Tom and Jerry (and Spike): A Metaphor for Hamdan v. Rumsfeld, the President, the Court, and Congress in the War on Terrorism

Tung Yin

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Tung Yin*

1. INTRODUCTION

In the old Tom and Jerry cartoons, Tom the cat often tried to implement a mischievous scheme to torment Jerry the mouse. Being physically smaller, Jerry had to resort to his wits to thwart Tom and, on occasion, Jerry would manipulate Spike the dog into putting Tom in his proper place (usually outside the house, if not off the property altogether). I say “manipulate” because Spike was usually seen slumbering happily in his doghouse, only to be assaulted by Tom due to Jerry’s misdirection.

As it turns out, the Tom-Jerry-Spike relationship is an apt way of viewing the power struggle between the President, the Supreme Court, and Congress in the war on terrorism. As “Tom,” the President is the initiator of controversial actions, including the implementation of military commissions to prosecute suspected terrorists captured primarily in Afghanistan or Pakistan. As “Jerry,” the Supreme Court has been drawn into standing up to the President in the numerous lawsuits brought by or on behalf of Guantanamo detainees. And as “Spike,” Congress, until only recently, has been silent in the war on terrorism.\(^2\)

But just as Jerry could not stand up to Tom physically, at least without hiding behind Spike, the Court has, in essence, hidden behind Congress in its decisions in the four war-on-terrorism cases since June 2004—most recently *Hamdan v. Rumsfeld*,\(^4\) and earlier, *Hamdi v. Rumsfeld*,\(^5\) *Rumsfeld v. Padilla*,\(^6\) and *Rasul v. Bush*.\(^7\) Three of the four

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* Associate Professor, University of Iowa College of Law. J.D., 1995, University of California, Berkeley (Boalt Hall); M.J., 1992, University of California, Berkeley; B.S., 1988, California Institute of Technology. Thanks to Randy Bezanson, Arthur Bonfield, Bill Buss, Judge John Ferren, Jon Carlson, Paul Mishkin, and participants at a mini-faculty workshop at the University of Iowa College of Law for helpful feedback at various stages, and to Steven Stickle (’07), Christine Eichinger (’08), and Stephen Thompson (’08) for excellent research assistance.

2. See infra Part I.B., IV.
cases are generally viewed as Executive Branch "losses," and the one "win" (Padilla) succeeded on a technical ground that was easily remedied. With the exception of Hamdi, these decisions are all ones of statutory interpretation, apparently leaving Congress free to overrule the Court. Even Hamdi had an important statutory interpretation element of possibly greater significance than its constitutional holding. 8 In short, the Court has said to the President either "Congress has allowed you to do what you want" or "Congress has forbidden you from doing what you want."

Yet, the cases are more subtle and complicated than mere statutory interpretation decisions. Curiously, the two cases involving alien petitioners (Rasul and Hamdan) resulted in narrow interpretations of the relevant statutes, thus benefiting the aliens; the two cases involving citizen petitioners (Padilla and Hamdi) resulted in broad interpretations of the scope of the relevant statutes, thus benefiting the government.

What accounts for the contrasting statutory interpretations based on citizenship? Returning to the Tom and Jerry metaphor, it is possible that the Court is maneuvering Congress into a position where it must decide whether to endorse the President's actions or to resist them. By making statutory interpretations in favor of the aliens, the Court may be exploiting congressional inertia—requiring Congress to act to undo the Court's rulings in favor of aliens. This might be seen as a plausible default rule, for aliens are not constituents, and therefore Congress would not be expected to act on their behalf.

In Part II of this article, I review Hamdan, focusing on the two major points of disagreement between the majority and the dissenters: the interpretation of the jurisdiction-ousting provisions of the Detainee Treatment Act of 2005 9 and the interpretation of the Uniform Code of Military Justice's restrictions, 10 if any, on the President's authority to convene military commissions. In Part III, I discuss the 2004 trio of terrorism cases, focusing on their statutory interpretations.

In Part IV, I turn to the question of why the Court might be privileging aliens over citizens. First, I consider the possibility that the Court is merely leveling the playing field between citizens and aliens. While this largely explains the disparity between the terrorism decisions, it still does not answer why the Court is acting to benefit the aliens, even in this more limited way. Next, I consider whether the Court might be acting in a representation-reinforcing role. Because aliens are not constituents, the political process cannot be expected to protect them. Therefore, the Court might be doing so. Ultimately, I conclude that the representation-reinforcing role cannot explain the Court's decisions because that role calls for constitutional decisions, not statutory interpretations. Instead, the Court appears to be enforcing a requirement of a clear statement of intent to discriminate against aliens on the part of the political branches.

Finally, in Part V, I examine the legislation that Congress passed in response to Hamdan. Signed into law by the President, this legislation mostly overrode Hamdan.

8. See infra Part II.B.
II. THE ROAD TO HAMDAN

After the 9/11 attacks, Congress authorized the President “to use all appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons.” President Bush determined that the al Qaeda terrorist group, based in Afghanistan and harbored by the Taliban leaders of that country, was responsible for the terrorist attacks. In November 2001, the United States, aided by Great Britain, launched air strikes against Taliban strongholds and suspected al Qaeda training camps. Days later, U.S. Special Forces began ground operations in conjunction with the Northern Alliance, the loose confederation of Afghan tribes opposed to the Taliban. Then, on November 13, 2001, the President issued an executive order, “Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism.” This order provided authority to try designated alien enemy combatants in military commissions.

Among those captured fighting U.S. and Northern Alliance forces was Salim Ahmed Hamdan, who was sent with hundreds of other suspected al Qaeda or Taliban fighters to the U.S. naval base on Guantanamo Bay, Cuba, for interrogation and detention. According to the U.S. government, Hamdan willingly joined the al Qaeda terrorist group in early 1996, “received weapons training at al Qaeda-sponsored camps,” and served “as Osama bin Laden’s ‘bodyguard and personal driver.’” On July 3, 2003, President Bush ordered trial by military commission of non-citizens such as Hamdan if “there is reason to believe’ that he or she . . . ‘is or was’ a member of al Qaeda or” was otherwise involved in terrorism directed against the United States. Hamdan was appointed military counsel and then his case languished for over a year, with Hamdan having filed a petition for a writ of habeas corpus in a district court before the government charged him formally with conspiracy. Separately, a Combatant Status Review Tribunal (CSRT) determined that Hamdan was indeed an enemy combatant subject to detention. It looked as if Hamdan would be the first detainee to be tried in a military commission, with a small number of others to follow.

A. The Lower Court Proceedings

The district court handling Hamdan’s habeas petition acted, however, and blocked
the military commission from proceeding. The court concluded that Hamdan was entitled to prisoner-of-war status until adjudged otherwise by a competent tribunal pursuant to Article 5 of the Geneva Convention and that the military commissions established by the President’s order violated the Uniform Code of Military Justice (UCMJ) and Common Article 3 of the Geneva Convention because the President’s order contained, among other things, provisions allowing the military commission to keep classified evidence from the defendant.19

The D.C. Circuit Court of Appeals reversed, holding that Hamdan had no individual rights under the Geneva Convention even if that convention applied to him and that the military commission procedures were lawful.20 Hamdan filed a petition for certiorari, which the Supreme Court granted on November 7, 2005.21 The first question presented was whether the military commission established to try Hamdan was authorized under the Authorization for Use of Military Force (AUMF), the UCMJ, or the President’s inherent powers. The second question presented was whether Hamdan was entitled to judicial enforcement of rights under the 1949 Geneva Convention.

B. The Detainee Treatment Act of 2005

While Hamdan was pending, Congress passed the Detainee Treatment Act of 2005 (DTA). Among other things, DTA amended the federal habeas corpus statute to include a new subsection (e) in title 28 U.S.C. § 2241:

Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—

(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense in Guantanamo Bay, Cuba; or

(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

(A) is currently in military custody; or

(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.23

In other words, all courts are deprived of jurisdiction to hear any legal claims, whether via habeas petition or federal court complaint, except for the one avenue specified in DTA.24 The exception provides the D.C. Circuit with exclusive jurisdiction

20. Hamdan, 415 F.3d at 42.
22. In addition to the provision regulating federal courts’ jurisdiction over claims by Guantanamo Bay detainees, DTA also regulates the interrogation of persons in military detention. 119 Stat. at 2739–40, §§ 1002-1003.
24. State courts are not explicitly mentioned in DTA, but state courts lack the power to issue writs of habeas corpus against federal custodians. See Tarble’s Case, 80 U.S. 397 (1872).
to review (1) "the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant" and (2) "the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order)."

DTA took effect on December 30, 2005, the date on which it was signed into law. It also contained a provision stating that the subparts providing the D.C. Circuit with exclusive jurisdiction in those two classes of cases—challenges to CSRT decisions and challenges to final decisions of military commissions—"shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act."

C. The Court's Opinions

Hamdan produced six opinions totaling 107 pages in the advance sheets. As Cass Sunstein has noted, there were seven distinct issues on which the Court divided by votes of 5-3, 4-3, or 5-2. In this section, I provide a summary of the opinions and then focus on the key issues in the case: the effect of DTA and the restraints imposed by UCMJ and the Geneva Convention upon the President's authority to dictate the procedures of the military commission.

1. Summary

The Court, in a 5-3 decision, reversed the D.C. Circuit. The majority opinion denied the government’s motion to dismiss based on DTA, rejected the government’s Schlesinger v. Councilman-based abstention argument, concluded not only that AUMF did not provide unlimited authorization for military commissions but also that the military commissions violated both UCMJ and the Geneva Convention, and held that Hamdan was entitled to the protections of Common Article 3 of the Geneva Convention.

In parts of the opinion not joined by Justice Kennedy, and therefore not part of the holding, Justice Stevens argued that the specific charge of conspiracy against Hamdan failed to state a violation of the laws of war. Next, Justice Stevens argued that the

26. Id. at 2743, § 1005(e)(3)(A).
27. Id. at § 1005(h)(1).
30. Chief Justice Roberts recused himself because he had been a member of the D.C. Circuit panel that ruled against Hamdan.
31. Hamdan, 126 S. Ct. at 2753-54.
32. Id. at 2754 (citing Councilman, 420 U.S. 738 (1975)). Councilman essentially imported the abstention rule of Younger v. Harris into the court-martial context. 420 U.S. at 758 (citing Younger, 401 U.S. 37, 41 (1971) (barring federal courts from enjoining "pending state court proceedings except under special circumstances" (footnote omitted))).
33. Hamdan, 126 S. Ct. at 2754-56.
34. Id. at 2756-57.
35. Id. at 2777-78 (plurality).
military commission procedures that permit the withholding of classified information from defendants without showing of necessity fail to satisfy "‘all the guarantees . . . recognized as indispensable by civilized peoples’ in Common Article 3." 36 Justice Breyer wrote a short concurrence emphasizing that the power dispute was between the President and Congress, noting "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary." 37

Also concurring was Justice Kennedy. 38 Unlike the majority opinion, Justice Kennedy invoked Justice Jackson’s three-part separation-of-powers framework from Youngstown. 39 That framework considered whether “the President act[ed] pursuant to an express or implied authorization of Congress . . . in absence of either a congressional grant or denial of authority . . . [or] when . . . [taking] measures incompatible with the expressed or implied will of Congress.” 40 In the first category, the president’s power was “at its maximum,” while in the third category it was “at its lowest ebb.” 41 For Justice Kennedy, Congress’ detailed legislation regarding military courts (including military commissions), particularly title 10 U.S.C. §§ 821 and 836, represented explicit limitations on the President’s authority and thus placed the President in the third category.

All three dissenters wrote opinions. Justice Scalia disputed the majority’s conclusion that DTA had not stripped the Court’s jurisdiction over Hamdan’s habeas petition. 42 He also argued that abstention under Councilman was appropriate. Whereas Justice Scalia disagreed with the majority about the Court’s jurisdiction over the case, Justice Thomas challenged the majority’s analysis of UCMJ and the Geneva Convention. 43 Finally, Justice Alito argued that the military commissions were in fact “regularly constituted,” which, if correct, would defeat the majority’s conclusion that the military commissions violated Common Article 3 of the Geneva Convention. 44

2. The Stevens-Scalia Debate over DTA

The heart of the debate between Justice Stevens, writing for the Court, and Justice Scalia, dissenting, was, in essence, whether Congress intended DTA to strip all federal courts immediately of jurisdiction over any claims brought by Guantanamo detainees or whether Congress intended for courts to retain jurisdiction over one class of actions—pending habeas petitions filed by aliens detained at Guantanamo—but not other actions challenging detention, determinations by CSRTs, or final decisions of military

36. Id. (citing Geneva Convention Relative to the Treatment of Prisoners of War, art. 3 (Aug. 12, 1949), 6 U.S.T. 3316, 3320) (omission in original).
37. Id. at 2799 (Breyer, J., concurring). Justices Kennedy, Souter, and Ginsburg joined this concurrence.
38. Hamdan, 126 S. Ct. at 2799 (Kennedy, J., concurring). Justices Souter, Ginsburg, and Breyer joined Parts I and II of this concurrence. In Part III, Justice Kennedy explained that he did not join those sections of the majority opinion that reached unnecessary issues. Id. at 2808–09.
39. Id. at 2800 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)).
40. Youngstown, 343 U.S. at 635–37 (Jackson, J., concurring) (citations omitted).
41. Id.
42. Hamdan, 126 S. Ct. at 2810 (Scalia, J., dissenting). Justices Thomas and Alito joined this dissent.
43. Id. at 2823 (Thomas, J., dissenting). Justice Scalia joined the entire dissent; Justice Alito joined large parts of the dissent.
44. Id. at 2849 (Alito, J., dissenting). Justices Scalia and Thomas joined this dissent.
Both sides had canons of statutory construction to draw upon. For Justice Stevens, there was first the constitutional avoidance doctrine, under which the Court will interpret ambiguous statutes so as to avoid confronting a difficult constitutional issue. If DTA were to strip the Court of its appellate jurisdiction to hear a pending case, the Court would have to confront the constitutional issue of whether Congress had suspended the writ of habeas corpus in satisfaction of the Suspension Clause. By construing DTA to have left the Court with jurisdiction to hear Hamdan’s appeal, the Court avoided having to decide the Suspension Clause issue. To be sure, Justice Stevens did not explicitly invoke the constitutional avoidance doctrine as such, but he did explain that it was “unnecessary to reach” Hamdan’s Suspension Clause argument because “[o]rdinary principles of statutory construction suffice to rebut the Government’s theory.

Most likely, Justice Stevens did not rest entirely on the avoidance doctrine because it is far from clear that the Suspension Clause issue was difficult. The procedural events in Hamdan were remarkably similar to those in the post-Civil War case Ex parte McCardle, when the Supreme Court upheld Congress’ elimination of its jurisdiction over an entire class of habeas cases, including McCardle’s pending case. McCardle was a Confederate sympathizer who was taken into military custody for “disturbing the peace, libel, incitement to insurrection, and impeding reconstruction” by writing newspaper editorials critical of Reconstruction. The Circuit Court for the Southern District of Mississippi denied his petition for a writ of habeas corpus, and the Supreme Court accepted the case under the 1867 habeas act. The case was politically explosive because one of McCardle’s challenges to military detention was that the Military Reconstruction Act itself was unconstitutional. After the Supreme Court heard oral arguments, but before it decided the case, Congress repealed the 1867 habeas act.

The Court held that Congress’ repeal of the 1867 habeas act was within its power under the Exceptions Clause, that it would not “inquire into the motives of the legislature,” and that “[w]ithout jurisdiction the court cannot proceed at all in any cause.” Accordingly, the Court dismissed McCardle’s habeas petition. Of significance

46. U.S. Const. art. I, § 9, cl. 2 (“The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).
47. 74 U.S. 514.
49. As this case pre-dated the Evarts Act of 1891, the circuit court was not one of the current Courts of Appeal but consisted of a district judge and a Supreme Court justice “riding circuit.”
51. Van Alstyne, supra n. 49, at 238.
52. The exact language of the statute, in relevant part, read: “‘That so much of the [1867 habeas act], as authorized an appeal from the judgment of the circuit court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be, and the same is, hereby repealed.’” McCardle, 74 U.S. at 508.
53. U.S. Const. art. III, § 2, cl. 2 (“[T]he supreme Court shall have appellate Jurisdiction... with such Exceptions, and under such Regulations as the Congress shall make.”).
was the fact that McCardle could have filed a habeas petition under Section 14 of the Judiciary Act of 1789. In *Ex parte Yerger*, a post-Civil War military detainee did exactly that, and the Court held that Congress had not repealed that portion of the 1789 Act. Thus, debate remains as to whether *McCardle* stands for the broader proposition that Congress has unfettered control over the Court’s appellate jurisdiction or stands for the narrower proposition that the Suspension Clause is not implicated so long as there remains one avenue open for habeas relief, even if another is closed. Either way, DTA would appear to be consistent with *McCardle* and *Yerger*, as it provides for exclusive jurisdiction in the D.C. Circuit for appeals of final decisions by CSRTs as to enemy combatant status and of final decisions of military commissions.

In any event, Justice Stevens had a second statutory construction canon to rely upon, namely that “a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.” The effective date provision of DTA contained two key subsections. The first was the general statement that DTA “shall take effect on the date of the enactment of this Act,” which, as we will see, was relied upon by Justice Scalia. The second stated that “[p]aragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.” Paragraphs (2) and (3) of subsection (e) vest the D.C. Circuit with “exclusive jurisdiction to determine the validity of any final decision of a [CSRT] that an alien is properly designated as an enemy combatant” and “to determine the validity of any final decision” of a military commission. Hamdan’s habeas petition did not fall within either paragraph (2) or (3) of subsection (e); rather, it was a habeas petition and as such fell within paragraph (1) of subsection (e). Accordingly, the fact that Congress specified in paragraphs (2) and (3) of subsection (e) that DTA applied to pending claims falling within those paragraphs also implied that DTA did not apply to pending claims falling outside those two paragraphs. Any other interpretation would render paragraphs (2) and (3) of subsection (e) superfluous.

For Justice Scalia, on the other hand, the general effective date provision combined with the general language of the judicial review provision constituted unmistakably clear

56. 75 U.S. 85 (1869).
58. Arguably, as noted by Justice Stevens, there remains a gap in DTA’s grant of jurisdiction to the D.C. Circuit, for only those defendants convicted and sentenced to ten or more years of imprisonment or death have a right to invoke such jurisdiction. The D.C. Circuit may decline to hear appeals from other defendants. *Hamdan*, 126 S. Ct. at 2763.
60. 119 Stat. at 2743, § 1005(h)(1).
61. Id. at 2743–44, § 1005(h)(2).
62. Id. at 2742–43, § 1005(e)(2)–(3).
directive to strip all federal courts of jurisdiction, save the limited exclusive jurisdiction
in the D.C. Circuit to hear claims by Guantanamo detainees. After all, the operative
language in DTA was that "no court, justice, or judge shall have jurisdiction to hear or
consider" (1) habeas petitions by Guantanamo detainees; (2) claims against the United
States relating to detention as enemy combatants pursuant to CSRT determinations; or
(3) claims against the United States resulting from final decisions of military
commissions. This provision took effect on December 30, 2005. Therefore, according
to Justice Scalia, on that date, "no court, justice, or judge" had the power to hear any
habeas petitions from Guantanamo detainees, that power having been cutoff by
Congress.

In addition, while Justice Stevens relied upon general rules of statutory
interpretation, Justice Scalia cited a rule specific to repeal of jurisdiction: "when a law
confering jurisdiction is repealed without any reservation as to pending cases, all cases
fall with the law." Justice Scalia argued that this rule was not merely one of statutory
interpretation but a constitutional rule stemming from the fact that federal courts were
courts of limited jurisdiction. In a particularly effective jab, Justice Scalia cited an
opinion authored by Justice Stevens, wherein the Court stated that it had "'regularly
applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction
lay when the underlying conduct occurred or when the suit was filed.'" Thus, according to Justice Scalia, once Congress determined to eliminate
jurisdiction over a class of cases, as it did in DTA, the default position should have been
no jurisdiction unless Congress specified otherwise. So how did Justice Scalia explain
the existence of DTA provisions regarding "pending claims"? He argued that those
provisions "confer[red] new jurisdiction (in the D.C. Circuit) where there was none
before." Such statutes are subject to the usual "presumption against" retroactive
application. It therefore behooved Congress to rebut this presumption by stating
explicitly that pending claims would be able to claim the benefit of the new jurisdiction.

My goal in laying out the analysis of the majority and dissenting opinions
regarding the meaning of DTA is not to suggest that one or the other was unquestionably
correct. Both opinions have their strengths and weaknesses and both point to established
rules of statutory interpretation. One of the arguments had to win out, and certainly
Justice Stevens' argument is not clearly incorrect. The interesting question is whether

63. Id. at § 1005(e).
64. Hamdan, 126 S. Ct. at 2810 (Scalia, Thomas & Alito, JJ., dissenting).
66. Id. at 2810–12.
67. Id. at 2810 (quoting Landgraf v. USI Film Products, 511 U.S. 244, 274 (1994)). To be fair, Justice Stevens
did sum up the list of cases he discussed with the observation that "a']pplication of a new jurisdictional
rule usually 'takes away no substantive right, but simply changes the tribunal that is to hear the case.'"
Landgraf, 511 U.S. at 274 (quoting Hallowell v. Commons, 239 U.S. 506, 508 (1916)). Under Justice Scalia's
interpretation of DTA, however, there was no change of tribunal for the class of habeas petitions including
Hamdan's, which were not challenges to CSRT determinations or to convictions in military tribunals. Because
his petition fell into neither of those two categories, he could not seek review in the D.C. Circuit and no other
court would have jurisdiction to hear his petition.
68. Hamdan, 126 S. Ct. at 2812 (Scalia, Thomas & Alito, JJ., dissenting) (citations omitted).
69. Id. at 2813.
70. Id. (quoting Hughes Aircraft Co. v. U. S. ex rel. Schumer, 520 U.S. 939, 951 (1997)).
the same interpretation rules that the *Hamdan* majority used in construing DTA were also used in the second statutory issue in the case as well as in the 2004 terrorism cases.

3. The Stevens-Thomas Debate over UCMJ

The second major dispute in *Hamdan* was the extent to which Congress intended UCMJ to regulate military commissions established by the President. Still writing for the Court, Justice Stevens began his analysis by noting that, historically, courts-martial and military commissions shared trial procedures so as "to protect against abuse and ensure evenhandedness under the pressures of war." Congress codified this uniformity principle in Article 36 of UCMJ:

(a) . . . procedures, including modes of proof, for cases . . . in courts-martial, military commissions and other military tribunals, and . . . courts of inquiry, 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.

The procedures established for the military commissions at issue deviated from those used in criminal prosecutions and in courts-martial in a number of significant ways. Most notably, the presiding officer at a military commission could "close" the proceedings to the defendant (and any civilian counsel representing the defendant) for a number of reasons, including the presentation of classified information. While the defendant's military counsel was allowed to remain at such closed sessions, the presiding officer could order the military counsel not to disclose what happened. By contrast, UCMJ requires the presence of the defendant at all sessions except those in which the members are deliberating.

Justice Stevens agreed that the President had satisfied the conditions for subsection (a), thus justifying the deviation in military commission procedures from those used in federal district courts. However, Justice Stevens argued that subsection (b) had not been satisfied because the President had not declared that it would be impracticable to follow the procedures used in courts-martial, particularly the requirement that the accused be present at all sessions except those in which the members are deliberating. Anticipating the counterpoint that the President could simply declare that it would be impracticable to use court-martial procedures in military commissions, Justice Stevens

71. *Id.* at 2788.
73. *Hamdan*, 126 S. Ct. at 2786 (citing Commn. Or. No. 1, § 6(B)(3)).
74. *Id.*
concluded that more would be required from the President than a mere declaration. 78

Accepting the President’s statement that international terrorism posed a danger to the United States, Justice Stevens noted that “it is not evident to us why [that danger] should require, in the case of Hamdan’s trial, any variance from the rules that govern courts-martial.” 79 In furtherance of this point, Justice Stevens noted that 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.” 80

In addition to the uniformity principle, Justice Stevens also concluded that the military commissions violated Common Article 3 of the Geneva Convention. Common Article 3 states that “[i]n the case of armed conflict not of an international character occurring in the territory of one of the” contracting parties, certain minimum standards of decency must be observed; most relevant to this case was the prohibition on “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.” 81 Numerous courts, including the U.S. Supreme Court itself, however, had held that the provisions of the Geneva Convention were not judicially enforceable. 82 Instead of overruling those cases, Justice Stevens held that Congress had imposed the requirements of Common Article 3 onto the President’s authority to establish military commissions through Article 21 of UCMJ. This was certainly a creative argument. Article 21 states:

The provisions of this chapter conferring jurisdiction upon courts-martial shall be construed to deprive 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 military commissions, provost courts, or other military tribunals. 83

At first glance, Article 21 would seem to be a limitation on the scope of courts-martial, not of military commissions. Numerous statutes use the language “shall not be construed” to limit the reach of those statutes rather than to limit some other grant of power. 84 Thus, one way of reading Article 21 would be to acknowledge that, prior to its

78. Id. at 2791–92 n. 52 (addressing Justice Thomas’ point in dissent that Defense Secretary Rumsfeld had made such statements).
79. Id. at 2792.
80. Id. (citing William Winthrop, Military Law and Precedents 831 (2d ed., 2d prtg., U.S. War Office 1920)).
81 6 U.S.T. 3316.
82. See Johnson v. Eisentrager, 339 U.S. 763, 789 n. 14 (1950) (“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.”); Hamdi v. Rumsfeld, 316 F.3d 450, 468 (4th Cir. 2003), overruled on other grounds, 124 S. Ct. 2633; Holmes v. Laird, 459 F.2d 1211, 1222 (D.C. Cir. 1972); see also Huynh Thi Anh v. Levi, 586 F.2d 625, 629 (6th Cir. 1978) (holding that Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, was not self-executing).
84. See e.g. South Port Marine LLC v. Gulf Oil, Ltd., 234 F.3d 58, 65 (1st Cir. 2000) (noting limitation of Oil Pollution Act); Hoge v. Honda of Am. Mfg., 384 F.3d 238, 245 (6th Cir. 2004) (noting limitation of Family Medical Leave Act rights); Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 561 (7th Cir. 1999) (noting that language in 42 U.S.C. § 12201(c)(1) “is obviously intended for the benefit of insurance companies rather than
enactment, the President had authority in times of war to convene military commissions as he saw fit. Rather than limit the President’s authority, which is dependent only on the activation of war powers, Article 21 could be seen as emphasizing that UCMJ does not intrude on such powers. This reading is bolstered by the fact that Congress has historically legislated the specific scope of military tribunals, suggesting that Congress must act affirmatively and explicitly to limit the President’s wartime authority.

True, Article 21 does reference “offenders or offenses that by statute or by the law of war may be tried by such military commissions.” Had Congress not included the italicized language, Article 21 would have read that it was not “to be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that may be tried by such military commissions.” Such a statute would remain intact and would be the clearest indication that it was not meant to limit the reach of military commissions.

In dissent, Justice Thomas argued that the uniformity principle did not apply to military commissions; rather, its purpose was to ensure uniformity of court-martial procedures among all the military branches. Here, Justice Thomas was able to cite persuasive legislative history to support his contention. With regard to the Article 21 argument, Justice Thomas accused the majority of selective incorporation of the Geneva Convention. The majority was keen to read Article 21 as incorporating by reference the substantive protections of the Geneva Convention—in this instance, Common Article 3—but at the same time ignoring the “exclusive diplomatic enforcement scheme.” As with the DTA issue, my purpose here has not been to argue that the majority or the dissent was inarguably correct but rather to show that both sides had plausible arguments. Part III will test the general statutory interpretation principles that won out in Hamdan against the 2004 trio of cases to see if those principles were consistently applied.

III. HAMDAN: JUST A STATUTORY INTERPRETATION DECISION?

Shortly after the Supreme Court issued Hamdan, numerous commentators described the decision as restrained by and as a clear descendant of the Youngstown

plaintiffs and it may seem odd therefore to find the plaintiffs placing such heavy weight on what is in effect a defense to liability”); see also U.S. Const. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”)

85. Madsen v. Kinsella, 343 U.S. 341, 347 (1952) (“In 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, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States.”); see also id. at 353 (quoting S. Rep. No. 130, 64th Cong., 1st Sess. 40 (statement of Judge Advocate General Crowder)) (“A military commission is our common-law war court . It has no statutory existence, though it is recognized by statutory law.”); David J. Bederman, Article 11 Courts, 44 Mercer L. Rev. 825, 834 (1993) (citing Article 21 for the proposition that “[a]lthough federal statute recognizes military commissions, it is clear that Congress considers them established not by virtue of the grant of power under Article I, but under the laws of war.”).

86. See Winthrop, supra n. 80, at 831.
87. Hamdan, 126 S. Ct. at 2842 (Thomas, Scalia & Alito, JJ., dissenting).
88. Id. at 2842 n. 17.
89. Id. at 2845.
case. Noting that the decision was one of statutory interpretation, not constitutional judicial review, these commentators emphasized that Congress was free to amend the statutes at issue. For example, Jack Balkin wrote on his blog:

[the key to understanding Hamdan is that the Court did not tell the president that he could under no circumstances create military tribunals with very limited procedural guarantees. . . . Rather, the Court told the president that [under the statutes already enacted by Congress,] he could not do so.]

Indeed, all of the concurring Justices either wrote or joined opinions emphasizing as much.

The primary import of Hamdan, then, was that it rebuked the President’s assertion of unilateral authority to wage war via the Commander in Chief Clause, a position argued forcefully and perhaps best by John Yoo. In Hamdan, the Court cast its lot with the likes of John Hart Ely, Harold Hongju Koh, and Louis Fisher in placing

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90. See e.g. Erwin Chemerinsky, In Guantanamo Case, Justices Rein in Executive Power, Trial 61 (Sept. 2006) (noting that the Supreme Court’s holding was one of statutory interpretation); Samuel Estreicher & Darmiid O’Scaannlain, The Limits of Hamdan v. Rumsfeld, 9 Green Bag 2d 353, 357 (2006) (“Hamdan is not a constitutional ruling, but rather a decision about the presence vel non of congressional authorization and the content of any congressional limits on the President’s use of military commissions.”); Sunstein, supra n. 29, at 4–5 (arguing that the Court opted for a clear statement principle of requiring an “explicit and focused decision” from Congress supporting the President’s actions); but see Jay Dratler, Jr., A Brief Lament on Hamdan (U. Akron Leg. Stud. Research Paper No. 06-14, 2006) (available at http://ssm.com/abstract-913822) (arguing that the Court provided a “dry lesson in technical statutory interpretation” that lost “the thread of fundamental national values in a welter of detail accessible only to legal specialists”).


93. Hamdan, 126 S. Ct. at 2799 (2006) (Breyer, Kennedy, Souter & Ginsburg, JJ., concurring) (“Nothing prevents the President from returning to Congress to seek the authority he believes necessary.”); id at 2800 (Kennedy, J., concurring in part) (“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.”). The Court’s opinion does, however, note that there still exist limits on Congress’ and the President’s joint power to establish military commissions. Id. at 2773 (majority) (“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.”).

94. Id. at 2799 (Breyer, Kennedy, Souter & Ginsburg, JJ, concurring) (“Congress has not issued the Executive a ‘blank check.’ Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here.” (internal citation omitted)).

95. John Yoo, The Powers of War and Peace. The Constitution and Foreign Affairs after 9/11 (Chi. U. Press 2005). To oversimplify, Yoo’s position is that the congressional power to declare war is distinct from the President’s power to initiate armed conflict, a view consistent with the understanding of the Framers and ratifiers of the Constitution. According to Yoo, a declaration of war defines the legal status between the warring nations, possibly triggering other obligations under domestic and international law. Armed conflict, however, can occur even in the absence of such legal status and Congress’s recourse, should it disagree with the President’s decision to commit troops, is to “defund” the military.

the President's warmaking authority in a subordinate role to Congress. Congress had
denied the President the authority to conduct military commissions of the sort established
by President Bush's executive order, and therefore the military commissions were
unlawful. The problem was not that the President could not ever conduct such military
commissions, only that he needed Congress' assent.

It is true that Hamdan, viewed alone, might be seen as a straightforward
application of the constitutional avoidance doctrine. By interpreting DTA the way it did,
the Court avoided having to address whether Congress' power under the Exceptions
Clause to regulate the Court's appellate jurisdiction included the power to strip it of
jurisdiction over a pending case that had already been decided by lower federal courts.
And by interpreting UCMJ as it did, the Court avoided having to address a whole host of
constitutional questions about the military commissions established by President Bush's
executive order, including whether aliens detained outside the United States had
judicially cognizable constitutional rights, and, if so, what the scope of those rights
would be.

Yet, to say that Hamdan was just a statutory interpretation decision is to overlook
subtleties present in it and the other terrorism cases decided by the Supreme Court in
2004. Rasul and Padilla were both statutory interpretation decisions, and Hamdi had a
statutory interpretation component in addition to a constitutional holding. A close
reading of all four cases reveals an interesting distinction between the Court's decisions
in cases involving aliens and those involving citizens. Specifically, the two cases
brought by citizens resulted in interpretations of statutes favorable to the government,
where the one case brought by aliens, like Hamdan, resulted in interpretations of statutes
favorable to the individuals. More strikingly, two of the cases involved the federal
habeas corpus statute yet produced quite different interpretations.

A. The Scope of the Habeas Statute

The federal habeas corpus statute states in relevant part: "Writs of habeas corpus
may be granted by the Supreme Court, any justice thereof, the district courts and any
circuit judge within their respective jurisdictions." The italicized portion was at issue
in Rasul and Padilla. First, who should the writ be directed against, and, second, did that
person have to be located within the specific judicial district of the judge?

The petitioners in Rasul were British, Australian, and Pakistani citizens captured in
late 2001 while allegedly fighting U.S. or allied forces in Afghanistan or Pakistan during
Operation Enduring Freedom. They were transported to the U.S. naval base on
Guantanamo Bay, Cuba, in early 2002, where they were detained as enemy combatants.
The detainees filed numerous court actions—some habeas corpus petitions, some
complaints claiming constitutional violations or violations of the Administrative

100. Rasul v. Bush, 542 U.S. at 470–71. The two British citizens were released after the petition for
certiorari had been granted. Id.
Procedure Act or other federal statutes—which the district court treated as habeas petitions. Applying Johnson v. Eisentrager,\textsuperscript{101} which it understood as barring aliens outside the United States from using the courts to challenge their detention, the district court dismissed the petitions for lack of jurisdiction, and the D.C. Circuit affirmed.\textsuperscript{102}

The Supreme Court reversed. Apart from the somewhat conclusory footnote 15, in which it implied that the petitioners in fact had judicially cognizable constitutional rights,\textsuperscript{103} it elected to resolve the legal dispute as a matter of statutory interpretation of the federal habeas corpus statute. In interpreting the meaning of the phrase “within their respective jurisdictions,” the Court had to consider Eisentrager and two other cases, Ahrens v. Clark\textsuperscript{104} and Braden v. 30th Judicial Circuit Court.\textsuperscript{105} In Ahrens, the Court held that aliens being detained at Ellis Island, New York, pending immigration proceedings, could not challenge their detention via habeas petitions filed in a district court in Washington, D.C. because Ellis Island was not within the territorial jurisdiction of that court.\textsuperscript{106} Ahrens might have been understood as requiring that the habeas petitioner be located physically within the territorial jurisdiction of the court, but Braden refuted that understanding. The habeas petitioner in Braden was imprisoned in Alabama but was complaining of a detainer lodged against him in a Kentucky state court.\textsuperscript{107} Braden argued that his speedy trial right was being violated because Kentucky was not going to proceed against him until after he was released from the Alabama prison.\textsuperscript{108} The incorrect reading of Ahrens would have required Braden to file his habeas petition in a federal court in Alabama where he was being held.\textsuperscript{109} This would have been a nonsensical result, though, because Alabama had nothing to do with the conduct that Braden was challenging.\textsuperscript{110}

Though its holding appeared to rest on a number of disparate grounds, Rasul held that the petitioners had a statutory right to file their habeas petitions in a district court, naming Defense Secretary Rumsfeld as the custodian.\textsuperscript{111} Though Rumsfeld was not the immediate custodian, the Court read Braden as doing away with that as an absolute requirement.\textsuperscript{112} The limited nature of the Court’s holding is apparent when one considers that it could have, for example, held that there was a constitutional right to

\begin{enumerate}
\item[101.] 339 U.S. at 763.
\item[103.] The Court noted that “[p]etitioners’ allegations . . . unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’” Rasul, 542 U.S. at 483 n. 15. I characterize this footnote as somewhat conclusory because the Court’s lone source of support was the federal habeas statute itself, along with a “contrast” reference to U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990), a case in which the Court held that an alien did not have Fourth Amendment rights regarding a warrantless search that took place in his home in Mexico. See e.g. Kal Raustiala, The Geography of Justice, 73 Fordham L. Rev. 2501, 2502 (2005).
\item[104.] 335 U.S. 188 (1948).
\item[105.] 410 U.S. 484 (1972).
\item[106.] Ahrens, 335 U.S. at 190.
\item[107.] 410 U.S. at 485.
\item[108.] Id. at 487.
\item[109.] Id. at 499.
\item[110.] Id.
\item[111.] Rasul, 542 U.S. at 483-84.
\item[112.] Id. at 467
\end{enumerate}
habeas corpus (subject to the Suspension Clause) regardless of one's geographic location,113 and thus the habeas statute's limitation of the issuance of the writ to persons within the "respective jurisdiction" of the court was unconstitutional.114 The Court did not do so.115

Was this the best reading of the habeas statute? Justice Scalia argued in dissent that it was not.116 He read Braden and Ahrens as standing for the proposition that, if the detainee and the custodian were not located in the same district, as was the case in Braden, it was the location of the latter that dictated where the habeas petition was to be filed.117 In Braden, it made sense that the District of Kentucky was the correct court in which to file the habeas petition because that court would be able to issue a habeas writ directed at the state court that had lodged the detainer against Braden.118 Because the custodian of the Guantanamo detainees was, in fact, the commander of the detention camp on the naval base, the same place the detainees were being held, the Braden exception would have been inapplicable.119

I have criticized the Court's reasoning in Rasul elsewhere120 and do not intend to reargue the point here. What is relevant for the purposes of this article is to contrast the broad interpretation of the habeas statute in Rasul with the much narrower one given in Rumsfeld v. Padilla.121

Jose Padilla, an American citizen, was arrested on May 8, 2002, as he stepped off a plane at Chicago's O'Hare International Airport.122 He was taken into custody on a material witness warrant but, on June 9, President Bush declared Padilla an enemy combatant.123 The military transported him from a federal holding facility in New York to a naval brig in South Carolina.124 Two days later, Padilla's court-appointed lawyer filed a habeas petition on his behalf in the District Court for the Southern District of New York, naming Secretary of Defense Rumsfeld as the custodian.125 The district court agreed that Rumsfeld was properly named as the custodian but held that the President

115. Contrast the limited scope of Rasul's rationale with the far broader (and ultimately overruled) reasoning employed by the Court of Appeals in Eisentrager. There, the D.C. Circuit concluded that the Fifth Amendment applied overseas, that there was no basis for distinguishing aliens from citizens with regard to the availability of the habeas writ, and that Congress, if it failed to make the habeas statute applicable overseas, would have suspended the writ in violation of the Constitution. Eisentrager v. Forrestal, 174 F.2d 961, 965–66 (D.C. Cir. 1949) ("We think that constitutional prohibitions apply directly to acts of Government, or Government officials, and are not conditioned upon persons or territory.")., overruled sup nom. Johnson v. Eisentrager, 339 U.S. 763 (1950). As a result, the court interpreted the habeas statute to avoid such a constitutional violation by holding that the habeas writ could be issued against any person with "directive custody." Id. at 966–67.
117. Id. at 495.
118. Braden, 410 U.S. at 485–86.
119. See Rasul, 542 U.S. at 479.
120. Tung Yin, The Role of Article III Courts in the War on Terrorism, 13 Wm. & Mary Bill of Rts. J. 1061, 1075 (2005).
121. 542 U.S. 426.
122. Id. at 430–31.
123. Id. at 431.
124. Id. at 432.
125. Id.
had authority under AUMF to detain Padilla as an enemy combatant.\textsuperscript{126} The Second Circuit Court of Appeals reversed on the merits, concluding that the Non-Detention Act evinced a presumption against detention of citizens and that AUMF did not contain sufficiently explicit language to overcome that presumption.\textsuperscript{127} In short, both lower courts held that they had jurisdiction over Padilla’s habeas petition despite the fact that he was being detained elsewhere in the country outside their respective jurisdictions.

The Supreme Court reversed in a 5-4 decision.\textsuperscript{128} The Court emphasized the longstanding requirement that the habeas petitioner name the “immediate custodian”\textsuperscript{129} and distinguished cases cited by Padilla by pointing out that they involved challenges to non-physical custody and were therefore inapplicable.\textsuperscript{130} The Court then held that the district court in the Southern District of New York lacked territorial jurisdiction over Padilla’s immediate custodian, Commander Melanie Marr, who was located in South Carolina.\textsuperscript{131} The Court’s opinion in \textit{Padilla} is, in fact, strikingly similar in reasoning to Justice Scalia’s dissent in \textit{Rasul} and, as one might expect, Justice Stevens’ dissent in \textit{Padilla} had much in common with his majority opinion in \textit{Rasul}.

The tension between \textit{Padilla} and \textit{Rasul} was immediately apparent. Justice Scalia found it baffling how aliens held outside the United States could benefit from a more favorable legal rule than that applicable to a U.S. citizen.\textsuperscript{132} While there may be reasonable explanations for this difference in treatment,\textsuperscript{133} it remains that in two cases involving the same provision of the same federal statute, the Court used different interpretative methods to reach different results. More significantly, the aliens received the benefit of favorable interpretations while the citizen was saddled with the unfavorable interpretation.

\section*{B. The Scope of AUMF}

Of the four post-9/11 terrorism cases, \textit{Hamdi v. Rumsfeld}\textsuperscript{134} is the only one that clearly contains an important constitutional holding—a U.S. citizen captured overseas in the field of battle and designated by the President as an enemy combatant nevertheless has Fifth Amendment due process rights to challenge that designation.\textsuperscript{135} However, \textit{Hamdi} also involved a question of statutory interpretation—whether Congress had, through AUMF,\textsuperscript{136} authorized the President to detain as an enemy combatant any U.S. citizen captured on the battlefield as “part of or supporting forces hostile to the United

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\textsuperscript{127} 352 F.3d at 699.

\textsuperscript{128} 542 U.S. 426.

\textsuperscript{129} \textit{Rumsfeld}, 542 U.S. at 434–35.

\textsuperscript{130} \textit{Id.} at 437–38.

\textsuperscript{131} \textit{Id.} at 446–47.

\textsuperscript{132} \textit{Rasul}, 542 U.S. at 506 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting) ("Today’s clumsy, countertextual reinterpretation... confers upon wartime prisoners greater habeas rights than domestic detainees.").

\textsuperscript{133} See infra Part III.A.

\textsuperscript{134} 542 U.S. 507.

\textsuperscript{135} Id. at 508.

\textsuperscript{136} 115 Stat. 224.
States or coalition partners.”

Yaser Esam Hamdi, a U.S. citizen by birth but raised in Saudi Arabia, was captured by Northern Alliance forces in November 2001. He was shipped to Guantanamo Bay for detention and interrogation, but when the military determined that he was a U.S. citizen he was transported to a naval brig in Norfolk, Virginia (and later moved to a brig in Charleston, South Carolina). Because Hamdi was a U.S. citizen, the Non-Detention Act arguably regulated the substantive basis for his detention. That Act states in relevant part, “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” The government argued, and a plurality of the Court agreed, that AUMF was “an Act of Congress” authorizing detention of U.S. citizens who fall within its statutory definition of the enemy. The plurality opinion noted that “detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war,” and thus AUMF “clearly and unmistakably authorized detention in the narrow circumstances considered here.”

Hamdi’s citizenship did not protect him from detention because the World War II saboteurs case, Ex parte Quirin, established that U.S. citizens who waged war on behalf of the enemy could be treated as enemy combatants.

Justice Souter dissented from the plurality’s statutory construction of AUMF. He noted that Congress had passed the Non-Detention Act specifically to repeal the Emergency Detention Act of 1950 “out of fear that it could authorize a repetition of the World War II internment of citizens of Japanese ancestry; Congress meant to preclude another episode like the one described in Korematsu v. United States.” Thus, it is fair to conclude that wartime detention was exactly the situation that Congress wanted to proscribe absent its own determination, by statute, that such detention was necessary. Relying on Ex parte Endo, in which the Court had held that “[w]e must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than

137. Hamdi, 542 U.S. at 516 (quoting Resp.’s Br. 3 (Mar. 29, 2004) (available at 2004 WL 724020)).
138. Id. at 510.
139. Id.
140. 18 U.S.C. § 4001(a).
141. Hamdi, 542 U.S. at 517 (citing Respt.’s Br. 21–22). Three Justices joined Justice O’Connor’s opinion accepting the government’s argument. Id. at 508 (O’Connor, J., Rehnquist, C.J., Kennedy, J. & Breyer, J., plurality). Two Justices argued that Congress (perhaps) could but had not authorized detention of citizens; two others argued that Congress could not authorize detention of citizens. Id. at 539 (Souter & Ginsburg, JJ., concurring in part, dissenting in part, and concurring in the judgment). One Justice argued that the President had inherent power under the Commander-in-Chief Clause to detain citizens as enemy combatants. Id. at 582 (Thomas, J., dissenting).
142. Id. at 519 (plurality).
143. 317 U.S. 1 (1942).
145. Id. at 539 (Souter & Ginsburg, JJ., concurring in part, dissenting in part, and concurring in the judgment).
148. Hamdi, 542 U.S. at 542 (Souter & Ginsburg, JJ., concurring in part, dissenting in part, and concurring in the judgment) (citing Korematsu v. U.S., 323 U.S. 214 (1944)).
149. 323 U.S. 283 (1944).
was clearly and unmistakably indicated by the language they used,“ 150 Justice Souter argued that there must be a clear statement of congressional authorization of detention of U.S. citizens. 151 However, he ultimately concurred in the judgment, agreeing that Hamdi should be given an opportunity to challenge his classification as an enemy combatant. 152

Finally, Justices Thomas and Scalia dissented on radically different grounds. Justice Thomas assumed AUMF authorized the President to detain citizens (but suggested that such authorization was not necessary) and disagreed with the plurality as to Hamdi’s entitlement to any procedures beyond those provided by the Executive Branch. 153 Justice Scalia, on the other hand, argued that Congress could not authorize the president to detain U.S. citizens as enemy combatants; rather, the options were to prosecute the citizen for treason or other crimes or to seek suspension of habeas corpus from Congress. 154

Putting aside the dissents by Justices Thomas and Scalia, which do not focus on the interpretation of AUMF, the debate between Justices O’Connor and Souter was quite narrow. Justice O’Connor did not challenge Justice Souter’s assertion that there needed to be a clear and unmistakable statement of congressional authorization of detention of U.S. citizens as enemy combatants. Instead, she concluded that AUMF was clear and unmistakable authorization.

C. Inconsistent Interpretations?

The four terrorism cases leave the Court open to criticism of inconsistent statutory interpretation principles. To test my hypothesis, consider the following possible rules applicable to ambiguous statutes such as the ones at issue in Hamdi, Padilla, Rasul, and Hamdan: where there are multiple reasonable interpretations of a statute and different interpretation canons lead to different results, choose the one that (1) is less harsh to the individual and (2) provides less authorization to the President.

There is a certain amount of overlap between these rules as they may be different ways of stating the same general principle. Rule (1) could be justified as an analog of the rule of lenity, under which ambiguous criminal statutes are interpreted to give the benefit of the doubt to the defendant. 155 The reasons for such a rule are to “assure[]

150. Id. at 300.
151. Hamdi, 542 U.S. at 544–45 (Souter & Ginsburg, JJ., concurring in part, dissenting in part, and concurring in the judgment).
152. Id. at 553.
153. Id. at 579 (Thomas, J., dissenting).
155. See e.g. U.S. v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221–22 (1952) ("[W]hen a choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before [choosing] the harsher alternative, to require that Congress should have spoken in language that is clear and definite"); see also McBoyle v. U.S., 283 U.S. 25, 27 (1831). Of course, this is not a perfect analogy, for the rule of lenity applies to substantive criminal law.
citizens of fair notice of what the law proscribes" and to "constrain[] the discretion of law enforcement officials." 156

Rule (2) could be justified based on the observation that an incorrect statutory interpretation could always be amended by Congress by simple statute, as has happened on occasion. 157 But an erroneous interpretation that gives the President more power than Congress intended will not be as easily amended as one that gives the President less power than Congress intended. In either case, Congress could by simple majority of both houses pass legislation to overrule the Supreme Court. However, where the Supreme Court's interpretation expands the power of the Executive Branch, the President would be expected to veto such corrective legislation. Congress could override the veto, but only if two-thirds of both houses agree to do so. In other words, in this scenario, slightly more than one-third of one house could block the intent of a majority of both houses. Rule (2) ensures that this scenario will not occur.

Rule (2) might also be seen as analogous to contra proferentum, the contract interpretation rule of construing an ambiguous contract against the drafter. 158 The reason for this rule is to deter sloppy drafting and to guard against "overbearing behavior between the contracting parties where the drafter, often the one in the better bargaining position, tries to pull a fast one over the party who can merely accept or reject the contract as a whole." 159 Both reasons may be seen as applicable to legislation. Courts may want to induce Congress to draft legislation more carefully by construing it narrowly and in favor of those governed by the legislation.

Neither rule can explain the outcomes in the four terrorism cases. The less harsh interpretation of the habeas statute's phrase "within their territorial jurisdiction" is the one the Court reached in Rasul, construing it to require merely that the court issuing the writ have jurisdiction over someone in the chain of command of custody over the petitioner. But that was not the rule that was applied in Padilla. Instead, the Court took a technical, narrow reading of "within their territorial jurisdiction" to require that the court have custody over the immediate custodian. 160 Similarly, while the less harsh interpretation of DTA was, of course, the one that left the court's jurisdiction over pending habeas petitions intact, the less harsh definition of AUMF was one that did not allow the President to detain U.S. citizens as enemy combatants unless specifically authorized by Congress to do so.

The interpretation of the habeas statute that gives the President less authority would be the one the Court reached in Rasul, for making habeas available to detainees would result in some judicial review of the President's detention of enemy combatants. The President would, for example, be expected to oppose statutory extension of habeas

157. For example, in McNally v. U.S., 483 U.S. 350 (1987), the Supreme Court reversed numerous lower courts in holding that the phrase "money or property" in the federal mail fraud statute, 18 U.S.C. § 1341 (2001), did not encompass the intangible right to honest services, thereby depriving federal prosecutors of a primary tool in fighting local corruption. One year later, Congress enacted 18 U.S.C. § 1346 (2000), which overruled McNally.
158. See e.g. Shelby Co. State Bank v. Van Diest Supply Co., 303 F.3d 832, 838 (7th Cir. 2002).
159. Id
160. Padilla, 542 U.S. at 442–47.
to such persons. Similarly, the Court's interpretations of DTA and UCMJ in *Hamdan* limited the President's authority to try detainees in military commissions. However, *Hamdi* chose the interpretation that expanded, not limited, the President's authority, even though Justice Souter had strong arguments that the Non-Detention Act was meant to address this specific situation—claims of military authority to detain citizens during times of war or armed conflict.

**IV. PRIVILEGING ALIENS OVER CITIZENS?**

Granting that *Hamdan, Rasul, Hamdi,* and *Padilla* are all well within the range of reasonable decisions, the combination nevertheless yields a curious result: petitioners who are aliens such as Rasul and Hamdan have benefited from more individual-friendly interpretations of statutes than have American citizens. Why has the Court reached such counterintuitive holdings?\(^{161}\)

**A. Leveling the Playing Field**

Consider first the possibility that the Court has not been privileging aliens so much as leveling the playing field between aliens and citizens. There is, after all, no reason to believe that, if an American citizen had been detained at Guantanamo Bay, such citizen would not have received the benefit of the same individual-friendly statutory interpretations that aliens have received. Rather, the difference between modes of statutory interpretation may need to be assessed in the light of the different circumstances in which the citizens and aliens are placed.

Thus, even though *Rasul* and *Padilla* involved the same federal statute, the more expansive interpretation accorded to the alien detainees did not stem from a desire to privilege aliens above citizens. Rather, it was the only meaningful way in which the Court could construe the statute so as to apply to the Guantanamo detainees. There was no district court whose territorial jurisdiction encompassed Guantanamo Bay, which led the Court to hold that Defense Secretary Rumsfeld could be named as the ultimate custodian.\(^{162}\) Jose Padilla, on the other hand, had a district court available to him to file his habeas petition. Applying the "ultimate custodian" rule to him would have been largely a windfall.

Similarly, the statutory interpretation at issue in *Hamdi* did not disadvantage citizens relative to aliens. There is little dispute that the Executive Branch has the

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161. The Court, of course, is not an organic entity whose constituent members act with a single purpose the way that a human being does despite being made up of millions of cells. *Rasul* and *Hamdan* were both authored by Justice Stevens, while *Hamdi* was authored by Justice O'Connor and *Padilla* by Chief Justice Rehnquist. A legal realist might answer that the alien petitioners benefited from more expansive statutory interpretations in their cases than did the citizen petitioners because the centrist Justices (Kennedy for all four cases and O'Connor for the 2004 trio) voted against the government in the alien cases and for it in the citizen cases. Still, from a doctrinal perspective, this is not a very useful response. The decisions are what they are, and it is possible to harmonize them so as to understand how one might argue in future cases about their meaning without resort to legal realism.

substantive authority under domestic law, pursuant to AUMF, to detain aliens who are enemy combatants. The holding in Hamdi extended AUMF's authorization to the President to include detention of citizens, notwithstanding the Non-Detention Act.

The "leveling the playing field" thesis is thus consistent with the outcomes of the four terrorism cases. With regard to availability of habeas corpus and the procedures used in military (i.e., non-civilian) trials, the result of Hamdi, Rasul, Padilla, and Hamdan is that aliens and citizens are effectively on the same footing. Enemy combatants, alien or citizen, can file habeas petitions, while aliens detained at Guantanamo Bay do not appear limited by law to any particular district court the way that the citizen detained inside the United States is. As a practical matter, all such alien petitions are being handled within the federal district court of the District of Columbia. Absent congressional action, the procedures for military commissions would apparently have to mirror those for courts-martial.

Still, there are two wrinkles to the level playing field thesis. The first wrinkle is that, as a practical matter, Padilla is still disadvantaged relative to Guantanamo Bay detainees. Because Padilla had to file his petition in the district court in which his immediate custodian could be located, he had to file in the District of South Carolina. The appeal from that court went to the conservative Fourth Circuit, compared to the more neutral D.C. Circuit, where the appeals of alien cases are being heard.

The second wrinkle is that in Hamdi, the Court leveled the playing field not by raising the procedural or substantive rights the aliens had to those of the citizen, but by reducing the substantive rights the citizen had to those of the aliens. While the end result levels the playing field between aliens and citizens, such result is reached by disadvantaging citizens relative to the treatment that they might have received absent the aliens.

163. There are, of course, questions about what procedures, if any, the government is obligated to promulgate to ensure that detainees are enemy combatants, as well as how long the government is entitled to detain such persons. For more detailed analysis and discussion of these issues, review Tung Yin, Procedural Due Process to Determine "Enemy Combatant" Status in the War on Terrorism, 73 Tenn. L. Rev. 351 (2006); Tung Yin, Ending the War on Terrorism One Terrorist at a Time: A Non-Criminal Detention Model for Holding and Releasing Guantanamo Bay Detainees, 29 Harv. J.L. & Pub. Policy 149 (2005).


165. For example, following the decision in Rasul, the Ninth Circuit transferred Gherebi v. Bush to the District of District of Columbia. 374 F.3d 727, 739 (9th Cir. 2004).

166. According to a newspaper article, "[t]he Fourth Circuit . . . is regarded by legal experts as the nation's most conservative federal appeals court." Jay Price, Blackwater Loses Appeal in Deaths of Four in Iraqi City: Families Can Go Forward with Suit, News & Observer B5 (Aug. 25, 2006). Therefore, it may not be a surprise that Padilla was not detained in a brig in San Diego, located within the liberal Ninth Circuit.

167. In some ways, this is similar to a point raised by Justice O'Connor during oral arguments in McCleskey v. Kemp, 481 U.S. 279 (1987), which involved an empirical study demonstrating that the race of the murder victim was a statistically significant factor in determining whether the defendant would receive the death penalty. Justice O'Connor asked whether the remedy was "to execute more people"—specifically, those who would reduce the statistical disparity based on the race of the victim. Edward Lazarus, Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court 203 (Penguin Group 1998).

168. This result arises occasionally in the Court's equal protection jurisprudence, where discriminatory treatment in favor of one group against another group is resolved by eliminating the favorable treatment for everyone, rather than granting it to everyone. See e.g. Evans v. Abney, 396 U.S. 435 (1970) (upholding elimination of state park altogether rather than opening it to African-Americans so as to effectuate intent of donator).
Finally, even if the leveling the playing field thesis explained the seemingly inconsistent principles of statutory interpretation, it still begs the question of why the Court would do so on behalf of aliens. After all, it is not exactly clear how one would justify such a rule of statutory interpretation.

B. Addressing the Lack of Representation

In the famous footnote 4 of *United States v. Carolene Products Co.*,\(^{169}\) the Court suggested that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . may call for a correspondingly more searching judicial inquiry.”\(^{170}\) In an earlier article, I suggested that *Rasul* might be understood and evaluated normatively as “achiev[ing] a workable balance between judicial abdication and judicial intrusiveness in the war on terrorism.”\(^{171}\)

1. Virtual representation

In other circumstances, a group that lacks political representation can nevertheless be said to have been represented “virtually.” The term “virtual representation,” of course, carries baggage: during the years leading up to the American Revolution, the British monarchy responded to the colonists’ complaints about taxation without representation by claiming that they were “virtually represented.”\(^{172}\) The colonists were not persuaded by the Crown because “there is not that intimate and inseparable relation between the electors of Great Britain and the inhabitants of the colonies, which must inevitably involve both in the same taxation.”\(^{173}\) Demonstrating that the common law was not all that we inherited from the British, the Framers later argued that the interests of slaves, women, and children were virtually represented.\(^{174}\) And those opposed to extending suffrage to women again invoked the concept of virtual representation to justify their position.\(^{175}\)

Note, however, that the argument in these historical instances was not that virtual representation was per se illegitimate but rather that the claimed virtual representation was either insufficient or inadequate due to a lack of alignment of interests between the truly represented and the virtually represented.\(^{176}\) Thus, the Supreme Court has accepted

169. 304 U.S. 144, 152 n. 4 (1938).
170. *Id*
171. Yin, *supra* n. 120, at 1115.
176. See e.g. Siegal, *supra* n. 176, at 991.
the concept of virtual representation when there is adequate and sufficient alignment of interests to be expected to represent the interests of the outsiders. For example, in McCulloch v. Maryland, after upholding Congress' power to create a national bank, the Court struck down a Maryland state tax that targeted the bank. In so holding, the Court distinguished a state tax “paid by the real property of the bank, in common with the other real property within the state,” which would have been valid. As John Hart Ely explained, the Court was invoking the concept of virtual representation: even though the national bank was not represented politically within Maryland, it would be virtually represented with regard to a general tax on real property because Maryland voters would act to prevent oppressive property taxes from being imposed if they too would be subject to the taxes. Similarly, the dormant Commerce Clause forbids, absent congressional authorization, discrimination against interstate commerce.

However, the Guantanamo detainees are not virtually represented in any meaningful sense. It is true that there have been two U.S. citizens who have been designated as enemy combatants—Jose Padilla and Yaser Esam Hamdi. Like the Guantanamo detainees, Padilla and Hamdi were detained in military custody, and the government asserted legal authority to hold them indefinitely without charges, pursuant to the President’s commander-in-chief power and the September 17, 2001, congressional authorization for use of military force. Apart from Padilla and Hamdi, however, other U.S. citizens allegedly affiliated with al Qaeda or the Taliban have been prosecuted in federal court for terrorism-related offenses.

Aside from detention, the government has treated citizens differently from aliens in a number of important ways. First, citizen enemy combatants have been detained on U.S. soil, whereas alien enemy combatants have been detained either on the U.S. naval base at Guantanamo Bay, Cuba, or elsewhere outside the country in undisclosed locations. Prior to Rasul and Hamdan, the location of one’s detention was potentially determinative of whether a detainee would be entitled to constitutional and statutory rights; the post-World War II decision in Johnson v. Eisentrager was generally understood to hold that aliens held outside the United States lacked any constitutional rights at all. Citizens held outside the United States, on the other hand, did appear to have cognizable constitutional rights, but the basis for recognizing and enforcing such

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177. 17 U.S. 316 (1819).
178. Id. at 436.
179. Ely, supra n. 172, at 85.
180. See Ym, supra n. 120, at 1119–20 (citing cases).
181. A third person, Ali Saleh al-Marri, was declared an enemy combatant but is not a U.S. citizen. As of this writing, al-Marri is the only person still in military custody as an enemy combatant.
183. Indeed, Yaser Esam Hamdi was initially detained at Guantanamo Bay, but when the military ascertained that he was a U.S. citizen, it transferred him to a navy brig in Norfolk, Virginia.
185. Id.
The impact of *Eisentrager* on the decision to situate alien detainees at Guantanamo Bay compared with citizen detainees inside the United States suggests an intent on the part of the Executive Branch to preclude the alien enemy combatants, but not citizen enemy combatants, from filing habeas petitions to challenge their detention. Additionally, persons who are detained inside the United States have a practical advantage over those detained in Guantanamo Bay or in other foreign locations: it is much easier for lawyers representing such persons to meet their clients than for ones whose clients are being held in Cuba.187

Second, the executive order establishing the military commissions at issue in *Hamdan* specifically applied only to non-citizens, defining “individual subject to this order” as “any individual who is not a United States citizen” determined by the President to be a member of al Qaeda, to have engaged or assisted international terrorism, or to have harbored such persons.188 Thus, enemy combatants who are U.S. citizens may face military detention for the duration of the war on terrorism, but, if they are to be punished, it must be in a civilian court189 unless a court-martial were somehow to have jurisdiction.190 Enemy combatants who are aliens, on the other hand, fare worse, for they could be prosecuted in a forum whose procedural rules are less favorable to the individual defendant (at least, prior to *Hamdan*). Because no U.S. citizens would be prosecuted in these military commissions, they would not provide virtual representation for the alien detainees.

2. Implications of the absence of virtual representation

An interesting question raised by the absence of virtual representation is whether the Court should accordingly show no deference to the judgments of the political branches. John Hart Ely’s influential theory justified judicial review not as a guarantee of substantive results but as a protector of the political process.191 As Ely explained:

> Malfunction occurs when the process is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.192

In Ely’s view, protection of the political process was not only an adequate justification

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186. See *e.g.*, *Burns v. Wilson*, 346 U.S. 137 (1953).
188. 66 Fed. Reg. at 57834, § 2(a).
190. For example, a U.S. citizen who was a member of the armed forces who joined al Qaeda could be court-martialed. See 10 U.S.C. § 904 (2000) (“Aiding the enemy”).
192. *Id.* at 103 (footnote omitted).
for judicial review but also the sole justification. 193

However, the Ely theory suggests that the Court has gone down the wrong path by relying on statutory interpretation and that it instead should have made constitutional rulings. Statutory interpretation decisions leave the final word to the political branches, which are free to overrule the Court’s interpretation. Given that aliens are not political constituents and that aliens suspected of being terrorists are the ultimate “outs,” the political process cannot be expected to be responsive to their concerns. 194

Why then has the Court not proceeded down the path of judicial review? The answer might lie in part with the constitutional avoidance doctrine; statutory interpretation decisions enable the Court to avoid difficult constitutional questions. For example, in Rasul, a constitutional decision in favor of the aliens would have required the Court to hold not only that aliens outside the country have a constitutional right to habeas corpus but also that the failure by Congress to extend such habeas rights via statute would violate the Suspension Clause.

The first holding—that aliens outside the country have a constitutional right to habeas corpus—is not implausible, but it would require the Court to overrule or distinguish the Plenary Power Doctrine, which holds that aliens seeking admission to the United States have absolutely no rights beyond whatever Congress provides, and Johnson v. Eisentrager, in which the Court appeared to hold that enemy aliens being imprisoned outside the United States lacked Fifth or Sixth Amendment trial rights, thus denying them other constitutional rights by implication. It would also raise a host of questions about whether aliens outside the country have other constitutional rights, including First Amendment speech and religious exercise rights. The second holding, that Congress suspended the privilege of the writ by not extending it to aliens detained outside the United States, would run afoul of Ex parte Bollman’s statement that federal courts have power to issue the habeas writ only if granted that power by Congress. 198

Similarly, as a constitutional decision reaching the same result, Hamdan would have had to resolve the scope of the Suspension Clause, answer whether aliens held outside the United States had judicially enforceable constitutional rights, hold that Common Article 3 was judicially enforceable as a self-executing treaty, and decide that the military commission proceedings violated Common Article 3.

193. Id. at 181 (“[T]he general theory is one that bounds judicial review under the Constitution’s open-ended provisions by insisting that it can appropriately concern itself only with questions of participation.”).
194. Of course, Congress and the President might feel the need to enact legislation that benefits aliens due to international pressures, moral beliefs, or other expediencies. For example, Congress enacted anti-torture provisions in DTA even though those protected by the act are aliens, not citizens. 119 Stat. at 2739, § 1003(a).
197. Id. at 784. I say “appeared” because Rasul v. Bush, 542 U.S. 466, left Eisentrager’s continued vitality in doubt. To the extent that Eisentrager was predicated solely on statutory interpretation of the habeas statute, Rasul overrules it. However, language from Eisentrager suggesting a constitutional holding remains.
198. 8 U.S. 75, 93–94 (1807); see also Ex parte Dorr, 44 U.S. 103, 104–05 (1845) (holding that federal courts could not issue habeas writs to state prisoners because section 14 of the First Judiciary Act—the only statutory grant at the time—was limited to federal prisoners).
Yet, *Hamdi v. Rumsfeld* stands in contrast because the Court did reach a constitutional issue: whether a citizen detained as an enemy combatant had a due process right to a hearing in which to challenge that classification. The Court could have avoided this constitutional conclusion by holding, as Justice Souter urged, that AUMF did not contain a clear enough statement to authorize detention of U.S. citizens. The plurality opinion and Justice Thomas' dissent concluded otherwise, and, therefore, the plurality had to reach the constitutional question. Though the Court had little difficulty concluding that Hamdi had such a right, defining the constitutional requirements of the hearing was not so easy. The plurality opinion's tentative observation was perhaps that the hearing could take place before a military judge, that hearsay evidence could be used, and that there could be a presumption in favor of the government.

In short, the Court has not consistently avoided constitutional issues, and, in the one instance where it did address such issues, it resolved a difficult due process question without producing a clear answer for lower courts. And when it has used the avoidance doctrine (explicitly or not), the Court appears to be eschewing the representation-reinforcing role called for in the absence of representation.

There is a reason that the representation-reinforcing theory does not neatly explain the Court's war-on-terrorism decisions. In the typical lack of virtual representation cases, a subdivision such as a State is acting to favor its own constituents at the expense of those outside the subdivision, and a national body such as the Supreme Court is called in to block that action. Accordingly, the Court is acting to protect one group of Americans from political discrimination by a government entity on behalf of another group of Americans. The Guantanamo Bay detainees, however, are in a different situation. They are aliens held outside the United States, and they are nationals of another nation. Under this analogy, the Supreme Court is part of the subdivision (the United States), while the obligations vis-à-vis the aliens come from the supranational entity (the world community). The Court might be contrasted with an entity such as the European Court for Human Rights, a supranational body charged with enforcing the human rights obligations of its member nations.

This is not to say that aliens outside the United States should be entirely powerless or without recourse. Treaties signed by the United States may impose certain obligations on the government, such as refraining from torture. Customary international law may also bind the government with respect to actions that it may take against aliens. And foreign nations may undertake diplomatic efforts on behalf of their citizens. It is to say that the Court might be properly leery of treading too heavily into this domain with constitutional decisions that would bind the political branches.

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199. Justice Souter agreed with the plurality opinion on this point. *Hamdi*, 542 U.S. at 541 (Souter & Ginsburg, JJ., concurring in part, dissenting in part, and concurring in the judgment).

200. *Id.* at 533 (plurality).

201. *But see Rasul*, 542 U.S. at 487–88. (Kennedy, J., concurring) (arguing that the case should have been decided based on the special circumstances of the United States' effective sovereignty over Guantanamo Bay).


203. *Cf. U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). *Curtiss-Wright* is often cited for the proposition that the President is "the sole organ of the federal government in the field of international
The Court might therefore see its role as questioning whether the political branches intended to discriminate against the alien outside the country; if such intent is clearly manifested, however, the Court might refrain from interfering with the political branches. We can call this a "clear intent to discriminate against aliens" requirement. Comparing *Rasul* and *Padilla*, it was clear that Jose Padilla had a district court in which he could seek habeas relief by naming his immediate custodian as the respondent. Even if Padilla had been detained outside the United States, he would have been entitled to seek habeas relief under *Burns v. Wilson*. Because neither the text of habeas statute nor *Burns* necessarily excludes aliens outside the country from invoking habeas, the Court could be seen as extending the habeas statute in the absence of a clear intent to discriminate. 204

The closest analogy to this "clear statement of intent to discriminate against aliens" can be found in *Hampton v. Mow Sun Wong*, 205 in which the Court invalidated a federal policy that barred non-citizens (except natives of American Samoa) from a variety of federal employment. The petitioners, who were all aliens with legal status in the United States, had sufficient due process rights such that there not only had to be an "overriding national interest" to justify the discriminatory rule, but also a "legitimate basis for presuming that the rule was actually intended to serve that interest." 206 According to the Court, such intent could be determined if Congress or the President had expressly imposed the citizenship requirement or if the agency has "direct responsibility for fostering or protecting that interest." 207 In *Mow Sun Wong*, the Court acknowledged that the government could have had a national interest in requiring citizenship so as to encourage immigrants to naturalize or that the President might want to use the potential for federal employment as a "bargaining chip" with foreign nations. 208

*Mow Sun Wong* is not a perfect precedent because it was predicated upon the aliens' presence inside the United States, which then entitled them to due process rights. It was those due process rights that in turn necessitated the clear statement of intent to discriminate against aliens. Because aliens outside the United States might not have due process rights, *Mow Sun Wong*’s reasoning might be inapplicable to them. Moreover, *Mow Sun Wong* held that a clear statement by the President or Congress would be sufficient to justify discrimination against aliens. Here, for example, the President’s executive order establishing the military commissions indicated on its face that it was applicable only to aliens. One might argue therefore that *Hamdan* was incorrectly decided even under this approach. I do not believe that argument is persuasive, however. The key feature of the employment rules at issue in *Mow Sung Wong* was that it involved relations," *id.* at 319–20, though this was actually dicta because the case concerned congressional delegation of authority to the President. See e.g. Koh, *supra* n. 97, at 94. On its holding, however, *Curtiss-Wright* does suggest great latitude by the political branches in the realm of foreign relations.


206. *Id.* at 103.

207. *Id.*

208. *Id.* at 104.
control over immigration, a matter the Court deemed “vested solely in the Federal Government” and “of a political character and therefore subject only to narrow judicial review.”

Either branch could have acted to deprive aliens of their eligibility for employment. The jurisdiction of federal courts to issue writs of habeas corpus, on the other hand, is a matter for Congress.

Thus, any clear statement about the intent to deny aliens (particularly those outside the country) of the privilege of the writ must come from Congress, not the president. With regard to military commissions, Congress may not have sole authority over the establishment of such tribunals, but Congress does have a claim to shared war powers, including the last word on military commissions.

In short, Mow Sun Wong is not inconsistent with the requirement of a clear statement of intent to discriminate against aliens. Because the matters involved in the terrorism cases are committed solely to Congress or jointly between Congress and the President, with Congress having the last word, it makes sense that the clear statement must come from Congress.

V. THE POST-HAMDAN LEGISLATION

Shortly after the Court issued its opinion in Hamdan, President Bush sought legislative approval of the military commissions at issue in the case. Congress responded by passing the 38-page Military Commission Act of 2006 (MCA) which the President subsequently signed into law. A direct response to Hamdan, MCA formally authorized military commissions for prosecuting “unlawful enemy combatants” for violations of the laws of war, codified the procedures to be used in such commissions, codified a number of purported common law of war crimes, revised the War Crimes Act to define specific “grave breaches” of Common Article 3, amended DTA (among other ways) to read as follows:

The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act, which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11,
This revision overrules Justice Stevens' interpretation of DTA in *Hamdan* by making it clear that DTA's jurisdiction-ousting provision applies to all pending habeas petitions "without exception." The upshot is that only the (e)(2) and (e)(3) petitions (those challenging CSRT decisions and final decisions of military commissions) can be reviewed via habeas petition by Article III courts and then only by the D.C. Circuit.

In addition, in its codification of military commission procedures, MCA repudiates Justice Stevens' argument that UCMJ authorized the President to create military commissions only in accordance with its own uniformity provision; the new provision in title 10 U.S.C. § 948b(c) states that UCMJ "does not, by its terms, apply to trial by military commission except as specifically provided in this chapter. The judicial construction and application of that chapter are not binding on military commissions established under this chapter." This provision eliminates the requirement of uniformity between courts-martial and military commissions.

Most observers' immediate reaction was that MCA was a victory for the President. Congress did hold fast in opposing the President's call for the exclusion of the accused from proceedings where called for in the interest of national security. Instead, Congress permitted exclusion of the accused only "(1) to ensure the physical safety of individuals; or (2) to prevent disruption of the proceedings by the accused" and only after warning the accused of the possibility of exclusion for misconduct. However, in all other respects, MCA ratifies the President's military commissions, even to the extent of purportedly codifying the substantive crime of "conspiracy," which the government had charged Hamdan with violating. This stands in sharp contrast to Martin Flaherty's pre-MCA observation about *Hamdan* that the Court's "insistence on a genuine legislative role... will matter... only to the extent that Congress takes advantage of the Court's defense of legislative prerogatives." Congress instead agreed with the President as to the tools he claimed to need to fight the global war on terrorism.

**VI. CONCLUSION**

Returning to the opening metaphor, if the President is Tom, the Court is Jerry, and Congress is Spike, then it appears that the Court did manage to get Congress to awaken and take note of the President. However, unlike the cartoon episodes, in which Spike
responded by beating Tom up, Congress ended up giving the President almost everything he was asking for in the Military Commission Act of 2006. Is the Tom and Jerry analogy inapplicable?

It strikes me that the analogy remains accurate up to a point. The Court’s decisions in *Hamdan* and *Rasul* set a default presumption against discrimination against aliens, a default presumption reinforced by the decision in *Hamdi* (ensuring that citizens can also be treated as enemy combatants). If Congress remained unmoved due to political inertia, then the result would be that aliens and citizens would be on the same footing.

That Congress overcame its inertia only to ratify the President’s actions is confirmation of the thesis by Daryl Levinson and Richard Pildes that the dominating rise of political parties has obliterated the original separation of powers envisioned by the Framers.226 The Congress that enacted DTA and MCA was controlled by the same party that controlled the White House, and, as predicted by Levinson and Pildes, acted to further the goals of the political party, as determined by the President, who is traditionally the head of his party.227 If Tom and Spike belonged to the same political party, perhaps they too would have put aside that natural cat-dog antipathy more often.

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227. See e.g. Norman C. Bay, *Executive Power and the War on Terror*, 83 Denver U. L. Rev. 335, 345 (2005); Robert J. Delahunt & John C. Yoo, *Book Review, Thinking About Presidents*, 90 Cornell L. Rev. 1153, 1154 (2005). In fact, contemporaneous news accounts of the debate over the language of MCA noted that, in holding fast on the accused’s right to be present at all proceedings (save deliberations), the Senate was “defying” the President. See e.g. Anne Plummer Flaherty, *GOP Panel Defies Bush: A Senate Committee Approved a Terror-Detainee Bill That the President Had Warned He Would Block*, Intelligencer A3 (Sept. 15, 2006).