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RESTORING THE BALANCE: THE *HAMDAN* DECISION AND EXECUTIVE WAR POWERS

Seth Weinberger*

I. INTRODUCTION

In November 2001, Salim Ahmed Hamdan, a former driver for Osama bin Laden, was detained in Afghanistan by U.S. soldiers and subsequently transferred to the Guantanamo Bay Detention Center in June 2002. In July 2003, President George Bush, pursuant to his November 13, 2001, authorization of military tribunals to try alien enemy combatants,¹ announced that Hamdan was to be designated as an enemy combatant and therefore eligible for trial by military tribunal.² The tribunal began in August 2004 but was halted in November as the U.S. District Court for the District of Columbia ruled that the military tribunals violated both U.S. military law and U.S. obligations under the Geneva Convention, in particular the requirements that detainees during time of war must be treated as prisoners of war unless a special hearing board determines otherwise.³ In July 2005, the U.S. Court of Appeals for the D.C. District reversed the lower court's opinion,⁴ and, in the following November, the U.S. Supreme Court agreed to hear the case.⁵ Chief Justice John Roberts recused himself due to his participation in the appeals court decision,⁶ and in July 2006, the Court ruled 5 to 3 that the military tribunals violated U.S. military law and the Geneva Conventions.⁷

There were many arguments on which the Supreme Court upheld Hamdan's petition, including the applicability of Common Article 3 of the Geneva Conventions⁸ and Article 36 of the Uniform Code of Military Justice.⁹ However, perhaps the most important impact of the ruling, not only for Hamdan and other proclaimed enemy combatants but for the scope and nature of executive power itself, is the implication of the decision for presidential war powers.¹⁰ It is this aspect that this article examines.

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1 66 Fed. Reg. 57833 (Nov. 16, 2001).

2. Adam Liptak, *Tribunals Move from Theory to Reality*, N.Y. Times A12 (July 4, 2001).

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

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

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

6. *Id.* at 2750.

7. *Id.* at 2798.

8. *Geneva Convention Relative to the Treatment of Prisoners of War* (Aug. 12, 1949), 6 U.S.T. 3316.

9. 10 U.S.C. § 836 (2000).

10. *The New York Times* referred to the *Hamdan* decision as "a defining moment in the ever-shifting

The *Hamdan*¹¹ decision, particularly when viewed in conjunction with the *Hamdi*¹² decision of two years earlier, represents a resetting of the balance of executive-congressional power during times of war. *Hamdan* fits into a long historical framework of Supreme Court case law, stretching as far back as the *Bas v. Tingy*¹³ decision in 1800. This framework, combined with presidential precedent and congressional actions (or inactions), creates an understanding of executive power during times of war that gives the president wide latitude in the deployment of force and conduct of hostilities. At the same time, it gives to Congress the critically important power of determining whether prosecution of the conflict demands that the president be granted extraordinary powers to act in the legislative arena.

The decision in *Hamdan* restores the balance to congressional-executive war powers that have steadily been misaligned by the growth of presidential power.¹⁴ The logic of the Supreme Court's decision rehabilitates the importance of a critical yet oft ignored and underappreciated tool: the formal declaration of war. *Hamdan* re-emphasizes the limitations of executive war powers in the absence of a formal declaration of war by Congress. Such a declaration, as opposed to any other kind of alternative sanction of force, functions as a broad authorization of legislative power to the president. Thus, a comprehensive understanding of congressional-executive war powers can be developed that receives support from the *Hamdan* decision. While the president has the power to send troops into conflict when it is determined to be necessary to do so, the president may not take actions of a legislative nature. *Hamdan* makes it clear that, if and when the president deems such legislative activity essential, authorization from Congress is required.¹⁵ And while *Hamdan* establishes that such authorization may take the form of a specific law permitting the president to take specific actions,¹⁶ this article argues that a formal declaration of war would serve the same purpose. Consequently, the importance of congressional war powers are, at least to some degree, enhanced in any conflict such as the on-going "War on Terror" that will involve action in the legislative sphere. The congressional power to declare war serves as a critical check on the ability of the executive to expand presidential power in times of war.

balance of power among branches of government that ranked with the [C]ourt's order to President Richard M. Nixon in 1974 to turn over the Watergate tapes, or with the [C]ourt's rejection of President Harry S. Truman's seizing of the nation's steel mills." Linda Greenhouse, *Justices*, 5-3, *Broadly Reject Bush Plan to Try Detainees*, N.Y. Times A1, A17 (June 20, 2006).

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

12. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

13. 4 U.S. 37 (1800).

14. On the issue of the expansion of presidential war powers at the expense of congressional authority, review Mark E. Brandon, *War and the American Constitutional Order*, in *The Constitution in Wartime: Beyond Alarmism and Complacency* 11-38 (Mark Tushnet ed., Duke U. Press 2005). Brandon writes "the story of American constitutional politics with respect to institutional relations in the context of military conflict has been one of steady erosion of Congress's power to prevent, confine, or even direct military action and of steady accretion of executive decision and control." *Id.* at 23. See also *infra* nn. 26, 29, 38.

15. *Hamdan*, 126 S. Ct. at 2774-75.

16. *Id.*

II. THE CASE FOR BROAD EXECUTIVE WAR POWERS

Regarding the political question raised by *Hamdan* concerning the scope of presidential power during time of war, the Bush Administration's argument was twofold: first, that the president has inherent authority to convene military tribunals,¹⁷ and second, that the Authorization for the Use of Military Force (AUMF) passed by Congress on September 18, 2001, served as specific authorization by Congress for such presidential actions.¹⁸ According to the government,

[t]he AUMF authorized the President "to use all necessary and appropriate force" against al Qaeda and its supporters. As a plurality of this Court recognized in *Hamdi v. Rumsfeld*, the AUMF thus authorized the President to exercise his full war powers in connection with the conflict against al Qaeda.¹⁹

And, "[e]ven if Congress's support for the President's Military Order^[20] were not so clear, the President has the inherent authority to convene military commissions to try and punish captured enemy combatants in wartime—even in the absence of any statutory authorization."²¹

Furthermore, the Administration argued,

in *Hamdi v. Rumsfeld*, a plurality of this Court concluded that the AUMF authorized the President to exercise his traditional war powers, and it relied on *Quirin* for the proposition that "the capture, detention, and trial of unlawful combatants, 'universal agreement and practice' are 'important incident[s] of war.'"²²

Essentially, the Administration claimed the power to conduct military tribunals as deemed necessary by the president was part of the inherent war powers of the president.

The Administration perceives such decisions to be part of the president's inherent war powers, arguing that

[t]he fact that Congress has not issued a formal declaration of war against al Qaeda is irrelevant. The President's prerogative to invoke the law of war in a time of armed conflict, including with respect to the trial and punishment of war criminals, in no way turns on the existence of such a declaration. The Court in *Hamdi* rejected a similar contention and found that the AUMF was sufficient to confirm Congress's support for the President's exercise of his war powers.²³

The Bush Administration argues the justification for broad inherent presidential war powers is also found in the U.S. Constitution: "The President's war power under Article II, Section 2 of the Constitution includes the inherent authority to create military commissions even in the absence of any statutory authorization, because that authorization is a necessary and long-standing component of his war powers."²⁴ In support of this claim, the Bush Administration points to previous uses of military

17. Respt.'s Br. 8 (Feb. 23, 2006).

18. *Id.* at 7.

19. *Id.* (internal citation omitted).

20. 66 Fed. Reg. 57833.

21. Respt.'s Br., *supra* n. 17, at 8.

22. *Id.* at 16 (citing *Ex parte Quirin*, 317 U.S. 1 (1947)) (internal citations omitted) (emphasis in original).

23. *Id.* at 18 (internal citations omitted).

24. *Id.* at 21 (citation omitted).

tribunals during war time, such as the use of tribunals by General George Washington during the Revolutionary War as well as the councils of war convened during the Mexican-American War.²⁵

The logic presented to the Supreme Court by the Bush Administration echoes those of the policy makers who have informed the political and legal decisions that underpin the on-going “War on Terrorism.” John Yoo, a law professor at the University of California at Berkeley and a deputy assistant attorney general in the Office of Legal Counsel of the Department of Justice from 2001 to 2003 who was intimately involved in many of the most controversial decisions of the Bush Administration, has laid bare these arguments in numerous articles and books.²⁶ Yoo cites the AUMF of September 18, 2001, as giving the president broad authority to take whatever actions deemed necessary to combat those responsible for the attacks of September 11, 2001.²⁷ The *Hamdi* decision is seen as fitting with this logic because “the [Supreme Court] implicitly recognized . . . that the United States may use *all the tools of war*—including detention without criminal trial—to fight a new kind of enemy.”²⁸ All of this, in Yoo’s opinion and arguably that of the Bush Administration’s, gives the president broad inherent and authorized power to conduct the War on Terror in any way deemed important for the protection of the country. The U.S. is at war with al Qaeda, and in war different rules apply than in a peacetime domestic situation.²⁹

With respect to the use of military tribunals, Yoo writes that the arguments that the “military commissions violate the Constitution because Congress hasn’t approved them have little merit. It is true that Congress has not passed a law specifically authorizing military commissions in the war on terrorism, but it never enacted one in World War II either.”³⁰ In this view, the authority to create the military commissions comes from three sources: (1) extant congressional authorizations, such as Article 15 of the Articles of War which has been incorporated into the Uniform Code of Military Justice (UCMJ); (2) the implied authorization contained within AUMF; and (3) the president’s inherent war powers.³¹ Yoo claims that “[e]ven if Congress hadn’t authorized military commissions in the UCMJ, President Bush would still have authority to establish them under his constitutional authority as commander in chief.”³² This inherent power applies in the course of any and all military actions that are, in any way, authorized by Congress:

Presidents have used military commissions in conflicts without any declaration of war, the Civil War being the most obvious example, and the Indian wars another. The declaration-of-war issue is a red herring. It ignores the fact that presidents have long used military

25. *Id.* at 21–22.

26. *E.g.* John Yoo, *War by Other Means: An Insider’s Account of the War on Terror* (A. Mthly. Press 2006) [hereinafter Yoo, *War*]; Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 Cal. L. Rev. 1 (2005), John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Cal. L. Rev. 167 (1996).

27. Yoo, *War*, *supra* n. 26, at 11–13.

28. *Id.* at 14 (emphasis added).

29. *Id.* at 16.

30. *Id.* at 226.

31. *Id.* at 226–27.

32. Yoo, *War*, *supra* n. 26, at 226.

force abroad without congressional approval of any kind.³³

The argument was repeated before the Supreme Court where Paul Clement, the Solicitor General arguing on behalf of the federal government, claimed that the right to create military tribunals “is the President invoking an authority that he’s exercised in virtually every war that we’ve had.”³⁴

This is the essence of the Bush Administration’s justification for the president’s right to create military tribunals to try suspected terrorists: Congress has given the president authorization to do so, but the president does not need such authorization. Even if authorization was not given to the president, the commissions could be created anyway. When the country is at war, as in the opinion of the Bush Administration the United States has been as of September 11, 2001, the president has inherent authority to use any and all of his war powers to take any action required to win the war.³⁵

III. THE *HAMDAN* DECISION

On June 29, 2006, the Supreme Court handed down its decision in *Hamdan v. Rumsfeld*, dealing the Bush Administration a stinging defeat.³⁶ The opinion, written by Justice John Paul Stevens,³⁷ held 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.”³⁸ The Court noted that the case was a very important one as “trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure.”³⁹ Ultimately, the *Hamdan* case is important to the development of a more nuanced understanding of the proper balance between congressional and executive war powers—an understanding made even more necessary in light of the nebulous nature of the War on Terror, which has no identifiable end, no observable metrics for victory, and no clear battlefield on which it is to be fought.

Ultimately, the Court ruled that, although the president’s war powers had indeed been activated and military commissions are generally authorized by Congress, the president does not have the inherent authority within his war powers to constitute military tribunals however he sees fit.⁴⁰ Rather, “the UCMJ, the AUMF, and the DTA [Detainee Treatment Act] 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.”⁴¹ Thus, the question fell to the Court whether the

33. *Id.* at 228.

34. Paul D. Clement, *Oral Argument on Behalf of the Respondents 45* (D.C. Mar. 28, 2006) (transcript available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-184.pdf).

35. In the words of Solicitor General Paul Clement, “I think the events of 9/11 speak to the fact that this is a war where the laws of war are involved.” *Id.* at 67.

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

37. *Id.* at 2759.

38. *Id.* Justice Stevens noted that “[f]our 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.” *Id.* at 2759–60. This argument is not, however, germane to this article.

39. *Id.* at 2759.

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

41. *Id.* at 2775.

military commission in question—the one to which Hamdan was referred—was justified by the existing laws and congressional authorizations. The Court found that it was not.⁴² Thus, in the absence of congressional authorization, the president could not, even though his war powers had indeed been activated by Congress with the passage of AUMF, take any action deemed necessary in pursuit of the military or political objectives of the on-going conflict.⁴³ Rather, the president is limited, even in wartime, by the will of Congress.

The *Hamdan* decision, therefore, represents a confirmation of the understanding of executive-legislative war powers to be presented herein. The framework argues that, while the president has wide latitude in the use of U.S. military force even in the absence of specific congressional authorizations to conduct military operations, his ability to take actions of legislative nature is more circumscribed by congressional war powers. This balance of war powers is especially important in a conflict such as the proclaimed War on Terror, which, due to both its nebulous nature and its domestic component, demands legislative as well as military strategies.

IV. IMBALANCED WAR POWERS⁴⁴

The Constitution is unclear on how exactly war powers should be balanced between Congress and the president, especially on whether congressional assent is required for each deployment of force. Congress is explicitly given the power, in Article I, Section 8, to declare war,⁴⁵ but the meaning of a declaration of war is not spelled out. Karl Schonberg argues that the Declare War Clause requires Congress' formal assent to each and every deployment of military force.⁴⁶ Similarly, Louis Fisher, a legal scholar with the Congressional Research Service who focuses on issues of war powers, writes that the Founding Fathers intended to only give the president the power to repel "sudden attacks" but nothing more in the absence of specific authorization.⁴⁷

However, it is fairly clear now that the president has the power to order American troops into combat even in the absence of a formal authorization from Congress. During the debate surrounding the ratification of the UN Charter, Senator Arthur Vandenberg made clear that

if we were to require the consent of Congress to every use of our armed forces, it would not only violate the spirit of the [UN] Charter, but it would violate the spirit of the Constitution of the United States, because under the Constitution the President has certain rights to use our armed forces in the national defense without consulting Congress. . . . It is just as much a part of the Constitution as is the congressional right to declare war.⁴⁸

As evidence, there have been well over 215 instances in which U.S. military forces

42. *Id.* at 2774–75.

43. *Id.*

44. The arguments about executive-legislative war powers presented in the following sections have appeared in substantively similar form in Seth Weinberger, *Presidential War Powers in a Never-Ending "War"*, ___ Tul. J. Comp. & Int. L. ___ (forthcoming).

45. U.S. Const. art. I, § 8.

46. See Karl K. Schonberg, *Global Security and Legal Restraint*, 19 Political Sci. Q. 115 (2004).

47. Louis Fisher, *Presidential War Power* 261 (2d rev. ed., U. Kan. Press 2004).

48. Sen. Commn. on For. Rels., *Charter of the United Nations*, 79th Cong. 299 (July 16, 1945).

have been deployed into combat, while Congress has only declared war five times.⁴⁹ Several of those conflicts have been authorized by Congress by means other than a formal declaration of war, such as the AUMF authorizing President Bush to use force against al Qaeda and others responsible for the 9/11 attacks and the Gulf of Tonkin resolution that permitted President Johnson to escalate U.S. involvement in Vietnam. In others, such as the Korean War or the NATO intervention in Kosovo, there was no specific congressional authorization whatsoever.⁵⁰ For example:

Kosovo is just one entry on a long list of presidential uses of force since the passage of the WPR [War Powers Resolution] that occurred without benefit of congressional authorization. Even an abbreviated list would have to include Lebanon, Iran, Grenada, the Persian Gulf (in 1987–88), Libya, Panama, Somalia, Iraq (in 1993 and throughout the “no-fly-zone” period), Haiti, Bosnia, Sudan, and Afghanistan (in 1998).⁵¹

By taking little to no action in the face of the long-standing tradition of presidential deployment of force without legislative approval, Congress has essentially resolved the political question concerning the initiation of hostilities by creating a “gloss” on the Constitution which, in the words of Supreme Court Justice Felix Frankfurter’s concurrence in the *Steel Seizure Case*, consists of

a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on “executive power.”⁵²

By sitting back and refusing to assert any power that it might possess, Congress has agreed that such unilateral deployments of force by the president are part of executive power.⁵³

However, even if the critics of an executive right, whether constitutional or created

49. For a list of all uses of force by the United States, review Richard F. Grimmert, *Instances of Use of United States Armed Forces Abroad, 1798–2004*, <http://www.history.navy.mil/library/online/forces.htm> (accessed Mar. 8, 2007). The U.S. Congress has declared war five times: the War of 1812, the Spanish-American War, the Mexican-American War, World War I, and World War II. *Id.*

50. John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11*, at 143 (U. Chi. Press 2005). The Kosovo intervention has been called “one of the most flagrant acts of usurpation of the war power in the history of the republic.” David Gray Adler, *The Clinton Theory of the War Power*, 30 *Pres. Studs. Q.* 155 (2000).

51. Andrew Rudalevige, *The New Imperial Presidency: Renewing Presidential Power after Watergate* 192 (U. Mich. Press 2005) (footnote omitted).

52. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case)*, 343 U.S. 579, 610–11 (1952).

53. Even the passage of the War Powers Resolution in 1973 does not challenge the long pattern of executive action. Congress has not once attempted to restrain a presidential deployment of force using the Resolution, while

[e]very President from President Nixon forward has taken the position that the War Powers Resolution is an unconstitutional infringement on the authority of the President, as Commander-in-Chief, to utilize the Armed Forces of the United States to defend what he determines are the vital national security interests of the United States.

Richard F. Grimmert, *CRS Report for Congress: Congressional Use of Funding Cutoffs since 1970 Involving U.S. Military Forces and Overseas Deployments* (Jan. 10, 2001) (available at <http://www.fas.org/man/crs/RS20775.pdf>). In fact, the passage and subsequent non-enforcement of the War Powers Act reinforces the gloss rather than challenges it. For more on presidential non-compliance with the War Powers Resolution, review Rudalevige, *supra* n. 51, at 192–200. For more on congressional silence in the face of presidential deployments of U.S. military force, review Adler, *supra* n. 50, at 155–56, n. 1.

by congressional inactions, to deploy force without congressional approval are correct that the Constitution requires congressional authorization of all uses of force, that authorization need not come in a formal declaration of war. *Mitchell v. Laird*⁵⁴ established the principle that congressional authorization of the use of force may take other forms than a formal declaration of war. In a unanimous decision, the court stated that that "it is constitutionally permissible for Congress to use another means than a formal declaration of war to give its approval to a war"⁵⁵ and that "any attempt to require a declaration of war as the only permissible form of assent might involve unforeseeable domestic and international consequences."⁵⁶ Furthermore, the court held that the manner in which Congress may give that assent is a political question to be determined by the interactions of the executive and legislative branches.⁵⁷

In what ways, other than a formal declaration of war, might Congress give its approval for a presidential deployment of U.S. military force? Building off of Justice Frankfurter's concept of the creation of a "gloss" on the Constitution as well as the long-standing practice of deployment of force without specific authorization, one form of "alternative authorization" can be discerned. Article I, Section 8 of the Constitution gives Congress the power to raise and support the armed forces of the United States with appropriations for no longer than two years and to make rules for the governance and regulation of the land and naval forces.⁵⁸ The appropriations process is well understood to be a tool by which Congress can control the use of military force by the president. *Holtzman v. Schlesinger*⁵⁹ established the principle that congressional appropriations of the military can in fact constitute a form of authorization for the conduct of hostilities.⁶⁰ The court found that

Congress in appropriation bills from 1965 through 1969 had shown "its continued support of the Vietnam action" and that Congress' choice of appropriations bills rather than a formal declaration of war to effectuate its intent involved a political question which did not prevent the finding that the fighting in Vietnam was authorized by Congress and that such fighting was not a usurpation of power by either of the Presidents who had been in office after 1964.⁶¹

Thus, if Congress is opposed to a particular use of military force by the president, it has the constitutional right to cut off funding to the troops or to designate that monies cannot be used in a specified conflict. Such a tactic was ultimately used by Congress to end U.S. military involvement in Vietnam.⁶²

Furthermore, *Spaulding v. Douglass Aircraft*⁶³ gives Congress broad discretionary powers over military appropriations. Specifically, the court stated that

54. 488 F.2d 611 (D.C. Cir. 1973).

55. *Id.* at 615.

56. *Id.*

57. *Id.* at 616.

58. U.S. Const. art. 1, § 8(b).

59. 361 F. Supp. 553 (E.D.N.Y. 1973).

60. *Id.*

61. *Id.* at 561-62.

62. Grimmett, *supra* n. 53, at 1-2.

63. 60 F. Supp. 985 (S.D. Cal. 1945), *aff'd*, 154 F.2d 419 (9th Cir. 1946).

Congress in making appropriations has the power and authority not only to designate the purpose of the appropriation, but also the terms and conditions under which the executive department . . . may expend such appropriations. . . .

The purpose of appropriations, the terms and conditions under which said appropriations were made is a matter solely in the hands of Congress and it is the plain and explicit duty of the executive branch to comply with the same.⁶⁴

This power has been used by Congress to prohibit specific activities, such as when, in 1984, Congress passed the Boland Amendment which forbade the president from using monies to fund the Nicaraguan *contra* rebels.⁶⁵ Such power of the purse is clearly and explicitly given to Congress and serves as a broad and effective means by which the legislative branch can exercise restraint on the executive branch, limiting or even forbidding federal funds to be used in particular ways.

The *Holtzman* decision did note that “appropriations bills do not necessarily indicate an open-ended approval of all military operations which may be conducted.”⁶⁶ Merely funding a standing army or not enacting fiscal impediments to the use of the U.S. military is not enough to argue that Congress has assented, either tacitly or overtly, to each and every use of American military might by the president. However, the constitutional “gloss” discussed by Justice Frankfurter helps discern a larger argument for a broad understanding of the executive power to use force without specific and particular congressional authorization each time. Given the congressional ability to use the power of the purse to control presidential uses of force (and the implications of the non-use of said power); given that Congress has not once attempted to force a president to comply with the War Powers Resolution of 1973; given that every president has stated that he does not believe himself to be bound by the War Powers Resolution and that the resolution is not constitutional; and given the long-standing historical pattern of presidentially deployed force without specific authorization from Congress, it is not difficult to perceive that a gloss has in fact developed on executive-legislative war powers. The logic of this gloss gives the president broad latitude in the deployment and use of American military force without needing to ask Congress for a declaration of war or any other specific approval or authorization.

This argument finds support in the *Steel Seizure Case*, normally cited as a blow to executive power and a reaffirmation of the role of Congress (indeed, this point shall be made below). Justice Jackson’s “zone of twilight”⁶⁷ in which “[the president] and Congress may have concurrent authority, or in which its distribution is uncertain” seems

64. *Id.* at 988.

65. The Boland Amendment was attached to the 1984 Defense Appropriations Act and stated, [n]one of the funds provided in this act may be used by the Central Intelligence Agency of the Department of Defense to furnish military equipment, military training or advice, or other support for military activities, to any group or individual, not part of a country’s armed forces, for the purpose of overthrowing the government of Nicaragua or provoking a military exchange between Nicaragua and Honduras.

Govt. Accountability Off., Report B-201260 (Sept. 11, 1984) (available at <http://redbook.gao.gov/14/f10067296.php>).

66. 361 F. Supp. at 562.

67. *Youngstown*, 343 U.S. at 637

to apply here.⁶⁸ When authority is unclear, as it certainly has become in light of presidential use of force,

congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.⁶⁹

In other words, congressional silence in the face of an assertion of presidential power can serve as acceptance of that power or even as a delegation of authority. In the case of presidential war powers, Congress certainly seems to have devolved any control over the deployment of military force that it might have been argued to possess.⁷⁰

However, this gloss has produced a gross imbalance between Congress and the president concerning war powers that has directly contributed to controversial, and recently overturned, executive actions, such as the domestic wiretapping operation conducted by the National Security Agency⁷¹ or the attempt to try those suspected of involvement with al Qaeda, such as Hamdan, in military tribunals. Once one takes the position that Congress has authorized the president to use his full complement of war powers, extending that power into other areas is not far behind. For example, John Yoo writes, "Congress also implicitly authorized the President to carry out electronic surveillance to prevent further attacks on the United States in the Authorization for the Use of Military Force passed on September 18, 2001."⁷² More directly to the point of the convening of military tribunals, Yoo goes on to note that the power to commit Hamdan and other suspected terrorists to military tribunals comes directly from "[the president's] authority as commander in chief."⁷³ As has been noted above, the recent history of war powers has been one of the steady accretions of power in the hands of the executive and the gradual diminishing of the role of Congress. While this has certain advantages, it also poses a particular problem in the on-going War on Terror.

V. RESTORING THE BALANCE: THE IMPORT OF *HAMDAN*

On September 20, 2001, President Bush, in an address to a joint session of Congress, publicly proclaimed that the United States, as a result of the attacks of September 11, 2001, was now fighting a "War on Terrorism."⁷⁴ In this war, as acknowledged by President Bush, a large part of the fighting will be within the United

68. *Id.*

69. *Id.*

70. For more on the argument that Congress has effectively devolved the power to initiate hostilities to the president, review Barbara Hinckley, *Less Than Meets the Eye: Foreign Policy Making and the Myth of the Assertive Congress* 195–203 (U. Chi. Press 1994); Rudalevige, *supra* n. 51, at 192–200; James L. Sundquist, *The Decline and Resurgence of Congress* 110–26, 265–72 (Brookings Instn. Press 1981). See also *supra* nn. 2, 26, and 29.

71. Eric Lichtblau, *Conflict of Interest Is Raised in Eavesdropping Ruling*, N.Y. Times A19 (Aug. 23, 2006); Adam Liptak & Eric Lichtblau, *U.S. Judge Finds Wiretap Actions Violate the Law*, N.Y. Times A1 (Aug. 18, 2006).

72. Yoo, *War*, *supra* n. 26, at 115.

73. *Id.* at 238.

74. George W. Bush, *Address to a Joint Session of Congress and the American People* (D.C., Sept. 20, 2001) (available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>).

States itself and use tools not traditionally considered to be part of a military response:

Our nation has been put on notice: We are not immune from attack. We will take defensive measures against terrorism to protect Americans. Today, dozens of federal departments and agencies, as well as state and local governments, have responsibilities affecting homeland security. These efforts must be coordinated at the highest level. So tonight I announce the creation of a Cabinet-level position reporting directly to me—the Office of Homeland Security.

We will come together to give law enforcement the additional tools it needs to track down terror here at home. We will come together to strengthen our intelligence capabilities to know the plans of terrorists before they act, and find them before they strike.⁷⁵

The domestic component of the war, along with the belief in broad and largely unfettered presidential war powers, led to Congress being largely shut out of the loop because the legislative body was not consulted regarding the National Security Agency domestic surveillance operation or the establishment of military tribunals to try Hamdan and other suspected terrorists.

Nevertheless, there is broad recognition that Congress has a valuable and essential role to play in a war like the War on Terror. In his concurrence to the *Steel Seizure* decision of *Youngstown*, Justice Jackson wrote that the historical experience of other nations' dealings with the question of the domestic applicability of war powers "suggests that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them."⁷⁶ Furthermore, "[w]ith all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."⁷⁷

The question in the *Steel Seizure* case was whether President Truman could, pursuant to his war powers in the Korean War—a conflict not declared or otherwise specifically authorized by Congress—seize steel mills, the product of which was deemed essential to the war effort, in the U.S. to force striking workers back to their jobs.⁷⁸ The decision was struck down as it was, in Justice Black's opinion, "lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not to the President."⁷⁹ And "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."⁸⁰ Furthermore,

[t]he order [to seize the mills] cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. . . . Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as

75. *Id.*

76. *Youngstown*, 343 U.S. at 652.

77. *Id.* at 655.

78. *Id.* at 582.

79. *Id.*

80. *Id.* at 587.

such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.⁸¹

Thus, even though the nation was undoubtedly engaged in a war, the president's inherent war powers as Commander in Chief could not be understood to extend into lawmaking, a power specifically reserved for Congress.

The concurrence of Justice Douglas supports this critical distinction between military actions and lawmaking: "The legislative nature of the action taken by the President seems to me to be clear."⁸² Justice Jackson goes further, writing,

[t]he essence of our free Government is "leave to live by no man's leave, underneath the law"—to be governed by those impersonal forces which we call law. . . . The Executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will of the President and represents an exercise of authority without law.⁸³

Again, the president has no inherent power to take actions of a legislative nature unless ordered or authorized to do so by Congress.

The notion that executive and legislative powers must remain separated lies at the very heart of the philosophical underpinnings of American constitutional democracy. In Federalist Paper 47, James Madison wrote, "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."⁸⁴ Justice Jackson echoed this fear, noting that President Truman's bid to seize the steel mills amounted to an attempt to claim legislative power for the executive branch under the aegis of war powers:

But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.⁸⁵

When the president wants to take an action of an inherent legislative nature pursuant to his powers as Commander in Chief, he must have express and explicit permission from Congress.

However, it is neither likely to be prudent nor expedient for a wartime president to seek specific authorization from Congress for each and every act of a legislative nature that he believes necessary for the prosecution of hostilities. Congress is a slow, deliberative body that is not likely to be capable of sufficiently rapid decision making in times of crisis. However, an option does exist whereby the president may request a broad and open-ended authorization from Congress to take legislative actions—a formal declaration of war. The *Hamdan* decision and the War on Terror more generally have refocused attention and refurbished the luster on this little-used and oft-forgotten

81. *Youngstown*, 343 U.S. at 587.

82. *Id.* at 630

83. *Id.* at 654–55.

84. Alexander Hamilton, James Madison & John Jay, *No. 47. Madison*, in *The Federalist Papers* 300, 303 (Clinton Rossiter ed., New Am. Lib. 1961).

85. *Youngstown*, 343 U.S. at 642.

component of congressional war powers by virtue of requiring, in the opinion of the Executive Branch, legislative actions.

If the president's inherent war powers give him the right to deploy force without specific authorization from Congress, then what good is the constitutionally delegated power to declare war? The answer lies in *Bas v. Tingy*,⁸⁶ a Supreme Court decision from 1800. In this decision, the Court established that there are two distinct states of war—imperfect and perfect.⁸⁷ An imperfect war is one in which war is not formally declared and yet “it is *public war*, because it is an external contention by force.”⁸⁸ Imperfect wars are wars “though all the members are not authorized to commit hostilities such as in a solemn [perfect] war.”⁸⁹

Imperfect wars are contrasted with perfect wars, in which war is formally declared. In a perfect war,

one whole nation is at war with another whole nation; and *all* the members of the nation declaring war, are authorized to commit hostilities against all the members of the other, in every place, and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition.⁹⁰

In a perfect, or formally declared, war, the entire energy of the nation is directed towards the war effort, while in an imperfect war, the war effort is limited and restrained by existing domestic law.⁹¹ Almost all uses of force by the U.S. military are imperfect wars, rather than perfect wars, meaning that the war powers of the president are limited. If the president wishes to expand the breadth of those war powers, he must ask Congress to declare war.

This logic is supported by the majority opinion and the dissent by Justice Nelson in the *Prize Cases*.⁹² Justice Nelson described the nature of a declared war as including the citizens of the warring nations becoming enemies, the suspension of all legal contracts, a right of interdiction of trade and commerce into the enemy nation, the ability to capture and confiscate the property of the enemy, and the right to blockade ports.⁹³ Furthermore, Justice Nelson wrote that

[n]o power short of [a congressional declaration of war] can change the legal status of the Government or the relations of its citizens from that of peace to a state of war. . . . The war power of the Government must be exercised before this changed condition of the Government and people . . . can be admitted.⁹⁴

86. 4 U.S. 37 (1800).

87. *Id.* at 38.

88. *Id.* at 40.

89. *Id.* at 40–41.

90. *Id.* at 40 (emphasis in original).

91. *Bas*, 4 U.S. at 40–41.

92. 67 U.S. 635 (1862). The majority decision in the *Prize Cases* found that previous congressional legislation, including the Acts of Congress of February 28, 1795, and March 3, 1806, served as a declaration of war for the Civil War by expressly giving the president the power to use the U.S. military in case of invasion or insurrection. Justice Nelson's dissent rejected that decision, arguing that a state of war did not exist between the warring parties until the Act of Congress on July 13, 1861. However, the majority opinion and the dissent both agreed on the substantive point made most clear in Justice Nelson's opinion and cited here.

93. *Id.* at 687.

94. *Id.* at 689.

One critical difference between a perfect or declared war and an imperfect or undeclared war is the ability of the president to act in a legislative manner. A war in the formal sense involves a significantly higher intensity of hostilities than in an imperfect war and thus requires the effort, focus, and resources of the entire country. A formal declaration of war, which creates a legal state of war, affects both domestic and international law, subordinating both to the war effort, and broadens the scope of presidential power to allow for a more complete and effective national effort in the prosecution of the conflict. Thus, in a formal state of war, a president is allowed to suspend habeas corpus, seize property needed for the war effort, ration food and materiel, or intern large segments of American citizens. When the country is not in a state of war by virtue of a formal declaration of war, the ability of the president to take such legislative actions is restricted and limited. Without a declaration of war, a president is not allowed to seize steel mills, conduct warrantless wiretapping of American citizens, indefinitely detain those suspected of terrorism, or change the established rules for the use of military tribunals.

The Bush Administration implicitly acknowledged this logic in the *Hamdan* case by making the argument that the country was indeed in a state of war by virtue of the attacks of September 11, 2001, and the passage of AUMF on September 18, 2001.⁹⁵ However, as noted earlier, the Court struck down the military commissions on the grounds that congressional statutes and international legal commitments (the Geneva Conventions⁹⁶) existed that spelled out the procedures and rules that must be followed in the use of military commissions and 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.”⁹⁷ The Court went on to note that “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.”⁹⁸ Thus, even though the Court “assume[d] that the AUMF activated the President’s war powers,”⁹⁹ “[n]either of these congressional Acts [the AUMF or the DTA] expands the President’s authority to convene military commissions.”¹⁰⁰ Thus, the Court explicitly recognized that the president’s war powers do not inherently involve the right to take legislative actions. Rather, that power must be specifically granted to the president by Congress.¹⁰¹

How can legislative power be granted to the president? Must the president during wartime come to Congress and request specific legislation for each and every legislative action he wishes to take in pursuit of victory? The answer presented herein is yes, unless Congress, realizing that the level of danger to the country is high and that the legislative process is too slow to successfully confront the extant threats, has in some way given broad authorization to the president to take such actions. A formal declaration of war

95. See *Hamdi*, 542 U.S. 507; Respt.’s Br., *supra* n. 17, at 2; 66 Fed. Reg. 57833.

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

97. *Id.* at 2759.

98. *Id.* at 2775.

99. *Id.*

100. *Id.*

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

serves this very purpose.

The decision of *Bas v. Tingy* makes it clear that there are crucial differences in the size and scope of perfect and imperfect wars, the latter of which requires that the power of the president be restrained and limited. Some wars, however, are so threatening to the national interest that they must be fought in a different manner. It is inconceivable that the U.S. could have successfully prosecuted either World War I or II without massive contributions and sacrifices from the home front, many of which came about through presidential initiative. Accordingly, both World Wars I and II were fought under formal declarations of war that permitted the presidents to take legislative actions such as establishing rationing patterns, seizing industries, censoring potentially seditious material, and interning Japanese Americans living on the West Coast.¹⁰² But, can it be argued that Congress explicitly intended to authorize such actions by the president and cede legislative power?

The declarations of war for World Wars I and II contain particular and specific language that provides evidence of Congress' intention to cede legislative power to the president in recognition of the unlimited scope, size, and potential threat of the conflicts. The language is found at the end of the declarations of war against Germany in both wars and against Japan and Italy in World War II:

the state of war between the United States and the [specified country] which has thus been thrust upon the United States is hereby formally declared; and the President is hereby authorized and directed to employ the entire naval and military forces of the [United States and the resources of the] government to carry on war against the [specified country]; and to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States.¹⁰³

By pledging "the resources of the Government" and "all of the resources of the country" to the president, Congress has recognized that in the current conflict the war effort will require extraordinary powers to be placed in the hands of the Commander in Chief.¹⁰⁴

When the country is embroiled in a conflict that is sufficiently threatening to

102. William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime 170–202* (Alfred P. Knopf 1998).

103. *Formal U.S. Declaration of War with Germany* (Apr. 6, 1917) (available at <http://firstworldwar.com/source/usofficialawardeclaration.htm>); *U.S. Declaration of War against Germany* (Dec. 11, 1941) (available at <http://www.law.ou.edu/ushistory/germwar.shtml>); *Congressional Declaration of War on Japan* (Dec. 8, 1941) (available at <http://www.law.ou.edu/ushistory/japwar.shtml>); *Declarations of a State of War with Japan, Germany, and Italy* (available at <http://www.yale.edu/lawweb/avalon/wwii/dec/dec05.htm>) (War with Italy was declared on Dec. 11, 1941.).

104. Note that while the declarations of war for the War of 1812 and the Mexican- and Spanish-American Wars do formally declare the existence of a state of war, they do not contain the language about ceding all the resources of the country to the president. But this should not be surprising. The concept of "total" war did not really come into existence until the beginning of the twentieth century, and World War I represents the first real total war. Furthermore, during the nineteenth century, the U.S. did not yet possess the domestic infrastructure or capability to mobilize much power from the home front. Fareed Zakaria, *From Wealth to Power: The Unusual Origins of America's World Role* (Princeton U. Press 1998). Because these three wars were not fought in the same way as the wars of the twentieth century, the absence of the "resources of the country" language does not undo the argument. For discussions of total war, review Philip Bobbitt, *The Shield of Achilles. War, Peace, and the Course of History* 196 (Alfred P. Knopf 2002); B.H. Liddell Hart, *Strategy* 338–44 (2d rev. ed., Praeger 1967); Karl von Clausewitz, *On War* (O.J. Matthijs Jolles trans., Random House 1976).

warrant the existence of a state of war, the president must be able to call upon legislative powers without waiting for specific congressional approval of each action. Without a declaration of war a president may not seize a domestic industry, even one crucial to the war effort, as President Truman tried to do during the Korean War,¹⁰⁵ with a declaration of war a president can order the internment of more than 100,000 American citizens, conduct warrantless surveillance, seize property, divert industrial assets to the war effort, and appropriate transportation systems.¹⁰⁶ Thus, as John Yoo writes:

Even the Supreme Court has suggested that in times of declared war, certain actions by the federal government would survive strict scrutiny but would certainly fail if attempted in peacetime. . . . One doubts whether the courts would have allowed the wholesale internment of Panamanian Americans during the 1989 Panama War, or of Yugoslavs during the Kosovo conflict, or of all Iraqi Americans during the recent invasion and occupation of Iraq. Only a declaration of war from Congress could trigger and permit such extreme measures reserved only for total war.¹⁰⁷

Should the AUMF of September 18, 2001, be interpreted as the functional equivalent of a declaration of war, as argued by the Bush Administration (and John Yoo)?¹⁰⁸ AUMF contains none of the critical language found in the formal declarations of war. It does not mention the existence of a state of war. It does not talk of committing the resources of the Government or “all the resources of the country” to the war effort. Rather, AUMF states that

the President is authorized 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, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.¹⁰⁹

This language cannot be read as creating a state of war, ceding power or authority to the executive, or functioning more generally as a declaration of war. While the president is authorized to use force in defense of the nation, he is not given the power to act in a legislative manner and thus does not have the right to supersede, bypass, or transform existing laws.

In the absence of a declaration of war, the logic of *Youngstown*¹¹⁰ holds sway over presidential decision making because it requires a determination of whether Congress has acted in a particular issue area. If it has, then the president may not act contrary to the law. Thus in *Hamdan*, given the existence of UCMJ and the Geneva Conventions, both of which spelled out the rules and procedures of using military tribunals, the president's action fell into Justice Jackson's third category of “practical situations” when “the President takes measures incompatible with the expressed or implied will of

105. *Youngstown*, 343 U.S. at 579.

106. Yoo, *supra* n. 50, at 151.

107. *Id.* at 151–52.

108. Review *supra* notes 3 and 9.

109. Pub L. No. 107-40, 115 Stat. 224 (2001).

110. 343 U.S. 579.

Congress.”¹¹¹ In such cases, presidential “power is at its lowest ebb” and “[p]residential claim to a power . . . must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”¹¹²

The question of whether *Hamdan* would have been decided differently in the case of a formal declaration of war by Congress is unresolved. But the argument presented in this article suggests that under a declaration of war the military commission established to try Hamdan would have been permitted. A declaration of war focuses the collective attention of Congress on the question of whether a state of war should be declared and thus would involve different deliberations and rationales than a more limited authorization of force. In the analysis presented herein, *Hamdan* serves to restore a much needed balance to war powers, bringing back a policy-relevant and constitutionally vital role to Congress.

VI. CONCLUSION: A BALANCE RESTORED

In his concurrence to the *Youngstown* decision, Justice Jackson wrote that “[t]he tendency is strong to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our Republic.”¹¹³ Indeed, this warning seems particularly prescient in the context of the on-going War on Terror. Even if the threat of al Qaeda is existential, as has been claimed by President Bush and supporters, it does not necessarily follow that the president should be freed from congressional restraints to pursue whatever strategies and implement whatever policies he deems necessary to fight that threat.¹¹⁴ In a “normal” war, like either of the two World Wars, an end can be envisioned, metrics can be created for assessing progress towards that end, and the extraordinary legislative powers ceded to the president by Congress can one day be given back when the war is over.

However, the War on Terror is not such a war. The enemy is unclear, does not wear uniforms, and may be living and operating among American citizens. The goal of the war is unclear as well. Is the purpose of the War on Terror to defeat all terrorism, to reduce terrorism to a manageable threat, or simply to lower the likelihood of another large-scale attack? The metrics are largely unknowable, making it difficult to determine whether the U.S. is winning. Does the absence of an attack against the U.S. since 9/11 mean that the war has been successful or that the terrorists have diverted their energies elsewhere? Which component of the War on Terror has been the most responsible for protecting the nation? At what point could victory, if victory is even possible, be declared and any extraordinary legislative powers be returned to Congress by the president?

In such a murky political and military situation, the burden of caution weighs against a broad interpretation of executive power and recommends against granting the

111. *Id.* at 635, 637.

112. *Id.* at 637–38.

113. *Id.* at 634.

114. In his address to Congress on September 20, 2001, President Bush asserted that “[t]hese terrorists kill not merely to end lives, but to disrupt and end a way of life” and that “what is at stake is not just America’s freedom” but also “progress and pluralism, tolerance and freedom.” Bush, *supra* n. 74.

president a “blank check” to act as he sees fit without congressional supervision. Turning back once more to the *Youngstown* concurrence of Justice Jackson, we repeat Jackson’s warning against just such a scenario:

no doctrine that the Court could promulgate would seem . . . more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation’s armed forces to some foreign venture.¹¹⁵

Noble goals and successful policies cannot be the arbiters of a policy’s legality and constitutionality. The power to make and define the country’s laws, even during wartime, rests solely with Congress and must do so in order to preserve the delicate balance of power and authority that defines American constitutional democracy.

In the absence of a threat that demands in the determination of Congress the creation of a legal state of war, the president must not and cannot take actions of a legislative nature. If the laws as they stand do not suit the strategy of the conflict, the president must go to Congress and ask for the laws to be changed. This is exactly what happened in the aftermath of *Hamdan*.¹¹⁶ Once the claim to inherent power was struck down, President Bush asked for and was granted by both the Senate and the House of Representatives the types of military commissions he believed to be necessary for the prosecution of the War on Terror.¹¹⁷ In this way, legislative power remains in the hands of the legislature as a check on the unfettered powers of the executive.

In a war like the War on Terror with no end in sight and no real metrics for victory, policy must flow from process. Extreme caution must be taken before handing this President (or any president) unmonitored and sweeping legislative power. The decision in *Hamdan* is vitally important as it restores the balance to congressional-executive war powers, ensuring that the separation of powers, which forms the essence of American constitutional democracy, will not be undone.

115. *Youngstown*, 343 U.S. at 642 (footnote omitted).

116. Charles Babington & Jonathon Weisman, *Senate Approves Detainee Bill Backed by Bush*, Wash. Post A1 (Sept. 29, 2006).

117. *Id.*