Page 397. After section 3 of the Note, add the following:

HAMDAN V. RUMSFELD

548 U.S. ____ (2006)

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

[Hamdan was captured in November, 2001, during the war with the Taliban and held at Guantanamo Bay. A year after his capture, the President deemed him eligible for trial by a military commission on unspecified charges. A year after that, he was charged with conspiracy "to commit offenses triable by military commission." He filed a writ of habeas corpus, alleging that the military commission lacked authority to try him because neither an act of Congress nor the common law of war allowed a trial for conspiracy and because the procedures that the President had adopted violated military and international law, including the principle that a defendant must be permitted to see and hear evidence against him.]

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

I

[O]n November 13, 2001, while the United States was still engaged in active combat with the Taliban, the President issued a comprehensive military order intended to govern the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57833 (hereinafter November 13 Order or Order). Those subject to the November 13 Order include any noncitizen for whom the President determines "there is reason to believe" that he or she (1) "is or was" a member of al Qaeda or (2) has engaged or participated in terrorist activities aimed at or harmful to the United States. Any such individual "shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including imprisonment or death."...

On July 3, 2003, the President announced his determination that Hamdan and five other detainees at Guantanamo Bay were subject to the November 13 Order and thus triable by military commission. [The] charging document, which is unsigned, contains 13 numbered paragraphs. The first two paragraphs recite the asserted bases for the military commission's jurisdiction—namely, the November 13 Order and the President's July 3, 2003, declaration that Hamdan is eligible for trial by military commission. The next nine paragraphs, collectively entitled "General Allegations," describe al Qaeda's activities from its inception in 1989 through 2001 and identify Osama bin Laden as the group's leader. Hamdan is not mentioned in these paragraphs.

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

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

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

The Court of Appeals for the District of Columbia Circuit reversed. [Chief Justice Roberts participated in the Court of Appeals decision (which was rendered before his appointment to the Supreme Court) and therefore disqualified himself from participation in the Supreme Court decision]....[1]

1. In portions of its opinion not reprinted here, the Court rejected on statutory construction grounds the Government's argument that the Detainee Treatment Act (DTA), enacted while the Hamdan case was pending, deprived the Court of jurisdiction and rejected the Government's argument that it should delay decision in the case until the final outcome of the military proceedings.—EDS.

IV

The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity....

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....

Whether [the] President may constitutionally convene military commissions "without the sanction of Congress" in cases of "controlling necessity" is a question this Court has not answered definitively, and need not answer today. For we held in *Quirin* that Congress had, through Article of War 15, sanctioned the use of military commissions in such circumstances. Article 21 of the UCMJ, the language of which is substantially identical to the old Article 15 and was preserved by Congress after World War II, reads as follows:

> "Jurisdiction of courts-martial not exclusive.
> "The provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals."

We have no occasion to revisit *Quirin*'s controversial characterization of Article of War 15 as congressional authorization for military commissions. Contrary to the Government's assertion, however, even *Quirin* did not view the authorization as a sweeping mandate for the President to "invoke military commissions when he deems them necessary." Rather, the *Quirin* Court recognized that Congress had simply preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions—with the express condition that the President and those under his command comply with the law of war.[23] 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 [Authorization for the Use of Military Force(AUMF) enacted in the immediate wake of the bombing of the World Trade Center] or the DTA specific, overriding authorization for the very commission that has been convened to try Hamdan. Neither of these congressional Acts, however, expands the President's authority to convene military commissions. First, while we assume that the AUMF activated the President's war powers, see [*Hamdi*] and that those powers include the authority to convene military commissions in appropriate circumstances, there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ.

Likewise, the DTA cannot be read to authorize this commission. Although the DTA, unlike either Article 21 or the AUMF, was enacted after the President had convened Hamdan's commission, it contains no language authorizing that tribunal or any other at Guantanamo Bay....

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

V

[The plurality examines the history of military commissions and concludes that they are used (1) when martial law has been declared; (2) as part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government does not function; and (3) "as an incident to the conduct of war" when necessary "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 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 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

23. Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. See [*Youngstown*,] Jackson, J., concurring). The Government does not argue otherwise.

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]. 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 is not triable by law-of-war military commission.

There is no suggestion that Congress has, in exercise of its constitutional authority to "define and punish... Offences against the Law of Nations," U.S. Const., Art. I, § 8, cl. 10, positively identified "conspiracy" as a war crime. 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 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....

[That] burden is far from satisfied here. The crime of "conspiracy" has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions (the major treaties on the law of war.... [The plurality's lengthy discussion of the historical precedent is omitted].

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 redhanded in a theater of war and which military efficiency demands be tried expeditiously, but with an *agreement* the inception of which long predated the attacks of September 11, 2001 and the AUMF. That may well be a crime,[41] but it is not an offense that

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

"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," 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

[Under Commission Order No. 1, the rights of the the accused] are subject [to] one glaring condition: The accused and his civilian counsel may be excluded from, and precluded from ever learning, what evidence was presented during any part of the proceeding that either the Appointing Authority or the presiding officer decides to "close." Grounds for such closure "include the protection of information classified or classifiable...; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests." Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer's discretion, be forbidden to reveal to his or her client what took place therein.

Another striking feature of the rules governing Hamdan's commission is that they permit the admission of *any* evidence that, in the opinion of the presiding officer, "would have probative value to a reasonable person." Under this test, not only is testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses' written statements need be sworn. Moreover, the accused and his civilian counsel may be denied access to evidence in the form of "protected information" (which includes classified information as well as "information protected by law or rule from unauthorized

disclosure" and "information concerning other national security interests," so long as the presiding officer concludes that the evidence is "probative" [and] that its admission without the accused's knowledge would not "result in the denial of a full and fair trial." Finally, a presiding officer's determination that evidence "would not have probative value to a reasonable person" may be overridden by a majority of the other commission members.

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

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....

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 [citing the dissenting opinion of Justice Rutledge, joined by Justice Murphy, in In re Yamashita, 327 U.S. 1 (1946)]. Among the dissenters' primary concerns was that the commission had free rein to consider all evidence "which in the commission's opinion 'would be of assistance in proving or disproving the charge,' without any of the usual modes of authentication."

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. The Court explained that Yamashita was neither a "person made subject to the Articles of War by Article 2" thereof, nor a protected prisoner of war being tried for crimes committed during his detention.

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

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

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

[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....

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....

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, 10 U.S.C. § 836(a), the jettisoning of so basic a right cannot lightly be excused as "practicable."

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

The Government's objection that requiring compliance with the court-martial rules imposes an undue burden both ignores the plain meaning of Article 36(b) and misunderstands the purpose and the history of military commissions. The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter. Exigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections....

D

The procedures adopted to try Hamdan also violate the Geneva Conventions....

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, 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. [For], regardless of the nature of the rights conferred on Hamdan, they are, as the Government does not dispute, part of the law of war. And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted.

ii

[A]s 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....

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

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

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

[This portion of Justice Stevens' opinion is joined only by Justices Souter, Ginsburg, and Breyer].

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....

VII

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

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

It is so ordered.

JUSTICE BREYER, with whom JUSTICE KENNEDY, JUSTICE SOUTER, and JUSTICE GINSBURG join, concurring.

The dissenters say that today's decision would "sorely hamper the President's ability to confront and defeat a new and deadly enemy." They suggest

that it undermines our Nation's ability to "preven[t] future attacks" of the grievous sort that we have already suffered. That claim leads me to state briefly what I believe the majority sets forth both explicitly and implicitly at greater length. The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a "blank check." Cf. [*Hamdi* (plurality opinion)]. Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.

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

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

Military Commission Order No. 1, which governs the military commission established to try petitioner Salim Hamdan for war crimes, exceeds limits that certain statutes, duly enacted by Congress, have placed on the President's authority to convene military courts. This is not a case, then, where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority. Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches. Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.

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

It seems appropriate to recite these rather fundamental points because the Court refers, as it should in its exposition of the case, to the requirement of the Geneva Conventions of 1949 that military tribunals be "regularly constituted" — a requirement that controls here, if for no other reason, because Congress requires that military commissions like the ones at issue conform to the "law of war." Whatever the substance and content of the term "regularly constituted" as interpreted in this and any later cases, there seems little doubt that it relies upon

the importance of standards deliberated upon and chosen in advance of crisis, under a system where the single power of the Executive is checked by other constitutional mechanisms. All of which returns us to the point of beginning — that domestic statutes control this case. If Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so....

I

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.*] "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. [The] UCMJ as a whole establishes an intricate system of military justice. [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....

[In the next part of his opinion, Justice Kennedy argued that the military commissions violate the UCMJ requirement that "insofar as practicable" all rules and regulations must be uniform and the requirement that military commissions comport with statutes and the laws of war].

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 people." 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 § 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 § 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. 10 U.S.C. § 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....

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....

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

II

[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....

In sum, as presently structured, Hamdan's military commission exceeds the bounds Congress has placed on the President's authority in §§ 836 and 821 of the UCMJ. Because Congress has prescribed these limits, Congress can change them, requiring a new analysis consistent with the Constitution and other

governing laws. At this time, however, we must apply the standards Congress has provided. By those standards the military commission is deficient.

III

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

First, I would not decide whether Common Article 3's standard — a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" — necessarily requires that the accused have the right to be present at all stages of a criminal trial...

I likewise see no need to address the validity of the conspiracy charge against [Hamdan]....

Finally, [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....

[Justice Scalia wrote a dissenting opinion, joined by Justices Thomas and Alito, which argued that the DTA deprived the Court of jurisdiction.]

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

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.

[The] structural advantages attendant to the Executive Branch — namely, the decisiveness, "'activity, secrecy, and dispatch'" that flow from the Executive's "unity'" — 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. See, e.g., [the *Prize Cases*].

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." [*Dames & Moore*]. 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. See [*Dames & Moore*].

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." ' Id. [quoting *Youngstown,* 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.*]

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,' " [emphasis added] and are therefore "an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." [*Hamdi,* Thomas, J., dissenting]....

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 [§ 821]. As I shall discuss below, [§ 821] alone supports the use

of commissions here. Nothing in the language of [§ 821], however, suggests that it outlines the entire reach of congressional authorization of military commissions in all conflicts. Accordingly, congressional authorization for military commissions pertaining to the instant conflict derives not only from [§ 821], but also from the more recent, and broader, authorization contained in the AUMF....

II

[In omitted sections of his opinion, Justice Thomas argued that the military commission had jurisdiction over Hamdan and over the offense with which he was charged.]

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 principle of the law of war, namely protecting noncombatants, 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. Those Justices who today disregard the commander-in-chief's wartime decisions, only 10 days ago deferred to the judgment of the Corps of Engineers with regard to a matter much

more within the competence of lawyers, upholding that agency's wildly implausible conclusion that a storm drain is a tributary of the waters of the United States. See Rapanos v. United States, 547 U.S. _____ (2006) [Justice Thomas' reference is to a case decided earlier in the Term, in which the Court interpreted the words "navigable waters" in the Clean Water Act] . It goes without saying that there is much more at stake here than storm drains. The plurality's willingness to second-guess the determination of the political branches that these conspirators must be brought to justice is both unprecedented and dangerous.

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 "has been adapted in each instance to the need that called it forth." [Madsen v. Kinsella, 343 U.S. 341 (1952).] 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." Id., at 348....

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. 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....

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." Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948). 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....

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 [both] of Hamdan's Geneva Convention claims are foreclosed by *Eisentrager*. 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, 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 concludes that petitioner may seek judicial enforcement of the provisions of the Geneva Conventions because "they are... 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 is granted." But Article 21 authorizes the use of military commissions; it does not purport to render judicially enforceable aspects of the law of war that are not so enforceable of their own accord....

In any event, the Court's argument is too clever by half. The judicial nonenforceability of the Geneva Conventions derives from the fact that those

Conventions have exclusive enforcement mechanisms, and this, too, is part of the law of war. The Court's position thus rests on the assumption that Article 21's reference to the "laws of war" selectively incorporates only those aspects of the Geneva Conventions that the Court finds convenient, namely, the substantive requirements of Common Article 3, and not those aspects of the Conventions that the Court, for whatever reason, disfavors, namely the Conventions' exclusive diplomatic enforcement scheme....

Even if the Court were correct that Article 21 of the UCMJ renders judicially enforceable aspects of the law of war that are not so enforceable by their own terms, Article 21 simply cannot be interpreted to render judicially enforceable the particular provision of the law of war at issue here, namely Common Article 3 of the Geneva Conventions. As relevant, Article 21 provides that "[t]he provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions... of concurrent jurisdiction with respect to *offenders or offenses* that by statute *or by the law of war* may be tried by military commissions" (emphasis added). Thus, to the extent Article 21 can be interpreted as authorizing judicial enforcement of aspects of the law of war that are not otherwise judicially enforceable, that authorization only extends to provisions of the law of war that relate to whether a particular "offender" or a particular "offense" is triable by military commission. Common Article 3 of the Geneva Conventions, the sole provision of the Geneva Conventions relevant to the Court's holding, relates to neither. Rather, it relates exclusively to the particulars of the tribunal itself, namely, whether it is "regularly constituted" and whether it "afford[s] all the judicial guarantees which are recognized as indispensable by civilized peoples."

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." "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." Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184-185 (1982); United States v. Stuart, 489 U.S. 353, 369 (1989). 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

[I]n 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] 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." [This] interest is surely compelling here....

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....

JUSTICE ALITO, with whom JUSTICES SCALIA and THOMAS join in Parts I-III, dissenting....

I

The second element [of Common Article 3, requiring that courts be "regularly constituted"] is the one on which the Court relies, and I interpret this element to require that the court be appointed or established in accordance with the appointing country's domestic law....

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

II

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

A

I see no basis for the Court's holding that a military commission cannot be regarded as "a regularly constituted court" unless it is similar in structure and composition to a regular military court or unless there is an "evident practical need" for the divergence. There is no reason why a court that differs in structure or composition from an ordinary military court must be viewed as having been improperly constituted. Tribunals that vary significantly in structure, composition, and procedures may all be "regularly" or "properly" constituted.

Consider, for example, a municipal court, a state trial court of general jurisdiction, an Article I federal trial court, a federal district court, and an international court, such as the International Criminal Tribunal for the Former Yugoslavia. Although these courts are "differently constituted" and differ substantially in many other respects, they are all "regularly constituted."...

B

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

* * * *

Congress responded to *Hamdi* and *Hamdan* by enacting the Detainee Treatment Act, 119 Stat. 2739, and the Military Commissions Act, 120 Stat. 2600. The Detainee Treatment Act granted exclusive jurisdiction to the United States Court of Appeals for the District of Columbia Circuit to review decisions made by the Combatant Status Review Tribunal concerning the detention of putative enemy combatants. It limited that court's review to whether the status determination was consistent with procedures established by the Secretary of Defense and "to the extent that the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." The Military Commissions Act vested the same court with exclusive jurisdiction to review judgments of military tribunals. It restricted this review to "matters of law" and provides that the Court is limited to consideration of "whether the final decision was consistent with the standards and procedures specified in this chapter" and "to the extent applicable, the Constitution and the laws of the United States."

In Boumediene v. Bush, 127 S. Ct. 1478 (2007), the Supreme Court denied certiorari after the court below denied the claims of detainees at Guantanamo