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The Constitution, the Camps & the Humanitarian Fifth Amendment

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The Constitution, the Camps & the Humanitarian Fifth Amendment

TUCKER CULBERTSON*

I. INTRODUCTION	307
II. BIRTH OF THE CAMPS	312
III. JUDGING THE COMMISSIONS: THE CASE OF SALIM AHMED HAMDAN	318
A. <i>Jurisdiction and the Detainee Treatment Act of 2005</i>	319
B. <i>Military Due Process Under U.S. and International Law</i>	323
1. UNIFORMITY AMONG MILITARY TRIBUNALS	324
2. THE UCMJ'S INCORPORATION OF THE INTERNATIONAL LAWS OF WAR ...	327
a. The GPW's General Application to the U.S. Military	327
b. The GPW's Particular Applicability to the U.S. War with al Qaeda	329
IV. <i>HAMDAN'S CONSTITUTIONAL SILENCES</i>	335
A. <i>The Incorporative Universality of Humanitarian Law</i>	337
B. <i>The Incorporative Humanitarianism of the Fifth Amendment</i>	342
V. CONCLUSION: ON CONSTITUTIONALISM AND POSITIVISM IN HUMANITARIAN LAW	361

I. INTRODUCTION

In *Hamdan v. Rumsfeld*,¹ the U.S. Supreme Court declared illegal the military commissions convened by the George W. Bush administration for the trial of alleged war criminals² detained in its War on Terror³ at its camps on Guantánamo Bay (“the camps”).⁴ *Hamdan* is a bold,

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

2. Though the term of art *unlawful enemy combatants* is used by the government to refer to many counterterrorist detainees, I opt for the term *war criminals*, since unlawful belligerency is, in essence, a war crime. See, e.g., Brief for Respondents at 2, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184) [hereinafter Brief for Respondents].

3. Though the military offensive authorized by Congress, in and after which the Guantánamo detainees were apprehended, was waged against al Qaeda and the Taliban, the President's order establishing the Guantánamo commissions speaks to broadly defined “international terrorism” against U.S. interests. Similarly, the President's order authorizes detention and trial for acts of terrorism beyond war crimes. See *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833, 57,834 (Nov. 16, 2001).

4. The present Guantánamo camps consist of Camp Delta (a 612-unit facility), Camp Iguana (which was initially used to hold detainees under the age of 16, all of whom have since been released, and subsequently was used for detainees recognized as *non-combatants* but deemed unable to be repatriated), and Camp X-Ray (which was a temporary facility replaced by Camp Delta). See GlobalSecurity.org, Guantánamo Bay—Camp Delta, http://www.globalsecurity.org/military/facility/guantanamo-bay_delta.htm (last visited Dec. 23, 2007); GlobalSecurity.org, Guantánamo Bay, <http://www.globalsecurity.org/military/facility/guantanamo-bay.htm> (last

oblique departure from precedent⁵ and a rebuke not only of the commissions at issue in *Hamdan*, but also of the administration's counterterrorism policy more generally.⁶ The Court's aggressive and in some ways radical opinion reflects the radical aggression of the administration's War on Terror, emblemized by, but not limited to, the camps and commissions. Professor Neal Katyal (who served as counsel for Salim Ahmed Hamdan) offered a characterization of the Court's prior ruling in *Rasul v. Bush*⁷ that might well have been written of the majority opinion in *Hamdan*:

By asserting that it had the ability to build an offshore facility to evade judicial review, do what it wanted at that facility to detainees under the auspices of the commander-in-chief power, and keep the entire process (including its legal opinions) secret, the executive branch appears to have provoked a[n overreactive] judicial backlash. . . .

. . . .

But is any of this surprising, when the administration stood before the Court asking for their blessing in turning Guantanamo Bay into a legal black hole, where no law applied and no court would review what they were doing to the detainees at any moment, even if the government decided to trump up capital offenses and summarily exe-

visited Dec. 23, 2007). From 1991 to 1995, the Guantánamo Bay Base housed camps for Haitian refugees. *See id.*

5. *See* Justice Thomas's dissent in *Hamdan*:

After seeing the plurality overturn longstanding precedents in order to seize jurisdiction over this case, and after seeing them disregard the clear prudential counsel that they abstain in these circumstances from using equitable powers, it is no surprise to see them go on to overrule one after another of the President's judgments pertaining to the conduct of an ongoing war. Those Justices who today disregard the commander-in-chief's wartime decisions, only 10 days ago deferred to the judgment of the Corps of Engineers with regard to a matter much more within the competence of lawyers, upholding that agency's wildly implausible conclusion that a storm drain is a tributary of the waters of the United States. It goes without saying that there is much more at stake here than storm drains. The plurality's willingness to second-guess the determination of the political branches that these conspirators must be brought to justice is both unprecedented and dangerous.

Hamdan, 126 S. Ct. at 2838–39 (Thomas, J., dissenting) (citations omitted).

6. The Court's holdings in *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004), *Rasul v. Bush*, 542 U.S. 466, 484 (2004), and *Hamdan v. Rumsfeld*, 126 S. Ct. at 2798, collectively compromise, when not condemning, many of the Bush administration's approaches to national security, including: its general war on terrorism without limited enemy or end; military detentions beyond the field of battle, the nation's borders, and the jurisdiction of the courts; noncompliance with treaties and other international law; consolidated executive power over the identification, apprehension, detention, trial, and punishment of enemy combatants and war criminals; and the extent and independence of the commander in chief's power generally.

7. 542 U.S. 466, 485 (2004).

cute them?⁸

As in *Rasul*, the Court in *Hamdan* summarily rejects the administration's claim for absolute authority over the identification, apprehension, detention, trial, and punishment of alleged combatants and war criminals who are not U.S. citizens.⁹ The Court insists upon detailed congressional authorization, federal judicial review, and international legal adherence in the administration's wars with al Qaeda or other international terrorist organizations. The Court also, in keeping with core constitutional commitments, insists upon at least some modicum of individual rights for every person subject to the force of the U.S. government—even an allegedly illegal alien enemy combatant held by the military abroad.

To summarize the case generally, the *Hamdan* Court held (with various qualifications) that:

- Congress's Detainee Treatment Act of 2005 ("DTA")¹⁰ did not strip the federal courts of jurisdiction to hear *some* habeas claims by Guantánamo detainees;¹¹
- the convention of judicial abstention in matters of military justice was neither necessary nor appropriate as regards complaints about the Guantánamo commissions;¹²
- the President had not received requisite congressional authorization for the commissions as constituted;¹³
- the commissions should have—but did not—adhere *generally* to:
 - the procedural rules governing courts-martial;¹⁴
 - the requirements of the Uniform Code of Military Justice ("UCMJ");¹⁵
 - the U.S. common law of war;¹⁶ and
 - the international laws of war, including the Geneva Convention on Prisoners of War ("GPW").¹⁷

8. Neal K. Katyal, *Executive and Judicial Overreaction in the Guantanamo Cases*, 2004 CATO SUP. CT. REV. 49, 49, 55 (2004).

9. The administration's foundational differentiation between citizen and alien enemies comprises one of its most obviously constitutionally questionable policies and is discussed *infra* text accompanying notes 331.

10. Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (to be codified in scattered sections of 10, 28 & 42 U.S.C.).

11. 126 S. Ct. at 2764.

12. *Id.* at 2793.

13. *Id.* at 2774.

14. *Id.* at 2756.

15. *Id.* at 2791. The UCMJ is codified at 10 U.S.C. §§ 801-946 (2000).

16. 126 S. Ct. at 2758.

17. *Id.* at 2794-95; *see also* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention].

Four justices held, moreover, that conspiracy (for which Hamdan was charged) is not a war crime and that the commissions were illegal because they exclude defendants from many parts of the judicial process, thus violating international law.¹⁸ Justice Kennedy was the only member of the majority to decline to affirm these propositions, *but he did not reject them*.¹⁹

Hamdan thus ruled against most of the D.C. Circuit's holding in the case,²⁰ the Government's arguments at bar, and the President's conduct in the camps generally. However, the *Hamdan* majority focused on structural rather than substantive issues, and statutory rather than constitutional issues. The bulk of the opinion insists upon the importance of legislative authorization for, and the impact of extant legislative limits upon, the Executive's counterterrorist policies. Congress's predictable passage of the Military Commissions Act of 2006 ("MCA")²¹ immediately after *Hamdan*, however, made clear that the Court's emphasis upon congressional consonance with executive acts merely propelled a more explicit legislative complicity with the executive camps and commissions, thereby delaying the substantive resolution of the detainees' claims.

In what follows, I critique *Hamdan*, signaling the constitutional matters that the Court must yet address and I hope will in its review of the MCA this term.²² I focus on three dimensions of the *Hamdan* opinion: its interpretation of the DTA's jurisdiction-stripping provisions; its interpretation of the UCMJ's requirement of uniformity among military tribunals; and its interpretation of the UCMJ's requirement that military commissions adhere to the laws of war. I argue that the Court's interpretations of congressional statutes should have come alongside a similar engagement with the Constitution. The Court's contentment to resolve *Hamdan* by reference to statutory law has left Congress unable to sensibly reconstruct the Executive's unacceptable system of military justice, and has left the detainees—like Mr. Hamdan—in circumstances that, if his allegations are true, run afoul of our most basic constitutional obligations.

After critiquing *Hamdan*'s constitutional silences, I offer constitutional analyses of the camps and commissions. My analyses center on the Fifth Amendment's Due Process Clause, which provides jurisdic-

18. *Hamdan*, 126 S. Ct. at 2758; *see also id.* at 2838 (Thomas, J., dissenting).

19. *Id.* at 2804, 2809 (Kennedy, J., concurring).

20. *Hamdan v. Rumsfeld*, 415 F.3d 33, 38 (D.C. Cir. 2005).

21. Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28 & 42 U.S.C.).

22. *See Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007).

tional, normative, historical, and doctrinal grounds for *hearing* and *redressing* the detainees' claims.²³ To elaborate the application of the Fifth Amendment to the detainees, I first make several jurisprudential arguments regarding the ways in which humanitarian law applies to conflicts, like the U.S. war with al Qaeda, which seems in many respects to fall beyond the specific terms and texts of humanitarian law, while seeming in other respects entirely consonant with such law. This general jurisprudential discussion suggests the moral and philosophical foundation upon which my arguments about the Fifth Amendment are based.

Humanitarian law necessarily transcends the inherently limited and contingent texts that effectuate it. Humanitarian law precedes, grounds, and exceeds the positive stipulations of particular U.S. and international laws, and it provides the very meaning of due process in the context of counterterrorist detentions. Consequently—affirming and elaborating claims by others—I argue that, just as the Fourteenth Amendment's Due Process Clause incorporates and imposes the federal Bill of Rights upon the criminal proceedings of the several states, the Fifth Amendment's Due Process Clause should incorporate and impose international humanitarian law upon the Guantánamo camps and commissions. The Court's due process precedents from World War I to the War on Terror support my interpretation both formally and substantively. In sum, I argue that the Fifth Amendment demands equal due process protections for every person detained by U.S. forces in every military engagement, regardless of—and indeed contrary to—the executive's creation and the legislature's authorization of exceptional systems of detention, indictment, trial, and punishment in the War on Terror. Such due process not only includes but also exceeds the particular terms and positive obligations of specific international instruments, enshrining instead the most general and vital aim of such instruments—the mitigation of the horrors incumbent upon violence among political communities.

Whether readers share my conclusions, I hope here to demonstrate the need for the Court—and all of us—to engage directly with central moral, political, and constitutional questions regarding the camps, the

23. This argument follows that of David D. Caron and others, in their amicus brief in *Rasul*. See Brief of International Law and Jurisdiction Professors as Amici Curiae in Support of the Petitioners, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 69144 [hereinafter Brief of International Law and Jurisdiction Professors]. This brief is discussed *infra* at text accompanying notes 219–28. For further discussion of the absence and aptness of Fifth Amendment analysis in *Hamdan*, see also George P. Fletcher, *Hamdan Confronts the Military Commissions Act of 2006*, 45 COLUM. J. TRANSNAT'L L. 427, 431–32, 434 (2007); Jana Singer, *Hamdan as an Assertion of Judicial Power*, 66 MD. L. REV. 759, 766–67 (2007). See generally Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, 2006 SUP. CT. REV. 1 (2006).

commissions, and the rule of humanitarian law over nation-states' counterterrorist programs and policies. As the Court noted in *Hamdi*²⁴ and *Rasul*,²⁵ the pleas and allegations of the Guantánamo detainees strike to the very heart of our constitutional text and tradition. By failing to address the constitutional status of the Guantánamo camps, tribunals, and commissions, the Court in *Hamdan* truly tragically deferred pleas for aid regarding state actions that some claim are necessary and proper for national security under the Constitution, but that others call exercises in tyranny and torture.

II. BIRTH OF THE CAMPS

On September 18, 2001 Congress issued its Authorization for Use of Military Force ("AUMF")²⁶ against those responsible for the attacks of September 11. Two months later, the George W. Bush administration issued a Military Order ("Mil. Order 2001") that initiated military detentions and tribunals for *non-citizens* whom the President suspects of

- (1) being or having been members of al Qaeda;
- (2) otherwise committing, conspiring to commit, aiding, or abetting international terrorist acts causing, threatening to cause, or intended to cause harm to U.S. citizens, national security, foreign policy, or economy; or
- (3) knowingly harboring persons described above.²⁷

The Guantánamo commissions could convene anywhere and anytime under procedures to be determined by the Secretary of Defense.²⁸ Mil. Order 2001 itself established minimal processes and structures for the commissions, including: full and fair trials for those accused; internal authority over matters of fact and law; admission of all evidence with reasonably probative value; conviction and sentencing upon a two-thirds vote of the military officers comprising the commission; and review only by the President or the Secretary of Defense if the President so designates.²⁹ Mil. Order 2001 also authorized and initiated indefinite detentions of suspects independent of any subsequent trial before the commissions.³⁰ Taken together, the provisions of the President's 2001 Order established "the role[s] of legislator, policeman, prosecutor, judge, and court of appeal, concentrating all of these powers in the executive

24. 542 U.S. 507, 532–33 (2004).

25. 542 U.S. 466, 473 (2004).

26. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as amended at 50 U.S.C. § 1541).

27. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 16, 2001).

28. *See id.* at 57,834, 57,835.

29. *Id.* at 57,835.

30. *Id.* at 57,834.

branch . . . to revise the jurisdictional design of the system of criminal justice.”³¹ Modifications to the commissions’ structure and process were issued, pursuant to Mil. Order 2001, on March 22, 2002 (“Mil. Order 2002”) and August 31, 2005 (“Mil. Order 2005”).³²

After ordering the creation of the commissions, the administration contended that federal courts lacked jurisdiction to hear habeas petitions by the Guantánamo detainees; the international laws of war enshrined in the Geneva Conventions—including those granting protections to prisoners of war—did not apply to the detainees; and the executive branch possessed plenary constitutional power to apprehend, detain, identify, try, punish, and hear appeals for the detainees.³³ The Supreme Court in *Rasul* and *Hamdi* disagreed, asserting not only federal jurisdiction over detainees’ habeas petitions, but also requiring more regular judicial process in the Guantánamo camps to review and confirm whether detainees were in fact combatants.³⁴ In response to these cases, the administration established the Combatant Status Review Tribunal (“CSRT”) to conduct such reviews.³⁵

Through the CSRT’s and the camps’ Administrative Review Boards (“ARBs”), 242 of the Guantánamo detainees had been discharged from the camps as of July 20, 2005.³⁶ Of that number, 174 were released outright—and thus the ARBs acknowledged either that these individuals had been wrongly detained or were otherwise not posing a threat to the U.S.—while sixty-seven of the detainees were transferred to the custody of other governments.³⁷

31. Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1265 n.24, 1266 (2002) [hereinafter Katyal & Tribe]. These scholars contend that the order thus violates the precedent of *Reid v. Covert*, 354 U.S. 1 (1957), which found that “blending of executive, legislative, and judicial powers in one person or even in one branch of the Government is ordinarily regarded as the very acme of absolutism.” *Id.* at 11.

32. Department of Defense, Military Commission Order No. 1: Procedures for Trial by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 32 C.F.R. § 9 (2005).

33. *See, e.g.*, John Ashcroft, U.S. Attorney General, Statement for the Senate Judiciary Committee (Dec. 6, 2001), 2001 WL 1558164 [hereinafter Ashcroft Statement]; Memorandum from White House Counsel Alberto Gonzales to Pres. George W. Bush (Jan. 25, 2002), <http://news.lp.findlaw.com/hdocs/docs/torture/gnzls12502mem2gwb3.html> [hereinafter Gonzales Memorandum].

34. *Rasul v. Bush*, 542 U.S. 466, 484 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509, 525 (2004).

35. Press Release, U.S. Dept. of Def., Combatant Status Review Trib. Order Issued (July 7, 2004), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=7530>; see also DEPUTY SEC’Y OF DEF., MEMORANDUM FOR THE SEC’Y OF THE NAVY, ORDER ESTABLISHING COMBATANT STATUS REVIEW TRIB. (2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

36. Press Release, U.S. Dept. of Def., Detainee Transfer Announced (July 20, 2005), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=8705>.

37. *Id.*

Hamdan's was the first case to be charged and set for trial before the commissions.³⁸ Hamdan alleges that in June 2002 he was given to U.S. authorities for a bounty and was then taken from Afghanistan to the Guantánamo camp.³⁹ In July 2003 Hamdan was deemed eligible for trial by commission.⁴⁰ He was then held in solitary confinement from December 2003 until November 2004.⁴¹ Hamdan was given military counsel in December 2003, and, in February 2004, he filed a request for charges and a speedy trial as guaranteed by the UCMJ.⁴² His request was rejected and the UCMJ was deemed inapplicable to Hamdan.⁴³ As the Court notes: "Not until July 13, 2004, after Hamdan had commenced this action in the United States District Court for the Western District of Washington, did the Government finally charge him with the offense for which, a year earlier, he had been deemed eligible for trial by military commission."⁴⁴

The July 2004 statement charged Hamdan with conspiracy and alleged that he

from on or about February 1996 to on or about November 24, 2001 . . . willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with [named members of al Qaeda] to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism.⁴⁵

The government made "no allegation that Hamdan had any command responsibilities, played a leadership role, or participated in the planning of any activity."⁴⁶

Hamdan filed his plea for a writ of mandamus or habeas corpus in April 2004.⁴⁷ Hamdan's case raised different concerns from those in *Hamdi* and *Rasul*, namely whether the process established for the *com-*

38. See Scott Higham, *Bin Laden Aide Is Charged at First Tribunal*, WASH. POST, Aug. 25, 2004, at A01; *National Briefing Washington: U.S. To Appeal Ruling On Detainees' P.O.W. Status*, N.Y. TIMES, Nov. 13, 2004, at A13 ("The Bush administration served notice that it would appeal a judge's ruling that stopped proceedings in the first trial by a military commission of a suspected member of Al Qaeda[Salim Ahmed Hamdan].").

39. See Brief for Petitioner at 3, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 WL 53988 ("Over four years ago, [Hamdan] was captured in Afghanistan by indigenous forces while attempting to return his family to Yemen. After being turned over to American forces in exchange for a bounty, he was taken in June 2002 to Guantanamo Bay, where he was placed with the general detainee population.").

40. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2760 (2006).

41. See Brief for Petitioner, *supra* note 39, at 3.

42. *Hamdan*, 126 S. Ct. at 2760; see 10 U.S.C. § 810 (2000).

43. *Hamdan*, 126 S. Ct. at 2760.

44. *Id.*

45. See *id.* at 2761 (citation omitted).

46. *Id.*

47. See Brief for Petitioner, *supra* note 39, at 4.

missions in Military Orders 2001, 2003, and 2005 were just.⁴⁸ Unlike the CSRTs, the *commissions* were convened to try and punish *war crimes* or other offenses as described in Mil. Order 2001.⁴⁹

In November 2004 Judge Robertson of the D.C. District Court partially granted Hamdan's habeas petition to review his pending trial by commission.⁵⁰ Judge Robertson rejected the Government's motion to dismiss and its demand for judicial abstention, holding the following:

- only violations of the laws of war may be tried by the commissions;
- the GPW is enforceable in federal court;
- Hamdan should be tried by court-martial unless his status as being *not* a POW under the GPW is confirmed; and
- the commissions as constituted violate the UCMJ.⁵¹

A three-judge panel of the Court of Appeals for the District of Columbia considered the Government's appeal of Robertson's holding.⁵² The panel included Judge—now Chief Justice—John Roberts.⁵³ In a remarkable convergence that deeply troubled advocates, teachers, and others, Judge Roberts and the Court of Appeals announced their opinion in Hamdan's case reversing the court below on July 15, 2005.⁵⁴ The opinion was issued mere days before President Bush announced Roberts as his nominee for the Supreme Court and the very same day on which Roberts interviewed with the President.⁵⁵ Moreover, in Roberts's subsequent confirmation hearings, it became clear that the judge had met with Attorney General Gonzales and other members of the President's staff as early as April 1—six days prior to oral arguments in Hamdan's case.⁵⁶

48. See *Hamdan v. Rumsfeld*, 415 F.3d 33, 37–39, 42–43 (D.C. Cir. 2005).

49. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

50. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 155 (D.D.C. 2004).

51. *Id.* at 158, 164–66.

52. *Hamdan*, 415 F.3d at 36.

53. See *id.* at 34 (listing Judge Roberts as a member of the three-judge panel).

54. See *id.* at 33; see also Stephen Gillers et al., *Improper Advances: Talking Dream Jobs with the Judge Out of Court*, SLATE, Aug. 17, 2005, <http://www.slate.com/id/2124603/?nav=tap3>.

55. *Bush Nominates Roberts to Supreme Court*, CNN.COM, July 20, 2005, <http://www.cnn.com/2005/POLITICS/07/19/scotus.main/index.html>.

56. See *Conflict of Interest? Roberts' Interviews with White House Officials Prior to Gitmo Ruling Raise Questions About Impartiality* (Democracy Now! broadcast Aug. 18, 2005) (transcription of an interview with David Luban, Professor of Law, Georgetown University Law Center), available at http://www.democracynow.org/2005/8/18/conflict_of_interest_roberts_interviews_with; Gillers, *supra* note 54 (“Hamdan's lawyer was completely in the dark about these interviews until Roberts revealed them to the Senate. (Full disclosure: Professor Luban [co-author of this article] is a faculty colleague of Hamdan's principal lawyer.) Did administration officials or Roberts ask whether it was proper to conduct interviews for a possible Supreme Court nomination while the judge was adjudicating the government's much-disputed claims of expansive presidential powers? Did they ask whether it was appropriate to do so without

The judgment of the panel, written by Judge Randolph and joined by Roberts and Judge Williams (in part), overturned the District Court in most every respect by:

- holding that the AUMF and UCMJ authorized the commissions as presently constituted;⁵⁷
- finding the GPW *not* enforceable in federal court;⁵⁸ and
- finding the war with al Qaeda exempt from the GPW in any event.⁵⁹

Hamdan appealed to the Supreme Court, which granted certiorari in November 2005.⁶⁰ In December 2005, between the grant and the hearing of the case, Congress passed the Detainee Treatment Act of 2005 (“DTA”),⁶¹ which—along with many other regulations—specified restricted review processes for Guantánamo detainees, deeply limiting the federal judiciary’s power to hear the detainees’ claims on several fronts.⁶²

Based on the DTA, the Government moved for the Court to dismiss Hamdan’s appeal for want of jurisdiction. As Justice Scalia would later note, the DTA was identified by at least one Senator as expressly barring the Court from hearing Hamdan’s case.⁶³ The Court declined to rule on the motion to dismiss under the DTA until after its consideration of the case on the merits.⁶⁴

Hamdan challenged the Guantánamo commissions on many grounds, including their:

- exclusion of the accused from crucial portions of trials,⁶⁵
- provision of no independent review beyond the executive branch,⁶⁶ and
- admission of evidence deemed to hold “probative value” to a

informing opposing counsel? If they had asked, they would have discovered that the interviews violated federal law on the disqualification of judges.”).

57. *See Hamdan*, 415 F.3d at 38.

58. *See id.* at 40.

59. *See id.* at 41.

60. *Hamdan v. Rumsfeld*, 126 S. Ct. 622 (2005).

61. Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (to be codified in scattered sections of 10, 28 & 42 U.S.C.).

62. *Id.* § 1005. The DTA is discussed in detail *infra* text accompanying notes 84–197.

63. “‘An earlier part of the amendment provides that no court, justice, or judge shall have jurisdiction to consider the application for writ of habeas corpus. . . . Under the language of exclusive jurisdiction in the DC Circuit, the U.S. Supreme Court would not have jurisdiction to hear the Hamdan case’” *Hamdan*, 126 S. Ct. at 2816 n.4 (Scalia, J., dissenting) (quoting 151 CONG. REC. S12796 (Nov. 15, 2005) (statement of Sen. Arlen Specter)).

64. *See id.* at 2762 (majority opinion).

65. U.S. Dept. of Def., Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 32 C.F.R. § 9.6(b)(3) (2005).

66. *Id.* § 9.6(h)(6).

reasonable person, including evidence obtained by coercion and even, as Hamdan claimed, evidence obtained by torture.⁶⁷

Hamdan argued that such procedures violate U.S. statutory and common law,⁶⁸ as well as international law and custom.⁶⁹ Hamdan also argued that the commissions' exclusive jurisdiction over noncitizens is illegal⁷⁰ and that conspiracy is not a violation of the laws of war and as such cannot be tried by a military commission.⁷¹ Hamdan's counsel also claimed that the laws of war in any event do not apply to the administration's War on Terror.⁷² More pertinently and persuasively, one member of Hamdan's counsel—Professor Katyal—elsewhere contested as improper and illogical the fact that the commissions' jurisdictional determinations hinge upon the same question as the commissions' trials on the merits—whether the detainees are in fact unlawful combatants, thus not deserving of POW status or other protections, thus subject to military commissions, and thus also guilty.⁷³

67. *Id.* § 9.6(d)(1).

68. See Brief for Petitioner, *supra* note 39, at 6, 22 (claiming that U.S. common law affords the right to be present and confront one's accusers) (citing *Diaz v. United States*, 223 U.S. 442, 455 (1912); *Lewis v. United States*, 146 U.S. 370, 372, 375 (1892); *United States v. Daulton*, 45 M.J. 212, 219 (C.A.A.F. 1996); *United States v. Dean*, 13 M.J. 676, 678 (A.C.M.R. 1982)).

69. *Id.* at 23 (“[T]he Government has offered no authority that permits a commission to be convened without rights of presence and confrontation. Nor have they offered anything to suggest that Congress has authorized a commission whose own procedures violate the laws of war.”).

70. The Petitioner relied on federal statutes and U.S. Supreme Court case law:

Congress has prohibited having non-citizens subject “to different punishments, pains, or penalties, on account of such person being an alien.” 18 U.S.C. 242. This statute forbids “being subjected to different punishments, pains or penalties by reason of alienage . . . than are prescribed for the punishment of citizens.” *United States v. Classic*, 313 U.S. 299, 326 (1941). No past commission, including [*Ex parte Quirin*, 317 U.S. 1 (1942)] itself, excluded citizens by design.

Id. at 24. Hamdan's counsel also argued that there might be a claim on this point under 42 U.S.C. § 1981 (2000), which requires evidentiary, procedural, penal, and other legal treatment for “all persons” to be equal to that of “white citizens.” See *id.* at 24 n.16. However, § 1981 was amended in 1991 in a manner that might restrict its application to the federal government. See Katyal & Tribe, *supra* note 31, at 1298–1304 & n.24 (discussing the legitimacy of the commissions' disparate treatment of noncitizens under § 1981, as well as under the guarantee of equal protection imputed to the Fifth Amendment).

71. See, e.g., Brief for Petitioner, *supra* note 39, at 27–30. Four justices accepted this argument. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2777–86 (2006).

72. See Brief for Petitioner, *supra* note 39, at 30–35. The *Hamdan* majority implicitly rejects this claim by applying the laws of war to the administration's War on Terror through the UCMJ. See *infra* text accompanying notes 148–97.

73. Katyal and Tribe note the following:

[The status] of al Qaeda members as “unlawful belligerents” is incapable of being ascertained apart from their ultimate guilt of planning and executing acts that massacre unarmed civilians and thereby violate the laws of war. The result is that any determination today, either by the President or by an Article III court on habeas review, of the jurisdiction of the military tribunals is necessarily bound up with the merits of the substantive charges against a particular defendant.

The administration claimed that the Court was jurisdictionally foreclosed from hearing the case because of the DTA, and that—even absent this strip of jurisdiction—the Court should abstain from hearing the case under principles of comity between the federal and military-justice systems. It further contended that the Court should at present forbear from hearing Hamdan’s claims, because the structural and procedural flaws he alleged (regarding the UCMJ, GPW, evidentiary standards, and internal appeals) could and should be heard only *after* the commission’s proceedings concluded.⁷⁴ To do otherwise, the administration contended, would be fatally premature.⁷⁵ Regarding the President’s authority to institute the commissions, the administration claimed that such authority was duly granted by Congress through the AUMF,⁷⁶ but that even without that grant, the establishment of commissions to try war crimes is inherent in the conduct of war, such that the Commander in Chief Clause of the Constitution and indeed the laws of war generally, conferred the power to install the Guantánamo commissions upon the President and his administration.⁷⁷ The administration argued the following: commissions may be convened beyond the battlefield;⁷⁸ conspiracy is a war crime;⁷⁹ non-citizens may be tried by commissions;⁸⁰ the GPW provides no rights that are enforceable in U.S. courts;⁸¹ the GPW does not apply to al Qaeda combatants in any event;⁸² and, Hamdan—as a non-citizen—does not enjoy the protections of the U.S. Constitution abroad.⁸³

III. JUDGING THE COMMISSIONS: THE CASE OF SALIM AHMED HAMDAN

Justice Stevens, writing for the majority in *Hamdan* along with Justices Breyer, Ginsburg, Souter, and Kennedy (in part), concluded that:

- the DTA did not strip the federal courts of jurisdiction to hear habeas claims by detainees, like Mr. Hamdan, which were pending as of the DTA’s enactment;⁸⁴

Katyal & Tribe, *supra* note 31, at 1286.

74. See Respondents’ Motion To Dismiss for Lack of Jurisdiction, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184); Brief for Respondents, *supra* note 2, at 7–9, 11–13.

75. See Brief for Respondents, *supra* note 2, at 12–15.

76. *Id.* at 15–20.

77. *Id.* at 20–23.

78. *Id.* at 27.

79. *Id.*

80. See *id.* at 28–30.

81. *Id.* at 30–36.

82. *Id.* at 37–42.

83. *Id.* at 43.

84. 126 S. Ct. 2749, 2764 (2006).

- the convention of judicial abstention in matters of military justice is not required, nor appropriate, as regards complaints about the Guantánamo commissions;⁸⁵
- the President had not received congressional authorization for the commissions as they were constituted, and the laws and customs of war do not grant the President the power to create such commissions absent explicit congressional authorization;⁸⁶
- the commissions should have—but did not—adhere *generally* to:
 - rules governing federal courts and courts-martial, because the UCMJ requires uniformity among tribunals absent a showing of impracticability;⁸⁷
 - the requirements of the UCMJ generally, which inaugurate and govern the commissions;⁸⁸
 - the U.S. common law of war;⁸⁹ and
 - the international laws of war, including the Geneva Convention on Prisoners of War, because—at the time when *Hamdan* was decided—the UCMJ explicitly incorporated such law into its provisions governing military tribunals.⁹⁰

A. *Jurisdiction and the Detainee Treatment Act of 2005*

The Court first held that the DTA did not clearly strip the Supreme Court—or presumably any federal court—of its jurisdiction to hear *Hamdan*'s case, *because the provision applicable thereto did not make explicit its reach to cases pending at the time of the DTA's enactment*.⁹¹ *Hamdan*'s case began prior to Congress's passage of the DTA, and as such the majority concluded it may proceed.⁹²

The DTA's "Procedures for Status Review of Detainees Outside the United States," regarding judicial review⁹³ of actions at the Guantánamo camp, stipulate that:

- "Except as provided [in the DTA], . . . no court, justice, or judge shall have jurisdiction to hear or consider"⁹⁴ habeas petitions, or

85. *Id.* at 2793.

86. *Id.* at 2774.

87. *Id.* at 2756.

88. *Id.* at 2791. The UCMJ is codified at 10 U.S.C. §§ 801–946 (2000).

89. 126 S. Ct. at 2758.

90. *Id.* at 2794–95; *see also* Geneva Convention, *supra* note 17.

91. 126 S. Ct. at 2764.

92. *See id.*

93. Pub. L. No. 109-148, § 1005, div. A, tit. X, 119 Stat. 2739, 2740–44 (codified as amended at 28 U.S.C. § 2241 (2000)) (including reporting requirements incumbent upon the Secretary of Defense).

94. *Id.* § 1005(e)(1).

any other claim or action against the U.S. government or its agents on behalf of non-citizen Guantánamo Detainees who either are, or were previously and properly, in custody at the camp;⁹⁵

- The D.C. Circuit Court of Appeals holds exclusive—and limited—jurisdiction to review findings of the CSRTs;⁹⁶
- The D.C. Circuit Court of Appeals holds exclusive—and limited—jurisdiction to review findings of the commissions.⁹⁷

Regarding the latter provisions governing review of findings by the Guantánamo commissions, the DTA mandates review by the Court of Appeals if a detainee receives a sentence of death or more than ten years in prison.⁹⁸ All other review is discretionary.⁹⁹ Moreover, the DTA circumscribes the D.C. Circuit's review as to whether the commission's decision conforms to Mil. Order 2001 and 2005 (or its successor)¹⁰⁰ and whether—to the degree applicable—the commission's "standards and procedures" conform to the Constitution.¹⁰¹

The DTA states that it takes effect on the date of its enactment, and that the provisions concerning the stripping and restriction of federal jurisdiction in "Paragraphs (2) and (3) of subsection (e) [regarding review of decisions by the CSRTs and commissions] shall apply with respect to any claim . . . that is pending on or after the date of the enactment of this Act."¹⁰²

As the Court in *Hamdan* notes, however, "The Act is silent about whether paragraph (1) of subsection (e) [regarding detainees' habeas petitions] 'shall apply' to claims pending on the date of enactment."¹⁰³ Nonetheless:

The Government argues that §§ 1005(e)(1) and 1005(h) had the immediate effect, upon enactment, of repealing federal jurisdiction not just over detainee habeas actions yet to be filed but also over any such actions then pending in any federal court—including this Court. Accordingly, it argues, we lack jurisdiction to review the Court of Appeals' decision below.¹⁰⁴

The provisions of the DTA not discussing habeas petitions by Guantánamo detainees—those regarding appeals of the CSRTs' and

95. *Id.*

96. *Id.* § 1005(e)(2)(A).

97. *Id.* § 1005(e)(3)(A).

98. *Id.* § 1005(e)(3)(B)(i).

99. *Id.* § 1005(e)(3)(B)(ii).

100. *Id.* § 1005(e)(3)(D)(i).

101. *Id.* § 1005(e)(3)(D)(ii). However, the administration's *Hamdan* brief contended that the Constitution is inapplicable to noncitizens such as *Hamdan*.

102. Detainee Treatment Act of 2005 § 1005(h).

103. 126 S. Ct. 2749, 2763 (2006).

104. *Id.*

commissions' final decisions—clearly apply to all cases pending upon enactment of the DTA. Consequently, Stevens opined that it would be improper to construe Paragraph 1 to strip the Court of its jurisdiction to hear Hamdan's case given the conspicuous absence of language applying Paragraph 1 to pending cases, the presence of such language in other provisions and Congress's rejection of earlier drafts of the DTA that contained such language in Paragraph 1.¹⁰⁵

By so doing, the Court avoids questions about whether the DTA accords with the Constitution's Suspension Clause concerning the great writ of habeas corpus.¹⁰⁶ The Court likewise avoids deciding whether Congress's stripping of the Supreme Court's jurisdiction is acceptable or excessive under the Exceptions Clause of Article III.¹⁰⁷ Thus, the Court also avoids judging the general intent and effect of the DTA under the Constitution regarding review of the CSRTs and commissions.

However, Justice Scalia—because he reads the DTA to clearly prohibit the federal courts from hearing detainees' pending habeas petitions—must consider whether the DTA is constitutionally permissible under the Suspension and Exceptions Clauses.¹⁰⁸ Scalia contends that the Constitution's Suspension Clause poses no problem in Hamdan's—or any noncitizen detainee's—case.¹⁰⁹ Per Scalia, under *Johnson v. Eisentrager*¹¹⁰ the great writ need not be extended to noncitizens held outside the territory of the United States by military forces.¹¹¹ In making this argument, Scalia reduces to “ill-considered dicta” the Court's conclusion in *Rasul* that the camps at Guantánamo are in every relevant respect under the exclusive control of the U.S. government, and thus are indeed U.S. territory for practical judicial purposes.¹¹²

Scalia wisely buttresses his argument—that the DTA's jurisdiction-stripping provisions do not violate the Suspension Clause—upon other grounds than this shady reading of *Rasul*. He argues that the DTA's provision for review of CSRT and commission proceedings by the D.C.

105. *Id.* at 2754.

106. See U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”).

107. See U.S. CONST. art. III, § 2, cl. 1.

108. See *Hamdan*, 126 S. Ct. at 2810–23 (Scalia, J., dissenting).

109. *Id.* at 2817–18.

110. 339 U.S. 763 (1950).

111. See *Hamdan*, 126 S. Ct. at 2817–18 (Scalia, J., dissenting) (discussing *Rasul v. Bush*, 542 U.S. 466, 480–81 (2004)). Scalia further cites to *Eisentrager*:

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

Id. at 2818 (quoting *Eisentrager*, 339 U.S. at 768).

112. *Id.*

Circuit Court of Appeals provides a sufficient alternative to habeas hearings in federal court, and as such poses no constitutional problem.¹¹³ Scalia then responds to Hamdan's—and the majority's—position that the DTA's provision of review for serious sentences, even if adequate as an alternative when activated, would exclude Hamdan because he faces a sentence of less than ten years.¹¹⁴ Scalia counters that the challenges Hamdan and the majority raise regarding the commissions could be raised before the D.C. Circuit irrespective of Hamdan's sentence, because these challenges allege inconsistency with the Constitution, and thus would warrant review.¹¹⁵

The D.C. Circuit thus retains jurisdiction to consider [Hamdan's] claims on postdecision review, and . . . the DTA leaves unaffected [the Supreme Court's] certiorari jurisdiction . . . to review the D.C. Circuit's decisions. . . . Thus, the DTA merely *defers* our jurisdiction to consider [Hamdan's] claims; it does not eliminate that jurisdiction. It constitutes neither an "inadequate" nor an "ineffective" substitute for [Hamdan's] pending habeas application.¹¹⁶

As such, there is no conflict with the Suspension Clause according to Justice Scalia.

Regarding the Exceptions Clause, Scalia comes to a related conclusion:

Though it does not squarely address the issue, the Court hints ominously that "the Government's preferred reading" [of the DTA] would "rais[e] grave questions about Congress' authority to impinge upon this Court's appellate jurisdiction, particularly in habeas cases." It is not clear how there could be any such lurking questions, in light of the aptly named "*Exceptions Clause*" of Article III, § 2, which, in making our appellate jurisdiction subject to "such Exceptions, and under such Regulations as the Congress shall make," explicitly permits exactly what Congress has done here. But any doubt our prior cases might have created on this score is surely chimerical in *this* case. As just noted, the exclusive-review provisions provide a substitute for habeas review adequate to satisfy the Suspension Clause, which *forbids* the suspension of the writ of habeas corpus. *A fortiori* they provide a substitute adequate to satisfy any implied substantive limitations, whether real or imaginary, upon the Exceptions Clause,

113. *Id.* ("This Court has repeatedly acknowledged that 'the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus.'") (quoting *Swain v. Pressley*, 430 U.S. 372, 381 (1977)).

114. *See id.* at 2788 (majority opinion).

115. *See id.* at 2815–19 (Scalia, J., dissenting); *see also* Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(3)(D)(ii), div. A, tit. X, 119 Stat. 2739, 2743 (codified as amended at 28 U.S.C. § 2241(c)(3) (2000)).

116. *Hamdan*, 126 S. Ct. at 2819 (Scalia, J., dissenting) (citations omitted).

which *authorizes* such exceptions¹¹⁷

Because the majority read the DTA to allow federal review of habeas petitions pending at the time of the DTA's enactment, the constitutional questions Scalia confronts go unaddressed by the majority, meriting only the ominous hints that Scalia chides. *As such, the constitutionality of the DTA itself remains entirely uncertain.* Through its perhaps defensible, but profoundly contorted, reading of the DTA, the Court allows itself to speak to what it ultimately finds to be the Government's unjust treatment and trial of Mr. Hamdan. However, by doing so in this manner, the Court failed to reach crucial questions regarding the Government's capacity to suspend habeas corpus and to minimize federal review of the camps and commissions.

B. *Military Due Process Under U.S. and International Law*

After discussing the jurisdiction-stripping provisions of the DTA and the convention of judicial comity regarding systems of military justice, the Court turns to the effect of the UCMJ upon the commissions.¹¹⁸ Through its reading of the UCMJ, the Court condemns the commissions for their failure to sufficiently resemble judicial process in courts-martial, the requirements of the UCMJ generally, the U.S. common law of war, and the international laws of war.¹¹⁹

The Court's holding is based upon legislative regulations governing military judicial process for courts-martial, commissions, and other tribunals as found in the UCMJ and the *Manual for Courts-Martial*:¹²⁰

The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the "rules and precepts of the law of nations."¹²¹

The Court rejected the Government's contention that the DTA provided a sufficient venue for raising challenges under the UCMJ *after* a final decision had been reached.¹²² Stevens noted that Hamdan's charge of conspiracy would not yield a sentence severe enough to warrant the exceedingly limited review established by the DTA.¹²³ The Court simi-

117. *Id.* (citations omitted).

118. *See id.* at 2790 (majority opinion).

119. *See id.* at 2790–98.

120. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), available at <http://www.jag.navy.mil/documents/mcm2000.pdf> [hereinafter MANUAL FOR COURTS-MARTIAL].

121. *Hamdan*, 126 S. Ct. at 2786 (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)).

122. *See id.* at 2787.

123. *See id.* at 2788; *see also* Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(3), div. A, tit. X, 119 Stat. 2739, 2743 (codified as amended at 28 U.S.C. § 2241(c)(3) (2000)).

larly rejected the Government's contention that Hamdan's claims before trial were improper since it should be assumed the commission would be conducted in good faith and with good law.¹²⁴ Stevens rightly noted reasons to assume the contrary, "that the procedures employed during Hamdan's trial will violate the law One of Hamdan's complaints is that he will be, and *indeed already has been*, excluded from his own trial."¹²⁵

1. UNIFORMITY AMONG MILITARY TRIBUNALS

Before passage of the Military Commissions Act of 2006 ("MCA"),¹²⁶ Article 36 of the UCMJ stipulated that the President may construct procedures for "courts-martial, military commissions and other military tribunals," which were required to, "so far as [the President] 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."¹²⁷ Before the MCA, such procedures—irrespective of any impracticable and thus inapplicable federal criminal procedures—were also required "not [to] be contrary to or inconsistent with this chapter [of the UCMJ]."¹²⁸ Moreover, the pre-MCA Article 36 required that "[a]ll rules and regulations made under [it] shall be uniform insofar as practicable."¹²⁹

Consequently, the Court construed the UCMJ's provisions on courts-martial, commissions, and other military tribunals to suggest that such diverse tribunals should be generally identical in procedure.¹³⁰ The Court reasoned that the distinction between courts-martial and military commissions was traditionally—and still ought to be—a distinction as to jurisdiction rather than process.¹³¹ Courts-martial, of course, hold personal jurisdiction over members of the Armed Forces, whereas military

124. See *Hamdan*, 126 S. Ct. at 2788.

125. *Id.*

126. Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28 & 42 U.S.C.).

127. 10 U.S.C. § 836(a) (2000).

128. *Id.*

129. *Id.* § 836(b).

130. See *Hamdan*, 126 S. Ct. at 2788.

131. See *id.*; Brief for Petitioner, *supra* note 39, at 19–20 n.10. In arguing this claim, Hamdan's counsel contended that "[h]istorical practice, legal commentary, and military regulations all confirm that commissions follow court-martial rules." *Id.* (citing ROLLIN A. IVES, A TREATISE ON MILITARY LAW (1879) ("The forms of procedure . . . are the same as before courts-martial"); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed., Arno Press 1979) (1886)). Hamdan's counsel also cited the 2000 edition of the Manual for Courts-Martial, which commands that "[m]ilitary commissions . . . shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial." MANUAL FOR COURTS-MARTIAL, *supra* note 120, at I-1.

commissions might be convened to hold jurisdiction over war criminals in the midst of conflict. The Court noted that in the U.S. Civil War, commissions such as those at issue in *Hamdan* were “constituted in a similar manner and their proceedings . . . conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise.”¹³²

Hamdan chiefly complained of, and the Court centered its opinion on, the following:

- (1) “the inconsistencies . . . between”:¹³³
 - (a) “[section] 6 of the Commission Order, which permits exclusion of the accused from proceedings and denial of his access to evidence”¹³⁴ and
 - (b) “the UCMJ’s requirement that ‘[a]ll . . . proceedings’ other than votes and deliberations by courts-martial ‘shall be made a part of the record and shall be in the presence of the accused’ ”;¹³⁵ and,
- (2) the fact that “the Commission Order dispenses with virtually all evidentiary rules applicable in courts-martial.”¹³⁶

The Government urged the opposite conclusion: Persons tried by the commissions are not guaranteed the process due to defendants in courts-martial.¹³⁷ Hamdan’s counsel countered that on this point the precedent set by the Court in *In re Yamashita*¹³⁸ no longer controls.¹³⁹ Since *Yamashita*, Congress has enacted the UCMJ, which restated, altered, and superseded the Articles of War under which *Yamashita* was decided, and offered no protections to alleged alien-enemy war criminals abroad.¹⁴⁰ The Court accepted Hamdan’s counsel’s position and resoundingly rejected *Yamashita*’s precedent on these matters:

132. *Hamdan*, 126 S. Ct. at 2788 (quoting 1 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES (Daniel S. Lamont et al. eds., Washington, Government Printing Office 1894) (discussing General Orders No. 1 of the Civil War)). The *Hamdan* Court also noted that during the Vietnam and Korean Wars, “procedural parity was espoused as a background assumption.” *Id.*

133. *Id.* at 2790.

134. *Id.*

135. *Id.* (quoting 10 U.S.C.A. § 839(c) (West 2007)).

136. *Id.*

137. Brief for Respondents, *supra* note 2, at 44–47.

138. 327 U.S. 1 (1946).

139. See Brief for Petitioner, *supra* note 39, at 23.

140. See *id.* at 23–24 (“[The Court of Appeals] panel replaced the UCMJ with the old Articles of War from *Yamashita*. Article 2 of those Articles did not extend procedural protections to persons facing commissions. But as the district court held, the UCMJ supplanted *Yamashita*. Over the Army JAG’s objection, it broadened Article 2 to include both ‘prisoners of war’ and ‘persons within an area leased by or otherwise reserved or acquired for the use of the United States.’”) (citations omitted).

[A] glaring historical exception to this general rule [of uniformity between courts-martial and commissions]. The procedures and evidentiary rules used to try General Yamashita . . . deviated in significant respects from those then governing courts-martial. The force of that precedent, however, has been seriously undermined by post-World War II developments.

. . . .

At least partially in response to subsequent criticism of General Yamashita's trial, the UCMJ's codification of the Articles of War after World War II expanded the category of persons subject thereto to include defendants in Yamashita's (and Hamdan's) position, and the Third Geneva Convention of 1949 extended prisoner-of-war protections to individuals tried for crimes committed before their capture. The most notorious exception to the principle of uniformity, then, has been stripped of its precedential value.¹⁴¹

However, the Court conceded that "[t]he uniformity principle is not an inflexible one,"¹⁴² asserting that courts-martials' procedures may be altered in military commissions, "[b]ut any departure must be tailored to the exigency that necessitates it."¹⁴³

The Court stopped short of explicitly condemning any particular components of the commissions' procedures, though it disparaged many. The Court was ultimately content to conclude generally that the President's determination under 10 U.S.C. § 836(a)—that it would be impracticable to apply *federal criminal* process in military commissions—failed as a determination under 10 U.S.C. § 836(b)—that it would be impracticable to apply principles and rules of *courts-martial*.¹⁴⁴ *In fact, the Court "assume[d] that complete deference is owed [to the President's] determination [that federal criminal process is impracticable]," but decided that "[n]othing in the record . . . demonstrates that it would be impracticable to apply court-martial rules in [Hamdan's] case."*¹⁴⁵

I disagree that "complete deference" is necessary in the one instance while "nothing" calls for deference in the other. After all, the federal criminal process and the courts-martial process are in some respects quite similar. How could—for example—evidentiary rules shared by both be impracticable in the one case but not in the other?

The Court avoided naming the particular necessary or practicable elements of courts-martial rules and procedures, instead generally chid-

141. *Hamdan*, 126 S. Ct. at 2788–90 (citations and internal quotation marks omitted).

142. *Id.* at 2790.

143. *Id.* (citation omitted).

144. *See id.* at 2791–92.

145. *Id.* (emphasis added).

ing the government for “misunderstand[ing] the purpose and the history of military commissions.”¹⁴⁶ The Court continued:

The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter. . . . Article 21 did not transform the military commission from a tribunal of true exigency into a more convenient adjudicatory tool. Article 36, confirming as much, strikes a careful balance between uniform procedure and the need to accommodate exigencies that may sometimes arise in a theater of war.¹⁴⁷

Despite recognizing the norm of uniformity not only among military tribunals, but also among civil and military criminal courts, the Court approached this norm as statutory procedural mandate, rather than as substantive constitutional law.

2. THE UCMJ’S INCORPORATION OF THE INTERNATIONAL LAWS OF WAR

Similarly, the Court found a statutory basis in the UCMJ for demanding that the commissions must—but at present did not—conform to the international laws of war, such as those of the 1949 Geneva Convention on Prisoners of War.¹⁴⁸ Contrary to the government’s claim, and the Court of Appeals’ decision, the *Hamdan* Court decided that the GPW indeed protects Mr. Hamdan and others detained in the counterterrorist enterprises of the United States.¹⁴⁹

a. The GPW’s General Application to the U.S. Military

The Court of Appeals in *Hamdan* had cited *Eisentrager* for the proposition that under the 1929 Geneva Conventions, “responsibility for observance and enforcement of these rights is upon political and military authorities.”¹⁵⁰

Relying on *Eisentrager*, the Court of Appeals concluded that the 1949 Geneva Conventions give Hamdan and other foreign detainees no rights or claims in U.S. courts.¹⁵¹ Hamdan’s counsel argued against the Court of Appeals’ interpretation of *Eisentrager*, and argued moreover

146. *Id.* at 2792.

147. *Id.* at 2792–93.

148. *See id.* at 2786; *see also* Geneva Convention, *supra* note 17.

149. *See* 126 S. Ct. at 2793–95.

150. 415 F.3d 33, 39 (D.C. Cir. 2005) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950)). The *Eisentrager* Court also noted: “Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.” 339 U.S. at 789 n.14.

151. *Hamdan*, 415 F.3d at 39–40.

that “the United States has implemented its obligations under the GPW by statute and regulation, both of which are subject to enforcement through a mandamus or habeas corpus petition.”¹⁵²

The Court, though, declined to engage *Eisentrager* or other sources on the question of the GPW’s independent enforceability by

assum[ing] that “the obvious scheme” of the 1949 Conventions is identical in all relevant respects to that of the 1929 Convention [as construed by *Eisentrager*], and even that that scheme would, absent some other provision of law, preclude Hamdan’s invocation of the Convention’s provisions as an independent source of law binding the Government’s actions and furnishing [Hamdan] with any enforceable right.¹⁵³

Despite this most alarming assumption—which the Court undermines in two footnotes suggesting the later Conventions do indeed furnish individual rights contra *Eisentrager*¹⁵⁴—the Court found that the GPW nonetheless is necessarily imposed upon the commissions.¹⁵⁵ This is so,

152. Brief for Petitioner, *supra* note 39, at 37–38. Here, Hamdan’s counsel cited to the following authorities: Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1091(b), 118 Stat. 1811, 2069 (2004) (to be codified at 10 U.S.C. § 801) (affirming that the United States will grant POW protections to detainees about whose status as POWs there is doubt, until their status is determined by a competent tribunal); § 1092(a) (requiring Defense Department procedures in keeping with international law); § 1092(b)(3) (requiring notice to detainees in their language of the protections of Geneva Conventions); U.S. DEP’T OF THE ARMY, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES, AND OTHER DETAINEES, ARMY REG. 190-8, § 1-5(a) (1997) (granting protections of the GPW to all detainees until a “competent authority” decides otherwise) [hereinafter ARMY REG. 190-8]; § 1-6 (requiring a “competent tribunal” to determine POW status for detainees denied such status who assert otherwise or about whose status there is doubt).

However, even if these provisions rendered the GPW’s protections for POWs and others generally enforceable, the foregoing statute and regulation require doubt as to detainees’ POW status to trigger provisional POW status. The government has contended that there is no such doubt about the Guantánamo detainees, insofar as: (1) the President—as a competent authority—has determined that members of al Qaeda and its allies are not POWs under the GPW; and (2) there is thus no doubt regarding their status. See Brief for Respondents, *supra* note 2, at 9–10 (“The President has determined that members and affiliates of al Qaeda, such as petitioner, are not covered by the Geneva Convention. That determination represents a core exercise of the President’s commander-in-chief and foreign-affairs powers during wartime and is entitled to be given effect by the courts.”). Moreover, after *Hamdi* and *Rasul*, the CSRTs were convened to review the detainees’ identifications as combatants, thus allegedly satisfying any requirement for determinations by “tribunal” or by a “legal authority,” other than the Executive himself. However, ARMY REG. 190-8, § 1-6, requires provisional POW status for those about whose status there is doubt or who assert they deserve POW status, which suggests that provisional POW status might be required regardless of the government’s assertions about the sufficiency of the President’s or the CSRT’s determinations of the detainees’ status. However, it seems unpersuasive to say that this statute and regulation render the GPW enforceable *itself* or *in its entirety*, rather than *selectively* rendering the substance of the GPW enforceable *under this statute and regulation*.

153. *Hamdan*, 126 S. Ct. at 2794 (footnote omitted).

154. See *id.* at 2794 nn.57–58.

155. See *id.* at 2794.

Stevens reasoned, because “regardless of the nature of the rights conferred on Hamdan they are, as the Government does not dispute, part of the law of war.”¹⁵⁶ The Court found this indisputable fact about the GPW dispositive because, regardless of self-execution, the law of war is a component of the statutory guidelines with which the commissions must comply.¹⁵⁷ “[C]ompliance with the law of war is the condition upon which the authority set forth in Article 21 is granted.”¹⁵⁸

b. The GPW’s Particular Applicability to the U.S. War with al Qaeda

Even if the GPW must be applied to military commissions *generally*, it remains unclear whether the terms of those conventions specifically reach Hamdan and other detainees in the War on Terror. The Government and the Court of Appeals concluded that, as a matter separate from the question of general enforceability, enemy combatants in such a war are not within the scope of persons granted protection by the GPW.¹⁵⁹

Articles 2, 12, 13, 14, 15, and 16 of the GPW concern conflicts among parties who have signed the Convention, and the protections due detained POWs.¹⁶⁰ Article 3 establishes a much more minimal set of protections for detainees in conflicts involving only one signing party.¹⁶¹ All of these Articles are only positively incumbent upon signing parties, although the GPW provides incentives for all political communities to adhere to the GPW’s provisions whether or not they are signatories or nation-states.¹⁶²

The government of Afghanistan signed the GPW.¹⁶³ Al Qaeda has not.¹⁶⁴ The U.S. government contended, and the Court of Appeals accepted, that the war between the United States and the Taliban is distinct from the war between the United States and al Qaeda; that Hamdan was an enemy combatant for al Qaeda but not for the Taliban; and, con-

156. *Id.* (citation omitted) (emphasis added).

157. As Hamdan’s counsel puts it:

10 U.S.C. § 821 ordains that, at most, the jurisdiction of the commissions would be defined by the law of war. This jurisdictional limitation is the defining feature of military tribunals and the most important protection against the threat to liberty and our constitutional separation of powers posed by the existence of military trials.

Brief for Petitioner, *supra* note 39, at 28 (citing *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 127 (1866)).

158. *Hamdan*, 126 S. Ct. at 2794.

159. See *Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005).

160. Geneva Convention, *supra* note 17, arts. 2, 12–16.

161. *Id.* art. 3.

162. See *id.* art. 2.

163. See *id.* (listing Afghanistan as a signatory).

164. See *id.* (not listing al Qaeda as a signatory).

sequently, that Article 2 does not protect Hamdan.¹⁶⁵

The Supreme Court declined to rule whether the wars with al Qaeda and the Taliban are separable,¹⁶⁶ and whether *alleged* Taliban/al Qaeda combatants are excluded from the protections of Article 2. The Court could do so because it concluded that Article 3 indeed applies to all alleged al Qaeda and Taliban combatants.¹⁶⁷

Article 3 states that, in the case of violent political conflict—“*not of an international character*”—involving a single signing state, the GPW still applies, setting what it deems “a minimum” standard for the treatment of enemy combatants.¹⁶⁸ Under Article 3:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end *the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:*

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.¹⁶⁹

The government contended that the United States’ truly global war with

165. *Hamdan v. Rumsfeld*, 415 F.3d 33, 41–42 (D.C. Cir. 2005).

166. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2794–95 (2006).

167. *Id.* at 2795. After Hamdan claimed that he should be granted POW status under Article 2, the D.C. Court of Appeals responded that Hamdan could raise his claim of POW status, and his challenge to the jurisdiction and process of the commission, in his trial *by the commission*. *Hamdan*, 415 F.3d at 40–41. Hamdan’s counsel, in petitioning the high court, contended that

[t]he panel . . . reached the extraordinary conclusion that Hamdan could raise his POW status claim in his commission. This acknowledges that “doubt” concerning Hamdan’s status exists, and such doubt precludes a commission trial in the first place. It would condone an unprecedented procedural laxity, including a 4-year delay, in implementing a solemn treaty obligation. . . . [Hamdan’s] status determination cannot take place in a tribunal trying him for war crimes.

Brief for Petitioner, *supra* note 39, at 47 n.38.

168. Geneva Convention, *supra* note 17, art. 3 (emphasis added).

169. *Id.* (emphasis added).

al Qaeda surely does not qualify as “not of an international nature,” and as such al Qaeda combatants are not protected by Article 3.¹⁷⁰ Hamdan’s counsel, though, reiterated Judge Williams’s opinion from the Court of Appeals that “international” properly means “between nations,” and that “not international” thus includes the U.S. war with al Qaeda.¹⁷¹ This reading is persuasive insofar as the intent behind Article 3 was to provide protection specifically for decolonization, revolutions, and other rebellions. The Court further compared Article 2’s provisions regarding wars between signatory and nonsignatory nation-states *occurring within the territory of the signatory* with Article 3’s provisions on “not international” conflict, concluded the following:

The term “conflict not of an international character” is used here in contradistinction to a conflict between nations. . . . [C]onflict [under Article 3] is distinguishable from the conflict [between a signatory and nonsignatory Power] described in . . . Article 2 chiefly because it does not involve a clash between nations (whether signatories or not).¹⁷²

In his dissent, Justice Thomas—in accord with the Department of Justice—reasoned that the U.S. war with al Qaeda is in fact international in nature, and thus exempt from Article 3.¹⁷³ This is so, Thomas reasoned, because the executive branch negotiates and enforces treaties like the GPW, and therefore the Court should not lightly contradict its interpretation.¹⁷⁴ Thomas continued:

Our duty to defer to the President’s understanding of the provision at issue here is only heightened by the fact that he is acting pursuant to his constitutional authority as Commander in Chief and by the fact that the subject matter of Common Article 3 calls for a judgment about the nature and character of an armed conflict.¹⁷⁵

Hamdan’s counsel argued that, even if Article 3 is directly inapplicable

170. Brief for Respondents, *supra* note 2, at 48.

171. See Brief for Petitioner, *supra* note 39, at 49.

172. *Hamdan*, 126 S. Ct. at 2795–96.

173. *Id.* at 2846 (Thomas, J., dissenting).

174. *Id.*

“Pursuant to [his] authority as Commander in Chief and Chief Executive of the United States,” the President has “accept[ed] the legal conclusion of the Department of Justice . . . that common Article 3 of Geneva does not apply to . . . al Qaeda . . .” Under this Court’s precedents, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”

The President’s interpretation of Common Article 3 is reasonable and should be sustained.

Id. (citations omitted) (quoting *United States v. Stuart*, 489 U.S. 353, 369 (1989); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982)).

175. *Id.* at 2846 (citing *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936)).

to the Guantánamo detainees in the manner set forth by Thomas, because it is either independently unenforceable or descriptively not inclusive of the U.S. war with al Qaeda, it nonetheless applies to the war with al Qaeda.¹⁷⁶ Indeed, Article 3 applies to *any* conflict like the government's War on Terror because it establishes the minimal standards regarding detainees in *all* violent political conflict, as a matter of *customary* international laws of war.¹⁷⁷

Again, the Government argued that Hamdan's claims alleging rights of law or custom under Article 3 could be raised in the review afforded under the DTA, and thus urged the Court to abstain from ruling on claims under the GPW.¹⁷⁸ Hamdan responded with the following:

[T]here are rights at the periphery of Common Article 3 that may necessitate trial before federal review. But the simple matters of whether the commission is a "regularly constituted court," and can deny fundamental rights (including the right to be present, trial by an impartial body, and trial without risk of testimony obtained by torture) are surely not among them. A commission that does not comply with such [fundamental rights] violates the laws of war and is improperly constituted.¹⁷⁹

The Court agreed. Without affirming or rejecting the interpretation and application of *customary* international law advanced by Hamdan's counsel, the Court accepted the definition of "not international" as "not between nation-states," thus finding that "Common Article 3 . . . is applicable here and . . . requires that Hamdan be tried by a 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'"¹⁸⁰

The Court likewise accepted the sources and suggestions provided by Hamdan's counsel¹⁸¹ as to what such a "regularly constituted court" would and could not be, concluding that

"[t]he regular military courts in our system are the courts-martial established by congressional statutes." At a minimum, a military commission "can be 'regularly constituted' by the standards of our military justice system only if some practical need explains devia-

176. See Brief for Petitioner, *supra* note 39, at 48–49.

177. See *id.*

178. See Brief for Respondents, *supra* note 2, at 30 n.7.

179. See Brief for Petitioner, *supra* note 39, at 50.

180. *Hamdan*, 126 S. Ct. at 2796 (citing Geneva Convention, 6 U.S.T. at 3320).

181. The International Committee of the Red Cross defines a "regularly constituted" court as one that is "established and organised in accordance with the laws and procedures already in force in a country . . . [and] able to perform its functions independently of any other branch of the government, especially the executive." JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. RED CROSS, 1 CUSTOMARY INT'L HUMANITARIAN LAW 355–56 (2005) (emphasis added) (citations omitted). This definition is quoted in Brief for Petitioner, *supra* note 39, at 48, and *Hamdan*, 126 S. Ct. at 2797.

tions from court-martial practice.” . . . [N]o such need has been demonstrated here.¹⁸²

The dissenting justices rejected the foregoing constructions of the GPW on several grounds. Justice Thomas contended that “even if Common Article 3 were judicially enforceable and applicable to the present conflict, [Hamdan] would not be entitled to relief [because] any claim [he] has under Common Article 3 is not ripe.”¹⁸³ Thomas went on that Article 3 only prohibits the passing of sentences and performance of executions, both of which require final judgment in order for the prohibited violation to occur.¹⁸⁴ The majority responded that this complaint regarding ripeness amounts to a demand for abstention and is thus dispatched in the same manner as the Government’s arguments regarding comity for military proceedings.¹⁸⁵ The majority also noted that Article 3 does not explicitly require a detainee to wait until after sentencing to complain of procedural irregularities.¹⁸⁶

The majority recognized Thomas’s view that procedural irregularities, such as the exclusion of the accused from proceedings or from access to evidence against him, should only be challenged if they have worked prejudice against the accused, which can only be known after the commission concludes its trial.¹⁸⁷ Such prejudice—in Thomas’s opinion—is in fact prohibited by the Military Orders establishing the commission, and may be complained of to the D.C. Circuit pursuant to the DTA.¹⁸⁸

Justice Alito opined that the commissions are “regularly constituted” as required by Article 3, given that “‘a regularly constituted court’ is a court that has been appointed, set up, or established in accordance with . . . domestic law.”¹⁸⁹ Alito consequently rejected the majority’s conclusion that the commissions must mirror U.S. courts-martial in order to be “regularly constituted.”¹⁹⁰ Rather, the commissions must merely be properly installed under U.S. law:

Insofar as [the Government] propose[s] to conduct the [Guantánamo commissions] according to the procedures of Military Commission

182. *Hamdan*, 126 S. Ct. at 2797 (citations omitted).

183. *Id.* at 2846 (Thomas, J., dissenting).

184. *Id.*

185. *Id.* at 2793 n.55 (majority opinion).

186. *Id.*

187. *Id.*

188. *Id.* at 2848 (Thomas, J., dissenting) (“[U]nder the commissions’ rules, the Government may not impose such bar [of the accused] or denial [of access to evidence] on Hamdan if it would render his trial unfair, a question that is clearly within the scope of the appellate review contemplated by regulation and statute.”).

189. *Id.* at 2851 (Alito, J., dissenting).

190. *See id.* at 2850–51.

Order No. 1 and orders promulgated thereunder—and nobody has suggested [the Government] intend[s] otherwise—then it seems that [Hamdan’s commission], like the hundreds of others [the Government] propose[s] to conduct, is very much regular¹⁹¹

Alito, like Thomas, believed that even if particular deviations from the courts-martial procedures are improper, those particular procedures should be rectified, rather than having the commissions rejected outright as illegal.¹⁹²

Nonetheless, a majority of the Court determined that “regularly constituted” military courts in the United States are those installed pursuant to the UCMJ, which, before the MCA, required uniformity between commissions and courts-martial and adherence to international laws of war.¹⁹³ Thus, significantly—not only for Hamdan and the Guantánamo commissions, but also generally for U.S. jurisprudence on international law’s restraints upon the U.S. government, especially the military—international law is found binding by way of domestic statutes and regulations that refer thereto.

In finding the administration restrained, the *Hamdan* majority relied neither upon the GPW itself nor legislative ratifications or executions thereof.¹⁹⁴ However, as with the requirement of uniformity among military tribunals and among civil and military courts, the Court’s conclusions regarding the applicability of the laws of war to U.S. counterterrorism were based upon statutory law in the form of the UCMJ.¹⁹⁵ Also, like its conclusions regarding uniformity, the Court’s conclusions about the laws of war were explicitly counteracted by the MCA’s amendment of the UCMJ.¹⁹⁶ Thus we can see what the Court must have known: Its occasionally contorted and consistently myopic attention to statutory rather than constitutional law essentially solicited Congress’s amendment of the UCMJ, even though the principles of uniformity and internationalism hailed by the Court are of profound constitutional importance as a matter of due process.¹⁹⁷ By avoiding questions

191. *Id.* at 2852.

192. *Id.* at 2852–53.

193. See Uniform Code of Military Justice, 10 U.S.C. § 836(a) (2000); Military Commissions Act of 2006, Pub. L. No. 109-366, § 4(a), 120 Stat. 2600, 2631 (to be codified in scattered sections of 10 U.S.C.).

194. See *Hamdan*, 126 S. Ct. at 2808 (relying on the UCMJ).

195. See *id.*

196. See Uniform Code of Military Justice, 10 U.S.C. § 836(a); Military Commissions Act of 2006 § 4(a).

197. Again, four Justices—the majority, excluding Justice Kennedy—held separately that conspiracy is not a war crime and as such cannot be tried before the commissions, and that the commissions’ procedures allowing the exclusion of the accused from portions of the trial are inconsistent with regular process befitting of “civilized” nations required by Article 3 of the GPW. See *Hamdan*, 126 S. Ct. at 2795, 2797–98. Justice Kennedy did not clearly reject these claims as

regarding constitutional due process for alleged alien war criminals at Guantánamo, the Court regrettably and recklessly deferred resolution of Mr. Hamdan's and other detainees' substantive grievances until another day.

IV. *HAMDAN'S CONSTITUTIONAL SILENCES*

In finding jurisdiction, rejecting abstention, and deeming the commissions illegitimate under domestic and international law, the Court relied upon legislative texts: the DTA (as dubiously constructed by the majority);¹⁹⁸ Congress's authorization of force against al Qaeda;¹⁹⁹ and the regulations of the UCMJ (which before the MCA demanded practicably uniform tribunals and adherence to international laws of war).²⁰⁰

The Court thus refused to ask and answer whether:

- Congress can bar federal review of statutory or constitutional habeas petitions by Guantánamo detainees;
- Congress can restrict federal jurisdiction over detainees' claims regarding the CSRTs and commissions;
- Congress can expressly grant the executive authority to construct commissions identical to those ruled illegal by *Hamdan*;
- Congress can—as it has done in the MCA—dispense with the principles of uniformity and internationalism enshrined in the pre-MCA UCMJ;
- Military, as opposed to civil, courts may be used for war-crimes trials.

To answer these questions, the Court must determine the application of various constitutional provisions regarding war powers, structural separation of the branches, the creation of tribunals, due process, equal protection, jury trials, cruel and unusual punishment, alienage, and extraterritoriality as related to military detentions, trials, and punishments.

In what follows, I attempt a preliminary and perhaps prerequisite constitutional engagement with the questions of humanitarian law posed above. This engagement involves the Fifth Amendment's guarantee of due process for all persons.²⁰¹ Affirming and elaborating arguments by others,²⁰² it is my contention that, in war or other violent conflicts

the dissenting Justices did, but he declined to affirm them given the sufficiency of the majority's other grounds for deeming the commissions fatally and illegally flawed. *See id.* at 2808–09 (Kennedy, J., concurring).

198. *See id.* at 2764–65 (majority opinion).

199. *See id.* at 2753–55.

200. *See id.* at 2790–94.

201. U.S. CONST. amend. V.

202. *See, e.g.*, Brief of International Law and Jurisdiction Professors, *supra* note 23.

involving U.S. military or intelligence forces, the Fifth Amendment restricts the actions of governmental agents and protects the rights of all individuals—even and perhaps especially criminal enemy aliens held abroad—pursuant to domestic and international laws and customs comprising humanitarian law. In the same manner that the UCMJ incorporated the laws of war, the Constitution itself invokes and binds itself to the laws of nations and wars. As such, the Fifth Amendment necessarily incorporates international law and custom into the fundamental individual protections and foundational governmental restrictions promulgated by our constitutional text.

There is a necessary interrelation between domestic and international—and among statutory, constitutional, conventional, and customary—humanitarian law governing war and other violent political conflict. This is more than a historical textual incident, which could be displaced if the incorporative internationalist language in the Constitution and the UCMJ were eradicated. Rather, the incorporative language of those texts reflects the necessarily synthetic character of humanitarian law, which must traverse and inflect diverse legal systems and traditions to govern conflicts among parties that are enemy and alien to one another. Such conflicts often seem the very antithesis of law, and necessarily involve diverse legal institutions and orientations.

Hence, I believe that an incorporative synthesis exists in the UCMJ, the Constitution, the GPW, and other texts of humanitarian law regarding domestic and international statutes, constitutions, conventions, and customs. Hence, too, my belief that the Fifth Amendment's defense of all persons' life, liberty, and property from unjust governmental imposition can and must incorporate the international laws of war as the very meaning of due process in the context of detention amid violent political conflict, such as the U.S. war with al Qaeda. What else could due process in the midst of war be, other than the common precepts of humanitarian law?

This view of the Fifth Amendment regarding the camps, tribunals, and commissions requires significant doctrinal justification. Precedent regarding the application of the Constitution to aliens, especially those abroad or in military custody, complicates—but ultimately bears out—this proposition. In what follows, I argue that Supreme Court precedent on war demonstrates the propriety and necessity of interpreting the Due Process Clause of the Fifth Amendment and other constitutional provisions as enforceable substantive regulations of the U.S. government's conduct in war and other violent conflicts.²⁰³

203. For example, the guarantee of equal protection incorporated into the Fifth Amendment may prohibit the administration's disadvantageous treatment of noncitizens. *See, e.g.*, Brief for

Thus, even if Congress authorizes the aggressive and absolutist power claimed by the administration in the Guantánamo camps, as it did in the MCA, the Fifth Amendment still demands due process—namely that demanded by humanitarian law—for all persons. Our task is to debate and determine what, not whether, the Fifth Amendment demands when any person is apprehended, detained, tried, or punished by the U.S. government.

A. *The Incorporative Universality of Humanitarian Law*

Before addressing the detainees' claims under the Fifth Amendment, I should make a series of arguments regarding the nature of humanitarian law. Such law is necessarily comprised of both domestic and international laws of war and crime, as the GPW, the UCMJ, the Constitution, and the Court have made clear. Humanitarian law is jurisprudentially and thus jurisdictionally universal, though it of course only ever exists in local and particular enactments. Humanitarian law speaks to a fundamental dimension of law and politics—violent conflict among political communities. Thus, it necessarily transcends the particular positive enumerations or boundaries of international associations, sovereign nation-states, etc. I mean to say that humanitarian law does—because it must—yield terms of judgment for all violent political conflict, including present U.S. war with al Qaeda and its allies.

Despite distinctive dimensions, the policy object and methodological foundations of humanitarian law substantively should, methodologically can, and morally must reach “wars with terror” and the pleas of the Guantánamo detainees.

Any particular enactment of humanitarian law is dependent upon historical contingencies and is binding only in specific circumstances. But the legal commitment upon which such enactments rest—the *amelioration of suffering and horror in violent conflict among political communities*—transcends the positively enumerated subjects and objects of particular humanitarian laws. To many, international and U.S. constitutional humanitarian law seems not to conceive of, let alone judge, the U.S. war with al Qaeda. However, even if al Qaeda falls outside of the types parties imagined by these particular instruments, the principles of those instruments are repeatedly articulated therein as paramount over

Petitioner, *supra* note 39, at 21–23; Katyal & Tribe, *supra* note 31, at 1298 (citing U.S. CONST. amend. XIV, § 1; *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)). The Sixth Amendment's guarantee of trial by jury in criminal cases, U.S. CONST. amend. VI, may extend to war crimes tribunals. See Brief of the CATO Institute as Amicus Curiae in Support of Petitioner, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184).

and above their particular subjects and objects of address, and thus surely apply as a matter of logical and linguistic necessity.

For example, though allegedly beyond the bounds of international humanitarian law,²⁰⁴ the administration has waged and defended its present war with al Qaeda through constant, if inconsistent, reference to humanitarian law. Specifically, and deeply ironically, the administration has referenced international treaties on interstate warfare.²⁰⁵ Again, the administration has declared that much, if not all, of international humanitarian law does not apply to the U.S. war with al Qaeda and its allies.²⁰⁶ Yet the administration's grounds for decrying al Qaeda's attacks of September 11, 2001, require reference to some form of humanitarian law. Without such reference, there are simply no grounds upon which we might call those attacks, or any other act of war, criminal or otherwise unjust (except under local criminal prohibitions of violence).

When former Attorney General John Ashcroft referenced humanitarian law to decry the September 11 attacks, as I am claiming is necessary, he called specifically upon the famous rhetoric of twentieth-century international laws of war. Echoing the Geneva Conventions, as well as the international criminal tribunals of Nuremberg, Tokyo, Rwanda, and Yugoslavia, Ashcroft described the attacks as "crimes of war" and "crimes against humanity," necessitating a comprehensive, unprecedented, and unequivocal response by U.S. forces, including the Justice Department and the judiciary.²⁰⁷ Testifying before the Senate Judiciary Committee three months after the attacks, Ashcroft characterized the legal dimensions of the U.S.–al Qaeda war thus:

Since September 11, through . . . a preventative campaign of arrest and detention of *lawbreakers*, America has grown stronger—and safer—in the face of terrorism. . . .

. . . .

The terrorist enemy that threatens civilization today is unlike any we have ever known. It slaughters thousands of innocents—a *crime of war and a crime against humanity*. . . .

. . . .

Mr. Chairman and members of the committee, we are at war with an enemy *who abuses individual rights* as it abuses jet airliners: as weapons with which to kill Americans. . . .

204. See *infra* text and notes 148–52.

205. See *infra* text and notes 208–11.

206. See, e.g., Gonzales Memorandum, *supra* note 33 ("Indeed, as the statement quoted from the administration of President George Bush makes clear, the U.S. will apply GPW 'whenever hostilities occur with regular foreign armed forces.' By its terms, therefore, the policy does not apply to a conflict with terrorists, or with irregular forces, like the Taliban, who are armed militants that oppressed and terrorized the people of Afghanistan.").

207. See Ashcroft Statement, *supra* note 33.

We have launched the largest, most comprehensive *criminal* investigation in world history to identify the killers of September 11 and to prevent further terrorist attacks. . . .

. . . .

We have waged a deliberate campaign of arrest and detention to remove suspected terrorists *who violate the law* from our streets. Currently, we have brought criminal charges against 110 individuals, of whom 60 are in federal custody. . . .

. . . .

Under Director Bob Mueller, the FBI is undergoing an historic reorganization to put the prevention of terrorism at the center of its law enforcement and national security efforts. . . .

. . . .

As Attorney General, it is my responsibility—at the direction of the President—to exercise those core executive powers the Constitution so designates. The law enforcement initiatives undertaken by the Department of Justice, those individuals we arrest, detain or seek to interview, fall under these core executive powers. In addition, *the President's authority to establish war-crimes commissions* arises out of his power as Commander in Chief. For centuries, Congress has recognized this authority and the Supreme Court has never held that any Congress may limit it.

In accordance with over two hundred years of historical and legal precedent, the executive branch is now exercising its core Constitutional powers in the interest of saving the lives of Americans. I trust that Congress will respect the proper limits of Executive Branch consultation that I am duty-bound to uphold. I trust, as well, that Congress will respect this President's authority to wage war on terrorism and defend our nation and its citizens with all the power vested in him by the Constitution and entrusted to him by the American people.²⁰⁸

Ashcroft—then the federal government's chief lawyer and law enforcement officer—calls al Qaeda's attacks *crimes* that infringe upon *individual rights*. On what positive grounds were al Qaeda's acts illegal or were its victims' rights enshrined? Ashcroft does not specify, but his statement that al Qaeda's crimes are "of war" and "against humanity" clearly invoke international conventions governing interstate warfare, despite the administration's contention that such conventions do not apply to al Qaeda.²⁰⁹ The administration's decision to refer to international conventions and declarations after the attacks of September 11 is thus quite surprising, given the administration's simultaneous denial of

208. *Id.* (emphasis added).

209. *See, e.g.*, Brief for Respondents, *supra* note 2, at 9, 23–26, 37–43, 48–50.

the reach of those very legal instruments to the U.S.–al Qaeda war.²¹⁰

Such a contradiction from the nation's lead attorney—charging *alleged* al Qaeda combatants with a crime under an instrument that does not simultaneously protect them—is genuinely tragic. A similar point was made by Hamdan's counsel as well as by former Secretary of State, Colin Powell.²¹¹ My point is more general: Ashcroft's necessary reliance on (here, international) humanitarian law demonstrates the ways in which individual pieces of humanitarian law irradiate and synthesize other pronouncements, including domestic pronouncements, of humanitarian law even where the irradiating individual enactments (here, the GPW) are technically inapplicable to the conflict at issue.

The appearance, agents, and implements of political violence change dramatically over time. This point has been consistently recognized in international humanitarian law, as new conventions, declarations, and protocols are drafted to comprehend ever-changing technological and geopolitical realities.²¹² The spirit and substance of international laws governing interstate warfare, like that of all humanitarian law, properly adhere to the broad phenomena of political violence rather than the particular actors (monarchies, nation-states, etc.) or implements (hot-air balloons, land mines, etc.) described by any single contingent effectuation of humanitarian law. *The horrors of war more than the historical preeminence of the bayonet, the battlefield, or the*

210. The resolute condemnation of al Qaeda's acts and very existence as war crimes is also surprising, given the administration's own means of war—tactics resulting in collateral civilian casualties in Iraq estimated at over 100,000 in 2004. See Rob Stein, *100,000 Civilian Deaths Estimated in Iraq*, WASH. POST, Oct. 29, 2004, at A16.

211. See Brief for Petitioner, *supra* note 39, at 35–36 (quoting Memorandum from Colin L. Powell, Sec'y of State, to Counsel to the President & Assistant to the President for Nat'l Sec. Affairs (Jan. 26, 2002)).

The [Court of Appeals] panel somehow reached the conclusion that Hamdan could be tried for a violation of the laws of war, even though it also found that the conflict with al Qaeda was not governed by the canonical statement of the laws of war—the GPW. But if the laws of war do not apply, there is nothing to charge. . . . [A] finding that the Geneva Conventions do not apply “undermines the President's Military Order [establishing the Guantánamo commissions] by removing an important legal basis for trying the detainees before Military Commissions.”

Id.

212. See, e.g., Declaration (IV, 2) Concerning Asphyxiating Gases, July 29, 1899; Declaration (IV, 3) Concerning Expanding Bullets, July 29, 1899; Declaration (IV, 1) To Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of a Similar Nature, July 29, 1899, in *THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 95, 99, 309 (Dietrich Schindler & Jiri Toman eds., 2004); see also Rome Statute of the International Criminal Court arts. 5–8, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (declaring jurisdiction over humanitarian law issues not only or predominantly regarding nation-states, but rather regarding all collectives capable of violent political conflict).

*nation-state, are at the heart of humanitarian law.*²¹³

The function of Article 3 within the 1949 Geneva Conventions is emblematic. The Article's bare-minimum standard for "not international" conflict and its attempt to incite states' respect for humanitarian law beyond their positive legal obligation under the GPW are suggestive of the universal character of humanitarian law.²¹⁴ "Not international" conflict as imagined in Article 3 will almost certainly involve a political community not a party to the GPW and not a recognized sovereign state. Article 3 nonetheless binds signing states to apply "minimum" standards requiring equality, dignity, safety, and judicial process in a regularly constituted court most befitting of "civiliz[ation]."²¹⁵ In my mind, these standards translate into liberal civil traditions of fair hearing, due process, presumed innocence, impartial adjudication, and independent appeal. This minimum is admirable. Here the GPW, an international instrument, effectuates law for single states regarding their treatment of political enemies that are not parties to the Convention, nor even recognized as states. By establishing such minimum duties, the GPW, though chiefly a contract among signing parties, imagines the irradiating application of its animating principles beyond the several states, military combatants, and positively stipulated obligations that are the subjects and objects of its address.

It is inconceivable that anything less than this minimum could be applied to the Guantánamo detainees even if the GPW fails to positively cover them. In Article 3—as in the introductions to the Hague, USA-POW, and Geneva Conventions—we can discern core normative principles and minimum regulatory standards of humanitarian law that transcend the GPW's—or any convention's, clause's, or common-law precedent's—limited positive application and historically particular context. Even if we concede that the GPW does not reach detentions in the U.S.—al Qaeda war—whether because of a particular detainee's citizenship, association, or conduct—Article 3 establishes a universal minimum under the GPW and all humanitarian law: Detaining parties and

213. For example, note the emphasis given to humanitarian law's general principle of mitigating the horrors of war in the following convention:

[R]ecognizing that, in the extreme case of a war, it will be the duty of every Power to diminish, so far as possible the unavoidable rigors thereof and to mitigate the fate of prisoners of war; desirous of developing *the principles* which inspired the international conventions of The Hague, in particular the Convention relative to the laws and customs of war and the Regulations annexed thereto; [we] have decided to conclude a Convention to that end

Convention Between the United States of America and Other Powers, Relating to Prisoners of War, Introduction, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343 (emphasis added).

214. Geneva Convention, *supra* note 17, art. 3.

215. *Id.*

persons must treat enemy combatants humanely; without discrimination, violence, threat, humiliation, or degradation; and with regular judicial process.²¹⁶ The GPW, like the Hague Convention's Declaration Prohibiting Launching Projectiles or Explosives from Balloons,²¹⁷ elaborates only particular obligations due in very particular contexts. Beyond and before these obligations are the general normative principles of humanitarian law that animate, and are not exhausted by, specific stipulations regarding specific sorts of conflicts among specific sorts of political communities in specific historical contexts.

B. *The Incorporative Humanitarianism of the Fifth Amendment*

Having made arguments about the universal character of humanitarian law, I will now return to the status of the Guantánamo detainees under the U.S. Constitution. For the sake of argument, I will continue to assume along with the *Hamdan* majority that the GPW does not in itself establish rights enforceable in the federal courts on behalf of the Guantánamo detainees. Nonetheless, international humanitarian law's central norms, such as those expressed in Article 3 of the GPW, must protect the detainees. In *Hamdan*, the majority recognized that such protections stemmed from the legislative construction of systems of military justice requiring adherence to the laws of war, including the GPW.²¹⁸ Even without this legislative provision, the laws of war and thus the GPW still bind the government's treatment of the Guantánamo detainees by way of the Fifth Amendment. Humanitarian law, comprised of domestic and international instruments, establishes the very meaning of due process vis-à-vis detentions and trials arising from violent conflict between political communities.

This interpretation, in which international humanitarian law is incorporated through the Fifth Amendment, was advanced persuasively in an amicus brief by David D. Caron, Anne-Marie Slaughter, John H. Barton, and Barry E. Carter in *Rasul*.²¹⁹ Their brief (like the *Hamdan* Court's reading of UCMJ's Article 21) displaces the argument that the GPW does not provide individually enforceable rights.²²⁰ It must be noted that the brief urged only that the Court exercise jurisdiction in the *Rasul* case; its arguments regarding the application of the Fifth Amendment to Guantánamo are speculative and merely suggestive. Nonethe-

216. *Id.*

217. Declaration (IV, 1) to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of a Similar Nature, *supra* note 212.

218. See 126 S. Ct. 2749, 2796 (2006).

219. Brief of International Law and Jurisdiction Professors, *supra* note 23, at 12–13.

220. *Id.* at 16.

less, they are helpful for deliberations on the detainees' substantive constitutional rights.

Caron and others situate their argument for jurisdiction and constitutional application within a recognition of the growing globalization of various spheres of domestic governmental action, a fact that they argue calls for a more expansive approach to constitutional rights and restraints:

As the executive acts internationally in ways that are like those of domestic criminal law enforcement, and as international issues become more important in daily life, Constitutional freedoms may become meaningless unless appropriate judicial restraints are applied.²²¹

They recognize, though, the Court's traditional reluctance, and at times outright refusal, to apply the Constitution abroad:

The Court's hesitation [in applying the Constitution extraterritorially] appears to reflect two groups of factors. The first [involves] . . . whether the specifics of the U.S. Bill of Rights are appropriate in areas governed by different legal traditions The second . . . reflects the separation of powers concerns about hampering the ability of the executive to operate effectively in international affairs.²²²

Caron and others rightly note that the first category of concerns do not apply in the cases of the Guantánamo detainees.²²³ As to the second category, they argue that

recognizing that law can increasingly be applied in some aspects of international relations, [courts] are narrowing the areas within which executives have discretion and applying constitutional or human rights standards to executives in foreign policy actions in a growing number of contexts.²²⁴

The authors also argue that the globalization of conventionally domestic governance and the willingness of courts to engage directly therewith have been accompanied by the codification and accumulation of related international laws and institutions:

Courts have been emboldened to take such jurisdiction [over government action abroad] in part because of the evolution of a set of human rights principles which are broadly accepted (and are very similar to the principles of the Constitution and the Bill of Rights). . . . Decisions under [various] conventions are becoming part of a global common law, a body of interpretive jurisprudence on

221. *Id.* at 4–5.

222. *Id.* at 6–7.

223. *Id.* at 7–13.

224. *Id.* at 7.

human rights, frequently citing U.S. Supreme Court decisions.²²⁵

For Caron and others the simultaneous need for and rise of international law suggest the propriety of developing and applying a mutually constitutive jurisprudence of constitutional and international law regarding U.S. governmental action abroad:

The border between the portions of international affairs that remain anarchic and those that can be ordered legally is shifting—and each component shifted into the legally-ordered side, and then recognized by courts as shifted, is a benefit to the international rule of law. . . .

This increased legalization expands on the long standing principle of United States law that Constitutional procedures must be respected in the foreign policy area.²²⁶

Moreover, Caron and others contend that, of this growing body of synthetic domestic-international jurisprudence, humanitarian law applicable to the Guantánamo camps is among the most explicit and developed:

Among the more legalized areas is the international exercise of criminal enforcement procedures and of treatment of prisoners, reflecting the international human rights principles discussed above as well as international humanitarian law principles such as those embodied in the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3116.²²⁷

The authors thus suggest that the U.S. Constitution should provide jurisdictional grounds for review and perhaps substantive grounds for relief in claims arising from U.S. military action or engagements with aliens abroad, by way of the Due Process Clause of the Fifth Amendment. They do so by analogy to the previously recognized mutual incorporation of the Fifth and Fourteenth Amendments as regards the Bill of Rights' application to the states and the Equal Protection Clause's application to the federal government.²²⁸

225. *Id.* at 11 (“Among the most important are the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, and the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967)[.] entered into force for the United States September 8, 1992, subject to Declarations.”).

226. *Id.* at 15 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

227. *Id.* at 16.

228. The authors suggest:

The Court has long recognized the need for flexibility in applying Constitutional protections abroad, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J.[.] concurring), and has used due process as its basic source of flexibility for incorporating principles from other areas. Thus, the Court interpreted Fourteenth Amendment due process to incorporate portions of the Bill of Rights and to apply them to states, using its own judgment to decide which provisions of the Bill of Rights should thus be incorporated. Similarly, when reviewing foreign actions of the United States executive, the Court could reasonably interpret the due process provision of the Fifth Amendment to incorporate an appropriate combination of Bill of Rights and international human rights norms. It has already

Thus, *all* detainees have a claim under the Fifth Amendment for redress of violations of the minimum and fundamental protections of humanitarian law. These minimum fundamentals are parallel to (which is not to say conceptually derivative of or positively derived from) those enumerated in Article 3 of the GPW.²²⁹ These minimum fundamentals are indeed the meaning of due process in the context of detention, trial, and punishment of *suspected* enemy combatants in any conflict between political communities.

Caron and others' argument can—and should—be taken further, given the expansive and anti-positivist nature of the Court's jurisprudence of incorporation. In the debates surrounding the applicability of the federal Bill of Rights to states' police forces, two competing arguments *in favor* of application emerged. The first interpretation, often called the *fundamental rights* or *fundamental fairness* interpretation, suggested that states were bound to abide by principles of fundamental fairness under the Due Process Clause of the Fourteenth Amendment, but that such fairness might not conform exactly to the federal Bill of Rights provisions regarding criminal procedure.²³⁰ This doctrine prevailed until the 1960s.²³¹ Under this fundamentalist approach, states might be bound less *or more* than the Bill of Rights require.²³² The standard of due process applied to the states under this interpretation included rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental."²³³ and "essential to the very concept of justice."²³⁴ Exemplifying the notion that fundamental rights exceed

considered and cited the body of international human rights law in interpreting Constitutional provisions, *Lawrence v. Texas*, 123 S.Ct. 2472, 2483 (2003) (privacy and homosexual acts); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (death penalty and mentally-retarded offenders); *Grutter v. Bollinger*, 123 S.Ct. 2325, 2347 (2003) (affirmative action) (Ginsburg, J.), concurring). . . . Even if the international norms were not treated as self-executing in U.S. law, i.e., not directly applicable by courts, the Court could still regard them as declaratory of fundamental rights or as a source to use in interpretation of a due process standard in an international context, just as it uses the Bill of Rights to interpret due process in the domestic context. This leaves the Court a logical basis to avoid application of the international norms in circumstances in which they might be feared to contradict U.S. norms.

Id. at 12–13.

229. See Geneva Convention, *supra* note 17, art. 3.

230. The first major case to declare the federal doctrine of "fundamental fairness" in state criminal proceedings was *Hurtado v. California*, 110 U.S. 516 (1884), which addressed whether the Fifth Amendment's requirement of grand juries for criminal indictments should extend, through the Fourteenth Amendment, to the states. See *id.* at 534–35; see also Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 278 (1982) (discussing *Hurtado*).

231. See Israel, *supra* note 230, at 273.

232. See *id.* at 274–76.

233. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

234. *Lisenba v. California*, 314 U.S. 219, 236 (1941).

even the Constitution's text, the Supreme Court in *Tumey v. Ohio*²³⁵ overturned a state-court conviction because the trial judge had a personal interest in the conviction.²³⁶ The Court thus held that state criminal proceedings must provide an unbiased judge. Such a requirement, however, is nowhere listed in the federal Bill of Rights. Thus the doctrine of fundamental fairness, authorized by the Fourteenth Amendment, and inclusive of the fundamental guarantees in the Bill of Rights, exceeds the enumerated institutional guarantees of all the relevant amendments. Under the second approach to federalizing state policing, often called *total incorporation*, the entire federal Bill of Rights was incorporated through the Fourteenth Amendment as a restraint upon states' police powers.²³⁷ This approach appeared in numerous concurring and dissenting opinions offered alongside majority opinions on *fundamental fairness* from the 1880s to the 1960s.²³⁸ Justice Black was the chief proponent of *total incorporation*, arguing that *fundamental fairness* was textually and historically inapt, as well as a judicially hubristic and arbitrary doctrine.²³⁹ Black argued that the Due Process Clause of the Fourteenth Amendment necessarily drew the named federal criminal protections down to the level of state policing.²⁴⁰ In resolving this debate, the Court ultimately settled on an approach called *selective incorporation*. One of its first iterations was in Justice Brennan's dissenting opinion in *Cohen v. Hurley*.²⁴¹ Under this doctrine, certain of the federal Bill of Rights's provisions, namely those deemed fundamental, are applied to the states through the Fourteenth Amendment. However, the *selective incorporation* method also maintains that dimension of the *fundamental fairness* doctrine that allowed federal courts to bind state police in excess of the restraints imposed by the Bill of Rights. Under the doctrine of *selective incorporation*, the Court during the 1960s extended to state policing the obligations of the Fourth, Fifth, Sixth, and Eighth Amendments regarding: (1) unreasonable searches and seizures,²⁴² (2) self-incrimination,²⁴³ (3) double jeopardy,²⁴⁴ (4) legal

235. 273 U.S. 510 (1927).

236. *Id.* at 535.

237. See Israel, *supra* note 230, at 257.

238. See *id.* at 256-73.

239. See Tracey L. Meares, *What's Wrong with Gideon*, 70 U. CHI. L. REV. 215, 221 n.32 (2003) (citing *Rochin v. California*, 342 U.S. 165, 175 (1952) (Black, J., concurring); *Adamson v. State*, 332 U.S. 46, 92 (1947) (Black, J., dissenting) (quoting *Fed. Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 601 n.4 (1942))).

240. See *id.* at 222 (citing *Betts v. Brady*, 316 U.S. 455, 474 (1942) (Black, J., dissenting)).

241. 366 U.S. 117, 154-60 (1961) (Brennan, J., dissenting).

242. See *Ker v. California*, 374 U.S. 23, 30 (1963); *Mapp v. Ohio*, 367 U.S. 643, 655-60 (1961).

243. See *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

244. See *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

representation for the accused,²⁴⁵ (5) speedy trials,²⁴⁶ (6) jury trials,²⁴⁷ (7) confrontation of witnesses,²⁴⁸ (8) acquisition of witnesses,²⁴⁹ and (9) cruel and unusual punishment.²⁵⁰ In the same era the Court also advanced doctrines on *fundamental fairness* that guaranteed extra-constitutional protections to the subjects of state policing, in the manner performed by the *Tumey* case in the 1920s.²⁵¹ Now called *free-standing due process*, rulings on *fundamental fairness* beyond the substance and settings of the named protections in the Bill of Rights limited state protocols for policing, pre-trial, pleas, trial, sentencing, and appeals.²⁵²

Though the Rehnquist Court in many respects halted and reversed the movement of the Warren Court,²⁵³ the general jurisprudential matter remains: Principles of justice qua federal constructions of states' due process obligations have, in the course of U.S. constitutional history, demanded and received readings of the Revolutionary and Reconstruction Constitutions that exceed both the structural parameters (vis-à-vis federal-state relations) and the substantive guarantees stated therein.

Such recourse to principles of *selective incorporation* and *fundamental fairness* is unsurprising, given the U.S. Constitution's entirely abstract and expressionistic guarantee of due process and its minimalist and provisional management of multiple sovereignty.

In the context of war and counterterrorism, a similar negotiation of multiple sovereignty involving an incorporative synthesis of constitutional and international law is not unprecedented. The Constitution

245. See *Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963).

246. See *Klopfer v. North Carolina*, 386 U.S. 213, 222 (1967).

247. See *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

248. See *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

249. See *Washington v. Texas*, 388 U.S. 14, 17–20 (1967).

250. See *Robinson v. California*, 370 U.S. 660, 667 (1962).

251. See Israel, *supra* note 230, at 281; see also Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 379–90 (2001).

252. See, e.g., Israel, *supra* note 230, at 304–05.

253. Such *free-standing due process*, however, was mightily restrained by rulings in the 1990s. In *Dowling v. United States*, 493 U.S. 342, 352 (1990), and *Medina v. California*, 505 U.S. 437, 443 (1992), the Court found that in federal and state criminal proceedings, the Due Process Clauses must reach only very narrowly and modestly beyond the protections enumerated in the Bill of Rights. These cases and their successors established that successful appeals under a doctrine of *free-standing due process* must do three things. First, it must pass an inquiry more deferential to the government than that of traditional balancing tests used in due process doctrines. See *Medina*, 505 U.S. at 446. Second, it must demonstrate not only a violation of *fundamental fairness*, but also a likely prejudice to the defendant thereby. See *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2561–63 (2006) (establishing that Bill of Rights claims require no showing of prejudice, while free-standing due process claims must demonstrate overall unfairness of trial). Third, it must demonstrate in some contexts that “the totality of the circumstances” in the case—and not merely a single prohibited act—affect an affront to *fundamental fairness*. See *Benton v. Maryland*, 395 U.S. 784, 795 (1969).

itself of course does so by elevating treaties to constitutional status and by recognizing the constitutional legitimacy of the laws of nations.²⁵⁴

Supreme Court precedent on humanitarian law likewise engages in this incorporation. One example, though controversial, most clearly makes this point. In *Yamashita*²⁵⁵ (where the Court considered a Japanese general's challenge to the jurisdiction of a military commission trying him for failing to prevent war crimes by his subordinates), the majority derived the legitimacy of the commission and the charges against General Yamashita by reference to a synthetic incorporation of constitutional and international humanitarian law:

It is evident that the conduct of military operations by troops whose excesses are unrestrained . . . would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander . . . could with impunity neglect to take reasonable measures for their protection.²⁵⁶

The Court speaks to the "law of war" and its primary end of minimizing and ameliorating brutality in violent political conflict, and, at the same time, the Court hails the specific language of international humanitarian law regarding POWs and civilian populations from prior conventions on war among states.²⁵⁷ Three years before the 1949 Geneva Convention, the Supreme Court had incorporated contemporary international humanitarian law into and through U.S. constitutional interpretation. The Court concluded that

[t]he trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war.²⁵⁸

Thus, the Court notes that the Constitution's grant to Congress of the authority to create such commissions is derived from and in dialogue with international humanitarian law. In other words, *Hamdan* often emphasizes, and thus presumably grants deference to, the enumerated power of Congress to establish military commissions or authorize the

254. See U.S. CONST. art. I, § 8, cl. 10, 11 (granting Congress authority "[t]o define and punish . . . Offences against the Law of Nations; . . . and make Rules concerning Captures on Land and Water"); *id.* art. VI, cl. 2 (declaring that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land").

255. 327 U.S. 1 (1946).

256. *Id.* at 15.

257. *Id.* at 15–16; see also Convention Between the United States of America and Other Powers, Relating to Prisoners of War, Introduction, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343 (using similar language and predating *Yamashita*).

258. *Yamashita*, 327 U.S. at 11.

President to do so or both.²⁵⁹ This enumerated power, in our own precedents, is derived from and in dialogue with the law of war, which ordinarily in such context means international treaties and protocols signed among nation-state governments. The *Yamashita* majority's rhetorical harmony with extant and impending international humanitarian laws supports this understanding of the "law of war," which Congress is constitutionally empowered to implement.²⁶⁰

Moreover, humanitarian law's constitutional norm against brutality leads the Court to establish a law regarding commanders' responsibility for subordinates' war crimes—a law not positively enumerated by then existing "laws of war."²⁶¹ Thus, the Court's interpretive justification of the charges against Yamashita demonstrates what I argue: Universal norms of humanitarian law—e.g., those prohibiting brutality, discrimination, degradation, threat, and disappearance—are to be applied to violent political conflicts even if the particular subjects or objects of such application are not positively enumerated in a binding and enforceable legal instrument.

Justice Murphy dissented in *Yamashita*, asserting (among other things) that any such military tribunal must comport with the standards of due process guaranteed by the Fifth Amendment, irrespective of such tribunals' legislative and executive authorization, irrespective of their adherence to and advancement of "the laws of war" otherwise.²⁶² By Murphy's reading, due process properly applies to "any person"—including non-citizens—whose life or liberty is threatened by any governmental official or agency.²⁶³ As such, charges of war crimes, some punishable by death, must necessarily bear the protections of full criminal due process. I quote Justice Murphy at length because his argument has indeed become the dominant tenet of contemporary humanitarian law:

The authority for [the present] action grows out of the exercise of the power conferred upon Congress by . . . the Constitution to "define and punish . . . Offenses against the Law of Nations . . ." The grave issue raised by this case is whether a military commission so established and so authorized may disregard the procedural rights of an

259. See 126 S. Ct. 2749, 2803 (2006) (Breyer, J., Concurring).

260. See 327 U.S. at 13–15.

261. Such rules regarding command responsibility for war crimes were not clearly codified until Article 86 of Additional Protocol I to the 1949 Geneva Conventions. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), adopted June 8, 1977, art. 86, 1125 U.N.T.S. 3; see also Nomi Bar-Yaacov, *Command Responsibility*, in *CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW* (Roy Gutman & David Rieff eds., 1999).

262. See 327 U.S. at 25–29 (Murphy, J., dissenting).

263. *Id.* at 25.

accused person as guaranteed by the Constitution, especially by the due process clause of the Fifth Amendment.

The answer is plain. The Fifth Amendment guarantee of due process of law applies to “any person” who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color, or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. *No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States.*²⁶⁴

Justice Rutledge likewise urged the application of constitutional criminal due process requirements to military tribunals (even if explicitly congressionally authorized) charging any person (even aliens) with any crime (including war crimes).²⁶⁵ Rutledge’s opinion, in part, also has become the law and custom of war:

It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late. . . .

. . . [Our philosophy] is one of universal law, albeit imperfectly made flesh of our system and so dwelling among us.²⁶⁶

These dissenting opinions, like the overriding of *Yamashita* worked by the codification of the UCMJ,²⁶⁷ demonstrate an important debate and development in humanitarian law. The dissenters argue that there are constitutional limits on the U.S. government’s defense of the international laws of war. The limits they urge—regular judicial process under

264. *Id.* at 26–27 (emphasis added).

265. *See id.* at 68–81 (Rutledge, J., dissenting).

266. *Id.* at 41–42.

267. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2789 (2006) (discussing the outdatedness of *Yamashita* in light of the UCMJ and developments in international law).

the Fifth Amendment—have subsequently become articulated as a part of the international laws of war. As I will discuss shortly, developments in international and domestic humanitarian law have come to require full and fair process for all *suspected* war criminals and alleged enemy combatants. As such, the method engaged by the *Yamashita* majority now urges the dissenters' conclusions regarding due process.

Agreeing with the dissents from *Yamashita*,²⁶⁸ I mean to propose answers to the constitutional questions unasked and unanswered by the Court in *Hamdan*.²⁶⁹ The questions, collapsed into a single reductive hypothesis, may be put thus: Presuming adequate and explicit congressional authorization, would the Guantánamo detainees' treatment in the camps, tribunals, and commissions be constitutionally sufficient under the Fifth Amendment?

No.

Confronted with changing and far more explicit *domestic and international* humanitarian laws regarding detentions and crimes of war, the deferent and insubstantial due process of the Guantánamo commissions (as well as those tribunals at issue in *Quirin*²⁷⁰ and *Yamashita*²⁷¹) must be forbidden by a reading of the Fifth Amendment that—as *Quirin* and *Yamashita* require—draws upon contemporary laws and customs of domestic and international humanitarian law in order to determine the proper judicial process due to suspected combatants and war criminals under the U.S. Constitution.

Developments in domestic and international humanitarian law affirm the dissents from *Yamashita* by Justices Rutledge and Murphy.²⁷² These developments echo the *Yamashita* dissents²⁷³ and assert that war crime, like all crime, is a serious charge that must be proven individually amid the procedures and protections due to defendants in regular courts, which in the U.S. context means either federal criminal courts or military courts-martial.

The international custom and law (for many) regarding due process in trials for war crimes are clear. Affirming and updating the GPW, an international community of states signed the Rome Statute of the International Criminal Court, clearly defining violations of humanitarian law and permanently establishing the International Criminal Court as a neutral, multinational institution possessed of a complex, synthetic criminal

268. *Yamashita*, 327 U.S. at 26–41 (Murphy, J., dissenting); *id.* at 41–81 (Rutledge, J., dissenting).

269. *Hamdan*, 126 S. Ct. 2749.

270. 317 U.S. 1 (1942).

271. 327 U.S. 1.

272. *Id.* at 26–41 (Murphy, J., dissenting); *id.* at 41–81 (Rutledge, J., dissenting).

273. *Id.*

jurisprudence derived from its founding statute, international law, and the laws of the several states.²⁷⁴ The Rome Statute guarantees a robust due process.²⁷⁵ As a result of a melding of common- and civil-law traditions,²⁷⁶ the due process established by the Rome Statute does not include the U.S. criminal due process right to a jury trial.²⁷⁷ This exclusion parallels custom in U.S. military courts.²⁷⁸

The Rome Statute and the International Criminal Court ("ICC") expand and more explicitly articulate the emphatic but inconclusive due process provisions of the GPW.²⁷⁹ In suggesting that the universal norms of humanitarian law should guide the Court's adjudication, the *Yamashita* majority implies that present international law and custom ought to bear on the determination of proper due process for enemy combatants under the U.S. Constitution.²⁸⁰

The Clinton administration voted against the Rome Treaty in 1998, and subsequently refused to sign it; however, near the end of his second term, on December 31, 2000, President Clinton did sign the treaty, but urged his successor not to submit the treaty to the Senate for ratification. President Bush went further, nullifying Clinton's signature in 2002, and advancing fierce legislative and diplomatic measures to undermine the legitimacy and stunt the functional capacities of the ICC.²⁸¹ Nonetheless, the international humanitarian law and custom detailed in the Rome Statute must affect our own sense, under our own Constitution, of the rights and process due to suspected combatants and war criminals. Thus, if the U.S. government never signs the Rome Statute, and if our Congress specifically implements military tribunals to charge and try war crimes, such tribunals must be possessed of due process reflecting, if not participating in, international law and custom, including those of the International Criminal Court.²⁸²

274. See Rome Statute, *supra* note 212.

275. See *id.*

276. See Kenneth Roth, *The Case for Universal Jurisdiction*, FOREIGN AFF., Sept.–Oct. 2001 (referring to the "blend[ing of] civil and common law traditions").

277. See *id.*; Human Rights Watch, *Myths and Facts About the International Criminal Court*, <http://www.hrw.org/campaigns/icc/facts.htm> (last visited Dec. 26, 2007).

278. See *The International Criminal Court: Hearings Before the H. Comm. on International Relations*, 106th Cong. 94 (2000) (statement of Monroe Leigh on behalf of the American Bar Association); Roth, *supra* note 276.

279. See Rome Statute, *supra* note 212, arts. 17(2), 20(3)(b).

280. 327 U.S. 1, 24–25 (1946).

281. See American Servicemembers' Protection Act of 2002, Pub. L. No. 107-206, 116 Stat. 899 (codified as amended at 22 U.S.C. §§ 7421–7431); see also United Nations Association of the United States of America, Comparison of the Clinton and Bush Administration Positions on the International Criminal Court, <http://www.unausa.org/site/pp.asp?c=fvKRI8MPJpF&b=345925> (last visited Dec. 16, 2007).

282. See Rome Statute, *supra* note 212.

U.S. law since *Yamashita* has likewise established procedures and protections for persons accused of war crimes. In refusing to sign the Rome Statute, the U.S. executive and legislature instituted the War Crimes Act of 1996 (“WCA”).²⁸³ This act follows the GPW in defining war crimes in detail.²⁸⁴

Regardless of citizenship, victims or perpetrators of violations of humanitarian law²⁸⁵ by or against U.S. citizens or soldiers must be given the protections of the Fifth Amendment. These protections include the right to appellate review beyond the branch that set the terms of detention and trial. As such, international humanitarian law and custom have been codified in the U.S. Code in the form of the WCA.

Thus, international and domestic law and custom suggest that the Fifth Amendment’s due process requirements for trials of war crimes must closely parallel U.S. criminal due process. At the very least, trials of war crimes must mirror the process of U.S. courts-martial. The precedents established in *The Insular Cases*,²⁸⁶ *Hamdi*,²⁸⁷ and *Rasul*²⁸⁸

283. Pub. L. No. 104-192, 110 Stat. 2104 (codified as amended in scattered sections of 18 U.S.C.).

284. The War Crimes Act reads:

(a) Offense. Whoever, 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.

(b) Circumstances. The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act [8 U.S.C.S. § 1101]).

(c) Definition. As used in this section the term “war crime” means any conduct—

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character; or

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

Id.

285. Humanitarian law as described generally in the Geneva Convention, *supra* note 17.

286. *See infra* note 289.

287. 542 U.S. 507 (2004).

288. 542 U.S. 466 (2004).

support the argument that such incorporative procedures and protections are proper under the Court's Fifth Amendment jurisprudence.

The constitutional questions raised by the detention, trial, and punishment of persons in the U.S.—al Qaeda war are fundamental. Thus, even under *The Insular Cases* from the beginning of the twentieth century, in which the Constitution's application to foreign lands and bodies was often limited to culturally and contextually appropriate fundamental rights,²⁸⁹ humanitarian law establishes that due process akin to federal criminal or courts-martial proceedings is the appropriate, customary, and practicable process due to alien detainees.

The Insular Cases, in sum, suggest that constitutional due process may be inapt, unworkable, or otherwise unavailable in international contexts where local custom or pragmatic concern outweigh the claim to or interest in such process. Thus, claims of a constitutional right to jury trials²⁹⁰ and revenue provisions²⁹¹ in Puerto Rico, grand juries²⁹² and jury trials²⁹³ in the Philippines, and grand juries and jury trials in Hawaii²⁹⁴ were all examined by the Court to determine whether the normative ideal or material realization of such rights would be improper or impracticable. In the case of detention, trial, and punishment arising from violent political conflict, it is customary to have something quite close, if not identical to, federal criminal due process. At the very least, the process of courts-martial is certain. Because a consideration of local custom and logistical practicability might eschew constitutional rights under *The Insular Cases*, it would ultimately require reference to international and domestic humanitarian law and thus recommend a very close parallel to criminal or courts-martial procedures.

The *Verdugo-Urquidez* case rejected the contextual doctrines of *The Insular Cases* and denied the application of Constitutional rights to aliens abroad.²⁹⁵ Recent holdings regarding the Guantánamo camps, however, suggest that the starkest interpretation of *Verdugo-Urquidez*

289. In *Ross v. McIntyre*, 140 U.S. 453, 464 (1891), the Court said that “[t]he Constitution can have no operation in another country.” *The Insular Cases* began ten years later. They include *Reid v. Covert*, 354 U.S. 1 (1957), *Balzac v. Puerto Rico*, 258 U.S. 298 (1922), *Dorr v. United States*, 195 U.S. 138 (1904), and *Downes v. Bidwell*, 182 U.S. 244 (1901). In these cases, the Court progressively expanded the reach of the Constitution. The split among the plurality at the *Insular* era's end was only as to how many, and in what context, constitutional rights applied to citizens and aliens in U.S. territories or abroad claiming injury at the hands of the U.S. government. See *Reid*, 354 U.S. at 41–64 (Frankfurter, J., concurring); *id.* at 65–78 (Harlan, J., concurring); *id.* at 78–90 (Clark, J., dissenting).

290. See *Balzac*, 258 U.S. at 303–04.

291. See *Downes*, 182 U.S. at 249.

292. See *Ocampo v. United States*, 234 U.S. 91, 98 (1914).

293. See *Dorr*, 195 U.S. at 139.

294. See *Hawaii v. Mankichi*, 190 U.S. 197, 211 (1903).

295. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (“Indeed we have

may no longer be good law, especially given that case's far more conservative concurrence by Justice Kennedy, which partly maintained the model of *The Insular Cases*.²⁹⁶

The Court in *Hamdi* does not discuss suspected war criminals, but rather it discusses alleged enemy combatants.²⁹⁷ Additionally, *Hamdi* addresses only Guantánamo detainees who are also U.S. citizens.²⁹⁸ It is thus largely distinguishable from *Hamdan*. *Hamdi*, though, is instructive in its Fifth Amendment analysis regarding due process for *all* Guantánamo detainees in terms of *all* identifications, detentions, and trials.²⁹⁹

Despite recognizing the legitimacy of some of the government's detentions,³⁰⁰ O'Connor wrote for the *Hamdi* majority that "[e]ven in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status."³⁰¹

After dismissing the administration's claim that Hamdi conceded his enemy status,³⁰² O'Connor then examines whether providing federal judicial scrutiny of, or more rigorous due process duties within, the government's identification of combatants would be as unconstitutional and unworkable as the Bush administration claims:

rejected the claim that aliens are entitled to Fifth Amendment rights outside the territory of the United States.").

296. *Id.* at 275–79 (Kennedy, J., concurring).

297. 542 U.S. 507, 509 (2004) (“[W]e are called upon to consider the legality of the Government’s detention of a United States citizen on United States soil as an ‘enemy combatant.’”).

298. *Id.*

299. *See id.* at 524–37.

300. Justice O'Connor, writing for a plurality, held that in passing the Authorization for Use of Military Force, Congress authorized the detention of combatants such as Hamdi. *Hamdi*, 542 U.S. at 518. The holding here is exceedingly and intentionally narrow. The plurality in *Hamdi* concedes only that the AUMF amounts to a congressional authorization of the detention of enemy combatants “‘part of or supporting forces hostile to the United States or coalition partners’” in Afghanistan and who “‘engaged in an armed conflict against the United States’” there. *Id.* at 526 (citing Brief for Respondents, *supra* note 2, at 3).

301. *Id.* at 524.

302. In dismissing this claim, Justice O'Connor writes:

Hamdi's seizure cannot in any way be characterized as “undisputed,” as “those circumstances are neither conceded in fact, nor susceptible to concession in law, because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances.” Further, the “facts” that constitute the alleged concession are insufficient to support Hamdi's detention. . . . An assertion that one *resided* in a country in which combat operations are taking place is not a concession that one was “*captured* in a zone of active combat operations in a foreign theater of war,” and certainly is not a concession that one was “part of or supporting forces hostile to the United States or coalition partners” and “engaged in an armed conflict against the United States.” Accordingly, we reject any argument that Hamdi has made concessions that eliminate any right to further process.

Id. at 526–27 (citations omitted).

Under the Government's most extreme rendition . . . "[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict" ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme. At most, the Government argues, courts should review its determination that a citizen is an enemy combatant under a very deferential "some evidence" standard.³⁰³ Under this review, a court would assume the accuracy of the Government's articulated basis for Hamdi's detention . . . and assess only whether that articulated basis was a legitimate one. . . .

In response, Hamdi emphasizes that this Court consistently has recognized that an individual challenging his detention may not be held at the will of the Executive without recourse to some proceeding before a neutral tribunal to determine whether the Executive's asserted justifications for that detention have basis in fact and warrant in law. He argues that the Fourth Circuit inappropriately "ceded power to the Executive during wartime to define the conduct for which a citizen may be detained, judge whether that citizen has engaged in the proscribed conduct, and imprison that citizen indefinitely," and that due process demands that he receive a hearing in which he may . . . adduce his own counter evidence.³⁰⁴

Applying the test from *Mathews v. Eldridge*,³⁰⁵ O'Connor began the process of "weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process."³⁰⁶ O'Connor concluded that formal tribunal proceedings over, and federal judicial review of, *citizen* detainees' identification as *combatants* was proper due process given the liberty interests at issue.³⁰⁷ The imposition of such proceedings on the Bush administration and its military forces did not override detained citizens' liberty interests:

303. The *Hamdi* Court cited to *Superintendent, Mass. Corr. Inst. v. Hill*, 427 U.S. 445, 455-57 (1985), which held that "[u]nder the some evidence standard, the focus is exclusively on the factual basis supplied by the Executive to support its own determination." *Id.* at 527 (noting that the some evidence standard "does not require" a "weighing of the evidence," but calls for assessing "whether there is any evidence in the record that could support the conclusion").

304. *Id.* at 527-28 (citations omitted).

305. 424 U.S. 319 (1976).

306. *Hamdi*, 542 U.S. at 529 (quoting *Mathews*, 424 U.S. at 335). O'Connor further states that [t]he ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not "deprived of life, liberty, or property, without due process of law," is the test that we articulated in *Mathews v. Eldridge*

Id. at 528-29 (citation omitted).

307. *See id.* at 530-31.

“[I]t is clear that commitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection” Indeed, as *amicus* briefs from media and relief organizations emphasize, the risk of erroneous deprivation of a citizen’s liberty in the absence of sufficient process here is very real. Moreover, as critical as the Government’s interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat. Because we live in a society in which “[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person’s physical liberty,” our starting point for the *Mathews v. Eldridge* analysis is unaltered by the allegations surrounding the particular detainee or the organizations with which he is alleged to have associated. We reaffirm today the fundamental nature of a citizen’s right to be free from involuntary confinement by his own government without due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails.³⁰⁸

The due process interest that O’Connor defends under the *Hamdi-Mathews* analysis must be examined with consideration given to humanitarian law (including its international iterations) under *Quirin*³⁰⁹ and *Yamashita*.³¹⁰ This collectively suggests that such process must be robust and liberal; it must be similar to the process due to criminal defendants under the Fifth Amendment, or at least similar to courts-martial defendants under the UCMJ.³¹¹

The interests discussed by O’Connor, despite the consistent and quite explicit limitation of her holding to citizen detainees, transcend any distinction between aliens and citizens. The administration’s interests remain the same, unless it claims a greater, and thus discriminatory, interest in combatants and war criminals from nations other than the United States. Moreover, humanitarian law attests that the proper due process for persons deemed combatants in violent conflict between political communities should not hinge upon their status as aliens. Humanitarian law, at its core, seeks to establish and advance fundamental norms and minimum standards to ameliorate the brutality and injustice that so often accompany violent political enmity and distinction among states, nations, or nationalities.

This nondiscriminatory, universal aim of humanitarian law is sup-

308. *Id.* (citations omitted).

309. 317 U.S. 1 (1942).

310. 327 U.S. 1 (1946).

311. Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 (2000).

ported by *Rasul*, wherein the Court summarily rebuffed the administration's argument that aliens possess no right to petition for habeas corpus in the federal courts when detained in the U.S.—al Qaeda war.³¹² As Professor Katyal notes:

This holding [in *Rasul*] is potentially unbounded, perhaps enabling someone detained at Kandahar or even Diego Garcia to challenge his detention via the great writ. It appears to be a striking break from the 1950 *Johnson v. Eisentrager* decision, which strongly intimated that no such lawsuits were possible . . . [because] no alien outside of the United States could challenge his detention . . .³¹³

Moreover, Katyal contends that “[t]he [*Rasul*] majority refused to cabin its holding to nonmilitary tribunal detainees or to those only at Guantanamo. And the justices may have tipped their hands about . . . the extra-territorial application of the Constitution to the detainees.”³¹⁴

The *Rasul* Court determined that the Guantánamo camps are not “outside” the United States because they are on territory entirely under the control of the U.S. military.³¹⁵ Similarly, the detainees in *Rasul* had received neither military nor civil judicial process,³¹⁶ while the detainees in *Eisentrager* had already had a military trial, and were petitioning after its conclusion.³¹⁷ It was upon those far more reserved grounds that Justice Kennedy concurred with the *Rasul* majority, writing separately just as he had done in *Hamdan*.³¹⁸

The *Rasul* majority, however, does not rely on the points of distinction from *Eisentrager*. Rather, it is argued that “*Rasul* eviscerates [*Eisentrager*], leading Justice Scalia in his dissent to lament that ‘[t]oday’s opinion . . . overrules *Eisentrager*.’”³¹⁹ Thus, “the Court may have cut back on an argument the executive branch has held in its back pocket for many years . . . [by suggesting] that certain fundamental rights may apply abroad.”³²⁰

312. See 542 U.S. 466, 484 (2004).

313. Katyal, *supra* note 8, at 49 (citation omitted).

314. *Id.* at 55.

315. See 542 U.S. at 484.

316. See *id.* at 471–72.

317. See *Johnson v. Eisentrager*, 339 U.S. 763, 765–66 (1950).

318. See *Rasul*, 542 U.S. at 487–88 (Kennedy, J., concurring). Justice Kennedy distinguished the circumstances of *Rasul* from *Eisentrager* in two ways: first, by observing that Guantánamo is in “every practical respect a United States territory, and it is one far removed from any hostilities[.]” and second, by observing that “the detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status. In *Eisentrager*, the prisoners were tried and convicted by a military commission of violating the laws of war and were sentenced to prison terms.” *Rasul*, 542 U.S. at 487–88; see also Katyal, *supra* note 8, at 53–54 (discussing Kennedy’s concurrence).

319. Katyal, *supra* note 8, at 50–51 (quoting *Rasul*, 542 U.S. at 497 (Scalia, J., dissenting)).

320. *Id.* 54–55.

Indeed, the *Rasul* majority emphasizes the seriousness of the detainees' allegations regarding deprivations of liberty and affirms a line of precedent establishing Fifth Amendment rights for aliens outside the U.S.³²¹ With reference to Kennedy's concurrence in *Verdugo-Urquidez* "and cases cited therein[,]"³²² which collectively affirm at least some extraterritorial fundamental rights for non-citizens, the Court suggests that it is willing to recognize Fifth Amendment rights for all Guantánamo detainees, or indeed for any alien detainee held by the Bush administration in the Guantánamo camps or anywhere else in the world.³²³

Nonetheless, *Rasul*, like *Hamdan*, is decided upon *statutory*, not *constitutional* grounds regarding rights to federal review.³²⁴ Thus, the Constitution is not necessarily the sole ground upon which Guantánamo detainees may assert their rights under the great writ guaranteed by *Rasul*.³²⁵ But this says nothing of the Constitution's sufficiency as grounds for *relief* rather than *review*. The government in *Rasul* and elsewhere alleged that there are no substantive grounds upon which to give the detainees relief, even if there is a right to habeas review.³²⁶ *Hamdan* finds substantive grounds to relieve the detainees, thereby demanding the reconstruction of the Guantánamo commissions. However, *Hamdan* relies upon *statutory* grounds in doing so, referencing the Congress's ambiguous DTA, its minimal AUMF, and its regulations in the UCMJ.

The implications of *Rasul* and *Hamdan* regarding constitutional rights for non-citizens detained by the military are of great importance. *Rasul*'s implications are not realized in *Hamdan*, though they are surely not foreclosed either. Indeed, they seem nearly inevitable, which is why it is so disappointing that the Court failed to explicitly avow the Fifth Amendment, rather than the UCMJ, as the means by which fundamental minimums of humanitarian law govern the Guantánamo camps.

Some, however, including the Bush administration in *In re Guantanamo Detainees Cases*,³²⁷ have argued that the Fifth Amendment yields no substantive ground upon which to demand constitutional due process in executive military detentions of aliens abroad, irrespective of *Rasul*.³²⁸

321. See 542 U.S. at 484.

322. *Id.* at 484 n.15.

323. See *id.*

324. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764–67, 2775–77, 2790–93 (2006); *Rasul*, 542 U.S. at 478.

325. See *Rasul*, 542 U.S. at 478.

326. See *id.* at 478–79.

327. 355 F. Supp. 2d 443 (D.D.C. 2005).

328. See *id.* at 464.

I disagree. Apart from the obvious violation of equal protection resulting from such an irrational, if not xenophobic, regime delimited by citizenship,³²⁹ just as *Rasul* accompanied *Hamdi*'s recognition of the right of citizen-detainees to petition for habeas corpus, so too must the Fifth Amendment process due to citizen-detainees extend identically to aliens.

Recall the *Verdugo-Urquidez* case,³³⁰ in which a majority seemed to reject the contextual doctrines of *The Insular Cases* and deny the application of constitutional rights to aliens abroad. This case was central to the D.C. Circuit Court's decision in the predecessor of *Rasul*.³³¹ The D.C. Circuit held that aliens not in a U.S. territory have no right to a habeas petition, and no substantive constitutional rights at all.³³² The Supreme Court overruled the D.C. Circuit in *Rasul* as to the habeas petition, but did not expressly outline the constitutional rights of alien detainees.³³³ However, as Judge Green notes in *In re Guantanamo Detainees Cases*, the D.C. Circuit had held that the right to a habeas petition was directly tied to a substantive constitutional right to relief.³³⁴ The D.C. Circuit held, under *Eisentrager*, that alien detainees had no right to a habeas petition.³³⁵ The Supreme Court in *Rasul* disagreed, declaring *Eisentrager* inapplicable to Guantánamo detainees.³³⁶ As such, per Judge Green's detailed analysis, the contextual fundamental-rights analysis of *The Insular Cases* was reestablished in *Rasul*. As Judge Green thoughtfully notes:

[R]ather than citing *Eisentrager* or even the portion of *Verdugo-Urquidez* that referenced the "emphatic" inapplicability of the Fifth Amendment to aliens outside U.S. territory, the *Rasul* Court specifically referenced the portion of Justice Kennedy's concurring opinion in *Verdugo-Urquidez* that discussed the continuing validity of the *Insular Cases*, Justice Harlan's concurring opinion in *Reid v. Covert*, and Justice Kennedy's own consideration of whether requiring adherence to constitutional rights outside of the United States would be "impracticable and anomalous."³³⁷

Hence, according to Judge Green, the *Rasul* majority concludes that "[p]etitioners' allegations . . . unquestionably describe custody in viola-

329. See Neal K. Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1381-93 (2007).

330. 494 U.S. 259 (1990).

331. See *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

332. See *id.* at 1141-45.

333. See 542 U.S. 466, 484 (2004).

334. See 355 F. Supp. 2d 443, 449 (D.D.C. 2005).

335. See *id.* at 459.

336. See *Rasul*, 542 U.S. at 484-85.

337. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 463.

tion of the Constitution or laws or treaties of the United States.”³³⁸ Judge Green thus reads *Rasul*, *The Insular Cases*, and other precedents to suggest that constitutional rights may apply to aliens abroad under U.S. custody, so long as doing so is neither impracticable nor anomalous.³³⁹ The question then becomes what process would pass this standard. The “law of war,” which as I’ve argued, must comprise due process in the case of the Guantánamo detainees, is in fact the source of Congress’s and the President’s constitutional authority over such detentions and trials. The D.C. Circuit Court held that with regard to the UCMJ’s courts-martial proceedings, it would be neither impracticable nor anomalous to apply fundamental norms of international humanitarian law, incorporated in and through the Fifth Amendment, to all persons detained by the U.S. government.³⁴⁰ Thus, *Rasul* and *In re Guantanamo Detainees* support the view that the Fifth Amendment provides substantive grounds for review and relief for any detainee deprived constitutional due process by the U.S. government or military.

In sum, my adoption and elaboration of Caron and others’ argument regarding the Fifth Amendment’s incorporation of humanitarian law and custom, and of Judge Green’s reading of *Rasul*, suggest that the Guantánamo commissions and tribunals must be based on humanitarian law, which requires adherence to the minimal standards of the GPW’s Article 3, including due process closely parallel, if not identical, to that of U.S. criminal law or courts-martial.³⁴¹ This would include individual criminal charges, full and fair evidentiary hearing of all charges and defenses, and a right to external appellate review.³⁴² This fundamental right to decent treatment and due process must be granted all detainees, whether citizen or alien, with regard to their identification, detention, treatment, trial, and punishment as combatants or war criminals.

V. CONCLUSION: CONSTITUTIONALISM AND POSITIVISM IN HUMANITARIAN LAW³⁴³

Irrespective of whether any particular instrument, such as the GPW,

338. *Rasul*, 542 U.S. at 498–99 (internal quotation marks omitted).

339. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 463.

340. *See id.* 478–81. Judge Green thus held that the Bush administration’s Combatant Status Review Tribunals, created after *Hamdi* and *Rasul*, were unconstitutional. *See id.* at 481. As such, Judge Green held that detainees must have access to review by the federal courts, with constitutional due process. *See id.* at 463. Moreover, Judge Green held that Taliban combatants may rightly invoke the protections of the Geneva Convention, which she held was self-executing, according to relevant law and custom. *See id.* at 478–79 (citing *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 165 (D.D.C. 2004)).

341. *See Geneva Convention*, *supra* note 17.

342. *See id.*

343. The remarks in this conclusion clearly have much in common with the contrast drawn by

positively governs the Bush administration's treatment of the Guantánamo detainees, humanitarian law necessarily does. From this conclusion, we must consult the GPW and other sources for foundational principles and minimum standards regarding the duties and rights due to suspected combatants and war criminals under humanitarian law. From this vantage, the principles of humanitarian law are principles of U.S. constitutional law and of due process under the Fifth Amendment specifically. As such, the general principles and minimum standards articulated in the Geneva Convention's Common Article 3,³⁴⁴ for example, must be identified and applied to the U.S.–al Qaeda war through concerted reference to domestic and international precedents and proceedings to identify what process is due to al Qaeda and aligned combatants under the U.S. Constitution. In this case, again, the question of whether the GPW itself establishes self-executing grounds for individual detainees' claims against the Bush administration becomes irrelevant.

And so, whether construed as a claim under a self-executing Geneva Convention, under the UCMJ,³⁴⁵ which recognizes the "law of war," or under a properly contextual and nondiscriminatory Due Process Clause, humanitarian law protects the Guantánamo detainees. At no point may the government compromise, by will or neglect, the minimum standards or fundamental norms of humanitarian law that are embodied in the individual instruments thereof, such as those of the Geneva Convention requiring regular and civilized due process and prohibiting brutality, degradation, discrimination, humiliation, threat, and disappearance.³⁴⁶

Every alleged violation of these minimum standards and fundamental norms, and indeed every prayer for relief under humanitarian law, will require individual factual judgment of particular acts and evidence through interpretive application of *both* positive legal obligations *and* universal norms animating those obligations. This is how, in the case of humanitarian law governing the transhistorical, cross-cultural problem of political violence, constitutionalism necessarily works through but exceeds positivism. This is how the laws of war necessarily apply to the War on Terror. This is why we—Attorney General Ashcroft and his successors, the Supreme Court, and I—can, do, and must speak of even unprecedented wars with reference to the universal principles and partic-

Ronald Dworkin between his own jurisprudential theory of interpretivism and the positivism of H.L.A. Hart (among others). Compare RONALD DWORKIN, *LAW'S EMPIRE* (1986), with H.L.A. HART, *THE CONCEPT OF LAW* (1961).

344. See Geneva Convention, *supra* note 17, art. 3.

345. 10 U.S.C. §§ 801–946 (2000).

346. See Geneva Convention, *supra* note 17, art. 3.

ular instruments of humanitarian law, including those that are allegedly inapplicable and anachronistic.

In interpretive translation, we apply foundational norms and minimum standards to do what we must in advancing and defending the long-suffering attempt, through law, to at least minimize, if not eradicate, the horror, cruelty, violence, and damage of violent political conflict. Doing so requires, and has always required, that we advance humanitarian law through international and domestic doctrines of war and crime. There are challenges to doing so, but analytically, politically, and ethically, it is crucial that we ask not whether, but only *how*, we can advance these doctrines. Unprecedented times are not unthinkable ones. Changes and differences in conditions of political violence must lead us only and always back to universal principles of law advanced and embodied in particular precedential laws. This method represents how, and the U.S.–al Qaeda war shows why, constitutionalism surely must exceed positivism. Otherwise, the inevitable descriptive distinctiveness accompanying historical, geopolitical, and technological change will perpetually leave us wholly without law amid terrible and terribly familiar scenes of war, torture, jail, and death—scenes that have perpetually been our constitutional laws' origins and primary objects of address.