Article 7), the American Convention on Human Rights[196] (Article 5(2)), the African Charter on Human and Peoples' Rights[197] (Article 5) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[198] as an absolute right (no derogation is permitted, even in case of emergency). Torture is also prohibited by the Geneva Conventions[199] in cases of internal conflicts (Convention I, Article 3, Section 1A), wounded combatants (Convention I, Article 12), prisoners of war in international conflicts (Convention III, Article 17), civilians in occupied territories (Convention IV, Article 32), civilians in international conflicts (Protocol I, Article 75, Section 2Ai) and civilians in internal conflicts (Protocol II, Article 4, Section 2A).

[194] Universal Declaration of Human Rights, adopted 10 December 1948, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

[195] International Covenant on Civil and Political Rights, entered into force March 23, 1976, for the United States, June 8, 1992, 999 U.N.T.S. 171.

[196] American Convention of Human Rights, entered into force July 18, 1978, not ratified by the United States, 1144 U.N.T.S. 123.

[197] African Charter on Human and Peoples' Rights, entered into force October 21, 1986, OAU Doc CAB//LEG/67/3 rev.5, 21 I.L.M. 58 (1982).

[198] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force June 26, 1987, for the United States October 21, 1994, 1465 U.N.T.S. 85.

[199] Geneva Conventions (note 10) *supra*.

1.2. Prohibition of Torture on the Constitutional Level

The American Constitution states in Article IV that "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; (…)". It does not explicitly prevent torture, but it does condemn cruel and unusual punishment (Amendment VIII), unreasonable search and seizure (Amendment IV) as well as self-incrimination (Amendment V). The Supreme Court has held in the past that due process includes the prohibition of torture and illegal confinement.[200] It was also found that it is difficult to conceive of a method more revolting to the sense of justice than torturing someone to extract information and to use these confessions as the basis for conviction and sentence.[201]

1.3. Prohibition of Torture on the Federal Law Level

The United States enacted in 1994 the Torture Convention Implementation Act[202] in order to implement the Convention Against Torture[203] into domestic law.

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[200] *Chambers v. Florida*, 309 U.S. 227, 236-237 (1940).

[201] *Brown v. Mississippi*, 297 U.S. 278, 286 (1936). See also Damien S. Donnely-Cole, Not Just a Few Bad Apples: The Prosecution of Collective Violence, 5. Wash. U. Glob. Stud. L. Rev. 159, 166 (2006).

[202] Torture Convention Implementation Act of 1994, P.L. 103-236, 108 Stat. 463 (1994), codified at 18 U.S.C.S. §§ 2340-2340 A (2005). With respect to the definition of torture, Section 2340 states the following: "(1) 'torture' means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control; (2) 'severe mental pain or suffering' means the prolonged mental harm caused by or resulting from (a) the intentional infliction or threatened infliction of severe physical pain or suffering; (b) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (c) the threat of imminent death; or (d) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; (…)". It should be noted that the United States have ratified the Convention against Torture with several reservations. See for further information, Declarations and Reservations, United States of America, available at: <http://www.ohchr.org/english/countries/ratification/9.htm#reservations> (accessed November 3, 2006). See also Frederic L. Kirgis, Distinctions Between International and U.S. Foreign Relations Law Issues Regarding Treatment of Suspected Terrorists, ASIL Insights, June 2004, available at: <http://www.asil.org/insights/insight138.htm> (accessed November 3, 2006).

[203] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (note 198) *supra*. The Convention defines torture under Article 1 (1) as "(…) any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other

The Torture Convention Implementation Act provides that "[w]hoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life"[204]. There is jurisdiction over torture when "(…) the alleged offender is a national of the United States (…)"[205] or if he or she "(…) is present in the United States, irrespective of the nationality of the victim or alleged offender"[206]. In addition, the War Crimes Act[207] provides that "[w]hoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death"[208]. The offender or the victim must be a member of the Armed Forces of the United States or a national of the United States for the Act to apply. Furthermore, the Military Extraterritorial Jurisdiction Act[209] provides for the prosecution of crimes committed by the Armed Forces outside the United States[210]. Finally, the Uniform Code of Military Justice holds that cruelty, oppression, maltreatment and maiming are prohibited.[211] There are also civil actions[212] available under specific circumstances to those that were submitted to torture under the Alien Tort Claims Act[213] and the Torture Victim Protection Act[214].

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person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[204] Torture Convention Implementation Act (note 202) *supra*.

[205] Ibid.

[206] Ibid.

[207] War Crimes Act 18 U.S.C.S. § 2441 (1996).

[208] Ibid.

[209] Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261 (2000).

[210] It also applies to acts "that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States". See Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261(a) (2000).

[211] UCMJ (note 5) *supra*, 10 U.S.C. § 893, Article 93 (1956) and 10 U.S.C. § 924, Article 124 (1956).

[212] For further discussion regarding the civil actions available to Guantanamo detainees, see Laura N. Pennelle, The Guantanamo Gap: Can Foreign Nationals Obtain Redress for Prolonged Arbitrary Detention and Torture Suffered Outside the United States?, 36 Cal. W. Int'l L. J. 303 (2006).

[213] Alien Tort Claims Act, see note 84 *supra*.

[214] Torture Victim Protection Act 28 U.S.C. § 1350 (1992). For further discussion on the prohibition of torture in U.S. law, see Linda M. Keller, Is Truth Serum Torture?, 20 Am. U. Int'l L. Rev. 521 (2005); John T. Parry/Welsh S. White, Interrogating Suspected Terrorists: Should Torture Be an Option, 63 U. Pitt. L. Rev. 743 (2002) and Macy Strauss, Torture, 48 N.Y.L. Sch.L.Rev. 201 (2003/2004).

1.4. Disastrous By-Passing Tactics by the Bush Administration

Despite this plethora of international instruments and national legislation, the Bush Administration used various legally questionable tactics during the war on terror in order to circumvent them. As part of its policy for preventing future terrorist acts, the U.S. Government issued several memoranda and documents allowing the use of certain interrogation techniques, which according to international law may amount to torture and/or cruel and unusual punishment. In two of these memoranda, the August 1, 2002 Department of Justice Memorandum entitled "Standards of Conduct for Interrogation under 18 U.S.C. 2340 – 2340A"[215] and the March 6, 2003 Department of Defence Memorandum entitled "Working Group Report Re: Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations"[216], the Bush Administration was attempting to explore the legal consequences of using unusual interrogation techniques. Both memoranda advocate a permissive view of torture and an expansive one of presidential power[217], even suggesting that torture may be legal. In December 2004, the Justice Department released a revised version of the August 1, 2002 Memorandum entitled "Legal Standards Applicable under 18 U.S.C. §§2340-2340A"[218], which revoked the previous Memoranda but still contained several inadequacies. While the definition of torture was broader, the other sources of applicable law were not considered (e.g. the Uniform Code of Military Justice[219], the Geneva Conventions[220], etc.). The Memorandum did not clarify further the President's unchecked power as Commander-in-Chief described in the August 1, 2002 Memorandum nor did it reject the legal defences against criminal liability available to staff officials. It further seemed to reaffirm that the President has complete discretion in his actions as Commander-in-Chief which do not need to be approved by Congress. Thus, it continued to employ the exclusive approach to presidential power.[221]

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[215] Bybee (note 131) *supra*.

[216] U.S. Department of Defense (note 134) *supra*.

[217] The August 1, 2002 Memorandum written by Bybee (note 131) *supra* concludes at 1 that "[f]or an act to constitute torture as defined in Section 2340, it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death". It further adds on the same page that "[f]or purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years". According to Bybee's view, Section 2340A requires the defendant to have specific intent which would mean that the defendant's precise objective is to inflict pain (at 3). Furthermore, it was found that the enforcement of Section 2340A would represent an unconstitutional infringement of the President's authority to conduct war (2). For further comments on the torture memos, see Margulies (note 159) *supra*, 89-109.

[218] Levin (note 133) *supra*.

[219] UCMJ (note 5) *supra*.

[220] Geneva Conventions (note 10) *supra*.

[221] Neil Kinkopf, The Statutory Commander in Chief, 81 Ind. L.J. 1169, 1171 (2006).

The interrogation policies mandated by the Bush Administration were initially used in Guantanamo and subsequently in Afghanistan and Iraq. The inevitable happened: it all came out into the open when the Abu Ghraib scandal broke out, revealing that Iraqi detainees were abused by U.S. intelligence personnel during interrogation.[222] The treatment of Iraqi detainees was considered as being "tantamount to torture" by the International Committee of the Red Cross in its report on the subject.[223] Since then, many previous Guantanamo detainees have come forward to tell their stories of ruthless interrogations and detention, leaving little doubt that U.S. practices amounted to torture.[224]

The United Nations have not remained silent in the face of such blatant abuse of international law. Recently, the United Nations Economic and Social Council issued (as part of the Commission on Human Rights) a report where it calls for the closing of Guantanamo Bay and states that certain interrogation techniques used by U.S. officials may amount to torture.[225] The Report further asserts that the Executive "(…) operates as a judge, prosecutor and defence counsel of the Guantanamo detainees: (…)"[226]. In addition, the United Nations Committee Against Torture recently stated in its concluding observations[227], following the submission of the second U.S. report, that the United States "(…) should rescind any interrogation technique, including methods involving sexual humiliation, 'water board-

[222] The Abu Ghraib scandal will however not be discussed as part of this article, as it is beyond its main scope.

[223] Violations were "tantamount to torture", The Guardian, May 8, 2004.

[224] It should be noted that, in June 2004, the Federal Bureau of Investigation (FBI) began an investigation to determine whether some of its staff had observed mistreatment of Guantanamo detainees. It was concluded that 26 FBI agents alleged having observed aggressive treatment of detainees. In response to these allegations, the Pentagon conducted another investigation under the direction of General Randall Schmidt. A report (widely known as the "Schmidt Report") was subsequently issued which confirmed the FBI's allegations of abusive treatment. See Army Regulation 15-6: Final Report/Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility, Unclassified, 1 April 2005 (Amended 9 June 2005), available at: <http://www.defenselink.mil/news/Jul2005/d20050714report.pdf> (accessed November 2, 2006). See also in relation to this point, Margulies (note 159) *supra*, 214-218 and Jane Mayer, The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted, The New Yorker, February 27, 2006, 32. For further discussion of the Torture memos, see Nigel. S. Rodley, The Prohibition of Torture: Absolute Means Absolute, 34 Denv. J. Int'l L. & Pol'y. 145 (2006); Harold Hongju Koh, Can the President Be Torturer In Chief?, 81 Ind. L.J. 1145 (2006) and Jonathan Canfield, The Torture Memos: The Conflict Between a Shift in U.S. Policy Towards a Condemnation of Human Rights and International Prohibitions Against the Use of Torture, 33 Hofstra L.Rev. 1049 (2005).

[225] United Nations Economic and Social Council, Commission on Human Rights 62nd Session, Items 10 and 11 of the Provisional Agenda, Economic, Social and Cultural Rights, Civil and Political Rights, Situation of Detainees at Guantanamo Bay, E/CN.4/2006/120, 38, para. 96.

[226] Ibid., 36, para. 85.

[227] United Nations Committee Against Torture, 36th Session, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture, United States of America, CAT/C/USA/CO/2, May 18, 2006, available at: <http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf> (accessed August 2, 2006).

ing', 'short shackling' and using dogs to induce fear, that constitute torture or cruel, inhuman or degrading treatment (…)"[228].

2. Enemy Combatant Status

The notion of "enemy combatants" was first mentioned in the *Ex Parte Quirin*[229] decision.[230] In fact, the *Quirin* court used the terms "unlawful combatant", "enemy bellingerent" and "enemy combatant" interchangeably and the term "enemy combatant" appeared only once in its decision.[231] For the Court, an enemy combatant was a person "(…) who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property (…) [is] generally deemed not to be entitled to the status of 'prisoners of war', but to be 'offender[s] against the law of war' subject to trial and punishment by military tribunals"[232]. Generally, the court preferred to use the term "unlawful combatant" and defined it in these words: "By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but, in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."[233]

The term "enemy combatant" is not defined anywhere in international law. Rather, it is only the term "unlawful combatant" which could be legitimately considered as falling under the 1949 Geneva Conventions[234]. Article 4 (A) 1 of the Convention relative to the treatment of prisoners of war[235] contains criteria which differentiate civilians from lawful combatants and others who should not be granted prisoner of war status. In order to be granted prisoner of war status a person must be commanded by a person responsible for his subordinates, must have a fixed distinctive sign that is recognisable from a distance, must be carrying arms openly and must be conducting an operation in accordance with the laws and customs of war. The term "unlawful combatant" is not defined, but it has been derived from the definition of a "lawful combatant".[236] It is a short hand expression

[228] Ibid., 7, para. 24.

[229] *Ex Parte Quirin* (note 18) *supra*.

[230] Joanna Woolman, The Legal Origins of the Term "Enemy Combatant" Do Not Support Its Present Day Use, 7 J.L. & Soc. Challenges 145, 147 (2005).

[231] Ibid., 148.

[232] *Ex Parte Quirin* (note 18) *supra*, 31.

[233] Ibid., 30-31.

[234] Geneva Conventions (note 10) *supra*.

[235] Ibid.

[236] Woolman (note 230) *supra*, 16.

used to describe those civilians who take up arms without being authorised to do so by international law.[237] It has a purely descriptive character and a third category of persons does not exist as such.[238] "Unlawful combatants" are either members of the regular forces or members of resistance guerrilla movements that do not fulfil the conditions of lawful combatants.[239]

Nonetheless, it is not the term "unlawful combatants" which has prevailed in the Supreme Court's language over the years, but rather "enemy combatants". In the context of the war on terrorism, the term "enemy combatant" has acquired a different meaning from the one applied during World War II. The Bush Administration has claimed the right to designate potential terrorists as "enemy combatants" in order to detain them without charges, judicial review and access to a lawyer and to try them by military commission. This was used in order to prevent captured combatants from continuing to aid the enemy. The concept of "enemy combatant" is now defined in the military order establishing the Combatant Status Review Tribunal as "(…) an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners"[240].

In *Hamdan*, Justice Stevens referred several times to the term "enemy combatant" while considering legislation applicable to the case and arguments set forth by the government. He did not examine the merits of such a classification. Hence, the Court demonstrated great deference to the Executive by not questioning the determination of "enemy combatant" status as applied to Hamdan. The case was remanded for further proceedings, and thus, it seems that the question was left to the lower courts.

The Court should not merely rubber stamp Presidential determinations of enemy combatant status, but rather actively question their merits. Also, as described earlier, the meaning of the term "enemy combatant" seems to have changed from the moment it was originally used in the World War II era case law. This modifica-

[237] Antonio Cassese, Expert Opinion on Whether Israel's Targeted Killings of Palestinians is Consonant with International Humanitarian Law, *The Public Committee Against Torture et al. v. The Government of Israel et al.*, June 2003, 14-15.

[238] Ibid., 15.

[239] Woolman (note 230) *supra*, 16.

[240] Deputy Secretary of Defense, Memorandum from Deputy Secretary of Defense Paul Wolfowitz Subject: Order Establishing Combatant Status Review Tribunal, Washington, July 4, 2006, 1, available at: <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (accessed August 31, 2006). For additional definitions used by the Administration see: Department of Defense, Fact Sheet: Thorough Process for Determining Enemy Combatant Status, available at: <http://www.defenselink.mil/news/Feb2004/d20040220det.pdf> (accessed October 31, 2006). In this fact sheet, an enemy combatant is defined as an individual who "was part of or supporting forces hostile to the United States or coalition partners, and engaged in an armed conflict against the United States". The same definition was repeated in the Brief for the Respondents in *Hamdi v. Rumsfeld,* 12, available at: <http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/216/Brief_Respondents.pdf> (accessed October 31, 2006). It appears that the definition of "enemy combatant" has been expanded by the Bush Administration since the beginning of the war on terror. For further details, see Margulies (note 159) *supra*, 161-162.

tion has gone unnoticed by the Court, but it certainly needs to be considered and explained. Finally, the terminology used in international humanitarian law should have been embraced by the Justices, instead of the President's custom-made definition of enemy combatant. The current legal situation of the so-called "enemy combatants" is highly controversial, and it clearly deserves a better day in court than the one it has been given thus far.

3. Impracticability

While reviewing the rules of procedure applicable by the military commission created to try Hamdan, Justice Stevens reminded that presidential power to create such rules is restricted by two requirements mentioned in Article 36 of the UCMJ[241]. First, procedural rules may not be "contrary to or inconsistent with" the UCMJ[242] and, second, they must be "uniform insofar as practicable". This latter requirement means that "(…) the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable"[243]. The Government argued that the rules of procedure are not inconsistent with the Uniform Code of Military Justice and that military commissions would be of no use if the provisions relative to courts-martial contained therein would be applicable.[244] Furthermore, it would be impracticable to apply the principles of law and rules of law recognised in district courts given the danger to the United States and the nature of international terrorism.[245] The Court found "(…) that complete deference is owed to that determination"[246]. However, it did explain that the President has not "(…) made a similar official determination that it is impracticable to apply the rules of courts-martial"[247]. It was also explained in a footnote that "(…) such a determination would be entitled to a measure of deference"[248]. The Court gave an example of such a determination indicating that it could be "(…) any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility"[249]. In the case at hand, however, the only reason offered for departing from the rules applicable in courts-martial was the danger posed by international terrorism, and this was found to be insufficient.

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[241] UCMJ (note 5) *supra*.
[242] Ibid.
[243] *Hamdan v. Rumsfeld* (note 1) *supra*, 2790.
[244] Ibid., 2790-2791.
[245] Ibid, 2791.
[246] Ibid.
[247] Ibid.
[248] Ibid., 2792 (footnote 51).
[249] Ibid., 2792.

From the above, it appears that the Court did not explain in great detail what it may consider as a true impracticability and it only gave one example. In fact, it determined what an impracticability is not, but it did not precisely explain what it may be. Thus, the Court left the door open for various possibilities, which could be difficult to determine at present. Once again, it could be that the Court did not want to limit its powers as well as the powers of the President in this field. Significantly, it was signalled that the President would have "a measure of deference" in relation to determinations of impracticability, and stating this, the Court may not have felt entirely competent to decide the question at hand.

V. Conclusion

Although the *Hamdan* decision does not represent a new era for the Supreme Court, it crystallises the Court's position on issues directly related to the war on terror and it sends an authoritative message to the various actors involved in this conflict. The Court made a rare assertion of power by actively intervening in this case and by reaching a verdict unfavourable to the Bush Administration. For a long time, it seemed that the President always won in foreign affairs[250]. This was due to the fact that the Executive took the initiative, Congress acquiesced and the Supreme Court showed deference.[251] The *Hamdan* decision stands in great contrast with the long-standing tradition of judicial deference which dominated case law in the World War II era. This trend has become increasingly apparent in the early cases on the war on terror leading up to *Hamdan*. In these decisions, there is interesting progression in the Court's opinions which is characterised by a more intervening judiciary, a narrower interpretation of presidential powers and a reaffirmation of the Court's and the Congress' role.

From these developments, it appears that the Court's self-conception within the domestic framework has gained momentum, and that the Court no longer acts only as a rubber stamp of the Executive's decisions. The Court is feeling more competent to intervene in war time decisions, especially those which are not carefully justified by the President. It is also much more cautious and scrutinises the Executive's evidence with greater care. The balancing of interests of both parties is more careful and it takes greater account of civil liberties. Furthermore, the Court is more prudent in finding congressional authorisation for the President's decisions, which reinforces the position of Congress within the war powers context. Thus, the Court has recuperated its legitimate role which consists in upholding civil rights in times of war or peace and in performing checks on the powers exercised by the other branches. Therefore, the *Hamdan* decision is certainly the most

[250] Koh (note 138) *supra*, 117.
[251] Ibid.

important judgment of the Supreme Court on the national security constitution since the landmark decision *Youngstown Sheet & Tube*[252].

Nonetheless, it should be emphasised that the majority ruling is a fragile one, given the votes cast. Also, the circumstances under which *Hamdan* was decided could explain the verdict reached. The international criticism of the Guantanamo Bay detention facilities is blatant and continuous, and the Court made a first step toward the resolution of this dilemma. The *Hamdan* decision can be understood as an attempt of the Court to help save the reputation of the Bush Administration. By setting boundaries to certain powers of the Executive in this context, the Court merely voiced the concerns of the international community and implicitly prevented further international scandals from occurring. In addition, the case was decided within the framework of the war on terror, which has become a conflict of indefinite duration between undefined enemies and unfettered Presidential powers. It is not a war involving a tangible threat, and the Court may have felt less bound by the usual deference it demonstrates to the Executive in times of a traditional war.

In relation to the reception of international humanitarian law, the Court's consideration of the relevant provisions is less impressive and innovative. The Court conveniently left certain important questions aside and tailored an international law approach which is safe and uncontroversial. Moreover, certain features of the U.S. legal landscape as well as certain circumstances in this case favoured the "international law-friendly" result reached by the Court.

Finally, it should be reminded that the *Hamdan* decision is one of the stepping stones which may lead to an improvement in the situation of Guantanamo detainees. Although several questions are still pending and many uncertainties remain regarding the fate of the detainees, the *Hamdan* decision is a reliable precedent for future development. Undoubtedly, further governmental and congressional interventions as well as court decisions will be necessary to bring justice to the hundreds of suspects still held in Cuba.[253] Perhaps one day, we will finally ensure that laws will never again be silent in Guantanamo Bay.

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[252] *Youngstown Sheet & Tube v. Sawyer* (note 54) *supra*.

[253] There have been several initiatives taken by the Bush Administration in response to the *Hamdan* decision. The most notorious one is the passing of new legislation, namely: the Military Commissions Act of 2006, Pub. L. No. 109-366 (S.3930), 120 Stat. 2600, available at: <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s3930es.txt.pdf> (accessed October 30, 2006). For further information on this Act, see the website of the Library of Congress: <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:S.3930:> (accessed October 30, 2006). The Military Commissions Act of 2006 has already received mixed reviews: Rushing Off a Cliff, The New York Times, September 28, 2006; Senate Approves Detainee Bill Backed by Bush: Constitutional Challenges Predicted, The Washington Post, September 29, 2006.