“The . . . shortcoming’s [of the charges against Hamdan] . . . are not merely formal, but are indicative of a broader inability on the Executive’s part here to satisfy the most basic preconditions -- at least in the absence of specific congressional authorization – for establishment of military commissions: military necessity.”

“The Court’s conclusion rests ultimately on a single ground: Congress has not issued the Executive a ‘blank check’”

“Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution’s three-part system is designed to avoid. It is imperative, then, that when military tribunals are established, full and proper authority exists for the Presidential directive.”

“It is not clear where the Court derives the authority – or the audacity – to contradict [the Executive’s] . . . determination . . . [of] military necessities relating to the disabling, deterrence, and punishment of the mass-murdering terrorists of September 11.”

“[T]he plurality’s inflexible approach has dangerous implications for the Executive’s ability to discharge his duties as Commander in Chief in future cases.”

HAMDAN v. RUMSFELD
548 U.S. 557, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2006)

Salim Ahmed Hamdan, a citizen of Yeman, was captured in Afghanistan during U.S. military operations there following al Qaeda’s attack on the U.S. of September 11, 2001. After over three years in custody without trial, he was charged with conspiracy to commit acts of terrorism and ordered to be tried by a military commission. The military commission was established under a presidential order of 2001 referred to in this case as the “November 13 Order.” From the U.S. naval prison in Guantanamo Bay, Cuba, Hamdan asked the U.S. District Court in the District of Columbia for a writ of habeas corpus. He claimed that the November 13 Order lacked necessary congressional authorization and that the procedures of the military commission violated basic principles of both military law (as specified in the Uniform Code of Military Justice or UCMJ) and international law (as specified in the Geneva Conventions), including his right to see the evidence against him. The District Court granted Hamdan’s request for habeas corpus, the Court of Appeals reversed, and the Supreme Court granted certiorari in November, 2005, “to decide whether the military commission convened to try Hamdan has authority to do so, and whether Hamdan may rely on the Geneva Conventions in these proceedings.”

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

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

II

On February 13, 2006, the Government filed a motion to dismiss the writ of certiorari. The ground cited for dismissal was the recently enacted Detainee Treatment Act of 2005 (DTA), Pub.L. 109-148, 119 Stat. 2739. We postponed our ruling on that motion pending argument on the merits, and now deny it.

The DTA, which was signed into law on December 30, 2005, addresses a broad swath of subjects related to detainees. It places restrictions on the treatment and interrogation of detainees in U.S. custody, and it furnishes procedural protections for U.S. personnel accused of engaging in improper interrogation. . . .

Subsection (e) of § 1005, which is entitled "judicial Review of Detention of Enemy Combatants," supplies the basis for the Government's jurisdictional argument. The subsection contains three numbered paragraphs. The first paragraph amends the judicial code as follows:
"1) In general[,] Section 2241 of title 28, United States Code, is amended by adding at the end the following: . . .

"'(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider-
"'(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or
"'(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who-
"'(A) is currently in military custody; or
"'(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit . . .to have been properly detained as an enemy combatant.'. . .

Paragraph (3) . . . governs judicial review of final decisions of military commissions. . . It vests in the Court of Appeals for the District of Columbia Circuit "exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 or any successor military order . . . Review is as of right for any alien sentenced to death or a term of imprisonment of 10 years or more, but is at the Court of Appeals' discretion in all other cases. The scope of review is limited to the following inquiries:

"(i) whether the final decision [of the military commission] was consistent with the standards and procedures specified [by the Department of Defense] . . .[and] "(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States."

Finally, § 1005 contains an "effective date" provision, which reads as follows:
"(1) In genera[,] [t]his section shall take effect on the date of the enactment of this Act.
"(2) Review of Combatant Status Tribunal [determining "enemy combatant" status] and Military Commission Decisions [determining guilt or innocence of unlawful acts]. . . shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act." . . .

The Act is silent about whether paragraph (1) of subsection (e) [barring judicial consideration of habeas requests] "shall apply" to [habeas] claims pending on the date of enactment.

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 [denying habeas] below.

Hamdan objects . . . on both constitutional and statutory grounds . . .that the Government's preferred reading raises grave questions about Congress' authority to impinge upon this Court's appellate jurisdiction, particularly in habeas cases. Support for this argument is drawn from *Ex parte Yerger,* 8 Wall. 85 (1869), in which, having explained that "the denial to this court of appellate jurisdiction" to consider an original writ of habeas corpus would "greatly weaken the efficacy of the writ," we held that Congress would not be presumed to have effected such denial absent an unmistakably clear statement to the contrary; see also . . . *Durousseau v. United States,* 6 Cranch 307 (1810) (opinion for the Court by Marshall, C.J.) (The "appellate powers of this court" are not created by statute but are "given by the constitution". . . . Cf. *Ex parte McCardle,* 7 Wall. 506 (1869) (holding that Congress had validly foreclosed one avenue of appellate review where its repeal of habeas jurisdiction . . . could not have been "plainer instance of positive exception". Hamdan also suggests that, if the Government's reading is correct, Congress has unconstitutionally suspended the writ of habeas corpus.

We find it unnecessary to reach either of these arguments. Ordinary principles of statutory construction suffice to rebut the Government's theory -- at least insofar as this case, which was pending at the time the DTA was enacted, is concerned.

The Government acknowledges that only paragraphs (2) [prohibiting law suits against the U.S. or its agents arising out of treatment of alien detainees] and (3) of subsection (e) [restricting review of judgments of guilt by military commissions] are expressly made applicable to pending cases, but argues that the omission of paragraph (1) [regarding habeas petitions] from the scope of that express statement is of no moment. This is so, we are told, because Congress' failure to expressly reserve federal courts' jurisdiction over pending cases erects a presumption against jurisdiction, and that presumption is rebutted by neither the text nor the legislative history of the DTA.

[**Editors' note:** In rejecting the Government's argument *for* jurisdiction-stripping ,

Justice Stevens goes on to read prior cases to support a presumption *against* jurisdiction stripping without clear congressional intent where, like here, jurisdiction "takes away" rights that a party possessed at the time he allegedly acted in violation of law. The right in question would have been a right to challenge the legality of his detention by petitioning an Article III court for a writ of habeas corpus. Justice Stevens also cites a statement during the floor debate by a sponsor of the DTA that preserves federal jurisdiction over habeas petitions pending at the time of enactment. To the government's argument that denying post-enactment habeas petitions while permitting pending habeas petitions would produced an "absurd result," Justice Stevens remarked: "There is nothing absurd about a scheme under which pending habeas actions -- particularly those, like this one, that challenge the very legitimacy of the tribunals whose judgments Congress would like to have reviewed -- are preserved, and more routine challenges to final decisions rendered by those tribunals are carefully channeled to a particular court and through a particular lens of review."]

III

Relying on our decision in *Schlesinger* v.*Councilman,* 420 U.S. 738, the Government argues that, even if we have statutory jurisdiction, we should apply the "judge-made rule that civilian courts should await the final outcome of on-going military proceedings before entertaining an attack on those proceedings." Like the District Court and the Court of Appeals before us, we reject this argument.

[**Editors' note:** Justice Stevens then offers what is mostly a precedential argument for rejecting the government's abstention argument.]

. . . While we certainly do not foreclose the possibility that abstention may be appropriate in some cases seeking review of ongoing military commission proceedings (such as military commissions convened on the battlefield), the foregoing discussion makes clear that, under our precedent, abstention is not justified here. We therefore proceed to consider the merits of Hamdan's challenge.

IV

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

Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8 and Article III, § 1 of the Constitution unless some other part of that document authorizes a response to the felt need. . . . And that authority, if it

exists, can derive only from the powers granted jointly to the President and Congress in time of war.

The Constitution makes the President the "Commander in Chief" of the Armed Forces but vests in Congress the powers to "declare War ... and make Rules concerning Captures on Land and Water," to "define and punish ... Offences against the Law of Nations," and "to make Rules for the Government and Regulation of the land and naval Forces." The interplay between these powers was described by Chief Justice Chase in the seminal case of *Ex parte Milligan:*
"The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President .... Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature." 4 Wall., at 139-140.

Whether Chief Justice Chase was correct in suggesting that the President may constitutionally convene military commissions "without the sanction of Congress" in cases of "controlling necessity" is a question this Court has not answered definitively, and need not answer today. For we held in *Quirin* that Congress had, through Article of War 15 [now Article 21 of the UCMJ] sanctioned the use of military commissions in such circumstances. . . .

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

The Government would have us dispense with the inquiry that the *Quirin* Court undertook and find in either the AUMF or the DTA specific, overriding authorization for the very commission that has been convened to try Hamdan. Neither of these congressional Acts, however, expands the President's authority to convene military commissions. . . .

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

V

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

The third type of commission, convened as an "incident to the conduct of war" when there is a need "to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war," *Quirin,* 317 U.S., at 28-29, has been described as "utterly different" from the other two. Not only is its jurisdiction limited to offenses cognizable during time of war, but its role is primarily a fact finding one --to determine, typically on the battlefield itself, whether the defendant has violated the law of war. The last time the U.S. Armed Forces used the law-of-war military commission was during World War II. In *Quirin,* this Court sanctioned President Roosevelt's use of such a tribunal to try Nazi saboteurs captured on American soil during the War. And in *In re Yamashita,* we held that a military commission had jurisdiction to try a Japanese commander for failing to prevent troops under his command from committing atrocities in the Philippines. 327 U.S. 1, (1946).

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

The classic treatise penned by Colonel William Winthrop, whom we have called "he 'Blackstone of Military Law,'" describes at least four preconditions for exercise of jurisdiction by a tribunal of the type convened to try Hamdan. First, "[a] military commission, (except where otherwise authorized by statute), can legally assume jurisdiction only of offenses committed within the field of the command of the convening commander." Winthrop 836. The "field of command" in these circumstances means the "theatre of war." *Ibid.* Second, the offense charged "must have been committed within the period of the war." *Id.,* at 837. No jurisdiction exists to try offenses [by military commissions] "committed either before or after the war." *Ibid.* Third, a military commission not established pursuant to martial law or an occupation may try only "[i]ndividuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war" and members of one's own army "who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war." *Id.,* at 838. Finally, a law-of-war commission has jurisdiction to try only two kinds of offense: "violations of the laws and usages of war cognizable by military tribunals only," and "[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war." *Id.,* at 839.

All parties agree that Colonel Winthrop's treatise accurately describes the common law governing military commissions, and that the jurisdictional limitations he identifies were incorporated in Article of War 15 and, later, Article 21 of the UCMJ. It also is undisputed that Hamdan's commission lacks jurisdiction to try him unless the charge "properly set[s] forth, not only the details of the act charged, but the circumstances conferring *jurisdiction*." *Id.,* at 842 (emphasis in original). The question is whether the preconditions designed to ensure that a military necessity exists to justify the use of this extraordinary tribunal have been satisfied here.

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

These facts alone cast doubt on the legality of the charge and, hence, the commission; as Winthrop makes plain, the offense alleged must have been committed both in a theater of war and *during,* not before, the relevant conflict. But the deficiencies in the time and place allegations also underscore -- indeed are symptomatic of -- the most serious defect of this charge: The offense it alleges [i.e., conspiracy] is not triable by law-of-war military commission. See *Yamashita,* 327 U.S., at 13, 66 S.Ct. 340 ("neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge proffered against him is of a violation of the law of war."

There is no suggestion that Congress has, in exercise of its constitutional authority to "define and punish ... Offences against the Law of Nations," positively identified "conspiracy" as a war crime. As we explained in *Quirin,* that is not necessarily fatal to the Government's claim of authority to try the alleged offense by military commission; Congress, through Article 21 of the UCMJ, has "incorporated by reference" the common law of war, which may render triable by military commission certain offenses not defined by statute. When, however, neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the [common law] precedent must be plain and unambiguous. To demand any less would be to risk concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution. Cf. *Loving v. United States,* 517 U.S. 748, 771 (1996) (acknowledging that Congress "may not delegate the power to make laws" . . . The Federalist No. 47 (J. Madison) ("the accumulation of all powers legislative, executive and judiciary in the same hands ... may justly be pronounced the very definition of tyranny.". . .

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

explains that under the common law governing military commissions, it is not enough to intend to violate the law of war and commit overt acts in furtherance of that intention unless the overt acts either are themselves offenses against the law of war or constitute steps sufficiently substantial to qualify as an attempt. See Winthrop 841 ("T]he jurisdiction of the military commission should be restricted to cases of offence consisting in *overt acts, i.e.,* in unlawful commissions or actual attempts to commit, and not in intentions merely"(emphasis in original)).

The Government cites three sources that it says show otherwise. First, it points out that the Nazi saboteurs in *Quirin* were charged with conspiracy. Second, it observes that Winthrop at one point [839] . . . identifies conspiracy as an offense "prosecuted by military commissions." Finally, it notes that another military historian, Charles Roscoe Howland, lists conspiracy "'to violate the laws of war by destroying life or property in aid of the enemy'" as an offense that was tried as a violation of the law of war during the Civil War. (C. Howland, Digest of Opinions of the Judge Advocates General of the Army 1071 (1912) (hereinafter Howland)). On close analysis, however, these sources at best lend little support to the Government's position and at worst undermine it. By any measure, they fail to satisfy the high standard of clarity required to justify the use of a military commission.

That the defendants in *Quirin* were charged with conspiracy is not persuasive, since the Court declined to address whether the offense actually qualified as a violation of the law of war-let alone one triable by military commission. The *Quirin* defendants were charged with the following offenses:
"[I.] Violation of the law of war.
"[II.] Violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy.
"[III.] Violation of Article 82, defining the offense of spying.
"[IV.] Conspiracy to commit the offenses alleged in charges [I, II, and III]."317 U.S., at 23, 63 S.Ct. 1.

The Government, defending its charge, argued that the conspiracy alleged "constitute[d] an additional violation of the law of war." *Id.,* at 15, 63 S.Ct. 1. The saboteurs disagreed; they maintained that "[t]he charge of conspiracy can not stand if the other charges fall." The Court, however, declined to resolve the dispute. It concluded, first, that the specification supporting Charge I adequately alleged a "violation of the law of war" that was not "merely colorable or without foundation." The facts the Court deemed sufficient for this purpose were that the defendants, admitted enemy combatants, entered upon U.S. territory in time of war without uniform "for the purpose of destroying property used or useful in prosecuting the war." That act was " [a] hostile and warlike" one The Court was careful in its decision to identify an overt, "complete"act. Responding to the argument that the saboteurs had "not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations" and therefore had not violated the law of war, the Court responded that they had actually "passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose." "the offense was complete when with that purpose they entered -- or, having so entered, they remained upon -- our territory in time of war without uniform or other appropriate means of identification."

Turning to the other charges alleged, the Court explained that "[s]ince the first specification of Charge I sets forth a violation of the law of war, we have no occasion to pass on the adequacy of the second specification of Charge I, or to construe the 81st and 82nd Articles of War for the purpose of ascertaining whether the specifications under Charges II and III allege violations of those Articles or whether if so construed they are constitutional." *Id.,* at 46. No mention was made at all of Charge IV -- the conspiracy charge.

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

That limitation makes eminent sense when one considers the necessity from whence this kind of military commission grew: The need to dispense swift justice, often in the form of execution, to illegal belligerents captured on the battlefield. . . . The same urgency would not have been felt vis-à-vis enemies who had done little more than agree to violate the laws of war. . . . The *Quirin* Court acknowledged as much when it described the President's authority to use law-of-war military commissions as the power to "seize and subject to disciplinary measures those enemies *who in their attempt to thwart or impede our military effort* have violated the law of war." (emphasis added).

Winthrop and Howland are only superficially more helpful to the Government. Howland, granted, lists "conspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy" as one of over 20 "offenses against the laws and usages of war" "passed upon and punished by military commissions." Howland 1071. But while the records of cases that Howland cites following his list of offenses against the law of war support inclusion of the other offenses mentioned, they provide no support for the inclusion of conspiracy as a violation of the law of war. . . . Winthrop, apparently recognizing as much, excludes conspiracy of any kind from his own list of offenses against the law of war. See Winthrop 839-840.

Winthrop does, unsurprisingly, include "criminal conspiracies" in his list of "[c]rimes and statutory offenses cognizable by State or U.S. courts" and triable by martial law or military government commission. See *id.,* at 839. And, in a footnote, he cites several Civil War examples of "conspiracies of this class, *or of the first and second classes combined*." *Id.,* at 839, n. 5 (emphasis added). The Government relies on this footnote for its contention that conspiracy was triable both as an ordinary crime (a crime of the "first class" and, independently, as a war crime (a crime of the "second class". But the footnote will not support the weight the Government places on it.

As we have seen, the military commissions convened during the Civil War functioned at once as martial law or military government tribunals and as law-of-war commissions. Accordingly, they regularly tried war crimes and ordinary crimes together. Indeed, as Howland observes, "[n]ot infrequently the crime, as charged and found, was a combination of the two species of offenses." Howland 1071; see also Davis 310, n. 2; Winthrop 842. The example he

gives is "'murder in violation of the laws of war.'" Winthrop's conspiracy "of the first and second classes combined" is, like Howland's example, best understood as a species of compound offense of the type tried by the hybrid military commissions of the Civil War. It is not a stand-alone offense against the law of war. Winthrop confirms this understanding later in his discussion, when he emphasizes that "*overt acts*" constituting war crimes are the only proper subject at least of those military tribunals not convened to stand in for local courts. Winthrop 841[.]

Justice THOMAS cites as evidence that conspiracy is a recognized violation of the law of war the Civil War indictment against Henry Wirz, which charged the defendant with "'[m]aliciously, willfully, and traitorously ... combining, confederating, and conspiring [with others] to injure the health and destroy the lives of soldiers in the military service of the United States ... to the end that the armies of the United States might be weakened and impaired, in violation of the laws and customs of war.'" . . . As shown by the specification supporting that charge, however, Wirz was alleged to have *personally committed* a number of atrocities against his victims, including torture, injection of prisoners with poison, and use of "ferocious and bloodthirsty dogs" to "seize, tear, mangle, and maim the bodies and limbs" of prisoners, many of whom died as a result. Crucially, Judge Advocate General Holt determined that one of Wirz's alleged co-conspirators, R.B. Winder, should *not* be tried by military commission because there was as yet insufficient evidence of his own personal involvement in the atrocities: "[I]n the case of R.B. Winder, *while the evidence at the trial of Wirz was deemed by the court to implicate him in the conspiracy* against the lives of all Federal prisoners in rebel hands, *no such specific overt acts of violation of the laws of war* are as yet fixed upon him as to make it expedient to prefer formal charges and bring him to trial."

Finally, international sources confirm that the crime charged here is not a recognized violation of the law of war. As observed above, none of the major treaties governing the law of war identifies conspiracy as a violation thereof. And the only "conspiracy" crimes that have been recognized by international war crimes tribunals (whose jurisdiction often extends beyond war crimes proper to crimes against humanity and crimes against the peace) are conspiracy to commit genocide and common plan to wage aggressive war, which is a crime against the peace and requires for its commission actual participation in a "concrete plan to wage war." 1 Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945-1 October 1946, p. 225 (1947). The International Military Tribunal at Nuremberg, over the prosecution's objections, pointedly refused to recognize as a violation of the law of war conspiracy to commit war crimes . . . and convicted only Hitler's most senior associates of conspiracy to wage aggressive war[.] As one prominent figure from the Nuremberg trials has explained, members of the Tribunal objected to recognition of conspiracy as a violation of the law of war on the ground that "[t]he Anglo-American concept of conspiracy was not part of European legal systems and arguably not an element of the internationally recognized laws of war." T. Taylor, Anatomy of the Nuremberg Trials: A Personal Memoir 36 (1992); see also *id.,* at 550 (observing that Francis Biddle, who as Attorney General prosecuted the defendants in *Quirin,* thought the French judge had made a "'persuasive argument that conspiracy in the truest sense is not known to international law'".

In sum, the sources that the Government and Justice THOMAS rely upon to show that

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

The charge's shortcomings are not merely formal, but are indicative of a broader inability on the Executive's part here to satisfy the most basic precondition -- at least in the absence of specific congressional authorization -- for establishment of military commissions: military necessity. Hamdan's tribunal was appointed not by a military commander in the field of battle, but by a retired major general stationed away from any active hostilities. . . . Hamdan is charged not with an overt act for which he was caught red handed in a theater of war and which military efficiency demands be tried expeditiously, but with an *agreement* the inception of which long predated the attacks of September 11, 2001 and the AUMF. That may well be a crime, but it is not an offense that "by the law of war may be tried by military commissio[n]." None of the overt acts alleged to have been committed in furtherance of the agreement is itself a war crime, or even necessarily occurred during time of, or in a theater of, war. Any urgent need for imposition or execution of judgment is utterly belied by the record; Hamdan was arrested in November 2001 and he was not charged until mid-2004. These simply are not the circumstances in which, by any stretch of the historical evidence or this Court's precedents, a military commission established by Executive Order under the authority of Article 21 of the UCMJ may lawfully try a person and subject him to punishment.

VI

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

A

The commission's procedures are set forth in Commission Order No. 1, which was amended most recently on August 31, 2005 -- after Hamdan's trial had already begun. [Justice Stevens then describes the procedures in detail]

B

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

C

In part because the difference between military commissions and courts-martial originally was a difference of jurisdiction alone, and in part to protect against abuse and ensure evenhandedness under the pressures of war, the procedures governing trials by military commission historically have been the same as those governing courts-martial. See, *e.g.,* 1 The War of the Rebellion 248 (2d series 1894) (General Order 1 issued during the Civil War required military commissions to "be constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise". Accounts of commentators from Winthrop through General Crowder -- who drafted Article of War 15 and whose views have been deemed "authoritative" by this Court, confirm as much.. As recently as the Korean and Vietnam wars, during which use of military commissions was contemplated but never made, the principle of procedural parity was espoused as a background assumption. See Paust, Antiterrorism Military Commissions: Courting Illegality, 23 Mich. J. Int'l L. 1, 3-5 (2001-2002).

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

The procedures and rules of evidence employed during Yamashita's trial departed so far from those used in courts-martial that they generated an unusually long and vociferous critique from two Members of this Court, [Justices Rutledge and Murphy, dissenting in *In re Yamashita*]. Among the dissenters' primary concerns was that the commission had free rein to consider all evidence "which in the commission's opinion 'could be of assistance in proving or disproving the charge,' without any of the usual modes of authentication."

The majority, however, did not pass on the merits of Yamashita's procedural challenges because it concluded that his status disentitled him to any protection under the Articles of War (specifically, those set forth in Article 38, which would become Article 36 of the UCMJ) or the Geneva Convention of 1929. . . .

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

The uniformity principle is not an inflexible one; it does not preclude all departures from the procedures dictated for use by courts-martial. But any departure must be tailored to the exigency that necessitates it. See Winthrop 835, n. 81. That understanding is reflected in Article 36 of the UCMJ. . . .

Article 36 places two restrictions on the President's power to promulgate rules of procedure for courts-martial and military commissions alike. First, no procedural rule he adopts may be

"contrary to or inconsistent with" the UCMJ -- however practical it may seem. Second, the rules adopted must be "uniform insofar as practicable." That is, the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable.

. . . Among the inconsistencies Hamdan identifies is that between § 6 of the Commission Order, which permits exclusion of the accused from proceedings and denial of his access to evidence in certain circumstances, and the UCMJ's requirement that "a]ll ... proceedings" other than votes and deliberations by courts-martial "shall be made a part of the record and shall be in the presence of the accused." 10 U.S.C.A. § 839(c) (Supp.2006). Hamdan also observes that the Commission Order dispenses with virtually all evidentiary rules applicable in courts-martial.

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

Hamdan has the better of this argument. Without reaching the question whether any provision of Commission Order No. 1 is strictly "contrary to or inconsistent with" other provisions of the UCMJ, we conclude that the "practicability" determination the President has made is insufficient to justify variances from the procedures governing courts-martial. Subsection (b) of Article 36 was added after World War II, and requires a different showing of impracticability from the one required by subsection (a). Subsection (a) requires that the rules the President promulgates for courts-martial, provost courts, and military commissions alike conform to those that govern procedures in *Article III courts,* "so far as *he considers* practicable." 10 U.S.C. § 836(a) (emphasis added). Subsection (b), by contrast, demands that the rules applied in courts-martial, provost courts, and military commissions -- whether or not they conform with the Federal Rules of Evidence-be "uniform *insofar as practicable*."§ 836(b) (emphasis added). Under the latter provision, then, the rules set forth in the Manual for Courts-Martial must apply to military commissions unless impracticable.

The President here has determined, pursuant to subsection (a), that it is impracticable to apply the rules and principles of law that govern "the trial of criminal cases in the United States district courts,"§ 836(a), to Hamdan's commission. We assume that complete deference is owed that determination. The President has not, however, made a similar official determination that it is impracticable to apply the rules for courts-martial. And even if subsection (b)'s requirements may be satisfied without such an official determination, the requirements of that subsection are not satisfied here.

Nothing in the record before us demonstrates that it would be impracticable to apply

court-martial rules in this case. There is no suggestion, for example, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility. Assuming *arguendo* that the reasons articulated in the President's Article 36(a) determination ought to be considered in evaluating the impracticability of applying court-martial rules, the only reason offered in support of that determination is the danger posed by international terrorism. Without for one moment underestimating that danger, it is not evident to us why it should require, in the case of Hamdan's trial, any variance from the rules that govern courts-martial.

The absence of any showing of impracticability is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself: the right to be present. Whether or not that departure technically is "contrary to or inconsistent with" the terms of the UCMJ § 836(a), the jettisoning of so basic a right cannot lightly be excused as "practicable."

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

. . . That Article not having been complied with here, the rules specified for Hamdan's trial are illegal.

D

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

i

The Court of Appeals relied on *Johnson v. Eisentrager,* 339 U.S. 763 (1950), to hold that Hamdan could not invoke the Geneva Conventions to challenge the Government's plan to prosecute him in accordance with Commission Order No. 1. *Eisentrager* involved a challenge by 21 German nationals to their 1945 convictions for war crimes by a military tribunal convened in Nanking, China, and to their subsequent imprisonment in occupied Germany. The petitioners argued, *inter alia,* that the 1929 Geneva Convention rendered illegal some of the procedures employed during their trials, which they said deviated impermissibly from the procedures used by courts-martial to try American soldiers. We rejected that claim on the merits because the petitioners (unlike Hamdan here) had failed to identify any prejudicial disparity "between the Commission that tried [them] and those that would try an offending soldier of the American forces of like rank," and in any event could claim no protection, under the 1929 Convention, during trials for crimes that occurred before their confinement as prisoners of war.

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

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

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

ii

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

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

We need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories. Article 3, often referred to as Common Article 3 because, like Article 2, it appears

in all four Geneva Conventions, provides that in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, certain provisions protecting "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by ... detention." One such provision prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being "'international in scope,'" does not qualify as a "'conflict not of an international character.'" That reasoning is erroneous. . . . Common Article 3 . . . affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory "power" who are involved in a conflict "in the territory of" a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase "not of an international character" bears its literal meaning. . . .

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

iii

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

The Government offers only a cursory defense of Hamdan's military commission in light of Common Article 3. As Justice KENNEDY explains, that defense fails because "[t]he regular military courts in our system are the courts-martial established by congressional statutes." At a minimum, a military commission "can be 'regularly constituted' by the standards of our military justice system only if some practical need explains deviations from court-martial practice." As we have explained, see Part VI-C, *supra,* no such need has been demonstrated here.

iv

Inextricably intertwined with the question of regular constitution is the evaluation of the

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

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

v

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

VII

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

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

It is so ordered.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.
Justice **BREYER**, with whom Justice **KENNEDY**, Justice **SOUTER**, and Justice **GINSBURG** join, concurring.

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

Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine -- through democratic means -- how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.

Justice **KENNEDY**, with whom Justice **SOUTER,** Justice **GINSBURG**, and Justice **BREYER** join as to Parts I and II, concurring in part.

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

I

Trial by military commission raises separation-of-powers concerns of the highest order. Located within a single branch, these courts carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review. Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid. It is imperative, then, that when military tribunals are established, full and proper authority exists for the Presidential directive.

The proper framework for assessing whether Executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952). "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." And "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."

In this case, as the Court observes, the President has acted in a field with a history of congressional participation and regulation. In the Uniform Code of Military Justice (UCMJ) . . . Congress has set forth governing principles for military courts. The UCMJ as a whole establishes an intricate system of military justice. It authorizes courts-martial in various forms, it regulates the organization and procedure of those courts, it defines offenses and rights for the

accused, and it provides mechanisms for appellate review[.] . . . [T]he statute further recognizes that special military commissions may be convened to try war crimes. While these laws provide authority for certain forms of military courts, they also impose limitations, at least two of which control this case. If the President has exceeded these limits, this becomes a case of conflict between Presidential and congressional action --a case within Justice Jackson's third category, not the second or first.

. . .

[The UCMJ] allows the President to implement and build on the UCMJ's framework by adopting procedural regulations, subject to three requirements: (1) Procedures for military courts must conform to district-court rules insofar as the President "considers practicable" (2) the procedures may not be contrary to or inconsistent with the provisions of the UCMJ; and (3) "insofar as practicable" all rules and regulations under § 836 must be uniform, a requirement, as the Court points out, that indicates the rules must be the same for military commissions as for courts-martial unless such uniformity is impracticable.

As the Court further instructs, even assuming the first and second requirements of § 836 are satisfied here -- a matter of some dispute, the third requires us to compare the military-commission procedures with those for courts-martial and determine, to the extent there are deviations, whether greater uniformity would be practicable. . . . The rules for military courts may depart from federal-court rules whenever the President "considers" conformity impracticable, § 836(a); but the statute requires procedural uniformity across different military courts "insofar as [uniformity is] practicable," § 836(b), not insofar as the President considers it to be so. The Court is right to conclude this is of relevance to our decision. Further, as the Court is also correct to conclude, the term "practicable" cannot be construed to permit deviations based on mere convenience or expedience. "practicable" means "feasible," that is, "possible to practice or perform" or "capable of being put into practice, done, or accomplished." Congress' chosen language, then, is best understood to allow the selection of procedures based on logistical constraints, the accommodation of witnesses, the security of the proceedings, and the like. Insofar as the "[p]retrial, trial, and post-trial procedures" for the military commissions at issue deviate from court-martial practice, the deviations must be explained by some such practical need.

. . .

In [UCMJ] § 821 Congress has addressed the possibility that special military commissions -- criminal courts other than courts-martial -- may at times be convened. At the same time, however, the President's authority to convene military commissions is limited: It extends only to "offenders or offenses" that "by statute or by the law of war may be tried by" such military commissions. The Government does not claim to base the charges against Hamdan on a statute; instead it invokes the law of war. That law, as the Court explained in *Ex parte Quirin,* derives from "rules and precepts of the law of nations" it is the body of international law governing armed conflict. If the military commission at issue is illegal under the law of war, then an offender cannot be tried "by the law of war" before that commission.

The Court is correct to concentrate on one provision of the law of war that is applicable to our Nation's armed conflict with al Qaeda in Afghanistan and, as a result, to the use of a military commission to try Hamdan. That provision is Common Article 3 of the four Geneva

Conventions of 1949. It prohibits, as relevant here, "[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." The provision is part of a treaty the United States has ratified and thus accepted as binding law. By Act of Congress, moreover, violations of Common Article 3 are considered "war crimes," punishable as federal offenses, when committed by or against United States nationals and military personnel. There should be no doubt, then, that Common Article 3 is part of the law of war as that term is used in [UCMJ] § 821.

The dissent by Justice THOMAS argues that Common Article 3 nonetheless is irrelevant to this case because in *Johnson v. Eisentrager,* 339 U.S. 763 (1950), it was said to be the "obvious scheme" of the 1929 Geneva Convention that "[r]ights of alien enemies are vindicated under it only through protests and intervention of protecting powers," *i.e*., signatory states. As the Court explains, this language from *Eisentrager* is not controlling here. Even assuming the *Eisentrager* analysis has some bearing upon the analysis of the broader 1949 Conventions and that, in consequence, rights are vindicated "under [those Conventions]" only through protests and intervention, Common Article 3 is nonetheless relevant to the question of authorization under [UCMJ] § 821. Common Article 3 is part of the law of war that Congress has directed the President to follow in establishing military commissions. Consistent with that view, the *Eisentrager* Court itself considered on the merits claims that "procedural irregularities" under the 1929 Convention "deprive[d] the Military Commission of jurisdiction."

In another military commission case, *In re Yamashita,* the Court likewise considered on the merits -- without any caveat about remedies under the Convention -- a claim that an alleged violation of the 1929 Convention "establish[ed] want of authority in the commission to proceed with the trial." That is the precise inquiry we are asked to perform here.

Assuming the President has authority to establish a special military commission to try Hamdan, the commission must satisfy Common Article 3's requirement of a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." The terms of this general standard are yet to be elaborated and further defined, but Congress has required compliance with it by referring to the "law of war" in [UCMJ] § 821. The Court correctly concludes that the military commission here does not comply with this provision.

Common Article 3's standard of a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," supports, at the least, a uniformity principle similar to that codified in [UCMJ] § 836(b). The concept of a "regularly constituted court" providing "indispensable" judicial guarantees requires consideration of the system of justice under which the commission is established, though no doubt certain minimum standards are applicable.

The regular military courts in our system are the courts-martial established by congressional statutes. Acts of Congress confer on those courts the jurisdiction to try "any person" subject to war crimes prosecution. [UCMJ] § 818. As the Court explains, moreover, while special military commissions have been convened in previous armed conflicts -- a practice

recognized in § 821 -- those military commissions generally have adopted the structure and procedure of courts-martial. Today, moreover, § 836(b) -- which took effect after the military trials in the World War II cases invoked by the dissent [in *Yamashita*] -- codifies this presumption of uniformity at least as to "[p]retrial, trial, and post-trial procedures." Absent more concrete statutory guidance, this historical and statutory background -- which suggests that some practical need must justify deviations from the court-martial model -- informs the understanding of which military courts are "regularly constituted" under United States law.

In addition, whether or not the possibility, contemplated by the regulations here, of midtrial procedural changes could by itself render a military commission impermissibly irregular, an acceptable degree of independence from the Executive is necessary to render a commission "regularly constituted" by the standards of our Nation's system of justice. And any suggestion of Executive power to interfere with an ongoing judicial process raises concerns about the proceedings' fairness. Again, however, courts-martial provide the relevant benchmark. Subject to constitutional limitations, see *Ex parte Milligan,* Congress has the power and responsibility to determine the necessity for military courts, and to provide the jurisdiction and procedures applicable to them. The guidance Congress has provided with respect to courts-martial indicates the level of independence and procedural rigor that Congress has deemed necessary, at least as a general matter, in the military context.

At a minimum a military commission like the one at issue --a commission specially convened by the President to try specific persons without express congressional authorization -- can be "regularly constituted" by the standards of our military justice system only if some practical need explains deviations from court-martial practice. In this regard the standard of Common Article 3, applied here in conformity with § 821, parallels the practicability standard of § 836(b). Section 836, however, is limited by its terms to matters properly characterized as procedural-that is, "[p]retrial, trial, and post-trial procedures" while Common Article 3 permits broader consideration of matters of structure, organization, and mechanisms to promote the tribunal's insulation from command influence. Thus the combined effect of the two statutes discussed here -- § § 836 and 821 -- is that considerations of practicability must support departures from court-martial practice. Relevant concerns, as noted earlier, relate to logistical constraints, accommodation of witnesses, security of the proceedings, and the like, not mere expedience or convenience. This determination, of course, must be made with due regard for the constitutional principle that congressional statutes can be controlling, including the congressional direction that the law of war has a bearing on the determination.

These principles provide the framework for an analysis of the specific military commission at issue here.

II

In assessing the validity of Hamdan's military commission the precise circumstances of this case bear emphasis. The allegations against Hamdan are undoubtedly serious. Captured in Afghanistan during our Nation's armed conflict with the Taliban and al Qaeda -- a conflict that continues as we speak -- Hamdan stands accused of overt acts in furtherance of a conspiracy to

commit terrorism: delivering weapons and ammunition to al Qaeda, acquiring trucks for use by Osama bin Laden's bodyguards, providing security services to bin Laden, and receiving weapons training at a terrorist camp. Nevertheless, the circumstances of Hamdan's trial present no exigency requiring special speed or precluding careful consideration of evidence. For roughly four years, Hamdan has been detained at a permanent United States military base in Guantanamo Bay, Cuba. And regardless of the outcome of the criminal proceedings at issue, the Government claims authority to continue to detain him based on his status as an enemy combatant.

Against this background, the Court is correct to conclude that the military commission the President has convened to try Hamdan is unauthorized. [**Editors' note:** Justice Kennedy proceeds to compare specific ways in which "the structure and composition of the military commission deviate from conventional court-martial standards" under the UCMJ.]

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

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

Instead, the order imposes just one evidentiary rule: "evidence shall be admitted if ... the evidence would have probative value to a reasonable person." Although it is true some military commissions applied an amorphous evidence standard in the past, ([including the 1942] order convening military commission to try Nazi saboteurs), the evidentiary rules for those commissions were adopted before Congress enacted the uniformity requirement of [the] Act of May 5, 1950 [amending the UCMJ]. And while some flexibility may be necessary to permit trial of battlefield captives like Hamdan, military statutes and rules already provide for introduction of deposition testimony for absent witnesses[.] Indeed, the deposition-testimony provision specifically mentions military commissions and thus is one of the provisions the Government concedes must be followed by the commission at issue. See *ante,* at 2790-2791. That provision authorizes admission of deposition testimony only if the witness is absent for specified reasons, § 849(d) --a requirement that makes no sense if military commissions may consider all probative evidence. . . .

The rule here could permit admission of multiple hearsay and other forms of evidence generally prohibited on grounds of unreliability. Indeed, the commission regulations specifically contemplate admission of unsworn written statements; and they make no provision

for exclusion of coerced declarations save those "established to have been made as a result of torture," Besides, even if evidence is deemed nonprobative by the presiding officer at Hamdan's trial, the military-commission members still may view it. In another departure from court-martial practice the military commission members may object to the presiding officer's evidence rulings and determine themselves, by majority vote, whether to admit the evidence

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

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

III

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

. . .whether Common Article 3's standard -- a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," -- necessarily requires that the accused have the right to be present at all stages of a criminal trial; . . . [whether] . . Article 75 of Protocol I to the Geneva Conventions is binding law notwithstanding the earlier decision by our Government not to accede to the Protocol[; and whether] the conspiracy charge against Hamdan [is a valid charge under the law of war]. . . . In light of the conclusion that the military commissions at issue are unauthorized Congress may choose to provide further guidance in this area. Congress, not the Court, is the branch in the better position to undertake the "sensitive task of establishing a principle not inconsistent with the national interest or international justice."

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

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

Justice SCALIA, with whom Justice THOMAS and Justice ALITO join, dissenting.

On December 30, 2005, Congress enacted the Detainee Treatment Act (DTA). It unambiguously provides that, as of that date, "no court, justice, or judge" shall have jurisdiction to consider the habeas application of a Guantanamo Bay detainee. Notwithstanding this plain directive, the Court today concludes that, on what it calls the statute's *most natural* reading,

every "court, justice, or judge" before whom such a habeas application was pending on December 30 has jurisdiction to hear, consider, and render judgment on it. This conclusion is patently erroneous. And even if it were not, the jurisdiction supposedly retained should, in an exercise of sound equitable discretion, not be exercised.

I

A

. . .

An ancient and unbroken line of authority attests that statutes ousting jurisdiction unambiguously apply to cases pending at their effective date. For example, in *Bruner v. United States,* 343 U.S. 112 (1952), we granted certiorari to consider whether the Tucker Act's provision denying district court jurisdiction over suits by "officers"of the United States barred a suit by an *employee* of the United States. After we granted certiorari, Congress amended the Tucker Act by adding suits by "'employees' " to the provision barring jurisdiction over suits by officers. This statute narrowing the jurisdiction of the district courts "became effective" while the case was pending before us . . . and made no explicit reference to pending cases. Because the statute "did not reserve jurisdiction over pending cases," we held that it clearly ousted jurisdiction over them. Summarizing centuries of practice, we said: "this rule -- that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law -- has been adhered to consistently by this Court." . . .

Though the Court resists the *Bruner* rule, it cannot cite a *single case* in the history of Anglo-American law (before today) in which a jurisdiction-stripping provision was denied immediate effect in pending cases, absent an explicit statutory reservation. By contrast, the cases granting such immediate effect are legion, and they repeatedly rely on the plain language of the jurisdictional repeal as an "inflexible trump" by requiring an express reservation to save pending cases. [**Editors' note:** Here Justice Scalia cites 14 cases in support of this point.] . . .

C

Worst of all is the Court's reliance on the legislative history of the DTA to buttress its implausible reading of DTA § 1005(e) (1). We have repeatedly held that such reliance is impermissible where, as here, the statutory language is unambiguous. But the Court nevertheless relies both on floor statements from the Senate and (quite heavily) on the drafting history of the DTA. To begin with floor statements: The Court urges that some "statements made by Senators preceding passage of the Act lend further support to" the Court's interpretation, citing excerpts from the floor debate that support its view. The Court immediately goes on to discount numerous floor statements by the DTA's sponsors that flatly contradict its view, because "those statements appear to have been inserted into the Congressional Record *after* the Senate debate." Of course this observation, even if true, makes no difference unless one indulges the fantasy that Senate floor speeches are attended (like the Philippics of Demosthenes) by throngs of eager listeners, instead of being delivered (like Demosthenes' practice sessions on the beach) alone into a vast emptiness. Whether the floor statements are spoken where no Senator hears, or written where no Senator reads, they represent at most the views of a single Senator. In any event, the Court greatly exaggerates the one-sidedness of the portions of the floor debate that clearly occurred before the DTA's enactment.

Some of the statements of Senator Graham, a sponsor of the bill, only make sense on the assumption that pending cases are covered. And at least one opponent of the DTA unmistakably expressed his understanding that it would terminate our jurisdiction in this very case. (Of course in its discussion of legislative history the Court wholly ignores the President's signing statement, which explicitly set forth *his* understanding that the DTA ousted jurisdiction over pending cases.)
[**Editors' note:** Justice Scalia added a footnote here that quoted from the president's signing statement: "[T]he executive branch shall construe section 1005 to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus, described in section 1005." President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006" (Dec. 30, 2005), available at http://www.whitehouse. gov/news/releases/2005/ 12/print/20051230 8.html.]

But selectivity is not the greatest vice in the Court's use of floor statements to resolve today's case. These statements were made when Members of Congress were fully aware that our continuing jurisdiction *over this very case* was at issue. The question was divisive, and floor statements made on both sides were undoubtedly opportunistic and crafted *solely* for use in the briefs in this very litigation. See, *e.g.,* 151 Cong. Rec. S14257-S14258 (Dec. 21, 2005) (statement of Sen. Levin) (arguing against a reading that would "tri[p] the Federal courts of jurisdiction to consider pending cases, *including the Hamdan case now pending in the Supreme Court*" . .

D

A final but powerful indication of the fact that the Court has made a mess of this statute is the nature of the consequences that ensue. Though this case concerns a habeas application challenging a trial by military commission, DTA § 1005(e)(1) strips the courts of jurisdiction to hear or consider *any* "application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." The vast majority of pending petitions, no doubt, do not relate to military commissions at all, but to more commonly challenged aspects of "detention" such as the terms and conditions of confinement. The Solicitor General represents that "[h]abeas petitions have been filed on behalf of a purported 600 [Guantanamo Bay] detainees," including one that "seek[s] relief on behalf of every Guantanamo detainee who has not already filed an action." The Court's interpretation transforms a provision abolishing jurisdiction over *all* Guantanamo-related habeas petitions into a provision that retains jurisdiction over cases sufficiently numerous to keep the courts busy for years to come.

II

Because I would hold that § 1005(e)(1) unambiguously terminates the jurisdiction of all courts to "hear or consider" pending habeas applications, I must confront petitioner's arguments that the provision, so interpreted, violates the Suspension Clause. This claim is easily dispatched. We stated in *Johnson v. Eisentrager,* 339 U.S. 763 (1950):
"We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes."

Notwithstanding the ill-considered dicta in the Court's opinion in *Rasul v. Bush,* 542 U.S. 466 (2004), it is clear that Guantanamo Bay, Cuba, is outside the sovereign "territorial jurisdiction"of the United States. See *id.,* at 500-505 (SCALIA, J., dissenting). Petitioner, an enemy alien detained abroad, has no rights under the Suspension Clause. . . .

Though it does not squarely address the issue, the Court hints ominously that "the Government's preferred reading" 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. . . .

III

Even if Congress had not clearly and constitutionally eliminated jurisdiction over this case, neither this Court nor the lower courts ought to exercise it. Traditionally, equitable principles govern both the exercise of habeas jurisdiction and the granting of the injunctive relief sought by petitioner. In light of Congress's provision of an alternate avenue for petitioner's claims in § 1005(e)(3), those equitable principles counsel that we abstain from exercising jurisdiction in this case.

In requesting abstention, the Government relies principally on *Schlesinger v.Councilman,* 420 U.S. 738 in which we abstained from considering a serviceman's claim that his charge for marijuana possession was not sufficiently "service-connected" to trigger the subject-matter jurisdiction of the military courts-martial. Admittedly, *Councilman* does not squarely control petitioner's case, but it provides the closest analogue in our jurisprudence. As the Court describes [the decision], *Councilman* "identifie[d] two considerations of comity that together favor[ed] abstention pending completion of ongoing court-martial proceedings against service personnel." But the Court errs in finding these considerations inapplicable to this case. Both of them, and a third consideration not emphasized in *Councilman,* all cut in favor of abstention here.

First, the Court observes that *Councilman* rested in part on the fact that "military discipline and, therefore, the efficient operation of the Armed Forces are best served if the military justice system acts without regular interference from civilian courts," and concludes that "Hamdan is not a member of our Nation's Armed Forces, so concerns about military discipline do not apply." This is true enough. But for some reason, the Court fails to make any inquiry into whether military commission trials might involve *other* "military necessities" or "unique military exigencies" comparable in gravity to those at stake in *Councilman*. To put this in context: The charge against the respondent in *Councilman* was the off-base possession and sale of marijuana while he was stationed in Fort Sill, Oklahoma. The charge against the petitioner here is joining and actively abetting the murderous conspiracy that slaughtered thousands of innocent American civilians without warning on September 11, 2001. While *Councilman* held that the prosecution of the former charge involved "military necessities" counseling against our interference, the Court *does not even ponder the same question* for the latter charge.

The reason for the Court's "blinkered study" of this question is not hard to fathom. The principal opinion on the merits makes clear that it does not believe that the trials by military commission involve any "military necessity" *at all:* "The charge's shortcomings ... are indicative of a broader inability on the Executive's part here to satisfy the most basic precondition ... for establishment of military commissions: military necessity." This is quite at odds with the views on this subject expressed by our political branches. Because of "military necessity," a joint session of Congress authorized the President to "use all necessary and appropriate force," including military commissions, "against those nations, organizations, or persons [such as petitioner] he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." In keeping with this authority, the President has determined that "[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order ... to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals." It is not clear where the Court derives the authority -- or the audacity-- to contradict this determination. If "military necessities" relating to "duty" and "discipline" required abstention in *Councilman,* military necessities relating to the disabling, deterrence, and punishment of the mass-murdering terrorists of September 11 require abstention all the more here. . . .

For the foregoing reasons, I dissent.

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

. . . The Court . . .openly flouts our well-established duty to respect the Executive's judgment in matters of military operations and foreign affairs. The Court's evident belief that *it* is qualified to pass on the "[m]ilitary necessity" of the Commander in Chief's decision to employ a particular form of force against our enemies is so antithetical to our constitutional structure that it simply cannot go unanswered. I respectfully dissent.

I

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

As I explained in *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004), the structural advantages attendant to the Executive Branch -- namely, the decisiveness, "'activity, secrecy, and dispatch'" that flow from the Executive's "'unity'" (quoting The Federalist No. 70 . . . (A.Hamilton)) -- led the Founders to conclude that the "president ha[s] primary responsibility -- along with the necessary power -- to protect the national security and to conduct the Nation's foreign relations." Consistent with this conclusion, the Constitution vests in the President "[t]he executive Power," Art. II, § 1, provides that he "shall be Commander in Chief" of the Armed Forces, § 2, and places in him the power to recognize foreign governments, § 3. This Court has observed that these provisions confer upon the President broad constitutional authority to protect the Nation's security in the manner he deems fit. . . .

Congress, to be sure, has a substantial and essential role in both foreign affairs and national security. But "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act," and "[s]uch failure of Congress ... does not, 'especially ... in the areas of foreign policy and national security,' imply 'Congressional disapproval' of action taken by the Executive." Rather, in these domains, the fact that Congress has provided the President with broad authorities does not imply -- and the Judicial Branch should not infer -- that Congress intended to deprive him of particular powers not specifically enumerated. . . .

When "the President acts pursuant to an express or implied authorization from Congress," his actions are "'supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion ... rest[s] heavily upon any who might attack it.'" (*Youngstown Sheet & Tube Co. v. Sawyer* (1952) (Jackson, J., concurring)). Accordingly, in the very context that we address today, this Court has concluded that "the detention and trial of petitioners -- ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger -- are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." *Ex parte Quirin* (1942).

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

Although the Court concedes the legitimacy of the President's use of military commissions in certain circumstances, it suggests that the AUMF has no bearing on the scope of the President's power to utilize military commissions in the present conflict. Instead, the Court determines the scope of this power based exclusively on Article 21 of the UCMJ, the successor to Article 15 of the Articles of War, which *Quirin* held "authorized trial of offenses against the law of war before [military] commissions." . . . Nothing in the language of Article 21, however, suggests that it outlines the entire reach of congressional authorization of military commissions in all conflicts -- quite the contrary, the language of Article 21 presupposes the existence of military commissions under an independent basis of authorization. Indeed, consistent with *Hamdi's* conclusion that the AUMF itself authorizes the trial of unlawful combatants, the original sanction for military commissions historically derived from congressional authorization

of “the initiation of war” with its attendant authorization of “the employment of all necessary and proper agencies for its due prosecution.” W. Winthrop, Military Law and Precedents 831 (2d ed.1920) Accordingly, congressional authorization for military commissions pertaining to the instant conflict derives not only from Article 21 of the UCMJ, but also from the more recent, and broader, authorization contained in the AUMF. [**Editors' note:** Justice Thomas adds in a note here that “[a]lthough the President very well may have inherent authority to try unlawful combatants for violations of the law of war before military commissions, we need not decide that question because Congress has authorized the President to do so.”]

I note the Court's error respecting the AUMF not because it is necessary to my resolution of this case . . .but to emphasize the complete congressional sanction of the President's exercise of his commander-in-chief authority to conduct the present war. In such circumstances, as previously noted, our duty to defer to the Executive's military and foreign policy judgment is at its zenith; it does not countenance the kind of second-guessing the Court repeatedly engages in today. Military and foreign policy judgments “‘are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.’”

It is within this framework that the lawfulness of Hamdan's commission should be examined.

II

. . . I agree with the plurality that Winthrop's treatise sets forth the four relevant considerations for determining the scope of a military commission's jurisdiction, considerations relating to the (1) time and (2) place of the offense, (3) the status of the offender, and (4) the nature of the offense charged. Winthrop 836-840. The Executive has easily satisfied these considerations here. The plurality's contrary conclusion rests upon an incomplete accounting and an unfaithful application of those considerations.

A

The first two considerations are that a law-of-war military commission may only assume jurisdiction of “offences committed within the field of the command of the convening commander,” and that such offenses “must have been committed within the period of the war.” Here . . . the Executive has determined that the theater of the present conflict includes “Afghanistan, Pakistan and other countries” where al Qaeda has established training camps, and that the duration of that conflict dates back (at least) to Usama bin Laden's August 1996 “*Declaration of Jihad Against the Americans,*” Under the Executive's description of the conflict, then, every aspect of the charge, which alleges overt acts in “Afghanistan, Pakistan, Yemen and other countries” taking place from 1996 to 2001, satisfies the temporal and geographic prerequisites for the exercise of law-of-war military commission jurisdiction. And these judgments pertaining to the scope of the theater and duration of the present conflict are committed solely to the President in the exercise of his commander-in-chief authority. . . .

Nevertheless, the plurality concludes that the legality of the charge against Hamdan is

doubtful because "Hamdan is charged not with an overt act for which he was caught redhanded in a theater of war ... but with an *agreement* the inception of which long predated ... the [relevant armed conflict]." The plurality's willingness to second-guess the Executive's judgments in this context, based upon little more than its unsupported assertions, constitutes an unprecedented departure from the traditionally limited role of the courts with respect to war and an unwarranted intrusion on executive authority. And even if such second-guessing were appropriate, the plurality's attempt to do so is unpersuasive.

As an initial matter, the plurality relies upon the date of the AUMF's enactment to determine the beginning point for the "period of the war," thereby suggesting that petitioner's commission does not have jurisdiction to try him for offenses committed prior to the AUMF's enactment. But this suggestion betrays the plurality's unfamiliarity with the realities of warfare and its willful blindness to our precedents. The starting point of the present conflict (or indeed any conflict) is not determined by congressional enactment, but rather by the initiation of hostilities. Thus, Congress' enactment of the AUMF did not mark the beginning of this Nation's conflict with al Qaeda, but instead authorized the President to use force in the midst of an ongoing conflict. Moreover, while the President's "war powers" may not have been activated until the AUMF was passed, the date of such activation has never been used to determine the scope of a military commission's jurisdiction. Instead, the traditional rule is that "[o]ffenses committed before a formal declaration of war or before the declaration of martial law may be tried by military commission." Green, The Military Commission, 42 Am. J. Int'l L. 832, 848 (1948) (hereinafter Green); . . . cf. *Yamashita,* 327 U.S., at 13 ("the extent to which the power to prosecute violations of the law of war shall be exercised before peace is declared rests, not with the courts, but with the political branch of the Government". Consistent with this principle, on facts virtually identical to those here, a military commission tried Julius Otto Kuehn for conspiring with Japanese officials to betray the United States Fleet to the Imperial Japanese Government prior to its attack on Pearl Harbor. Green 848.

Moreover, the President's determination that the present conflict dates at least to 1996 is supported by overwhelming evidence. [**Editor's note:** Here Justice Thomas cites State Department documents and other sources regarding statements by al Qaeda leaders from 1996, al Qaeda's bombings of U.S. military and other targets, the bombing of the World Trade center in 1993, and the U.S. military responses to these activities.] Based on the foregoing, the President's judgment -- that the present conflict substantially predates the AUMF, extending at least as far back as al Qaeda's 1996 declaration of war on our Nation, and that the theater of war extends at least as far as the localities of al Qaeda's principal bases of operations -- is beyond judicial reproach. And the plurality's unsupportable contrary determination merely confirms that "'the Judiciary has neither aptitude, facilities nor responsibility'" for making military or foreign affairs judgments.

B

The third consideration identified by Winthrop's treatise for the exercise of military commission jurisdiction pertains to the persons triable before such a commission, Winthrop 838. Law-of-war military commissions have jurisdiction over "'individuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war,'" They also have jurisdiction over "[i]rregular armed bodies or persons not forming part of the

organized forces of a belligerent" "who would not be likely to respect the laws of war." Indeed, according to Winthrop [at 784], such persons are not "within the protection of the laws of war" and were "liable to be shot, imprisoned, or banished, either summarily where their guilt was clear or upon trial and conviction by military commission." This consideration is easily satisfied here, as Hamdan is an unlawful combatant charged with joining and conspiring with a terrorist network dedicated to flouting the laws of war.

C

The fourth consideration relevant to the jurisdiction of law-of-war military commissions relates to the nature of the offense charged. As relevant here, such commissions have jurisdiction to try "'[v]iolations of the laws and usages of war cognizable by military tribunals only,'" (quoting Winthrop 839). . . .

The common law of war as it pertains to offenses triable by military commission is derived from the "experience of our wars" and our wartime tribunals, Winthrop 839, and "the laws and usages of war as understood and practiced by the civilized nations of the world,"11 Op. Atty. Gen. 297, 310 (1865). Moreover, the common law of war is marked by two important features. First, as with the common law generally, it is flexible and evolutionary in nature, building upon the experience of the past and taking account of the exigencies of the present. . . . The legitimate use of the great power of war, or rather the prohibitions upon the use of that power, increase or diminish as the necessity of the case demands." *Id*., at 300. Accordingly, this Court has recognized that the "jurisdiction" of "our common-law war courts" has not been "prescribed by statute," but rather "as been adapted in each instance to the need that called it forth." Second, the common law of war affords a measure of respect for the judgment of military commanders. Thus, "[t]he commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles. His authority in each case is from the law and usage of war." 11 Op. Atty. Gen., at 305. In recognition of these principles, Congress has generally "'left it to the President, and the military commanders representing him, to employ the commission, *as occasion may require,* for the investigation and punishment of violations of the law of war.'" . . . (quoting Winthrop 831; emphasis added).

In one key respect, the plurality departs from the proper framework for evaluating the adequacy of the charge against Hamdan under the laws of war. The plurality holds that where, as here, "neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent [establishing whether an offense is triable by military commission] must be plain and unambiguous." This is a pure contrivance, and a bad one at that. It is contrary to the presumption we acknowledged in *Quirin,* namely, that the actions of military commissions are "not to be set aside by the courts without the *clear conviction* that they are" unlawful, 317 U.S., at 25 (emphasis added). It is also contrary to *Yamashita,* which recognized the legitimacy of that military commission notwithstanding a substantial disagreement pertaining to whether Yamashita had been charged with a violation of the law of war. Compare 327 U.S., at 17. Nor does it find support from the separation of powers authority cited by the plurality. Indeed, Madison's praise of the separation of powers in The Federalist No. 47, if it has any relevance at all, merely highlights the illegitimacy of today's judicial intrusion onto core executive prerogatives in the waging of war, where executive competence is

at its zenith and judicial competence at its nadir.

The plurality's newly minted clear-statement rule is also fundamentally inconsistent with the nature of the common law which, by definition, evolves and develops over time and does not, in all cases, "say what may be done." 11 Op. Atty. Gen., at 300. Similarly, it is inconsistent with the nature of warfare, which also evolves and changes over time, and for which a flexible, evolutionary common-law system is uniquely appropriate. Though the charge against Hamdan easily satisfies even the plurality's manufactured rule, the plurality's inflexible approach has dangerous implications for the Executive's ability to discharge his duties as Commander in Chief in future cases. We should undertake to determine whether an unlawful combatant has been charged with an offense against the law of war with an understanding that the common law of war is flexible, responsive to the exigencies of the present conflict, and deferential to the judgment of military commanders.

1

Under either the correct, flexible approach to evaluating the adequacy of Hamdan's charge, or under the plurality's new, clear-statement approach, Hamdan has been charged with conduct constituting two distinct violations of the law of war cognizable before a military commission: membership in a war-criminal enterprise and conspiracy to commit war crimes. The charging section of the indictment alleges both that Hamdan "willfully and knowingly joined an enterprise of persons who shared a common criminal purpose," and that he "conspired and agreed with [al Qaeda] to commit ... offenses triable by military commission." . . .

The common law of war establishes that Hamdan's willful and knowing membership in al Qaeda is a war crime chargeable before a military commission. Hamdan, a confirmed enemy combatant and member or affiliate of al Qaeda, has been charged with willfully and knowingly joining a group (al Qaeda) whose purpose is "to support violent attacks against property and nationals (both military and civilian) of the United States." . . .

The conclusion that membership in an organization whose purpose is to violate the laws of war is an offense triable by military commission is confirmed by the experience of the military tribunals convened by the United States at Nuremberg. [**Editors' note:** Justice Thomas here offers a brief account of the Nuremberg trials.]

Moreover, the Government has alleged that Hamdan was not only a member of al Qaeda while it was carrying out terrorist attacks on civilian targets in the United States and abroad, but also that Hamdan aided and assisted al Qaeda's top leadership by supplying weapons, transportation, and other services. These allegations further confirm that Hamdan is triable before a law-of-war military commission for his involvement with al Qaeda. . . . Undoubtedly, the conclusion that such conduct violates the law of war led to the enactment of Article 104 of the UCMJ, which provides that "[a]ny person who ... aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things ... shall suffer death or such other punishment as a court-martial or military commission may direct." 10 U.S.C. § 904.

Separate and apart from the offense of joining a contingent of "uncivilized combatants who [are] not ... likely to respect the laws of war," Winthrop 784, Hamdan has been charged with "conspir[ing] and agree[ing] with ... the al Qaida organization ... to commit ... offenses triable by military commission." Those offenses include "attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism." This, too, alleges a violation of the law of war triable by military commission.

"[T]he experience of our wars," Winthrop 839, is rife with evidence that establishes beyond any doubt that conspiracy to violate the laws of war is itself an offense cognizable before a law-of-war military commission. World War II provides the most recent examples of the use of American military commissions to try offenses pertaining to violations of the laws of war. In that conflict, the orders establishing the jurisdiction of military commissions in various theaters of operation provided that conspiracy to violate the laws of war was a cognizable offense. [**Editor's note:** Here Justice Thomas lists several documents and records.]

To support its contrary conclusion, the plurality attempts to evade the import of *Quirin* (and the other World War II authorities) by resting upon this Court's failure to address the sufficiency of the conspiracy charge in the *Quirin* case. But the common law of war cannot be ascertained from this Court's failure to pass upon an issue, or indeed to even mention the issue in its opinion; rather, it is ascertained by the practice and usage of war.

The Civil War experience provides further support for the President's conclusion that conspiracy to violate the laws of war is an offense cognizable before law-of-war military commissions. Indeed, in the highest profile case to be tried before a military commission relating to that war, namely, the trial of the men involved in the assassination of President Lincoln, the charge provided that those men had "combin[ed], confederat[ed], and conspir[ed] ... to kill and murder" President Lincoln. G.C.M.O. No. 356 (1865), reprinted in H.R. Doc. No. 314, 55th Cong., 3d Sess., 696 (1899) (hereinafter G.C.M.O. No. 356). . . .

In addition to the foregoing high-profile example, Winthrop's treatise enumerates numerous Civil War military commission trials for conspiracy to violate the law of war. Winthrop 839, n. 5. The plurality attempts to explain these examples away by suggesting that the conspiracies listed by Winthrop are best understood as " species of compound offense," namely, violations both of the law of war and ordinary criminal laws, rather than "stand-alone offense[s] against the law of war[]" (citing, as an example, murder in violation of the laws of war). But the fact that, for example, conspiracy to commit murder can at the same time violate ordinary criminal laws and the law of war, so that it is "a combination of the two species of offenses," does not establish that a military commission would not have jurisdiction to try that crime solely on the basis that it was a violation of the law of war. Rather, if anything, and consistent with the principle that the common law of war is flexible and affords some level of deference to the judgments of military commanders, it establishes that military commissions would have the discretion to try the offense as (1) one against the law of war, or (2) one against the ordinary criminal laws, or (3) both. . . .

The plurality further contends, in reliance upon Winthrop, that conspiracy is not an

offense cognizable before a law-of-war military commission because "it is not enough to intend to violate the law of war and commit overt acts in furtherance of that intention unless the overt acts either are themselves offenses against the law of war or constitute steps sufficiently substantial to qualify as an attempt." But Winthrop does not support the plurality's conclusion. The passage in Winthrop cited by the plurality states only that "the jurisdiction of the military commission should be restricted to cases of offence consisting in *overt acts, i.e.* in unlawful commissions or actual attempts to commit, and not in intentions merely." Winthrop 841 (emphasis in original). This passage would be helpful to the plurality if its subject were "conspiracy," rather than the "jurisdiction of the military commission." Winthrop is not speaking here of the requirements for a conspiracy charge, but of the requirements for *all* charges. Intentions do not suffice. An unlawful act -- such as committing the crime of conspiracy -- is necessary. Winthrop says nothing to exclude either conspiracy or membership in a criminal enterprise, both of which go beyond "intentions merely" and "consis[t] of *overt acts, i.e.* ... unlawful commissions or actual attempts to commit," and both of which are *expressly* recognized by Winthrop [at 784, 839, 840] as crimes against the law of war triable by military commissions. Indeed, the commission of an "overt ac[t]" is the traditional requirement for the completion of the crime of conspiracy, and the charge against Hamdan alleges numerous such overt acts. The plurality's approach, unsupported by Winthrop, requires that any overt act to further a conspiracy must itself be a completed war crime distinct from conspiracy -- which merely begs the question the plurality sets out to answer, namely, whether conspiracy itself may constitute a violation of the law of war. And, even the plurality's unsupported standard is satisfied here. Hamdan has been charged with the overt acts of providing protection, transportation, weapons, and other services to the enemy, acts which in and of themselves are violations of the laws of war.

3

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

Today a plurality of this Court would hold that conspiracy to massacre innocent civilians does not violate the laws of war. This determination is unsustainable. The judgment of the political branches that Hamdan, and others like him, must be held accountable before military commissions for their involvement with and membership in an unlawful organization dedicated to inflicting massive civilian casualties is supported by virtually every relevant authority, including all of the authorities invoked by the plurality today. It is also supported by the nature of the present conflict. We are not engaged in a traditional battle with a nation-state, but with a worldwide, hydra-headed enemy, who lurks in the shadows conspiring to reproduce the atrocities of September 11, 2001, and who has boasted of sending suicide bombers into civilian gatherings, has proudly distributed videotapes of beheadings of civilian workers, and has tortured and dismembered captured American soldiers. But according to the plurality, when our Armed Forces capture those who are plotting terrorist atrocities like the bombing of the Khobar Towers,

the bombing of the U.S.S. Cole, and the attacks of September 11 -- even if their plots are advanced to the very brink of fulfillment -- our military cannot charge those criminals with any offense against the laws of war. Instead, our troops must catch the terrorists "redhanded," in the midst of the attack itself, in order to bring them to justice. Not only is this conclusion fundamentally inconsistent with the cardinal principal of the law of war, namely protecting non-combatants, but it would sorely hamper the President's ability to confront and defeat a new and deadly enemy.

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. . . . 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.

III

The Court holds that even if "the Government has charged Hamdan with an offense against the law of war cognizable by military commission, the commission lacks power to proceed" because of its failure to comply with the terms of the UCMJ and the four Geneva Conventions signed in 1949. This position is untenable.

A

As with the jurisdiction of military commissions, the procedure of such commissions "has [not] been prescribed by statute," but "as been adapted in each instance to the need that called it forth." Indeed, this Court has concluded that "[i]n the absence of attempts by Congress to limit the President's power, it appears that, as Commander in Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions." . . .

The Court nevertheless concludes that at least one provision of the UCMJ amounts to an attempt by Congress to limit the President's power. This conclusion is not only contrary to the text and structure of the UCMJ, but it is also inconsistent with precedent of this Court. Consistent with . . . the common-law nature of military commissions and the President's discretion to prescribe their procedures, Article 36 of the UCMJ authorizes the President to establish procedures for military commissions "which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." Far from constraining the President's authority, Article 36 recognizes the President's prerogative to depart from the procedures applicable in criminal cases whenever he alone does not deem such procedures "practicable." While the procedural regulations promulgated by the Executive must not be "contrary to" the UCMJ, only a few provisions of the UCMJ mention "military commissions," and there is no suggestion that the procedures to be employed by Hamdan's commission implicate any of those provisions.

Notwithstanding the foregoing, the Court concludes that Article 36(b) of the UCMJ, which provides that "'[a]ll rules and regulations made under this article shall be uniform insofar

as practicable,'" requires the President to employ the same rules and procedures in military commissions as are employed by courts-martial "insofar as practicable." The Court further concludes that Hamdan's commission is unlawful because the President has not explained why it is not practicable to apply the same rules and procedures to Hamdan's commission as would be applied in a trial by court martial.

This interpretation of § 836(b) is unconvincing. As an initial matter, the Court fails to account for our cases interpreting the predecessor to Article 21 of the UCMJ -- Article 15 of the Articles of War -- which provides crucial context that bears directly on the proper interpretation of Article 36(b). Article 15 of the Articles of War provided that:
"the provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offences that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals."

In *Yamashita*, this Court concluded that Article 15 of the Articles of War preserved the President's unfettered authority to prescribe military commission procedure. . . . And this Court recognized that Article 15's preservation of military commissions as common-law war courts preserved the President's commander-in-chief authority to both "establish" military commissions and to "prescribe [their] procedure [s]." . . .

Given these precedents, the Court's conclusion that Article 36(b) requires the President to apply the same rules and procedures to military commissions as are applicable to courts-martial is unsustainable. When Congress codified Article 15 of the Articles of War in Article 21 of the UCMJ it was "presumed to be aware of ... and to adopt" this Court's interpretation of that provision as preserving the common-law status of military commissions, inclusive of the President's unfettered authority to prescribe their procedures. The Court's conclusion that Article 36(b) repudiates this settled meaning of Article 21 is not based upon a specific textual reference to military commissions, but rather on a one-sentence subsection providing that "[a]ll rules and regulations made under this article shall be uniform insofar as practicable." 10 U.S.C. § 836(b). This is little more than an impermissible repeal by implication. Moreover, the Court's conclusion is flatly contrary to its duty not to set aside Hamdan's commission "without the clear conviction that [it is] in conflict with the ... laws of Congress constitutionally enacted." Quirin, at 25.

Nothing in the text of Article 36(b) supports the Court's sweeping conclusion that it represents an unprecedented congressional effort to change the nature of military commissions from common-law war courts to tribunals that must presumptively function like courts-martial. And such an interpretation would be strange indeed. The vision of uniformity that motivated the adoption of the UCMJ, embodied specifically in Article 36(b), is nothing more than uniformity across the separate branches of the armed services. See ch. 169, 64 Stat. 107 (preamble to the UCMJ explaining that the UCMJ is an act "[t]o unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard.") There is no indication that the UCMJ was intended to require uniformity in procedure between courts-martial and military commissions, tribunals that the UCMJ itself recognizes are different. To the contrary, the UCMJ expressly recognizes that

different tribunals will be constituted in different manners and employ different procedures. See 10 U.S.C. § 866 (providing for three different types of courts-martial-general, special, and summary-constituted in different manners and employing different procedures). Thus, Article 36(b) is best understood as establishing that, so far as practicable, the rules and regulations governing tribunals convened by the Navy must be uniform with the rules and regulations governing tribunals convened by the Army. But, consistent with this Court's prior interpretations of Article 21 and over a century of historical practice, it cannot be understood to require the President to conform the procedures employed by military commissions to those employed by courts-martial.

Even if Article 36(b) could be construed to require procedural uniformity among the various tribunals contemplated by the UCMJ, Hamdan would not be entitled to relief. Under the Court's reading, the President is entitled to prescribe different rules for military commissions than for courts-martial when he determines that it is not "practicable" to prescribe uniform rules. The Court does not resolve the level of deference such determinations would be owed, however, because, in its view, "[t]he President has not ... [determined] that it is impracticable to apply the rules for courts-martial." This is simply not the case. On the same day that the President issued Military Commission Order No. 1, the Secretary of Defense explained that "the president decided to establish military commissions because he wanted the option of a process that is different from those processes which we already have, namely the federal court system ... and the military court system," Dept. of Defense News Briefing on Military Commissions (Mar. 21, 2002). . . and that "[t]he commissions are intended to be different ... because the [P]resident recognized that there had to be differences to deal with the unusual situation we face and that a different approach was needed."

The President reached this conclusion because
"We're in the middle of a war, and ... had to design a procedure that would allow us to pursue justice for these individuals while at the same time prosecuting the war most effectively. And that means setting rules that would allow us to preserve our intelligence secrets, develop more information about terrorist activities that might be planned for the future so that we can take action to prevent terrorist attacks against the United States.... [T]here was a constant balancing of the requirements of our war policy and the importance of providing justice for individuals ... and each deviation from the standard kinds of rules that we have in our criminal courts was motivated by the desire to strike the balance between individual justice and the broader war policy."

The Court provides no explanation why the President's determination that employing court-martial procedures in the military commissions established pursuant to Military Commission Order No. 1 would hamper our war effort is in any way inadequate to satisfy its newly minted "practicability"requirement. On the contrary, this determination is precisely the kind for which the "judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.' And, in the context of the present conflict, it is exactly the kind of determination Congress countenanced when it authorized the President to use all necessary and appropriate force against our enemies. Accordingly, the President's determination is sufficient to satisfy any practicability requirement imposed by Article 36(b).

The plurality further contends that Hamdan's commission is unlawful because it fails to provide him the right to be present at his trial, as recognized in 10 U.S.C.A. § 839(c). But § 839(c) applies to courts-martial, not military commissions. It provides:
"when the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and, in cases in which a military judge has been detailed to the court, the military judge."

In context, "all other proceedings" plainly refers exclusively to "other proceedings" pertaining to a court-martial. This is confirmed by the provision's subsequent reference to "members of the court " and to "cases in which a military judge has been detailed to the court." It is also confirmed by the other provisions of § 839, which refer only to courts-martial. . . . Section 839(c) simply does not address the procedural requirements of military commissions.

B

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

1

As an initial matter, and as the Court of Appeals concluded, both of Hamdan's Geneva Convention claims are foreclosed by Johnson v. Eisentrager, 339 U.S. 763 (1950). In that case the respondents claimed, *inter alia*, that their military commission lacked jurisdiction because it failed to provide them with certain procedural safeguards that they argued were required under the Geneva Conventions. While this Court rejected the underlying merits of the respondents' Geneva Convention claims, it also held, in the alternative, that the respondents could "not assert ... that anything in the Geneva Convention makes them immune from prosecution or punishment for war crimes," The Court explained:
"We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, 47 Stat.2021, concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention."

This alternative holding is no less binding than if it were the exclusive basis for the Court's decision. While the Court attempts to cast *Eisentrager's* unqualified, alternative holding as footnote dictum, it does not dispute the correctness of its conclusion, namely, that the provisions of the 1929 Geneva Convention were not judicially enforceable because that Convention contemplated that diplomatic measures by political and military authorities were the exclusive mechanisms for such enforcement. Nor does the Court suggest that the 1949 Geneva Conventions departed from this framework.

2

In addition to being foreclosed by *Eisentrager,* Hamdan's claim under Common Article 3 of the Geneva Conventions is meritless. Common Article 3 applies to “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” 6 U.S.T., at 3318. “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 ... detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to ‘armed conflict not of an international character.’” 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.”. . . 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. . . .

The President's interpretation of Common Article 3 is reasonable and should be sustained. The conflict with al Qaeda is international in character in the sense that it is occurring in various nations around the globe. Thus, it is also “occurring in the territory of” more than “one of the High Contracting Parties.” The Court does not dispute the President's judgments respecting the nature of our conflict with al Qaeda, nor does it suggest that the President's interpretation of Common Article 3 is implausible or foreclosed by the text of the treaty. Indeed, the Court concedes that Common Article 3 is principally concerned with “furnish[ing] minimal protection to rebels involved in ... a civil war,” precisely the type of conflict the President's interpretation envisions to be subject to Common Article 3. Instead, the Court, without acknowledging its duty to defer to the President, adopts its own, admittedly plausible, reading of Common Article 3. But where, as here, an ambiguous treaty provision (“not of an international character”) is susceptible of two plausible, and reasonable, interpretations, our precedents require us to defer to the Executive's interpretation.

3

But even if Common Article 3 were judicially enforceable and applicable to the present conflict, petitioner would not be entitled to relief. As an initial matter, any claim petitioner has under Common Article 3 is not ripe. The only relevant “acts” that “are and shall remain prohibited” under Common Article 3 are “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.” As its terms make clear, Common Article 3 is only violated, as relevant here, by the act of “passing of sentenc[e],” and thus Hamdan will only have a claim if his military commission convicts him and imposes a sentence. Accordingly, as Hamdan's claim is “contingent [upon] future events that may not occur as anticipated, or indeed may not occur at all,” it is not ripe for adjudication. Indeed, even if we assume he will be convicted and sentenced, whether his trial will be conducted in a manner so as to deprive him of “the judicial guarantees which are recognized as indispensable by civilized peoples” is entirely speculative. And premature adjudication of Hamdan's claim is especially inappropriate here because “reaching the merits of the dispute

would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." . . .

In any event, Hamdan's military commission complies with the requirements of Common Article 3. It is plainly "regularly constituted" because such commissions have been employed throughout our history to try unlawful combatants for crimes against the law of war. . . .

The Court concludes Hamdan's commission fails to satisfy the requirements of Common Article 3 not because it differs from the practice of previous military commissions but because it "deviate[s] from [the procedures] governing courts-martial." But there is neither a statutory nor historical requirement that military commissions conform to the structure and practice of courts-martial. A military commission is a different tribunal, serving a different function, and thus operates pursuant to different procedures. The 150-year pedigree of the military commission is itself sufficient to establish that such tribunals are "regularly constituted court [s]."

Similarly, the procedures to be employed by Hamdan's commission afford "all the judicial guarantees which are recognized as indispensable by civilized peoples." Neither the Court nor petitioner disputes the Government's description of those procedures.
"Petitioner is entitled to appointed military legal counsel, and may retain a civilian attorney (which he has done). Petitioner is entitled to the presumption of innocence, proof beyond a reasonable doubt, and the right to remain silent. He may confront witnesses against him, and may subpoena his own witnesses, if reasonably available. Petitioner may personally be present at every stage of the trial unless he engages in disruptive conduct or the prosecution introduces classified or otherwise protected information for which no adequate substitute is available and whose admission will not deprive him of a full and fair trial. If petitioner is found guilty, the judgment will be reviewed by a review panel, the Secretary of Defense, and the President, if he does not designate the Secretary as the final decisionmaker. The final judgment is subject to review in the Court of Appeals for the District of Columbia Circuit and ultimately in this Court.

Notwithstanding these provisions, which in my judgment easily satisfy the nebulous standards of Common Article 3, the plurality concludes that Hamdan's commission is unlawful because of the possibility that Hamdan will be barred from proceedings and denied access to evidence that may be used to convict him. But, under the commissions' rules, the Government may not impose such bar or denial 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.

Moreover, while the Executive is surely not required to offer a particularized defense of these procedures prior to their application, the procedures themselves make clear that Hamdan would only be excluded (other than for disruption) if it were necessary to protect classified (or classifiable) intelligence, including the sources and methods for gathering such intelligence. The Government has explained that "we want to make sure that these proceedings, which are going on in the middle of the war, do not interfere with our war effort and ... because of the way we would be able to handle interrogations and intelligence information, may actually assist us in promoting our war aims." News Briefing (remarks of Douglas J. Feith, Under Secretary of Defense for Policy). And this Court has concluded, in the very context of a threat to reveal our Nation's intelligence gathering sources and methods, that "[i]t is 'obvious and unarguable' that

no governmental interest is more compelling than the security of the Nation," and that "[m]easures to protect the secrecy of our Government's foreign intelligence operations plainly serve these interests." This interest is surely compelling here. According to the Government, "[b]ecause al Qaeda operates as a clandestine force relying on sleeper agents to mount surprise attacks, one of the most critical fronts in the current war involves gathering intelligence about future terrorist attacks and how the terrorist network operates-identifying where its operatives are, how it plans attacks, who directs operations, and how they communicate." We should not rule out the possibility that this compelling interest can be protected, while at the same time affording Hamdan (and others like him) a fair trial.

In these circumstances, "civilized peoples" would take into account the context of military commission trials against unlawful combatants in the war on terrorism, including the need to keep certain information secret in the interest of preventing future attacks on our Nation and its foreign installations so long as it did not deprive the accused of a fair trial. Accordingly, the President's understanding of the requirements of Common Article 3 is entitled to "great weight."

4

. . . Hamdan also claims that he is entitled to the protections of the Third Geneva Convention, which applies to conflicts between two or more High Contracting Parties. There is no merit to Hamdan's claim.

Article 2 of the Convention provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." "Pursuant to [his] authority as Commander in Chief and Chief Executive of the United States," the President has determined that the Convention is inapplicable here, explaining that "none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world, because, among other reasons, al Qaeda is not a High Contracting Party." The President's findings about the nature of the present conflict with respect to members of al Qaeda operating in Afghanistan represents a core exercise of his commander-in-chief authority that this Court is bound to respect.

For these reasons, I would affirm the judgment of the Court of Appeals.

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

For the reasons set out in Justice SCALIA's dissent, which I join, I would hold that we lack jurisdiction. On the merits, I join Justice THOMAS' dissent with the exception of Parts I, II-C-1, and III-B-2, which concern matters that I find unnecessary to reach. I add the following comments to provide a further explanation of my reasons for disagreeing with the holding of the Court.

[**Editors' note:** Justice Alito went on to argue, in the main, that the President's detainee system was consistent with Common Article 3 of the Geneva Conventions. He reasoned that a "regularly constituted court" was simply a court established by law to hear specific kinds of cases and that the guarantee of "civilized" procedures operated chiefly against "summary justice." "It seems clear," he said, "that the commissions at issue here meet this standard.

Whatever else may be said about the system that was created by Military Commission Order No. 1 and augmented by the Detainee Treatment Act, this system -- which features formal trial procedures, multiple levels of administrative review, and the opportunity for review by a United States Court of Appeals and by this Court -- does not dispense 'summary justice.'"]

Editors' Notes

(1) A major part of the disagreement between Justice Stevens and the dissenting justices is whether the UCMJ requires the President to satisfy a court that "some practical need" or "military necessity" justifies departures from the trial procedures of federal courts and courts martial. If the dissenters are right, is there any constitutional restraint on the executive's treatment of military detainees? If Justice Stevens is right, does the UCMJ (or the Constitution itself) compromise the President's power as commander-in-chief? Must a *constitutional* government impose *some* judicially enforceable restraints on *any* governmental power, including the power to wage war? If so, can a constitutional government be *fully* competent to wage war – or, for that matter, pursue any governmental objective?

(2) Justice Scalia criticizes the majority for appealing from what he treats as the plain meaning of the language of the Detainee Treatment Act to Congress's intent behind that language. He also criticizes the majority for ignoring the President's interpretation of the Act when he signed the bill into law. Is Scalia suggesting that the President's signing statement should carry as much weight with the Court as evidence of congressional intent? Is he suggesting that, in this case, the Court ignore both? Is there any way to distinguish the President's signing statement from what Justice Scalia calls "opportunistic" statements in the Congressional Record "crafted *solely* for use in the briefs of this very litigation"?

(3) *Hamdan* was decided on June 29, 2006. President Bush acted swiftly to reverse its impact. On October 17, 2006, less than a month before the Congressional election of November 7 that would return Democratic majorities to both houses, the Republican dominated Congress passed the Military Commissions Act of 2006. This act stripped the federal courts of habeas jurisdiction in all cases involving detainees who were not citizens

(4) In Rasul v. Bush, 542 U.S. 466 (2004), a 6:3 court led by Justice Stevens held that the Habeas Corpus Act, 28 U.S.C sec. 2241, gives "federal courts . . . jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals" held as enemy combatants at Guantanamo Bay, Cuba. In dissent, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, argued that the statute limited habeas jurisdiction to U.S. territory, and that Guantanamo Bay was outside U.S. territory. Stevens cited language from the lease for the Guantanamo Naval Base that said that while ultimate sovereignty would remain with Cuba, the U.S. "shall exercise complete jurisdiction and control over and within" the Base during the lease period. Though this holding was a matter of statutory construction, it reflected the majority's view of habeas corpus as integral to a constitutional scheme in which an independent judiciary could

play a role in checking arbitrary executive detentions.